No.

In the Supreme Court of the United States

THE ART AND ANTIQUE DEALERS LEAGUE OF AMERICA, INC.; THE NATIONAL ANTIQUE AND ART DEALERS ASSOCIATION OF AMERICA, INC.,
Petitioners,

v.

BASIL SEGGOS, IN HIS OFFICIAL CAPACITY, AS THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners are trade associations whose members include respected antique and art galleries in New York. They sell prized antiques and works of art that contain ivory and rhinoceros horn—products whose sale is expressly authorized by the Endangered Species Act (ESA) and its implementing regulations. In 2014, New York enacted its State Ivory Law, which bans Petitioners' members from selling their inventories of antique ivory and horn articles in New York.

Petitioners challenged the law as preempted by the ESA, which expressly preempts state laws that "prohibit what is authorized pursuant to an exemption or permit provided for in [the ESA] or in any regulation which implements [the ESA]." 16 U.S.C. § 1535(f). The Second Circuit panel held, over a dissent by Judge Sullivan, that only individualized administrative exceptions trigger the statute's preemption provision. Because the sale of antiques and art containing ivory and horn is allowed under broad, self-executing exceptions to the ESA's otherwise applicable prohibitions on commerce, the panel majority therefore held that New York's Ivory Law is not preempted.

The question presented is whether the ESA's preemption provision protects all activities enjoying an exception under the ESA, even if self-executing, or instead only those activities authorized by an individualized administrative exception.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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

Respondent-Intervenors are The Humane Society of the United States; Center for Biological Diversity; Natural Resources Defense Council, Inc.; and Wildlife Conservation Society.

The Art and Antique Dealers League of America, Inc. is a not-for-profit corporation. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

The National Antique and Art Dealers Association of America, Inc. is a not-for-profit corporation. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

These proceedings are directly related to the above-captioned case under Rule 14.1(b)(iii):

The following proceedings are directly related to this case:

- *The Art and Antique Dealers League of America, Inc., et al. v. Basil Seggos*, No. 1:18-cv-02504, 2019 WL 416330 (S.D.N.Y. Feb. 1, 2019).
- *The Art and Antique Dealers League of America, Inc., et al. v. Basil Seggos*, No. 1:18-cv-02504, 394 F.Supp.3d 447 (S.D.N.Y. Aug. 14, 2019).
- *The Art and Antique Dealers League of America, Inc., et al. v. Basil Seggos, et al.*, No. 1-18:cv-02504, 523 F.Supp.3d 641 (S.D.N.Y. Mar. 5, 2021).
- *The Art and Antique Dealers League of America, Inc., et al. v. Basil Seggos, et al.*, No. 21-569, 121 F.4th 423 (2d Cir. Nov. 13, 2024).

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PETITION FOR A WRIT OF CERTIORARI

The Art and Antique Dealers League of America, Inc., and The National Antique and Art Dealers Association of America, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The panel opinion of the Second Circuit is reported at 121 F.4th 423 and is reproduced in the Appendix at 1a.

The opinion of the United States District Court for the Southern District of New York is reported at 394 F.Supp.3d 447 and is reproduced in the Appendix at 74a.

JURISDICTION

The final decision of the Second Circuit sought to be reviewed was issued on November 13, 2024. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

Section 6(f) of the Endangered Species Act, 16 U.S.C. § 1535(f), is set forth in the Appendix at 115a. The New York State Ivory Law, N.Y. Env't Conserv. Law § 11-0535-a, is set forth in the Appendix at 130a.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Ivory has been an important medium for art, furniture, and jewelry around the globe for millennia. It has played a significant role in recording the history of art, religion, and human civilization. How it was obtained and the effect of the ivory trade on some

species of wildlife throughout the world are unavoidable aspects of ivory's history. Unquestionably, attitudes toward conservation and animal harvesting have changed over the years. And with increased attention given to endangered and threatened species, domestically and abroad, elephant ivory and rhinoceros horn are no longer commonly available for use in making new goods.

This case, however, does not concern goods made from new ivory or horn. Rather, Petitioners' members include some of the preeminent antique and art dealers in the United States who deal in antiques and art containing ivory and horn that are of historical and artistic significance. Some items date back centuries and are museum-quality. All items containing ivory and horn that Petitioners' members sell are authorized under exceptions to the otherwise applicable prohibitions of the Endangered Species Act (ESA). *See* 16 U.S.C. § 1539(h)(1); 50 C.F.R. § 17.40(e)(3). Simply, this case has no connection whatsoever to the modern concerns about poaching that animate New York's State Ivory Law, N.Y. Env't Conserv. Law § 11-0535-a.

Resolving this case requires interpreting the scope of the ESA's preemption provision, 16 U.S.C. § 1535(f) (Section 6(f)). That provision provides that state laws and regulations are preempted when they "prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter." *Ibid.* Specifically at issue in this case is the meaning of "exemption or permit."

The Second Circuit below held that the ESA's exceptions applying to antiques and art containing

ivory and horn sold by Petitioners' members are not "exemptions" included in the ESA's preemption provision. App. 18a. But the Second Circuit's decision runs directly counter to 50 years of governmental policy adopted under the ESA. The United States Department of the Interior, its subordinate United States Fish and Wildlife Service, and the United States Department of Justice all interpret Section 6(f) "exemptions" as including self-executing exceptions found throughout the ESA and its implementing regulations. The Second Circuit's conflicting interpretation thus undermines the federal structure created by Congress to allow commerce in certain species to respect treaty obligations and the need for uniform rules concerning endangered and threatened species.

The Second Circuit's decision also conflicts with the interpretation of ESA Section 6(f) in the Ninth Circuit. Over a dissent by Judge Sullivan, App. 40a, the Second Circuit panel interpreted Section 6(f) as referring only to individualized grants of authorization enumerated in Section 10 of the ESA, 16 U.S.C. § 1539. App. 18a. Because the exceptions authorizing trade in ivory and horn articles are self-executing, *see* 16 U.S.C. § 1539(h)(1); 50 C.F.R. § 17.40(e)(3), the Second Circuit held that the ESA does not preempt New York's State Ivory Law. In contrast, the Ninth Circuit interprets "exemption" under its ordinary meaning to include all self-executing exceptions to the ESA's prohibitions on commerce. *See April in Paris v. Bonta*, 659 F.Supp.3d 1114, 1127 (E.D. Cal. 2023) (applying *Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983), and *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758 (9th Cir. 1983)).

This case presents an ideal vehicle to settle both conflicts and establish a uniform meaning for Section 6(f) "exemptions." While additional states have enacted and continue to enact and consider laws similar to New York's State Ivory Law, New York holds the dominant position in the legal ivory market in the United States. Without this Court's intervention, it is thus unlikely that the issue presented in this case will continue to percolate among the Courts of Appeals. The Court should grant certiorari and settle the meaning of "exemption or permit" in the ESA's preemption provision.

STATEMENT OF THE CASE

I. Factual Background

A. Federal Regulation of Ivory[1]

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).[2] The following year, the United States entered the Convention on International Trade in Endangered Species 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 provide for the protection

[1] Although this case concerns ivory and rhinoceros horn, this Petition will refer to both as "ivory" unless otherwise specified.

[2] 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 endangered and threatened species. One method employed by the ESA is a general prohibition on the import, export, and trade in endangered species. 16 U.S.C. § 1538.

The ESA creates several self-executing exceptions from the statute's otherwise applicable prohibition on dealing in endangered species. *See*, *e.g.*, §§ 1538(b)(1)(A); 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.

African and Asian elephants are listed as threatened and endangered, respectively, under the ESA. 50 C.F.R. § 17.11(h). Likewise, all living species of wild rhinoceros are listed under the ESA. *Ibid*. As noted, for those species listed as endangered, any import, export, and trade in them is generally prohibited. 16 U.S.C. § 1538(a)(1). Trade in threatened species may be governed by regulation if necessary and advisable to provide for the conservation of a particular species, except where Congress has exempted such trade from regulation. § 1533(d). *See* § 1539.

The United States Fish and Wildlife Service (Service) regulates trade in African elephants under § 1533(d). *See* 50 C.F.R. § 17.40(e). That rule, however, is qualified by the statute's antique exception. 16 U.S.C. § 1539(h)(1). The rule also establishes a de minimis exception for non-antiques

containing African elephant ivory, if the ivory was removed from the wild prior to February 26, 1976; the ivory does not account for more than 50 percent of the item's value or volume; and the item was made prior to July 6, 2016. 50 C.F.R. § 17.40(e)(3).

Therefore, under these above-described self-executing exceptions, 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 an ESA permit.

B. New York's State Ivory Law

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

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. Env't 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. Env't 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. Env't Conserv. Law § 71-0925(16).

The State Ivory Law ostensibly allows 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.[3] § 11-0535-a(3). Unlike the federal antique exception, the State Ivory Law only permits the Department to issue licenses for the sale of antiques containing ivory if the ivory "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.

In sum, the State Ivory Law is more restrictive than federal law because: (1) its antique exception limits antiques to those containing less than 20 percent of their volume in ivory, while federal law includes no such limitation; and (2) it does not include a de minimis exception for non-antiques containing African elephant ivory offered for sale in New York.

C. The ESA's Preemption Clause

Section 6(f) of the ESA expressly preempts state laws and regulations that "prohibit what is authorized pursuant to an exemption or permit" under the ESA. *See* 16 U.S.C. § 1535(f). Congress thus precluded any state interference with any interstate and foreign commerce exempted from ESA prohibitions on trade.

II. Petitioners

The Art and Antique Dealers League of America, Inc., a nonprofit trade organization, is the oldest and principal antiques and fine arts organization in the

[3] The Department's license conditions applicable to advertising restrictions that were challenged in the district court and ordered enjoined by the Second Circuit are not at issue in this Petition.

United States. App. 149a. 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 devotes itself to the best interests of dealers and collectors of antiques and works of art. *See* App. 149a–150a. The League consists of more than 80 fine art and antique dealers with over 60 fields of expertise. App. 149a.

The National Antique and Art Dealers Association, Inc., is a nonprofit trade organization of the United States' leading dealers. App. 154a. 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. 154a. Through many years of study and experience, the Association's members possess specialized knowledge that makes them recognized authorities in their fields. App. 154a. 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. 154a.

Members of both organizations include individuals, galleries, and other businesses. They have an economic and professional interest in the purchase and sale of art and antiques containing ivory, among other things.

III. This Lawsuit

Petitioners initiated suit on March 20, 2018, challenging New York's Ivory Law and the Department of Environmental Conservation's license condition on displaying ivory articles on preemption and First Amendment grounds. After the district court dismissed Petitioners' complaint for lack of

subject matter jurisdiction, *see* App. 65a, Petitioners filed their Third Amended Complaint in March 2019, App. 146a, curing "standing deficiencies identified" by the district court, App. 78a. Petitioners then moved for summary judgment, with Respondent and Respondent-Intervenors moving to dismiss. App. 74a–75a, 78a.

The district court granted the motions to dismiss as to Petitioners' preemption claim, holding that New York's State Ivory Law only restricts sales of ivory articles in intrastate commerce, and did not therefore implicate the ESA's preemption provision. App. 83a–87a. As to Petitioners' First Amendment claim, the district court denied Petitioners' summary judgment motion because additional factual development was needed. App. 92a. After discovery, the parties cross-moved for summary judgment on Petitioners' First Amendment claim. The district court granted Respondent's motion, concluding that the Department of Environmental Conservation's license condition on displaying ivory articles was sufficiently tailored to a substantial governmental interest. App. 60a–64a.

On appeal, the Second Circuit affirmed dismissal of Petitioners' preemption claim. App. 18a. The majority held that, under ESA Section 6(f), a qualifying and preempting "exemption" is limited to only those ESA exceptions that require some individualized administrative process to be effective. *Ibid.* Because the antique and de minimis exceptions relied on by Petitioners are self-executing, they have,

per the majority, no preemptive effect under Section 6(f).[4] *Id.*

In dissent, Judge Sullivan disagreed with the majority's narrow view that Section 6(f) "exemptions" apply only to individualized administrative determinations. App. 42a–46a. Relying instead on the text of the ESA and its implementing regulations, the ordinary meaning of "exemption," and the ESA's own inclusion of self-executing "exemptions," Judge Sullivan concluded that Section 6(f) preempted New York's Ivory Law. App. 42a–46a.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because the Decision Below Conflicts With 50 Years of Policy Adopted under the Endangered Species Act

The Service is responsible for administering the ESA as applied to species for which the Secretary of the Interior maintains responsibility. *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 651 (2007). The National Marine Fisheries Services administers the ESA as applied to species for which the Secretary of Commerce maintains responsibility. *Ibid.* Generally, the Secretary of Commerce is responsible for marine and anadromous species, *see* 50 C.F.R. §§ 200.1–296.15, whereas the Secretary of the Interior has authority over all other ESA-listed species, *see* 50 C.F.R. § 10.1. As a result,

[4] As to Petitioners' First Amendment claim, the Second Circuit reversed the grant of summary judgment to the Department of Environmental Conservation and ordered summary judgment be entered in Petitioners' favor, enjoining the license condition restricting display of ivory articles for sale. App. 38a–39a.

the Service has primary responsibility for enforcing the ESA. The Second Circuit's interpretation of Section 6(f) of the ESA is directly at odds with 50 years of governmental policy adopted under the ESA, as evidenced by several examples discussed below.[5] A lack of uniformity in interpretation risks creating an uneven enforcement regime and reduces federal protections for commerce due solely to geography.

First. In 2015, the New York State Department of Environmental Conservation filed comments opposing the de minimis exception for art containing African elephant ivory, 50 C.F.R. § 17.40(e)(3), acknowledging that 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).[6] In response, and in declining to incorporate the Department's opposition, the Service agreed that the self-executing de minimis exception would preempt contrary state laws.[7] *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). Thus, the Service interprets Section 6(f) "exemptions" to include self-executing exceptions set out in the ESA's implementing regulations.

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[5] Given this divergence, a call for the views of the Solicitor General is particularly appropriate in this case.

[6] *Available at* https://downloads.regulations.gov/FWS-HQ-IA-2013-0091-6059/attachment_1.pdf.

[7] The Service also rejected the Department's argument that the exception would interfere with elephant conservation efforts.

Second. Consistent with the Service's view, the United States Department of Justice, in an amicus curiae brief submitted in *April in Paris v. Bonta*, 659 F.Supp.3d 1114 (E.D. Cal. 2023), argued that a California law restricting trade in crocodilian parts was preempted by the ESA. *See* App. 178a. According to the Department of Justice, because the Service issued special rules under the ESA applicable to the American alligator and threatened crocodilians, 50 C.F.R. § 17.42(a) and (c), the California law prohibited that which is authorized under the ESA's regulations. App. 191a–195a. In making that argument, the Department of Justice necessarily took the view that the special rules for the American alligator and crocodilians triggered Section 6(f), even though these rules established self-executing exceptions. *See* App. 192a–193a (state law void that "effectively . . . prohibit[s] what is authorized pursuant to . . . any regulation which implements this chapter") (citing 16 U.S.C. § 1535(f)) (alterations in original). *See also* 50 C.F.R. § 17.42(a)(2)(ii) ("Any person may take an American alligator in the wild . . . by any means whatsoever and in the course of a commercial activity in accordance with the laws and regulations of the State of taking subject to" limited conditions.); 50 C.F.R. § 17.42(c)(3) ("you may import, export, or re-export, or sell or offer for sale, deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of a commercial activity, threatened crocodilian skins, parts, and products without a threatened species permit").

Third. A 2019 "Chiefs Directive" issued by the Service's Assistant Director for the Office of Enforcement addressed the California law at issue in the *April in Paris* case noted above. App. 199a. The

Directive stated that, "if the provisions of the ESA, or endangered and threatened species regulations (50 CFR part 17), or endangered-species or threatened-species permits (50 CFR part 17) authorize . . . interstate commerce activities with an endangered species or threatened species, any conflicting State law is void." *Ibid.* The Directive then proceeded to call out the specific regulations applicable to crocodilians, 50 C.F.R. § 17.42(a) and (c), as preemptive of the California law that restricted interstate commerce in various crocodilian products. As noted above, these regulations establish self-executing exceptions, analogous to the antique, 16 U.S.C. § 1539, and de minimis exceptions, 50 C.F.R. § 17.40(e)(3), which Petitioners rely upon.

Fourth. In response to questions by legislators about the intended scope of the ESA's preemption provision during the original legislative debates over the ESA, Deputy Assistant Secretary for Fish and Wildlife and Parks, Douglas Wheeler, stated that it was the Administration's intent to prevent the "Federal program of prohibitions and exceptions" from being "thwarted" by contrary state laws, "especially where treaty obligations [like CITES] are relevant to the issuance of permits or exemptions." Hearings on Endangered Species Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93d Cong. 1st Sess. 387 (1973). Thus, the Department of the Interior did not appear to think that the self-executing aspect of an exception precluded the protection of the ESA's preemption provision.

Fifth. FWS Director's Order 210, Appendix 1, Guidance on the Antique Exception under the

Endangered Species Act provides detailed guidance from the Service on the antique exception, 16 U.S.C. § 1539(h). App. 203a. The Guidance makes clear that items qualifying for the exception may be sold in interstate commerce. App. 204a. Importantly, nowhere does the Guidance advise that conflicting state laws will void the commercial protections of the exception.

Taken together, these five examples show that the Department of the Interior, Department of Justice, and the Service all consistently interpret the ESA's preemption provision differently from the Second Circuit. While the longstanding consistency of the Service and the Departments of the Interior and Justice in interpreting Section 6(f) is not binding on the Court, the interpretation warrants "respect" given that it has been "made in pursuance of official duty [and is] based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). *See also Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 402 (2024) ("Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'") (quoting *Skidmore*, 323 U.S. at 140).

The Service's and Departments' interpretations are also consistent with the text of the ESA. First, the ESA does not define "exemption." *See* 16 U.S.C. § 1532. Second, the section relied upon by the Second Circuit majority to narrow the meaning of

"exemption," 16 U.S.C. § 1539, is titled "Exceptions."[8] Third, within section 1539, both self-executing exceptions and individualized authorizations are included. *Compare* § 1539(h), *with* § 1539(b). Fourth, section 1539(d), titled "Permit and exemption policy," refers to the provision for "hardship exemptions," § 1539(b), as an "exception." It is thus plain that a Section 6(f) "exemption" carries an ordinary meaning synonymous with "exception" and the ESA uses both terms interchangeably to refer to self-executing exceptions as well as individualized authorizations. *See* App. 42a–46a.

Because the Second Circuit's interpretation of Section 6(f) is directly at odds with the interpretation of the Service and the Departments of the Interior and Justice, as well as the text of the ESA, this Court should grant certiorari to ensure uniform application.

II. Certiorari Should Be Granted to Resolve a Conflict Between the Second and Ninth Circuits Over the Scope of the Endangered Species Act's Preemption Provision

The Courts of Appeals are in conflict over the scope of the Endangered Species Act's preemption provision, 16 U.S.C. § 1535(f). The Second Circuit panel below held that the provision narrowly applies to exemptions to the ESA's prohibitions that require some form of individualized administrative action to be effective. App. 11a–12a. In contrast, the Ninth

[8] When 16 U.S.C. § 1539 was amended in 1978 to add the antiques exception relied on by Petitioners, legislators referred to it as "exempting," "exempted," or "exempt" from the ESA's prohibitions. H.R. Rep. No. 95-1804, at 24 (1978) (Conf. Rep.); H.R. Rep. No. 95-1625, at 27 (1978).

Circuit has broadly applied the preemption provision to all exceptions contained in the ESA and its implementing regulations, whether self-executing or not. *See April in Paris*, 659 F.Supp.3d at 1127 (applying *Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983), and *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758 (9th Cir. 1983)).

In parsing the meaning of "exemption," the Second Circuit majority gave it an exceedingly narrow interpretation. While the ESA does not define "exemption," *see* § 1532, the court looked to section 1539, which sets out several "exceptions" to the ESA. App. 11a. To the Second Circuit, "exemption" in section 1539 is "employed in a narrow and precise fashion that distinguishes [it] from other limitations on the scope of the ESA's regulatory sweep." App. 11a. Unlike "exceptions," which "result from simple application of the terms of the [ESA] or [its] regulations" to narrow the ESA's prohibitions, "exemptions" refer only to "administrative actions, taken by the Secretary of the appropriate [federal] Department, that expressly grant an applicant authorization to engage in conduct that the ESA otherwise prohibits." App. 11a. The necessary authorization results from an "individualized grant[] of authority by the Secretary of the empowered Department." App. 12a.

The upshot of the Second Circuit's interpretation is that self-executing exceptions like those that apply to antiques containing ivory and art containing de minimis quantities of African elephant ivory are not "exemptions" that preempt state restrictions. App. 13a. That is because both exceptions automatically apply so long as the item qualifies for the respective

exception. Thus, the party wishing to conduct commerce with the item is not required to seek individual authorization by way of an "exemption" or permit from the Service or any other federal agency to conduct that commerce.

District courts within the Second Circuit have likewise narrowly interpreted the ESA's preemption provision. For example, in *Pinto v. Conn. Dep't of Env't Protection*, Civ. No. B-87-523, 1988 WL 47899, at *11 n.8 (D. Conn. Mar. 24, 1988), the court held that a self-executing exemption for possession of captive animals pursuant to 16 U.S.C. § 1538(b)(1) was not an "exemption" for preemption purposes. Instead, the court pointed to section 1539 and 50 C.F.R. § 17.21 (1986) as examples of the kinds of "affirmative exemptions" covered by Section 6(f). *Ibid.*

The Ninth Circuit, on the other hand, interprets "exemption" according to its ordinary meaning. In *Man Hing Ivory and Imports, Inc. v. Deukmejian*, 702 F.2d 760, 761 (9th Cir. 1983), the court considered whether a California law prohibiting trade in parts of various species of wildlife, including elephants, was preempted by the ESA. The plaintiff in that case was a "wholesale importer of African elephant ivory products" that operated under a federal permit granted under the then-operative regulation governing trade in African elephant products. *Id.* at 764. *See* 50 C.F.R. § 17.40(e) (1981). That permit triggered protection by the ESA's preemption provision as a "permit provided for . . . in any regulation which implements this chapter." *Man Hing*, 702 F.2d at 764; 16 U.S.C. § 1535(f).

On the same day as the *Man Hing* decision, the Ninth Circuit decided *H.J. Justin & Sons, Inc. v.*

Deukmejian, 702 F.2d 758 (9th Cir. 1983). Similarly to *Man Hing*, *H.J. Justin* was a challenge to the same California statute prohibiting trade in parts of various animal species, but *H.J. Justin* involved a manufacturer of boots made from African elephants, Indonesian pythons, and the Wallaby kangaroo who sought protection under the ESA's Section 6(f). 702 F.2d at 759. In line with *Man Hing*, the court held that the California statute was preempted as applied to African elephant boots because the boot manufacturer possessed a federal permit pursuant to 50 C.F.R. § 17.40(e) (1981). *H.J. Justin*, 702 F.2d at 759. *See also* 16 U.S.C. § 1535(f).

Both *Man Hing* and *H.J. Justin* were recently applied in *April in Paris v. Bonta*, 659 F.Supp.3d 1114 (E.D. Cal. 2023). There, the court reasoned that, under the plain language of Section 6(f), an "'exemption' is best understood as a legal provision that relieves a person of an otherwise applicable permit requirement." *Id.* at 1127. *See also id.* at 1131 (citing *Man Hing* and *H.J. Justin* for the proposition that Section 6(f) is "clear"). The court then went on to find that the Service's generally applicable and self-executing special rule for threatened crocodilians, 50 C.F.R. § 17.42(c)(1)(i)(E)–(F), "fit that definition" of "exemption." 659 F.Supp.3d at 1127. *See also Los Altos Boots v. Bonta*, 562 F.Supp.3d 1036, 1041–42 (E.D. Cal. 2021) (regulations governing trade in crocodilian parts, 50 C.F.R. § 17.42, are "exemptions" for Section 6(f) purposes). As a result, the California statute that sought to prohibit trade authorized under the Service's special rules for crocodilians was preempted. 659 F.Supp.3d at 1131. *See also April in Paris v. Becerra*, 494 F.Supp.3d 756, 767–68 (E.D. Cal. 2020) (preliminarily enjoining California's restriction

on sales of crocodilian parts, finding it likely that special rules for crocodilians are "exemptions" contemplated by Section 6(f)).

Intervenors in *April in Paris*—including two of the Respondent-Intervenors in this case—unsuccessfully pressed the same argument eventually adopted by the Second Circuit majority, App. 11a: an "exemption" in the ESA's preemption provision protects only "categorical exemptions and exceptions listed in 16 U.S.C. § 1539." 659 F.Supp.3d at 1130. The *April in Paris* court expressly rejected that argument, instead holding that "[i]t is improbable that Congress intended section 6(f) as a cross-reference to § 1539 only," because such a narrow interpretation would "artificially limit the plain language of section 6(f)" and had Congress intended such limitation it would have defined "exemption" as such and likely cross-referenced § 1539 in section 6(f) to accomplish that narrow end. *Ibid*. The interpretation of the ESA's preemption provision in the Ninth Circuit, as recently distilled in *April in Paris*, is squarely in conflict with that of the Second Circuit below. Only this Court can resolve the conflict. Certiorari should be granted to do so.

III. Certiorari Should Be Granted Because This Case Presents a Recurring Issue of Growing National Importance

The scope of the ESA's preemption provision is an issue of great importance beyond New York's legal ivory market. Whether other states enact restrictive ivory laws in conflict with the ESA's exceptions for antiques and art, or whether states attempt to limit commerce in other species expressly exempted from ESA prohibitions, there is substantial need for a

uniform interpretation of the ESA's preemption provision.

New York is not alone in seeking to restrict interstate and foreign commerce in articles containing ivory and rhinoceros horn. To date, at least 13 states and the District of Columbia have enacted similar restrictions.[9] Organizations like Respondent-Intervenors in this case also continue to advocate for new restrictions on ivory in additional states. *See* Kitty Block, *In Win For Elephants and Rhinos, Federal Court Upholds New York's Ivory and Horn Ban*, The Humane Society of the United States (Nov. 14, 2024).[10]

The states have also sought to limit other commerce expressly preempted by the ESA and its implementing regulations. For example, as discussed above with the *April in Paris* case, 659 F.Supp.3d at 1119–20, California restricted sales of items containing crocodilian parts despite successful conservation efforts to improve American alligator populations, *ibid.*, and despite ESA regulations authorizing trade in crocodilian parts, 50 C.F.R.

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[9] California (Cal. Fish & Game Code § 2022); District of Columbia (D.C. Code §§ 22-1861–1864); Hawaii (Haw. Rev. Stat. § 183D-66); Illinois (815 Ill. Comp. Stat. 357/5–10); Maryland (Md. Code Ann. Nat. Res. §§ 10-2B-01–09); Minnesota (Minn. Stat. § 84.0896); Nevada (Nev. Rev. Stat. § 597.905); New Hampshire (N.H. Rev. Stat. Ann. §§ 212-C:1–2); New Jersey (N.J. Stat. Ann. §§ 23:2A-13.1–13.5); New Mexico (N.M. Stat. Ann. §§ 17-10-1–6); Oregon (Or. Rev. Stat. § 498.022); Vermont (Vt. Stat. Ann. tit. 10, §§ 5501–08); Washington (Wash. Rev. Code § 77.15.135).

[10] *Available at* https://www.humanesociety.org/blog/new-york-ivory-horn-ban.

§ 17.42(c)(1)(i)(E)–(F).[11] In defense of California's restrictive and conflicting law, intervenor-organizations argued that the federal crocodilian rules were not "exemptions" for ESA preemption purposes—an argument that the court rejected. 659 F.Supp.3d at 1126, 1130.

Given the Second Circuit's conflict with both the Ninth Circuit's and the Service's and the Departments of the Interior and Justice interpretations of Section 6(f), neither state regulators nor dealers in antique ivory like Petitioners can know whether state laws outside of the Second and Ninth Circuits restricting sales of items expressly authorized under the ESA are preempted by the ESA. Until the scope of the ESA's preemption provision is settled, the lack of certainty is likely to significantly chill commerce in those states in items expressly authorized under the ESA, including antiques containing ivory and works of art containing de minimis amounts of African elephant ivory. Such a result is contrary to what Congress intended by authorizing commerce in those items. The Court should grant certiorari so that all

[11] Under the Second Circuit's interpretation of the ESA's preemption provision, states could also potentially ban commerce in other species despite self-executing exceptions within the ESA to the contrary. *See*, *e.g.*, 50 C.F.R. § 17.40(B)(1)(iv)(b) ("public zoological institutions may sell grizzly bears or offer them for sale in interstate or foreign commerce"); *id*. § 17.40(m)(2) (interstate commerce in wool from live vicuñas); *id*. § 17.41(c)(3) (interstate commerce in certain species within the parrot family); *id*. § 17.41(m)(2)(i) (interstate commerce in emperor penguins by public institutions); *id*. § 17.42(l)(2)(ii) (interstate commerce in Egyptian tortoises by public institutions); *id*. § 17.44(y)(3) (interstate commerce in beluga sturgeon caviar and meat).

interested parties have certainty about which state restrictions are preempted by the ESA.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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