

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

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

**AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

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

INTRODUCTION

1. This civil-rights lawsuit seeks to vindicate Plaintiff Peggy Fontenot's constitutional right to truthfully market and describe her art in Missouri.

2. Ms. Fontenot is an award-winning American Indian photographer and artist, specializing in hand-beaded jewelry. She is a member of the Virginia-recognized Patawomeck Indian Tribe.

3. Ms. Fontenot markets and describes her art as American Indian-made. She has won numerous awards at American Indian art markets for her work, shown and sold her art in American Indian museums and galleries

throughout the United States, taught American Indian art classes, and has been an active member of the American Indian community for 37 years.

4. Prior to Mo. Rev. Stat. § 407.315 taking effect, Ms. Fontenot marketed and sold her art in Missouri as American Indian-made. But due to the recent change in Missouri law, Ms. Fontenot is subject to fines and imprisonment if she continues to market and describe 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.

6. The restrictions imposed by Mo. Rev. Stat. § 407.315, and enforced by Defendant, violate Ms. Fontenot's constitutional right to speak freely.

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 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 violation of rights secured by the First Amendment to the United States Constitution.

9. Jurisdiction over Ms. Fontenot's claims for declaratory and injunctive relief is proper under 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), and 2201–2202 (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 Jefferson City, Missouri, which is located in Cole County, Missouri, which is part of the Central Division of the Western District of Missouri. *See* 28 U.S.C. § 105(b)(4).

PARTIES

Plaintiff

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

12. Ms. Fontenot is a member of the Patawomeck Indian Tribe of Virginia (a Virginia state-recognized tribe). Ms. Fontenot received her Patawomeck membership in 2006. Ms. Fontenot's tribal number is 10780.

13. Prior to enactment of the statute challenged in this case, Ms. Fontenot described, marketed, and sold her art in Missouri as American Indian-made. Ms. Fontenot wishes to continue describing, marketing, and selling her photography and art in Missouri as American Indian-made. If the challenged law is declared unconstitutional, Ms. Fontenot will market and sell her art in Missouri as American Indian-made.

Defendant

14. Defendant Eric Schmitt is the Attorney General of Missouri and the chief law officer of the state. *See* Mo. Rev. Stat. § 27.060. Plaintiff is informed and believes, and on that basis alleges, that Mr. Schmitt has ultimate responsibility for enforcing the criminal penalties proscribed by Mo. Rev. Stat. § 407.315 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 depriving Ms. Fontenot of her First Amendment rights under color of state law by enforcing Mo. Rev. Stat. § 407.315.

FACTUAL ALLEGATIONS

I

THE CHALLENGED LAW

15. Ms. Fontenot incorporates and realleges each and every allegation contained in the preceding paragraphs of this Complaint.

16. Mo. Rev. Stat. § 407.315 makes it unlawful for anyone to “distribute, trade, sell, or offer for sale or trade within this state any article represented as being made by American Indians” unless the article was made or assembled by an “American Indian.”

17. Mo. Rev. Stat. § 407.315 defines an “American Indian” as “a person who is a citizen or enrolled member of an American Indian tribe.”

18. Mo. Rev. Stat. § 407.315 defines an “American Indian tribe” as “any Indian tribe federally recognized by the Bureau of Indian Affairs of the United States Department of the Interior.” As a result, tribes recognized by states, and other organized tribes, are excluded from the statutory definition.

19. Ms. Fontenot is informed and believes, and on that basis alleges, that Mo. Rev. Stat. § 407.315 prohibits (1) members and citizens of state-recognized American Indian tribes; (2) individuals certified by federally recognized tribes as Indian artisans, *see* 25 C.F.R. § 309.25; and (3) anyone else who is not a member of a federally recognized American Indian tribe, from representing his or her art as American Indian-made.

20. Any person who violates Mo. Rev. Stat. § 407.315 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. Mo. Rev. Stat. § 407.315.

II

PEGGY FONTENOT AND HER AMERICAN INDIAN ART

21. Ms. Fontenot incorporates and realleges each and every allegation contained in the preceding paragraphs of this Complaint.

22. Since 1983 Ms. Fontenot has created and sold American Indian art. Ms. Fontenot uses traditional American Indian stitches in her beadwork to make both 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.

23. Ms. Fontenot shows and sells her art at art shows, museums, galleries, through her website, and through her prior clients and contacts.

24. 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.

25. Ms. Fontenot's jewelry has won multiple awards at American Indian art shows and markets. In 2019, she won Second Place in Beadwork at the Heard Museum Indian Market in Phoenix, Arizona, and Third Place in Beadwork at the Red Earth Indian Market in Oklahoma City, Oklahoma.

26. Ms. Fontenot's photography has also won multiple awards at American Indian art shows and markets. In 2019, Ms. Fontenot's photography won Second Place in Photography at the Eiteljorg Museum in Indianapolis, Indiana. In 2018, she won Best of Division and First Place in Photography at

the Heard Museum in Phoenix, Arizona, and First Place in Photography at the Autry Museum Indian Art Market in Los Angeles, California. In 2017, she won Second Place in Photography at the Autry Museum.

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

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

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

III

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

30. Ms. Fontenot incorporates and realleges each and every allegation contained in the preceding paragraphs of this Complaint.

31. Prior to the effective date of Mo. Rev. Stat. § 407.315, Ms. Fontenot sold her art in Missouri while representing it as American Indian-made.

32. Even though she is a member of a state-recognized tribe, Ms. Fontenot is no longer legally able to truthfully market and describe her art in

Missouri as American Indian-made without penalty. *But see* 25 U.S.C. § 305e. That is because Mo. Rev. Stat. § 407.315 prohibits all persons except those who are citizens or enrolled members of federally recognized tribes from making such representations.

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

34. As a result of Defendant's enforcement of Mo. Rev. Stat. § 407.315, and only because of Defendant's enforcement, Ms. Fontenot is not actively marketing her art in Missouri.

35. Therefore, Mo. Rev. Stat. § 407.315 causes irreparable and ongoing financial and reputational harm.

36. Ms. Fontenot plans to continue marketing her art in Missouri as American Indian-made at such time as the challenged law is declared unconstitutional and enjoined.

LEGAL CLAIM

THE CHALLENGED LAW VIOLATES THE FIRST AMENDMENT

37. Ms. Fontenot incorporates and realleges each and every allegation contained in the preceding paragraphs of this Complaint.

38. Pursuant to Mo. Rev. Stat. § 407.315, Defendant, acting under color of state law, forbids any person other than a citizen or a member of a

federally recognized American Indian tribe from describing or marketing their art or crafts as American Indian-made.

39. The restrictions of Mo. Rev. Stat. § 407.315 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.

40. The restrictions of Mo. Rev. Stat. § 407.315 also apply to Ms. Fontenot based on her identity. The law is therefore a speaker-based restriction on speech.

41. 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 protecting consumers from fraudulent or misrepresented art.

42. Ms. Fontenot is informed and believes, and on that basis alleges, that Mo. Rev. Stat. § 407.315 restricts people like her—who are, in fact, American Indians—from truthfully stating that their art is American Indian-made.

43. Ms. Fontenot is informed and believes, and on that basis alleges, that less restrictive alternatives to banning her truthful speech (such as disclaimers) are available.

44. By enforcing Mo. Rev. Stat. § 407.315, 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.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court:

1. Enter a declaratory judgment that Mo. Rev. Stat. § 407.315 is unconstitutional, facially and as applied to Ms. Fontenot, to the extent that it restricts speech in violation of the First and Fourteenth Amendments to the U.S. Constitution;

2. Enter a permanent injunction against Defendant, his agents, representatives, and employees, from enforcing Mo. Rev. Stat. § 407.315, 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: September 20, 2019.

Respectfully submitted,



ANASTASIA P. BODEN (Cal. Bar No. 281911*)
CALEB R. TROTTER (Cal. Bar No. 305195*)
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: ABoden@pacificlegal.org
E-mail: CTrotter@pacificlegal.org
**Pro Hac Vice*

DAVID E. ROLAND (Mo. Bar No. 60548)
Freedom Center of Missouri
P.O. Box 693
Mexico, Missouri 65265
Telephone: (573) 567-0307
Email: dave@mofreedom.org

Attorneys for Plaintiff Peggy Fontenot

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2019, 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