No. 21-569

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE ART AND ANTIQUE DEALERS LEAGUE OF AMERICA, INC., THE NATIONAL ART AND ANTIQUE DEALERS ASSOCIATION OF AMERICA, INC.
Plaintiffs-Appellants,
v.
BASIL SEGGOS, in his official capacity, as the Commissioner of the New York State Department of Environmental Conservation, THE HUMANE SOCIETY OF THE UNITED STATES, CENTER FOR BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, INC., WILDLIFE CONSERVATION SOCIETY,
Defendants-Appellees,

THE HUMANE SOCIETY OF THE UNITED STATES, CENTER FOR BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, INC. WILDLIFE CONSERVATION SOCIETY,
Intervenor-Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
NO. 18-cv-02504 (LGS) (Hon. Lorna G. Schofield, District Judge)

BRIEF FOR APPELLEE-INTERVENORS

Rebecca A. Cary and Ralph E. Henry
The Humane Society of the United States
1255 23rd St. NW, Suite 450
Washington, DC 20037
Telephone: (202) 676-2330
Facsimile: (202) 676-2357
Attorneys for Appellee-Intervenors
The Humane Society of the United States, Center for Biological Diversity, Natural Resources Defense Council, Inc., and Wildlife Conservation Society

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CORPORATE DISCLOSURE STATEMENT

None of the Appellee-Intervenors has a parent corporation. No publicly held company owns more than 10% of stock in any of Appellee-Intervenor organizations.

INTRODUCTION

This Court should uphold the District Court's decision to grant Appellee-Defendants' motions to dismiss and for summary judgment. *First*, New York's Ivory Law is not preempted, and Appellants ask the Court to adopt a dramatically overbroad interpretation of preemption under the Endangered Species Act ("ESA"). Such an interpretation plainly contravenes the federal law's plain text, legislative history, implementing regulations, and interpreting case law—including controlling Second Circuit caselaw—and would lead to invalidating a plethora of state laws that restrict commerce in threatened and endangered species.

At the root of Appellants' misapplication of the ESA is the false notion that the law affirmatively authorizes the sale of antique and *de minimis* amounts of ivory; it does not. Nor does the African elephant specific regulation adopted pursuant to the ESA affirmatively authorize ivory sales. Because New York's Ivory Law does not regulate anything *authorized* by federal provisions, the state law is not preempted—either expressly or impliedly by way of conflict preemption. At most, the ESA regulatory provisions Appellants rely on eliminate

certain prohibitions involving *imports* and *interstate commerce*, as a matter of federal law. States are sovereign entities, and courts should be hesitant to find preemptive effect in a choice by an agency to simply not prohibit certain conduct under federal law. A choice to not prohibit activity is not the same as a guarantee of the right to engage in that activity. Moreover, the federal regulatory provisions do not authorize (or even address) conduct covered by New York's Ivory Law—which addresses only *intrastate commercial activity* involving certain ivory objects.

Second, Appellants ask this Court to find that the District Court erred in rejecting their claim that the New York Department of Environmental Conservation's ("DEC") prohibition on certain display of ivory and rhinoceros horn ("Display Restriction") violates the First Amendment. However, the prohibition is entirely consistent with, and not more extensive than necessary to serve, New York's interest in regulating the sale of ivory and conserving wildlife. That is why, even after discovery on this claim, the District Court properly held that the Display Restriction does not violate the First Amendment.

Therefore, this Court should affirm the judgments of the District Court.

JURISDICTIONAL STATEMENT

Appellee-Intervenors agree with Appellants' jurisdictional statement contained in "Appellants' Opening Br." ("Op. Br.") (Dkt. No. 41-1) at 1.

ISSUES PRESENTED

Was the District Court correct in dismissing Appellants' complaint for failing to adequately allege that the Ivory Law is preempted by the Endangered Species Act?

Was the District Court correct in granting summary judgment to Appellees on the grounds that the Display Restriction does not violate the First Amendment?

STATEMENT OF THE CASE

I. THE IVORY LAW

The Ivory Law was enacted because elephant and rhinoceros populations across Africa and Asia are severely declining, and members of these species are being slaughtered at an alarming rate to supply the ivory and horn trade. NY Spons. Memo., 2014 A.B. 10143. At the time the law was enacted, it was estimated that 96 elephants were slaughtered each day. *Id*. Signed into law by Governor Cuomo on August 12, 2014, the Ivory Law was enacted out of legislative concern regarding "the demand for illegal wildlife and wildlife products in the United States, including New York [which] is driving many species toward extinction," and in order to "help deter the illegal trade in [ivory and rhinoceros horn] in New York." *Id*. The bill generally prohibits the sale, offer for sale, purchase, trade, barter or distribution of elephant and mammoth ivory articles and rhinoceros horn within New York, except in limited situations where the DEC may issue a license under the provisions of New York's Environmental Conservation Law ("ECL")

Section 11-0535-a(3). Called the Ivory Law, its exceptions include antiques that are both demonstrably over 100 years old and less than 20 percent ivory, situations where the horn or ivory is being transferred as part of an estate or trust, or when the horn or ivory is being transferred for "bona fide educational or scientific purposes," or to authorized museums. ECL § 11-0535-a(3)..

Eleven other states and the District of Columbia have enacted laws similar to New York's, which explicitly prohibit intrastate sale in ivory and rhinoceros horn.[1] The California law was recently upheld against a similar preemption challenge. *Ivory Educ. Instit. v. State of Cal.*, Cal. Super. Ct., Civ. No. BC602584 (Cal. Super. Ct., Los Angeles County, Jan 4, 2017).

II. THE ENDANGERED SPECIES ACT

The Endangered Species Act, 16 U.S.C. §§ 1531-1544 ("ESA"), was developed to protect and recover imperiled species by establishing a system under which the U.S. Fish & Wildlife Service ("FWS") lists certain species as either endangered or threatened with extinction and grants federal protections to such species. *Id.* FWS also carries out the United States' responsibilities under the

[1] Cal. Fish & Game Code § 2022; D.C. Code Ann. § 22-1862; Haw. Rev. Stat. Ann. § 183D-66; 815 Ill. Comp. Stat. Ann. 357/10; Minn. Stat. Ann. § 84.0896; Nev. Rev. Stat. Ann. § 597.905; N.H. Rev. Stat. Ann. §§ 212-C:1, 212-C:2; N.J. Stat. Ann. § 23:2A-13.3; N.M. Stat. Ann. §§ 17-10-2, 17-10-3; Or. Rev. Stat. Ann. § 498.022; Vt. Stat. Ann. tit. 10, §§ 5501, 5502; Wash. Rev. Code Ann. § 77.15.135.

Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES")[2] through the ESA. *See* 16 U.S.C. § 1537a(a); 50 C.F.R. §§ 23.1-23.92.

Section 9 of the ESA prohibits certain activities involving an animal (whether alive or dead, including animal parts and products) that is a member of a listed endangered species unless FWS issues a permit under Section 10 for one of a few statutorily enumerated activities that are consistent with the conservation of the species, including for scientific purposes or to enhance the propagation or survival of the species. 16 U.S.C. §§ 1538(a)(1)(A), 1539(a)(1)(A). Pursuant to the ESA and FWS regulations, once FWS lists a species as endangered, it is unlawful to (1) import; (2) export; (3) deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of a commercial activity; or (4) sell or offer for sale in interstate or foreign commerce, any such species (including live animals, or any part or product derived from such wildlife), among other prohibitions. 16 U.S.C. §§ 1532(8), 1538(a)(1)(A),(E),(F); 50 C.F.R. § 17.21. These same prohibitions generally apply to threatened species. 50 C.F.R. § 17.31. Otherwise,

[2] CITES is an international treaty that aims to prevent species from becoming endangered or extinct by restricting international trade. *See generally* Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, T.I.A.S. No. 8249, 27 U.S.T. 1087. CITES imposes varying levels of legal protections on roughly 5,600 species of animals, directing the more than 180 member countries (including the United States) to adopt import and export permitting programs.

the FWS shall issue specific rules under Section 4(d) of the ESA that define the full scope of protections that a threatened species receives. 16 U.S.C. § 1533(d). Congress has mandated that any Section 4(d) regulation must be "necessary and advisable to provide for the conservation of such species." *Id*.

Thus, with respect to commerce, the ESA only addresses certain activities, and in those circumstances, it generally *prohibits* imports, exports, and *interstate or foreign* commerce. 16 U.S.C. § 1538(a)(1)(A),(E),(F). Further, as addressed in more detail below, Section 6 of the ESA explicitly contemplates a system of cooperative federalism with states to effectuate the goal of protecting and preserving imperiled species. 16 U.S.C. § 1535(f) (providing that state laws are not preempted unless they prohibit conduct authorized by the ESA, by exemption or permit, or authorize conduct prohibited under the ESA).

III. PROCEDURAL HISTORY

Appellants filed this action in March of 2018. The District Court granted Defendants-Appellees' motions to dismiss the preemption claim in August of 2019, finding that "it was not the clear and manifest purpose of Congress to preempt state laws restricting purely intrastate commerce in ivory." Joint Appendix Vol. 1 ("App.") (Dkt. No. 45) at 29 (internal citation omitted). At that time, the District Court found that the Third Amended Complaint "pleads sufficient facts to make plausible Plaintiffs' contention that the Display Restriction violates the First

Amendment" but also found that "the record does not establish as a matter of law that the Display Restriction violates the First Amendment." App. at 29-30. Thus, the District Court denied Plaintiffs' summary judgment motion without prejudice. *Id*.

After discovery, the parties cross-moved for summary judgment on the First Amendment claim. The District Court granted summary judgment for Defendants-Appellees, holding that DEC's "Display Restriction is no more extensive than necessary to serve New York's legitimate interest in regulating the sale of ivory." App. at 41.

This appeal followed.

SUMMARY OF ARGUMENT

Appellants' preemption and First Amendment claims are grounded in the false notion that the Endangered Species Act, 16 U.S.C. §§ 1531-1544, affirmatively authorizes the sale of antique and *de minimis* amounts of ivory, and that New York's law therefore explicitly or implicitly takes something away from Appellants that federal law guarantees. That is not so. Nor did Congress intend to occupy the entire field of endangered species protection. The District Court correctly found that the Ivory Law is not preempted because "it was not the clear and manifest purpose of Congress to preempt state laws restricting purely intrastate commerce in ivory." App. at 29 (internal citation omitted).

Appellants shift tactics on appeal and insist that the Ivory Law inherently and impermissibly applies with respect to import, export, or interstate and foreign commerce in endangered or threatened species and is therefore preempted. This argument is logically faulty and contrary to this Court's prior ruling in *Cresenzi Bird Importers, Inc. v. State of N.Y.*, which found that "even state statutes which apply to interstate commerce will not be preempted by ESA unless they conflict with *affirmative* federal regulation." 658 F. Supp. 1441, 1445 (S.D.N.Y. 1987), *aff'd*, 831 F.2d 410 (2d Cir. 1987). In addition, this argument fails for the same reason Appellants' previous arguments failed below: even if the Ivory Law somehow applied with respect to the things Appellants believe it does (which, as a matter of fact, the District Court found it does not), it still only has preemptive effect if it permits anything prohibited by the ESA or prohibits anything authorized by the ESA. 16 U.S.C. § 1535(f). Here, the federal government's choice *not* to prohibit an activity—in this case, activity pertaining to certain *de minimis* and antique ivory—does not have preemptive effect. The absence of federal prohibition is not the same as a determination that states cannot restrict a specified activity. This is especially true here, where the ESA makes clear that the federal government does not intend to occupy the entire field, but rather, provides a floor, expressly reserving to the states the right to be more restrictive than federal law. 16 U.S.C. § 1535(f). Thus, the District Court correctly determined that the Ivory Law

is not preempted because "it was not the clear and manifest purpose of Congress to preempt state laws restricting purely intrastate commerce in ivory." App. at 29 (internal citation omitted). This conclusion is supported by Circuit precedent and by other courts upholding state laws against similar ESA preemption challenges.

Appellants' First Amendment argument fares no better. In urging the Court to apply strict scrutiny, Appellants again misread the ESA, wrongly contending that "the Display Restriction prohibits speech *authorized* under the ESA." Op. Br. at 44 (emphasis added).[3] The clear implication is that the Display Restriction should somehow be more suspect because it imposes some minor limitations on speech that Appellants believe federal law explicitly authorizes. But that is not the case, and Appellants' grounds for applying strict scrutiny are ill founded. The District Court correctly applied intermediate scrutiny and found, based on the record and controlling Circuit law, that the Display Restriction "is no more extensive than necessary to serve New York's legitimate interest in regulating the sale of ivory." App. at 41. Appellants themselves conceded that "New York has a substantial interest in regulating the sale of ivory within its borders," and "the Display Restriction directly advances this interest." App. at 18.

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[3] Elsewhere, Appellants contend that items the Ivory Law pertains to "are undisputedly authorized for sale under federal law." Op. Br. at 45-46. Intervenor-Appellees have and do continue to dispute this claim, for the reasons discussed *infra* at II(A)(3).

Ultimately, Appellants' protestations about the balance of federal and state regulatory authority is mere window dressing for their wish to peddle their wares in whatever market and manner they wish, without regard to how those activities imperil animals on the brink of extinction, and despite the fact that states have long retained the power to regulate markets within their borders. Appellants would have this Court prevent states from restricting commercial conduct that occurs within their borders if the regulated items could ultimately make their way into interstate commerce. Appellants' protests cannot and do not support a claim that New York's regulation of intrastate commercial activity involving ivory and rhino horn is constitutionally impermissible.

This Court should affirm the District Court's decisions.

ARGUMENT

I. STANDARD OF REVIEW

A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*, and all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007). However, the Court is "not required to credit conclusory allegations or legal conclusions couched as factual allegations." *Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

Summary judgment orders on matters of law applied to undisputed facts are also reviewed *de novo*. *Amaker v. Foley*, 274 F.3d 677, 680 (2d Cir. 2001). Where there are no genuine disputes of material fact, whether a party is entitled to summary judgment turns upon the party's ability to satisfy its burden under the appropriate level of judicial scrutiny. *Vt. Teddy Bear Co. v. Beargram Co.*, 373 F.3d 241, 244 (2d Cir. 2004).

On appeal, a district court's "factual findings will not be set aside . . . unless 'clearly erroneous[.]'" *Lyddan v. United States*, 721 F.2d 873, 875 (2d Cir. 1983) (citing Fed. R. Civ. P. 52(a)).

II. THE IVORY LAW IS NOT PREEMPTED BY THE ENDANGERED SPECIES ACT

New York was well within its constitutional authority to adopt the Ivory Law, which regulates only intrastate commercial activity and serves as a complement to the ESA by helping to deter illegal trade in ivory and rhinoceros horn. Nevertheless, Appellants continue to misunderstand and misapply federal law, claiming that the ESA preempts the Ivory Law. As the District Court noted, Appellants' Third Amended Complaint challenges the Ivory Law only as applied to intrastate commercial activities, and the State has conceded the Ivory Law does not apply to interstate conduct. App. at 20. Appellants now insist on appeal that the Ivory Law *inherently* and impermissibly "applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered or threatened

species," simply "because elephants and rhinos are not native to New York." Op. Br. at 23. Appellants also assert, for the first time, that DEC's Display Restriction "targets wholly interstate and foreign commerce," and thereby adds to what they see as a conflict preemption problem. Op. Br. at 18.

To the extent Appellants argue, for the first time on appeal, that a state cannot regulate conduct occurring within its borders if subsequent downstream conduct might involve interstate activity—that theory should be rejected as newly raised on appeal, and because it finds no basis in case law or in ESA Section 6's preemption provision, 16 U.S.C. § 1535(f). Further, Appellants' view that New York has no authority to regulate commercial activity in the parts and products of non-native species contravenes existing case law. If adopted, Appellants' position would threaten many state laws restricting trade relating to imperiled foreign species.

These new twists fail as both a matter of common sense and the law of this Circuit. Even if they had been properly raised below, Appellants' new arguments fail for the same reason their arguments did below: the Ivory Law simply does not permit what is prohibited, or prohibit what is authorized, by the ESA. 16 U.S.C. § 1535(f). The same is true of the Display Restriction. The federal government's choice not to prohibit an activity—in this case, activity pertaining to certain *de minimis* and antique ivory—is not the same as a determination that the activity

cannot be restricted by the states, especially where, as here, the federal scheme makes clear that the federal government does not intend to occupy the entire field and expressly reserves to the states the right to be more restrictive than federal law. 16 U.S.C. § 1535(f).

A. The Ivory Law Is Not Expressly Preempted

Appellants cherry pick parts of the ESA to fit their false narrative that it expressly preempts the Ivory Law. But Congress explicitly defines the extent to which its enactments preempt state law, and the full federal scheme here makes clear that the Ivory Law is soundly within the scope of contemplated and acceptable state action. *English v. Gen. Elec. Co.* 496 U.S. 72, 79-80 (1990). Congress' "'purpose . . . is the ultimate touchstone' in every pre-emption case," and this purpose is primarily discerned "from the language of the pre-emption statute and the 'statutory framework' surrounding it." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486-87 (1996) (internal citations omitted).

1. The Federal Structure Contemplates Laws Like the Ivory Law

In the ESA, Congress plainly envisioned a regulatory scheme of state cooperation to promote the conservation of threatened and endangered species:

> 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 (1) permit what is prohibited by this chapter or by any regulation which

> implements this chapter or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter.

16 U.S.C. § 1535(f). Thus, state laws are preempted *only* to the extent that they would effectively prohibit conduct authorized under the ESA by exemption or permit, or authorize conduct prohibited under the ESA.

The limited scope of preemption is further clarified in the remainder of Section 6—the portion that operates as a savings clause—which states that the ESA:

> shall not otherwise be construed to void any state law or regulation which is intended to conserve . . . wildlife, or to permit or prohibit sale of such . . . wildlife. 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 Act or in any regulation which implements this Act but no less restrictive than the prohibitions so defined.

16 U.S.C. § 1535(f). In this way, Congress explicitly left room for states to enact laws that are more protective than the federal law. Indeed, a California state court relied on the ESA's savings clause when it upheld a similar California law, ultimately finding the law was not preempted by the ESA. *Ivory Education Institute v. State of California*, Cal. Super. Ct., Civ. No. BC602584, Statement of Findings of Fact and Conclusions of Law, at 7 (Cal. Super. Ct., Los Angeles

County, Jan. 4, 2017) (on appeal, the plaintiffs in the California case abandoned their preemption argument).

If the language of the ESA's preemption clause—addressing state laws that "prohibit what is authorized by an exemption or permit" under federal law—was read to void every state law that addresses activity that is merely left *unrestricted* by the federal government (as opposed to activity clearly authorized by the federal government), there would be *no* state law that could ever restrict such activity. Such a reading of the ESA's preemption clause would render meaningless the ESA's savings clause that allows states to enact laws that go farther than federal law in limiting behavior for the purpose of conserving wildlife, including state laws that "prohibit sale" of wildlife for that purpose. The Court should not accept an invitation from Appellants to read the ESA's preemption clause so broadly as to render the ESA's savings clause inoperative and to implicitly overturn dozens of state wildlife laws.

The legislative history of the ESA confirms Congressional intent that "states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal Government and to enforce legislation." H.R. Rep. No. 412, 93d Cong., 1st Sess. 7-8 (1973). The only exception is "where there was a specific Federal permission . . . or ban," but "in every other respect, the State powers to regulate in a more restrictive fashion . . . remain unimpaired." *Id.* Thus, a

determination of what state ivory laws might be preempted by the ESA turns upon what is specifically prohibited and what is specifically authorized by the federal scheme.

Before a species receives any protection under the ESA, FWS must list the species as "threatened" or "endangered," based solely on a scientific evaluation of threats to the species' continued existence. 16 U.S.C. § 1533(a), (c). The ESA strictly prohibits interstate sale and interstate transport in the course of commercial activity involving the non-antique parts of endangered species, like Asian elephants and all but one subspecies of rhinoceros. 16 U.S.C. § 1538(a)(1)(D), (E); 50 C.F.R. § 17.11(h). For threatened species, like African elephants, Section 4(d) of the ESA provides:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538 (a)(1) of this title [i.e., Section 9].

16 U.S.C. § 1533(d).[4] In other words, FWS must issue regulations to conserve threatened species (called "4(d) Rules"), and it may extend the statutory

[4] Southern white rhinoceros are listed as threatened due to their similarity of appearance to endangered rhinoceros, a rule specifically adopted by the Service to

protections afforded to endangered species to threatened species through such regulations. *See, e.g., Safari Club International v. Zinke*, 878 F.3d 316, 329 (D.C. Cir. 2017).

In 2016, FWS did just this for African elephants by amending the 4(d) Rule for that species. 81 Fed. Reg. 36,388 (June 6, 2016). The new regulation strictly regulates the import of ivory into the United States, including restricting the number of elephant tusks that may be imported as trophies each year by a hunter, and requiring ESA permits for all trophy imports regardless of the country of origin. 81 Fed. Reg. at 36,418. The 4(d) Rule also generally prohibits *interstate* commercial activity involving ivory; importantly, the Rule does *not* specifically authorize commercial ivory activity within a particular state. In fact, states with intrastate trade will only "be able to continue" "where such activity is allowed under State law," suggesting intrastate commercial activity may indeed be banned by states. 81 Fed. Reg. at 36,416; *id.* at 36,407 (intrastate trade may continue "unless prohibited under State law"). For endangered species, import, export, and interstate commercial activity of non-antique ivory or rhinoceros horn is prohibited unless authorized by a permit under Section 10 of the ESA. 16 U.S.C. §

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improve enforcement of the ESA's prohibition on interstate and international trade in rhinoceros horn. 79 Fed. Reg. 28,847 (May 20, 2014); 16 U.S.C. § 1533(e) (authorizing application of regulatory protections for species that are difficult to distinguish from listed species).

1539(a)(1)(A) (such permits can be issued only for scientific purposes or to enhance the survival of the species in the wild). Thus, the ESA's regulatory scheme for ivory and rhinoceros horn leaves to the States how best to regulate intrastate commercial activities.

2. The Ivory Law Does Not Apply With Respect to Interstate Commercial Conduct

Although the Third Amended Complaint challenges the Ivory Law only as to intrastate commercial activity (after State Appellees conceded that the law does not apply to interstate commercial activity), Appellants now assert that the Ivory Law *and* the Display Restriction *inherently* "apply with respect" to interstate commerce, simply because elephants and rhinoceros are not native to New York. App. at 20-22 n.3; Op. Br. at 23-24. Because this argument was not raised in the District Court, this Court need not consider it. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005). Even if considered, the argument fails for several reasons.

First, and as discussed *supra* at 13, the ESA's savings clause explicitly permits state action that is more restrictive than the ESA's prohibitions on commercial activity in endangered and threatened species—without regard to whether the state action involves native wildlife. 16 U.S.C. § 1535(f) (stating that the ESA "shall not otherwise be construed to void any State law or regulation which is intended to conserve . . . wildlife, or to permit or prohibit sale of such . . .

wildlife"). Appellants conspicuously omit any mention of this part of the savings clause, and instead focus on the sentence before it, which is not applicable here, regarding "migratory, resident, or introduced fish or wildlife." *Id*.

Appellants' citation to *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364 (2008) is inapposite. In *Rowe*, the Court analyzed whether the state law at issue had a sufficiently direct effect on activity prohibited by federal law to raise a preemption problem. *Id.* at 371. Here, in contrast, the Court need not speculate about the extent of a state regulatory "patchwork," because regulation of intrastate commercial activity involving wildlife is entirely consistent with—and explicitly contemplated by—the statutory language and congressional intent. *Id.* at 373.

Second, if New York (or any state) is barred from regulating non-native animals, a plethora of existing state laws concerning animals not native to the regulating state would be preempted, rendering the ESA's savings clause meaningless. In addition to the many states with laws explicitly prohibiting intrastate commercial activity in ivory and rhinoceros horn, most state wildlife codes (including New York's) generally prohibit the sale of parts of species listed as threatened or endangered, including species so listed by the federal government, regardless of whether that species is native to the regulating state.[5] Moreover, the

[5] *See, e.g.,* Cal. Penal Code § 653p; Colo. Rev. Stat. Ann. § 33-2-105; Conn. Gen. Stat. Ann. § 26-311; Del. Code Ann. tit. 7, § 601; 520 Ill. Comp. Stat. Ann. 10/3;

principle advanced by Appellants would reach too far—if as a matter of "inherent" limitation on state regulatory authority a state cannot regulate commodities that are not naturally occurring within the state, many state laws would suddenly be *ultra vires*.

Third, this Court has previously and conclusively interpreted the "applies with respect to" language of Section 6(f), noting that "Congress has indicated that *even state statutes which apply to interstate commerce* will not be preempted by ESA unless they conflict with *affirmative* federal regulation." *Cresenzi*, 658 F. Supp. at 1445 (emphasis added).[6] Thus, even if Appellants had a valid argument that the Ivory Law applies with respect to interstate or foreign commerce—that is, the law indirectly affects commercial conduct in other states downstream of prohibited commercial activity occurring within New York's borders—and were not foreclosed from raising it here (for failure to raise it below), the New York law

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Kan. Stat. Ann. § 32-961; Ky. Rev. Stat. Ann. § 150.183; La. Stat. Ann. § 56:1905; Me. Rev. Stat. tit. 12, § 12808; Mich. Comp. Laws Ann. § 324.36505; Minn. Stat. Ann. § 84.0895; Miss. Code. Ann. § 49-5-109; Mo. Ann. Stat. § 252.240; Mont. Code Ann. § 87-5-107; Neb. Rev. Stat. Ann. § 37-810; N.H. Rev. Stat. Ann. § 212-A:12; N.J. Stat. Ann. § 23:2A-6; N.M. Stat. Ann. § 17-2-41; N.Y. Envtl. Conserv. Law § 11-0535; Okla. Stat. Ann. tit. 29, § 7-503; Or. Rev. Stat. Ann. § 498.026; 34 Pa. Stat. and Cons. Stat. Ann. § 2167; 20 R.I. Gen. Laws Ann. § 20-37-3; S.D. Codified Laws § 34A-8-9; Tenn. Code Ann. § 70-8-102; Tex. Parks & Wild. Code Ann. § 68.015; Va. Code Ann. § 29.1-564; Wis. Stat. Ann. § 29.604.

[6] *See also* App. at 25 n.6 (District Court noting *Cresenzi* discussion of "applies with respect to" and also noting that "no language in § 1535(f) indicates that it applies to state laws merely 'affecting' interstate commerce").

would not be presumptively invalid. Thus, as in the District Court, the only relevant question remains whether the Ivory Law's provisions regarding intrastate activities with antique and *de minimis* amounts of ivory prohibit conduct affirmatively authorized by the ESA or authorize conduct affirmatively prohibited, such that they are expressly preempted. As explained herein, the answer to that question is a resounding no.

3. The Ivory Law Does Not Prohibit Anything Expressly Authorized by the ESA

Appellants continue to mistake the federal *de minimis* provision in the African elephant 4(d) Rule, 50 C.F.R. § 17.40(e)(3), for an affirmative authorization pursuant to an exemption or permit as discussed in the ESA's savings clause. 16 U.S.C. § 1535(f); Op. Br. at 16. However, the *de minimis* provision is not an affirmative authorization. It only applies to the "interstate and foreign commerce of [African elephant] ivory," and merely eliminates restrictions with respect to certain objects with *de minimis* amounts of ivory that are "sold or offered for sale *in interstate or foreign commerce*" from the default prohibitions of *federal law*. 50 C.F.R. § 17.40(e)(3) (emphasis added).[7] Thus, Appellants' argument fails in the first instance because, according to the State's representations and the findings of the District Court, the New York law will be applied only to

[7] No such *de minimis* exception exists for Asian elephant ivory or any rhinoceros species' horn.

intrastate conduct to which the 4(d) rule does not apply. However, even if this Court credited Appellants' new argument that the Ivory Law and/or the Display Restriction somehow indirectly "applies with respect to" imports, exports, or interstate or foreign commerce (because prohibiting commercial conduct in New York might cut off subsequent interstate activity downstream of the conduct in New York—e.g., if a sale occurred within New York and the product was delivered afterward to a recipient in another state), the *de minimis* provision simply exempts certain interstate activities from federal prohibitions; it does not amount to a requirement that such interstate activity be unaffected by state regulation of intrastate conduct—the only conduct actually regulated by the Ivory Law, as all parties have agreed. And, the ESA and the African elephant 4(d) Rule are silent as to *intrastate* commercial activity in *de minimis* amounts of ivory.

Appellants similarly misapply the ESA's antiques provisions in Section 10. 16 U.S.C. § 1539(h). Like the federal provisions relating to items containing *de minimis* amounts of ivory, the federal provisions relating to antique ivory and rhinoceros horn merely eliminate federal restrictions on certain activities that would *otherwise be prohibited* under the ESA and associated regulations. This does not amount to a federal guarantee of the right to engage in conduct with which state restrictions could be in conflict. Further, as with the *de minimis* provisions, the federal provisions relating to antique ivory do not address intrastate

conduct at all. Thus, even if the antiques provisions are viewed as an affirmative authorization of conduct, they address only interstate and foreign activity. Relevant here, the ESA's antiques section eliminates: (1) any 4(d) Rule prohibitions (such as prohibitions on import and certain *interstate* commercial activity for African elephants); (2) CITES prohibitions[8] (which relate solely to the import and export of elephants and rhinoceros and their parts and derivatives); and (3) the ESA's statutory prohibitions on *interstate* commercial activity (which apply to Asian elephants and endangered rhinoceroses), with respect to antique ivory and rhinoceros horn, as defined by Section 10(h). 16 U.S.C. § 1539(h) (for qualifying antiques, "Sections 4(d), 9(a), and 9(c) [16 USCS §§ 1533(d), 1538(a), (c)] do not apply"). The African elephant 4(d) rule clearly indicates a federal policy choice to not apply the default federal prohibitions relating to import and interstate commercial activity, but that is very different than a federal decision to eliminate States' abilities to announce their own restrictions (which the ESA's savings clause, 16 U.S.C. § 1535(f), expressly contemplates), let alone address the entirely distinct activity of intrastate trade in antiques.[9]

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[8] 16 U.S.C. § 1538(c)(1), (2).

[9] This outcome would also be a complete perversion of the purpose and goals of the federal ESA, and the specific authority delegated to the FWS by Congress in that legislation. The ESA is not a wildlife management scheme by which Congress intended the federal government to establish optimal levels of harvest and other

4. A Mere Exception to a Prohibition is Not an "Authorization" as Required to Trigger the ESA's Preemption Provision

Appellants attempt to read the *authorized* part out of Section 6, which refers specifically to activities "authorized pursuant to an exemption or permit." 16 U.S.C. § 1535(f). They summarily assert that the Ivory Law prohibits what federal law allows, Op. Br. at 24, but fail to establish that FWS's choice to not restrict import and interstate sale of ivory constitutes "an exemption or permit" as those terms are used in Section 6, 16 U.S.C. § 1535(f). Nor do Appellants explain how such a choice—even if it is an "exemption or permit" —amounts to an *authorization* of conduct that results in preemption.[10]

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actions that exploit covered species. The ESA is a protectionist regime, applying to species that are "listed" (as endangered or threatened, or candidates for those designations) when they need protection, and not applying to them otherwise. In this context, the *de minimis* and antique provisions of FWS's African elephant 4(d) regulation cannot be viewed as an affirmative authorization of trade activity that states are not free to restrict. The 4(d) regulation is simply the result of a choice to apply less than the full protections that could be afforded under federal law as a matter of federal policy. If construed as something more, it would grant FWS authority beyond which Congress gave the agency in commanding it to protect species once they become imperiled. And, of course, there is a presumption against preemption in the caselaw precisely to avoid exclusion of states from regulation of intrastate conduct except where federal authority and intention to do so is clear and manifest. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (presumption against preemption is strongest in areas of traditional state regulation).

[10] Appellants cite a preliminary injunction decision in an ongoing California case about an unrelated state law for the notion that the antique and de minimis provisions of the ESA regulations are "exemptions." Op. Br. at 23-34 (citing *April in Paris v. Becerra*, 494 F. Supp. 3d 756, 767-68 (E.D. Cal. 2020)). This ruling is

The very caselaw Appellants point to confirms this glaring omission. In each case, the challenged law was overturned only to the extent it prohibited activities expressly authorized by federal law at the time the case was decided. For example, *Man Hing* was decided 35 years ago, when federal law expressly authorized the import of African elephant ivory so long as the importer complied with CITES requirements. *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 763 (9th Cir. 1983); *see also* 50 C.F.R. § 17.40(e) (1981) (reproduced in *Man Hing*, 702 F.2d at 764). In other words, California's law prohibited what was explicitly authorized by federal law, at that particular point in time. *Man Hing*, 702 F.2d at 764.[11] And the court noted that the ESA "allows full implementation of [the

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still only preliminary, and the judge expressly reserved opportunity to change course after full merits briefing. *Id.* at 772. Moreover, the ruling addresses a state law *that applies to more than just intrastate trade*. *Id.* at 765. And, as to the California law's impact on import into the country and interstate trade, the preliminary ruling in the *Paris* case is specific to the wording of the alligator and crocodile 4(d) regulation involved. *See id.* at 768-69. There the court, in detailing the federal rules for alligators and crocodiles, found that the rule for alligators appears to leave room for states to be more restrictive while the rule for crocodiles appears to provide authorization for sale. *Id.* Thus, the *Paris* decision supports the principle that there is a distinction between activity allowed but not expressly authorized by federal law which may be restricted by states. If the existence of an exception to a federal prohibition alone was enough to expressly preempt state laws on the same subject, the "authorized pursuant to" language of Section 6(f) would be superfluous. 16 U.S.C. § 1535(f).

[11] Since Congress enacted the African Elephant Conservation Act, 16 U.S.C. §§ 4201-4246, in 1988, and FWS updated the 4(d) regulations for African elephants, 57 Fed. Reg. 35,473 (Aug. 10, 1992; 81 Fed. Reg. 36,388 (June 6, 2016) ("increase[ing] protection for African elephants in response to the alarming rise in

California law] as long as the state statute does not prohibit what the federal statute or its implementing regulations permit," but that the challenged law was unlawful because it halted activity authorized by a federal permit. *Id.* at 764; *see also Fouke Co. v. Brown*, 463 F. Supp. 1142 (E.D. Ca. 1979) (holding that a California law prohibiting the import and sale of alligator hides was preempted because the applicable federal 4(d) Rule for alligators, 50 C.F.R. § 17.42, explicitly authorizes licenses for those very activities (unlike the African elephant 4(d) Rule)); *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758, 759-60 (9th Cir. 1983) (state law was preempted only to the extent it applied to a federal permit holder for import and export of African elephant products—as such trade was explicitly authorized at the time the case was decided—and upholding the portion of the law that restricted trade in pythons and wallabies, as there were no ESA permits explicitly authorizing such trade).

In contrast, the antiques and *de minimis* provisions upon which Appellants rely do not authorize anything—let alone the intrastate commercial activity prohibited by the Ivory Law. Thus, the law is more akin to the Wild Bird Law upheld in *Cresenzi*, 658 F. Supp. at 1446. There, the court carefully distinguished between licenses that granted only general "permission to engage in business as an

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poaching to fuel the growing illegal trade in ivory"), federal law now expressly prohibits import of and interstate commercial activity in all African elephant ivory, subject to narrow exceptions. *See* 50 C.F.R. § 17.40(e).

importer or exporter of wildlife" and certain permits clearly intended to "supersede more restrictive state laws." *Id.* at 1446. Like the licenses in *Cresenzi*, the federal government did not indicate in the antique and *de minimis* exemptions an intent to supersede state laws.

B. The Ivory Law is not Otherwise Preempted

Appellants purportedly abandon their field preemption argument on appeal, but their conflict preemption argument relies on their contention that the general presumption against preemption is not triggered because the federal government has, they allege, substantially occupied the field of ivory regulation. Op. Br. at 34. But whether packaged as a field preemption or conflict preemption argument,[12] Appellants' claim fails. The Ivory Law is exactly the type of law contemplated by the federal scheme—which it is in harmony with rather than in conflict with federal law.

First, contrary to Appellants' strained arguments, the presumption against preemption applies here. As the District Court correctly noted, "[w]here, as here, Congress has legislated in a field traditionally occupied by the states, '[t]he presumption against federal law preempting state law is particularly strong.'" App.

[12] Appellants persist with their conflict preemption argument despite the fact that their Statement of Material Undisputed Facts in the District Court did not even allege that there was a conflict between federal law and the Ivory Law (but only that there were *differences* between them) (Dkt. 24 at 7).

at 027 (citing *Marentette v. Abbott Lab'ys, Inc.*, 886 F.3d 112, 117 (2d Cir. 2018)). Appellants mischaracterize and downplay New York's interest in the Ivory Law as simply "regulating foreign animal species." Op. Br. at 43. But the record is clear that New York's interest is in regulating its own markets to "help deter the illegal trade in [ivory and rhinoceros horn] in New York." NY Spons. Memo., 2014 A.B. 10143. This is a constitutionally sound use of New York's police powers. *See Cresenzi*, 658 F. Supp. at 1447 ("A state may constitutionally conserve wildlife elsewhere by refusing to accept local complicity in its destruction. The states' authority to establish local prohibitions with respect to out-of-state wildlife has, since the late nineteenth century, been recognized by the [C]ourt[]."). *See also United States v. Stevens*, 559 U.S. 460, 469 (2010) ("[T]he prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies"); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 947-53 (9th Cir. 2013), *cert denied*, 135 S. Ct. 398 (2014); *Chinatown Neighborhood Ass'n v. Harris*, 794 F. 3d 1136, 1146-47 (9th Cir. 2015).

Contrary to Appellants' argument, there could be no clearer example that this is *not* an instance where federal authority has "substantially occupied" the field such that the presumption against preemption does not apply. Op. Br. at 41-42 (citing *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)).

The plain language of the ESA's savings clause is a clear rejoinder to this argument. 16 U.S.C. § 1536(f). Ignoring the ESA's savings clause, Appellants fail to address that Congress expressly left room for States to supplement federal conservation efforts in the ESA, which "negates" any inference of field preemption. *Viva! Int'l. Voice for Animals v. Adidas Promotional Retail Operations, Inc.*, 41 Cal. 4th 929, 944 (2007) (internal quotation marks omitted).

Accordingly, courts have routinely upheld the application of state laws restricting trade in endangered and threatened species when the activity at issue was not covered by a federal authorization via exemption or permit. *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 635 (S.D.N.Y. 1970) (upholding state law banning the sale of certain reptilian skins against claim of ESA preemption and noting that the ESA and its regulations "explicitly recognize the role of the states" and "[t]here is no inconsistency or conflict" between the ESA and the state law), *aff'd* 440 F. 2d 1319 (2d Cir. 1971); *Chinatown Neighborhood Ass'n v. Harris*, 794 F. 3d 1136, 1143 (9th Cir. 2015) (rejecting plaintiffs' attempt to draw a negative inference of preemption from Congress' silence in the Magnuson Stevens Act regarding on-land activities related to shark finning even where the federal government issues permits authorizing on-water fishing activity up to established quotas, and noting that "[s]ilence, without, more, does not preempt"); *DeHart v. Town of Austin, Ind.*, 39 F. 3d 718, 722 (7th Cir. 1994) (upholding municipal prohibition on possession

of exotic animals and rejecting plaintiffs' argument that federal and state law setting standards for humane care of exotic animals somehow *requires* that possession of exotic animals be allowed); *Cresenzi*, 658 F. Supp. at 1446 (holding that state laws concerning certain birds were not preempted by the ESA because "the birds which plaintiffs sell are not sold pursuant to permits or an exception under the ESA); *Viva!*, 41 Cal. 4th at 946 (upholding a state law banning the commercial importation and sale of kangaroo parts where federal law was silent, and finding that the law was not preempted by the ESA, noting that "Congress or federal authorities may preempt without regulating, but only by affirmatively deciding no state regulation is permitted").

Second, conflict preemption does not apply here because it is possible to comply with both the Ivory Law and the ESA, and the Ivory Law does not obstruct the "accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (internal citations omitted); *see also Marentette*, 886 F.3d at 117 (noting that "federal law does not preempt state law under obstacle preemption analysis 'unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.'") (alteration and citation omitted). Appellants cannot establish that the Ivory Law actually conflicts with the federal scheme, nor that it obstructs Congressional objectives.

Far from asserting any irreconcilable conflict between the federal scheme and the Ivory Law, Appellants simply rehash their express preemption argument that the Ivory Law prohibits federally exempted conduct.[13] But as discussed *supra* at 13-24, the Ivory Law only applies only to intrastate commercial activity of certain ivory objects. It does not operate in the same sphere as the ESA, which, with respect to commercial activity, addresses only those ivory activities related to international and interstate commerce. Indeed, even the narrower application of the ESA to antique and *de minimis* amounts of ivory, does no more than exempt those items from certain federal prohibitions.

The Ivory Law is also unlike the one at issue in *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000), which directly regulated conduct occurring wholly outside the state's borders by imposing sanctions on out-of-state companies that did business in Burma. *Id.* at 379 (noting the state law prohibited contracts between Massachusetts and the United States "even though those transactions are explicitly exempted" by federal law). Appellants assert that there is disagreement between New York and Congress regarding the necessity of laws like the Ivory

[13] As with their express preemption argument, Appellants assert for the first time in their conflict preemption argument that the Display Restriction, along with the Ivory Law, "combine to penalize conduct and speech," without elaborating as to the Display Restriction's relevance here. Regardless, the argument has been waived and need not be addressed here. *Wal-Mart Stores*, 396 F.3d at 124 n.29.

Law here. But even if such a disagreement existed (it does not)[14], the Ivory Law does not frustrate Congressional objectives. This is evidenced, in part, by the cooperative federal/state scheme envisioned by the ESA and discussed *supra* at 13-18. But in addition to the shared federal and state conservation goals, it takes nothing away from the ESA's purview for New York to enforce its Ivory Law. This is so because the ESA does not authorize anything with respect to antiques and *de minimis* amounts of ivory, and the state law therefore has nothing to take away. This is in stark contrast to the law at issue in *Crosby*, where the court found that the relevant federal law affirmatively authorized the President of the United States to issue certain sanctions, and the Massachusetts law conflicted with that federal authorization in such a way that it would mean "the President has less to offer and less economic and diplomatic leverage as a consequence." *Crosby*, 530 U.S. at 377. Unlike the Massachusetts law in *Crosby*, the Ivory Law does not "reduce[] the value of the chips created by the federal statute" and therefore does not create an irreconcilable conflict. *Id.*

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[14] While Appellants are correct that the African elephant 4(d) rule contains language suggesting that Congress felt exceptions to commercial activity within its purview could exist for "items and activities" they believed were not "contributing to the poaching of elephants in Africa," 81 Fed. Reg. at 36,388, they also made clear that States are free to restrict intrastate commerce in ESA-listed species and their parts and products. *Id.* at 36,407 (intrastate trade in ivory may continue "unless prohibited under State law"). Further, Appellants previously admitted that New York has a substantial interest in regulating the sale of ivory within its borders and that the Display Restriction advances that interest.

III. THE DISPLAY RESTRICTION DOES NOT VIOLATE THE FIRST AMENDMENT

The Display Restriction narrowly regulates commercial speech to accomplish the Ivory Law's lawful objective of regulating intrastate commercial activity in ivory. Appellants urge the Court to apply a higher level of scrutiny in reviewing their First Amendment claim. But as the District Court correctly held, "the appropriate constitutional standard of review of commercial speech is intermediate scrutiny, even when the speech restrictions are content-based as they are here." App. at 039. Thus, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) provides the relevant test. Under the fourth prong of the *Central Hudson* test—the only one in dispute here—all that is required of DEC is that the challenged restriction "is no more extensive than necessary to serve New York's legitimate interest in regulating the sale of ivory." *Id.* at 569. Both the record below and controlling case law confirms that it is.

A. Intermediate Scrutiny Applies

Appellants insist that strict scrutiny applies to a review of the Display Restriction, asserting that the facts here require a different result than in *Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), which applied intermediate scrutiny to commercial speech analysis. The *Vugo* court briefly entertained a hypothetical that there might be some commercial speech restrictions where strict rather than intermediate scrutiny should apply ("even if strict scrutiny applied to

some commercial speech restrictions"). *Id.* at 50 n.7. The court noted only one example limited to a situation where "content-based burden[s]" were imposed upon "particular speakers." *Id.* The *Vugo* court contrasted that hypothetical to the restrictions at issue, which do not "'quiet' [ ] truthful speech with a particular viewpoint" that the government "'fears.'" *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011)).

Likewise, here, no particular speaker's viewpoint is targeted by way of DEC's policies implementing the Display Restriction. The prohibitions apply across the board to any would-be displayer of such goods, regardless of their viewpoints on ivory products. The prohibitions simply do not target a "single category of speech by a single category of speaker" or otherwise restrict truthful information.[15] On the contrary, the restrictions serve only to further the state law goal of reducing the demand for certain wildlife products to protect wildlife from extinction in a viewpoint-neutral manner. *Id.* Thus, intermediate is the appropriate level of scrutiny here.

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[15] Appellants assert that in prohibiting certain displays of items unlawful to sell intrastate, DEC seeks to quiet "the viewpoint that antiques containing more than 20% ivory can be sold," Op. Br. at 48, but whether those items might be lawfully sold *interstate* is a matter of truth or falsity, not of opinion—let alone one targeted or feared by the government. And, regardless, DEC's restrictions do not quiet this so-called "opinion," which may still be expressed using multiple methods, including advertisements in catalogues, at trade shows, or on the internet.

B. The Display Restriction is Narrowly Tailored

Appellants' argument that even under the intermediate level of scrutiny, the Display Restriction is insufficiently tailored to New York's substantial interest in regulating the sale of ivory within its borders[16] proceeds from the false premise that the restriction must fail if less restrictive alternatives—such as those suggested by Appellants—are available. This is not the case. As Appellants themselves have acknowledged, DEC need not adopt the least restrictive means of advancing its interests in deterring illegal ivory and rhino horn trade and sales. Op. Br. 43. Rather, there need only be a "reasonable" fit between the display restriction and DEC's interest in regulating the sale of ivory and rhinoceros horn and conserving wildlife. *Clear Channel Outdoor, Inc. v. City of New York*, 594 F. 3d 94, 106 (2d Cir. 2010), *cert denied*, 562 U.S. 981 (2010). Such a fit need not be "necessarily perfect, but reasonable" and should "represent[] not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* at 104 (citing *Bd. of Tr. of the State Univ. of N.Y. v. Fox,* 492 U.S 469, 480 (1989)).

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[16] Beyond this substantial interest Appellants have conceded, the State's interest is broader still. Courts have consistently ruled that a state has a legitimate interest in adopting laws for purposes of wildlife conservation and animal welfare. *Cresenzi* 658 F. Supp. at 1447; *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 952 (9th Cir. 2013); *Pac. Northwest Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994); *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 551, 557 (7th Cir. 2007); *Empacadora de Carnes de Fresnillo, S.A. DE C.V. v. Curry*, 476 F.3d 326, 336 (5th Cir. 2007).

Put differently, a restriction can be reasonable even if other reasonable fits exist. The State does not need to show that Appellants' suggested alternative to the Display Restriction would be ineffective for the Display Restriction to survive constitutional scrutiny. Op. Br. at 61; *see Vugo*, 931 F.3d at 58 (noting that the government should be given "considerable leeway in determining the appropriate means to further a legitimate government interest" and that the fourth prong of *Central Hudson* does not require "that there be no conceivable alternative to the government's approach or that the government's regulation be the least restrictive means of advancing its asserted interests.");[17] *see also Boelter v. Hearst Commc'ns, Inc.*, 192 F. Supp. 3d 427, 450-51 (S.D.N.Y. 2016) (noting that as long as a restriction is tailored to the state's goals, "[w]ithin those bounds we leave it to the governmental decisionmakers to judge what manner of regulation may best be employed").

Further factual development of this case has only bolstered the reasonableness of the fit between the restriction and the protection of the public interest in elephant and rhinoceros conservation. As in *Lorillard Tobacco Co. v.*

[17] While the *Central Hudson* court did note that it could not "approve the complete suppression of [Petitioner's] advertising" without a showing "that more limited speech regulation would be ineffective," 447 U.S. at 571, the display ban is not a ban on all advertising, as Appellants acknowledge. And, State Appellees have previously detailed the ineffectiveness of Appellants' proposed alternative. *See* App. at 188-203 (detailing that the segregation and labeling alternative would not ensure that sellers will not sell ivory to in-state prospective buyers).

Reilly, 533 U.S. 525, 569 (2001), ivory displays of items not lawful for intrastate sale "present an opportunity for access" to the products by buyers who cannot legally purchase them. App. at 188-203 (Captain Paluch's testimony detailing how the Display Restriction helps ensure compliance with the Ivory Law by disrupting purchases of ivory not legal for sale in New York). The reasonableness is also confirmed by information in the record that the amount of commerce in ivory has fallen since the Ivory Law's passage, and that the number of ivory items displayed for sale in New York City has drastically diminished. Paluch Decl. App. at 145-46. At most, Appellants argue that there is not enough evidence in the record regarding the reasonableness of the Display Ban to suit their liking. But as the District Court recognized, New York is not required to produce "empirical data . . . accompanied by a surfeit of background information." App. at 43 (citing *Lorillard Tobacco Co.*, 533 U.S. at 555 (internal citation omitted)). The Display Restriction is narrowly tailored and passes First Amendment muster.

CONCLUSION

For the foregoing reasons, Appellee-Intervenors respectfully request that the District Court's orders granting Defendants' motions to dismiss and for summary judgment be affirmed.

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/s/ Rebecca Cary
Rebecca Cary
rcary@humanesociety.org
The Humane Society of the United States
Counsel for Appellee-Intervenors