

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA**

PEGGY FONTENOT,	)	
	)	
Plaintiff,	)	
	)	Case No. <u>CIV-16-1339-W</u>
v.	)	
	)	
E. SCOTT PRUITT, Attorney General	)	
of Oklahoma, in his official capacity,	)	
	)	
Defendant.	)	
_____	)	

**COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff Peggy Fontenot, through her attorneys, alleges as follows:

**INTRODUCTION**

1. This civil-rights lawsuit seeks to vindicate the constitutional rights of Peggy Fontenot to truthfully market her art in Oklahoma, participate in the interstate market for American Indian art and crafts, and enjoy her right to earn a living in a lawful occupation of her choice.

2. Plaintiff Peggy Fontenot is an award-winning American Indian photographer and artist, specializing in hand-made beaded jewelry and cultural items. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia, and lives in

Santa Monica, California. For years, she has made regular visits to Oklahoma to show and sell her art.

3. Ms. Fontenot has always marketed and described her art as “American Indian-made.” She has won numerous awards for her work, shown and sold her art in museums and galleries throughout the United States, taught American Indian art classes, and had a regular presence within the American Indian community.

4. Due to a recent change in Oklahoma law, Ms. Fontenot is subject to fines and imprisonment if she continues to market and describe her art as American Indian-made while in Oklahoma. Federal law allows Ms. Fontenot to market her art as “American Indian-made.”

5. The right to truthfully describe and market one’s art is protected by the First and Fourteenth Amendments to the United States Constitution, and the right to participate in the interstate market for American Indian art and crafts is protected by the Commerce Clause of the U.S. Constitution. Further, the Supremacy Clause forbids state laws that override the objectives of an explicit federal law. Finally, the right to pursue a trade without being subjected to irrational, arbitrary, and discriminatory laws is guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

6. The restrictions Defendant has imposed on Ms. Fontenot violate her constitutional right to speak freely, participate in interstate commerce, and engage in her chosen profession.

7. Ms. Fontenot requests prospective relief in the form of a declaration that the challenged law is invalid, unenforceable, and void; a permanent injunction against any further enforcement of the challenged law; plus costs and reasonable attorney's fees, pursuant to 42 U.S.C. § 1988. Ms. Fontenot does not seek money damages against Defendant.

### **JURISDICTION AND VENUE**

8. Ms. Fontenot brings this civil-rights lawsuit pursuant to 42 U.S.C. § 1983, for the violations of rights secured by the First Amendment; Article I, Section 8, Clause 3, of the U.S. Constitution (Commerce Clause); the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and alleging federal preemption under Article VI of the U.S. Constitution (Supremacy Clause).

9. Jurisdiction over Ms. Fontenot's claims for declaratory and injunctive relief is proper under 28 U.S.C. §§ 1331 (federal question jurisdiction), 1343 (civil rights jurisdiction), and 2201-2202 (the Declaratory Judgment Act).

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) on the grounds that all or a substantial part of the acts giving rise to Ms. Fontenot's claims occurred

in Oklahoma City, Oklahoma, which is located in the Western District of Oklahoma (*see* 28 U.S.C. § 116(c)).

## **PARTIES**

### **Plaintiff**

11. Plaintiff Peggy Fontenot is a United States citizen and resident of Santa Monica, California.

12. Ms. Fontenot is an award-winning photographer and artist, specializing in hand-crafted beaded jewelry and cultural items. She regularly participates in American Indian art fairs and markets throughout the United States, where she discusses, displays, and markets her art as American Indian-made. She has shown and sold her work across the United States—including Oklahoma—for many years.

13. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia (a Virginia state-recognized tribe). Ms. Fontenot received her Patawomeck tribal card in 2010, after the tribe received recognition from the State of Virginia. Ms. Fontenot's tribal number is 10780.

14. Ms. Fontenot wishes to continue describing, marketing, and selling her photography and art in Oklahoma as American Indian-made. Since enactment of the changes in Oklahoma law in June, 2016, Ms. Fontenot has again been invited to participate in American Indian art shows—including the Red Earth Festival in

Oklahoma City in 2017. If the law is struck down, she will resume attending shows in Oklahoma and describing her art and photography as American Indian-made.

**Defendant**

15. Defendant E. Scott Pruitt is the Attorney General of Oklahoma and the chief law officer of that state. Okla. Stat. tit. 74, § 18. Plaintiffs are informed and believe, and on that basis allege, that Mr. Pruitt has ultimate responsibility for enforcing the criminal penalties proscribed by Okla. Stat. tit. 78, § 75 for the marketing and selling of American Indian-made art and crafts by individuals who are not citizens or enrolled members of federally recognized tribes. Defendant is being sued in his official capacity, pursuant to *Ex parte Young*, 209 U.S. 123 (1908), for acting under color of state law by enforcing Okla. Stat. tit. 78, §§ 71-75.

**FACTUAL ALLEGATIONS**

**I**

**THE CHALLENGED LAW**

16. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

17. Okla. Stat. tit. 78, §§ 71-75 is known as the “American Indian Arts and Crafts Sales Act of 1974” (Art Sales Act).

18. The purpose of the Art Sales Act is to “protect the public, under the police powers of the state, from false representation in the sale of authentic and imitation American Indian arts and crafts.” Okla. Stat. tit. 78, § 72.

19. Okla. Stat. tit. 78, § 74 makes it unlawful for anyone “to distribute, trade, sell or offer for sale or trade . . . any article represented as being made by American Indians” unless the article was made or assembled by an American Indian.

20. In August of 2016, the Oklahoma Legislature narrowed Okla. Stat. tit. 78, § 73 to define an “American Indian” as “a person who is a citizen or is an enrolled member of an American Indian tribe.” The previous definition was much broader, including any person “who is enrolled or who is a lineal descendant of one enrolled upon an enrollment listing of the Bureau of Indian Affairs or upon the enrollment listing of a recognized Indian tribe, band or pueblo.”

21. In August of 2016, the Oklahoma Legislature further narrowed Okla. Stat. tit. 78, § 73 to define an “American Indian tribe” as “any Indian tribe federally recognized by the Bureau of Indian Affairs of the United States Department of the Interior.” The previous definition was much broader, including “any Indian tribe, organized band or pueblo, which is domiciled in the United States.”

22. Ms. Fontenot is informed and believes, and on that basis alleges, that Defendant enforces the Art Sales Act as prohibiting (1) individuals certified as Indian

artisans; (2) members or citizens of state-recognized American Indian tribes; and (3) anyone else who is not a member of a federally recognized Indian tribe, from representing themselves as American Indians when marketing and selling their art and crafts in Oklahoma.

23. Any person who violates the Art Sales Act is guilty of a misdemeanor, punishable by a fine of up to \$200, or by imprisonment for a period of at least 30 days and not more than 90 days, or by both fine and imprisonment. Okla. Stat. tit. 78, § 75.

## II

### THE RELEVANT FEDERAL LAW

24. Congress enacted the federal Indian Arts and Crafts Act (Federal Act) to “promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship.” 25 U.S.C. § 305a.

25. The Federal Act prohibits offering, displaying, or selling goods “in a manner that falsely suggests [the good] is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization.” 25 U.S.C. § 305e(b).

26. The Federal Act defines “Indian” as one who is a member of an Indian tribe or one who is certified as an Indian artisan by an Indian tribe. 25 U.S.C. § 305e(a)(1).

27. The Federal Act defines “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 25 U.S.C. § 5304. Under the Federal Act, “Indian tribe” is also defined as “an Indian group that has been formally recognized as an Indian tribe by a State legislature, a State commission, or another similar organization vested with State legislative tribal recognition authority.” 25 U.S.C. § 305e(a)(3)(b).

28. Ms. Fontenot is informed and believes, and on that basis alleges, that Oklahoma’s Art Sales Act prohibits two-thirds of the categories of individuals who are permitted under the Federal Act to describe and market their art as American Indian-made from doing so in Oklahoma.

### **III**

#### **PEGGY FONTENOT AND HER AMERICAN INDIAN ART**

29. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

30. Since 1983 Ms. Fontenot has created and sold American Indian art. Ms. Fontenot uses traditional American Indian stitches in her beadwork to make contemporary and traditional pieces. With her photography, Ms. Fontenot creates hand-developed, black and white images of native people to celebrate their heritage. Ms. Fontenot also hand-makes silver jewelry with semi-precious stones.

31. Ms. Fontenot shows and sells her art at art shows, museums, galleries, and through her website. Ms. Fontenot typically participates in at least one show in Oklahoma each year. Since the Art Sales Act was enacted, Ms. Fontenot was again invited to participate in the Red Earth Festival in Oklahoma City in 2017—one of the most respected Indian art shows in the United States.

32. Ms. Fontenot's art is currently sold in several museums and galleries, including the Smithsonian's National Museum of the American Indian in Washington, D.C., and the Autry Museum of the American West in Los Angeles, California. Over the course of her career, Ms. Fontenot's art has been shown and sold nationwide and abroad.

33. Ms. Fontenot's jewelry has won multiple awards at American Indian art shows and markets, including First Place in Beadwork in 2015 and 2016 at the Eiteljorg Museum Indian Market Place in Indianapolis, Indiana, and Third Place in

2016 at the Red Earth Pow Wow in Oklahoma City. Ms. Fontenot's American Indian photography has also been recognized with several awards.

34. Ms. Fontenot has taught American Indian beading classes at the Smithsonian's National Museum of the American Indian, several other museums, schools, and American Indian cultural centers.

35. Ms. Fontenot repaired and restored vintage and antique American Indian beadwork items in the Southwest Museum's internationally acclaimed collection in Los Angeles.

36. Ms. Fontenot has exhibited her photography nationally since 1991. She created several exhibits featuring American Indians for museums and galleries across the United States.

37. In the summer of 2016, The Language Conservancy asked Ms. Fontenot to serve as the photographer for "Last Native Speakers"—a traveling exhibit that will feature images of American Indians from 40 tribes who are the last fluent speakers of their tribe's language.

38. Ms. Fontenot is informed and believes, and on that basis alleges, that sales of her art through her website or over the telephone result from individuals discovering her work at American Indian art shows and festivals, including those in Oklahoma.

**IV**

**THE CHALLENGED LAW PREVENTS  
MS. FONTENOT FROM TRUTHFULLY  
DESCRIBING HER ART IN OKLAHOMA**

39. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

40. Under the Federal Act, Ms. Fontenot may call herself an American Indian and may describe her art as American Indian-made because she is a member of the Patawomeck—a state-recognized tribe.

41. Even though the Federal Act allows it, because of Oklahoma's Art Sales Act, Ms. Fontenot is no longer legally able to truthfully market and describe her art in Oklahoma as American Indian-made without penalty because she is not a citizen or enrolled member of a federally recognized tribe.

42. Ms. Fontenot fears that if she describes her art in Oklahoma as American Indian-made, she will incur fines or suffer jail time.

43. As a result of Defendant's enforcement of the Art Sales Act, and only because of Defendant's enforcement, Ms. Fontenot is not marketing her art in Oklahoma.

44. Because Ms. Fontenot's art is geared toward consumers desiring to purchase American Indian art and crafts, being unable to describe her art as American Indian-made causes irreparable and ongoing financial and reputational harm.

45. Ms. Fontenot has been denied her right to truthfully describe and market her art in Oklahoma in violation of the First Amendment, the Commerce Clause of the U.S. Constitution, and the Supremacy Clause of the U.S. Constitution. Further, Ms. Fontenot has been denied her right to equal protection of the law and the right to earn a living in the occupation of her choice without undue interference from the government, in violation of the Fourteenth Amendment.

46. Ms. Fontenot has concrete and specific plans to continue marketing her art in Oklahoma as American Indian-made at such time as the challenged law is declared unconstitutional and enjoined.

## **LEGAL CLAIMS**

### **Count I: First Amendment**

47. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

48. Pursuant to Okla. Stat. tit. 78, §§ 71-75, Defendant, acting under color of state law, forbids any person other than a citizen or a member of a federally recognized tribe from describing their art or crafts as American Indian-made.

49. The restrictions of Okla. Stat. tit. 78, §§ 73-75 apply to Ms. Fontenot based on the content of her speech—i.e., whether or not she states she is an “American Indian,” and whether or not she represents that her art is American Indian-made.

50. The restrictions of Okla. Stat. tit. 78, §§ 73-75 also apply to Ms. Fontenot based on her identity. The law is therefore a speaker-based restriction on speech.

51. Ms. Fontenot is informed and believes, and on that basis alleges, that prohibiting everyone but citizens or members of federally recognized tribes from representing their art and crafts as American Indian-made is not narrowly tailored to protect consumers from fraudulent or misrepresented art.

52. By enforcing Okla. Stat. tit. 78, §§ 73-75, Defendant, acting under color of state law, unconstitutionally deprives Ms. Fontenot of her freedom of speech as protected by the First and Fourteenth Amendments to the United States Constitution.

### **Count II: “Dormant” Commerce Clause**

53. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

54. The Commerce Clause of the U.S. Constitution, art. I, § 8, cl. 3, creates a national market in goods and services by delegating to Congress the exclusive power to regulate interstate commerce. This power operates as a restraint on the legislative

power of the states even when Congress has not expressly exercised that power—a doctrine known as the “dormant” federal commerce power.

55. Under the dormant aspect of the Commerce Clause, states are prohibited from enacting laws that either discriminate against interstate commerce or incidentally burden interstate commerce more than they benefit legitimate local interests. Oklahoma’s Art Sales Act does both.

56. There are approximately 39 federally recognized tribes in Oklahoma. Many other states recognize additional tribes at the state level. On information and belief, approximately 18 states recognize a total of 62 state-recognized tribes.

57. There is a robust interstate market for American Indian-made art and crafts. American Indian art shows and festivals take place year-round throughout the United States. Many American Indian artists regularly travel from state-to-state to participate in the various shows and festivals.

58. Ms. Fontenot regularly travels the country to participate in American Indian art shows and festivals. Prior to enactment of the Art Sales Act, Ms. Fontenot regularly traveled to and participated in American Indian art shows in Oklahoma, marketing and describing her art as American Indian-made. Since enactment of the Art Sales Act, Ms. Fontenot has ceased marketing her art in Oklahoma.

59. The Art Sales Act prevents out-of-state artists like Ms. Fontenot, who are members of state-recognized tribes, from marketing their art and crafts in Oklahoma as American Indian-made.

60. Oklahoma's Art Sales Act substantially burdens the American Indian art market for the purpose of benefitting artists who are members of Oklahoma-based federally recognized tribes.

61. Oklahoma's Art Sales Act has the effect of discriminating against out-of-state artists in favor of in-state artists.

62. Oklahoma's Art Sales Act places substantial burdens on interstate commerce for Indian art, which are not justified by any legitimate local interests or benefits.

63. Oklahoma's Art Sales Act has the underlying purpose and effect of protecting in-state artists from competing with out-of-state artists.

64. Economic protectionism, including protecting in-state artists from competition from out-of-state artists, is not a legitimate state interest.

65. Oklahoma's Art Sales Act does not achieve any legitimate local benefits.

66. Ms. Fontenot has been and continues to be harmed by the enforcement of Oklahoma's Art Sales Act.

67. Ms. Fontenot will continue to suffer substantial and irreparable harm unless the discrimination in violation of the Commerce Clause established by Oklahoma's Art Sales Act is declared unlawful and enjoined by this Court.

### **Count III: Preemption**

68. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

69. The Supremacy Clause of the U.S. Constitution, art. VI, cl. 2, provides that the "Laws of the United States . . . shall be the supreme Law of the Land."

70. The Federal Act's purpose is to develop a robust market for American Indian art and crafts. It broadly defines American Indians as three categories of artists: members of a federally recognized tribe; artisans certified by an American Indian tribe; and members of state-recognized tribes.

71. Oklahoma's Art Sales Act frustrates that purpose by limiting the definition of American Indians to only one of those three categories of artists: members of federally recognized tribes.

72. As a member of a state-recognized tribe, but not of a federally recognized tribe, Ms. Fontenot may not fully participate in the American Indian art and crafts market contemplated under the Federal Act because she cannot call herself an American Indian when marketing and describing her art in Oklahoma.

73. Because of the Art Sales Act, Ms. Fontenot cannot practically carry on her business in Oklahoma even though she complies with the Federal Act. Ms. Fontenot will continue to be prohibited from conducting her business in Oklahoma due to Oklahoma's conflicting law, resulting in substantial and irreparable harm unless the Art Sales Act is declared unlawful and enjoined by this Court.

74. By enforcing Okla. Stat. tit. 78, §§ 73-75, Defendant, acting under color of state law, unconstitutionally frustrates the purpose of the Federal Act in violation of the Supremacy Clause.

#### **Count IV: Due Process**

75. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

76. Reserving to members of federally recognized tribes the right to market and describe their art as American Indian-made infringes on Ms. Fontenot's constitutional right to pursue her chosen occupation as an American Indian artist.

77. Prohibiting citizens and members of state-recognized tribes from marketing and describing their art and crafts as American Indian-made does not bear any rational relationship to protecting the public health, safety, welfare, or other legitimate governmental interest.

78. The underlying purpose and practical effect of the Art Sales Act is to protect artists who are members of federally recognized tribes from economic competition.

79. There is no legitimate governmental interest advanced by prohibiting artists who are members of state-recognized tribes, or who are lineal descendants of American Indians, from describing and marketing their art as American Indian-made. Nor is the prohibition rationally related to any legitimate governmental interest that Defendant purports to have.

80. By enforcing the arbitrary, irrational, and fundamentally unfair prohibition against members of state-recognized tribes and lineal descendants established by Okla. Stat. tit. 78, §§ 73-75, Defendant, acting under color of state law, is depriving Ms. Fontenot of her constitutional right to earn a living in a chosen profession without due process of law.

81. Ms. Fontenot will continue to suffer substantial and irreparable harm unless the arbitrary, irrational, and fundamentally unfair prohibition against members of state-recognized tribes and lineal descendants from marketing their art as American Indian-made is declared unlawful and enjoined by this Court.

### **Count V: Equal Protection**

82. Ms. Fontenot incorporates and re-alleges each and every allegation contained in the preceding paragraphs of this Complaint.

83. By granting citizens and enrolled members of federally recognized tribes the sole authority to market and describe their art and crafts as American Indian-made, Oklahoma's Art Sales Act creates an irrational and arbitrary distinction among American Indian artists.

84. By enforcing the discriminatory and unequal definitions of the Art Sales Act, Defendant, acting under color of state law, irrationally and arbitrarily discriminates against Ms. Fontenot and in favor of members of federally recognized tribes in violation of Ms. Fontenot's right to equal protection of the laws.

85. Giving members of federally recognized tribes the exclusive ability to market and describe their art as American Indian-made bears no rational relationship to any legitimate governmental interest that Defendant purports to have.

86. Ms. Fontenot is as legitimately qualified to market and describe her art as American Indian-made as are artists who are members of federally recognized tribes.

87. The Equal Protection Clause of the Fourteenth Amendment prohibits government from treating similarly situated persons differently unless the reasons for doing so are rationally related to a legitimate governmental interest.

88. Ms. Fontenot suffers substantial and ongoing harm because Oklahoma's Art Sales Act requires Defendant to treat Ms. Fontenot, and others similarly situated, differently from citizens and members of federally recognized tribes without a rational basis.

89. Ms. Fontenot will continue to suffer substantial and irreparable harm unless the discrimination enshrined in the definitions of Okla. Stat. tit. 78, § 73 is declared unlawful and enjoined by this Court.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests the following relief:

1. Entry of a declaratory judgment that:
  - a. Okla. Stat. tit. 78, §§ 71-75 is unconstitutional, facially and as applied to Ms. Fontenot, to the extent that it bans speech in violation of the First and Fourteenth Amendments to the U.S. Constitution;
  - b. Okla. Stat. tit. 78, §§ 71-75 is unconstitutional, facially and as applied to Ms. Fontenot, to the extent that it discriminates against interstate commerce

in the American Indian art market in violation of the Commerce Clause of the U.S. Constitution;

c. Okla. Stat. tit. 78, §§ 71-75 is unconstitutional, facially and as applied to Ms. Fontenot, to the extent that it is preempted by federal law in violation of the Supremacy Clause of the U.S. Constitution;

d. Okla. Stat. tit. 78, §§ 71-75 is unconstitutional, facially and as applied to Ms. Fontenot, to the extent that it deprives Ms. Fontenot of her right to earn a living in a lawful occupation of her choice in violation of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution;

e. Okla. Stat. tit. 78, §§ 71-75 is unconstitutional, facially and as applied to Ms. Fontenot, to the extent that it deprives Ms. Fontenot of equal protection of the laws in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution;

2. Entry of a permanent injunction against Defendant, his agents, representatives, and employees, from enforcing Okla. Stat. tit. 78, §§ 71-75, as well as any and all implementing administrative rules and regulations, and the policies and practices by which Defendant enforces these provisions;

3. An award of attorney fees, costs, and expenses in this action pursuant to 42 U.S.C. § 1988; and

4. An award of any further legal and equitable relief as the Court may deem just and proper.

DATED: November 22, 2016.

Respectfully submitted,

s/ AMBER M. GODFREY

AMBER M. GODFREY

Bar Number: OBA No. 22152

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*\*Pro Hac Vice applications to be filed*