

**REPORT ON LEGISLATION
BY THE ANIMAL LAW COMMITTEE**

**H.R 1806
S.804**

**Rep. Young
Sen. Sullivan**

AN ACT to amend the Marine Mammal Protection Act of 1972 to protect the cultural practices and livelihoods of producers of Alaska Native handicrafts and fossilized ivory products, and for other purposes.

THIS LEGISLATION IS OPPOSED

I. SUMMARY OF THE PROPOSED LEGISLATION

The proposed legislation — the Empowering Rural Economies Through Alaska Native Sustainable Arts and Handicrafts Act (the “Act”)¹ — would preempt states and their political subdivisions from banning certain ivory products. Specifically, states and localities would be barred from prohibiting the importation, sale, offer for sale, transfer, trade, barter, possession or possession with the intent to sell, transfer, trade, or barter of (i) fossilized ivory from a mammoth, mastodon, walrus, narwhal, or whale; or (ii) mammoth, mastodon, or walrus ivory, marine mammal bones, teeth, or baleen produced under the Marine Mammal Protection Act by an Indian, Aleut, or Eskimo as an authentic native article of handicrafts and clothing.

II. BACKGROUND

Ivory is derived from the teeth or tusks of mammals, including whales, walruses, mammoths, mastodons, and, in its most familiar form, elephants.² While international trade in elephant ivory has been significantly restricted for decades,³ illegal trade in ivory, and particularly

¹ Empowering Rural Economies Through Alaska Native Sustainable Arts and Handicrafts Act, H.R. 1806, S. 804, 116th Cong. (2019). The full text of the bills are available at <https://www.congress.gov/116/bills/hr1806/BILLS-116hr1806ih.pdf> (H.R. 1806) and <https://www.congress.gov/116/bills/s804/BILLS-116s804is.pdf> (S. 804). (All links in this report were last visited on June 26, 2019.)

² See, e.g., Edgard O. Espinoza & Mary-Jacque Mann, Identification Guide for Ivory and Ivory Substitutes at 4 (1999), <https://cites.org/sites/default/files/eng/resources/pub/E-Ivory-guide.pdf>.

³ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which regulates international trade in African and Asian elephants (including those elephants’ ivory), has significantly restricted international trade in Asian and African elephants since 1975 and 1976, respectively. U.S. Fish & Wildlife Service

ivory from elephants, is a global criminal enterprise responsible for countless animals' deaths. Poachers continue to slaughter the animals in staggering numbers, with over 90% of illicit elephant ivory in circulation from recently killed elephants.⁴ Poaching has put even the species itself at risk. One 2014 study of poaching in Africa estimated a 64% decline in the continent's elephant population from 2002 to 2012.⁵ And the first continent-wide, standardized survey of African savannah elephants in 2016 found similarly large declines.⁶ In some African countries the elephant population has dwindled to a handful of animals, and Sierra Leone's elephants may have vanished altogether.⁷

Nor is it just the declining numbers that are concerning; so too are the poachers' methods. Poachers often kill elephants with high-powered rifles like AK-47s or with grenade launchers, then hack out the animals' tusks with hatchets.⁸ Other poaching methods include poisoning elephant watering holes with cyanide.⁹

Yet the illicit ivory trade is not limited to elephants' native areas; it is global. In fact, much illegal ivory finds its way into the United States.¹⁰ For instance, a 2014 investigation of ivory sales

(FWS), *CITES & Elephants: What Is the "Global Ban" on Ivory Trade?* (2013), <https://www.fws.gov/le/pdf/CITES-and-Elephant-Conservation.pdf>; CITES (Mar. 3, 1973), 27 U.S.T. 1087; CITES, Appendices I, II and III (Oct. 4, 2017), <https://cites.org/sites/default/files/eng/app/2017/E-Appendices-2017-10-04.pdf>.

⁴ Columbia University, Lamont-Doherty Earth Observatory, *Illegal Ivory Almost All From Recent Killing, Study Finds* (Nov. 7, 2016), <https://www.ldeo.columbia.edu/news-events/illegal-ivory-almost-all-recent-killing-study-finds> (citing Thure E. Cerling et al., *Radiocarbon Dating of Seized Ivory Confirms Rapid Decline in African Elephant Populations and Provides Insight into Illegal Trade*, 113 PROC. NATL. ACAD. SCI. U.S.A 13330, 13330 (2016), <https://www.pnas.org/content/pnas/113/47/13330.full.pdf>).

⁵ George Wittemyer et al., *Illegal Killing for Ivory Drives Global Decline in African Elephants*, 111 PROC. NATL. ACAD. SCI. U.S.A 13117, 13118 (2014), <http://www.pnas.org/content/pnas/111/36/13117.full.pdf>.

⁶ Michael J. Chase et al., *Continent-wide Survey Reveals Massive Decline in African Savannah Elephants*, PEERJ 4:e2354 at 11-15 (2016), <https://peerj.com/articles/2354.pdf>. The study estimated a population of 350,000, meaning an average of 27,700 elephants died per year during 2010-2014.

⁷ Michael McCarthy, *Trade in Mammoth Ivory "Is Fueling Slaughter of African Elephants"*, THE INDEPENDENT, (Sept. 29, 2010), <https://www.independent.co.uk/environment/nature/trade-in-mammoth-ivory-is-fuelling-slaughter-of-african-elephants-2092528.html>; Agence France-Presse, *Sierra Leone Elephants Wiped Out – Official*, TIMES OF MALTA (Nov. 28, 2009), <https://www.timesofmalta.com/articles/view/20091128/world/sierra-leone-elephants-wiped-out-official.283635>.

⁸ Tristan McConnell, *The Bloody Toll of Congo's Elephant Wars*, GQ (April 16, 2018), <https://www.gq.com/story/inside-the-ivory-wars>; see also Agence France-Presse, *Botswana Poaching Spree Sees 90 Elephants Killed in Two Months*, THE GUARDIAN (Sept. 4, 2018), <https://www.theguardian.com/world/2018/sep/04/ninety-elephant-carasses-found-in-botswana-with-tusks-and-trunks-chopped>.

⁹ Peta Thornycroft and Aislinn Laing, *Poachers Kill 300 Zimbabwe Elephants with Cyanide*, THE TELEGRAPH (Oct. 20, 2013), <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/10390634/Poachers-kill-300-Zimbabwe-elephants-with-cyanide.html>.

¹⁰ U.S. Fish & Wildlife Service (FWS), Revisions to the Endangered Species Act (ESA) Special Rule for the African Elephant: Questions and Answers ("Questions and Answers") at 2, <https://www.fws.gov/international/pdf/questions-and-answers-african-elephant-4d-final-rule.pdf>.

in California, one of the country's largest ivory markets, estimated that most ivory sold in the state was illegal, sourced from recently killed elephants.¹¹

In the face of this poaching crisis, nine states to date — California,¹² Hawaii,¹³ Illinois,¹⁴ Nevada,¹⁵ New Hampshire,¹⁶ New Jersey,¹⁷ New York,¹⁸ Oregon,¹⁹ and Washington²⁰ — have enacted restrictions on ivory trade. Several other states have similar bills pending.²¹ Most of these states have imposed general bans on trading not just elephant ivory but also similar products, including ivory and/or bone from mammoths, mastodons, whales, walruses and other animals.²² Such laws are stricter than restrictions under federal law. In particular, fossilized mammoth and mastodon ivory is not subject to federal trade restrictions.²³ And while the Marine Mammal Protection Act of 1972 (“MMPA”)²⁴ has imposed a broad moratorium on taking²⁵ and importing

¹¹ Daniel Stiles, *Elephant Ivory Trafficking in California, USA*, at Abstract (2015) (prepared for the Natural Resources Defense Council), https://www.nrdc.org/sites/default/files/wil_15010601a.pdf.

¹² CAL. FISH & GAME CODE § 2022, <http://codes.findlaw.com/ca/fish-and-game-code/fgc-sect-2022.html>.

¹³ HAW. REV. STAT. § 183D-66, https://www.capitol.hawaii.gov/hrscurrent/Vol03_Ch0121-0200D/HRS0183D/HRS_0183D-0066.htm.

¹⁴ 815 ILL. COMP. STAT. § 357, <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3888&ChapterID=67>.

¹⁵ NEV. REV. STAT. § 597.905, <https://www.leg.state.nv.us/NRS/NRS-597.html#NRS597Sec905>.

¹⁶ N.H. REV. STAT. § 212-C: 1–2, <http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-XVIII-212-C.htm>.

¹⁷ N.J. REV. STAT. § 23:2A-13.1–13.5, <http://codes.findlaw.com/nj/title-23-fish-and-game-wild-birds-and-animals/nj-st-sect-23-2a-13-3.html>.

¹⁸ N.Y. E.C.L. § 11-0535-A, <https://www.nysenate.gov/legislation/laws/ENV/11-0535-A>. New York allows, subject to registration, the one-time distribution of articles containing mammoth ivory to a legal beneficiary of a trust or heir or distributee of an estate. See New York State Department of Environmental Conservation, *Elephant and Mammoth Ivory or Rhinoceros Horn Registration* (Jan. 2018), https://www.dec.ny.gov/docs/wildlife_pdf/etsihreg18.pdf.

¹⁹ OR. REV. STAT. § 498.022, https://www.oregonlegislature.gov/bills_laws/ors/ors498.html.

²⁰ WASH. REV. CODE § 77.08.010, <https://app.leg.wa.gov/RCW/default.aspx?cite=77.08.010>; WASH. REV. CODE §§ 77.15.085, 77.15.100, 77.15.135, <https://app.leg.wa.gov/RCW/default.aspx?cite=77.15>.

²¹ The Journal of Paleontological Sciences, *States Banning The Sale of Fossil Ivory and Proposed Legislation* (June 15, 2019), <https://www.aaps-journal.org/Fossil-Ivory-Legislation.html> (listing states that have introduced, though not yet enacted, ivory bills).

²² See notes 12 through 18 above.

²³ Jani Actman, *Woolly Mammoth Ivory Is Legal, and That's a Problem for Elephants*, NATIONAL GEOGRAPHIC (Aug. 23, 2016), <https://news.nationalgeographic.com/2016/08/wildlife-woolly-mammoth-ivory-trade-legal-china-african-elephant-poaching/>.

²⁴ Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. The full text of the MMPA is available at <https://www.fws.gov/international/pdf/legislation-marine-mammal-protection-act.pdf>.

²⁵ 16 U.S.C. § 1371(a). “Take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13); 50 C.F.R. § 216.3 (further defining “take”).

“marine mammal products,”²⁶ the MMPA still allows for certain limited trade in ivory.²⁷ Relevantly here, the MMPA generally exempts²⁸ takings by an Indian, Aleut, or Eskimo residing in Alaska and dwelling on the coast, where the taking is done for “creating and selling authentic native articles of handicrafts and clothing.”²⁹

According to the proponents of this Act, the recent state ivory bans have drawn too large a target, unfairly sweeping other animal products within their prohibition rather than focusing on only elephant ivory.³⁰ The Act thus seeks to undo these states’ laws and to prevent other states and localities from passing similar laws — essentially forcing states and localities to become markets for certain non-elephant ivory.³¹

III. REASONS FOR OPPOSITION

The New York City Bar Association’s Animal Law Committee opposes the Act because it (i) hinders state and local efforts to fight the illegal elephant ivory trade and associated criminality and (ii) threatens states’ and localities’ ability to make individualized decisions about how to protect their citizens and the environment.

²⁶ “Marine mammal product” means “any item of merchandise which consists, or is composed in whole or in part, of any marine mammal.” 16 U.S.C. § 1362(7). “Marine mammal” in turn means any mammal which (A) is morphologically adapted to the marine environment ..., or primarily inhabits the marine environment (such as the polar bear); and, for the purposes of this chapter, includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.” 16 U.S.C. § 1362(6); 50 C.F.R. § 82.5(d) (further defining “marine mammal” with respect to animals under the Secretary of the Interior’s authority); 50 C.F.R. § 216.3 (further defining “marine mammal” with respect to animals under the Secretary of Commerce’s authority).

²⁷ 16 U.S.C. §§ 1371(b)-(f).

²⁸ The exemption may not apply under certain conditions where the applicable Secretary has transferred management authority of a species to a state. *See* 16 U.S.C. §§ 1371(b), 1379.

²⁹ 16 U.S.C. § 1371(b). “Authentic native articles of handicrafts and clothing” has the same meaning under the MMPA and the Act: “items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices. Traditional native handicrafts include, but are not limited to weaving, carving, stitching, sewing, lacing, beading, drawing and painting[.]” 16 U.S.C. § 1371(b)(2); Act § 2; *see also* 50 C.F.R. § 18.23 (Native Exemptions for marine mammals); 16 USC § 1539(e)(3)(ii) (similar exemption under the Endangered Species Act). As an additional requirement, such taking must “not [be] accomplished in a wasteful manner.” 16 U.S.C. § 1371(b)(3); 50 C.F.R. § 18.23(a).

For discussions (and critiques) of this exemption, see Jeremy David Sacks, *Culture, Cash or Calories: Interpreting Alaska Native Subsistence Rights*, 12 ALASKA L. REV. 247, 280-83, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1325&context=alr>; *Katelnikoff v. U.S. Dept. of Interior*, 657 F. Supp. 659, 666 (D. Alaska 1986), <https://law.justia.com/cases/federal/district-courts/FSupp/657/659/2265256/>.

³⁰ *Alaska Delegation Moves to Protect Native Craftsmen*, THE DELTA DISCOVERY (April 10, 2019), <https://deltadiscovery.com/alaska-delegation-moves-to-protect-native-craftsmen/>.

³¹ Act, § 2.

a. The Act Hinders State and Local Efforts to Fight the Illegal Elephant Ivory Trade and Associated Criminality.

By stopping states and localities from banning trade in fossilized ivory³² and other ivory, the proposed law hinders state and local efforts to fight the illegal elephant ivory trade in at least two ways.

First, opening state and local markets to trade in fossilized ivory, and in particular mammoth ivory, makes it easier for traders of illegal elephant ivory to escape detection. As mentioned above, mammoth ivory is legal at the federal level and in most states; it can accordingly be freely bought and sold.³³ While such ivory is not impossible to distinguish from elephant ivory, doing so is a task for experts³⁴ — making detection a practical and costly obstacle for law enforcement, let alone most consumers. As a result, to avoid being caught, smugglers often try to pass off elephant ivory as mammoth ivory or identify elephant ivory as mammoth ivory on shipment documentation.³⁵

Second, allowing trade in any ivory likely increases the overall demand for ivory, and poaching in turn rises to meet that demand. A 2016 working paper of the National Bureau of Economic Research studied the effects of certain large-scale — and legal — sales of ivory.³⁶ The study found a 66% increase in illegal ivory production following the legal sales.³⁷ While some of

³² “Fossilized ivory” includes a fossilized tooth or tusk from a species of walrus, mammoth, mastodon, narwhal, or whale. Act, § 2.

³³ The Journal of Paleontological Sciences, States Banning The Sale of Fossil Ivory and Proposed Legislation, note 21 above (listing nine states that have passed recent ivory restrictions).

³⁴ E.g., Edgard O. Espinoza & Mary-Jacque Mann, Identification Guide for Ivory and Ivory Substitutes, note 2 above, at 3 (“[A]n examination of the carved ivory object by a trained scientist is still necessary to obtain a positive identification of the species source.”); see also U.S. Fish & Wildlife Service, Forensics Laboratory, *Natural Ivory*, https://www.fws.gov/lab/ivory_natural.php; Testimony of Kevin T. Uno, Ph.D., of Lamont-Doherty Earth Observatory of Columbia University, N.Y. State Assembly, Standing Committee on Environmental Conservation, Trans. of Public Hearing on The Effectiveness of New York’s Restrictions on the Sale of Ivory, at 162:8-18, 168:14-170:13 (Jan. 16, 2014), http://nystateassembly.granicus.com/MinutesViewer.php?view_id=8&clip_id=854&doc_id=8bc571b0-ec51-1031-927d-78be5054b89b.

³⁵ FWS, Questions and Answers, note 10 above, at 2 (“Our criminal investigations and anti-smuggling efforts have clearly shown legal ivory trade can serve as a cover for illegal trade.”); Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity? Evidence from a Global Ivory Experiment and Poaching Data*, NBER Working Paper No. 22314, at 15 (June 2016), <https://www.nber.org/papers/w22314.pdf>. Notably too, the vast majority of mammoth ivory exported from Siberia ends up in China, the same place where most illegal ivory ends up. Jani Actman, *Woolly Mammoth Ivory Is Legal, and That’s a Problem for Elephants*, NATIONAL GEOGRAPHIC, note 23 above.

Although we are not aware of specific incidents where mastodon ivory was used to mask illegal elephant ivory, we note that mastodon ivory often appears to be marketed as near-interchangeable with mammoth ivory. See, e.g., The Boone Trading Company Inc., “Mammoth Ivory Jewelry,” <https://www.boonetradings.com/collections/mammoth-ivory-jewelry> (“These very unique jewelry pieces are made from genuine mammoth and mastodon ivory from Alaska, Canada and Siberia, how cool is that!”).

³⁶ Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity?*, note 35 above, at 3-4.

³⁷ *Id.* at 15. Some scholars have challenged this study’s findings. See CITES, Seventeenth Meeting of the Conference of the Parties, Johannesburg, South Africa, A Statement from the MIKE and ETIS Technical Advisory

this increase is likely due to the “passing off” effect noted above, the study’s authors also found evidence that legal trade had directly increased demand — for instance, by removing social stigmas around ivory.³⁸

To the extent that recent state laws reduce the illegal ivory trade, they also help combat criminality and terrorism. The illegal ivory trade is closely linked to the drug trade, money-laundering, weapons trafficking, trading, and governmental corruption.³⁹ In fact, New Jersey’s 2014 ivory ban was enacted in part to eliminate poaching profits as a potential source of funds for terrorist groups that benefit from the illegal ivory trade.⁴⁰

In light of this, and despite the fact that mammoths have long been extinct, several states have extended their trade restrictions to mammoth ivory.⁴¹ India has likewise prohibited the import of mammoth ivory, while Israel and Kenya have proposed similar laws.⁴² And at the next CITES meeting, various world governments will consider a proposal to list the extinct mammoth as an endangered species, with the aim of curtailing the illegal elephant ivory trade.⁴³

b. The Act Threatens States’ and Localities’ Ability to Make Individualized Decisions about How to Protect Their Citizens and the Environment.

More generally, the Act threatens the ability of states and localities to make individualized decisions about how to protect their citizens. Under the Tenth Amendment of the U.S. Constitution, states have the authority to enact laws to protect the health, safety, and welfare of the

Group on Recent Claims that the CITES-Approved Ivory Sales in 2008 Caused a Spike in Poaching Levels (2016), <https://cites.org/sites/default/files/eng/cop/17/InfDocs/E-CoP17-Inf-42.pdf>.

³⁸ Solomon Hsiang & Nitin Sekar, *Does Legalization Reduce Black Market Activity?*, note 35 above, at 7.

³⁹ Tristan McConnell, “*They’re Like the Mafia*”: *The Super Gangs Behind Africa’s Poaching Crisis*, THE GUARDIAN (Aug. 19, 2017), <https://www.theguardian.com/environment/2017/aug/19/super-gangs-africa-poaching-crisis>; Alex Shoumatoff, *Ivory and Agony*, VANITY FAIR (Aug. 2011), <https://www.vanityfair.com/news/2011/08/elephants-201108>. For an extensive study of the highly-organized nature of the illegal poaching industry and its links to militias, terrorists, organized crime, and governmental corruption, see Varun Vira and Thomas Ewing, *Ivory’s Curse: The Militarization & Professionalization of Poaching in Africa* (April 2014), <https://www.all-creatures.org/articles/ar-Ivorys-Curse-2014.pdf>.

⁴⁰ Michele S. Byers, *Byers: New Jersey First to Ban Ivory Trade*, NJ.com (Aug. 28, 2014), https://www.nj.com/hunterdon-county-democrat/index.ssf/2014/08/new_jersey_first_to_ban_ivory.html.

⁴¹ See notes 12-15 and 17-18 above.

⁴² Zafir Rinat, *In Bid to Save the Elephants, Israel and Kenya Call for Supervision of Trade in Mammoth Ivory*, HAARETZ (Nov. 15, 2018), <https://www.haaretz.com/israel-news/.premium-to-save-elephants-israel-and-kenya-seek-curbs-in-mammoth-ivory-trade-1.6655531>; *Israel Proposes Tougher Regulations on Mammoth Trade*, AFRICANEWS (June 9, 2019), <https://www.africanews.com/2019/06/09/israeli-proposes-tougher-regulations-on-mammoth-trade/>; see also CITES, CoP17 Doc. 38: Identification of Elephant and Mammoth Ivory in Trade (Sept. 5, 2016 – Oct. 5, 2016), <https://cites.org/sites/default/files/eng/cop/17/WorkingDocs/E-CoP17-38.pdf>.

⁴³ *Extinct Woolly Mammoth up for Listing. You Read That Right*, E&E News (May 29, 2019), <https://www.eenews.net/stories/1060424735>.

public.⁴⁴ As explained above, nine states have passed criminal laws broadly banning trade in ivory due to legitimate local public safety concerns, including the close connection between the illegal ivory trade and criminality.⁴⁵ By barring states and localities from passing such laws, the Act impedes these authorities' abilities to protect their residents. Permitting states and localities to make these decisions is not just important as a constitutional matter but also for practical reasons: different states face different problems with respect to the illegal ivory trade.⁴⁶

Even where legal ivory may not facilitate the illegal elephant ivory trade, states and localities may have other reasons for restricting ivory. For instance, excavating fossilized mammoth tusks causes damage to the environment, particularly the Siberian wilderness.⁴⁷ In addition, mammoth tusks are also rare and in finite supply, and their use in ivory products accordingly reduces the amount of tusks available for scientific study.⁴⁸

IV. COUNTERARGUMENTS

While acknowledging that measures are needed to combat elephant poaching, the Act's sponsors have criticized recent state laws restricting ivory trade as overly broad, because the bans target not just elephant ivory, but also ivory from mammoths and other animals.⁴⁹ Yet as explained above, states and localities have reasonable and legitimate justifications for broad bans and should be allowed to pass those bans in order to protect their citizens and the environment.⁵⁰

⁴⁴ U.S. Const. art. IV; *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926), <https://supreme.justia.com/cases/federal/us/272/365/#tab-opinion-1931541>.

⁴⁵ See Sections II and III.a above.

⁴⁶ See, e.g., New York City Bar Association, Animal Law Committee, Report on A.8824-A, S.7040 & S.7194, at 2-4 (June 2014), <https://www2.nycbar.org/pdf/report/uploads/20072744-PenaltiesforSellingorPurchasingIvory.pdf> (discussing New York-specific issues with the illegal ivory trade).

⁴⁷ Steven Lee Myers, *Weaning Itself From Elephant Ivory, China Turns to Mammoths*, N.Y. TIMES (Aug. 6, 2017), <https://www.nytimes.com/2017/08/06/world/asia/china-elephant-mammoth-ivory.html>; Amos Chapple, *The Mammoth Pirates*, RADIOFREEEUROPE / RADIOLIBERTY (2016), <https://www.rferl.org/a/the-mammoth-pirates/27939865.html>.

⁴⁸ Taylor Hill, *The Mammoth Problem With Selling an Extinct Animal's Ivory*, TAKEPART (Aug. 31, 2015), <http://www.takepart.com/article/2015/08/31/wooly-mammoth-and-elephants-ivory-trafficking>; Steven Lee Myers, *Weaning Itself From Elephant Ivory, China Turns to Mammoths*, N.Y. TIMES, note 47 above.

⁴⁹ *Alaska Delegation Moves to Protect Native Craftsmen*, THE DELTA DISCOVERY, note 30 above. The Act's sponsors justified a predecessor bill, the Allowing Alaska IVORY Act, on similar grounds. Dan Sullivan, Lisa Murkowski & Don Young, Letter to National Conference of State Legislatures and National Governors Association (Oct. 17, 2017), <https://www.sullivan.senate.gov/imo/media/doc/AK%20Delegation%20Letter%20to%20NGA%20and%20NCSL%20Re%20State%20Ivory%20Bans.pdf>; U.S. Senator for Alaska: Lisa Murkowski, *Sullivan, Murkowski Introduce the Allowing Alaska IVORY Act* (Oct. 19, 2017), <https://www.murkowski.senate.gov/press/release/sullivan-murkowski-introduce-the-allowing-alaska-ivory-act>.

⁵⁰ See Section III above. Notably, most of these state laws do not in fact impose as broad a prohibition as the bans' critics suggest. Indeed, at least one references the MMPA exemptions while others arguably incorporate the exemptions. See, e.g., HAW. REV. STAT. § 183D-66(b) (exempting marine mammal products if "otherwise authorized by federal law including the Marine Mammal Protection Act" and not covering mastodon products); see also CAL. FISH & GAME CODE § 2022(c)(2) (exempting "[a]n activity that is ... otherwise expressly authorized under federal law"); NEV. REV. STAT. § 597.905(2)(f) (exempting "[w]hen the activity is expressly authorized by

The Act's sponsors have also objected to the state bans as negatively impacting local Alaskan communities by potentially decreasing demand for those communities' ivory products.⁵¹ As an initial matter, this does not explain the Act's legalization of *all* fossilized mammoth and mastodon ivory, whether carved by a native Alaskan or not.⁵² In addition, while native Alaskans' economic welfare is a valid consideration, even the MMPA's exemption for native articles is not absolute and contemplates restrictions on native Alaskans' ability to "take" marine mammals.⁵³ Moreover, even if state bans may have some impact on local Alaskan communities, the illegal ivory trade — which those bans seek to stop — itself impacts local communities in other regions, both because such trade is closely tied to crime⁵⁴ and because the trade threatens a species on which local communities depend for tourism.⁵⁵

V. CONCLUSION

For the reasons above, the New York City Bar Association's Animal Law Committee opposes the proposed legislation.

Animal Law Committee
Chris Wlach, Chair

June 2019

federal law" and not covering whale or mastodon products); OR. REV. STAT. § 498.022(2)(b)(B) (exempting "[w]hen the activity is expressly authorized by federal law" and not covering walrus, mammoth or mastodon products).

⁵¹ *Alaska Delegation Moves to Protect Native Craftsmen*, THE DELTA DISCOVERY, note 30 above; *see also* Davis Hovey, *Confusion Over Legalities Is Hurting Alaskan Ivory Market, Locals Say*, KTOO PUBLIC MEDIA (June 20, 2017), <https://www.ktoo.org/2017/06/20/confusion-legalities-hurting-alaskan-ivory-market-locals-say/>.

⁵² Act, § 2. Notably, the Act would do so by amending the *Marine Mammal Protection Act*. Such an amendment seems particularly inapt, as mammoths and mastodons are neither marine mammals, nor do they require "protection" as the other mammals covered by the MMPA do — mammoths and mastodons have been extinct for thousands of years. Encyclopædia Britannica, "Mammoth," <https://www.britannica.com/animal/mammoth-extinct-mammal>; Encyclopædia Britannica, "Mastodon," <https://www.britannica.com/animal/mastodon>. Not surprisingly, mammoths, mastodons, and fossils are mentioned nowhere in the MMPA.

⁵³ In particular, the MMPA allows the Secretary of Interior and the Secretary of Commerce, as applicable, to regulate the taking of marine mammals upon a determination that the species or stock has been "depleted." 16 U.S.C. § 1371(b). The MMPA also requires that takings under the native articles exemption "not [be] accomplished in a wasteful manner." 16 U.S.C. § 1371(b)(3). For a critique of this "wasteful manner" language as ambiguous, *see generally* Martin Robards and Julie Lurman Joly, *Interpretation of "Wasteful Manner" Within the Marine Mammal Protection Act and Its Role in Management of the Pacific Walrus*, 13 OCEAN & COASTAL L.J. 171 (2008).

⁵⁴ See Section III.b above.

⁵⁵ Pavithra Rao, *Elephants Are the Latest Conflict Resource*, AFRICARENEWAL (Dec. 2013), <https://www.un.org/africarenewal/magazine/december-2013/elephants-are-latest-conflict-resource>.