In 2011, the State of California enacted a ban on the sale, possession and trade of shark fins. California's ban follows similar laws passed by Hawaii, Washington and Oregon over the past few years. The legislation, codified as California Fish & Game Code sections 2021 and 2021.5, followed years of advocacy by marine conservation groups, scientists and organizations such as the Monterey Bay Aquarium to ban the practice of killing sharks for their fins. The opponents of "shark finning" base their position on the documented, alarming declines in shark populations off the California coast and worldwide, as well as the barbaric and wasteful practice of harvesting fins from sharks and dumping the rest of the animal as by-catch–often while the shark is still alive and therefore left to suffer a slow and painful death.

A number of Asian restaurant owners and cultural advocates opposed the California ban–which took effect last month–claiming it unfairly targets the Asian community and the economic livelihood of some Asian businesses. (The most prominent use of shark fins is as a component of shark fin soup, long considered a culinary delicacy in China and some other Asian nations.)

It should perhaps come as no surprise that opponents of California's shark fin ban, having been unsuccessful in the state legislature, chose to pursue their judicial remedies. They sued state officials in federal court to invalidate the new law, claiming (among other things) that it is discriminatory. (Their efforts similarly to play the race/cultural card in the earlier legislative debate were effectively undercut by the testimony of Asian environmentalists and scientists supporting the shark fin ban.) When the opponents' efforts to obtain an injunction against the new legislation failed in federal district court, they appealed to the U.S. Court of Appeals for the Ninth Circuit.

That's when things got interesting.

Late last month, the United States lodged an amicus brief with the Ninth Circuit, arguing that California's shark fin ban is preempted by federal law and therefore unenforceable. Specifically, the Justice Department and National Oceanic and Atmospheric Administration argue that recent amendments to the federal Magnuson-Stevens Act (MSA), designed to afford shark populations more modest fisheries protections, conflict with California's shark fin ban. That's despite the fact that the MSA expressly provides that it's not intended to limit the jurisdiction of states to control fishing practices in state waters. To make matters worse, the feds apparently never bothered to share their preemption concerns while the California shark fin ban was being debated in the state legislature. And, adding further insult to injury, the government is basing its preemption argument in part on a federal rule making proceeding it only got around to commencing three months ago, and which remains

a work in progress.

This kind of judicial sneak attack was common practice during the George W. Bush administration, when federal agencies and lawyers mounted a major preemption offensive against numerous California environmental programs. (The vast majority of these legal challenges were rebuffed by the courts.) But from its first days, the Obama administration took pains to distance itself from its predecessor's confrontational preemption posture. Indeed, the White House in 2009 expressed concern to federal agency heads about the recent trend of federal agencies "announc[ing] that their regulations preempt State law…without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles."

Alas, it appears that the Department of Justice and the National Oceanic and Atmospheric Administration, which jointly authored the amicus brief in the shark fin case before the Ninth Circuit, failed to get the memo.

The Ninth Circuit heard oral arguments in the shark fin appeal earlier this month. Fortunately, the judicial panel seemed disinterested in the feds' amicus brief and its preemption arguments. So it would appear that California's shark fin ban will likely prevail.

But that begs the question of what possessed the federal government to inter-meddle in this third-party lawsuit in the first place. If the Obama administration truly believes in states' rights, the Tenth Amendment and a collaborative federal-state partnership when it comes to environmental policy, it should withdraw its amicus brief in the shark fin case and pledge not to repeat this sorry episode anytime soon.

My Legal Planet colleagues and I routinely write about the deficiencies, lack of foresight and political gridlock that currently infect what passes for federal environmental policy. With looming challenges on climate change, public health, marine resources and a myriad of other environmental fronts, the federal government would be better served by focusing on real problems rather than on extra credit frolics designed to torpedo legitimate state environmental initiatives.

Stated differently: lead, follow, or get out of the way.

A female mako shark being finned at a shark fishing camp, Santa Rosalia, Mexico. Photograph: Brian

Skerry/National Geographic/Getty Images