No. 13-15188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHINATOWN NEIGHBORHOOD ASSOCIATION, *et al.*,
Plaintiffs-Appellants

v.

EDMUND G. BROWN, JR., in his official capacity as
Governor of the State of California, *et al.*,
Defendants-Appellees

and

THE HUMANE SOCIETY OF THE UNITED STATES, *et al.*,
Intervenors-Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of California
No. 4:12-cv-03759
Hon. Phyllis J. Hamilton, District Judge

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL ON THE SUPREMACY CLAUSE CLAIM

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The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29.

STATEMENT OF INTEREST

This case concerns whether a California statute violates the Supremacy Clause of the United States Constitution by prohibiting the possession, sale, and distribution of shark fins, including fins from sharks harvested in federal waters and landed in compliance with federal law. The United States has a strong interest in the proper application of preemption principles. That interest includes the application of preemption principles to federal fisheries management under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. § 1801, *et seq.*, particularly where state regulation is an obstacle to achieving the purposes and objectives of the MSA.

ISSUE PRESENTED

Plaintiffs-Appellants Chinatown Neighborhood Association and Asian Americans for Political Advancement (collectively, "Chinatown Association") challenge California's law banning the possession, sale, and distribution of any shark fin product. Under federal law, possession

and trade of shark fins is lawful so long as the shark is landed with its fins naturally attached. Chinatown Association contends that California's law is preempted by federal law. The district court denied a motion for a preliminary injunction, finding that federal law does not preempt the State's law.

The question before this Court is whether the district court abused its discretion in denying Chinatown Association's motion for a preliminary injunction. This amicus brief addresses only the merits of the federal preemption claim. The United States participates here, against the backdrop of ongoing rulemaking on this issue, to urge the Court to exercise restraint in ruling on the following:

Whether the district court erred in determining that Chinatown Association has no likelihood of success on its claim that California Assembly Bills 376 and 853, codified as Cal. Fish and Game Code §§ 2021 and 2021.5 ("Shark Fin Ban"), violate the Supremacy Clause.

STATEMENT

I. Statutory Framework

A. The Magnuson-Stevens Act

Congress enacted the MSA to "conserve and manage . . . fishery resources," "promote domestic commercial and recreational fishing under sound conservation and management principles," and "achieve and maintain, on a continuing basis, the optimum yield from each fishery." 16 U.S.C. § 1801(b)(1), (3), (4). The MSA promotes commercial fishing, subject to conservation and management measures, and recognizes that "commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation." *Id.* § 1801(a)(3). Fishery Management Plans established pursuant to the MSA must "prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry," minimize adverse economic impacts on fishing communities, consider efficiency in the utilization of fishery resources, and comply with other substantive and procedural requirements. *See* 16 U.S.C. § 1851(a)(1), (4), (5) (National Standards);

id. § 1853(a) (Plan Required Provisions); *id.* § 1854(e) (Rebuilding Overfished Fisheries).

The United States has "sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." *Id.* § 1811(a). The exclusive economic zone, or EEZ, extends from the seaward boundary of the States to a boundary 200 nautical miles from the baseline from which the breadth of the territorial sea is measured. *See id.* § 1802(11); Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983). Fishing in the EEZ is thus subject to federal regulation. The MSA gives the federal government authority to regulate not only the harvesting of fish, but also possession, landing, and sale of fish catch. *See* 16 U.S.C. § 1853(b)(3).

States generally have authority over fishing within the boundaries of the state, which for most states extend three miles seaward of the coastline. *Id.* § 1856(a)(1)–(2); *see also* Submerged Lands Act, 43 U.S.C. §1301 *et seq.* Under certain limited circumstances, states may regulate fishing vessels in the EEZ. *See* 16 U.S.C. § 1856(a)(3). None of those circumstances applies here.

The MSA, as amended by the Shark Finning Prohibition Act of 2000, Pub. L. 106-557, and the Shark Conservation Act of 2010, Pub. L. 111-348 (collectively, the "Finning Prohibition Act"), makes it unlawful for any person:

> (i) to remove any of the fins of a shark (including the tail) at sea;
>
> (ii) to have custody, control, or possession of any such fin aboard a fishing vessel unless it is naturally attached to the corresponding carcass;
>
> (iii) to transfer any such fin from one vessel to another vessel at sea, or to receive any such fin in such transfer, without the fin naturally attached to the corresponding carcass; or
>
> (iv) to land any such fin that is not naturally attached to the corresponding carcass, or to land any shark carcass without such fins naturally attached.

16 U.S.C. § 1857(1)(P).[1] The Finning Prohibition Act thereby seeks to "end the wasteful and abusive practice of shark finning." 156 Cong. Reg. H8790 (Dec. 21, 2010) (Statement of Rep. Bordallo).

The federal Finning Prohibition Act does not prohibit the possession, sale, or distribution of a shark fin from a shark landed in compliance with federal law. *Cf.* 146 Cong. Rec. H 11570, 11571 (Oct.

[1] The requirement that sharks be landed with fins attached does not apply to commercial fishing for smooth dogfish off the Atlantic coast. Act of Jan. 4, 2011, Pub. L. No. 111-348, § 103(b), 124 Stat. 3668, 3670; *see* 16 U.S.C. § 5102.

30, 2000) (Statement of Rep. George Miller) ("The Shark Finning Prohibition Act will not prevent United States fishermen from harvesting sharks, bringing them to shore, and then using the fins or any other part of the shark. Instead, it would simply prevent the cutting off of the fins and the disposal of the carcass at sea, or the transport or landing of fins harvested in this manner by another fishing vessel.").

B. Federal Regulations Implementing the Finning Prohibition Act

The MSA generally does not preempt a state's laws applicable to its fisheries in state waters. Apart from exceptions not relevant here, "nothing in [the MSA] shall be construed as extending or diminishing the jurisdiction of any State within its boundaries." 16 U.S.C. § 1856(a)(1). The National Marine Fisheries Service's (NMFS) regulations implementing the Shark Finning Prohibition Act of 2000 state that "[n]othing in this regulation supercedes more restrictive state laws or regulations regarding shark finning in state waters." 50 C.F.R. § 600.1201(c); *see* NMFS, Final Rule: Implementation of the Shark Finning Prohibition Act, 67 Fed. Reg. 6194 (Feb. 11, 2002). However, consistent with general principles of conflict preemption, state regulations may not interfere with or impede accomplishment of fishery

management objectives for federally-managed commercial and recreational fisheries. *See* NMFS, Notice of Proposed Rulemaking: Implementation of the Shark Conservation Act of 2010, 78 Fed. Reg. 25,685, 25,687 (May 2, 2013).

On May 2, 2013, NMFS issued a notice of proposed rulemaking to implement the Shark Conservation Act of 2010 and clarify the relationship between federal and state shark finning laws.[2] *Id.* NMFS is soliciting public comment on the notice through July 31, 2013. 78 Fed. Reg. 40,687 (July 8, 2013) (comment period extension). The notice explains that section 600.1201(c) of the current regulations "affirm[s] that the [federal] regulations would not infringe on a state's jurisdiction or authority." 78 Fed. Reg. at 25,687. However, "[n]either the [Shark Finning Prohibition Act of 2000] nor the [Shark Conservation Act of

[2] In its letter responding to Chinatown Association's submission of supplemental authority pursuant to Federal Rule of Appellate Procedure 28(j), California urged the Court to dismiss NMFS's statements in the proposed rule as "non-binding," "informal commentary." Dkt. 37 at 1. Although the publication concerned a proposed regulation, NMFS expressly explains that its "view regarding state and federal authority has not changed since 2002." 78 Fed. Reg. at 25,687. The proposed rule simply clarifies NMFS's consistent position on preemption. *Id.*

2010] suggest[s] that Congress intended to amend the [MSA] to prohibit the possession or sale of shark fins." *Id.* at 25,686.

NMFS further explains that "[s]tate or territorial shark fins laws are preempted if they are inconsistent with the [MSA] as amended by the [Finning Prohibition Act], implementing regulations for the statutes, or applicable fishery management plans or regulations." *Id.* at 25,687. "If sharks are lawfully caught in federal waters, state laws that prohibit the possession and landing of those sharks with fins naturally attached or that prohibit the sale, transfer or possession of fins from those sharks unduly interfere with achievement of [MSA] purposes and objectives" and would be preempted. *Id.* However, "if a state law prohibiting the possession, landing, or sale of shark fins is interpreted not to apply to sharks legally harvested in federal waters, the law would not be preempted." *Id.*

Consistent with these principles, the proposed rule would clarify 50 C.F.R. § 600.1201:

> (c) This subpart does not supersede state laws or regulations governing conservation and management of state shark fisheries in state waters.
>
> (d) State and territorial statutes that address shark fins are preempted if they are inconsistent with the [MSA] as amended

> by the Shark Conservation Act of 2010, regulations under this part, and applicable federal fishery management plans and regulations.

78 Fed. Reg. at 25,689.

Beginning with Hawaii in 2010, *see* Haw. Rev. Stat. § 188-40.7, several states and U.S. territories have enacted or are considering enacting statutes that address shark fins. *See, e.g.*, Or. Rev. Stat. § 498.257; Wash. Rev. Code § 77.15.770; 515 Ill. Comp. Stat. 87-833/5/5-30. NMFS is currently engaged in discussions with states about ways in which the states may interpret their laws so as not to be preempted. NMFS is also assisting the states in ensuring effective enforcement of state law as it applies to sharks caught in state waters, while still allowing for full utilization of sharks, including fins, harvested in federal waters and landed in compliance with federal law.

C. California's Shark Fin Ban

In 2011, California passed a shark fin law that is more restrictive than the MSA. California's Shark Fin Ban prohibits the sale, trade, or distribution of shark fins. The law provides, in relevant part, that "it shall be unlawful for any person to possess, sell, offer for sale, trade, or distribute a shark fin." Cal. Fish & Game Code § 2021(b). A "shark fin"

is the "raw, dried, or otherwise processed detached fin, or the raw, dried, or otherwise processed detached tail, of an elasmobranch." *Id.* § 2021(a). This law was intended to "close the California market for shark fins" by "eliminating an important end market" — use in shark fin soup — "thereby impacting the demand for shark fins." Cal. Br. at 18.

II. Factual Background

A. Federal Regulation of Shark Fisheries

Federal shark fisheries are managed under Fishery Management Plans (FMPs) that are developed by eight regional Fishery Management Councils or the Secretary of Commerce. Council voting members include NMFS regional directors, state officials with marine fishery management responsibilities, and individuals who are knowledgeable about conservation and management of fishery resources. 16 U.S.C. § 1852(a)–(b). The latter are nominated by state governors and appointed by the Secretary. *Id.* FMPs must be approved by the Secretary, who has delegated his authority to NMFS. 16 U.S.C. § 1854(a).

The Councils develop FMPs for fish stocks that require conservation and management. As explained above, FMPs must comply with national standards and other substantive and procedural requirements. *See* 16 U.S.C. §§ 1852(h), 1851(a), 1853(a), 1854(e). Among other requirements, FMPs must "prevent overfishing and rebuild overfished stocks." *Id.* § 1853(a); *see* 50 C.F.R. § 600.10. NMFS's mandates include "achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry." 16 U.S.C. § 1851(a)(1). The MSA defines "optimum" yield as the amount of fish that "will provide the greatest overall benefit to the Nation," based in part on the "maximum sustainable yield from the fishery." 16 U.S.C. § 1802(33); *see also* 50 C.F.R. § 600.310(e)(3). An FMP may include time and area closures, prohibitions on fishing, limits on fish catch through quotas, trip limits, and fish size limits, as well as restrictions on gear type. 16 U.S.C. § 1853(b).

The Pacific Fishery Management Council, which has authority over fisheries off the coasts of California, Oregon, and Washington, manages the common thresher, shortfin mako, blue, bigeye thresher, and pelagic thresher sharks under the West Coast Highly Migratory

Species FMP. 16 U.S.C. § 1852(a)(1)(F); *see* NOAA Fisheries Fact Sheet, Shark Management, *at* http://www.nmfs.noaa.gov/sfa/hms/sharks/Fact_Sheets/management.htm (last visited July 22, 2013). This FMP prohibits the harvest of great white, megamouth, and basking sharks. *Id.*

NMFS also manages shark fisheries in the Atlantic Ocean, Caribbean Sea, and Gulf of Mexico under a Secretarial Plan for highly migratory species. 16 U.S.C. §§ 1854(g), 1852(a)(3), 1802(21). The highly migratory species regulations require permitting of shark vessels; prohibit retention of certain sharks; and establish commercial quotas for sandbar sharks, non-sandbar large coastal sharks, small coastal sharks, and pelagic sharks. 50 C.F.R. §§ 635.4(e), 635.27(b).

In sum, federal shark fishery regulations provide for the harvest of certain shark species in the EEZ to achieve optimum yield from federal fisheries, consistent with MSA requirements. *See* 16 U.S.C. § 1851(a)(1) (National Standard 1). For such species, fishers may possess and sell all parts of the shark caught in the EEZ, including shark fins, so long as the shark is caught and landed in accordance with federal law.

B. Chinatown Association's Lawsuit

Chinatown Neighborhood Association and Asian Americans for Political Advancement are, respectively, a nonprofit organization and political action committee, both with members who are "people of Chinese national origin who are engaged in cultural practices involving the use of shark fins and in business practices involving the buying and selling of shark fins in interstate commerce." ER 245 (Compl. ¶¶ 6–7).

Chinatown Association sued Edmund Brown, *et al.* ("State of California"), alleging that California's Shark Fin Ban violates the Equal Protection Clause, 42 U.S.C. § 1983, the Commerce Clause, and the Supremacy Clause. As is relevant to this brief, Chinatown Association argues that the Shark Fin Ban is unconstitutional under the Supremacy Clause "because it unlawfully preempts federal law," ER 249 (Compl. ¶ 21), specifically, the MSA, which "contains explicit uniform regulations governing shark fishing and banning shark finning." Chinatown Br. at 46.

C. The District Court's Decision

On January 2, 2013, the district court issued its order denying Chinatown Association's motion for preliminary injunction. The court

found that the state Shark Fin Ban is not preempted by federal law. ER 012–13. In support of this conclusion, the court cited a NMFS regulation stating that "[n]othing in this regulation supercedes more restrictive state laws or regulations regarding shark finning in state waters." ER 013 (quoting 50 C.F.R. § 600.1201(c)). The court also observed that under the MSA, states retain concurrent jurisdiction over their own waters. *Id.* (citing 16 U.S.C. § 1856). Finally, the court reasoned that it was possible to comply with both federal and state law because "[f]ederal law primarily regulates shark finning and the taking and landing of sharks within U.S. waters, while the [state law] prohibits the sale, trade, or possession of shark fins in California." *Id.*

Subsequent to the decision, NMFS published its May 2, 2013, proposed rule, which explains that the agency's "view regarding state and federal authority has not changed since 2002 [when it enacted 50 C.F.R. § 600.1201(c)], but the agency believes that section 600.1201(c) could be clarified." 78 Fed. Reg. at 25,687; *see supra* pp. 7–9.

ARGUMENT

State law may be preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). Although California's law does not directly regulate shark fisheries in the EEZ, it categorically prohibits the possession, sale, and purchase of shark fins from sharks caught in the EEZ, even when such possession, sale, and purchase is allowed under federal law. California's law thus stands as an obstacle to NMFS's ability to exercise its exclusive authority to manage federal fisheries, at least to the extent it reaches fishing in the EEZ and activities ancillary to fishing, including commercial fishers' ability to land the fish and place it into the stream of commerce. *See* 16 U.S.C. § 1802(4), (14).

California's Shark Fin Ban therefore is in "'actual conflict' with precise and sufficiently narrow objectives that underlie the federal enactments" — the MSA's mandate to manage federal fisheries to ensure sustainable, optimum yields for commercial fishing. *City of Charleston v. A Fisherman's Best*, 310 F.3d 155, 169 (4th Cir. 2002), *see*

also Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

I. California's Shark Fin Ban Conflicts With the MSA to the Extent the Ban Applies to Sharks Caught in the EEZ

A. The MSA's Objective of Achieving Optimum Yield From Federal Fisheries

One primary purpose of the MSA is the promotion of commercial fishing in federal waters under sound conservation principles. 16 U.S.C. § 1801(b)(3). Commercial fishing is "fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade." *Id.* § 1802(4). As explained above, FMPs must address overfishing and rebuilding requirements, but also "achiev[e], on a continuing basis, the optimum yield from each fishery for the United States fishing industry," consider efficiency in the utilization of fishery resources, and "minimize adverse economic impacts on [fishing] communities," which are communities "substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs." *Id.* §§ 1802(17), 1851(a)(1), (5), (8).

B. California's Law Obstructs the Use of Fishery Resources Lawfully Obtained in Federal Waters

The Shark Fin Ban impedes commercial fishing in the EEZ. While a fisher may land a shark caught in the EEZ in compliance with California law, the fisher is not permitted to possess, sell, or trade part of the shark. In essence, fishers are told that they may land the shark but may not sell a part of the shark that has economic value. This "stands as an obstacle," *Crosby*, 530 U.S. at 372, to the MSA's purpose of achieving optimum yield from federal fisheries and "maintaining an economically viable fishery together with its attendant contributions to the national, regional, and local economies." 50 C.F.R. § 600.310(e)(3)(iii)(A); *see* 16 U.S.C. § 1851(a)(1).

The effect of California's restriction is similar to that in *Southeastern Fisheries Association v. Mosbacher*, where federal regulation permitted the harvest of redfish but state law prohibited the landing, possession, or sale of redfish. 773 F. Supp. 435, 440 (D.D.C. 1991). The state law was preempted because "in effect, [the challenged regulations] told commercial fishermen that they may catch the fish, but that they may not land them. This makes no sense, and creates a conflict that is impermissible under the [MSA]." *Id.*

Here, although California has not prohibited the landing of a shark with its fin attached, the state law may make it infeasible or economically impractical for a fisher to sell a shark. At the moment the fisher removes a shark fin in order to prepare the remainder of the shark for storage and sale, even to purchasers out of State, the fisher is arguably in possession of a detached fin in violation of California law. The state Shark Fin Ban may effectively shut down shark fishing because it prevents fishers from obtaining a significant part of the economic value of the shark. This creates an impermissible conflict with the MSA's purpose of promoting commercial fishing and its mandate of achieving "optimum yield."

The Eleventh Circuit's ruling in a fishing quota case is also instructive. In *Southeastern Fisheries Association v. Chiles*, the court of appeals found that Florida's daily landing limit for mackerel was likely preempted because the relevant FMP had set only an annual quota for total mackerel catch. 979 F.2d 1504, 1510 (l1th Cir. 1992) (remanding to the district court for further fact-finding).[3] Hence, if the *Chiles* plaintiffs

[3] Both *Mosbacher* and *Chiles* were decided prior to the 2007 amendments to the MSA, Pub. L. No. 109-479, but the relevant statutory provisions in those cases remain unchanged.

hypothetically "were to harvest the entire federal annual quota from the EEZ" on the first day of the fishing season, Florida's regulation would prohibit the plaintiffs from landing all of that catch. *Id.* Therefore, Florida's quota was inconsistent with NMFS's decision regarding the appropriate manner to manage that fishery. *Id.*; *see also City of Charleston v. A Fisherman's Best, Inc.* 310 F.3d 155, 173, 176 (4th Cir. 2002) (invalidating a city resolution forbidding dock access to vessels using certain gear permitted under federal regulations). The reasoning of *Mosbacher* and *Chiles* demonstrates that state laws are invalid if they restrict commercial fishers' ability to possess and sell fish legally procured in the EEZ.

The consequence of California's Shark Fin Ban is that a commercial fisher may catch a shark in federal waters and land it with fins attached, in compliance with federal law. However, the fisher is prohibited from fully utilizing the shark because the fisher's possession and sale of the shark fin, while permitted under federal law, is prohibited under California law. And while a fisher theoretically may be able to ship a shark whole to a state where possession and sale of fins is

permitted, as a practical matter, this is not likely a viable option because it is difficult to store and transport a whole shark.

In short, California's law directly affects a central component of commercial fishing — the ability to possess and place into commerce fish caught in federal waters. *See* 16 U.S.C. § 1802(4) (defining commercial fishing as "fishing in which the fish harvested, either in whole or in part, are intended to enter commerce or enter commerce through sale, barter or trade"). This creates an impermissible conflict with NMFS's management of federal shark fisheries to ensure optimum yield under sound conservation and management principles.[4]

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[4] The Supremacy Clause claim before the Court arises in the context of a motion to preliminarily enjoin enforcement of a coastal state's ban on the possession and sale of shark parts from sharks lawfully obtained in federal waters. In analyzing the likelihood of success of Chinatown Association's facial challenge to California's law, this Court should proceed mindful of the fact that, at a minimum, the State's ban on the fisher's possession and the first sale of shark fins conflicts with federal law.

A state law prohibition applicable to downstream activities, such as resale or consumption of shark fins, may present distinct questions. Such a law could affect NMFS's determination of how to manage federal fisheries to ensure sustainable, optimum yield. Analysis of such a law may require consideration of multiple factors, including NMFS's authority to regulate the sale of fish and to prescribe other conditions or restrictions determined to be "necessary and appropriate for the

C. NMFS's Regulations Preserve, But Do Not Augment, State Authority

Instead of asking whether California's Shark Fin Ban conflicts with MSA requirements regarding management of federal shark fisheries, the district court interpreted NMFS's current regulations as expressly exempting California's law from preemption. *See* ER 013 (citing 50 C.F.R. § 600.1201(c), which states that "[n]othing in this regulation supercedes more restrictive state laws or regulations regarding shark finning in state waters"). The district court's reliance on 50 C.F.R. § 600.1201(c) is misplaced.

The MSA states that "nothing in this Act shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries," and thereby preserves state authority over fishery resources in state waters. 16 U.S.C. § 1856(a)(1). The statutory

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conservation and management of the fishery." 16 U.S.C. § 1853(b)(3), (14).

A limited ruling here that the California Shark Fin Ban is preempted at least as it applies to the initial possession and first sale of shark fins would not prejudice the ongoing rulemaking process to implement the Shark Conservation Act of 2010. Indeed, the rulemaking proceedings may generate information that sheds light on how downstream actors and activities are affected by federal and state shark fin regulations.

provision and regulation pertain to state waters and stand for the unremarkable proposition that states may continue to exercise their existing authority over vessels in state waters. For example, a valid state law may prohibit shark harvest within state waters but not restrict the landing or initial trade of sharks and shark fins lawfully harvested in the EEZ.

Section 600.1201(c) does not, however, augment state authority by overriding general principles of preemption. The district court here failed to grapple with the conflicting means and goals of federal and California shark fishery management. *See Wis. Dep't of Indus., Labor & Human Relations v. Gould, Inc.*, 475 U.S. 282, 286 (1986) ("'[C]onflict is imminent' whenever 'two separate remedies are brought to bear on the same activity.'"). Consequently, the court below erred in finding that the California Shark Fin Ban was not preempted to the extent it applies to fins from sharks caught in the EEZ, at least with possession in connection with landing and the introduction of shark fins and parts into commerce.

II. Consistency of Regulatory Objectives Does Not Save California's Law From Preemption

The State of California and Intervenors-Defendants Humane Society of the United States, *et al.* (collectively, HSUS) argue that California's Shark Fin Ban is not preempted because it is "consistent" with the federal Finning Prohibition Act's purpose of "eliminat[ing] the wasteful and unsportsmanlike practice of shark finning." Cal. Br. at 48–49; *see* HSUS Br. at 34–36. But "it is not enough to say that the ultimate goal of both federal and state law" is the same. *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *see also Fla. Lime & Avocado Growers*, Inc., 373 U.S. at 142 (noting that the preemption test is "not whether they [federal and state laws] are aimed at similar or different objectives"). A state law is invalid to the extent that it "actually conflicts with a . . . federal statute." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). Such conflict will be found when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985).

While it is true that the MSA, as amended by the Finning Prohibition Act, seeks to halt the practice of shark finning, that is not

the sole objective of the MSA. As discussed above, *see supra* pp. 3–4, 11, the MSA requires that FMPs consider the social and economic needs of fishing communities in prescribing measures to achieve optimum yield from each fishery for the U.S. fishing industry on a continuing basis. Congress chose a circumscribed approach to addressing the practice of shark finning that did not include a total ban on the possession, sale, and trade of fins from sharks that were legally harvested in federal waters. California's law conflicts with this Congressional judgment.

The State of California further asserts that sale or trade of legally obtained shark fins "is not the 'objective' of the [Shark Act]." *See* Cal. Br. at 48. This argument is likewise inapposite. While the federal Finning Prohibition Act does not affirmatively permit trade in shark fins, it does not prohibit it. And one of the MSA's objectives is to ensure sustained, optimum yields from fisheries. *See supra* pp. 3, 11, 16.

III. The District Court Failed to Appreciate the Conflict Presented by California's Ban on Possession and Sale of Shark Fins from Sharks Caught in Federal Waters

The district court noted that Chinatown Association did not "establish[] that it will be impossible to comply with both" laws. ER 013. But it is no answer to the obstacle preemption question that compliance

with both sets of laws may theoretically be possible. *See Mut. Pharm Co. v. Bartlett*, 133 S. Ct. 2466, 2473, 2477 & n.3 (2013) (finding that a state drug labeling law is preempted and rejecting the argument that the drug manufacturer could comply with both state and federal law by not doing business in the relevant state). Here, California's law goes too far by banning all possession and sale of shark fins from sharks caught in federal waters, when federal law allows for possession and sale so long as the shark is landed in compliance with federal law. *Cf. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380 (2000) (finding state law prohibiting trade with Burma preempted, noting that "the fact that some companies may be able to comply with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ" against Burma).

As the courts in *Chiles* and *Mosbacher* recognized, where federal law permits the catching of a fish in the EEZ, a state law may not interfere with a fisher's ability to place that fish into the stream of commerce — for example, in those cases, by interfering with a fisher's ability to land the fish in the first place. *See Chiles*, 979 F.2d at 1509–

10; *Mosbacher*, 773 F. Supp. at 440–41. The effect of California's Shark Fin Ban is that a fisher who catches a shark in the EEZ in compliance with federal law must then discard an economically valuable part of that shark upon reaching California docks to comply with California law.[5] He must do so even though federal law allows for the possession, sale, and trade of the entire shark, including the shark fin. Thus, California's law is an obstacle to the achievement of "optimum yield" from federal shark fisheries.

In sum, the MSA establishes multiple objectives in the conservation and management of fisheries in the EEZ, including achieving optimum yield for the U.S. fishing industry. California's law prevents commercial fishers from possessing, selling, and trading fins from sharks lawfully caught in the EEZ, and therefore stands as an obstacle to Congressional command to manage federal fisheries for

[5] It is unclear from the text of California's Shark Fin Ban whether a fisher could detach and discard the fin without being in "possession" of the fin for some period of time.

maximum sustainable yield. California's Shark Fin Ban is thus preempted.[6]

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the district court's judgment regarding Chinatown Association's likelihood of success on its Supremacy Clause claim.

Respectfully submitted,

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General Counsel
U.S. Department of Commerce

July 22, 2013
90-12-13963

[6] Aside from addressing the district court's error in evaluating Chinatown Association's likelihood of success on the preemption claim, we take no position on the other arguments raised in the appeal or whether, ultimately, the district court erred in denying Chinatown Association's request for a preliminary injunction.

STATEMENT OF RELATED CASES

Attorneys for the Federal Amici are not aware of any related cases as defined in Ninth Circuit Rule 28–2.6.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 29 (c) and 32(a)(7)(B) because it contains 5,098 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Century Schoolbook.

/s/ Vivian H.W. Wang

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will serve the brief on the other participants in this case.

/s/ Vivian H.W. Wang