

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

| | | |
|-------------------------------------|---|---------------------------|
| PEGGY FONTENOT, |) | |
| |) | |
| Plaintiff, |) | Case No. 2:19-cv-4169-FJG |
| v. |) | |
| |) | |
| ERIC SCHMITT, Attorney General of |) | |
| Missouri, in his official capacity, |) | |
| |) | |
| Defendant. |) | |

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

| | |
|---------------------------------------------------------------------------------------------------------------------------------|----|
| Table of Authorities..... | 3 |
| Statement of Undisputed Facts..... | 6 |
| Standard of Review..... | 14 |
| Argument..... | 14 |
| I. Plaintiff lacks standing to bring this lawsuit..... | 15 |
| II. Even if Plaintiff has standing, this case is not ripe for adjudication..... | 20 |
| A. Plaintiff's claim is not factually or legally developed enough for a court's determination..... | 21 |
| B. Plaintiff will not suffer a hardship if judicial consideration is withheld..... | 23 |
| III. The Missouri American Indian Art or Craft Act does not violate the First Amendment of the United States Constitution..... | 24 |
| A. Plaintiffs' Construction of Section 407.315 is Incorrect | 25 |
| i. By its plain text, § 407.315 prohibits only <i>false</i> or misleading representations..... | 25 |
| ii. Other canons of statutory construction support Defendant's interpretation... | 28 |
| iii. The canon of constitutional avoidance compels Defendants' interpretation..... | 29 |
| B. Section 407.315 places a permissible restriction on commercial speech..... | 31 |
| Conclusion..... | 33 |

TABLE OF AUTHORITIES

Cases

| | |
|-------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>44 Liquormart, Inc. v. Rhode Island</i> , 517 U.S. 484 (1996) | 29 |
| <i>281 Care Committee v. Anderson</i> , 638 F.3d 621 (8th Cir. 2011) | 21 |
| <i>520 S. Michigan Ave. Assocs., Ltd. v. Unite Here Local 1</i> , 760 F.3d 708 (7th Cir. 2014) | 32 |
| <i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967) | 22 |
| <i>Almendarez-Torres v. United States</i> , 523 U.S. 224 | 30 |
| <i>Alpert v. State</i> , 543 S.W.3d 589 (Mo. 2018) | 21 |
| <i>Arizona Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011) | 17 |
| <i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997) | 23 |
| <i>Babbitt v. Farm Workers</i> , 442 U.S. 289 (1979) | 17, 18, 19, 21 |
| <i>Blaske v. Smith & Entzeroth, Inc.</i> , 821 S.W.2d 822 (Mo. 1991) | 31 |
| <i>Bolen v. Orchard Farm R-V Sch. Dist.</i> , 291 S.W.3d 747 (Mo. App. 2009) | 29 |
| <i>Brown & Root, Inc. v. Louisiana State AFL-CIO</i> , 10 F.3d 316 (5th Cir. 1994) | 31 |
| <i>Brown v. City of Pittsburgh</i> , 586 F.3d 263 (3d Cir. 2009) | 31 |
| <i>Bryant v. Woodall</i> , 363 F. Supp. 3d 611 (M.D.N.C. 2019) | 19 |
| <i>Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York</i> , 447 U.S. 557 (1980) | 32, 33, 34 |
| <i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013) | 17, 20 |
| <i>Comprehensive Health of Planned Parenthood Great Plains v. Hawley</i> , 903 F.3d 750 (8th Cir. 2018) | 23, 24 |
| <i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council</i> , 485 U.S. 568 (1988) | 30, 31 |
| <i>F.C.C. v. Fox Television Stations, Inc.</i> , 556 U.S. 502 (2009) | 30 |
| <i>Farver v. McCarthy</i> , 931 F.3d 808 (8th Cir. 2019) | 15 |
| <i>Fontenot v. Hunter</i> , 378 F. Supp. 3d 1075 (2019) | 10, 17, 25 |

| | |
|-------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>Friedman v. Rogers</i> , 440 U.S. 1 (1979) | 34 |
| <i>Griffin v. Bryant</i> , 30 F. Supp. 3d 1139 (D.N.M. 2014) | 32 |
| <i>Gun Owners' Action League, Inc. v. Swift</i> , 284 F.3d 198 (1st Cir. 2002) | 22 |
| <i>H.D.V.-Greektown, LLC v. City of Detroit</i> , 568 F.3d 609 (6th Cir. 2009) | 31 |
| <i>Int'l Ass'n of Machinists v. Street</i> , 367 U.S. 740 (1961) | 31 |
| <i>Laird v. Tatum</i> , 408 U.S. 1, (1972) | 21 |
| <i>Lincoln Credit Co. v. Peach</i> , 636 S.W.2d 31 (Mo. 1982) | 31 |
| <i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992) | 16 |
| <i>M & P Enterprises, Inc. v. Transamerica Fin. Servs.</i> , 944 S.W.2d 154 (Mo. 1997) | 31 |
| <i>Martin v. Schmalz</i> , 713 S.W.2d 22 (Mo. App. E.D. 1986) | 31 |
| <i>McFadden v. United States</i> , 135 S. Ct. 2298 (2015) | 30 |
| <i>Milavetz, Gallop & Milavetz, P.A. v. United States</i> , 541 F.3d 785 (8th Cir. 2008) | 31 |
| <i>Missourians for Fiscal Accountability</i> , 830 F.3d | 16, 17, 22 |
| <i>N.L.R.B. v. Catholic Bishop of Chicago</i> , 440 U.S. 490(1979) | 31 |
| <i>Nat'l Right to Life Political Action Comm. v. Connor</i> , 323 F.3d 684 (8th Cir. 2003) | 24 |
| <i>Nat'l Wildlife Fed'n v. Agric. Stabilization & Conservation Serv.</i> , 901 F.2d 673 (8th Cir. 1990) | 16 |
| <i>Nebraska Pub. Power Dist. v. MidAmerican Energy Co.</i> , 234 F.3d 1032 (8th Cir. 2000) | 17, 22, 23, 24 |
| <i>Ohralik v. Ohio State Bar Ass'n</i> , 436 U.S. 447 (1978) | 34 |
| <i>Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No.</i> , 1506, 409 F.3d 1199 (9th Cir. 2005) | 32 |
| <i>Parrish</i> , 761 F.3d | 16, 22 |
| <i>Pine v. City of W. Palm Beach, FL</i> , 762 F.3d 1262 (11th Cir. 2014) | 32 |
| <i>Radiance Found., Inc. v. N.A.A.C.P.</i> , 786 F.3d 316 (4th Cir. 2015) | 31 |
| <i>Rodgers v. Bryant</i> , 942 F.3d 451 (8th Cir. 2019) | 16 |

| | |
|------------------------------------------------------------------------------------------------------------------|--------|
| <i>Shelton Bros., Inc.</i> , 669 F.3d 873 (8th Cir. 2012)..... | 26 |
| <i>Sisney v. Kaemingk</i> , 886 F.3d 692 (8th Cir. 2018)..... | 32 |
| <i>SKF USA, Inc. v. U.S. Customs & Border Prot.</i> , 556 F.3d 1337 (Fed. Cir. 2009)..... | 32 |
| <i>Spokeo, Inc. v. Robins</i> , 136 S. Ct. 1540 (2016) | 17, 19 |
| <i>St. Louis Cnty. v. Prestige Travel, Inc.</i> , 344 S.W.3d 708 (Mo. banc 2011) | 26, 28 |
| <i>State v. Burnau</i> , 642 S.W.2d 621 (Mo. 1982)..... | 31 |
| <i>Susan B. Anthony List v. Driehaus</i> , 573 U.S. 149 (2014) | 20 |
| <i>U.S. W., Inc. v. F.C.C.</i> , 182 F.3d 1224 (10th Cir. 1999)..... | 32 |
| <i>United States v. Caronia</i> , 703 F.3d 149 (2d Cir. 2012)..... | 31 |
| <i>United States v. Students Challenging Regulatory Agency Procedures (SCRAP)</i> , 412 U.S. 669 (1973) | 17 |
| <i>Veilleux v. Nat’l Broad. Co.</i> , 206 F.3d 92 (1st Cir. 2000) | 31 |
| <i>Warth v. Seldin</i> , 422 U.S. 490 (1975) | 17 |
| <i>Wash. State Grange v. Wash. State Republican Party</i> , 552 U.S. 442 (2008) | 23 |
| <i>Weaver v. U.S. Info. Agency</i> , 87 F.3d 1429 (D.C. Cir. 1996) | 32 |
| <i>Whitmore v. Arkansas</i> , 495 U.S. 149 (1990) | 17 |
| Statutes | |
| 24 U.S.C. § 305e | 11 |
| 25 U.S.C. § 305e | 29 |
| § 305e(d), the IACA | 11 |
| § 407.315.1, RSMo (2018) | passim |
| Rules | |
| Fed. R. Civ. P. Rule 56(a)..... | 7, 15 |
| Other Authorities | |
| 13B Charles Alan Wright & Arthur R. Miller, <u>Federal Practice and Procedure</u> , § 3532 (3d ed.).. | 22 |

**MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. Rule 56(a), Defendant, Eric Schmitt, provides the following memorandum in supports of its Motion for Summary Judgment.

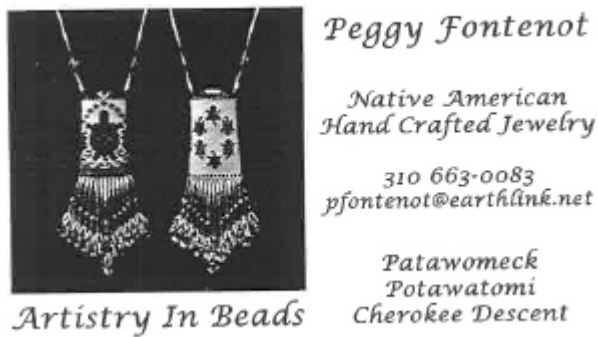
STATEMENT OF UNDISPUTED FACTS

For the purpose of this Motion, Defendant does not dispute any material fact, as set forth below:

1. Plaintiff is a resident of Santa Monica, California. Exhibit A, Amended Comp., ¶ 11.
2. Since 2006 Plaintiff has been a member of the Patawomeck Indian Tribe of Virginia, and identifies herself as a member of the Patawomeck Indian Tribe. Ex. A ¶ 12.
3. The Patawomack Indian Tribe is not recognized by the federal government or any state other than Virginia.
4. Since 1983, Plaintiff has created and sold Native American art consisting of beadwork and silver jewelry. *Id.*
5. Plaintiff also takes, develops, and sells her photography portraying images of native people. *Id.*
6. Plaintiff shows and sells her art and photography at art shows, museums, galleries, through her website, and through word-of-mouth contact through prior clients. *Id.*
7. Plaintiff has a long history of identification and affiliation with Native American heritage and culture. Ex. B, Pl. Resp. to Def's Interrog., No. 13.
8. Over the years, Plaintiff has changed the way she describes and markets her art:

- a. From 1983 through 2013 Plaintiff described herself as Cherokee, even though she was not a member of the Cherokee Tribe. *Id.* See also Exhibit C, Plaintiff's Deposition, 24:4-16.
 - b. In 2013 Plaintiff started describing herself as "Cherokee Descent" after meeting with an Indian lawyer who "explained to [Fontentot] the difference" between describing herself as "Cherokee" versus of "Cherokee Decent." See Exhibit D, Declaration of A. Mayer, ¶ 2 (Pl's 2017 Deposition) at 23:4-24:1.
 - c. From 2004 through 2019, Plaintiff identified and described herself as "Potawatomi Certified Artisan." Ex. B, No. 13.
 - d. In 2019, Plaintiff changed her identification and description to "Potawatomi Descent." *Id.*

Since 2007 Plaintiff has identified herself as a member of the Patawomeck Indian Tribe of Virginia. *Id.*; see also Ex. A, ¶ 12.
9. Plaintiff's primary mode of marketing is her business card and her website, and she sometimes uses table signs at shows she attends. Ex. C, 14:11-18; see also Ex. B, No. 13.
10. Plaintiff currently describes and markets herself using the terminology on her business card, which says: "Native American Hand Crafted Jewelry" "Patawomeck", "Potawatomi" and "Cherokee Descent" :



See Ex. C, 28:11, 13:3-16; see also Ex. D ¶ 3.

11. Plaintiff markets her photography on her website. Ex. C, 14:17-18.

12. Plaintiff's business card for her photography also only includes the terms "Patawomeck," "Potawatomi," and "Cherokee Descent":



Id., and Ex. D, ¶ 3.

13. As listed on her photography business card, Plaintiff's website is located at the web address fontenotphotography.com. Ex. C, 30:2.

Plaintiff's Oklahoma Lawsuit

14. In 2016, the Oklahoma legislature passed a law amending its consumer fraud statute to prevent any merchant artist from marketing art as "American Indian made" if the art was not a

produced or sold by a member of a federally recognized tribe (the “Oklahoma Act”). *See Fontenot v. Hunter*, 378 F. Supp. 3d 1075 (2019).

15. Plaintiff sued the Attorney General of Oklahoma, Mike Hunter, challenging the constitutionality of Oklahoma’s law on several different legal bases including the due process clause, the equal protection clause, and the First Amendment (the “Oklahoma lawsuit”). *See generally, id.*

16. In the Oklahoma lawsuit, Plaintiff provided evidence that she frequently attended festivals and events in Oklahoma where she sold and marketed her art, including:

2007: Cherokee Art Market, Tulsa; Fred Jones Museum, Norman, August; IOA Gallery, Current Realities, Oklahoma City, November-December; Red Earth Pow Wow, Cox Convention Center, Oklahoma City;
2008: Cherokee Art Market, Tulsa; IOA Gallery, Current Realities, Oklahoma City, January-February; Red Earth Master Artist Show, Oklahoma City, February-March;
Red Earth Pow Wow, Cox Convention Center, Oklahoma City;
2010: Red Earth Pow Wow, Cox Convention Center, Oklahoma City;
2011: Red Earth Pow Wow, Cox Convention Center, Oklahoma City;
2014: Red Earth Pow Wow, Remington Park, Oklahoma City;
2015: Red Earth Pow Wow, Cox Convention Center, Oklahoma City;
2016: Red Earth Pow Wow, Cox Convention Center, Oklahoma City;
2017 (anticipated): Red Earth Pow Wow, Cox Convention Center, Oklahoma City, June 9-11.

See Ex. D, ¶ 4 (Fontenot0181–0182).

17. In the Oklahoma lawsuit, the Western District of Oklahoma held that Oklahoma’s law did not violate the due process clause, the equal protection clause, or the First Amendment. The Court struck down Oklahoma’s law for an alternative reason—that it conflicted with the Federal Indian Arts and Crafts Act (the IACA). *Hunter*, 378 F. Supp. 3d at 1099.

18. The IACA is codified in 24 U.S.C. § 305e, and provides that certain specified individuals¹ may:

bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States . . . [.]

Id. at § 305e(b).

19. The IACA provides the following definitions, which are only applicable “in this section” of the statute:

(1) Indian

The term “Indian” means an individual that--

(A) is a member of an Indian tribe; or

(B) is certified as an Indian artisan by an Indian tribe.

(2) Indian product

The term “Indian product” has the meaning given the term in any regulation promulgated by the Secretary.

(3) Indian tribe

(A) In general

The term “Indian tribe” has the meaning given the term in section 5304 of this title.

(B) Inclusion

The term “Indian tribe” includes, for purposes of this section only, an Indian group that has been formally recognized as an Indian tribe by--

(i) a State legislature;

(ii) a State commission; or

(iii) another similar organization vested with State legislative tribal recognition authority.

Id. at § 305e(a)(1)-(3).

Plaintiff’s Current Lawsuit

¹ In § 305e(d), the IACA sets forth the “persons that may initiate civil actions” are (A) the Attorney General, acting on behalf an Indian tribe, an Indian, or an Indian arts and crafts organization; or (B) an Indian tribe, acting on behalf of a member of an Indian tribe or an Indian arts and crafts organization; or (C) an Indian; or (D) and Indian arts and crafts organization.

20. In 2018, the Missouri General Assembly passed HB 1832, which amended Missouri's consumer fraud statute by (among other things), adding § 407.315, which provides protection for Missouri consumers by providing that:

2. No merchant shall distribute, trade, sell, or offer for sale or trade within this state any article represented as being made by American Indians unless the article is an authentic American Indian art or craft. All such articles purporting to be of silver shall be made of coin or sterling silver.

3. Any 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 this section shall be subject to a fine of not less than twenty-five dollars and not more than two hundred dollars, to imprisonment for not less than thirty days and not more than ninety days, or to both such fine and imprisonment.

Id. at § 407.315.2–.3 (the “Missouri American Indian Art or Craft Act” or the “Missouri Act”).

21. Similar to the Oklahoma's Act, Missouri's American Indian Art or Craft Act provides the following definitions:

1. As used in this section, the following terms mean:

- (1) “**American Indian**”, a person who is a citizen or enrolled member of an American Indian tribe;
- (2) “**American Indian tribe**”, any Indian tribe federally recognized by the Bureau of Indian Affairs of the United States Department of the Interior;
- (3) “**Authentic American Indian art or craft**”, any article of American Indian style, make, origin, or design that was made wholly or in part by American Indian labor and workmanship including, but not limited to, any Kachina doll, rosette, necklace, choker, barrette, hair tie, medallion, pin, pendant, bolo tie, belt, belt buckle, cuff links, tie clasp, tie bar, ring, earring, purse, blanket, shawl, moccasin, drum, or pottery or any visual or performing arts or literature;
- (4) “**Imitation American Indian art or craft**”, any basic article purporting to be of American Indian style, make, origin, or design that was not made by American Indian labor and workmanship;
- (5) “**Merchant**”, any person engaged in the sale to the public of imitation American Indian art or craft or authentic American Indian art or craft.

§ 407.315.1, RSMo (2018).

22. While Plaintiff was challenging the Oklahoma law, “the State of Missouri ... passed a bill that was similar. So [Plaintiff] decided to challenge the Missouri law, as well.” Ex. C, 9:4-10.

23. Plaintiff became aware of Missouri’s Indian Arts and Crafts law through a “Google Alert” she had set up to identify these news about these issues. *Id.* at 9:11-18

24. Plaintiff does not directly market to Missouri consumers; she only indirectly markets to Missouri consumers by hosting a website that Missouri consumers can access. *Id.* at 13:2.

25. Plaintiff does not specifically target any states to advertise her work. *Id.* at 15:6-7.

26. Plaintiff has not attended any Native American events, festivals, or art shows in the state of Missouri. *Id.* at 11:16.

27. Plaintiff had no plans before August 28, 2018, the effective date of Mo. Rev. Stat. § 407.315, and has had no plans since August 28, 2018 to attend any event, sale, or festival in the state of Missouri. *Id.* at 15:19-23.

28. Plaintiff has never physically advertised her products for sale in the state of Missouri. *Id.* at 11:13.

29. In fact, Plaintiff has never been to Missouri. *Id.* at 11:10-13.

30. Plaintiff knows of only one customer from Missouri (the “Missouri customer”), who purchased two sets of earrings from Plaintiff in July 2018. Ex. B, No. 8.

31. The Missouri customer is a Patawomeck Indian Tribe member who learned about Plaintiff’s jewelry from a relative, who is also connected to the Patawomeck Indian Tribe. Ex. C, 10:21-22.

32. The Missouri customer's relative showed the Missouri customer photographs of Plaintiff's work, and learned about plaintiff's products through pictures and word of mouth, not through Plaintiff's marketing. *Id.* at 10:22-23.

33. Despite almost no contact with Missouri consumers, Plaintiff filed the instant lawsuit, asserting both as-applied and facial challenges to the constitutionality of the Missouri Act, claiming it violates her First Amendment right to free speech. Ex. A, p. 10 (Prayer for Relief).

34. Further, in the course of discovery, Plaintiff has been unable to identify any art show, event, or festival in Missouri that she did not attend because of the Missouri Act. Ex. 15:16-23 ("Missouri doesn't have any festivals, Native American festivals.").

35. Plaintiff says that she is now unable to sell to Missouri galleries that market Native American art in Missouri, but she admits that she "typically does not solicit galleries to sell [her] work," and has no knowledge of any Missouri gallery putting out a call for artists to submit their artwork. *Id.* at 26:18-28:18.

36. Plaintiff has never been approached by any private citizen in the state of Missouri requesting that she cease marketing of her art. *Id.* at 12:15.

37. Plaintiff has never been approached by any law enforcement agency located in the state of Missouri regarding the marketing or sales of her products; nor has Plaintiff ever been threatened with fines or imprisonment regarding the marketing or sales of her products in violation of the Missouri Act. *Id.* at 12:10.

38. Plaintiff has not changed anything on her website since the passage of Mo. Rev. Stat. § 407.315. *Id.* at 26:6.

39. Plaintiff has not changed anything on her business card based on the passage of Mo. Rev. Stat. § 407.315. *Id.* at 26:9.

40. Plaintiff has not cancelled any plans to attend any events based on the passage of Mo. Rev. Stat. § 407.315. *Id.* at 26:12-13.

41. Plaintiff has not changed her attendance at any festivals, art shows, or any other venues where she might sell her art, beadwork, or silver jewelry since the passage of Mo. Rev. Stat. § 407.315. *Id.* at 26:17.

42. The only Missouri-specific marketing that Plaintiff claims to have done differently since the Missouri AIACA was passed, is that she “can’t reach out to the [Missouri] customer who purchased my art, or if they reached out to me, I cannot under this new law, sell to them.” *Id.* at 25:19-21; 26:18-21.

43. Under the IACA Plaintiff is unable to market herself in a way that suggests that she is member of a federally recognized tribe, such as “Cherokee.” *See id* at 19:4-20:12 (2020).

44. Plaintiff admits that consumers of Native American arts and crafts make their purchasing decisions on a variety of factors, including the tribal heritage of an art or craft and/or the artist who created the art or craft. *Id.* at 21:20-22:9.

STANDARD OF REVIEW

Summary judgment is appropriate when “there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” *Farver v. McCarthy*, 931 F.3d 808, 811 (8th Cir. 2019) (quoting Fed. R. Civ. P. 56(a)). There is a genuine issue of material fact if there is enough evidence “that a reasonable jury could return a verdict for the nonmoving party.” *Farver*, 931 F.3d at 811.

ARGUMENT

Defendant is entitled to judgment as a matter of law on Plaintiff’s claim (both as-applied and facially) for three separate reasons. First, Plaintiff lacks standing because any alleged injury is

purely hypothetical, not concrete or particularized. Plaintiff markets and sells her products at events. However, she has not attended or identified any Native American event in Missouri, she does not target Missouri customers through her marketing and website, and she has not presented any evidence that the marketing of her products is prohibited by § 407.315. Thus, Plaintiff has not suffered an injury in fact sufficient to confer standing. Second, this case is not ripe. Plaintiff's alleged harm of not being able to market her products concern future events that may not even occur. Second, Plaintiff's alleged harm has not matured enough to warrant judicial intervention. *Missourians for Fiscal Accountability*, 830 F.3d at 797, citing *Parrish*, 761 F.3d at 875. Third, § 407.315 does not violate the First Amendment because it places appropriate limits on only misleading commercial speech, which is entirely permissible under the *Central Hudson* test. The statute allows truthful marketing of arts and crafts made by members of federally-recognized American Indian tribes, thereby furthering Missouri's interest in protecting consumers and ensuring the integrity of the market.

I. Plaintiff lacks standing to bring this lawsuit.

Plaintiff cannot proceed with this case because she does not meet the requirements of Article III standing. “The party invoking federal jurisdiction bears the burden of establishing” it meets these requirements. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). To have Article III standing, a plaintiff must allege and prove “(1) an injury in fact; (2) a causal connection between the injury and the law; and (3) that a favorable decision will “likely” redress the injury. *Rodgers v. Bryant*, 942 F.3d 451, 454 (8th Cir. 2019); *Lujan*, 504 U.S. at 560–61.

The Eighth Circuit follows the Supreme Court's explanation of the purpose of the injury in fact requirement: “to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem.” *Nat'l Wildlife Fed'n v.*

Agric. Stabilization & Conservation Serv., 901 F.2d 673, 677 (8th Cir. 1990) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)). Standing requires “that the alleged injury is not too speculative for Article III purposes”—the injury must be “certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013) (citation omitted). “To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (internal quotation marks and citation omitted). “Allegations of possible future injury do not satisfy the [‘actual or imminent’] requirement[] of Art. III.” *Fontenot v. Hunter*, 378 F. Supp. 3d 1075, 1087 (W.D. Okla. 2019), quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

The party invoking jurisdiction must “show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.” *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 135 (2011) (quotations omitted). If “the plaintiff’s standing does not adequately appear from all materials of record, the complaint must be dismissed.” *Warth v. Seldin*, 422 U.S. 490, 501–02 (1975); *see also Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1039 (8th Cir. 2000).

In the First Amendment context, a plaintiff can establish injuries to satisfy Article III’s standing requirement in one of two ways. *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016). First, plaintiff can allege “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.” *Id.*, citing *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Second, a plaintiff can allege he or she self-censored. *Id.* Ms. Fontenot has not established either type of injury.

First, assuming that Ms. Fontenot does have a constitutionally-protected right to market her products as made by a member of a federally-recognized American Indian tribe—discussed in Part III *supra*—she has not offered evidence that she intends to engage in a course of conduct prohibited by § 407.315. In her deposition, Plaintiff testified that the only reason she brought the lawsuit was because “the State of Missouri, while we were challenging the Oklahoma law, passed a bill that was similar. So we decided to challenge the Missouri law, as well.” Statement of Facts (SOF), ¶ 22. When asked about her history of marketing and sales to Missourians, Plaintiff responded that “there are no shows in Missouri, so I wasn't present in Missouri.” SOF, ¶ 34. Plaintiff admitted that she has never marketed her goods in Missouri. SOF, ¶ 28. She knows of no event in Missouri where she would want to sell her goods. SOF, ¶ 27; Ex. C, 11:16. Aside from one Missouri customer who purchased her earrings in about July 2018—before § 407.315 was in effect— Plaintiff did not identify any other Missouri customer who purchased her products and she does not track her customers. SOF, ¶ Ex. C, 17:5-6.

Plaintiff has not changed anything on her website or business card or changed her attendance at events because of Missouri’s law. SOF ¶ Ex. C, 26:3-12. In fact, of the two business cards Plaintiff produced in discovery, neither had used the term “American Indian.” SOF ¶¶ 10, 12. The only change that came to Plaintiff’s business that she attributes to Missouri’s law is that she cannot “reach out to the [Missouri] customer who purchased my art, or if they reached out to me, I cannot, under this new law sell to them.” SOF ¶ 42. But, as discussed in Part III below, nothing in § 407.315 prohibits Plaintiff from contacting her single Missouri customer from July 2018 or selling a product to them.

Additionally, though Plaintiff alleged in her Complaint that she is subject to fines and imprisonment if she continues to market and describe her art as American Indian-made,” (Ex. A, ¶ 4), she has put forward no credible evidence of future prosecution. She testified that no prosecutor has approached her nor has any citizen sent her a demand or cease and desist letter to cease marketing her products in a certain way. SOF ¶¶ 36-37; Ex. C, 12:10. Plaintiff’s theory of prosecution is purely “conjectural or hypothetical,” *Spokeo*, 136 S. Ct. at 1548. For any chill on speech to be justiciable as an injury in fact, it must be an objectively reasonable chill based on the actual sweep of the statute or actual likelihood of enforcement.

Because Plaintiff has neither alleged nor come forward with evidence of past or imminent future conduct violating the statute, Plaintiff any possible enforcement is but vague speculation and far from qualifying as a credible threat of imminent enforcement. “A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.” *Babbitt*, 442 U.S. at 297–98. In other words, “‘imaginary or speculative fears of prosecution are insufficient to confer standing.” *Bryant v. Woodall*, 363 F. Supp. 3d 611, 614 (M.D.N.C. 2019). Plaintiff has shown no credible threat of enforcement of the law against her in any specific case or sale. And because Plaintiff has not marketed or advertised her art as being made by a member of a federally-recognized American Indian tribe, she does not come within the scope of the statute’s coverage, as discussed in Part III *supra*.

And there is good reason why no prosecutor has sought to enforce the law against Plaintiff. Plaintiff’s allegation that the statute prevents her from “truthfully market[ing] and describe[ing] her art in Missouri,” is incorrect because the statute only prohibits misrepresenting products as made by a member of a federally-recognized American Indian tribe. Plaintiff has already admitted that she is not a member of a federally-recognized tribe. SOF ¶ 3; Ex C, 16:23-24. And the statute,

under any reasonable reading, would not prevent Plaintiff from selling any products made by *others* who are members of federally-recognized American Indian tribes.

And critically, Plaintiff has not introduced any evidence that she has ever used the term “American Indian” in her marketing and advertising whether before or after § 407.315 was enacted. Instead, she has used the term “Native American” and the name of her Virginia-state-recognized tribe. While Plaintiff testified in her deposition that the terms American Indian and Native American are one in the same to her, Ex. C, 14:6, § 407.315 is a classic truth-in-advertising law that prevents the use of very specific false and misleading terms in advertising.

But Plaintiff “cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.” *Clapper*, 568 U.S. at 416. Standing does not exist, and an injury is not fairly traceable to a law, when the alleged injury is “based on a fear of” the effect of the law or “a reasonable reaction to a risk of harm.” *Id.* Accepting such a self-inflicted injury as creating Article III standing would “improperly water[] down the fundamental requirements of Article III.” *Id.* “If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear.” *Id.*; *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (requiring a credible threat of enforcement). Simply alleging that Plaintiff’s *intended* speech is *arguably* covered and prevented by the statute ignores the context-dependent analysis required under *Susan B. Anthony List*, which considered the objective reasonableness of the fear of enforcement, including actual evidence of enforcement as well as whether the challengers fell under the actual sweep of the statute before concluding that there was a credible risk of enforcement in that case. 573 U.S. at 161–67. If the opposite were true, any fear of falling under a statute would be an Article III injury-in-fact, no matter how strained and incorrect the

reading of the statute was, and no matter how divorced from any actual threat of an enforcement proceeding the fear was. And that cannot be the law.

Additionally, Plaintiff cannot demonstrate standing under the self-censorship prong of standing. In her deposition, Plaintiff testified nothing changed about the way she has been advertising her art. Pl. Dep. 8:11-13 (“No. I still advertise with my card, or when I do a show if they make a sign for your table, I exhibit that.”) Specifically, she testified that she markets her art in the same way, regardless of where she is located (SOF, ¶ 25; Ex. C, 8:14-20); she has never physically advertised or sold her art in the state of Missouri (SOF ¶ 28; Ex. C, 11:10-13); and she is not aware of any events, festivals, or art shows in Missouri where she would sell her art (SOF, ¶ 34; Ex. C, 15:19-20). Plaintiff’s imagined self-censorship in the hypothetical event that she becomes aware of a Missouri festival or art show is insufficient to confer Article III standing. *See 281 Care Committee v. Anderson*, 638 F.3d 621 (8th Cir. 2011) (“[S]elf-censorship based on mere allegations of a “subjective” chill resulting from a statute is not enough to support standing (citing *Laird v. Tatum*, 408 U.S. 1, 13–14, (1972)))); *see also Babbitt*, 442 U.S. at 298 (“[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.”).

II. Even if Plaintiff has standing, this case is not ripe for adjudication.

Plaintiff also must show that this case presents a justiciable and ripe controversy. “A ripe controversy exists if the parties’ dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief with a conclusive character.” *Alpert v. State*, 543 S.W.3d 589, 592 (Mo. 2018). “The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant

judicial intervention.” *Missourians for Fiscal Accountability*, 830 F.3d at 797, citing *Parrish*, 761 F.3d at 875. “The central concern is whether the case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all.” 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 3532 (3d ed.).

One purpose of the ripeness doctrine is to avoid unnecessary decisions by the court, ones that “dissipate judicial energies better conserved for litigants who have a real need for official assistance.” 13B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 3532.1 (3d ed.). Another purpose is to prevent burdening defendants from spending resources trying to litigate hypotheticals. The First Circuit has held that “[d]efendants, moreover, should not be forced to bear the burdens of litigation without substantial justification, and in any event may find themselves unable to litigate intelligently if they are forced to grapple with hypothetical possibilities rather than immediate facts.” *Gun Owners' Action League, Inc. v. Swift*, 284 F.3d 198, 206 (1st Cir. 2002). Determining ripeness requires probing the (1) “fitness of the issues for judicial decision” and (2) “the hardship to the parties of withholding court consideration.” *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). In the Eighth Circuit, “[a] party seeking judicial relief must necessarily satisfy both prongs to at least a minimal degree.” *Id.* at 1039.

A. Plaintiff’s claim is not factually or legally developed enough for a court’s determination.

Similar considerations that defeat Plaintiff’s standing to bring this lawsuit also show that her claims are neither sufficiently factually or legally developed. Plaintiff’s claim rests on contingent future events that may not happen at all. “The ‘fitness for judicial decision’ inquiry goes to a court’s ability to visit an issue. . . . [I]t safeguards against judicial review of hypothetical

or speculative disagreements.” *Nebraska Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000). Courts in the Eighth Circuit do not entertain a challenge as justiciable “without information” about how the law “actually operates.” *Comprehensive Health of Planned Parenthood Great Plains v. Hawley*, 903 F.3d 750, 755 (8th Cir. 2018). “Refraining from ‘premature’ decisions on facial challenges is a proper exercise of judicial restraint.” *Id.* (citing *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). “This is especially true when adjudicating the constitutionality of state laws.” *Id.* (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

Plaintiff cannot meet her burden of proving that the case is ripe for judicial review. There is no evidence in the record that the State nor a county prosecutor has tried to enforce the statute in the way that Plaintiff fears, either against Plaintiff or against any other merchant, or even given any indication that they plan to do so. Nearly two years since § 407.315 was passed, and Plaintiff has come forward with no evidence of actual or threatened prosecution under the statute, and Plaintiff has no evidence that she might be the first person prosecuted, perhaps based on her stated methods of marketing and business activities and her incorrect reading of the scope of the statute. This case would be better suited for judicial review if Plaintiff has identified a Missouri market for her products; evidence of a lost Missouri customer base because of § 407.315; Plaintiff’s attendance at Missouri festivals and events; and promotional efforts directed at Missouri customers. Instead, Plaintiff is an out-of-state merchant without a Missouri customer base that seeks to challenge a law designed to protect Missouri customers from false and misleading advertising.

B. Plaintiff will not suffer a hardship absent immediate judicial consideration.

“In addition to being fit for judicial resolution, an issue must be such that delayed review will result in significant harm. ‘Harm’ includes both the traditional concept of actual damages—pecuniary or otherwise—and also the heightened uncertainty and resulting behavior modification that may result from delayed resolution.” *Nebraska Pub. Power Dist.*, 234 F.3d at 1038. Some factors courts consider in determining the hardship question included delayed review results in “substantial financial risk, or will force parties to modify their behavior significantly.” *Id.* at 1039.

There is no significant practical harm that will befall Plaintiff by delaying adjudication until Plaintiff can come forward with facts demonstrating a ripe judicial controversy. Plaintiff markets her art, beadwork, and silversmithing products by handing out her business card and displaying signage at her table during shows. SOF, ¶ 9; Pl. Dep. 8:11-13. However, Plaintiff has not attended any art shows within the state of Missouri. SOF, ¶ 26; Pl. Dep. 10:16-17. Plaintiff has not attended any Native American events or festivals within the state of Missouri. *Id.* Therefore, Plaintiff has never marketed any American Indian-related items within the state of Missouri. *See* Ex. C, 10:6-11:24. Thus, Plaintiff will not be subjected to substantial financial risk absent immediate judicial resolution.

Rather than entertain this case now, with no realistic, credible, or concrete chance of enforcement under the theories plaintiffs hypothesize, it would be better to consider this case later if any threat of enforcement materializes. With no evidence of enforcement, delay will not cause hardship to the parties, and adjudication is premature, because Plaintiff’s activities in Missouri are, at best, not sufficiently mature and thus fit for review. *Nat’l Right to Life Political Action Comm. v. Connor*, 323 F.3d 684, 694 (8th Cir. 2003). In short, her claims would benefit from “further factual development.” *Id.* at 692–93. And any ruling now would mean “would lack the clarity and

force which ought to inform the exercise of judicial authority.” *Comprehensive Health of Planned Parenthood Great Plains*, 903 F.3d at 757 (citations omitted). Nor would hardship be imposed by withholding constitutional judgment when the law has never been enforced against Plaintiff and appears unlikely to be applied to her.

Missouri consumers have not relied upon and do not rely upon Plaintiff’s representations about her Native American heritage or tribal affiliations. Because Plaintiff has never marketed to or specifically targeted Missourians, and because Plaintiff’s sales and marketing have not changed since the passage of RSMo § 407.315, Plaintiff will not suffer a hardship if the court withholds consideration of Plaintiff’s claim. Additionally, Plaintiff’s claim is based upon events that may not ever occur. Therefore, Plaintiff’s claim is not ripe for judicial consideration.

III. The Missouri American Indian Art or Craft Act does not violate the First Amendment of the United States Constitution.

It is not necessary for the Court to decide the merits of Plaintiff’s claim² that § 407.315 violates her First Amendment speech rights. But, in the event this Court reaches the merits, Plaintiffs’ claim fails for two reasons. First, Plaintiffs’ First Amendment claim is based entirely on her own incorrect interpretation of the statutory language. The rules of statutory construction favor a much narrower interpretation of § 407.315’s limitations on commercial speech. Second, the State’s narrower interpretation only prohibits misleading commercial speech, which is allowed under the *Central-Hudson* test for regulations relating to commercial speech.

² It is worth noting that in *Fontenot v. Hunter*, Plaintiff raised several challenges to the act, including due process, equal protection, and First Amendment claims, as well as preemption by the IACA. *See generally* 378 F. Supp. 3d 1075. Here Plaintiffs only raises a First Amendment claim—a legal basis expressly rejected by the Western District of Oklahoma. *Id.* at 1094.

A. Plaintiff's construction of Section 407.325 is incorrect.

Plaintiff's as-applied and facial challenge to § 407.315 rests entirely on her personal interpretation that, “even though [Plaintiff] is a member of a state-recognized tribe, [she] is no longer legally able to truthfully market and describe her art in Missouri as American-Indian made without penalty.” Ex. A, ¶ 32. Plaintiff appears to believe the statute specifically prevents her from calling her art “American Indian” made. *Id.* at ¶ 33. Further, Plaintiff argues that the statute is an impermissible “speaker based distinction” because it does not prohibit citizens or members of federally recognized tribes from representing their art and crafts as American Indian-made. Ex. A, ¶ 41. But the plain language of the statute does not support Plaintiff's interpretations of the statutory language.

Further, even if the statute's language is ambiguous, only Defendants' interpretation of § 407.315 comports with Missouri's other rules of statutory construction and avoids an apparent First Amendment issue.

i. By its plain text, § 407.315 prohibits only *false* or misleading representations.

“Under Missouri law, ‘[t]he seminal rule of statutory construction is to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning.’ *Missouri Bev. Co., Inv. v. Shelton Bros., Inc.*, 669 F.3d 873, 877 (8th Cir. 2012) (quoting *St. Louis Cnty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 713–14 (Mo. banc 2011)). “When a statute's language is clear, Missouri courts give effect to its plain meaning and ‘refrain from applying the rules of construction unless there is some ambiguity.’” *Id.* (quoting *Prestige Travel, Inc.*, 344 S.W. 3d at 714). But, when there is ambiguity and “statutory interpretation is necessary,

statutory language is considered in context and in comparison with other sections to determine its meaning.” *Id.* (quoting *Prestige Travel, Inc.*, 344 S.W.3d at 714).

The plain language of § 407.315 does not support Plaintiff’s interpretation of the statute’s application to her situation. Section 407. 315.2 provides that “no merchant shall distribute, trade, sell, or offer for sale or trade within this state any article represented as being made by American Indians unless the article is an authentic American Indian art or craft.” *Id.* at § 407.315.2. The statute itself defines several of the terms used in this section:

As used in this section, the following terms mean:

- (1) “**American Indian**”, a person who is a citizen or enrolled member of an American Indian tribe;
- (2) “**American Indian tribe**”, any Indian tribe federally recognized by the Bureau of Indian Affairs of the United States Department of the Interior;
- (3) “**Authentic American Indian art or craft**”, any article of American Indian style, make, origin, or design that was made wholly or in part by American Indian labor and workmanship including, but not limited to, any Kachina doll, rosette, necklace, choker, barrette, hair tie, medallion, pin, pendant, bolo tie, belt, belt buckle, cuff links, tie clasp, tie bar, ring, earring, purse, blanket, shawl, moccasin, drum, or pottery or any visual or performing arts or literature;
- (4) “**Imitation American Indian art or craft**”, any basic article purporting to be of American Indian style, make, origin, or design that was not made by American Indian labor and workmanship;
- (5) “**Merchant**”, any person engaged in the sale to the public of imitation American Indian art or craft or authentic American Indian art or craft.

§ 407.315.1, RSMo (2018). When we apply the definitions provided for “merchant,” “American Indian,” and “authentic American Indian art or craft” to the language of § 407.315.2, the meaning of this section is clear: No *person engaged in the sale to the public of either “imitation” or “authentic” American Indian art or craft* (merchant), may distribute, trade, sell or offer for sale or trade within Missouri, any article represented as being made by *citizens or enrolled members of a federally recognized Indian tribe* (American Indians), unless the article is *made wholly or in part by labor and workmanship of a citizen or enrolled member of a federally recognized tribe*

(“authentic American Indian art or craft”). Similarly, § 407.315.3 provides a criminal penalty for “[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 this section[.]” *Id.* The “specifications of this section” are those previously established by §406.315.2—the statute’s prohibition against merchants’ representing an article to be “made by a citizen or enrolled member of a federally recognized Indian tribe” when it is not “made wholly or in part by labor and workmanship of a citizen or enrolled member of a federally recognized tribe.”³

This section does not prevent Plaintiff from truthfully marketing or describing her art as American-Indian made. Plaintiff likely qualifies as a “merchant” under the statute because she sells (what the statute defines as) “imitation American Indian art or craft.” However, § 407.315 does not prohibit the truthful distribution, trade, sale, tagging, or labeling of any “imitation American Indian art or craft.” Nor does the statute expressly prohibit using any words, like “American Indian.” Rather, uses “American Indian” as a defined term of art, the meaning of which is only “used in this section.” *See* § 407.315.1. The statute only expressly prohibits merchants from selling articles “represented as being made by” citizens or members of a federally recognized tribe when they are not made wholly or in part by a citizen or member of a federally recognized tribe.

Plaintiff also incorrectly interprets § 407.315 to prohibit “everyone but citizens or members of federally recognized tribes from representing their art and crafts as American Indian-made.” Pl. Amend. Com. ¶ 41. Section 407.315 is not a “speaker based” restriction on commercial speech. The statute expressly defines “merchants” as any person who publically sells *either* imitation or

³ Section 407.315.2 also provides that “all such articles purporting to be of silver shall be made of coin or sterling silver.”

authentic “American Indian” art or craft. *See* § 407.315.1(5). The statute’s prohibitions in § 407.315.2-.3 extend to *all* “merchants” (including those who sell “authentic” American Indian arts and crafts). In other words, a member of the federally recognized Cherokee Indian tribe may not label or sell any “imitation American Indian art or craft” as if it was made by a citizen or member of the Cherokee Indian tribe, unless the product is actually made by a member of a federally recognized tribe.

ii. Plaintiff’s interpretation does not comport with rules of statutory construction.

Even if the statutory language is ambiguous, Plaintiffs’ interpretation fails because it is inconsistent with Missouri’s rules of statutory construction, specifically the rule that courts “must construe provisions of the entire legislative act together[.]” *See Bolen v. Orchard Farm R-V Sch. Dist.*, 291 S.W.3d 747, 751 (Mo. App. 2009). Defendant’s interpretation of § 407.315 as a speaker-based restriction on commercial speech ignores that the statute is part of Missouri’s larger consumer fraud statute—the Missouri Merchandising Practices Act (“MMPA”). States have an interest in protecting their consumers from “commercial harms[.]” *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996). Thus, interpreting § 407.315 as **not** applying to members of federally recognized tribes would undercut the very purpose of the MMPA—protecting consumers, not merchants.⁴

⁴ As a truth-in-marketing law, § 407.351 aligns with the purposes of the IACA, 25 U.S.C. § 305e. Both laws target false statements related to the source or origin of Native American art. However, the IACA is *not* primarily a consumer fraud statute. Instead, the IACA, creates a private right of action for both the members of federal and state Indian tribes, to sue for damages arising from false advertising under the statute. Missouri’s law exists solely to protect Missouri’s *consumers*. This means that Missouri’s law does not *conflict* with the IACA—it merely fails to create a specific MMPA violation for falsely representing that an art or craft was made by a member of state-recognized tribe.

As Plaintiff herself admitted in her deposition, consumers of Native American arts and crafts make purchasing decisions for a variety of reasons. Sometimes the decision is based on the tribal heritage of the individual who created the art or craft. SOF, ¶ 44; Ex. C, 21:20-22:9. This is especially true in our “melting pot” nation where citizens’ have diverse genealogies stemming from a variety of different ethnic groups. If a Missouri consumer is looking to purchase authentic Cherokee jewelry, they are protected from merchants who falsely use names of a federally recognized tribe, such as the Cherokee Nation,⁵ to market and sell their products. Conversely, if the same Missouri consumer merely wants to purchase American-Indian style jewelry without regard to its origin—he or she will have a variety of price-friendly options, because the statute does not prohibit the sale of “imitation” American Indian style art or craft.

iii. The canon of constitutional avoidance compels Defendants’ interpretation.

Again, even were there was doubt about the meaning or effect of § 407.315, a different rule of construction—the canon of constitutional avoidance—precludes interpreting the statute to pose a First Amendment problem. Under both federal and state law, if a law is subject to “competing plausible interpretations,” *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015), the statute must be construed “so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score,” *Almendarez-Torres v. United States*, 523 U.S. 224, 237–328 (1998) (quotation omitted).

This canon “is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S.

⁵ The entire list of 574 federally recognized tribal entities can be found here: <https://www.federalregister.gov/documents/2020/01/30/2020-01707/indian-entities-recognized-by-and-eligible-to-receive-services-from-the-united-states-bureau-of>.

502, 516 (2009). It “not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). “The courts will therefore not lightly assume that [a legislature] intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.” *Id.*

Under Missouri law, where “one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended.” *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. 1991) (en banc). For this reason, “ambiguous statutes that are susceptible to more than one construction should be construed in a manner consistent with the constitution.” *M & P Enterprises, Inc. v. Transamerica Fin. Servs.*, 944 S.W.2d 154, 159 (Mo. 1997), as modified on denial of reh’g (May 27, 1997). State statutes thus “cannot be held unconstitutional if they are susceptible to *any reasonable construction* supporting their constitutionality” *State v. Burnau*, 642 S.W.2d 621, 623 (Mo. 1982) (emphasis added). In short, if there is any doubt about the statute’s meaning, this Court should accept the interpretation that avoids constitutional concerns. *Martin v. Schmalz*, 713 S.W.2d 22, 25 (Mo. App. E.D. 1986) (quoting *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31, 35 (Mo. 1982)).

The Supreme Court has unanimously applied the canon of constitutional avoidance in First Amendment cases. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 588 (1988).⁶ Courts have recognized that this canon “is not a negation

⁶ *See also, e.g., N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 499–507 (1979); *Int’l Ass’n of Machinists v. Street*, 367 U.S. 740, 749–50 (1961). That has long been the precedent of this

of, or an end-run around, overbreadth doctrine,” because the First Amendment overbreadth doctrine does not apply when a statute is susceptible of multiple interpretations, one of which avoids a constitutional infirmity. *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1190–91 (D.N.M. 2014). *See also Sisney v. Kaemingk*, 886 F.3d 692, 698 (8th Cir. 2018) (cautioning that it is “not generally desirable to proceed to an overbreadth issue unnecessarily—that is, before it is determined that the statute would be valid as applied.”).

B. Section 407.315 places a permissible restriction on commercial speech.

Properly understood, Missouri’s statute comports with the First Amendment. Section 407.315’s prohibition on false statements of fact and misleading commercial speech does not apply to the non-misleading speech that Plaintiff currently uses to market her art and photography. Plaintiff testified that she stopped marketing herself as “Cherokee” and started using the term “Cherokee descent” years ago precisely because her advertising would falsely lead consumers to believe that she was a member of a federally recognized tribe. SOF ¶ 8(a). For this reason, § 407.315 does not apply to Plaintiffs’ current conduct, and she does not win on her as-applied challenge to the statute.

court. *Milavetz, Gallop & Milavetz, P.A. v. United States*, 541 F.3d 785, 791 (8th Cir. 2008), *aff’d* on these grounds, 559 U.S. 229 (2010). And the other federal courts of appeals hold the same. *E.g.*, *Veilleux v. Nat’l Broad. Co.*, 206 F.3d 92, 122 (1st Cir. 2000); *United States v. Caronia*, 703 F.3d 149, 160 (2d Cir. 2012); *Brown v. City of Pittsburgh*, 586 F.3d 263, 287 (3d Cir. 2009); *Radiance Found., Inc. v. N.A.A.C.P.*, 786 F.3d 316, 322 (4th Cir. 2015); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 316, 327 (5th Cir. 1994); *H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 624 (6th Cir. 2009); *520 S. Michigan Ave. Assocs., Ltd. v. Unite Here Local 1*, 760 F.3d 708, 726 (7th Cir. 2014); *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1209 (9th Cir. 2005); *U.S. W., Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir. 1999); *Pine v. City of W. Palm Beach, FL*, 762 F.3d 1262, 1271 (11th Cir. 2014); *Weaver v. U.S. Info. Agency*, 87 F.3d 1429, 1439 (D.C. Cir. 1996); *SKF USA, Inc. v. U.S. Customs & Border Prot.*, 556 F.3d 1337, 1350 (Fed. Cir. 2009).

Nor does Plaintiff's facial challenge succeed on the merits. Section 407.315 only applies to "merchants," and thus limits only commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"). Not all commercial speech receives First Amendment protection. *See id.* at 562-63 (explaining that the Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.").

In commercial speech cases, before applying any level of scrutiny, the Court first "must determine whether the expression is protected by the First Amendment." *Cent. Hudson*, 447 U.S. at 566. The Court proceeds to the other parts of the *Central Hudson* test—whether the government interest is substantial, whether the regulation directly advances it, and whether the regulation is no more extensive than necessary—*only if* the First Amendment protects the speech in the first place. *Id.* And the First Amendment does not protect false statements of fact, or inherently misleading speech. *Id.* In the words of *Central Hudson*, "[f]or commercial speech to come within [the First Amendment], it at least must concern lawful activity and *not be misleading*." 447 U.S. at 566 (emphasis added). If commercial speech is "misleading," *id.*, it is not protected by the First Amendment at all.

Here, this threshold question of *Central Hudson* decides the issue because the statute regulates only false or inherently misleading commercial speech, and so the First Amendment does not apply *at all* to the targeted speech. The statute prohibits merchants from selling and marketing "any article represented as being made by American Indians unless the article is an authentic American Indian art or craft." § 407.315.2. The statute's forbidden practice is, therefore, selling and marketing articles which are "*represented as being made by*" members or citizens of a

federally recognized tribes unless the article is “made wholly or in part by American Indian labor[.]” *See* § 407.314.1(2)-(3). Because the focus of the statute is the merchant’s representations relating to the product’s maker, the statute leaves no doubt that it is banning only false or misleading advertising.

Thus, the First Amendment allows Missouri to prohibit representing or labeling American-Indian style art as being made by a member or citizen of a federally recognized Indian tribe, when article is not, in fact, made in whole or in part by a member or citizen of a federally recognized Indian tribe. After all, “there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public... The government may ban forms of communication more likely to deceive the public than to inform it.” *Cent. Hudson*, 447 U.S. at 563 (citing *Friedman v. Rogers*, 440 U.S. 1, 13, 15–16 (1979); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464–465 (1978)). Because § 407.315 regulates only false or inherently misleading commercial speech, the *Central Hudson* inquiry for the facial challenge ends at the threshold question and the law is constitutional. 447 U.S. at 566 (1980).

CONCLUSION

For the foregoing reasons, Defendant asks this court to grant its motion for summary judgment.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April 2020, 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/ Alyssa M. Mayer

Alyssa M. Mayer