UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

PEGGY FONTENOT, Plaintiff, v. ERIC SCHMITT, Attorney General of Missouri, in his official capacity, Defendant.	)	Case No. 2:19-cv-4169-FJG ORAL ARGUMENT REQUESTED Hon. Judge Fernando J. Gaitan, Jr.

PLAINTIFF'S SUPPORTING SUGGESTIONS
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I

STATEMENT OF UNCONTROVERTED MATERIAL FACTS

A. Peggy Fontenot and Her American Indian Art

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

2. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia. Fontenot Dec. ¶ 3; Def.'s Resp. to Pltf.'s Req. for Admissions No. 1. She has been a member since 2006, and her tribal number is 10780. Fontenot Dec. ¶ 3. The Patawomeck is a state-recognized tribe. H.J. Res. 150, 2010 Sess. (Va. 2010).

3. Ms. Fontenot is an American Indian artist and photographer, and for more than 30 years she has travelled the country to show and sell her American Indian art. Fontenot Dec. ¶¶ 2, 4; Def.'s Resp. to Pltf.'s Req. for Admissions No. 3. Ms. Fontenot uses traditional American Indian stitches in her beadwork to make both contemporary and traditional pieces. Fontenot Dec. ¶ 2. With her photography, Ms. Fontenot creates hand-developed, black and white images of native people to celebrate her native heritage. *Id.* Ms. Fontenot also hand-makes silver jewelry with semi-precious stones. *Id.*

4. Ms. Fontenot shows and sells her art at American Indian art shows, festivals, and museums. She also markets and sells her art through her personal contacts and previous customers, and she uses her website (www.fontenotphotography.com) to market and sell her photography. Fontenot Dec. ¶ 4.

5. Ms. Fontenot has sold her art in museums and galleries nationwide and abroad, including the Smithsonian's National Museum of the American Indian in Washington, D.C., and the Autry Museum of the American West in Los Angeles, California. Fontenot Dec. ¶ 7.

6. Ms. Fontenot's jewelry and beadwork have won multiple awards at American Indian art shows and markets. Fontenot Dec. ¶ 6. In 2019, she won Second Place in Beadwork at the Heard Museum Indian Market in Phoenix, Arizona, and Third Place in Beadwork at the Red Earth Indian Market in Oklahoma City, Oklahoma. *Id.* She also received the "Judge's Choice" award at the Autry Museum Indian Art Market in Los Angeles, California, and the "Honorable Mention" distinction at the Briscoe Western Art Museum in San Antonio, Texas, for her beaded Sampler, Murdered and Missing Indigenous Women and Girls ("Nsayjek Mine Giwanijek"). *Id.*

7. Ms. Fontenot's photography has also won multiple awards at American Indian art shows and markets. Fontenot Dec. ¶ 6. In 2019, Ms. Fontenot's photography won Second Place in Photography at the Eiteljorg Museum in Indianapolis, Indiana. *Id.* In 2018, she won Best of Division and First Place in Photography at the Heard Museum in Phoenix, Arizona, and First Place in Photography at the Autry Museum Indian Art Market in Los Angeles, California. *Id.* In 2017, she won Second Place in Photography at the Autry Museum. *Id.*

8. Ms. Fontenot has also taught American Indian beadwork classes, including classes at the Smithsonian National Museum of the American Indian, and the Southwest Museum in Los Angeles. Fontenot Dec. ¶ 8. She has had a regular presence within the American Indian community for over 30 years. Fontenot Dec. ¶ 9.

9. In addition to creating art that she sells, she has created many exhibits at galleries and museums to bring awareness to social issues within the American Indian community. Fontenot Dec. ¶ 4.

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

11. Prior to the date on which the law challenged in this case took effect, Ms. Fontenot sold her art to individuals in Missouri, Fontenot Deposition at 10, 17; she marketed this art as American Indian-made. Fontenot Dec. ¶ 10.

B. The Challenged Law

12. Mo. Rev. Stat. § 407.315 (Art Labeling Act) restricts who may represent their art in Missouri as American Indian-made. Under the Art Labeling Act, only an "American Indian" as defined by the Act may market her art as being made by an American Indian. *See id.*

13. Mo. Rev. Stat. § 407.315 took effect on August 28, 2018.

14. Prior to the effective date of Mo. Rev. Stat. § 407.315, Ms. Fontenot could legally represent her art in Missouri as "American Indian-made."

15. Mo. Rev. Stat. § 407.315 limits the definition of an "American Indian" to "a person who is a citizen or an enrolled member of an American Indian tribe." § 407.315.1(1). An "American Indian tribe" is further limited by the Act to "any Indian tribe *federally recognized* by the Bureau of Indian Affairs of the United States Department of the Interior." § 407.315.1(2) (emphasis added). The Act thus excludes from the definition of "American Indian" those individuals who are members of state-recognized tribes, certified Indian artisans

(even those certified by federally recognized tribes), and anyone else who does not happen to be a citizen or enrolled member of a federally recognized tribe—including individuals who are descendants of tribal citizens or enrolled members but who are not citizens or enrolled members themselves. *See* 25 U.S.C. § 305e.

16. Any person who violates the Art Labeling Act is guilty of a misdemeanor, punishable by a fine of up to $200, or by imprisonment for a period of at least 30 days and not more than 90 days, or by both fine and imprisonment. Mo. Rev. Stat. § 407.315.3.

17. Because Ms. Fontenot is not a citizen or an enrolled member of a federally recognized tribe, she can be punished with fines or risk jail time if she markets her art in Missouri as American Indian-made. Mo. Rev. Stat. § 407.315.

18. The sponsor of Mo. Rev. Stat. § 407.315, Rep. Rocky Miller, is a citizen of the Cherokee Nation—a federally recognized tribe.

C. The Art Labeling Act Is Not Necessary

19. Since at least 1967, Missouri has had a general consumer protection statute, the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.020, which prohibits sellers from making false or misleading statements about their products, including art.

20. Defendant possesses no evidence that anyone has been prosecuted for violating the Merchandising Practices Act since January 1, 2009, on the basis that they misrepresented their art as being American Indian-made. Def.'s Resp. to Pltf.'s Req. for Admissions Nos. 11-12, 15.

21. The Art Labeling Act was enacted in 2018.

22. Defendant possesses no evidence that any person made a formal complaint alleging unlawful representations of art or artist heritage or descent under the Art Labeling Act from its effective date on August 28, 2018, to present. Def.'s Resp. to Pltf.'s Req. for Admissions No. 5.

II

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Plaintiff Peggy Fontenot is an award-winning American Indian photographer and artist who specializes in handmade beaded jewelry and cultural items. *Supra* at 1-3. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia. *Supra* at 1. For over 30 years, she has shown and sold her art in museums and galleries throughout the United States, taught American Indian beadwork classes, and had a regular presence within the American Indian community. *Supra* at 1-3. She has also cultivated customers in Missouri. Fontenot Deposition at 10, 17. Throughout her career, Ms. Fontenot has represented and marketed her art as "American Indian-made" or "Native American-made."[1] *Supra* at 3. But due to a recent change in Missouri law, Ms. Fontenot is now subject to fines and imprisonment if she continues to represent her art in Missouri as American Indian-made. *Supra* at 3-4.

Missouri's Art Labeling Act prohibits distributing, trading, selling, or offering for sale or trade "any article represented as being made by American Indians" unless the article actually is made or assembled by an American Indian. Mo. Rev. Stat. § 407.315. Further, "[a]ny merchant who knowingly and willfully tags or labels any article as being an American Indian

[1] These terms are typically considered synonymous in the Native community. Fontenot Deposition at 30-31.

art or craft" when the article doesn't comply with the Act is guilty of a misdemeanor and subject to imprisonment for up to 90 days and a fine up to $200. *Id.* Crucially, the Act's definitions severely limit what artwork may be described as "American Indian" by reserving that right solely to members of federally recognized tribes, thus excluding artists like Ms. Fontenot who are members of state-recognized tribes.

Because the Art Labeling Act restricts the use of particular terms, and limits who may use them, the Act is a content- and speaker-based restriction on speech and is thus subject to the highest level of judicial scrutiny provided by the First Amendment to the U.S. Constitution, which it fails. Even if the Court were to apply the less stringent test for restrictions on "commercial" speech, the government is unable to satisfy that heightened level of scrutiny either.

III

ARGUMENT

A. Standard of Review

Summary judgment must be granted if "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of showing that there is no genuine issue of material fact. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The burden then shifts to the nonmoving party to show that there is a dispute as to material fact that necessitates a trial. *Id.* The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), and must identify specific

facts in evidentiary materials revealing a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 323. Here, Ms. Fontenot is entitled to judgment as a matter of law because the undisputed facts demonstrate that Missouri's Art Labeling Act, which restricts some American Indians from representing their art as American Indian-made, violates the First and Fourteenth Amendments[2] to the U.S. Constitution.

B. 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). Those criteria are easily 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 Comm'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

[2] The First Amendment is applicable to the States through the Fourteenth Amendment, *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 840 (8th Cir. 2006), and it prohibits them from enacting laws "abridging the freedom of speech," U.S. Const. amend. I.

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)), and the related injury of self-censorship, *Rodgers v. Bryant*, 942 F.3d 451, 454-55 (8th Cir. 2019).

Here, the Art Labeling Act injures Ms. Fontenot by depriving her of the ability to market her art by truthfully stating that the work is American Indian-made. Thus, she is injured because the Act denies her the ability to speak freely. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-68 (2014) (injury in fact established where group was prohibited from placing an ad on a billboard to criticize a politician); *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016); *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); *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) ("The leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact.").

In addition, the Art Labeling Act tangibly injures Ms. Fontenot because she is prohibited from selling her art in conjunction with the art being labeled or represented as American Indian. Mo. Rev. Stat. § 407.315.2-3. But for the Act, Ms. Fontenot would pursue follow-up sales with her current customers in Missouri and would seek to make sales to new customers. Fontenot Deposition at 29. Because the Art Labeling Act injures Ms. Fontenot by depriving her of her ability to sell and represent her art truthfully, and the requested declaratory and injunctive relief would alleviate her injury, she has standing to challenge the Act. *See Fontenot v. Hunter*, 378 F. Supp. 3d 1075, 1087 (W.D. Okla. 2019).

C. The Art Labeling Act Unconstitutionally Restricts Speech

"If the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 373 (2002).

The Art Labeling Act prohibits individuals from truthfully representing their art as American Indian-made unless they fit Missouri's narrow definition of "American Indian." Mo. Rev. Stat. § 407.315. By punishing certain speakers for speaking truthfully about themselves and their art, the Art Labeling Act deprives individuals of their right to speak freely, and is subject to the First Amendment. Because the law restricts speech based on the speaker's identity and the speech's content, the Art Labeling Act must satisfy strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Both on its face and as applied to Ms. Fontenot, Defendant cannot meet his burden of satisfying that test.

Further, because the Art Labeling Act regulates more than just "commercial" speech, the less-stringent test for restrictions on commercial speech is inappropriate here. In any event, even under that test, Defendant cannot justify the Art Labeling Act's restriction on speech.

1. The Art Labeling Act is a content-based speech restriction

Because Missouri's Art Labeling Act restricts the use of a particular term (art represented as "American Indian-made"), Mo. Rev. Stat. § 407.315.2, it is a content-based speech restriction subject to strict scrutiny.

"Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226.

Content-based laws are those that "appl[y] to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. Courts determine whether a restriction is content-based by considering whether the restriction "'on its face' draws distinctions based on the message a speaker conveys." *Id.* (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564-66 (2011)).

Here, the Art Labeling Act is a content-based speech restriction because it only applies when individuals describe their art as American Indian-made. *See* Mo. Rev. Stat. § 407.315.2 ("any article represented as being made by American Indians"); *Reed*, 135 S. Ct. at 2227; *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811-12 (2000); *Willson v. City of Bel-Nor*, 924 F.3d 995, 1000-01 (8th Cir. 2019). For example, if Ms. Fontenot describes a pair of her handmade earrings simply as "cultural items," or "folk," or "handmade," or any other number of adjectives, then the Act does not apply. But when she represents those same handmade earrings as American Indian-made, then the Act applies. Because it literally regulates the content of her speech, the Act is a content-based law that is subject to strict scrutiny. *See Telescope Media Group v. Lucero*, 936 F.3d 740, 754 (8th Cir. 2019); *Willson*, 924 F.3d at 1001.

2. The Art Labeling Act is a speaker-based speech restriction

Missouri's Art Labeling Act also restricts *who* can represent their art as being "American Indian-made." Mo. Rev. Stat. § 407.315. Thus, the Art Labeling Act is also a speaker-based speech restriction subject to strict scrutiny.

"In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("restrictions

distinguishing among different speakers, allowing speech by some but not others" are "[p]rohibited"). Laws that reflect governmental preference for favored speakers, or that restrict speech by disfavored speakers, are subject to strict scrutiny. *Turner Broad. Sys., Inc. v. Fed. Comm. Comm'n*, 512 U.S. 622, 658 (1994); *Sorrell*, 564 U.S. at 564-65; *see also Playboy*, 529 U.S. at 812. That is because laws targeting certain speakers suffer from the same core "vice of content-based legislation [which] is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes." *Reed*, 135 S. Ct. at 2229 (cleaned up); *see also Citizens United*, 558 U.S. at 340 (speaker-based restrictions prohibited because "restrictions based on the identity of the speaker are all too often simply a means to control content"). In fact, the Court said exactly that in *Reed*: "a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." 135 S. Ct. at 2230. *See also Citizens for Free Speech, LLC v. Cty. of Alameda*, 194 F. Supp. 3d 968, 983 (N.D. Cal. 2016) (applying strict scrutiny to speaker-based restrictions).

Here, the Art Labeling Act is a speaker-based law because it singles out and restricts the speech of individuals who are not members of federally recognized tribes. *See* Mo. Rev. Stat. § 407.315. If Ms. Fontenot was a member of a federally recognized tribe, the Art Labeling Act would permit her to represent her art as American Indian-made. However, because she is not a member of a federally recognized tribe, the Act prohibits Ms. Fontenot from representing her art as American Indian-made. As a result, the Art Labeling Act reflects the government's "aversion" to all but members of federally recognized tribes representing their

art as American Indian-made, and must be subject to strict scrutiny.[3] *See Turner*, 512 U.S. at 658. Because the Art Labeling Act is a content- and speaker-based speech restriction subject to strict scrutiny, it is "presumptively unconstitutional" and will only be upheld if the government proves that the Act is narrowly tailored to serve a compelling government interest. *Reed*, 135 S. Ct. at 2226; *Playboy*, 529 U.S. at 813. For the reasons discussed below, the Act cannot be upheld under strict scrutiny.

3. The commercial speech 'doctrine' does not apply here

"Commercial" speech is speech that "does no more than propose a commercial transaction." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)); *cf. Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1151 (2017) (holding regulation of how businesses communicate prices to be subject to commercial speech scrutiny). Commercial speech is therefore distinct from speech which is "uttered for a profit" or simply made in a commercial context.[4] *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 482 (1989); *Smith v. California*, 361 U.S. 147, 150 (1959); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (paid editorial warranted full protection under the First Amendment because the message communicated more than commercial advertising).

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[3] The sponsor of Mo. Rev. Stat. § 407.315, Rep. Rocky Miller, is on the record stating his belief that anyone who is not a member of a federally recognized tribe is a "wannabe Indian" if they represent themselves as an American Indian. *See, e.g.*, Crystal Thomas, *Native American artist says Missouri 'Indian-made' law violates free speech rights*, Kansas City Star (Oct. 21, 2019, 2:49 PM), https://www.kansascity.com/news/politics-government/article235817312.html.

[4] Even trademarks may not be commercial speech because they typically possess an "expressive component." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part and dissenting in part).

Representing a piece of art as "American Indian-made" does not itself propose a commercial transaction. Rather, it simply provides important information about the artist and the piece of art, and is therefore fully protected by the First Amendment. *Cf. ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 918-19, 925 (6th Cir. 2003) (paintings of golfer Tiger Woods, which included literature about the artist, the artist's photograph, and a description of the painting, are not commercial speech). Moreover, the Art Labeling Act applies in both commercial and non-commercial contexts. That is, the Act applies whether an individual markets art for sale as American Indian-made, or merely "distributes" American Indian-made art notwithstanding compensation. Mo. Rev. Stat. § 407.315.2. Thus, regardless of whether Ms. Fontenot advertises her art for sale, gives it away, or offers it for display in a museum or gallery, if she represents her art as American Indian-made, then the Art Labeling Act applies. *See id.* The law therefore regulates fully protected speech.

Nevertheless, even if representations of art as American Indian-made were considered commercial speech, the Art Labeling Act is still subject to strict scrutiny because it prohibits commercial speech inextricably intertwined with fully protected speech, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988), and it "restrict[s] truthful speech in order to suppress the ideas it conveys," *Matal v. Tam*, 137 S. Ct. 1744, 1769 (2017) (Thomas, J., concurring) (quoting *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 572 (2001) (Thomas, J., concurring)). That is, when Ms. Fontenot represents her art as American Indian-made, she uses the term "American Indian" to explain the relationship between her heritage and her art, as well as the context and content of her art, to potential consumers. Fontenot Dec. ¶ 5. Prohibiting her from using the term will thus inevitably prevent Ms. Fontenot from speaking to such issues as her American

Indian identity, her artistic influences, her artistic motivations, and the meaning of her art. Therefore, the prohibition on the term "American Indian" must be subject to strict scrutiny because it will also prohibit truthful non-commercial speech—speech that is vital to the free exchange of ideas.[5]

In addition, Ms. Fontenot's descriptions of her art, even within 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 and her beaded Samplers. *See* Fontenot Dec. ¶ 4, Ex. 3. If Ms. Fontenot is no longer able to represent her art as American-Indian made, her "information and advocacy" about these topics will "likely cease." *Riley*, 487 U.S. at 796. The Art Labeling Act should therefore be subject to strict scrutiny.

4. The Art Labeling Act fails strict scrutiny

Under strict scrutiny, "[c]ontent-based regulations are presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and will only be upheld if the government proves that they are narrowly tailored to serve a compelling government interest, *Reed*, 135 S. Ct. at 2226, 2231.

According to Defendant, the Art Labeling Act advances interests in "protecting both Missouri consumers and artists from the fraudulent, deceptive, and/or misleading marketing practices of selling fake or counterfeit American Indian art and crafts." Def.'s Answers to Pltf.'s First Interrogs. No. 3. However, those interests are merely "legitimate," not

[5] To be sure, even content-based laws restricting untruthful speech are subject to strict scrutiny. *United States v. Alvarez*, 567 U.S. 709, 726, 729 (2012) (Kennedy, J., plurality opinion).

"compelling," and cannot justify the Art Labeling Act. *See*, *e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 163 (2002) (crime prevention is a legitimate interest); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) (recognizing a legitimate interest in regulating solicitation to protect residents from fraud).

Even if Defendant could establish a compelling interest, the Act is not narrowly tailored for at least three reasons. First, as discussed more fully *infra* at 18-19, Defendant has failed to point to any evidence to support the claim that the stated interests are advanced by the Art Labeling Act. Def.'s Responses to Pltf.'s Req. for Admissions No. 5-8, 11-13, 15. Thus, Defendant has failed to show that the Act is "actually necessary" to accomplish the stated aims, and therefore, the Act fails strict scrutiny. *See Alvarez*, 567 U.S. at 725 (citation omitted).

Second, the law is not narrowly tailored because it prohibits even truthful and non-misleading speech. *See Schaumburg*, 444 U.S. at 636-38 (declaring unconstitutional an ordinance that sought to label certain charities as fraudulent and ban solicitations by them, because the organizations were charities under federal and state law and more direct methods of prohibiting fraud were available). Ms. Fontenot is a member of a state-recognized tribe, and it is therefore not false or misleading to call herself or her art "American Indian."

Third, Defendant could serve his interests through content-neutral and less restrictive means, like enforcing Missouri's general consumer protection statute, which makes it unlawful to make false or misleading representations during commercial transactions. *See* Mo. Rev. Stat. § 407.020; *Riley*, 487 U.S. at 795. Defendant could also require artists to disclose relevant information, like the tribe they belong to and whether the tribe is federally or state-recognized. *See Miller v. Stuart*, 117 F.3d 1376, 1383-84 (11th Cir. 1997) (prohibiting speech ban when "a

disclaimer or some other form of additional disclosure [would constitute] a narrower limitation") (alteration in original). Defendant could also inform the public about the differences between federally and state-recognized tribes.[6] *Cf. Peel v. Att'y Registration and Disciplinary Comm'n of Illinois*, 496 U.S. 91, 104-05 (1990) (rejecting notion that public incapable of understanding difference between attorney being "licensed" versus "certified" as a "specialist").

Here, Ms. Fontenot is a member of the Virginia-recognized Patawomeck Indian Tribe. Because of her tribal membership, representing her art as American Indian-made is literally true.[7] But by excluding members of state-recognized tribes from the definition of "American Indian," the Art Labeling Act prohibits Ms. Fontenot from making such truthful and non-misleading representations. Thus, the Act regulates more speech than necessary and prohibits many American Indian artists from engaging in truthful speech. Def.'s Answers to Pltf.'s First Interrog. No. 3 ("[T]he Act may occasionally result in limiting advertising language used by Native American artists who are not enrolled in a federally recognized Native American tribe . . . ."). As a result, the Art Labeling Act fails strict scrutiny.

5. Even under commercial speech scrutiny, the Art Labeling Act is unconstitutional

As discussed above, Ms. Fontenot's representations of her art as American Indian-made do far more than simply "propose a commercial transaction," and instead provide context for and information about her art. *See supra* at 13-14. Nevertheless, even if considered

[6] In fact, Defendant already maintains programs on his website to assist Missouri consumers in making informed decisions. *See*, *e.g.*, "Check a Charity," https://ago.mo.gov/civil-division/consumer/check-a-charity.

[7] Such representations are also permissible under federal law. 25 U.S.C. § 305e.

commercial speech, and notwithstanding the heightened standard for content- and speaker-based restrictions on commercial speech, *see Sorrell*, 564 U.S. at 571 (speaker-and content-based burdens on commercial speech justify "heightened scrutiny"), the Act fails even the test for restrictions on commercial speech as set out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980); *accord Missouri Broads. Ass'n v. Schmitt*, 946 F.3d 453, 460-62 (8th Cir. Jan. 8, 2020).

Under *Central Hudson*, when the government restricts commercial speech that "concern[s] lawful activity and [is] not . . . misleading," then the Court must consider: (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." 447 U.S. at 566-57. Defendant bears the burden of proving that restricting Ms. Fontenot from representing her art as American Indian-made satisfies *Central Hudson*'s test for commercial speech. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *Missouri Broads. Ass'n*, 946 F.3d at 460-61. That "burden is not satisfied by mere speculation or conjecture;" instead, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71. Defendant cannot meet that heavy burden in this case.

At the outset, Ms. Fontenot's speech is not "inherently misleading." *See Thompson*, 535 U.S. at 367, 371-72. Because Ms. Fontenot is a member of a state-recognized tribe, it is not inherently misleading for her to represent her art as American Indian-made. In fact, it is literally true. Defendant has not shown that the Patawomeck tribe is illegitimate, nor that state-

recognized tribes generally lack legitimacy. Rather, the State of Virginia has recognized the tribe, H.J. Res. 150, 2010 Sess. (Va. 2010), and Congress has included state-recognized tribes in its own statutory schemes, 25 U.S.C. § 305e. The First Amendment requires that Defendant err on the side of requiring more, not less, speech even if Ms. Fontenot's representations were "potentially misleading." *See id.*; *Peel*, 496 U.S. at 100-01, 109-10.

Defendant cannot satisfy *Central Hudson*'s first prong because his stated interests in the Art Labeling Act are "legitimate," not "substantial." *See supra* at 14-15. Therefore, they are insufficient to justify the Act's speech restrictions.

Second, the Act does not directly advance any substantial interest because Defendant cannot show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *See Edenfield*, 507 U.S. at 770-71; *see also Missouri Broads. Ass'n*, 946 F.3d at 460 ("Missouri must show that the Statute 'significantly reduces' the alleged harms."). Not only has Defendant failed to even allege throughout litigation that state-recognized tribes are illegitimate, Defendant further admitted that the government possesses no evidence that any Missouri consumer has complained of being misled by any misrepresentation of art as American Indian-made, and that the government itself has failed to discover any instance of art being misrepresented as American Indian-made. Def.'s Responses to Pltf.'s Req. for Admissions No. 5-8, 11-13, 15. In addition, Defendant has affirmatively refused to attempt to show that the Act directly advances any of the claimed interests. Def.'s Responses to Pltf.'s Req. for Admissions No. 16 ("No level of judicial scrutiny in this facial challenge to the constitutionality of a statute requires Defendant to prove that the harms identified . . . have been 'significantly reduced' by [the] Art Labeling Act."); *id.* at No. 17; Def.'s Answers to Pltf.'s

Second Set of Interrogs. No. 9. Therefore, Defendant cannot show that the recited harms are more than "mere speculation or conjecture." *Edenfield*, 507 U.S. at 770-71. Defendant thus fails this prong because he "provides only ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564.

Third, even if Defendant's interests in the Act were substantial, for the reasons previously discussed, *supra* at 15-16, the Act seeks to further those interests in a manner more extensive than necessary. *See Missouri Broads. Ass'n*, 946 F.3d at 461-62 ("The Statute should indicate that Missouri 'carefully calculated the costs and benefits associated with the burden on speech.'") (citation omitted); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993) (statute likely unconstitutional "if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech"). Indeed, Defendant does not allege that the costs and benefits of the Art Labeling Act were ever considered. Def.'s Responses to Pltf.'s Req. for Admissions No. 22.

CONCLUSION

The Art Labeling Act is subject to strict scrutiny because it is a content- and speaker-based restriction on speech, and the less-stringent scrutiny applicable to restrictions on "commercial" speech does not apply. Because Defendant cannot meet his heavy burden under either test, the Court should grant Ms. Fontenot's motion for summary judgment, and declare the Art Labeling Act unconstitutional and permanently enjoin its enforcement.

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Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western District of Missouri through the Court's CM/ECF system.

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

/s/ Caleb R. Trotter
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