CASE NO. 12-6151

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KEITH CRESSMAN,

Plaintiff/Appellant,

v.

MICHAEL C. THOMPSON, *et al.,*

Defendants/Appellees.

APPELLEES' JOINT RESPONSE BRIEF

ORAL ARGUMENT IS NOT REQUESTED

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October 4, 2012

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Defendants/Appellees respectfully submit this Brief in Response to Plaintiff/Appellant's Brief in Chief.

LOCAL RULE 28.2(C)(1) STATEMENT

Appellees are not aware of any prior appeals of this case.

STATEMENT OF ISSUES

I. **CRESSMAN LACKED ARTICLE III STANDING TO SUE THE DEFENDANTS.**

II. **CRESSMAN DID NOT STATE A VALID FIRST AMENDMENT CLAIM.**

III. **CRESSMAN WAS NOT ENTITLED TO A PRELIMINARY INJUNCTION.**

IV. **ALLEN WAS ENTITLED TO QUALIFIED IMMUNITY.**

STATEMENT OF THE CASE

Plaintiff/Appellant, Keith Cressman filed his Complaint in this case on November 2, 2011, naming the Oklahoma Department of Public Safety (DPS) Defendants Michael Thompson 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 had been violated. [Aplt. App. at 010]. In conjunction with that Complaint he filed a Motion for Preliminary Injunction [Aplt. App. at 030] and Memorandum in Support. [Aplt. App. at 059]. In response, the DPS Defendants

filed a Motion to Dismiss his Complaint on February 1, 2012, [Aplt. App. at 089] pursuant to a District Court Order, and an Objection to Plaintiff's Motion for Preliminary Injunction, attaching evidentiary materials. [Aplt. App. at 122]. Before the Court could rule on Defendants' Motion to Dismiss, Cressman filed an Amended Complaint [Aplt. App. at 184] adding several new Defendants, including another DPS official (Kerry Pettingfill, Chief of the Highway Patrol sued in his official capacity) and the Tax Commissioners, Thomas Kemp, Jr., Jerry Johnson, and Dawn Cash, all sued in their official capacities. The DPS Defendants filed a Motion to Dismiss the Amended Complaint on March 8, 2012, claiming failure to properly serve them, failure to state a claim, lack of Article III standing, and Allen claiming *qualified immunity.* [Aplt. App. at 208]. The Oklahoma Tax Commission Defendants filed their Motion to Dismiss the Amended Complaint on March 15, 2012, [Aplt. App. at 246] on similar grounds. On June 16, 2012, the District Court issued an Order denying Cressman's Motion for a preliminary injunction and granting the DPS Defendants' Motion to Dismiss, and considering the Tax Commission's Motion to be moot. [Aplt. App. at 339].

STATEMENT OF FACTS

The First Amended Complaint alleged that Oklahoma's vehicle license plates depicting a modified picture of a Native-American sculpture called the "Sacred Rain

Arrow", is a Native American religious symbol that interferes with Cressman's "sincerely-held religious beliefs" protected by the First Amendment. [Aplt. App. at 184, para. 1 and 22]. Cressman claimed that he "does not want his car to serve as a billboard for ideas, messages, and images that he finds objectionable on religious grounds." [Aplt. App. at 184, para. 27]. He claimed that at first 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 or official state license plate and now wants to cover up the image of the "Sacred Rain Arrow" sculpture. [Aplt. App. at 184, para. 28]. He further claimed 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 depiction and was allegedly told that he would likely get a ticket if he covered it up, but the Tax Commission Clerk suggested to him that he could check with the "enforcing officer" at the Department of Public Safety. [Aplt. App. at 192, para. 30]. He claimed 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." [Aplt. App. at 192, para. 31]. He alleged 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 [Native-American] 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." [Aplt. App. at 193, para. 32]. In his Amended Complaint, he claimed that Allen told him that he could not cover up any portion of the license plate because doing that would violate OKLA. STAT. ANN. tit. 47, § 4-107, and that if he did do it, he could be prosecuted. [Aplt. App. at 193, para. 33 and 34]. He claimed 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 claimed, 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. [Aplt. App. at 195, para. 42]. As a result of Oklahoma's state law prohibiting him from covering up any portion of the official State license plate, he claimed 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. [Aplt. App.

at 196, para. 47]. The First Amended Complaint alleged Four Cause of Actions [Doc. 198]:

> FIRST CAUSE OF ACTION - Violation of Freedom of Speech Clause
>
> 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 the Oklahoma Religious Freedom Act [OKLA. STAT. tit. 51, § 251 *et seq*.]

Cressman sued the Defendants pursuant to 42 U.S.C. § 1983 requesting the District Court enter judgment declaring that the application of OKLA. STAT. tit. 47, § 4-107 and OKLA. STAT. tit. 47, § 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 rights to engage in free exercise of his religion, as guaranteed under the First and Fourteenth Amendments to the United States Constitution and under the Oklahoma Religious Freedom Act. [Aplt. App. at 202, PRAYER FOR RELIEF, para. B]. He asked the District 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 OKLA. STAT. tit. 47, § 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. [Aplt. App. at 202, PRAYER FOR RELIEF, para. C]. Finally, he asked the Court to award him nominal damages arising from the acts of the Defendants as an important vindication of his constitutional rights, as well as, attorney fees, costs, and expenses.[Aplt. App. at 202, PRAYER FOR RELIEF, para. E and F].

In response to Plaintiff's Motion for a Preliminary Injunction, the District Court was presented with evidence that Oklahoma's current official license plate design was the culmination of a Legislative Task Force created for the purpose of re-designing those license plates which (many) were beginning to show signs of fading; many having been in continuous use since 1993. [Aplt. App. at 154-173]. Over approximately a two year period the Task Force met to discuss how best to meet the needs of the state in the areas of public safety, tax revenue, and the promotion of the State's tourism business. [Aplt. App. at 154-173]. With help from members of the Tax Commission, the Department of Public Safety, and the Department of Tourism, the Task Force narrowed several submissions by various artists down to five designs. [Aplt. App. at 154-173]. The design chosen was a modified drawing of a sculpture depicting a Native American that sits in front of the Gilcrease Museum in Tulsa, Oklahoma. [Aplt. App. at 154-173]. The original sculpture outside the Museum depicts a Native American shooting an arrow straight up into the sky. *See*

http://gilcrease.utulsa.edu/Learn/Speaking-of-Gilcrease/The-Gardens-at-Gilcrease. The modified picture chosen for the license plates shows a similar Native American shooting an arrow at an angle into the sky. [Aplt. App. at 051]. The State acknowledges that the design is a modified version of the sculpture that sits outside the Gilcrease Museum in Tulsa, Oklahoma, a popular tourist attraction for the State [Aplt. App. at 154-173], but denies it was chosen for any religious reasons. It was chosen to meet the State's desire to market itself with its successful tourism slogan "OKLAHOMA Native-America". [Aplt. App. at 051].

SUMMARY OF ARGUMENT

The District Court properly dismissed Plaintiff's Amended Complaint for failure to state a valid claim upon which it could grant him any relief.

ARGUMENT AND AUTHORITIES

CRESSMAN LACKED ARTICLE III STANDING TO SUE ALL THE DEFENDANTS

Cressman sued the DPS Defendants Thompson, Pettingill, and Allen, in their *official capacities*. He also sued the Tax Commissioners, Thomas Kemp, Jr., Jerry Johnson, and Dawn Cash, in their *official capacities*. The District Court did not have the authority to award Cressman money damages against those state officials sued in their *official capacities,* because neither the State nor a public official sued officially

is a "person" under § 1983. *Lapides v. Board of Regents*, 535 U.S. 613, 122 S.Ct. 1640 (2002)(States and their agencies are not "persons" for purposes of 42 U.S.C. § 1983 claims). However, under the ***Ex parte Young*** doctrine, [209 U.S. 123, 28 S.Ct. 441 (1909)], the District Court could have issued prospective injunctive relief against a state official sued in their *official capacity* for violations of federal law, if there was 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, 106 S.Ct. 2932 (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"). When a violation of federal law is alleged against a state official in his *official capacity*, only the particular state official whose conduct is alleged to have violated that federal right is the rightful party to the suit, and prospective injunctive relief can only be ordered against him or her under *Ex parte Young,* if a Plaintiff can meet his Article III **standing** requirements. *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, 535 U.S. 635, 122 S.Ct. 1753 (2002).

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, 28 S.Ct. 441 (1908)(requiring ***nexus*** between the injury and the alleged violator's conduct). Article III 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.' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S.Ct. 1854 (2006) (*quoting Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301 (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, 112 S.Ct. 2130 (1992)(omissions in original) (internal quotation marks and citations omitted)[emphasis added]. *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 127 S.Ct. 2553 (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***.")

1. DPS Defendants Thompson, Allen and Pettingill in their official capacities.

None of the named Defendants' alleged conduct had a ***sufficient nexus*** (*Ex parte Young*) with, or was ***fairly traceable*** to (Article III), Cressman's alleged constitutional claims, because he did not alleged Allen had any enforcement power to either arrest or prosecute him, and Thompson (as the Commissioner of DPS) and Pettingill (as the Chief of the OHP Patrol) had only a ***general obligation*** to instruct OHP troopers in how to enforce the traffic laws of the State; the ultimate decision of issuing a ticket or arresting someone for violation of OKLA. STAT. tit. 47, § 4-107 was within the sound discretion of the officer in the field. Cressman's requested remedy was to have the District Court order the DPS Defendants to provide him a specialty car tag at the cost of the official license plate. [Aplt. App. 192, para. 29]. He did not alleged that either Thompson or Pettingill had threatened to ticket, arrest, or prosecute him, or that they would in fact instruct those OHP troopers under their command to ticket Cressman for his hypothetical actions. Cressman did not alleged that Commissioner Thompson or Chief Pettingill had any control or authority over those other law enforcement entities in the State. Commissioner Thompson and Chief

Pettingill only had a ***general obligation*** to enforce those statutes. They had absolutely no authority to **prosecute** violators of that law, because they are not prosecutors. Even if the District Court had held that Cressman's federal constitutional rights could have been violated if he had been ticketed, arrested, or prosecuted for covering up the Native American on his license plate, an Order by the District Court to Thompson or Pettingill commanding them to make sure no one under their control or authority issued a ticket or arrested Cressman, would not necessarily keep him from getting a ticket or from being prosecuted by some other law enforcement entity in the State. Cressman had 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, because his allegations were not concrete, he only had a fear of being ticketed and prosecuted. No DPS Defendant had actually threatened to issue him a ticket. Therefore, the District Court could have dismissed Cressman's Amended Complaint against the DPS Defendants sued in their ***official capacities***, for lack of Article III standing. *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 127 S.Ct. 2553 (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, Cressman's claims were "speculative, conjectural, and hypothetical" in that he only ***wanted*** to cover up the Native American on his license plate because he did not want to pay for a specialty license plate anymore. He did not alleged that he already done so, or that he had been ***threatened*** with a ticket, arrest, or prosecution **by these Defendants**. Furthermore, how could an Order by the District Court to these Defendants resolve Cressman's *hypothetical* problem? Any Order by that Court to these Defendants would not likely have fully redressed Cressman's fear of being ticketed, arrested, or prosecuted, and the DPS Defendants had absolutely no authority to provide Cressman with his desired remedy of a specialty license plate at the cost of the official license plate. Therefore, Cressman had no "***standing***" to bring this lawsuit **against the DPS Defendants** because: (1) he had not suffered an "injury in fact" (he had only threatened to cover up the Native American and none of these Defendants had threatened to ticket, arrest or prosecute him); (2) he had no injury in fact that was "causally connected" and "fairly traceable to" these Defendants' **alleged conduct**; and (3) any favorable decision the District Court could award, would not have likely redress Plaintiff's alleged "fear" injury, or granted him the relief he wanted, *i.e*., a specialty tag at the cost of the official license plate. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992)(requiring injury ***in fact***); *Ex parte Young*, 209 U.S. 123, 149-156, 28 S.Ct. 441

(1908)(requiring ***nexus*** between the injury and the alleged violator's actions); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598, 127 S.Ct. 2553 (2007)(Standing***: likely*** to be ***redressed*** by the requested relief).

2. Tax Commission Defendants Kemp, Johnson and Cash in their official capacities.

The same could be argued for the Tax Commission Defendants; Cressman lacked Article III standing to sue them for violation of his First Amendment rights pursuant to 42 U.S.C. § 1983. The addition of the Tax Commissioners in their official capacities almost seemed to be an afterthought. Once the DPS Defendants filed their first Motion to Dismiss, arguing that even if the District Court had found the Statutes violated Cressman's First Amendment rights, Cressman lack standing because any order to the DPS Defendants would not have remedied Cressman's problem, because neither Thompson, Allen, or Pettingill had any official authority to provide Cressman with a specialty tag at the cost of an official license plate. Only the Tax Commission had that authority. While the Tax Commission Defendants sued in their official capacities could have been ordered to provide Cressman with a specialty tag at the cost of the official license plate, the Tax Commission Defendants had absolutely no power or authority to enforce the challenged statutes in this case. They could not issue Cressman a ticket for covering up the Native American on the

license plate, and they had absolutely no prosecutorial authority to prosecute him if he were ticketed. They did not have a ***sufficient nexus*** (*Ex parte Young*) with, and/or their actions were not ***fairly traceable*** to (Article III), Cressman's alleged constitutional claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992)(requiring injury ***in fact***); *Ex parte Young*, 209 U.S. 123, 149-156, 28 S.Ct. 441 (1908)(requiring ***nexus*** between the injury and the alleged violator's actions); *Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 598, 127 S.Ct. 2553 (2007)(Standing***: likely*** to be ***redressed*** by the requested relief). "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 § 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). Therefore, even if the District Court had found that the challenged statutes did infringe on Cressman's First Amendment rights, he lack standing to sue the Tax Commission Defendants in their *official capacities* because they had absolutely no

enforcement power under the challenged statutes, and they lacked the required *personal participation* necessary to hold them accountable.

CRESSMAN DID NOT STATE A VALID FIRST AMENDMENT CLAIM

Plaintiff argues he ***has*** alleged a "Valid First Amendment Claim" in his First Amended Complaint against the named Defendants. [Appellant Brief ("Aplt. Brf."), at 13]. He alleges on appeal that the State of Oklahoma is "compelling [him] to speak" by forcing him to make the choice of either displaying the State's official license plate with what ***he*** ***considers*** the objectionable image of the Native American, or else he must pay an extra $37 (and then $35 yearly) for a specialty license plate. The District Court found that the Native American depiction on the State's official license plates was not speech, and so – Cressman is in the unusual position of having to convince this Court that the Native American depiction is "symbolic speech" before he can even get to his argument that the State is compelling him to speak.

In support of that claim, he makes five arguments: (A) that the "Scared Rain Arrow" image constitutes protected speech [Aplt. Brf., at 14]; (B) that the image conveys a message on Oklahoma's license plates [Aplt. Brf., at 15]; (C) that the image is private – not government – speech [Aplt. Brf., at 23]; (D) that Oklahoma's statutes compel him to convey a message he would rather not convey [Aplt. Brf., at

25]; and (E) that Oklahoma's statutes (that he claims are compelling him to speak) are not narrowly tailored to serve any compelling state interest. [Aplt. Brf., at 32].

Cressman correctly cites *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1283 (10th Cir. 2004) for the elements of his "compelled speech" claim, but then attempts to recast those elements in the light of an additional consideration. [Aplt. Brf., at 14]. He claims that "[i]n addition to these considerations, there is another relevant inquiry applicable to all speech claims: whether the activity at stake involves 'speech' protected under the First Amendment" [Aplt. Brf., at 14]. He must recast his appeal argument in those terms in order to draw this Court's attention away from the "compelled speech" claim he argued in the District Court where he relied on *Axson-Flynn's* three elements, and also to diminish the short comings of that original claim, *i.e.*, that the depiction of the Native American is not "speech" at all, within the meaning of *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977)(where the Court found the State motto "Live Free or Die" was compelled speech on New Hampshire's license plates). *See* Aplt. App. at 348, fn. 14 ("Regardless of the test applied, plaintiff cannot demonstrate that driving a vehicle with a standard Oklahoma license tag is 'sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendment.'" *citing Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2nd Cir. 2003)).

In order to overcome that hurdle on appeal, Cressman first argues that the Native American depicted on Oklahoma's official license plates is "speech" within the meaning of the First Amendment, because it is an "***image***" as opposed to a mere depiction of a Native American shooting an arrow in the sky based upon one of the State's tourist attractions, *i.e.*, Allan Houser's sculpture that sits in front of the Gilcrease Museum in Tulsa, Oklahoma. He argues that "[i]mages and symbols are not the same. While an image is a visual representation of something, a symbol stands for – or suggests – something else by reason of relationship." (*citing* the Merriam-Webster dictionary. [Aplt. Brf., at 15, fn. 7]). Cressman claims that the District Court "tripped" over its characterization of the Native American on the license plate as not being "speech", because (according to Cressman) the District Court "believed" that it was bound by *Wooley v. Maynard*, irrespective of the State's contention that the Native American depiction was probably "government speech" under current Supreme Court authority. [Aplt. Brf., at 16, citing fn. 12 of that Court's Opinion found on appeal at Aplt. App. at 345-346].

Continuing with his (unusual) argument that the Native American depiction is "symbolic speech" within the meaning of the First Amendment for "free speech" purposes, Cressman then contends that an "image" (here the Native American on the license plate) "need not be particularized" [Aplt. Brf., at 17], and "need not be

ideological for protection." [Aplt. Brf., at 20]. He must make these arguments on appeal in order to avoid his real objection to the Native American depiction, which is that "***he***" believes the depiction violates the "establishment clause." He must make this unusual argument on appeal because he did not plead an Establishment Clause violation in the District Court — and for good reason.

Under Establishment Clause challenges, the Court will apply a three part test to determine whether the challenged statute or activity was motivated wholly by religious considerations. *See Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2125 (1971). In applying the secular purpose test, it is appropriate to ask whether the government's actual purpose is to endorse or disapprove of religion. *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479 (1985). For instance this Circuit applies a hybrid *Lemon/O'Conner* test for establishment clause claims as was discussed in *Weinbaum v. City of Las Cruses, N.M.*, 541 F.3d 1017 (10th Cir. 2008). In *Weinbaum* this Circuit was asked whether the City of Las Cruses, N.M., had violated the Establishment Clause, by displaying three crosses on the City's official seal which appears on various public property such as the City's vehicles, a local sports complex sculpture, and on a mural at an elementary school. The Court held that "where that challenged conduct is the selection or display of artwork, the artist's inspiration or intent is irrelevant." *Id*. (*Citing O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005)).

The Court applying the *Lemon/O'Conner* test found that the City's use of the "crosses" on various public property did not offend the Establishment Clause because the very name of that City means "crosses." (*i.e.*, a derivative of *El Pueblo del Jardin de Las Cruses* translated as "the City of the Garden of the Crosses"). The same logic can be used in this case.

For First Amendment "free speech" and "free exercise" analysis, an artist's inspiration does not automatically transform that artwork into "symbolic speech." Irrespective of the fact that the Native American depicted on Oklahoma's License plates is not an exact *replica* of Allan Houser's sculpture, and even ignoring the fact that the Legislative Task Force did not intend to adopt the modified *replica* of his sculpture for religious reasons (but instead to promote the State's tourism business), Cressman wants this Court to transmogrify an innocuous depiction into something it is not – namely "symbolic religious speech" that ***he believes*** (whether he will expressly state so or not) violates the establishment clause. Since the use of the sculpture chosen by the Legislative Task Force as its inspiration for the Native American it chose to depict on the State's official license plates in this case was to promote the State's tourism business, and not to promote any religious beliefs, and since this Court should not take into its consideration an artist's inspiration and intent in his creation of his art work [*O'Connor*], but instead (perhaps) the government's

intent[1] in choosing the depiction, this Court should uphold the District Court's decision.

Under Establishment Clause analysis, a Court will look at the government's intent in speaking; under Free Exercise and Free Speech analysis, a Court will look at the individual's intent in wanting to speak or exercise their religion. Cressman knew he could not win an Establishment Clause case because he knew that the Legislative Task Force that chose the Native American depiction based loosely on Allan Houser's sculpture was not chosen for religious purposes, but instead was chosen for tourism reasons, *i.e.*, to promote the State as "Native-America." Therefore, he would have this Court adopt ***his subjective belief*** about the Native-American depiction as the Government's intent, and then ask this Court to apply the Compelled Speech doctrine, arguing that the State is forcing him to speak (based upon his own subjective beliefs), even though he does not wish to speak (about his subjective beliefs). Clever — but a *dangerous* interpretation of an important right. If such were the test, then anyone could sue the government for violation of their Free Speech rights or Free Exercise rights based simply upon their own subjective belief

[1] *See Johanns v. Livestock, Mktg. Ass'n*., 544 U.S. 550, 553, 125 S.Ct. 2055 (2005)(finding that "the Government's own speech ... is exempt from First Amendment scrutiny," even when it has the effect of limiting private speech); *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854 (2005)(finding that historically significant displays and monuments do not offend the First Amendment).

system, no matter how irrational those beliefs may be. Under such a compelled speech standard, the government could literally be forced to not speak or act in any manner that would offend any individual based upon that individual's own subjective beliefs. ("The government can not write me any traffic tickets because, based upon my religion, I believe traffic laws do not apply to me"; "I can not be arrested for robbing a bank, because it says on all currency "In God we Trust" and I trust in God – that the State's laws against robbery do not apply to me – therefore, its not illegal according to my beliefs"). Even if the District Court's rationale for its determination that the Native American depiction on the State's official license plates was not "symbolic speech" within the meaning of the "Compelled Speech" doctrine is wrong, its conclusion was correct. Plaintiff failed to allege a valid First Amendment Free Speech and/or Free Exercise claim, because when the government speaks, it is exempt from traditional First Amendment scrutiny [*Johanns v. Livestock Mktg. Ass'n*., 544 U.S. 550, 553, 125 S.Ct. 2055 (2005)], as long as the government is not attempting to establish a religion. *See Green v. Haskell County Board of Com'rs.*, 568 F.3d 784 (10th Cir. 2009).

CRESSMAN WAS NOT ENTITLED TO A PRELIMINARY INJUNCTION

Cressman contends that his right "not to speak" on his license plate is "private speech" protected under the First Amendment. But recent Supreme Court and Tenth Circuit precedent probably disagrees with that conclusion, as far as "official" state license plates are concerned. More likely than not, the placement of the Native-American depiction on Oklahoma's license plates would be considered "government speech" rather than "private speech" as Cressman contends.

Cressman relies heavily on the 1977 case of *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428 (1977). However, since the Court announced that decision, it has greatly expanded what it has termed "government speech." While it is a bedrock principle of First Amendment "free speech" analysis that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content" [*Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S.Ct. 2286 (1972)], "the Government's own speech ... is exempt from First Amendment scrutiny," even when it has the effect of limiting private speech. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 125 S.Ct. 2055 (2005). In the Supreme Court's most recent decision concerning "government speech" the Court was asked whether a City could be forced to allow a religious organization to erect a monument containing the

Seven Aphorisms of Summun. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125 (2009). The Court in ***Pleasant Grove*** held "that although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." *Id*. (Emphasis added).

Obviously, the government cannot use the "government speech" defense to "establish a religion" because such would violate the "establishment clause" of the First Amendment. *See Green v. Haskell County Board of Com'rs.*, 568 F.3d 784 (10th Cir. 2009). However, when that government speech is based on historical or artistic reasons, rather then religious beliefs, such government speech does not offend the First Amendment. *See Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854 (2005)(finding that historically significant displays and monuments do not offend the First Amendment). In this case, the Native-American depiction chosen for Oklahoma's official state license plate was not selected for religious reasons, but

instead was selected to promote the State's Native-American heritage. [Ex. 4, 5, 6]. Indeed, as every Oklahoma grade school student can attest, the very name of the State "Oklahoma" means "Land of the Red Man" or "red people." http://en.wikipedia.org/wiki/Oklahoma.

Cressman also alleged that since he has a right to drive his vehicle, and since he is being prevented from driving that vehicle based upon his own subjective belief that the government is compelling him to speak contrary to Free Speech and Free Exercise rights under the First Amendment, then the State is compelling him to speak about something he does not wish to speak about. However, in Oklahoma the operation of a motor vehicle on the the State's highways is not a "right", but instead a "privilege." *State v. Ceasar*, 237 P.3d 792, 794 (Okla.Crim.App.,2010) ("Driving is privilege, not a right"). "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." X Amend, U.S. Constitution. The State of Oklahoma has the authority under its reserved police powers to regulate motor vehicles that drive on its highways. *Tapp v. Perciful*, 2005 OK 49, 120 P.3d 480 (Okla. 2005); *See also*, *State v. Stevens*, 718 P.2d 398 (1986)(the operation of a motor vehicle upon the public highways is not a fundamental right, but only a privilege); *People v. Peterson*, 734 P.2d 118 (Colo. 1987). Cressman does not have a right to drive his vehicle on the

state's highways, but rather a mere privilege. If he chooses to exercise his privilege and drive his vehicle, he has the option of purchasing other tags, at a minuscule cost that would not offend his subjective beliefs to "not speak." The mere fact that he may have to pay a little exact for a specialty car tag, does not interfere with his right to not speak. So the State is not compelling Plaintiff to "not speak" by its enforcement of OKLA. STAT. tit. 47, § 4-107 or § 1113. Cressman can chose to not exercise his "privilege" by not driving with the State's official license plate, or else he can purchase a specialty tag that does not offend his subjective beliefs.

Finally, what Plaintiff is actually arguing under the "compelled speech" doctrine is for this Court to analyze the challenged statutes under "strict scrutiny." However, in order to do that Plaintiff must convince this Court that those statutes are "facially invalid" because they are "content-based." *Golan v. Gonzales*, 501 F.3d 1179, 1196 (10th Cir. 2007) ("Content-based restrictions on speech are those which 'suppress, disadvantage, or impose differential burdens upon speech because of its content.'"); *See also*, *Golan v. Holder*, 609 F.3d 1076, 1094 (10th Cir. 2010)("facial challenges to statutes are generally disfavored as facial invalidation is, manifestly, strong medicine that has been employed by the Supreme Court sparingly and only as a last resort.")(*citing Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580, 118

S.Ct. 2168 (1998)(quotations and citations omitted). As such, Cressman has a heavy burden in raising a facial constitutional challenge. *Id*.

The State Defendants asserted that OKLA. STAT. tit. 47, § 4-107 and § 1113 are "content-neutral" not "content-based." *See Golan v. Holder*, 609 F.3d at 1083. "In determining whether [those statutes are] content-neutral or content-based, the government's purpose in enacting [them] is the controlling consideration." *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 686 (10th Cir. 1998). If those statutes serve purposes unrelated to the content of expression it is considered neutral, even if it has an incidental effect on some speakers or messages but not others. *Z.J. Gifts*, 136 F.3d at 686. On their face, OKLA. STAT. tit. 47, § 4-107 and § 1113 are content-neutral, and there is no indication that the State adopted those statutes for a purpose unrelated to their content. *See The Tool Box v. Ogden City Corp*., 355 F.3d 1236 (10th Cir. 2004).

In order to determine if a statute violates "free speech" under the First Amendment when the statute is "content-neutral", the Courts use the four part test announced in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968). Courts use this test when someone claims that application of a law has infringed on the person's freedom of speech, but "the governmental purpose in enacting the [law] is unrelated to the suppression of expression." *City of Erie v. Pap's A.M.*, 529 U.S. 277,

120 S.Ct. 1382 (2000). A law passes muster under ***O'Brien*** if: (1) the law "is within the constitutional power of the government to enact," *id.* at 296, 120 S.Ct. 1382; (2) the law "furthers an important or substantial government interest," *id.*; (3) "the government interest is unrelated to the suppression of free expression," *id.* at 301, 120 S.Ct. 1382; and (4) "the restriction is no greater than is essential to the furtherance of the government interest," *id*. For example, the Supreme Court has employed the ***O'Brien*** test to reject a Vietnam War protester's challenge to the law prohibiting the burning of draft cards, *O'Brien*, 391 U.S. at 382, 88 S.Ct. 1673, and to reject a nude-dancing establishment's challenge to a law banning all public nudity, *Pap's A.M.*, 529 U.S. at 296-302, 120 S.Ct. 1382.

The District Court properly denied Cressman a preliminary injunction because the challenged state statutes in this case (*i.e.*, OKLA. STAT. tit. 47, § 4-107 & § 1113) pass Constitutional muster under ***O'Brien*** analysis. The challenged statutes (1) are within the constitutional power of the State to enact pursuant to the state's police and revenue taxing powers (including the taxes raised through its tourism business); (2) those statutes further important and substantial governmental interests in the name of public safety; (3) the State's interest is unrelated to the suppression of free expression, because those statutes serve a public safety and taxing interest; and (4) those statutes restrictions are no greater than necessary in order to further the State's

stated purposes of public safety, and to generate tax revenue; both valid and important governmental interests. Therefore, the District Court was correct to deny Cressman's request for a preliminary injunction.

ALLEN WAS ENTITLED TO 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, 112 S.Ct. 358 (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, 107

S.Ct. 3034 (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, 129 S.Ct. 808, 823 (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, 127 S.Ct. 1769 (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, 118 S.Ct. 1584 (1998) (*quoting Mitchell v. Forsyth*, 472 U.S. 511, 526–29, 105 S.Ct. 2806 (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, 119 S.Ct. 1692 (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, 106 S.Ct. 1092 (1986)).

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). Cressman's Amended Complaint [Doc. 20] did not plead ***sufficient facts*** against Allen in her ***individual capacity*** in this case that **affirmatively links** her individual conduct to each of Cressman'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, 127 S.Ct. 1955 (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*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009)(requiring ***personal participation***).

Allen did not violated any of Cressman's First Amendment "free speech" rights. [Doc. 20, para. 57-60]. Allen merely informed him that if he did covered up the Native-American on his license plate, he could be in violation of Oklahoma law; specifically, OKLA. STAT. tit. 47, § 4-107. Cressman did not plead that Allen told him that she would write him a ticket, arrest him, or prosecute him for violation of OKLA. STAT. tit. 47, § 4-107 or § 1113. Cressman did 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, 127 S.Ct. 1955 (2007)(requiring ***sufficient factual allegations*** for a ***plausible claim***); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (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, as far as Allen is concerned, the District Court

could have dismiss Cressman's First Amendment Complaint granting her ***qualified immunity*** in her *individual capacity*.

CONCLUSION

This Court should uphold the District Court's decision to dismiss Cressman's Amended Complaint.

NECESSITY OF ORAL ARGUMENT

Pursuant to Fed.R.App.P. 34(a) and 10th Cir. R. 34.1, Defendants/Appellees requests that this case be submitted with oral argument to assist the Court in its determination.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 7,699 words.

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Pursuant to the Tenth Circuit Court of Appeals' General Order on Electronic Submission of Documents (March 18, 2009), I hereby certify that:

1. There are no required privacy redactions (Fed. R. App. P. 25(a)(5)) to be made to the attached ECF pleading; and

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CERTIFICATE OF SERVICE

I certify that on this 4th day of October 2012, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and transmitted the original and seven copies of the foregoing to the Clerk of the Court via U.S. Mail, postage prepaid and a copy to be served by U.S. Mail, postage prepaid on:

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