

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

Docket No. 18-cv-02504 (LGS)

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

Defendant.

**BRIEF OF AMICUS CURIAE ANIMAL WELFARE INSTITUTE
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

ANIMAL WELFARE INSTITUTE
Johanna Hamburger
900 Pennsylvania Ave SE
Washington, DC 20003
Telephone: (202) 446-2136
Facsimile: (202) 446-2131
E-mail: johanna@awionline.org

COOLEY LLP
Kaitland Kennelly
Amy Dodenhoff
Bonnie Weiss McLeod
1114 Avenue of the Americas
New York, NY 10036-7798
Telephone: (212) 479-6643
E-mail: kkennelly@cooley.com
adodenhoff@cooley.com
bweissmcleod@cooley.com

Attorneys for Amicus Curiae
Animal Welfare Institute

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIESii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

CORPORATE DISCLOSURE STATEMENT1

INTRODUCTION2

NEW YORK’S IVORY LAW WAS ADOPTED IN RESPONSE TO THE POACHING
CRISIS3

ORGANIZED, MILITANT, AND TERRORIST ORGANIZATIONS PROFIT FROM THE
POACHING CRISIS7

ANTIQUÉ IVORY PERPETUATES THE SALE OF NEW IVORY9

NEW YORK’S ROLE IN THE IVORY TRADE AND THE INEFFECTIVENESS OF
PENALTIES EXISTING PRIOR TO 2014.....11

SUCCESS OF THE IVORY LAW AND THE IMPORTANCE OF KEEPING IT IN
PLACE.....15

CONCLUSION.....16

TABLE OF AUTHORITIES

State Statutes

N.Y. ENVTL. CONSERV. LAW § 11-0535-a (Consol. 2014).....	2
N.Y. ENVTL. CONSERV. LAW § 71-0923 (Consol. 2013).....	13
N.Y. ENVTL. CONSERV. LAW § 71-0925(13) (Consol. 2013).....	13
N.Y. PENAL LAW § 70.00 (2014).....	13

Federal Rules

FED. R. APP. P. 26.1	1
FED. R. APP. P. 29	1

Other Authorities

Amanda Mikelberg, <i>Undercover Agents Nab Midtown Antique Dealers in Historic \$4.5M Ivory Bust</i> , METRO, Sept. 23, 2016, https://www.metro.us/new-york/4-5m-ivory-bust-from-midtown-shop-is-the-biggest-in-state-history/zsJpiw---oQ3BCNHfYarbw	16
Amanda Purcell, <i>Police: Poached Ivory Sold in City</i> , HUDSON VALLEY 360, June 26, 2018, https://www.hudsonvalley360.com/article/police-poached-ivory-sold-city	16
ANDREA CROSTA & KIMBERLY SUTHERLAND, <i>THE WHITE GOLD OF JIHAD: AL-SHABAAB AND THE ILLEGAL IVORY TRADE</i> (2016)	8
Andrea Turkalo et al., <i>Slow Intrinsic Growth Rate in Forest Elephants Indicates Recovery from Poaching Will Require Decades</i> , J. APPLIED ECOLOGY, 153 (2017)	4
C. NELLEMAN ET AL., <i>UNEP-INTERPOL, THE RISE OF ENVIRONMENTAL CRIME: A GROWING THREAT TO NATURAL RESOURCES, PEACE, DEVELOPMENT AND SECURITY</i> (2016)	<i>passim</i>
CITES SECRETARIAT ET AL., <i>STATUS OF AFRICAN ELEPHANT POPULATIONS AND LEVELS OF ILLEGAL KILLING AND THE ILLEGAL TRADE IN IVORY: A REPORT TO THE AFRICAN ELEPHANT SUMMIT</i> (2013).....	3
Colin Beale, <i>Spatial Analysis of Aerial Survey Data Reveals Correlates of Elephant Carcasses within a Heavily Poached Ecosystem</i> , BIOLOGICAL CONSERVATION 258 (2018).....	4
ESMOND MARTIN & DANIEL STILES, <i>IVORY MARKETS IN THE USA</i> (2008).....	12, 15
Fiona Maisels et al., <i>Devastating Decline of Forest Elephants in Central Africa</i> , PLOS ONE, Mar. 4, 2013, at 1.....	4
INTERNATIONAL FUND FOR ANIMAL WELFARE (IFAW), <i>CRIMINAL NATURE: THE GLOBAL SECURITY IMPLICATIONS OF THE ILLEGAL WILDLIFE TRADE</i> (2013)	3, 6-7, 9
Letter from Robert K. Sweeney, Chair, Env'tl. Conserv. Comm., N.Y. Assembly, to Gov. Andrew M. Cuomo (June 24, 2014), http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/49058.3 , 7	
Matthew Taylor & Hannah Ellis-Peterson, <i>Last Male Northern White Rhino's Death Highlights Huge Extinction Crisis</i> , THE GUARDIAN, Mar. 20, 2018, https://www.theguardian.com/environment/2018/mar/20/last-male-northern-white-rhinos-death-highlights-huge-extinction-crisis	6

Memorandum in Support of Legislation from New York State Assembly on A1043 (June 24, 2014),
http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/49058
3, 13

New York State Dept. of Env'tl. Conservation, *DEC Announces Conviction of Manhattan Antique Merchant in Ivory Case*, Mar. 8, 2017, <http://www.dec.ny.gov/press/109465.html>.....16

OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING (2014)8

Philippe Bouché et al., *Will Elephants Soon Disappear from West African Savannahs?*, PLOS ONE, June 22, 2011 at 15

Press Release, Office of Governor Andrew M. Cuomo, Governor Cuomo Signs New Law to Combat Illegal Ivory Trade and Protect Endangered Species (Aug. 12, 2014), <https://www.governor.ny.gov/news/governor-cuomo-signs-new-law-combat-illegal-ivory-trade-and-protect-endangered-species> 3-4, 6, 14

RACHEL KRAMER ET AL., TRAFFIC REPORT, THE US ELEPHANT IVORY MARKET: A NEW BASELINE (2017)3, 9, 15

The Effectiveness of New York’s Restrictions on the Sale of Ivory: Hearing on A10143 Before the Assembly Comm. on Env'tl. Conservation, 2014 Leg. (N.Y. 2014)
https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_f72c36964aadd41ade88a6630885986b.pdf&view=1&embedded=true *passim*

TRAFFIC, *South Africa rhino poaching in 2017 almost matches 2016 figure with Kwazulu Natal now bearing the brunt*, Jan. 25, 2018, <https://www.traffic.org/news/south-africa-rhino-poaching-in-2017-almost-matches-2016-figure-with-kwazulu-natal-now-bearing-the-brunt/>6

U.S. AFRICA COMMAND, POSTURE STATEMENT: U.S. AFRICA COMMAND BEFORE THE HOUSE ARMED SERVICES COMMITTEE (2011).....8

U.S. Attorney’s Office, S.D.N.Y., *Antiques Dealer Sentenced in Manhattan Federal Court to Two Years in Prison for Smuggling Cups Made from Rhinoceros Horns to China*, Nov. 13, 2015, <https://www.justice.gov/usao-sdny/pr/antiques-dealer-sentenced-manhattan-federal-court-two-years-prison-smuggling-cups-made>16

U.S. Dept. of Justice, *Senior Auction Official at Beverly Hills Auction House Sentenced to Prison for Wildlife Trafficking*, June 22, 2016, <https://www.justice.gov/usao-sdny/pr/senior-auction-official-beverly-hills-gallery-pleads-guilty-manhattan-federal-court>.....16

UNEP ET AL., A RAPID RESPONSE ASSESSMENT: ELEPHANTS IN THE DUST, THE AFRICAN ELEPHANT CRISIS (2013).....5

UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), GUIDELINES ON METHODS AND PROCEDURES FOR IVORY SAMPLING AND LABORATORY ANALYSIS (2014).....10, 11

VARUN VIRA & THOMAS EWING, *IVORY’S CURSE: THE MILITARIZATION & PROFESSIONALIZATION OF POACHING IN AFRICA* (2014) *passim*

I. Statement of Interest of Amicus Curiae

This brief is submitted with the consent of all parties in accordance with Federal Rule of Appellate Procedure 29 and the rules of this Court. The Animal Welfare Institute (“AWI”), established in 1951, is one of America’s oldest non-profit charitable animal welfare organizations. AWI works to safeguard endangered or threatened wild animals and their habitats through public education, research, collaboration, media relations, outreach to agencies, advocating for stronger laws both domestically and internationally, and through litigation. Both through CITES and independent of it, AWI engages in work to protect elephants, rhinoceroses, and other species subject to international trade, including by contributing to CITES working groups on elephants and rhinoceros and by working with governments to advance protections for these species. AWI has assisted governments by improving training programs for rangers, augmenting forensic science capabilities, providing access to aircraft and other equipment to improve law enforcement efforts, and through public outreach to educate people, including children, of the value of elephants and rhinoceroses, the need for their conservation, and the threats that they face, including threats from poaching and trade in ivory and horn products.

II. Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* certifies as follows: AWI is a non-profit corporation recognized under Section 501(c)(3) of the Internal Revenue Code. AWI asserts that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

Respectfully submitted this 10th day of August, 2018.

By: /s/ Johanna Hamburger
Johanna Hamburger

Counsel for *Amicus Curiae*

III. Introduction

In 2014, New York amended Environmental Conservation Law § 11-0535-a (2014) (“Ivory Law”) to target the most intractable problems associated with the global resurgence of trafficking in elephant ivory and rhinoceros horn. The late 2000s marked the beginning of a catastrophic poaching crisis on a scale that has not been seen for a generation. The crisis is driven by demand for ivory and horn primarily from the United States and China, which has resulted in surging prices. This price increase has transformed ivory and horn trafficking from the small-scale activity of the past several decades to a massive, weaponized war on wildlife dominated by sophisticated organized crime syndicates, militant groups, and terrorist organizations that sell ivory and horn to fund criminal and terror campaigns. Recognizing New York’s role as the largest U.S. market for ivory and horn products, the Ivory Law was designed to decrease demand for these products. Increasing penalties and placing strict limits on trade in “antique” ivory, which can conceal new ivory from recently killed elephants, were cornerstones of the Assembly’s efforts to help stem the poaching crisis and stabilize elephant and rhinoceros populations. Evidence demonstrates the Ivory Law’s remarkable success, and recent high profile investigations reveal the importance of the Law remaining in place.

This brief addresses the four primary reasons that the New York Assembly passed the Ivory Law: (1) the poaching crisis; (2) the link between elephant and rhinoceros poaching and organized criminal, militant, and terrorist groups; (3) the role that antique ivory plays in fueling modern poaching due to the difficulty of distinguishing between antique and new ivory; and (4) New York’s role in the ivory trade in the United States, as well as the weakness of the laws in effect prior to 2014. The final section details successes achieved under the Ivory Law and describes the impact the law has had on stemming New York’s formerly robust ivory trade.

IV. New York's Ivory Law Was Adopted in Response to the Poaching Crisis

The Ivory Law is a direct and powerful response to the greatest elephant poaching crisis since 1989, when the global trade in ivory was largely banned,¹ and a more recent spike in rhinoceros poaching. A surge in global demand for ivory and horn has fueled a devastating decline in elephant and rhinoceros populations that began in the mid to late-2000s, and quickly accelerated to unsustainable levels.² The illegal ivory trade has more than doubled since 2007, and is over two and a half times larger than in 1998.³ In hearings on the Ivory Law, Assembly members heard testimony that some species of elephants are threatened with extinction in the next decade⁴ because “96 elephants are slaughtered every day.”⁵ The African elephant

¹ VARUN VIRA & THOMAS EWING, *IVORY'S CURSE: THE MILITARIZATION & PROFESSIONALIZATION OF POACHING IN AFRICA* 9 (2014).

² RACHEL KRAMER ET AL., *TRAFFIC REPORT, THE US ELEPHANT IVORY MARKET: A NEW BASELINE* 13 (2017); CITES SECRETARIAT ET AL., *STATUS OF AFRICAN ELEPHANT POPULATIONS AND LEVELS OF ILLEGAL KILLING AND THE ILLEGAL TRADE IN IVORY: A REPORT TO THE AFRICAN ELEPHANT SUMMIT 1* (2013); C. NELLEMAN ET AL., *UNEP-INTERPOL, THE RISE OF ENVIRONMENTAL CRIME: A GROWING THREAT TO NATURAL RESOURCES, PEACE, DEVELOPMENT AND SECURITY* 39 (2016).

³ CITES SECRETARIAT, *supra* note 2, at 11; INTERNATIONAL FUND FOR ANIMAL WELFARE (IFAW), *CRIMINAL NATURE: THE GLOBAL SECURITY IMPLICATIONS OF THE ILLEGAL WILDLIFE TRADE* 9 (2013).

⁴ *The Effectiveness of New York's Restrictions on the Sale of Ivory: Hearing on A10143 Before the Assembly Comm. on Env'tl. Conservation*, 2014 Leg., 134 (N.Y. 2014) [hereinafter *Hearing*] (statement of Dr. Elizabeth Bennett, Vice President, Species Program, Wildlife Conservation Society),

https://nystateassembly.granicus.com/DocumentViewer.php?file=nystateassembly_f72c36964aad41ade88a6630885986b.pdf&view=1&embedded=true; Press Release, Office of Governor Andrew M. Cuomo, Governor Cuomo Signs New Law to Combat Illegal Ivory Trade and Protect Endangered Species (Aug. 12, 2014) [hereinafter *Cuomo Press Release*],

<https://www.governor.ny.gov/news/governor-cuomo-signs-new-law-combat-illegal-ivory-trade-and-protect-endangered-species>. *See also* IFAW, *supra* note 3, at 19.

⁵ Letter from Robert K. Sweeney, Chair, Env'tl. Conserv. Comm., N.Y. Assembly, to Gov. Andrew M. Cuomo (June 24, 2014) [hereinafter *Sweeney Letter*], http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/49058; Memorandum in Support of Legislation from New York State Assembly on A10143, 2 (June 24, 2014), [hereinafter *Assembly Memorandum*]

http://digitalcollections.archives.nysed.gov/index.php/Detail/Object/Show/object_id/49058.

population was estimated at only 400,000 elephants in late 2013,⁶ reduced from 1.3 million in 1972.⁷ From 2009 to 2012, it is estimated that over 100,000 elephants were poached across Africa, with estimates ranging from 30,000 to 40,000 per year.⁸ Dr. Elizabeth Bennett, Vice President of the Wildlife Conservation Society, testified that “[i]n 2012, we estimate that some 35,000 African elephants were killed, which is the [largest] mass slaughter of elephants in any year since 1989.”⁹ In 2013, as many as 50,000 elephants were killed.¹⁰ The number of elephants killed relative to the remaining population is at the highest rate in recorded history.¹¹

This unprecedented rate of killing has caused the population of the African forest elephant and the African savannah elephant to decline precipitously. Between 2002 and 2011, the forest elephant population declined by 62%, and its range was reduced by 30%.¹² Testimony before the Assembly indicated that by 2014, the forest elephant population had fallen by 76% since 2002,¹³ with 10-18% of the population killed per year.¹⁴ Due to low reproductive rates, research indicates it would take 81 years for forest elephants to recover to population levels in 2000.¹⁵ Similarly, the savannah elephant population declined 76% between 1985 and 2010.¹⁶

⁶ Colin Beale, *Spatial Analysis of Aerial Survey Data Reveals Correlates of Elephant Carcasses within a Heavily Poached Ecosystem*, BIOLOGICAL CONSERVATION 258, 258-59 (2018).

⁷ NELLEMAN, *supra* note 2, at 46.

⁸ *Id.*

⁹ *Hearing, supra* note 4, at 134 (statement of Dr. Elizabeth Bennett). *Accord* Cuomo Press Release, *supra* note 4.

¹⁰ VIRA, *supra* note 1, at 5.

¹¹ *Hearing, supra* note 4, at 44 (statement of Richard Ruggiero, Chief, Africa Branch, International Affairs, U.S. Fish and Wildlife Service).

¹² NELLEMAN, *supra* note 2, at 39; Fiona Maisels et al., *Devastating Decline of Forest Elephants in Central Africa*, PLOS ONE, Mar. 4, 2013, at 1, 3.

¹³ *Hearing, supra* note 4, at 133-34 (statement of Dr. Elizabeth Bennett).

¹⁴ Andrea Turkalo et al., *Slow Intrinsic Growth Rate in Forest Elephants Indicates Recovery from Poaching Will Require Decades*, J. APPLIED ECOLOGY, 153, 153-54 (2017).

¹⁵ *Id.* at 156.

¹⁶ Philippe Bouché et al., *Will Elephants Soon Disappear from West African Savannahs?*, PLOS ONE, June 22, 2011, at 1.

The elephant poaching crisis is concentrated in Central African countries, which have witnessed a 60-70% decline in elephant populations in the past decade.”¹⁷ Testimony before the Assembly highlighted critical losses in particular African countries. In the Democratic Republic of Congo (“DRC”), the population fell from 400,000 in the 1980s to fewer than 12,000 in 2013.¹⁸ In 2013, fewer than 8,000 elephants were estimated to live outside DRC and Gabon, a disastrous decline from the 130,000 elephants that inhabited that area in 1986.¹⁹ Populations in the Central African Republic (“CAR”), which numbered 1 million in the early 20th century, now number only a few thousand.²⁰ In Chad, herds of 50,000 have been reduced to 500.²¹ East Africa has experienced a similarly devastating population decline. In Kenya, by 2011, the poaching rate was almost triple the poaching rate from 1998 to 2008.²² In Tanzania, 109,419 elephants lived in the Selous-Mikumi ecosystem in 1976, but in 2009 the population dropped to 38,975, and in 2013, only 13,084 elephants remained, which represents a 66% decline from 2009 to 2013, and a decline of nearly 90% from the 1970s.²³ During the same timeframe, over 8,000 elephants, or approximately 40% of the population, were killed in Mozambique.²⁴ Additionally, although North Africa was once part of the elephant’s range, the species is now extinct in that region.²⁵

The number of rhinoceroses killed by poachers in Africa has also risen dramatically in the last decade, from thirteen in 2007 to 1,338 in 2015, the highest number in decades.²⁶ This

¹⁷ *Hearing, supra* note 4, at 43 (statement of Richard Ruggiero); *VIRA, supra* note 1, at 6, 24.

¹⁸ *Hearing, supra* note 4, at 43 (statement of Richard Ruggiero).

¹⁹ *VIRA, supra* note 1, at 24.

²⁰ *Hearing, supra* note 4, at 43 (statement of Richard Ruggiero).

²¹ *VIRA, supra* note 1, at 24.

²² *Id.* at 58.

²³ *Id.* at 92. *See also Hearing, supra* note 4, at 133-34 (statement of Dr. Elizabeth Bennett).

²⁴ *VIRA, supra* note 1, at 7.

²⁵ UNEP ET AL., A RAPID RESPONSE ASSESSMENT: ELEPHANTS IN THE DUST, THE AFRICAN ELEPHANT CRISIS (2013).

²⁶ NELLEMAN, *supra* note 2, at 39.

increase is driven by a horn value of US \$66,139/kg, more than the value of gold and platinum.²⁷ In South Africa, the country that holds the majority of the world's rhinoceroses, poaching increased 300% between 2010 and 2013.²⁸ Since 2008, 7,127 rhinoceroses were killed by poachers in South Africa.²⁹ In 2014, 1,215 rhinoceroses were killed, and in 2015, poachers killed at least 1,175 rhinoceroses.³⁰ With only 25,000 rhinoceroses left in Africa, poaching could drive the species extinct in the next few decades.³¹ Indeed, two subspecies have already been declared extinct; in 2011, the Western black rhinoceros subspecies went extinct,³² and in 2018, the last male Northern white rhinoceros died, likely dooming the subspecies to extinction.³³

Asian rhinoceroses are also under severe pressure from poaching. There are three species of Asian rhinoceros: the greater-one horned, with a population of 3,500 in mid-2015; the Javan, with a population of 63 in mid-2015; and the Sumatran, with fewer than 100 individuals in mid-2015. Over 70% of greater one-horned rhinoceroses are located in Kaziranga National Park in India, where 123 rhinoceroses were killed between 2006 and 2015. Poaching has accelerated alarmingly in recent years, with 58% of poaching deaths in Kaziranga occurring between 2013 and 2015.³⁴ In 2011, Vietnam lost its last Javan rhinoceros to poachers.³⁵ The Ivory Law was

²⁷ IFAW, *supra* note 3, at 9.

²⁸ VIRA, *supra* note 1, at 72.

²⁹ TRAFFIC, *South Africa Rhino Poaching in 2017 Almost Matches 2016 Figure with Kwazulu Natal Now Bearing the Brunt*, Jan. 25, 2018, <https://www.traffic.org/news/south-africa-rhino-poaching-in-2017-almost-matches-2016-figure-with-kwazulu-natal-now-bearing-the-brunt/>.

³⁰ NELLEMAN, *supra* note 2, at 48.

³¹ IFAW, *supra* note 3, at 20. *See also* Cuomo Press Release, *supra* note 4.

³² IFAW, *supra* note 3, at 9, 20.

³³ Matthew Taylor & Hannah Ellis-Peterson, *Last Male Northern White Rhino's Death Highlights Huge Extinction Crisis*, THE GUARDIAN, Mar. 20, 2018, <https://www.theguardian.com/environment/2018/mar/20/last-male-northern-white-rhinos-death-highlights-huge-extinction-crisis>.

³⁴ NELLEMAN, *supra* note 2, at 49.

³⁵ IFAW, *supra* note 3, at 20.

designed to address this crisis by reducing consumer demand for ivory and horn products, which is the force that drives the current poaching rates.³⁶

V. Organized, Militant, and Terrorist Organizations Profit from the Poaching Crisis

The Assembly heard testimony on the link between the illegal ivory trade and organized criminal networks, militant groups, and terrorist groups, which use ivory to fund their operations. Tuvako Manongi, the Ambassador of Tanzania to the United Nations, testified that “[w]ildlife trafficking is increasingly associated with rebel and terrorist groups such as the Lord’s Resistance Army and Al Shabaab, an Al Qaeda terrorist cell in East Africa.”³⁷ Richard Ruggiero, Chief of the Africa Branch within the U.S. Fish and Wildlife Service (“USFWS”), testified that the high price of ivory “has drawn the interest of highly organized criminal organizations that are well-structured and well-financed.”³⁸ These groups are also drawn to ivory because it “is a portable resource that has low sunk costs relative to other extractive industries” and does not necessitate “access to established markets or infrastructure.”³⁹ These groups also commit other crimes connected to ivory trafficking such as “tax fraud . . . money laundering, internet crimes and hacking, phishing/identity theft, securities fraud, [and] financial crimes.”⁴⁰ “These crimes not only rob governments and developing countries of hard-needed revenues, but also undermine legal markets and businesses, even impacting stock markets.”⁴¹ As a result, the United States has recognized poaching by heavily armed groups as a threat to both

³⁶ *Hearing, supra* note 4, at 49 (statement of Richard Ruggiero).

³⁷ *Hearing, supra* note 4, at 15 (statement of His Excellency Tuvako Manongi, Ambassador and Permanent Representative, Permanent Mission of Tanzania to the United Nations). *Accord* Sweeney Letter, *supra* note 5, at 5, IFAW, *supra* note 3, at 12.

³⁸ *Hearing, supra* note 4, at 45 (statement of Richard Ruggiero).

³⁹ VIRA, *supra* note 1, at 17.

⁴⁰ NELLEMAN, *supra* note 2, at 64.

⁴¹ *Id.* at 65.

national and global security.⁴² Mr. Ruggiero informed Assembly members that these groups “pose a growing threat not only to wildlife but also the stability of fragile governments, their economies, to human rights; and thus to global security.”⁴³

The Assembly heard testimony on the role of Al-Shabaab and the Lord’s Resistance Army (“LRA”) in the poaching crisis. Al-Shabaab is a militant Islamist group that pledged allegiance to Osama bin Laden and is most notorious for a 2013 terror attack on a Kenyan mall.⁴⁴ U.S. Africa Command proclaims that Al-Shabaab “provides al-Qaeda a safe haven to plan global terror operations, train foreign fighters, and conduct global terror operations[.]”⁴⁵ A study of Al-Shabaab’s operations concluded that “its role was that of trafficker – buying ivory from poachers or brokers, facilitating transit, and reselling it to foreign traders[.]”⁴⁶ The study found that monthly income from “ivory was estimated at USD 200,000 . . . meaning that ivory trafficking could have provided a large part of the group’s . . . payroll expense.”⁴⁷ The LRA, the most notorious rebel group operating in the DRC, poaches extensively.⁴⁸ The LRA is “infamous for its mass executions, rape, abduction, and mutilation of victims; and use of child soldiers[.] LRA escapees have reported witnessing rebels shoot elephants and . . . said that Kony [the group’s leader] had ordered his fighters to kill as many elephants as possible.”⁴⁹

⁴² OFFICE OF THE PRESIDENT OF THE UNITED STATES, NATIONAL STRATEGY FOR COMBATTING WILDLIFE TRAFFICKING (2014).

⁴³ *Hearing, supra* note 4, at 45 (statement of Richard Ruggiero). *See also id.* at 135 (statement of Dr. Elizabeth Bennett).

⁴⁴ ANDREA CROSTA & KIMBERLY SUTHERLAND, THE WHITE GOLD OF JIHAD: AL-SHABAAB AND THE ILLEGAL IVORY TRADE 13, 23 (2016). *See also* VIRA, *supra* note 1, at 12, NELLEMAN, *supra* note 2, at 11.

⁴⁵ U.S. AFRICA COMMAND, POSTURE STATEMENT: U.S. AFRICA COMMAND BEFORE THE HOUSE ARMED SERVICES COMMITTEE (2011).

⁴⁶ *Id.* at 7.

⁴⁷ *Id.*

⁴⁸ VIRA, *supra* note 1, at 35, 42.

⁴⁹ IFAW, *supra* note 3, at 12. *Accord* VIRA, *supra* note 1, at 35, NELLEMAN, *supra* note 2, at 11.

Terrorist and militant groups involved in ivory poaching are also active in other African countries and in Asia. In Sudan, Janjaweed militias implicated in the Darfur genocide⁵⁰ fund their operations from elephant poaching.⁵¹ In CAR, Muslim rebel factions overthrew the government in 2013, and greatly expanded elephant poaching.⁵² In Mozambique, “[o]rganized crime . . . networks have monopolized the [poaching] industry.”⁵³ In Bangladesh, Islamic groups affiliated with al-Qaeda likely poach elephants and rhinoceros to support terror activities.⁵⁴

The Assembly was also concerned about the ivory trade’s devastating human toll. At least 1,000 rangers were killed over the last decade, and the actual number may be between 3,000 and 5,000.⁵⁵ Mr. Ruggiero testified that “the loss of a ranger and a breadwinner has a trickle-down effect to families: to wives, to mothers, to children and therefore the fabric of the society.”⁵⁶ Furthermore, “marginalized populations . . . bear the full brunt of the trade’s negative externalities: militarization and banditry, increased petty corruption, and the destruction of tourist-drawing nature reserves that are among the biggest economic assets of rural peoples[.]”⁵⁷

VI. Antique Ivory Perpetuates the Sale of New Ivory

The Ivory Law’s narrow antique exemption reflects the Assembly’s concern that the “antique” ivory trade is often used to disguise new ivory from recently killed elephants through sellers’ deliberate deception or ignorance and the near impossibility of determining the ivory’s true age without advanced methods of analysis. Federal and State law enforcement officers

⁵⁰ IFAW, *supra* note 3, at 13.

⁵¹ *Id.* at 5, 13.

⁵² VIRA, *supra* note 1, at 31.

⁵³ *Id.* at 69.

⁵⁴ IFAW, *supra* note 3, at 12.

⁵⁵ *Id.* at 10.

⁵⁶ *Hearing, supra* note 4, at 46 (statement of Richard Ruggiero).

⁵⁷ VIRA, *supra* note 1, at 10. *See also* KRAMER, *supra* note 2, at 13.

testified about deceptive seller practices they have witnessed. Lieutenant John Fitzpatrick, of the New York State Department of Environmental Conservation (“NYSDEC”), told Assembly members of his experiences in the field:

[E]veryone says pretty much the same thing: ‘This is pre-ban. This is antique. This is old.’ . . . [T]he bad guys will a lot of times use techniques to make it look old. I’ve seized some pieces of ivory that . . . look like wood. I mean, they’re stained almost as dark as this table I’m sitting at. So there’s a lot of different tricks and stuff like that they’ll do.⁵⁸

Mr. William Woody, of the USFWS, had similar experiences, stating “[t]hey disguise the elephant ivory, as they paint it to look [as] old as antiques.”⁵⁹

Law enforcement officers also testified that it is nearly impossible for officers in the field to determine whether ivory is antique or new ivory. Major Scott Florence, the Acting Director of NYSDEC, stated: “it’s very difficult to determine the age of ivory products, particularly ivory that’s less than a hundred years old or not attached to a recognizable piece of furniture or other manufactured product[.]”⁶⁰ Lieutenant Fitzpatrick supported this finding, testifying “it’s really impossible, and I’ve had many conversations with scientists and experts, for us in the field to determine the age of a piece of ivory.”⁶¹

Although scientists can determine the approximate age of ivory, even advanced methods cannot always determine when the elephant that produced the ivory died. Radiocarbon dating

⁵⁸ *Hearing, supra* note 4, at 92-93 (statement of Lieutenant John Fitzpatrick, N.Y. Dept. of Environmental Conservation).

⁵⁹ *Hearing, supra* note 4, at 52 (statement of William Woody, Assistant Director, Office of Law Enforcement, U.S. Fish and Wildlife Service); UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), GUIDELINES ON METHODS AND PROCEDURES FOR IVORY SAMPLING AND LABORATORY ANALYSIS 29 (2014) (“it is possible to make recent ivory look like an old sample”).

⁶⁰ *Hearing, supra* note 4, at 81 (statement of Major Scott Florence, Acting Director, Division of Law Enforcement, N.Y. Dept. of Environmental Conservation).

⁶¹ *Hearing, supra* note 4, at 93 (statement of Lieutenant John Fitzpatrick).

can be used to ascertain whether ivory is antique or if it derives from more recent poaching incidents⁶² by determining whether an elephant was living before or after 1955.⁶³ However, using radiocarbon dating to determine when an elephant died between 1955 and the present is less precise.⁶⁴ This is because the age of ivory varies across the length of the elephant tusks.⁶⁵ For whole tusks, the year of death can be determined to within 0.5 to 3 years.⁶⁶ However, with worked ivory it can be difficult to know what part of the tusk the item was carved from, making the year of death “ambiguous or impossible” to ascertain.⁶⁷ In addition to these uncertainties, Major Florence testified that radiocarbon dating “can be cost prohibitive for . . . law enforcement,” “destructive,” and “not readily available to officers in the field.”⁶⁸ Based on this evidence, the Ivory Law’s regulation of antique ivory is narrowly tailored to limit the antique trade’s ability to contribute to the current poaching crisis.

VII. New York’s Role in the Ivory Trade and the Ineffectiveness of Penalties Existing Prior to 2014

Assembly members heard extensive testimony on New York’s role in perpetuating the ivory trade both within the United States and internationally. Fundamentally, the regulatory mechanisms in place at both the federal and state level failed to protect elephants and rhinoceroses from catastrophic decline. Prior to passage of the Ivory Law, New York was the

⁶² *Hearing, supra* note 4, at 163, 181 (statement of Kevin Uno, Postdoctoral Research Scientist, Lamont-Doherty Earth Observatory of Columbia University); UNODC, *supra* note 59, at 46.

⁶³ *Hearing, supra* note 4, at 162-63, 180-81 (statement of Kevin Uno); UNODC, *supra* note 59, at 30.

⁶⁴ *Hearing, supra* note 4, at 168-70 (statement of Kevin Uno); UNODC, *supra* note 59, at 46.

⁶⁵ *Hearing, supra* note 4, at 163-64 (statement of Kevin Uno); UNODC, *supra* note 59, at 30, 38.

⁶⁶ *See Hearing, supra* note 4, at 163 (statement of Kevin Uno); UNODC, *supra* note 59, at 30.

⁶⁷ *Hearing, supra* note 4, at 163, 169 (statement of Kevin Uno); UNODC, *supra* note 59, at 30.

⁶⁸ *Hearing, supra* note 4, at 81 (statement of Scott Florence). *See also Hearing, supra* note 4, at 93-94 (statement of John Fitzpatrick); *Hearing, supra* note 4, at 174-75 (statement of Kevin Uno).

largest market for ivory in the United States.⁶⁹ Brian Shapiro, New York State Director of the Humane Society of the United States (“HSUS”) testified: “according to the results of the most recent comprehensive ivory market study . . . the United States is the second largest market for ivory. And within the United States, New York City is by far the largest ivory market.”⁷⁰ This study was based on a 2006 to 2007 survey by Esmond Martin and Daniel Stiles that found 124 outlets selling 11,376 ivory items almost entirely within Manhattan alone.⁷¹ The researchers found that 77 percent of the outlets were antique shops and markets.⁷² Mr. Shapiro also testified that in 2013, “HSUS examined New York’s online ivory marketplace [A]uction houses, antique shops and antique piano key vendors[] combined offered more than 300 objects for sale . . . rang[ing] in price from \$50 – U.S. dollars to over \$219,000.”⁷³

Assembly members were also informed that New York holds a “unique position in the global trade” of ivory products. Specifically, New York is “a corridor in the global trade and potentially a conduit for trade outside of the U.S.”⁷⁴ Lieutenant Fitzpatrick testified that: “[e]ven where you have the so-called legal trade in New York, it’s problematic in that that’s still a conduit for people to get their hands on stuff and then illegally smuggle it out of the country.”⁷⁵

Inadequate penalties likely contributed to New York’s status as the epicenter of the U.S. ivory trade and elevated its role in the current poaching crisis. Prior to 2014, regulation of the

⁶⁹ *Hearing, supra* note 4, at 138 (statement of Dr. Elizabeth Bennett).

⁷⁰ *Hearing, supra* note 4, at 141 (statement of Brian Shapiro, N.Y. State Director, Humane Society of the United States).

⁷¹ ESMOND MARTIN & DANIEL STILES, *IVORY MARKETS IN THE USA* 29 (2008). *See also Hearing, supra* note 4, at 138 (statement of Dr. Elizabeth Bennett).

⁷² MARTIN & STILES, *supra* note 71, at 30.

⁷³ *Hearing, supra* note 4, at 146 (statement of Brian Shapiro).

⁷⁴ *Hearing, supra* note 4, at 205 (statement of Catherine Machalaba, Program Coordinator for Health and Policy, Ecohealth Alliance).

⁷⁵ *Hearing, supra* note 5, at 119 (statement of John Fitzpatrick).

ivory and horn trade fell under two provisions of New York’s Environmental Conservation Law, ECL § 11-0535 and § 11-0536. A Memorandum issued by the Assembly in Support of the Ivory Law (“Assembly Memorandum”) stated that “a violation of ECL § 11-0535 or § 11-0536 is only a violation level offense . . . the lowest offense specified under New York law. The penalty for a violation includes a fine structure of between [US] \$0 and \$250 and a maximum of 15 days in jail.”⁷⁶ Officials also relied on ECL § 71-0924, which established illegal commercialization of wildlife as a Class E felony. A Class E felony typically carries a prison sentence of between one and four years, though the court may choose to impose a sentence of less than one year.⁷⁷

The Assembly Memorandum states that “[g]iven the potential profits and volume of ivory and horn sales in New York, the current law is not sufficient to have any detrimental effect on the present market.”⁷⁸ The Assembly Memorandum described the existing laws as “out-of-date and no longer [able to] provide[] meaningful deterrence.”⁷⁹ The laws prior to 2014 were insufficient because “[e]xperience has shown that . . . very few who are convicted ever face jail time, limiting the deterrent effect of criminal sanctions.”⁸⁰ The limitations of the pre-2014 laws were highlighted by a 2012 seizure of \$2 million worth of elephant ivory from jewelers in New York City. Lieutenant Fitzpatrick contrasted this seizure with simultaneous illegal ivory seizures

⁷⁶ Assembly Memorandum, *supra* note 5, at 2. *Accord Hearing, supra* note 4, at 95 (statement of John Fitzpatrick). *See also* ENVTL. CONSERV. LAW § 71-0923 (Consol. 2013) (setting forth criminal penalties for violation of ENVTL. CONSERV. LAW § 11-0535 or § 11-0536); *id.* § 71-0925(13) (setting forth civil penalties for violation of § 11-0535 or § 11-0536).

⁷⁷ N.Y. PENAL LAW § 70.00 (Consol. 2014).

⁷⁸ Assembly Memorandum, *supra* note 5, at 2.

⁷⁹ *Id.*

⁸⁰ *Hearing, supra* note 4, at 82-83 (statement of Scott Florence). *Accord Hearing, supra* note 4, at 196 (statement of Catherine Machalaba) (“those convicted of wildlife crimes in New York State almost never receive jail time.”), *Hearing, supra* note 4, at 98 (statement of Lieutenant John Fitzpatrick) (“In my almost 18 years of working these cases here in New York City, I could probably count one or two hands the number of people who have gotten jail time. And usually there’s other extenuating circumstances, like other violations of the penal law[.]”).

at other stores that totaled \$30,000 and \$120,000: “[Y]ou literally have three orders of magnitude; but they were all charged with the same E felony.”⁸¹ Governor Cuomo’s office issued a statement that “the penalties imposed on the jewelers were minimal” and the case “exposed the need for increased sanctions to curtail New Yorks [sic] role in this illegal trade.”⁸²

Furthermore, the low monetary penalties associated with the pre-2014 laws had little effect on reducing trafficking. As Catherine Machalaba of EcoHealth Alliance testified, New York’s laws “fall short in deterring criminals from illicit activity as the relatively small fines compared to other organized crimes are often viewed as merely the cost of doing business. Fines issued for wildlife trade crimes in the State have ranged from hundreds of dollars to tens of thousands of dollars. However, this pales in comparison to the value of ivory[.]”⁸³

Moreover, the minimal punishments under the pre-2014 laws made it difficult to exert leverage over defendants to compel cooperation with authorities. Lieutenant Fitzpatrick testified the laws are inadequate “[b]ecause when you get a guy and you think he has other contacts and information but his defense attorney is saying: ‘Look, you don’t have to tell the cops anything because even if you’re convicted, you’re not going to jail,’ he really doesn’t have any motivation to cooperate with us[.]”⁸⁴ The Ivory Law addressed these concerns by providing law enforcement with more powerful penalties to combat ivory trafficking within the State to reduce demand, which was widely acknowledged as the primary driver of the poaching crisis.⁸⁵

⁸¹ *Hearing, supra* note 4, at 95-96 (statement of Lieutenant John Fitzpatrick).

⁸² Cuomo Press Release, *supra* note 4.

⁸³ *Hearing, supra* note 4, at 195 (statement of Catherine Machalaba).

⁸⁴ *Hearing, supra* note 4, at 98 (statement of Lieutenant John Fitzpatrick).

⁸⁵ *See, e.g., Hearing, supra* note 4, at 49-50 (statement of Richard Ruggiero) (“the roots and motivation for the illegal killing of elephants and trafficking ivory is consumer demand[.]”).

VIII. Success of the Ivory Law and the Importance of Keeping it in Place

The Ivory Law has had a strong impact on curtailing New York's ivory trade. After 2014, New York experienced a drastic reduction in the number of ivory items for sale, falling from the single largest market in the United States for ivory and horn products to the third largest market.⁸⁶ A 2016 study conducted by TRAFFIC revealed a significant decline in the sale of ivory products in New York City compared to the 2008 findings of Martin and Stiles,⁸⁷ which the authors attribute to strong regulations, enforcement, and public awareness measures by New York and the federal government.⁸⁸ In 2016, researchers found 41 vendors selling 224 ivory items in New York City.⁸⁹ This compares to 124 vendors selling at least 11,376 ivory items in New York City during 2006 to 2007.⁹⁰ This represents a 67% reduction in the number of vendors and a 98% reduction in the quantity of ivory for sale in New York City.⁹¹ These results demonstrate the vital role that the Ivory Law has played in successfully reducing ivory and horn trafficking within New York's borders.

Prominent prosecutions in New York after 2014 reveal that significant demand for ivory and horn products still exists, which demonstrates the necessity of keeping the Ivory Law in place. For example, in 2015, an antique dealer was sentenced for purchasing and smuggling 16 "libation cups" carved from horns worth more than \$1 million from the United States to China.⁹²

⁸⁶ KRAMER, *supra* note 2, at 31.

⁸⁷ See, MARTIN, *supra* note 71, at 29-36.

⁸⁸ KRAMER, *supra* note 2, at 8.

⁸⁹ *Id.* at 16, 31.

⁹⁰ MARTIN, *supra* note 71, at 29.

⁹¹ KRAMER, *supra* note 2, at 16-17.

⁹² U.S. Attorney's Office, SDNY, *Antiques Dealer Sentenced in Manhattan Federal Court to Two Years in Prison for Smuggling Cups Made from Rhinoceros Horns to China*, Nov. 13, 2015, <https://www.justice.gov/usao-sdny/pr/antiques-dealer-sentenced-manhattan-federal-court-two-years-prison-smuggling-cups-made>.

In 2016, an auction administrator was sentenced for conspiring to smuggle horn, ivory, and coral worth \$1 million by intentionally falsifying documents.⁹³ Later that year, three antique dealers were indicted in the largest ivory bust in New York's history. Wildlife officers seized 126 items made of elephant ivory with an estimated value of \$4.5 million.⁹⁴ In 2017, an antique dealer was arrested for intentionally mislabeling and selling illegal elephant ivory.⁹⁵ In 2018, 100 illegal wildlife items worth more than \$15,000, including items made of elephant ivory, were seized from three antique dealers.⁹⁶ If the Ivory Law is struck down, it is highly likely that the market would respond with an increased supply of illegal ivory and horn products, which would place untenable pressures on elephant and rhinoceros populations threatened with extinction.

IX. Conclusion

We respectfully urge the Court to uphold the Ivory Law as constitutional by granting the DEC Commissioner's cross-motion to dismiss and denying the Plaintiffs' motion for summary judgment. Preserving the Ivory Law will ensure that law enforcement officials continue to have a strong framework in place to prosecute those who profit from ivory and horn trafficking. The evidence demonstrates that the Ivory Law is an effective tool in reducing the ivory trade and in promoting species conservation, which is essential to stemming the current elephant and rhinoceros poaching crisis.

⁹³ U.S. Dept. of Justice, *Senior Auction Official at Beverly Hills Auction House Sentenced to Prison for Wildlife Trafficking*, June 22, 2016, <https://www.justice.gov/usao-sdny/pr/senior-auction-official-beverly-hills-gallery-pleads-guilty-manhattan-federal-court>.

⁹⁴ Amanda Mikelberg, *Undercover Agents Nab Midtown Antique Dealers in Historic \$4.5M Ivory Bust*, METRO, Sept. 23, 2016, <https://www.metro.us/new-york/4-5m-ivory-bust-from-midtown-shop-is-the-biggest-in-state-history/zsJpiw---oQ3BCNHfYarbw>.

⁹⁵ New York State Dept. of Env'tl. Conservation, *DEC Announces Conviction of Manhattan Antique Merchant in Ivory Case*, Mar. 8, 2017, <http://www.dec.ny.gov/press/109465.html>.

⁹⁶ Amanda Purcell, *Police: Poached Ivory Sold in City*, HUDSON VALLEY 360, June 26, 2018, <https://www.hudsonvalley360.com/article/police-poached-ivory-sold-city>.

Respectfully submitted this 10th day of August, 2018.

/s/ Johanna Hamburger

Johanna Hamburger
Animal Welfare Institute
900 Pennsylvania Ave SE
Washington, DC 20003
Telephone: (202) 446-2136
Facsimile: (202) 446-2131
E-mail: johanna@awionline.org

/s/ Kaitland Kennelly

Kaitland Kennelly
Amy Dodenhoff
Bonnie Weiss McLeod
Cooley LLP
1114 Avenue of the Americas
New York, NY 10036-7798
Telephone: (212) 479-6643
Email: kkennelly@cooley.com
adodenhoff@cooley.com
bweissmcleod@cooley.com