

**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 REPLY SUGGESTIONS IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

I

REPLY TO DEFENDANT’S OBJECTIONS TO PLAINTIFF’S STATEMENT OF UNCONTROVERTED MATERIAL FACTS

10. Defendant misconstrues paragraph 10. Ms. Fontenot has not attempted to “change her prior sworn testimony.” *See* Defendant’s Opposing Suggestions 6 (Doc. 42). Rather, the statement in her Declaration that she “markets and describes her art as American Indian-made” uses the term “American Indian” as a synonym for “Native American,” “Indian,” and “Patawomeck.” Defendant ignores that Ms. Fontenot discussed this fact in her deposition, *see id.* (citing Plaintiff’s Depo. 13:12 – 14:10, 30:11-17), and Ms. Fontenot reiterated this in her Supporting Suggestions at 5 n.1 (Doc. 34), as well as her Opposing Suggestions at 1, 12 n.3, 19-20 (Doc. 40). Further, as evidenced by her Amended Complaint, multiple discovery filings, and her suggestions in support of and opposition to the cross-motions for summary judgment, Ms. Fontenot has used the term “American Indian” rather than the synonymous term “Native American” in written submissions throughout this litigation in order to maintain consistency with the statutory language.

11. Defendant fundamentally misunderstands paragraph 11. As Ms. Fontenot stated in her deposition at 10:16-19, 10:21-24, and as reiterated in her Opposing Suggestions at 5, Nos. 30-31, the sale at issue in this case was made to a married couple who live in Missouri. Nothing in paragraph 11 contradicts, or is meant to contradict, Ms. Fontenot’s deposition testimony that she made a single sale, to a married couple in Missouri, with the help of a fellow Patawomeck member, and that she did not herself physically travel to Missouri to complete the transaction.

Defendant also misunderstands what Ms. Fontenot means by the statement: “she marketed this art as American Indian-made.” As stated above in response to Defendant’s objections to paragraph 10, she uses these terms synonymously, and of course they *are* in fact synonyms, particularly from the perspective of a consumer. Ms. Fontenot also explained in her deposition that her Missouri customers “know that I’m a member of the Patawomeck,” Depo. 16:25. Therefore, representing her art as made by a member of the Patawomeck tribe is simply another way of representing it as “American Indian-made.”

20. Defendant’s Responses to Plaintiff’s Requests for Admissions Nos. 11-12 and 15 speak for themselves. Specifically, Request for Admissions No. 15 states: “Admit that Defendant possesses no evidence that anyone has been prosecuted for violating the Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.020, on the basis that they misrepresented their art as being American Indian-made.” Defendant responded simply that the Request is “Admitted.”

22. Defendant’s Response to Plaintiff’s Requests for Admissions No. 5 speaks for itself. Request for Admissions No. 5 states: “Admit that Defendant has received no complaints from August 28, 2018, to present, alleging unlawful representations of art or artist heritage or descent under the Art Labeling Act.” Defendant responded simply that the Request is “Admitted.”

II

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In an effort to prevent the Court from declaring Mo. Rev. Stat. § 407.315 (the “Art Labeling Act”) unconstitutional, Defendant asks the Court to give a strained, overly narrow reading to the Act. The natural and logical reading of the Act is that it only permits art to be represented as “American Indian-made,” “Native American-made,” “Indian-made,” or “authentic” if the art was made by a member of a federally recognized tribe. Defendant, however, urges the Court to read the Act as solely prohibiting someone from falsely claiming art was made by a member of a federally recognized tribe. Under Defendant’s reading, an artist could market her art as an “authentic American Indian art or craft,” or as “Native American,” regardless of whether she satisfied the Art Labeling Act’s definition for “American Indian” or whether her art satisfied the Act’s definition of an “authentic American Indian art or craft.” Neither the plain text, nor basic common sense or logic support such a crabbed reading of the Act.

With the meaning of the Act properly understood, Ms. Fontenot easily establishes standing and her First Amendment injury. Because Defendant has failed to even attempt to meet his evidentiary burden under either strict or intermediate scrutiny, the Art Labeling Act fails. Ms. Fontenot’s Motion for Summary Judgment should be granted.

III

ARGUMENT

A. The Art Labeling Act Bars Ms. Fontenot From Marketing Her Art in Missouri

The Art Labeling 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. An “authentic” American Indian art or craft is limited to those articles made by a member of a federally recognized tribe. § 407.315.1. Despite these straightforward limitations, Defendant claims that “[t]he statute does not prohibit merchants from using any specific word, like ‘American Indian.’” Def.’s Opp. Suggestions 12. According to Defendant, then, the Act does not stop Ms. Fontenot from marketing her art as “American Indian-made” or “authentic” even though she does not meet the Act’s definition of “American Indian,” and despite that her art does not qualify as “authentic” under the Act. That makes no sense and is confusing for merchants and consumers.

Under no reasonable interpretation of the Act could an artist who is not a member of a federally recognized tribe market their art with the term “American Indian.” It is self-contradictory to define “American Indian” and “authentic American Indian art” in a certain way on the one hand, and then to say that *anyone* may use the terms on the other hand. *See* Def.’s Opp. Suggestions 10-11.

If the Art Labeling Act was really meant to simply prohibit anyone other than members of federally recognized tribes from marketing their art as made by a member of a federally recognized tribe, the Act goes about it in an odd way. It would be far more straightforward

for the Act to say “no one other than a member of a federally recognized tribe may market their art as made by a member of a federally recognized tribe” than for the legislature to write the Art Labeling Act in the way that it did.

It is evident from the Act’s text that it was meant to do something more: it deems art made by certain people “authentic” and bars anyone other than members of federally recognized tribes from marketing their art as authentic Native art. This is exactly what a nearly identical law in Oklahoma also did. *See Fontenot v. Hunter*, 378 F. Supp. 3d 1075 (W.D. Okla. 2019). As a result, the Art Labeling Act prohibits people like Ms. Fontenot from using the terms “American Indian,” “Native American,”¹ “Indian,”² and “Patawomeck,” all of which are synonymous, and which serve the purpose of marketing art as “native made.”³

Even if the meaning of the Art Labeling Act is ambiguous, no interpretive canons favor Defendant’s interpretation of the Act. As noted in Ms. Fontenot’s Opposing Suggestions 20, the canon of constitutional avoidance does not apply here because that canon only applies when a court is presented with two competing, reasonable interpretations of a statute. *See Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues *if a reasonable alternative* interpretation poses no constitutional question.”) (emphasis added); *see also Clark v. Martinez*, 543 U.S. 371, 385 (2005); *State v. Burnau*, 642 S.W. 2d 621, 623 (Mo. 1982). Here, there is only

¹ *American Indian*, thesaurus.com, <https://www.thesaurus.com/browse/american%20indian?s=t> (last visited May 18, 2020).

² The Art Labeling Act itself uses the synonym “Indian” in defining “American Indian tribe.” § 407.315.1(2).

³ As noted in Ms. Fontenot’s Opposing Suggestions 19-20, the Western District of Oklahoma interpreted identical statutory language as having this same meaning. *See Fontenot v. Hunter*, 378 F. Supp. 3d at 1092.

one reasonable interpretation of the Act. Therefore, regardless of the ultimate constitutionality of the Act, the Court must reject Defendant's interpretation.

In addition, the surplusage and related-statutes canons militate against Defendant's interpretation of the Act. The surplusage canon states that:

“[i]f a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred.”

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

Here, the Missouri Merchandising Practices Act already makes it unlawful to untruthfully market art as made by a member of a federally recognized American Indian tribe. Mo. Rev. Stat. § 407.020 (declaring it an unlawful practice to use “any deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce . . .”). Thus, interpreting the Art Labeling Act as only prohibiting false representations of art as made by a member of a federally recognized tribe would render the Act redundant and would give it “an effect already achieved by another provision.” In contrast, applying the common sense meaning of the Art Labeling Act as prohibiting all but members of federally recognized tribes from marketing their art as “American Indian-made” leaves the Art Labeling Act and the Merchandising Practices Act to have “independent operation[s].” In other words, the Art Labeling Act restricts what art may be represented as “authentic” and “American Indian-made” based on the tribal affiliations of the artist, whereas the Merchandising Practices Act prohibits falsely representing art as made by a member of a federally recognized tribe.

Similarly, the related-statutes canon rests on the grounds that (1) “the body of the law should make sense,” and (2) “it is the responsibility of the courts, within the permissible meanings of the text, to make it so.” Scalia & Garner, *Reading Law* 252. Based on those principles, statutes “should no more be interpreted to clash with the rest of [an entire *corpus juris*] than it should be interpreted to clash with other provisions of the same law.” *Id.* Under the related-statutes canon, courts must consider “affiliated statutes” in order to “intelligently” read the statute at issue. *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947)). Here, both the Merchandising Practices Act and the Art Labeling Act fall under chapter 407 of the Missouri Revised Statutes regulating “Merchandising Practices.” Both Acts are susceptible of being “interpreted harmoniously” under the common sense and non-redundant understanding of the Art Labeling Act. A harmonious reading of chapter 407 is that § 407.020 generally prohibits untruthful advertising, while § 407.315 specifically defines which representations of “authentic” “American Indian” art are truthful: those that refer only to art made by members of federally recognized tribes.

B. Ms. Fontenot Has Standing

For the reasons previously discussed at length, Ms. Fontenot has standing. *See* Plaintiff’s Supporting Suggestions 7-8; Plaintiff’s Opposing Suggestions 8-14. Defendant does not contest that Ms. Fontenot satisfies the causation or redressability prongs of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), but he erroneously contends that she does not suffer an injury-in-fact due to the Art Labeling Act. Def.’s Suggestions in Opposition 15-16 (Doc. 42).

Ms. Fontenot's injuries at the hands of the Art Labeling Act are well-established. She is prevented from marketing her art in Missouri as "American Indian," "Native American," "Indian," or "authentic." The Act therefore prohibits her from speaking freely—and truthfully—about her art. That prohibition alone is sufficient to confer standing on Ms. Fontenot. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-68 (2014) (injury-in-fact established where group was prohibited from placing an ad on a billboard to criticize a politician); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (citing *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), for the proposition that being prohibited from speaking freely is a quintessential injury); *see also Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 426-27 (9th Cir. 2008) (deprivation of First Amendment free speech rights is sufficient to establish injury-in-fact). Because of the Act's prohibitions, Ms. Fontenot has stopped marketing her art to her previous Missouri customers and she has not sought out new ones. The representations on her website may also 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. Therefore, the Act also causes a tangible financial injury to Ms. Fontenot.

Supreme Court and Eighth Circuit precedent support the argument that Ms. Fontenot has standing. Because Ms. Fontenot wishes to continue truthfully representing her art in Missouri as American Indian-made to her existing Missouri customers as well as prospective new customers, Fontenot Deposition 10:21-25, 16:14-19, 29:4-19; Def.'s Ex. C in support of Def.'s Memo. in Support of M. for Summ. J. 25:19-21; Def.'s Ex. B, No. 8, she has sufficiently alleged "an intention to engage in a course of conduct arguably affected with a constitutional interest" *Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016)

(quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); see also *Susan B. Anthony List*, 573 U.S. at 161 (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”). And as discussed above, that course of conduct—the representations Ms. Fontenot wishes to make about her art—are “proscribed” by the plain language of the Act. See *Klahr*, 830 F.3d at 794 (quoting *Babbitt*, 442 U.S. at 298). There is also a “credible threat of prosecution” here, see *Klahr*, 830 F.3d at 794 (quoting *Babbitt*, 442 U.S. at 298), because “[n]othing in [the Supreme] 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,” *Susan B. Anthony List*, 573 U.S. at 163. Indeed, when a law “on [its] face,” prohibits a plaintiff’s conduct, “fear of prosecution [is not] imaginary or speculative.” *Saint Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481, 485 (8th Cir. 2006); see also *Rodgers v. Bryant*, 942 F.3d 451, 454-55 (8th Cir. 2019) (standing established where law prohibited plaintiffs’ intended activities and plaintiffs changed their activities due to the law).

Ms. Fontenot’s self-censorship also confers standing to challenge the Art Labeling Act. 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.” *Klahr*, 830 F.3d at 795; see also *281 Care Comm. v. Arneson*, 638 F.3d 621, 627, 630 (8th Cir. 2011). Because the Act prohibits Ms. Fontenot from marketing her art as American Indian-made, § 407.315.2, and enforces that prohibition through fines and imprisonment, § 407.315.3, she has stopped marketing her art to her current Missouri customers, and she has taken no active steps to seek out new customers. Plaintiff’s Supp.

Suggestions 8. That self-censorship is “objectively reasonable,” and Ms. Fontenot has standing. *See 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”).

C. The Art Labeling Act Unconstitutionally Restricts Speech

In her Supporting Suggestions, Ms. Fontenot thoroughly discussed why the Art Labeling Act is a content- and speaker-based restriction on her speech that is subject to strict scrutiny, which it fails. *See* Plaintiff’s Supporting Suggestions in Support of Plaintiff’s Motion for Summary Judgment 9-12, 14-16 (Doc. 34). In response, Defendant makes no attempt to satisfy his burden to justify the Act under strict scrutiny. As a result, Defendant has conceded that if the Court agrees that the Act is subject to strict scrutiny, the Act fails under that standard. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (holding that content-based laws are “presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

Instead of attempting to justify the Art Labeling Act under strict scrutiny, Defendant asserts that the Act “only applies to ‘merchants,’ and thus limits only commercial speech.” *See* Defendant’s Opposing Suggestions 19 (Doc. 42). But as discussed in Ms. Fontenot’s Supporting Suggestions 12-14, that is (1) not the proper definition for “commercial speech,” *see 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 518 (1996) (Thomas, J., concurring) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)) (“Commercial” speech is speech that “does no more than propose a commercial transaction.”); (2) the Act regulates more than just “commercial” speech; and (3) even if

representations of art as American Indian-made were considered commercial speech, the Act is still subject to strict scrutiny because it prohibits commercial speech inextricably intertwined with fully protected speech, *see Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). Defendant provides no response to that discussion. In any event, even if Defendant is correct that the test for commercial speech as set out in *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980), applies, Defendant has still failed to justify the Art Labeling Act's restriction on speech under intermediate scrutiny.⁴

Under *Central Hudson*, when the government restricts commercial speech that “concern[s] lawful activity and [is] not . . . misleading,” then the Court must consider: (1) “whether the asserted governmental interest is . . . substantial;” (2) “whether the regulation directly advances the governmental interest asserted;” and (3) “whether it is not more extensive than is necessary to serve that interest.” 447 U.S. at 566-67; *accord Missouri Broads. Ass'n v. Schmitt*, 946 F.3d 453, 460-62 (8th Cir. Jan. 8, 2020). Defendant bears the burden of proving that restricting Ms. Fontenot from representing her art as American Indian-made satisfies *Central Hudson*'s test for commercial speech. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *Missouri Broads. Ass'n*, 946 F.3d at 460-61. That “burden is not satisfied by mere speculation or conjecture;” instead, “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Edenfield*, 507 U.S. at 770-71. Defendant fails to meet, or even attempt to meet, that heavy burden in this case.

⁴ Because Defendant cannot satisfy intermediate scrutiny, he necessarily fails to satisfy any “heightened” scrutiny for content- and speaker-based restrictions on commercial speech. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011).

Defendant does not attempt to show that the Art Labeling Act directly advances substantial government interests and is no more extensive than necessary to serve those interests. Instead, Defendant claims that *Central Hudson's* threshold question as to false and misleading speech “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.” Defendant’s Opposing Suggestions 20 (emphasis in original).

But Defendant admits that Ms. Fontenot’s speech is not “inherently misleading.” *Id.* at 19; *see also Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367, 371-72 (2002). Ms. Fontenot is a member of a state-recognized tribe, so it is not inherently misleading for her to represent her art as American Indian-made. In fact, it is literally true. The First Amendment requires that Defendant err on the side of requiring more, not less, speech even if Ms. Fontenot’s representations were “potentially misleading.” *See id.*; *Peel v. Attorney Registration and Disciplinary Comm’n of Ill.*, 496 U.S. 91, 100-01, 109-10 (1990).

Because Defendant has failed to show that the Art Labeling Act directly advances substantial government interests, Plaintiff’s Supporting Suggestions 18-19, and because the Act eschews less restrictive alternatives by prohibiting all but a select group of artists from truthfully marketing their art, *see id.* at 19, it violates the First Amendment.

CONCLUSION

Under a natural reading of the Art Labeling Act, Ms. Fontenot is prohibited from marketing her art in Missouri as “American Indian-made.” This prohibition constitutionally injures Ms. Fontenot and violates the First Amendment. Ms. Fontenot’s Motion for Summary Judgment should be granted.

DATED: May 22, 2020.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 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 in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Caleb R. Trotter
CALEB R. TROTTER