

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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The Art and Antique Dealers
League of America, Inc. and
The National Antique and Art
Dealers Association of America, Inc.

Plaintiffs,

**Docket No.
18-CV-2504**

-against-

Basil Seggos, in his official
Capacity, as the Commissioner of
the New York State Department of
Environmental Conservation.

**COMPLAINT FOR INJUNCTIVE
AND DECLARATORY RELIEF**

Defendant.

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Plaintiffs, the Art and Antique Dealers League of America,
Inc. and the National Antique and Art Dealers Association of
America, Inc. (the "League" or "NAADAA", respectively, or
collectively referred to as "plaintiffs") by and through their
attorneys, McLaughlin & Stern, LLP, as and for their complaint
against defendant Basil Seggos, in his official capacity, as the
Commissioner of the New York State Department of Environmental
Conservation ("State DEC" or "defendant") allege the following:

PRELIMINARY STATEMENT

1. This is an action seeking a declaratory judgment and a
permanent injunction with respect to New York State
Environmental Conservation Law § 11-0535-A ("ECL § 11-0535-A")

as it relates to antique ivory and/or items with a *de minimis* amount of ivory in them. ECL § 11-0535-A is a state statute enacted in 2014 which, among other things, regulates the sale of ivory and carries criminal and civil penalties for violating it. State DEC has taken inconsistent positions on the interpretation of the statute. According to its website, it interprets ECL § 11-0535-A to apply only to intrastate commerce. Yet, according to public comments in 2016, it interprets the law to apply to interstate commerce as well.

2. As set forth more fully below, ECL § 11-0535-A is preempted by and conflicts with federal law by limiting and narrowing two federal exemptions. It limits and unduly infringes upon the Antique and *De Minimis* Exemptions outlined in the Endangered Species Act and regulations promulgated thereunder. Thus, New York law makes illegal what the federal government specifically declares as lawful conduct.

3. Federal law is robust in the field of regulating ivory. Since 1973, the federal government has engaged in regulating the sale of ivory and protecting endangered and threatened species worldwide through international treaty, statutes and agency regulations.

4. Federal law generally bans the sale of ivory and the

importation/exportation thereof. However, the federal government has carved out two important exceptions to this rule. First, antique ivory (which is defined in the Endangered Species Act) may be sold. Second, non-antique articles containing a *de minimis* amount of ivory (defined in federal regulations as 50% or less) may also be sold. ECL § 11-0535-A is in conflict with these federal exceptions.

5. ECL § 11-0535-A conflicts with federal law because its definition of "antique" is more restrictive. It requires all antique ivory to contain less than 20% ivory. Federal law contains no such limitation or restriction and permits an antique to be composed of 100% ivory.

6. ECL § 11-0535-A also disregards the federal *de minimis* exception for non-antique ivory. Federal law defines *de minimis* ivory in non-antique articles as containing no more than 50% ivory. New York State neither recognizes nor accounts for this exception at all. Thus, one can comply with federal law and, at the same time, risk criminal prosecution and civil penalties under state law. Under this scenario, state law must yield to federal law.

7. Plaintiffs have no adequate remedy at law and only seek prospective injunctive relief and a declaratory judgment. A

declaratory judgment will serve a useful purpose in clarifying and settling the legal relations in issue. It will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to this proceeding.

JURISDICTION AND VENUE

8. This Court has jurisdiction of the action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act), 28 U.S.C. § 1651 (All Writs Act), and the court's inherent authority to issue permanent injunctive relief over matters arising under the United States Constitution and the laws of the United States.

9. Venue properly lies in this judicial district pursuant to 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to the claims herein occurred, or a substantial part of property that is the subject of the action is situated, in this district. In addition, venue is proper because defendant is subject to the court's jurisdiction with respect to this action.

PARTIES

10. The League is a duly licensed New York State not-for-profit corporate trade organization representing over 110 art and antique individual and corporate dealers (more than half of

which are located within New York State) covering 60 fields of expertise including, *inter alia*, antique elephant and mammoth ivory from Africa and Asia. These dealers are members of the League and have an economic and professional interest in, among other things, the purchase, sale, distribution or trading of antique elephant ivory. The League is the oldest and principal antiques and fine arts organization in the United States. The purpose in forming the League was to bring the various members of the art and antiques trade closer together to promote a greater understanding among themselves and with the public, and generally to devote itself to the best interests of dealers and collectors of antiques including elephant ivory.

11. NAADAA is a non-profit trade organization of the United States' leading dealers. Its members are mutually pledged to safeguard the interests of those who buy, sell or collect antiques and works of art, achieved through just, honorable and ethical trade practices. Many years of study and experience are necessary to acquire the specialized knowledge that has made NAADAA members recognized authorities in their various fields. Each member has earned a high reputation for integrity and fair dealing in all transactions, so that collectors can be confident that an antique work of art is honestly represented as to

authenticity, provenance and condition. Membership is very selective, and by invitation only. For 50 years, NAADAA has presented exhibitions and has sponsored a wide range of conferences and lectures concerning art and antiques for both specialists and the general public.

12. State DEC was created on July 1, 1970 to combine in a single agency all New York State programs designed to protect and enhance the environment within the state. State DEC is headed by a commissioner who is assisted by executive managers. It has 24 divisions and offices throughout the state and is further organized into bureaus to fulfill the functions and regulations established by Title 6 of New York Codes, Rules and Regulations. According to its website, the mission of State DEC is "[t]o conserve, improve and protect New York's natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well-being." Its website acknowledges that some of its programs "are also governed by federal law."

13. Basil Seggos is the Commissioner of the State DEC and is responsible for, among other things, overseeing and ensuring the enforcement of the provisions of ECL § 11-0535-A.

STATEMENT OF FACTS

The Federal Government Regulates Ivory as a Matter of Foreign Affairs, International Conservation, Interstate and International Commerce

A. The Convention

14. On March 3, 1973, the United States entered into the Convention on International Trade in Endangered Species of Wild Fauna and Flora (the "Convention").

15. The Convention regulates the international trade of imperiled species that are listed in its appendices, which include African and Asian elephants. These animals are hunted for their ivory which is a valuable commodity across the world.

16. The purpose of the Convention was to regulate the trade of species like elephants who are threatened with extinction or may be threatened with extinction. See, Convention at art. II(1) and (II)(2), respectively.

17. Under the Convention, if a species is threatened with extinction ("Appendix I Species"), it can only be shipped internationally if both the importing and exporting nations grant permits, which are subject to certain conditions. *Id.* at art. III.

18. If a species *may* be threatened with extinction ("Appendix II Species"), the Convention only requires a permit

from the exporting country with a finding that the trade in the potentially threatened species "will not be detrimental to the survival of the species." *Id.* at art. IV.

19. Asian and African elephants are currently listed in the Convention as Appendix I and Appendix II Species, respectively.

20. The Convention allows for each signatory nation to adopt "stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species ... or the complete prohibition thereof." *Id.* at art. XIV(1).

21. The Convention is not self-executing. Accordingly, the United States adopted domestic measures to protect endangered and threatened species, like the Asian and African elephants, when it passed the Endangered Species Act in 1973. In a further effort to protect African elephants, Congress passed the African Elephant Conservation Act, 16 U.S.C. § 4201, *et seq.*, in 1998 which permits the United States to provide funding for the research, conservation, management, and protection of African elephants. Similarly, Congress passed the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.*, in 1972 to address, among other things, the sale and distribution of walrus ivory. The federal government has enacted a robust regime of laws and regulations to protect and conserve animals with ivory.

B. The Endangered Species Act ("ESA")

22. The ESA provides for the conservation of endangered and threatened species. *Id.* at § 1531(b). The ESA defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range." *Id.* at § 1532(6). "Threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* at § 1532(20). With exemptions in narrow circumstances, the ESA generally prohibits the importation of *endangered* species into the United States. *Id.* at § 1538(a)(1)(A); 50 C.F.R. § 17.21(b). Threatened species, on the other hand, are treated differently as set forth below.

23. Section 9(c)(2) of the ESA states that "[a]ny importation into the United States" of non-endangered, Appendix II Species such as the African elephant "shall," where certain conditions are met, "be presumed to be an importation not in violation of any provision of [the ESA] or any regulation issued pursuant to [the ESA]." *See*, 16 U.S.C. § 1538(c)(2).

24. The ESA requires the U.S. Fish and Wildlife Service ("Service") to issue regulations, enforce and implement the law. *See*, 16 U.S.C. § 1533(d).

C. U.S. Fish and Wildlife Service Regulates the Sale of Ivory

25. Pursuant to the authority delegated to it under the ESA, the Service promulgated regulations with respect to the sale of ivory.

26. The D.C. Circuit Court of Appeals interpreted the Service's role in regulating the importation of threatened species, like the African elephant, as follows: "the [Service] has, with this regulation, established a regime in which the prohibitions established for endangered species are extended automatically to all threatened species by a blanket rule and then withdrawn as appropriate, by special rule for particular species and by permit in particular situations." *See, Sweet Home Chapter of Cmty. for a Great Or. v. Babbitt*, 1 F.3d 5 (D.C. Cir. 1993).

27. Pursuant to the 2014 Order #210 of the Director of the Service, as amended, new ivory may not be imported or exported from the United States. Prior to that, the Service allowed ivory to be imported and exported throughout the United States including the 12 ports of entry within the State of New York.

28. As set forth above, federal regulations permit the Service to make special rules regarding threatened species like the African elephant. Such special rules "contain *all* the

applicable prohibitions and exceptions” regarding import of that species. 50 C.F.R. § 17.31(c) (emphasis added). In fact, since 1978 the Service maintained special rules regarding the African elephant. See, 50 C.F.R. § 17.40(e) (9). As recently as March 1, 2018, the Service reversed a prior federal policy and now permits the importation of African elephant hunting trophies including ivory into the United States on a case-by-case basis. Accordingly, the federal government has created through treaty, statute, regulations, and special rules a comprehensive regulatory scheme with respect to the distribution of ivory.

D. The ESA and Service’s Special Rules Regarding Antique Elephant Ivory (the “Antique Exemption”)

29. The Service permits the sale of elephant ivory in the United States so long as the ivory meets the definition of an “antique” under federal law. This is known as the “Antique Exemption”. The Antique Exemption states that “[a]ntiques that consist of or contain raw or worked ivory may similarly be sold or offered for sale in interstate or foreign commerce and delivered, received, carried, transported, or shipped in interstate or foreign commerce in the course of a commercial activity without a threatened species permit...” *Id.* (Emphasis added).

30. The Antique Exemption adopts the ESA's definition of an "antique". Section 10(h) of the ESA defines an antique as any article which: (a) is at least 100 years old, (b) is composed in whole or in part of any endangered or threatened species, (c) has not been repaired or modified with any part of any such species on or after December 28, 1973, and (d) enters the United States through a lawful customs port.

31. The Antique Exemption was codified in 1978 as part of the ESA at 16 U.S.C. 1539(h) by way of amendment.

32. The Antique Exemption places no limit on how much ivory is in the antique. It only requires that the antique be "composed in whole or in part" with ivory from an endangered or threatened species. Thus, the antique exemption applies whether it contains 1% or 100% ivory (and meets the other three criteria for an "antique" under Section 10(h) of the ESA).

33. Plaintiffs' members relied on the Antique Exemption and the supremacy of federal law when they commercially purchased and sold antique ivory for 50 years.

E. The Service's *De Minimis* Exemption

33. As of 2016, federal law provides for another exemption to the sale of African (not Asian) elephant ivory known as the

De Minimis Exemption. See, 50 CFR § 17.40(e)(3). The *De Minimis* Exemption applies to non-antique ivory.

34. There are seven requirements that an item must meet in order to claim the *De Minimis* Exemption (being an antique is not one of them).

35. The seven requirements are:

- (i) If the item is located within the U.S., the item must have been imported prior to January 18, 1990, or was imported into the U.S. under a proper Convention certificate;
- (ii) If the item is located outside the U.S., the item was taken from the wild prior to February 26, 1976;
- (iii) The ivory is a fixed or integral part of a larger manufactured or handcrafted item and is not the primary source of value for the item, that is, the ivory does not account for more than fifty (50) percent of the value;
- (iv) The ivory is not raw;
- (v) The ivory does not account for more than 50% of the item by volume;
- (vi) The total weight of the ivory is less than 200 grams; and,
- (vii) The item was manufactured or handcrafted before July 6, 2016.

See, 50 CFR § 17.40(e)(3)(i)-(vii).

36. Like the Antique Exemption, plaintiffs' members relied on the *De Minimis* Exemption beginning in 2016 and the supremacy

of federal law when they commercially purchased and sold African ivory that were not antiques.

THE SALE OF IVORY UNDER NY ECL § 11-0535-A

37. In 2014, New York passed ECL § 11-0535-A based, in part, on the illegal trading of ivory in New York City and to aid in the conservation of elephants. The law on its face does not state whether it applies to intrastate commerce, interstate commerce, or both.

38. ECL § 11-0535-A(2) states, in relevant part, that “no person shall sell, offer for sale, purchase, trade, barter or distribute an ivory article ...” A violation of this law constitutes a Class D Felony in some instances and carries substantial civil penalties. ECL §§ 71-0924, 71-0925.

39. The law defines an “ivory article” as “any item containing worked or raw ivory from any species of elephant or mammoth.” ECL § 11-0535-A(1)(b).

40. The state law contains an antique exemption with respect to the sale of ivory but the state exemption is significantly narrower than the federal one. Under state law, an ivory article may be sold if it is a “bona fide antique”, at least 100 years old with evidence of provenance, and the ivory in it is less than 20% by volume.

41. Unlike federal law, the state law does not contain a *de minimis* exemption for non-antique ivory.

NY ECL § 11-0535-A Prohibits what Federal Law Allows

42. ECL § 11-0535-A conflicts with and curtails federal law in several ways. For instance:

(a) ECL § 11-0535-A redefines the ESA's definition of an antique. Federal law places no cap on the amount of ivory in an antique. The Antique Exemption applies to all antiques containing any amount of ivory. ECL § 11-0535-A, however, narrows and limits the federal Antique Exemption by placing a 20% ivory cap on all antiques.

(b) Federal law allows for a *De Minimis* Exemption for non-antiques containing no more than 50% ivory. ECL § 11-0535-A, however, provides for no such exception.

Thus, if plaintiffs' members comply with federal law while in New York, they will be in violation of state law which can lead to imprisonment and/or civil penalties.

43. Federal law should prevail under these circumstances. It provides for a nationwide scheme to regulate the trade of ivory based on an international treaty, federal statutes, regulations, and special rules.

STATE DEC ACKNOWLEDGED FEDERAL PREEMPTION

44. Although on its website it appears that New York is only applying its law to intrastate commerce, the State DEC has taken a different position in public filings and the statute does not limit its reach.

45. State DEC previously admitted that it is attempting to regulate interstate commerce and that its attempt at doing so would be preempted by federal law. In a 2016 public comment in response to the *De Minimis* Exemption, State DEC wrote that “[t]he de minimis exemption in the Service’s proposed rule is a significant flaw that would weaken New York State’s ivory prohibitions on *interstate* sale. Current New York State law generally prohibits *interstate* sale of elephant ivory unless a person can demonstrate that the item is an antique greater than 100 years old and the person secures a permit from the DEC to sell the ivory. *The ESA generally preempts a state law that ... prohibits what is authorized pursuant to an ESA exemption ...* If the de minimis standard is adopted, the State of New York must permit *interstate* sale of manufactured items containing de minimis amounts of ivory even if they are not antiques. The Service should reconsider this exemption.” (emphasis added).

46. The Service did not reconsider the regulation and promulgated it on June 6, 2016.¹ Although State DEC's website permits the sale of interstate ivory under federal law, ECL § 11-0535-A contains no such language and, on its face, applies to all activity including interstate commerce. Accordingly, the text of ECL § 11-0535-A conflicts with the exceptions set forth in federal law.

FIRST CAUSE OF ACTION

**(Declaratory Judgment and Permanent Injunction:
Express and Implied Preemption)**

47. Plaintiffs repeat and reallege each and every allegation as if set forth in full herein.

¹In a similar and recent case, the State of New Jersey conceded that its law banning, among other things, parts or products of the African elephant was preempted by the ESA in certain circumstances and agreed not to enforce it in a manner that would conflict with federal law. See, *Conservation Force v. Porrino*, 16-cv-04124(FLW) (April 25, 2017, Wolfson, U.S.D.J.), 2017 U.S. Dist. LEXIS 62380, *2-4. In addition, the Ninth Circuit struck down a California penal statute making it unlawful to sell boots made from the hides of African elephants because such conduct was legal under the ESA which preempted state law on the subject. *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758 (9th Cir. 1983). See also, *Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983) (holding that the ESA and the regulations promulgated thereunder allowing trade in African elephant products preempted California's statutory prohibition on trade in elephant products).

48. The U.S. Constitution declares that the laws of the United States "shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Thus, state laws that conflict with federal law are void.

49. The inherent equitable powers of courts allow it to enjoin enforcement of state laws preempted under the Supremacy Clause.

50. Congress enacted 16 U.S.C. § 1535(f) (the ESA's Cooperation with States Provision) so that states and the federal government could work in tandem to protect national and international environments (the "Cooperation Clause").

51. The Cooperation Clause, in relevant part, states that "Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively ... prohibit what is authorized pursuant to an exemption or permits provided for in this Act or in any regulation which implements this Act."

52. The Cooperation Clause further states that "Any State law or regulation respecting the *taking* of an endangered species or threatened species may be more restrictive than the

exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined." *Id.* (Emphasis added). Section 16 U.S.C. § 1532(19) defines "taking" as follows: "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."²

53. Thus, a state may enact more restrictive laws regarding the active taking of endangered or threatened species but only those that are alive and located within its jurisdiction. Since the African elephant is not indigenous or located within New York, the state may not enact stricter laws than those enacted by the federal government with respect to that species.

54. The federal Antique and *De Minimis* Exemptions, respectively, permit plaintiffs to possess, import, export, purchase, sell, trade, and transport in interstate commerce: (a) antique ivory (as defined by federal law), and (b) non-antique articles containing no more than 50% ivory. The text of ECL §

² State law has a near identical definition: "Take or taking means the pursuing, shooting, hunting, killing, capturing, trapping, snaring and netting of any species listed as

11-0535-A, however, prohibits this type of interstate activity because the state law, on its face, does not distinguish between interstate and intrastate commerce. The law says that “no person shall sell, offer for sale, purchase, trade, barter or distribute an ivory article.” It makes no exception or carve out for the antique or *de minimis* exemptions provided for under federal law. Thus, a plain reading of ECL § 11-0535-A criminalizes what federal law permits.

55. Accordingly, if ECL § 11-0535-A applies to interstate commerce (which its plain meaning suggests and which the state has conceded in 2016 as set forth above), then it is expressly preempted by the ESA’s Cooperation Clause.

56. If, however, the state takes the position that ECL § 11-0535-A applies only to intrastate commerce, then it is preempted by implication because (a) federal law has a comprehensive regulatory scheme on the subject, and (b) it conflicts with federal law.

57. Since 1973, as set forth above, federal law addressed the conservation of elephant ivory through treaty, law, regulations, and special rules. The United States government

endangered or threatened in this Part, and all lesser acts such as disturbing, harrying or worrying.” See, 6 CRR-NY 182.2(x).

has a comprehensive and robust scheme with respect to elephant ivory which takes into account foreign affairs as well as domestic environmental policy. Federal law specifically permits the sale of antique ivory and non-antique items containing ivory in interstate commerce. ECL § 11-0535-A, however, interferes with the federal conservation and regulatory efforts even if it only applies to intrastate activity because it: (a) unduly obstructs and affects interstate commerce, (b) redefines what "antique ivory" is and contradicts the definition under federal law, and (c) disregards the *De Minimis* Exemption under federal law altogether. Accordingly, the intrastate restrictions and new definitions under state law unduly interfere with federal law and criminalizes intrastate that which is lawful interstate.

58. Accordingly, ECL § 11-0535-A should be declared void and State DEC should be permanently enjoined from enforcing it.

SECOND CAUSE OF ACTION

**(Declaratory Judgment and Permanent Injunction:
Void for Vagueness under the Fifth Amendment)**

59. Plaintiffs repeat and reallege each and every allegation as if set forth in full herein.

60. ECL § 11-0535-A, on its face, does not state whether it applies to interstate commerce, intrastate commerce, or both.

61. State DEC's comments about the geographic scope of the law is contradictory and ambiguous. In a 2016 public comment, State DEC claimed that the law applies to interstate commerce. Yet, on its website as of 2018, it claims that the law only applies to intrastate commerce. Accordingly, the geographic scope of the statute is not defined in the statute, is not capable of being defined by reference to other materials, and is otherwise ambiguous.

62. The lack of clarity in the statute and the contradictory language in State DEC's interpretation of it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited.

63. A violation of ECL § 11-0535-A is both a criminal and civil offense with serious consequences for not complying with it. Accordingly, individuals should receive fair notice or warning when the state prohibits specific behavior or acts and the state law does not accomplish this as written.

THIRD CAUSE OF ACTION

**(Declaratory Judgment and Permanent Injunction:
Overbroad under the Fifth Amendment)**

64. Plaintiffs repeat and reallege each and every allegation as if set forth in full herein.

65. The text of ECL § 11-0535-A is unconstitutionally overbroad because it prohibits what federal law allows. The threat of enforcement of an overbroad law deters people from engaging in protected activity.

66. The federal Antique and *De Minimis* Exemptions, respectively, permit plaintiffs to possess, import, export, purchase, sell, trade, and transport in interstate commerce antique ivory (as defined by federal law) and (b) non-antique articles containing a *de minimis* amount of ivory (as defined by federal law). The plain text of ECL § 11-0535-A, however, prohibits this type of activity regardless of whether it involves interstate commerce, intrastate commerce, or both. It criminalizes what federal otherwise permits.

67. The state law is overbroad because it does not distinguish between interstate or intrastate commerce when prohibiting any person or entity from "sell[ing], offer[ing] for sale, purchas[ing], trad[ing], barter[ing] or distribut[ing] an ivory article." Thus, a resident of New York may be prosecuted for following federal law.

68. The state law, as written, is overbroad because it: (a) fails to clearly set forth whether it applies to interstate or intrastate commerce, (b) fails to carve out from its

application the antique or *de minimis* exemptions provided for under federal law, and (c) redefines what an "antique" is in a manner that conflicts with the federal definition.

FOURTH CAUSE OF ACTION

**(Violation of the First Amendment:
Prohibiting Lawful Commercial Speech)**

69. Plaintiffs repeat and reallege each and every allegation as if set forth in full herein.

70. All ivory permits issued by State DEC restrain plaintiffs' members from participating in certain forms of protected commercial speech.

71. In particular, the permits require that plaintiffs' members "not physically display for sale within New York State any item that is not authorized" under ECL § 11-0535-A. Thus, plaintiffs' members are prohibited from advertising by means of a physical display items that are permissible for sale under federal law but not state law.

72. State DEC only permits advertising of such restricted item by means of pictures, catalogues or photos so long as there is a disclaimer that the item cannot be sold or purchased in New York. However, State DEC prohibits altogether the actual physical items from being displayed regardless of whether such a

disclaimer is posted. The distinction in advertisement rules with respect to the sale of ivory is content based and favors the sale of state-sponsored ivory.

73. State DEC is against all ivory products that do not conform to ECL § 11-0535-A. Therefore, it limits the amount of commercial speech associated with said products.

74. State DEC does not limit advertising of products that conform to ECL § 11-0535-A.

75. Such content based prohibitions on commercial speech is impermissible because the State is using its power to advance its viewpoint and suppress the viewpoint of others with respect to the sale of certain types of ivory.

76. The State's wholesale ban on displaying in-store ivory items that do not comport to ECL § 11-0535-A but are permitted in interstate commerce under federal law is in violation of the First Amendment.

77. Limiting the type of advertisement is limiting speech on conduct which is lawful under federal law but disfavored by the state.

78. The State is singling out the advertisement of certain ivory products that it politically opposes.

79. The State is restricting the manner and method in which the interstate sale of ivory may be advertised because it does not agree with these types of sales which are permitted by federal law.

80. The State's prohibition of the in-store display of ivory that does not comport with ECL § 11-0535-A as a form of advertisement while permitting in-store pictures, catalogues, and photographs of the same bears no relationship to any legitimate State interest.

81. The purpose of such a ban is to limit the form and effectiveness of commercial speech that the State disagrees with.

82. This form of content based commercial speech restrictions under state law is not permissible because the purpose is to advance the State's point of view on the subject and minimize the speech of others.

WHEREFORE, for the reasons set forth above, plaintiffs request the following relief:

1. On the First, Second and Third causes of action: (a) a declaratory judgment that ECL § 11-0535-A is void, (b) a permanent injunction enjoining the State DEC from enforcing ECL

§ 11-0535-A, and (c) an award of plaintiffs' costs and disbursements in this action.

2. On the Fourth cause of action: (a) a declaratory judgment that State DEC's permit requirement violates the First Amendment, (b) a permanent injunction enjoining the State DEC from enforcing said permit requirement, and (c) an award of plaintiffs' costs and disbursements in this action.

3. On all causes of action, that this Court order any further relief that it deems just and appropriate.

Dated: New York, New York
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