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

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

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

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Pursuant to Fed. R. Civ. P. Rule 56(a) and LCvR56.1, Defendant Mike Hunter respectfully moves this Court to grant summary judgment because there is no genuine dispute of any material fact and Defendant is entitled to judgment as a matter of law.

Statement of Undisputed Facts

1. The consumer demand for American Indian-made art is driven by the product's origin and authenticity as much as its content or aesthetics. Many consumers appreciate the artwork for its association with history, culture, and process.[1] This makes the market ripe for confusion and misrepresentation as to origin and authenticity.[2]

2. In 1990, the United States Congress passed the American Indian Arts and Crafts Act ("Federal Act").[3] The Federal Act's purpose was to "protect Indian artists from unfair competition from counterfeits."[4] Congress amended the Federal Act in 2000, the stated purpose of the new legislation was "to improve the enforcement of the [Federal Act] for the protection of economic and cultural integrity of authentic Indian arts and crafts."[5]

[1] Ex. 1, Tehee Report at 11-12; *see also* Ex. 6, 137 Cong. Rec. S18150-01, at 2 (statement of Sen. Bingaman).
[2] Ex. 1, Tehee Report at 12-13.
[3] 25 U.S.C. § 305a.
[4] Ex. 2, H.R. No. 101-400(I), at 3.
[5] Ex. 3, S.Rep. No. 106–452 (2000).

3. In 1990, Congress declared that "existing state and federal laws…were ineffective in curbing the flood [of inauthentic American Indian goods],"[6] stating, "in most states, enforcement of state legislation is weakened by ambiguity of the laws" and "the responsibility for enforcement lies with county attorneys who, in the past, have shown little interest in investigating violations of the existing law."[7] Congress found that unaware consumers substituted a sizeable percentage of authentic American Indian art with counterfeits.[8] The increased supply coming from counterfeits decreased prices of authentic goods. This reduced a source of income and entrepreneurship for American Indian artisans and discouraged young artisans from joining the trade—reducing the generational and cultural legacy of tribes themselves.[9]

4. Accordingly, the Federal Act, described as a truth-in-advertising law,[10] prohibits anyone from "offer[ing] or display[ing] for sale or sell[ing] a good… in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization."[11] Those in violation are subject to civil liability and criminal prosecution.[12]

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[6] *Native American Arts, Inc. v. Contract Specialties, Inc.*, 754 F.Supp.2d 386, 388 (2010).
[7] Ex. 2, H.R. No. 101-400(I) at 4.
[8] *Contract Specialties, Inc.*, 754 F.Supp.2d at 388.
[9] Ex. 3, S. Rep. No. 106-452, at 1-2 (2000).
[10] The Indian Arts and Crafts Act of 1990, Indian Arts and Crafts Board, U.S. Department of the Interior, available at https://www.doi.gov/iacb/act accessed on September 26, 2017.
[11] 25 U.S.C.A. § 305e.
[12] 25 U.S.C.A. § 305e; 18 U.S.C.A. § 1158.

5. When it was introduced, the Federal Act would have preempted states from enacting their own laws with respect to misrepresentation of American Indian art. But the preemption provision was removed.[13]

6. Oklahoma has a rich American Indian history. Formed in 1907 out of lands encompassing the entire historic Indian Territory,[14] Oklahoma is now home to 39 of the 567 federally recognized tribes.[15]

7. The problem of inauthentic American Indian art is something that Plaintiff has witnessed and is otherwise aware of occurring in Oklahoma.[16]

8. The Oklahoma American Indian Arts and Crafts Act of 1974 ("Oklahoma Act"), a consumer protection law passed under Oklahoma's police power, makes it "unlawful to distribute, trade, sell or offer for sale or trade within this state any article represented as being made by American Indians unless the article actually is made or assembled by American Indian labor or workmanship." Sellers who "knowingly and willfully tag[] or label[]" an article for sale in violation of the Oklahoma Act are guilty of a misdemeanor.[17]

9. Twelve states—Alaska, Arizona, California, Colorado, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, South Dakota, and Texas—have enacted

[13] Ex. 2, H.R. No. 101-400(II) at 6-7.
[14] Act of June 16, 1906, §§ 16–20, 34 Stat. 267.
[15] Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915.
[16] Ex. 7, Plaintiff Deposition at 76-79.
[17] Okla. Stat. tit. 78, §§ 74-75.

laws prohibiting the misrepresentation of American Indian arts and crafts.[18] Most of these states have the highest American Indian populations and are "major marketing areas" for American Indian arts and crafts.[19] Of the states that have enacted these laws, only Texas and New Mexico explicitly define "American Indian tribe" to include state-recognized tribes.[20]

10. "Federally recognized tribes meet stringent guidelines with the Office of Federal Acknowledgment for legal recognition."[21] The Bureau of Indian Affairs ("BIA") uses seven criteria for federal recognition of an American Indian tribe: (1) Indian entity identification; (2) community; (3) political influence or authority; (4) governing document; (5) descent; (6) unique membership; and (7) lack of congressional termination.[22]

11. Federal recognition confers upon an American Indian tribe a "unique status" as a "separate people."[23] A government-to-government relationship is formed which

[18] Alaska Stat. § 45.65.010-070; Ariz. Rev. Stat. Ann. § 44-1231 et seq.; Cal. Bus. & Prof. Code § 17569; An Act Concerning The Nonsubstantive Relocation Of Laws Related To Indian Arts And Crafts Sales, 2017 Colo. Legis. Serv. Ch. 163 (H.B. 17-1241); Minn. Stat. Ann. § 325F.43; Mont. Code Ann. § 30-14-601-04; Nev. Rev. Stat. § 597.900; N.M. Stat. Ann. § 30-33-1 et seq.; Okla. Stat.,. tit. 78, § 71-75; S.D. Cod. Laws § 37-7-2.1 et seq.; Tex. Bus. & Com. Code § 17.851.

[19] Ex. 2, H.R. Rep. No. 101-400(I), at 5 (1990); *see also* U.S. Census Bureau, U.S. Census 2010, 2010 Census Demographic Profiles, interactive map available at https://www.census.gov/2010census/popmap/.

[20] N.M. Stat. Ann. § 30-33-4(A)(2); Tex. Bus. & Com. Code § 17.851.

[21] Ex. 1, Tehee Report, at 5-6 & n.10.

[22] Ex. 5, 25 C.F.R. § 83.11.

[23] *Cherokee Nation v. Georgia*, 30 U.S. (Pet. 1) 1, 17 (1831); *U.S. v. Antelope*, 430 U.S. 641, 646 (1977).

includes federal acknowledgment of the tribal government's inherent authority.[24] Furthermore, the federal government takes on a trust obligation with respect to that tribe which includes significant investments of time, money, and other resources.[25] For federally recognized tribes, "American Indian citizenship is straightforward."[26] But "[w]hen moving below the federal and tribal level into self-determination and state recognition, the negotiation of American Indian identity becomes murkier."[27]

12. In 11 states, various state legislatures, commissions, and governors have also recognized 60 tribes.[28] The federal government provides some benefits to state-recognized tribes in, for example, healthcare[29] and housing assistance.[30] The benefits from states are largely "symbolic" and "states themselves provide limited benefits to members of tribes they recognize."[31] "States…rarely provide meaningful benefits to member of state-recognized tribes giving them little incentive to establish stringent policies." States independent recognition of tribes is also a recent phenomenon,

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[24] *See, e.g., U.S. v. Lara*, 541 U.S. 193, 204 (2004); *U.S. v. Wheeler*, 435 U.S. 313, 324 (1978); *Montana v. U.S.*, 450 U.S. 544, 564 (1981).
[25] *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 530–31 (2000) (Stevens, J., dissenting).
[26] Ex. 1, Tehee Report, at 5-6.
[27] Ex. 1, Tehee Report, at 6.
[28] Federal and State Recognized Tribes, National Council of State Legislatures, available at http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx (last updated October 2016) (The states that independently recognize tribes are Alabama, Connecticut, Georgia, Louisiana, Maryland, Massachusetts, New York, North Carolina, South Carolina, Vermont, Virginia).
[29] 25 U.S.C. § 1603(b), (d).
[30] 25 U.S.C. § 4103(12)(C)(I).
[31] American Indian Law Deskbook, Conference of Western Attorneys General, Thomas Reuters (2017 Ed.) at § 2:7.

"something that was not in their purview for most of the twentieth century."[32] There is not a uniform standard and "it is uncertain whether there is a clear set of criteria for determinations made at the state level with criteria depending on which state. Across the states, the recognition processes are dynamic."[33]

13. Oklahoma tribes have been targeted by fraudulent tribes. The Cherokee Nation of Oklahoma maintains a list of what it considers fraudulent tribes. Some of these tribes have received state recognition elsewhere.[34]

14. In 2016, the Oklahoma Legislature amended the Oklahoma Act. The relevant changes are found in the definition section. The legislature added "visual or performing arts or literature" to the non-exhaustive enumeration of authentic American Indian art subject to the Oklahoma Act. The legislature also re-worded the statutory definition of "American Indian" so that the Oklahoma Act defines "American Indian" as a member of a federally recognized tribe.[35]

15. Plaintiff lives in Santa Monica, California.[36] Plaintiff is a beadmaker and photographer. Plaintiff has made and sold her art since 1983.[37] She has travelled to Oklahoma almost annually for the past ten years. While in Oklahoma, she participates

[32] Ex. 1, Tehee Report, at 6.
[33] Ex. 1, Tehee Report, at 7, 9.
[34] Ex. 1, Tehee Report, at 8.
[35] Okla. Stat. tit. 78, § 73(4).
[36] Compl. (Doc. 1) ¶ 11.
[37] Compl. (Doc. 1) ¶ 30.

in American Indian art shows and sells her art—most notably at the Red Earth Festival in Oklahoma City.[38]

16. Plaintiff believes that advertising her art as American Indian-made is to her financial advantage.[39]

17. Prior to the year 2000, Plaintiff marketed her work as "Cherokee." She is not a member of the Cherokee Nation, nor do they certify her as a tribal artisan.[40] After 2000, Plaintiff changed the message on her signage and business cards from "Cherokee" to "Cherokee descent."[41] Her claim to Cherokee descent is something her grandparents told her as a child.[42] She is "still working on the documentation."[43]

18. The Cherokee Heritage Center offers services to trace family lineage, so ancestry based on family stories can be verified.[44] People using this service "were operating under long held family myth…that in no way comported with Cherokee residence patterns."[45]

19. Plaintiff has been a member of the Patawomeck Indian Tribe of Virginia ("Patawomeck Tribe") since 2010. Virginia alone recognizes the Patawomeck Tribe—it is not federally recognized.[46]

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[38] Compl. (Doc. 1) ¶ 14.
[39] Compl. (Doc. 1) ¶ 44.
[40] Ex. 4, Plaintiff Deposition, at 23.
[41] Ex. 4, Plaintiff Deposition, at 23-24, 57.
[42] Ex. 4, Plaintiff Deposition, at 50.
[43] Ex. 4, Plaintiff Deposition, at 36-37.
[44] Ex. 1, Tehee Report, at 13-14.
[45] Ex. 1, Tehee Report at 13.
[46] Compl. (Doc. 1) ¶ 13.

20. According to its membership application, the Patawomeck Tribe is a "Descendancy Based Tribe."[47] Plaintiff conducted an amateur[48] ancestral trace, which Plaintiff asserts connects her to the Patawomeck Tribe through her great, great, great, great, great, great, great, great, great, great grandfather, Chief Wahangonoche.[49] But the documentation she provided to the Patawomeck Tribe stops around the early 1700s—three generations short of this alleged connection.[50] Nowhere in the documentation is any mention of the Patawomecks.[51] The Patawomeck Tribe found this sufficient to grant Plaintiff membership.[52] Plaintiff has limited knowledge of, or involvement with, the Patawomecks.[53] For example. Plaintiff has never participated in any cultural events of the Patawomeck tribe aside from attending two general monthly meetings that happened to be taking place while she was in the area.[54]

21. As of 2017, Plaintiff's advertising, such as signage and business cards, describes her artwork as "Native American" for example "Native American jewelry" usually accompanied by a photograph of a sample of her work. Then, after name and contact information, a list that reads "Patawomeck," "Potawatomi," and "Cherokee Descent"

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[47] Ex. 7, Application for Patawomeck Membership, at 11.
[48] Ex. 4, Plaintiff Deposition, at 43-45 (Plaintiff never consulted with a genealogy expert in gathering or reviewing the records she used to obtain membership in the Patawomeck Tribe).
[49] See, Ex. 7, Application for Patawomeck Membership, at 12; Ex. 4, Plaintiff Deposition, at 46.
[50] Ex. 7, *Patawomeck Documentation,* at 12-13, 55-59.
[51] Ex. 7, *Patawomeck Documentation,* at 11-59, 43-44.
[52] Ex. 7, Patawomeck Membership Card, at 8-9.
[53] Ex. 4, Plaintiff Deposition, at 54-56.
[54] Ex. 4, Plaintiff Deposition at 54-56.

in that order is included.[55]

22. Plaintiff believes that if she changed her current advertising to remove the general term "Native American" and left on the specific tribal names (for example, "Patawomeck"), that it would not affect her sales. Indeed, she believes it would have no effect if she removed all references to American Indian origin.[56]

23. Many artists belonging to federally recognized tribes display their tribal affiliation in their advertising.[57]

24. Under law generally, "[t]he question of who is an 'Indian' depends in large measure on the context in which the issue arises."[58] The most common legal definition of American Indian is a member of a federally recognized tribe.[59] Other definitions of American Indian are more complex involving a mixture of legal definitions and concepts of race, culture, indigeneity, politics, and residency.[60]

25. "Authenticity is paramount" for many collectors of American Indian art. The varying standards, ill-defined incentive structure, and dynamic nature of state tribal

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[55] Ex. 4, Plaintiff Deposition, at 22-23.
[56] Ex. 4, Plaintiff Deposition, at 68-69.
[57] Ex. 1, Tehee Report, at 12.
[58] American Indian Law Deskbook, Conference of Western Attorneys General, Thomas Reuters (2017 Ed.) at § 2:1.
[59] American Indian Law Deskbook, Conference of Western Attorneys General, Thomas Reuters (2017 Ed.) at § 2:6; *see also, e.g.*, Indian Reorganization Act, 48 Stat. 984, codified at 25 U.S.C. §§ 461 et seq.; Indian Child Welfare Act, 92 Stat. 3069, codified at 25 U.S.C. §§ 1901 et seq., Native American Graves Protection and Repatriation Act, 104 Stat. 3048, codified at 25 U.S.C. §§ 3001 et seq.
[60] American Indian Law Deskbook, Conference of Western Attorneys General, Thomas Reuters (2017 Ed.) at § 2:6; *see also* Ex. _, Tehee Report at 3-6.

recognition processes create a loophole for sellers seeking to subvert American Indian identity for monetary gain in the arts. The complexities of American Indian identity allow sellers of inauthentic goods to take advantage of customers. State recognition of tribes outside the federal process adds to the complexity. "[W]ithout the stringent process of federal recognition, consumers are left without any real assurance that the goods they purchase comport with global standards of indigeneity, and by extension American Indian identity."[61] "With the proliferation of self-recognized groups and population of those self-identifying as American Indian exploding, there currently exists a great need for consumer assurance of authenticity."[62] Customers are "looking to the state for assurance that artwork marked as American Indian…is indeed so. This is only guaranteed by the stringent federal guidelines."[63] The Oklahoma Act would prevent consumer confusion and deception for artists claiming American Indian heritage but do not belong to a federally recognized tribe to reveal that information in their advertising.[64]

Standard of Review

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of

[61] Ex. 1, Tehee Report at 2.
[62] Ex. 1, Tehee Report, at 9.
[63] Ex. 1, Tehee Report at 12.
[64] Ex. 1, Tehee Report at 2-3, 5-6, 12-14.

law."[65] "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[66] Courts generally "view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment."[67]

Argument

Plaintiff is a California-based artist who advertises her art as "American Indian-made." She is suing to enjoin the State of Oklahoma from enforcing a law that prohibits arts and crafts from being advertised as American Indian-made unless they are actually American Indian-made. Plaintiff is not included in the Oklahoma Act's definition of "American Indian" as she belongs to a tribe not recognized by the federal government. She claims the law violates her right to free speech, equal protection, and due process; violates the Constitution's Commerce Clause; and is preempted by federal law. Based on the undisputed material facts stated above, each claim fails.

I. Plaintiff lack standing because she does not suffer injury in fact.

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or

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[65] *Universal Underwriters Ins. Co. v. Winton*, 818 F.3d 1103, 1105 (10th Cir. 2016) (quoting Fed. R. Civ. P. 56(a)).
[66] *Birch v. Polaris Indus., Inc.*, 812 F.3d 1238, 1251 (10th Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)); *see also Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).
[67] *Profutures Bridge Capital Fund, L.P. v. Thermoview Indus., Inc.*, 64 Fed. App'x 64 (10th Cir. 2002) (citation omitted).

imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."[68] The party invoking federal jurisdiction bears the burden of establishing these elements.[69]

Plaintiff alleges that the Oklahoma Act prohibits her from advertising her products as American Indian-made.[70] But she also believes that selling her products in Oklahoma without reference to American Indian origin would not affect her sales because she sells her products at art shows and displays a sign informing customers of her Patawomeck membership and alleged Potawatomie and Cherokee heritage.[71] She concedes that removing the label "Native American" and while retaining the specific tribal names (for example, "Patawomeck") would not affect her sales.[72]

Nothing in the Oklahoma Act prohibits her from telling customers about her affiliation with a state-recognized tribe. Because compliance with the law will cause no harm to Plaintiff, she lacks standing to bring this suit.

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[68] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).
[69] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561(1992).
[70] Compl. (Doc 1.) ¶ 14.
[71] Statement of Undisputed Facts, *supra*, ¶ 22.
[72] Statement of Undisputed Facts, *supra*, ¶ 22.

II. The Oklahoma Indian Art Sales Act does not violate the Free Speech Clause of the First Amendment.

Plaintiff's first challenge to the Oklahoma Act is that this law violates her Free Speech rights under the First Amendment to the U.S. Constitution. The appropriate legal standard by which to adjudicate this challenge is the standard for reviewing restrictions on "commercial speech."[73] This is because the Oklahoma Act applies only where there is a proposition of a "commercial transaction"[74]—when someone is "distribut[ing], trad[ing], sell[ing], or offer[ing] for sale or trade" an "article represented as being made by American Indians."[75] Commercial speech is afforded a lower level of protection than other types of speech.[76]

A law regulating commercial speech is constitutional if: (1) there is a substantial government interest, (2) the regulation directly advances the governmental interest, and (3) the regulation is not more extensive than is necessary to serve that interest.[77] The Supreme Court has explained that this final prong means that there must be "a fit between the legislature's ends and the means chosen to accomplish those ends—

[73] *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376, 385 (1973)).
[74] *See 44 Liquormart v. Rhode Island*, 517 U.S. 484, 518 (Thomas, J. concurrence in part); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983).
[75] Okla. Stat. tit. 78, § 74.
[76] *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).
[77] *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564 (1980).

a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served."[78]

Before turning to these three factors as they apply to the Oklahoma Act, it is worth noting that the Federal Act—which serves the same purposes through similar means, albeit with a different scope—has withstood many First Amendment challenges.[79] For example, in *Waldron Corp.*, Judge Posner writing for the Seventh Circuit overturned a district court's decision holding that a regulation under the Federal Act violated the First Amendment. If such regulation on American Indian art advertising violated the First Amendment, the court held, "trademark law would be unconstitutional."[80] The court noted that the law, in effect, "makes 'Indian' the trademark denoting products made by Indians, just as 'Roquefort' denotes a cheese manufactured from sheep's milk cured in limestone caves in the Roquefort region of France."[81] Thus, "[a] non-Indian maker of jewelry designed to look like jewelry made by Indians is free to advertise the similarity but if he uses the word 'Indian' he must qualify the usage so that consumers aren't confused and think they're buying not only the kind of jewelry that Indians make, but

[78] *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (quotations and citations omitted).

[79] *See, e.g., Native Am. Arts, Inc. v. Contract Specialties, Inc.*, 754 F. Supp. 2d 386, 393 (D.R.I. 2010) ("The Court has no trouble dismissing this threadbare First Amendment challenge to the [Federal Act], as other courts have done.") *see also Native Am. Arts, Inc. v. Bundy–Howard, Inc.,* 168 F.Supp.2d 905, 910 (N.D.Ill. 2001); *Native Am. Arts, Inc. v. Waldron Corp.,* 399 F.3d 871, 873–74 (7th Cir. 2005) (overturning the district judge's ruling that a regulation under the Federal Act violated the First Amendment).

[80] *Waldron Corp.*, 399 F.3d at 873.

[81] *Id.* at 873-74 (citation omitted).

jewelry that Indians in fact made."[82] "There is no constitutional infirmity" under the First Amendment in this regulatory regime.[83]

Not surprisingly, Plaintiff has never challenged the Federal Act as unconstitutional, even before her eligibility to market her art as American-Indian made under the Federal Act, implicitly recognizing the Federal Act as a valid restriction on misleading commercial speech. Again, the Oklahoma Act and the Federal Act employ similar means to combat the infiltration of counterfeits into the authentic American Indian art market in order to protect artists and consumers. Indeed, similar to the purposes recognized in *Waldron Corp.*, the Oklahoma Act is codified in Title 78 of the Oklahoma Statutes, which covers "Trade Marks and Labels." The difference between the Oklahoma Act and Federal Act is the inclusion of tribes not recognized by the federal government but recognized by a state (as well as certified tribal artisans) in its definition of "American Indian." The Federal Act includes them. The Oklahoma Act does not. Thus, the Court must decide here whether that sole difference renders the Oklahoma Act unconstitutional.

A. Oklahoma has a substantial interest in preventing consumer deception.

Like the Federal government does in the Federal Act, the State has a substantial interest in preventing consumer deception, especially in the American Indian art market. "It is the State's interest in protecting consumers from 'commercial harms' that

[82] *Id.* at 874.
[83] *Id.*

provides 'the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech.'"[84] The State may restrict commercial speech to protect the public from commercial harms and reduce the risk of fraud.[85] Preventing consumer deception also supports economic development. Just as encouraging tribal economic development is an "important federal interest[,]"[86] so too is encouraging tribal economic development an important state interest. The American Indian art market is a source of employment and entrepreneurship for Oklahoma citizens. The market complements other Oklahoma industries, such as the tourism industry. The opportunities in complementary industries benefit American Indian and non-American Indian citizens alike.

The Oklahoma Act protect consumers from being misled. The text is straight-forward: an individual may not "sell or offer for sale…within this state any article represented as being made by American Indians unless the article actually is made…by American Indian labor."[87] Consumer demand for American Indian-made art is driven by the product's origin and authenticity as much as, if not more than, its content or aesthetics. Many consumers appreciate the artwork for its association with history,

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[84] *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 502 (1996) citing *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 426 (1993).
[85] *R.A.V. v. City of St. Paul, Minn*., 505 U.S. 377, 388-89, citing *Virginia Bd.* at 771-72.
[86] *Native American Arts, Inc. v. Mangalick Enterprises, Inc.*, 633 F.Supp.2d 591, 595 (2009) *quoting California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216–217 (1987).
[87] Okla. Stat. tit. 78, § 74.

culture, and process.[88] Thus, the market ripe for confusion and misrepresentation.[89] If a consumer is misled into spending money on American Indian art only to discover that the art lacked the characteristics driving that consumer's demand, i.e., origin and cultural authenticity, then that consumer has suffered "commercial harm."[90] Courts have acknowledged a consumers interest in product origin, where the interest is more than mere curiosity, as a substantial government interest. In *American Meat Institute*,[91] for example, the D.C. Circuit found a substantial government interest in, *inter alia*, enabling a consumer to choose American-made products. Thus, it can hardly be disputed that Oklahoma has a substantial interest in preventing consumers from deception, thereby also promoting the economic development of authentic Indian art.

B. The Oklahoma Indian Arts Sales directly advances the State's interest in preventing consumer deception.

The State's interests in preventing consumer deception and economic development of Indian tribes is directly advanced by consumer protection laws such as the Oklahoma Act, which prohibit fraud, safeguard and instill confidence in the market, and urge clarifying information from artists whose advertising may otherwise be misleading.

Consumer protection laws like the Oklahoma Act safeguard consumer confidence by protecting state residents or any consumer engaged in transactions within the state.

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[88] Statement of Undisputed Facts, supra. ¶ 1.
[89] Statement of Undisputed Facts, supra. ¶ 1.
[90] *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 579 (2011).
[91] *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 23 (D.C. Cir. 2014).

In a market driven by authenticity, uncertainty about the origin or genuineness of the product will decrease a product's demand. In the legislative improvements of 2000, Congress found that lack of consumer protection against inauthentic American Indian art reduced consumer confidence in the market, and the "[l]ack of consumer confidence will reduce the demand for Indian arts and crafts as consumers shift their preference to goods with greater consumer protections."[92] The Oklahoma Act, by prohibiting people from marketing their art as American Indian-made when it is not, directly prevents such harms—like the Federal Act, which "directly addresses false and misleading speech."[93]

The State's interests are also directly advanced when advertising is *potentially* misleading, because such regulation incentivizes disclosures aimed at keeping consumers from being misled.[94] In *Native American Arts, Inc. v. Bundy-Howard, Inc.*, for example, the Northern District of Illinois acknowledged that the Federal Act "requires some products to contain affirmative representations about their origin to avoid creating a false suggestion."[95] The same is true here. For members of state-recognized tribes, the Oklahoma Act incentivizes the "disclosure of beneficial consumer information" to avoid confusion.[96]

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[92] Ex. _, S.Rep. No. 106–452 (2000).
[93] *Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 910 (2001).
[94] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *see also Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977); *see also Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 110 ("To the extent that potentially misleading statements…could confuse consumers, a State might consider…requiring a disclaimer….").
[95] 168 F.Supp.2d 905, 910 (2001) (quotations omitted).
[96] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

Furthermore, the State's interests are directly advanced by a clear, enforceable rule. Leading to the passage of the Federal Act, Congress found the problems with state laws to be ambiguity and lack of enforcement.[97] This problem is solved by the Oklahoma Act's removal of ambiguity.

C. There is a reasonable fit between the regulation and the State's interest.

As detailed above, the analysis of the first two factors in the *Central Hudson* test are identical for both the Federal Act and the Oklahoma Act: the same governmental interests are advanced (*e.g.*, preventing deception of consumers) using substantially the same means (*e.g.*, making misleading advertising unlawful). The primary difference is in the scope of the act, which relates to the third *Central Hudson* factor: whether there is a "reasonable fit" between the regulation and the State's interest.[98] The Federal Act permits members of both federally recognized and state recognized tribes to advertise their art as "American-Indian made," while the Oklahoma Act permits only members of federally recognized tribes to so advertise their art. "The question of who is an 'Indian' depends in large measure on the context in which the issue arises."[99] The Oklahoma Act reasonably does not permit state-recognized tribal members to, without qualification, advertise their art as "American-Indian made" to prevent consumers from being confused and misled, as described below.

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[97] Ex. 2, H.R. Rep. No. 101-400(I), at 4 (1990).
[98] *See, e.g., Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).
[99] American Indian Law Deskbook, Conference of Western Attorneys General, Thomas Reuters (2017 Ed.) at § 2:1.

First, while federal standards for recognizing tribes are strict and backed by a long history, the same cannot necessarily be said of state recognition practices.[100] The federal government has an incentive to carefully scrutinize application for tribal recognition because federal recognition involves significant investment in the tribe.[101] Thus, federally recognized tribes must meet stringent guidelines to qualify for federal recognition.[102] All of these provide Oklahoma consumers with confidence that art created by that tribe is authentically American Indian with a high degree of certainty. State recognition provides no such assurances.[103]

Second, and in a similar vein, federally-recognized tribes has a long history and great incentive to strongly police their membership rolls, whereas the same is not always true with state-recognized tribes. Here, for example, the Patawomeck Tribe granted Plaintiff membership with a tenuous ancestral trace, attempting to skip over a few generations to reach a tribal chief.[104] But "[t]here must… be some limit on what is reasonable" as to tribal membership, and "to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members…goes well beyond any reasonable limit."[105] Plaintiff's involvement with the tribe has also been

[100] *Statement of Undisputed Facts*, supra. ¶ 28.
[101] *Statement of Undisputed Facts*, supra. ¶ 28.
[102] *Statement of Undisputed Facts*, supra. ¶ 12.
[103] *Statement of Undisputed Facts*, supra. ¶ 28.
[104] Statement of Undisputed Facts, supra. ¶ 20.
[105] *Rice v. Cayetano*, 528 U.S. 495, 527 (2000) (Breyer, J., concurring) (Striking a Native Hawaiian-descendant statute).

extremely limited.[106] Federally recognized tribes on the other hand zealously protect their identity. For example, the Cherokee Nation keeps a list of tribes that it deems fraudulent, despite the fact that some of these tribes have been officially recognized by other states.[107] Oklahoma consumers simply cannot rely on information by tribes or tribal organizations that lack the storied tradition of membership enrollment present in federally-recognized tribes.[108]

Third, Plaintiff's view, if accepted, would force Oklahoma to recognize groups of people as American Indian tribes simply because another state has, whether or not that state employs a tribal recognition process satisfactory to Oklahoma. While Oklahoma through its representatives in Congress and its vote on the leader of the Executive branch can voice its views on appropriate federal policy for determining legitimate "American-Indian" recognition practices, it cannot do the same for state-recognition. Oklahoma has absolutely no say in who Virginia recognizes as an American Indian, even if Virginia's recognition does not comport with the Oklahoma consumer's understanding of the meaning of "American Indian." Oklahoma thus reasonably limits its definition to those enrolled in federally-recognized tribes. This is similar to the concerned voiced by the Supreme Court in *Edge Broadcasting*, where striking the law "would permit … [the] lottery laws [of one state] to dictate what stations in a

[106] Statement of Undisputed Facts, supra. ¶ 13.
[107] Statement of Undisputed Facts, supra. ¶ 13.
[108] Statement of Undisputed Facts, supra. ¶ 28.

neighboring state may air."[109] Another state may develop tribal recognition processes to be as lax as it sees fit, but that should not bind Oklahoma. Nor does the Constitution does not require such a result.

Indeed, not only is Oklahoma's restriction reasonable, the Oklahoma Act is not as demanding as other states with similar statutes. The Oklahoma Act does not impose a specific disclosure requirement like in Arizona where "[a] person who sells…nonauthentic Indian arts and crafts shall post a sign bearing the words, in letters not less than three inches in height, 'nonauthentic Indian arts and crafts' above or adjacent to the articles being sold."[110] The Oklahoma Act does not require an artist to have a certain label or seal to market their products as American Indian-made like in California where "[o]nly those articles bearing a registered trademark or label of authentic Indian labor…may be deemed an art or craft of authentic Indian labor."[111] The Oklahoma Act does not require a minimum blood quantum for individuals not belonging to a federally recognized tribe to qualify as an American Indian like in Minnesota where "Indian-made goods are those made exclusively by persons who are of at least one-quarter Indian blood or who are listed on the rolls of the United States Bureau of Indian Affairs."[112]

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[109] *U.S. v. Edge Broadcasting,* 509 U.S. 418, 419 (1993).
[110] Ariz. Rev. Stat. § 44-1231.02.
[111] Cal. Bus. & Prof. Code § 17569 (West).
[112] Minn. Stat. Ann. § 325F.43 (West).

Moreover, the Oklahoma Act leaves open a way for members of state-recognized tribes to advertise their goods that is neither "untruthful [nor] controversial."[113] A Patawomeck artist is free to advertise that a member of the Patawomeck Tribe made this piece of art. Of course, she is not required to identify her tribal affiliation. The law only prohibits her from hiding the fact that her tribal membership is in a tribe that is not federally recognized behind the general term "American Indian." If an artist believes that proclaiming her affiliation in a state-recognized tribe is good for business, she may do so. The Oklahoma Act seeks merely to encourage members of state-recognized tribes to market their art in a way that American Indian artists already do: displaying one's tribal affiliation.

III. The Oklahoma Indian Art Act does not violate Plaintiff's Due Process and Equal Protection rights

Plaintiff also asserts that the Oklahoma Act violates her equal protection and due process rights. The State's reasonable means to achieve its substantial interest (as stated above) should quickly dispose of these two claims.

Both Plaintiff's Equal Protection and Due Process challenges to this economic regulation are subject to rational basis review, which is less demanding than the scrutiny given to speech restrictions in commercial advertising. On rational basis review of economic regulations, "[i]t is well settled that economic and social legislation generally is presumed valid" and that courts "will sustain such legislation if the classifications

[113] *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985).

drawn by the statute are rationally related to a legitimate state interest."[114] "The burden is on [the plaintiff] to dream up possible rational bases for the [law]'s classifications and varied regulations, and to present evidence negating them."[115] Meanwhile, the defendant need not "verify its legislative assumptions with empirical evidence" in order to prevail, since "[c]ommon sense propositions can be sufficient to uphold social and economic legislation."[116] As advanced above, the challenged Act advances the legitimate state interest of, *inter alia*, protecting consumers from potentially misleading statements. Permitting only members of federally-recognized tribes to advertise their art as American-Indian made rationally prevents consumers from being misled as to the status of the artist as "American Indian," given the rigorous process associated with federal tribal recognition and membership, as well as the common association of American-Indian status with such membership.[117]

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[114] *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enf't Com'n,* 889 F.2d 929, 932 (10th Cir. 1989).

[115] *Authentic Beverages Co., Inc. v. Texas Alcoholic Beverage Com'n*, 835 F. Supp.2d 227, 248 (W.D. Tex. 2011); *see also Armour v. City of Indianapolis, Ind.*, 132 S. Ct. 2073, 2080-81 (2012); *cf. Latu v. Ashcroft*, 375 F.3d 1012, 1020-21 (10th Cir. 2004) (upholding law where plaintiff failed to negate all the rational bases identified by another circuit).

[116] *Okla. Educ. Ass'n v. Alcoholic Beverage Laws Enf't Com'n,* 889 F.2d 929, 934 (10th Cir. 1989) (citation omitted). "Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938)).

[117] *See also, e.g.*, *Native Am. Arts, Inc. v. Mangalick Enterprises, Inc.*, 633 F. Supp. 2d 591, 595 (N.D. Ill. 2009) (holding that the Federal Act's imposition of criminal penalties on false representations of American Indian origin is rationally related to a legitimate government interest of protecting Indian artists from unfair competition from counterfeiters and protecting consumers from unknowingly purchasing inauthentic products).

Indeed, far from being arbitrary, Oklahoma draws the line in defining "American Indian" in the same place the federal government has in numerous other statutes. For example, the benefits and regulations of Indian child welfare,[118] employment preference in the Bureau of Indian Affairs,[119] grant-eligibility for tribally-controlled schools,[120] American Indian self-determination and education assistance,[121] and American Indian graves protection[122] all apply *only* to members of federally-recognized tribes, not members of state-recognized tribes. The line between federal- and state-recognition thus not only is rational—it may be the most obvious line there is. For these reasons, Defendant is entitled to judgment in its favor on Plaintiff's Due Process and Equal Protection claims.

IV. The Oklahoma Indian Art Act Does Not Burden Interstate Commerce.

Plaintiff asserts that the Oklahoma Act violates the Commerce Clause, claiming it "substantially burdens the American Indian art market for the purpose of benefitting artists who are members of Oklahoma-based federally recognized tribes."[123] Plaintiff claims the Oklahoma Act "has the underlying purpose and effect of protecting in-state artists from competing with out-of-state artists."[124] This claims has no merit.

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[118] 25 U.S.C. § 1903(8).
[119] 25 U.S.C. § 5116.
[120] 25 U.S.C. § 2511(4).
[121] 25 U.S.C. § 5304(e).
[122] 25 U.S.C. § 3001(7).
[123] Compl. (Doc. 1) ¶ 60.
[124] Compl. (Doc. 1) ¶ 63.

When a state statute does not discriminate against out-of-state interests on its face, in purpose, or in effect, the law does not run afoul of the Commerce Clause unless the burden on interstate commerce *greatly* outweighs the legitimate state interest.[125] Courts presume in favor of upholding the state statute.[126]

The Oklahoma Act is facially neutral and does not greatly burden interstate commerce. "The purpose of the [Oklahoma Act] is to protect the public…from false representation in the sale of authentic…American Indian arts and crafts."[127] It "regulates evenhandedly" between interstate and intrastate commerce.[128] It makes no facial distinction between in-state and out-of-state goods or sellers.

Nor can the distinction between federally-recognized and state-recognized tribes support a notion that the law has the purpose or effect of discriminating against out-of-state commerce. The 39 federally recognized tribes based in Oklahoma are only a small percentage (6.8%) of the 567 federally recognized tribes in the United States—all of whose members can sell their art in Oklahoma and advertise it as American Indian-made.[129] Moreover, members of Oklahoma-based federally recognized tribes live

[125] *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see also Philadelphia v. New Jersey*, 437 U.S. 617 (1978).
[126] *See, e.g.*, *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 470-471(1981).
[127] Okla. Stat. tit. 78, § 72.
[128] *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471(1981).
[129] Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 10, 2017).

outside Oklahoma, and many members of non-Oklahoma tribes live in Oklahoma. The law treats them all the same.

Similarly, members of state-recognized tribes may live outside of the state that recognizes their tribe, just Plaintiff does.[130] The Oklahoma Act also treats in-state and out-of-state members of state-recognized tribes the same. The proliferation of state-recognized tribes is also a rare and recent phenomenon. Eleven states have recognized 60 tribes.[131] Only five states have traditionally recognized tribes, while the remainder and vast majority have been recognized in modern times.[132] Tribal recognition was not in the state's "purview for most of the twentieth century."[133] Thus, it can hardly be said that Oklahoma's failure to abide by the idiosyncratic policy choices of a handful of other States is part of a systematic effort to discriminate against out-of-state commerce. Accordingly, the Oklahoma Act simply does not disadvantage out-of-state interests nor affect interstate commerce.[134]

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130 Ex. 4, Plaintiff Deposition, at 8-9, 30.

131 Statement of Undisputed Facts, *supra*. n. _.

132 Koenig and 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, 153 (2008) (The summary is dated, for example, the Pawmunkey Tribe of Virginia has since achieved federal recognition).

133 Statement of Undisputed Fact, *supra*, ¶ 12.

134 *See, e.g., Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981) (upholding a facially neutral ban of the sale of milk in plastic disposable containers, which would benefit Minnesota's plywood industry, noting there were in-state and out-of-state winners and losers); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (Commerce Clause "protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.").

Finally, the Oklahoma Act does not ban anyone from creating, marketing, or selling anything in Oklahoma. Rather, it only regulates how they may advertise their goods, which they may freely sell in Oklahoma. Thus, any burden created by the Oklahoma Act on interstate commerce is minimal, especially in light of the legitimate state interests discussed above in preventing consumers from being misled and encouraging a robust market for authentic American Indian art. Plaintiff's Commerce Clause claim must fail.

V. The Oklahoma Indian Arts Act is not Preempted by Federal Law.

Plaintiff asserts that under the Supremacy Clause the Oklahoma Act is preempted by the Federal Act because it frustrates the Federal Act's purported purpose of "develop[ing] a robust market for American Indian arts and crafts."[135] But the Oklahoma Act in way no is preempted by the Federal Act; rather, the two aim to achieve the same goal, even acknowledging that the Oklahoma Act provides greater protection against consumers being misled.

There is a strong presumption that a federal statute does not preempt a state law. "[I]n a field which the States have traditionally occupied," such as consumer protection, the courts assume that "the historic police powers of the States were not to be

[135] Compl. (Doc. 1) ¶¶ 68-74. Plaintiff cites to 25 U.S.C. § 305a for this proposition, but that section does not delineate the Federal Act's purpose in prohibiting false advertising of Indian art. Rather it states that it is "the function and the duty of *the Secretary of the Interior through the Board* 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 (emphasis added).

superseded by the federal law unless that was the *clear and manifest* purpose of Congress."[136]

Preemption can occur when federal law and state law "directly conflict," such that "it is impossible for a private party to comply with both state and federal requirements."[137] That is simply not the case here: Plaintiff's compliance with the challenged state law in no way forces her to violate federal law. If Plaintiff abides by the Oklahoma Act by not advertising her art as Indian American-made, she does not thereby violate the Federal Act. In other words, although the Federal Act *permits* her to so-market her art, it does not *force* her to do so in violation of the Oklahoma Act. There is no conflict.

State law may also be preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[138] This raises the question of whether Congress's intent in passing the law was to create a uniform standard of the definition of "American Indian" in marketing American Indian-made arts and crafts.[139] Congress did no such thing.

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[136] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).
[137] *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 618 (2011) (citation and internal marks omitted).
[138] *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013).
[139] *Geier v. American Honda Motor Co.*, 529 U.S. 861, 870 (2000) (Congressional intent may be to allow states to pass laws that will "establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.").

Rather, Congress expressly considered and rejected preempting state laws, specifically eschewing a uniform standard for the nation. Representative John Rhodes (AZ) could not have made this point any more clear, he said:

> [A]s reported by the House Interior Committee, [this bill] would have preempted States from enacting and enforcing their own laws with respect to imitation Indian arts and crafts. At the time, it was felt that a uniform, national standard was the best approach. Upon further reflection…the section in the bill that would have preempted State legislative actions in this field has been deleted. I am pleased that many State legislatures… have felt it important to help protect local Indian commerce from fraudulent competition coming from foreign and domestic sources….[140]

Thus, far from evincing a "clear and manifest" intent to preempt, Congress specifically choose *not* to preempt state regulation of consumer protection in the Indian art market by allowing States to adopt their own (possibly more stringent) regulations.[141] Whatever choice Congress may have made in giving an expansive scope to the term "Indian" in the context of the Federal Act, there is no evidence that it intended to preempt States from providing a different definition in their own Indian art laws.

Conclusion

For the foregoing reasons, this Court should grant Defendant's motion for summary judgment.

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[140] Ex. 3, 136 Cong. Rec. H8291-01 (1990).

[141] *See Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009) ("The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest.").

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2016, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing, and that the Notice of Electronic Filing will be transmitted to all parties by the ECF System.

/s/ Mithun Mansinghani
Mithun Mansinghani