No. 13-15188

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHINATOWN NEIGHBORHOOD ASSOCIATION, a nonprofit corporation and ASIAN AMERICANS FOR POLITICAL ADVANCEMENT, a political action committee,

Plaintiffs-Appellants,

v.

EDMUND G. BROWN, Jr., Governor of the State of California; *et al*.,

Defendants-Appellees,

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
Case No. 4:12-cv-03759 PJH
The Honorable Phyllis J. Hamilton, District Judge.

BRIEF OF *AMICI CURIAE* SUSTAINABLE FISHERIES ASSOCIATION, INC., GARDEN STATE SEAFOOD ASSOCIATION, INC., NORTH CAROLINA FISHERIES ASSOCIATION, INC., and VIRGINIA SEAFOOD COUNCIL, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT (FRAP 26.1)

Pursuant to Fed. R. App. P. 26.1, all of the *amici* are nonprofit corporations; none of the *amici* has any parent corporation; and there is no publicly held corporation that owns ten percent or more of the stock of the *amici*.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Sustainable Fisheries Association, Inc. is a Massachusetts-based nonprofit organization that was founded in 2010 by four seafood processors: Marder Trawling Inc., Seatrade International Company Inc., Zeus Packing Inc., and Eastern Fisheries Inc. The members of the Association work with Federal and State fishery management and regulatory bodies overseeing the Atlantic dogfish, skate, monkfish, and redfish fisheries, advocating sustainable fishery practices and the production and release of timely and accurate scientific research.

The Sustainable Fisheries Association, Inc. was granted Marine Stewardship Council (MSC) certification that the US Atlantic spiny dogfish (*Squalus acanthias*) fishery is a sustainable and well-managed fishery. Following the success of the certification, in February of 2013, MSC expanded the scope of certification such that all spiny dogfish landed in state and federal waters from Maine to North Carolina are now certified by MSC as sustainable.

The Garden State Seafood Association, Inc. is a statewide trade association of commercial fishermen and fishing companies, related businesses, and individuals working together to promote the sustainable development of our commercial fishing industry and the long-term interests of New Jersey's coastal communities and seafood consumers. The Association's primary goal is to ensure that our fishery resources are managed responsibly and that the people of New

Jersey, whether they are harvesters, anglers or consumers, will be able to enjoy the bounty of New Jersey's rich coastal and offshore waters for generations to come. The Association was formed in 1999 and there are now more than 170 members who employ a combined total of over 1,000 people.

The North Carolina Fisheries Association, Inc. ("NCFA") was established as a professional trade association in 1952 to organize various aspects of the commercial seafood industry in North Carolina. Since that time the NCFA has represented the interests of this industry at both the state and federal levels.

NCFA represents approximately 2000 members: fishermen and their families, seafood processors, and various related businesses throughout North Carolina and other parts of the country. The NCFA's primary responsibility is to see that regulatory agencies and bodies understand the importance of the industry to the coastal regions of the state and, also. The NCFA also to highlights the significance of the seafood industry as a truly American industry, bringing a vital food source to people throughout the United States and the world, as NCFA members conduct domestic and international trade through import and export of a myriad of seafood products.

The Virginia Seafood Council, Inc. founded in 1955, is a non-profit trade association, whose members employ over 300 people involved in all facets of the seafood industry. For nearly sixty (60) years, the Virginia Seafood Council's has

remained a true champion of the Mid-Atlantic seafood industry, which is why it is recognized as the premier voice of Virginia's seafood industry by State and Federal officials, regulatory bodies, universities, government agencies and the seafood industry itself.

HISTORY

Plaintiffs filed a complaint in the United States District Court, for the Northern District of California, alleging that when California amended the California Fish & Game Code by adding §§ 2021 and 2021.5[2] (together the "Shark Fin Law"), banning the possession, sale, offer for sale, trade or distribution of shark fins, it violated Clause 2 of Article VI of the United States Constitution (the "Supremacy Clause"), and further that the Shark Fin Law is preempted by Federal law. Plaintiffs also alleged that the Shark Fin Law violates the Plaintiffs' rights under U.S. Const., art. I § 8, cl. 3 (the "Commerce Clause"), as it imposes an impermissible burden on interstate commerce.

In addition to the Supremacy Clause and Commerce Clause claims, the Plaintiffs also alleged that the Shark Fin Law violates Plaintiffs' rights under the U.S. Const., art. IV § 2, cl. 1 (the "Privileges and Immunities Clause") and under the U.S. Const., amend. XIV, § 1 (the "Equal Protection Clause").

Plaintiffs sought a preliminary injunction to enjoin the provisions of the Shark Fin Law and prevent violations of Plaintiffs' constitutional and statutory rights. The District Court denied Plaintiffs' motion for a preliminary injunction and Plaintiffs filed a timely appeal under Fed. R. App. P.4(a)(1)(A).

[2] Hereinafter, the "Shark Fin Law" refers to AB376, AB853 and Cal. Fish & Game Code §§ 2021 and 2021.5 collectively.

ARGUMENT

A. THE SHARK FIN LAW VIOLATES THE SUPREMACY CLAUSE AND IS PREEMPTED BY FEDERAL LAW

The District Court committed reversible error by denying Plaintiffs' Motion for a Preliminary Injunction. It is well established by application of the Supremacy Clause that where a state law conflicts with treaties or federal laws, the state law is preempted and void. Indeed, the Constitution itself states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. U.S. Const., art. VI, cl. 2.

Treaties "are [contracts] with foreign nations, which have the force of law[.] They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign." THE FEDERALIST No. 75 (Alexander Hamilton). For over two hundred years the United States has made treaties with other governments regulating commerce. See *Treaty of Amity and Commerce Between the United States and France* (signed on February 6, 1778) (establishing commercial alliance between the United States and France).

"Pre-emption can occur in one of three ways: (1) federal law can expressly pre-empt state law; (2) federal law can occupy a field of law so completely that

pre-emption may be inferred; or (3) federal law can conflict with state law, thereby pre-empting it." *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

The Shark Fin Law conflicts with existing treaties between the United States and foreign countries by overtly blocking the stream of lawful commerce at the California border. See *United Nations convention on contracts for the international sale of goods* (April 11, 1980); *Transatlantic Declaration on EC-US Relations* (November 23, 1990); *North American Free Trade Agreement, with notes and annexes* (Signed at Washington, Ottawa, and Mexico December 8, 11, 14 and 17, 1992); and others cited in the United States Department of State document: *Treaties in Force - A List of Treaties and Other International Agreements of the United States in Force on January 1, 2012*. The Shark Fin Law prohibits citizens of other states, and other nations, from shipping legally caught shark fins through the State of California to foreign and domestic destinations. Cal. Fish & Game Code § 2021. Similar prohibitions have been found unconstitutional. *Fouke Co. v. Mandel*, 386 F.Supp. 1341 (D.Md.1974) (federal treaty and wildlife protection statute preempted Maryland criminal statutes prohibiting the importation of seal skins into Maryland).

Not only does the Shark Fin Law violate the Supremacy Clause insofar as it conflicts with international treaties, but it also seeks to occupy a field of law already fully occupied by federal law, including the Magnuson-Stevens Fishery

Conservation and Management Act (hereinafter "*MSA*"). 16 U.S.C.A. § 1801 et. seq., and the Shark Finning Prohibition Act of 2000, 16 U.S.C.A. § 1857(1) et. seq. This is an impermissible conflict under the Supremacy Clause. See *City of Charleston, South Carolina v. A Fisherman's Best, Inc.*, 310 F.3d 155, 169 (4th Cir. 2002) (holding state laws need not be in direct conflict with federal laws to be preempted).

The Supreme Court has held that absent explicit statutory language, state law may still be pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such intent may be inferred from a "scheme of federal regulation [. . .] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79, (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, (1947)). This so-called "field pre-emption" has been recognized in a number of decisions. See *City of Charleston, South Carolina*, 310 F.3d at 169-170; s*ee also* Laurence H. Tribe, *American Constitutional Law*, § 6–31, at 1206–07, (citing *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge*, 403 U.S. 274, 296, (1971), at fn. 13) (recognizing instances of field preemption).

It has already been found by the 11th Circuit that the *MSA* outlines a complete and persuasive federal scheme and reflects congressional intent to occupy the field of fishery management within the exclusive economic zone it establishes. *Southeastern Fisheries Ass'n, Inc. v. Chiles*, 979 F.2d 1504 (11th Cir. 1992).

The Shark Fin Law's ban on the possession of shark fins also directly conflicts with one of the stated purposes of the *MSA*, which is "to promote domestic commercial fishing." 16 U.S.C.A. § 1801(b)(3); see *Bateman v. Gardner*, 716 F.Supp. 595 (S.D.Fla.1989), *aff'd* 922 F.2d 847 (11th Cir. 1990) (state enforcement of shrimp fishing regulations preempted by the Shrimp Fishery Management Plan, managed by the Gulf of Mexico Fishery Management Council).

The Shark Fin Law is in direct contravention of the federal regulations promulgated under the *MSA* in that it expressly and intentionally restricts the trade of lawfully obtained shark fins in the stream of interstate or international commerce. Cal. Fish & Game Code § 2021. The *MSA* promulgated and gave rise to thousands of regulations relating to fish and fishery management, including shark fishing, that have the same preemptive effect as Congressional legislative action. See *MSA*, 16 U.S.C.A. § 1801; see also *City of Charleston, South Carolina,* 310 F.3d at 169 citing *Hillsborough County, FL v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) (showing state laws can be pre-empted by federal

regulations and federal statutes). The sheer number and extent of these regulations should be construed as evidencing the federal government's intention to occupy the field of large-scale fisheries management.

Pursuant to the *MSA*, the Mid-Atlantic Fishery Management Council and the New England Fishery Management Council, in cooperation with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service ("NOAA Fisheries"), implemented and amended the U.S. Atlantic Spiny Dogfish (*Squalus acanthias*) Fishery Management Plan (the "Dogfish FMP"). *Dogfish FMP* §1.1.3 (1976), as amended.

U.S. Atlantic spiny dogfish ("Dogfish") are a species of small shark. The Dogfish FMP incorporates the *MSA's* comprehensive regulations governing the harvest, possession, landing, purchase, and sale of Dogfish, as well as providing for a prohibition on shark finning. See *MSA; Dogfish FMP*. Subsequent to its enactment in 1976, the *MSA* has been amended to include prohibitions on the finning of sharks and the requirement that sharks be landed whole with their fins attached. *MSA* as amended by the *Shark Finning Prohibition Act of 2000*, 16 U.S.C.A. § 1857(1)(P), and by the *Shark Conservation Act of 2010*,16 U.S.C.A. § 1801.

Similarly, the Dogfish FMP has been amended numerous times and it also requires that sharks be landed whole with their fins attached. *Dogfish FMP* §1.1.3

(1976), as amended. While federal law permits the trade of legally obtained shark fins, the Shark Fin Law unnecessarily restricts the shark fin trade entirely within California, while still permitting the trade of other products from the same sharks. Cal. Fish & Game Code § 2021; Decl. B. Marder (attached hereto as Exhibit 3).

In the instant case, there is a clash between federal law permitting the trade of legally obtained shark fins and the Shark Fin Law which unwarrantedly and unnecessarily prohibits such trade. *MSA; Dogfish FMP*. Accordingly, the Shark Fin Law is in conflict with, and preempted by on-point federal regulations with respect to fisheries and fishery management. *MSA*; *Dogfish FMP*.

B. THE SHARK FIN LAW VIOLATES THE COMMERCE CLAUSE

"A very material object of [the Commerce Clause] was the relief of the States which import and export through other States[.] THE FEDERALIST No. 42 (James Madison). Alexander Hamilton noted his belief that "[a]n unrestrained intercourse between the States themselves will advance the trade of each" and was necessary for a successful and prosperous union. THE FEDERALIST No. 11 (Alexander Hamilton).

The Shark Fin Law is a *per se* violation of the U.S. Const., art. I § 8, cl. 3 (the "Commerce Clause"), because it forbids mere transportation of shark fins through California and "thus overtly blocks the flow of interstate commerce at the State's borders," an impermissible obstacle under the Commerce Clause. *Hughes v.*

Oklahoma, 441 U.S. 322, 337 (1979) (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)) (finding overbroad statute that burdened interstate commerce unconstitutional); see also *Oregon Waste Systems, Inc. v. Dept. of Env. Quality*, 511 U.S. 93, 97 (1994) (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Welton v. Missouri*, 91 U.S. 275 (1875)).

The Supreme Court has stated "[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." *Heart of Atlanta Motel*, 379 U.S. 241, 256 (1964) (quoting *Caminetti v. United States*, 242 U.S. 470, 491, (1917)). The Shark Fin Law closes the channels of interstate commerce.

The Shark Fin Law directly effects commerce occurring wholly outside the state of California, which exceeds the State's enabling authority and is invalid *per se*. *Estate of Graham v. Sotheby's, Inc.,* 860 F.Supp.2d at1124; *Hughes* 441 U.S. at 322 (holding state's conduct impacting entirely out of state commerce impermissible under Commerce Clause).

Dogfish are landed in every state from Maine to North Carolina. *Dogfish FMP* §2.3.1 (1976); Decl. B. Marder. The exploitable population of Dogfish in the area covered by the Dogfish FMP has responded favorably to responsible management measures and increased so dramatically that the commercial quota has increased from 8,000,000 pounds in fishing year 2008 to 40,842,000 pounds in

fishing year 2013. *Dogfish FMP, as amended.* All Dogfish landed from Maine to North Carolina, from either Federal or State waters, are from a fishery that both NOAA Fisheries and the Marine Stewardship Council ("MSC") deem "sustainable". *NOAA FishWatch – Atlantic Spiny Dogfish Shark*, http://www.fishwatch.gov/seafood_profiles/species/dogfish/species_pages/atl_spiny_dogfish.htm (last visited March 3, 2013); U.S. Atlantic spiny dogfish (Squalus acanthias); http://www.msc.org/track-a-fishery/fisheries-in-the-program/certified/north-west-atlantic/us_atlantic_spiny_dogfish (last visited March 3, 2013); Decl. B. Marder.

MSC certification of the Dogfish fishery provides independent third-party verification that ensures that Dogfish shark fins in the stream of commerce originated from a sustainable fishery. When MSC grants chain of custody certification to processors in Asia, it will be possible to trace Dogfish shark fins being imported into the United States along the entire chain of supply back to their origin in a MSC certified sustainable Dogfish fishery, thereby eliminating the possibility that the shark fins originated in a country that did not prohibit shark finning. See Decl. B. Marder. By seeking to regulate commercial activity occurring wholly outside the state of California, in the several states and in foreign countries, the Shark Fin Law exceeds the State's authority and is invalid *per se*. See *Estate of Graham*, 860 F.Supp.2d at 1124 (noting state statute that controls commerce

occurring wholly outside its borders exceeds state's authority); see also *Hughes*, 441 U.S. at 322.

Commercial fishing for dogfish takes place in State and Federal waters from Maine to North Carolina. *Dogfish FMP* §2.3.1 (1976), as amended; Decl. B. Marder. After being landed, the Dogfish are shipped through the channels of interstate commerce in trucks owned and operated by fishermen as well as by independent third-parties involved in the transportation of seafood throughout the United States. *Dogfish FMP* §2.3.4.1 (1976), as amended. After being processed, one hundred percent (100%) of the Dogfish is put into the stream of domestic and international commerce when it is shipped throughout the United States and to various countries around the world. Decl. B. Marder. The most recent figures from NOAA Fisheries Statistics reveal that for every job on the water (i.e. fisherman) there are five (5) more jobs on land. *NOAA Office of Science and Technology, Fisheries Statistics* (2011), http://www.st.nmfs.noaa.gov/commercial-fisheries/fus/fus11/index (last visited March 3, 2013). However, such statistics only account for the jobs on land directly related to fishing and would nearly double if they accounted for people employed in ancillary businesses providing indispensable goods like ice, fuel, gear, and provisions, or providers of integral services like processors, packaging, trucking, rubber recycling, technology, communications and professional services. *Id.* The Shark Fin Law puts all of those

jobs in jeopardy by impermissibly closing the channels and instrumentalities of interstate commerce and therefore threatening the viability of entire fisheries. Decl. B. Marder.

Dogfish and Dogfish products are things in interstate commerce and thus subject to regulation by Congress. See *City of Philadelphia*, 437 U.S. at 622 ("All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."); see also *Estate of Graham v. Sotheby's, Inc.*, 860 F.Supp.2d 1117, 1123 (C.D. Cal. 2012) (finding works of fine art sold from one state to another constitutes a "thing" in interstate commerce); *U.S. v. King*, 660 F.3d 1071, 1079-80 (9th Cir.2011) (deeming drinking water an economic commodity). The Shark Fin Law unconstitutionally isolates California from the use of its channels of interstate commerce (i.e. ports, airports and freeways) by restricting the flow of economic commodities like shark fins from out of state businesses. See *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F.Supp.2d 1234, 1240 (D. Kan. 2001) (prohibiting state from posturing for economic isolation.); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980) (finding Florida impermissibly locked out out-of-state banks).

The Shark Fin Law discriminates on its face, and in its practical effect, against individuals entering transactions involving fins from legally caught Dogfish that pass through California by creating an impermissible burden on the

free flow of interstate commerce. See *City of Philadelphia*, 437 U.S. at 624 (recognizing evils of commercial isolationism); *Estate of Graham*, 860 F.Supp.2d at 1124 (finding state statute controlling commerce outside its borders violates Commerce Clause). Statutes that place such a burden on interstate commerce "invoke[] the strictest of scrutiny." *Hughes*, 441 U.S. at 336-37.

The impermissible burden the Shark Fin Law imposes on interstate commerce is "clearly excessive in relation to the putative local benefits," because it prohibits the entry into California of products from a fishery already regulated under Federal and State statutes (that also prohibit shark finning), and because California's s alleged concern over elevated mercury levels is specious at best.[3] Thus the statute cannot survive a Commerce Clause challenge. See generally *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); and cases cited.

Irrespective of its purported intent, the Shark Fin Law is discriminatory on its face and in its practical effect and thus fatally defective. See *City of Philadelphia*, 437 U.S. at 626 (the "evil of protectionism can reside in legislative means as well as legislative ends"). Such legislation is Constitutionally invalid. *Id.* As the Shark Fin Law is *per se* discriminatory, it is up to the State of California to demonstrate that the Shark Fin Law survives strict scrutiny analysis despite the

[3] The Environmental Protection Agency indicated in the Mercury Study Report to Congress (U.S. EPA, 1997) that the typical U.S. consumer was not in danger of consuming harmful levels of methylmercury from fish and was not advised to limit fish consumption on the basis of mercury content.

crushing burden it has on interstate commerce. *Hughes*, 441 U.S. at 337. Additionally, such facial discrimination requires that the state "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 988, 997 (9th Cir.2002) cert. denied, 537 U.S. 1112, (2003) (quoting *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994)). The Court in *Conservation Force* found Arizona's interests for its citizens were legitimate, but Arizona failed to overcome its burden to show that it had no less discriminatory means to advance its legitimate interests. *Conservation Force*, 301 F.3d at 1000. As applied to the instant matter, the Shark Fin Law is not narrowly tailored to be the 'least discriminatory alternative' to serve California's interests. *Conservation Force*, 301 F.3d at 999 (quoting *Hughes*, 441 U.S. at 337-38) (discussing alternative means of achieving state's goals).

Other means exist that could serve California's to advance the purported purpose of the Ban – to stop shark finning – without creating an impermissible burden on the free flow of Dogfish fins passing through California in interstate commerce. O.R.S. § 509.160; *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 1000 (9th Cir. 2002) (holding "Arizona's cap on nonresident hunting substantially affects and discriminates against interstate commerce and therefore is subject to strict scrutiny under the dormant Commerce Clause"). In contrast to the Shark Fin

Law, the state of Oregon enacted O.R.S. § 509.160, a statute controlling the possession, sale, trade and distribution of shark fins, but narrowly tailored the statute in order to avoid creating an impermissible burden on the free flow of Dogfish fins passing through the state in interstate commerce. The statute states, in pertinent part:

> O.R.S. § 509.160.
> Possession, sale, etc. of shark fins prohibited; exceptions
>
> (1) As used in this section:
> (a) "Shark fin" means the raw or dried fin or tail of a shark.
>
> (b) "Spiny dogfish" means a shark belonging to the family Squalidae in the order Squaliformes that has two spines, one anterior to each dorsal fin, and that does not have an anal fin.
>
> (2) A person may not possess, sell or offer for sale, trade or distribute a shark fin in this state.
>
> (3) This section does not apply to:
>
> (a) A person who possesses, sells or offers for sale, trades or distributes a shark fin from a spiny dogfish that was legally taken or landed under rules adopted by the State Department of Fish and Wildlife and in accordance with federal regulations;
>
> (b) A person who holds a license or permit issued by the State Department of Fish and Wildlife under the commercial fishing laws to take a shark and who possesses, sells or offers for sale, trades or distributes a shark fin consistent with the terms of that license or permit; and
>
> (c) A fish processor who holds a license under the commercial fishing laws, who possesses and processes a shark obtained from a person described in paragraph (a) of this subsection and who sells or offers

> for sale, trades or distributes the shark fin consistent with the terms of the license of that fish processor.

O.R.S. § 509.160. The Oregon statute is but one example of how a more narrowly tailored statute can achieve the goals of sustainable and humane fishing. Furthermore, the Shark Fin Law, like the minnow statute in *Hughes v. Oklahoma*, "is certainly not a 'last ditch' attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would likely fulfill the State's purported legitimate local purpose of conservation more effectively." *Hughes*, 441 U.S. at 338; O.R.S. § 509.160. The Shark Fin Law, like the discriminatory minnow statute in *Hughes v. Oklahoma,* is "repugnant to the Commerce Clause." *Hughes*, 441 U.S. at 338.

C. THE SHARK FIN LAW VIOLATES THE EQUAL PROTECTION CLAUSE

The Shark Fin Law discriminates against out of state fishermen in favor of California fishermen in violation of the Privileges and Immunities Clause of the Constitution and the Equal Protection Clause of the Fourteenth Amendment. Cal.Fish & Game Code §§ 2021 and 2021.5; U.S. Const., art. IV § 2, cl. 1; U.S. Const., amend. XIV, § 1. It is settled law that commercial fishing within the territorial waters (i.e. the three mile limit) of a state falls under the scope of authority of the Privileges and Immunities Clause of the Constitution. *Toomer v.*

Witsell, 334 U.S. 385, 403 (1948) (holding "commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause").

The Constitution provides that "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States" and the Equal Protection Clause of the Fourteenth Amendment states "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., art. IV § 2, cl. 1; U.S. Const., amend. XIV, § 1. However, the Shark Fin Law treats California fishermen differently than fishermen from any other state because it allows California fishermen to possess shark fins and bans fishermen from any other state from possessing shark fins in the state. Cal.Fish & Game Code §§ 2021 and 2021.5; See also *Torao Takahashi v. Fish and Game Commission et al.*, 334 U.S. 410, 413, (1948) (striking down a California statute that denied Japanese fishermen fishing licenses).

The Shark Fin Law discriminates against out of state fishermen by excluding them from possessing shark fins in the state. Cal.Fish & Game Code §§ 2021 and 2021.5. Such discrimination is impermissible in light of relevant Constitutional provisions. *Brown v. Anderson*, 202 F.Supp. 96, 103 (D.Alaska 1962) (deeming a law of Alaska that allowed residents and prohibited nonresidents from fishing

abridged the privileges and immunities of citizens of the several states). The Shark Fin Law could have been more narrowly tailored to allow out of state fishermen to possess shark fins in the state. *Contra* O.R.S. § 509.160.

CONCLUSION

For the reasons stated herein, the amici respectfully request that the decision of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to 9th Circuit Rules 28-4,29-2(c)(2) and (3), 32-2 or 32-41 for Case Number 13-15188, I certify that the attached *amici curiae* brief complies with the length limits set forth at Ninth Circuit Rule 32-4 and the brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font and contains 3,809 words.

Dated: March 4, 2013

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CERTIFICATE OF SERVICE

I certify that I 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 on March 4, 2013. Participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: March 4, 2013

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