

Litigation Background

Artist Silenced: American Indian Artist Files Federal Constitutional Lawsuit for Right To Truthfully Describe Her Art in Oklahoma

(Fontenot v. Pruitt)

Peggy Fontenot is an award-winning American Indian photographer and artist, specializing in hand-made beaded jewelry and cultural items. For more than 30 years, Ms. Fontenot has traveled the country to show and sell her American Indian art. Because of Oklahoma's deep connections with American Indian history and culture, Ms. Fontenot has regularly participated in art shows and festivals in the state.

In the summer of 2016, the Oklahoma Legislature passed a law that prohibits Ms. Fontenot from describing or marketing her art as "American Indian-made." At the urging of large, politically connected tribes, the legislature modified the definition of "Indian tribe." Now, only members of federally recognized tribes may market and describe their art as "American Indian-made."

The problem for Ms. Fontenot is that she is a member of the Patawomeck—a Virginia state-recognized tribe. The prior version of Oklahoma's law was broad enough to include all tribes recognized by either the federal or a state government. The amended version of the law forbids people like Ms. Fontenot, who belong to a state-recognized tribe, from marketing their art as "American Indian-made." Being unable to truthfully market her art puts Ms. Fontenot's livelihood as an artist at risk.

Fortunately for Ms. Fontenot, the First Amendment to the United States Constitution prohibits the government from restricting speech based on its content or the identity of the speaker. Furthermore, since Oklahoma's law also impermissibly burdens interstate commerce, conflicts with federal law, arbitrarily discriminates, and violates Ms. Fontenot's right to earn a living, Oklahoma's law fails to pass constitutional muster.

The rights to engage in free speech and the occupation of one's choice without unnecessary governmental interference are some of the most cherished rights protected by the Constitution. That is why Ms. Fontenot has joined with Pacific Legal Foundation (PLF) to file a federal constitutional lawsuit against the Attorney General of Oklahoma—the official responsible for enforcing Oklahoma's misguided law.

Peggy Fontenot's Art

Since 1983, Peggy Fontenot has made her living as an American Indian artist. A resident of Santa Monica, California, Ms. Fontenot has shown and sold her work throughout the United States, including regular appearances in Oklahoma at festivals like Red Earth.

Ms. Fontenot uses three different mediums to practice her art: black and white photography, hand-crafted beaded jewelry, and hand-crafted silver jewelry. With her hand-developed photography, Ms. Fontenot creates striking images of native people to celebrate their heritage and culture. With Ms. Fontenot's beadwork, she uses traditional American Indian stitches to make contemporary and traditional pieces.

Due to her talent and the beauty of her work, Ms. Fontenot's art is shown and sold in galleries and museums across the country including the Smithsonian's National Museum of the American Indian in Washington, D.C. Ms. Fontenot has also won numerous awards for her work, and taught American Indian beading classes at several museums, schools, and American Indian cultural centers.

Because of Ms. Fontenot's success and renown as a longstanding American Indian artist, she was dismayed to learn that she may be forever banned from showing and selling her art in Oklahoma as American Indian-made as a result of Oklahoma's new law.

A Not So Truthful Truth-in-Advertising Law

The stated purpose of Oklahoma's American Indian Arts and Crafts Sales Act¹ is to protect the public from buying art that is misrepresented as American Indian-made. But, in an effort to protect American Indian art-buyers in Oklahoma from fraudulent artists, Oklahoma's law actually causes consumers to receive less information about the art they're buying, and effectively cuts a substantial amount of artists out of the Oklahoma market.

Under the Oklahoma law, only artists who are members of federally recognized tribes may continue marketing their art as American Indian-made. Artists who are members of state-recognized tribes, like Ms. Fontenot, or who are certified as an artisan by an American Indian tribe, must cease marketing their art as American Indian-made regardless of the truth of their statements. In essence, Oklahoma law now says that members of state-recognized tribes are not American Indians, and that decisions of tribes (federally recognized or state-recognized) to certify artisans will no longer be respected by the State of Oklahoma.

¹ Okla. Stat. tit 78, §§ 71-75.

In contrast, under a similar federal law,² artists who are either 1) a member of a federally recognized tribe; 2) a member of a state-recognized tribe; or 3) certified as an artisan by an Indian tribe, are all permitted to describe and market their art as American Indian-made. In practice, Ms. Fontenot always informs her customers of her membership in the Patawomeck tribe. This allows customers to know who Ms. Fontenot is and to ask questions about the style of her art and her method of creating it.

Because of Oklahoma's new law, Ms. Fontenot must resort to describing herself and her art generically, while omitting crucial facts about her identity and art. Where Ms. Fontenot previously would inform her customers of her American Indian heritage and then explain how she made her art, in Oklahoma she can no longer talk about her heritage. If she were to continue to state that she is a member of the Patawomeck tribe and that she hand-makes her art, then she would be unlawfully marketing her art as American Indian-made. Aside from the legal penalties, it is impractical for Ms. Fontenot to travel to Oklahoma to participate in art shows if she cannot truthfully and accurately describe her art. Thus, absent the ability to describe her art, Ms. Fontenot is effectively precluded from the Oklahoma market.

As a result of this law, both customers and artists lose. Customers can no longer receive valuable truthful information about artists and the art they make, and two-thirds of the categories of American Indian artists are now unwelcome in Oklahoma. Furthermore, due to this law, the amount of American Indian art available in the state will likely decrease substantially. Not only is this harmful and unfair, but the law is also unconstitutional.

The Legal Challenge: Defending the Right to Free Speech and To Make a Living

Represented by Pacific Legal Foundation attorneys, Ms. Fontenot has filed a federal civil rights lawsuit in the United States District Court for the Western District of Oklahoma in Oklahoma City. While primarily a First Amendment challenge, Ms. Fontenot raises five constitutional claims.

First, Oklahoma's law restricts Ms. Fontenot's right to free speech, in violation of the First Amendment. The law is a content- and speaker-based restriction on speech because it reserves solely to members of federally recognized tribes the right to call themselves American Indians when marketing or distributing art in Oklahoma. When the government picks and chooses what can be said or who may do the speaking, the law must be narrowly tailored to achieve a compelling governmental interest. Because Oklahoma can address the problem of fraudulent American Indian art without banning members of state-recognized tribes and certified artisans from describing themselves

² 25 U.S.C. § 305, *et seq.*

and their art as American Indian, the law is not narrowly tailored and is unconstitutional.

Second, the law unduly burdens the interstate American Indian art market, in violation of the Constitution's Commerce Clause. Oklahoma's law attempts to carve the state out of the national American Indian art market, and heavily restrict which American Indian artists may participate in the Oklahoma market. As noted above, because Oklahoma has less burdensome ways of preventing fraud, the burdens the law places on the interstate market for American Indian art are unconstitutionally excessive.

Third, the law unconstitutionally conflicts with a similar federal law, in violation of the Supremacy Clause. With the federal law, Congress seeks to promote a robust market in American Indian art for the economic development and prosperity of American Indians. Because Oklahoma's law frustrates that purpose by preventing two-thirds of the categories of American Indian artists contemplated under the federal law from engaging in the market in Oklahoma, it is unconstitutional.

Fourth, the law violates Ms. Fontenot's right to engage in a lawful occupation of her choice. Under the Fourteenth Amendment's Due Process Clause, the government cannot arbitrarily interfere with a person's right to earn a living. This is especially true when the government interferes for the purpose of economically benefitting others. Oklahoma's law restricts Ms. Fontenot's ability to engage in her profession as an American Indian artist in Oklahoma when it could instead prosecute actual instances of fraudulent art. Furthermore, because Oklahoma's law was passed at the behest of federally recognized tribes in order to economically benefit their members, it is unconstitutional.

Fifth, reserving to artists who are members of federally recognized tribes the exclusive right to describe and market their art as American Indian-made arbitrarily discriminates against Ms. Fontenot, in violation of the Equal Protection Clause of the Fourteenth Amendment.

Parties to the Lawsuit

The Plaintiff in the case is Peggy Fontenot of Santa Monica, California. The Defendant is the Attorney General of Oklahoma, E. Scott Pruitt, sued in his official capacity.

Litigation Team

Pacific Legal Foundation Attorney Caleb R. Trotter³ is lead counsel, working with PLF Staff Attorney Anastasia P. Boden⁴ and PLF Principal Attorney Meriem L. Hubbard.⁵ PLF attorneys are assisted by Oklahoma City attorney Amber Godfrey as local counsel.

Founded in 1973 and headquartered in Sacramento, California, PLF is the most frequent and successful public-interest champion in the nation's courts for individuals and entrepreneurs whose constitutional rights have been violated by the government. It represents Ms. Fontenot without charge.

Media Contact

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