

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

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

**PLAINTIFF’S OPPOSING SUGGESTIONS IN OPPOSITION TO  
DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

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## **I. PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED FACTS**

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

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

3. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 3.

4. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 4 so long as the term "Native American" is understood to be synonymous with the term "American Indian." *See* Plaintiff's Supporting Suggestions in Support of Plaintiff's Motion for Summary Judgment 5 n.1 (Doc. 34).

5. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 5.

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

7. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 7 so long as the term "Native American" is understood to be synonymous with the term "American Indian." *See* Plaintiff's Supporting Suggestions in Support of Plaintiff's Motion for Summary Judgment 5 n.1 (Doc. 34).

8. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 8(a), (c), and (d). Plaintiff disputes the alleged facts in Paragraph 8(b) only with

regard to the date. Plaintiff began describing herself as “Cherokee Descent” in 2014, not 2013. *See* Def.’s Ex. B, No. 13. In any event, that fact is not material to the claims in this case.

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

10. For the purposes of this Motion, Plaintiff disputes the alleged facts in Paragraph 10 only with regards to the Potawatomi tribe. The image reproduced within Paragraph 10 is an outdated copy of Plaintiff’s business card. Plaintiff’s current business cards describe her as “Potawatomi Descent,” not as “Potawatomi.” Ex. 2 to Def.’s Ex. D ¶ 3, Bates-labeled Fontenot0457. In any event, that fact is not material to the claims in this case.

11. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 11.

12. For the purposes of this Motion, Plaintiff disputes the alleged facts in Paragraph 12 only with regards to the Potawatomi tribe. The image reproduced within Paragraph 12 is an outdated copy of Plaintiff’s business card. Plaintiff’s current business cards describe her as “Potawatomi Descent,” not as “Potawatomi.” Ex. 2 to Def.’s Ex. D ¶ 3, Bates-labeled Fontenot0457. In any event, that fact is not material to the claims in this case.

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

14. Paragraph 14 is primarily a statement of law, thus no response is required. For the purposes of this Motion, however, Plaintiff disputes the alleged facts in Paragraph 14 as to the nature of the Oklahoma legislature’s action in 2016. The 2016 law did not amend Oklahoma’s “consumer fraud statute.” Rather, Oklahoma’s American Indian Arts and Crafts

Sales Act of 1974 was amended. H.B. 2261, 55th Legislature, Second Reg. Sess. (Okla. 2016).

In any event, that fact is not material to the claims in this case.

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

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

17. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 17.

18. Paragraph 18 is a statement of law to which no response is required. Nevertheless, Plaintiff disputes that the Indian Arts and Crafts Act (IACA) is codified at 24 U.S.C. § 305e. It is in fact codified at 25 U.S.C. § 305e. In any event, that fact is not material to the claims in this case.

19. Paragraph 19 is a statement of law to which no response is required.

20. Paragraph 20 is a statement of law to which no response is required. However, Plaintiff disputes the phrase, “which provides protection for Missouri consumers,” because it is a legal conclusion about the interpretation of the challenged law.

21. Paragraph 21 is a statement of law to which no response is required.

22. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 22.

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

24. Plaintiff disputes the alleged facts in Paragraph 24. As discussed in Plaintiff's deposition, she directly marketed her art to Missouri consumers prior to the challenged law taking effect, and she would continue to directly market in Missouri but for the challenged law. Def.'s Ex. C 10:21-25; 16:14-19; 25:19-21; 29:4-19; Def.'s Ex. B, No. 8.

25. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 25.

26. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 26.

27. Plaintiff disputes the characterization of the alleged facts in Paragraph 27 and objects on the grounds that the alleged facts are not supported by the evidence cited by Defendant. Plaintiff's deposition answer was based on the current lack of festivals in Missouri, but Plaintiff indicated her willingness to attend any future events if and when scheduled. Def.'s Ex. C 15:19-20, 22-23.

28. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 28.

29. Plaintiff disputes the alleged facts in Paragraph 29. The evidence cited by Defendant does not support the alleged facts. Defendant's question during Plaintiff's deposition asked whether Plaintiff has "ever been present in the State of Missouri to advertise [her] art?" Def.'s Ex. C 11:10-12. Defendant did not ask whether Plaintiff has ever been present in the State of Missouri generally. *See id.* In fact, Plaintiff has been to Missouri many times for a number of purposes, including to visit relatives. Fontenot Dec. in Support of Oppo. ¶ 2.



30. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 30. However, the customer is two individuals who are married to each other. Def.'s Ex. C 10:16-19, 10:21-24.

31. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 31 with the qualification that the customer is two individuals who are married to each other. *See id.*

32. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 32, except for the phrase "not through Plaintiff's marketing." Plaintiff represented her earrings as American Indian-made when selling them to her Missouri customers. Throughout the purchasing process, Plaintiff's art was represented by herself and by others as American Indian-made, a representation now made illegal by the challenged law.

33. Plaintiff objects to the first clause of Paragraph 33 as argumentative, but for the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 33.

34. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 34.

35. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 35.

36. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 36.

37. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in the first clause of Paragraph 37. The second clause raises a legal question as to interpretation of the challenged statute, and no response is therefore required.

38. For the purposes of this Motion, Plaintiff does not dispute that she has not made any material changes to her website since the effective date of the challenged law, nor that she has made any changes to her website due to the challenged law.

39. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 39.

40. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 40.

41. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 41 as they pertain to events and venues in Missouri.

42. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 42. However, Plaintiff also made additional statements that due to the passage of the challenged law she is (1) prevented from making follow-up sales and marketing her art to her current Missouri customers; (2) prevented from marketing her art and making sales to new customers in Missouri; and (3) but for the challenged law, she would market her art in Missouri. Def.'s Ex. C 29:4-19.

43. The alleged facts in Paragraph 43 state a legal conclusion, thus no response is required.

44. For the purposes of this Motion, Plaintiff does not dispute the alleged facts in Paragraph 44.

## II. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant acknowledges Ms. Fontenot's reputation and credentials as an American Indian artist, and therefore goes to great lengths to rewrite Mo. Rev. Stat. § 407.315 (Art Labeling Act), to permit Ms. Fontenot to continue marketing and representing her art in Missouri without running into conflict with the Act. Through Defendant's novel interpretation of the Act, he claims that (1) Ms. Fontenot lacks standing; (2) her claims are not ripe; and (3) the First Amendment does not apply. But Defendant's interpretation conflicts with common sense and the language of the Act.

The Art Labeling Act deems American Indian art "authentic" only if it is made by a member of a federally recognized tribe. It deems all other American Indian art, including art made by members of state-recognized tribes, "imitation." The Act then prohibits people from representing art as "made by American Indians" unless that art is "authentic." § 407.315.2. The only reasonable interpretation of the Act's text is that people who sell American Indian art cannot call art "American Indian-made," "Native American-made," "Indian-made," "authentic," or otherwise indicate that it has been made by an American Indian, unless it was made by a member of a federally recognized tribe.

As Defendant admits, Ms. Fontenot is not a member of a federally recognized tribe; she is member of a state-recognized tribe. Because Ms. Fontenot does not meet the Act's definition of "American Indian," Defendant contends that Ms. Fontenot's art is "imitation American Indian art." Given these assertions, Defendant's interpretation of the act is non-sensical. It makes no sense for Defendant to argue on the one hand that Ms. Fontenot is not an "American Indian" for purposes of the Act, and to further assert that her art is "imitation

American Indian art,” and yet on the other hand to state that Ms. Fontenot may legally market her art as “American Indian-made.” The Act’s text and purpose prohibit Ms. Fontenot from describing her art truthfully and calling it “American Indian art,” “Native American art,” or “authentic.” Given the restrictions that the Act imposes on Ms. Fontenot, she has standing to challenge the Act under the First Amendment, and Defendant cannot meet his burden of satisfying strict scrutiny.

Both parties agree that there are no material facts in dispute. Because the facts show that Defendant is not entitled to judgment as a matter of law, the Court should reject Defendant’s Motion for Summary Judgment.

### **III. ARGUMENT**

#### **A. Ms. Fontenot Has Standing**

Ms. Fontenot has suffered an injury-in-fact.<sup>1</sup> As briefed in Plaintiff’s Suggestions in Support of Summary Judgment,<sup>2</sup> Ms. Fontenot has stopped marketing her art to previous Missouri customers and she has not sought out new Missouri customers. Even the representations on her website may now be illegal in Missouri. As a result, she must decline to do business with anyone in Missouri who may find her through her website or otherwise. This self-censorship and fear over the legality of the representations on her website satisfies Article III, and Defendant’s argument that he has not yet enforced the Act is unavailing.

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<sup>1</sup> Defendant does not challenge standing based on causation or redressability; he only challenges the injury-in-fact prong. *See* Def.’s Memo. in Support 15-20 (Doc. 36).

<sup>2</sup> Ms. Fontenot incorporates by reference her Supporting Suggestions in Support of Plaintiff’s Motion for Summary Judgment 7-8 (Doc. 34) for the affirmative argument that she satisfies all three factors of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

When a plaintiff challenges a government action that regulates her directly, “there is ordinarily little question that the action . . . has caused [her] injury . . . .” *Lujan*, 504 U.S. at 561-62. There is even less question in a First Amendment case, where ordinary standing requirements are relaxed. *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.”).

Ms. Fontenot satisfies the requirements for establishing standing under *Lujan* for the reasons stated in her earlier Supporting Suggestions. She has already ceased marketing her art in Missouri as American Indian-made to her existing customers, and she has deliberately refrained from marketing to new customers or cultivating new sales, solely due to the Art Labeling Act. She also fears for the legality of the representations on her website or any future sales made pursuant to the representations on that site.

Ms. Fontenot need not actually expose herself to prosecution, nor wait for prosecution, in order to have standing. Under *Missourians for Fiscal Accountability v. Klahr*, Ms. Fontenot has standing because she has alleged “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 thereunder.” 830 F.3d 789, 794 (8th Cir. 2016) (quoting *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)). Moreover, she has standing because she has been forced to self-censor. See *Klahr*, 830 F.3d at 794 (citing *281 Care Comm. v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011)).

Defendant argues that Ms. Fontenot has not satisfied *Klahr* because she has not alleged an intention to engage in conduct affected with a constitutional interest, but he misconstrues

what Ms. Fontenot seeks to do. *See, e.g.*, Def.’s Memo. in Support 17 (“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”). Ms. Fontenot has never marketed, nor does she intend to market, her art as “made by a member of a federally-recognized American Indian tribe,” because such a representation would be untruthful. Def.’s Ex. C 16:23-24, 19:14-16. Rather, based on her membership in the Virginia-recognized Patawomeck tribe, she wishes to continue truthfully representing her art in Missouri as American Indian-made to her existing Missouri customers and prospective new customers. Def.’s Ex. A ¶¶ 13, 31, 33-36; Def.’s Ex. B, No. 9-10; Def.’s Ex. C 16:14-19, 29:4-19. That speech, which is the same truthful speech that she engaged in prior to the effective date of the Art Labeling Act, is now prohibited by the Act. Such representations are protected by the First Amendment. U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). Therefore, Ms. Fontenot has sufficiently alleged “an intention to engage in a course of conduct arguably affected with a constitutional interest . . .” *Klabr*, 830 F.3d at 794 (quoting *Babbitt*, 442 U.S. at 298); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161 (2014) (holding petitioners alleged “an intention to engage in a course of conduct” because they “pleaded specific statements they intend[ed] to make in [the] future”).

Based on the plain language of the Art Labeling Act, § 407.315, Ms. Fontenot’s intended course of conduct (speech) is “proscribed.” *See Klabr*, 830 F.3d at 794 (quoting *Babbitt*, 442 U.S. at 298). The Act states that “[n]o 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.” § 407.315.2. Under the Act,

“authentic American Indian art or craft” must be “made wholly or in part by American Indian labor and workmanship . . . .” § 407.315.1(3). The Act limits who is considered an “American Indian” to “a person who is a citizen or enrolled member of an American Indian tribe,” § 407.315.1(1), and an “American Indian tribe” is exclusively defined as “any Indian tribe federally recognized by the Bureau of Indian Affairs of the United States Department of the Interior,” § 407.315.1(2). Thus, on the face of the Act, Ms. Fontenot is prohibited from representing her art as American Indian-made because she is not a member of a federally recognized tribe.

There also “exists a credible threat of prosecution” that Ms. Fontenot will be penalized should she violate the Art Labeling Act. *See Klahr*, 830 F.3d at 794 (quoting *Babbitt*, 442 U.S. at 298). “[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.” *Steffel v. Thompson*, 415 U.S. 452, 459 (1974); *see also Susan B. Anthony List*, 573 U.S. at 163 (“Nothing in this Court’s decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law.”). Nor is “fear of prosecution . . . imaginary or speculative” when a law “on [its] face,” prohibits a plaintiff’s conduct. *Saint Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006).

In *Rodgers v. Bryant*, two men raised a First Amendment free speech challenge to an Arkansas law that banned “begging in a manner that is harassing, causes alarm, or impedes traffic.” 942 F.3d 451, 455 (8th Cir. 2019). The court held that the plaintiffs had standing even though they had not yet violated the law or been threatened with prosecution under it, because “they claim to have changed when, where, and how they beg due to fear of being criminally

prosecuted,” and the law on its face applied to their intended activities. *Id.* at 454-55. Furthermore, the court held the threat of prosecution was credible despite the government’s claim that “it would never enforce its anti-loitering law against ‘polite’ and ‘courteous’ beggars like [plaintiffs].” *Id.* at 455. Similarly, here, the Art Labeling Act, on its face, prohibits Ms. Fontenot from representing her art as American Indian-made. As a result, Ms. Fontenot has stopped representing her art in Missouri as American Indian-made.<sup>3</sup> Def.’s Ex. A ¶¶ 13, 31, 33-36; Def.’s Ex. B, No. 9-10; Def.’s Ex. C 16:14-19, 29:4-19. Therefore, by law, there is a “credible threat of prosecution” sufficient to confer standing for Ms. Fontenot.

Ms. Fontenot also has standing as a result of her self-censorship. “In analyzing a claim of standing through self-censorship, [t]he relevant inquiry is whether a party’s decision to chill his speech in light of the challenged statute was objectively reasonable.” *Klabr*, 830 F.3d at 794-95 (quoting *281 Care Comm.*, 638 F.3d at 627). The “objectively reasonable” standard is a lenient one, as no actual threatened criminal complaint or prosecution is necessary to satisfy it, and “non-criminal consequences contemplated by a challenged statute” can also suffice. *281 Care Comm.*, 638 F.3d at 627, 630. In fact, when the plain language of the challenged statute establishes penalties for engaging in the speech that a plaintiff has self-censored herself from engaging in, the self-censorship is objectively reasonable. *Klabr*, 830 F.3d at 795.

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<sup>3</sup> Defendant erroneously asserts that Ms. Fontenot’s use of synonymous terms rather than the specific term “American Indian” somehow renders the Art Labeling Act inapplicable to Ms. Fontenot, thus causing her to lack standing. *See* Def.’s Memo. in Support 19. First, Ms. Fontenot would like to use both terms. Second, the Act excludes her art from the definition of “authentic American Indian art,” as it would make little sense to prohibit the phrase “American Indian” but not “Native American” or synonymous terms. Third, as discussed below, *infra* at 17-20, Defendant’s “interpretation” effectively rewrites the Act and lacks support in the statute’s text or in logic.



In *Klabr*, the plaintiff challenged a Missouri statute that prohibited certain campaign committees from soliciting or accepting contributions within specified time periods, 830 F.3d at 792, and the statute was enforced through civil penalties, *id.* at 795. As a result, the plaintiff engaged in self-censorship for 11 days in order to comply with the law until a temporary restraining order was entered enjoining enforcement of the statute. *Id.* at 794. The Eighth Circuit held that the plaintiff had standing due to its self-censorship because the challenged statute's plain language provided penalties for the plaintiff's speech, rendering the plaintiff's self-censorship objectively reasonable. *Id.* at 795.

Likewise, here, at the threat of fines and imprisonment, § 407.315.3, the Art Labeling Act prohibits Ms. Fontenot from marketing her art as American Indian-made, § 407.315.2. In response, Ms. Fontenot has stopped marketing her art to her current Missouri customers, and she has taken no active steps to seek out new customers. Def.'s Ex. A ¶¶ 13, 31, 33-36; Def.'s Ex. B, No. 9-10; Def.'s Ex. C 16:14-19, 29:4-19. Under *Klabr*, then, Ms. Fontenot's self-censorship is objectively reasonable. *See also Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (holding self-censorship is objectively reasonable where a plaintiff wishes to engage in activity that the challenged statute "arguably covers" because "most people are frightened of violating criminal statutes").

*281 Care Comm.* also supports the objective reasonableness of Ms. Fontenot's self-censorship. There, the Eighth Circuit held that infrequent enforcement of the challenged statute did not undermine the plaintiff's objective reasonableness in self-censoring. 638 F.3d at 628. In fact, the court held that even "[t]otal lack of enforcement" can only undermine the objective reasonableness of self-censorship "in extreme cases approaching desuetude." *Id.*

Absent evidence of an official binding policy “that authorities actually reject a statute” or “a long history of disuse,” a lack of enforcement of a challenged statute does not render the threat of prosecution speculative or hypothetical. *Id.*; *see also United Food & Commercial Workers Int’l Union v. IBP, Inc.*, 857 F.2d 422, 429 (8th Cir. 1988) (rejecting the argument that the plaintiffs lacked standing because the defendants did not plan to enforce an anti-picketing law against them). The Eighth Circuit’s conclusion is in line with Supreme Court precedent holding that parties have standing in pre-enforcement First Amendment challenges. *281 Care Comm.*, 638 F.3d at 628 (citing, e.g., *Babbitt*, 442 U.S. at 302; *Doe v. Bolton*, 410 U.S. 179, 188 (1973)); *see also Susan B. Anthony List*, 573 U.S. at 163.

Notably, Defendant has not explicitly disclaimed an intention to enforce the Act; rather, he says he has not enforced it **yet**. But it is immaterial that Defendant has not yet sought to enforce the Act. *See* Def.’s Memo. in Support 18-19. Indeed, the Act only took effect in August of 2018, and Ms. Fontenot initiated her original Complaint in August of 2019. Thus, this case is more similar to a pre-enforcement challenge than a challenge to a long-unenforced statute, and plaintiffs are routinely held to possess standing in pre-enforcement challenges in First Amendment cases. *281 Care Comm.*, 638 F.3d at 628. Therefore, the lack of enforcement of the Art Labeling Act is insufficient to render Ms. Fontenot’s self-censorship in response to the Act objectively unreasonable. Ms. Fontenot has standing.

#### **B. This Case Is Ripe for Adjudication**

Because Ms. Fontenot has established her Article III injury due to the Art Labeling Act, declining jurisdiction on prudential ripeness grounds would be in “tension with [the Supreme Court’s] recent reaffirmation of the principle that ‘a federal court’s obligation to hear

and decide' cases within its jurisdiction 'is virtually unflagging.'" *Susan B. Anthony List*, 573 U.S. at 167 (citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)). In other words, it is rarely appropriate to decline to adjudicate a case in which a plaintiff has satisfied the Constitution's requirement of "Cases" and "Controversies." See U.S. Const. art. III, § 2, cl. 1. Nevertheless, even considering the prudential ripeness doctrine, this case is ripe.

Questions of ripeness require a two-prong analysis to consider the "fitness of the issues for judicial decision" and "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 Laboratories v. Garner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). "The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention." *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014).

In *281 Care Comm.*, the court held that the case was ripe because "the injury is speech that has already been chilled and speech that will be chilled each time" the plaintiff seeks to engage in the speech proscribed by the challenged statute. 638 F.3d at 631. The same is true here. As discussed above, due to the Art Labeling Act, Ms. Fontenot has already self-censored herself from marketing her art as American Indian-made to her existing Missouri customers, and she has not sought out new customers to market to. Def.'s Ex. A ¶¶ 13, 31, 33-36; Def.'s Ex. B, No. 9-10; Def.'s Ex. C 16:14-19, 29:4-19. Ms. Fontenot's injury is thus not "contingent [on] future events that may not happen at all." Def.'s Memo. in Support 21. Rather, the injury has already occurred, and continues to occur.

Whether it violates the First Amendment that the Art Labeling Act excludes artists like Ms. Fontenot, who are not members of federally recognized tribes, from marketing their art as American Indian-made, “presents an issue that is ‘purely legal, and will not be clarified by further factual development.’” *Susan B. Anthony List*, 573 U.S. at 167 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985)); see also *281 Care Comm.*, 638 F.3d at 631. This case is thus fit for judicial decision.

Ms. Fontenot would also suffer substantial hardship should this Court decline to hear her claims. *Susan B. Anthony List*, 573 U.S. at 167-68 (denying judicial review causes substantial hardship where plaintiff must choose between self-censorship and risking prosecution). Ms. Fontenot has stated numerous times that (1) prior to the effective date of the Art Labeling Act, she marketed her American Indian-made earrings to a couple in Missouri; and (2) after the Act took effect, she chose not to market her art to those same customers again, or seek new Missouri customers, because she feared the penalties set out in the Act. Def.’s Ex. A ¶¶ 13, 31, 33-36; Def.’s Ex. B, No. 9-10; Def.’s Ex. C 16:14-19, 29:4-19. Defendant therefore errs in claiming that Ms. Fontenot “has never marketed any American Indian-related items within the state of Missouri.” Def.’s Memo. in Support 23.

As a result, this case is ripe because “by [the Act’s] very existence, [it] chills the exercise of the Plaintiffs’ First Amendment rights.” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1098 (10th Cir. 2006); see also *Klabr*, 830 F.3d at 797 (“The touchstone of ripeness is the harm asserted by [plaintiff]. [Plaintiff] asserts the harm of self-censorship, based on its compliance with [the statute] . . . [Plaintiff’s] case is ripe for review.”); *281 Care Comm.*, 638 F.3d at 631.

### C. Defendant's Attempt to Rewrite the Act Has No Support

The Art Labeling Act deems art “authentic” or “imitation” depending on the status of who makes it. It then prohibits people from representing art as “made by American Indians” unless the art qualifies as an “authentic American Indian art or craft.” § 407.315.2. Defendant asks the Court to interpret § 407.315.2 as only prohibiting people from falsely representing that art was made by a member of a federally recognized tribe.<sup>4</sup> Def.’s Memo. in Support 26-27. But Defendant’s preferred interpretation effectively rewrites the Act and should be rejected for several reasons.<sup>5</sup>

Using Defendant’s interpretation of the Act, he claims that Ms. Fontenot may represent her art as “American Indian-made” because the Act does not “expressly prohibit using any words, like ‘American Indian,’” but instead “uses ‘American Indian’ as a defined term of art.” *See* Def.’s Memo. in Support 27. Defendant therefore concludes that the Act only prohibits Ms. Fontenot from calling her art “made by a member of a federally recognized tribe,” but it

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<sup>4</sup> Under any interpretation of the Act, Ms. Fontenot is prohibited from representing her art as made by a member of a federally recognized tribe. That fact is uncontroversial and unchallenged in this case, as Ms. Fontenot has stated that she has no intention to falsely represent herself. Def.’s Ex. C 16:23-24, 19:14-16. However, under no reasonable interpretation does the Act permit Ms. Fontenot to use the terms “American Indian,” “Native American,” “Indian,” or “Patawomeck” when marketing her art.

<sup>5</sup> Defendant’s interpretation is not entitled to deference. The Attorney General’s views on the meaning of a statute “are not entitled to any more deference than that of any other competent attorney.” *Lams v. Sec’y of State*, 895 S.W.2d 43, 48 n.5 (Mo. Ct. App. 1995). That is true even for formal opinions released by the Attorney General. *Id.* And that is even more so the case for an ad hoc interpretation developed as part of litigation. As the United States Supreme Court recently explained, agency interpretations that are a “convenient litigating position” or a “post hoc rationalization advanced to defend past agency action against attack” are entitled to no deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (cleaned up).

does not prohibit her from calling her art “American Indian.” *Id.* This interpretation of the statute is not supported by the text or logic.<sup>6</sup>

Were the Act interpreted to permit Ms. Fontenot to use the term “American Indian,” it would make no sense; it would on the one hand define “American Indians” as members of federally recognized tribes, but on the other hand allow people like Ms. Fontenot, who are not “American Indian” by the Act’s definition, to describe their art as made by an “American Indian.” Simply, a statute that prohibits anyone other than members of an “American Indian tribe” from marketing their art as “being made by American Indians,” § 407.315.2, cannot at the same time permit purportedly **non-American Indians** to use the term “American Indian-made.” Such a result defies logic.<sup>7</sup> The only logical interpretation is that the Act permits only members of federally recognized tribes to market their art as “American Indian” or “American Indian-made.” It therefore prohibits Ms. Fontenot from representing her art as “American Indian.”<sup>8</sup>

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<sup>6</sup> The Act’s contextual background also shows that members of state-recognized tribes were targeted for exclusion. [https://www.columbiamissourian.com/news/state\\_news/what-is-authentic-native-american-art-missouri-lawmakers-trying-to/article\\_0644483e-06a3-11e8-a455-b79320fa1482.html](https://www.columbiamissourian.com/news/state_news/what-is-authentic-native-american-art-missouri-lawmakers-trying-to/article_0644483e-06a3-11e8-a455-b79320fa1482.html).

<sup>7</sup> A result that allows an artist to market “imitation” art as “American Indian” also potentially subjects an artist to penalties under the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.020, which prohibits sellers from making false or misleading statements about their products, including art.

<sup>8</sup> For these reasons, Defendant’s claim that the Act “does not apply to Plaintiff’s current conduct, and she does not win on her as-applied challenge to the statute,” fails. Defendant states that years ago Plaintiff changed her marketing from “Cherokee” to “Cherokee Descent.” Defendant therefore argues that Ms. Fontenot is not representing her art as made by a member of a federally recognized tribe, and as a result, her speech is not prohibited by the Act. Def.’s Memo. in Support 31. But as discussed above, the Act prohibits her current representations and she should therefore prevail on her as-applied claims as well.

Because the Act prohibits Ms. Fontenot from describing her art as made by an “American Indian,” it must also prohibit synonymous terms like “Native American,” “Indian,” “authentic,” and even “Patawomeck.”<sup>9</sup> Were it otherwise, the Act would regulate who can market art as “being made by American Indians,” yet it would have no application at all to a person who cleverly markets her art as “Native American” or simply “Indian.” That is not only illogical, it **would result in greater consumer confusion**, not less. *Cf. Locke v. Shore*, 682 F. Supp. 2d 1283, 1296 (N.D. Fla. 2010), *aff’d on other grounds*, 634 F.3d 1185, 1190 n.3 (11th Cir. 2011) (holding that “few if any prospective customers know the state definition of ‘interior designer,’” making it unlikely that the public would understand the term “interior design” to only refer to licensed interior designers). There is no reason to expect that Missouri consumers would understand “American Indian” to be defined differently than “Native American” or “Indian.”<sup>10</sup>

Furthermore, Defendant’s interpretation conflicts with the interpretation of identical language in *Fontenot v. Hunter*, 378 F. Supp. 3d 1075, 1092 (W.D. Okla. 2019). In that case, Ms. Fontenot raised multiple claims against Oklahoma’s American Indian Arts and Crafts Sales Act of 1974, Okla. Stat. tit. 78, §§ 71-75, that prohibited her from representing her art as American Indian-made. *Id.* at 1081. The facts of that case were nearly identical to this case, in that Ms. Fontenot specifically represented her art as “Native American,” “Patawomeck,” and

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<sup>9</sup> Indeed, the Act itself uses the synonym “Indian” in defining “American Indian tribe.” § 407.315.1(2).

<sup>10</sup> The typical consumer would understand Ms. Fontenot’s use of her tribal affiliations as representing that she is an “American Indian,” “Native American,” or “Indian,” and because the typical consumer is unlikely to know the difference between federally and state-recognized tribes, the Act also forbids her from marketing her art solely using her affiliations.

“Cherokee descent.” *Id.* at 1086. The court did not see any difference in Ms. Fontenot’s use of synonymous terms rather than specifically using the term “American Indian,” and it did not narrowly construe the statute as Defendant does here. Instead, the court held that the Oklahoma law was preempted by federal law, and recognized that the state law permitted

artists who are members of federally recognized tribes . . . [to] market and sell their art and crafts in Oklahoma as American Indian-made, and those artists who are members of only state-recognized tribes . . . may not market or sell their art and crafts in Oklahoma as American Indian-made.

*Id.* at 1092.

The canon of constitutional avoidance does not apply. “The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as **a means of choosing between them.**” *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (emphasis in original). Here, under “ordinary textual analysis,” there is only one reasonable interpretation of the Act: it prohibits Ms. Fontenot from marketing her art as American Indian-made (or with synonymous terms) because she is not a member of a federally recognized tribe. Therefore, because there is not more than one “reasonable” construction for the Court to choose from, the canon does not apply. *See State v. Burnau*, 642 S.W. 2d 621, 623 (Mo. 1982).

#### **D. The Art Labeling Act Violates the First Amendment**

Defendant’s argument that *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557 (1980), does not apply relies on his unsupported interpretation of the Art Labeling Act.<sup>11</sup> Defendant asserts that the “threshold question of *Central Hudson* decides the issue because the statute regulates only false or inherently misleading commercial speech, and

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<sup>11</sup> Ms. Fontenot does not concede that commercial speech scrutiny as articulated in *Central Hudson* is the proper constitutional analysis here. Rather, as discussed in her Supporting Suggestions at 9-16, strict scrutiny remains proper, and Defendant fails to satisfy his burden under that standard.



so the First Amendment does not apply at all to the targeted speech.” Def.’s Memo. in Support 32-33. But Defendant’s argument, while acknowledging that Ms. Fontenot’s speech is not false or misleading, relies solely on his flawed interpretation of the Act discussed above.

Contrary to Defendant’s assertion, the Act impermissibly restricts speech that is not false or inherently misleading. *See Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367, 371-72 (2002) (only “inherently misleading” speech, not just potentially misleading speech, may be restricted); *see also Peel v. Att’y Registration and Disciplinary Comm’n of Illinois*, 496 U.S. 91, 101 (1990). In fact, the Act prohibits all artists who are not members of federally recognized tribes from representing that their art is “American Indian,” “Native American,” “Indian,” or “authentic.” The Act likely even prohibits using names of state-recognized tribes when representing art as made by artists from those tribes. Thus, the Act prohibits speech that is literally truthful. *See Locke*, 682 F. Supp. 2d at 1295-96 (holding “[i]t is not misleading for an unlicensed person who lawfully practices residential interior design to refer to herself as an ‘interior designer,’ regardless of how the statute defines the term”); *Roberts v. Farrell*, 630 F. Supp. 2d 242, 249 (D. Conn. 2009) (noting circularity of making “the determination of what is ‘misleading’ dependent upon the parameters of the challenged restriction,” and that terms simply describing oneself are not inherently misleading); *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) (noting it is not inherently misleading to accurately describe oneself despite how a statute may define the term); *Abramson v. Gonzalez*, 949 F.2d 1567, 1577 (11th Cir. 1992) (recognizing that “the preferred remedy is more disclosure, rather than less.”).

Therefore, because the Art Labeling Act restricts more than false or inherently misleading speech, *Central Hudson* applies. And because Defendant has made no attempt to satisfy his burden under that standard—nor could he, *see* Plaintiff’s Supporting Suggestions 16-19—the Act fails under the First Amendment.

## CONCLUSION

For the reasons above, Defendant’s Motion for Summary Judgment should be denied.

Dated: May 8, 2020.

Respectfully submitted:

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 8, 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  
CALEB R. TROTTER

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