

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
CALIFORNIA

April in Paris v. Becerra

No. 2:19-cv-02471-KJM-CKD (E.D. Cal. Mar. 6, 2023) · No. 2:19-cv-02471-KJM-CKD; consolidated with No. 2:19-cv-02488-KJM-CKD · Decided March 7, 2023

SUMMARY

The United States District Court for the Eastern District of California resolves consolidated cross-motions for summary judgment concerning whether the federal Endangered Species Act preempts California Penal Code sections 653o and 653r as applied to alligator and crocodile products. The court holds that the state laws are expressly preempted because they prohibit conduct authorized by federal regulations and grants the plaintiffs’ motions while denying the defendants’ motions.

CASE DETAILS

COURT	United States District Court for the Eastern District of California
JURISDICTION	United States District Court for the Eastern District of California
DECIDED	March 7, 2023
DOCKET	2:19-cv-02471-KJM-CKD; consolidated with No. 2:19-cv-02488-KJM-CKD
DISPOSITION	other
PROCEDURAL POSTURE	Consolidated actions challenging California Penal Code sections 653o and 653r. After granting preliminary injunctive relief, the court resolved the parties' cross-motions for summary judgment concerning whether the Endangered Species Act preempts California criminal prohibitions on importing, possessing, and selling alligator and crocodile products.
STANDARD OF REVIEW	Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Cross-motions are evaluated separately under the same standard. The court applied de novo statutory interpretation and express-preemption analysis.
PRECEDENTIAL VALUE	unpublished
PARTIES	April in Paris, et al., Louisiana Wildlife and Fisheries Commission, et al. v. Rob Bonta, et al.

TOPICS

endangered species act

environmental law

federalism

statutory interpretation

summary judgment

PRACTICE AREAS

environmental law

federal courts

constitutional law

civil procedure

QUESTIONS PRESENTED

1. Whether the Endangered Species Act's express-preemption provision, 16 U.S.C. § 1535(f), preempts California Penal Code sections 653o and 653r insofar as they prohibit federally authorized interstate or foreign commerce in American alligator products.
2. Whether the same California provisions are expressly preempted with respect to products of Nile and saltwater crocodilians covered by federal special rules and CITES-based exemptions.
3. Whether the permanent injunction entered in *Fouke v. Brown* applies to the plaintiffs' claims involving American alligator products.
4. Whether intervenors established grounds to dissolve or modify the *Fouke* permanent injunction.

HOLDINGS

1. The Endangered Species Act expressly preempts California Penal Code sections 653o and 653r to the extent they prohibit interstate or foreign commerce in American alligator products that federal regulations authorize through exemptions or permits.
2. The permanent injunction entered in *Fouke v. Brown* applies to the plaintiffs' claims concerning American alligator products, and intervenors failed to establish grounds for modifying or dissolving it.
3. California Penal Code sections 653o and 653r are expressly preempted under 16 U.S.C. § 1535(f) insofar as they prohibit interstate or foreign trade in Nile and saltwater crocodilian products authorized by federal special rules and CITES-based exemptions.

KEY QUOTATIONS

“When Congress passed the Endangered Species Act, it intended to preempt state laws prohibiting what federal regulations authorize.” (at 1)

“Congress cannot have intended for broad conditions in federal regulations to short circuit the express preemption in section 6(f).” (at 16)

“The plaintiffs have shown, however, that Congress intended to preempt state laws that prohibit interstate and foreign trade when federal regulations authorize that trade, and they have shown that California Penal Code section 653o and 653r run afoul of that express preemption.” (at 25)

FACTUAL BACKGROUND

Federal regulations issued under the Endangered Species Act authorized specified imports, exports, takings, sales, and transfers of American alligator products and certain Nile and saltwater crocodilian products, subject to

regulatory conditions. California Penal Code sections 653o and 653r prohibited importing, possessing with intent to sell, or selling crocodile and alligator bodies, parts, and products. Plaintiffs alleged that the state prohibitions conflicted with federal exemptions and authorizations governing interstate and foreign commerce.

PROCEDURAL HISTORY

Businesses dealing in alligator and crocodile products and Louisiana organizations filed separate actions shortly before California's prohibition took effect. The parties stipulated to a temporary restraining order; the court permitted intervention, consolidated the cases, and granted plaintiffs' motions for a preliminary injunction. On cross-motions for summary judgment, the court granted plaintiffs' motions, denied defendants' motions, directed the parties to propose a schedule for final resolution and remedies, and ordered the second docket closed administratively.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand. The court granted plaintiffs' cross-motions for summary judgment and denied defendants' cross-motions. The parties were ordered to meet and confer and file a joint report within twenty-eight days proposing a schedule for final resolution, including appropriate remedies. The clerk was directed to close the consolidated secondary case docket.

CASES CITED

- Gibbs v. Babbitt, 214 F.3d 483, 503 (4th Cir. 2000)
- Fouke Co. v. Brown, 463 F. Supp. 1142 (E.D. Cal. 1979)
- Man Hing Ivory & Imports, Inc. v. Deukmejian, 702 F.2d 760 (9th Cir. 1983)
- H.J. Justin & Sons, Inc. v. Deukmejian, 702 F.2d 758 (9th Cir. 1983) (per curiam)
- United States v. Alaska, 521 U.S. 1, 59 (1997)
- Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1170 (2021)
- Barnhart v. Thomas, 540 U.S. 20, 26 (2003)
- Brown v. Plata, 563 U.S. 493, 542 (2011)
- Ryan Karnoski v. Donald Trump, Karnoski v. Trump, 926 F.3d 1180, 1198 (9th Cir. 2019)
- Sharp v. Weston, 233 F.3d 116, 1170 (9th Cir. 2000)
- Alto v. Black, 738 F.3d 1111, 1120 (9th Cir. 2013)
- FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)
- United States v. Aldana, 878 F.3d 877, 882 (9th Cir. 2017)
- City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 438 (2002)
- Engine Manufacturers Ass'n v. South Coast Air Quality Management District, 498 F.3d 1031, 1040 (9th Cir. 2007)

- *Tocher v. City of Santa Ana*, 219 F.3d 1040, 1045 (9th Cir. 2000)
- *Tillison v. City of San Diego*, 406 F.3d 1126 (9th Cir. 2005)
- *Chamber of Commerce of the United States v. Whiting*, 563 U.S. 582, 594 (2011)
- *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019)
- *Lacoste v. Department of Conservation of State of Louisiana*, 263 U.S. 545, 551 (1924)
- *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003)

OPINION

April in Paris v. Becerra

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 FOR THE EASTERN DISTRICT OF CALIFORNIA

10 11 April in Paris, et al., No. 2:19-cv-02471-KJM-CKD 12 Plaintiffs, 13 v. 14 Rob Bonta, et al.,
15 Defendants. 16 17 Louisiana Wildlife and Fisheries No. 2:19-cv-02488-KJM-CKD
Commission, et al.,

18 ORDER

Plaintiffs, 19 v. 20 21 Rob Bonta, et al., 22 Defendants. 23 24 The parties in these consolidated cases each move for summary judgment on a narrow 25 legal question: does the federal Endangered Species Act preempt California criminal laws that 26 punish imports and sales of alligator and crocodile products? When Congress passed the 27 Endangered Species Act, it intended to preempt state laws prohibiting what federal regulations 28 authorize. California law prohibits what the U.S. Department of Fish & Wildlife has authorized 1 under the Endangered Species Act, so the state's laws are preempted, as explained further in this 2 order. The court grants plaintiffs' cross-motions for summary judgment in both cases, and 3 denies the defendants' motions.

4 I. BACKGROUND

5 The Endangered Species Act creates a federal program for the conservation of fish, 6 wildlife and plants. 16 U.S.C. § 1531(b). It gives detailed instructions to the Secretaries of the 7 Interior and Commerce to create lists of "endangered" and "threatened" species. See *id.* § 1533. 8 These agencies have delegated that authority to the U.S. Fish and Wildlife and National Marine 9 Fisheries Services. 50 C.F.R. § 402.01(b). In broad strokes, a species is "endangered" if it is "in 10 danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A 11 "threatened" species is one that is "likely to become an endangered species within the foreseeable 12 future throughout all or a significant portion of its range." *Id.* § 1532(20). In some cases, the 13 government also can treat a species as endangered or threatened even though it is not in danger of 14 extinction and not likely to become an endangered species. See *id.* § 1533(e). If a non-listed 15 species "so closely resembles" a listed species that enforcement officers "would have substantial

16 difficulty in attempting to differentiate between the listed and unlisted species,” and if a number
17 of other ancillary requirements are satisfied, then the government can afford the non-listed 18
species the same protections as the listed species. See id. 19 Endangered and threatened species
receive different protections. If a species is 20 endangered, the Endangered Species Act generally
prohibits all imports, exports, sales, deliveries 21 and “taking” of the species. See id. § 1538(a)(1);
see also 50 C.F.R. § 17.21. The verb “take” is 22 a defined term. It means “to harass, harm, pursue,
hunt, shoot, wound, kill, trap, capture, collect, 23 or to attempt to engage in any such conduct.” 16
U.S.C. § 1532(19). By contrast, if a species is 24 threatened, the Endangered Species Act offers
the administration more flexibility. See id. 25 § 1533(d). In practice, however, the administration
applies most of same protections to 26 threatened species as it does to endangered species. See 50
C.F.R. § 17.31. 27 // 1 The Endangered Species Act and the regulations implementing that Act
create several 2 exceptions and exemptions. A few are simple and practical, such as those
permitting “any 3 person” to take wildlife “in defense of his own life or the lives of others,” id. §
17.21(c)(2), and 4 allowing officers to take wildlife if necessary to “[a]id a sick, injured or
orphaned specimen,” id. 5 § 17.21(c)(3)(i). Other exceptions are broader and more complex. For
example, the government 6 can permit a taking if the taking is “incidental to, and not the purpose
of, the carrying out of an 7 otherwise lawful activity.” 16 U.S.C. § 1539(a)(1)(B). The Endangered
Species Act creates a 8 regulatory process for permits in this latter category. See id. § 1539(a)(2).
The applicant must 9 submit a conservation plan, the public can submit comments, and the
government must be 10 satisfied that several statutory requirements are satisfied. See id. 11 The
U.S. Fish and Wildlife Service also has issued a number of “special rules” that permit 12 takings
and trade in some circumstances. Among these are the special rules for reptiles. See 50 13 C.F.R. §
17.42. Two of these special rules are the subject of this case. 14 The first special rule allows some
takings of American alligators (*Alligator 15 mississippiensis*). American alligators are neither
threatened nor endangered, but they are treated 16 as threatened because American alligator
products can be difficult to distinguish from those of 17 threatened crocodilians. See id. §
17.11(h). Under the special rule, “[n]o person may take any 18 American alligator” with two
exceptions, one narrow and one broad. The narrow exception 19 allows certain federal and state
employees or agents to take an American alligator “when acting in 20 the course of official
duties.” Id. § 17.42(a)(2)(i). The broad exception allows anyone to take an 21 American alligator,
but imposes detailed conditions: 22 (ii) Any person may take an American alligator in the wild, or
one 23 which was born in captivity or lawfully placed in captivity, and may 24 deliver, receive,
carry, transport, ship, sell, offer to sell, purchase, or 25 offer to purchase such alligator in interstate
or foreign commerce, by 26 any means whatsoever and in the course of a commercial activity in
27 accordance with the laws and regulations of the State of taking 28 subject to the following
conditions: 29 (A) Any skin of an American alligator may be sold or otherwise 30 transferred only
if the State or Tribe of taking requires skins to 31 be tagged by State or tribal officials or under
State or tribal 1 supervision with a Service-approved tag in accordance with the 2 requirements in

part 23 of this subchapter; and 3 (B) Any American alligator specimen may be sold or otherwise 4 transferred only in accordance with the laws and regulations of 5 the State or Tribe in which the taking occurs and the State or 6 Tribe in which the sale or transfer occurs. 7 Id. § 17.42(a)(2)(ii). The special rule also allows imports and exports: “Any person may import 8 or export an American alligator specimen provided that it is in accordance with part 23 of this 9 subchapter.” Id. § 17.42.(a)(3).

10 Part 23, cross referenced above, includes regulations to fulfill the United States’ 11 obligations under the Convention on International Trade in Endangered Species of Wild Fauna 12 and Flora, commonly abbreviated “CITES.” See, e.g., 50 C.F.R. §§ 23.1(a), 23.20(e). CITES 13 governs international trade in products of many animal species. See id. § 23.70. For purposes of 14 this case, the most salient of the CITES regulations are shipping and labeling requirements. For 15 example, all skins and parts must be tagged and labelled with a self-locking tag and unique serial 16 number. See id. § 23.70(d)–(f). 17 The second special rule at issue in this case applies to several other crocodilians, including 18 Nile and Saltwater crocodiles (*Crocodylus niloticus* and *Crocodylus porosus*, respectively). Id. 19 § 17.42(c)(1)(i)(E), (F). The Nile crocodile is currently listed as threatened, and some 20 populations of Saltwater crocodiles are listed as threatened or endangered. See id. § 17.11(h); see 21 also U.S. Fish & Wildlife Serv., “Reclassification of Saltwater Crocodile Population in Australia 22 from Endangered to Threatened,” 61 Fed. Reg. 32356 (June 24, 1996). Under the special rules 23 for these crocodilians, “live specimens” are subject to the full set of prohibitions and permitting 24 rules in sections 17.31 and 17.32. 50 C.F.R. § 17.42(c)(2)(i). Skins and other products may be 25 imported, exported, sold, and delivered with a permit. See id. § 17.42(c)(2). In some 26 circumstances, however, the administration does not require a permit: 27 Except as provided in (c)(2)(i), you may import, export, or re-export, 28 or sell or offer for sale, deliver, receive, carry, transport, or ship in 29 interstate or foreign commerce and in the course of a commercial 30 activity, threatened crocodilian skins, parts, and products without a 31 threatened species permit otherwise required under § 17.32 provided 1 the requirements of parts 13, 14, and 23 of this subchapter and the 2 requirements of paragraphs (c)(3) and (4) of this section have been 3 met. 4 Id. § 17.42(c)(3). The many cross-references in this paragraph point to regulations governing live 5 specimens, see id. § 17.42(c)(2)(i); regulations for “the issuance, denial, suspension, revocation, 6 and general administration of all permits,” see id. § 13.2; import and export regulations, see id. 7 § 14.1, regulations implementing the United States’ CITES obligations, see id. § 23.1(a), specific 8 tagging and labeling rules, see id. § 17.42(c)(3); and “additional restrictions in trade of threatened 9 crocodilians,” see id. § 17.42(c)(4). 10 The Endangered Species Act also includes a detailed section about the relationship 11 between the federal government and the states. See 16 U.S.C. § 1535. That section begins by 12 directing federal agencies to “cooperate to the maximum extent practical with the States.” Id. 13 § 1535(a). For example, the federal government must consult with a state “before acquiring any 14 land or water . . . for the purpose of conserving any endangered species or threatened species.” 15 Id. The

federal government may also enter “cooperative agreements” with “any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species,” *id.* § 1535(c)(1), and the government may “provide financial assistance” to the cooperating state, *id.* § 1535(d)(1). These provisions and others have led other courts to describe the Endangered Species Act and its implementing regulations as “cooperative federalism.” *Gibbs v. Babbitt*, 214 F.3d 483, 503 (4th Cir. 2000). But if state laws and regulations conflict with the Endangered Species Act and its implementing regulations, the state rules are expressly preempted by section 6(f), codified at 16 U.S.C. § 1535(f).

Section 6(f) has two basic parts. The first delineates the preemption affirmatively:

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. 16 U.S.C. § 1535(f). “This chapter” refers to Chapter 35 of Title 16, the Endangered Species Act.

Section 6(f) thus prohibits two types of conflicts between federal and state laws and regulations.

If a state law or regulation permits conduct that is forbidden by the Endangered Species Act or its implementing regulations, then the state law is preempted. Likewise, if the Endangered Species Act or its implementing regulations authorize conduct by “exemption or permit,” then a state may not prohibit the authorized conduct. The second part of section 6(f) clarifies which state laws and regulations are not preempted. It begins by clarifying that aside from the preemption in the first sentence, the Endangered Species Act should not be read as preempting certain state conservation efforts: “This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife.” *Id.* Section 6(f) ends by making clear that state laws or regulations “respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.” *Id.* Litigation over section 6(f) reached California federal courts only a few years after the Endangered Species Act was passed. In an action filed in this court in the late 1970s, another judge of this court permanently enjoined California from enforcing sections 6530 and 6531 of the state penal code against trade in American alligator products, citing section 6(f). See generally *Fouke Co. v. Brown*, 463 F. Supp. 1142 (E.D. Cal. 1979). Similar challenges wound their way through California federal courts a few years later. The Ninth Circuit affirmed a district court’s determination that the Endangered Species Act preempted California laws that criminalized trade in elephant ivory products, but held in a companion case that the same California laws were not preempted with respect to Indonesian pythons and

Wallaby kangaroos. See generally *Man Hing 27 Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 761 (9th Cir. 1983); *H.J. Justin & Sons, Inc. 28 v. Deukmejian*, 702 F.2d 758 (9th Cir. 1983) (per curiam). 1 Despite *Fouke*, *Man Hing* and *H.J. Justin*, the California legislature did not amend the two 2 relevant penal code sections, 653o and 653r. In 2006, the Governor of Louisiana sponsored a bill 3 to remove the American alligator from California Penal Code section 653o. See Cal. Senate 4 Comm. on Nat. Res. & Water, S.B. 1485 Bill Analysis at 1 (May 9, 2006); see also Cal. 5 Assembly Comm. on Water Parks & Wildlife, S.B. 1485 Bill Analysis (May 15, 2006). The 6 Governor and the bill's author argued that successful conservation efforts had pulled the 7 American alligator back from the brink of extinction. Sen. Comm. Analysis at 1–2. In the 8 intervening years, the American alligator had been removed from the “endangered” and 9 “threatened” lists, and other states had repealed their prohibitions on alligator products. See *id.* at 10 2. Opponents of this proposed legislation argued that alligator hides were difficult to distinguish 11 from the hides of other crocodilians, and pointed out the Ninth Circuit had upheld some of section 12 653o in its 1983 decisions. See *id.* 13 The state removed the American alligator from section 653o as proposed, but it added a 14 sunset clause: starting January 1, 2010, crocodiles and alligators would again be a part of the 15 restrictions in section 653o. See 2016 Cal. Stat. Ch. 660 (S.B. 1485). The legislature extended 16 the 2010 effective date twice more, in 2009 and 2014. 2009 Cal. Stats. Ch. 15 (S.B. 609); 2014 17 Cal. Stats. Ch. 464 (S.B. 2075). In 2019, legislation was proposed to again extend the effective 18 date, but these bills did not pass. See, e.g., Assembly Bill 719, 2019–2020 Reg. Sess. (Cal. 2019). 19 As a result, beginning on January 1, 2020, the following prohibition came into force: “[I]t is 20 unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell 21 within the state, the dead body, or a part or product thereof, of a crocodile or alligator.” Cal. Pen. 22 Code § 653o(b)(1). Violators are “guilty of a misdemeanor and shall be subject to a fine of not 23 less than one thousand dollars (\$1,000) and not to exceed five thousand dollars (\$5,000) or 24 imprisonment in the county jail not to exceed six months, or both that fine and imprisonment, for 25 each violation.” *Id.* § 653o(d). Section 653r imposes a similar prohibition.¹ 1 “Notwithstanding the provisions of Section 3 of Chapter 1557 of the Statutes of 1970, it shall be unlawful to possess with intent to sell, or to sell, within this state, after June 1, 1972, the 1 A few weeks before the prohibition in section 653o(b)(1) came into force, several 2 businesses that distribute and sell products made from alligator and crocodile parts challenged 3 that provision in this court. See generally *Compl.*, ECF No. 1; *First Am. Compl.*, ECF No. 8.2 In 4 a separate action, three Louisiana organizations, including the Louisiana Wildlife and Fisheries 5 Commission, filed a similar challenge. See generally *Compl.*, No. 19-cv-2488, ECF No. 1. The 6 parties stipulated to the entry of a temporary restraining order until the court could hear and 7 resolve the plaintiffs’ motions for a preliminary injunction in both cases. See *Stip.*, ECF No. 29. 8 The United States filed an *amicus curiae* brief with the court’s permission, ECF No. 34-1, and the 9 court permitted three nonparty organizations to intervene in defense of section 653o, see 10 *Intervention Order*, ECF No. 43. 11 The court consolidated the two

cases and granted the plaintiffs' motions for a preliminary injunction. See generally Prelim. Inj. Order, ECF No. 48. The preliminary injunction bars the California Attorney General and the Director of the California Department of Fish and Wildlife from enforcing Penal Code sections 653o and 653r "in connection with the importation, possession, or sale of American alligator bodies, parts, or products thereof, and the bodies, parts, or products" of certain Saltwater and Nile crocodiles listed in CITES "until the final disposition of this case." *Id.* at 20. The court then set a schedule to resolve the case on cross-motions for summary judgment. See Mins., ECF No. 52. Before the parties' briefs came due, the U.S. Fish & Wildlife Service proposed amending the special rule for American alligators. As noted above, that special rule allows sales and transfers "only in accordance with the laws and regulations of . . . the State or Tribe in which the sale or transfer occurs." 50 C.F.R. § 17.42(a)(2)(ii)(B). Louisiana urged the Fish & Wildlife Service to drop that requirement, which it contended was confusing and unnecessary. See U.S. Fish & Wildlife Serv., Proposed Rule, 86 Fed. Reg. 5111, 5116 (Jan. 19, 2021). The specified in Section 653o or 653p. Violation of this section constitutes a misdemeanor." Cal. Pen. Code § 653r (line break omitted). Unless otherwise noted, all record citations refer to the docket in the lead case, No. 19- 2471. 1 administration "evaluated" that petition and "concluded that there is sufficient reason for a new rulemaking" as Louisiana had proposed. *Id.* In light of this notice, the court extended the briefing schedule for the parties' cross-motions. See Orders, ECF Nos. 59, 64. After many months, however, the proposed change remained a proposal only, so the court denied a request to again extend the briefing schedule, and the case moved forward. See Order, ECF No. 64. The Fish & Wildlife Service still has not adopted the proposed rule change. The parties have now briefed cross-motions for summary judgment on a single, narrow, dispositive issue: does the Endangered Species Act preempt the portions of California Penal Code sections 653o and 653r that relate to alligator and crocodile parts and products? The plaintiffs in both cases argue the answer is "yes," as a matter of both express and implied preemption. See generally Pl.'s Mem., ECF No. 65-1; Delacroix Mem., No. 19-2488, ECF No. 54-1; Opp'n to 12 Cal., ECF No. 69; Opp'n to Intervenor, ECF No. 68; Delacroix Reply, No. 19-2488, ECF No. 13 58. California argues the answer is "no" because in its view, section 653o applies only to activities entirely within the state, not to interstate or foreign commerce. See generally Cal. 15 Mem., ECF No. 66-1; Cal. Reply, ECF No. 70. The intervenors argue the California law is not preempted, but for a different reason. They contend the Endangered Species Act does not void state laws that offer greater protections than federal law. See generally Intervenor's Mem., ECF 18 No. 67-1; Intervenor's Reply, ECF No. 71.

The court heard oral arguments in a combined hearing on March 4, 2022. Christopher Hughes, David Frulla, and Bret Sparks appeared for the plaintiffs in Case No. 19-2471. Joseph 21 St. John appeared for the plaintiffs in Case No. 18-2488. Gwynne Hunter appeared for the Attorney General in both cases. Christopher Meyer, Sidni Frederick and Deborah Sivas appeared 23 for the intervenors in both cases.

24 II. LEGAL STANDARD

25 A court may grant summary judgment to any party who “shows that there is no genuine 26
dispute as to any material fact” and that it “is entitled to judgment as a matter of law.” Fed. R. 27
Civ. P. 56(a). Cross motions for summary judgment are evaluated separately under the same 28
standard. *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 1
2003). When the parties do not dispute the material facts, as in this case, the court need only 2
determine whether any party is entitled to judgment on the disputed claims.

3 III. DISCUSSION

4 A. The Permanent Injunction in *Fouke v. Brown* 5 Initially, the court must determine whether the
plaintiffs are entitled to summary judgment 6 under the permanent injunction issued many years
ago in *Fouke v. Brown*. In that case, two 7 sellers of alligator hides and alligator hide products
challenged California’s ban on alligator 8 product sales, citing section 6(f). See 463 F. Supp. at
1143–44. At the time, the U.S. Fish & 9 Wildlife Service’s special rule for American alligators was
more restrictive than it is today. With 10 the exception of only three Louisiana parishes, American
alligators in the wild were listed as 11 “endangered” or “threatened.” See U.S. Fish & Wildlife
Serv., *Endangered and Threatened 12 Wildlife*, 42 Fed. Reg. 2071, 2076 (Jan. 10, 1977). The
special rules for reptiles permitted takings 13 in only those three parishes, and they required
buyers to obtain a federal permit. See *id.* 14 (reproducing 50 C.F.R. § 17.42(a)(1)(i)(E) (1977)). 15
In *Fouke*, the buyer had obtained the necessary federal permit, so there was no dispute that 16
federal regulations and the Endangered Species Act would not bar its plan to sell alligator 17
products in California. See 463 F. Supp. at 1144. The district court thus concluded that 18
California’s law was preempted: it prohibited conduct that was authorized by federal regulations
19 and a federal permit. See *id.* The court permanently enjoined the Governor and Attorney
General 20 from enforcing the California Penal Code sections in question as applied to American
alligator 21 hides “unless the same are taken, bought, tanned, or fabricated in contravention of the
U.S. 22 Endangered Species Act,” its implementing regulations, or the terms of a permit or
exemption 23 issued under those regulations. See *id.* at 1145. 24 The *Fouke* injunction remains in
place today. It applies squarely to the plaintiffs’ claims. 25 The same preemptive statute and the
same state laws were at issue then as now. One of the 26 defendants in this case is the California
Attorney General, who was among the defendants who 27 was enjoined in *Fouke* from enforcing
Penal Code sections 653o and 653r in relation to American 28 alligator hides, which are some of
the same products now in dispute. 1 Despite these similarities, California and the intervenors each
argue the injunction does 2 not apply to this case. California argues the modern version of section
653o does not regulate 3 interstate commerce, but rather only activity within the state. See Cal.
Mem. at 9. This argument 4 rests on the first phrase of the express preemption provision in section
6(f), which voids state laws 5 and regulations only if they apply “with respect to the importation or
exportation of, or interstate 6 or foreign commerce in, endangered species or threatened species.”
16 U.S.C. § 1535(f). This 7 court rejected the state’s argument in its previous order. See Prelim.

Inj. Order at 9. The court 8 reaches the same conclusion now for three reasons. 9 First, both the previous and modern versions of section 653o unambiguously regulate 10 interstate commerce by expressly forbidding imports. Both versions make it unlawful to “import 11 into this state” alligator products “for commercial purposes.” Both versions also apply to all who 12 “possess” alligator products “with intent to sell,” no matter whether the intended sale is inside or 13 outside California. 14 Second, the express preemption in section 6(f) is broader than California suggests. 15 Section 6(f) refers to two types of state laws and regulations: those that “appl[y] with respect to 16 the importation or exportation of” endangered and threatened species, and those that “appl[y] 17 with respect to . . . interstate or foreign commerce.” *Id.* This court must avoid any interpretation 18 of this two-part phrase that renders it redundant. See *United States v. Alaska*, 521 U.S. 1, 59 19 (1997). The best way to avoid redundancy is to understand section 6(f) as encompassing two 20 types of state laws and regulations: those that apply specifically “with respect to” imports and 21 exports, and those that apply more generally “with respect to interstate and foreign commerce.” 22 In other words, California cannot prevail simply by showing section 653o leaves imports and 23 exports untouched. It also must show section 653o does not apply “with respect to” interstate or 24 foreign commerce at all. Section 653o clearly “applies with respect to” interstate and foreign 25 commerce by prohibiting all sales of American alligator products within California’s borders, 26 regardless of origin and destination. 27 Third, the modern version of section 653o and the version at issue in *Fouke* are nearly 28 identical. When *Fouke* was decided in 1979, section 653o made it “unlawful to import into this 1 state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead 2 body or any part or product thereof, of any alligator.” 463 F. Supp. at 1143 (quoting Cal. Pen. 3 Code § 653o (1971)). Today, section 653o makes it “unlawful to import into this state for 4 commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or a 5 part or product thereof, of [an] alligator.” Cal. Pen. Code § 653o(b)(1). California has identified 6 no meaningful difference between these versions of the statute. The court can identify none. The 7 two versions also have similar practical effects. As were the plaintiffs in *Fouke*, the plaintiffs in 8 this case are foreign to California. Both cases were challenges by organizations that feared 9 section 653o would bar sales of alligator skins and products originating outside California. Both 10 versions of section 653o imposed restrictions on interstate commerce in practice. 11 California resists this conclusion by urging the court to interpret section 653o narrowly. 12 See Cal. Mot. at 9–10. For ease of reference, here is the relevant language of section 653o once 13 more: “Commencing January 1, 2020, it is unlawful to import into this state for commercial 14 purposes, to possess with intent to sell, or to sell within the state, the dead body, or a part or 15 product thereof, of a crocodile or alligator.” Cal. Penal Code § 653o(b)(1). The state argues the 16 trailing modifier “within the state” applies to each of the prohibited activities in the list it follows. 17 See *id.* That is, California proposes reading section 653o as making it unlawful only to “import 18 into this state for commercial purposes within the state, to possess with intent to sell within the 19 state, or to sell within the state.” See Cal. Mot. at

10 (emphasis added). 20 That interpretation is a poor fit for the text of section 653o. Although a trailing modifier 21 can limit each item in the preceding list, that is unlikely to be true if the list is not a cohesive 22 whole and is not separated from the trailing modifier by a comma. See *Facebook, Inc. v. Duguid*, 23 141 S. Ct. 1163, 1170 (2021). The better interpretative rule for section 653o is the rule of the last 24 antecedent: “a limited clause or phrase should ordinarily be read as modifying only the noun or 25 phrase that it immediately follows.” *Id.* (alteration omitted) (quoting *Barnhart v. Thomas*, 540 26 U.S. 20, 26 (2003)). This interpretive rule fits the statutory and factual context better than 27 California’s reading, which leads to the unlikely conclusion that the state has banned only 28 “imports into this state for commercial purposes within the state,” and not “imports into this state 1 for commercial purposes outside the state.” Nor does California claim any interest in protecting 2 alligator populations within its territory from a domestic threat. 3 The legislative history of the modern alligator prohibition confirms California lawmakers 4 had interstate and foreign commerce in mind. The legislators who sought to keep alligator and 5 crocodile products off the list in section 653o cited successful conservation efforts in other states 6 and the importance of global trade. See California Senate Committee on Natural Resources and 7 Water, Hearing on A.B. 719 at 3–4 (July 9, 2019). Legislators who sought to reactivate the ban 8 emphasized the danger of confusing illegal wildlife products from Latin America and elsewhere 9 with legal and licensed imports. See *id.* at 4–5. For these reasons as well, *Fouke v. Brown* cannot 10 be distinguished by interpreting the current version of section 653o narrowly. 11 The intervenors advance very different arguments to distinguish *Fouke*. They begin by 12 urging the court to find the injunction in *Fouke* “does not apply” because the federal “regulatory 13 scheme” has “significantly changed” since 1979. Intervenors’ Mem. at 8. For example, permits 14 are no longer required for most transactions. See *id.* Even if this argument is correct, it would 15 not make a meaningful difference for this case. Although the *Fouke* injunction cites federal 16 regulations, it does so only to clarify that California may enforce its Penal Code against those 17 who do not abide by federal laws and regulations. See 463 F. Supp. at 1145. There is no 18 evidence to show the plaintiffs in these consolidated cases have not complied with applicable 19 federal regulations. The permanent injunction in *Fouke v. Brown* is thus applicable to the 20 plaintiffs’ claims about American alligator products. 21 In addition to arguing the permanent injunction does not apply, the intervenors argue the 22 court should dissolve or modify the injunction if it does apply. See Intervenors’ Mem. at 8–10. 23 “The power of a court of equity to modify a decree of injunctive relief is long-established, broad, 24 and flexible.” *Brown v. Plata*, 563 U.S. 493, 542 (2011) (quoting *N.Y. State Ass’n for Retarded 25 Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983)). When a party asks to modify or 26 dissolve an injunction, the court considers whether “a significant change in facts or law warrants 27 revision or dissolution of the injunction.” *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 28 2019) (per curiam) (quoting *Sharp v. Weston*, 233 F.3d 116, 1170 (2000)). The relevant test has 1 two parts: the moving party must show not only that the facts or the law have changed 2 significantly, but also that in light of

that change, the injunction should be dissolved or modified 3 under the same legal standard that governed the previously entered injunction. See *id.* at 1198 & 4 n.14 (applying standard for preliminary injunctions to request to dissolve a preliminary 5 injunction). 6 This legal test “presumes that the moving party could have appealed the grant of the 7 injunction but chose not to do so, and thus that a subsequent challenge to the injunctive relief 8 must rest on grounds that could not have been raised before.” *Alto v. Black*, 738 F.3d 1111, 1120 9 (9th Cir. 2013). That presumption is inaccurate if applied to this case. Although the Attorney 10 General’s predecessor elected not to appeal or challenge the district court’s decision in *Fouke*, the 11 state’s current Attorney General has not asked this court to relieve him from the permanent 12 injunction; he argues only that the injunction entered in *Fouke* does not apply. See *Cal. Mem.* at 13 9–10; *Cal. Reply* at 3. Only the intervenors have asked the court to dissolve or modify the 14 permanent injunction. The court knows of no way the intervenors or anyone in privity with them 15 could have appealed or challenged the injunction in *Fouke*. They do not contend, however, that 16 *Fouke* was wrongly decided, so the court has not considered whether it was. The court asks 17 instead only whether the intervenors have shown “a significant change in facts or law warrants 18 revision or dissolution of the injunction.” *Karnoski*, 926 F.3d at 1198 (quoting *Sharp*, 233 F.3d at 19 1170). 20 The intervenors have not satisfied these requirements. Now, as before, section 6(f) of the 21 Endangered Species voids any state laws that “prohibit what is authorized pursuant to an 22 exemption or permit provided for in this chapter or in any regulation which implements” the 23 Endangered Species Act. 16 U.S.C. § 1353(f). Now, as before, regulations adopted under the 24 authority of the Endangered Species Act provide that “[n]o person may take any American 25 alligator,” with specific exceptions. Compare 50 C.F.R. § 17.42(a)(2)(ii) with 50 C.F.R. 26 § 17.42(a)(1)(i)(E) (1977). And now, as before, California Penal Code sections 653o and 653r 27 prohibit takings authorized by those regulations. In short, the facts and the law behind *Fouke v. 28 Brown* are the same today as they were in 1979: “California Penal Code Sec. 653o and Sec. 653r 1 purport to prohibit what is authorized pursuant to an exemption or permit provided for by the U.S. 2 Endangered Species Act and regulations implementing it.” 463 F. Supp. at 1144. 3 Although federal regulations and the status of the American alligator both have changed 4 since *Fouke* was decided, those changes lack “significance” in the sense that would be necessary 5 here. American alligators are no longer “endangered” or even “threatened,” *Intervenors’ Mem.* at 6 8–9, but they still are protected under the Endangered Species Act, as their appearance is similar 7 to that of threatened crocodilians, see 50 C.F.R. § 17.42(a). The administration no longer requires 8 a permit to take, purchase, possess, sell, transfer, or ship alligator products, see *Intervenors’ Mem.* 9 at 8 (citing 50 C.F.R. § 17.42(a) (1977)), and imports and exports are now authorized, see 50 10 C.F.R. § 17.42(a)(3), but the conflict between these regulations and California law remains. 11 Federal regulations allow people to take American alligators and to buy and sell American 12 alligator products; California law prohibits it. 13 The intervenors also cite a provision in the special rules for American alligators that was 14 added after *Fouke* was decided. See *Intervenors’ Mot.* at 9. In

their view, this provision resolves 15 any conflict between the federal regulations and California law by expressly accepting that 16 California, and any other state, could ban all American alligator products. See *id.* The provision 17 they cite conditions federal authorization on compliance “with the laws and regulations of . . . the 18 State or Tribe in which the sale or transfer occurs.” 50 C.F.R. § 17.42(a)(2)(ii)(B). 19 In its previous order, this court concluded that this provision presented a serious question. 20 See Prelim. Inj. Order at 15. On its face, it implies that states can impose independent conditions 21 on the sales and transfers of American alligator products—and perhaps even an outright ban. See 22 *id.* The parties had not adequately explored that possibility in their briefing when the court 23 considered the question before. See *id.* They have done so now. Having reviewed the parties’ 24 arguments and the record, the court concludes that contrary to the intervenors’ argument, the new 25 provision does not remove this action from the scope of the permanent injunction in *Fouke*. 26 The primary fault in the intervenors’ position is the absence of any workable limiting 27 principle. If they are correct, then federal regulations permit states to pass whatever restrictions 28 they like. The special rules would effectively short circuit the express preemption in section 6(f). 1 The Ninth Circuit addressed and rejected a very similar argument in *Man Hing*. A few more 2 details about that case are necessary to explain why. 3 The plaintiff in *Man Hing* was a wholesale importer of African elephant ivory products.

4 See 702 F.2d at 761. The California Penal Code prohibited trade in elephant products. See *id.* at 5 761–62 (quoting Cal. Penal Code § 653o (1970) and citing 1976 Cal. Stat. 1696). By contrast, 6 federal regulations adopted under the Endangered Species Act authorized trade in elephant ivory 7 products, provided, again, that all necessary permits were in place. See *id.* at 763–64 (quoting 50 8 C.F.R. § 17.40(e) (1981)). The district court concluded the state law was preempted because it 9 prohibited what federal regulations permitted, and the Ninth Circuit affirmed. See *id.* at 764–65. 10 The Circuit rejected the state’s argument that the federal permit was conditional on 11 compliance with the state’s own laws. See *id.* at 765. Although the permit expressly cautioned 12 that its validity was “conditioned upon strict observance of all applicable foreign, state, and other 13 federal law,” the circuit decided this caveat was intended to implement another federal regulation, 14 which required that trade under a federal permit “meet state or federal health, quarantine, 15 customs, and agricultural laws.” *Id.* (emphasis omitted) (citing 50 C.F.R. § 10.3 (1981)). “To 16 read the condition more broadly . . . would open the way for states to impose regulation to 17 supersede federal regulation of trade in imported endangered species or their export or interstate 18 commerce, a form of state preemption clearly contrary to the intent of Congress in passing the 19 Endangered Species Act.” *Id.* A broad reading also would “pave the way for a day when an 20 enterprise . . . could secure a federal permit . . . and yet find itself unable to conduct such trade 21 within the United States because of widespread state adoption of statutes paralleling California’s 22 section 653o” *Id.* at 765 n.5. The Circuit’s reasoning is as compelling today as it was when *Man* 23 *Hing* was decided. Congress cannot have intended for broad conditions in federal regulations to 24 short circuit the express preemption in section 6(f). See *id.*

at 765 & n.5. 25 In addition, reading the new regulatory condition as the intervenors propose would imply 26 the U.S. Fish & Wildlife Service silently departed from a prior policy in stark “disregard” for the 27 “rules that are still on the books,” an outcome the Administrative Procedure Act would prohibit. 28 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). As the plaintiffs persuasively 1 explain, before the current language in the American alligator special rule was adopted, the 2 special rule did not mention the laws and regulations of receiving states, such as California. See 3 Pls.’ Mem. at 13–16. The new language was added after a series of restrictions on American 4 alligator trade was lifted. See *id.* If the intervenors’ interpretation were correct, then the agency 5 would be permitting states to prohibit trade in a way it never before had done, and it would have 6 done so in the same moment it was lifting trade restrictions. Federal courts avoid such irrational 7 interpretations of federal regulations when, as in this case, it is possible to use “a more plausible 8 interpretation.” *United States v. Aldana*, 878 F.3d 877, 882 (9th Cir. 2017). 9 The better reading of the new condition in the special rule for American alligators is as a 10 broad requirement to comply with any relevant state health and safety, quarantine, and similar 11 regulations. Although previous versions of the special rules for American alligators did not 12 include the condition the parties now dispute, the condition’s substance is not new. In 1979, as 13 today, federal regulations made clear that import and export permits did not relieve permit holders 14 of their duties to comply with any applicable statutes and regulations, including state law. See 50 15 C.F.R. § 10.3. Federal permits issued under the Endangered Species Act reiterated that caution at 16 the time. See *Man Hing*, 702 F.2d at 765. This caution is sensible and unsurprising if it is 17 interpreted as a warning that health, safety and similar requirements still apply. These are animal 18 products, after all. State health and safety laws do not conflict with the federal regime and have 19 become more salient as restrictions on alligator meat and other products loosened, as plaintiffs 20 persuasively explain. See Pls.’ Mem. at 11–16. 21 At oral argument, the intervenors contended their position does not create a loophole or a 22 shortcut around section 6(f) because federal regulators still have power to prevent states from 23 passing whatever laws they like. For example, the intervenors proposed, federal regulators could 24 again impose a permit requirement, or they could clearly state that an exemption or exception 25 creates a positive right to engage in some specific conduct. This argument assumes federal 26 regulations do not already create such a right. Current regulations do just that. See 50 C.F.R. 27 § 17.8(b) (“Except as provided in a special rule in §§ 17.40 through 17.48, any live or dead 28 specimen of a fish or wildlife species listed as threatened under this part may be imported without 1 a threatened species permit under § 17.32 provided that all of the following conditions are met 2”); *id.* § 17.42(a) (special rule for American alligators). 3 In sum, the terms of the permanent injunction in *Fouke v. Brown* apply to the plaintiffs’ 4 claims regarding American alligator hides. Neither California nor the intervenors have satisfied 5 the first part of the two-part test for modifying or dissolving an injunction, so the injunction 6 remains in place. 7 B. Claims Beyond *Fouke v. Brown* 8 At the same time, in *Fouke*, the court enjoined the enforcement of California Penal Code 9 sections 653o and 653r with respect

to American alligator hides only. See 463 F. Supp. at 1145. 10 The plaintiffs in this case assert claims about other products as well, including products made 11 with the hides of Nile and saltwater crocodiles. For that reason, the court must consider 12 independently whether the Endangered Species Act preempts California Penal Code sections 13 653o and 653r with respect to these species. 14 “Preemption analysis starts with the assumption that the historic police powers of the 15 states were not to be superseded by the Federal Act unless that was the clear and manifest purpose 16 of Congress.” *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 438 17 (2002) (alternation, internal quotations and citation omitted). As a result, “Congressional 18 intent . . . is the ultimate touchstone of preemption analysis.” *Engine Mfrs. Ass’n v. S. Coast Air 19 Quality Mgmt. Dist.*, 498 F. 3d 1031, 1040 (9th Cir. 2007) (quoting *Tocher v. City of Santa Ana*, 20 219 F.3d 1040, 1045 (9th Cir. 2000), abrogated in part on other grounds as explained in *Tillison 21 v. City of San Diego*, 406 F.3d 1126 (9th Cir. 2005)). When a statute expressly preempts state 22 law, the court “focus[es] on the plain wording of the clause, which necessarily contains the best 23 evidence of Congress’ pre-emptive intent.” *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 24 582, 594 (2011). 25 As summarized above, section 6(f) preempts any state law or regulation that “prohibit[s] 26 what is authorized pursuant to an exemption or permit provided for in [the Endangered Species 27 Act] or in any regulation which implements [it].” 16 U.S.C. § 1535(f). This court concluded in 28 its previous order that the plaintiffs were likely to prevail on their claim that the California Penal 1 Code prohibits activities authorized by the special rules for other threatened crocodilians. See 2 Prelim. Inj. Order at 11–15. The court concludes now that the Penal Code does in fact prohibit 3 what federal regulations authorize. 4 The court begins with the language of section 6(f). That section uses the word 5 “exemption” as a disjunctive alternative to the word “permit.” See 16 U.S.C. § 1535(f). For that 6 reason, an “exemption” is best understood as a legal provision that relieves a person of an 7 otherwise applicable permit requirement. See Prelim. Inj. Order at 13. The special rules for other 8 threatened crocodilians fit that definition. The Endangered Species Act and the administration’s 9 regulations generally prohibit trade in Nile and saltwater crocodiles, but under the special rules 10 for other threatened crocodilians, prohibited trade is authorized by a permit or by compliance with 11 CITES, see supra at 2–5, subject to the person’s compliance with the requirements in other 12 regulations. See Prelim. Inj. Order at 14; see also 50 C.F.R. § 17.8(a) (“Except as provided in a 13 special rule . . . , all provisions of §§ 17.31 and 17.32 apply”). In this way, the strictures of 14 CITES supplant the administration’s own permit and create an “exemption.” California prohibits 15 trade in crocodile products in Penal Code sections 653o and 653r, so those sections prohibit what 16 federal regulations authorize and are expressly preempted under section 6(f) of the Endangered 17 Species Act. 18 This interpretation of section 6(f) also follows from several clues about Congress’s intent 19 reflected in the Endangered Species Act’s legislative history. According to a House report, 20 preemption was of “great interest” during legislative hearings because the preemptive language 21 that eventually became section 6(f) was “susceptible of alternative

interpretations.” See H.R. 22 Rep. No. 412, 93rd Cong., 1st Sess. 7 (July 27, 1973). Under the draft language Congress was 23 then considering, a state law or regulation would be “void to the extent that it would effectively 24 permit or prohibit imports, exports, or transactions in interstate or foreign commerce in a manner 25 inconsistent with” federal law and regulations. See H.R. 4758 § 4(e), 93rd Cong., 1st Sess. (Feb. 26 27, 1973). 27 The phrase “inconsistent with” raised concerns in states whose laws already protected 28 endangered species. New York was an example. Its “Mason law” prohibited sales of skins and 1 bodies of several animals, including alligators. See Statement of James P. Corcoran, Assistant 2 Attorney General, State of New York, Hearings before the Subcommittee on Fisheries and 3 Wildlife Conservation of the Committee on Merchant Marine and Fisheries of the U.S. House of 4 Representatives on H.R. 2169 and 4758 at 351, 353 (Mar. 27, 1973) (citing Mason Law, N.Y. 5 Agric. & Mkts. § 358-a (1970)). A representative of the New York Attorney General explained 6 the State’s concern with the proposed preemption to a House subcommittee: “Some of [the] 7 animals [protected by the New York Mason law] are not presently on the Secretary’s list, nor is 8 there any certainty that they will be included in the near future.” Id. at 352. “Since all 9 endangered species under the Mason law travel in interstate or foreign commerce to New York, 10 this law would presumably be void except insofar as it precisely followed the Federal law, in 11 which case the State law would be meaningless.” Id. New York thus feared the proposed law 12 would preempt the field entirely. Id.; see also id. at 362–63. The New York Attorney General 13 proposed an amendment clarifying that the Endangered Species Act should not be construed “as 14 superseding or limiting the power of any State to enact legislation more restrictive than the 15 provisions in this act for the protection and conservation of fish and wildlife.” Id. at 352. 16 California’s Attorney General joined in “strongly recommending” that Congress “allow 17 states to have more restrictive laws to protect endangered species.” Id. at 374–75. He explained 18 that like New York, California protected some species that the administration had not included on 19 its proposed lists of endangered species. Id. For example, at the time, section 653o of the 20 California Penal Code forbade imports and sales of the bodies and parts of alligators, crocodiles, 21 polar bears, leopards, tigers, wolves, whales and several other animals. See id. at 249–50. If 22 federal law completely preempted section 653o, and if the federal law did not list all of the 23 species listed in section 653o, those unlisted species might not be protected in California at all. 24 See id. at 375. 25 At least one legislator thought this was “a very interesting point” and “ought to be 26 clarified.” Id. at 358. The subcommittee chairman asked the Department of the Interior, which 27 had drafted the original preemption language, for its response. See id. at 387. In a letter, the 28 administration clarified its position. “It was not our intention,” the administration wrote, to “void 1 State laws, such as New York’s Mason Act, which apply to the sale of species not appearing on 2 the Federal endangered species lists.” Id. (emphasis in original). Nor did the administration wish 3 to “void all State laws which regulate interstate or foreign commerce in endangered or non- 4 endangered species by ‘preempting the field’ of commercial restraints upon the trade in or 5 movement of such fish and wildlife in

interstate or foreign commerce.” *Id.* The administration 6 had no concerns if states wished to regulate takings within their borders more strictly. *Id.* But it 7 believed states “should not be permitted to prohibit acts which are expressly allowed by a Federal 8 permit or exemption, or to permit what is prohibited by federal law.” *Id.* (emphasis in original). 9 In the administration’s view, federal law must void any state laws that “thwarted” the federal 10 program of prohibitions and exceptions, especially because the federal programs would 11 implement the United States’ obligations under international treaties. *Id.* 12 The administration proposed a clarifying revision, and that revision is similar to the final 13 preemptive language in section 6(f). Compare *id.* at 387–88 with 16 U.S.C. § 1535(f). A House 14 Report explains: “the Committee rewrote the . . . bill to make it clear that states would and should 15 be free to adopt legislation or regulations that might be more restrictive than that of the Federal 16 government and to enforce the legislation,” but in cases of “a specific Federal permission for or a 17 ban on importation, exploitation, or interstate commerce,” states “could not override the Federal 18 action.” H.R. Rep. No. 412, 93rd Cong., 1st Sess. 7 (July 27, 1973). 19 Although this legislative history is not decisive, it confirms what the text of section 6(f) 20 clearly implies. First, if an animal is not listed, states can give greater protections. Section 6(f) 21 refers only to “what is prohibited” and “what is authorized” by federal law and regulations. 22 Second, when an animal is listed, states can regulate takings within their borders. They can also 23 “conserve” wildlife within their borders if their laws and regulations are more restrictive than 24 federal laws and regulations, but only within their borders. Section 6(f) refers to “migratory, 25 resident, or introduced fish or wildlife” and “takings,” not foreign, non-native animals. But third, 26 section 6(f) expressly and unambiguously voids state laws and regulations that conflict with 27 federal regulation of interstate and foreign commerce. 1 By prohibiting all trade in crocodile products, California Penal Code section 653o falls on 2 the preempted side of each of these three divisions. First, California is regulating crocodile 3 species on the “threatened” list. Second, California is not regulating crocodile takings within its 4 borders. Nothing in the record suggests crocodiles reside in California, migrate into California or 5 have been introduced into California. Third, section 653o applies expressly to interstate and 6 foreign commerce by barring “imports,” thus encroaching on a federal system of permits and 7 exemptions that implements CITES, an international treaty. 8 This conclusion withstands the state’s and the intervenors’ counterarguments. California 9 argues again that section 653o can and should be interpreted as applying only to trade within the 10 state—not to “interstate commerce”—and thus is not preempted. See, e.g., Cal. Mem. at 9–10. In 11 the state’s view, this interpretation obviates a constitutional question. See *id.* But that is not so 12 clear to this court. The state’s argument still relies on a comparison of federal law and 13 regulations, and that comparison is at the core of determining express preemption. See *Whiting*, 14 563 U.S. at 594. Even if the state’s interpretation does sidestep a constitutional question, the 15 court could not adopt that interpretation. For the reasons in the previous section, section 653o 16 cannot reasonably be interpreted as applying only to trade within the state’s borders, see *supra* at 17 11–

13, so the doctrine of constitutional avoidance is no aid. See *Nielsen v. Preap*, 139 S. Ct. 954, 18 972 (2019) (“[C]onstitutional avoidance ‘comes into play only when, after the application of 19 ordinary textual analysis, the statute is found to be susceptible of more than one construction.’ 20 (citation and quotation marks omitted)). 21 The intervenors, by contrast, accept that section 653o regulates interstate commerce, but 22 argue the special rules do not create “exemptions” under express preemption in section 6(f). 23 They contend the word “exemption” in section 6(f) refers to several categorical exemptions and 24 exceptions listed in 16 U.S.C. § 1539. See, e.g., *Intervenors’ Mem.* at 17–18. It is improbable 25 that Congress intended section 6(f) as a cross-reference to § 1539 only. If Congress had intended 26 to use “exemption” as a defined term and a reference to specific provisions in § 1539, it would 27 likely have added a cross reference in section 6(f), or it could have included the word 28 “exemption” in the Endangered Species Act’s list of definitions. See 16 U.S.C. § 1532. Defining 1 the word “exemption” by cross-reference to § 1539 would also artificially limit the plain language 2 of section 6(f), which refers not only to “this chapter” but also to “any regulation which 3 implements this chapter.” 4 In addition, the intervenors advance several arguments highlighting the traditional role of 5 the states in protecting wildlife. See, e.g., *Intervenors’ Mem.* at 10–11 (arguing section 6(f) 6 should be interpreted narrowly to preserve states’ traditional police powers); *id.* at 11–12 (arguing 7 Congress intended to preserve stricter state regulations of trade in listed species). The legislative 8 history summarized above demonstrates Congress was aware of these interests and intended to 9 preserve states’ roles. But that history also shows how Congress limited the states’ roles. In 10 addition to states’ traditional interests, traditional federal interests were at stake: the regulation of 11 interstate and foreign commerce and international treaties. See, e.g., U.S. Const. Art. I, § 8, cl. 3 12 (Commerce Clause); *id.* Art. II, § 2, cl. 2 (Treaties Clause). Congress balanced these competing 13 interests in section 6(f) and expressly preempted conflicting state laws and regulations, as 14 explained above. 15 It may be, as the intervenors contend, that Congress intended to return traditional 16 regulatory authority to the states as wildlife populations rebounded. See *Intervenors’ Mem.* at 17 10–14. As the Ninth Circuit recognized in *Man Hing*, when federal protections wane, state 18 regulations could potentially become stricter. See 702 F.2d at 765 n.4. The Supreme Court also 19 recognized long before the Endangered Species Act that “[p]rotection of the wild life [sic] of the 20 state is peculiarly within the police power, and the state has great latitude in determining what 21 means are appropriate for its protection.” *Lacoste v. Dep’t of Cons. of State of La.*, 263 U.S. 545, 22 551 (1924)). The plaintiffs have shown, however, that Congress intended to preempt state laws 23 that prohibit interstate and foreign trade when federal regulations authorize that trade, and they 24 have shown that California Penal Code section 653o and 653r run afoul of that express 25 preemption. 26 This is not to say the plaintiffs’ conception of section 6(f) is free of counterintuitive 27 implications. The Ninth Circuit explained one potentially counterintuitive result in *Man Hing*. If 28 an animal is listed as endangered or threatened under federal law and regulations, but importers 1 can obtain a federal trade permit, then states could not prevent

imports. See *Man Hing*, 702 F.2d 2 at 765 n.4. If, however, the animal were not endangered or threatened—and, as a result, no 3 federal permit were necessary—a state could ban trade outright. See *id.* That is, animals that are 4 not listed on the endangered and threatened lists could be afforded greater protection than 5 animals on the list. See *id.* This anomaly came into full relief in *H.J. Justin*. In that case, the 6 plaintiff importer wished to sell products made from the hides of African elephants, Indonesian 7 pythons and Wallaby kangaroos in California, but again, section 653o banned those sales. 702 8 F.2d at 759. Under *Man Hing*, the Circuit determined the state’s ban on elephant hide imports 9 was preempted. *Id.* By contrast, Indonesian pythons and Wallaby kangaroos were not listed as 10 “endangered” or “threatened” species, so California could prohibit all imports without running 11 afoul of section 6(f). See *id.* at 759–60. 12 Perverse incentives are not difficult to see in this potentially counterintuitive system. 13 Those who traffic in vulnerable wildlife may be perfectly content for their targets to remain 14 “threatened” in the eyes of a federal regulator, if that means state markets remain open to them. 15 Despite these potential anomalies, the Ninth Circuit concluded the terms of section 6(f) were 16 clear. See *id.*; see also *Man Hing*, 702 F.2d at 765 n.4. This court agrees. Section 6(f) expressly 17 preempts California Penal Code sections 653o and 653r. For that reason, the court need not and 18 does not decide whether the Endangered Species Act impliedly preempts those sections as well. 19 See *Delacroix Mem.* at 14–17 (advancing that argument).

20 IV. CONCLUSION

21 The court grants plaintiffs’ cross-motions for summary judgment in the consolidated 22 case. The court denies state’s and intervenors’ cross-motions. This order does not grant any 23 party’s request for a remedy. Within twenty-eight days, the parties shall meet and confer and 24 file a joint report proposing a schedule for the final resolution of this matter, including the 25 determination of any appropriate remedies. 26 The court notes Case No. 2:19-cv-02471-KJM-CKD and Case No. 2:19-cv-02488-KJM- 27 CKD were consolidated into Case No. 2:19cv02471-KJM-CKD on October 13, 2020, however, 28 Case No. 2:19cv02488-KJM-CKD was not closed. The court directs the clerk’s office to close 1 | Case No. 2:19-cv-02488-KJM-CKD, and all future documents filed in the consolidated case shall 2 | be filed only in case No. 2:19-cv-02471-KJM-CKD. 3 This order resolves ECF Nos. 65, 66 and 67 in case No. 19-2471 and ECF No. 54 in case 4 | No. 19-2488. 5 IT IS SO ORDERED. 6 | DATED: March 6, 2023.

CHIEF ED STATES DISTRICT JUDGE

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