CASE NO CIV-11-1290-HE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

KEITH CRESSMAN

Plaintiff,

vs.

THOMAS KEMP, JR., et al.,

Defendants.

DEPARTMENT OF PUBLIC SAFETY DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

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DEPARTMENT OF PUBLIC SAFETY DEFENDANTS'
MOTION TO DISMISS FIRST AMENDED COMPLAINT

COMES NOW, Defendants Michael C. Thompson sued in his ***official capacity***, Kerry Pettingill sued in his ***official capacity***, and Paula Allen sued **both** ***individually*** and ***officially***, by and through Assistant Attorney General for the State of Oklahoma Kevin L. McClure, to move this Court to dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. Rule 12. In support of this motion, these Defendants would show this Court the following:

PLAINTIFF'S CLAIMS

1. Plaintiff, Keith Cressman filed an Amended Complaint in this case on February 16, 2012, naming Defendants Michael Thompson in his *official capacity,* Kerry Pettingill in his *official capacity,* and Paula Allen in both her *individual* and *official capacity*, claiming his state law rights and his First and Fourteenth Amendment rights have been violated. [doc. 20].

2. The Amended Complaint alleges that Oklahoma's vehicle license plates depicting a Native-American sculpture called the "Sacred Rain Arrow" on it, is a Native American religious symbol that violates Plaintiff's "sincerely-held religious beliefs." [doc. 20, para. 1 and 22].

3. Plaintiff claims that he "does not want his car to serve as a billboard for ideas, messages, and images that he finds objectionable on religious grounds." [doc. 20, para. 27].

4. He claims that initially he "chose to display a specialty license plate at an extra cost of $37.00 to him initially and then $35 for renewal." But "[a]fter incurring these costs, [he] did not want to continue to pay extra money to avoid expressing a message contrary to his religious beliefs" so (he claims) he purchased the standard state license plate and now wants to cover up the image of the "Sacred Rain Arrow" sculpture. [doc. 20, para. 28].

5. Plaintiff claims that "[t]o determine whether he could legally cover up the image of the sculpture, [he] went to the Oklahoma Tax Commission, Motor Vehicle Division, in Oklahoma City on December 7, 2009" and spoke with a clerk about covering up

the Native American sculpture and was allegedly told that he would likely get a ticket if he covered up the sculpture, but the Tax Commission Clerk suggested to him that he could check with the "enforcing officer" at the Department of Public Safety. [doc. 20, para. 30-31].

6. Cressman claims that on that same day, he "went to the Oklahoma Department of Public Safety in Oklahoma City. There, [he] spoke to Allen [the person he believes is], the official in charge of interpreting policies for the Department of Public Safety." [doc. 20, para. 31].

7. Plaintiff alleges that "Allen invited [him] into her office." Once there he claims he "explained his religious objections to Allen and asked if he could display a standard license plate and cover up the image of the sculpture without violating the law – as long as he did not cover up anything else on the license plate. He also asked which, if any, law he would violate by displaying a license plate on his car while covering the image of the 'Sacred Rain Arrow' sculpture." [doc. 20, para. 32].

8. Plaintiff claims that Allen told him that he could not cover up any portion of the license plate because doing that would violate 47 O.S. § 4-107, and that if he did do it, he could be prosecuted. [doc. 20, para. 33-34].

9. Plaintiff claims that he is being "forced" to have a license plate on his vehicle but cannot cover up the image without subjecting himself to criminal sanctions. As a result, he claims, that he is being forced to pay fees for a specialty license plate to comply with the law and to avoid endorsing a message contrary to his religious beliefs. [doc. 20, para. 42].

10. As a result of Oklahoma's state law prohibiting him from covering up any portion of a standard license plate, he claims that he is forced to pay additional money for speciality license plates or else risk being prosecuted for covering up the image which he claims is contrary to his religious beliefs. [doc. 20, para. 48-49].

11. Plaintiff's Amended Complaint alleges Four Cause of Actions [doc. 20]:

FIRST CAUSE OF ACTION - Violation of Freedom of Speech

SECOND CAUSE OF ACTION - Violation of the Due Process Clause

THIRD CAUSE OF ACTION - Violation of the Free Exercise Clause

FOURTH CAUSE OF ACTION - Violation of Oklahoma Religious Freedom Act

12. Plaintiff has sued the Defendants pursuant to 42 U.S.C. § 1983 requesting this Court enter judgment declaring that the application of 47 O.S.. § 4-107 and 47 O.S. § 1113 to force him to use the offending license plate violates his constitutional and statutory right to avoid expressing a message contrary to his religious beliefs, violates his due process rights, and to engage in free exercise of religion, as guaranteed under the First and Fourteenth Amendments to the United States Constitution and under the Oklahoma Religious Freedom Act. [doc. 20, PRAYER FOR RELIEF, para. B].

13. He is asking this Court to enter a preliminary and permanent injunction enjoining Defendants, their agents, servants, employees, and all persons in active concert or participation with them from applying 47 O.S. § 4-107 and § 1113 so as to restrict his

constitutionally and statutorily protected right to remain silent, to avoid expressing a message contrary to his religious beliefs, and to engage in the free exercise of religion. [doc. 20, PRAYER FOR RELIEF, para. C].

14. Finally, Plaintiff is asking this Court to award him nominal damages arising from the acts of the Defendants as an important vindication of his constitutional rights, as well as, attorneys' fees, costs, and expenses. [doc. 20, PRAYER FOR RELIEF, para. E and F].

PROPOSITION I

PLAINTIFF HAS FAILED TO PROPERLY SERVE DEFENDANT ALLEN IN HER INDIVIDUAL CAPACITY

Defendants in their official capacity accept serve of process in this case, even though they still may not have been properly served. Defendant Allen, in her *individual capacity*, still objects to service of process on her and moves this Court to dismiss this lawsuit pursuant to Federal Rule of Civil Procedure (Fed.R.Civ.P.), Rule 12(b)(5) for insufficient service of process. Service of Process must be accomplished in compliance with Fed.R.Civ.P. Rule 4. It is Plaintiff's burden to establish the validity of the service of process. *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 174 (10th Cir.1992). *Housing Authority of City of Atlanta, Georgia v. Millwood*, 472 F.2d 268, 272 (5th Cir.1973)("Under [Rule] 12(b) there is no longer any necessity for appearing specially to protest the court's jurisdiction or question the sufficiency of process or service of process. All such objections are assertable in an answer or motion to dismiss pursuant to Rule 12(b)").

A Rule 12(b)(5) motion challenges the mode or lack of delivery of a summons and complaint. *Oltremari v. Kansas Social & Rehabilitative Serv*., 871 F.Supp. 1331(D.Kan.1994). "Objections to the sufficiency of process 'must be specific and must point out in what manner the plaintiff has failed to satisfy the service provision utilized.' " *O'Brien v. R.J. O'Brien & Assocs*., 918 F.2d 1394, 1400 (7th Cir.1993) (citation omitted). Defendant Allen specifically contends that Plaintiff has failed to serve a summons and amended complaint according to Rule 4(e)(service upon an Individual).

Plaintiff has sued Defendant Allen in both her *individual capacity* and her *official capacity*. Therefore, in order to have proper service of process on Allen sued ***individually***, Plaintiff must satisfy Fed.R.Civ.P. Rule 4(e). **Rule 4(e)** describes the manner and method for serving an "*Individual*." That Rule provides in relevant part:

(e) Unless federal law provides otherwise, an *individual*--other than a minor, an incompetent person, or a person whose waiver has been filed--may be served in a judicial district of the United States by:

(1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

(2) doing any of the following:

(A) delivering a copy of the summons and of the complaint to the individual **personally**; [emphasis added]

(B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or

C) delivering a copy of each to an **agent authorized by appointment** or **by law to receive service of process.**

In this case, Defendant Allen was never ***personally*** served, no one of suitable age was served at her "dwelling or usual place of abode," and no "agent authorized by appointment or by law" was ever served. [Ex. 1 - Affidavit of Allen;]. Additionally, there is no state "law" authorizing the service of process for state employees sued *individually*. Therefore, this Court must dismiss Defendant Allen in her *individual capacity* from this lawsuit, for failure of service of process pursuant to Fed.R.Civ.P. Rule 12(b)(5).

PROPOSITION II

PLAINTIFF HAS FAILED TO STATE A CLAIM UPON WHICH THIS COURT CAN GRANT HIM RELIEF, ALLEN HAS QUALIFIED IMMUNITY, AND PLAINTIFF LACKS ARTICLE III STANDING AGAINST THE DEPARTMENT OF PUBLIC SAFETY DEFENDANTS

Pursuant to Fed.R.Civ.P. Rule 12(b)(6) the State Defendants move this Court to dismiss this lawsuit. Plaintiff has sued all three Department of Public Safety ("DPS") Defendants – Thompson, Pettingill, and Allen – in their *official capacity*. He has also sued Defendant Allen in her *individual capacity*. All claims against all Defendants should be dismissed, for failure to state a claim upon which **this court** can grant **this Plaintiff** relief, against **these Defendants**. (Fed.R.Civ.P. Rule 12(b)(6)). In addition, Allen has qualified immunity in her *individual capacity*, and Plaintiff lacks Article III ***standing*** to sue these State Officials.

Individual Capacity Claims Against Allen

Plaintiff has alleged that on December 7, 2009, a clerk at the Oklahoma Tax Commission, Motor Vehicle Division, suggested that Plaintiff "check with the 'enforcing officer' at the Department of Public Safety" as to whether or not Plaintiff would get a ticket for covering up the Native-American sculpture depicted on Oklahoma's standard license plates. [doc. 20, para. 30]. He has alleged that he (that same day) "went to the Oklahoma Department of Public Safety in Oklahoma City" where he alleges he spoke with Defendant Allen about his concerns. [doc. 20, para. 31 and 32]. Plaintiff alleges that Allen told him that the covering up of the image of the sculpture on the license plate would violate 47 O.S. § 4-107. [doc.20, para. 33]. From those allegations, Plaintiff has sued Allen *individually* for money damages under 42 U.S.C. § 1983 for violation of his First Amendment right to Freedom of Speech [doc. 20, para. 57-60], his Fourteenth Amendment right to Due Process [doc. 20, para. 61-63], his First Amendment right to Free Exercise of his Religion [doc. 20, para. 64-69], and for violation of his state law rights under the Oklahoma Religious Freedom Act [51 O.S. § 251]. [doc. 1, para. 70-74].

Plaintiff has no right to sue Allen in her *individual capacity* in federal court for violating his **state law rights** under the Oklahoma Religious Freedom Act, because he does not claim this Court has Diversity jurisdiction (28 U.S.C. § 1332) nor does he claim Federal Question jurisdiction (28 U.S.C. § 1331) under that Act. Furthermore, Plaintiff has no cause of action under 42 U.S.C. § 1983 for violation of the Oklahoma Religious Freedom Act [51

O.S. § 251]. Section 1983 is a remedial statute enacted to enforce **federal** Constitutional and statutory rights. *See Marshall v. Columbia Lea Regional Hosp*., 345 F.3d 1157, 1164 (10th Cir. 2003)(Section 1983 does not provide a basis for redressing violations of state law, but only for those violations of federal law). And, 42 U.S.C. § 1983 does not create any substantive rights; it merely provides remedies for deprivations of rights established elsewhere. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Therefore, this Court must dismiss Defendant Allen sued in her *individual capacity* from this lawsuit as far as Plaintiff's state law claims under the Oklahoma Religious Freedom Act are concerned.

Furthermore, Plaintiff has failed to allege ***sufficient factual allegations*** against Allen for a ***plausible claim*** under the Oklahoma Religious Freedom Act. (51 O.S. §§ 251-258). *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Plaintiff's only factual allegations against Allen are that he told her that the sculpture interfered with his religious beliefs and she (allegedly) told him that he would likely be issued a ticket and possibly prosecuted if he covered up the sculpture on his license plate. [doc. 20, para. 30-33]. Plaintiff has not alleged that Allen told him that **she would** issue him a ticket or prosecute him under his hypothetical scenario; nor has he alleged that Allen even has any authority or control over any law enforcement officers who could issue him a ticket or any prosecutors who could actually decide to prosecute him for his desired actions. How could Allen's alleged conduct violate any of Plaintiff's "free exercise of his religious beliefs?" Clearly, this Court must dismiss Plaintiff's state law claim under the Oklahoma Religious Freedom Act for failure to pled

sufficient and plausible allegations pursuant to Fed.R.Civ.P. Rule 12(b)(6), Rule 8(a)(2), and *Twombly*. (*See also*, 51 O.S., § 163(C)("Suits instituted pursuant to the provisions of this act **shall** name as defendant **the state** or the political subdivision against which liability is sought to be established. **In no instance shall an employee** of the state or political subdivision acting within the scope of his employment **be named as defendant**..."). Furthermore, the Oklahoma Religious Freedom Act [51 O.S. § 251-258] only provides for damages "against a governmental entity..." [51 O.S. § 256] not against an individual such as Allen, and does not apply to laws concerning "traffic management." *See* 51 O.S. § 258. Arguably, 47 O.S. § 4-107 and § 1113 (the challenged statutes in this case) are "laws concerning traffic management." Both statutes relate to the management of vehicles licensed to drive on the highways of this State, which would include the management of traffic on the state's highways. Finally, Plaintiff has failed to allege that he has complied with the GTCA's "Notice of Tort Claims" provisions pursuant to 51 O.S. § 156(B). Taking all of Plaintiff's allegation facts as true, he claims that he spoke to Allen on **December 7, 2009**. [doc. 20, para. 30-31]. If that true, than he would have had to file a Notice of Tort claim with the State's "Office of the Risk Management" [*see* § 156©] within 1 year of that date or else his claim would be "forever barred." *Id.* § 156(B). Plaintiff's original complaint was filed November 2, 2011. [doc. 1]. While his original Complaint may have met his statute of limitations deadline for filing a § 1983 cause of action, he has clearly missed his GTCA deadlines by almost 1 year. Therefore, any and all claims alleged against Allen in her

individual capacity for any kind of violation of Plaintiff's State law claims under the Oklahoma Religious Freedom Act should be dismissed. That leaves only Plaintiff's federal claims under § 1983 for this Court to resolve.

Plaintiff's Federal Claims Against Allen in her Individual Capacity Should be Dismissed

The only federal cause of actions Plaintiff is entitled to sue for under § 1983 in this case, are for violations of the United States Constitution; here the First and Fourteenth Amendments. However, even if every factual allegation in the Amended Complaint is taken as true, Defendant Allen has not violated any of Plaintiff's First Amendment rights to "free speech" or "free exercise" of his religion, or any of Plaintiff's Fourteenth Amendment rights to "due process."

Defendant Allen claims qualified immunity. "Under the doctrine of qualified immunity, government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Douglas v. Dobbs*, 419 F.3d 1097, 1100 (10th Cir. 2005); *Frank v. Relin*, 1 F.3d 1317, 1327 (2nd Cir. 1993)(Qualified immunity applies to claims for monetary relief against officials in their individual capacities)(*citing Hafer v. Melo*, 502 U.S. 21, 22-23 (1991). When a defendant raises a claim of qualified immunity, the burden shifts to the plaintiff to show that the defendant is not entitled to immunity. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir.2001). To overcome a qualified immunity defense, a plaintiff must first assert a violation of a

federal constitutional or statutory right and then show that the right was clearly established. *Garramone v. Romo*, 94 F.3d 1446, 1449 (10th Cir.1996). A right is clearly established if "[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing [or alleged of doing] violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, (1987). To show that a right is clearly established, a plaintiff does not have to produce a factually identical case. Rather, plaintiff may produce a Supreme Court or Tenth Circuit opinion on point, or demonstrate that the right is supported by the weight of authority from other courts. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1299 (10th Cir.2004). Once the plaintiff satisfies this initial two-part burden, the burden shifts to the defendant to show that there are no genuine issues of material fact and that the defendant is entitled to judgment as a matter of law. *Id*. "The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Pearson et al. v. Callahan*, 555 U.S. 223, 244 (2009).

Generally, in determining whether a plaintiff has met his burden of establishing a constitutional violation that was clearly established, a Court should construe the facts in the light most favorable to the plaintiff as the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378, 380 (2007). However, at the motion to dismiss stage, the Court takes the Complaint and asks: even if all the factual allegations are true, has Plaintiff alleged a clearly established constitutional violation, such that a reasonable state official would know or should have known that their conduct (as alleged in the Complaint) would violate that federal right. *See*

Riggins v. Goodman, 572 F.3d 1101, 1107 (10th Cir. 2009) ("The plaintiff must demonstrate on the ***facts alleged*** both that the defendant violated his constitutional or statutory rights, and that the right was ***clearly established*** at the time of the alleged unlawful activity.") (emphasis added). Whether a statutory or constitutional right was clearly established at the time of the official's conduct is "an 'essentially legal question.'" *Crawford–El v. Britton*, 523 U.S. 574, 588 (1998) (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526–29 (1985). It is not enough simply to allege the violation of a clearly established but conceptually broad right, such as the right to free speech, or the right to due process. *See Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2084 (2011) ("We have repeatedly told courts ... not to define clearly established law at a high level of generality.") (citations omitted). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more ***particularized***, and hence more ***relevant***, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640 (emphasis added); *see al- Kidd*, —— U.S. ——, 131 S.Ct. at 2083 ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question ***beyond debate***."); *Wilson v. Layne*, 526 U. S. 603, 618 (1999)("[I]f judges ... disagree on a constitutional question, it is unfair to subject [state officials] to money damages for picking the losing side of the controversy."). "Reasonable knowledge of the law means ... knowledge of present constitutional law [and] involves knowledge only of legal rules that were 'clearly established' at the time of the conduct at

issue." *Harris v. District of Columbia*, 932 F.2d 10, 13 (D.C.Cir.1991) (citation omitted). Thus, "[w]hen properly applied, [qualified immunity] protects 'all but the plainly incompetent or those who knowingly violate the law.' " *al- Kidd*, 131 S.Ct. at 2085 (*quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Plaintiff's claims against Allen are bought against her under 42 U.S.C. § 1983. "[S]ection 1983 provides a remedy for deprivations of specific constitutional rights, not generalized allegations of constitutional deprivations." *Trautvetter v. Quick*, 916 F.2d 1140, 1148 (7th Cir.1990) (citation omitted). "A failure to identify a right, privilege or immunity secured by the Constitution that was violated merits dismissal of the cause of action for failure to state a claim upon which relief can be granted." *Codd v. Brown*, 949 F.2d 879, 882 (6th Cir.1991). A civil rights complaint "must not be conclusory and must set forth facts which state a claim as a matter of law." *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir.1993). Furthermore, the cornerstone of any § 1983 claim is ***personal participation***. "Individual liability under [42 U.S.C.] § 1983 must be based on personal involvement in the alleged constitutional violation." *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir.1997) (*citing Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir.1996); *Bennett v. Passic*, 545 F.2d 1260, 1262–63 (10th Cir.1976) (Personal participation is an essential allegation in a Section 1983 violation; only where there is an "affirmative link" between that alleged violator's conduct and the alleged violation can there be liability under § 1983). *Stidham v. Peace Officer Stds. & Training*, 265 F.3d 1144, 1156 (10th Cir. 2001). Plaintiff's Amended Complaint [doc. 20]

does not plead ***sufficient facts*** against Allen in her ***individual capacity*** in this case that **affirmatively links** her individual conduct to each of Plaintiff's alleged constitutional violations that would have alerted Allen that those actions would ***plausibly*** violate Plaintiff's "**clearly established**" constitutional rights. *See* Fed.R.Civ.P. 8(a)(2)("A pleading that states a claim for relief must contain: (2) a short and plain statement of the claim showing that the pleader is entitled to relief"); *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544 (2007)(requiring a Plaintiff to plead ***sufficient facts*** indicating that he has pled a ***plausible claim*** entitling him to the relief he is requesting); *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(requiring ***personal participation***).

Allen has not violated any of Plaintiff's First Amendment "free speech" rights. [doc. 20, para. 57-60]. Allen merely informed Plaintiff that if he covered up the sculpture of the Native-American on his license plate, he could be in violation of Oklahoma law; specifically, 47 O.S. § 4-107. Plaintiff has not pled that Allen told him that she would write him a ticket, arrest him, or prosecute him for violation of 47 O.S. § 4-107 or § 1113. Plaintiff has not pled a ***plausible*** claim with ***sufficient factual allegations*** against Allen that would entitle Plaintiff to any relief in this case based upon ***clearly established law***. *Bell Atlantic Corp., v. Twombly*, 550 U.S. 544 (2007)(requiring ***sufficient factual allegations*** for a ***plausible claim***); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)(requiring ***personal participation*** allegations); *Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2084 (2011)(requiring the ***clearly established*** law prong for qualified immunity to be "***beyond debate***"). Therefore, this Court must dismiss

Plaintiff's First Amendment "free speech" CAUSE OF ACTION, granting Allen ***qualified immunity;*** or else dismiss his claim pursuant to Fed.R.Civ.P. Rule 12(b)(6) for failure to pled a claim upon which this Court can grant Plaintiff relief in this case against Defendant Allen in her *individual capacity* under § 1983.

Allen has also, not violated any of Plaintiff's Fourteenth Amendment rights to "due process." [doc. 20, para. 61-63]. Plaintiff's only factual allegations against Allen in his Complaint are that she told him that he might be ticketed and prosecuted for covering up the sculpture on his license plate. She did not tell him that she would either write him a ticket, arrest him, or prosecute him if he cover up the sculpture. Again, Plaintiff has not pled a ***plausible*** claim with ***sufficient factual allegations*** against Allen that would entitle Plaintiff to any relief in this case based upon ***clearly established*** Fourteenth Amendment "due process" law. (Again *see, Bell Atlantic Corp., v. Twombly*, 550 U.S. 544 (2007)(requiring ***sufficient factual allegations*** for a ***plausible claim***); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)(requiring ***personal participation*** allegations); *Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2084 (2011)(requiring the ***clearly established*** law prong for qualified immunity to be "***beyond debate***")). Therefore, this Court must dismiss Plaintiff's Fourteenth Amendment "due process" CAUSE OF ACTION, and grant Allen ***qualified immunity***, and/or dismiss his claim pursuant to Fed.R.Civ.P. Rule 12(b)(6) for failure to pled a claim upon which this Court can grant Plaintiff relief in this case against Defendant Allen in her individual capacity under § 1983.

Finally, Plaintiff has failed to sufficiently and plausibly plead a violation of his First Amendment rights to the "free exercise" of his religion. [doc. 20, para. 64-69]. Even though Plaintiff alleges that he told Allen that the reason he wanted to cover up the sculpture on his license plate were religious in nature, and Plaintiff alleges that Allen told him that he could be ticketed and possibly prosecuted for his actions, Plaintiff has not alleged that Allen herself threatened to ticket, arrest, or prosecute Plaintiff for his hypothetical actions. (Once again, *see, Bell Atlantic Corp., v. Twombly*, 550 U.S. 544 (2007)(requiring ***sufficient factual allegations*** for a ***plausible claim***); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)(requiring ***personal participation*** allegations); *Ashcroft v. al-Kidd*, —— U.S. ——, 131 S.Ct. 2074, 2084 (2011) (requiring the ***clearly established*** law prong for qualified immunity to be "***beyond debate***")). Therefore, this Court must (also) dismiss Plaintiff's First Amendment "free exercise" CAUSE OF ACTION, and grant Allen ***qualified immunity***, and/or dismiss this claim pursuant to Fed.R.Civ.P. Rule 12(b)(6) for failure to pled a claim upon which this Court can grant Plaintiff relief in this case against Defendant Allen in her individual capacity under § 1983.

Official Capacity Claims Against Thompson, Pettingill, and Allen

Plaintiff has also sued Thompson, Pettingill, and Allen in their ***official capacities*** for violation of his First and Fourteenth Amendment rights. While this Court **does not** have the authority to award Plaintiff money damages against the State (or a state official in *official capacity* suits) pursuant to § 1983 (*i.e.*, neither the State nor a public official sued officially

is a "person" under § 1983) or the Eleventh Amendment (prohibiting claims for money damages against the State), under the ***Ex parte Young*** doctrine, [209 U.S. 123 (1908)], this Court could issue prospective injunctive relief against a state official sued in their *official capacity* for violations of federal law, if there is a ***nexus*** between the alleged violator's actions and the constitutional violation, ***sufficient enough*** for the Court to remedy the violation. *See Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir.1979) (holding the governor or attorney general of a state are not the proper defendants in every action attacking the constitutionality of a state statute merely because they have a ***general obligation*** **to enforce state laws**); *Papasan v. Allain*, 478 U.S. 265 (1986)("Relief that in essence serves to compensate a party injured in the past by an action of a state official in his official capacity that was illegal under federal law is barred even when the state official is the named defendant."). Therefore, when a violation of federal law is alleged against a state official in his *official capacity*, only the particular state official whose conduct violates that federal right is the rightful party to the suit, and prospective injunctive relief can only be had against him or her under *Ex parte Young,* if a Plaintiff can meet his or her Article III **standing** requirements.

Ex parte Young and its progeny reflect the Supreme Court's strict adherence with Article III's **standing** requirements. *See Ex parte Young*, 209 U.S. 123, 149-156 (1908)(requiring ***nexus*** between the injury and the alleged violator's conduct). Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases"

and "Controversies," and " 'Article III standing ... enforces the Constitution's case-or-controversy requirement.' " *Daimler Chrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) (*quoting Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004)). To establish Article III standing, a plaintiff must show: (1) "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of—the injury has to be fairly ... traceable to the challenged action of the defendant, and ***not*** **... the result of the independent action of some third party not before the court**"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be **redressed by** a **favorable decision**." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (omissions in original) (internal quotation marks and citations omitted)[emphasis added]. *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007)("A plaintiff must allege personal injury ***fairly traceable*** to the defendant's allegedly unlawful conduct **and** ***likely to be redressed by the requested relief***.").

In this case, neither Thompson, Pettingill, nor Allen's alleged conduct have a ***sufficient nexus*** with (*Ex Parte Young*), or are ***fairly traceable*** to (Article III), Plaintiff's alleged constitutional claims, because Plaintiff has not alleged Allen has any enforcement power to either arrest or prosecute Plaintiff, and Thompson (as the Commissioner of DPS) and Pettingill (as the Chief of the OHP Patrol) have only a ***general obligation*** to instruct OHP troopers in how to enforce the traffic laws of this State; the ultimate decision of issuing

a ticket or arresting someone for violation of 47 O.S. § 4-107 lies with the officer in the field. Furthermore, Plaintiff has not alleged that Thompson or Pettingill have threatened to ticket, arrest, or prosecute him, or that they would in fact instruct those OHP troopers under their command to ticket Plaintiff for his hypothetical actions. Furthermore, there are 77 county Sheriffs and over 200 municipal and higher education law enforcement entities in the State of Oklahoma who could stop and ticket Plaintiff for violation of 47 O.S. § 4-107. Plaintiff has not alleged that Commissioner Thompson or Chief Pettingill have any control or authority over those other law enforcement entities. Commissioner Thompson and Chief Pettingill only have a ***general obligation*** to enforce those statutes. They have absolutely no authority to **prosecute** violators of that law, because they are not prosecutors. Therefore, even if this Court held that Plaintiff's federal constitutional rights could be violated if he is ticketed, arrested, or prosecuted for covering up the sculpture on his license plate, an order to Thompson or Pettingill commanding them to make sure no one under their control or authority issues a ticket or arrests Plaintiff, would not necessarily keep Plaintiff from getting a ticket or from being prosecuted. Plaintiff has no standing to bring this action against either Thompson, Pettingill or Allen in their *official capacities* under **Article III** or the ***Ex Parte Young*** doctrine. Therefore, this Court must dismiss Plaintiff's Amended Complaint against these DPS Defendants sued in their ***official capacity***, pursuant to Fed.R.Civ.P. 12(b)(6) for Plaintiff's failure to state a valid and ***plausible*** claim with ***sufficient factual allegations*** against these State Officials that would allow this Court to award Plaintiff any meaningful

relief against these Defendants and ameliorate Plaintiff of his fear of being ticketed, arrested or prosecuted. *See Bell Atlantic Corp., v. Twombly*, 550 U.S. 544 (2007)(requiring ***sufficient factual allegations*** for a ***plausible claim***); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007)("A plaintiff must allege personal injury ***fairly traceable*** to the defendant's allegedly unlawful conduct **and** ***likely to be redressed by the requested relief***.").

Furthermore, Plaintiff's claims are "speculative, conjectural, and hypothetical" in that he (at this point at least) only wants to cover up the sculpture on his license plate, because he does not want to pay for a specialty license plate anymore. He has not alleged that he already has done so, or that he has been threatened with a ticket, arrest, or prosecution **by these Defendants**. Furthermore, how could an Order by this Court to these Defendants resolve Plaintiff's hypothetical problem? Any Order by this Court to these Defendants would not likely redressed Plaintiff's fear of being ticketed, arrested, or prosecuted. There are hundreds of other law enforcement entities in this state that could enforce that statute and issue Plaintiff a ticket for covering up the sculpture on his license plate, and there numerous prosecutors who could prosecute Plaintiff for his desired conduct. Therefore, Plaintiff has no "***standing***" to bring this lawsuit **against these DPS Defendants** because: (1) he has not suffered an "injury in fact" (he has only threatened to cover up the sculpture and none of these Defendants have threatened to ticket, arrest or prosecute him); (2) he has no injury in fact that is "causally connected" and "fairly traceable to" these Defendants' **alleged conduct**; and (3) any favorable decision by this Court would not likely redress Plaintiff's alleged

injury, because there are numerous other law enforcement entities who could ticket Plaintiff. He has not alleged any Defendant would actually issue him a ticket or prosecute him for his desired hypothetical conduct. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)(requiring injury ***in fact***); *Ex parte Young*, 209 U.S. 123, 149-156 (1908)(requiring ***nexus*** between the injury and the alleged violator's actions); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007)(Standing***: likely*** to be ***redressed*** by the requested relief).

CONCLUSION

This Court should dismiss Plaintiff's Amended Complaint for failure to properly serve the Defendant Allen in her individual capacity pursuant to Fed.R.Civ.P. Rule 12(b)(5). And — even if this Court determines that Plaintiff has good serve on Defendant Allen, this Court should dismiss Plaintiff's Complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which this Court can grant him relief against these Defendants, and pursuant to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) for failure to pled a plausible claim with sufficient facts. Furthermore, this Court should grant State Defendant Allen, sued in her "individual capacity", ***qualified immunity***, because Plaintiff cannot produce a single case that would have alert Allen that her **alleged conduct** of telling Plaintiff he might get ticketed and possibly prosecuted if he covers up the sculpture on his license plate would violate clearly established law. Allen's alleged ***personal participation*** **conduct** does not infringe any of Plaintiff's alleged cause of actions in this case. Finally, even though Plaintiff may

have partially pled his way into a possible claim under § 1983 *via*. ***Ex Parte Young***, Plaintiff does not have Article III standing to sue **these Defendants** for any of his claims that would allow this Court to issue Plaintiff **any meaningful relief** against these Defendants**,** for Plaintiff's **hypothetical and speculative injury**, that would ameliorate Plaintiff of his fear of being ticketed, arrested, or prosecuted for violation of the challenged statutes. WHEREFORE, this Court must dismiss Plaintiff's Amended Complaint.

Respectfully submitted,

s/ Kevin L. McClure
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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2012, I electronically transmitted the attached document to the Clerk of the Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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