Court of Appeal, First District, Division 4, California.
Pia SALK, Plaintiffs and Appellants,
v.
The REGENTS OF the UNIVERSITY OF CALIFORNIA, Defendant and Respondent.
No. A120289.
(San Francisco City and County Super. Ct. No. CGC07-465615).

Dec. 19, 2008.

Corey Evans, Evans & Page, San Francisco, CA, Mark Kennedy, Daniel Kinburn, Physicians Committee for Responsible Medicine, Washington, DC, for Plaintiff and Appellant.

Christopher M. Patti, University of California, Oakland, CA, Ethan P. Schulman, Folger Levin & Kahn LLP, San Francisco, CA, for Defendant and Respondent.

REARDON, J.

***1** After the trial court sustained a demurrer without leave to amend, it dismissed a taxpayer action filed by appellants **Pia Salk** and others [FN1] against respondent Regents of the University of California (Regents). (See Code Civ. Proc., [FN2] § 526a.) Salk appeals, contending that the trial court erred when it concluded that the taxpayer action was preempted by federal law. (See 7 U.S.C. §§ 2131-2159.) We affirm the judgment.

FN1. The appellants are **Pia Salk**, Lawrence Hansen, Nancy Harrison, Richard McLellan, Mark Niblack and Jacquelyn Wilson. For convenience, we refer to all appellants as "Salk."

FN2. All statutory references are to the Code of Civil Procedure.

I. FACTS[FN3]

FN3. As a demurrer assumes that the facts alleged in the challenged complaint are true, our statement of facts makes the same assumption. (See *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6,cert. den.(2006) 549 U.S. 987 [127 S.Ct. 434].)

Respondent Regents operate research facilities within the meaning of the federal Animal Welfare Act (AWA).[FN4] (See 7 U.S.C. § 2132(e); 9 C.F.R. § 1.1 (2008) [defining "research facility"].) The AWA is intended to promote the humane care and treatment of animals intended for use in research facilities. (7 U.S.C. § 2131(1).) The Department-the federal agency charged with enforcing the AWA-makes periodic inspections to determine whether a research facility complies with its standards. (See 7 U.S.C. §§ 2132(b), 2143(a)(1), 2146(a); 9 C.F.R. §§ 1.1 [defining "department" and "secretary"], 2.38(b) (2008).)

FN4. The Regents asked us to take judicial notice of a September 2005 consent decree entered by the United States Department of Agriculture (Department) in July 2008. In August 2008, we granted that request, without any finding of relevance. At this time, we find that the evidence is relevant.

Since 1998, Department inspections of the Regents' research facilities have resulted in reports of many

AWA violations. For example, in 2004, the Department filed a complaint against the Regents, alleging multiple violations of the AWA at its research facilities between May 2001 and December 2003. In 2005, this action was resolved by the entry of a consent decree. Without admitting any AWA violation, the Regents agreed to cease and desist from any violation of that law and paid a $92,500 civil penalty with public funds. FN5

> FN5. Salk also alleged that the Regents were fined $2,000 for AWA violations occurring in 2000.

In July 2007, Salk and several other California taxpayers filed an action for declaratory and injunctive relief against the Regents. (See § 526a.) Salk sought to prevent the Regents from permitting and carrying out research activities in violation of the AWA. She alleged that the Regents' committee charged with AWA compliance had allowed research activities to be conducted at University of California facilities in violation of federal law and had illegally used public funds to do so. Salk sought inter alia an adjudication that the Regents' practices violated federal law, an injunction preventing operation of research facilities until the Regents could guarantee AWA compliance, and the appointment of an independent monitor to ensure the Regents' AWA adherence.

In September 2007, the Regents demurred to the complaint on various grounds, including federal preemption. Salk opposed the motion. In November 2007, the trial court sustained the Regents' demurrer without leave to amend. It concluded that the remedy sought was based on the AWA; that there was no private right of action under the AWA; and that a taxpayer action was not proper if it challenged conduct implicating an exercise of discretion by the legislative or executive branches. The following month, judgment for the Regents was entered accordingly.

II. PRELIMINARY MATTERS

A. *Procedural Challenge*

***2** Salk contends on appeal as she did in the trial court that a demurrer is an improper procedural device to attack a particular type of damage or remedy. She argues that the Regents' demurrer attacked only a remedy sought in the complaint, not the causes of action pled in it. She reasons that the Regents should have moved to strike that remedy, rather than demurring to the entire complaint. Having reviewed the record in this matter, we are satisfied that the Regents' demurrer took aim not only at the remedies sought, but at the underlying causes of action. In addition, we observe that a demurrer is a proper means of resolving whether a state action is federally preempted and must be dismissed. (*Washington Mutual Bank v. Superior Court* (2002) 95 Cal.App.4th 606, 612;*Ball v. GTE Mobilenet of California* (2000) 81 Cal.App.4th 529, 535; see *In Defense of Animals v. Cleveland Metroparks Zoo* (N.D.Ohio 1991) 785 F.Supp. 100, 102 [federal preemption as defense to action] .)

B. *Standard of Review*

By its demurrer, the Regents challenged inter alia whether Salk stated a cause of action in her complaint that was not federally preempted. A demurrer tests the legal sufficiency of the complaint. (*City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 869(*City of Morgan Hill*);*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497; see § 430.10, subd. (e).) On appeal from a judgment dismissing an action after an order sustaining a demurrer, we make an independent review of that order to determine the legal question of whether the complaint states facts sufficient to constitute a cause of action. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125,cert. den.(1991) 499 U.S. 936;*Montclair Parkowners Assn. v. City of*

Montclair (1999) 76 Cal.App.4th 784, 790;*Desai v. Farmers Ins. Exchange* (1996) 47 Cal.App.4th 1110, 1115; see *Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 fn. 10, petn. for cert. filed Apr. 18, 2008 (No. 07-1327) [federal preemption case].) We are not bound by the trial court's ruling on this matter. (*Satten v. Webb* (2002) 99 Cal.App.4th 365, 374-375.) Issues of statutory construction are also questions of law for us to decide anew on appeal. (*City of Oakland v. Superior Court* (1996) 45 Cal.App.4th 740, 753; see *Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1089 fn. 10 [federal preemption as pure issue of law]; *Wholesale Electricity Antitrust Cases I & II* (2007) 147 Cal.App.4th 1293, 1304 [federal preemption as issue of law if facts undisputed]; *Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal.App.4th 604, 611.)

When conducting this de novo review, we consider all facts pled-including those evidentiary facts found in recitals of exhibits attached to the complaint-as true. (*Satten v. Webb, supra,* 99 Cal.App.4th at p. 375; see *Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; see also fn. 3, *ante.*)"We must also accept as true those facts that may be implied or inferred from those expressly alleged."(*City of Morgan Hill, supra,* 118 Cal.App.4th at p. 869;*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) We may consider facts subject to judicial notice. (*Moore v. Conliffe, supra,* 7 Cal.4th at p. 638;*Serrano v. Priest* (1971) 5 Cal.3d 584, 591, cert. den. *sub nom.Clowes v. Serrano* (1977) 432 U.S. 907.) However, we do not assume the truth of any contentions, deductions or conclusions of fact or law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967;*City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870.)

***3** If we conclude that Salk stated a cause of action under any possible legal theory, the demurrer must be overruled. (*Aubry v. Tri-City Hospital Dist., supra,* 2 Cal.4th at p. 967;*City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870; see *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 870.) However, if we find that the facts alleged do not state a cause of action as a matter of law, then we must find that the demurrer was properly sustained by the trial court. (*City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870;*Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 55; see also *Baughman v. State of California* (1995) 38 Cal.App.4th 182, 187.)

C. *Taxpayer Standing*

Salk's complaint is a taxpayer action seeking to declare unlawful and to enjoin the Regents from permitting and carrying out research activities in violation of the AWA. It asserts that the trial court had jurisdiction to make these rulings because the Regents had illegally used public funds in these research activities. Any California citizen may obtain a judgment restraining and preventing any illegal expenditure or waste of public funds. (§ 526a.) This provision grants taxpayers standing to challenge wasteful government action and illegal government activities resulting in actual expenditures of public funds. It allows various forms of relief, including both injunctive and declaratory relief. (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 355.) The purpose of this provision is to enable citizens to challenge governmental action that would otherwise go unchallenged for lack of standing. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268.)

On appeal, Salk argues that her action is not federally preempted because she pursued her complaint under California's taxpayer standing statute, not the AWA. (See § 526a.) She contends that section 526a is a complementary state regulation permitted by the AWA. She is correct that the AWA allows states to promulgate standards-that is, state regulations governing the humane treatment of animals in research facilities-in addition to those promulgated by the Secretary of Agriculture. (7 U.S.C. §

2143(a)(1), (8).) We need not determine whether or not the taxpayer standing provision is a state regulation governing the treatment of animals within the meaning of the AWA. The issues of standing and preemption are separate questions-both must be resolved in Salk's favor if she is to withstand the Regents' demurrer. (See, e.g., *Citizens for Uniform Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1473.) While section 526a gives Salk standing to sue, it does not resolve the separate question of whether or not her state action is federally preempted. FN6

FN6. Thus, Salk cannot overcome the Regents' demurrer by a mere showing that the Regents may have illegally or wastefully expended public funds within the meaning of section 526a. The trial court must sustain the demurrer if the Regents establish that-despite her standing to sue-the action she brought is federally preempted. (See *City of Morgan Hill, supra,* 118 Cal.App.4th at p. 870;*Smith v. City and County of San Francisco, supra,* 225 Cal.App.3d at p. 55.)

III. FEDERAL PREEMPTION

A. *Supremacy of Federal Law*

Salk contends that her taxpayer action was not preempted by the federal AWA. (See 7 U.S.C. §§ 2131-2159; see § 526a.) She asserts that the trial court improperly characterized this action as an attempt to create a private right of action under the AWA. Before we address this question, we set out the federal preemption principles that guide us in its resolution.

***4** The supremacy clause of the United States Constitution grants Congress the power to preempt state law. (*English v. General Electric Co.* (1990) 496 U.S. 72, 78;*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1087;*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 949; see U.S. Const., art. VI, cl. 2.) Federal regulations can preempt state action just as federal statutes can. (*Fidelity Federal Sav. & Loan Assn. v. de la Cuesta* (1982) 458 U.S. 141, 153.) The principles of federal preemption apply regardless of whether the state action is a legislative enactment or judicial relief granted in a private lawsuit. (See *Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1162,cert. den.(2000) 528 U.S. 1077 [damages].) A state action that conflicts with federal law is without effect. (See *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, 516;*Jevne v. Superior Court, supra,* 35 Cal.4th at p. 949.)

There are various forms of federal preemption. (See *English v. General Electric Co., supra,* 496 U.S. at p. 78;*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935(*Viva! Internat.*).) As the Regents claim only that conflict preemption-a form of implied preemption-applies, we do not consider other types of preemption. (See, e.g., *Jevne v. Superior Court, supra,* 35 Cal.4th at p. 950.) The Regents-the party asserting that the state action is federally preempted-bear the burden of proving preemption. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1088;*Viva! Internat., supra,* 41 Cal.4th at p. 936.)

B. *Presumption against Preemption*

The first step in our analysis is to determine whether the general presumption against implied preemption applies in this matter. FN7 (*Wholesale Electricity Antitrust Cases I & II, supra,* 147 Cal.App.4th at p. 1304.) Courts tend to apply a strong presumption against preemption. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at pp. 1088, 1099;*Viva! Internat., supra,* 41 Cal.4th at p. 936; see *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 485.) This presumption stems from the recognition that states are independent sovereigns in our federal system. We begin with the assumption that the historic powers

of the states are not superseded by federal law unless this is the clear, manifest purpose of Congress. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1088;*Jevne v. Superior Court, supra,* 35 Cal.4th at p. 949; see *Medtronic, Inc. v. Lohr, supra,* 518 U.S. at p. 485.) However, when the state regulates an area in which there has been a history of significant federal presence, the presumption against preemption does not apply. (*United States v. Locke* (2000) 529 U.S. 89, 108;*Wholesale Electricity Antitrust Cases I & II, supra,* 147 Cal.App.4th at pp. 1304-1305.)

> FN7. The Regents also bear the burden of overcoming any presumption against preemption. (*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1099.)

In resolving this preliminary question, we look for guidance from the United States Supreme Court. In a case before that court, a consultant who guided a manufacturer through the process of obtaining federal regulatory approval of a medical device was sued in state court by injured plaintiffs who alleged that the consultant made fraudulent representations in order obtain federal agency approval. (*Buckman Co. v. Plaintiffs' Legal Comm.* (2001) 531 U.S. 341, 343(*Buckman*).) The court held that the state tort action was preempted by federal law. (*Id.* at p. 344.)It found that policing fraud against federal agencies is not a traditional field occupied by state courts. (*Id.* at p. 347.)The consultant's dealings with the agency were prompted by federal law and the subject matter of its allegedly fraudulent statements was dictated by federal law. (*Id.* at pp. 347-348.)Thus, no presumption against preemption was held to apply in that matter. (*Id.* at p. 348.)

***5** The situation presented in *Buckman* is similar to that in Salk's case.[FN8] The first paragraph of the Salk complaint asks the state court to "declare unlawful and enjoin [the Regents] from permitting and carrying out research activities that violate the federal Animal Welfare Act."It asserts that the Regents failed to comply with the AWA by performing research activities that violate the AWA. The Salk action seeks state court enforcement of that federal law. However, enforcement of the AWA is a federal function, not a state responsibility. For the same reasons that the United States Supreme Court found no presumption against preemption applied in its case, we conclude that no presumption against preemption applies in the case before us. (See *Buckman, supra,* 531 U.S. at pp. 347-348.)

> FN8. We recognize that *Buckman* is a clearer case of federal preemption on its facts, but find that the general principles applied by the United States Supreme Court also apply to our somewhat different fact situation.

C. *Is Action Preempted?*

Having resolved this preliminary issue, we turn to the central issue in this appeal-whether the Salk action is preempted by federal law. Preemption may occur if a state action conflicts with the AWA or creates an obstacle to the application of it. Obstacle preemption [FN9] arises when, in the circumstances of a particular case, the state action stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*Viva! Internat., supra,* 41 Cal.4th at p. 936; see *Crosby v. National Foreign Trade Council* (2000) 530 U.S. 363, 372-373;*English v. General Electric Co., supra,* 496 U.S. at p. 79;*Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1087;*Jevne v. Superior Court, supra,* 35 Cal.4th at pp. 949-950.) A state action constitutes a barrier to the accomplishment of a federal goal if the action interferes with the application of federal law. (See *Geier v. American Honda Motor Co.* (2000) 529 U.S. 861, 873.) Whether a state action forms a sufficient obstacle is a matter of judgment, to be determined in the context of the federal statute as a whole, its purposes, and its intended effects. (*Crosby v. National For-*

eign Trade Council, supra, 530 U.S. at p. 373;*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815.)

> FN9. Obstacle preemption is a subset of conflict preemption. (See, e.g., *Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1089;*City of Charleston v. A Fisherman's Best* (4th Cir.2002) 310 F.3d 155, 169,cert. den.(2003) 539 U.S. 926; see also *Gade v. National Solid Wastes Management Assn.* (1992) 505 U.S. 88, 98;*Pacific Gas & Elec. v. Energy Resources Comm'n* (1983) 461 U.S. 190, 204.) As courts have noted, the categories of implied preemption are not rigidly distinct. (See *English v. General Electric Co., supra,* 496 U.S. at p. 79, fn. 5;*Viva! Internat., supra,* 41 Cal.4th at pp. 935-936 fn. 3.)

The resolution of the preemption question stems from the legislative intent expressed in the AWA. The use of animals has been deemed instrumental in certain research to advance knowledge of cures and treatments for diseases and injuries afflicting humans and animals. (H.Conf.Rep. No. 99-447, 1st Sess.(1985), reprinted in 1985 U.S.Code Cong. & Admin. News, pp. 2251, 2518; *Intern. Primate Prot. v. Inst. for Behav. Research* (4th Cir.1986) 799 F.2d 934, 940,cert. den.(1987) 481 U.S. 1004(*Intern.Primate*).) Congress intended that the federal AWA ensure that those animals used in research facilities are humanely treated. (*Intern. Primate, supra,* 799 F.2d at p. 939; see *Bajalo v. Northwestern University* (Ill.App.2006) 860 N.E.2d 556, 566.) However, Congress did not intend this goal to be achieved at the expense of progress in medical research. (*Intern. Primate, supra,* 799 F.2d at p. 939.) The AWA was intended *both* to protect animal welfare and to subordinate animal welfare to the continued independence of research scientists.[FN10](*Intern. Primate, supra,* 799 F.2d at p. 939.) In this scheme, "the research scientist still holds the key to the laboratory door."(H.R.Rep. No. 91-1651, 2d Sess.(1970), reprinted in 1970 U.S.Code Cong. & Admin. News, pp. 5103, 5104; *Intern. Primate, supra,* 799 F.2d at p. 939.) Thus, Congress balanced competing goals when enacting the AWA.

> FN10. The AWA asserts the congressional intent to balance these dual goals in several ways. While the AWA directs the Secretary of Agriculture to promulgate regulations to govern the humane treatment of research animals, it does not authorize the Secretary to regulate the design, outlines, guidelines or performance of a research facility's actual research or experimentation. (7 U.S.C. § 2143(a)(1), (6)(A); *Intern. Primate, supra,* 799 F.2d at p. 939; see 9 C.F.R. §§ 3.1-3.142 (2008).) Likewise, Department inspectors have the power to remove a suffering animal from a research facility, but only if that animal is no longer required by the research facility to carry out its research. (7 U.S.C. § 2146(a); *Intern. Primate, supra,* 799 F.2d at p. 939.)

***6** These goals and the numerous administrative remedies set out in the AWA compel the conclusion that Congress did not intend to create a private right of action under the AWA, for two reasons.[FN11]First, the language of the AWA and the means that Congress chose to enforce it constitute a statutory design that is inconsistent with a private right of action.[FN12](*Intern. Primate, supra,* 799 F.2d at p. 939.) Congress did not intend that the supervision of AWA goals be realized through private lawsuits, but only by means of remedies it afforded to the Secretary of Agriculture. (*Intern. Primate, supra,* 799 F.2d at p. 940; see *Northwest Airlines, Inc. v. Transport Workers* (1981) 451 U.S. 77, 93-94 [application of equal pay law].) Private enforcement of the AWA would raise the specter of exposing research facilities to decisions of judges and juries that might inject inconsistency and unpredictability into laboratory research, thus increas-

ing the costs of federally funded research. Interference with the Department's enforcement of the AWA might also discourage scientists from entering many lines of medical inquiry. (See *Intern. Primate, supra,* 799 F.2d at p. 940.)

FN11. Salk concedes as much.

FN12. Those means include Department promulgation of regulations, inspection of research facilities and issuance of cease and desist orders, if necessary. (7 U.S.C. § 2143(a)(1), (6)(A), 7 U.S.C. § 2146(a), (b); *Intern. Primate, supra,* 799 F.2d at p. 939.)

Second, the AWA is to be enforced in a manner that protects its competing goals. The Department is charged with this enforcement responsibility. (*Intern. Primate, supra,* 799 F.2d at p. 939.) When a federal agency uses its authority to achieve a somewhat delicate balance of statutory objectives, that balance can be skewed if states are also allowed to enforce that law. (*Buckman, supra,* 531 U.S. at p. 348.) A state court taxpayer action could frustrate the objectives of the AWA by interfering with the authority of the Department and its inspectors to protect the welfare of animals in research facilities in a manner that does not deter scientific research. The Salk action would require the trial court to second-guess whether Department inspectors had met these competing goals in order to assess whether the Regents had violated the AWA. (See, e.g., *Wholesale Electricity Antitrust Cases I & II, supra,* 147 Cal.App.4th at p. 1312.) This assessment is better left to the Department's sole discretion.

We conclude that Salk's claims-grounded in the AWA-are necessarily federal in nature. (See *In Defense of Animals v. Cleveland Metroparks Zoo, supra,* 785 F.Supp. at p. 102 [removal case].) Those claims would require a state court to adjudicate whether the Regents had violated the federal AWA. As the existence of the federal AWA is a critical element of Salk's case, a state action would exert an impermissible extraneous pull on Congress's AWA enforcement scheme. (*Buckman, supra,* 531 U.S. at p. 353 [state action preempted]; see *Farm Raised Salmon Cases, supra,* 42 Cal.4th at pp. 1096-1097.) A state action to enforce this federal law would violate the congressional intent precluding a private right of action. (See *Buckman, supra,* 531 U.S. at pp. 348, 350 [state law fraud claim intrudes on federal agency's responsibility to police fraud consistent with agency's judgment and objectives].)

***7** We recognize that states may provide for a private remedy for violation of state laws imposing requirements identical to those imposed by federal law. (See *Farm Raised Salmon Cases, supra,* 42 Cal.4th at p. 1096.) However, Salk would use the state action to remedy a violation of the federal AWA. This would be improper. (See *Summit Tech. v. High-Line Med. Instruments Co.* (C.D.Cal.1996) 933 F.Supp. 918, 943 fn. 21 [California plaintiff may not bring state law unfair competition action if it is attempt to state claim under federal law].)

We conclude that the Salk action constitutes a sufficient obstacle to Department enforcement of the AWA to warrant the application of federal preemption. (See *Crosby v. National Foreign Trade Council, supra,* 530 U.S. at p. 373;*Olszewski v. Scripps Health, supra,* 30 Cal.4th at p. 815.) Thus, the trial court properly dismissed the action.[FN13]

FN13. In light of this ruling, we need not consider the Regents' alternative grounds in support of its demurrer-that the underlying action would interfere with legislative or executive discretion and that judicial abstention applies.

The judgment is affirmed.

We concur: RUVOLO, P.J., and SEPULVEDA, J.

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(Cal.App. 1 Dist.)

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