

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

KEITH CRESSMAN,

Plaintiff,

vs.

MICHAEL C. THOMPSON, et. al.,

Defendants.

NO. 5:11-cv-01290-HE

**PLAINTIFF KEITH
CRESSMAN'S MEMORANDUM
IN SUPPORT OF HIS MOTION
FOR SUMMARY JUDGMENT**

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INTRODUCTION

Plaintiff Keith Cressman (Cressman) moves this Court for summary judgment in his favor. Defendants (officials from Department of Public Safety [DPS] and officials from Oklahoma Tax Commission [OTC], and collectively referred to as “Oklahoma officials”) compel Cressman to display an objectionable image on his personal vehicle, violating his constitutional rights in the process. Because there are no genuine issues of material fact in this case, Cressman is entitled to judgment as a matter of law.

STATEMENT OF MATERIAL FACTS

License Plates in the State of Oklahoma

1. Oklahoma requires all non-commercial vehicles owned by residents of Oklahoma to display a standard license plate unless resident chooses to pay extra for specialty or personalized license plate. (First Amended Complaint, ¶ 17; DPS Answer, ¶ 9; OTC Answer ¶ 13).

2. With the advent of specialty license plates in Oklahoma, license plates are no longer just numbers and letters, but a reflection of people’s personal lives and hobbies. (Excerpts of Paul Ross (Ross) deposition [depo.], p. 18, attached to Motion for Summary Judgment [MSJ] as Exhibit [Ex.] “K”; Article from MuskogeePhoenix.com, dated January 4, 2008, entitled “License Plates show Personality, Interest”, attached as Ex. “M” to Plaintiff’s MSJ).

3. Currently, OTC offers over 200 different types of specialty plates. (Ross depo., p.11).

4. Oklahoma citizens have a large spectrum of specialty license plates to choose from the OTC for extra cost, featuring a variety of causes and special interests, including plates representing Purple Heart, Square Dancing, Choose Life, Adopt a Child, Ducks Unlimited, NASCAR, University of Oklahoma, Animal Friendly, Don't Tread on Me, Indian Tribal, Patriot, Oklahoma City Thunder, and "In God We Trust." (Ross depo., pp. 15-24; various specialty license plates as depicted on OTC website, attached as Exs. "W", "X", "Y", "Z", "AA", "BB", "CC" & "DD").

Placement of *Sacred Rain Arrow* Image on Oklahoma Standard License Plate

5. Effective June 4, 2007, Oklahoma enacted a law, section 1113.3, creating the "Oklahoma License Plate Design Task Force" (Task Force) to develop a new design for Oklahoma standard license plate. (Section 1113.3, attached as Exhibit "4" to Defendants' Response to Initial Motion for Preliminary Injunction [MPI]).

6. The Task Force was charged with studying and choosing a new official Oklahoma license plate in consultation with OTC and DPS. (Section 1113.3).

7. The first meeting of the Task Force was on November 6, 2007, and they met with representatives OTC, DPS, and the Department of Tourism and Recreation (DTR), directing these three agencies to jointly develop a series of license plate designs for presentation to the Task Force at the next meeting on November 27, 2007. (Progress Report from Oklahoma License Plate Design Task Force, dated December 31, 2007, attached as Exhibit "6" to Defendants' Response to Initial MPI).

8. Hardy Watkins (Watkins) was Executive Director of DTR in 2007 and participated in the Task Force meetings as the representative from his department. (Excerpts of Watkins depo., pp. 6, 28-29, attached to Plaintiff's MSJ as Exhibit "L").

9. Oklahoma's DTR is responsible for branding and messaging for the state. (Watkins depo., pp. 18-19).

10. Oklahoma's DTR participated in the Task Force for the purpose of branding and messaging of the state, offering designs to be chosen for the license plate. (Watkins depo., pp. 24, 29).

11. Oklahoma's DTR worked on the creation of the license plate design and oversaw it. (Ross depo., p. 38).

12. The Task Force, along with DTR, viewed the Oklahoma license plate as a mobile "billboard" and the new design of the license plate as an opportunity to rebrand the state. (Task Force press release, attached as Exhibit "5" to Defendants' Response to Initial MPI; Watkins depo., p. 25).

13. The Task Force met on November 27, 2007. During this meeting, Watkins presented about 26 different designs, with task force paring it down to five choices, including two designs of the "Sacred Rain Arrow" sculpture that stands in front of the Gilcrease Museum in Tulsa. (Task Force press release).

14. The only Native American themed option for the license plate involved various angles of the "Sacred Rain Arrow" sculpture. (Watkins depo, pp. 36, 52-53).

15. The design chosen by the Task Force placed an image of the “Sacred Rain Arrow” sculpture on the left side of the Oklahoma standard license plate. (Watkins depo., pp. 52-53; Ross depo, p. 26; photograph of standard license plate with “Sacred Rain Arrow” image, attached as Exhibit “D” to Initial MPI).

16. This new design on the Oklahoma standard license plate replaced the Osage shield that was previously on the Oklahoma standard license plate. (Doc. 92, Stipulations [Stip.], ¶ 1).

17. This new design of the Oklahoma license plate, featuring the “Sacred Rain Arrow” sculpture, was adopted to communicate a message that would help brand the state and market the state as a tourist destination. (Task Force press release; Watkins depo., pp. 24-25).

Sacred Rain Arrow , its Meaning and Notoriety

18. The ‘Sacred Rain Arrow’ is a sculpture made by Allan Houser (Houser) that depicts a Native American shooting an arrow into the clouds to draw rain. (Stip., ¶¶ 2, 12).

19. The Fine Arts Center, in Colorado Springs, Colorado, describes the Sacred Rain Arrow as depicting a young Apache warrior shooting his arrow towards heaven with the hope of carrying a prayer for rain to the Spirit World, representing the strength, dignity, beauty, and spirituality of Houser’s people. (Stip., ¶ 2).

20. Houser was born and raised in the state of Oklahoma. (Stip., ¶ 7).

21. Houser is considered one of the foremost painters and sculptors of the 20th century. (Stip., ¶ 9).

22. Houser's works can be found at Smithsonian Museum of American Art, National Portrait Gallery in Washington, D.C., and in numerous major art collections throughout the world. (Stip., ¶ 10).

23. In 1985, Houser was inducted in the Oklahoma Hall of Fame. (Stip., ¶ 13).

24. In 1992, Houser became the first Native American to receive the National Medal of Arts. (Stip., ¶ 16).

25. In 2014, in celebration of the 100th anniversary of Houser's birth (1914), a first-ever statewide collaboration of Oklahoma museums and cultural institutions, in conjunction with the Oklahoma Museums Association, will honor his memory, works, and legacy with special exhibitions, events and educational opportunities throughout the state in various venues. (Announcement of "Celebrating Allan Houser: An Oklahoma Perspective", attached as Ex. "N" to Plaintiff's MSJ).

26. The "Sacred Rain Arrow" sculpture was the centerpiece of the Olympic Village at the 2002 Winter Olympic Games. (Stip., ¶ 3).

27. The "Sacred Rain Arrow" sculpture is located in the Smithsonian National Museum of the American Indian on the 3rd Level, near *Our Lives*, with an accompanying plaque stating: "*Sacred Rain Arrow* is a gift to Indian Country, and is held in trust by the Smithsonian's National Museum of the American Indian. The sculptor and artist Allan Houser invited Senator Daniel K. Inouye (Hawai'i), chairman of the U.S. Senate

Committee on Indian Affairs (1987-1994, 2001-2003), to select a piece from Houser's collection of works. Senator Inouye chose this bronze sculpture, which was formerly displayed in the committee's meeting room on Capitol Hill. *Sacred Rain Arrow*, on temporary display in the museum, was inspired by the story of a young Apache warrior who was chosen to shoot a sacred arrow carrying his people's prayer for rain to the Spirit World." (Stip., ¶¶ 11, 12; photographs of "Sacred Rain Arrow" sculpture and plaque in Smithsonian, attached as Exs. "O", "P" "Q" and "R" to Plaintiff's MSJ).

28. In 1991, a special dedication copy of the "Sacred Rain Arrow" sculpture was chosen to be put on permanent display in the meeting room of the U.S. Senate Select Committee on Indian Affairs in the Russell Senate Office Building in Washington, D.C. (Stip., ¶ 15).

29. The "Sacred Rain Arrow" sculpture has been on at display at the Gilcrease Museum in Tulsa, Oklahoma, at the entrance of the museum since 1989, representing one of the eight sculptures created from the original casting. (Stip. ¶¶ 4, 5).

30. The Gilcrease Museum is the largest, most comprehensive collection of art and artifacts of the American West, offering an unparalleled collection of Native American art and artifacts and historical documents. (Stip., ¶ 6).

31. Gilcrease Museum is a major tourist destination. (Watkins depo., pp. 34, 54).

Cressman, His Beliefs, and Use of Oklahoma License Plate

32. Cressman is a citizen of Oklahoma, a professing Christian, and a minister for the Christian faith. (Verified Complaint, ¶ 11; 2nd Affidavit of Cressman, ¶ 11).

33. Cressman adheres to historic Christian beliefs, including monotheism, the Trinity, and the notion that we can only approach God the Father through the Son Jesus Christ. (Affidavit [Aff.] of Cressman, ¶ 2; 2nd Aff. of Cressman, ¶ 11).

34. As a minister of the Christian faith, Cressman preaches these orthodox Christian beliefs to his congregation. (2nd Aff. of Cressman, ¶ 11).

35. Cressman cannot endorse or acknowledge the existence of multiple gods or multiple divinities or any god besides the one true God without violating his conscience. (Aff. of Cressman, ¶ 5).

36. Cressman wants to remain silent with respect to images, messages, and practices that he cannot accept or endorse. (Verified Complaint, ¶ 16).

37. Cressman recognizes license plate on his vehicle as moving billboard that communicates messages from him as the owner of the vehicle. (2nd Aff. of Cressman, ¶ 9).

38. Cressman understands that all non-commercial vehicles must display a standard license plate unless he chooses to pay extra for a specialty license plate. (Aff. of Cressman, ¶ 7).

Cressman's Objection to "Sacred Rain Arrow" Image on License Plate

39. In August of 2008, Cressman learned about the State of Oklahoma adopting a new standard license plate containing an image of the “Sacred Rain Arrow” image. (2nd Aff. of Cressman, ¶ 3).

40. Cressman first learned this news from an online article in the *Tulsa World*, dated August 2, 2008, entitled ‘Sacred Rain Arrow’ image picked for new plates. (2nd Aff. of Cressman, ¶ 4; *Tulsa World* article, attached as Ex. “H” to 2nd MPI).

41. This article from the *Tulsa World* relayed an announcement from the Oklahoma Tax Commission about the new plates. (2nd Aff. of Cressman, ¶ 5; *Tulsa World* 8/2/08 article).

42. The Oklahoma Tax Commission announced the selection of the new plate as one that “features the Sacred Rain Arrow sculpture by Oklahoma artist Allan Houser (1914-1994)” and would replace all Oklahoma regulation license plates beginning on January 2, 2009. (*Tulsa World* 8/2/08 article; Notice from Oklahoma Tax Commission website, attached as Ex. “S” to Plaintiff’s MSJ; Ross depo., p. 40).

43. Cressman read in the article that the “Sacred Rain Arrow” sculpture is found at the Gilcrease Museum in Tulsa and that it depicts “a young Apache warrior who was selected in a time of drought into the sky, into the heavens, to bring people’s prayers to their gods so that they would get rain.” (*Tulsa World* 8/2/08 article; 2nd Aff. of Cressman, ¶ 6).

44. Reading this article to the conclusion, Cressman also saw a copy of the new plate featuring the “Sacred Rain Arrow” image, showing a Native American kneeling

down on one knee in a praying position, shooting the arrow about his head and toward the sky with no object in sight other than clouds, revealing to him the intention to draw rain. (*Tulsa World* 8/2/08 article; 2nd Aff. of Cressman, ¶¶ 7, 17).

45. Cressman was immediately offended by the prospect of having the “Sacred Rain Arrow” image on his vehicle, thinking that he did not want to be an agent for the State and promote tourism through a message he does not want to communicate. (2nd Aff. of Cressman, ¶ 8).

46. Cressman stridently objects to having the “Sacred Rain Arrow” image on his license plate because he does not want to express the message imparted by that image. (2nd Aff. of Cressman, ¶ 10).

47. Cressman is aware of many other news articles that came out in 2008 and 2009 about the selection of the “Sacred Rain Arrow” image on the Oklahoma standard license plate, describing the sculpture and its meaning. (2nd Aff. of Cressman, ¶¶ 14, 16; article from theadanews.com, dated August 4, 2008, entitled “Image of sculpture selected for state license plates” attached as Ex. “T” to Plaintiff’s MSJ; article from *Tulsa World* dated September 16, 2008, entitled “New license tag deadline looms”, attached as Ex. “U” to Plaintiff’s MSJ; article from gtrnews.com updated August 20, 2009, entitled “Sacred Rain Arrow Statue Marks History”, attached as Exhibit “V” to Plaintiff’s MSJ).

48. Because of the publicity surrounding the selection of “Sacred Rain Arrow” image for the license plate, along with the portrayal of the sculpture on the license plate,

Cressman realizes other Oklahoma residents would likewise be aware of the sculpture and its meaning. (2nd Aff. of Cressman, ¶ 15).

49. Cressman knows others have publically voiced concerns about the placement of the “Sacred Rain Arrow” image on the Oklahoma standard license plate. (2nd Aff. of Cressman, ¶¶ 18-19; letter to the editor in the *Tulsa World*, dated September 3, 2009, attached as Ex. “I” to 2nd MPI; op-ed piece in *The Oklahoman*, dated January 28, 2012, attached as Ex. “J” to 2nd MPI).

Cressman’s Efforts to Avoid Display of “Sacred Rain Arrow” Image

50. Cressman cannot in good conscience display the “Sacred Rain Arrow” image on his vehicle because it is so divergent to his deeply-held beliefs, implying some other god or another way to God besides Jesus. (2nd Aff. of Cressman, ¶ 12).

51. Aside from having a standard license plate with the “Sacred Rain Arrow” image, Cressman’s only option is to obtain a specialty license plate. (Aff. of Cressman, ¶¶ 7, 17).

52. Initially, Cressman did display a specialty license plate at an extra cost of \$37.00 to him up front, and \$35.00 for annual renewal. (Aff. of Cressman, ¶ 17).

53. Cressman later chose a cheaper specialty plate, \$18.00 initially and \$16.50 for renewal. (Aff. of Cressman, ¶ 17).

54. Wanting to avoid to extra expense Cressman considered covering up the “Sacred Rain Arrow” image on the standard license plate without covering up anything else on the license plate. (Aff. of Cressman, ¶ 18).

55. To determine whether he would be allowed to cover up the image on the license plate, on December 7, 2009, Cressman went to the Oklahoma Tax Commission's Motor Vehicle Division in Oklahoma City, and advised a clerk of his objections to the image on the license plate. (Aff. of Cressman, ¶ 19).

56. Cressman advised he wanted to cover up the image of the sculpture without covering up anything else on the license plate and was told this action would subject him to criminal penalty. (Aff. of Cressman, ¶ 19).

57. The clerk then directed Cressman to go see an "enforcing officer" at the DPS for further elaboration of the ramifications for covering up the image on the license plate. (Aff. of Cressman, ¶ 19).

58. Following this directive, Cressman went directly to the DPS and spoke with an "enforcing officer," Paula Allen. (Aff. of Cressman, ¶ 20).

59. Cressman explained his objections to Allen, and asked whether he could cover up the image of the sculpture on the standard license plate without covering up anything else, inquiring about any legal basis that would preclude him from covering up the image in this way. (Aff. of Cressman, ¶ 21).

60. Allen advised Cressman that he could not cover up the objectionable image without violating Oklahoma law. (Aff. of Cressman, ¶ 22).

61. To confirm this conclusion, Allen called an official with the Oklahoma Highway Patrol, who verified that Cressman would be prosecuted under Oklahoma law for covering up the image on the license plate. (Aff. of Cressman, ¶ 23).

62. After this conversation with Allen, Cressman reviewed 47 Okl. St. Ann § 4-107 and 47 Okl. St. Ann. § 1113, and confirmed that Allen and the Highway Patrol were correct in concluding that covering up the image on the standard license plate would be violative of the law and subject him to criminal penalties. (Aff. of Cressman, ¶¶ 26-27; copies of statutes attached as Exs. “B” & “C” to Initial MPI).

63. The only way Cressman can comply with state law and avoid conveying an objectionable message is to pay extra money for specialty license plate, which is intolerable for Cressman because he does not want incur a fee just to avoid saying something he does not want to say. (Aff. of Cressman, ¶¶ 27-28).

Confirmation and Continuation of Enforcement of Oklahoma Statutes

64. Hoping to avoid unnecessary litigation, Cressman sent a letter, through counsel, to the Oklahoma Attorney General and various state officials on March 10, 2010, asking that he be allowed to cover up the objectionable image and to stop violating his constitutional rights. (Aff. of Cressman, ¶ 29; letter dated March 10, 2010, attached as Ex. “F” to Initial MPI).

65. Along with this letter, Cressman sent a photographic sample of what he wanted to do, showing the covering of the image alone on the license plate. (Letter dated March 10, 2010, attached as Ex. “F” to Initial MPI; license plate with image covered, attached as Ex. “E” to Initial MPI).

66. The letter sought relief within three weeks, but no one from the State of Oklahoma has ever responded to this plea. (Aff. of Cressman, ¶ 31).

67. Due to the stance of Oklahoma officials, Cressman must pay extra money for specialty license plate, subject himself to criminal penalties, or violate his conscience. (Aff. of Cressman, ¶¶ 32-35).

68. Cressman does not want to face criminal sanction or pay extra money for license plate to avoid expressing a message he does not want to say. (2nd Aff. of Cressman, ¶ 20).

ARGUMENT

A court is to “grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P 56(a). The moving party has the initial burden of establishing no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to rebut that showing by producing affidavits or some other relevant and admissible evidence beyond the pleadings. *Id.* at 324.

Only a genuine dispute as to a material fact can preclude summary judgment. *Daniels v. United Parcel Service, Inc.*, 701 F.3d 620, 627 (10th Cir. 2012) . A fact is material if it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists when “a reasonable jury could return a verdict for the non-moving party.” *Id.* Therefore, mere denial of liability is an inadequate basis for defeating a motion for summary judgment. Fed. R. Civ. P. 56(e).

There are no genuine disputes regarding any of the material facts – as they relate to Cressman’s compelled speech claim – concerning violations of free speech, due process, free exercise of religion, and the Oklahoma Religious Freedom Act. The “Sacred Rain Arrow” image constitutes speech protected by the First Amendment, the “Sacred Rain Arrow” image conveys a message on the Oklahoma standard license plate, this speech on the license plate is private – not government – expression, Oklahoma officials are compelling Cressman to speak an objectionable message through the compulsion of the standard license plate, and this compulsion is not narrowly tailored to any compelling state interest.

In the absence of any genuine disputes of material fact on these matters, the precedent of *Wooley v. Maynard*, 430 U.S. 705 (1977) is binding, and Cressman is entitled to judgment as a matter of law.

I. THE “SACRED RAIN ARROW” IMAGE IS SPEECH

When this Court first entertained Cressman’s motion for preliminary injunction, Oklahoma officials did not address the question of whether the “Sacred Rain Arrow” image is speech, focusing on standing issues instead. (Order, at p.16 n. 22). We now know Oklahoma officials do not dispute the expressive character of the “Sacred Rain Arrow” image on the Oklahoma standard license plate; their position is that the image is government - and not private - speech. (Doc. 62, Joint Status and Discovery Plan, p. 2; Doc. 69, Defendants’ Response to Second Motion for Preliminary Injunction, pp. 5-14). *See Cressman v. Thompson*, 719 F.3d 1139, 1148 n. 11 (10th Cir. 2013) (appellate court

noting Oklahoma officials’ concession that the license plate image constitutes speech). This concession is dispositive of the point, eliminating any possible factual dispute over the existence of speech and any need for this Court to delve into question of speech. *See N. Ins. Co. of N.Y. v. Chatham County, Ga.*, 547 U.S. 189, 194-95 (2006) (County concession that it was not entitled to Eleventh Amendment immunity was accepted).¹ Nevertheless, the record conclusively shows the “Sacred Rain Arrow” image is speech.

A. Images – like the “Sacred Rain Arrow” Image – constitute Pure Speech

The “Sacred Rain Arrow” image is an image of representational art, namely, that of the “Sacred Rain Arrow” sculpture by famed artist Allan Houser. Accordingly, it is to be analyzed like pure speech, not like symbolic speech.

Images are not the same as symbols and cannot be treated as expressive conduct. While an image is a visual representation of an object (*i.e.*, a photograph), a symbol stands for – or suggests – something else by reason of relationship (*i.e.*, circle with diagonal slash).² Due to the expressive qualities associated with images, they are recognized as pure speech, just like words. *See Kaplan v. California*, 413 U.S. 115, 119–120 (1973) (concluding that pictures, films, paintings, drawings and engravings receive same First Amendment standards as oral and written words); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) (“The tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully

¹ This is to be contrasted from the appellate court, which could not accept this concession as a basis for reversal of this Court. *Cressman*, 719 F.3d at 1148 n. 11.

² Definitions found in Merriam-Webster dictionary, <http://www.Merriam-Webster.com>.

protected by the First Amendment) (emphasis in original); *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996) (“Visual art is as wide ranging in its depiction of ideas, concepts, and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection.”). *See also Christensen v. Park City Mun. Corp.*, 554 F.3d 1271, 1276-77 (10th Cir. 2009) (acknowledging authority of *Bery* in determining speech in art context). On the other hand, free speech claims involving symbols are sometimes evaluated like expressive conduct. *See, e.g., Draper v. Logan County Public Library*, 403 F. Supp.2d 608, 612-13 (W.D. Ky. 2005) (assessed claim involving symbol of cross like expressive conduct).

The Tenth Circuit referenced some of the difficulty federal courts have experienced in assessing the extent of constitutional protection afforded either abstract art or objects loosely called art. *Cressman*, 719 F.3d at 1154 n.14. *Cf. Kleinman v. City of San Marcos*, 597 F.3d 323,326 (5th Cir. 2010) (discounting the speech component of a car used as a cactus planter). There is no authority, however, indicating that images of representational art lack First Amendment covering. *See generally* Mark Tushnet, *Art and the First Amendment*, 35 Colum. J. L. & Arts 169, 212-13 (2012) (contrasting representational art from nonrepresentational or abstract art). The “Sacred Rain Arrow” image – as an image of representational art – constitutes pure speech as a matter of law and is fully entitled to First Amendment protection.

B. If Analyzed as Symbolic Speech, the “Sacred Rain Arrow” Image is Expressive and Deserving of Protection

To garner covering under the Free Speech clause, an activity must be “sufficiently imbued with elements of communication.” *Spence v. Washington*, 418 U.S. 405, 409 (1974). Even if this Court classifies the “Sacred Rain Arrow” image as symbolic speech rather than pure speech – though it is an image of representational art – it would still be worthy of protection, given the communicative aspects linked to the image. Cressman is not obliged to prove the image is a particularized message to secure this constitutional protection; even so, the image does in fact communicate a particularized message likely to be understood by those who view it.

1. Image need not be a particularized message for protection

In *Spence*, the Supreme Court evaluated symbolic speech consisting of an upside down American flag with peace signs attached to both sides. 418 U.S. at 405. Finding this symbol sufficiently expressive, the Court observed that an “intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” 418 U.S. at 410-11. Later on, in *Texas v. Johnson*, 491 U.S. 397, 404 (1989), the Supreme Court analyzed whether particular conduct – the burning of an American flag – constituted protected expression, and re-couched the *Spence* “particularized message” phraseology in the form of a test (*i.e.*, *Spence-Johnson* test). The Supreme Court later clarified, though, that a particularized, understandable message is not a prerequisite for finding speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). The Court was unequivocal in this regard, concluding that “a narrow, succinctly

articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message’... would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll.” *Id.*³

Following these decisions, the Third Circuit, in *Troster v. Pennsylvania State Dep’t. of Corrections*, held that *Hurley* repudiated the “particularized message” test. 65 F.3d 1086, 1090 (3d. Cir. 1995). The Eleventh Circuit, in *Holloman ex rel. Holloman v. Harland*, described *Hurley*’s effect as “liberalizing” the test. 370 F.3d 1252, 1270 (11th Cir. 2004). Because expressive symbols and conduct can be communicative, yet capable of various interpretations, the Eleventh Circuit reasoned that “in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message.” *Id.* (emphasis in original). Without referring to the test as being liberalized, other circuits have adopted similar approaches to *Holloman*, infusing the *Hurley* imperative in the *Spence-Johnson* test, emphasizing the sufficiency of an inexact message and the threshold being low for discerning a message. *E.g.*, *Kaahumana v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). Under this post-*Hurley* test, as an object constitutes speech if a reasonable observer understands that it is expressive, even if not all observers agree on what it

³ In *Kleinman*, the Fifth Circuit opined that the Supreme Court’s reference to Jackson Pollock’s painting as expression in *Hurley* was limited to great works of art. 597 F.3d at 326. If true, there is little question the “Sacred Rain Arrow” image meets this criteria.

expresses. *See Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 66 (2006) (suggesting “reasonable observer” standard for expressive conduct claims).

As for the Tenth Circuit, the appellate court expressly declined to “grapple” with the impact of *Hurley* on the “particularized message” standard at the early stage of the proceedings. *Cressman*, 719 F.3d at 1150. But assuming the appellate court would not posture itself as an outlier, some standard like that uttered in *Holloman*, combining *Hurley* with the *Spence-Johnson* test, and allowing a message with various interpretations to qualify for constitutional protection, can reasonably be expected when the time comes.

The test pronounced by the Eleventh Circuit in *Holloman* (symbolic speech need only be perceived as some sort of message) – or something like it – is appropriate for this circuit and this Court to adopt in evaluating symbolic speech. *Id.* Not only is this test true to *Hurley*, it is true to the First Amendment, which covers a wide variety of mediums and objects that have no precise message. *See, e.g., Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2738 (2011) (video games); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (dancing); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-934 (1975) (topless dancing); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061 (9th Cir. 2010) (tattoos composed of “realistic or abstract images, symbols, or a combination of these”); *Nurre v. Whitehead*, 580 F.3d 1087, 1093 (9th Cir. 2009) (purely instrumental music). The *Holloman* test tracks how humans communicate. People regularly use symbols and words that simultaneously convey multiple, imprecise, and/or non-cognitive

messages.⁴ Audiences are often unable to pinpoint a singular meaning for a message. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 401 (2007) (protecting message “BONG HiTS 4 JESUS” even though it was “cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all.”). Yet, ambiguous messages with various meanings contribute to and help shape the marketplace of ideas. To categorically remove these works from First Amendment coverage would allow the government to infringe on valuable communication.

The Tenth Circuit acknowledged that the *Spence-Johnson* “standard may at times be too high a bar for First Amendment protection.” *Id.* at 1150. Given the inherent expressiveness associated with an image, specifically, the “Sacred Rain Arrow” image, the instant case would be one of those “times.”

2. Even so, “Sacred Rain Arrow” image is a particularized message likely to be understood by those who view it

The Oklahoma standard license plate “features the ‘Sacred Rain Arrow’ sculpture by Oklahoma artist Allan Houser (1914-1994).” (Notice from Oklahoma Tax Commission website, attached as Ex. “S” to Plaintiff’s MSJ). The message imparted by

⁴ The Supreme Court recognized the importance of non-cognitive messages in *Cohen v. California*: “much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force.” 403 U.S. 15, 26 (1971). Using this same reasoning, the D.C. Circuit prohibited an attempt to compel the display of anti-smoking images because these images were used to evoke emotion. *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012). The underlying premises of this decision are that ambiguous images convey a message and speakers cannot be compelled to display ambiguous images to which they object.

this image is undoubtedly particularized: A Native American shooting an arrow into the sky to draw rain.

There is no ambiguity, no double-meaning, with this sculpture. The “Sacred Rain Arrow” is not abstract art, but representational art with a singular depiction. The Fine Arts Center in Colorado Springs relays that the “Sacred Rain Arrow” sculpture depicts “a young Apache warrior shooting his arrow towards heaven with the hope of carrying a prayer for rain to the Spirit World.” (Stip., ¶ 2). The Smithsonian describes the sculpture the same way, as being “inspired by a story of a young Apache warrior who was chosen to shoot a sacred arrow carrying his people’s prayer for rain to the Spirit World.” (Stip., ¶ 12).

Because the message associated with this image is particularized, it is also likely to be understood by those who view it. Previously, this Court opined that “[n]othing on the tag indicates that the image is based on a sculpture or that the arrow is sacred or the reason why it is being shot.” (Order, p. 12). But like any other image, the “Sacred Rain Arrow” image cannot be viewed in a vacuum; it must incorporate visual cues and knowledge of the viewer. *See Spence*, 418 U.S. at 409-10 (finding protected expression, considered “nature of ...activity, combined with factual context and environment in which it was undertaken”). Despite the lack of annotation on the license plate stating “this is a Native American shooting an arrow into the sky to draw rain,” the image still communicates this same idea.

The image itself conveys this message. To be sure, the dress and appearance reveals the gentleman shooting the arrow is Native American. He is not hunting, nor is he conducting target practice. The image, as affixed to the license plate, shows him shooting an arrow into the clouds, *i.e.* the heavens, leaving an intention to draw rain as the only logical explanation for the effort. Moreover, the Native American shoots the arrow from a kneeling position, widely recognized as a prayerful posture.

Oklahomans are not likely to overlook the connection with Houser's sculpture. The image on Oklahoma's plate obviously depicts a sculpture. Allan Houser, born and raised in Oklahoma, is well known in the state, considered one of the foremost painters and sculptors of the 20th century. In 1985, Houser was inducted in the Oklahoma Hall of Fame, and in 1992, he became the first Native American to receive the National Medal of Arts. And the "Sacred Rain Arrow" is one of Houser's most famous works. It was the centerpiece of the Olympic Village at the 2002 Olympic Winter Games. The "Sacred Rain Sculpture" has been on display at the Gilcrease Museum in Tulsa since 1989. A major tourism destination for Oklahomans, the Gilcrease Museum is the largest, most comprehensive collection of art and artifacts of the American West, offering an unparalleled collection of Native American art and artifacts and historical documents.

And for any that might have missed the visual cues of the image or be unfamiliar with Houser and/or this monumental piece, various Oklahoma news outlets – who repeatedly reported on the state's selection of this image for the standard license plate – supplied the background on the image. The selection of the "Sacred Rain Arrow" image

as the design for the new license plate garnered much publicity in 2008 and 2009, with numerous news articles supplying the name of the sculpture (“Sacred Rain Arrow”) and a depiction of it (Native American shooting an arrow into sky to draw rain).

Oklahoma residents, like Cressman, have sufficient knowledge to understand the meaning of the “Sacred Rain Arrow” image.

II. THE “SACRED RAIN ARROW” IMAGE CONVEYS A MESSAGE ON THE OKLAHOMA LICENSE PLATE

The “Sacred Rain Arrow” image constitutes speech, and the communication does not end upon being replicated on a license plate. If anything, the license plate setting bolsters the expressive content. “[I]rrespective of their size, license plates and their content have long been recognized as giving rise to First Amendment concerns...” *Byrne v. Rutledge*, 623 F.3d 46, 57 (2d Cir. 2010).

The sole purpose of a license plate is to communicate. It is for this reason that states routinely supply messages promoting state “history” or “pride” on license plates. *Wooley*, 430 U.S. at 716. Oklahoma officials concede to using the “Sacred Rain Arrow” image on the Oklahoma’s license plate in this way, so they can “rebrand [their] image” and “market [their] state,” noting that their tags “are really like billboards....” (Task Force press release, attached to Response to Initial MPI as Ex. “5”). *See also* Watkins depo, pp. 12, 18-19, 24-25 (referencing Oklahoma DTR’s interest in branding and messaging with license plate due to it being a “travelling billboard”).

Private individuals also use license plates to convey messages. *See Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008) (“Like many states, Illinois

invites private civic and charitable organizations to place their messages on specialty license plates. The plates serve as ‘mobile billboards’ for the organizations and like-minded vehicle owners to promote their causes...”). The State of Oklahoma offers a large spectrum of specialty license plates, with over 200 different types of plates to choose from, including plates for Square Dancing, Ducks Unlimited, NASCAR, University of Oklahoma, Animal Overpopulation Crisis, Oklahoma City Thunder, one stating “In God We Trust,” another stating “Don’t Tread on Me,” and another one stating “Choose Life.” Representing a variety of causes and special interests, license plates in Oklahoma are a reflection of drivers’ personal lives and hobbies.

Accordingly, this case is distinguishable from the *Troster* decision in the Third Circuit, having a factually different context. In *Troster*, a government employee attempted to enjoin a rule requiring him to display an American flag patch on his uniform at work. 65 F.3d at 1092. The Third Circuit found no compelled speech in that instance because “observers would [not] likely understand the patch or the wearer to be telling them anything about the wearers’ beliefs.” *Id.* The government was not communicating anything with the American flag patch on the uniform and was therefore not compelling the employee to say anything by wearing the patch. *Id.*

But while *Troster* involved a uniform, this case involves a license plate. The distinction is critical because uniforms do not generally convey messages as mobile billboards like license plates. The background assumptions associated with license plates are more conducive to expression. Thus, where speech is rarely found through display of

clothing, it is invariably found in the license plate context. *Compare Brandt v. Board of Educ. of City of Chicago*, 480 F.3d 460, 465-66 (7th Cir. 2007) (discussing clothing cases) with *Roach v. Stouffer*, 560 F.3d 860, 863-68 (8th Cir. 2009) (reviewing license plate cases).

The *Byrne v. Rutledge* decision is instructive, where the Second Circuit determined that the letters “JN36TN” on the Vermont license plate constitute speech. 623 F.3d at 57-58. This combination of letters and numbers does not communicate a message any more distinct than the American flag patch in *Troster*. The difference between the expression in *Troster* and the expression in *Byrne* is context (uniforms v. license plates). Placed on the Oklahoma license plate, in lieu of somewhere else, the “Sacred Rain Arrow” image communicates a message.

III. THE “SACRED RAIN ARROW” IMAGE ON THE OKLAHOMA LICENSE PLATE IS PRIVATE, NOT GOVERNMENT, SPEECH

Another requirement for a compelled speech claim is to show that the speech at issue is private, not government, speech. “Although the government may not restrict, or infringe, an individual’s free speech rights, it may interject its own voice into public discourse.” *Phelan v. Laramie County Community College Bd.*, 235 F.3d 1243, 1247 (10th Cir. 2000). The “crucial question” is whether Oklahoma “is compelling others to espouse...certain ideas and beliefs.” *Id.* And here, Oklahoma officials are doing just that, compelling Cressman to speak by forcing him to display an image on his private property, that is, on his own car. Messages on standard license plates represent private speech. *Wooley*, 430 U.S. at 707-08.

In seminal case of *Wooley*, two Jehovah's Witnesses objected when the State of New Hampshire required them to place a standard license plate on their vehicle displaying the state's motto: "Live free or die." *Id.* Striking down the measure as compelled speech, the Supreme Court considered the motto to be private – instead of government – speech. *Id.* at 715. Just like the state motto on the standard license plate in *Wooley*, the "Sacred Rain Arrow" image on the Oklahoma license plate is private speech. There is no appreciable difference between *Wooley* and the case at hand. Both involve messages displayed on standard license plates from private automobiles, invoking the compulsion of private speech.

Realizing the import and the reach of the *Wooley* decision, Oklahoma officials suggest that *Wooley* is no longer good law, but the suggestion is dubious. The Supreme Court has never signaled this sea change, and appellate courts have consistently cited *Wooley* for the proposition that messages on standard license plates are private speech. *See, e.g., Byrne*, 623 F.3d at 57-58; *Az. Life Coalition, Inc. v. Stanton*, 515 F.3d 956, 967 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. v. Comm'r of Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002). As this Court rightly held, *Wooley* remains good law. (Order at pp. 7-8 n.12). The Tenth Circuit concurs. *Cressman*, 719 F.3d at 1157. Being good law, *Wooley* applies and condemns Oklahoma's compulsion of speech.

IV. OKLAHOMA IS COMPELLING CRESSMAN TO SPEAK A MESSAGE HE DOES NOT WANT TO CONVEY

A compelled speech claim contemplates the government taking some action to force private speech. “[T]o compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is regulatory, proscriptive, or compulsory in nature.” *Axson-Flynn*, 356 F.3d at 1290. *See also Bauchman v. West High School*, 132 F.3d 542, 557 (10th Cir. 1997) (noting that “compulsion” is a “threshold element” of a First Amendment compelled speech claim).

Cressman satisfies this requirement because 47 Okl.St. Ann. § 1113 mandates a “license plate” be “securely attached” to the vehicle and “be clearly visible at all times,” prohibiting the “operation of a vehicle... upon which the license plate is covered, overlaid or otherwise screened with any material...” *See also United States v. Arciga-Bustamante*, 276 Fed.Appx. 716 (10th Cir. 2006) (interpreting 47 Okl.St. Ann. § 1113 to prohibit car with obscured license plates); *United States v. DeGasso*, 369 F.3d 1139, 1145-49 (10th Cir. 2004) (interpreting 47 Okl.St. Ann. § 1113 to prohibit in-state and out-of-state cars with obscured license plates). Violating this statute is a criminal misdemeanor that results in a fine. Cressman cannot avoid the requirement of license plate, nor cover up anything on the license plate, without subjecting himself to this criminal penalty.⁵

As this Court observed, Cressman demonstrates a credible threat of prosecution; he cannot cover the “Sacred Rain Arrow” image on his license plate without being

⁵ 47 Okl.St. Ann. § 1113 is very similar to the statute invalidated in *Wooley*. *See Wooley*, 430 U.S. at 707 (describing text and effect of statutory scheme).

punished. (Order, at p. 6 n.9).⁶ The Tenth Circuit agreed with this assessment. *Cressman*, 719 F.3d at 1145. This ominous threat of penalty adversely affects Cressman in his desire to be silent and avoid an objectionable message.

A. Cressman Does Not Want to Convey the “Sacred Rain Arrow” Image

Cressman does not want to display the “Sacred Rain Arrow” image from his vehicle because he “only want[s] to accept, endorse, and display images from [his] car that he finds religiously acceptable and that he chooses to display.” (Aff. of Cressman, ¶ 16). Cressman need not explain his objection any further to demonstrate a compelled speech claim because the First Amendment protects Cressman’s right to be silent. *See, e.g., See Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796-97 (1988) (noting there is no “constitutional significance” between compelled speech and compelled silence); *Wooley*, 430 U.S. at 714 (First Amendment protects “the right to refrain from speaking at all.”). The government may not even compel ideologically agreeable speech. *Axson-Flynn*, 356

⁶ Although Oklahoma allows drivers to display a personalized or vanity plates on their cars, this option does not alleviate Cressman’s concerns because a personalized or vanity plate costs more than a standard license plate in Oklahoma. This difference equates to Cressman being penalized for exercising his First Amendment right to remain silent. “Compulsion need not take the form of a direct threat or a gun to the head. ‘The consequence may be an ‘indirect discouragement,’ rather than a direct punishment, such as ‘imprisonment, fines, injunctions or taxes.’” *Axson-Flynn*, 356 F.3d at 1290. *See also Planned Parenthood Ass’n of Chicago v. Kempiners*, 700 F.2d 1115, 1123 (7th Cir. 1983)\ (“It is well established that the state may not condition the receipt of a governmental benefit on the waiver of first amendment rights.”). By forcing Cressman to pay higher fees to remain silent, Oklahoma compels Cressman to violate his First Amendment freedoms. In effect, the Oklahoma statutes impose one of three untenable choices on Cressman: either 1) cover-up the image and violate 47 Okl.St. Ann. § 1113 or 2) do not cover-up the image and be forced, under threat of penalty, to display an image he does not want to display from his car or 3) pay more money to display a specialty license plate from his car. No matter which option Cressman chooses, he is penalized.

F.3d at 1284 n.4. Cressman is only required to identify speech he “would not otherwise make.” *Riley*, 487 U.S. at 795. *See also Hurley*, 515 U.S. at 573 (explaining that First Amendment protects person from any speech he “would rather avoid.”); *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) (preventing government from compelling mushroom company to speak message that “mushrooms are worth consuming,” even if company’s disagreement with message was “minor”); *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539, 552 (4th Cir. June 27, 2012) (“Indeed, strict scrutiny applies even in cases where the compelled disclosure is limited to factually accurate or non-ideological statements.”).

As Cressman has made plain, he does not want to convey the “Sacred Rain Arrow” image. He discovered the “Sacred Rain Arrow” image and its placement on the Oklahoma license plate on August 2, 2008, when he read an on-line news article from the *Tulsa World*. He read about the Oklahoma Tax Commission announcing the selection of a license plate featuring the “Sacred Rain Arrow” sculpture by the late Allan Houser. Reading on, Cressman discerned the meaning of the “Sacred Rain Arrow” sculpture in front of the Gilcrease Museum in Tulsa: “It is depicting a young Apache warrior who was selected in a time of drought to shoot a rain arrow into the sky, into the heavens, to bring people’s prayers to their gods so that they would get rain.” (*Tulsa World* 8/2/08 article). Glancing toward the bottom of the article, Cressman also saw a picture of it. Consistent with the description, Cressman observed a Native American kneeling down in praying

position shooting an arrow over his head toward the sky with no object in sight other than clouds, with drawing rain being the only conceivable intention.

Cressman was immediately offended by the thought of having to communicate this message portrayed by the “Sacred Rain Arrow” image on his vehicle. Recognizing his license plate as a mobile billboard, Cressman objected to the “Sacred Rain Arrow” image on his license plate, since he does not want to express that message. In good conscience, Cressman cannot communicate the message conveyed by the “Sacred Rain Arrow” image, being so divergent from his own personal views about God. Other Oklahomans have expressed similar concerns about the “Sacred Rain Arrow” image.

The compelled speech doctrine seeks to protect an individual’s autonomy and dignity, to safeguard their “individual freedom of mind” and their “sphere of intellect and spirit.” *Board of Education v. Barnette*, 319 U.S. 624, 637, 642 (1943). *See also Hurley*, 515 U.S. at 573, 575 (noting that “a speaker has the autonomy to choose the content of his own message” and the “choice of a speaker not to propound a particular point of view...is presumed to lie beyond the government's power to control.”) (emphasis added). The government infringes on this sphere when it makes a person speak unwillingly, no matter what message the government foists on her and no matter why she objects to it. By forcing a disinclined person to speak any message, the government is treating that person like a puppet, undermining her dignity and autonomy. *See Steven H. Shiffrin, Freedom of Speech and Two Types of Autonomy*, 27 Const. Comment. 337, 344 (2011) (detecting that “there is something deeply wrong with forcing someone like the school

child in *Barnette* or the driver in *Wooley* to be a forced courier of, or megaphone for, a government message...[because it] simply does not appropriately respect the speaker's human dignity.”). The harm suffered by Cressman pertains to him being forced to speak when he would rather not. *See R.J. Reynolds Tobacco Co. v. FDA*, 845 F.Supp.2d 266, 272 (D.D.C. 2012) (identifying harm as government forcing others to “serve as its unwilling mouthpiece.”).

B. Cressman Need Not Show Image is Ideological to Avoid Expression of It

In the previous Order, this Court acknowledged that First Amendment protection does not depend on the ideological character of the speech. Order, at 10-11 n.15. But this Court also postulated that Cressman’s “claims in this case are based on his assertion that he is being forced to convey an objectionable religious message.” *Id.* The presumption is inaccurate. In pursuit of his claim, Cressman does not contend the “Sacred Rain Arrow” image is necessarily religious in and of itself; rather, he urges that the message – the image of Native American kneeling and shooting an arrow in the sky – is objectionable to him. While the basis of his objection does relate to his core religious beliefs, Cressman’s claim is simply that he objects to this message and he does not want to convey it.

This case falls directly in line with *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004). There, the Tenth Circuit entertained a compelled speech claim brought by Axson-Flynn, a Mormon, who was pressured to utter words in an acting class that she considered religiously offensive. 356 F.3d at 1281. Finding a viable free speech claim,

the appellate court concluded that the forced speech need not be ideological to substantiate a claim. *Id.* at 1284 n.4. Despite her ideologically and religiously-based objections, all Axson-Flynn had to show was that she was “uncomfortable” with the words she was compelled to say in class. *Id.* at 1290. Likewise, all Cressman need show is that he does not wish to communicate the compelled message.

The Tenth Circuit in this case confirmed the constraints of *Axon-Flynn*, reaffirming the principle that First Amendment protection does not hinge on the message being ideological, remarking: “[P]ost-*Wooley* Supreme Court decisions suggest that compelled speech protection is not limited to ideological speech, and this court said in *Axon-Flynn* that the harm of compelled speech occurs regardless of whether the speech is ideological.” *Cressman*, 719 F.3d at 1155 (quotation marks and citation omitted). To obtain relief, Cressman is not obliged to show the “Sacred Rain Arrow” image conveys either a religious or an ideological message.⁷

V. COMPULSION TO MAKE CRESSMAN SPEAK IS NOT NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST

Oklahoma officials cannot justify the compulsion they impose on Cressman. To compel speech in this setting, they must overcome strict scrutiny. *See, e.g., Wooley*, 430 U.S. at 716-17 (requiring the government interest to be compelling and the means narrowly tailored to justify compelled speech on license plate). *See also Riley*, 487 U.S.

⁷ Though not needed to substantiate the claim, the “Sacred Rain Arrow” image – showing a Native American shooting arrow into the sky to draw rain – does seem to be ideological because it presents an idea, in particular, an idea that is objectionable to Cressman.

at 797-98 (subjecting law to strict scrutiny because it compelled facts in non-commercial context); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1038 n.4 (9th Cir. 1999 (“When personal speech is compelled, as in *Wooley v. Maynard*...state action is valid only if it is ‘a narrowly tailored means of serving a compelling state interest.’”).⁸ Their action in compelling expression is not narrowly tailored to serve a compelling state interest.

To date, Oklahoma officials have yet to supply any acceptable reason for compelling speech in this way. Just like here, the Supreme Court in *Wooley* confronted a state statute imposing criminal penalties on someone for partially covering up his license plate. 430 U.S. at 707-08. The state tried to defend this penalty as necessary to facilitate “the identification of passenger vehicles” and to promote “appreciation of history, individualism, and state pride.” *Id.* at 716. The Supreme Court rejected the identification interest because the citizen in *Wooley* only wanted to cover up the state motto on his license plate without covering any other identifying number or letter on his license plate. *Id.* Consequently, state officials could still identify the citizen’s vehicle by the uncovered numbers and letters. *Id.* Besides this identification interest, the Supreme Court also rejected the state’s promotion interest because the state’s desire to promote an ideology “cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Id.* at 717.

⁸ As the *Riley* Court explained, laws that compel speech “necessarily” alter the content of a person’s speech and are therefore content-based laws. 487 U.S. at 795.

Likewise, Oklahoma officials cannot rely on identification or tourism as reasons to compel Cressman to speak through his vehicles. Cressman does not seek to cover any letters or numbers on his license plate, merely the objectionable image. Much like the citizen in *Wooley*, Cressman does not impede on Oklahoma officials' ability to identify vehicles. And, though Oklahoma might benefit from promoting certain messages on license plates for tourism purposes, officials are not at liberty to force Cressman to disseminate those messages against his will. Whether the message relates to religion, history, tourism, Oklahoma, Native America or Native Americans, Oklahoma officials' interest in disseminating such messages cannot outweigh Cressman's interest in avoiding the compelled speech.⁹

Wooley undermines any argument Oklahoma may proffer to justify the compulsion on Cressman to speak. The facts, holding, and rationale of *Wooley* are indistinguishable from the instant case, substantiating a violation of Cressman's First Amendment rights.¹⁰

CONCLUSION

For reasons set forth herein, Cressman respectfully requests that this Court grant his Motion for Summary Judgment.

⁹ In response to the Initial MPI, Oklahoma officials also tried to justify its compelled speech as necessary to produce revenue. Cressman, however, does not object to payment for the standard license plate. He only wants to cover the objectionable image on his license plate.

¹⁰ This compulsion also violates Cressman's right to free exercise of religion, due process, and Oklahoma Religious Freedom Act, which are all subsumed by the compelled speech claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 2nd day of December, 2013, that I electronically transmitted the attached document to the Clerk of Court using the CM/ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants: Kevin L. McClure, Jeb E. Joseph, and Larry D. Patton.

/s/ Nathan W. Kellum