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,

Intervenors-Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR APPELLEE BASIL SEGGOS

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PRELIMINARY STATEMENT

New York State prohibits the sale of items containing ivory and rhinoceros horn, subject to limited exceptions, but does not prohibit any interstate or foreign sales that are authorized by federal law. In 2014, the Legislature enacted the State Ivory Law as part of the State's longstanding concern for protecting endangered and threatened species. To bolster compliance with the law, the New York State Department of Environmental Conservation (DEC) issues licenses to authorized sellers and prohibits licensees from physically displaying any item in New York that cannot lawfully be bought or sold within the State. This license condition does not prevent sellers from engaging in any other form of communication about their products, including print and online advertisements, or physical displays of items outside of New York.

In March 2018, plaintiffs—the Art and Antique Dealers League of America, Inc. and the National Art and Antique Dealers Association of America, Inc.—filed this lawsuit to challenge the constitutionality of the State Ivory Law and DEC's display restriction. They argued that the State Ivory Law, as applied to intrastate sales, is preempted by the federal Endangered Species Act (ESA) and its implementing regulations,

and that DEC's display restriction violates the First Amendment. The United States District Court for the Southern District of New York (Schofield, J.) dismissed plaintiffs' preemption claim and granted summary judgment to DEC on the First Amendment claim. This Court should affirm.

The district court correctly held that the ESA and its implementing regulations do not expressly or impliedly preempt the State Ivory Law's prohibitions on intrastate sales. The ESA's substantive prohibitions make clear that, for ivory articles, federal law regulates only interstate and foreign sales (including imports and exports), not intrastate sales. The relevant portion of the ESA's preemption provision reflects this limited scope by voiding only more restrictive state laws that *both* (1) apply to interstate or foreign commerce, *and* (2) prohibit what federal law authorizes. Here, the State Ivory Law, as applied to intrastate commerce, does neither.

The district court also correctly entered summary judgment in favor of DEC on plaintiffs' First Amendment claim. DEC's prohibition on the physical display of certain ivory articles is subject, at most, to intermediate scrutiny under *Central Hudson Gas and Electric Corp. v. Public*

Service Commission, 447 U.S. 557 (1980). And the record evidence shows that the display restriction has a reasonable fit with the State's substantial interest in prohibiting intrastate sales of ivory products: it prevents the situation particularly likely to result in a prohibited sale, where a willing seller, eager buyer, and prohibited item are all physically present in the same location in New York. At the same time, sellers retain ample avenues to communicate information about their products for legitimate interstate or foreign sales, including print and online advertisements, and physical displays outside of New York.

ISSUES PRESENTED

1. Whether the district court properly concluded that the federal Endangered Species Act does not preempt New York State's regulation of purely intrastate sales of ivory articles.

2. Whether the district court properly concluded that the First Amendment does not bar New York State's restriction on the physical display of ivory articles that are prohibited for sale in New York.

STATEMENT OF THE CASE

A. Legal Background

1. The New York State Ivory Law and licensing scheme

For decades, New York law has prohibited the trafficking of endangered or threatened species, including products made from such animals. *See* Ch. 664, § 2, 1972 N.Y. Laws 2242, 2335 (codified at Environmental Conservation Law (ECL) § 11-0535). In 2014, the Legislature added a provision to the state endangered and threatened species law to specifically address the alarming slaughter of elephant and rhinoceros populations by the ivory and horn trade. *See* Sponsor's Mem. (June 24, 2014), *in* Bill Jacket for ch. 326 (2014), at 7. Finding the "high consumer demand for ivory and horn products in New York [to be] especially troubling," and the "existing penalties . . . not high enough to deter violations," the Legislature sought to expressly curtail the sale of ivory and horn within New York, and to increase the criminal and civil penalties for violators. *Id.*

The resulting State Ivory Law, codified at ECL § 11-0535-a, generally prohibits the sale, offer for sale, or purchase of any item containing ivory or rhinoceros horn, subject to a few limited exceptions.

Id. § 11-0535-a(2), (3). As relevant here, the law authorizes DEC "to issue licenses or permits for the sale, offering for sale, purchase, trading, bartering or distribution" of certain bona fide antiques. *Id.* § 11-0535-a(3).[1] To qualify, an item must be at least 100 years old, and the ivory or horn component must not exceed twenty percent of the item's total volume. *Id.* § 11-0535-a(3)(a). Absent DEC authorization, sales of ivory or horn products within New York are subject to civil and criminal penalties. *See id.* §§ 71-0924(4), 71-0925(16).

An entity licensed to sell ivory or horn by DEC must comply with all conditions and obligations that appear on the face of the license. (*See* Joint Appendix (A.) 99-102.) As relevant here, one condition of DEC's ivory and horn license states that licensees may not "physically display for sale within New York State any item that is not authorized for Intrastate sale." (A. 100.) This condition—which the district court and plaintiffs here have described as the "Display Restriction"—does not

[1] DEC's specific policies setting forth when licenses for the sale of ivory and horn are required, and when they will be granted, are published on its website. *See* Dep't of Env't Conservation, *Ivory and Rhinoceros Horn Restrictions: Frequently Asked Questions* (July 2018), https://www.dec.ny.gov/docs/wildlife_pdf/ivoryfaqs.pdf ("*FAQ*").

preclude licensees from advertising these items in print or online, so long as they include a notice that the item may not be bought or sold in the State of New York. (*See* A. 100.)

2. The federal Endangered Species Act and implementing regulations

The federal Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., and its implementing regulations restrict commerce in products made from endangered or threatened species. Congress enacted the ESA in 1973 to effectuate the United States' international commitments to conserving endangered and threatened species and to establish conservation programs in partnership with the States. *See id.* § 1531(a)(5), (b), (c)(2).

The United States Fish and Wildlife Service (FWS) has deemed Asian elephants and most species of rhinoceros to be endangered species. *See* 50 C.F.R. § 17.11. The FWS has also issued special rules for African elephants, which are a threatened (rather than endangered) species. These regulations generally apply the same prohibitions governing endangered species to African elephants. *See id.* § 17.40(e).

For endangered species (or threatened species subject to the same regulatory regime), the ESA contains two overlapping but distinct

prohibitions on their trade. First, the statute prohibits imports, exports, and other transactions in "interstate or foreign commerce" involving endangered species. 16 U.S.C. § 1538(a)(1)(A), (E)-(F). These prohibitions do not refer to purely *intrastate* transactions of such products.

Second, and by contrast, a separate provision more broadly prohibits *any* possession, sale, or delivery of endangered species that are unlawfully "take[n] . . . within the United States," in territorial waters, or on the high seas.[2] *Id.* § 1538(a)(1)(B)-(C). That prohibition does not generally apply to ivory or horn products, however, since elephants and rhinoceros are not native to the United States and are thus not "taken" here. Rather, ivory and horn products from these species are governed by the ESA's narrower prohibitions on imports, exports, and interstate and foreign commerce, which apply to all products derived from endangered species.

As relevant here, there are two narrow federal exceptions to the ESA's general prohibitions on the import and export of, and interstate and foreign commerce in, ivory and horn products. *First*, the ESA excepts

[2] "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

certain antiques from these prohibitions. *See id.* § 1539(h)(1) ("Antique Exception").[3] Like the State Ivory Law, the ESA requires bona fide antiques to be least "100 years of age." *Id.* § 1539(h)(1)(A). Qualifying antiques also cannot have been "repaired or modified with any part of any such species on or after December 28, 1973." *Id.* § 1539(h)(1)(C). And any such antique must have "entered [the United States] at a port designated" by the Secretary of the Treasury specifically for the importation of such exempt antiques. *Id.* § 1539(h)(1)(D). Unlike New York's law, the ESA does not require items to contain less than a certain percentage of ivory by volume to qualify under the exemption. *See id.* § 1539(h)(1).

Second, FWS's regulation governing African elephants permits the sale of items containing "de minimis" amounts of ivory from such elephants "in interstate or foreign commerce." 50 C.F.R. § 17.40(e)(3) ("De Minimis Exception"). The regulation defines "de minimis" as a quantity of ivory not exceeding 200 grams or fifty percent of the total volume or value of the item, *id.* § 17.40(e)(3)(iii), (v)-(vi), and also sets forth other

[3] The FWS's regulation governing African elephants extends the Antique Exception to ivory articles made from the tusks of African elephants. *See* 50 C.F.R. § 17.40(e)(1), (3), (9).

criteria based on the object's composition and provenance, *see id.* § 17.40(e)(3). By contrast, the State Ivory Law contains no "de minimis" exception for ivory articles made from the tusks of African elephants.

These federal exceptions make the ESA's prohibition on the sale of ivory and horn products narrower than that of the State Ivory Law in two respects: (1) the state law does not exempt antiques that are more than twenty percent ivory or horn by volume, while the ESA's Antique Exception exempts all qualifying antiques; and (2) the state law does not have the federal law's de minimis exception for ivory articles made from the tusks of African elephants. As explained below, however, the federal and state restrictions are able to operate without conflict because DEC does not apply the State Ivory Law to prohibit any imports, exports, or interstate or foreign sales that are permitted under the federal exceptions.

3. The ESA's narrow preemption of state law

The ESA contains an express preemption provision that addresses "conflicts between federal and state laws." 16 U.S.C. § 1535(f) (capitalization omitted). That provision states, in relevant part:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate and 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.

Id. (emphasis added).

The next sentence of § 1535(f) clarifies that the ESA "shall not otherwise be construed to void any State law which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife." *Id.* And the last sentence provides that, for "[a]ny State law or regulation respecting the taking of an endangered or threatened species"—which is not at issue here—the state law "may be more restrictive" than federal law, "but not less restrictive than the prohibitions so defined." *Id.*

Because, as explained above, the ESA and its implementing regulations narrowly permit certain interstate or foreign sales of ivory or horn products, DEC has complied with the statute's directive that state regulations not "prohibit what is authorized" under federal law, *id.*, by clarifying that it does not deny licenses or permits for the *interstate or foreign* sales of federally authorized products, even if they may not be sold within New York under the State Ivory Law. (A. 18.) *See also FAQ*, *supra*, at 6.

As a result, sellers in New York may obtain a DEC license to sell any ivory or horn product permitted under federal law to *out-of-state* buyers. Similarly, buyers in New York may purchase any ivory or horn product permitted under federal law from *out-of-state* sellers. DEC enforces the State Ivory Law's broader restrictions only as to purely *intrastate* sales of ivory or horn products—that is, commercial activity "conducted wholly within New York State." *Id.*

B. Procedural History

Plaintiffs—the Art and Antique Dealers League of America, Inc. and the National Art and Antique Dealers Association of America, Inc.—are two trade organizations comprising fine art and antique dealers, galleries, and other businesses. (*See* A. 57, 61-62, 67-68.) In March 2018, plaintiffs filed this action against defendant Basil Seggos, the DEC Commissioner, asserting that (1) the ESA and its implementing regulations preempted the State Ivory Law, and that (2) the First Amendment prohibited the Display Restriction in their DEC-issued licenses.[4] (ECF

[4] In July 2018, the district court permitted the Humane Society of the United States, Center for Biological Diversity, National Resources

(*continued on the next page*)

No. 1.[5]) Plaintiffs subsequently amended the complaint to cure certain standing deficiencies and to clarify that their preemption challenge was limited to the State Ivory Law's application to purely *intrastate* sales. (A. 18-19, 58, 88; *see also* ECF Nos. 50-58, 60-61.)

1. The district court dismisses plaintiffs' preemption claim

In August 2019, the district court granted the State's and intervenors' motions to dismiss plaintiffs' preemption claim and denied plaintiffs' cross-motion for summary judgment. (A. 15.) As relevant here, the court concluded that neither express nor conflict preemption applied.[6] (A. 20-28.)

On express preemption, the court explained that, by its "plain terms," the ESA's preemption clause applies only to state laws regulating "the importation or exportation" of endangered or threatened species and their

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Defense Council, Inc., and Wildlife Conservation Society to intervene as defendants. (A. 4, 38.)

[5] Unless otherwise indicated, citations to "ECF No." refer to the docket entries for No. 18-cv-2504 (S.D.N.Y.).

[6] Although plaintiffs also relied on field preemption below, they have abandoned that basis for preemption on appeal. *See* Br. for Appellant (Br.) at 15 n.7.

sale in "interstate or foreign commerce," and thus does not apply to the State Ivory Law's prohibitions on *intrastate* sales of ivory. (A. 22 (emphasis omitted).) The court rejected plaintiffs' contention that the ESA preempts any state law that *affects* interstate or foreign sales of ivory products, noting that "the plain wording of the [preemption] clause" did not include any such effects-based language. (*See* A. 21 (quoting *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 594 (2011); *see also* A. 23-24.)

The district court further concluded that conflict preemption is inapplicable. (*See* A. 27-29.) As the court explained, that doctrine applies when "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (A. 27 (quoting *Coalition for Competitive Elec. v. Zibelman,* 906 F.3d 41, 49 (2d Cir. 2018)).) The district court found no impossibility here because "DEC will not deny permits for interstate or foreign commerce in ivory" permitted under federal law (A. 27); thus, plaintiffs can comply with the State Ivory Law for intrastate sales while making interstate or foreign sales authorized by the ESA and its implementing regulations. The court further concluded that any indirect effect on interstate or foreign commerce—even if

proven—did not rise to the level of "undermin[ing] or obstruct[ing] the federal regulatory scheme" established by the ESA. (A. 28.)

2. The district court enters summary judgment in defendant's favor on plaintiffs' First Amendment claim

In March 2021, following discovery, the district court granted summary judgment to the State and intervenors on plaintiffs' First Amendment challenge to the Display Restriction in their DEC-issued licenses. (A. 35.)

As a threshold matter, the district court rejected plaintiffs' argument that the Display Restriction should be subject to strict scrutiny. (*See* A. 40.) The district court then held that the Display Restriction amply satisfies intermediate scrutiny under *Central Hudson*. Upon reviewing the parties' evidence, the court concluded that the record established a reasonable fit between the Display Restriction and the State's substantial interest in "halting the illegal sale of ivory within its borders"—the only prong of the *Central Hudson* test in dispute. (A. 42.) Specifically, the court found that the Display Restriction is "narrowly tailored to serve New York's interest" because it "reduces the opportunity for, and temptation to engage in," the illegal sale of items that are prohibited under the

State Ivory Law while simultaneously providing "alternative avenues to market ivory permitted for sale only interstate or internationally"—such as allowing these items to be displayed in print advertisements, catalogs, and websites. (A. 42-43.)

The district court rejected plaintiffs' argument that the State could have achieved its objectives just as well by "Segregation and Labeling"—i.e., physically displaying ivory articles that are permitted only for interstate or foreign sales with a label stating that restriction. The court concluded that the State had proffered sufficient evidence showing that this alternative would not be sufficient to deter illegal sales because "it still allows the seller, the possible buyer and the prohibited ivory to be together in one place" within New York. (A. 44.) As the court noted, the State was not required to "show that there is 'no conceivable alternative' to advance its goals." (A. 43 (quoting *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 265 (2d Cir. 2014)).)

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews de novo a district court's grant of a motion to dismiss. *Fink v. Time Warner Cable*, 714 F.3d 739, 740-41 (2d Cir. 2013). The Court likewise reviews de novo a district court's grant of a motion for summary judgment. *Jackson v. Federal Express*, 766 F.3d 189, 193-94 (2d Cir. 2014). On de novo review, this Court may affirm based on "any ground appearing in the record." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 49 (2d Cir. 2010).

This Court should affirm the district court's dismissal of plaintiffs' preemption claim and entry of summary judgment in favor of defendant on their First Amendment claim.

I. The district court correctly concluded that the ESA does not expressly or impliedly preempt the State Ivory Law's prohibitions on purely intrastate sales of ivory articles.[7] The ESA's preemption provision voids only state laws restricting commerce in endangered or threatened

[7] Because plaintiffs limit their arguments to New York's regulation of "antiques and art containing ivory" (*e.g.*, Br. at 23), the State will refer to only ivory articles below. The same analysis applies to the State Ivory Law's restrictions on items made from rhinoceros horn.

species that *both* (i) "appl[y] with respect to" imports, exports, or interstate or foreign commerce, *and* (ii) prohibit what federal law affirmatively authorizes. 16 U.S.C. § 1535(f). The State Ivory Law, as applied to intrastate commerce, satisfies neither prerequisite to preemption. The New York statute's restrictions on the sale of ivory articles within the State do not "appl[y] with respect to" interstate or foreign sales. And because the ESA and its implementing regulations (including the Antique and De Minimis Exceptions) do not affirmatively authorize *intrastate* sales of ivory articles, the State Ivory Law also does not prohibit anything that federal law permits.

For similar reasons, the State Ivory Law does not conflict with the ESA. Rather, as Congress intended, the federal and state laws operate in harmony, with federal law regulating interstate and foreign commerce in ivory, and state law restricting only purely intrastate commerce and interstate commerce not authorized by federal law. Such concurrent regulation is consistent with Congress's overt aim in the ESA to encourage cooperative federal-state regulation over trade in endangered and threatened species.

II. The district court properly held that the Display Restriction comports with the First Amendment. As a threshold matter, the court correctly applied binding circuit precedent to conclude that the commercial speech restriction here is subject at most to intermediate scrutiny under *Central Hudson*. *See Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2717 (2020). The court also correctly concluded that the Display Restriction satisfies the *Central Hudson* test. Because plaintiffs concede that the restriction directly advances the State's substantial interest in preventing the illegal intra-state sale of ivory, the only issue on appeal is whether the restriction has a reasonable fit with that substantial interest. It does.

The Display Restriction prevents the particularly risky situation where a New York-based seller and an ivory product are all physically present at the same time and in the same place as an out-of-state or foreign purchaser who has traveled into New York to inspect the product. That confluence of circumstances creates both the opportunity and the temptation for the interested parties to immediately consummate an unlawful intrastate sale. By contrast, the Display Restriction does not prevent sellers from conveying information about their ivory products by

any other means, including in print or online advertisements both within and outside of New York, and by arranging for physical displays of their products outside of New York. The Display Restriction thus does not "burden substantially more speech than is necessary to further the government's legitimate interests." *See Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94, 104 (2d Cir. 2010).

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' PREEMPTION CLAIM

The ESA does not expressly or impliedly preempt the New York State Ivory Law as applied to purely intrastate sales. As a threshold matter, the presumption against preemption applies with "particular force" here because "Congress has legislated in a field traditionally occupied by the States. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). The Supreme Court has long acknowledged that the conservation of wildlife "has always been treated as within the proper domain of the police

power" of the States. *Lawton v. Steele*, 152 U.S. 133, 138 (1894).[8] The 2014 State Ivory Law is just such a traditional exercise of New York's police power, following in the footsteps of New York's endangered species law, which was enacted in 1972, one year *before* the passage of the federal ESA, *see* Ch. 664, § 2, 1972 N.Y. Laws at 2335 (codified at ECL § 11-0535). Moreover, in enacting the ESA, Congress went out of its way to direct federal agencies to "cooperate to the maximum extent practicable with the States" to promote the conservation of wildlife. 16 U.S.C. § 1535(a). Against this backdrop, the district court correctly concluded that Congress did not supersede New York's authority to exercise its "historic police powers" to restrict the purely intrastate sales of ivory products. *See Altria Grp., Inc.*, 555 U.S. at 77 (quotation marks omitted).

[8] *See also People ex rel. Silz v. Hesterberg*, 211 U.S. 31, 37, 44 (1908) (upholding New York's regulation prohibiting possession of certain imported game); *A.E. Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 190 (1970) ("[I]t is almost axiomatic that wildlife conservation has been a matter traditionally left to the States.").

A. The ESA Does Not Expressly Preempt New York State's Regulation of Intrastate Sales of Ivory.

1. The ESA preempts only conflicting state regulation of interstate and foreign commerce, not state regulation of intrastate sales.

To determine whether a federal statute expressly preempts state law, courts "focus on the plain wording of the [statute], which necessarily contains the best evidence of Congress'[s] preemptive intent." *Chamber of Com. of U.S. v. Whiting*, 563 US. 582, 594 (2011) (quotation marks omitted); *see also Air Transp. Ass'n of Am. v. Cuomo*, 520 F.3d 218, 221 (2d Cir. 2008). The district court correctly concluded here that the ESA does not expressly preempt the State Ivory Law, as applied to purely intrastate sales. (*See* A. 21-25.)

That conclusion follows from two closely related features of the ESA and its preemption provision. First, § 1535(f) preempts state laws governing commerce in endangered or threatened species only if they "appl[y] with respect to the importation or exportation of, or interstate or foreign commerce in" such species. 16 U.S.C. § 1535(f). This language does not include state laws' application to *intrastate* sales—an omission that is particularly conspicuous given that Congress went out of its way to identify by name four other types of non-intrastate commerce (imports,

exports, and interstate and foreign sales). *See Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 232-33 (2011) (applying *expressio unius* canon to construe statute's preemptive scope). And Congress made its focus on these non-intrastate transactions clear by using the phrase "applies with respect to," since the word "apply" denotes "put[ting] to use with a *particular* subject matter," *Black's Law Dictionary*, s.v. *apply* (11th ed. 2019) (Westlaw) (emphasis added)—i.e., the four types of commerce specifically listed as triggering preemption under § 1535(f). Thus, the State Ivory Law's prohibitions on intrastate commerce in ivory articles does not fall under § 1535(f)'s preemptive scope.

Second, and relatedly, preemption under § 1535(f) is limited to more restrictive state laws that "prohibit what is authorized pursuant to an exemption or permit" under the ESA and its implementing regulations. 16 U.S.C. § 1535(f). But the only applicable exemptions here are the Antique Exception and the De Minimis Exception—both of which authorize only certain interstate or foreign sales, not intrastate sales. The limited scope of this authorization follows directly from the narrow prohibitions to which these exceptions apply. As explained above (at 7), because ivory articles are derived from endangered or threatened species

taken outside of the United States, the applicable prohibitions in § 1538(a) are limited to imports, exports, and interstate or foreign sales of such products. Intrastate sales of such products are not addressed by § 1538(a). It follows then that the limited exemptions in the Antique Exception and the De Minimis Exception also do not address intrastate sales; instead, these exceptions allow only what § 1538(a) would otherwise prohibit, which are certain interstate and foreign sales.

The De Minimis Exception expressly recognizes its narrow scope. Under that exception, "items containing de minimis quantities of ivory may be sold or offered for sale in *interstate or foreign* commerce." 50 C.F.R. § 17.40(e)(3) (emphasis added). In promulgating this exception, FWS repeatedly emphasized that the regulation would "not have an impact on intrastate commerce." Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (*Loxodonta africana*), 81 Fed Reg. 36,388, 36,412 (June 6, 2016); *see also id.* at 36,416 ("The final rule does not impact intrastate (within a State), commerce . . . ."); *id.* at 36,407 ("Businesses will not be prohibited by the final rule from selling raw or worked ivory within the State in which they are located, unless prohibited under State law.").

Because the De Minimis and Antique Exceptions thus authorize only interstate and foreign sales of qualifying ivory products, and do not authorize intrastate sales, the State Ivory Law's application to purely intrastate sales does not prohibit any transaction that would be authorized under the ESA and its implementing regulations.

The ESA's focus on interstate and foreign sales rather than intrastate sales was previously recognized by this Court in *Cresenzi Bird Importers, Inc. v. New York*, 831 F.2d 410 (2d Cir.) (per curiam), *aff'g* 658 F. Supp. 1441 (S.D.N.Y. 1987). That case rejected a preemption challenge to a similar New York statute. The plaintiffs argued that the ESA preempted New York's Wild Bird Law, which prohibited the sale of wild birds "within the state of New York" but did "not ban or limit the importation of wild birds into New York" or "prevent a New York importer from making sales to out-of-state purchasers." *Cresenzi Bird Importers, Inc. v. New York*, 658 F. Supp. 1441, 1443-44 (S.D.N.Y. 1987). The district court found no preemption under the ESA. *Id.* at 1445-46. Among other things, the court observed that the limited effect of preemption under the ESA was to prevent States from "interfer[ing] with interstate shipments of products." *Id.* at 1444. But Congress deliberately left "the states free to

protect wildlife by restricting sales of endangered species within their jurisdiction." *Id.*; *see also id.* ("States could ban local retail sales regardless of the origin of the product."). This Court summarily affirmed for "substantially" the same reasons. *See Cresenzi Bird Importers, Inc.*, 831 F.2d at 410.

The legislative history of the ESA further supports the conclusion that, for ivory articles, the statute's preemptive effect is limited to conflicting state regulation of interstate and foreign sales. In the hearings before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, members of Congress extensively discussed the intended effect of the ESA's preemption clause on then-existing state statutes, such as New York's Mason Law, which prohibited the sale of products made from nonnative species and species not listed for federal protection.[9] In so doing, the representatives expressly indicated that States should be permitted to ban local retail sales, so long as they did not interfere with interstate or foreign shipments of products. *See, e.g.*,

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[9] *See Endangered Species: Hearings Before the Subcomm. on Fisheries & Wildlife Conservation & the Env't of the Comm. on Merchant Marine & Fisheries*, 93rd Cong. 353-362 (1973) (hereinafter cited as "*Endangered Species Hearings*").

Endangered Species Hearings, at 358-59 (comments of Rep. Bob Eckhardt (Texas) (federal law should control "sale across State lines" but "not preempt New York from making any law it wants to with respect to intra-state sales, even though it may be to a business affecting commerce")). Following the hearings, the official House report clarified: "laws already passed in States such as New York, California and Hawaii, which list additional species or prohibit such activities as sales within their jurisdiction would remain unaffected." H.R. Rep. No. 93-412, at 14 (1973). The report further elaborated:

> The question of preemption of state laws was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the 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 the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation, or interstate commerce; in any such case the State could not override the Federal action. In every other respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired.

Id. at 7-8. These explanations in the legislative history unequivocally confirm that Congress did not intend to preempt the application of state regulations, like the State Ivory Law, to intrastate sales.

2. Plaintiffs' contrary arguments are meritless.

Plaintiffs make several arguments in support of their claim that the ESA expressly preempts the State Ivory Law. None of their arguments have merit.

First, plaintiffs contend (Br. at 25-28) that the ESA's express preemption clause must be broadly construed to void any state law that *affects* interstate or foreign commerce, including restrictions on purely intrastate sales. But when Congress intends to extend a statute to conduct affecting interstate or foreign commerce, it knows how to do so, and says so expressly. *See, e.g.*, 29 U.S.C. § 651(b)(3) (authorizing the Secretary of Labor to "set mandatory occupational safety and health standards" applicable to any "businesses affecting interstate commerce"); 42 U.S.C. § 2000a(b) (prohibiting discrimination in all "[e]stablishments affecting interstate commerce"). Such language is conspicuously missing from § 1535(f). Instead, the ESA's preemption provision is explicitly limited to any state law that "applies with respect to the importation or

exportation of, or interstate or foreign commerce in, endangered species or threatened species." 16 U.S.C. § 1535(f). For reasons already explained (at 21-22) the State Ivory Law's prohibition of certain intrastate sales does not "appl[y] with respect to" imports, exports, or interstate or foreign commerce; instead, it applies with respect to intrastate commerce.

Second, plaintiffs misplace their reliance (Br. at 25-27) on *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008), which found preemption based on a statute with materially different language. The statute in that case precluded States from enacting any regulation "*related to* a price, route, or service of any motor carrier." *Id.* at 368 (emphasis added) (quoting 49 U.S.C. § 14501(c)(1)). But the phrase "related to" has a unique provenance in federal preemption. This specific phrase appears in many federal preemption provisions—including, most notably, section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a)—and the Supreme Court has long recognized that this phrase is "deliberately expansive," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987), and must be "expansively applied," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990); *see also Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (listing many examples).

Rowe referred to this accepted understanding of "related to" to conclude that Congress's "repetition of the same language" evinced its intent to broadly preempt state laws. 552 U.S. at 370*; see also Altria Grp., Inc.*, 555 U.S. at 85 ("the phrase 'relating to' indicates Congress'[s] intent to preempt a large area of state law"). Here, by contrast, Congress did not use the familiar phrase "related to," but instead, "applies with respect to," which carries no such settled meaning indicating Congress's intent to broadly preempt state law.

Third, the cases cited by plaintiffs (Br. at 27-28) that directly invoke the ESA's preemption clause are easily distinguishable. Each of the cited cases addressed California's prohibition on the *import* or *interstate sale* of threatened species. In *Man Hing Ivory and Imports, Inc. v. Deukmejian*, for example, a "wholesale importer of African elephant ivory products" challenged California's ban on the import and trade of elephant parts. 702 F.2d 760, 761 (9th Cir. 1983) (citing Cal. Penal Code § 653*o*). The other two decisions likewise concerned challenges to the same California law prohibiting interstate sales of animal products. *See H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758, 758, 759 (9th Cir. 1983) (per curiam) (Texas company sought to sell elephant-hide boots in

California); *Fouke Co. v. Brown*, 463 F. Supp. 1142, 1143-44 (E.D. Cal. 1979) (Delaware company sought to sell alligator hides to California fabricators).

Those cases are further distinguishable because, unlike plaintiffs here, the plaintiffs in those cases all possessed federal permits or licenses expressly authorizing them to engage in the interstate or foreign commerce at issue. *See Man Hing Ivory and Imports, Inc.*, 702 F.2d at 762, 764-65; *H.J. Justin & Sons, Inc. v. Brown*, 519 F. Supp. 1383, 1390 (E.D. Cal. 1981), *aff'd in part and rev'd in part*, 702 F.2d 758 (9th Cir. 1983); *Fouke Co.*, 463 F. Supp. at 1144. California's law thus squarely triggered § 1535(f)'s preemption language, which voids any state law that "prohibit[s] what is authorized pursuant to an exemption or permit" under the ESA. *See* 16 U.S.C. § 1535(f).

Finally, plaintiffs' arguments about the ESA's "savings clause" (Br. at 28-30) miss the mark. The language cited by plaintiffs, which also appears in § 1535(f), states, in relevant part: "[t]his chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife." 16 U.S.C. § 1535(f).

According to plaintiffs, this language demonstrates that Congress intended to leave States only the power to regulate "migratory, resident, or introduced" species, while reserving for federal power alone any regulation over "out-of-state and foreign species" (Br. at 29).

There is no basis for such an inference. The mere fact that the ESA expressly recognizes one area of state authority does not imply federal preemption of all other areas. Such an implication would violate both the presumption against preemption of traditional state powers, *see Altria Grp., Inc.,* 555 U.S. at 77, as well as the settled principle that "preemption will not lie unless it is 'the *clear and manifest* purpose of Congress,'" *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

There is also no need to infer federal preemption when Congress spoke clearly in the first sentence of § 1535(f) and, for the reasons already explained, expressly limited preemption of state laws restricting commerce in endangered or threatened species to regulations that both (1) "appl[y] with respect to" interstate or foreign commerce, and (2) prohibit interstate or foreign commerce that is authorized under the ESA and its

implementing regulations. It is this language that matters for purposes of express preemption, not any distinction between in-state and out-of-state species. *See Cresenzi Bird Importers, Inc.*, 658 F. Supp. at 1445-46 (analyzing text of § 1535(f) and its legislative history). Because the State Ivory Law's prohibition of certain *intrastate* sales of ivory articles does not prohibit what federal law affirmatively authorizes, the ESA's preemption provision is inapplicable here.

B. The State Ivory Law Does Not Conflict with the ESA or Its Implementing Regulations.

The district court also correctly concluded that conflict preemption does not apply to the State Ivory Law. That doctrine applies only where "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quotation marks omitted). Here, plaintiffs do not argue impossibility. And they have not shown that the State Ivory Law's prohibition of certain intrastate sales frustrates Congress's "purposes and objectives" in the ESA.

That conclusion follows from the fact that, as discussed, the ESA's regulation of ivory articles is limited to their import, export, and interstate or foreign sale. There is thus no conflict at all: the ESA neither authorizes nor prohibits intrastate sales of such items; and, for its part, DEC does not deny licenses for any interstate or foreign purchases or sales that are permitted under federal law. Because the federal and state schemes can work in tandem, plaintiffs have failed to identify any conflict "so direct and positive that the two acts cannot be reconciled or consistently stand together." *See Marentette v. Abbott Lab'ys, Inc.*, 886 F.3d 112, 117 (2d Cir. 2018) (quotation marks omitted).

The distinct spheres of federal and state law in this area distinguish this case from *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). That case found that Congress preempted a state law that directly interfered with foreign policy by withholding state contracts from entities doing business with Burma. *Id.* at 366-67, 373-74. But contrary to plaintiffs' assertion (Br. at 32-33), the State Ivory Law cannot plausibly interfere with "foreign affairs" or affect trade with foreign nations when DEC does not apply the law to ban any federally authorized imports, exports, or sales of ivory in foreign commerce.

Plaintiffs wrongly contend that the State Ivory Law conflicts with the ESA because it "functionally" prohibits members from engaging in interstate and foreign commerce in ivory. *See id.* at 24, 33. There is simply no such barrier. Indeed, plaintiffs' own evidence demonstrates that their members continue to sell ivory articles to out-of-state buyers. (*See, e.g.*, A. 127 (Blumka Dep. Tr. 24:22-24) (testifying that Blumka Galleries currently deals items "composed in whole or in part in ivory")); A. 131 (Blumka Dep. Tr. 40:2-7 (testifying that plaintiffs' members located in New York continue to sell ivory to customers located outside of New York)).) Instead, what plaintiffs complain about is that the State Ivory Law makes out-of-state or foreign sales marginally more difficult by preventing purchasers from traveling into New York and physically inspecting plaintiffs' ivory products. Br. at 24-25. But that asserted burden is a consequence of the Display Restriction in DEC's licenses, not of the State Ivory Law's prohibition of certain intrastate sales that plaintiffs seek to preempt here.

In any event, plaintiffs have failed to show that any such impediment constitutes an obstacle to a *federal-law* objective. Contrary to plaintiffs' characterization, the ESA was not enacted to promote the sale of

ivory or horn, nor was its object to "provid[e] consumers with a 'range of choices' in select ivory products" (Br. at 31-32). Rather, the purpose of the ESA was to conserve endangered species by largely *banning* their trade. *See* 16 U.S.C. § 1531(b)-(c) (setting forth the ESA's policy and purposes); *id.* § 1538(a) (generally prohibiting commerce in endangered species). Although the statute and its implementing regulations contain narrow exceptions to this ban, these exceptions reflect, at most, the desire to "balance the burden of regulation with conservation." 81 Fed. Reg. at 36,399. Nothing in the exceptions suggests that Congress or the FWS had as a primary focus the goal of affirmatively promoting the ivory trade or minimizing transaction costs for vendors of ivory products. Thus, any inconvenience that the State Ivory Law may impose on vendors seeking to sell ivory articles outside of New York or abroad does not conflict with any cognizable objective in the ESA.

More fundamentally, plaintiffs' argument disregards the fact that, in enacting the ESA, Congress plainly intended the regulation of endangered and threatened species (including their trade) to be subject to *concurrent* state and federal regulation. The legislative history confirms, in particular, that Congress did not intend to disturb more stringent state

laws—including sales bans—so long as they did not block any federally authorized interstate or foreign sales. See *supra* at 25-27. Congress's awareness and acceptance of such concurrent state laws when it enacted the ESA thus confirm that it did not consider any incidental effects of these laws on interstate or foreign commerce to be an obstacle to the ESA's federal objectives. *See Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 516 (1989) (incidental effect on interstate commerce is not sufficient to preempt state regulation in dual regulatory scheme); *see also Wyeth v. Levine*, 555 U.S. 555, 575 (2009) (case for preemption is "particularly weak" where Congress is aware of concurrent state and federal regulation and has "decided to stand by both concepts and to tolerate whatever tension there [is] between them" (quotation marks omitted)).

POINT II

NEW YORK STATE'S RESTRICTION ON THE PHYSICAL DISPLAY OF IVORY ARTICLES IN NEW YORK COMPORTS WITH THE FIRST AMENDMENT

The district court correctly entered summary judgment in favor of DEC on plaintiffs' First Amendment challenge to the Display Restriction. Even assuming the Display Restriction regulates plaintiffs' commercial speech, binding circuit precedent dictates that, at most, intermediate scrutiny applies. *See Vugo*, 931 F.3d at 42. Here, the Display Restriction amply satisfies the test set forth in *Central Hudson*, which requires the court to assess "whether (1) the expression is protected by the First Amendment; (2) the asserted government interest is substantial; (3) the regulation directly advances the government interest asserted; and (4) the regulation is no more extensive than necessary to serve that interest." *Vugo*, 931 F.3d at 44 (citing *Central Hudson*, 447 U.S. at 566). Plaintiffs concede that the State has a substantial interest in stopping the illegal sale of ivory within its borders and that the Display Restriction directly advances this interest. Br. at 42. And the record further establishes that prohibiting the physical display of items that may not be bought or sold

in New York has a reasonable fit with New York's substantial interest in preventing such prohibited sales.

A. The District Court Properly Concluded That the Display Restriction Is Not Subject to Strict Scrutiny.

As a threshold matter, the district court correctly rejected plaintiffs' contention that the Display Restriction is subject to strict scrutiny. (*See* A. 40-41.) Plaintiffs acknowledge that the Display Restriction regulates commercial speech. Br. at 35. Their argument that strict scrutiny applies (*id.* at 37-41) is thus squarely foreclosed by this Court's recent decision in *Vugo*, in which this Court explicitly adhered to "*Central Hudson*'s intermediate scrutiny test to commercial speech restrictions," 931 F.3d at 50, including those that are "content-based," *id.* at 49.

Plaintiffs mischaracterize *Vugo* when they contend that "this Court recognized that some content-based commercial speech restrictions may be subject to strict scrutiny" (Br. at 38). The footnote that they cite said no such thing. Instead, that footnote engaged in alternative reasoning to conclude that, "*even if* strict scrutiny applied to *some* commercial speech restrictions," it would not apply to the policy challenged in *Vugo* (a New York City advertising ban). 931 F.3d at 50 n.7 (emphasis added). *Vugo*'s

actual holding, however, made clear that *Central Hudson*'s intermediate scrutiny test remains the applicable level of scrutiny for commercial speech regulations. *Id.* at 50.

Vugo also disposes of plaintiffs' attempt to marshal Supreme Court precedent in their favor. *See* Br. at 39-41. *Vugo* directly engaged with the argument that *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), required a heightened level of scrutiny for commercial speech and rejected that interpretation, concluding that "*Sorrell* leaves the *Central Hudson* regime in place." 931 F.3d at 50; *see also Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (commercial speech restrictions remain "subject to the relaxed scrutiny outlined in *Central Hudson*"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504-08 (1996) (analyzing Rhode Island's prohibition against advertising retail prices of alcoholic beverages under *Central Hudson*). To the extent that *Sorrell* did allude to a more skeptical review of the Vermont law at issue, that additional analysis was a result of the Vermont statute's unusual features. As this Court has explained, the law in *Sorrell* was *both* "content- and speaker-based in that it targeted a single category of speech by a single category of speaker: marketing carried out by pharmaceutical manufacturers." *Vugo*, 931 F.3d at 50 n.7.

Indeed, *Sorrell* emphasized that those features meant that Vermont's law went "even beyond mere content discrimination, to actual viewpoint discrimination." 564 U.S. at 565 (quotation marks omitted).

Here, by contrast, the Display Restriction does not engage in such impermissible discrimination. It applies equally to all sellers in New York.[10] And it even-handedly restricts the physical display of ivory articles that are prohibited for sale in New York, regardless of the characteristics of the product, the intended target of the advertisement, or the underlying views of the seller. Nor does the Display Restriction seek to keep "out-of-state and international buyers of antiques and artwork containing ivory from receiving information that could lead to a legal purchase." *See* Br. at 41 (citing *44 Liquormart*, 517 U.S. at 503). Quite the opposite: DEC expressly permits licensees to disseminate information about their

[10] Plaintiffs' argument that "the Display Restriction singles out licensees" (Br. at 39) makes no sense. Because the Display Restriction is a license condition, it necessarily applies only to licensees. Equally meritless is plaintiffs' contention that the Display Restriction seeks to suppress the viewpoint that "antiques containing more than 20% ivory can be sold." *Id.* at 40. Sellers are free to advertise such antiques—and thereby express such a viewpoint—through any means other than physical display in New York.

products online and in print. (*See* A. 100.) There is thus no basis to apply strict scrutiny here.

B. The Display Restriction Satisfies the *Central Hudson* Test.

The district court correctly concluded that the Display Restriction complies with the First Amendment under *Central Hudson*. Because plaintiffs concede that the restriction directly advances a substantial state interest (Br. at 42), only the final factor of the *Central Hudson* test is in dispute. Under that factor, the State must establish that "the regulation [does] not burden substantially more speech than is necessary to further the government's legitimate interests." *Clear Channel*, 594 F.3d at 104. That showing requires "a 'fit' between the legislature's ends and the means chosen to accomplish those ends, . . . that is not necessarily perfect, but reasonable." *Board of Trs. v. Fox*, 492 U.S. 469, 480 (1989).

Here, DEC's uncontroverted evidence amply demonstrates a "reasonable" fit between the Display Restriction and the State's goal of curtailing the illegal sale of ivory goods within New York.[11] As explained

[11] Plaintiffs did not dispute any of the facts in DEC's Rule 56.1 counterstatement. (*See* A. 185-186.) And they argue on appeal only that

(*continued on the next page*)

in the declaration of Captain Anthony Paluch, an experienced DEC investigative officer, the Display Restriction meaningfully prevents unlawful intrastate sales of ivory articles by removing the product itself from interactions between a seller and a prospective buyer. (A. 144-145.) That testimony accords with common sense. Absent the Display Restriction, nothing would prevent all of the prerequisites for an unlawful intrastate sale from being physically present in the same New York location at the same time: a willing seller, a buyer with available funds, and the item itself. As the district court correctly recognized, removing the item from this transaction "reduces the opportunity for, and temptation to engage in, a quick, illegal sale." (A. 42.) The record evidence supports this conclusion: Captain Paluch's declaration referred not only to undercover investigations in which physically displayed ivory products were in fact sold within New York (A. 140-141, 146-148), but also to reports and studies showing that "the amount of commerce in ivory in New York State has fallen dramatically" since the enactment of the State Ivory Law and the Display Restriction (A. 145), with the number of items displayed

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DEC's evidence is insufficient—as a matter of law—to satisfy its burden of justifying the Display Restriction. *See* Br. at 45.

for sale falling drastically from over 11,000 in 2006 to 224 in 2016 (A. 185).

At the same time, the Display Restriction "leave[s] open ample channels of communication." *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001). Sellers are free to propose for sale, and consumers to receive information about, any ivory product that is permitted for sale under federal law, so long as they do not physically display (or sell) that item in New York. That information may be conveyed in any manner—in print or online—and may freely be transmitted both within and outside of New York, subject only to the requirement that it include a disclaimer that the item may not be physically purchased in New York. And although sellers may not physically display ivory products within New York, nothing prevents them from physically displaying those products outside New York—a particularly appropriate channel of communication given that federal law authorizes only interstate or foreign sales of such products. Plaintiffs' own evidence shows that New York-based sellers can and do arrange for the physical inspection of items outside of New York State prior to their sale. (*See, e.g.*, A. 127 (Blumka Dep. Tr. 25:8-13).)

The Supreme Court upheld an analogous display restriction in *Lorillard*, 533 U.S. at 569-70. The Massachusetts regulation at issue in that case required all tobacco products to be displayed in locations accessible only by salespersons and it prohibited self-service displays. *Id.* at 567. On the assumption that tobacco sellers had "a cognizable speech interest in a particular means of displaying their products," the Court found no First Amendment violation because Massachusetts's display restriction was "an appropriately narrow means" of advancing the State's substantial interest "in preventing access to tobacco products by minors." *Id.* at 569. In particular, as here, Massachusetts's display restriction prevented perspective customers from physically interacting with tobacco products in a way that would "present an opportunity for access without the proper age verification required by law." *Id.* At the same time, the restriction "le[ft] open ample channels of communication," including displays of "empty tobacco packaging." *Id.* at 569-70.

Plaintiffs' attempts to distinguish *Lorillard* are unpersuasive. They contend that the Display Restriction leaves "no viable alternative to conveying and receiving accurate information about the quality and authenticity of items containing ivory" because this information can "only

be gleaned through physical display and inspection of each item." Br. at 48 n.17. But, as explained, sellers remain free to convey information about their ivory products through any means other than physical display, and they remain free to arrange for physical inspections of their products outside of New York. Although out-of-state inspections may be less convenient for plaintiffs, any such burden is minimized here because, by definition, any lawful sale must ultimately take place across state lines or across national borders; the sale will thus necessarily have an out-of-state component even without the Display Restriction.

More fundamentally, *Lorillard* made clear that retailers do not have an unfettered First Amendment right to a particular "presentation of their products" when one method of engaging with prospective customers raises the risk of unlawful transactions. *See* 533 U.S. at 569-70. And here, as in *Lorillard*, particular physical interactions with the product at issue create the unique risk that the buyer and seller will consummate an unlawful sale then and there. Plaintiffs' desire for convenience does not trump New York's substantial interest in preventing unlawful intrastate sales of ivory articles.

Plaintiffs' remaining arguments are meritless. *First*, they inaccurately claim (Br. at 46-47) that DEC justified the Display Restriction with only "a single anecdote" of an illegal sale. In fact, as explained above (at 42-43), the record here contains not only evidence of actual illegal sales, but also Captain Paluch's testimony about the broader experience of uniformed DEC officers, as well as reports and studies of the ivory market in New York and the impact of the State Ivory Law and Display Restriction.

Second, plaintiffs wrongly contend (Br. at 46-47) that DEC was required to justify the Display Restriction with empirical analysis "calculating the costs and benefits." As plaintiffs themselves concede *(id.* at 46), the Supreme Court has long recognized that no such empirical analysis is required, and that States may appropriately rely "solely on history, consensus, and simple common sense" to justify commercial speech regulations. *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 628 (1995) (quotation marks omitted). Nothing in the Court's jurisprudence requires the government to perform any specific analysis or to conduct any particular study.

Plaintiffs' reliance (Br. at 51) on *New York State Association of Realtors v. Shaffer*, 27 F.3d 834 (1994), is wholly misplaced. There, this Court invalidated New York's regulation prohibiting real estate solicitation in designated areas to prevent "blockbusting"—"a practice in which real estate brokers engage in frenzied solicitation practices that prey upon the racial and ethnic fears of persons residing in transitional neighborhoods as a means for increasing the volume of residential real estate transactions." *Id.* at 835-36; *see also id.* at 840. Although the Court concluded that the State's failure to empirically assess less restrictive alternatives was fatal to their assertion that the ban was narrowly tailored, the Court made clear that its holding was limited to the record at hand. *Id.* at 844 ("[O]ur decision today is a narrow one, limited solely to the record before us."). Specifically, the Court relied principally on the fact that the scope of the restriction was disproportionate "in light of the *degree* of the harm" demonstrated by the record. *Id.; see also id. at* 842-44 (observing that the State had adjudicated only "four complaints of racial steering in the last ten years" and zero cases against a licensed real estate broker). Here, by contrast, the record clearly establishes the magnitude of the State's asserted harm: prior to the enactment of the

State Ivory Law, New York City was "the primary market for the trade in ivory" in the United States, with "more than four times as many" ivory articles displayed for sale as the city with the next most significant ivory market. (A. 145.)

Third, plaintiffs incorrectly assert (Br. at 50-56) that the Display Restriction is invalid because their proposed alternative, which they call "Segregation and Labeling," would also satisfy the State's interests here. Under that alternative, ivory products could be physically displayed within New York so long as they are segregated from other items and labeled as not being available for intrastate sale. *Id.* at 44.

Plaintiffs' "Segregation and Labeling" proposal does not support invalidation of the Display Restriction for several reasons. For one, the Supreme Court has long held that *Central Hudson* does not require that "that there be no conceivable alternative" to the government's approach, *Fox*, 492 U.S. at 478, or that the regulation be "the least restrictive means" of advancing the state interest, *id.* at 469, 480. The "fit" inquiry instead turns on whether the State's regulation is "reasonable." *Id.* at 480. Thus, the mere existence of an alternative regulation does not automatically render the State's chosen method unconstitutional, so long as

its scope is "in proportion to the interest served." *Id.* (quotation marks omitted).

Here, for the reasons given above (at 41-45), the Display Restriction is appropriately tailored to serve the State's interest in prohibiting the unlawful sale of ivory in New York because it impedes the immediate consummation of such sales when a seller and interested buyer are physically present in the same location within the State. By contrast, DEC reasonably concluded that "Segregation and Labeling" would not effectively prevent such illegal sales.[12] As Captain Paluch explained, his experience "enforcing prohibitions on the sale of wildlife products generally, and enforcing the State Ivory Law specifically," has shown that

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[12] There is no merit to plaintiffs' argument that the State is required to show their proposed alternative would be wholly ineffective. *See* Br. at 50-56. Both the Supreme Court and this Court have observed that the fourth prong of the *Central Hudson* test requires only that the government demonstrate a proffered alternative is less effective at furthering the asserted state interest. *See United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993) (requirement for narrow tailoring is "met if 'the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989))); *United States v. Caronia*, 703 F.3d 149, 168 (2d Cir. 2012) (holding that the government bears the burden of "demonstrating that the proposed alternatives are less effective" than the government's selected method).

"the presence of a label identifying objects as not for sale is not a reliable indicator that the seller intends to abide by the restriction on the label." (A. 146-147.)

Indeed, Captain Paluch attested that he made an undercover purchase of ivory under exactly such circumstances. (*See* A. 147, 162-163.) And, again, common sense supports this experience. Ivory products are high-cost, luxury items that have historically been in high demand in New York. *See* Sponsor's Mem., *supra*, at 7 (citing "high consumer demand for ivory and horn products in New York"). An out-of-state or foreign purchaser who is willing to travel into New York to physically inspect an ivory product has already manifested an unusually keen interest in making a purchase. And if a willing seller, a particularly eager buyer, and the ivory product itself are all in one place—literally within a hand's reach—it is reasonable to be concerned that a mere disclaimer, without any enforcer being present, would be insufficient to prevent an unlawful intrastate sale.

On the other hand, plaintiffs have not adduced any evidence to show that "Segregation and Labeling" would be effective at deterring unlawful intrastate sales. As an initial matter, this Court should disregard

two of the three declarations that plaintiffs have submitted in support of their motion for summary judgment because plaintiffs did not list these witnesses—Scott Defrin and Mark Schaffer—in their initial disclosures under Rule 26(a) of the Federal Rules of Civil Procedure or subsequently disclose these witnesses pursuant to Rule 26(e).[13] *See* Fed. R. Civ. P. 37(c)(1); *see also Chamberlain v. City of White Plains*, 960 F.3d 100, 117 (2d Cir. 2020). But even if the Court were to consider these declarations, the result would be the same. Defrin's declaration does not even mention "Segregation and Labeling." (*See* A. 116-118.) And the two remaining declarations merely suggest "Segregation and Labeling" as an alternative without providing any concrete information about its efficacy in preventing illegal sales. (*See* A. 114 (Blumka Decl.); A. 120 (Schaffer Decl.).)

Finally, plaintiffs' cited authorities (Br. at 46-47, 50) lend no support for their First Amendment claim. The principal cases on which they rely all involved far more sweeping restrictions on commercial speech that courts found to lack adequate justification. *Central Hudson*, for example,

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[13] Defendant also sought to preclude these declarations below. The district court declined to reach this issue, holding instead that, "even if the declarations of Mr. Defrin and Mr. Schaffer are considered, they would not defeat Defendant's motion for summary judgment." (A. 36 n.1.)

addressed a blanket ban on advertisements promoting "the use of electricity." 447 U.S. at 558 (quotation marks omitted). The remaining cases likewise involved regulations either completely prohibiting speech or conditioning the plaintiff's right to speak at all on making certain disclosures.[14] When a government restriction on commercial speech is so sweeping at the outset, there is necessarily a broader range of less restrictive alternatives, and a government's failure to even acknowledge, let alone seriously consider, such alternatives will demonstrate the absence of a "reasonable fit" to a substantial state interest. *See, e.g.*, *Bad Frog Brewery, Inc.*, 134 F.3d at 101 (statewide ban of liquor label to protect children from vulgarity was "plainly excessive" where "numerous less intrusive alternatives" existed).

Here, by contrast, the Display Restriction is not an inherently sweeping one. It prevents only physical displays of ivory products within

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[14] *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002) (banning pharmacists from advertising compounded drugs); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 479 (1995) (prohibiting beer labels from displaying alcohol content); *Safelite Grp., Inc. v. Jepsen*, 764 F.3d 258, 260 (2d Cir. 2014) (prohibiting insurance companies and claims administrators from mentioning their affiliates unless they also named a competitor); *Bad Frog Brewery, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 101 (2d Cir. 1998) (banning liquor label containing vulgar gesture).

New York. Neither the State Ivory Law nor DEC otherwise bans the advertisement of ivory goods through any of the numerous other channels by which sellers may communicate information about these products. See *supra* at 43. When, as here, a State has carefully calibrated the commercial speech regulation to address the asserted harm, courts have long cautioned against judicial interference with the government's policy choices. *See, e.g.*, *Fox*, 492 U.S. at 478 ("we have been loath to second-guess the Government's judgment"); *Clear Channel*, 594 F.3d at 105 (courts must afford the state "considerable leeway . . . in determining the appropriate means to further a legitimate governmental interest" (quotation marks omitted)).[15]

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[15] *See Edge Broad. Co.*, 509 U.S. at 429-30 (ban on lottery advertising in States that do not conduct a state-run lottery is narrowly tailored because it "directly advances the governmental interest in enforcing the restriction in nonlottery States, while not interfering with the policy of lottery States"); *Alexander v. Cahill,* 598 F.3d 79, 103 (2d Cir. 2010) (ban on attorney advertisements targeting victims within thirty days of an accident is narrowly tailored where it "permits attorneys to advertise to the general public their expertise with personal injury or wrongful death claims"); *Anderson v. Treadwell,* 294 F.3d 453, 462 (2d Cir. 2002) (prohibition of real estate solicitation where resident has opted into cease-and-desist list is narrowly tailored because it is "precisely co-extensive with . . . the particular harm that it is designed to alleviate").

The district court thus properly concluded that DEC is entitled to summary judgment on plaintiffs' First Amendment claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court against plaintiffs' on their First Amendment claim and dismissing plaintiffs' preemption claim should be affirmed.

Dated: New York, New York
September 14, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,599 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*