

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

PEGGY FONTENOT,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 4:19-CV-04169-FJG
)	
ERIC SCHMITT, Attorney General of.)	
Missouri, in his official capacity,)	
)	
Defendant.)	

ORDER

Currently pending before the Court is Plaintiff's Motion for Summary Judgment (Doc. No. 33), Defendant's Motion for Summary Judgment (Doc. No. 35), and Defendant's Motion for Leave to File Overlength Brief (Doc. No. 37).

I. BACKGROUND

Plaintiff is a resident of Santa Monica, California. 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. The Patawomeck Indian Tribe is not recognized by the federal government or any state other than Virginia. Since 1983, plaintiff has created and sold art described as Native American and consisting of beadwork and silver jewelry. Plaintiff also takes, develops, and sells her photography portraying images of Native people. Plaintiff shows and sells her art and photography at art shows, museum, galleries, through her website, and by word-of-mouth through prior contacts. Over the years, plaintiff has changed the way she describes herself and markets her art.

From 1983 through 2013, plaintiff described herself as Cherokee, though she was not a member of the Cherokee Tribe. In 2014, plaintiff began describing herself as

“Cherokee Descent” after meeting with an Indian lawyer who “explained the difference” between describing herself as “Cherokee” versus of “Cherokee Descent.” From 2004 through 2019, plaintiff identified and described herself as Potawatomi Certified Artisan. In 2019, plaintiff changed her identification and description to Potawatomi Descent. Since 2007, plaintiff has identified herself as a member of the Patawomeck Indian Tribe of Virginia.

Plaintiff’s primary mode of marketing is her business card and her website, and she sometimes uses table signs at shows she attends. At one point, plaintiff described and marketed herself using the terminology on her business card, which says: “Native American Hand Crafted Jewelry,” “Potawomeck,” “Potawomi,” and “Cherokee Descent.” Today, instead of Potawomi, plaintiff now claims to use “Potawatomi Descent” (Doc. No. 40, page 6).

In 2018, the Missouri General Assembly passed the Missouri American Indian Art or Craft Act (hereinafter “The Missouri Act”). The new law changed Missouri’s consumer fraud statute and, in pertinent part, provides 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.

3. Any merchant who knowingly 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 law defines “American Indian” as “a person who is a citizen or enrolled member of an American Indian tribe.” § 407.315.1, RSMo (2018). An “American Indian Tribe” is “any

Indian tribe federally recognized by the Bureau of Indian Affairs of the United States Department of the Interior.” Id. Plaintiff has never physically advertised her products for sale in the state of Missouri, however, a married couple who are members of a Patawomeck Indian Tribe learned about plaintiff’s jewelry from a relative, who is also connected to the Patawomeck Indian Tribe. As a result of this law, plaintiff believes she is now unable to truthfully market and describe her art in Missouri without penalty. 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.

II. STANDARD OF REVIEW

A moving party is entitled to summary judgment on a claim only if there is a showing that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). “The substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the moving party meets this requirement, the burden shifts to the non-moving party to “set forth specific facts showing that there is a genuine issue for trial.” Anderson, 477 U.S. 242, 248 (1986). In Matsushita Electric, the Court emphasized that the party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts” in order to establish a genuine issue of fact sufficient to warrant trial. In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the

non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence.

III. DISCUSSION

In defendant's Motion for Summary Judgment, defendant argues that plaintiff has not suffered an injury in fact sufficient to confer standing because plaintiff 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. Defendant also argues that plaintiff's case is not ripe because plaintiff's alleged harm of not being able to market her products concern future events that may not even occur and the harm has not matured enough to warrant judicial intervention. Third, defendant argues that the Missouri Act does not violate the First Amendment because it places appropriate limits on only misleading commercial speech and 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.

A. Defendant's Standing Arguments

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). Defendant does not challenge standing based on causation or redressability; instead, defendant challenges only the injury-in-fact prong. See Def.'s Memo. in Support 15-20 (Doc. 36). 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). In the First Amendment context, two types of injuries may confer U.S. Const. Art. III standing to seek prospective relief. Missourians for Fiscal Accountability v. Klahr, 830 F.3d 789 (8th Cir. 2016)

First, a plaintiff can establish standing by alleging 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. Id. Here, plaintiff alleges, without evidence, an intention to engage in a course of conduct proscribed by the Missouri Act. Plaintiff, without claiming that her business cards or website ever used the “American Indian” description, states only that she “wishes to continue truthfully representing her art in Missouri as American Indian-made to her existing Missouri customers and prospective new customers” (Doc. No. 40, page 14). In fact, plaintiff argues that the Missouri Act, which purportedly prohibits her from describing her art as “American Indian-made,” may be reasonably interpreted as also prohibiting her from describing her art as “Native American-made,” “Indian-made,” and “authentic” (Doc. No. 40, page 11). On the face of the statute, it is unclear how the plaintiff is currently exposed to prosecution. Nevertheless, when contesting the constitutionality of a statute, it is not necessary that the plaintiff first expose herself to prosecution. Babbitt v. UFW Nat'l Union, 442 U.S. 289, 298 (1979) citing Steffel v. Thompson, 415 U.S. 452, 459 (1974). Instead, plaintiff needs only to allege that she intends 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. Id. Given the plain language of the statute proscribing plaintiff’s intended course of conduct and defendant’s confirmation of its policy to fine and imprison violators, plaintiff has met this standard.

Second, the plaintiff can establish standing by alleging that it self-censored. Missourians for Fiscal Accountability, 830 F.3d 789, 794 (8th Cir. 2016). In analyzing a claim of standing through self-censorship, the relevant inquiry is whether a party's decision to chill his speech in light of the challenged statute was objectively reasonable. 281 Care Comm. v. Arneson, 638 F.3d 621, 627 (8th Cir. 2011). In Missourians for Fiscal Accountability, plaintiff MFA formed a campaign committee less than thirty days before the November 4 election—in violation of Missouri law section 130.011(8). The law, in relevant part, prohibited campaign committees from forming later than thirty days prior to the election and made it a violation punishable by fine to knowingly accept or make a contribution or make an expenditure. To comply with the law, MFA refrained from receiving contributions and making expenditures. Id. at 793. MFA subsequently sued the Missouri Ethics Commission (MEC), claiming standing through self-censorship and seeking to declare the thirty-day deadline an unconstitutional burden on its First Amendment rights to free speech and political association. In its inquiry of whether MFA's decision to chill its speech in light of the challenged statute was objectively reasonable, the Eighth Circuit instructed that even where there is no threatened criminal prosecution, "non-criminal consequences contemplated by the challenged statute can also contribute to the objective reasonableness of alleged chill." Id. at 795. The Circuit Court held that, in light of the plain language of the statute and MEC's stated policy, MFA's self-censorship was objectively reasonable. In the instant case, plaintiff claims that she has ceased marketing her art in Missouri as American Indian-made to her existing customers, and she has deliberately refrained from marketing to new customers solely due to the Missouri Act (Doc. No. 40, page 13). Defendant confirmed its policy to impose a fine and

imprisonment (Doc. No. 36, page 11). Therefore, to avoid such penalties, plaintiff's self-censorship is objectively reasonable.

B. Defendant's Ripeness Arguments

A plaintiff must also show that the case involves a ripe controversy. The ripeness inquiry requires examination of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Parrish v. Dayton, 761 F.3d 873, 875 (2014) (quotations omitted). The fitness prong safeguards against judicial review of hypothetical or speculative disagreements and is concerned with questions of finality, definiteness, and the extent to which resolution of the challenge depends upon facts that may not yet be sufficiently developed. Id. The hardship prong asks whether delayed review inflicts significant practical harm on the plaintiff. Id. The touchstone of a ripeness inquiry is whether the harm asserted has matured enough to warrant judicial intervention. Id. A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all. Id. at 875-76.

Defendant argues that the plaintiff's claim lacks ripeness because there is no evidence in the record that the State or a county prosecutor has tried to enforce the statute in the way that plaintiff fears, either against plaintiff or any other merchant. (Doc. No. 36, page 22). Defendant further claims that there is no significant practical harm that will befall plaintiff by delaying adjudication unless plaintiff can present facts demonstrating ripeness. Defendant encourages this Court to consider this case later if any threat of enforcement materializes. Plaintiff contends that the harm already exists given her self-censorship.

Typically, a plaintiff's assertion that she has self-censored her speech to comply with a statute or ordinance "dispenses with any ripeness concerns," Missourians for Fiscal

Accountability, 830 F.3d at 797, because the denial of judicial review would impose a hardship on the plaintiff due to her intended future conduct of using “American Indian” to advertise and market her art to Missouri customers. See 281 Care Comm., 638 F.3d 631 (finding the claims were ripe because “the injury is speech that has already been chilled and speech that will be chilled.”) Indeed, under these circumstances, if prompt judicial action is not taken, plaintiff would be forced to choose between self-censorship or engaging in protected speech proscribed by the labeling ordinance, risking consequences if she does so. See Susan B. Anthony List v. Dreihaus, 134 S. Ct. 2334, 2347 (2014). However, here, these are not plaintiff’s only options and she risks no such consequences. Plaintiff currently and historically has used a number of phrases to describe her art—“American Indian” not being one. In plaintiff’s Opposing Suggestions in Opposition to Defendant’s Motion for Summary Judgment, she repeatedly urges this court to read language into the statute that does not exist. First, in defendant’s Memorandum in Support of Defendant’s Motion for Summary Judgment, he states: “Since 1983, Plaintiff has created and sold Native American art consisting of beadwork and silver jewelry” (Doc. No. 36, page 6). In response to this statement, plaintiff states: “For the purpose 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’” (Doc. No. 40, page 5, ¶¶ 4, 7). Second, plaintiff states: “The Act then prohibits people from representing art as “made by American Indian” unless that art is authentic . . . [t]he 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 . . .” (Doc. No. 40, page 11). Third, plaintiff states: “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” (Doc. No. 40, page 23). In reading the plain language of the Missouri Act, it is clear that no such prohibition exists. The Court cannot pretend that the Missouri Act proscribes any language other than “American Indian” or that the statute even so much as mentions the use of “Native American” and “Indian” simply to allow plaintiff’s suit to go forward. There is no significant practical harm on the plaintiff because she has used and wishes to continue to engage in conduct that is not plainly proscribed by the Missouri Act. Plaintiff states in her Opposing Suggestions: “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” (Doc. No. 40, page 14) (internal quotations omitted). To the extent that plaintiff wishes to use “American Indian” in the future, any such claim at this juncture would rest upon contingent future events that may not occur as anticipated, or indeed may not occur at all. Parrish at 875-76. As a result, plaintiff’s case is not fit for judicial review.

IV. CONCLUSION

Accordingly, for the reason state above, the Court hereby **DENIES** Plaintiff’s Motion for Summary Judgment (Doc. No. 33), **GRANTS** Defendant’s Motion for Summary Judgment (Doc. No. 35), and **GRANTS** Defendant’s Motion for Leave to File Overlength Brief (Doc. No. 37).

IT IS SO ORDERED.

Date: March 17, 2021
Kansas City, Missouri

S/ FERNANDO J. GAITAN, JR.
Fernando J. Gaitan, Jr.
United States District Judge

Kiren Mathews

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Western District of Missouri

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