RICHARD M. FRANK (SBN 63482)
Professor of Environmental Practice
SCHOOL OF LAW
UNIVERSITY OF CALIFORNIA
400 Mrak Hall Drive
Davis, CA 95616
Telephone: (916) 217-1292
Facsimile: (530) 752-4704
Email: rmfrank@ucdavis.edu

Attorney for *Amici Curiae* Professors of Foreign Relations Law

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.,

Defendants.

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

BRIEF OF *AMICI CURIAE* PROFESSORS OF FOREIGN RELATIONS LAW

Date: June 29, 2020
Time: 1:30 p.m.
Judge: Hon. William B. Shubb
Courtroom: 5 (14th Floor)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes and Treaties

Other Authorities

I. Interest of Amici[1]

Amici (listed in the Appendix) are Professors of Foreign Relations Law. They have expertise on doctrines that sometimes invoke the idea that the United States must speak with "one voice" in foreign affairs, and specifically on the various doctrines of foreign affairs preemption that govern the cross-motions for summary judgment in this case. Many of the amici joined the Brief of Amici Curiae Professors of Foreign Relations Law, ECF No. 54, on the first cross-motions for summary judgment with respect to the Treaty Clause and Compact Clause claims. This Court relied on that amicus brief in deciding those claims. *See United States v. California*, No. 2:19-cv-02142 WBS EFB, at 23-24 (Mar. 12, 2020) (*United States v. California I*). Amici believe they can be helpful with respect to the executive branch's claims of foreign affairs preemption as well.

II. Summary of Argument

In its second motion for summary judgment, the executive branch makes foreign affairs preemption claims of staggering breadth. Although the executive branch has challenged only California's cap-and-trade arrangement with Québec, its motion additionally complains about the statements of California's political leaders, ECF No. 102, at 1-2, 26-27, 29, 35-36, meetings with foreign officials, *id.* at 2, 27, 29, 36, speculative plans to link California's emissions program to foreign programs to reduce deforestation, *id.* at 11, 13-14, 27, and even California's initial decision to reduce its own greenhouse gas emissions unilaterally, *id.* at 26. Thus, the executive branch argues that "California's *public statements* and *broader conduct* 'compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'" *Id.* at 36 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 381 (2000)) (emphases added).

The executive branch's broad preemption arguments are based on the notion that "[t]here must be one voice for the United States in international relations on greenhouse gas emissions and agreements." EFC No. 102, at 4. That one voice must apparently be the President's. *See* EFC No. 102, at 26 (referring to "the President's singular and 'effective voice'" (quoting *Crosby*, 530 U.S. at 381)). In support, the executive branch cites the Supreme Court's statement in *United States v. Curtiss-Wright*

[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.

Corp., 299 U.S. 304 (1936), that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." EFC No. 102, at 38 (quoting *Curtiss-Wright*, 299 U.S. at 319).

Although the U.S. Supreme Court has invoked the "one-voice" idea in a variety of contexts, foreign relations law scholarship representing a wide range of views has shown that it is inconsistent with the text and structure of the U.S. Constitution, as well as with the practical construction of the Constitution over time. *See, e.g.*, Sarah H. Cleveland, Crosby *and the "One-Voice" Myth in U.S. Foreign Relations*, 46 Vill. L. Rev. 975 (2001); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va. L. Rev. 1617 (1997); David H. Moore, *Beyond One Voice*, 98 Minn. L. Rev. 953 (2014).

Indeed, the Supreme Court has recently repudiated the "sole organ" dictum from *Curtiss-Wright* on which the executive branch relies. Addressing the separation-of-powers context in *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), the majority "decline[d] to acknowledge that unbounded power," *id.* at 2089, noting that "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy," *id.* at 2090. In dissent, Chief Justice Roberts agreed that "our precedents have never accepted such a sweeping understanding of executive power." *Id.* at 2115 (Roberts, C.J., dissenting). He further noted that "the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action." *Id.* at 2116 (citing *Medellín v. Texas*, 552 U.S. 491, 523-32 (2008)).

The executive branch's claims of foreign affairs preemption must be decided not under the slogan of "one-voice" but rather under the more nuanced tests that the Supreme Court has articulated to govern this area. Under *Garamendi*, there are two relevant tests for foreign affairs preemption: (1) field preemption; and (2) conflict preemption. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418-20 (2003); *see also Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071-72 (9th Cir. 2012) (en banc) (*Movsesian III*). Field preemption applies only when a state has "no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n.11; *Movsesian III*, 670 F.3d at 1074. Conflict preemption requires a "clear conflict" with an express federal policy. *Garamendi*, 539 U.S. at 421.

California's arrangement with Québec supports California's cap-and-trade program by making it easier for regulated sources in California to comply with the limits on greenhouse gas emissions that California independently imposes. The Supreme Court has long recognized that protecting the environment is a traditional state responsibility. *See Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-38 (1907). The Supreme Court has more recently recognized that state environmental interests extend to climate change. *See Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007); *see also Am. Fuel & Petrochemical Manufacturers v. O'Keeffe*, 903 F.3d 903, 913 (9th Cir. 2018). In rejecting the executive branch's Compact Clause claim, this Court acknowledged that "[i]t is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." *U.S. v. California I*, at 30.

The existence of a legitimate state interest in regulating greenhouse gas emissions distinguishes this case from the field preemption cases on which the executive branch relies. *See Zschernig v. Miller*, 389 U.S. 429, 437 (1968) ("As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata."); *Movsesian III*, 670 F.3d at 1076 n.4 ("California's main goal in enacting section 354.4 was to provide redress for individuals who were, in its view, victims of a foreign genocide, and . . . that goal falls outside the realm of traditional insurance regulation."); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010) (*Von Saher I*) ("By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of 'traditional state responsibility,' and the statute is therefore subject to a field preemption analysis."). In each of those cases, the state used a traditional state power to pursue a policy that lay beyond its traditional responsibility. In this case, by contrast, there is no doubt that California's policy of reducing its own greenhouse gas emissions falls within its traditional responsibility, and no doubt that its arrangement with Québec supports that policy by easing the burden on California emitters. Because California's arrangement with Quebec "address[es] a traditional state responsibility," *Garamendi*, 539 U.S. at 419 n.11, field preemption does not apply.

California's arrangement with Québec also does not create a "clear conflict" with an express federal policy. *Garamendi*, 539 U.S. at 421. The executive branch cites a federal policy of withdrawing

from the Paris Agreement and negotiating a better deal. EFC No. 102, at 19. But California's arrangement does not continue the United States' participation in the Paris Agreement, and the executive branch has not articulated a policy of preventing other countries from participating in the Paris Agreement. Nor does California's arrangement stand as an obstacle to the United States negotiating a better deal on greenhouse gas emissions. The United States' "leverage" as "one of the world's largest emitters of greenhouse gases," EFC No. 102, at 27, might be undercut by California's decision to limit its own emissions independently through its Global Warming Solutions Act and related statutes and regulations. But that is not a policy that the executive branch has challenged in this litigation. Finally, even if there were a conflict between California's agreement and an express federal policy, that conflict would have to be substantial, given "the strength of the state interest" in this case. *Garamendi*, 539 U.S. at 420.

III. Argument

A. The Executive Branch's Invocation of the One Voice Doctrine Is Misleading.

In its motion for summary judgment, the executive branch argues that "there must be one voice for the United States in international relations on greenhouse gas emissions and agreements." ECF No. 102, at 4. The motion quotes out of context statements from a number of Supreme Court and Ninth Circuit decisions purporting to show that the federal government has exclusive authority over all matters affecting foreign relations. *See, e.g.*, *id.* at 1 (citing *Zschernig*, *Hines*, and *Movsesian III*). Scholars of foreign relations law disagree about many things, but they generally agree that "[t]he 'one-voice' doctrine is a myth." Cleveland, *supra*, at 975; *see also* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 446 (1998) ("[T]he one-voice metaphor has never been very accurate."); Goldsmith, *supra*, at 1688 ("[T]he oft-stated but little-analyzed notion that state activity prevents the federal government from speaking with 'one voice' in foreign relations makes little sense."); Moore, *supra*, at 1038 ("[T]he Constitution nowhere vests foreign affairs power in one branch of the federal government nor utterly precludes its exercise by the states."); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 Va. J. Int'l L. 555, 561 (2002) ("The 'one voice' in foreign affairs has always been more of a slogan than a constitutional reality."); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 Va. J. Int'l L. 365, 449 (2002)

("[T]he 'one voice' idea has always been something of a myth."). Of particular relevance to this case, scholars of foreign relations law have noted that "even if the federal foreign affairs power is comprehensive, it may not be exclusive." Moore, *supra*, at 994; *see also* Goldsmith, *supra*, at 1619 ("[I]t is important to distinguish between plenary federal power and exclusive federal power."); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L. Rev. 341, 380 (1999) [hereinafter Ramsey, *Original Understanding*] (distinguishing between "federal supremacy" and "federal exclusivity").

There is no denying that the Supreme Court has invoked the "one voice" notion in a variety of different contexts. Sometimes, the Court has suggested that the President must be able to speak without interference from Congress. *See, e.g.*, *Zivotofsky*, 135 S. Ct. at 2086 ("Recognition is a topic on which the Nation must 'speak . . . with one voice.' That voice must be the President's." (quoting *Garamendi*, 539 U.S. at 424)). Sometimes, the Court has suggested that the political branches must be able to speak without interference from the courts. *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (noting that for the judiciary "to second-guess" determinations about the likelihood that foreign governments would torture transferees would "undermine the Government's ability to speak with one voice in this area"); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (suggesting that questions touching foreign relations may be political questions because "many such questions uniquely demand single-voiced statement of the Government's views"). And sometimes, the Court has suggested that the federal government must be able to speak without interference from the states. *See, e.g.*, *Garamendi*, 539 U.S. at 424 (holding that state law conflicted with express federal policy on settlement of World War II claims); *Crosby*, 530 U.S. at 381 (holding that state law conflicted with federal statute imposing sanctions on Burma); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (holding that dormant Foreign Commerce Clause protects federal government's ability to speak with "one voice" in regulating commerce with foreign countries). Sometimes, the Court has even suggested that the federal government's authority over foreign relations is exclusive. *See, e.g.*, *Zschernig*, 389 U.S. at 436 (suggesting that "foreign affairs and international relations [are] matters which the Constitution entrusts solely to the Federal Government"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("The Federal Government . . . is entrusted with full and exclusive responsibility for the conduct of affairs with

foreign sovereignties."). But as Professor Bradley has observed, "the Court's one-voice statements have always been broader than the Court's actual decisions, which have not in fact allowed the federal government unfettered power in foreign affairs." Bradley, *supra*, at 447.

The text of the Constitution refutes the idea that the United States will speak with one voice in foreign affairs. Article I "bestow[s] the bulk of the foreign affairs powers on Congress," Cleveland, *supra*, at 984, including the powers to provide for the common defense, to regulate foreign commerce, to establish a uniform rule of naturalization, and to define and punish offenses against the law of nations. U.S. Const., art. I, § 8, cls. 1, 3, 4 & 10. Although the President has the sole authority to receive ambassadors and other public ministers, *id.* art. II, § 3, he shares his other foreign affairs powers with Congress, including the power to appoint ambassadors and to make treaties, *id.* art. II, § 2. The President serves as Commander in Chief, *id.*, but Congress has the authority to declare war, provide for the army and navy, and make rules for their regulation, *id.* art. I, § 8, cls. 11-14. Article III also assigns important foreign relations matters to the federal judiciary, including all cases arising under treaties, all cases affecting ambassadors, other public ministers, and consuls, all case of admiralty and maritime jurisdiction, and controversies between U.S. citizens and foreign states and their citizens. *Id.* art. III, § 2, cl. 1. As Professor Cleveland has observed, "the Framers guaranteed, as a matter of constitutional design, that the United States would *not* 'speak with one voice' in foreign relations." Cleveland, *supra*, at 984.

The Constitution's text directly addresses the authority of the states in foreign relations. Article I, § 10, prohibits the states from engaging in certain foreign relations activities like entering treaties and, unless Congress consents, laying duties on imports or exports, keeping troops or ships in time of peace, and entering compacts with foreign powers. *Id.* art. I, § 10. "The most natural inference from these provisions and from the Constitution's enumerated powers structure is that all foreign relations matters not excluded by Article I, Section 10 fall within the *concurrent* power of the state and federal governments until preempted by federal statute or treaty." Goldsmith, *supra*, at 1642 (emphasis added).

Professor Ramsey has shown in detail that the Framers intended the federal government to have *supreme* power in foreign affairs, but not *exclusive* power unless state action was forbidden by Article I, § 10 or preempted under Article VI by federal legislation or a treaty. *See* Ramsey, *Original*

Understanding, *supra*. The standard quotations concerning the Framers' intent with respect to foreign relations are about federal supremacy, not federal exclusivity. Consider James Madison's statement in Federalist No. 42 that "[i]f we are to be one nation in any respect, it clearly ought to be in respect to other nations." Ramsey points out that, "[i]n context, it is clear that Madison was justifying the grant of particular foreign relations powers to the federal government" rather than "suggesting a generalized constitutional preclusion of the states." Ramsey, *Original Understanding*, *supra*, at 383. The same is true of Alexander Hamilton's statement in Federalist No. 80 that "the peace of the WHOLE ought not be left at the disposal of a PART." Hamilton was defending the federal courts' diversity jurisdiction, which "has nothing to do with a generalized foreign affairs power, and in fact has nothing to do with any preclusion of the states of any sort, since state courts would have concurrent jurisdiction over such cases." Ramsey, *Original Understanding*, *supra*, at 385. Ramsey examines the Constitution's text, drafting history, and ratification in more detail than amici have space to recount. *See id.* at 403-18. He concludes that the Constitution established "a system in which Article VI plus specific preclusive clauses of the Constitution were the operative restrictions upon the states" and that "[a] generalized preclusion to protect unenacted foreign policy does not appear to have been in anyone's contemplation." *Id.* at 418.

Historical practice also refutes the notion that the United States must speak with one voice in foreign affairs. "U.S. history has been characterized both by substantial actions by states that affect foreign affairs and by deference and tolerance of many such state actions by the national political branches." Cleveland, *supra*, at 991; *see generally id.* at 991-1001 (discussing examples of state involvement in foreign affairs); Goldsmith, *supra*, at 1637-39, 1674-76 (same); Moore, *supra*, at 1014-17 (same). States have taken positions on questions of foreign policy ever since the 1798 Virginia and Kentucky Resolutions protested the United States' undeclared war with France. *See* Cleveland, *supra*, at 993 n.125 (giving this example and others). In the 1980s, many states and localities adopted measures against South Africa that Congress expressly declined to preempt. *See* Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 606, 100 Stat. 1086 (preserving state and local measures); *see also* Cleveland, *supra*, at 1002 n.175 (discussing Congress's decision not to preempt state anti-apartheid measures). In the 1970s, California imposed a unitary business tax on foreign corporations,

leading to protests from foreign governments. *See Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 324 n.22 (1994) (noting foreign protests). But Congress declined to preempt this tax, and the Supreme Court upheld it against challenge under the Foreign Commerce Clause. *See id.* at 325-31. When joining international agreements, the federal government has again been careful to respect the prerogatives of state and local governments. *See* Bradley, *supra*, at 447 (noting that "the Senate routinely attaches federalism clauses to human rights treaties"); Cleveland, *supra*, at 1005 ("The United States was similarly deferential to state interests in ratifying the GATT/WTO system."). Federal deference to state action affecting foreign affairs is driven partly by the realization that "foreign affairs has changed to include many matters under the traditional control of subnational units." Goldsmith, *supra*, at 1673-74. Environmental regulation constitutes just one example of this phenomenon.

Increasingly, the Supreme Court has insisted that the political branches of the federal government must exercise their constitutional authority in order to silence the voices of the states. In *Japan Line*, the Court was willing to strike down a state tax under the Foreign Commerce Clause "because it prevents the Federal Government from 'speaking with one voice' in international trade." *Japan Line*, 441 U.S. at 453. But more recently in *Barclays Bank*, the Court declined to do the same because there were "no 'specific indications of congressional intent' to bar the state action," 512 U.S. at 324, despite both foreign protests, *id.* at 324 n.22, and executive branch opposition to the tax, *id.* at 328-31. *See also* Goldsmith, *supra*, at 1705 ("As for the one-voice test in dormant foreign Commerce Clause cases: *Barclays Bank* effectively eliminated it."). In *Zschernig*, the Court was willing to strike down state probate laws for affecting foreign relations despite the executive branch's representation that those laws did not interfere with foreign relations. *Zschernig*, 389 U.S. at 434, 440. But more recently in *Garamendi*, the Court insisted on "conflict with express foreign policy of the National Government." *Garamendi*, 539 U.S. at 420. As Professor Moore has noted, "[i]n light of opinions like *Garamendi* and *Barclays Bank*, the trend in dormant preemption generally appears to be shifting away from judicial policing of state action affecting foreign affairs." Moore, *supra*, at 968.

The Roberts Court has been particularly skeptical of claims by the executive branch to be the only voice that speaks for the United States. In *Medellín*, the Court rejected the executive branch's claim that it could preempt state habeas rules in order to comply with a ruling of the International Court

of Justice that the United States had violated the Vienna Convention on Consular Relations. *See Medellín*, 552 U.S. at 530-32; *see also Zivotofsky*, 135 S. Ct. at 2116 (Roberts, C.J., dissenting) (noting that "the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action"). In *Zivotofsky*, the Court upheld the executive's power to speak for the United States only with respect to the recognition of foreign governments. *Zivotofsky*, 135 S. Ct. at 2086. Indeed, the Court went out of its way to reject *Curtiss-Wright*'s "sole organ" dictum more generally. *See id.* at 2089-90. As Justice Kennedy pointedly observed, "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy." *Id.* at 2090; *see also id.* at 2115 (Roberts, C.J., dissenting) ("[O]ur precedents have never accepted such a sweeping understanding of executive power.").

The text of the Constitution, historical practice, and recent Supreme Court decisions all refute the notion that the President's voice must be the only voice in the United States with respect to matters affecting foreign affairs. Greenhouse gas emissions are undoubtedly a matter of national and international concern. But they are also a matter that falls within an area of traditional state responsibility. Whether California's cap-and-trade arrangement with Québec is preempted depends not on slogans about "one voice" but rather on the specific doctrines of foreign affairs preemption that the Supreme Court and the Ninth Circuit have articulated.

B. California's Cap-and-Trade Arrangement with Québec Is Not Preempted.

The executive branch claims both field preemption and conflict preemption in this case. This Court should reject field preemption because California is "addressing a traditional state responsibility." Garamendi, 539 U.S. at 419 n.11. This Court should reject conflict preemption because there is no "clear conflict" between California's arrangement with Québec and any express federal policy. *Id.* at 421.

1. Field Preemption Does Not Apply in This Case

There are actually two different doctrines of field preemption in foreign relations law. The first, illustrated by *Hines*, applies when the federal government has occupied the field by statute or treaty, precluding state regulation of the same subject. The second, illustrated by *Zschernig*, applies even in the absence of federal action, preempting state law that does not address a traditional state

responsibility and if it also intrudes on the federal government's foreign affairs power.

Despite the executive branch's repeated citations to *Hines*, ECF No. 102, at 1, 17, 28, 35, 39, it makes no serious argument for field preemption of the first sort. Its motion states in passing that the Global Climate Protection Act of 1987 (GCPA), Pub. L. No. 100-204, 101 Stat. 1407 (codified at 15 U.S.C. § 2901 note), "caused the federal government to occupy the field of foreign relations on this subject matter," EFC No. 102, at 5, but the motion points to nothing in the GCPA that limits state regulation of greenhouse gas emissions. Citing *Massachusetts v. EPA*, the executive branch also says the Supreme Court has recognized "that the field of global climate regulation and greenhouse gas emissions is occupied by the federal government." ECF No. 102, at 37 (citing *Massachusetts*, 549 U.S. at 519). But *Massachusetts* in no way held that states were precluded from regulating greenhouse gas emissions. To the contrary, that decision recognized "Massachusetts' interest" in climate change as a reason to grant the state standing to sue the federal government. *See Massachusetts*, 549 U.S. at 522-23.

Instead, the executive branch's field preemption claim is of the second sort. *See* ECF No. 102, at 28-29. Under this doctrine of field preemption (sometimes called dormant foreign affairs preemption), state law may be preempted if it "(1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power." *Movsesian III*, 670 F.3d at 1074; *see also Garamendi*, 539 U.S. at 419 n.11. Because California's arrangement with Québec addresses an area of traditional state responsibility, this doctrine of field preemption does not apply.

The executive branch argues that "[r]egulating greenhouse gas emissions to address global climate change is not a traditional state responsibility." ECF No. 102, at 29. Ninth Circuit precedent is to the contrary. In *O'Keeffe*, the Court of Appeals stated: "It is well settled that the states have a legitimate interest in combating the adverse effects of climate change on their residents." 903 F.3d at 913. The executive branch suggests that climate change cannot be an area of traditional state responsibility because it is also an area of federal responsibility, ECF No. 102, at 31, because California cannot solve this problem on its own, *id.* at 31-32, and because climate change is global problem, *id.* at 32-33. But the fact that climate change is a global responsibility and a national responsibility does not preclude its being a state responsibility as well. Indeed, this Court has already rejected the executive

branch's position in the context of deciding the Compact Clause claim, holding that "[i]t is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution." *United States v. California I*, at 30.

The executive branch also argues more narrowly that "participating in schemes of regulation involving greenhouse gas emissions in foreign jurisdictions and engaging in global climate diplomacy are emphatically *not* traditional state responsibilities." ECF No. 102, at 31. But this argument confuses California's means with its end. California is not imposing limitations on its greenhouse gas emissions in order to enter an arrangement with Québec. California is entering an arrangement with Québec in order to facilitate compliance with the limitations on its own greenhouse gas emissions that California has independently decided to impose. More specifically, California is entering an arrangement with Québec in order to reduce the burden on businesses in California of complying with those emissions limitations.

This case therefore presents the exact reverse of the situations found in the field preemption cases on which the executive branch relies. In each of those cases, a state used its traditional authority over things like probate, insurance regulation, and statutes of limitations to address a problem that lay beyond its traditional authority. In *Zschernig*, Oregon used its probate laws to express disapproval of inheritance laws in Communist countries. *See Zschernig*, 389 U.S. at 437 ("As one reads the Oregon decisions, it seems that foreign policy attitudes, the freezing or thawing of the 'cold war,' and the like are the real desiderata."). In *Movsesian III*, California used its authority over insurance regulation to provide a forum for victims of the Armenian genocide. *See Movsesian III*, 670 F.3d at 1076 n.4 ("California's main goal in enacting section 354.4 was to provide redress for individuals who were, in its view, victims of a foreign genocide, and . . . that goal falls outside the realm of traditional insurance regulation."). In *Von Saher I*, California used its authority over statutes of limitations to create a forum for Holocaust restitution claims against museums and art galleries located anywhere in the world. *See Von Saher I*, 592 F.3d at 965 ("By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of 'traditional state responsibility,' and the statute is therefore subject to a field preemption analysis."). The same was true in *Garamendi* and *Crosby*, although the Supreme Court decided those cases on the

basis of conflict preemption rather than field preemption. *Garamendi*, 539 U.S. at 420; *Crosby*, 530 U.S. at 373.

In this case, by contrast, California is addressing an area of traditional state responsibility by reducing its emissions of greenhouse gases. *See United States v. California I*, at 30 ("It is well within California's police powers to enact legislation to regulate greenhouse gas emissions and air pollution."). California's arrangement with Québec is ancillary to California's program of emissions reduction; the arrangement makes that program more efficient by allowing California businesses to purchase compliance instruments issued by Québec rather than reducing their own emissions. Unlike the state laws invalided in *Zschernig*, *Movsesian III*, and *Von Saher I*, the aim of California's arrangement lies close to home. Because California is clearly "addressing a traditional state responsibility," *Garamendi*, 539 U.S. at 419 n.11, the executive branch's claim of field preemption must be rejected.[2]

2. California's Cap-and-Trade Arrangement Does Not Conflict with an Express Federal Policy.

As the executive branch acknowledges, conflict preemption requires a "clear conflict" with an express federal policy. EFC No. 102, at 17 (quoting *Garamendi*, 539 U.S. at 421).[3] But the executive is

---

[2] Because California is addressing an area of traditional state responsibility, it is unnecessary for this Court to decide whether the arrangement with Québec intrudes on the federal government's foreign affairs power. *See Movsesian III*, 670 F.3d at 1074. In asserting that the arrangement does so intrude, the executive branch simply repeats its arguments about conflict with federal foreign policy. *See* ECF No. 102, at 35 ("California is expressly advancing the Agreement, Arrangements, and other policies with foreign governments in declared opposition to the foreign policy of the United States."). As discussed in the next section, no such conflict exists.

[3] The executive branch makes a separate obstacle preemption argument based on the GCPA and the United Nations Framework Convention on Climate Change (UNFCCC). ECF No. 102, at 23-28. Obstacle preemption is a species of conflict preemption covering "those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full *purposes and objectives of Congress*.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (emphasis added) (quoting *Hines*, 312 U.S. at 67). Despite the executive branch's claim, ECF No. 102, at 24, the GCPA did not delegate to the President authority to set U.S. climate change policy unilaterally. Rather, the GCPA provided that "the President . . . shall be responsible for developing *and proposing to Congress* a coordinated national policy on global climate change." GCPA, *supra*, § 1103(b) (emphasis added). Also, as

mistaken in asserting that "the threshold for establishing such a conflict is low." *Id. Garamendi* makes clear that a court must "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." *Garamendi*, 539 U.S. at 420; *see also id.* at 419 n.11 (noting that the "clarity or substantiality" of the conflict required for preemption "would vary with the strength or the traditional importance of the state concern asserted"). In *Garamendi*, the Supreme Court noted "the weakness of the State's interest," *id.* at 425, in regulating the disclosure of "policies issued by European companies, in Europe, to European residents, at least 55 years ago," *id.* at 426. By contrast, the Supreme Court has acknowledged the strength of state interests in combatting climate change. *See Massachusetts*, 549 U.S. at 522-23; *see also O'Keeffe*, 903 F.3d at 913. To preempt California's arrangement with Québec, the conflict with federal foreign policy must be correspondingly greater.

The executive branch claims that California's arrangement with Québec conflicts with U.S. policy in two respects: (1) because it is "inconsistent with the President's withdrawal of the United States from the Paris Agreement"; and (2) because it "undermine[s] the federal government's ability to develop a new international mitigation arrangement." ECF No. 102, at 19. Elsewhere in its motion, the executive branch states that federal foreign policy with respect to greenhouse gas emissions is not to commit the United States to policies that produce burdens to the United States that other countries do not face. *Id.* at 11. It is clear from the executive branch's conflict preemption arguments, that its real quarrel is with California's decision to limit its own greenhouse gas emissions independently. But the executive branch has not challenged that policy in this litigation. It has challenged only California's arrangement with Québec, which neither continues U.S. participation in the Paris Agreement nor

---

California has explained, its arrangement with Québec is entirely consistent with the UNFCCC. ECF No. 110, at 16-18. In obstacle preemption analysis, the Supreme Court has cautioned, "courts should assume that 'the historic police powers of the States' are not superseded 'unless that was the clear and manifest *purpose of Congress*.'" *Arizona*, 567 U.S. at 400 (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Nothing in the GCPA or the UNFCCC suggests any congressional purpose to superseded state authority over greenhouse gas emissions. And even if there is evidence that the President intends to supersede state authority over such emissions, the President's intent is irrelevant for the purpose of obstacle preemption because the President must persuade Congress to enact legislation if he wants to preempt state law.

undermines the federal government's ability to negotiate a new agreement. California's arrangement with Québec clearly does not *produce* burdens in the United States; instead, it *eases* the burdens that California's emissions limitations have imposed by giving California emitters the option of purchasing compliance instruments issued by Québec rather than reducing their own emissions.

First, the executive branch does not claim that California's arrangement with Québec itself continues U.S. participation in the Paris Agreement. As this Court found in deciding the first motions for summary judgment, California establishes its emissions limitations independently from any other jurisdiction. *United States v. California I*, at 23. The fact that California's arrangement allows for the trading of compliance instruments in a way that may be similar to the internationally traded mitigation outcomes (ITMOs) provided in the Paris Agreement, ECF No. 102, at 20-21, does not make California's arrangement a continuation of the Paris Agreement.

In fact, the gist of the executive branch's first argument seems to be that California's arrangement with Québec "facilitates *Canada's* participation in that agreement." EFC No. 102, at 19 (emphasis added); *see also id.* at 20 ("California facilitates Canada's participation in the Paris Agreement . . . ."). But the President of the United States has no authority to withdraw Canada from the Paris Agreement. Indeed, the executive branch does not assert any federal policy of interfering with other countries' participation in the Paris Agreement. The argument that "[b]ecause California's Agreement and Arrangements with Quebec facilitate *Canada's* participation in the Paris Agreement, they are in clear conflict with the President's lawful decision to withdraw the *United States* from that agreement," ECF No. 102, at 19 (emphases added), is simply a non-sequitur.

Second, the executive branch argues that California's actions "undermine the federal government's ability to develop a new international mitigation arrangement," ECF No. 102, at 19, and pose an obstacle to the federal policy "to obtain better and more equitable deals on climate mitigation for the American people," *id.* at 23. But the executive branch has not explained how the arrangement with Québec has this effect. The executive branch's real complaint is not with that arrangement but rather with California's decision to limit its own greenhouse gas emissions in the first place. *See* ECF No. 102, at 23 (complaining of "emission reductions made by United States citizens acting under coercive state-law legal regimes"); *id.* at 26 (noting that "California's efforts to create its own working

international climate regime reach back to 2006"). As the executive branch explains, the United States' status as "one of the world's largest emitters of greenhouse gases" gives it "significant leverage in climate negotiations." *Id.* at 27. By reducing emissions unilaterally, California's cap-and-trade program arguably limits the President's ability to trade those reductions for concessions from other countries.

But the executive branch has not challenged California's cap-and-trade program in this Court. That is because the executive branch could not plausibly argue that the President's foreign relations authority allows him to preempt state law in an area of traditional state responsibility. In *Medellín*, the Supreme Court rejected the argument that the President's authority to settle claims with other nations allowed him to override state rules on habeas corpus in order to comply with a decision of the International Court of Justice. *Medellín*, 552 U.S. at 530-32. The Supreme Court emphasized that "[t]he claims-settlement cases involve a narrow set of circumstances," *id.* at 531, and in any event could not support a presidential directive that "reaches deep into the heart of the State's police powers," *id.* at 532. As Chief Justice Roberts subsequently described the opinion that he authored in *Medellín*, "the President's so-called general foreign relations authority does not permit him to countermand a State's lawful action." *Zivotofsky*, 135 S. Ct. at 2116 (Roberts, C.J., dissenting).

Finally, California's arrangement with Québec does not conflict with the U.S. policy, stated elsewhere in the executive branch's motion, not to commit the United States to policies that produce burdens on the United States that other countries do not face. ECF No. 102, at 11. To be sure, California's limits on greenhouse gas emissions impose burdens on regulated sources in California. But the arrangement with Québec eases those burdens by giving California businesses the option of buying compliance instruments issued by Québec rather than reducing their own emissions.

Because the executive branch has challenged *only* California's arrangement with Québec, it must show a clear conflict between *that arrangement* and an express federal policy in order to establish conflict preemption. It has not done so. The arrangement with Québec neither continues U.S. participation in the Paris Agreement, nor undermines the federal government's ability to negotiate a new agreement, nor burdens greenhouse gas emitters in the United States.

///

///

IV. Conclusion

The fact that greenhouse gas emissions are a matter of national and international concern does not make them any less a matter of legitimate state concern. By limiting its greenhouse gas emissions, California is addressing an area of traditional state responsibility. And by allowing regulated sources to purchase compliance instruments issued by Québec, California is facilitating compliance by its own businesses and making its cap-and-trade program more efficient. For this reason, the executive branch's field preemption claim must fail.

The executive branch's conflict preemption claim must also fail. California's arrangement with Québec does not conflict with the United States' withdrawal from the Paris Agreement, nor prevent the United States from negotiating a better deal on climate change, nor impose burdens on the United States that other countries do not face. Whatever leverage in international negotiations the executive branch may have lost as a large emitter of greenhouse gases comes from California's emissions limitations themselves—limitations the executive branch has not challenged—and not from the arrangement with Québec.

For the reasons above, amici respectfully suggest that this Court should deny the United States' motion for summary judgment and grant California's motion for summary judgment. If Congress wishes to preempt California's emissions limitations, or wishes to preempt just its arrangement with Québec, Congress has the constitutional authority to do so. But under our constitutional system, the President may not set aside state law in an area of traditional state responsibility simply by asserting that his should be the only voice.

Respectfully submitted,

Dated: May 26, 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.

Sarah H. Cleveland is Louis B. Henkin Professor of Human and Constitutional Rights at Columbia Law School. Her publications on foreign relations law have appeared in the *Columbia Law Review*, the *Texas Law Review*, and the *Yale Law Journal*. From 2009 to 2011, she served as Counselor on International Law to the Legal Adviser at the U.S. Department of State. From 2012 to 2018, she served as Co-Reporter for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018). From 2015 to 2019, she was a member of the U.N. Human Rights Committee.

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 Robert D. Sloane, of *Foreign Affairs Federalism: The Myth of National Exclusivity* (2016). He is a member of the American Law Institute and the Board of Editors of the *American Journal of International Law*.

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).

Michael D. Ramsey is the Hugh and Hazel Darling Foundation Professor at the University of San Diego Law School. He is the author of *The Constitution's Text in Foreign Affairs* (2007) and has published articles on foreign relations law in the *American Journal of International Law*, the *Columbia Law Review*, the *Georgetown Law Journal*, the *University of Chicago Law Review*, and the *Yale Law Journal*.

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 U.S. foreign relations law and is the co-author, with Michael J. Glennon, of *Foreign Affairs Federalism: The Myth of National Exclusivity* (2016). He is a member of the American Law Institute and holds a high-level diploma in public international law from The Hague Academy of International Law.

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 May 26, 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 26th day of May, 2020, at Davis, 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

SERVICE LIST

Michael P. Cayaban
California Office of the Attorney General
600 West Broadway, Suite 1800
San Diego, CA 92101
Email: mike.cayaban@doj.ca.gov

Attorney for Defendants *CALIFORNIA AIR RESOURCES BOARD, STATE OF CALIFORNIA, GAVIN C. NEWSOM, JARED BLUMENFELD, AND MARY D. NICHOLS*

Michael Stephen Dorsi
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102
Email: Michael.Dorsi@doj.ca.gov

Attorney for Defendants *CALIFORNIA AIR RESOURCES BOARD, STATE OF CALIFORNIA, GAVIN C. NEWSOM, JARED BLUMENFELD, AND MARY D. NICHOLS*

Monica Hans Folsom
Delfino Madden O'Malley Coyle Koewler
500 Capitol Mall, Suite 1550
Sacramento, CA 95814
Email: mfolsom@delfinomadden.com

Attorney for Defendants *WESTERN CLIMATE INITIATIVE, INC., JARED BLUMENFELD, KIP LIPPER, MARY D. NICHOLS AND RICHARD BLOOM*

Phillip M. Hoos
California Department of Justice
600 W. Broadway, Suite 1800
San Diego, CA 92101
Email: phillipm.hoos@doj.ca.gov

Attorney for Defendants *CALIFORNIA AIR RESOURCES BOARD, STATE OF CALIFORNIA, GAVE C. NEWSOM, JARED BLUMENFELD, AND MARY D. NICHOLS*

Peter James McVeigh, GOVT
Department of Justice
950 Pennsylvania Avenue, N.W., Room 2612
Washington, DC 20530
Email: peter.mcveigh@usdoj.gov

Attorney for Plaintiff *UNITED STATES OF AMERICA*

Margaret Elaine Meckenstock
Office of the Attorney General
1515 Clay Street, 20th Floor
Oakland, CA 94612
Email: Elaine.Meckenstock@doj.ca.gov

Attorney for Defendants *CALIFORNIA AIR RESOURCES BOARD, STATE OF CALIFORNIA, GAVIN C. NEWSOM, JARED BLUMENFELD AND MARY D. NICHOLS*

Zachary Michael Norris
Sheppard, Mullin, Richter & Hampton
333 S Hope Street, 43rd Floor
Los Angeles, CA 90071-1422
Email: znorris@sheppardmullin.com

Attorney for Intervenor *INTERNATIONAL EMISSIONS TRADING ASSOCIATION*

Paul Emmanuel Salamanca
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Email: paul.salamanca@usdoj.gov

Attorney for Plaintiff *UNITED STATES OF AMERICA*

Matthew D. Zinn
Shute Mihaly & Weinberg
396 Hayes Street
San Francisco, CA 94102
Email: zinn@smwlaw.com

Attorney for Intervenor *ENVIRONMENTAL DEFENSE FUND*

Nicholas W. van Aelstyn
Sheppard Mullin Richter & Hampton LLP
4 Embarcadero Center, 17th Floor
San Francisco, CA 94111
Email: NvanAelstyn@sheppardmullin.com

Attorney for Intervenor *INTERNATIONAL EMISSIONS TRADING ASSOCIATION*