No. 21-569

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE ART AND ANTIQUE DEALERS LEAGUE OF AMERICA, INC., THE NATIONAL ANTIQUE AND ART 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,
and
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
Honorable Lorna G. Schofield, District Judge

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Art and Antique Dealers League of America, Inc., a private nongovernmental party, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Pursuant to Federal Rule of Appellate Procedure 26.1, the National Antique and Art Dealers Association of America, Inc., a private nongovernmental party, states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF JURISDICTION

Pursuant to 28 U.S.C. §§ 1331, 1651, and 2201–02, the district court had original jurisdiction over this dispute arising under the United States Constitution. This appeal arises from the district court's August 14, 2019, dismissal of Plaintiffs-Appellants' preemption claim, App. 015, and the district court's March 5, 2021, grant of Defendants-Appellees' motion for summary judgment as to Plaintiffs-Appellants' First Amendment claim, App. 035. Plaintiffs-Appellants timely appealed both decisions on March 8, 2021. App. 046. This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the New York State Ivory Law is preempted by the federal Endangered Species Act and its implementing regulations.

2. Whether the New York State Department of Environmental Conservation's Display Restriction is subject to strict scrutiny under the First Amendment.

3. Whether the Display Restriction survives even intermediate scrutiny.

INTRODUCTION AND STATEMENT OF THE CASE

I. Introduction

Ivory has been an important medium for art, furniture, and jewelry for millennia. App. 119. Carvings of ivory have been found dating to prehistoric times. Ancient Egyptians and Phoenicians used ivory in masterful works of art and furniture, along with certain tools. Encyclopedia Britannica, *Ivory Carving* (2019).[1] Skilled western artisans continued using ivory from the Middle Ages through the Renaissance and Baroque periods to create objects depicting Biblical scenes and figures, *id*., with their 17th-19th century works serving more elaborate and decorative purposes. *See generally* Johanna Hecht, *Ivory and Boxwood Carvings, 1450-1800* (Heilbrunn Timeline of Art History) (Oct. 2008).[2]

Artistic use of ivory was not limited to western civilizations. Skillful ivory carving was also practiced in China as early as the Shang Dynasty in the 16th century BCE. Middle Eastern artisans used ivory for furniture, caskets, and pulpits during the time of Muhammad. Indian Hindus and Buddhists, indigenous Inuit, and native Africans have likewise used ivory in artistic carvings for centuries. *See* Encyclopedia Britannica, *Ivory Carving*.

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[1] *Available at* https://www.britannica.com/art/ivory-carving.
[2] *Available at* https://www.metmuseum.org/toah/hd/boxw/hd_boxw.htm.

It is evident then, that ivory has played a significant role in recording the history of art, religion, and human civilization. An unavoidable part of the history of ivory is how it was obtained, and the impact that its use has had on some animal species throughout the world. Just as unavoidable is the fact that attitudes toward conservation and animal harvesting have changed. Indeed, with greater international and domestic attention being given to endangered and threatened species throughout the world, elephant ivory and rhinoceros horn is no longer commonly available for use in making new goods.

In 1973, Congress enacted the Endangered Species Act ("ESA") to, among other things, restrict trade in products of endangered animals and, in some cases, threatened animals as well. *See* 16 U.S.C. § 1538. *See also* 16 U.S.C. § 1533(d). A few years later, Congress included a general exemption from the ESA's prohibitions for trade in antiques. 16 U.S.C. § 1539(h). Subsequently, the United States Fish and Wildlife Service implemented regulations governing trade in African elephant products, including antiques containing ivory. 50 C.F.R. § 17.40(e).

Recently, however, New York State and the New York State Department of Environmental Conservation took a different, far more restrictive approach. With 2014's passage of the New York State Ivory Law, N.Y. Envtl. Conserv. Law § 11-0535-a, and the Department's creation of license conditions limiting whether, and how, antiques containing ivory may be displayed, most such antiques are now

considered verboten and banned from being sold and displayed for sale within and from New York. These restrictions threaten the livelihoods and burden the constitutional rights of individuals and small businesses that trade in fine art and antiques.

New York's restrictive approach is foreclosed by the ESA, which expressly preempts state laws and regulations that "may effectively" prohibit activity authorized by a federal exemption or permit. 16 U.S.C. § 1535(f). This is precisely what the State Ivory Law and the Department's licensing regulations do. Federal law exempts the sale of antique ivory pieces from federal trade prohibitions. Disagreeing with federal law, New York seeks to withdraw the state from this interstate market and restrict how sellers advertise interstate and foreign sales. Thus, the State Ivory Law is preempted.

The Department's restriction on displaying antiques also violates the First Amendment to the U.S. Constitution. Because the Display Restriction targets commercial displays of antiques and art containing ivory, and prevents the Dealers from offering those items for sale and expressing the viewpoint that they are properly sold under federal law, the Restriction is subject to strict scrutiny. Even if intermediate scrutiny applies, the Display Restriction fails because it restricts more speech than is necessary to address the illegal ivory trade.

II. Statement of the Case

In this action, Plaintiffs-Appellants the Art and Antique Dealers League of America, Inc., and the National Antique and Art Dealers Association of America, Inc., (collectively "Dealers") challenge the State Ivory Law and the Department's license conditions as preempted by the Endangered Species Act and contrary to the U.S. Constitution's First Amendment. The district court dismissed the Dealers' preemption claim. *Art & Antique Dealers League of America, Inc. v. Seggos*, No. 18 Civ. 2504, 394 F. Supp. 3d 447 (S.D.N.Y. Aug. 14, 2019) (Schofield, J.) (App. 015). After discovery, the district court also granted summary judgment to the Department on the Dealers' First Amendment claim. *Art & Antique Dealers League of America, Inc. v. Seggos*, ___ F. Supp. 3d ___, 2021 WL 848196 (S.D.N.Y. Mar. 5, 2021) (Schofield, J.) (App. 035). This appeal followed.

A. Federal Regulation of Ivory and Antiques

Direct federal regulation of ivory products began in 1972 with the enactment of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361, *et seq.* (addressing the sale and distribution of walrus ivory, among other things).[3] The following year, the United States entered the Convention on International Trade in Endangered Species

[3] Before 1972, importation of any wildlife product, including ivory, procured illegally under the source country or state's laws was regulated by the Lacey Act. *See* 16 U.S.C. §§ 3371, *et seq*.

of Wild Fauna and Flora ("CITES"), an international agreement to prevent the extinction of animal and plant species by managing trade. CITES is not self-executing, however, so in 1973 Congress enacted the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*, to conserve endangered and threatened species. One method of conservation employed by the ESA is a general prohibition on the import, export, and trade in endangered species. 16 U.S.C. § 1538.

However, the ESA also creates several exemptions from the general prohibition on dealing in endangered species and the Fish and Wildlife Service's authority to regulate dealing in threatened species. *See* § 1539. Relevant here, the ESA exempts antiques that are: (1) "not less than 100 years of age;" (2) "composed in whole or in part of any endangered species or threatened species;" (3) not "repaired or modified with any part of any such species on or after December 28, 1973;" and (4) imported via an authorized port. § 1539(h)(1). Sellers of exempt antiques thus need not comply with federal permit requirements.

The ESA also expressly preempts state laws and regulations that apply to the "importation or exportation of, or interstate or foreign commerce in, endangered … or threatened species" to the extent that the state "may effectively … prohibit what is authorized pursuant to an exemption or permit" under the ESA. *See* § 1535(f). Congress thus precluded any state interference with any interstate and foreign commerce exempted from ESA regulation.

African and Asian elephants are listed as threatened and endangered, respectively, under the ESA.[4] Likewise, all living species of wild rhinoceros are listed under the ESA.[5] As noted, for those species listed as endangered, any import, export, and trade in them is generally prohibited. § 1538(a)(1). Trade in threatened species may be governed by regulation if necessary and advisable to the conservation of a particular species, except where Congress has exempted such trade from regulation. § 1533(d). *See* § 1539.

The U.S. Fish and Wildlife Service has issued a regulation under § 1533(d) governing trade in African elephants. *See* 50 C.F.R. § 17.40(e). That rule, however, is qualified by the statute's antique exemption. § 1539. The rule also establishes a de minimis exemption for non-antiques containing African elephant ivory, if the ivory was removed from the wild prior to February 26, 1976, does not account for

[4] *See* https://ecos.fws.gov/ecp/species/7724 (African elephant); https://ecos.fws.gov/ecp/species/7388 (Asian elephant) (both last visited June 9, 2021).

[5] *See* https://ecos.fws.gov/ecp/species/1234 (Black: endangered); https://ecos.fws.gov/ecp/species/612 (Great Indian: endangered); https://ecos.fws.gov/ecp/species/3511 (Javan: endangered); https://ecos.fws.gov/ecp/species/4752 (Northern white: endangered); https://ecos.fws.gov/ecp/species/9537 (Southern white: threatened); https://ecos.fws.gov/ecp/species/610 (Sumatran: endangered) (all last visited June 9, 2021).

more than 50 percent of the item's value or volume, and the item was made prior to July 6, 2016. § 17.40(e)(3).[6]

Therefore, under federal law, antiques containing ivory and non-antiques containing de minimis amounts of African elephant ivory can be imported into and sold within the United States without a federal permit. By its express terms, the ESA forbids states from enforcing any law or regulation that "may effectively" interfere with the activities authorized by these exemptions. § 1535(f).

B. New York's State Ivory Law and Regulations

New York State and the New York State Department of Environmental Conservation take a more restrictive approach to regulating trade in antiques containing ivory and non-antique items containing de minimis amounts of African elephant ivory.

[6] In 2015, the Department filed comments opposing this de minimis exemption because it would preempt New York's efforts to regulate the interstate ivory market under the State Ivory Law. *See* Comments of NY State Department of Environmental Conservation re: Proposed African Elephant Rule, Dkt. No. FWS-HQ-IA-2013-0091 (Sept. 28, 2015), *available at* https://downloads.regulations.gov/FWS-HQ-IA-2013-0091-6059/attachment_1.pdf. In response, the Fish and Wildlife Service agreed that the de minimis exemption would preempt contrary state laws, and also rejected the Department's argument that the exemption would interfere with elephant conservation efforts. *See* Revision of the Section 4(d) Rule for the African Elephant, 81 Fed. Reg. 36,388, 36,399 (June 6, 2016) (to be codified at 50 C.F.R. pt. 17).

In 2014, New York State enacted the State Ivory Law, which makes it illegal for any person to "sell, offer for sale, purchase, trade, barter or distribute an ivory article or rhinoceros horn" within New York. N.Y. Envtl. Conserv. Law § 11-0535-a(2). The Ivory Law defines "ivory article" as "any item containing worked or raw ivory from any species of elephant or mammoth." § 11-0535-a(1)(b). Violations of the Law can result in imprisonment for up to seven years for a felony, N.Y. Envtl. Conserv. Law § 71-0924(4), N.Y. Penal Law § 70.00(2)(d), and carry fines of up to $3,000 or two times the value of the item involved, N.Y. Envtl. Conserv. Law § 71-0925(16).

The State Ivory Law does allow the Commissioner of the Department of Environmental Conservation to "issue licenses or permits for the sale, offering for sale, purchase, trading, bartering or distribution of ivory articles or rhinoceros horns" in limited circumstances. § 11-0535-a(3). Unlike the federal antique exemption, the Department only issues licenses for the sale of antiques containing ivory if the ivory "is part of a bona fide antique and is less than twenty percent by volume of such antique …." § 11-0535-a(3)(a). The Department does not license the sale of non-antique items containing de minimis amounts of African elephant ivory. Still, the Department conceded in the district court that it "will not deny a license for the sale of ivory from within New York to a buyer located outside of New York, provided

the transaction fully complies with federal requirements," including the federal antique and de minimis exemptions. *Seggos*, 394 F. Supp. 3d at 451, App. 018.

Under its authority to issue licenses pursuant to the State Ivory Law, the Department imposes advertising restrictions on the sale of antiques containing ivory. Two such advertising conditions are relevant here.

First, the license condition titled "Ivory and Horn—Displaying items for sale in New York State—Advertisement" states:

> The licensee is authorized to, via picture and item description, display or offer for sale via advertisement, catalogue or online, all items approved for sale in license condition Ivory and Horn – Authorization for Sale or Offer for Sale. For all items not authorized for Intrastate sale, the licensee shall, next to the picture of item description, post a notice which states that the item "Cannot be Purchased or Sold within New York State.

App. 100.

Second, the license condition titled "Ivory and Horn—Displaying items for sale in New York State—Prohibition" states:

> The licensee shall not physically display for sale within New York State any item that is not authorized for Intrastate sale as identified in license condition Ivory and Horn – Authorization for Sale or Offer for Sale.

App. 100. Unlike the first condition, this "Display Restriction" condition does not allow for disclaimers or other less restrictive alternatives.

In sum, the State Ivory Law is more restrictive than federal law because: (1) its antique exemption for intrastate sales limits antiques to containing less than 20

percent of its volume in ivory, while federal law includes no such limitation; (2) it does not include a de minimis exemption for non-antiques containing African elephant ivory offered for intrastate sale in New York; (3) the Department's Display Restriction prohibits sellers from displaying items that they can sell in interstate and foreign commerce; and (4) the Ivory Law restricts mammoth ivory where federal law does not.

C. The Art and Antique Dealers

The Art and Antique Dealers League, a nonprofit trade organization, is the oldest and principal antiques and fine arts organization in the United States. App. 061, 103, 105. The League brings various members of the art and antiques trade together to promote a greater understanding among themselves and with the public, and generally to devote itself to the best interests of dealers and collectors of antiques and works of art. *See* App. 116. The League consists of more than 80 fine art and antique dealers with over 60 fields of expertise. App. 103, 116.

The National Antique and Art Dealers Association is a nonprofit trade organization of the United States' leading dealers. App. 103. Through "just, honorable, and ethical trade practices," the Association's members pledge to safeguard the interests of those who buy, sell, or collect antiques and works of art. App. 067–068. Through many years of study and experience, the Association's members possess specialized knowledge that makes them recognized authorities in

their fields. App. 067–068. Each member of the Association has a reputation for integrity and fair dealing, so that collectors can be confident that an antique work of art is honestly represented as to authenticity, provenance, and condition. App. 067–068.

Members of the Dealers include individuals, galleries, and other businesses. Collectively, they have an economic and professional interest in the purchase and sale of art and antiques containing ivory, among other things. App. 116. The members deal in art and antiques containing ivory that are of historical and artistic significance. App. 061–072, 106, 109, 119. For example, Antiquarium, Ltd., a New York member of the League, possesses a 1st century Roman lidded pyxis made from ivory, and a 13th century French panel of the Annunciation made from ivory. App. 065. Likewise, New York League member European Decorative Arts Company possesses a pair of carved jeweled ivory figures attributed to Georg Roth of Hanau circa 1900, an ivory tankard depicting a battle between Ottoman and Christian warriors circa 1875, and an 18th century wood and ivory sculpture by Simon Troger. App. 062–064, 109, 117.

The Dealers' ability to sell and communicate about those items, as well as others, is proscribed by the State Ivory Law and the Department's Display Restriction. App. 119. For example, European Decorative Arts Company has an inventory of antiques containing ivory and non-antiques containing de minimis

amounts of African elephant ivory that is permissible to sell under the ESA's antiques and de minimis exemptions, but not under the State Ivory Law. App. 117. Even though it has a license from the Department to sell its inventory in interstate and foreign commerce, it is precluded from selling that same inventory to buyers within New York and from physically displaying the inventory for sale in its showroom and at antique shows in New York. App. 117. Because none of European Arts' customers will purchase items containing ivory without physically inspecting them, and because it is prohibited from selling to customers in New York, the Display Restriction and Ivory Law have caused it to lose significant revenue despite advertising its inventory online and with photographs and catalogues. App. 062–063, 108–109, 111, 117.

Likewise, Blumka Gallery is a member of both Dealer groups and maintains a showroom in New York where it sells medieval, Renaissance, and Baroque antiques. App. 068–069, 106, 114. Due to the enactment of the State Ivory Law and the Department's Display Restriction, Blumka shipped its inventory of antiques containing ivory to Europe where they are offered for sale once a year at a show in the Netherlands. App. 114, 127. If not for the State Ivory Law and Display Restriction, Blumka would seek to return its inventory to its New York gallery for sale and display. App. 114, 127, 132.

Because of New York's misguided targeting of antiques and artwork containing ivory, the Dealers, their customers, and the public are deprived of viewing and trading valuable items of historical significance. As a result, the Dealers suffer direct economic and First Amendment harms due to the State Ivory Law and the Department's Display Restriction.

D. This Lawsuit

The Dealers sued on March 20, 2018, challenging the State Ivory Law and the Department's Display Restriction on preemption and First Amendment grounds. After the district court dismissed the Dealers' complaint for lack of subject matter jurisdiction, *see Art & Antique Dealers League of America, Inc. v. Seggos*, No. 18 Civ. 2504, 2019 WL 416330, at *1 (S.D.N.Y. Feb. 1, 2019) (Schofield, J.), the Dealers filed their Third Amended Complaint on March 21, 2019, App. 057, curing "standing deficiencies identified" by the lower court, *Seggos*, 394 F. Supp. 3d at 452, App. 018. The Dealers later moved for summary judgment as to their preemption and First Amendment claims, with the Department and Intervenor-organizations moving to dismiss the same. *Id*. at 450, 452; App. 014, 018.

The district court granted the motions to dismiss as to the Dealers' preemption claim, holding that the State Ivory Law is not expressly preempted by the ESA, nor

in conflict with federal law. *Id*. at 456–58; App. 025–029.[7] As to the Dealers' First Amendment claim, the district court denied the Dealers' summary judgment motion without prejudice to renewal to allow for greater factual development. *Seggos*, 394 F. Supp. 3d at 458; App. 029–030. Nevertheless, the lower court held that "[b]ecause the in-store display of ivory proposes plausible lawful transactions, such a display constitutes protected commercial speech." *Id*. at 459, App. 031 (citing *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 114 (2d Cir. 2017)).

After discovery, the parties cross-moved for summary judgment as to the Dealers' First Amendment claim. The lower court denied the Dealers' motion and granted the Department's motion. *Seggos*, 2021 WL 848196, at *1; App. 035. The court first considered whether this Court's recent decision in *Vugo, Inc. v. City of New York*, 931 F.3d 42 (2d Cir. 2019), changed the applicable constitutional standard. *See Seggos*, 2021 WL 848196, at *2–3; App. 039–041. Concluding that it did not, *id*., the district court then analyzed whether the Department's Display Restriction was sufficiently tailored to a substantial government interest and concluded that it was, *id*. at *3–5; App 039-045.

[7] The district court also analyzed and rejected any application of field preemption. *Seggos*, 394 F. Supp. 3d at 456–57; App. 025–027. The Dealers do not raise field preemption as a basis for reversal in this appeal.

This appeal followed as to both the district court's dismissal of the Dealers' preemption claim, and the court's order granting the Department's summary judgment motion as to the Dealers' First Amendment claim.

SUMMARY OF ARGUMENT

This Court should reverse the district court and hold that the New York State Ivory Law, including the Display Restriction the Department imposes to enforce the Ivory Law, is preempted by the federal Endangered Species Act and its implementing regulations. Alternatively, this Court should hold that the Department's Display Restriction license condition violates the First Amendment.

The State Ivory Law is expressly preempted by the federal ESA because it "applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species," and "effectively prohibits" commerce authorized under the ESA's and Fish and Wildlife Service's antiques and de minimis exemptions. *See* 16 U.S.C. §§ 1535(f), 1539(h); 50 C.F.R. §§ 17.40(e)(9), 17.40(e)(3).

The Dealers have shown that because of the Ivory Law and the Department's Display Restriction they are "effectively prohibited" from selling licensed antiques containing ivory and artwork containing de minimis amounts of African elephant ivory in interstate or foreign commerce. As a result, the preemption provision applies here. Nor can the Ivory Law find quarter in the ESA's carve out for state trade

restrictions intended to conserve species native to that state. *See* § 1535(f). That is because the Ivory Law applies to ivory from non-native, and as for mammoths, extinct species. The Ivory Law is therefore expressly preempted.

Were the State Ivory Law not expressly preempted, it would still "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), and be preempted for that reason. Congress and the Fish and Wildlife Service have sought to "balance the burden of regulation with conservation," including by exempting trade and other activities that do not significantly threaten conservation. *See* Revised Section 4(d) Rule, 81 Fed. Reg. at 36,399. This is especially so where regulation implicates inherently federal foreign affairs concerns, including developing nations' control over their own resources. *See id.* at 36,403 ("This is a global challenge requiring global solutions. The United States is working with foreign governments, international organizations, nongovernmental organizations, and the private sector to maximize impacts together.").

The State Ivory Law upends the balance struck by the ESA and its implementing regulations by prohibiting the sale in New York of most antiques containing ivory and other artwork containing de minimis amounts of African elephant ivory. N.Y. Envtl. Conserv. Law § 11-0535-a(2). The Department's Display Restriction further targets wholly interstate and foreign commerce by

prohibiting goods intended for such markets from being displayed in New York. As a result, the two prohibitions interfere with activities Congress and the Fish and Wildlife Service "explicitly exempted or excluded from sanctions." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 378–79 (2000). The State Ivory Law thus creates "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines*, 312 U.S. at 67, and is preempted.

Should this Court disagree that the State Ivory Law and the Department's enforcement of the law through the Display Restriction is preempted, the Display Restriction still violates the First Amendment.

The district court correctly concluded that the Display Restriction prohibits protected commercial speech, *see Seggos*, 394 F. Supp. 3d at 459, App. 030-031, but the court erred in its intermediate scrutiny analysis and in its decision to apply intermediate rather than strict scrutiny. *See Seggos*, 2021 WL 848196, at *2, App. 039 ("the appropriate constitutional standard of review of commercial speech is intermediate scrutiny, even when the speech restrictions are content-based as they are here"). Under this Court's recent decision in *Vugo*, 931 F.3d at 50 n.7, strict scrutiny is the proper standard to apply in cases such as this where the government targets commercial speech it disfavors due to the content and viewpoint expressed, and where it "prevent[s] the public from receiving certain truthful information."

But even under the Supreme Court's intermediate scrutiny test set out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980), the Display Restriction still fails because it prohibits more speech than is necessary to further New York's interest in curbing the illegal ivory trade. Relatedly, the district court erred as a matter of law in holding that the Dealers' proposed less restrictive advertising alternative must be "as effective" as the Display Restriction; under *Central Hudson* and its progeny, the Dealers' alternative defeats the Display Restriction unless the alternative is "ineffective." *See Seggos*, 2021 WL 848196, at *4, App. 044. The Department bears the burden to show that the Dealers' proposed alternative to the Display Restriction does not advance the Department's stated interest in regulating the illegal ivory trade. The Department has not done so, and the Display Restriction fails scrutiny as a result.

ARGUMENT

I. Standard of Review

This Court conducts de novo review of a lower court's dismissal under Fed. R. Civ. P. 12(b)(6). *Bacon v. Phelps*, 961 F.3d 533, 540 (2d Cir. 2020). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When reviewing dismissal orders, courts "presume all factual allegations in

the complaint to be true and view them in a light most favorable to the plaintiff." *Ferran v. Town of Nassau*, 11 F.3d 21, 22 (2d Cir. 1993).

This Court also conducts de novo review of a lower court's summary judgment orders. *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). When reviewing summary judgment orders, courts draw all factual inferences in favor of the non-moving party. *Id*. "Summary judgment is appropriate only if the moving party shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Id*.

Here, the district court dismissed the Dealers' preemption claim for failure to state a claim under Rule 12(b)(6), *Seggos*, 394 F. Supp. 3d at 450, 458, App. 015-016, 029, and subsequently granted the Department's summary judgment motion as to the Dealers' First Amendment claim, *Seggos*, 2021 WL 848196, at *1, App. 035. Both decisions are subject to de novo review by this Court. *Miller*, 321 F.3d at 300.

II. NEW YORK'S STATE IVORY LAW IS PREEMPTED BY THE ENDANGERED SPECIES ACT

The State Ivory Law is preempted because it "effectively prohibits" importation or exportation of, and interstate or foreign trade in, particular items containing ivory, including antiques, despite such trade being "authorized pursuant to an exemption or permit" under the Endangered Species Act, 16 U.S.C. § 1535(f). Further, even if Congress had not had the foresight to expressly preempt the State

Ivory Law, it would be preempted as an obstacle to the achievement of Congress' purposes.

A. The State Ivory Law Is Expressly Preempted

Express preemption results when "Congress … withdraws specified powers from the States by enacting a statute containing an express preemption provision." *Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238 (2d Cir. 2014) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). When considering an express preemption clause, courts "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). Courts must also consider the structure of the statute. *King v. Burwell*, 576 U.S. 473, 486 (2015) ("Our duty, after all, is to construe statutes, not isolated provisions.").

The ESA expressly voids "[a]ny state law or regulation that applies with respect to" importation, exportation, and interstate or foreign commerce in listed species "to the extent that it may effectively … prohibit what is authorized" by any federal exemption or permit under the statute or its implementing regulations. 16 U.S.C. § 1535(f). This provision does not turn on any magic words, as the state argues and the Court held below, but on the practical effect of state law. *Cf. Rowe v. New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 372 (2008).

Instead, Congress used exceedingly broad language in this provision, including that it applies to "any" state law "that applies with respect to" interstate and foreign commerce in listed species, when such law "*may* effectively … prohibit" activity authorized under the federal act, and that the same preemptive effect shall be given to any federal regulation that may ever be issued to implement the federal statute. § 1535(f). *See also* Hearings on Endangered Species Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong., 1st Sess. 234 (1973) (statement of Mr. Pollock) ("the State would not be in a position to control interstate commerce which is a function and responsibility for the Federal Government."); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes.").

Indeed, the breadth of this provision is confirmed by the later sentence's confirmation of what states may do without fear of preemption. To conserve "migratory, resident, or introduced wildlife," states may "permit or prohibit sale of such wildlife" within their borders. 16 U.S.C. § 1535(f). Of course, this savings clause is only necessary if such state laws would have otherwise been preempted, lending further support to the Dealers' interpretation. The ESA contains no similar recognition of state power to close themselves off to trade in foreign wildlife authorized under federal law.

Contrary to the decision below, the ESA does not allow states to avoid preemption through the artifice of labeling a state ban as limited to intrastate commerce. Instead, the typical rules of statutory interpretation apply, and the entire preemption provision is considered to determine the statute's plain meaning. Here, because the State Ivory Law's intent and effect is to limit interstate and foreign commerce authorized under federal law, it is preempted.

1. The State Ivory Law Effectively Prohibits Trade in Antiques and Art Containing Ivory

State laws that apply with respect to import, export, or interstate or foreign commerce are preempted if they "effectively … prohibit what is authorized pursuant to an exemption or permit provided for in this chapter …." 16 U.S.C. § 1535(f).

Laws regulating trade in antiques and art containing ivory inherently "appl[y] with respect to" importation, interstate commerce, and foreign commerce because elephants and rhinos are not native to New York. *Id*. Trade in antiques and art containing ivory is expressly authorized under the ESA's antique and de minimis exemptions. *See* 16 U.S.C. § 1539(h); 50 C.F.R. §§ 17.40(e)(9), 17.40(e)(3). Both are "an exemption … provided for in this chapter or in any regulation which implements this chapter." *See April in Paris v. Becerra*, 494 F. Supp. 3d 756, 767–

68 (E.D. Cal. 2020). Therefore, any state law that in effect interferes with the interstate and foreign market for these items is preempted.[8]

The Ivory Law and the Department's Display Restriction effectively prohibit this federally exempted activity. The Ivory Law seeks to close the state to the interstate and foreign market in federally exempted ivory art and antiques. *Cf. Swift & Co. v. United States*, 196 U.S. 375, 398 (1905) ("commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business.").[9]

In the court below, the Dealers presented evidence that they are unable to functionally sell antiques containing ivory to even out-of-state and foreign customers. App. 114, 117, 119, 128. Potential buyers of valuable antiques and other

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[8] *Cresenzi Bird Importers, Inc. v. State of N.Y.*, is therefore distinguishable. 658 F. Supp. 1441, 1446 (S.D.N.Y. 1987), *aff'd*, 831 F.2d 410 (2d Cir. 1987); *cf. Pinto v. Conn. Dep't of Envtl. Prot.*, 1988 WL 47899, at *11 (D. Conn. 1988) (state law prohibiting possession of tiger not preempted by § 1535(f) because possessors did not have possession pursuant to ESA exemption or permit). There, New York's Wild Bird Law was not preempted by § 1535(f) because the permits possessed by the bird-seller plaintiffs were not the permits contemplated as having preemptive effect by the statute. 658 F. Supp. at 1446. Here, however, the Dealers operate under the ESA's antique and de minimis exemptions. *See April in Paris*, 494 F. Supp. 3d at 767–68.

[9] As in *Rowe v. New Hampshire Motor Transport Ass'n*, there may be some situations where a state law indirectly implicating ivory is so far removed from the preemption provision's purpose that it is not implicated. 552 U.S. 364, 375 (2008). Here, however, the State Ivory Law directly seeks to restrict commerce that Congress and the Fish and Wildlife Service have determined should be exempt from regulation.

items containing ivory understandably want to physically inspect them before completing the purchase. App. 117, 119. Photographs, catalogues, and online advertisements are insufficient to allow a buyer to verify the quality and authenticity of the item. App. 117–119. Interstate and foreign trade in antiques containing ivory is thus "effectively" prohibited by the State Ivory Law and the Department's enforcement of the Law via the Display Restriction.

Without disputing the inherent connection between ivory and interstate and foreign commerce, or the Dealers' evidence of the State Ivory Law's practical effects, the district court dismissed the Dealers' preemption claim on a "magic words" theory. Because the State Ivory Law purports to regulate only intrastate sales, the court held that the practical effects and Congress' intent underlying the preemption provision can be ignored. *Seggos*, 394 F. Supp. 3d at 454, App. 022–023. The court justified this result by taking an extremely narrow view of the phrase "'applies with respect to' … interstate commerce[.]" *Id*. at 454 n.4, App. 022. This miserly interpretation is neither the best reading of the statute nor consistent with Congress' intent. It is also inconsistent with the Supreme Court's approach to interpreting broad effect-based preemption provisions, like the ESA's.

In *New Hampshire Motor Transport Ass'n*, for instance, a state sought to circumvent a provision preempting state laws "related to" a motor carrier "price, route, or service" by regulating shippers who use motor carriers' services rather than

the carriers themselves. 552 U.S. at 367–69. The Supreme Court rejected the state's attempt, recognizing that the state law "produces the very effect that the federal law sought to avoid." *Id.* at 372. To embrace such state creativity, the Court recognized, would eventually lead to a "regulatory patchwork" where Congress had sought to establish a uniform system of federal regulation and exemption. *Id.* at 373. Therefore, the Court interpreted the preemption provision's text broadly to effectuate Congress' purpose rather than narrowly to permit the state to frustrate that purpose. *Id.* at 376.

Here, the most natural reading of the ESA's preemption provision is that state laws are preempted if they effectively interfere with interstate or foreign commerce. Congress went out of its way to use expansive language to broaden the preemption provision's reach beyond the lower court's narrow construction. 16 U.S.C. § 1535(f) (preemption provision applies to "any" state law that "may effectively … prohibit," and it gave preemptive effect to any exemption that might be established by regulation); *see also* H.R. Rep. No. 412, 93rd Cong., 1st Sess. 7–8 (1973) ("where there was a specific Federal permission for … importation, exploitation or interstate commerce … the State could not override the Federal action."). Thus, despite the Department's attempt to avoid the ESA's preemption provision by limiting the State Ivory Law to intrastate commerce, *Seggos*, 394 F. Supp. 3d at 453 n.3, App. 020–021, the Ivory Law and Display Restriction in effect interfere with interstate and

foreign commerce in art and antiques containing ivory and, thus "apply with respect to" such commerce. § 1535(f). *See New Hampshire Motor Transport Ass'n*, 552 U.S. at 371–72. *See also* App. 114, 117, 119, 128. A contrary holding would permit every state to interfere with the very commerce that the ESA and its implementing regulations exempt from regulation, balkanizing interstate and foreign commerce and creating precisely the sort of regulatory patchwork that the preemption provision is intended to preclude. *See New Hampshire Motor Transport Ass'n*, 552 U.S. at 373.

Cases interpreting the ESA's preemption provision support the Dealers' view. In *Man Hing Ivory and Imports, Inc. v. Deukmejian*, for example, the Ninth Circuit held preempted a California law that made it illegal to "import into this state for commercial purposes, to possess with intent to sell, *or to sell within the state*" elephant hunting trophies or other elephant products. 702 F.2d 760, 761 (9th Cir. 1983) (emphasis added). Because the effect of such a law is to close off the state to interstate and foreign markets authorized under federal law, it was preempted due to its effective prohibition on interstate or foreign commerce in foreign ivory. *See id.* at 764.

The Ninth Circuit has similarly held preempted California's attempt to close itself off to sales of boots made from the hides of African elephants. *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758, 759 (9th Cir. 1983). Because the state law

"would prohibit trade *within California* in elephant products even by a federal permittee," the law was preempted by § 1535(f). *Id*. (emphasis added).

Courts have likewise held preempted California's efforts to prohibit California-based companies from selling alligator hides. *Fouke Co. v. Brown,* 463 F.Supp. 1142, 1143–44 (E.D. Cal. 1979).

In none of these cases was the state law preempted because it explicitly targeted interstate and foreign commerce. Indeed, several involved challenges to restrictions on intrastate sales of items made from nonnative species. Instead, courts looked to the practical effect of the state law at issue. Where state law seeks to close off the state to the interstate and foreign market for products made from foreign species and exempt from federal regulation, it is preempted.

The Dealers seek to trade in antiques containing ivory and artwork containing de minimis amounts of African elephant ivory pursuant to exemptions under the ESA. Because the State Ivory Law—and the Department's enforcement of the law through the Display Restriction—effectively prohibits such trade, it is preempted.

2. The ESA's Savings Clause Confirms the Dealers' Interpretation

While the ESA generally preempts state laws that may effectively prohibit activity exempt from federal regulation, it also contains a savings clause preserving state power to "prohibit sale" of "migratory, resident, or introduced fish or wildlife"

as part of state programs to conserve such species. § 1535(f). When read together with the previous sentences of the preemption provision, it is evident that Congress intended to leave room for states to conserve resident species—those living within or migrating through their borders—while generally asserting federal primacy over commerce in out-of-state and foreign species. *Cf. Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979) (states retain powers to "protect and conserve wild animal life within their borders."). This understanding is bolstered by the legislative hearings discussing the provision. *See* Hearings on Endangered Species Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment, 93rd Cong., 1st Sess. 243-246 (discussion of Reps. Breaux, Eckhardt, and Potter with Mr. Gazlay) (the states view resident wildlife as "being within their purview," whereas nonresident wildlife is subject to federal control).

Thus, the structure of § 1535(f) supports the Dealers' interpretation. The provision saving state sale prohibitions involving resident species from preemption only makes sense and has any practical effect if such state prohibitions would otherwise be preempted. As a result, the district court's interpretation nullifies this text and undermines Congress' intent.

To its credit, the Department does not argue that the State Ivory Law is the type of state sale prohibition preserved by § 1535(f)'s savings clause. Nor could it. African elephants and the other species regulated by the State Ivory Law are not

native to New York. *See* Revision of the Section 4(d) Rule, 81 Fed. Reg. 36,388. As the Governor stated upon signing the State Ivory Law into law, its purpose is not to address any local conservation concern but to conserve "animals across the world." *See* Press Release, *Governor Cuomo Signs New Law to Combat Illegal Ivory Trade and Protect Endangered Species* (Aug. 12, 2014).[10] Therefore, the State Ivory Law is not "intended to conserve migratory, resident, or introduced fish or wildlife," but to interfere with interstate and foreign commerce in a foreign species despite Congress' decision to exempt it from regulation. This is precisely what § 1535(f) preempts.

B. The State Ivory Law Is Preempted Because It Conflicts With Federal Law

State law can also be preempted by federal law when that state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "What is a sufficient obstacle [requiring preemption] is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects[.]" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

[10] *Available at* https://www.governor.ny.gov/news/governor-cuomo-signs-new-law-combat-illegal-ivory-trade-and-protect-endangered-species.

Here, Congress and the U.S. Fish and Wildlife Service have sought to "balance the burden of regulation with conservation" by helping African nations conserve their wildlife without unduly interfering with trade in ivory artwork and antiques. Revision of the 4(d) Rule, 81 Fed. Reg. 36,399. "[B]ased on all available evidence," the Fish and Wildlife Service found that this exempted commerce does not contribute "to the poaching of elephants in Africa." *See* Revision of the Section 4(d) Rule, 81 Fed. Reg. at 36,388. Therefore, restricting it is unnecessary.

New York disagrees, seeing stricter regulation of ivory markets as necessary to African elephant conservation. *See* N.Y. Envtl. Conserv. Law § 11-0535-a. *See also* Comments of N.Y. State Department of Environmental Conservation re: Proposed African Elephant Rule, Dkt. No. FWS-HQ-IA-2013-0091 (Sept. 28, 2015) (opposing the de minimis exemption for this reason); Revision to the Section 4(d) Rule, 81 Fed. Reg. at 36,399 (rejecting New York's argument). The legislative history of the Ivory Law confirms that New York sought to restrict commerce for the purpose of affecting poaching and conservation activities in foreign nations. N.Y. Assemb., N.Y. Comm. Rep., A.B. 10143–237 (2013) ("The high consumer demand for ivory … products in New York is especially troubling."); App. 142 (law was "targeted at reducing trafficking in ivory and rhinoceros horn specifically.").

In addition, the Department's Display Restriction exacerbates the conflict created by the Ivory Law by prohibiting items intended only for interstate and

foreign commerce from being displayed in New York. As a result, the Ivory Law and Display Restriction combine to penalize conduct and speech that the federal government "explicitly exempted or excluded from sanctions." *Crosby*, 530 U.S. at 378–79. Thus, Congress' and the Fish and Wildlife Service's plan to balance conservation concerns with the burdens on commerce by providing consumers with a "range of choices" in select ivory products is impeded. *See* Revision of the Section 4(d) Rule, 81 Fed. Reg. at 36,399; *Geier v. American Honda Motor Co., Inc*., 529 U.S. 861, 875 (2000). Because the State Ivory Law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it is preempted. *Hines*, 312 U.S. at 67.

In *Crosby*, a Massachusetts law restricted state agencies from contracting with firms doing business with Burma (Myanmar). 530 U.S. at 366, 373. The Court held that the state law was preempted because it undermined a federal law's purpose of giving the President discretion to control sanctions against Burma, and of limiting sanctions to certain Americans and investments. *Id*. at 373–74. Even though both statutes "share[d] the same goals," the Court held that the Massachusetts statute conflicted with federal law because it imposed a separate, and different, system of economic pressure against Burma. *Id*. at 378–79. In addition, the state law penalized individuals and conduct that Congress "explicitly exempted or excluded from

sanctions." *Id*. The lack of consistency thus undermined Congress' carefully calibrated approach. *Id*. at 380.

Likewise, here, Congress enacted the ESA to implement CITES and its international standards. The issue of regulating trade in elephant and rhinoceros ivory—products of species not native to the United States—is a contentious one of foreign affairs, with several African countries strongly opposed to bans on trade. *See*, *e.g.*, Keith Somerville, *EU's new stand on ivory trade upsets East Africa ahead of key decision*, The Conversation (July 17, 2016).[11] A uniform federal approach is appropriate in such circumstances. Even if the State Ivory Law "shares the same [conservation] goals" as the ESA, it conflicts with the ESA because of its effective prohibition on interstate and foreign trade in antiques and certain artwork containing ivory—trade expressly allowed under the ESA's carefully calibrated approach. *See Crosby*, 530 U.S. at 380.

Although courts generally apply a "presumption against pre-emption," *Wyeth*, 555 U.S. at 565 n.3, that presumption "is not triggered when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005) ("The presumption against federal preemption

[11] *Available at* https://theconversation.com/eus-new-stand-on-ivory-trade-upsets-east-africa-ahea d-of-key-decision-62236.

disappears, however, in fields of regulation that have been substantially occupied by federal authority for an extended period of time."); *Knox v. Brnovich*, 907 F.3d 1167, 1173–74 (9th Cir. 2018) (holding that there is "no presumption against preemption when the State regulates in an area such as national and international maritime commerce") (quotation omitted). Even where the presumption against preemption applies, it "is rebutted … where Congress makes its intent to supersede state law 'clear and manifest.'" *Berezovsky v. Moniz*, 869 F.3d 923, 930 (9th Cir. 2017) (quoting *Arizona v. United States*, 567 U.S. 387, 400 (2012)).

The presumption does not apply here, where there is a "history of significant federal presence" in setting policy for trade in ivory. *See Locke*, 529 U.S. at 108. This is especially true here where New York has no traditional state interest in regulating foreign animal species. *See Hughes*, 441 U.S. at 338. As discussed above, from the enactment of the Marine Mammal Protection Act in 1972, CITES and the ESA in 1973, the African and Asian Elephant Conservation Acts in the 1980s and '90s, and to current Fish and Wildlife Service regulations, Congress and the Service have significantly regulated and controlled trade in ivory. Federal regulation of these products makes sense given the sensitive foreign affairs implications of restricting their trade. Because the State Ivory Law and Display Restriction cause New York to wade into the international debate on trade in ivory, and to take an approach counter

to the one chosen by Congress and the Service, the presumption against preemption does not apply here.

III. The Display Registration Violates the Dealers' First Amendment Rights

The State Ivory Law further conflicts with federal law by imposing restrictions on advertising which, if not preempted, violate the First Amendment by banning far more speech than necessary to achieve any government interest. The lower court's decision upholding the Department's Display Restriction should be reversed.[12]

The State Ivory Law requires the Dealers to be licensed by the Department, N.Y. Envtl. Conserv. Law § 11-0535-a(3), and a condition of that license is a "Display Restriction," which prohibits the "physical[ ] display for sale" of any item not authorized for sale under the State Ivory Law—even if the merchant is authorized under the federal Endangered Species Act to sell the item in interstate or foreign commerce. App. 100.

The district court correctly concluded that the Display Restriction prohibits "commercial speech," *see Seggos*, 394 F. Supp. 3d at 459, App. 030–031, but the court erred in its intermediate scrutiny analysis and in its decision to apply

[12] This Court need not reach the Dealers' First Amendment challenge to the Display Restriction if it holds that the State Ivory Law is preempted, as this would void the Display Restriction, too.

intermediate rather than strict scrutiny, *see Seggos*, 2021 WL 848196, at *2, App. 039 ("the appropriate constitutional standard of review of commercial speech is intermediate scrutiny, even when the speech restrictions are content-based as they are here"). Under this Court's recent decision in *Vugo*, 931 F.3d at 50 n.7, strict scrutiny is the proper standard to apply in cases like this one where the government singles out commercial speech because of the speech's content and viewpoint. But even under the Supreme Court's *Central Hudson* intermediate scrutiny test, 447 U.S. 557, the Display Restriction fails because it prohibits more speech than is necessary to further New York's interest in curbing the illegal ivory trade. Indeed, the Display Restriction prohibits speech authorized under the ESA. Finally, the district court erred as a matter of law in holding that the Dealers' proposed less restrictive advertising alternative must be "as effective" as the Display Restriction. *See Seggos*, 2021 WL 848196, at *4, App. 044. Under *Central Hudson* and its progeny, the Dealers' alternative defeats the Display Restriction unless the alternative is "ineffective," which it is not.

A. The Display Restriction Regulates Speech

The physical display of artwork for sale constitutes speech. *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996); *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 755 (N.D. Ill. 2015); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 568–69 (2001) ("Assuming that petitioners have a

cognizable speech interest in a particular means of displaying their products ….”); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (declaring that ordinance prohibiting display of commercial handbills in newsracks violates the First Amendment). Here, the Dealers are prevented from physically displaying licensed antiques and artwork containing ivory in their respective galleries and shops in New York. The Dealers have volunteered to post a notice that the antiques and art are not available for intrastate sale. Because such a display “propose[s] a commercial transaction” to potential out-of-state or international buyers who may view it when in New York, it is speech protected by the First and Fourteenth Amendments to the United States Constitution. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976).

B. Strict Scrutiny Applies to the Display Restriction

The district court correctly held that the Display Restriction is a content-based speech restriction because whether a display is authorized hinges on whether the items being displayed are for sale and whether the State agrees that the items should be available for sale. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (a restriction is content-based that “‘on its face’ draws distinctions based on the message a speaker conveys” or “defin[es] regulated speech by its function or purpose.” (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564–66 (2011)). The Display Restriction only applies to the display of items that communicate an offer

to sell and is limited to the display for sale of certain antiques and art that New York has deemed verboten, but that are undisputedly authorized for sale under federal law. *See Seggos*, 2021 WL 848196, at *2, App. 039; App. 100 ("The licensee shall not physically display for sale within New York State any item that is not authorized for Intrastate sale . . ."); *see also Reed*, 576 U.S. at 163–64.

For example, a display offering to sell an antique containing ivory that is licensed for intrastate sale is permissible. Likewise, a display for decorative or educational purposes of an antique containing ivory that is not licensed for intrastate sale is also permissible. In contrast, a display offering to sell an antique containing ivory that is not licensed by the State for intrastate sale is prohibited by the Display Restriction even if the offer is only made to out-of-state or international buyers. Thus, the Display Restriction is content-based because it expressly limits which types of ivory may be displayed if the purpose of the display is a commercial message with which the State disagrees.

Ordinarily, a content-based commercial speech restriction is only subject to intermediate scrutiny. *Vugo*, 931 F.3d at 49. But this Court recognized that some content-based commercial speech restrictions may be subject to strict scrutiny when the government "targets a single category of speech by a single category of speaker" or "prevents the public from receiving certain truthful information" by "quieting truthful speech with a particular viewpoint that it fears might persuade." *See id*. at 50

n.7 (cleaned up) (*citing Sorrell*, 564 U.S. at 563–64 and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 (1996)). While those considerations did not warrant strict scrutiny in *Vugo*, this case requires a different result.

In *Sorrell*, the challenged speech restriction singled out one "category of speech by a single category of speaker: marketing carried out by pharmaceutical manufacturers," for disfavored treatment. *Vugo*, 931 F.3d at 50 n.7. As a result, the law "'impose[d] an aimed, content-based burden' on particular speakers." *Id.* (quoting *Sorrell*, 564 U.S. at 564).[13] Likewise, here, the Display Restriction singles out licensees who sell antiques and artwork containing ivory, and prohibits them from displaying items that cannot be sold intrastate. That prohibits the most effective means of speaking about those items and quiets the Dealers' view that they should be able to sell them consistent with federal law. The record also confirms that the purpose of the Display Restriction is to prohibit individuals from engaging in speech that the Department fears is too effective. *See* App. 144–45.

In contrast to this Court's decision not to apply strict scrutiny to the speech restriction at issue in *Vugo*, the Display Restriction stems from the Department's attempt to "'quiet[ ]' truthful speech with a particular viewpoint that it 'fear[s] …

[13] This conclusion was also supported by "[f]ormal legislative findings accompanying [the statute] confirm[ing] that the law's express purpose and practical effect are to diminish the effectiveness of marketing by manufacturers of brand-name drugs." *Vugo*, 931 F.3d at 50 n.7 (quoting *Sorrell*, 564 U.S. at 565).

might persuade.'" 931 F.3d at 50 n.7 (quoting *Sorrell*, 564 U.S. at 576). Here, unlike the Department's allowance for displays of antiques containing ivory for any non-commercial purposes—such as in a museum—and of commercial displays of antiques containing less than 20% ivory, the Department seeks to "quiet" the viewpoint that antiques containing more than 20% ivory can be sold by prohibiting the physical display of those items for sale.[14] This is no different than in *Sorrell*, where pharmacies could share prescriber-identifying information with anyone for any reason, except marketing that the State disapproved of. 564 U.S. at 572. But as was the case in *Sorrell*, "the fear that speech might persuade provides no lawful basis for quieting it." *See id*. at 576; *cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 391–92 (1992) (content-based law also viewpoint-based because it restricted displays based on the purpose of the speech).

The Department imposes the restriction on displaying items for sale in interstate or foreign commerce because it fears the display of those items may lead to consumers being tempted to engage in an illegal intrastate transaction. *See* App. 144–45. The Dealers' only intention is to propose a transaction that all agree is lawful under federal law, but the Display Restriction aims at something different. It "seek[s] to keep people in the dark for what the government perceives to be their

[14] The viewpoint that mammoth ivory can generally be sold is also prohibited by the Display Restriction.

own good." *44 Liquormart*, 517 U.S. at 503 (Stevens, J., plurality opinion); *see also Vugo*, 931 F.3d at 50 n.7 ("strict scrutiny might apply to some commercial speech restrictions out of concern that the government is seeking to 'keep[ ] would-be recipients of the speech in the dark,'") (quoting *44 Liquormart*, 517 U.S., at 523 (Thomas, J., concurring)). Therefore, just as the law in *44 Liquormart* banning all price advertising on liquor to promote temperance went too far because it kept even moderate drinkers from receiving truthful, non-misleading information, so 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. Strict scrutiny applies here, and thus the Department bears the burden to show that the Display Restriction is narrowly tailored to serve compelling state interests. *Reed*, 576 U.S. at 163. It has not done so.

C. The Display Restriction Cannot Survive Even Intermediate Scrutiny

Even if strict scrutiny does not apply, the Display Restriction still violates the First Amendment. Under intermediate scrutiny, when the government restricts commercial speech that "concern[s] lawful activity and [is] not … misleading," then the Court must consider: (1) "whether the asserted governmental interest is … substantial;" (2) "whether the regulation directly advances the governmental interest

asserted;" and (3) "whether it is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566–57.

Citing *Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 114, the lower court correctly held that "[b]ecause the in-store display of ivory proposes plausible lawful [interstate or foreign] transactions, such a display constitutes protected commercial speech." *Seggos*, 394 F. Supp. 3d at 459, App. 030. In addition, the parties did not dispute whether the Department has asserted a substantial governmental interest in preventing the illegal trade of ivory in New York, or whether the Display Restriction directly advances that interest. *Seggos*, 2021 WL 848196, at *3, App. 041.

Still, the lower court erroneously held that the Display Restriction is not more extensive than necessary to serve the Department's interests in preventing illegal sales of ivory in New York. *See id*., App. 042–045. Fundamentally, the Display Restriction fails because it is only supported by a single, attenuated anecdote—far from the evidence required to justify a speech restriction under intermediate scrutiny. Thus, the Display Restriction prohibits more speech than is necessary to further New York's interest in curbing illegal ivory sales. Furthermore, the district court erred as a matter of law in holding that the Dealers' proposed less restrictive advertising alternative must be "as effective" as the Display Restriction, rather than shown to be "ineffective." *See Seggos*, 2021 WL 848196, at *4, App. 044–045.

1. The Display Restriction Is More Extensive Than Necessary

The Department bears the burden to show that the Display Restriction is "no more extensive than necessary" to further the government's interest in preventing illegal ivory sales within New York. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87 (1995). "The Government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest—'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served.'" *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999) (quoting *Bd. of Trustees of St. Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). "[W]hat constitutes a reasonable fit 'is far different … from the 'rational basis' test used for Fourteenth Amendment equal protection analysis.'" *New York State Ass'n of Realtors, Inc. v. Shaffer*, 27 F.3d 834, 844 (2d Cir. 1994) (quoting *Fox*, 492 U.S. at 480). In addition, as part of the Department's burden, it must "show that it carefully calculated costs and benefits of burdening speech." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (cleaned up).

Under the State Ivory Law, the Department prohibits the Dealers from physically displaying for sale in New York antiques containing more than 20%

ivory, and non-antique artwork containing de minimis amounts of African elephant ivory, even though the Department licenses the Dealers to sell them interstate and internationally. *See* N.Y. Envtl. Conserv. Law § 11-0535-a(3); 16 U.S.C. § 1539(h); 50 C.F.R. § 17.40(e). Seeking middle ground, the Dealers have proposed a less restrictive alternative that would permit antiques and artwork that are authorized for interstate and international sales to be displayed separately from items that may be sold intrastate, so long as a notice is included informing the viewer that the piece is not for sale within New York.[15]

The Dealers' proposed alternative is not the least restrictive option available to the Department. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. Unlike the Dealers' "Segregation and Labeling" proposal, simple segregation of items behind a counter, glass, or rope, for example, would be an even less restrictive means of regulating that would still allow the Dealers to control access to antiques that are not permitted to be sold within New York.[16] App. 114–15.

[15] The Department only permits the display of such items online, or via photographs and catalogues, so long as a disclaimer is included that the item "Cannot be purchased or Sold within New York State." App. 100.

[16] Other alternatives would not mandate where the items at issue are displayed, but would simply require a visible notice be posted in each gallery informing viewers of the Ivory Law's prohibitions, or require that a notice be posted alongside each item stating that it cannot be sold within New York.

The district court rejected the Dealers' proposed Segregation and Labeling alternative as less effective than the Display Restriction. *Seggos*, 2021 WL 848196, at *4, App. 044–045. In doing so, the court endorsed the Department's primary justification that without the Display Restriction buyers and sellers would be too tempted to engage in an illegal intrastate transaction if they were able to physically view and inspect a verboten item. *Id*. at *3–4, App. 042–044. But along with raising issues of content and viewpoint discrimination warranting strict scrutiny noted above, *see supra* at 45-49, the record belies that justification; and as discussed below, the district court applied an impermissibly deferential standard in rejecting the Dealers' alternative as "less effective."

The Department failed to meet its evidentiary burden because the only evidence offered by the Department to support the Display Restriction does not support the notion that buyers are tempted into illegal transactions with licensed sellers like the Dealers. The Department relied exclusively on the testimony of an enforcement officer who managed to elicit a single illegal sale during a sting operation. The officer made an undercover purchase of ivory from an unlicensed seller who displayed that ivory with a sign saying, "Ivory Not For Sale," but who was willing to sell it within New York State at the officer's request. App. 147–48, 199–201. This seller was not a member of either of the Dealer-organizations, nor

was he operating pursuant to a Department license, which was the basis for the Department's citation. App. 147–48.

While it is true that anecdotes, history, and "simple common sense" can be used to support some speech restrictions, *see Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995), upholding a speech ban based on a single anecdote is insufficient to satisfy the government's burden to show it "carefully calculated" the cost of banning speech when a more tailored approach would advance its interests. *See New York State Ass'n of Realtors*, 27 F.3d at 844; *see also Rubin*, 514 U.S. at 491 (striking government's speech restriction because advertiser proposed alternatives "which could advance the Government's asserted interest in a manner less intrusive to [advertiser's] First Amendment rights."); *Safelite Group, Inc. v. Jepsen*, 764 F.3d 258, 266 (2d Cir. 2014) (holding law to be more extensive than necessary because a proposed alternative "would have served the same governmental interests" as the government's more restrictive approach).

In *New York State Ass'n of Realtors*, this Court held that certain New York real estate advertising regulations were more extensive than necessary to address racial segregation in the housing market because the government "fail[ed] to determine empirically whether less restrictive measures … would provide an alternative means for effectively combating the level of [the problem] evidenced by the record in this case." 27 F.3d at 844. Nor did the government proffer evidence

that narrower, more tailored measures were an "ineffective means for combating the individual incidents" of racial bias. *Id*. As a result, this Court rejected the government's position that the advertising regulations were "a reasonably tailored means for eliminating the harm …." *Id*.

Similarly, here, rather than carefully calculating the costs and benefits of the Display Restriction, the record shows that the Department did no such thing. For example, Captain Paluch's deposition testimony revealed that he is unaware of the Department undertaking any analysis of alternatives to the Display Restriction, considering the burden of the Restriction on speech, or conducting or seeking out any studies or data to determine the effectiveness of the Restriction or its value to law enforcement. App. 199. As a result, the record shows that the Display Restriction was the first and only means of regulating physical displays of licensed antiques and artwork offered for interstate and international sale considered by the Department. But "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373 (2002).

Nor can a speech regulation "unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Lorillard Tobacco*, 533 U.S. at 565. Here, potential out-of-state and international buyers of certain antiques and artwork containing de

minimis amounts of ivory are completely barred from the opportunity to obtain the necessary information about items they are interested in purchasing. Sales of these items are explicitly protected and permitted by federal law, as discussed above, and even the sales that the State Ivory Law putatively condones are thwarted by the Display Restriction. It is undisputed that buyers are unwilling to purchase such items without first having the opportunity to view and physically inspect them. App. 117, 144. As a result, the Display Restriction "unduly impinge[s]" on buyers and sellers because it prevents buyers from obtaining vital information, and it prohibits the Dealers from making the information available.[17] *See Lorillard Tobacco*, 533 U.S. at 565.

In addition, the Department's rationale that the Display Restriction is not more extensive than necessary because it is the only means available to prevent buyers from being tempted to engage in an illegal intrastate transaction is undermined by the State Ivory Law and other Department license conditions themselves. First, the Department permits the Dealers to post images and descriptions of items they are

[17] The district court's citation to *Lorillard Tobacco*, 533 U.S. at 570, for the proposition that a law that provides "alternative avenues for vendors to convey information about products" survives *Central Hudson*, is inapt here, where there is no viable alternative to conveying and receiving accurate information about the quality and authenticity of items containing ivory which can only be gleaned through physical display and inspection of the item. *See Seggos*, 2021 WL 848196 at *4; App. 117.

prohibited from selling within New York online, as well as in their shops via catalogues and photographs. Second, the Ivory Law does not prohibit Dealers from possessing ivory that they can sell out-of-state, or from keeping it hidden in their galleries, thus the imagined risk that buyers flipping through a catalogue will be tempted to engage in illegal transactions is not even addressed by the Display Restriction. A buyer could ask about the availability of certain items he or she views online or in a catalogue or photograph, and then request to inspect the item in the gallery and be "tempted" into an illicit sale. Requiring that merchants hide certain items out of sight does not therefore prevent buyers and sellers willing to circumvent the law from doing so. This fact alone is enough to render the Display Restriction more extensive than necessary.[18]

The Department failed to carefully calculate the costs and benefits of imposing the Display Restriction. The record shows that the Department resorted to restricting the Dealers' speech before attempting or considering other measures of advancing its stated interest, and that an extensive undercover operation yielded no evidence that licensed sellers were engaging in the illegal transactions targeted by the Display Restriction. The Department's speech restriction is thus more extensive

[18] If a potential buyer asks one of the Dealers' members if he or she can view an item not licensed for sale in New York, they inform the person that New York prohibits them from doing so. App. 117–18.

than necessary and must fall under the First Amendment. *Cf. Va. State Bd. of Pharmacy*, 425 U.S. at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us").

2. The Department Must Show that the Dealers' Proposed Alternative Would Be Ineffective

In holding that the Display Restriction is not more extensive than necessary, the district court held that the Dealers' "Segregation and Labeling" alternative would not advance the government's interest in preventing the illegal ivory trade "as effectively" as the Display Restriction. *Seggos*, 2021 WL 848196, at *4, App. 044. But that is not what the Supreme Court, or this Court, requires.

In *Central Hudson*, the Court stated that "[i]n the absence of a showing [by the government] that more limited speech regulation would be *ineffective*, we cannot approve the complete suppression of [Petitioner's] advertising." 447 U.S. at 571 (emphasis added). Additionally, the Court more recently explained that "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson*, 535 U.S. at 371.

This Court has also rejected giving the government carte blanche to ban speech in the face of effective alternatives. For example, in *Bad Frog Brewing, Inc. v. New York State Liquor Auth.*, 134 F.3d 87, 101 (2d Cir. 1998), this Court held that

banning beer bottle labels that included an image of a frog extending its middle finger was more extensive than necessary to shield children from vulgarity. A less restrictive alternative was simply to regulate where the bottles could be displayed in stores to prevent children from seeing the offending label. *See id*. Obviously, banning the label was more effective because it prevented anyone from seeing it, rather than risk an employee stocking the shelves incorrectly or customers moving the bottles where children could see them. But this Court held the ban unconstitutional even though the alternative approach was "less effective."

Similarly, the real estate advertising restrictions discussed above that were struck down in *New York State Ass'n of Realtors, Inc. v. Shaffer* because they were broader than necessary, also failed because the government did not show that less restrictive alternatives would be "ineffective" in addressing the government's stated interest in preventing housing discrimination. 27 F.3d at 844. In that case, this Court noted that the record provided "evidence of the existence of a tangible harm that the [government] is justified in trying to eliminate." *Id*. at 843. But because the government "fail[ed] to determine empirically whether less restrictive measures … would provide an alternative means for effectively combating the [harm] evidenced by the record," the government's chosen speech restriction was not "a reasonably tailored means for eliminating the harm …." *Id*. at 844.

Nor does this Court's decision in *Vugo* require a different result here. In that case, this Court upheld New York City's selective ban on in-taxi video advertisements after concluding that the City's determination that "banning ads altogether is the most effective approach" was "reasonable." 931 F.3d at 59. But in doing so, this Court based its holding on the substantial evidence in the record showing that the proposed less restrictive alternatives—mandating on-off switches or mute buttons on the television hardware, or content-neutral limitations on the ads' placement and size—would be *ineffective* in advancing the government's stated interests in the challenged law, whereas no such evidence is in this record. *See id*. at 58–59.

This Court also relied in *Vugo* on the Supreme Court's billboard precedents—which have limited application outside that context—to declare that "the 'most direct and perhaps the only effective approach' to prevent the harms of intrusive and annoying advertisements" is to ban them. *Id*. at 59. Applying billboard caselaw to in-taxi advertisements was appropriate because of the captive-audience similarities, but that similarity does not apply here. *See IMS Health, Inc. v. Sorrell*, 630 F.3d 263, 279–80 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011). Thus, *Vugo*'s narrow tailoring analysis is fatally attenuated in non-billboard, non-captive-audience cases such as this one.

In this case, the district court erred in placing the burden on the Dealers to "show that 'Segregation and Labeling' advances the State's interest as effectively as the Display Restriction." *See Seggos*, 2021 WL 848196, at *4, App. 044. As *Central Hudson* and the cases discussed above make clear, it is the Department's burden to show that the Dealers' proposed alternative would not advance the government's interest at all. 447 U.S. at 571.

The only evidence that the Department has produced to show that the Dealers' proposed alternative is ineffective is a single occurrence of an *unlicensed* merchant displaying *unlicensed* items containing ivory, and selling them to an undercover officer upon the officer's request despite a sign stating the items were not for sale. App. 147–48. But the Department's evidence does not show that the Dealers' proposed Segregation and Labeling alternative would be ineffective in preventing illegal intrastate sales generally, or as applied to Department license-holders. Rather, it merely shows that unlicensed merchants willing to sell unlicensed items containing ivory are unsurprisingly also willing to display those unlicensed items and sell them in New York despite posted statements to the contrary.[19]

[19] In contrast, the record shows that certain individual members of the Dealers have shipped their licensed items out of New York, or placed them into storage indefinitely, rather than display them in New York. App. 114, 117–18. Therefore, prohibiting licensed Dealers from displaying licensed items, due to a single instance of illegal behavior on the part of an unlicensed merchant with unlicensed goods, is irrational.

Indeed, the Department's own witness confirmed the narrow application of the evidence. App. 147–48 ("In this prosecution, the illegal ivory was not licensed for interstate or intrastate sale, and thus could not have been displayed for sale regardless of the Display Restriction."); App. 147 ("seller subsequently pleaded guilty to … violating § 11-0535-a, by illegally selling ivory not licensed for intrastate sale …."). Therefore, the Department has not shown that the Dealers' proposed alternative of displaying licensed items containing ivory separately from other items, and including a notice that the items are not for sale in New York, is ineffective in preventing illegal intrastate sales.

Holding the government to the burden of showing less restrictive alternatives are ineffective in advancing the government's aims makes sense. Were plaintiffs required to show less restrictive alternatives are "as effective" as speech bans, that would create a perverse presumption in favor of banning protected speech. As it is likely that where the government is restricting speech to address a harm in a way that satisfies *Central Hudson*'s first three prongs, banning the offending speech, rather than limiting it to some extent, will be the most effective means to protect against those alleged harms.[20]

[20] It would also empower the government "to license speech and reduce its constitutional protection by means of the licensing alone." *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009).

For example, in *Lorillard Tobacco Co. v. Reilly*, the Supreme Court held that Massachusetts' outdoor advertising restrictions on certain tobacco products were more extensive than necessary even though the restrictions—which in many locations functioned as an outright ban—were more effective in reducing underage tobacco use than alternatives that allowed a greater amount of advertising. 533 U.S. at 560–66. Therefore, if challengers to speech bans must show a less restrictive alternative is as effective as a ban—which they are unlikely to be able to do—then the government will be spared from a powerful check placed by the Supreme Court on the incentive to enact anything but speech bans.[21] *See NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect."); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (rejecting government's use of prophylactic ban on commercial speech because "the protection afforded

[21] It is also hard to conceive of a principle capable of limiting applicability of such a standard to just this case. For example, were the government to similarly argue that the most effective approach to limiting the harms of age-restricted products to underage individuals is to ban their display, then numerous products sold and displayed throughout New York—many of which are displayed openly in stores like Walmart, as well as bodegas and drugstores—could likewise be banned from being displayed. *See*, *e.g.*, N.Y. Alco. Bev. Cont. Law §§ 3(1), 65(1), 82 (prohibiting sale of frozen alcoholic desserts, beer, and wine to individuals under 21); N.Y. Gen. Bus. Law § 399-r (prohibiting sale of paint pellet guns to individuals under 16); N.Y. Penal Law § 400 (requiring license to purchase handguns, and license is only available to individuals aged 21 and older); N.Y. Pub. Health Law §§ 1399-BB, 1399-CC, 3381 (prohibiting sale of tobacco, tobacco products, tobacco paraphernalia, and hypodermic needles and syringes to individuals under 21).

commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course.").

When considering whether the government's chosen speech restriction—in this case a ban on certain physical commercial displays—is more extensive than necessary, the government bears the burden of showing that any less restrictive alternatives are ineffective at advancing the government's aims. Because the court below merely compared the efficacy of the Display Restriction with the Dealers' proposed Segregation and Labeling alternative, and determined the Display Restriction to be most effective, the lower court erred as a matter of law and should be reversed.

CONCLUSION

The district court's decisions dismissing the Dealers' preemption claim and granting the Department's motion for summary judgment as to Dealers' First Amendment claim should be reversed.

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Respectfully submitted,

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