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1 **INTEREST OF THE UNITED STATES***

2 The United States Department of the Interior, through the United States Fish and Wildlife
3 Service (FWS), has primary responsibility within the federal government for the management of
4 certain fish and wildlife species in the United States. FWS implements programs under the
5 Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*, for the conservation of endangered and
6 threatened species, including the threatened American alligator and endangered and threatened
7 crocodile and caiman species.¹ FWS regulations support the science-based efforts of States to
8 manage the American alligator, and the FWS program has served as a model for international
9 standards for trade in alligators and certain listed crocodilians.² FWS has a strong interest in the
10 interpretation of the ESA and its implementing regulations concerning the American alligator and
11 threatened crocodilians, as well as in ensuring the continued success of the American alligator
12 conservation program, with its attendant benefits for endangered and threatened crocodiles and
13 other species.

14 **INTRODUCTION**

15 This Court should enjoin the State of California from enforcing state law that would
16 prohibit certain commercial trade in threatened alligators and crocodiles, because federal
17 regulations under the ESA specifically authorize these activities. “[O]ne of the first endangered
18 species success stories,” the American alligator was saved from possible extinction through the
19 combined efforts of FWS and State wildlife agencies, in part by controlling harvest and trade.
20 FWS, American Alligator Fact Sheet (Feb. 2008), *available at*

21 _____
22 * This brief is identical in substance to the brief that the United States is simultaneously
23 filing in a related case pending in this Court, *Delacroix Corp. v. Becerra*, No. 19-2488.

24 ¹ Caimans are smaller-sized relatives of alligators and crocodiles that inhabit Central and
25 South America. GALE ENCYCLOPEDIA OF SCIENCE 1183-86 (K. Lee Lerner & Brenda
26 Wilmoth Lerner eds., 4th ed., 2008) *available at* https://link.gale.com/apps/doc/CX2830100643/GVRL?u=doi_main&sid=GVRL&xid=f9efe042,
27 (last accessed Mar. 3, 2020).

28 ² Alligators, crocodiles, and caiman are referred to collectively as “crocodilians” because
they belong to an order of mostly large, predatory, amphibious reptiles known as crocodilia
(or crocodylia). GALE ENCYCLOPEDIA, *supra* note 1, at 1183-86.

1 <https://www.fws.gov/uploadedFiles/American-Alligator-Fact-Sheet.pdf> (last accessed Mar. 3,
2 2020). Today, the alligator is biologically recovered, but FWS regulates State-managed harvest
3 and legal trade as part of the efforts to prevent illegal take and trafficking in other threatened and
4 endangered “look-alike” reptiles. FWS also regulates the legal trade in certain threatened, foreign
5 crocodylian species for much the same reason.

6 By prohibiting this commercial trade, California once again seeks to supersede the
7 balanced federal regulatory approach that made the recovery of the American alligator possible.
8 As this Court previously declared in *Fouke Co. v. Brown*, 463 F. Supp. 1142, 1145 (E.D. Cal.
9 1979), the California law is contrary to federal law, and thus is unconstitutional and unenforceable
10 as applied to the otherwise lawful trade in American alligator hides. Despite being under a federal
11 injunction not to enforce the law, last year, California allowed its ban on alligator trade to go into
12 effect once again. Because California law would prohibit activity that is specifically authorized
13 under the ESA and its regulations, it is precluded to that extent by the ESA’s express preemption
14 provision. The Court should therefore declare the California law invalid and preclude its
15 enforcement where it would prohibit federally authorized trade in American alligators and
16 threatened crocodylians.

17 I. BACKGROUND

18 A. The Endangered Species Act

19 In 1973, Congress enacted the Endangered Species Act “to provide a means whereby the
20 ecosystems upon which endangered species and threatened species depend may be conserved,
21 [and] to provide a program for the conservation of such endangered species and threatened
22 species.” 16 U.S.C. § 1531(b). Section 4 of the ESA directs the Secretary of the Interior to
23 determine by regulation whether a given species should be listed as endangered or threatened,³
24 including both domestic and international species. *Id.* § 1533(a). The ESA prohibits, *inter alia*,

25 _____
26 ³ An endangered species is one that is in danger of extinction throughout all or a significant
27 portion of its range. 16 U.S.C. § 1532(6). A threatened species is one that is likely to
28 become endangered within the foreseeable future throughout all or a significant portion of
its range. *Id.* § 1532(20).

1 taking (which includes harming, trapping, and killing), possession, import, export, interstate
2 commerce, and foreign commerce in species listed as endangered with extinction. *Id.* §§ 1532(19),
3 1538(a). ESA Section 4(d) allows FWS to extend those same protections by regulation (often
4 referred to as a “special rule”) to species of fish or wildlife listed as threatened. *Id.* § 1533(d). The
5 ESA also allows FWS to issue regulations under Section 4(d) to authorize these otherwise
6 prohibited activities by regulation or permit. *Id.*; *see also* 50 C.F.R. pt. 17.

7 Separate from the ESA’s provisions for species listed as threatened or endangered, the ESA
8 also implemented the Convention on International Trade in Endangered Species of Wild Fauna
9 and Flora (CITES), *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. 8249, a
10 multilateral treaty that aims to protect wildlife that is vulnerable to or adversely affected by trade,
11 by regulating trade in species that are listed in its three Appendices. *See* 16 U.S.C. §§ 1537a,
12 1538(c); *Japan Whaling Ass’n v. Am. Cetacean Soc’y.*, 478 U.S. 221, 238 n.8 (1986); *see also* 50
13 C.F.R. pt. 23. CITES Appendix II, which includes the alligators and crocodiles that are the focus
14 of this litigation, lists species that may become threatened with extinction unless their trade is
15 subject to strict regulation, as well as look-alike species. *Id.* art. II.2. Appendix II species may be
16 traded, including for primarily commercial purposes, under export permits and re-export
17 certificates. *Id.* art. IV. *See also* CITES Appendices, *available at*
18 <https://www.cites.org/eng/app/appendices.php> (last accessed Mar. 3, 2020).

19 ESA Section 6 details federal-state relations pertaining to carrying out the program
20 authorized by the Act. It contains a provision specifying the extent to which Congress intended to
21 preempt state wildlife conservation laws:

22 **Conflicts between State and Federal Laws.** Any State law or regulation
23 which applies with respect to the importation or exportation of, or interstate
24 or foreign commerce in, endangered species or threatened species is void to
25 the extent that it may effectively (1) permit what is prohibited by this chapter
26 or by any regulation which implements this chapter, or (2) prohibit what is
27 authorized pursuant to an exemption or permit provided for in this chapter or
28 in any regulation which implements this chapter. 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.

1 16 U.S.C. § 1535(f). Section 6(f) also permits State laws respecting take to be more
2 restrictive than provided for in the ESA.

3 Relevant to the some of the alligators and crocodilians affected by this litigation, under
4 certain circumstances, the ESA also authorizes the Secretary of the Interior to treat an unlisted
5 species as endangered or threatened due to its “similarity of appearance” with a listed species (i.e.,
6 it’s a “look-alike”). *Id.* § 1533(e). Extending ESA protections to other species that closely
7 resemble listed species is intended to protect listed species indirectly. To qualify for such
8 treatment, the resemblance must be so closely similar that enforcement personnel would have
9 substantial difficulty in differentiating between the two. *Id.* The Secretary also must find that the
10 potential for confusion is an additional threat to the endangered or threatened species, and that
11 treating the species as listed will substantially facilitate enforcement and further the policy of the
12 Act. *Id.*

13 **B. Federal Regulation of Trade in the American Alligator**

14 Today, the American alligator, *Alligator mississippiensis*, is listed under the ESA as
15 “threatened due to similarity of appearance” throughout its range. *See* 50 C.F.R. § 17.11(h). That
16 status, however, reflects decades of work at the State and federal level to help recover the species.
17 A brief history of these efforts, as relevant to this case, is described below.

18 **1. Initial Listing as Endangered and Rapid Recovery**

19 FWS first listed the American alligator as an endangered species in 1967, under a
20 predecessor statute to the ESA. 32 Fed. Reg. 4,001, 4,001 (Mar. 8, 1967). The American alligator,
21 FWS found, was in need of protection because of a drop in numbers caused by “many years of
22 excessive exploitation and habitat usurpation by man.” 40 Fed. Reg. 44,412, 44,412 (Sept. 26,
23 1975). The newly passed Endangered Species Act introduced a “threatened” classification for
24 species in 1973. *Id.* The State of Louisiana then submitted a petition to FWS to reconsider the
25 endangered listing of the American alligator in three of the State’s parishes. *Id.* In response, FWS
26 published a rule for the American alligator. FWS reclassified it as “threatened due to similarity in
27
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1 appearance” in those three parishes, based on the potential for confusion with the endangered
2 American alligators in the remainder of the range. *See id.* at 44,422.

3 First, FWS confirmed that conservation efforts for the American alligator had revived the
4 population to “ecologically secure” numbers in those portions of the species’ range. *Id.* at 44,412.
5 Second, FWS found that illegal commerce and malicious killing had become top threats to the
6 alligator. The latter derived from increased development of alligator habitat and increased human-
7 alligator conflicts. *Id.* Therefore, with respect to the alligator populations in the three petitioning
8 parishes, FWS decided that “[r]eorientation of enforcement efforts toward effective control of
9 commerce in parts and products of legally taken alligators would permit the initiation of
10 practicable management programs.” *Id.*

11 FWS therefore issued a special rule pursuant to ESA Section 4(d). This prohibited the
12 unpermitted taking of any American alligator, unless it was (1) in the defense of one’s own life or
13 (2) in the course of enumerated official government duties, or (3) in carrying out scientific research
14 or conservation programs by FWS or a State conservation agency. *Id.* at 44,427–28. Under the
15 third exclusion, and in the three Louisiana parishes where American alligators were reclassified as
16 threatened due to similarity in appearance, American alligator hides could be sold to a federally
17 licensed buyer if they were tagged, but could not be imported or exported. *Id.* at 44,428. The 1975
18 special rule also created a harvesting permit for buyers, tanners, and fabricators. *Id.* There was
19 no express requirement at the time that sales or transfers also comply with the law of the State.

20 In the years that followed, the species continued to improve. FWS reconsidered the
21 classification of the American alligator throughout the remainder of the species’ range. It also
22 revised the special rule on alligators. *See* 42 Fed. Reg. 2,071, 2,071 (Jan. 10, 1977) (reclassifying
23 the American alligator from “endangered” to “threatened” in all of Florida and certain coastal areas
24 of Georgia, Louisiana, South Carolina, and Texas); 44 Fed. Reg. 37,130, 37,132 (June 25, 1979)
25 (revising special rule); 44 Fed. Reg. 51,980, 51,982 (Sept. 6, 1979) (same); 44 Fed. Reg. 59,080,
26 59,084 (Oct. 12, 1979) (expanding “threatened due to similarity of appearance” classification from
27 three to twelve Louisiana parishes); 45 Fed. Reg. 78,153, 78,156 (Nov. 25, 1980) (revising special
28

1 rule); 46 Fed. Reg. 40,664 (Aug. 10, 1981) (expanding “threatened due to similarity of appearance”
2 classification to all of Louisiana); 48 Fed. Reg. 46,332 (Oct. 12, 1983) (all of Texas); 50 Fed. Reg.
3 25,672 (June 20, 1985) (all of Florida); 50 Fed. Reg. 45,407, 45,409 (Oct. 31, 1985) (revising
4 special rule).

5 **2. 1987 Reclassification as “Threatened Due to Similarity of 6 Appearance”**

7 In 1987, FWS reclassified the American alligator as “threatened due to similarity of
8 appearance” throughout its entire range. 52 Fed. Reg. 21,059, 21,059 (June 4, 1987); *see also id.*
9 at 21,064 (revising the special rule). Despite the general recovery of the species, however, FWS
10 identified “a need for continued Federal controls on taking and commerce to insure against
11 excessive taking.” *Id.* at 21,060. Scientific methods then allowed States to design harvests such
12 that the alligator populations were not negatively affected. *Id.* But rather than delist the American
13 alligator, FWS maintained the species’ classification as “threatened due to similarity in
14 appearance” due to its similarity in appearance to other crocodylians that are threatened with
15 possible extinction. *Id.* at 21,062. State wildlife agencies, including the then-Louisiana
16 Department of Wildlife and Fisheries, made “major contributions” to the alligator’s recovery, *id.*
17 at 21,059, including by prohibiting harvest on State lands and purchasing or protecting wetlands.
18 *Id.* at 21,061. Another significant factor in the alligator’s recovery was cooperation between FWS
19 and state wildlife agencies to monitor and protect the species through reintroduction and captive
20 breeding on alligator farms. *See id.* (describing “continual monitoring and research,” and
21 “restricting and controlling harvest on State lands based on survey and population data”).

22 **3. Current Special Rule on American Alligators**

23 Today, alligator farms maintain a sustainable level of trade and allow wild populations to
24 rebound. FWS, Alligators & Crocodylians at
25 <https://www.fws.gov/international/animals/alligators-and-crocodiles.html> (last accessed Mar. 3,
26 2020). The current version of the special rule applicable to American alligators allows States to
27 expand or initiate harvesting programs and regulates the trade in American alligators and their
28

1 parts and products. 50 C.F.R. § 17.42(a) (2015). As it currently stands, the special rule for the
2 American alligator allows that:

3 [a]ny person may take an American alligator . . . , and may deliver, receive,
4 carry, transport, ship, sell, offer to sell, purchase, or offer to purchase such
5 alligator in interstate or foreign commerce, by any means whatsoever and in
the course of a commercial activity in accordance with the laws and
regulations of the State of taking.

6 *Id.* § 17.42(a)(2)(ii). This authorization is subject to two conditions: First, that any sale or transfer
7 must be “in accordance with the laws and regulations of the State or Tribe in which the taking
8 occurs and the State or Tribe in which the sale or transfer occurs.” *Id.* § 17.42(a)(2)(ii)(B). Second,
9 the State of taking must require the use of FWS-approved tags for skins in accordance with tagging
10 requirements under U.S. CITES implementing regulations at 50 C.F.R. § 23.70. *Id.* §
11 17.42(a)(2)(ii)(A).

12 Section 17.42 also authorizes import and export of American alligator specimens under
13 specified conditions. *Id.* § 17.42(a)(3)-(4). Import and export of American alligator specimens
14 for commercial purposes is authorized under the special rule where it is in compliance with all
15 U.S. CITES implementing regulations in 50 C.F.R. part 23. Under these regulations, States and
16 Tribes may obtain federal CITES export program approval to facilitate the international trade in
17 American alligator skins, body parts, and meat. 50 C.F.R. § 23.70(c). To be a federally-approved
18 CITES export program, the State or Tribe must provide documentation to FWS to ensure
19 (1) American alligators harvested under the program are legally acquired, and (2) export of the
20 American alligators under the program will not be detrimental to the survival of the species in the
21 wild. *Id.* The regulation also requires tagging of skins and other labelling requirements, *id.*
22 § 23.70(d), (e), as well as reporting and recordkeeping requirements. *Id.* §§ 23.70(c)(2),
23 17.42(a)(4).

24 **C. Federal Regulation of Trade in Certain Threatened Crocodylians**

25 FWS now regulates trade in six species of “threatened crocodylians.” These are defined as
26 any live or dead specimen of six crocodylian species, 50 C.F.R. § 17.42(c)(1)(i), which do not
27 naturally live in the wild in the United States, and which are listed as threatened under the ESA.
28

1 *See id.* § 17.11(h) (list of endangered and threatened wildlife). As it does for the American
2 alligator, the special rule for threatened crocodylians authorizes any person subject to the
3 jurisdiction of the United States to:

4 import, export, or re-export, or sell or offer for sale, deliver, receive,
5 carry, transport, or ship in interstate or foreign commerce and in the
6 course of a commercial activity threatened crocodylian skins, parts,
7 and products.

8 *Id.* § 17.42(c)(3). Although there is no requirement that sale or transfer be in accordance with the
9 law of the State of sale or transfer, traders also must meet any applicable requirements of Parts 13,
10 14, and 23 of Title 50 of the Code of Federal Regulations, Chapter I, Subchapter B. *Id.* Authorized
11 commercial activities must also comply with tagging and other CITES-related provisions of
12 Section 17.42(c)(3)(i). Federal regulations also do not authorize take of threatened crocodylians,
13 except for the limited exceptions provided in 50 C.F.R. §§ 17.31 and 17.32. *Id.*⁴

14 **E. California’s ban on trade in alligators and crocodiles**

15 In 1970, the State of California amended its criminal code to make it unlawful within the
16 State to trade in various species of animals, including alligators and crocodiles. Cal. Penal Code
17 § 653o (1970) (“the California law”). In 1979, this Court enjoined enforcement of the law as to
18 the American alligator to the extent that FWS’s 1975 special rule authorized interstate trade in the
19 alligator. *See Fouke Co.*, 463 F. Supp. at 1145. In addition, implementation of the law with respect
20 to alligators and crocodiles has been repeatedly delayed. For a decade, California passed a series
21 of interim bills extending the effective date. *See, e.g.*, Cal. Stats. 2009, c. 15 (S.B. 609), § 2
22 (delaying effective date until Jan. 1, 2015); Cal. Stats. 2014, c. 464 (A.B. 2075), § 2 (delaying
23 effective date until Jan. 1, 2020). Last year, a bill expanding the ban to certain other species
24 (including to caiman) was signed into law without any further extension of the effective date for

25 ⁴ For completeness, we note that the population of the American crocodile, *Crocodylus actus*, in
26 Florida is listed as threatened, and that it is listed as endangered throughout the remainder of its
27 range. *See* 72 Fed. Reg. 13,027, 13,027 (Mar. 20, 2007). The American crocodile is not subject
28 to the special rule. Take and trade of the American crocodile are prohibited, except as authorized
by a permit issued under 50 C.F.R. part 17. *Id.* at 13,039. There are also other alligators,
crocodiles, and caimans that are not covered by this rule.

1 the crocodile and alligator ban. *See* Cal. Stat. 2019, c. 767 (AB 1260), § 1. Section 653o of the
2 California Penal Code now reads, in relevant part:

3 (b)(1) Commencing January 1, 2020, it is unlawful to import into
4 this state for commercial purposes, to possess with intent to sell, or
5 to sell within the state, the dead body, or a part or product thereof,
6 of a crocodile or alligator.

7 (2) This subdivision does not authorize the importation or sale of
8 any alligator or crocodilian species, or products thereof, that are
9 listed as endangered under the federal Endangered Species Act, or
10 to allow the importation or sale of any alligator or crocodilian
11 species, or products thereof, in violation of federal law or
12 international treaty to which the United States is a party.

13 Cal. Penal Code § 653o(b); *see also id.* § 653o(c) (extending to caiman and certain other species
14 beginning in January 1, 2022); *id.* § 653r (making it unlawful to possess with intent to sell or to
15 sell within the state the dead body of any fish, amphibian, reptile, or mammal specified in Section
16 653o). Violations are a misdemeanor subject to a fine of between \$1,000 and \$5,000, or
17 imprisonment of no more than six months, or both, for each violation. *Id.* § 653o(d). The law also
18 includes a provision on severability, noting that “[a] finding of the invalidity of any one or more
19 prohibitions shall not affect the validity of any remaining prohibitions.” *Id.* at § 653o(e). On
20 December 23, 2019, based on California’s non-opposition, this Court granted motions for
21 temporary restraint on enforcement of the California law. ECF No. 30.

22 SUMMARY OF ARGUMENT

23 Pursuant to federal statute and the Supremacy Clause of the Constitution, Art. VI, cl. 2,
24 FWS regulations authorize certain types of trade in American alligator and threatened crocodilians.
25 These preempt state law that would effectively prohibit such trade. Because California Penal Code
26 Sections 653o(b) and 653r would effectively prohibit commercial import and export and certain
27 types of interstate trade that FWS regulations authorize, the California law is preempted to the
28 extent of the conflict. Plaintiffs are, therefore, likely to succeed on the merits of their claim. The
public interest in the conservation of the species also supports their bid. As it has done before, this
Court should declare California Penal Code Sections 653o(b) and 653r preempted by the ESA and

1 relevant regulations. California should be enjoined from enforcing these provisions to the extent
 2 preempted.⁵

3 **ARGUMENT**

4 **I. The Endangered Species Act and regulations expressly preempt California’s law.**

5 California’s ban on importing for commercial purposes, possessing with intent to sell, or
 6 selling crocodile or alligator parts is expressly preempted under Section 6(f) of the ESA. The Act
 7 explicitly voids State laws that prohibit what FWS has authorized. Under the ESA, the lawful
 8 trade in crocodile or alligator parts is permitted. “There is no doubt that Congress may withdraw
 9 specified powers from the States by enacting a statute containing an express preemption
 10 provision.” *Arizona v. United States*, 567 U.S. 387, 399 (2012).

11 The ESA authorizes federal regulation of trade in threatened species. 16 U.S.C. § 1533(d).
 12 It also expressly preempts contrary state laws. *Id.* § 1535(f). Pursuant to this authority, FWS has
 13 promulgated special rules governing the trade in American alligator and threatened crocodilian⁶
 14

15 ⁵ Because the preemptive effect of the ESA is an express basis for relief, the United States
 16 does not take any position at this time on Plaintiffs’ other causes of action.

17 ⁶ References to “threatened crocodilians” in this brief mean those species included in the definition
 18 at 50 C.F.R. § 17.42(c)(1)(i) and which are subject to the special rule. We do not intend to include
 19 the American crocodile, another threatened crocodile species that is not subject to the special rule,
 20 or any unlisted crocodilians or crocodilians listed only under CITES. For clarity, we summarize
 21 the preemptive effect of federal regulations regarding these subsets of crocodilians in the table
 22 below:

Species	Do federal regulations as to this species preempt California Penal Code §§ 653o(b) and 653r?	Reason
American alligator	Yes, to the extent that California law may prohibit what is authorized by 50 C.F.R. part 17, including 50 C.F.R. § 17.42(a).	See in-text argument.
“Threatened crocodilians” as defined in 50 C.F.R. § 17.42(c)(1)(i)	Yes, to the extent that California law may prohibit what is authorized by 50	See in-text argument.

1 parts. 50 C.F.R. § 17.42(a), (c). The special rules help ensure that both harvest and trade in the
 2 American alligator and threatened crocodilians is well-managed, traceable, lawful, and not
 3 detrimental to the survival of the species or the listed species they resemble. The regulation
 4 includes comprehensive tagging, marking, and labeling for domestic and international commercial
 5 trade in skins, meat, and other parts and products of the species. *Id.* (incorporating requirements
 6 of 50 C.F.R. § 23.70). But California Penal Code Sections 653o(b) and 653r would ban
 7 commercial trade in alligators and crocodiles that is authorized by these special rules. Those bans
 8 are preempted to the same extent by the ESA.

9 The preemptive effect of the ESA is set forth in Section 6(f). 16 U.S.C. § 1535(f). *See*
 10 *Man Hing Ivory Imports, Inc. v. Deukmejian*, 702 F.2d 760, 763 (9th Cir. 1983) (“Section 6(f) . . .
 11 directly address[es] the scope of federal preemption intended for the [ESA]”). Under Section 6(f),
 12 state laws governing “the importation or exportation of, or interstate or foreign commerce in . . .
 13 threatened species,” are void to the extent that the state law “may effectively . . . prohibit what is
 14 _____

	C.F.R. part 17, including 50 C.F.R. § 17.42(c).	
American crocodile	Yes, but only to the extent California law may prohibit what is authorized by 50 C.F.R. part 17, including any permit issued under 50 C.F.R. § 17.32(a).	Federal regulations prohibit take and trade in the American crocodile, <i>see</i> 72 Fed. Reg. at 13,039, except as authorized by permit.
Unlisted crocodilians or crocodilians listed only under CITES	No.	ESA Section 6(f) does not preempt state regulations restricting or prohibiting trade in species that are not listed as endangered or threatened under the ESA. <i>H.J. Justin & Sons, Inc. v. Deukmejian</i> , 702 F.2d 758, 759–60 (9th Cir.), <i>cert. denied</i> , 464 U.S. 823 (1983); <i>Man Hing Ivory & Imports, Inc. v. Deukmejian</i> , 702 F.2d 760, 763 (9th Cir. 1983).

1 authorized pursuant to . . . any regulation which implements this chapter.” 16 U.S.C. § 1535(f).
2 Section 6(f) only “allows [state statutes’] full implementation . . . so long as the state statute does
3 not prohibit what the federal statute or its implementing regulations permit.” *Man Hing*, 702 F.2d
4 at 763. Thus, “the precise scope of what the Act permits” may be determined “only by reference
5 to the federal regulations adopted to implement the Act.” *Id.*; see also *Cresenzi Bird Importers,*
6 *Inc. v. State of N.Y.*, 658 F. Supp. 1441, 1444–46 (S.D.N.Y.) (collecting legislative history of
7 Section 6(f)), *summarily aff’d*, 831 F.2d 410 (2d Cir. 1987).

8 The ESA does not specify particular prohibitions and authorizations for threatened species.
9 Instead, the ESA requires the Secretary of the Interior to issue such regulations. “[A]s [the
10 Secretary] deems necessary and advisable to provide for the conservation of [the] species,” the
11 Secretary has discretion to extend the Section 9(a)(1) prohibitions to the American alligator and
12 threatened crocodilians. 16 U.S.C. § 1533(d). Pursuant to this authority, FWS promulgated
13 federal controls on the taking of and commerce in the American alligator. These insure against
14 excessive take. They also protect the American crocodile in the U.S. and foreign countries, as well
15 as to protect other endangered crocodilians in foreign countries. See 50 Fed. Reg. at 21,062 (June
16 4, 1987).

17 The special rules for the American alligator and threatened crocodilians authorize activity
18 that fall within the scope of California law if it goes into effect. In fact, the putative violations can
19 be criminally prosecuted. Subject to certain conditions (including compliance with the law of the
20 State of sale or transfer), the FWS special rule for the regulation of the American alligator at 50
21 C.F.R. § 17.42(a)(2) authorizes the delivery, receipt, carriage, transport, shipping, sale, offer to
22 sell, purchase, or offer to purchase alligator parts or products in interstate or foreign commerce.
23 California Penal Code Section 653o(b), by comparison, prohibits the import of the same into
24 California for commercial purposes, possession with intent to sell, and the sale within California
25 of alligator parts or products. Section 17.42(a)(3) and (4) of the FWS regulations also authorize
26 import and export of alligator parts or products. This, too, would be prohibited under California
27 Penal Code Sections 653o(b) and 653r.

1 And, no person seeking to engage in commercial activities involving import or export of
2 alligator or threatened crocodile skins, parts, or products into or out of the United States via
3 designated wildlife ports in California could do so without violating the these provisions of
4 California law. This, too, is specifically authorized by 50 C.F.R. § 17.42(a)(3) and 17.42(c)(3).
5 FWS regulations governing the trade in threatened crocodilians are closely similar to those for the
6 American alligator. *See* 50 C.F.R. § 17.42(c)(3).

7 In short, California Penal Code Sections 653o(b) and 653r prohibit within state boundaries
8 what federal regulations authorize: the commercial import and export of and certain interstate trade
9 in American alligator and threatened crocodilian skins, parts, and products. California Penal Code
10 Sections 653o(b) and 653r effectively prohibit trade in alligator and crocodile parts authorized by
11 50 C.F.R. § 17.42(a) and (c). That California law is void to the same extent pursuant to Section 6(f)
12 of the ESA and the Supremacy Clause.

13 **II. The law of the Ninth Circuit supports granting declaratory and injunctive relief.**

14 This matter does not come to the Court on a blank slate. This Court has previously
15 considered the California law's effect on the otherwise lawful trade in American alligator hides
16 authorized pursuant to FWS regulations, 50 C.F.R. part 17, and permits issued thereunder. It found
17 the California law preempted and unenforceable. The Court then enjoined California from
18 enforcing the state law. *Fouke Co.*, 463 F. Supp. at 1145. In a similar case involving elephant
19 parts, the Ninth Circuit also concluded the California law was preempted. *Man Hing*, 702 F.2d at
20 763. The Court should follow these precedents and enjoin the California law again here to the
21 extent it prohibits federally authorized trade.

22 In *Fouke Co. v. Brown*, plaintiff was an out-of-state business engaged in the processing,
23 tanning, and marketing of alligator hides. It sold to companies that used them to make specialty
24 goods. The Fouke Company alleged that it desired to sell directly to a California fabricator, Gary's
25 Leather Creations, Inc., for resale to consumers. 463 F. Supp. at 1143-44. At the time, the
26 American alligator was still listed under the ESA as endangered in part of its range. But harvest
27 of its threatened populations was permitted by FWS regulation and sale permitted to licensed
28

1 buyers.⁷ The Fouke Company had a FWS license under 50 C.F.R. § 17.42(a) to purchase, possess,
2 sell or otherwise transfer, and ship (but not export) hides and to manufacture hides into various
3 products. *Id.*

4 This Court concluded that “California Penal Code Sections 653o and 653r are in direct
5 conflict with the [ESA], particularly Section 6 of said Act.” *Id.* at 1145. This Court granted relief
6 coterminous with the federal exemption: The declaration and injunction held the California law
7 unconstitutional as applied to American alligator hides “unless the same [are] taken, bought,
8 tanned, or fabricated in contravention of the [ESA] or [the implementing] regulations . . . , or in
9 contravention of the terms and conditions of a permit or exemption issued pursuant to said Act or
10 regulations.” *Id.* Because California has recently allowed California Penal Code Section 653o(b)
11 to go into effect again, this Court should once again enjoin its enforcement as to activity authorized
12 by 50 C.F.R. part 17.

13 In *Man Hing Ivory*, the Ninth Circuit affirmed a similar conclusion by the Northern District
14 of California regarding the import of elephant parts. Plaintiff Man Hing Ivory and Imports, Inc.,
15 sought to conduct wholesale trade in African elephant ivory within the State of California. 702
16 F.2d at 761. By amendment in 1976, the California law had added elephants to the list of animals
17 whose parts could not be traded. *Id.* at 762. The Court concluded that the California law was not
18 preempted by CITES, *id.*, but held that it was preempted by ESA Section 6(f). *Id.* at 763; *see also*
19 *H.J. Justin & Sons, Inc. v. Deukmejian*, 702 F.2d 758, 759-60 (9th Cir.),
20 *cert. denied*, 464 U.S. 823 (1983) (finding Section 653o preempted as to African elephant products,
21 but not as to other species not listed as endangered or threatened).

22 The Ninth Circuit, citing *Fouke*, reasoned that pursuant to ESA Section 6(f), “only by
23 reference to the federal regulations adopted to implement the Act may the precise scope of what
24

25
26 ⁷ Until June 28, 1979, the American alligator was also included on CITES Appendix I, meaning
27 there was no lawful international trade in American alligator for primarily commercial purposes
28 at the time of the *Fouke* decision in January 1979, *see* CITES art. III.3.(c) and 16 U.S.C.
§ 1538(c)(1), and the authorizations under the ESA threatened-species regulations at 50 C.F.R.
§ 17.42(a) at that time extended only to domestic trade.

1 the Act permits be determined.” 702 F.2d at 763. Because ESA special rules adopted by FWS
2 permitted limited trade in African elephant parts subject to certain conditions, *see* 50 C.F.R. §
3 17.40(e) (1981), the Ninth Circuit concluded that these regulations and ESA Section 6(f) “preclude
4 California’s enforcement of section 653o where it would prohibit federally authorized trade in
5 African elephant products.” 702 F.2d at 764..

6 In short, a State law is void to the extent it would prohibit trade otherwise authorized by
7 FWS’s endangered and threatened species regulations at 50 C.F.R. part 17. Pursuant to the express
8 preemption clause in ESA Section 6(f) and by this Court’s own precedent and governing circuit
9 law, the California law is likewise preempted where it would prohibit trade in American alligator
10 and threatened crocodilian parts authorized by FWS’s threatened-species regulations at 50 C.F.R.
11 § 17.42.

12 CONCLUSION

13 For the foregoing reasons, the ESA and its implementing regulations preempt California
14 Penal Code Sections 653o(b) and 653r to the extent that the conduct prohibited under the state law
15 is authorized by federal regulation of trade in American alligators and threatened crocodilians
16 under 50 C.F.R. part 17. Because these sections of California law are expressly preempted as
17 described above, the Court should grant Plaintiffs’ motion for a preliminary injunction.
18 Ultimately, the Court should declare the California law invalid and permanently enjoin its
19 enforcement where it would prohibit federally authorized trade in American alligators and
20 threatened crocodilians.

21 Dated: March 3, 2020.

22
23 Respectfully submitted,

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