No. 12-6151

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEITH CRESSMAN,

Plaintiff-Appellant,

v.

MICHAEL C. THOMPSON, et. al.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Oklahoma
The Honorable Judge Joe Heaton
No. CIV–11–1290–HE

APPELLANT'S REPLY BRIEF

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Oral Argument is Requested

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On this appeal, Appellant Keith Cressman (Cressman) asks this Court to reverse the district court's ruling on the motion to dismiss and reinstate his claims against state officials from the Oklahoma Department of Safety, Oklahoma Tax Commission, and Oklahoma Highway Patrol (referred to collectively as "Oklahoma officials"). Cressman also asks this Court to reverse the district court's ruling on his motion for preliminary injunction and direct the lower court to grant his sought-after injunction. Both requests are merited.

I. RELIEF CAN – AND OUGHT TO – BE GRANTED ON CRESSMAN'S CLAIMS

Cressman is entitled to nominal damages for being compelled to display an expressive, objectionable image on his car's license plate – and a preliminary injunction enjoining the continuation of this compulsion – against Oklahoma officials.

A. Cressman's Claims are Valid

Cressman brings four claims in this cause, relating to compelled speech, free exercise of religion, due process, and the Oklahoma Religious Freedom Act. (Aptl. Appx. at 198-201). The compelled speech claim subsumes the others and was the focal point of the district court's ruling below. (Aplt. Appx. at 339-355). But all four of Cressman's claims state valid causes of action and should be reinstated.

In their Response, Oklahoma officials do not directly take issue with any of stated claims asserted by Cressman.[1] Rather, they accuse Cressman of believing – without pleading – the existence of an Establishment Clause violation and endeavor to repudiate that imaginary claim. (Appellees' Brief at 18-21). Oklahoma officials do not reveal the source for attributing this supposed belief to Cressman, nor do they elaborate on the import of it. In assessing the propriety of the district court's dismissal, this Court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the *legal theory proposed*." *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1160 (10th Cir. 2007) (emphasis added). Because Cressman does not propose an Establishment Clause theory, Oklahoma's entire argument on the merits is an exercise in futility. This Court is to evaluate claims that Cressman has actually pled.[2]

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[1] This was likewise true in the court below. Oklahoma officials did not challenge the sufficiency of Cressman's stated claims in their respective motions to dismiss, which focused instead on standing and immunity issues. (Aplt. Appx. at 204-37, 240-64). They asserted that the claims fell short only to the extent that they did not differentiate which defendants were responsible for the constitutional violations. (Aplt. Appx. at 227-29, 255-58). To grant the motion to dismiss, the lower court was pressed to mine other pleadings to find even a passing critique of these claims. (Aplt. Appx. at 354 n. 22).

[2] In pushing for an Establishment Clause analysis in the absence of an Establishment Clause claim, Oklahoma forewarns of governmental paralysis, predicting a gloomy world where drivers avoid traffic fines due to subjective views

To prevail on his primary claim - the compelled speech claim - Cressman is obliged to show that the "Sacred Rain Arrow" image on the license plate is speech, that the speech is private, that this private speech is compelled, and that his interest in avoiding the compelled speech outweighs Oklahoma officials' interest in compelling it. *See Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1230-32 (10th Cir. 2009) (setting out elements of compelled speech claim). Jettisoning the district court's premise for ruling against Cressman, Oklahoma officials do not dispute that the image constitutes speech on a license plate. (Appellees' Brief at 15-21).[3] Oklahoma disputes that the "Sacred Rain Arrow" image is private – instead of government - speech, that Cressman is truly compelled to express this image, and that the appropriate scrutiny weighs in

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of traffic laws and robbers circumvent justice because of personal opinions about "In God We Trust" being on currency. Yet, it is Oklahoma officials' forced Establishment Clause analysis that lies behind this prospect of anarchy. Under the compelled speech doctrine, mere offense to a government action is not enough; an individual must show that private expression is compelled to establish a valid claim. *Phelan v. Laramie County Community College Bd. Of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000). *See Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977) (rebutted suggestion that use of currency implicates compelled speech concerns because it "differs in significant respects from an automobile, which is readily associated with its operator.")

[3] Oklahoma officials repeatedly refer to Cressman's argument as "unusual" but do not deny that the image is speech. (Appellees' Brief at 15, 17). In fact, Oklahoma officials indicate that the "Sacred Rain Arrow" image conveys a message by promoting the State as "Native-America" for tourism reasons. (Appellees' Brief at 19-20).

Cressman's favor. (*Id*.). Oklahoma is mistaken on all counts.

1. The "Sacred Rain Arrow" image is private speech

A critical question for this appeal is whether the "Sacred Rain Arrow" image found on the Oklahoma car license plate is private or government speech. *See Phelan*, 235 F.3d at 1247 ("Although the government may not restrict, or infringe, an individual's free speech rights, it may interject its own voice into public discourse"). And this question was definitively answered by the Supreme Court in *Wooley v Maynard*. There, the High Court held that expression placed on vehicle license plate is the private speech of the operator. 430 U.S. at 715. Appellate court decisions, following *Wooley*, have consistently acknowledged this truism. *E.g. Byrne v. Rutledge*, 623 F.3d 46, 57-58 (2d Cir. 2010); *Az. Life Coaltion, Inc. v. Stanton*, 515 F.3d 956, 967 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm'r of Dep't of Motor Vehichles*, 288 F.3d 610, 621 (4th Cir. 2002).

In the face of this authority, Oklahoma officials declare that the image on the Oklahoma license plate is "[m]ore likely than not" government speech. (Appellees' Brief at 22). They offer little in support of this startling notion that contradicts Supreme Court precedent. Citing *Pleasant Grove v. Summum*, 555 U.S. 460 (2009), Oklahoma officials do propose a new-found expansion of the term "government speech" that would create a divergence with *Wooley* and its progeny. The *Summum* Court, though, makes no reference to any expansion of

government speech; nor does it mention – much less limit – the *Wooley* holding. The *Summum* decision has no bearing on license plates or any other context where private individuals utilize governmental emblems. *See Rothamel v. Fluvanna Cty, Va*., 810 F.Supp. 2d 771, 786 (W.D. Va. 2011) (distinguishing *Summum*, court held private use of county seal is private and not government expression).

Absent *Wooley* being overruled, vehicle license plates consist of private expression meriting First Amendment protection.

2. Oklahoma officials compel Cressman to communicate "Sacred Rain Arrow" image on license plate

Oklahoma officials also quarrel with the idea that Cressman is compelled to speak because he has options, namely, he can forego the "privilege" of driving or "pay a little exact for a specialty car tag." (Appellees' Brief at 24-25). These supposed options are inadequate. While Oklahoma depicts driving an automobile as a privilege, that function has long been considered "a virtual necessity for most Americans." *Wooley*, 430 U.S. at 715. For Cressman to maintain this necessity, he is compelled to speak when he would prefer to be silent. And what Oklahoma considers a "little exact" is repugnant and cost-prohibitive for Cressman. (Aplt. Appx. 197-98 ¶¶ 48-52).

Focusing entirely on their own perspective, Oklahoma officials gloss over how their actions amount to a real compulsion for Cressman. "Compulsion need not take the form of a direct threat or a gun to the head." *Axson-Flynn v. Johnson*,

356 F.3d 1277, 1290 (10th Cir. 2004). In *Axson-Flynn*, this Court observed that speech was sufficiently compelled when a student (Axson-Flynn) could not continue with an acting class without communicating objectionable messages. *Id.* Just like Axson-Flynn could not be forced to give up her acting class, Cressman cannot be forced to give up driving a car. Nor is it appropriate to require Cressman to pay a financial penalty to safeguard his conscience. Governmental discouragement via fine or tax is ample compulsion.

3. Compulsion is not justified

Oklahoma officials further challenge the scrutiny applied to the compelled speech claim, concentrating on the text of the statutes and pursuing a scrutiny used for content-neutral infractions (instead of content-based ones). (Appellees' Brief at 25-26). Oklahoma officials then compound this error by calling for a standard set aside for expressive conduct - not speech – as articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). (Appellees' Brief at 26-27).

The Supreme Court has held that a compelled speech claim triggers strict scrutiny because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C. Inc.*, 487 U.S. 781, 795 (1988). The scrutiny level is not derived from a statute's text, but "the nature of the speech taken as a whole and the effect of the compelled statement." Id. *See Wooley*, 430 U.S. at 716-17 (applying strict

scrutiny when statute was facially content-neutral).

Applying the correct level of scrutiny – that being, strict scrutiny - the compulsion to make Cressman speak cannot survive

B. Cressman can Enjoin State Officials in their Official Capacities

The named state officials challenge Cressman's standing to bring suit against them (Appellees' Brief at 7-15), but as found by the lower court, this challenge is misplaced. (Aplt. Appx. at 343-45).

As a prerequisite for any claim, a plaintiff is to show 1) an injury in fact 2) that is fairly traceable to the named defendant(s), and that it is 3) likely to be redressed by a favorable decision. *Awad v. Ziriax*, 670 F.3d 1111, 1120 (10th Cir. 2012). Having established these elements in the record, Cressman has Article III standing to obtain injunctive relief against all named defendants.

1. Cressman suffered and continues to suffer injury in fact

To avoid display of an objectionable image on his vehicle, Cressman faces criminal sanction or an additional expense for a specialty license plate. Either possibility violates Cressman's First Amendment right not to speak.

Cressman is precluded from partially covering the standard Oklahoma license plate for fear of violating Oklahoma statutes, which chills his desired First Amendment activity. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (noting that "a chilling effect on the exercise of a plaintiff's

First Amendment rights may amount to a judicially cognizable injury in fact…"). Contrary to Oklahoma's assumption, speakers can suffer injury "even if they have never been prosecuted or actively threatened with prosecution." *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003). The statutes effectively harm Cressman by compelling him to speak. *See also Sherman v. Community Consol. Dist. 21*, 980 F.2d 437, 441 (7th Cir. 1992) (student had standing to challenge statute compelling him to recite pledge of allegiance, even though school was not directly forcing student to recite pledge).[4]

It is therefore irrelevant whether Cressman has covered up the objectionable image on his license plate in the past or has "been **threatened** with a ticket, arrest, or prosecution **by <u>these</u> Defendants**." (Appellees' Brief at 12, emphasis in brief). Cressman need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974).

The pertinent issue is whether there is "a credible threat of prosecution or other consequences flowing from the statute's enforcement." *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004). Of course, "the existence of a statute implies the

[4] Because Oklahoma officials have in fact threatened Cressman with application of the statutes, this case is not a pre-enforcement challenge. Still, the test for determining injury for injunctive relief is whether there is a credible threat of prosecution/enforcement in the future.

threat of enforcement…." *Consumer Data Industry, Ass'n v. King*, 678 F.3d 898, 902 (10th Cir. 2012). And 47 Okl. St. § 1113 textually precludes Cressman from covering the objectionable image on his license plate under the threat of sanction. *See Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) (finding standing even though defendants disavowed statute's application to plaintiffs because plaintiffs "are clearly covered by the plain language of the statute"); *New Hampshire Right To Life Political Action Committee v. Gardner*, 99 F.3d 8, 15 (1st Cir. 1996) (in challenge to policies "that facially restrict expressive activity by the class to which the plaintiff belongs, courts will assume a credible threat of prosecution in the absence of compelling contrary evidence."). Likewise, the looming threat of prosecution for Cressman violating 47 Okl. St. § 4-107 is real since officials explicitly prohibit him from covering the objectionable image on his license plate in light of that particular statute. *See American Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County*, 221 F.3d 1211, 1214-15 (11th Cir. 2000) (plaintiff had standing to challenge county law because he asked county official in Department of Consumer Protection if plaintiff's actions would violate the law and official responded that the actions would violate the law); *Citizen Action Fund v. City of Morgan City*, 154 F.3d 211, 215-17 (5th Cir. 1998) *withdrawn on other grounds by* 172 F.3d 923 (5th Cir. 1999) (explaining that speaker suffered injury-in-fact when told by officials

that statute barred speaker's expression even though statute did not textually bar the speaker's expression).

Oklahoma officials have declined to disavow application of these statutes to Cressman, substantiating his standing for challenging the application of them. *See Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988) (concluding that plaintiffs have standing where the "State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise."); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (finding threat of prosecution because "the State has not disavowed any intention of invoking the criminal penalty provision" against plaintiff). *See also King*, 678 F.3d at 904 n.1 ("The threat of injury may be negated by the government defendant's renouncing any intention to enforce the challenged law"). Indeed, Oklahoma officials have consistently defended the need to apply these statutes against Cressman throughout the course of litigation, including this appeal. Prosecution is not speculation, but a certainty. *See Hawaii Newspaper Agency v. Bronster*, 103 F.3d 742, 746–747 (9th Cir. 1996) (finding live controversy because "Attorney General Bronster's argument in this matter clearly indicates her intention to enforce Act 243 against the newspapers."); *Let's Help Florida v. McCrary*, 621 F.2d 195, 198–199 (5th Cir. 1980) (finding controversy because state officials "have not disavowed any intention to enforce the statute" and even indicated

intention to enforce statutes against plaintiff in future).

At bottom, the only way Cressman can avoid involuntary display of the objectionable image is to pay for a specialty license plate. This option also harms Cressman because it requires him to incur a financial cost to exercise his freedom not to speak. *See Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the federal constitution."); *Follett v. McCormick*, 321 U.S. 573, 577 (1944) ("The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious as the imposition of a censorship or a previous restraint.").

2. Oklahoma officials cause injury by interpreting and enforcing statutes against Cressman

All of the named defendants try to deflect their respective roles in causing Cressman harm, but as agents of the State, in construing and enforcing the statutes that compel Cressman's speech, they are properly held responsible.

Defendants Thompson, Allen, and Pettingill protest that they have not created any injury because none of them have personally threatened to arrest Cressman or retain any power to enforce the statutes. (Appellees' Brief at 10-13). Similarly, Defendants Kemp, Johnson, and Cash complain of having no power or authority to enforce the challenged statutes. (Appellees' Brief at 13-15). These contentions are inaccurate as they are irrelevant.

For Article III purposes, a party effectively sues the state by naming state officials in their official capacities. *Callahan v. Poppell*, 471 F.3d 1155, 1159 (10th Cir. 2006); *Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir. 1987). In *Wilson*, a speaker sued the Oklahoma Attorney General in his official capacity and sought to enjoin a state statute criminalizing his literature distribution. 819 F.2d at 945-46. Like the argument here, the attorney general in *Wilson* postulated that "this suit does not create a case or controversy as to him because his office played no part in Wilson's arrest, did not threaten Wilson with enforcement of the statute, and allegedly did not intend to enforce the statute against him." *Id*. at 946. This Court was not persuaded by the suggestion, concluding that "the official represents the state whose statute is being challenged as the source of injury." *Id*. at 947. By suing the state official in his official capacity, this Court found the plaintiff was effectively suing the state, which was responsible for promulgating and enforcing the challenged statute. *Id*. at 947. This Court held: "In sum, we conclude that a plaintiff challenging the constitutionality of a state statute has a sufficiently adverse legal interest to a state enforcement officer sued in his representative capacity to create a substantial controversy when, as here, the plaintiff shows an appreciable threat of injury flowing directly from the statute." *Id*.

Cressman overcomes Eleventh Amendment immunity through the *Ex Parte Young* doctrine that permits the pursuit of prospective relief against state officials

in their official capacities. *Prairie Band Potawatomi Nation v. Wagnon*, 476 F.3d 818, 827-28 (10th Cir. 2007). To fall within the *Ex Parte Young* exception, Cressman need only show that the named officials have "some connection" to the alleged unconstitutional act. *Id*. at 828. It is sufficient if the officials "currently assist in giving effect to the law." *Id*.

Cressman satisfies this requirement because he identifies Thompson, Allen, and Pettingill as state officials responsible for interpreting and enforcing the relevant statutes. Cressman alleges that Thompson and Pettingill are officials with the power to enforce and administer the statutes. (Aptl. Appx. 186 ¶¶ 9, 9d). And Cressman alleges that Allen is a state official with the power to interpret and administer these same statutes. (Aplt. Appx. at 187 ¶ 10). Other allegations confirm Allen as the official responsible for interpreting 47 Okl. St. § 4-107. (Aplt. Appx. at 192 ¶ 31). Accepting these allegations as true, Defendants Thompson, Allen, and Pettingill all have the power to specifically enforce and interpret these statutes.

Cressman further satisfies the requisite showing with Defendants Kemp, Johnson, and Cash, alleging that they are responsible for interpreting, administrating, and enforcing the statutes that force Cressman to display an objectionable image on his vehicle. (Aplt. Appx. at 186-87 ¶¶ 9a-c). Cressman alleges that Kemp, Johnson, and Cash are each "responsible for supervising the

interpretation, administration, and enforcement that pertain to the license plates, including 47 Okl. St. § 4-107 and 47 Okl. St. § 1113 and for issuing license plates and for collecting and apportioning fees." (*Id.*).

Aside from the allegations (that must be accepted as true), Oklahoma law explicitly empowers the named defendants to injure Cressman. As members of the Tax Commission, Oklahoma law bestows Defendants Kemp, Johnson, and Cash with the power to determine how drivers may display the license plates on their cars. Cressman challenges 47 Okl. St. § 1113, which says in A.2 that the "Tax Commission may, with the concurrence of the Department of Public Safety, by Joint Rule, change and direct the manner, place and location of display of any vehicle license plate when such action is deemed in the public interest." Tax Commission defendants have the ability to control how 47 Okl. St. § 1113 is applied to Cressman and whether Cressman must cover up the objectionable image under 47 Okl. St. § 1113.

Also, 47 Okl. St. § 2-108 identifies the Commissioner of Public Safety (Thompson) as the official with the power to administer and enforce Title 47. And 47 Okl. St. § 1113 A.2 allows the Tax Commission "with the concurrence of the Department of Public Safety" to change the manner of display for any license plate. Thus, as the head of Public Safety, Thompson also has the power to change the manner for displaying any license plate. Oklahoma law further specifies that

Thompson as Commissioner and Pettingill and Allen as officers in the Department of Public Safety are "peace officers of the State of Oklahoma" who have the authority to "enforce the provisions of this title and any other law regulating the operation of vehicles or the use of the highways" and to "arrest without writ, rule, order or process any person detected by them in the act of violating any law of the state." 47 Okl. St. § 2-117.

This explicit identification of these state officials is significant because it highlights that they do not merely have a "general obligation" to enforce the challenged statutes; the obligation is specific. They are the state officials legally charged with enforcing these statutes, connecting them to these challenged statues, and satisfying the *Ex Parte Young* doctrine. *See Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1203 n.4 (10th Cir. 2009) (noting that Governor and Attorney General were correct parties because Oklahoma law granted them authority to enforce challenged statutes).

This strong connection is analogous to that found in the *Prairie Band* decision. In that case, an Indian tribe sued various Kansas state officials, including the Superintendent of the Kansas Highway Patrol, to force the state to recognize motor vehicle registrations and titles issued by the tribe. 476 F.3d at 820. Like Oklahoma officials do here, the Kansas officials denied a sufficient connection between themselves and the challenged law, claiming that they were "not

specifically empowered to enforce the state statute in question." *Id*. at 828. This Court disagreed with that assessment, explaining that state officials need not be "specifically empowered" to enforce the law as long as they were responsible for "giving effect" to the law. *Id*. The Superintendent of the Kansas Highway Patrol was deemed to give effect to the law because he "enforces traffic and other laws of the State related to highways, vehicles, and drivers of vehicles." *Id*.

Just like *Prairie Band*, the duty and responsibility granted the named Oklahoma officials is sufficient to demonstrate the requisite connection for standing, the *Ex Parte Young* exception, and give reason for enjoining these officials.

3. The requested injunction against Oklahoma officials will redress Cressman's injury

Since Oklahoma officials cause Cressman to be injured through the interpretation and enforcement of Oklahoma statutes, the enjoining of these officials will surely redress his injury.[5] "[F]ederal courts have consistently found a case or controversy in suits between state officials charged with enforcing a law and private parties potentially subject to enforcement." *King*, 678 F.3d at 905.

To satisfy the redressability component for standing, Cressman need only show "that a favorable decision relieves an injury, not *every* injury." *Id.* (emphasis

[5] The burden of showing redressibility is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997).

added). *See Massachusetts v. EPA*, 549 U.S. 497, 536 (2007) (redressability satisfied if harm "would be reduced to some extent if petitioners received the relief they seek."). It is not necessary, then, for Cressman to enjoin every Oklahoma trooper enforcing the challenged statutes as long as the injunction attaches to state officials who oversee interpretation and enforcement. *See Chamber of Commerce of U.S v. Edmondson*, 594 F.3d 742, 757, 757 n.15 (10th Cir. 2010) (noting that injunction would still redress injury, even if some public officials outside the scope of injunction could still injure plaintiff, because injunction would at least enjoin one state official with power to enforce challenged statute). *See also Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864 (8th Cir. 2006) ("Although one may question whether enjoining these two state officers would fully redress Appellees' alleged injuries, we agree with the concession implicit in the State's decision not to press this issue-the Governor and the Attorney General have 'some connection with the enforcement' of § 29 and therefore this suit for equitable relief falls within the exception to the State's Eleventh Amendment immunity established in *Ex parte Young*. This satisfies the case or controversy requirement of Article III.") (citation omitted).

There is no reason to think that other state officials will disregard a court order declaring the statutes invalid. *See Edmondson*, 594 F.3d at 757 n.15 (noting that it will "assume it is substantially likely that [other] officials would abide by an

authoritative interpretation of the…provision…even though they would not be directly bound by such a determination.") (citation and quotations omitted). An injunction against some state officials redresses a plaintiff's injury even if the injunction does not cover all officials responsible for enforcing the statute. *Id*. *See USA Foundation v. United States*, 242 F.3d 1300, 1306–11 (11th Cir. 2001) (finding redressability in suit challenging constitutionality of the North American Free Trade Agreement even though President could not be ordered to terminate participation in NAFTA because judicial order would be followed by subordinates); *Los Angeles County Bar Ass'n v. Eu,* 979 F.2d 697, 701 (9th Cir. 1992) (redressability requirement was satisfied in suit against Governor and Secretary of State claiming injury due to lack of judges in Los Angeles County because it was substantially likely that the California legislature, although its members were not parties to the action, would abide by the court's declaration).

Cressman's injury can be redressed by enjoining the named state officials.

C. Cressman can Obtain Nominal Damages against Allen in her Individual Capacity

Oklahoma officials also seek to dismiss claims against Allen in her individual capacity on the ground of qualified immunity. (Appellees' Brief at 28-33). But because she interpreted and applied a statute causing Cressman to display an unwanted message on his car, Allen does not deserve qualified immunity on Cressman's claim for nominal damages.

Qualified immunity protects government officials sued in their individual capacity from damages liability. *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011). "In resolving a motion to dismiss based on qualified immunity, a court must consider whether the facts that a plaintiff has alleged make out a violation of a constitutional right, and whether the right at issue was clearly established at the time of defendant's alleged misconduct." *Id*.

Wooley clearly establishes Cressman's right to avoid an objectionable message on his vehicle. 430 U.S. at 714.[6] Oklahoma officials question Allen's involvement in violating this clearly established right, denying that Allen personally participated in forcing Cressman to display the objectionable message. Specifically, they deny Allen's participation on the basis that she never told Cressman "that she would write him a ticket, arrest him, or prosecute him for" violating any statute. (Appellees' Brief at 32).

This contention reflects a basic misapprehension of the personal participation requirement. Oklahoma officials cite no authority that limits § 1983 liability to only those officials who threaten arrest or citation. To be sure, "[t]he exercise of control which may create the 'affirmative link' [for liability] does not need to be the sort of on-the-ground, moment-to-moment control that defendants

[6] A Supreme Court decision on point makes a right clearly established for qualified immunity purposes. *Zia Trust Co. ex rel. Causey v. Montoya*, 597 F.3d 1150, 1155 (10th Cir. 2010).

appear to suggest. Rather, the establishment or utilization of an unconstitutional policy or custom can serve as the supervisor's 'affirmative link' to the constitutional violation." *Davis v. City of Aurora*, 705 F.Supp.2d 1243, 1263–64 (D.Colo. 2010). Section 1983 imposes liability on any official "who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor or her subordinates) of which 'subjects, or causes to be subjected' that plaintiff 'to the deprivation of any rights ... secured by the Constitution ....'" *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010).

Allen is thus liable under §1983 because she implemented and retained responsibility for applying 47 Okl. St. § 4-107 against Cressman. She was the enforcing officer and "the official in charge of interpreting policies for the Department of Public Safety." (Aplt. Appx. 192 ¶31). She was the official responsible for interpreting 47 Okl. St. § 4-107 for the Department of Public Safety and for determining whether Department of Public Safety officials would apply 47 Okl. St. § 4-107 against Cressman. And, in exercising her responsibility, Allen interpreted 47 Okl. St. § 4-107 to apply to Cressman.

Allen was uniquely responsible for placing Cressman within the scope of 47 Okl. St. § 4-107, obliging other Department of Public Safety officials to enforce 47 Okl. St. § 4-107 against Cressman. Her interpretation serves as the "affirmative

link" that prevented Cressman from covering up a portion of his license plate. And since Allen's actions had "a deterrent, or 'chilling' effect on the [Cressman's] speech," this affirmative link contributed to a First Amendment violation. *Eaton v. Meneley*, 379 F.3d 949, 954 (10th Cir. 2004).

Rattner v. Netburn, 930 F.2d 204 (2d. Cir. 1991) is apposite. In *Rattner*, a businessperson (Rattner) placed a controversial advertisement in a newspaper owned by the local chamber of commerce. *Id*. at 205-06. A city official (Netburn) then wrote a letter to the chamber of commerce criticizing the advertisement, implicitly threatening the chamber. *Id*. As a result, the chamber stopped the advertisement. *Id*. When Rattner sued Netburn for violating his First Amendment freedoms, the district court adopted the argument Oklahoma proposes here --- that Netburn did not violate the First Amendment because he had no power to threaten the chamber. *Id*. at 209. On appeal, the Second Circuit repudiated this logic, viewing the evidence in a light favorable to Rattner. *Id*. at 209-10. The record established a First Amendment violation since it indicated "a threat was perceived and its impact was demonstrable." *Id*. at 210.

Viewing the evidence favorably to Cressman, Allen's statements threatened and deterred Cressman's expression. As found in *Rattner*, it does not matter if Allen personally had the power to arrest or cite or prosecute. She had the power to interpret and cause other officials to arrest Cressman, she pronounced her

interpretation to Cressman, and deterred Cressman's speech in the process. There exists an affirmative link between her actions and the violation of Cressman's constitutional rights. *See Hammerhead Enterprises, Inc. v. Brezenoff*, 707 F.2d 33, 39 (2d Cir. 1983) ("Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated.").

Allen cannot invoke qualified immunity as way to avoid Cressman's constitutional claims.

II. PRELIMINARY INJUNCTION IS PROPER

Cressman is entitled to injunctive relief as long as he can show a likelihood of success on the merits, irreparable injury to him, the absence of substantial harm to others, and a positive impact of a preliminary injunction on the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). By demonstrating the validity of his stated claims - in the absence of any disputed facts in the record - Cressman has shown that he is likely to succeed on the merits in this case. With Oklahoma failing to refute the other requisite factors, Cressman has further demonstrated the balance of the preliminary injunction standard. He has shown that he is entitled to a preliminary injunction granting him immediate

relief from the Oklahoma statutes that force him to convey an objectionable message.

CONCLUSION

In their quest to promote tourism, Oklahoma officials enforce statutes against Cressman that require him to be a mobile billboard and display a "Sacred Rain Arrow" image from his car's license plate, despite his strong objection to that image. Being affixed to Cressman's car, the "Sacred Rain Arrow" image constitutes his speech. And by forcing Cressman to convey this objectionable message against his will, Oklahoma officials are improperly compelling speech from Cressman, violating his First Amendment right. Thus, Cressman - so as to obtain relief from this on-going infringement - respectfully requests this Court reverse the decision of the district court, reinstate his claims, and grant his motion to preliminarily enjoin Oklahoma officials from applying these statutes to him.

Respectfully submitted this 18th day of October, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Plaintiff-Appellant has been produced using proportionately spaced 14-point Times New Roman typeface. According to the "word count" feature in the Microsoft Word 2010 software, this brief contains 5,401 words.

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I certify that on October 18, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users, and by delivering a true and correct copy to a third-party commercial carrier for delivery within two (2) business days to their address of record.

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