

**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 RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

Mithun Mansinghani, OBA #32453
Solicitor General

DIXIE L. COFFEY, OBA #11876
Assistant Attorney General

Email: Mithun.Mansinghani@oag.ok.gov

Email: Dixie.Coffey@oag.ok.gov

RANDALL YATES, OBA 30304
Assistant Solicitor General

Oklahoma Office of the Attorney General
313 NE 21st Street

Oklahoma City, OK 73105

Phone: (405) 521-3921

Fax: (405) 521-4518

Email: Randall.Yates@oag.ok.gov

Counsel for Defendant Mike Hunter

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**DEFENDANT’S RESPONSE TO
PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT**

Defendant Mike Hunter, in his official capacity as the Attorney General of Oklahoma, respectfully requests that the Court deny Plaintiff’s Motion for Summary Judgment.

INTRODUCTION

This case ultimately boils down to one dispute: Did the Oklahoma Legislature act reasonably in limiting the trademark “American-Indian made” to those works of art that were made by enrolled members of federally-recognized tribes, or does the Constitution mandate that the State adopt Plaintiff’s preferred definition?

It can hardly be disputed that Oklahoma has a strong and legitimate interest in preventing consumer deception and thereby promoting the market of authentic American Indian art. Nor does Plaintiff argue that the trademark-like protections of both the Federal Act and Oklahoma Act are a reasonable method to further those interests. Thus, the problem facing the State is: How should the State appropriately limit the use of the trademark of “American-Indian made” so as to reduce as much as possible the potential for consumers to be misled?

Plaintiff acknowledges that “tribal enrollment is a complex issue” and it is “difficult to define who is American Indian.”¹ Her own preferred definition of the term excludes many people who identify as American Indian, including Plaintiff herself for most of her art career. Yet Plaintiff also claims the Constitution mandates *her* definition of American Indian, rather than the definition chosen by the State Legislature in exercise of its policy

¹ Pltf. MSJ Br., Doc. 33, at 16, 20.

judgment as the body composed of democratic representatives of the consumers of Oklahoma. There is no legal or factual basis for such a conclusion.

The course Oklahoma has chosen is reasonable. Verified, public American-Indian identity historically in this nation, and in Oklahoma in particular, has at its core been enrollment in federally-recognized Indian tribes. These tribes have met the rigorous standards associated with federal recognition, and their enrollment practices are well-vetted and well-established. Thus, most reasonable definitions of American Indian would include members of federally-recognized tribes. Indeed, such a definition is present throughout the vast body of federal Indian law.

Outside of enrolled members of federally-recognized tribes, claims to American Indian identity run the gamut from individuals told family stories of American-Indian heritage to those eligible for membership but not enrolled in a federally-recognized tribe. Consumers have their own connotations—some will undoubtedly be strict with their definition, others will not. Unlike the well-understood federal recognition process, many consumers may not think that those “certified” as “artisans” or members of tribes recognized only by a single state can, solely by that designation, lay claim to “Indian” heritage and identity. Thus, the label “American Indian” for products created by such persons has greater potential to mislead or fail to align with an Oklahoma consumer’s notion of that term. Even so, under the Act, artists with potentially colorable claims to American-Indian identity, but who are not members of a federally recognized tribe, are free to disclose whatever truthful claim they have to the consumer. For example, if an artist like Plaintiff is a member of the Patawomeck Indian Tribe of Virginia, she may say so. The Act thus balances the need to

guard against consumer deception with the ability of artists to make truthful advertising that is less likely to mislead by using a generic term like “American-Indian” in lieu of a specific claim of heritage. Such reasonable legislation does not run afoul of the Constitution.

RESPONSE TO PLAINTIFF’S STATEMENT OF UNDISPUTED FACTS

¶¶ 1-2. Defendant does not dispute ¶¶ 1-2 of Plaintiff’s Statement of Undisputed Facts (“Plaintiff’s Statement”).

¶ 3. Defendant disputes ¶ 3 of Plaintiff’s Statement because Plaintiff’s claim to Indian artisanship cannot be presented in a form that would be admissible in evidence.² Plaintiff cites a letter from March 1, 2004, but this is inadmissible hearsay and Plaintiff lists no witness that can introduce it at trial.³ Furthermore, Plaintiff lists no witness that can testify that the asserted certification was in compliance with 25 C.F.R. § 309.25. Nor can Plaintiff produce the underlying documentation that purportedly justified the alleged certification.⁴ Defendant does not dispute that the Citizen Band Potawatomi Nation is a federally-recognized Indian tribe.

¶¶ 4-9. Defendant does not dispute ¶¶ 4-9 of Plaintiff’s Statement.

² Fed. R. Civ. Pro. 56(c)(2); Fed. R. Evid. 802.

³ See *Thomas v. IBM*, 48 F.3d 478, 485 (10th Cir. 1995) (hearsay testimony should not be considered on summary judgment).

⁴ Plaintiff cannot produce documents to show lineage pursuant to 25 C.F.R. § 309.25(a)(1). Nor does the letter of March 1, 2004, cite tribal authority that this was an act of the governing authority pursuant to 25 C.F.R. § 309.25(a)(2). Furthermore, 25 C.F.R. § 309.25(b) prohibits a tribe from imposing a fee for certifying an artisan. But the letter of March 1, 2004, states Plaintiff “uses the proceeds from the sale of her artwork” to promote a Native American art piece. It is unclear if Plaintiff would have received this letter without her contribution or if this would be a “fee” in violation of the regulation.

¶ 10. Paragraph 10 of Plaintiff's statement is a legal conclusion. That legal conclusion is disputed: the term "recognized" in the prior law may have been interpreted to mean "federally recognized" because the law was passed before the proliferation of state-recognized tribes.⁵ Regardless, the previous version of the Oklahoma Act is immaterial to this case and to the constitutionality of its current form.

¶ 11. Defendant does not dispute ¶ 11 of Plaintiff's Statement.

¶ 12. Paragraph 12 of Plaintiff's Statement is a legal conclusion. To the extent that ¶ 12 of Plaintiff's Statement suggests that persons who are members of state-recognized tribes and also members of federally-recognized tribes are excluded from the Act's definition, Defendant disputes this conclusion. Also, to the extent that Plaintiff's Statement suggests that those enrolled only in state-recognized tribes are for any and all purposes "American Indian," Plaintiff disputes this allegation and it is unsupported by any evidenced offered by Plaintiff.

¶ 13. Defendant does not dispute ¶ 13 of Plaintiff's Statement.

¶ 14. Defendant does not dispute that "[a]ny merchant who knowingly and willfully tags or labels any article as being an American Indian art or craft when it does not meet the specifications of the American Indian Arts and Crafts Sales Act of 1974 shall be guilty of [a misdemeanor]." ⁶

¶ 15. Defendant disputes ¶ 15 of Plaintiff's Statement to the extent that it suggests that Oklahoma cannot be home to individual members of state-recognized tribes.

⁵ Def. MSJ, Doc. 35, at 21.

⁶ Okla. Stat. tit. 78, § 75.

¶ 16. Paragraph 16 of Plaintiff's Statement is immaterial. Contrary to Plaintiff's contention that this law is the idiosyncratic preference of a single Oklahoma-based tribe, HB 2261 passed the Oklahoma House 90-0 and the Senate 35-9, indicating that the labeling system and definition of American Indian are widely supported and accepted in Oklahoma.⁷

¶¶ 17-23. Defendant does not dispute ¶¶ 17-23 of Plaintiff's Statement.

¶ 24. Paragraph 24 of Plaintiff's Statement is a legal conclusion. Defendant raises the same issues regarding Plaintiff's Indian artisanship as described in response to ¶ 3 of Plaintiff's Statement. Moreover, Plaintiff may also have a civil action instituted against her to the extent that she falsely markets her art as being made by a member of a particular tribe (*e.g.* if she markets her art as Cherokee-made). *See* 25 U.S.C. § 305e(b).

ARGUMENT AND AUTHORITIES

A. The American Indian Arts and Craft Sales Act does not violate the First Amendment.

1. The American Indian Arts and Craft Sales Act involves only commercial speech.

Contrary to Plaintiff's contention, only commercial speech is at issue. Commercial speech is speech that "does no more than propose a commercial transaction."⁸ The Oklahoma Act applies only when goods are "distribute[d], trade[d], s[old], or offer[ed] for

⁷ H.B. 2261, 55th Leg., 2d Reg. Sess. (Okla. 2016).

⁸ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)).

sale or trade.”⁹ Plaintiff argues that because the Oklahoma Act includes the word “distribute” it covers non-commercial conduct.¹⁰ In other words, Plaintiff asserts that the Oklahoma Act would apply even if she merely gave away an art piece.¹¹ Plaintiff’s interpretation is both incorrect and should be rejected to avoid any constitutional concerns Plaintiff raises.

First, the context of the word “distribute” clearly indicates it is meant to encompass only distribution in a commercial setting. Under the interpretive canon *noscitur a sociis*, when a word in a statute is part of a list, that “word is known by the company it keeps.”¹² The canon “is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to [statutes].”¹³ For example, in *Yates v. United States*,¹⁴ the Supreme Court interpreted the term “tangible object” in the Sarbanes-Oxley Act of 2002¹⁵ to refer not to *any* tangible object—such as a fish—but only to tangible objects involving records or documents. This was because the term appeared in a list with other words, most notably “records” and “documents,” that indicated “tangible object” referred “specifically to the subset of tangible objects involving records and documents, *i.e.*, objects used to record or preserve information.”¹⁶

⁹ Okla. Stat. tit. 78, § 74.

¹⁰ Pltf. MSJ Br., Doc. 33, at 14, n. 2.

¹¹ Pltf. MSJ Br., Doc. 33, at 14, n. 2.

¹² *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 694 (1995).

¹³ *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961); *see also Beecham v. United States*, 511 U.S. 368, 371 (1994) (“That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well”).

¹⁴ 135 S. Ct. 1074 (2015).

¹⁵ 18 U.S.C. § 1519.

¹⁶ *Yates*, 135 S. Ct. at 1085.

This case is even simpler than *Yates* because, even under a dictionary definition, the term “distribute” can be limited to the commercial context, such as “[t]o market (a commodity) under a franchise in a particular area especially at wholesale.”¹⁷ That commercial definition is confirmed by the *noscitur a sociis* canon because the term “distribute” is part of a list that encompasses other terms—*i.e.*, sell, trade, or offer for sale—that apply only to commercial transactions, and thus limits the term’s scope to commercial transactions. Noticeably absent from the enumeration are unambiguous non-commercial terms such as “donate” or “gift.” Further confirming this is the fact that the Act is titled the American Indian Arts and Crafts ***Sales*** Act of 1974.¹⁸ Indeed, Plaintiff herself admits that, under the Act, “only an ‘American Indian’ as defined by that statute may ***market*** their art as made by an American Indian”¹⁹—effectively conceding that the Act restricts marketing, which is quintessential commercial speech.

Second, courts assume that the legislature did not intend to enact unconstitutional legislation. Thus, “where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.”²⁰ In sum, under the Oklahoma Act, “distribution” is appropriately read to refer to commercial transactions only. As a result, the Act regulates only commercial speech and must thus be evaluated under the standards

¹⁷ *Distribute*, *Webster’s Third New International Dictionary* (1993).

¹⁸ Okla. Stat. tit. 78, § 71 (Emphasis added). *See, e.g., F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 388 (1959) (titles can be useful devices to resolve doubt about the meaning of a statute).

¹⁹ Pltf. MSJ Br., Doc. 33, at 2, ¶ 8.

²⁰ *Jones v. United States*, 526 U.S. 227, 239 (1999) (citations omitted).

for adjudicating commercial speech regulations.

2. Commercial speech regulations are subject to the *Central Hudson* test regardless of whether they are specific to a particular subject matter.

Plaintiff argues that any speech restriction in the Oklahoma Act is subject to strict scrutiny because it regulates the advertising's particular subject matter, *i.e.*, American Indian art.²¹ But “laws restricting commercial speech, unlike laws burdening other forms of protected expression, need only be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny.”²²

None of the cases on which Plaintiff relies to advance her strict-scrutiny application argument were limited to commercial advertising.²³ In *Reed*, a town ordinance subjected signs to varying restrictions based on certain categories including whether the signs were “Ideological,” “Political,” or “Temporary Directional”—that is, signs directing the public to a church or “qualifying event.”²⁴ The ordinance did not regulate purely commercial speech. The Supreme Court found the restrictions content-based and subject to strict scrutiny.²⁵ Likewise the speech restriction at issue in *U.S. v. Playboy* was not aimed at the content of Playboy's advertising, but at its sexual content.²⁶ Nor was commercial advertising at issue in *U.S. v. Alvarez*, where the Supreme Court applied strict scrutiny to the Stolen Valor Act, which made it a crime to falsely claim receipt of a military decoration.²⁷

²¹ Pltf. MSJ Br., Doc. 33, at 14.

²² *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

²³ Pltf. MSJ Br., Doc. 33, at 9-11.

²⁴ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2225 (2015).

²⁵ *Reed*, 135 S. Ct. at 2224.

²⁶ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000).

²⁷ *U.S. v. Alvarez*, 567 U.S. 709, 724-25 (2012). The same is true for other cases Plaintiff cites. *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571-72, 579 (2011) (holding that there

Rather than the strict scrutiny Plaintiff desires, the Supreme Court consistently evaluates regulation of commercial advertising under the “intermediate scrutiny”²⁸ standard described in *Central Hudson*, even when they are content based.²⁹ Indeed, speech restrictions in commercial advertising almost invariably involve a particular subject matter and speaker. In *44 Liquormart v. Rhode Island*, for example, Rhode Island’s complete ban on liquor price advertising was subject to *Central Hudson* review.³⁰ In fact, in that case the Supreme Court held that the *Central Hudson* test was the most stringent review available for commercial speech.³¹ Similarly, in *Rubin v. Coors Brewing Co.*, the Supreme Court applied the *Central Hudson* test even though the commercial speech at issue involved the subject matter of alcohol content.³² The speech restriction in *Central Hudson* itself had applied only to utility advertising.³³ Furthermore, the restrictions in these cases were speaker-based—the liquor-advertising ban affected only liquor retailers, the beer label ban affected only beer producers, and the utility advertising ban affected only utility providers—yet the Court applied *Central Hudson* scrutiny rather than strict scrutiny.³⁴

was no need to determine if the pharmacy records at issue were purely commercial speech because the regulation would not pass commercial speech scrutiny, and also stating that “commercial speech can be subject to greater governmental regulation than noncommercial speech.”); *Retail Dig. Network, LLC v. Prieto*, 861 F.3d 839, 846 (9th Cir. 2017) (en banc) (“*Sorrell* did not mark a fundamental departure from *Central Hudson*’s four-factor test, and *Central Hudson* continues to apply.”).

²⁸ *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24 (1995).

²⁹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980).

³⁰ 517 U.S. 484, 504-05 (1996).

³¹ *44 Liquormart*, 517 U.S. at 501.

³² 514 U.S. 476, 478, 482-83 (1995).

³³ 447 U.S. 557, 580 (1980) (Stevens, J., concurring).

³⁴ See also *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983) (commercial speech scrutiny applied to statute that singled out contraceptives and contraceptive providers); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 415 (1993) (commercial speech scrutiny

Plaintiff's proposed test would subject virtually *all* commercial speech regulations to strict scrutiny, creating the possibility that, as Judge Posner put it, all of "trademark law would be unconstitutional."³⁵ The same would be true for general prohibitions of misleading speech in commercial advertising, since (Plaintiff would argue) such speech is based on the content of it both being "commercial" and "misleading."³⁶ None of this comports with binding precedent. Rather, the appropriate test to apply in this case is *Central Hudson's* standard, not strict scrutiny. The practices of other circuits since *Reed* reinforce this conclusion.³⁷

3. The American Indian Arts and Craft Sales Act passes the *Central Hudson* test because there is a reasonable fit between preventing consumer deception and the State's labeling system.

As described in Defendant's Motion for Summary Judgment, the State has a substantial interest in preventing consumer deception, especially in the authentic American Indian art

applied to a municipal ordinance that singled out news racks for commercial handbills); *In re RMJ*, 455 U.S. 191, 203-04(1982) (lawyer advertising).

³⁵ *Waldron Corp.*, 399 F.3d at 873. For example, Oklahoma's regulation of use of the label "honey" may be unlawful under Plaintiff's theory. *See* Okla. Stat. tit. 78, §§ 81-82.

³⁶ *See, e.g.*, Oklahoma Deceptive Trade Practices Act, Okla. Stat. tit. 78, §§ 51-56.

³⁷ *See, e.g.*, *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 111-12 (2d Cir. 2017) (finding a commercial speech restriction to be content-based and then applying *Central Hudson* scrutiny); *Kiser v. Kamdar*, 831 F.3d 784, 789 (6th Cir. 2016) ("[In regulating commercial speech] the government is not required to use the 'least restrictive means' to achieve its interest."); *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) ("[A]lthough laws that restrict only commercial speech are content based, such restrictions need only withstand intermediate scrutiny." (citing *Reed* and *Central Hudson*)); *Contest Promotions, LLC v. City & Cty. of San Francisco*, No. 17-15909, 2017 WL 4773041, at *3 (9th Cir. Oct. 23, 2017) ("Restrictions on commercial speech are subject to intermediate scrutiny under *Central Hudson*."); *Ocheesee Creamery LLC v. Putnam*, 851 F.3d 1228, 1234 (11th Cir. 2017) ("Challenges to restrictions on commercial speech are evaluated according to the rubric set forth by the Court in *Central Hudson*.").

market.³⁸ This interest is the most common reason “commercial speech can be subject to greater governmental regulation than noncommercial speech.”³⁹ The State’s interest is directly advanced by prohibiting potentially misleading advertising.⁴⁰ This is especially true with the Act at issue because origin and authenticity drive this particular market.⁴¹

Plaintiff does not appear to seriously dispute any of these broader points. Rather, her main contention concerns how the State defines “American Indian.” But all parties agree that “tribal enrollment is a complex issue” and it is “difficult to define who is American Indian.”⁴² Thus, the question is: With respect to this difficult judgment call, does the State Legislature have the discretion to reasonably define the term for the purposes of this Act or does the Constitution mandate that Plaintiff’s definition must be used?

“The difficult policy choices reflected in a statute are for the legislature to make.”⁴³ The Oklahoma Legislature is the entity best situated to determine the contours of the meaning of “American Indian” in the mind of an average Oklahoma art consumer for purposes of crafting a law that prevents consumers from potentially being misled. As explained in more detail in Defendant’s Motion for Summary Judgment, the State has reasonably limited the definition of “American Indian” to those enrolled in tribes

³⁸ Def. MSJ, Doc. 35, at 15-17.

³⁹ 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993)).

⁴⁰ *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).

⁴¹ Def. MSJ, Doc. 35, Ex. 1, at 11-12.

⁴² Pltf. MSJ Br., Doc. 33, at 16, 20; *see also* Defs MSJ, Doc. 35, at 9, ¶¶ 24-25.

⁴³ *Lujan v. Regents of Univ. of California*, 69 F.3d 1511, 1518 (10th Cir. 1995); *see also, In re Walker*, 959 F.2d 894, 900 (10th Cir. 1992) (“[W]e cannot substitute our judgment for that of the Oklahoma legislature.”).

recognized by the federal government. Federally recognized tribes are well-vetted by the federal government, incentivized to monitor their own membership rolls, and are the most readily identifiable American Indians to the Oklahoma art consumer.⁴⁴ Like the Oklahoma Act, much of federal Indian law applies only to members of federally-recognized tribes.⁴⁵ The varying, dynamic, and opaque nature of state recognition processes cannot ensure authenticity in the minds of Oklahoma consumers.⁴⁶

To be sure, there may be some people who others may regard as truly “American Indian” even though they do not meet this statutory definition. But that is true under *any* definition one gives that would be reasonably administrable, given the fraught nature of answering this question of identity. This is true of Plaintiff’s preferred definition, which excludes from “American Indian” those who are not formally enrolled or certified by a state- or federally-recognized tribe, but nonetheless have some claim to that heritage or identity. Indeed, Plaintiff admits that she *herself* was one such person because she has claimed Indian identity for over 30 years of marketing her art, yet only became an enrolled state tribal member in 2010 or only claims to have been certified as a tribal artisan since 2004.⁴⁷ In sum, there may be no perfect solution to the quandary of how to promote authenticity and prevent consumer deception in the Indian art market, but Oklahoma has chosen one among many reasonable options.

In any event, contrary to Plaintiff’s intimations, the Oklahoma Act is not a total ban

⁴⁴ Def. MSJ, Doc. 35, at 19-22.

⁴⁵ Def. MSJ, Doc. 35, at 25.

⁴⁶ Def. MSJ, Doc. 35, Ex. 1, at 6-7, 14.

⁴⁷ Pltf. MSJ Br., Doc. 33, at 1 ¶ 2, 6; Pltf. Appdx. to MSJ, Doc. 34, Ex. 1, at 1 ¶ 2, Ex. 3, at 1.

on advertising American Indian art by anyone other than members of federally recognized tribes. Nor does the act prevent truthful advertisements that have less potential to mislead and are more precise and clear (*e.g.*, disclosing specific tribal affiliations). Under the Act, all Oklahoma consumers will know that persons who claim their art is “American-Indian made” make that claim only after going through the rigorous federal recognition and enrollment process. Meanwhile, artists with claims to American Indian identity, but who are not members of federally-recognized tribes, can nonetheless reveal any such claim to identity to their consumers (*e.g.*, by advertising their state-recognized tribal enrollment or tribal artisan certification), which allows the consumer to make an informed decision. And artists without legitimate claims are prevented by the Act from misleading consumers.

Thus, there is a reasonable fit between the State’s substantial interest in preventing consumer deception and the Oklahoma Act’s labeling system. The Act passes the *Central Hudson* test.

4. Plaintiff’s proposed alternatives are either more restrictive, ineffective, or needlessly inefficient.

Plaintiff argues that the State, rather than using the challenged trademark and labels statute, should instead just “enforce [the State’s] general truth-in-advertising consumer protection statute,” “require artists to disclose relevant information, like the tribe they belong to and whether the tribe is state- or federally-recognized,” or “inform the public about the differences between state- and federally-recognized tribes.”⁴⁸ Plaintiff’s proposed least restrictive alternatives are actually more restrictive, ineffective, or needlessly inefficient.

⁴⁸ Pltf. MSJ Br., Doc. 33, at 13-14.

Using the Oklahoma Consumer Protection Act (“OCPA”)⁴⁹ to regulate the American Indian art market, for example, does not resolve the issue caused by lack of an “American Indian” definition. Again, Plaintiff acknowledges that “tribal enrollment is a complex issue” and it is “difficult to define who is American Indian.”⁵⁰ If someone brought a civil suit against sellers for falsely representing their products as “American Indian-made” and the sellers’ defense is the products are actually “American Indian-made,” how would a court adjudicate the dispute? Would it only count enrolled members of federally-recognized tribes? State-recognized tribes? Unrecognized tribes that are seeking recognition? Would it be through lineage and geological studies? If so, would there be a minimum blood quantum requirement? Or, would stories of heritage told by grandparents suffice? Artist and consumers alike would have less notice about what the law is and how to comply with it. Thus, declining to define the term up front, as Plaintiff suggests, will result in the law being harder to enforce and detrimental to the very purposes it is trying to serve—preventing deception and promoting the authentic market.

Furthermore, the OCPA’s penalties are much harsher than those of the Act at bar. Merchants who tag or label their goods in violation of the Oklahoma Act are subject to criminal penalties of up to 90 days imprisonment and \$200 fine.⁵¹ Under the OCPA, criminal penalties are up to 10 years imprisonment and \$5,000 fine, while civil penalties up to \$10,000 *per violation*.⁵² Furthermore, OCPA’s penalties cover a broader range of conduct.

⁴⁹ Okla. Stat. tit. 15, § 753.

⁵⁰ Pltf. MSJ Br., Doc. 33, at 16, 20.

⁵¹ Okla. Stat. tit. 78, § 75.

⁵² Okla. Stat. tit. 15, § 761.1 (A-E).

Under the Oklahoma Act, penalties apply only when a merchant “tags or labels any article.”⁵³ Under the OCPA, the harsher penalties apply in a variety of circumstances including when someone “[m]akes a false or misleading representation ... as to affiliation, connection, association with ... another.”⁵⁴ Thus, Plaintiff’s proposed alternative is actually *more* punitive and *more* restrictive than the Act at bar.

Plaintiff’s next proposed alternative, a requirement of “full disclosure of an artist’s tribal affiliations,”⁵⁵ similarly fails because *requiring* disclosure is more restrictive than *permitting* disclosure of the same information—which is all the current Act requires.⁵⁶ The Oklahoma Act, like the Federal Act, in effect, grants the trademark of “American Indian” to members of federally recognized tribes.⁵⁷ Like a trademark, members of state-recognized tribes—and anybody else not belonging to a federally recognized tribe—may use any legally available descriptor outside that term. Thus, members of state-recognized tribes proclaiming their specific tribal affiliation in their art advertising are not in violation of the statute. Outside of this construct, the Oklahoma Act does not mandate how an artist complies. Rather, it allows the artist to decide. Meanwhile, Plaintiff’s proposed solution would *compel* speech—hardly a less restrictive First Amendment solution.

When the Supreme Court has suggested the use of a disclaimer, it did so when the advertising restriction amounted to a total ban on advertising. In *Central Hudson*, for

⁵³ Okla. Stat. tit. 78, § 75.

⁵⁴ Okla. Stat. tit. 15, § 753 (3, 5).

⁵⁵ Pltf. MSJ Br., Doc. 33, at 25.

⁵⁶ See, e.g., *Riley v. Nat’l Fed. of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796-97 (1988).

⁵⁷ As Judge Posner noted in *Native American Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873-74 (2005), and confirmed by the Oklahoma Act’s placement in Title 78: Labels and Trademarks.

example, the state statute at issue completely banned utility advertising. In striking that statute, the Court said, “[the state] might, for example, require that the advertisements include information about the relative efficiency and expense of the offered [utility] service” to achieve its substantial interest.⁵⁸ Here, however, the State does not completely ban artists from labeling or advertising their art. The Oklahoma Act does not close all “channels of communication.”⁵⁹ Rather, it merely sets a definition of a term such that use outside that definition is *per se* deceptive (just as the Federal Act does). All other advertising on that topic is permitted. The Oklahoma Act compels neither speech nor silence with respect to members of state-recognized tribes highlighting their tribal membership in their art advertising.⁶⁰ Thus, it cannot properly be described as a “categorical prohibition against the dissemination of accurate factual information.”⁶¹

Finally, informing the public about the differences between state- and federally-recognized tribes would do little if consumers are potentially misled by the generic term “American-Indian” without a law defining the scope of that term. This is simply not a plausibly effective solution. And the means that the State chose to employ here is more

⁵⁸ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 570-71 (1980). See also *Peel v. Attorney Registration & Disciplinary Comm’n of Illinois*, 496 U.S. 91, 110 (1990) (addressing an attorney’s challenge to Illinois’s total ban of lawyers holding themselves out as “certified” or “specialist,”); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (striking down a law that totally banned alcohol content information on beer labels).

⁵⁹ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996); see also *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 633-634 (1995) (upholding a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers).

⁶⁰ *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 796–97 (U.S. 1988) (“First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”) (Emphasis in original).

⁶¹ Pltf. MSJ Br., Doc. 33, at 15.

efficient than running its own public information campaign because it puts the obligation to inform on the sellers—who have better information on their product’s origin than the government.

Finally, the Oklahoma Act is a more easily enforceable system. An investigator should not have trouble identifying if a product is permissibly represented as being made by an American Indian because of the documentation associated with membership in a federally recognized tribe—all members are on a Bureau of Indian Affairs (BIA) or tribal roll. The enhanced enforceability combined with the removal of ambiguity will also work to resolve the problem of underreporting.⁶² Plaintiff’s attempt to use the First Amendment to invalidate the State’s reasonable policy choices to solve an acknowledged problem must fail.

B. The American Indian Arts and Craft Sales Act is not preempted by the Federal Act because the Oklahoma Act does not conflict with the purpose of the Federal Act.

Plaintiff next asserts the Oklahoma Act is preempted by the Federal Act. 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 superseded by the federal law unless that was the *clear and manifest* purpose of Congress.”⁶³ “The case for federal preemption is particularly weak where Congress has indicated its awareness of the operation

⁶² Def. MSJ, Doc. 35, Ex. 1, at 14, n. 27.

⁶³ *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).

of state law” in the regulated field.⁶⁴ Federal law preempts state law when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁶⁵

Far from evincing a “clear and manifest” intent to preempt, Congress specifically choose *not* to preempt state regulation of consumer protection in the authentic American Indian art market by allowing States to adopt their own (possibly more stringent) regulations. As Rep. Rhodes stated, “many States are ahead of the Congress with regard to enacting legislation designed to protect genuine Indian arts and crafts” therefore the “section in the bill that would have preempted State legislative actions in this field has been deleted.”⁶⁶

Plaintiff further conflates the duties of the American Indian Arts and Crafts Board with the purpose of the provision prohibiting misrepresentation of Indian goods, citing 25 U.S.C. § 305a. That provision 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.”⁶⁷ But even assuming that the Federal Act’s purpose is to promote the authentic American Indian art market by protecting it from fraud, Congress’s loose definition of “Indian” to promote authenticity does not foreclose the State from imposing a stricter definition of “Indian” to *better* ensure

⁶⁴ *Wyeth v. Levine*, 555 U.S. 555, 574-75 (2009).

⁶⁵ *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013).

⁶⁶ Def. MSJ, Doc. 35, Ex. 6, at 6-7 (Statement of Rep. Rhodes).

⁶⁷ 25 U.S.C. § 305a (emphasis added); *see also* Def. MSJ, Doc. 35, at 28, n. 135.

authenticity. Oklahoma's protects the authentic American Indian art market, while doing nothing to impede the Federal Act's broader purpose.⁶⁸

Furthermore, the Federal Act's legislative history regarding the need to broaden the Federal Act's definition of "Indian" is irrelevant because the Oklahoma Act and the Federal Act operate differently. While the Oklahoma Act and the Federal Act employ similar means, the systems are not identical.⁶⁹ The Oklahoma Act uses the labeling system described above, while under the Federal Act artists are subject to civil and criminal liability if they advertise "in a manner that falsely suggests it is Indian produced."⁷⁰ The broader scope of the conduct regulated in the Federal Act may necessitate a broader definition of American Indian. It does not foreclose all other definitions, especially for use in a different system. Plaintiff simply "read[s] too much into the [federal statute]."⁷¹

Properly read, nothing in the Oklahoma Act "stands as an obstacle" to the promotion of economic welfare of Indian tribes through the development of the authentic American Indian Art market.⁷² Members of state-recognized tribes may still advertise their art in

⁶⁸ Plaintiff cannot rely on *Geier* or *Crosby* for its preemption claim. Pltf. MSJ Br., Doc. 33, at 17. In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881 (2000), the Court specifically said that a variety of mechanisms across states, rather than a national uniform standard, may achieve the Federal law's purpose of automobile safety. Additionally, the state law at issue in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 369 (2000), actually impeded the President's flexibility regarding a comprehensive, international strategy to deal with human rights issues in Burma. Nothing in the Oklahoma Act restricts the implementation of the Federal Act.

⁶⁹ Def. MSJ, Doc. 35, at 15.

⁷⁰ 25 U.S.C.A. § 305e.

⁷¹ *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 488 (10th Cir. 1998) (finding an ordinance designating cemetery property as "open space" did not present obstacle to the objectives of a federal law).

⁷² Pltf. MSJ Br., Doc. 33, at 17-18.

myriad ways, including promotion of their state-tribal affiliation. Indeed, Plaintiff admits that advertising her products without using the term “American Indian” would not affect her sales.⁷³ The Oklahoma Act only provides greater protection against consumers being misled than the Federal Act.⁷⁴ The Federal Act’s broader definition creates the potential of allowing artists to hide information on artisan certifications and state-tribal affiliations—which are not as well-accepted and less known to be tied to verified Indian heritage—behind the generic label “American Indian.” Plaintiff cannot claim that allowing certified tribal artisans and artists belonging to state-recognized tribes to hide important information from their customers is an obstacle-causing conflict with the Federal Act’s objective.

C. The American Indian Arts and Craft Sales Act does not burden interstate commerce and therefore does not violate the Commerce Clause.

Plaintiff claims that the Oklahoma Act violates the Commerce Clause because it discriminates against and excessively burdens interstate commerce. A non-discriminatory law, which courts presume is valid,⁷⁵ does not violate the Commerce Clause unless the burden on interstate commerce greatly outweighs a legitimate state interest.⁷⁶ Because the Oklahoma Act neither discriminates against nor burdens interstate commerce, Plaintiff’s claim fails.

At the outset, Plaintiff bases her argument on an inaccurate reading of the Oklahoma

⁷³ Def. MSJ, Doc. 35, at 9, ¶ 22, Ex. 4, Plaintiff Deposition, at 23-24.

⁷⁴ See, e.g., *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.”).

⁷⁵ See, e.g., *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 471 (1981).

⁷⁶ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Act.⁷⁷ Plaintiff contends that the Oklahoma Act forces her to cease operating at American Indian art shows altogether. She says that her participation “at least implies” her art is American Indian-made.⁷⁸ While the Oklahoma Act would regulate certain aspects of advertising within the show, nothing in it prevents her from participating. The Oklahoma Act regulates the narrower, more affirmative conduct of “representing” rather than “implying” or even the Federal Act’s “falsely suggest[ing].”⁷⁹

Plaintiff’s reliance on *Hunt* and *West Lynn Creamery* is also misplaced. In *West Lynn Creamery*, Massachusetts set up a scheme where certain milk producers were assessed a fee.⁸⁰ Although nearly two-thirds of the milk producers affected were out-of-state, the assessment was distributed only among in-state dairy farmers. Thus, the scheme guaranteed that in-state producers would be subsidized by primarily out-of-state producers. Nothing of the sort is happening in this case. Similarly, the Oklahoma Act actually does the opposite of the scheme North Carolina used in *Hunt v. Wash. State Apple Adver. Comm’n*.⁸¹ In *Hunt*, the state mandated that all apple growers use the same certification label.⁸² Here, rather than impose uniformity that burdens out-of-state artists, the Oklahoma Act incentivizes more distinctions and diverse disclosures in labeling for more informed consumer decisions, none of which impacts out-of-state artists more than in-

⁷⁷ Cf. *Native American Arts, Inc. v. Contract Specialties, Inc.*, 754 F.Supp.2d 386, 392-393 (D. R.I. 2010) (rejecting litigant’s challenge to Federal Act and regulations based on overly-broad and strained interpretation of the Act).

⁷⁸ Pltf. MSJ Br., Doc. 33, at 23.

⁷⁹ 25 U.S.C. § 305a.

⁸⁰ 512 U.S. 186 (1994).

⁸¹ 432 U.S. 333 (1977).

⁸² *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 338-39 (1977).

state artists.

Contrary to Plaintiff's contention, the Oklahoma Act is not about economic protectionism. Oklahoma is home to less than ten percent of federally recognized tribes.⁸³ Meanwhile, the vast majority of states are similarly-situated to Oklahoma in that they do not engage in the practice of state-recognition. The law treats in-state and out-of-state individuals equally. A state cannot be accused of economic protectionism when the vast majority of the out-of-state market is unaffected. Further, state-recognized tribal members are not necessarily out-of-state artists, since tribal members may live outside of the state in which their tribe is located. Plaintiff herself is a resident of California claiming membership in a Virginia-based tribe.⁸⁴

There is no evidence, nor is it a foregone conclusion, that those who live out-of-state will lose more market share than those that live in-state to any significant degree. As noted before, Plaintiff admits that advertising her products without using the term "American Indian" would not affect her sales.⁸⁵ Nor is there evidence that any loss of market share by a member of a state-recognized tribe would be lost to artists who live in state. Moreover, whatever economic detriment caused by the Oklahoma Act to an artist of a state-recognized tribe would be the result of a more informed consumer decision, whether or not that artist lived in Oklahoma.

⁸³ Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 10, 2017).

⁸⁴ Pltf. MSJ Br., Doc. 33, at 6 ¶ 1.

⁸⁵ Def. MSJ, Doc. 35, Ex. 4, Plaintiff Deposition, at 23-24.

D. Plaintiff's repetitive Equal Protection and Due Process claims must also fail.

Plaintiff cannot deny that the State has a substantial interest in consumer protection, nor can Plaintiff demonstrate that the challenged Act fails to meet the intermediate scrutiny required by the First Amendment for regulation of commercial speech. For the same reasons as advanced above in defense of the First Amendment claim, Oklahoma Act passes the much more lenient rational basis review under Plaintiff's Equal Protection and Due Process challenges. For the reasons set forth in Defendant's Motion for Summary Judgment, Plaintiff's Due Process and Equal Protection claims must fail.⁸⁶

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

Mithun Mansinghani, OBA #32453

Solicitor General

DIXIE L. COFFEY, OBA #11876

Assistant Attorney General

Email: Mithun.Mansinghani@oag.ok.gov

Email: Dixie.Coffey@oag.ok.gov

/s/ Randall Yates

RANDALL YATES, OBA 30304

Assistant Solicitor General

Oklahoma Office of the Attorney General

313 NE 21st Street;

Oklahoma City, OK 73105

Phone: (405) 522-4448

Fax: (405) 521-4518

Email: Randall.Yates@oag.ok.gov

Counsel for Defendant

⁸⁶ Def. MSJ, Doc. 35, at 23-25.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of November, 2017, 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/ Randall Yates

RANDALL YATES

Assistant Solicitor General