Last week I wrote about an interesting, pending lawsuit involving a constitutional challenge to California's recently-enacted ban on the sale, possession or trade of shark fins. Asian restauranteurs and cultural advocates who'd filed the lawsuit and failed in their earlier efforts to persuade the federal district court to enjoin the law appealed that ruling to the U.S. Court of Appeals for the Ninth Circuit. There, in a move that surprised many observers, the federal government filed a friend-of-the-court brief in support of the plaintiffs, arguing that California's shark fin ban is preempted by the federal Magnuson-Stevens Fishery Conservation and Management Act (MSA).

The Court of Appeals issued its decision in the case yesterday, ruling unanimously in favor of the State of California. In a brief, unpublished decision, the Ninth Circuit declined to suspend the law, finding that the plaintiffs failed to prove that the shark fin ban causes them irreparable harm. More significantly, the Court of Appeals agreed with the district court judge that the plaintiffs had failed to demonstrate they were likely to succeed on any of their constitutional theories–Equal Protection, dormant Commerce Clause or federal preemption–as to why the California law is invalid.

Specifically as to federal preemption, the Ninth Circuit noted that the MSA "does not expressly preempt state law or occupy the field." Nor, it observed, was there any evidence that California's shark fin ban conflicts with MSA objectives. And the court was apparently not amused by or impressed with the federal government's 11th hour friend-of-the-court brief. The appellate judges wryly noted in their opinion:

> "Although the federal government raised preemption concerns on the eve of oral argument before this court as a late-filing amicus, because those arguments were never before the district court, the district court did not abuse its discretion in failing to anticipate them."

Yesterday's ruling doesn't end the litigation, which now goes back to the district court for a hearing on the merits of the challengers' constitutional claims. But a careful parsing of the Ninth Circuit's decision reveals that the plaintiffs face an uphill battle in their efforts to invalidate California's shark fin ban. Perhaps the most intriguing question at this point is whether federal officials will persist in their preemption arguments before the district court or, instead, move on to more constructive legal and policy endeavors.