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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INTRODUCTION

Pursuant to exemptions in the Endangered Species Act ("ESA") and its implementing regulations, members of the Art and Antique Dealers League of America, Inc., and the National Antique and Art Dealers Association of America, Inc., (collectively "Dealers") deal in valuable antiques and artwork containing ivory.[1] *See* 16 U.S.C. § 1539(h) (exempting 100-year-old antiques from ESA's trade prohibitions); 50 C.F.R. § 17.40(e)(3) (exempting artwork containing de minimis amounts of African elephant ivory). Such items possess artistic and cultural value worldwide, and often significant monetary value. Federal law protects Dealers' ability to trade these important artifacts; New York disagrees with that policy.

Out of concern "for protecting endangered and threatened species," Dep't Br. at 1, New York enacted the State Ivory Law to effectively prohibit most sales of ivory in New York. N.Y. Envtl. Conserv. Law § 11-0535-a. Nevertheless, New York also recognized that sales of antiques containing ivory do not affect at-risk species. *Id*. § 11-0535-a(3)(a) (exempting some 100-year-old antiques). *See also* Revision of the 4(d) Rule, 81 Fed. Reg. 36,388 ("based on all available evidence," trade in 100-year-old antiques does not contribute "to the poaching of elephants in Africa."); *id*.

[1] Throughout this Brief and Dealers' Opening Brief, references to antique ivory include rhinoceros horn.

at 36,397 ("we do not believe [items with de minimis ivory] are contributing to elephant poaching or the illegal ivory trade.").

Despite the evidence, New York arbitrarily capped which items qualify as antiques permissible for sale in New York and banned sales of art containing de minimis amounts of African elephant ivory. But this lawsuit forced the State to concede that it has no authority to ban sales that the ESA allows, at least to out-of-state buyers. App. 020–021 n.3. Instead of the outright ban the Legislature enacted, the Department of Environmental Conservation now enforces a more limited ban that allegedly applies only to sales that happen entirely within New York. Yet the ban on all sales effectively remains because the Department prohibits Dealers from physically displaying items that it concedes are legal for sale to out-of-state buyers. Because buyers of antiques and art containing ivory insist on physically inspecting the pieces, App. 062–063, 108–109, 111, 117, 144, the Display Restriction ensures that the market for these items remains moribund in New York, despite contrary federal policy.

Even if the Ivory Law were not preempted, the Display Restriction violates Dealers' constitutional rights to display legal products for sale. Consistent with the original intent of the Ivory Law to ban such sales, the Display Restriction ensures Dealers' commercial message is silenced. Without the right to display antiques and art for sale, Dealers are effectively prohibited from selling those legal items. Because

the Display Restriction is a content- and speaker-based restriction that singles out licensees, it is subject to strict scrutiny, which it fails. Even under intermediate scrutiny, the Display Restriction violates Dealers' First Amendment rights because it is more extensive than necessary to prevent illegal sales.

This Court should reverse the dismissal of Dealers' preemption claim, and the grant of summary judgment to the Department on the First Amendment claim.

I. The State Ivory Law Is Preempted

The Ivory Law was intended to outlaw what the ESA allows. Subject to limited exceptions, the Ivory Law makes it illegal 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)–(3). Faced with this litigation, the Department conceded that it only applies the Ivory Law to sales occurring entirely within New York. App. 021–022 n.3. But the Department nevertheless imposes a Display Restriction that results in an effective ban on sales even to buyers outside New York. The Ivory Law's original intent is thus effectively in full force, as nearly all sales of ivory are restricted in New York regardless of the buyer's location.

To avoid the ESA's preemption provision, 16 U.S.C. § 1535(f), the Department and Intervenors highlight form over function. That Appellees say the Ivory Law only applies to commerce within New York does not make it so. Despite the Department's assurances that it only applies the Ivory Law to sales within

New York of antiques containing more than 20% ivory and art containing de minimis amounts of African elephant ivory, the Law still runs afoul of the ESA's preemption provision due to the practical effects of the Law and the inherently interstate nature of the ivory market. Even if the Ivory Law were not in direct conflict with the ESA, the Law still creates an obstacle to the achievement of the federal government's exemption of antiques and art from trade restrictions.

A. The State Ivory Law Is Expressly Preempted

The ESA preempts "[a]ny state law or regulation that applies with respect to the importation or exportation of, or interstate or foreign commerce in" listed species "to the extent that it may effectively … prohibit what is authorized pursuant to an exemption" under the statute or its implementing regulations. 16 U.S.C. § 1535(f). The Department argues that the Ivory Law neither "applies with respect to" interstate or foreign commerce, nor "effectively … prohibits what is authorized" by federal exemptions because it only applies the Ivory Law to transactions entirely within New York. Dep't Br. at 21–23. But the Department's myopic focus on where a transaction occurs fails to account for how the statutory scheme operates. The ESA's preemption of state laws that "effectively … prohibit" what federal law allows is focused entirely on the *practical* operation of state law.

The Department concedes that the antique and de minimis exemptions are "exemptions" within the meaning of section 1535(f). *See* Dep't Br. at 22. Indeed,

section 1535(f) is found along with the antique exemption in Chapter 35 of Title 16 of the U.S. Code. *See* 16 U.S.C. § 1539(h). Likewise, the de minimis exemption resides in the regulations implementing Chapter 35 at 50 C.F.R. §§ 17.40(e)(3) and (e)(9). *See* 50 C.F.R. § 17.1 ("The regulations in this part implement the [ESA]").

Contrary to the Department's concession and the ESA's text, Intervenors claim that there is some meaningful difference between "activity that is merely left unrestricted" and "activity clearly authorized by the federal government." *See* Int. Br. at 15. Yet the ESA preempts state laws that "effectively … prohibit what is authorized" by any federal exemption or permit under the ESA. Section 1535(f). If the ESA or its regulations exempt an activity that is otherwise prohibited, then that activity is "authorized pursuant to an exemption." *Id*.[2]

It is true that section 1535(f) does not explicitly preempt intrastate sales, *see* Dep't Br. at 21–22, but that does not mean a limitation on sales within New York cannot practically "appl[y] with respect to" importation and interstate or foreign trade and "effectively … prohibit" what the ESA allows. *Cf. United States v. Lopez*,

[2] Any application of *Cresenzi Bird Importers, Inc. v. New York*, 658 F. Supp. 1441 (S.D.N.Y. 1987), is limited, as that case was resolved on the grounds that permits possessed by the challengers were "not the 'permits' or 'exceptions' under § 1539 to which § 1535(f) refers," *see id*. at 1446. Here, there is no reasonable disagreement that the antique and de minimis exemptions are covered by section 1535(f). In any event, Intervenors overstate the precedential value of *Cresenzi*. Int. Br. at 20. On appeal, this Court summarily affirmed for "substantially" the same reasons, 831 F.2d 410, 410 (2d Cir. 1987), thus Intervenors err in claiming "this Court … conclusively interpreted the 'applies with respect to' language" of section 1535(f).

514 U.S. 549, 559 (1995) (intrastate activities that "substantially affect interstate commerce" subject to Congress' commerce power). The Ivory Law prevents sales of antiques and art containing ivory, which originate only outside of New York, as the Department admits, Dep't Br. at 22–23. Therefore, the Ivory Law "applies with respect to" importation and interstate and foreign trade in ivory because it restricts sales of antiques and art that are only present in New York due to their importation into the state. For example, Anthony Blumka testified that due to the Ivory Law he no longer imports antiques and art containing ivory into New York, App. 114, 128 (27:16-20), 132 (44:19-25; 45:10-25), and Scott Defrin testified that his inventory lies dormant in storage, and that he is unlikely to import additional items into New York, *see* App. 118.[3] In addition, the Department's use of the Display Restriction to enforce the Ivory Law also causes the Law to apply to interstate and foreign trade because it "effectively prohibits" such trade. *See* App. 062–063, 108–109, 111, 117, 144. As a result, this Court should focus on the Ivory Law's practical effects when

[3] The Department asks this Court to "disregard" the Defrin (App. 116) and Schaffer (App. 119) declarations. Dep't Br. at 50–51. But precluding witness testimony is discretionary, *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 297 (2d Cir. 2006), and "a harsh sanction that should be imposed with caution," *see Pal v. N.Y. Univ.*, No. 06 Civ. 5892, 2008 WL 2627614, at *3 (S.D.N.Y. June 30, 2008). The Department never alleged any prejudice from the declarations, so preclusion is improper. *See Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006). Further, the failure to disclose the witnesses was harmless, as the declarations simply provide additional evidence of Dealers' practices and the effects of the Ivory Law that are supported by uncontroverted sources.

interpreting the "plain wording" of the ESA's preemption clause. *See Chamber of Commerce of the U.S.A. v. Whiting*, 563 U.S. 582, 594 (2011) (quotation omitted).

The Department's and Intervenors' discussion of the ESA's legislative history likewise ignores the Ivory Law's practical effect in prohibiting imports and interstate and foreign trade, as well as the foreign nature of the items themselves. Dep't Br. at 25–26 ("so long as they did not interfere with interstate or foreign shipments …."); Int. Br. at 15–16. Statements relied on by Appellees also do not show whether Congress or the Fish and Wildlife Service ever considered that a state's ban on intrastate sales may effectively prohibit importation or interstate and foreign commerce. *See* Int. Br. at 17. It is evident, however, that Congress intended federal law to control the market for ivory. 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."). Therefore, it is unlikely that Congress would endorse the Department's attempt to avoid preemption by claiming that restricting trade within the state of an inherently foreign product does not affect importation or interstate commerce. Were it otherwise, the antique and de minimis exemptions would have little practical effect.

Contrary to the Department's efforts to distinguish *Rowe v. New Hampshire Motor Transport Ass'n*, 552 U.S. 364, 368 (2008), and its use of the phrase "related

to," *see* Dep't Br. at 28, the Court in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), noted that "[t]he phrase 'relate to' was given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Id*. at 47 (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)); *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) ("a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."); *Altria Group, Inc. v. Good*, 555 U.S. 70, 86 (2008) ("'relating to' is synonymous with 'having a connection with'") (citation omitted). Here, the ESA's "applies with respect to" language likewise should be given its "common-sense meaning" such that the Ivory Law applies to imports and interstate and foreign trade in antiques and art containing ivory due to its practical effects on those activities.

Nor are the Department or Intervenors correct that the Ninth Circuit cases cited by Dealers only "addressed California's prohibition on the import or interstate sale of threatened species." Dep't Br. at 29; Int. Br. at 25–26. Both cases deal with commerce within a single state. *Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760, 761 (9th Cir. 1983) (state law preempted that prohibited the "import into this state for commercial purposes, *to possess with intent to sell, or to sell within the state*") (emphasis added); *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758,

759 (9th Cir. 1983) (state law preempted that "would prohibit *trade within California* in elephant products even by a federal permittee") (emphasis added). the Ninth Circuit looked to the practical effect of the state laws at issue—prohibiting all trade of certain products within and from a state—to determine they were preempted.[4]

The ESA's savings clause further clarifies the preemption provision by excluding state laws targeting "migratory, resident, or introduced fish or wildlife" from ESA preemption. § 1535(f). The savings clause thus allows states to restrict sales of species found within their borders even if such restrictions would otherwise be preempted because they effectively prohibit authorized interstate or foreign trade. But that is not the case here, where the Ivory Law limits the ability of Dealers to trade in antiques and art containing ivory derived from animals not migratory, resident, or introduced to New York.[5]

Far from rendering the savings clause "meaningless" or imperiling "many state laws," Int. Br. at 19–20, the effect of the antique and de minimis exemptions is

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[4] That the plaintiffs in both cases possessed federal permits or licenses is not a distinguishable factor. *See* Dep't Br. at 30. Under the ESA, state laws which "effectively … prohibit what is authorized" by an "exemption *or* permit" are preempted. Here, Dealers seek to conduct transactions authorized by ESA exemptions.

[5] Intervenors omit the key "migratory, resident, or introduced" qualifiers from the savings clause, apparently attempting to expand the savings clause. *See* Int. Br. at 14, 18. Intervenors also incorrectly accuse Dealers of omitting the very sentence that includes the "migratory, resident, or introduced" language. *Id*. at 19.

limited. Should Dealers prevail, only antiques containing more than 20% ivory and artwork containing de minimis amounts of African elephant ivory will be affected. New York's, or any other state's, ban on all other sales of ivory is not implicated. Because the Ivory Law effectively prohibits commerce authorized by federal exemptions, it is preempted.

B. The State Ivory Law Conflicts with Federal Law

Congress' and the Fish and Wildlife Service's ivory policy balances conservation concerns with burdens on commerce. *See* 81 Fed. Reg. 36,399. Because the Ivory Law effectively prohibits Dealers from importing antiques and art containing ivory into New York, and the Ivory Law and Display Restriction combine to effectively prohibit Dealers from conducting any sales of those items from New York, that policy is frustrated. Intervenors and the Department focus on the general conservation goals of the ESA, Dep't Br. at 19–20; Int. Br. at 23–24 n. 9, but the specific policy judgments that matter are those that led to the inclusion of the antique and de minimis exemptions. And "based on all available evidence," the Fish and Wildlife Service found that exempting this commerce was consistent with the ESA's conservation goals because it does not contribute "to the poaching of elephants in Africa." *See* 81 Fed. Reg. at 36,388. Therefore, the balanced policy judgment served by the antique and de minimis exemptions is stymied by the Ivory Law.

Attempting to undermine Dealers' claim that they are effectively prohibited from conducting interstate and foreign trade, the Department selectively cites portions of the record about what little remains of Dealers' ivory business. *See* Dep't Br. at 34. But in the same testimony cited by the Department, Mr. Blumka explained that he shipped his inventory to Europe because of the Ivory Law, App. 127 (25:5-13), and if not for the Law he would seek to re-import his inventory, App. 127 (25:14-21). There are additional examples throughout the record of how the Ivory Law effectively prohibits interstate and foreign trade in antiques and art containing ivory. *See*, *e.g.*, App. 062–063, 108–109, 111, 117.

The presumption against preemption does not apply here. To the extent it is true that "the conservation of wildlife 'has always been treated as within the proper domain of the police power' of the States," Dep't Br. at 19–20, the cases relied on by the Department qualify that statement as applying to regulations concerning species that are physically present in the state due to their native or migratory status. *See Lawton v. Steele*, 152 U.S. 133, 139 (1894) ("As the waters … in the act are unquestionably within the jurisdiction of … New York, there can be no valid objection to a law regulating … fishing in these waters"); *see also Barrett v. New York*, 220 N.Y. 423, 427 (N.Y. 1917) ("the general right of the government to protect wild animals is too well established to be now called in question. Their ownership is in the state in its sovereign capacity …."); *Hughes v. Oklahoma*, 441 U.S. 322, 338

(1979) (states "protect and conserve wild animal life within their borders."). *See also* 16 U.S.C. § 1535(f) (exempting "migratory, resident, or introduced fish or wildlife").

Cresenzi is not to the contrary. *See* Int. Br. at 28. While *Cresenzi* noted that states possess the power to regulate some out-of-state wildlife, it relied on the limited holding of *People ex rel. Silz v. Hesterberg*. 211 U.S. 31, 39 (1908) ("The acts in question were passed … with a view to protect the game supply for the use of the inhabitants of the state."); *see* 658 F. Supp. at 1447. At best, *Cresenzi* was concerned with animal species with a direct tie to the state, or which could affect animals within the state. Neither condition applies here.

* * *

The Ivory Law effectively prohibits importation and interstate and foreign trade in antiques and art containing ivory, which are inherently foreign objects whose trade is authorized by federal exemptions. As a result, the ESA preempts the Ivory Law regardless of the Department's attempt to limit its application to intrastate sales. Even if the Ivory Law were not expressly preempted, it conflicts with federal policy exempting antiques and art containing ivory from trade restrictions. The Ivory Law is preempted.

II. The Display Restriction Violates Dealers' First Amendment Rights

The Department recognizes that the Ivory Law is preempted from *directly* prohibiting interstate and foreign commerce in antiques and art containing ivory, 81 Fed. Reg. 36,399, but it employs the Display Restriction to effectively ban those sales anyway. Even if the Ivory Law were not preempted, the Display Restriction severely restricts Dealers' free speech rights. The Department admits that it targeted licensees' physical displays because it is the most effective speech, App. 144; the Display Restriction is therefore subject to strict scrutiny. Even if a lesser standard applied, restricting licensees' speech concerning licensed antiques and art is far more extensive than necessary to address the Department's concerns about illegal sales.

A. Strict Scrutiny Applies to the Display Restriction

Like the law struck down in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563–64 (2011), the Display Restriction stops "a single category of speech by a single category of speaker": marketing antiques and art containing ivory by those authorized to sell them. Although this Court applied intermediate scrutiny in *Vugo, Inc. v. City of New York*, 931 F.3d 42, 49 (2d Cir. 2019), it acknowledged that strict scrutiny "might apply" to commercial speech restrictions that "keep[] would-be recipients of the speech in the dark," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 523 (1996) (Thomas, J., concurring), "or otherwise prevent the public from receiving certain truthful information," *id.* at 503 (Stevens, J., plurality opinion).

Vugo, 931 F.3d at 50 n.7. In such cases, laws that are content- and speaker-based because they "target a single category of speech by a single category of speaker," *id*., are suspect because they suggest the government is attempting to "quiet[ ]" speech that it "fear[s] … might persuade," *id*. (quoting *Sorrell*, 564 U.S. at 563–64, 576).

The Ivory Law regulates antiques and art containing ivory involved in economic transactions within New York. N.Y. Envtl. Conserv. Law § 11-0535-a(2). In turn, the Display Restriction applies to Department licensees who display "items for sale in New York." App. 100. The Department and Intervenors thus incorrectly state that the Display Restriction "even-handedly restricts the physical display of ivory articles that are prohibited for sale in New York," Dep't Br. at 40, and that it "appl[ies] across the board to any would-be displayer of [ivory articles] … ," Int. Br. at 34. In fact, rather than applying to anyone who displays antiques and art containing ivory in New York, the Display Restriction applies only to the Department's licensees who display those items *for sale*. Anyone else who displays antiques and art containing ivory—e.g., museums or private citizens not selling their items—is not subject to the Display Restriction; it is therefore speaker-based due to its singular application to licensees like the Dealers. *See Sorrell*, 564 U.S. at 563-64.

The Display Restriction is also content-based because it only applies to the display of antiques and art containing ivory for sale. Displays for educational,

artistic, or decorative purposes are not affected by the Display Restriction. Neither Appellee disputes the content-based nature of the Display Restriction. Dep't Br. at 38; Int. Br. at 33. Nor could they. *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*, 564 U.S. at 564–66). As a result, the Display Restriction "target[s] a single category of speech by a single category of speaker." *Vugo*, 931 F.3d at 50 n.7.

The Department's attempt to distinguish *Sorrell* based on the "unusual features" of the statute at issue there only highlights its similarity to the Display Restriction. *See* Dep't Br. at 39–40. In *Sorrell*, the law "restrict[ed] the sale, disclosure, and use of pharmacy records that reveal[ed] the prescribing practices of individual doctors." 564 U.S. at 557. The law singled out pharmaceutical manufacturers, prohibiting them from using the information to market their products to doctors. *Id*. at 564–65. Here, the Department singled out licensees like the Dealers and prevents only them from physically displaying antiques and art containing ivory for the purpose of marketing those products.

The Department chose to single out licensees instead of all displayers of antiques and art containing ivory, and it restricted only the displays of licensees offering those items for sale, because it "fear[s]" such displays "might persuade"

someone to conduct an ivory purchase within New York. *See* Dep't Br. at 50; App. 144–45; *see also Vugo*, 931 F.3d at 50 n.7 (quoting *Sorrell*, 564 U.S. at 576). The Display Restriction is thus an impermissible attempt to "keep[ ] would-be recipients of the speech in the dark," *44 Liquormart*, 517 U.S. at 523 (Thomas, J., concurring), "or otherwise prevent the public from receiving certain truthful information," *id.* at 503 (Stevens, J., plurality opinion). *See also id.* at 497 ("a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it."). But "the fear that speech might persuade provides no lawful basis for quieting it." *Sorrell*, 564 U.S. at 576.

The Department's focus on the possibility that buyers may view information about antiques and art containing ivory via photographs, catalogues, and the internet, for example, ignores the fact that buyers only consider a physical display, along with the opportunity to inspect items, as a sufficient means of obtaining the information necessary to determine whether they will purchase ivory art and antiques. App. 062–063, 108–109, 111, 117, 144. The Department obviously agrees that a physical display is the most meaningful speech; that is why it singled it out for prohibition. *See* App. 144. It did so to silence the most effective means of communicating with potential buyers because the State disagrees with the federal policy allowing those sales. Strict scrutiny applies.

B. The Display Restriction Fails Even Intermediate Scrutiny

The Display Restriction is more extensive than necessary to further the only interest the Department identifies—"curtailing the illegal sale of ivory goods within New York," *see* Dep't Br. at 41—because the only sales the Display Restriction targets are *legal* sales. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 188 (1999). The Display Restriction is a condition of receiving a Department license to sell antiques and art containing ivory in interstate and foreign commerce, which prohibits licensees from physically displaying items that the Department concedes licensees like Dealers are allowed to sell. App. 100. This distinction is important, because anyone caught selling any item containing ivory without a license is guilty of engaging in an illegal sale, not of illegally displaying ivory. *See* App. 147. Therefore, employing the Display Restriction to limit the speech of licensees engaging in *legal* interstate and foreign transactions involving licensed items is fundamentally more extensive than necessary to further the Department's stated interest.

The Department advances two primary arguments in its attempt to satisfy its burden to show the Display Restriction is no more extensive than necessary. *See Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("the State bears the burden of justifying its restrictions"). First, the Department asserts the Display Restriction "remov[es] the product itself from interactions between a seller and a

prospective buyer." Dep't Br. at 42. Second, the Department claims that sufficient alternative means of communication remain available to Dealers. Dep't Br. at 43. Both arguments ignore how the Display Restriction functions and the record evidence.

1. The Display Restriction Does Not Target Illegal Sales

The Display Restriction does not "remov[e]" antiques and art containing ivory from interactions between buyers and sellers for the simple reason that it does not prohibit Dealers from keeping their licensed inventory hidden from view at their galleries. A buyer can view photographs of an antique in the gallery, in catalogues, or online—all of which are permitted by the Department—and ask to physically inspect the item. Then, an unscrupulous seller can lead the buyer into a back room to display the item and sell it. The Display Restriction does not "remove" the ivory, it simply encourages surreptitious viewing. It thus lacks a "reasonable" fit with the Department's stated aim of preventing illegal sales and is more extensive than necessary. *See Fox*, 492 U.S. at 480.

That the number of items containing ivory being physically displayed in New York has declined since the enactment of the Ivory Law and imposition of the Display Restriction, is predictably unremarkable. *See* App. 146, 185. Such evidence merely shows that licensees are complying with the Display Restriction, and that those who may engage in unlicensed sales no longer openly flout the law. To the

extent that illegal intrastate sales may continue, the Display Restriction impedes efforts to discover them by encouraging unscrupulous sellers to keep their inventory hidden. Were licensees able to physically display their antiques and art for sale, it would promote compliance among all sellers by making it easier for Department inspectors to see what items are being offered for sale. When even licensed items must be hidden from view, Department efforts to prevent illegal sales are plainly more difficult because illegal sales are conducted in the shadows. In contrast, when items are openly displayed, an inspector can more easily identify items containing ivory being offered for immediate sale and can cross-reference the Department's records to determine whether the item is licensed for sale. *See*, *e.g.*, App. 147, 202 (58:4-19). Should an antique item licensed only for interstate sale be found on display, an inspector could then check the licensee's sales records in the future to ensure such items were not sold intrastate. *See* App. 100.

The Department's evidence showing that the number of ivory items displayed for sale in New York has declined is most notable for what it does not show. That the Ivory Law and Display Restriction have succeeded in reducing the number of items being displayed for sale does not address whether the law is more extensive than necessary to stop *illegal sales* of ivory. Indeed, the evidence does not establish whether the number of transactions has declined, legal or otherwise. The Department

does not say; it merely assumes that the reduction in displays means that illegal sales have likewise declined. *See* Dep't Br. at 46; App. 145–46.

At bottom, the Department argues that the physical display of *licensed* antiques and art containing ivory must be prohibited, otherwise ivory objects will continue to be illegally sold without a license. To support its assertion, one would expect the Department to produce evidence of licensees displaying items that are not licensed for intrastate sale and conducting those sales anyway. The Department has not done so. In fact, the Department has not produced evidence demonstrating a single instance of a licensee attempting or conducting an illegal intrastate sale. *See* App. 197 (37:16-25). Instead, the Department points to an anecdote concerning one enforcement action taken over an *unlicensed* ivory sale,[6] App. 147, 164, statements and studies showing the number of ivory objects on display in New York has decreased, App. 146, details of an enforcement action taken prior to the effective date of the Ivory Law and creation of the Display Restriction, App. 140–41, 159, and a general description of an undercover operation in which charges were brought for allegedly illegal ivory sales against unnamed defendants,[7] App. 141. None of

[6] It is not even clear that the piece was an antique or artwork capable of being licensed by the Department. App. 201 (at 54–55) ("we never looked into the age of the piece.").

[7] The description does not state the basis for the illegality of the sales or the disposition of the charges.

this evidence points to a problem of licensed sellers illegally selling ivory within New York.

Attempting to prevent illegal sales by restricting the speech of licensed sellers conducting legal sales fails to establish a "reasonable" fit, and is thus more extensive than necessary. *See Fox*, 492 U.S. at 480. This conclusion is confirmed by Captain Paluch's statement that the aim of the Display Restriction is to limit all sales of ivory in New York, not just illegal sales, App. 144 (¶¶ 20–21), as well as the Department's admission that its status as the "primary market for the trade in ivory" when the Ivory Law was enacted "establishes the magnitude of the State's asserted harm," Dep't Br. at 47–48. The Department's revelation that it is somehow harmed by sales of ivory whether those sales are legal or not, fatally undermines its argument that the Display Restriction is no more extensive than necessary to limit illegal sales.

More fundamentally, the Department fails to justify the Display Restriction because it relies on post-enactment evidence. This Court held that pre-enactment evidence is required to justify restrictions on expressive conduct under intermediate scrutiny. *See White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171 (2d Cir. 2007); *cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (intermediate scrutiny of sex-based discrimination requires justifications that "must be genuine, not hypothesized or invented *post hoc* in response to litigation."). The Department has not produced any probative evidence on which it originally based

its decision to create the Display Restriction. It has instead relied on the *post-enactment* evidence discussed above to justify the Restriction in response to this litigation.[8]

Dealers do not argue that the Department must "perform any specific analysis or [ ] conduct any particular study," Dep't Br. at 46, but the Department must point to some pre-enactment evidence that it weighed costs and benefits before imposing the Display Restriction. *Fox*, 492 U.S. at 480 ("we require the government goal to be substantial, [ ] the cost to be carefully calculated," and "it must affirmatively establish the reasonable fit we require."); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.* , 447 U.S. 557, 571 (1980) (government must show that "more limited speech regulation would be ineffective"); *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 371 (2002) ("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*.") (emphasis added). Rather than satisfying its burden, the Department attempts to shift it onto Dealers. *See* Dep't Br. at 50–51 ("plaintiffs have not adduced any evidence ….").

[8] The Hesse Auctions incident described by Captain Paluch is not pre-enactment evidence that supports the need for the Display Restriction. *See* App. 140–41. As detailed by him, the items at issue were not legally offered for sale in New York and were originally found on the company's *website*. *Id*. Upon further inspection, multiple illegal items were found housed in a warehouse. App. 141. It strains credulity that the Display Restriction would have prevented the core problem in that case: possession and sale of illegal items.

In any event, Captain Paluch testified that the Department failed to undertake any analysis of alternatives to the Display Restriction, to consider the burden of the Restriction on speech, or to conduct or seek out *any* studies or data to determine the effectiveness of the Restriction. App. 199. Instead, the evidence shows that the Department's first and only attempt to limit illegal ivory sales after the Ivory Law was enacted was to restrict the speech of licensed sellers in conducting legal sales. But "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson*, 535 U.S. 373.

New York State Ass'n of Realtors, Inc. v. Shaffer, 27 F.3d 834 (2d Cir. 1994) is instructive. There, licensed Realtors challenged a regulation prohibiting solicitation in designated areas. *Id*. at 839–40. The government sought to justify the restrictions through: (1) anecdotes that suggested some Realtors engaged in unsavory solicitations; (2) written examples purporting to show impermissible solicitations; and (3) complaints about solicitation that lacked specificity as to whether solicitations were improper or merely unwanted. *Id*. at 842–43. However, the government failed to show a single case had been brought against a licensed Realtor, and instead claimed that "persistent solicitation by realtors, regardless of its content" was "sufficient to establish *a fortiori* the existence of widespread blockbusting." *Id*. at 843. This Court held the solicitation ban was insufficiently justified because less restrictive measures were not examined, and existing measures

were not analyzed to determine if they were "an ineffective means" of reaching the same result. *Id*. at 844.

Similarly, here, the Department relies on anecdotes and reports stating the number of ivory items displayed for sale has decreased, without any evidence whether unlicensed items were removed from display or licensed sellers were complying with the Display Restriction. Nor does the Department have any evidence of a licensed seller either violating the Display Restriction or illegally selling ivory within New York. *See* App. 197 (37:16-25). Thus, just as in *New York State Ass'n of Realtors*, the Display Restriction lacks a "reasonable" fit and "is an impermissible restriction on commercial speech." *See* 27 F.3d at 844.

2. Sufficient Speech Alternatives Are Unavailable

The Department alleges the Display Restriction "leave[s] open ample channels of communication," Dep't Br. at 43 (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 569 (2001)), but it omits that the Restriction was chosen *because* it imposed a particularly effective burden on speech, *see* App. 144 (¶ 21). The Department also ignores Dealers' numerous statements that physical displays are the only meaningful and effective way of communicating about antiques and art containing ivory—statements that the Department's own witness endorsed. *See* App. 144 ("buyers of ivory of significant value are unwilling to make a purchase of ivory that they have not inspected in person."). The theoretical availability of ineffective

and inferior speech "alternatives" is insufficient to satisfy the Department's burden to show "ample" communicative methods remain available. *See Edenfield v. Fane*, 507 U.S. 761, 766 (1993) (in-person solicitation had "considerable value," and restriction "threaten[ed] societal interests in broad access to complete and accurate commercial information"); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977) (ban on real estate "for sale" signs unconstitutional because, while sellers had other options for communicating that property was for sale, "in practice realty is not marketed through" inferior alternatives, and alternatives "may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the [property]"); *Lorillard*, 533 U.S. at 565 (government cannot "unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products.").

Lorillard does not help the Department. In upholding part of Massachusetts' tobacco display regulations, the Court noted that the regulations governed "the placement of tobacco products *for reasons unrelated to the communication of ideas*." 533 U.S. at 569 (emphasis added). In contrast, the Court held that restrictions on indoor height requirements for tobacco advertising failed because they targeted the communicative aspects of the displays. 533 U.S. at 567. The Court's qualification is fatal to the Display Restriction because Captain Paluch admitted that the Restriction was imposed to limit the effectiveness of licensees' speech. App. 144, ¶ 21. Even

were that not true, the restrictions upheld in *Lorillard* are distinguishable from the Display Restriction.

Massachusetts' restrictions on tobacco displays merely required that tobacco be kept behind a counter and a salesperson be involved in handling the product. 533 U.S. at 568. By contrast, the Department bans all physical display of items it licenses only for interstate sale, and even rejected Dealers' proposal to place those items in separate displays along with disclaimers that the items are not for sale in New York. Nor do galleries like those operated by Dealers' members generally allow for self-service shopping. Indeed, the Department's other, unchallenged, license conditions include a requirement for salespersons to be involved in sales. App. 100 (requiring licensees to annually report description of all licensed items sold, including the date of transaction and contact info for purchaser).

The Court in *Lorillard* had no trouble finding the restrictions on tobacco displays "le[ft] open ample channels of communication," because they "do not significantly impede adult access to tobacco products." 533 U.S. at 569. Indeed, the Court noted that the restrictions on cigar displays did not prevent customers from physically inspecting cigars with a salesperson. *Id*. at 570. The opposite is true here. Dealers have shown, and the Department's witness agreed, that the Display Restriction impedes buyers from making legal purchases, and the very point of the Restriction is to forbid physical inspection.

Dealers do not seek an "unfettered First Amendment right" to display antiques and art containing ivory. *See* Dep't Br. at 45. To the contrary, Dealers do not challenge the Department's general license requirement, and have volunteered to separately display their items, with a disclaimer. To the extent that *Lorillard* upheld Massachusetts' narrower display restrictions because they limited the probability of illegal transactions, the evidence here fails to show that the Display Restriction is necessary to keep licensed sellers like Dealers from engaging in illegal sales. At most, the evidence shows that *unlicensed* sellers are willing to illegally sell unlicensed goods. The Display Restriction does not address such actions and is thus more extensive than necessary.

Dealers do not suggest that the Department must employ the least restrictive means available to address illegal sales or show there are no conceivable alternatives to the Display Restriction. "[B]ut if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Numerous alternatives less restrictive than the Segregation and Labeling alternative proposed by Dealers are available to the Department. Op. Br. at 52. Because the Department has provided no evidence that it considered any of these alternatives, it cannot "show that it carefully calculated costs and benefits of

burdening speech." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (cleaned up); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995) (alternatives "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) (alternatives "would have served the same governmental interests" as the government's more restrictive approach); *Bad Frog Brewing, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 101 (2d Cir. 1998) (where "numerous less intrusive alternatives" exist, speech restriction is "plainly excessive").

The Department suggests it "reasonably concluded that 'Segregation and Labeling' would not effectively prevent … illegal sales," Dep't Br. at 49, but it relied on post-enactment evidence of a single anecdote involving an unlicensed seller.[9] And as noted, the Department's witness acknowledged he was unaware of the Department ever considering the efficacy of any alternatives, App. 199, and admitted that the Display Restriction was chosen *because of* the burden placed on speech, App. 144. Because the Department first resorted to limiting speech, the Display Restriction fails even intermediate scrutiny. *See Thompson*, 535 U.S. at 373.

[9] The anecdote also fails to support the Department's argument that a disclaimer will not prevent a genuine buyer from initiating an illegal intrastate sale; Captain Paluch proposed the illegal sale. App. 200 (51:17–52:2).

CONCLUSION

This Court should reverse the lower court's dismissal of Dealers' preemption claim and the grant of summary judgment to the Department as to Dealers' First Amendment claim.

DATED: October 5, 2021.

Respectfully submitted,

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DATED: October 5, 2021.

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