IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

PEGGY FONTENOT,	)	
	)	
Plaintiff,	)	Case No. 5:16-cv-01339-W
v.	)	
	)	
MIKE HUNTER, Attorney General of Oklahoma, in his official capacity,	)	
	)	
	)	
Defendant.	)	Hon. Judge Lee R. West
_____	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Peggy Fontenot and Her Art

1. Peggy Fontenot is a U.S. citizen and resident of California. Fontenot Dec. ¶ 2.

2. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia. Fontenot Dec. ¶ 3; Deyo Dec. ¶ 8; Newton Dec. ¶ 6; Defendant's Supp. Resp. to Plaintiff's Req. for Admissions No. 1. The Patawomeck is a state-recognized tribe. H.J. Res. 150, 2010 Sess. (Va. 2010); *see also* Defendant's Supp. Resp. to Plaintiff's Req. for Admissions No. 2.

3. Ms. Fontenot is also certified as an "Indian artisan" by the Citizen Potawatomi Nation. Fontenot Dec. ¶ 3. The Citizen Potawatomi is a federally recognized tribe. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 5019-02, 5020 (Jan. 29, 2016).

4. For over 30 years Ms. Fontenot has been an artist and photographer, travelling the country to show and sell her art. Fontenot Dec. ¶ 2; Defendant's Supp. Resp. to Plaintiff's Req. for Admissions No. 3. Her specialty is handmade beaded jewelry, silver jewelry, and black and white photography. Fontenot Dec. ¶ 2.

5. Ms. Fontenot has won numerous awards for her jewelry, including recently placing First in Photography and Beadwork in 2015, 2016, and 2017 at the Eiteljorg Museum Indian Market Place in Indianapolis, Indiana; Second Place in Photography in 2016 at the Autry Museum of the American Indian Market Place in Los Angeles, California; and First Place in Photography in 2015 and Third Place in Beadwork in 2016 at the Red Earth Pow Wow in Oklahoma City. Fontenot Dec. ¶ 6. She has shown and sold her art in museums and

galleries throughout the United States, including the Smithsonian's National Museum of the American Indian in Washington, D.C., and the Autry Museum of the American West in Los Angeles, California. *Id.* ¶ 7. She has taught American Indian beadwork classes, including classes at the Smithsonian National Museum of the American Indian, and the Southwest Museum in Los Angeles. *Id.* ¶ 8. She has had a regular presence within the American Indian community for over 30 years. *Id.* ¶ 9.

6. For at least the last 13 years, Ms. Fontenot has regularly visited Oklahoma to show and sell her art in American Indian art shows, festivals, and galleries. Fontenot Dec. ¶ 4. In addition to creating art that she sells, she has created many exhibits at galleries and museums to bring awareness to social issues within the American Indian community. *Id.* ¶ 4.

7. Ms. Fontenot markets and describes her art as American Indian-made. Fontenot Dec. ¶ 5. Her business cards note her tribal affiliations, and she displays a sign in her booth at art shows stating the same. *Id.* She is sometimes asked about her tribal affiliations while at art shows, and she describes her art in conjunction with her American Indian identity. *Id.* She considers her American Indian identity to be central to her art. *Id.*

B. The Challenged Law

8. The Oklahoma American Indian Arts and Crafts Sales Act (State Act), Okla. Stat. tit. 78, §§ 71-75 (1974), regulates who may represent their art as American Indian-made. Under that law, only an "American Indian" as defined by that statute may market their art as made by an American Indian. *See id.*

9. Prior to June, 2016, the State Act defined an American Indian as "a person who is enrolled or who is a lineal descendant of one enrolled upon an enrollment listing of the

Bureau of Indian Affairs or upon the enrollment listing of a recognized Indian tribe, band or pueblo." Okla. Stat. tit. 78, § 73(2) (1974). It further defined "Indian tribe" as "any Indian tribe, organized band or pueblo, which is domiciled in the United States." *Id.* § 73(1).

10. Accordingly, prior to June, 2016, Ms. Fontenot could legally represent her art in Oklahoma as "American Indian-made."

11. On June 8, 2016, Governor Fallin signed HB 2261, which amended the State Act. H.B. 2261, 55th Leg., 2d Reg. Sess. (Okla. 2016).

12. The amended version restricts "American Indian" to "a person who is a citizen or is an enrolled member of an American Indian tribe." Okla. Stat. tit. 78, § 73(2) (2014). "American Indian tribe" is further limited to "any Indian tribe *federally recognized* by the Bureau of Indian Affairs of the United States Department of the Interior." *Id.* § 73(1) (emphasis added). The Act thus excludes from the definition of "American Indian" those American Indians who are members of state-recognized tribes, certified Indian artisans, and anyone else who does not happen to be a citizen or enrolled member of a federally recognized tribe.

13. Any person who violates the State Act is guilty of a misdemeanor, punishable by a fine of up to $200, or by imprisonment for a period of at least 30 days and not more than 90 days, or by both fine and imprisonment. Okla. Stat. tit. 78, § 75.

14. Because Ms. Fontenot is not a citizen or enrolled member of a federally recognized tribe, she will be punished with fines or risk jail time if she markets her art in Oklahoma as American Indian-made. Okla. Stat. tit. 78, §§ 73-75.

15. Oklahoma is home to approximately 39 federally recognized tribes, *see* 81 Fed. Reg. 5019-02, but the state itself does not recognize tribes, meaning there are no state-recognized tribes in Oklahoma.

16. The authors of HB 2261, Rep. Hoskin and Sen. Sparks, are members of the Cherokee Nation—a federally recognized tribe. Res. 16-09, 2016 Inter-tribal Council of the Five Civilized Tribes (2016).

C. Enforcement of the State Act

17. Defendant has no evidence that any person made a formal complaint alleging that an artist misrepresented their art in violation of the State Act from January 1, 2006, to present. Defendant's Resp. to Plaintiff's Req. for Admissions No. 6.

18. Nor does Defendant have any evidence that any state entity warned, cited, or prosecuted anyone for violating the State Act from January 1, 2006, to present. Defendant's Resp. to Plaintiff's Req. for Admissions Nos. 7-9, 15, 17.

19. In addition to the State Act, Oklahoma has a general consumer protection statute, the Oklahoma Consumer Protection Act, Okla. Stat. tit. 15, § 753, which prohibits sellers from making false or misleading statements about their products. Defendant has no evidence that any consumer has alleged a deceptive or misleading representation of American Indian art, artist heritage, or descent from January 1, 2006, to present under that Act. Defendant's Resp. to Plaintiff's Req. for Admissions No. 10.

20. Nor does Defendant have any evidence that the state has issued any warning letter or citation, or initiated any form of prosecution for alleged misrepresentations of American Indian art, artist heritage, or descent in violation of the Oklahoma Consumer

Protection Act from January 1, 2006, to present. Defendant's Resp. to Plaintiff's Req. for Admissions Nos. 11-13, 17.

21. On January 3, 2017, Plaintiff and Defendant stipulated that Defendant would stay enforcement of the amended State Act during the pendency of this case. Doc. 16-17.

D. The Federal Indian Arts and Crafts Act

22. The federal Indian Arts and Crafts Act (Federal Act) regulates who may refer to their art as American Indian-made. *See* 25 U.S.C. § 305e(a)(1), (a)(3).

23. The Federal Act broadly defines "Indian" as any person who is "a member of an Indian tribe" or who is "certified as an Indian artisan by an Indian tribe." 25 U.S.C. § 305e(a)(1). The Act defines an "Indian tribe" as either a federally recognized tribe, *id.* § 305e(a)(3)(A) (citing 25 U.S.C. § 5304(e)), or an "Indian group that has been formally recognized as an Indian tribe by a State legislature, a State commission, or another similar organization vested with State legislative tribal recognition authority." *Id.* § 305e(a)(3)(B). The Federal Act thus defines "Indian" as: (1) a member of a federally recognized tribe; (2) a member of a state-recognized tribe; or (3) a certified Indian artisan.

24. Because Ms. Fontenot is a member of a state-recognized tribe and is a certified Indian artisan, she may market and describe her art as American Indian-made under the Federal Act without fear of punishment. Defendant's Supp. Resp. to Plaintiff's Req. for Admissions No. 5.

II

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff Peggy Fontenot is an award-winning, California-based American Indian photographer and artist, specializing in handmade beaded jewelry and cultural items. *Supra* at 1. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia, and is certified as an Indian artisan by the Citizen Potawatomi Nation. *Supra* at 1. For at least the last 13 years, she has made regular visits to Oklahoma to show and sell her art. *Supra* at 2. Ms. Fontenot has always marketed and described her art as "American Indian-made." *Supra* at 2. In addition to her many awards, she has shown and sold her art in museums and galleries throughout the United States, taught American Indian beadwork classes, and had a regular presence within the American Indian community for over 30 years. *Supra* at 1-2. But due to a recent change in Oklahoma law, Ms. Fontenot is now subject to fines and imprisonment if she continues to describe or market her art in Oklahoma as American Indian-made. *Supra* at 2-3.

The amended State Act prohibits distributing, trading, selling, or offering for sale or trade "any article represented as being made by American Indians unless the article actually is made or assembled" by an American Indian. Okla. Stat. tit. 78, § 74. Further, "[a]ny merchant who knowingly and willfully tags or labels any article as being an American Indian art or craft" when the article doesn't comply with the State Act is guilty of a misdemeanor and subject to imprisonment for up to 90 days and a fine up to $200. *Id.* § 75. Crucially, the State Act's definitions severely limit what artwork may be described as "American Indian."

Federal law also regulates who may market their art as American Indian, but the contrast between state and federal law is stark. Under the Federal Act, artists who are members

of federally recognized tribes *or* state-recognized tribes, as well as those who are certified by a tribe as an Indian artisan, are authorized to represent their art as American Indian-made. *See* 25 U.S.C. §§ 305e(a)(1), 305e(a)(3)(A)-(B). But Oklahoma's State Act removes two of those three qualifying categories and allows only those who are members of federally recognized tribes to represent their art as American Indian-made. *See* Okla. Stat. tit. 78, § 73(1).

The State Act runs afoul of numerous constitutional provisions. First, the State Act violates the First Amendment because it is a content- and speaker-based restriction on speech that cannot survive strict scrutiny. Even under the less-stringent scrutiny for commercial speech, the State Act is unconstitutional because the State has less-restrictive means of addressing its stated objectives and it possesses no evidence that the problems it seeks to alleviate are more than conjectural. Second, the State Act violates the Supremacy Clause of the U.S. Constitution because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013). Third, the State Act violates the dormant Commerce Clause because it discriminates against and excessively burdens interstate commerce in American Indian art by favoring in-state American Indian artists at the expense of out-of-state artists. Fourth, the State Act violates the Equal Protection Clause of the Fourteenth Amendment because it irrationally discriminates against artists who are members of state-recognized tribes and certified Indian artisans for the benefit of artists who are members of federally recognized tribes. And fifth, the State Act violates the Fourteenth Amendment's Due Process Clause by irrationally burdening Ms. Fontenot's right to earn a living.

ARGUMENT

III

STANDARD OF REVIEW

Summary judgment must be granted if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Reed v. Bennett*, 312 F.3d 1190, 1194 (10th Cir. 2002). The burden then shifts to the nonmoving party to show that there is a dispute as to material fact that necessitates a trial. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and must identify specific facts in evidentiary materials revealing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, Ms. Fontenot is entitled to judgment as a matter of law because the undisputed facts demonstrate that Oklahoma's law, which restricts some American Indians from describing and marketing their art as American Indian-made, violates the First and Fourteenth Amendments, as well as the Commerce and Supremacy Clauses of the U.S. Constitution.

IV

THE STATE ACT UNCONSTITUTIONALLY RESTRICTS SPEECH

The State Act prohibits individuals from truthfully representing their art as American Indian-made unless they fit the state's narrow definition of "American Indian." Okla. Stat. tit. 78, § 74. By punishing certain speakers for speaking truthfully about themselves and their art, the State Act deprives individuals of their right to speak freely, and is subject to the First

Amendment. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Because the law is based on the speaker's identity and the speech's content, the State Act is subject to strict scrutiny.

Both on its face and as applied to Ms. Fontenot, the State Act cannot meet that test. Although its purported purpose is preventing fraud, the State Act restricts truthful and non-misleading speech, and is therefore overbroad. Moreover, the State has other, less-restrictive alternatives to achieve its goal.

A. The State Act Is an Unconstitutional Content- and Speaker-based Speech Restriction

1. The State Act is a content-based restriction on speech

A law is content-based when it applies to particular speech due to the idea or message expressed, or the topic discussed. *Reed*, 135 S. Ct. at 2227. Courts determine whether a restriction is content-based by considering whether the restriction "'on its face' draws distinctions based on the message a speaker conveys." *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-66 (2011)). The State Act does just that.

In *Reed*, the Town of Gilbert enacted a sign code that governed how people could display outdoor signs. 135 S. Ct. at 2224. The town's sign code categorized signs based on the information conveyed by the sign, and subjected each category to different restrictions. *Id.* For example, "political signs" were defined as signs whose message was "designed to influence the outcome of an election," and could be placed on "up to 16 square feet on residential property and up to 32 square feet on nonresidential property," and "may be displayed up to 60 days before a primary election and up to 15 days following a general election." *Id.* at 2224-25, 2227. In contrast, "temporary directional signs" were signs that directed the public to an event or a church, but were subject to wholly different restrictions. *Id.* at 2225, 2227. The Court held that

the sign code was content-based because its distinctions were based "entirely on the communicative content of the sign." *Id.* at 2227. Importantly, the Court held that it is irrelevant whether the government could justify the law without regard to its viewpoint. *Id.* at 2227-30. Where a law draws a distinction based on content, it is subject to strict scrutiny. *Id.* at 2226; *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812-13 (2000) (statute was content-based where it only applied to television channels that were "primarily dedicated to sexually-oriented programming").

Here, the State Act is a content-based speech restriction because it only applies when individuals describe their art as American Indian-made. *See Reed*, 135 S. Ct. at 2227; *Playboy*, 529 U.S. at 811-12; Okla. Stat. tit. 78, § 74 ("any article represented as being made by American Indians"). If Ms. Fontenot displays a pair of her handmade earrings and describes them simply as "cultural items," or "folk," or "handmade," or any other number of adjectives, then the Act does not apply. But when Ms. Fontenot represents those same handmade earrings as American Indian-made, then the Act applies. This is sufficient for the Act to be content-based and subject to strict scrutiny.

2. The State Act is a speaker-based restriction on speech

The State Act is also subject to strict scrutiny because it is a speaker-based restriction on speech. Laws that reflect governmental preference for favored speakers, or that restrict speech by disfavored speakers, are subject to strict scrutiny. *Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n*, 512 U.S. 622, 658 (1994); *Sorrell*, 564 U.S. at 564-65; *see also Playboy*, 529 U.S. at 812; *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). The First Amendment prohibits

speaker-based restrictions because "restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United*, 558 U.S. at 340.

In *Citizens United*, the challenged law singled out corporations and prohibited them alone from advocating for the election or defeat of political candidates, and from broadcasting electioneering communications, within 30 days of a primary and 60 days of a general election. 558 U.S. at 337. Because the law singled out "corporate speech," the Court applied strict scrutiny. *Id.* at 337, 340; *see also Sorrell*, 564 U.S. at 563-64 (Vermont law prohibiting pharmaceutical manufacturers from using doctors' drug prescribing information for marketing purposes was an impermissible speaker-based restriction on speech).

Here, the State Act is a speaker-based speech restriction because it singles out individuals who are not members of federally recognized tribes. *See* Okla. Stat. tit. 78, § 73(1). If Ms. Fontenot was a member of a federally recognized tribe, the State Act would permit her to represent her art as American Indian-made. However, because Ms. Fontenot is not a member of a federally recognized tribe, the Act prohibits her from representing her art as American Indian-made. As a result, the State Act reflects the government's "aversion" to all but members of federally recognized tribes representing themselves as American Indians and must be subject to strict scrutiny. *See Turner*, 512 U.S. at 658.

3. The State Act fails strict scrutiny

Content- and speaker-based speech restrictions are "presumptively unconstitutional," and will only be upheld if the government proves that they are narrowly tailored to serve a compelling government interest. *Reed*, 135 S. Ct. at 2226; *Playboy*, 529 U.S. at 813. The stated purpose of the State Act is "to protect the public, under the police powers of the state, from

false representation in the sale of authentic and imitation American Indian arts and crafts." Okla. Stat. tit. 78, § 72 (emphasis added).

To begin, Defendant has the burden to prove that the purported interest is compelling. *Reed*, 135 S. Ct. at 2231. Notably, Defendant possesses no evidence of any complaints under either the State Act or the Consumer Protection Act alleging misrepresentations of American Indian art. *See* Defendant's Resp. to Plaintiff's Req. for Admissions Nos. 6-13. Even assuming Defendant could show a compelling interest, the State Act is not narrowly tailored to achieving it.

First, the law is not narrowly tailored because it prohibits even truthful and non-misleading speech. *See Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-38 (1980); *cf. United States v. Alvarez*, 567 U.S. 709, 726, 729 (2012) (Kennedy, J., plurality opinion) (law prohibiting even *false* statements about receiving Medal of Honor was overbroad and not narrowly tailored). In *Schaumburg*, the challenged law prohibited charities from soliciting contributions unless they used at least 75% of their receipts for "charitable purposes." 444 U.S. at 624. The state argued that charities who used less than that percentage were not really "charitable," and the restriction was therefore narrowly tailored to preventing fraud. *Id.* at 636. The Court rejected that argument. It held that the state could not classify an organization engaged in truthful non-misleading speech as "fraudulent" based on its own notions of how charitable organizations should be allocating their money. Moreover, the law was overbroad because the State could serve those interests through less restrictive means, like enforcing antifraud statutes or requiring charities to disclose certain financial information. *Id.* at 639; *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 789 (1988) (same).

Here, Ms. Fontenot is a member of the Virginia-recognized Patawomeck Indian Tribe and is certified as an Indian artisan by the Citizen Potawatomi Nation due to her descendancy from the tribe. Because of her tribal membership and certification, describing her handmade beaded jewelry as American Indian-made is literally true. The same is true for many American Indian artists who are not members of federally recognized tribes.[1] For this reason (and as discussed more fully below in Part V), the Federal Act permits individuals who are members of state-recognized tribes *and* those who are certified Indian artisans to represent their art as American Indian-made. 25 U.S.C. § 305e. But by excluding members of state-recognized tribes from the definition of "American Indian," the State Act prohibits Ms. Fontenot from making such a truthful representation. Thus, the State Act regulates more speech than necessary, and prohibits many American Indian artists from engaging in truthful speech.

Second, Oklahoma could serve its goal of prohibiting false or misleading speech by using less restrictive means. It could, for example, enforce its general truth-in-advertising consumer protection statute, which makes it unlawful to make false or misleading representations during commercial transactions. *See* Okla. Stat. tit. 15, § 753; *Riley*, 487 U.S. at 795. Or it could require artists to disclose relevant information, like the tribe they belong to and whether the tribe is state- or federally-recognized. *See Miller v. Stuart*, 117 F.3d 1376, 1383

[1] There may be many reasons why an American Indian is not a member of a federally recognized tribe, including: destruction of genealogical records by state officials; the government's inability to recognize tribes in a timely manner; and opposition from existing federally recognized tribes fearful of gaming competition. Alexa Koenig & Jonathan Stein, *Federalism and the state recognition of Native American tribes: A survey of state-recognized tribes and state recognition processes across the United States*, 48 Santa Clara L. Rev. 79, 80-82 (2008); *see also*, *infra* at 19-20 (statement of Sen. Bingaman).

(11th Cir. 1997). Or the State itself could inform the public about the differences between state- and federally-recognized tribes. *Cf. Peel v. Att'y Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 104-05 (1990).

Because the State Act regulates speech based on its subject matter, and singles out individuals who are not members of federally recognized tribes for disfavor, the Act is a content- and speaker-based speech restriction. Further, because the Act neither serves a compelling governmental interest, nor is narrowly tailored, it fails strict scrutiny.

B. The State Act Even Fails Under Commercial Speech Scrutiny

The State Act restricts speech given the highest level of protection by the First Amendment.[2] But even if representations of art as American Indian-made are considered commercial speech, the State Act is unconstitutional. The State may not ban commercial speech that is not "inherently misleading." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357,

[2] Commercial speech is speech that "does no more than propose a commercial transaction." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) ("commercial speech is . . . speech that merely advertises a product or service for business purposes"). Describing a piece of art as "American Indian-made," does not itself propose a commercial transaction. Rather, it simply provides important information about the artist and the piece of art, and is therefore fully protected by the First Amendment. *Cf. ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 918-19, 925 (6th Cir. 2003) (paintings of golfer Tiger Woods, which included literature about the artist, the artist's photograph, and a description of the painting, held to not be commercial speech). Moreover, the State Act applies in both commercial and non-commercial contexts. That is, the Act applies whether an individual markets art for sale as American Indian-made, or merely "distributes" American Indian-made art notwithstanding compensation. Okla. Stat. tit. 78, § 74. Regardless of whether Ms. Fontenot advertises her art for sale, gives it away, or offers it for display in a museum or gallery, if she represents her art as American Indian-made, then the State Act applies. The law therefore regulates fully protected speech. *Cf. Riley*, 487 U.S. at 796 (when expressive speech and commercial speech are "inextricably intertwined," the Supreme Court applies the test for fully protected speech).

367, 371-72 (2002). The value of free speech is so fully protected by the First Amendment that a state must err on the side of requiring more, not less, speech even in cases where commercial speech is "potentially misleading." *Id.*; *Peel*, 496 U.S. at 101.

In *Peel*, 496 U.S. at 101, the Court held that the state could not prohibit an attorney from placing the term "Certified Civil Trial Specialist" on his letterhead, when he was, in fact, certified by a private organization. There was no evidence the term was inherently or actually misleading, but the state contended that it was potentially misleading because consumers might think the certification was issued by the state. *Id.* at 100-01. This, the lower court held, "might be so likely to mislead as to warrant restriction." *Id.* at 101 (cleaned up). The Supreme Court reversed. There was "no basis for belief" that consumers would be misled, *id.* at 103, because the context of the speech in question and the general level of understanding among consumers was enough to minimize confusion. *Id.* at 104-05 (It was "unlikely that petitioner's statement about his certification . . . would be confused with formal state recognition."). Even if the term were potentially misleading, the Court held that this potential could not "satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information." *Id.* at 109. Where speech is only potentially misleading, the state may not categorically ban it, but should instead "'assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.'" *Id.* at 110 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977)). *Accord In re R. M. J.*, 455 U.S. 191, 204-07 (1982) (attorney may truthfully state that he is admitted to the Supreme Court Bar even if this is potentially misleading).

The same is true here. Ms. Fontenot's description of her art as made by an "American Indian artist" is not inherently misleading; in fact, it is objectively true. But even if potentially misleading, the State could impinge less on the right of free speech by imposing a disclosure requirement rather than banning her speech altogether. The State Act therefore fails even under a commercial speech standard.

V

THE STATE ACT UNCONSTITUTIONALLY CONFLICTS WITH FEDERAL LAW

The State Act also violates the Supremacy Clause of the U.S. Constitution because it is preempted by the Federal Act. The Federal Act's purpose is to protect a broad array of American Indians from fraudulent misrepresentations in the national American Indian art market. Recognizing that tribal enrollment is a complex issue, the drafters of the Federal Act purposefully defined "Indian" to include members of federally recognized tribes, members of state-recognized tribes, and certified Indian artisans. Because the State Act defines an American Indian as a member of a federally recognized tribe only, it undermines the Federal Act's protections for the other two categories of American Indian artists, and unconstitutionally "conflicts" with the Federal Act.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, when there is a "direct conflict" between state and federal law, the "state law must give way." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011) (citing *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring)); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) ("state law is naturally preempted to the extent of any conflict with a federal statute"). State law impermissibly conflicts with federal law when it "stands as an obstacle to the accomplishment and execution

of the full purposes and objectives of Congress." *Hillman*, 133 S. Ct. at 1950 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

In *Crosby*, 530 U.S. at 373, a Massachusetts law restricted state agencies from engaging the services of firms doing business with Burma. *Id.* at 366. Shortly after the Massachusetts law was enacted, Congress enacted its own law imposing sanctions on Burma. *Id.* at 368. The Court held that the state law was preempted because it undermined the federal law's intended purpose of giving the President discretion to control sanctions against Burma, and limiting sanctions to certain Americans and investments. *Id.* at 373-74. Even though both statutes "share[d] the same goals," the Court held that Massachusetts' statute conflicted with federal law because it imposed a separate, and different, system of economic pressure against Burma, and because it penalized individuals and conduct that Congress "explicitly exempted or excluded from sanctions." *Id.* at 378-79. The lack of consistency undermined Congress' carefully calibrated approach. *Id.* at 380.

In *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 864-65 (2000), the Court held that a state common-law tort action was preempted by federal automobile safety standards. In that case, a driver was injured in an auto accident after colliding with a tree. *Id.* at 865. She sued the vehicle's manufacturer on the state common law theory that the car should have been equipped with airbags. *Id.* Federal law, however, did not require airbags and the manufacturer was in compliance with federal law. *Id.* The Court held that the state action conflicted with federal law because the federal law's purpose was to deliberately give manufacturers a "range of choices among different passive restraint devices," which would increase safety by "bring[ing] about a mix of different devices introduced gradually over time." *Id.* at 875. The

state suit conflicted with those standards because it would create an obstacle to achieving the "variety and mix of devices" that the standards sought. *Id.* at 881.

Here, the Federal Act authorizes three categories of individuals to represent their art as American Indian-made: members of federally recognized tribes; members of state-recognized tribes; and artisans who are certified by a tribe. 25 U.S.C. § 305e(a)(1), (a)(3). Its purpose is to "promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship." 25 U.S.C. § 305a. Highlighting Congress' intent to enact a broad definition, the Federal Act specifically states that the definition of "Indian tribe" was expanded to include state-recognized tribes to promote the purposes of the Act. *Id.* § 305e(a)(3)(B).

The Federal Act's legislative history further shows that the purposes and objectives of the Act are to give protections to a broad range of American Indian artists—not just those who are members of federally recognized tribes. Initially, the introduced version of the Federal Act only defined "Indian tribes" and "Indians" to be federally recognized tribes and their members. *See H.R. 2006, To Expand the Powers of the Indian Arts and Crafts Board: Hearing Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. 6-11 (1989).[3] However, the primary author of the Act, Rep. Kyl, noted that the narrow definition would "have to be broadened," and was included in the initial draft "for discussion purposes only." *Id.* at 67 (statement of Rep. Kyl). In subsequent discussions over the proper definition, many expressed disagreement

[3] Available as Exhibit 10 in Plaintiff's Index of Evidence.

with the exclusion of people who are not members of federally recognized tribes. *See, e.g.*, *id.* at 13-15 (statement of Mr. Calac, Vice-Chairman of Indian Arts and Crafts Board); *id.* at 23-26 (statement of Ms. Carol Snow); *but see id.* at 80 (statement of Mr. Smith). The Federal Act's drafters understood that the Act's final version would take into consideration, for example, members of state-recognized tribes and "individuals who for one reason or another are not enrolled members of tribes." *Id.* at 67 (statement of Rep. Kyl).

The Federal Act's drafters sought to include artists who are not members of federally recognized tribes because they recognized that tribal enrollment is not the defining characteristic of being an American Indian. 136 Cong. Rec. H8293 (daily ed. Sept. 27, 1990) (statement of Rep. Kyl).[4] Thus, in addition to including members of state-recognized tribes, the Act even accommodates artists who are not enrolled in *any* tribe by allowing tribes to certify them as an artisan after considering the artist's individual circumstances and the validity of their claims of descendancy. *Id.*; *see also Hearing Before the H. Comm. on Interior and Insular Affairs*, 101st Cong. at 53 (statement of Rep. Campbell) ("we're trying to expand the definition so that Indian artists who do not have a [tribal] number would have some degree of legitimacy").

There are many reasons that American Indian artists may not be enrolled in a tribe. Those reasons include: dissuasion from tribal officials seeking to keep enrollment rolls short; distrust and fear of government recognition; and personal offense that an enrollment number is necessary to validate one's heritage and ethnicity. 137 Cong. Rec. S18151 (daily ed. Nov. 26,

[4] Available as Exhibit 11 in Plaintiff's Index of Evidence.

1991) (statement of Sen. Bingaman).[5] Confirming those concerns, in a Senate committee hearing on the Federal Act ten years after its enactment, one of the original co-authors of the 1990 bill explained that it was very difficult to define who is American Indian because many are not enrolled in federally recognized tribes. *Public Law 101-644, To Expand the Powers of the Indian Arts and Crafts Board: Hearing Before the S. Comm. on Indian Affairs*, 106th Cong. 1-2 (2000) (statement of Sen. Ben Nighthorse Campbell).[6] To address the problem, the Federal Act's drafters created the three categories noted above.

Recognizing that concerns remained that the certified artisan provision could be abused by fraudsters, the Federal Act's implementing regulations clarify who qualifies as a certified artisan. *See* 25 C.F.R. § 309.25(a). The artisan must have written documentation from the certifying tribe attesting to the certification; and, most importantly, the artisan must be of lineage of a member of the certifying tribe. *Id.* Further, tribes cannot charge a fee to those seeking to become certified artisans, so tribes lack an economic incentive to encourage artists to seek certification. *Id.* § 309.25(b). Therefore, the purposes and objectives of the Federal Act are to protect American Indian artists from counterfeit products diluting the market, and to provide that protection to American Indians, *broadly defined*, throughout the United States. In doing so, the Act deliberately included more than just members of federally recognized tribes.

Oklahoma's State Act plainly conflicts with the Federal Act because it "undermines" those purposes and objectives. *See Crosby*, 530 U.S. at 373-74, 378-80. Where the Federal Act intentionally expanded the definition of tribes and individual American Indians to include

[5] Available as Exhibit 12 in Plaintiff's Index of Evidence.
[6] Available as Exhibit 13 in Plaintiff's Index of Evidence.

more than just federally recognized tribes and their members, the State Act excludes members of state-recognized tribes and certified artisans. Effectively then, the State Act removes protections granted by the Federal Act to members of state-recognized tribes and certified artisans when in Oklahoma. *Cf. Crosby*, 530 U.S. at 378-79. Thus, the State Act violates the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of Congress' carefully calibrated approach of protecting three categories of American Indian artists. *See Hillman*, 133 S. Ct. at 1950; *Crosby*, 530 U.S. at 380; *Geier*, 529 U.S. at 875, 881.

VI

THE STATE ACT VIOLATES THE COMMERCE CLAUSE

Oklahoma's State Act also violates the Commerce Clause because it discriminates against and excessively burdens interstate commerce.

A. The State Act Discriminates Against Interstate Commerce

The "dormant" Commerce Clause, U.S. Const. art. I, § 8, cl. 3, is "driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Kleinsmith v. Shurtleff*, 571 F.3d 1033, 1039 (10th Cir. 2009) (quoting *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008)). If a challenged statute "discriminates against interstate commerce on its face or in practical effect," then it is subject to a "virtually per se rule of invalidity," and can only be upheld if the government shows that it has no non-discriminatory means of serving a legitimate purpose. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 392, 402 (1994); *see also Dep't of Revenue of Ky.*, 553 U.S. at 338-39; *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). A

facially neutral statute has the practical effect of discriminating against interstate commerce when it "cause[s] local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 196 (1994) (quoting *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 n.16 (1978)); *see also*, *e.g.*, *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 350-52 (1977). When analyzing a discriminatory statute, courts employ "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

In *West Lynn Creamery*, the Supreme Court struck down a Massachusetts pricing regulation that imposed an assessment on all fluid milk sold by milk dealers to retailers in Massachusetts. 512 U.S. at 188. At the time, nearly two thirds of all fluid milk sold in Massachusetts was produced out-of-state. *Id.* The regulation directed the entire assessment to be distributed to Massachusetts dairy farmers. *Id.* Because the regulation had the effect of providing in-state milk producers with an economic benefit to the detriment of out-of-state producers, it violated the Commerce Clause. *Id.* at 196.

Here, Oklahoma is home to approximately 39 federally recognized tribes, but it chooses not to recognize tribes at the state level. *See* 81 Fed. Reg. 5019-02. Many states, however, including Virginia, recognize tribes at the state level, and the Patawomeck Tribe—of which Ms. Fontenot is a member—is one of those tribes. *Supra* at 1, ¶ 1. As in *West Lynn Creamery*, the State Act discriminates against out-of-state artists like Ms. Fontenot by economically benefitting Oklahoma artists who are members of federally recognized tribes to the detriment of state-recognized American Indian artists. 512 U.S. at 196.

Similarly, in *Hunt*, the Court invalidated a North Carolina statute that mandated that all apples sold in North Carolina be labelled under a federal labeling program. 432 U.S. at 350-54. The Court held that the law was discriminatory and had the practical effect of burdening out-of-state growers for three reasons. *Id.* First, the discriminatory policy increased the cost of doing business in North Carolina for out-of-state growers, while leaving in-state growers unaffected, because only out-of-state growers were required to modify their marketing. *Id.* at 351. Second, the North Carolina law deprived out-of-state growers of their competitive advantage gained through the use of their state-based labeling program. *Id.* And third, the labeling restriction had the effect of "leveling" the market and causing out-of-state apples to suffer a downgrade in market power. *Id.* at 351-52. As a result, the law disadvantaged out-of-state growers, who were no longer permitted to label their apples under their recognized state-based labeling program. *Id.* at 352.

Here, as in *Hunt*, the State Act disadvantages out-of-state artists who are members of state-recognized tribes, and leaves Oklahoma artists who are members of federally recognized tribes "unaffected." *See id.* at 351. Not only is Ms. Fontenot denied the benefit of describing her art as "American Indian-made," because Ms. Fontenot shows and displays her art in explicitly American Indian art shows and festivals, her very participation in those events at least implies that her art is American Indian-made. The State Act therefore forces her to cease operating at American Indian art shows in Oklahoma altogether. As a result, the State Act "cause[s] local goods to constitute a larger share, and goods with an out-of-state source to constitute a smaller share, of the total sales in the market." *West Lynn Creamery*, 512 U.S. at 196.

Further, even if Ms. Fontenot were to continue selling her art in Oklahoma at non-American Indian art shows and festivals while refraining from representing it as American Indian-made, such an action would deprive her of the benefit of her earned reputation as an American Indian artist. Thus, she would lose her competitive advantage over less-known Oklahoma artists who are members of federally recognized tribes and can still label their art as American Indian-made. *See Hunt*, 432 U.S. at 351. As a result, the Oklahoma market for American Indian art is "levelled" under the State Act, and Ms. Fontenot has suffered a "downgrade" in her market power by no longer being able to market her art as American Indian-made. *See id.* at 351-52.

Therefore, the State Act prohibits everyone but members of federally recognized tribes from representing their art as American-Indian made, Okla. Stat. tit. 78, §§ 73-75, and because Oklahoma contains no state-recognized tribes, under the Act, Oklahoma artists who are members of federally recognized tribes stand to gain market share at the expense of out-of-state artists like Ms. Fontenot.[7] Thus, the State Act has the effect of granting in-state artists a substantial economic benefit to the detriment of out-of-state artists; and as a result, the Act discriminates against interstate commerce.

Because the State Act is discriminatory, it is subject to a "virtually per se rule of invalidity," and can only be upheld if it advances a legitimate state purpose and does so in the least discriminatory way. *C & A Carbone*, 511 U.S. at 392; *Dep't of Revenue of Ky.*, 553 U.S. at 338-

[7] In supporting the amendments to the State Act, the Principal Chief of the Oklahoma-based (and federally recognized) Cherokee Nation openly acknowledged that the Act "will provide a direct economic benefit to Cherokee artists." Bill John Baker, *Strengthening American Indian Arts and Crafts Sales Act is important*, Cherokee Phoenix (May 2, 2016), *available at* http://www.cherokeephoenix.org/Article/index/10236.

39. Rather than protect Oklahoma consumers from misrepresentations in American Indian-made art, the State Act denies consumers access to truthful information and art. While the State Act does not protect consumers, it does protect in-state artists from competing with out-of-state artists like Ms. Fontenot. As evidenced by the statement of the Cherokee Nation's Principal Chief, the underlying purpose of the State Act is economic protectionism for Oklahoma artists who are members of federally recognized tribes. *See supra*, n.7. Indeed, even the Act's authors are members of the Cherokee Nation. *See* Res. 16-09, 2016 Inter-tribal Council of the Five Civilized Tribes (2016). Economic protectionism is not a legitimate state purpose under the dormant Commerce Clause. *City of Philadelphia*, 437 U.S. at 624; *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949). But even assuming *arguendo* that the State Act serves a legitimate purpose, the Act still fails because, as discussed above, there are numerous less-discriminatory means of achieving it. For example, the Act could require full disclosure of an artist's tribal affiliations, or the State could simply enforce Oklahoma's existing Consumer Protection Act.

B. The State Act Excessively Burdens Interstate Commerce

Even if the State Act is found not to discriminate against interstate commerce, it still violates the dormant Commerce Clause because it imposes a burden on interstate commerce that is excessive in relation to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The "extent of the burden that will be tolerated . . . depend[s] on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

In *Pike*, Arizona sought to protect and promote the reputation of produce growers in the state by prohibiting deceptive packaging. 397 U.S. at 143. To that end, Arizona forbid a grower of high-quality cantaloupes from packing its crop 31 miles away in California and stating on its label that the crop was packed in that state. *Id.* at 144. As a result, the grower was required to construct a new packing facility in Arizona at substantial cost. *Id.* The Court acknowledged that the state's interest was legitimate, but held the burden imposed to be excessive. *Id.* at 145.

Here, the local public benefits in this case are minimal. Defendant states that the purpose of the State Act is "to protect the public, under the police powers of the state, from false representation in the sale of authentic and imitation American Indian arts and crafts." Def.'s Answ. to Plaintiff's Interrogatories No. 3. But as discussed above, the Federal Act already provides such protection (and includes far greater penalties for violations of that Act),[8] and Oklahoma already has a general consumer protection statute that protects against false advertising and misrepresentations. *See* Okla. Stat. tit. 15, § 753. Further, the government admits that it has no evidence of any complaints for violations under either the State Act, or the Oklahoma Consumer Protection Act from January 1, 2006, to present. Def.'s Resp. to Plaintiff's Req. for Admissions Nos. 6-13, 15-17. Therefore, the alleged benefits of the State Act (even assuming *arguendo* that they are legitimate) are merely redundant.

[8] *Compare* 18 U.S.C. § 1159 (in addition to civil liability, violations of the Federal Act are punishable by up to 15 years in prison and a fine of $250,000, or both) *with* Okla. Stat. tit. 78, § 75 (violations of the State Act are a misdemeanor, punishable by a fine of up to $200, or by imprisonment up to 90 days, or both).

In contrast, the burdens of the State Act are substantial. Because, as discussed above, participation in the American Indian art market at least implies that the artist is an American Indian, and as a result, a cessation of marketing art as American Indian-made is insufficient, the State Act effectively prohibits Ms. Fontenot and other artists like her from continuing to engage in commerce in Oklahoma. And, for example, because Oklahoma has other protective laws at its disposal, and could require artists to fully disclose their tribal affiliations and whether their tribe is federally recognized, there are other ways of promoting the government's interest "with a lesser impact on interstate activities." *See Pike*, 397 U.S. at 142. As a result, the Act violates the Commerce Clause because the burdens of the State Act severely exceed the alleged benefits.

VII

THE STATE ACT DISCRIMINATES AGAINST MS. FONTENOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE

The State Act violates the Equal Protection Clause of the Fourteenth Amendment because it treats similarly situated people differently. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Here, the relevant class is American Indian artists as defined by the Federal Act.[9] Oklahoma's State Act permits one group authorized by the Federal Act (artists who are members of federally recognized tribes) to represent their art as American Indian-made, but it prohibits artists who make up the remaining two groups under the Federal Act (members of state-recognized tribes and

[9] The Federal Act defines American Indian artists to be either a member of a federally recognized tribe, a member of a state-recognized tribe, or an artisan certified by a tribe. 25 U.S.C. §§ 305e(a)(1), 305e(a)(3)(A)-(B).

certified artisans) from making the same representations. Okla. Stat. tit. 78, § 73. Because the State Act treats Ms. Fontenot and those like her (certified Indian artisans and artists who are members of state-recognized tribes) differently from artists who are members of federally recognized tribes, it must withstand scrutiny under the Equal Protection Clause. It does not.

Differential treatment of similarly situated individuals must be struck down unless it is rationally related to a legitimate governmental purpose. *United States v. Weed*, 389 F.3d 1060, 1071 (10th Cir. 2004). The stated purpose of the State Act is "to protect the public, under the police powers of the state, from false representation in the sale of authentic and imitation American Indian arts and crafts." Okla. Stat. tit. 78, § 72. But excluding two groups of individuals that American Indian tribes have acknowledged as American Indian—groups that Congress also acknowledges to be American Indian—is not a rational way to further that purpose. In other words, prohibiting certain groups of American Indians from representing art they made as American Indian-made is not a rational way of preventing *false* representations of American Indian-made art. An artist who is a member of a state-recognized tribe *is an American Indian* because of that membership. Likewise, a certified artisan must be of lineage of a member of the certifying tribe. 25 C.F.R. § 309.25. Thus, even though a certified artisan may lack tribal membership, they are actually an American Indian.

"Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which [the state regulation] is very well tailored:" protecting members of federally recognized tribes from competing with artists in state-recognized tribes and certified artisans. *Craigmiles v. Giles*, 312 F.3d 220, 228 (6th Cir.

2002).[10] As noted above, the State Act's authors are themselves members of a federally recognized tribe, and the Principal Chief of that tribe celebrated the "direct economic benefit" that the Act would provide to members of his tribe. *See supra*, n.7. The State Act therefore does not rationally relate to the State's purpose and instead furthers only the illegitimate purpose of economic protectionism.

VIII

THE STATE ACT'S DEFINITIONS ARE ARBITRARY AND IRRATIONAL IN VIOLATION OF THE DUE PROCESS CLAUSE

The Fourteenth Amendment protects the right to earn a living free from unreasonable governmental interference. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). Here, the State Act burdens Ms. Fontenot's right to earn a living because it burdens her ability to sell her art in the Oklahoma American Indian art market. As with violations of the Equal Protection Clause discussed above, to be constitutional, the restrictions on Ms. Fontenot's right to earn a living must satisfy rational basis review. *Powers*, 379 F.3d at 1215. For the same reasons stated under the equal protection analysis, they do not.

[10] While the Tenth Circuit has held that *intrastate* economic protectionism is a legitimate governmental interest in equal protection cases unless there is a violation of a specific federal statutory or constitutional provision, *Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. 2004), three other circuit courts of appeals disagree, and the U.S. Supreme Court has yet to resolve the split. *See Craigmiles*, 312 F.3d at 224-25; *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *and St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir. 2013). In any event, this case involves *interstate* economic protectionism and violations of specific statutory and constitutional provisions, and is thus distinguishable from *Powers*.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment should be *granted.*

DATED: October 16, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I electronically transmitted the foregoing to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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