

**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

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hon. Judge Lee R. West

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. RESPONSE TO DEFENDANT’S STATEMENT OF UNDISPUTED FACTS	1
II. INTRODUCTION AND SUMMARY OF ARGUMENT.....	6
ARGUMENT	7
III. MS. FONTENOT HAS STANDING	7
IV. THE STATE ACT DOES NOT SURVIVE SCRUTINY UNDER THE FIRST AMENDMENT	10
A. The State Act fails strict scrutiny	10
1. The Act is subject to strict scrutiny because it prohibits fully protected speech.....	10
2. The Act is subject to strict scrutiny because it prohibits inextricably intertwined speech.....	12
B. The State Act fails even commercial speech scrutiny.....	14
1. Defendant has not shown there is a substantial interest in the State Act.....	15
2. The State Act does not directly advance the State’s interest	15
3. The State Act regulates more extensively than necessary	17
V. THE STATE ACT IS PREEMPTED BY FEDERAL LAW	22
VII. THE STATE ACT VIOLATES THE COMMERCE CLAUSE	26
VII. THE STATE ACT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES	28
CONCLUSION	30

TABLE OF AUTHORITIES

Cases

<i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996)	15-16, 19, 27
<i>Abramson v. Gonzalez</i> , 949 F.2d 1567 (11th Cir. 1992)	10
<i>Arizona v. United States</i> , 567 U.S. 387 (2012)	24-25
<i>Byrum v. Landreth</i> , 566 F.3d 442 (5th Cir. 2009)	20
<i>C & A Carbone, Inc. v. Town of Clarkstown, N.Y.</i> , 511 U.S. 383 (1994)	27
<i>Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York</i> , 447 U.S. 557 (1980)	14-15, 17
<i>Cincinnati v. Discovery Network, Inc.</i> , 507 U.S. 410, 417 (1993)	17
<i>City of Philadelphia v. New Jersey</i> , 437 U.S. 617 (1978)	27
<i>Dep’t of Revenue of Ky. v. Davis</i> , 553 U.S. 38 (2007)	27
<i>Edenfield v. Fane</i> , 507 U.S. 761 (1993)	15
<i>Fed. Election Com’n v. Akins</i> , 524 U.S. 11 (1998)	7
<i>General Motors Corp. v. Tracy</i> , 519 U.S. 278 (1997)	8
<i>Heckler v. Mathews</i> , 465 U.S. 728 (1984)	8
<i>Jacobs v. Clark Cty. Sch. Dist.</i> , 526 F.3d 419 (9th Cir. 2008)	8
<i>Locke v. Shore</i> , 682 F. Supp. 2d 1283 (N.D. Fla. 2010)	19-20, 28
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001)	17
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	7
<i>Motor Coach Employees v. Lockridge</i> , 403 U.S. 274 (1971)	25
<i>Native American Arts, Inc. v. Bundy-Howard, Inc.</i> , 168 F. Supp. 2d 905 (N.D. Ill. 2001)	17
<i>Native American Arts, Inc. v. Contract Specialties, Inc.</i> , 754 F. Supp. 2d 386 (D. R.I. 2010)	1
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	11-12, 18
<i>Pleasant Grove City v. Summum</i> , 555 U.S. 460 (2009)	8
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015)	10
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	23
<i>Riley v. Nat’l Fed. of the Blind</i> , 487 U.S. 781 (1988)	13
<i>Rubin v. Coors Brewing Co.</i> , 514 U.S. 476 (1995)	17
<i>Skull Valley Band of Goshute Indians v. Nielson</i> , 376 F.3d 1223 (10th Cir. 2004)	8
<i>Smith v. California</i> , 361 U.S. 147 (1959)	11
<i>Sorrell v. IMS Health Inc.</i> , 564 U.S. 552 (2011)	14
<i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016)	7-8
<i>Susan B. Anthony List v. Driehaus</i> , 134 S. Ct. 2334 (2014)	8
<i>Thompson v. Western States Med. Ctr.</i> , 535 U.S. 357 (2002)	14, 28
<i>Turner Broad. Sys., Inc. v. Fed. Comm. Comm’n</i> , 512 U.S. 622 (1994)	10

<i>United States v. Alvarez</i> , 567 U.S. 709 (2012)	10, 13
<i>United States v. Locke</i> , 529 U.S. 89 (2000)	24
<i>Utah Licensed Beverage Ass’n v. Leavitt</i> , 256 F.3d 1061 (10th Cir. 2001)	17-18
<i>West Lynn Creamery, Inc. v. Healy</i> , 512 U.S. 186 (1994)	27
<i>Whitney v. California</i> , 274 U.S. 357 (1927)	18

Federal Constitution

U.S. Const. art. I, § 8, cl. 3	23
--------------------------------------	----

Federal Statutes

25 U.S.C. § 305e(a)(1)	6
25 U.S.C. § 305e(a)(3)	6
25 U.S.C. §§ 305-310	24

State Statutes

Alaska Stat. § 45.65.010-070	23
Ariz. Rev. Stat. Ann. § 44-1231, <i>et seq.</i>	23
Cal. Bus. & Prof. Code § 17569	23
Col. Rev. Stat. Ann. § 6-15-201, <i>et seq.</i>	23
Minn. Stat. Ann. § 325F.43	23
Mont. Code Ann. § 30-14-601	23
N.M. Stat. Ann. § 30-33-1, <i>et seq.</i>	23
Nev. Rev. Stat. § 597.900	23
Okla. Stat. tit. 78, §§ 71-75	6, 23
Okla. Stat., tit. 78, § 72	24
Okla. Stat. tit. 78, §§ 73-74	9
Okla. Stat. tit. 78, § 74	10, 12
S.D. Cod. Laws § 37-7-2.1, <i>et seq.</i>	23
Tex. Bus. & Com. Code § 17.851	23

Rules

LCvR 56.1(d)	1, 3, 5
--------------------	---------

Federal Regulations

25 C.F.R. § 309.8	17
-------------------------	----

Other Authorities

81 Fed. Reg. 5019-02	26
----------------------------	----

Karns, Christopher A., <i>State Taxation as a Means of Diminishing the Tribal Land Base</i> , 42 Am. U. L. Rev. 1213 (1993).....	23
The Merriam Webster Dictionary (Home & Office Ed. 1995).....	12
Smoot, D.E., <i>Artists to return to show while status of law pending</i> , Muskogee Phoenix (Oct. 29, 2017), http://www.muskogee phoenix.com/news/artists-to-return-to-show-while-status- of-law-pending/article_ff5a1373-211d-57cb-b77e-504293e20bd7.html	12

I

RESPONSE TO DEFENDANT’S STATEMENT OF UNDISPUTED FACTS

1. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 1.

2. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 2.

3. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 3, *except* that Plaintiff disputes the characterization in sentence one that “*Congress declared* that ‘existing state and federal laws...were ineffective in curbing the flood [of inauthentic American Indian goods].’” (emphasis added). The case cited by Defendant for that proposition states that “Congress enacted [the Federal Act] *in response to concerns* that...existing state and federal laws...were ineffective in curbing the flood.” *Native American Arts, Inc. v. Contract Specialties, Inc.*, 754 F. Supp. 2d 386, 388 (D. R.I. 2010) (emphasis added). In addition, sentence three of Paragraph 3 is not followed by citation as required by LCvR 56.1(d), thus no response is required.

4. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 4.

5. No response to sentence one of Paragraph 5 is required because it is not followed by citation as mandated by LCvR 56.1(d). Paragraph 5, as a whole, is a statement of law. Nevertheless, Plaintiff does not dispute that a preemption provision was removed from the Committee substitute and not included in the final enacted version of the Federal Act. *See* Def.’s Ex. 2, H.R. No. 101-400(I) at 6; H.R. No. 101-400(II) at 8.

6. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 6.

7. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 7, *except* that the full context of Ms. Fontenot's statement cited by Defendant was solely in regards to authentically handmade goods versus imported, non-handmade goods. *See* Pl.'s Deposition at 75 ("I see artists that, to my knowledge, *are Native* that include imported items with their work.") (emphasis added).

8. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 8.

9. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 9.

10. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 10.

11. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in the first three sentences of Paragraph 11, or the final sentence of the paragraph. Plaintiff objects to and disputes sentence four of Paragraph 11 as unclear and contradicted by other statements in Defendant's Tehee expert report. For example, the expert report goes on to state that "[c]itizenship is, *superficially*, straightforward," *see* Def.'s Ex. 1, Tehee Report at 6 (emphasis added), and notes that each of the 500+ federally recognized tribes "sets its own standards for citizenship" and that "the federal government offers a wide range of definitions for American Indian." *Id.* Based on those additional statements, Plaintiff disputes that

American Indian citizenship is “straightforward.” In any event, none of the alleged facts in Paragraph 11 are material to the claims in this case.

12. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 12.

13. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 13.

14. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 14.

15. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 15.

16. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 16.

17. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 17, *except* the first sentence of the paragraph is not followed by citation as required by LCvR 56.1(d), thus no response is required.

18. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in the first sentence of Paragraph 18. Plaintiff objects to and disputes the alleged facts in sentence two of Paragraph 18 as contradicted by Dr. Tehee’s own expert report, which stated that she had in fact encountered individuals using the Cherokee Heritage Center who were able to trace their lineage to the Cherokee. *See* Def.’s Ex. 1, Tehee Report at 13. Nevertheless, this fact is not material to the claims in this case.

19. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 19, *except* that she received her Patawomeck membership in 2006, not 2010.¹ *See* Fontenot Dec. in Support of Pl.’s Mot. for Summ. Judg. at ¶ 3; Deyo Dec. in Support of Pl.’s Mot. for Summ. Judg. at ¶¶ 5-8; Newton Dec. in Support of Pl.’s Mot. for Summ. Judg. at ¶ 5.

20. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in the first three sentences of Paragraph 20. Plaintiff objects to and disputes the fourth sentence of Paragraph 20 where Defendant alleges that “[n]owhere in the documentation is any mention of the Patawomecks.” As noted on the Patawomeck’s membership application, “[t]he Newton, Green, Monteith, Roberson, Curtis *and related older families*...have at least been partially documented and that information is available to the Council; therefore, if the Applicant can provide a genealogical (sic) tie to those lines, further research may not be required.” Pl.’s Ex. 7 at Interrogatory No. 8-011 (emphasis added). In her Patawomeck membership application, Ms. Fontenot documented her ancestry to the Bryant family. Interrogatory No. 8-010, 8-012; Pl.’s Ex. 20, Deyo Supp. Dec. at ¶ 3. The Bryant family is one of the “related older families” of which the Patawomeck tribal council possesses sufficient documentation so that Ms. Fontenot was not required to duplicate it for her application. Pl.’s Ex. 19, Fontenot Supp. Dec. at ¶ 2; Pl.’s Ex. 20, Deyo Supp. Dec. at ¶ 3. Ms. Fontenot further disputes Defendant’s statement that she “has limited knowledge of, or involvement with, the Patawomecks.” Ms. Fontenot is in frequent contact with members of the Patawomeck tribe via telephone and email, and is a regular, if unofficial, representative of the tribe when presenting herself as a

¹ Plaintiff acknowledges that the reference to 2010 in the Complaint was a typographical error. 2010 is the year that the Patawomeck received state recognition from Virginia. *See* Plaintiff’s Ex. 14.

Patawomeck artist. Pl.'s Ex. 19, Fontenot Supp. Dec. at ¶ 3. Nevertheless, neither of these facts are material to the resolution of Plaintiff's claims, because it is undisputed that she is a member of the Patawomeck—a state-recognized tribe.

21. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 21.

22. Sentence one of Paragraph 22 is not followed by citation as required by LCvR 56.1(d), thus no response is required. Nevertheless, Plaintiff renews her objections raised during her deposition to the questions that produced the responses cited by Defendant in Paragraph 22. *See* Pl.'s Depo. at 68-69. Plaintiff's statements cited in Paragraph 22 should be disregarded because of counsel's timely objection based on speculation and personal knowledge. *See id.* In any event, the speculative statements raise legal questions as to the interpretation of the State Act, thus no response is required.

23. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 23.

24. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 24.

25. The first four sentences of Paragraph 25 are not followed by citation as required by LCvR 56.1(d), thus no response is required. Plaintiff disputes and objects to sentences five and seven as inadmissible hearsay, and sentence eight as reliant on inadmissible hearsay for its conclusion. *See* Pl.'s Ex. 21, Tehee Depo. at 23. Plaintiff disputes and objects to the final sentence of Paragraph 25 as stating a legal conclusion. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in sentence six.

II

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Peggy Fontenot is an artist and a member of the state-recognized Patawomeck Indian Tribe of Virginia. *See* Pl.’s Ex. 1, Fontenot Dec. ¶ 3. She has shown her art extensively in the Native community—earning numerous awards for her photography and beadwork. *Id.* ¶¶ 3, 6. She has taught American Indian beadwork classes and shown her art at the Smithsonian National Museum of the American Indian. *Id.* ¶ 8. Ms. Fontenot considers her American Indian heritage as integral to her work, and seeks to represent her art as “American-Indian made,” when exhibiting in Oklahoma. *Id.* ¶ 5. Under the federal Indian Arts and Crafts Act (Federal Act), she is permitted to do so. *See* 25 U.S.C. § 305e(a)(1), (a)(3). But Oklahoma’s American Indian Arts and Crafts Sales Act (State Act) denies her that right because she is not a member of one of the politically favored federally recognized tribes in that state. Okla. Stat. tit. 78, §§ 71-75.

Though Defendant attempts to characterize the State Act as a truth in advertising law, *see* Def.’s Mot. for Summ. Judg. at 15, the Act prohibits even truthful speech, and violates the First Amendment. Rather than furthering any interest the state has in consumer protection, the undisputed evidence shows that the State Act instead operates to benefit in-state politically favored American Indian artists at the expense of out-of-state state-recognized American Indian artists. Because the law is blatantly protectionist, and because it is an excessive burden on interstate commerce, the law also violates the dormant Commerce Clause. And because it makes irrational distinctions between members of state- and federally -recognized tribes, it

cannot withstand even rational basis review. Finally, the Act is an obstacle to the Federal Act's Congressional objectives. The State Act is therefore unconstitutional.

Both parties agree that there are no material facts in dispute. Because the facts show that Ms. Fontenot is entitled to judgment as a matter of law, she is entitled to summary judgment.

ARGUMENT

III

MS. FONTENOT HAS STANDING

As a threshold matter, Ms. Fontenot has standing. A plaintiff has Article III standing when (1) she has suffered an injury in fact; (2) there is “a causal connection between the injury and the conduct complained of;” and (3) it is “likely” that her injury will be redressed by a favorable decision in her case. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). That criteria is met here.

When a plaintiff challenges a government action that regulates her directly, “there is ordinarily little question that the action...has caused [her] injury, and that a judgment preventing...the action will redress it.” *Id.* at 561-62. Under *Lujan*, an injury in fact is “an invasion of a legally protected interest which is...concrete and particularized, and...actual or imminent, not conjectural or hypothetical.” *Id.* at 560 (citations and quotations omitted). An injury need not be financial, or even tangible. Even an intangible injury is sufficient to confer Article III standing when “it actually exist[s].” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548-49 (2016). In *Fed. Election Com’n v. Akins*, 524 U.S. 11, 21 (1998), for example, the court held that the failure of a group of voters to obtain information was sufficient to establish that the group

had standing. Another quintessential intangible injury is being prohibited from speaking freely. *Spokeo*, 136 S. Ct. at 1549 (citing, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009)).

Here, the State Act injures Ms. Fontenot by depriving her of the ability to market her art by including the truthful representation that the work is American Indian-made. This not only injures her by denying her the ability to speak freely, see *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341-47 (2014) (injury in fact established where group was prohibited from placing an ad on a billboard to criticize a politician); see also *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 426-27 (9th Cir. 2008) (deprivation of First Amendment free speech rights sufficient to establish injury in fact), it also injures her by denying her a right conferred to her under the federal Indian Arts and Crafts Act. See *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1235 (10th Cir. 2004) (“no additional evidence is necessary to establish standing” when the plaintiff is regulated by state statute alleged to be preempted by federal law). In addition, the State Act discriminates, in practical effect, against out-of-state American Indian artists, including Ms. Fontenot. See *General Motors Corp. v. Tracy*, 519 U.S. 278, 286-87 (1997); see also *Heckler v. Mathews*, 465 U.S. 728, 740 n.9 (1984) (unequal treatment is itself an Article III injury).

Defendant contends that Ms. Fontenot does not have standing because she does not suffer financial harm from not being able to market her art as “American Indian” made—pointing to statements she made at deposition. See Def.’s Mot. for Summ. Judg. at 12 (citing Def.’s Ex. 4, Fontenot Depo. at 68-69). Defendant contends that Ms. Fontenot was asked whether removing the reference to “American Indian origin” from her art would cause her to lose money, and she responded negatively. *Id.* Under a tortured reading of the State Act, Defendant further contends that Ms. Fontenot may still market her art as “Patawomeck-

made,” she simply can’t use the magic words “American Indian,” and thus she suffers no financial harm and has no standing. *Id.*

That argument fails.² First, as argued above, an injury need not be financial, and Ms. Fontenot is otherwise injured. Second, contrary to Defendant’s convenient interpretation, the State Act prohibits her from representing her art as made by an American Indian, and this means not only that she cannot use the term “American Indian,” she also cannot use even her state tribal affiliations.³ It may even effectively prevent her from participating in the Indian art market altogether, because mere participation in “American Indian” art shows may qualify as representing her art as American Indian-made. This, Ms. Fontenot unequivocally stated, would in fact cause her financial harm. Complaint (Doc. 1) ¶ 44; Pl.’s Ex. 24, Fontenot Depo. at 58, 82.

Third, as Ms. Fontenot has made plain in other statements, she does in fact believe that she will suffer harm even if solely prevented from using the term “American Indian.” Complaint ¶ 44. As Defendant admits, Ms. Fontenot “believes that advertising her art as American Indian-made is to her financial advantage.” Def.’s State. of Undisp. Facts ¶ 16. This

² The questions to which Ms. Fontenot was responding were properly objected to by counsel. *See supra* Statement of Undisp. Facts ¶ 22; Def.’s Ex. 4, Fontenot Depo. at 68-69.

³ Defendant’s interpretation of the State Act as allowing Ms. Fontenot to market her art as “Patawomeck-made” suffers from a number of problems. The text of the State Act says it is “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 was made by a member of a federally recognized tribe. Okla. Stat. tit. 78, §§ 73-74. The plain reading is that she may not use any term tending to show that her art is made by an American Indian. She cannot, for example, use the term “Native American.” *See* Plaintiff’s Ex. 21, Tehee Depo. at 18-19 (only members of federally recognized tribes can “market their art as Native American.”). Any other reading would be absurd, and would cause confusion to consumers by allowing artists to use only one of two interchangeably-used terms. *See* Def.’s Ex. 1, Tehee Expert Report at 13; Plaintiff’s Ex. 21, Tehee Depo. at 18-19, 24, 41, 43-44.

is corroborated by Defendant’s own arguments, which are based on the size of the American Indian art market, Def.’s Ex. 1, Tehee Expert Report at 11, and the fact that an artist’s lineage is very important to consumers. Def.’s Mot. for Summ. Judg. at 16-17. The term “American Indian” is vital to American Indian artists. *See* Complaint ¶ 44.

In sum, the State Act injures Ms. Fontenot by depriving her of her ability to market her art in the manner she wishes. That is an Article III injury. But apart from that, the Act will cause her financial harm by disadvantaging her participation in the Oklahoma American Indian art market.

IV

THE STATE ACT DOES NOT SURVIVE

SCRUTINY UNDER THE FIRST AMENDMENT

A. The State Act fails strict scrutiny

1. The Act is subject to strict scrutiny because it prohibits fully protected speech

The State Act is a content- and speaker-based restriction on speech. That alone is sufficient to subject the law to strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Turner Broad. Sys., Inc. v. Fed. Comm. Comm’n*, 512 U.S. 622, 658 (1994). But it is also subject to strict scrutiny because it prohibits fully protected speech. The State Act makes it unlawful for certain speakers to represent their art as “American Indian-made” when “distributing, trading, selling, or offering their art.” Okla. Stat. tit. 78, § 74. That is, it prohibits them from using self-descriptive terms related to their identity and their art, which are fully protected by the First Amendment. *Cf. United States v. Alvarez*, 567 U.S. 709, 724-29 (2012)

(*untruthful* statements about being a recipient of the Congressional Medal of Honor are even fully protected speech).

Defendant contends that the State Act prohibits commercial speech because it prohibits speech within a commercial setting—that is, in the context of selling art. Def.’s Mot. for Summ. Judg. at 13. But fully protected speech does not become commercial just because it is spoken within a commercial setting. Just as books do not become commercial speech when they are sold, *Smith v. California*, 361 U.S. 147, 150 (1959), the terms that Ms. Fontenot uses to describe her art do not become commercial speech when used in commercial transactions.

For example, in *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964), the Supreme Court held that a paid editorial warranted full protection under the First Amendment because the message communicated far more than commercial advertising. In that case, the editorial “communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.” *Id.* at 266. According to the Court, if such a communication were not subject to full First Amendment protection, then newspapers would be discouraged from publishing “editorial advertisements,” and it would “shackle the First Amendment” in its attempt to secure wide dissemination of information. *Id.*

Here, when Ms. Fontenot discusses her art with her customers and informs them of her tribal affiliations, she is describing her lineage and culture, and communicating a great deal about her identity and experience, in addition to potentially selling the work. But the State Act prohibits all but members of federally recognized tribes from marketing their art as American

Indian-made. As a result, if Ms. Fontenot's communication of her art as American Indian-made is not fully protected speech, then her ability to fully describe her art and her own identity is likewise "shackled." *See New York Times*, 376 U.S. at 266.

Moreover, the State Act is far broader than Defendant contends; it prohibits speech both within and outside of a commercial setting. The Act makes it unlawful to "*distribute*, trade, sell, or offer for sale or trade" art represented as made by American Indians unless it was made by a member of a federally recognized tribe. Okla. Stat. tit. 78, § 74 (emphasis added). Under the ordinary meaning of the word "distribute," it is not limited to commercial exchanges. *The Merriam Webster Dictionary* (Home & Office Ed. 1995) ("to divide among several or many; to spread out."). Indeed, museums could remove references to an artist's non-federally recognized tribe from the display of their work, or even decline to display their art in the first place.⁴ Therefore, strict scrutiny is the proper standard here.

2. The Act is subject to strict scrutiny because it prohibits inextricably intertwined speech

Even if use of the term "American Indian" was considered commercial speech merely because the State Act regulates it within a commercial setting, the Act is subject to strict scrutiny because it prohibits commercial speech inextricably intertwined with fully protected speech. That is, when artists like Ms. Fontenot represent their art as American Indian-made, they use the term "American Indian" to explain the relationship of their heritage and her art, as well as the content of their art, to potential consumers. Pl.'s Ex. 1, Fontenot Dec. ¶ 5.

⁴ *See, e.g.*, D.E. Smoot, *Artists to return to show while status of law pending*, Muskogee Phoenix (Oct. 29, 2017), available at http://www.muskogee phoenix.com/news/artists-to-return-to-show-while-status-of-law-pending/article_ff5a1373-211d-57cb-b77e-504293e20bd7.html.

Prohibiting the term will inevitably prohibit Ms. Fontenot from speaking to such issues as her American Indian identity, her artistic influences, her artistic motivations, and the meaning of her art. Thus, the prohibition on the term “American Indian,” must be subject to strict scrutiny because it will also prohibit non-commercial speech—speech that is vital to the free exchange of ideas.

For example, in *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 796 (1988), the Supreme Court struck down a law requiring fundraisers to disclose fundraising statistics to potential donors even though that speech was considered commercial—because that speech was inextricably intertwined with fully protected speech. While some of the fundraisers’ speech could be considered commercial, “solicitation is characteristically intertwined with informative and perhaps persuasive speech.” *Id.* Without solicitation, that “information and advocacy would likely cease.” *Id.* For a court to “parcel out the speech, applying one test to one phrase and another test to another phrase” would be “both artificial and impractical.” *Id.*

The same is true here. Ms. Fontenot’s descriptions of her art, even when in the context of selling it, will necessarily be intertwined with “informative and perhaps persuasive speech” about her identity, her art, and issues affecting American Indian communities—which is the subject of her photography. If she is no longer able to represent her art as American-Indian made, “information and advocacy” about these topics will “likely cease.” The State Act should therefore be subject to strict scrutiny, which it cannot meet. *See* Pl.’s Mot. for Summ. Judg. at 11-14.⁵

⁵ Defendant makes no attempt to argue that the State Act survives strict scrutiny—nor could he. Even restrictions on false speech fail strict First Amendment scrutiny. *See Alvarez*, 567 U.S. at 724-29.

B. The State Act fails even commercial speech scrutiny

Even if the Court applies commercial speech scrutiny, the State Act still fails.⁶ For commercial speech to warrant First Amendment protection, “it at least must concern lawful activity and not be misleading.” *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980). If so, the Court next considers (1) whether the asserted governmental interest is substantial; (2) “whether the regulation directly advances the governmental interest asserted;” and (3) “whether it is not more extensive than is necessary to serve that interest.” *Id.*

At the outset, though Defendant claims that the State Act is related to preventing consumer deception, it is never actually claimed that Ms. Fontenot’s representation of her art as American Indian-made is misleading or concerns unlawful activity. Nor does Defendant claim that such representations by any certified artisan or member of a state-recognized tribe are misleading. Defendant simply argues that federal recognition of American Indian tribes is “stringent.” Def.’s Mot. for Summ. Judg. at 20. But that does not mean it is misleading for members of state-recognized tribes to call themselves “American Indian.”

Accordingly, the State Act can only be upheld if *the State can show*: (1) a substantial government interest that is (2) directly advanced by the speech restriction, and (3) the substantial interest cannot be served as well by a “more limited restriction.” *Central Hudson*, 447 U.S. at 566; *see also Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 368 (2002). The Act fails all three prongs.

⁶ And even if the Act prohibits commercial speech, it is still subject to heightened scrutiny because it is a speaker- and content-based restriction. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

1. Defendant has not shown there is a substantial interest in the State Act

Defendant contends that the State has a substantial interest in “preventing consumer deception.” Def.’s Mot. for Summ. Judg. at 15. But Defendant admits that the State possesses no evidence of any customer complaints or prosecutions undertaken regarding misrepresentations of art in violation of the State Act. *See* Pl.’s Ex. 15, Def.’s Resp. to Pl.’s Req. for Admissions No. 6, 7-9, 15, 17. Defendant’s expert would not claim that all state-recognized tribes are fraudulent. Pl.’s Ex. 21, Tehee Depo. at 22. In fact, while Defendant’s expert alluded to a list of “fraudulent” tribes, she admits that the list is limited to “fraudulent Cherokee groups,” that the Patawomeck are not on it, and that she does not even know the criteria used to determine whether a tribe is “fraudulent.” Pl.’s Ex. 21, Tehee Depo. at 13. Due to the fact that there is such scant evidence that a problem exists in Oklahoma, Defendant has not shown a substantial interest in the Act.

2. The State Act does not directly advance the State’s interest

A restriction of commercial speech will not be upheld if “it provides only ineffective or remote support for the government’s purpose.” *Central Hudson*, 447 U.S. at 564. Not only must Defendant show that its interest is directly advanced by the State Act, but also that it does so “to a material degree.” *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

In 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505-07 (1996), the Court held that the State’s interest in promoting temperance was not directly advanced by prohibiting the advertisement of prices for alcohol. The Court so held because the State provided no evidence that the price-advertising ban would “*significantly* reduce alcohol consumption.” *Id.* at 505-06 (emphasis in original). Even though the Court noted it was “common sense” that the

advertising ban would lead to higher prices, and that as a result, there was some evidence that “temperate drinkers of modest means” would consume less, this was not enough to show that consumption would be “significantly” reduced by the ban. *Id.*

Here, Defendant claims that the State Act’s purpose in protecting consumers is directly advanced by prohibiting fraud, instilling confidence in the market, and “urg[ing] clarifying information from artists whose advertising may otherwise be misleading.” Def.’s Mot. for Summ. Judg. at 17. But nowhere does Defendant contend that state-recognized tribes are illegitimate, much less the Patawomeck Tribe. Indeed, Defendant’s own expert witness acknowledged that legitimate state tribes might fail the federal recognition process for reasons outside of their control. Pl.’s Ex. 21, Tehee Depo. at 15, 22. She further testified that there might be artists who meet her criteria for being American Indian, but are prohibited under the State Act from marketing their art as American Indian-made because they cannot gather the documentation necessary to obtain eligibility for their tribe, or because the tribe is not able to gain federal recognition. *Id.*, Tehee Depo. at 12, 15, 17-18.

Nor does the law “urge” clarifying information. *See* Def.’s Mot. for Summ. Judg. at 17. In fact, it bans it. But even if, as Defendant contends, the State Act allowed for an artist to disclose her state-recognized tribe, but prohibited her from claiming to be an American Indian, Defendant provides no evidence that consumer confusion would be reduced at all, much less *significantly* reduced. *See 44 Liquormart*, 517 U.S. at 505-06. In fact, as previously discussed, the reverse is likely true. Defendant’s own expert indicated that:

it is not common practice for a Native American artist [to] only label their work as Native American or American Indian made. Individual artists either label or advertise their goods with their specific tribal affiliation or with their tribal affiliation in tandem with some other identifier.

Def.'s Ex. 1, Tehee Expert Report at 12. Therefore, disclosure of one's state-recognized tribe alone would not add anything to the existing common practice, but only result in *less* information being provided to the consumer. Indeed, Ms. Fontenot already notes her tribal affiliations along with the phrase "Native American Hand Crafted Jewelry." Def.'s Statement of Undisputed Facts ¶ 21. Therefore, the State Act at best "provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564.⁷

3. The State Act regulates more extensively than necessary

The State Act also fails under commercial speech scrutiny because the State's purported interest "could be served as well by a more limited restriction." *Central Hudson*, 447 U.S. at 564. If there are other regulatory options which could "advance the Government's asserted interest in a manner less intrusive" than prohibiting all but members of federally recognized tribes from representing their art as American Indian-made, then the State Act's speech restrictions must be set aside. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 491 (1995). The government must show that the State "carefully calculated the costs and benefits associated with the burden on speech imposed." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561 (2001) (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). Here, "[t]here is no indication that [the State] made any careful calculation of the costs associated with its speech restrictions." *Utah*

⁷ Defendant also contends that the Federal Act "requires some products to contain affirmative representations" about the origins of American Indian art. Def.'s Mot. for Summ. Judg. at 18 (quoting *Native American Arts, Inc. v. Bundy-Howard, Inc.*, 168 F. Supp. 2d 905, 910 (N.D. Ill. 2001)). But this "requirement" is not found in the text of the Federal Act. Indeed, such a reference in the Federal Act can only expressly be found in the implementing regulations *recommending* such disclosures. *See* 25 C.F.R. § 309.8. Thus, even if Defendant and the court in that case were correct, such a situation simply has no applicability to the State Act which contains no disclosure requirement in the text of the Act.

Licensed Beverage Ass'n v. Leavitt, 256 F.3d 1061, 1075 (10th Cir. 2001). Nowhere does Defendant point to any evidence that the burdens of the speech restriction imposed by the State Act on certified Indian artisans and members of state-recognized tribes was ever considered, much less “carefully calculated.” At best, Defendant provides *post hoc* policy rationales for why Oklahoma may choose not to recognize American Indian tribes at the state level. *See generally* Def.’s Ex. 1, Tehee Expert Report.

Indeed, other less-restrictive alternatives that serve the State’s interest in consumer protection abound. It is fundamental under the First Amendment that the default remedy for unpopular speech is “more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *see also New York Times*, 376 U.S. at 270. Thus, rather than limit representations of art as American Indian-made solely to members of federally recognized tribes, the State could require artists who are not members of state-recognized tribes to disclose that fact. For example, an artist could be required to disclose the name of the tribe they are a member of and that it is “state-recognized.” Even Defendant’s expert witness acknowledged that “it would be truth in advertising” for a state-recognized artist to market her art in that manner. Pl.’s Ex. 21, Tehee Depo at 25, 43. In addition, certified artisans could be required to disclose their certification and that they are not a member of the certifying tribe. Indeed, Defendant’s expert also acknowledged that certified artisans could truthfully market their art as “*American Indian-made*” with such a disclosure. *Id.*, Tehee Depo. at 31-32 (emphasis added). And in any event, Defendant’s expert noted that the vast majority of artists already engage in such disclosures voluntarily, Def.’s Ex. 1, Tehee Expert Report at 12, so a

similar state requirement would be substantially less burdensome than an outright prohibition on certain artists' use of the term American Indian.

Any one of those options would provide consumers with more detailed information about the artist while allowing all American Indian artists to truthfully market their art. The State could even engage in a public education campaign to warn the public about fraudulent artists or tribes, or about the differences between state and federal recognition of tribes and the concerns that the State has about tribes recognized by other states.⁸ See *44 Liquormart*, 517 U.S. at 507. But the State Act does none of those things. Instead, it reserves to members of federally recognized tribes the ability to market art as American Indian-made, while silencing members of other tribes. As a result, there is no "reasonable fit" between the State's interest and the means it chose to address that interest through the State Act.

In *Locke v. Shore*, 682 F.Supp.2d 1283, 1294-96 (N.D. Fla. 2010) (titling law holding not appealed), a Florida law limited use of the term "interior designer" to only those licensed as an interior designer, even though the practice of residential interior design was not a licensed profession in the state. The court struck down this advertising restriction under the commercial speech doctrine because, "regardless of how the statute defines the term," it is not misleading for a person lawfully practicing interior design to refer to herself as an interior designer. *Id.* at 1295-96; see also *Abramson v. Gonzalez*, 949 F.2d 1567, 1576 (11th Cir. 1992) (not misleading for an unlicensed person who lawfully practices psychology to refer to herself as a "psychologist," even though a state statute defines "psychologist" as someone with a license);

⁸ Defendant's expert notes that the Cherokee Nation maintains a list of allegedly "fraudulent" tribes. See Def.'s Ex. 1, Tehee Expert Report at 8. There is no reason this list could not be shared with the State, or that the State could not publish its own list.

see also Byrum v. Landreth, 566 F.3d 442, 446–48 (5th Cir. 2009) (not misleading for an unlicensed person who lawfully practices interior design to call herself an “interior designer,” even though a statute defines “interior designer” as someone with a license).

According to the *Locke* court, it was unlikely that most consumers knew that the state defined “interior designer” to only include licensed designers, and instead viewed it as a “stretch” that anyone would understand the term in such a limited manner. 682 F. Supp. 2d at 1296. Further, the court held that the state could not “prohibit a person from describing her lawful services using words of her own selection, so long as they are true and not misleading,” because in modern times, “a ban on using the most popular term ordinarily used to describe a person’s lawful work imposes a burden that is not inconsequential.” *Id.*

The same is true here. Ms. Fontenot is a member of the Virginia-recognized Patawomeck tribe and she is certified as an artisan by the Citizen Potawatomi Nation based on her descendancy from that tribe. Pl.’s Ex. 1, ¶ 3. Thus, she is literally an American Indian,⁹ and is considered as such under the Federal Act. Regardless of how Oklahoma defines “American Indian,” it is not misleading for Ms. Fontenot to call herself an American Indian artist. *See Locke*, 682 F. Supp. 2d at 1295-96. And yet, under the State Act, only if Ms. Fontenot refrains from calling her art “American Indian-made” may she lawfully sell her art in Oklahoma. It is unlikely that Oklahoma consumers are aware that the State has so narrowly defined who an American Indian artist is. Def.’s Ex. 1, Tehee Expert Report at 13; Pl.’s Ex. 21, Tehee Depo. at 25. Moreover, consumers are unlikely to be aware of any difference in

⁹ Defendant’s expert also acknowledged that certified artisans could truthfully market their art as “*American Indian-made*.” Plaintiff’s Ex. 21, Tehee Depo. at 31-32 (emphasis added).

recognition practices between the State and federal government—which itself saw fit to protect the right of members of state-recognized tribes to describe their art as American Indian-made when it amended the Federal Act in 1990.

Defendant contends that it is necessary to limit the State Act to members of federally recognized tribes because those tribes have long histories and strongly “police their membership rolls” to “zealously protect their identity.” Def.’s Mot. for Summ. Judg. at 20-21. But state-recognized tribes have long histories as well.¹⁰ Moreover, there is no guarantee (or evidence provided by Defendant) that once recognized by the federal government, tribes will maintain strict guidelines for membership. Indeed, when asked if she knew of federally recognized tribes allowing membership to people she does not consider American Indian, Defendant’s expert witness gave the example of the Cherokee Freedmen—a group that was given citizenship in the federally recognized Cherokee Nation despite many members of that group holding no “Cherokee blood.” Pl.’s Ex. 21, Tehee Depo. at 14-15.

Defendant also contends that if the State Act is declared unconstitutional, Oklahoma will be forced to recognize American Indian tribes it would prefer not to. Def.’s Mot. for Summ. Judg. at 21-22. But that is not true. The State will not be forced to recognize anything—it will merely be prevented from stifling the truthful speech of artists from tribes recognized by *other* states. The same is already true for federally recognized tribes—which Oklahoma has no control over. *See* Pl.’s Ex. 21, Tehee Depo. at 12, 14. And in any event, the State’s concern about rogue state-recognition processes is severely undercut by the State’s insistence that the

¹⁰ Historical references to the Patawomeck Tribe date to at least the early 1600s, with some references to as early as the late 1200s, for example. *See* <http://patawomeckindiantribeofvirginia.org/ct-menu-item-3>.

State Act “seeks merely to encourage members of state-recognized tribes to market their art in a way that American Indian artists already do.” *See* Def.’s Mot. for Summ. Judg. at 23. In other words, if the State were truly concerned about other states’ tribal recognition practices, then it makes no sense for Defendant to interpret the State Act as only *encouraging* artists who are not members of federally recognized tribes to disclose their tribe.

Defendant offers two final contentions that the State Act survives under the First Amendment: (1) the Federal Act “has withstood many First Amendment challenges,” *see* Def.’s Mot. for Summ. Judg. at 14; and (2) that Ms. Fontenot has never challenged the Federal Act. *See id.* at 15. But neither fact has any bearing on whether the *State Act* is constitutional.¹¹ In this case, Ms. Fontenot claims that the State Act is unconstitutional because it prohibits certified artisans and members of state-recognized tribes from representing their art as American Indian-made. The Federal Act does not impose such restrictions. Thus, any arguments about the Federal Act’s constitutionality are irrelevant to this lawsuit.

V

THE STATE ACT IS PREEMPTED BY FEDERAL LAW

The Federal Act preempts Oklahoma’s State Act because the State Act is an obstacle to Congress’ intended protection of certified artisans and artists who are members of state-recognized tribes. Defendant argues that there is a presumption against preemption of state

¹¹ Under Defendant’s theory, every individual is implicitly recognizing the constitutionality of the hundreds of thousands of laws on the books by not challenging them. That cannot be the case. In any event, Ms. Fontenot does not have standing to challenge the Federal Act’s definition of “Indian,” as she is eligible under two of that Act’s three categories. Nor has she had standing since March 1, 2004, when she first received her artisan certification letter from the Citizen Potawatomi Nation. *See* Plaintiff’s Ex. 3.

laws dealing with traditional state regulatory powers, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), but that presumption does not apply here.

First, regulating American Indians and American Indian tribes is a duty traditionally undertaken by the *federal* government, not the states. *See* U.S. Const. art. I, § 8, cl. 3; *see also, e.g.*, Christopher A. Karns, *State Taxation as a Means of Diminishing the Tribal Land Base*, 42 Am. U. L. Rev. 1213, 1213 (1993) (“The Federal Government’s policy has traditionally been to exclude states from American Indian affairs.”). Thus, even if regulating truth-in-advertising is a traditional state power, regulating truth-in-advertising of American Indian-made art is not. The federal Indian Arts and Crafts Board was created in 1935, and one of its stated duties is prosecuting those who misrepresent art as American Indian-made. Def.’s Ex. 2 at 4. Of the 12 states that have enacted their own laws to aid in enforcement of misrepresentations of American Indian-made art, most do not conflict with the Federal Act,¹² and most were enacted 30-40 years after the creation of the Indian Arts and Crafts Board.¹³ Indeed, Oklahoma’s original State Act was not enacted until 1974. *See* Okla. Stat., tit. 78, § 71-75. Thus, states have not traditionally regulated American Indians and, even when they have, they have not conflicted with the Federal Act. As a result, the presumption against preemption does not

¹² Of those 12, only two states (Minnesota and Oklahoma) expressly exclude artists who are members of state-recognized tribes. The remaining states define American Indian similarly to the Federal Act’s three categories.

¹³ *See* Alaska Stat. § 45.65.010-070 (first enacted in 1961); Ariz. Rev. Stat. Ann. § 44-1231 *et seq.* (first enacted in 1975); Cal. Bus. & Prof. Code § 17569 (first enacted in 1965); Col. Rev. Stat. Ann. § 6-15-201 *et seq.* (first enacted in 1975); Minn. Stat. Ann. § 325F.43 (first enacted in 1937); Mont. Code Ann. § 30-14-601 (first enacted in 1947); Nev. Rev. Stat. § 597.900 (first enacted in 1967); N.M. Stat. Ann. § 30-33-1 *et seq.* (first enacted in 1929); Okla. Stat., tit. 78, § 71-75 (first enacted in 1974); S.D. Cod. Laws § 37-7-2.1 *et seq.* (first enacted in 1974); Tex. Bus. & Com. Code § 17.851 (first enacted in 1989).

apply in this case. *United States v. Locke*, 529 U.S. 89, 108 (2000) (presumption against preemption “is not triggered when the State regulates in an area where there has been a history of significant federal presence.”).

Defendant argues that because the State and Federal Acts share the same goal, the former is not preempted by the latter. First, they do not share the same goal. The Federal Act is codified at 25 U.S.C. §§ 305-310 under the title “Promotion of Social and Economic Welfare” for Indians. To further that general purpose, the Federal Act created the Indian Arts and Crafts Board to assist the Secretary of the Interior in promoting “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.” *Id.* § 305a. The Federal Act helps promote and develop Indian artists, broadly defined, and to expand markets for their work by protecting them from fraudulent competition by non-Indians. In so doing, and as discussed in Pl.’s Mot. for Summ. Judg. at 18-21, Congress rejected defining American Indians as only those who are members of federally recognized tribes and giving protections to them alone. In contrast, the purported 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, and it does so by narrowing who may call themselves “American Indian” to a small subset of politically favored tribes.

But even if the State Act and the Federal Act shared the same goal, the State Act is still preempted. The U.S. Supreme Court has held that a “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy.” *Arizona v. United States*,

567 U.S. 387, 406 (2012) (quoting *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971)) (alteration in original). Regardless of whether the purpose is to protect the public or artists from misrepresentations, Oklahoma uses the “technique” of excluding artists who are members of state-recognized tribes and who are certified Indian artisans from marketing their art in Oklahoma. Such an exclusion runs counter to Congress’ deliberate choice of allowing certified artisans and members of state-recognized tribes to market their art as American Indian-made.¹⁴

Defendant also argues that the inclusion of a preemption clause in an early draft of the Federal Act and its subsequent removal means there is no preemption here.¹⁵ Defendant quotes Rep. Rhodes as stating, “Upon further reflection...the section in the bill that would have preempted State legislative actions in this field has been deleted.” Def.’s Mot. for Summ. Judg. at 30. But the full quote states: “...and based on correspondence received from concerned state legislators, it became apparent that many States are ahead of the Congress with regard to enacting legislation designed to protect genuine Indian arts and crafts.” Def.’s Ex. 6, 136 Cong. Rec. H8291-01 (1990). In addition, Rep. Rhodes went on to emphasize that the preemption clause was removed to allow for “complementary” legislative initiatives by the states. *Id.* Furthermore, the House report on the Federal Act clarifies what Rep. Rhodes meant by “complementary” state initiatives when it notes that the preemption clause was removed

¹⁴ The oldest and largest national organization of American Indian and Alaska Native tribal organizations, National Congress of American Indians (NCAI), agrees, and issued an official resolution condemning the State Act as harmful and preempted by the Federal Act. NCAI Res. PHX-16-068 (2016), available as Pl.’s Ex. 23.

¹⁵ For the full text of the committee substitute for the Act that included the preemption clause that was subsequently removed, *see* Pl.’s Ex. 22, H.R. Rep. No. 101-400, pt. 1 (Feb. 6, 1990).

to permit states “to protect their own Indian arts and crafts, *provided that they do not interfere with federal law.*” Def.’s Ex. 2, H.R. No. 101-400(II), at 8 (emphasis added).

Therefore, when the full statements of Rep. Rhodes are considered alongside the House report on the Federal Act, the best understanding of the meaning for the removal of the preemption clause becomes clear: Congress allowed states to continue enforcing state laws regarding American Indian arts and crafts so as to serve, not subvert, the goals of the Federal Act. Oklahoma’s State Act does not complement the Federal Act, but interferes with the aim of the Federal Act, which grants protections to American Indian artists, *broadly defined*, including members of state-recognized tribes such as Ms. Fontenot. The State Act is therefore preempted.

VI

THE STATE ACT VIOLATES THE COMMERCE CLAUSE

Defendant contends that the State Act does not violate the dormant Commerce Clause because 1) it does not discriminate against out-of-state commerce, and 2) it does not greatly burden interstate commerce. Def.’s Mot. for Summ. Judg. at 25-28. Both arguments fail.

First, the State Act discriminates against out-of-state commerce because it burdens members of state-recognized tribes for the benefit of members of federally recognized tribes. Oklahoma does not recognize tribes at the state level. 81 Fed. Reg. 5019-02. All state-recognized tribes, which are excluded by the State Act, are based out-of-state. Indeed, Ms. Fontenot is a member of the Virginia-based Patawomeck Indian Tribe, and she resides in Santa Monica, California. Pl.’s Ex. 1, ¶¶ 2-3. Oklahoma is, however, home to 39 federally

recognized tribes. Def.’s State. of Undisp. Facts ¶ 6. The practical effect of the State Act, then, is to disadvantage artists from out-of-state.

Defendant contends that the law is not discriminatory because some out-of-state citizens might also benefit, or because it might burden some members of state-recognized tribes who live in Oklahoma. Def.’s Mot. for Summ. Judg. at 26-27. But a law does not cease being discriminatory just because it may, incidentally, benefit out-of-state citizens, or burden some residents. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 194 (1994) (“Although the tax also applies to milk produced in Massachusetts, its effect on Massachusetts producers is entirely (indeed more than) offset by the subsidy provided exclusively to Massachusetts dairy farmers.”). Where the plain effect is to burden out-of-state commerce, the law is discriminatory. *See id.* at 196 (law is discriminatory where 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.”).

Because the State Act is discriminatory, it is “virtually per se...invalid[],” and can only survive if the government can show it has no non-discriminatory means of serving a legitimate purpose, which it has not even attempted to do. *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. v. Davis*, 553 U.S. 38, 338-39 (2007); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

Second, Defendant argues that the State Act survives the *Pike* balancing test because “it only regulates” how artists may “advertise their goods, which they may freely sell.” Def.’s Mot. for Summ. Judg. at 28. But speech bans, including advertising bans, are a “drastic” measure, *44 Liquormart*, 517 U.S. at 505, which should only be implemented as a last resort.

See Thompson, 535 U.S. at 373. A “ban on using the most popular term ordinarily used to describe a person’s lawful work imposes a burden that is not inconsequential.” *Locke*, 682 F.Supp.2d at 1296. Further, the State Act effectively prohibits Ms. Fontenot from participating in the Oklahoma American Indian art market because even if she refrains from using the term “American Indian” in her advertising, she still shows her work *at American Indian art shows*. Thus, her participation at least implies that she is an American Indian artist. And because Defendant has ample alternatives to address any problems with consumer deception, the State Act must fall under the Commerce Clause. *See supra* at 18-19; Pl.’s Memo. in Supp. of Mot. for Summ. Judg. at 26.

VII

THE STATE ACT VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

Defendant argues that the State Act survives rational basis scrutiny under the Equal Protection and Due Process clauses because it “advances the legitimate state interest of...protecting consumers from potentially misleading statements.” Def.’s Mot. for Summ. Judg. at 24. But as noted above, Defendant’s interpretation of the State Act will *cause* consumer confusion rather than prevent it. *Supra*, at 16-17. Further, prohibiting two groups of individuals (members of state-recognized tribes and certified Indian artisans) recognized as American Indians under the Federal Act from representing their art as American Indian-made in Oklahoma is a fundamentally irrational approach to preventing false and misleading statements. Pl.’s Memo. in Supp. of Mot. for Summ. Judg. at 28. Defendant contends that favoring federally recognized tribes is rational because of the “rigorous process associated with

federal tribal recognition and membership.” Def.’s Mot. for Summ. Judg. at 24. But once Congress recognizes a tribe, it allows the tribe itself to dictate tribal eligibility. Tribes, then, can allow whomever they choose into the tribe. As Defendant’s expert noted at deposition, this means that even federally recognized tribes can enroll people she would not consider American Indian. Pl.’s Ex. 21, Tehee Depo. at 14. In fact, as previously noted, the Cherokee Freedmen were given citizenship in the Cherokee Nation even though many members of that group lacked actual lineal connections to the tribe. Pl.’s Ex. 21, Tehee Depo. at 14-15.

Moreover, neither Defendant, nor Defendant’s expert witness, has any evidence that state recognition is insufficient to prevent illegitimate tribes from gaining official recognition. *See id.*, Tehee Depo. at 21-22. Nor does Defendant or Defendant’s expert contend that the Patawomeck Tribe is illegitimate or fraudulent. *See id.*, Tehee Depo. at 13. In fact, Defendant’s expert admits that she lacks knowledge of the Patawomeck Tribe, and has only “a degree” of familiarity with state-recognized tribes generally. *Id.*, Tehee Depo. at 20, 26-27. Furthermore, even individuals who meet Defendant’s expert’s own criteria for being American Indian are prohibited under the State Act from marketing their art as American Indian-made, because they are not members of a federally recognized tribe. *Id.*, Tehee Depo. at 12, 15, 17-18. As a result, far from drawing the “most obvious line there is,” Def.’s Mot. for Summ. Judg. at 25, the line drawn in the State Act arbitrarily discriminates against members of state-recognized tribes and certified artisans in violation of the Equal Protection and Due Process Clauses.

CONCLUSION

For the reasons stated above, the Court should *deny* Defendant's Motion for Summary Judgment and *grant* Ms. Fontenot's Motion for Summary Judgment.

DATED: November 14, 2017.

Respectfully submitted,

s/Caleb R. Trotter

CALEB R. TROTTER (Cal. Bar No. 305195*)

MERIEM L. HUBBARD (Cal. Bar No. 155057*)

ANASTASIA P. BODEN (Cal. Bar No. 281911*)

Pacific Legal Foundation

930 G Street

Sacramento, California 95814

Telephone: (916) 419-7111

Facsimile: (916) 419-7747

Email: crt@pacificlegal.org

Email: mlh@pacificlegal.org

Email: apb@pacificlegal.org

**Pro Hac Vice*

AMBER M. GODFREY

OBA No. 22152

Godfrey Law & Associates, PLLC

1901 N. Classen Boulevard, Suite 222

Oklahoma City, Oklahoma 73106

Telephone: (405) 525-6671

Facsimile: (405) 525-6675

Email: amber@godfreyandassociates.net

Attorneys for Plaintiff Peggy Fontenot

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Oklahoma through the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

s/Caleb R. Trotter
CALEB R. TROTTER