CASE NO. 14-6020

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

APPELLEES' JOINT RESPONSE BRIEF

ORAL ARGUMENT IS REQUESTED

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May 30, 2014

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LOCAL RULE 28.2(C)(1) STATEMENT

There is a related appeal in this case. Case No. 12-6151. That decision was the reversal of the District Court's dismissal of this case pursuant to Fed. R. Civ. P. 12(b)(6). *Cressman v. Thompson*, 719 F.3d 1139 (10th Cir. 2013).

ORAL ARGUMENT

Oral Argument is requested due to the complexity of the issues.

JURISDICTIONAL STATEMENT

This Court does have appellant jurisdiction pursuant to 28 U.S.C. § 1291 because the District Court did grant judgment for all the Defendants on all claims denying Plaintiff injunctive relief. Cressman did filed suit against the State officials pursuant to 42 U.S.C. § 1983 seeking an "injunction, declaratory relief, and nominal damages." [App. Appx., p. 15, ¶ 2]. He sued Paula Allen in both her *individual* and *official capacity*. All the other named state officials were sued in their *official capacity* only. However, in order to make the record on appeal clear, the only issue appealed is the **compelled speech claim** under the First Amendment "*free speech*" clause.

STATEMENT OF THE ISSUES

ISSUE NO. 1: Whether Cressman proved he has ***standing*** under **Article III** to sue the DPS Defendants in this case?

ISSUE NO. 2: Whether the District Court's decision was correct when it held that Cressman failed to meet his burden of proof under the compelled speech doctrine?

ISSUE NO. 3: Assuming the Native-American on the state's standard license plate is "speech" under the First Amendment, is it **government speech** not subject to First Amendment scrutiny?

STATEMENT OF THE CASE

Cressman filed this lawsuit on November 2, 2011, against Michael Thompson in his *official capacity* as the Commissioner for the Oklahoma Department of Public Safety ("DPS"), and against Paula Allen, in both her *individual* and *official capacities*. [Supp. Appx., p. 1]. Along with his original Complaint, Cressman also filed a Motion for Preliminary Injunction, asking the District Court to stop both Thompson and Allen from enforcing two Oklahoma statutes: 47 O.S. § 4-107 and 47 O.S. § 1113, which Cressman claimed are the "do not obscure" or "cover" the State's license plate statutes. [Supp. Appx., p. 21]. On January 10, 2012, the District Court directed the Oklahoma Attorney General to enter an appearance in the case pursuant

to 74 Okla. Stat. § 18b(A)(2). [Supp. Appx., p. 50]. At that time, the DPS Defendants filed an Objection to the Motion for Preliminary Injunction and a Motion to Dismiss for failure to properly serve them. [Supp. Appx., pp. 52 & 85]. But before the Court could rule on DPS's Motion to Dismiss, Cressman filed an Amended Complaint on February 16, 2012, making the same claims that were in his original Complaint, but adding three Tax Commissioners (Thomas Kemp, Jr., Jerry Johnson, and Dawn Cash) and the Chief of the Oklahoma Highway Patrol, Kerry Pettingill, all sued only in their *official capacities*. [App. Appx., p. 14]. The Amended Complaint kept the same allegations against Thompson in his *official capacity* and against Allen in both her *official* and *individual capacities*, claiming she was a "Licensing Services Hearing Officer for the Oklahoma Department of Public Safety" who was "responsible for interpreting and administrating regulations that pertain to license plates, including 47 Okla. Stat. § 4-107 and 47 Okla. Stat. § 1113." [App. Appx., p. 18, ¶ 10]. The Amended Complaint alleged that Oklahoma's official license plates contain a modified version of a statue by Allan Houser that depicts a Native-American holding a bow and arrow, with the arrow in the drawn position. [App. Appx., p. 19, ¶ 19]. He also alleged that the Native-American image on the state's official license plate violates his religious beliefs and right to "not speak" about a message he views as religiously objectionable claiming the image is a replica of Allan Houser's statue the

"Sacred Rain Arrow" which sits outside the Gilcrease Museum in Tulsa, Oklahoma, and that Houser's inspiration for the statue came from a Native-American legend which depicts "an Apache warrior who was selected in a time of drought to shoot a sacred rain arrow into the heavens in order to bring his people's prayers for rain to the 'spirit world' so that they would get rain."[App. Appx., p. 20, ¶ 22-24]. Cressman claimed that as a Christian, he "cannot endorse, express agreement with, or communicate approval of, pantheism (the belief that God and nature are identical), panentheism (the belief that God exists and interpenetrates every part of nature), henotheism (the beliefs that one god exists while accepting the existence or possible existence of other deities), polytheism (the belief that multiple deities exist) or animism (the belief that souls or spirits exist not only in humans but also in animals, plaints, rocks, and other natural phenomena)." [App. Appx., p. 19, ¶ 16]. He claimed that even though the state of Oklahoma provides motorists with the option of purchasing a personalized [47 O.S. § 1135.4] or specialized license plate [47 O.S. § 1135.1, § 1135.2, § 1135.3, § 1135.5, § 1135.6, § 1135.7, § 1136], because such other license plates have a higher "tax" associated with them, then such additional "tax" violates his First Amendment right "to not speak" under the Free Speech clause . [App. Appx., p. 25, ¶ 43; p. 27, ¶ 50-54]. Cressman requested the District Court for one of two remedies. He wanted either (1) an order to the Tax Commissioners

requiring them to provide him a personalized or specialty license plate at the same tax rate as the standard license plate, or (2) he wanted the court to issue an injunction against the Department of Public Safety Defendants preventing them from enforcing 47 O.S. § 4-107 and 47 O.S. § 1113, ***as applied*** to him. [App. Appx., p. 27, ¶ 50-54; pp. 31-32, PRAYER FOR RELIEF]. He alleged that "[f]or fear of arrest and punishment, [he] has not covered up the image of the 'Sacred Rain Arrow' sculpture" and that "[t]he fear of arrest severely limits [his] constitutionally-protected right to be free from compelled messages." [App. Appx., p. 28, ¶ 53-54].

The District Court dismissed Cressman's Amended Complaint on May 16, 2012, holding that "[t]hough the Native American image conceivably sends a message on some level, it is not a **particularized message** that viewers will likely understand." [Supp. Appx., p. 237]. The District Court in dismissing the Amended Complaint for failure to state a claim, held that "[t]he conclusion that the State of Oklahoma is not compelling others to espouse certain ideas and beliefs, and the related conclusion that the State, *via* the Native American image on its standard license plate, is not forcing plaintiff to convey a message that violates his religious beliefs, preclude plaintiff from establishing an essential element of his free speech claim and from obtaining injunctive relief." [Supp. Appx., p. 252]. From that ruling, Cressman appealed to this Court.

The Tenth Circuit, in a 2-1 decision, held that Cressman had sufficiently "**pled**" ***standing*** for a First Amendment Compelled Speech Claim by demonstrating (**in his Amended Complaint**) that Thompson and Pettingill (the DPS Defendants) had enforcement authority under Title 47 to enforce the challenged state statute (47 O.S. § 1113), and that the Tax Commission Defendants could provide him his preferred remedy of giving him a "specialty" or "personalized" license plate at the same tax rate as the official license plate. *Cressman*, 719 F.3d at 1144-1147. The Court dismissed Paula Allen in her *official capacity*, finding she had no enforcement authority under Title 47. *Id*. at 1147. The Court then held that pursuant to *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), which the Court stated it was bound to follow, Cressman had sufficiently "**pled**" a First Amendment Compelled Speech Claim. *Id*. at 1147-1158. The Tenth Circuit ***reversed*** the District Court's decision to dismiss the case and ***remanded*** it for further determinations.

On remand, the District Court dismissed Allen in her *individual capacity* on November 20, 2013, granting her *qualified immunity*. [Supp. Appx., p. 254]. Cressman has not appealed the District Court's decision to grant Allen *qualified immunity*. On December 2, 2013, both the Oklahoma Department of Public Safety Defendants and the Oklahoma Tax Commission Defendants filed Motions for Summary Judgment, arguing that Cressman lacked standing to challenge the state

statutes at issue; that the Tax Injunction Act prohibited the Court from having jurisdiction over the Tax Commissioners; that the State was not compelling Cressman to speak about a religion that he finds objectionable; and that the image was not compelled speech at all, but if it was speech, it was government speech exempt from free speech analysis, *inter alia*. [Supp. Appx., p. 255]. Cressman filed a Cross Motion for Summary Judgment, and on December 31, 2013 the District Court essentially denied all those Motions (except the Tax Injunction Act defense) and ordered the parties to appear for a bench trial on January 9, 2014. [Supp. Appx,. pp. 622-634]. After Plaintiff presented his case at trial, the Court granted the Tax Commission Defendants a Rule 52(c) motion to dismiss [App. Appx., pp. 147-148] based on the fact that Plaintiff failed to prove the Tax Commissioners had any enforcement authority under the challenged statute at issue. (*i.e.*, 47 O.S. § 1113). The Court then heard further evidence and argument from the remaining parties, and then granted judgment against Cressman on his compelled speech claim, the only issue he choose to proceed with at trial. [Supp. Appx., p. 636-677; App. Appx., p. 217-231]. Having abandoned all his other claims, Cressman now appeals the District Court's judgment against the DPS Defendants on his compelled speech claim. [App. Appx., p. 232].

STATEMENT OF THE FACTS

In Oklahoma, when a motorist purchases a vehicle they are given the option to obtain either the state's official (or standard) license plate, a specialty license plate, or a personalized license plate. Official license plates are taxed annually at the "standard rate" of between $85 and $15 depending on the age of the vehicle (47 O.S. § 1132), with the specialty and personalized license plates taxed at the "standard tax rate" plus an additional tax between $8 and $38, depending on which specialty license plate the motorist chooses. (47 O.S. § 1135.1 - § 1136). The extra taxes assessed for the specialty tags go to fund a variety of organizations and groups. (§ 1135.5). See *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007). Then each year thereafter, motorists are required to pay taxes annually on each vehicle they own, receiving a sticker to place on the tag they choose, proving that they have paid their taxes on that vehicle for that year. (47 O.S. § 1132). In addition, each year the motorists have the option of obtaining a different license plate, choosing from either the official state license plate with a different set of numbers and letters, or choosing from one of the many specialty or personalized license plates — again, taxed at an additional rate. (47 O.S. § 1132, § 1132.4, § 1135.1 - § 1136).

Sometime in 2007, the Oklahoma Legislature decided to create the Oklahoma License Plate Design Task Force to address public safety concerns because many of

the state's standard license plates were "fading, making them difficult to read." (App. Appx., p. 171). The Task Force made up of legislative officials and two members from the Governor's staff (App. Appx., p. 172 "members of the task force"), decided that since they were going to update the state's standard license plates for public safety reasons, it was also a great opportunity to "rebrand" the state's image on the state's official license plate. (App. Appx., p. 171). Apparently the slogan "Native America" was a successful marketing tool for the state, but it seemed that people outside the state did not really understand the symbolism of the Osage Shield on the state's standard license plate. (App. Appx., p. 171-172; Supp. Appx., p. 441; See old standard license plate at Supp. Appx., p. 678). **One** of the members of the Task Force stated in a Senate Press Release that "Our tags are really like billboards for our state, so we want to update the design to something that will better market Oklahoma as a tourist destination while also making sure public safety needs are met." (App. Appx., p. 171). That same Senate Press Release reported that:

> At Tuesday's task force meeting at the State Capital, officials with the Department of Tourism and Recreation presented about 26 different tag design prototypes, with the task force members narrowing it down to five choices. There are two different versions of a tag depicting the Guardian statue, which sits atop the State's Capitol's dome. Another tag depicts a cowboy doing rope tricks. There are also two variations of a tag depicting a statue of a Native American shooting an arrow into the sky, which stands in front of Tulsa's Gilcrease Museum.

> At this point, Tourism will refine those designs, and ultimately they'll be placed on their website so that the public can give their input on the selection. We'll also have the input of the Governor, Department of Public Safety and others. My hope is that we'll have the new tag selected and available to the public in early 2009." [Senator] Jolley said. [App. Appx. p-171].

The Task Force met again on December 31, 2007. A Progress Report from that meeting states that:

> Pursuant to the provisions of Senate Bill 748 a new section of law was codified (47 O.S. Section 1113.3) that created the Oklahoma License Plate Design Task Force. The task force was supported administratively by the staff of the State Senate with the assistance from the Tax Commission, the Department of Public Safety and the Department of Tourism and Recreation. The charge of the task force was to choose the design of a new official Oklahoma license plate. **Issuance of a new plate will require authorization by the Legislature**. [App. Appx., p. 172(emphasis added)].

The Progress Report also summarizes the task force's meetings on November 6, 2007 and November 27, 2007, then reports that:

> Also at the meeting, the representative from the Department of Public Safety stated that their only remaining concern would be that the fonts for display of the assigned license plate numbers and letters be established in a method by which law enforcement personnel could clearly distinguish the difference between such letters and numbers. In addition, the representative from the Oklahoma Tax Commission expressed a few concerns regarding associated administrative issues. Primarily, he was concerned about having sufficient notice and lead-time to obtain inventory and subsequently implement the issuance of a newly designed license plate.
>
> At the conclusion of the meeting the Department of Tourism and Recreation was asked to commence planning for the future display of

> the selected design proposals on their website in a manner that will allow the general public to participate in the selection process and to contact the various artists involved in submitting the proposed license plate redesigns for the purpose of seeking copyright permission. [App. Appx., p. 172].

Appellant/Cressman has a law degree and is a pastor for a Christian Church in Oklahoma City. [App. Appx., p. 91, ln. 16-23; App. Appx., p. 126, ln. 7-12; p. 133, ln. 19-21]. He claims that the State of Oklahoma is forcing him to communicate a message on the State's official license plates that he finds objectionable and contrary to his religious beliefs. [App. Appx., p. 92, ln. 23-25; p. 93, ln. 1-3; p. 96, ln. 2-13]. Even though Cressman claims that this case involves an "**as-applied** challenge to the Oklahoma statutes [47 O.S. § 1113] that requires [him] to display the 'Sacred Rain Arrow' image ... on his car's license plate", the undisputed facts at the trial proved that he does not currently have the official license plate on any of his vehicles, and that even prior to the issuance of the new official state license plates with the Native-American, he had previously purchased specialty license plates for all his vehicles. [App. Appx., p. 126, ln. 23-25; p. 127-129]. When asked in his deposition if he had ever driven a vehicle with the official license plate at issue in this case, he took his Fifth Amendment right to remain silent and declined to answer. [App. Appx., p. 129, ln. 19]. At the bench trial, he testified that he had a Nissan Xterra that he drove with the Native-American covered from January to May 2009 before getting a specialty

tag [App. Appx., p. 101, ln. 10-25; p. 102; p. 103, ln. 1-7], and that he drove a Dodge Charger for about a month in 2009 with the image covered before getting a specialty tag. [App. Appx., p. 128, ln. 13-25]. Yet, the undisputed evidence is that the challenged statute has **never been applied to him**, and no one has ever stopped him, threatened him with a ticket or arrest, or prosecuted him for covering the image. [App. Appx., p. 119, ln. 12-25; p. 120, ln. 1-12; p. 121, ln. 7-9; p. 129, ln. 7-10; p. 131, ln. 21-25; p. 132-133; p. 134, ln. 21-25, p. 135, ln. 1-8; Tax Commission has no authority to enforce the statute]. Despite **not currently** possessing any vehicle with the Native-American license plate, and despite having successfully driven with the Native-American covered for at least six months without getting a ticket from January to May 2009, he drove to the Oklahoma Tax Commission in December of 2009 to ask **if** he had the official license plate on his vehicle, would he get a ticket **if** he covered the Native-American on the state's official license plate. [App. Appx., p. 133, ln. 4-15; p. 104, ln. 21-25; p. 105, ln. 1-17]. He then claims that he drove to DPS that same day and to have spoken to a Drivers License Hearing Officer named Paula Allen. [App. Appx., p. 105, ln. 18-25]. He claims that Allen told him that an OHP trooper told her (over the phone) that if he covered the Native-American on the State's official standard license plate, he would get a ticket. [App. Appx., p. 106, ln. 14-25; p. 107-108, ln. 1-4]. Paula Allen testified that the man at trial was not the man she

remembered coming to DPS, the man she met with was African-American; Cressman is not African-American, [App. Appx., p. 150,ln. 23-25; p. 151, ln. 1-17]. She also testified at trial that she was a Drivers License hearing officer for DPS and she had no authority to detain, arrest or prosecute drivers, and that she had absolutely no authority to interpret or determine the law regarding license plates. [App. Appx., p. 153, ln. 13-22]. Cressman has explained his "options" as either getting a specialty or custom plate or move out of the state. [App. Appx., p. 109, ln. 8-14].

Prior to learning about the state's new official license plate containing the Native-American, Cressman had no idea what the artist Allan Houser (a Christian) meant to represent in his statue the Sacred Rain Arrow. [App. Appx., p. 114, ln. 1-10; p. 119, ln. 6-11 (he has been told that Houser was a Christian)]. In fact, Cressman's information about the Native-American came from a newspaper article and online research. [App. Appx., p. 95, ln. 4-25; p. 114, ln. 1-25]. He understands that the Native-American on the state's official license plate is not an exact replica of the 'Sacred Rain Arrow' statue [App. Appx., p. 115, ln. 7-19; p. 95, ln. 10-12 (it's "an adaptation" of the statue by Allan Houser)], that the state is not trying to establish a religion by placing the Native-American on its official license plates [App. Appx., p. 113, p. 22-25], and that he has no objection to the State trying to market itself as "Native America." [App. Appx., p. 122, ln. 12-15]. In addition, by wanting to cover

the Native-American, he is not trying to "protest" the state's message or Native-Americans in general [App. Appx., p. 109, ln. 20-25; p. 110, ln. 1-18], but instead he would (if he had a vehicle with the Native-American on it) want to not express "***the message***" of the Native-American that was the inspiration for the artist that drew the design, that was based on the statue by Allan Houser. [App. Appx., p. 111, ln. 2-7; p. 114, ln. 17-22 (his **beliefs** are "[b]ased on the description of the statue given to us by [Houser], it is a depiction of a person who is crouching down or kneeling in order to send prayer arrows to the gods, and that is an act of prayer."); p. 115, ln. 1-6; p. 124, ln. 2-18; p. 95, ln. 10-12 (he understands that it is "**an adaptation**" of Houser's statue; no an exact replica]. Furthermore, even though he claims that he would rather "remain silent" and "say nothing" by his ***hypothetical desire*** to cover the Native-American on the State's official license plates (**if** he had one on his vehicle) [App. Appx., p. 96, ln. 10-13], when asked if he would be happy with just a plain white license plate with nothing on it except numbers and letters, he testified that such would be unacceptable, because if such a license plate was provided only to those with religious objections it would create a "stigma". [App. Appx., p.116, ln. 18-25; p. 117, ln. 1-25]. He was unable to clearly articulate why covering the Native-American would not create a "stigma" and be acceptable to him, but a plain white

license plate would create a "stigma" and be unacceptable. [App. Appx., p. 116, ln. 18-25; p. 117, ln. 1-25].

SUMMARY OF THE ARGUMENT

Cressman has no ***standing*** to bring this suit under **Article III** to sue the DPS Defendants, and the District Court did not have ***jurisdiction*** under ***Ex Parte Young*** to hear his compelled speech claim because he had "specialty license plates" on all his vehicles prior to the issuance of the new standard license plate, and he **currently** does not (and has not since 2009) owned a vehicle with the state's standard license plate with the Native-American. Even when he did own a vehicle with the Native-American covered for six months in 2009, he was never stopped, ticketed, arrested, or threatened with prosecution for covering the image. He has admitted that even if he had a vehicle with the standard license plate containing the Native-American, he does not really want to cover it up, claiming his only real options are to either get a specialty license plate at an additional tax or move out of the state.

The evidence at the trial proved that while the Native-American on the state's standard license plates is an "adaptation" by an artist of Allan Houser's statue that sits outside the Gilcrease Museum in Tulsa, Oklahoma, it is not an exact replica of that statue, and there was absolutely no evidence that the Task Force or the Legislature intended to adopt either the artist's inspiration in drawing the Native-American or

Houser's legend. The District Court's decision that the Native-American did not portray a "particularized message" that those viewing it would understand that Cressman would be speaking about a religion not his own was correct, and was (therefore) not speech under the First Amendment. However, even if it is "speech" under the First Amendment, as Cressman claims, it was **government speech** — not subject to *free speech* analysis.

ARGUMENT

Even though Cressman wants this Court to accept the image at issue as the 'Sacred Rain Arrow' statue *carte blanche,* the evidence at trial does not support such conclusion. The evidence before the District Court indicates that the Task Force choose the new standard plate design with input of the public, and then the Legislature approved the new design. [App. Appx., pp. 171-173]. While the Native-American on the new standard license plate may have been **based on** (or inspired by) the "Sacred Rain Arrow" statue, it is undisputed that it is not an exact replica, and that it is (instead) an artist's **adaptation** of Allan Houser's statue. [App. Appx., p. 95, ln. 10-12 where Cressman admits it is an "adaptation" of the statue]. While that artist's inspiration may have come from Allan Houser's statue, there is absolutely no evidence that the artist who drew the Native-American for the new design intended to relate the same message (*i.e.*, the legend) that inspired Houser when he created the

"Sacred Rain Arrow" statue. Nor is there any evidence that either the Task Force or the Legislature intended to adopt either the artist's inspiration who drew the new design or Houser's legend. The evidence only indicates that the new license plate design contains an image of a Native-American in a kneeing position holding a bow and arrow in the drawn position, with an arrow pointing in a sightly elevated level, with the words OKLAHOMA across the top and NATIVE AMERICA at the bottom of the plate. [Supp. Appx., p. 679, compare with p. 680].

Despite that fatal flaw in Cressman's argument undermining the premise of his entire appeal, he has now waived any and all other claims involving his due process, free exercise, and state law rights, because he has failed to raise those claims on appeal. [Supp. Appx., p. 638-646 (where he abandoned those claims at trial)]. Therefore, the only claim at issue in this appeal is his First Amendment **compelled speech claim**. This is significant because, as Cressman points out in his opening brief [p. 21], "without intervening judicial relief, [he] is constrained to display the 'Sacred Rain Arrow' image on the standard license plate of his own personal vehicle – against his will and conscience." He claims the "image constitutes speech." He claims that Oklahoma officials are forcing him "through the threat of criminal sanction – to say what he does not want to say, violating his fundamental right to free speech." **However, Cressman failed to prove any of those allegations at the trial.**

Even though the District Court was correct when it held that the Tax Injunction Act [28 U.S.C. § 1341] prohibited it from having jurisdiction over the Tax Commission Defendants to order them to provide Cressman with a specialty license plate at the same tax rate as the standard plate (see *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007)), the District Court was incorrect when it held that Cressman had **standing** under Article III. [App. Appx. p-221]. However, despite that error, the District Court's decision to grant the DPS Defendants judgment on the merits of Cressman's First Amendment **compelled speech claim** was correct.

I. THE TAX INJUNCTION ACT

Judgment for the Oklahoma Tax Commission Defendants is final and unchallenged. Neither Cressman's Docketing Statement, nor his "Statement of Issues Presented" in his Opening Brief make any reference to the application of the Tax Injunction Act ("TIA") in his appealed claim. OTC Defendants were granted a Partial Summary Judgment by the District Court [App. Appx., pp. 53-66; Supp. Appx., p. 622]. The District Court determined that the TIA divested it of jurisdiction to award Cressman a specialty plate at no additional tax over that of a standard plate. [App. Appx., pp. 59-60]. Although the District Court expressed doubt that any other viable claim for relief was asserted against the OTC Defendants, it reserved that issue for future consideration. [App. Appx., p. 61]. Summary judgment was granted the OTC

Defendants as to application of the TIA [App. Appx., p. 65]. Cressman notes entry of Partial Summary Judgment, but presents neither argument nor authorities contesting the District Court's Order. [Appellant's Opening Brief, p. 5].

At trial, the District Court had for determination, the question of whether the Defendants, including the OTC Defendants, should be enjoined from enforcing certain Oklahoma statutes against Cressman, **if** he actually had a standard license plate and **if** he cover the Native-American on the license plate he found to be objectionable. [App. Appx., pp. 217-228, 218]. The District Court determined that the OTC Defendants had no role in enforcement of the statute [47 O.S. § 1113] in issue, that the elements of causation and redressability were missing, and that there was no basis for entry of judgment against the OTC defendants, even if Cressman succeeded on his remaining claim. [App. Appx., pp. 220-221]. That determination was not mentioned in Cressman's Docketing Statement, "Statement of Issues Presented" in his Opening Brief, nor in his Opening Brief.

Cressman asserted a claim for relief pursuant to the Oklahoma Religious Freedom Act, as to which both OTC Defendants and DPS Defendants asserted 11th Amendment immunity. The District Court determined that he had made no showing to overcome the State's 11th Amendment immunity, which precluded relief on that claim [App. Appx., p. 219]. That determination was not mentioned in Cressman's

Docketing Statement, his "Statement of Issues Presented" in the Opening Brief, nor in the Opening Brief itself. *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) (Arguments which are not raised or inadequately presented in an Opening Brief are waived on appeal); *Phillips v. Calhoun*, 956 F.2d 949, 954 (10th Cir. 1992) (Even if issues are designated for review, those issues are lost, if not actually argued in a party's brief). The issues regarding the OTC Defendants were neither designated for review nor argued in the Opening Brief. *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (The decisional law rule is founded on the obligation imposed by Fed. R. App. P. 28(a)(9)(a) to identify contentions and the reasons for them, with citations to authorities in the parts of the record on which an appellant relies). Therefore, all determinations in favor of the OTC Defendant on all of Cressman's claims, and the Judgment in their favor, are unchallenged and final.

II. ARTICLE III STANDING AND *EX PARTE YOUNG*

When a state official is sued in their *official capacity*, it is the same as suing the State itself. *Kentucky v. Graham*, 473 U.S. 159, 166-67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). The Eleventh Amendment prohibits a federal court from exercising jurisdiction over either States or state officials sued in their *official capacity*, except in very limited situations. See, *e.g.*, *Printz v. United States*, 521 U.S. 898, 117 S. Ct. 2365, 138 L. Ed. 2d 914 (1997) (Congress may not commandeer state officers); *Coyle*

v. Smith, 221 U.S. 559, 579, 31 S. Ct. 688, 55 L. Ed. 853 (1911) (Congress may not dictate a State's capital). One of those limited situations, allows a federal court to obtain jurisdiction over a state official sued in their *official capacity* pursuant to the ***Ex parte Young*** doctrine.[1] Under that doctrine a federal court can retain jurisdiction over a state official sued in their *official capacity* for the limited purpose of determining if that particular state official **is currently** violating a plaintiff's U.S. Constitutional or federal rights. *Ex parte Young*, 209 U.S. 123, 159-160, 28 S. Ct. 441, 52 L. Ed. 714 (1908). However, even then the federal court only possesses the authority under *Ex parte Young* to issue **prospective injunctive relief**. *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002). If a plaintiff's claim is tantamount to an award of damages, irrespective of how it is pled, the federal court lacks jurisdiction over that state official because the official is said to possess **sovereign immunity** under the Eleventh Amendment. *Papasan v. Allain*, 478 U.S. 265, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). In this case, the only remaining claim against the DPS Defendants is Cressman's **compelled speech claim** under the First Amendment for the sole determination of whether or not a federal court has the power and authority to issue an order to them in their *official capacities*, ordering them to not enforce 47 O.S. §

[1] *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1909).

1113 (The do not obscure license plate statute). However, Cressman lacks ***standing*** to sue the DPS Defendants for his compelled speech claim.

The DPS Defendants have consistently argued that Cressman does not have ***standing*** under **Article III** to sue them in their *official capacity,* because Cressman **currently** does not own a vehicle with the Native-American image on it, and even when he did own a vehicle with the image covered for six months in 2009, he was never stopped or threatened with a ticket, arrest or prosecution for violating the statute. Furthermore, Cressman failed to prove at the Trial that he planned in the future to obtain the disputed tag with the image he finds objectionable, or that any of the named DPS Defendants would enforce (or order the enforcement of) the statute against him.

A. Cressman Is Currently Not Attempting to Cover up the Native American on the State's Official License Plate, and He Has Not Stated an Intent to Either Purchase a Standard License Plate, or an Intent to Cover It.

Cressman claims that *Wooley v. Maynard*, 430 U.S. 705 (1977) is clearly applicable to the facts in this case. In *Wooley*, the two appellees were husband and wife of the Jehovah Witness faith. They had been, and were threatened with, prosecution for covering New Hampshire's state motto "Live Free or Die" on the state's official license plate. They claimed to have a free-speech right to cover the motto because it was "repugnant to their moral, religious, and political beliefs." *Id*.

at 707. They filed suit under 42 U.S.C. § 1983 in federal district court seeking injunctive and declaratory relief asking the court to enjoin the state officials from further enforcing its state traffic statutes that prohibited vehicle owners from "obscur[ing] the figures or letters" on the state's license plates. The Court did hold that the State may not require an individual to participate in the dissemination of an ***ideological message*** by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. *Id*. at 713. But in doing so, the Court had to first overcome the State official's claim that the *Younger* doctrine[2] should preclude the court from hearing Plaintiffs' case. *Younger* allows abstention when federal adjudication would disrupt an ongoing state criminal proceeding. The Court in *Wooley* held that since the plaintiffs had been prosecuted three times in the past and there was a very real threat of prosecution in the future, then the *Younger* doctrine did not apply because there were "exceptional circumstances and a clear showing that an injunction [was] necessary in order to afford adequate protection of constitutional rights." *Id.* at 712 (citing *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 95, 55 S. Ct. 678, 79 L. Ed. 1322 (1935)).

However, there are no "exceptional circumstances" alleged by Cressman in this case claiming anyone has threatened to ticket, arrest, or prosecute him, nor is there

[2] *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

a "clear showing that an injunction" would be necessary in this case against any of the DPS Defendants. It is undisputed that Cressman currently does not have a standard license plate on any of his vehicles, and therefore, no State Defendant is currently compelling him to "not speak about a message he finds objectionable." It is questionable whether or not Cressman would ever have any kind of constitutional claim against the State Defendants, since even before the State issued the new license plates with the Native-American, he was already purchasing specialty tags for the vehicles he owned. Such conduct demonstrates that Cressman really does not wish to protest the state's "do not obscure" statute ***as applied*** to him, but rather (more likely) he wants to protest the State's choice in selecting the Native-American, covertly arguing complete separation of church and state.[see App. Appx., p. 118, ln. 14-20 (where he testified that the State should not put anything religious in nature on their official state tags); see also, Supp. Appx., p. 363, ln. 6-8; p. 364, ln. 6-11]. However, since the Constitution really does not have a complete separation of church and state clause in it, and since recent Supreme Court precedent appears to not support such a notion (see *Van Orden v. Perry*, 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005)), Cressman had to draft his Complaint so as to survive a motion to dismiss, alleging enough facts to survive a Rule 12(b)(6) motion claiming First Amendment "free speech" and "free exercise" clause rights, but omitting critical facts

as to his actual beliefs (*i.e.*, separation of church and state) to establish ***standing*** to bring such a claim.

There is a distinction between "pleading" standing and "proving" standing. If standing was determined solely on the facts pled in the Complaint, then it would be a rule based on knowledge of the law and creative pleading alone, irrespective of the truth or evidence presented at Trial. In this case, Cressman may have **pled** a compelled speech claim, but he has failed to **prove** the challenged statute has been (or is "***imminently***" likely to be) "***as applied***" to him.

Article III of the U.S. Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "Article III standing ... enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1*, 11*, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (U.S. 2014)). To establish Article III standing, a plaintiff must show: (1) "**an injury in fact** – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or **imminent**, **not *conjectural* or *hypothetical***"; (2) "a causal connection between the injury and the conduct complained of - the injury has to be fairly ... traceable to the challenged action of the

defendant, and not ... the result of the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (omissions in original) (internal quotation marks and citations omitted) (emphasis added). *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 127 S. Ct. 2553, 168 L. Ed. 2d 424 (2007) ("A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.").

The undisputed evidence at the Trial proved that Cressman drove at least two vehicles with the disputed license plate image covered for at least six months in 2009, and that during that time he was never stopped, or threatened with a ticket, arrest, or prosecution for violating 47 O.S. § 1113. Since 2009, he has always obtained specialty license plates for all his vehicles, and currently owns no vehicle with the standard license plate with the Native-American that he finds objectionable. [App. Appx., p. 119, ln. 12-25; p. 120, ln. 1-12; p. 121, ln. 7-9; p. 129, ln. 7-10; p. 131, ln. 21-25; pp. 132-133; pp. 134, ln. 21-25, pp. 135, ln. 1-8; Supp. Appx., p. 348, ln. 15-18]. Furthermore, Cressman did not testify at the Trial that he was in fact going to obtain the disputed license plate for one of his vehicles in the future, and there was absolutely no evidence presented at the trial that any state official, with actual

statutory authority to enforce the statute, would actually enforce it against him. Cressman, has not in the past, is not currently, and does not anticipate in the future, being threatened with a ticket or prosecuted for violating the "do not obscure" a vehicle license plate statute. 47 O.S. § 1113. Therefore, he has not suffered an "**injury in fact**" that is "concrete," "particularized," "actual" **or "imminent**." *Lujan*, 504 U.S. 560-61. His claim is merely ***"conjectural***" and ***"hypothetical***." *Id*.

At trial, he failed to prove that his ***"as applied"*** claim was "concrete, particularized, actual, and/or imminent." *Lujan,* 504 U.S. at 560-61. His claim was basically, that ***if*** he had a vehicle with the new standard license plate and ***if*** he were stopped, ticketed, arrested or prosecuted for covering the Native-American, such would violate his compelled speech rights under the First Amendment. The evidence at trial proved that Cressman's claim was merely **"conjectural"** and **"hypothetical"** and that there was no **"imminent" threat** of the statute being **applied to** him. The District Court's finding that Cressman had sufficiently pled standing based on a creditable threat of prosecution was not fully explained by the Court. [See App. Appx., pp. 221-222 (relying on a creditable threat of prosecution theory pursuant to *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003))]. But in *Ward*, the plaintiff had been previously arrested, with the charges being dismissed. The plaintiff in *Ward*

alleged that he planned to protest the animal rights issue again, and that he feared he would be arrested, again.

If the District Court was relying on Cressman's alleged conversation with Paula Allen, a Drivers License Hearing Officer with no official authority or knowledge of the license plate statutes, and her alleged conversation with an OHP official (which Cressman did not hear), then such would still be too tenuous of a thread to establish constitutional standing under Article III, because no law enforcement officer or state official with ***actual authority*** to threatened Cressman has ever **threatened him** with prosecution, and Cressman does not **currently** own any vehicles with the Native-American image. [App. Appx., p. 121, ln. 7-24 p. 123, ln. 4-10; p. 149-153 (where Allen testified that she had never had authority to determine policy for DPS); Supp. Appx., p. 332, ln. 22-25 (he did not hear the person Allen spoke to)]. Furthermore, Cressman did not testify at the trial that he was actually planning to obtain a license plate with the Native-American on it in the future, or that he actually intended to cover the Native-American. He only testified that he had a "desire" to obtain a standard tag, and a "desire" to cover the Native-American. There was absolutely no evidence at the trial that any one has (or would in the future) enforce § 1113 against Cressman, **if** he did do what he want he wanted to do. Cressman could have called the Commissioner or the Chief of the OHP (or summoned someone else in the OHP)

to the stand and ask them under oath, "Would I get a ticket and then be prosecuted **if** I own a vehicle with a standard license plate, and **if** I did cover the Native-American?" It was his burden of proof at trial to prove his case, and he failed to meet that burden.

Furthermore, this Court should question Cressman's true motives in wanting to cover the Native-American, because he testified that if the state provided a "plain white tag" to those with a religious objection to the Native-American, such would be unacceptable because it would create a "stigma." [App. Appx., p. 116, ln. 28-25; pp. 117-118 (where he cannot adequately articulate the difference in a *stigma* between the State providing a 'plain white plate' and him covering up the image)]. That testimony undermines his claim of forced compelled speech, and when combined with his belief in a complete separation of church and state [App. Appx., p. 118, ln. 14-20], illustrates his true objection to the Native-American. Why else would a "plain white tag" not be acceptable to him? And, why else was Cressman ordering specialty tags even before the new Native-American tag was issued, but suddenly when the new design is issued, now (he says) he wants a standard tag or a specialty tag at the same cost? Irrespective of that obvious inconsistent testimony from Cressman himself, this Court should hold that he **failed to prove** at trial that he had ***standing*** to sue the DPS Defendants because no one with ***actual statutory authority***

had in the past, currently is, or will (***imminently***) in the future enforce 47 O.S. § 1113 against him.

IV. THE DISTRICT COURT'S DECISION AFTER HEARING THE EVIDENCE AT TRIAL TO GRANT THE DPS DEFENDANTS JUDGMENT WAS CORRECT

The District Court held that Cressman failed to meet his burden of proof because:

> "a reasonable observer would not be likely to conclude that an identifiable message was conveyed simply from the inclusion of the image on the standard state license plate. Without further research, it is simply a depiction of an Indian shooting a bow and arrow. A reasonable observer, even one living in Oklahoma, would not be likely to know of Allen [sic] Houser's intentions or thoughts in creating the 'Sacred Rain Arrow' statue or the legend behind it, even if the observer assumed the image was an exact replica of the statue. The average Oklahoman or other reasonable observer is unlikely to have seen the specific background information plaintiff submitted or to have made the connection to the plate that plaintiff relies on." [App. Appx., p. 227].

A. Cressman's Arguments on Appeal

Cressman claims that *Wooley v. Maynard*, 430 U.S. 705 (1977) is clearly applicable to his compelled speech claim in this case. However, even assuming he had ***standing*** under Article III or the District Court had ***jurisdiction*** under *Ex Parte Young*, or if the TIA did not apply to his case, *Wooley* is clearly distinguishable. In *Wooley*, the plaintiffs were arguing that the words "Live Free or Die" was speech contrary to their religious beliefs. There was little doubt that their actions of covering

those **words** were in **protest** to that clear message ***intended*** by the State of New Hampshire. However, in this case, Cressman wants to cover an image of a Native-American that has absolutely no message associated with it except that Oklahoma is "Native America." Cressman admits that in choosing the Native-American he does not believe that the State intend to establish a religion, nor does he deny that the State's purpose in adding the Native-American was to market the state as "Native America", and he has testified that he is not wanting to "protest" the State's message. [App. Appx., pp. 109-111; p. 111, ln. 24-16 ("this isn't about wanting other people to know that, it's about I don't want to express that message that is in the image. I don't want to do it."); p. 112, ln. 5-6 ("I have no objection to the phrase 'Native America' on our plate."); p. 113 (he does not believe the State is trying to establish a religion)]. In fact, he cannot point to one shred of evidence that either the Task Force or the State's Legislature **intended** to require anyone displaying the standard license plate on their vehicles to adopt either the artist's inspiration who drew the Native-American, or Allan Houser's legend in creating the 'Sacred Rain Arrow' statue. [App. Appx., p. 115, ln. 7-19 (Cressman claims that the Native-American is the same as the statue that sits outside the Gilcrease Museum in Tulsa, Oklahoma, but admits that it is not identical)]. Despite not being an exact replica of the 'Sacred Rain Arrow' statue, and admitting that it is an artist's "**adaptation**" of that statute [App.

Appx., p. 95, ln. 10-12], he claims that because of the *context* in which it is used, and the clear evidence that the image is "based on" that statue, he does not want it on his own personal property.

B. The Right to Speak vs. the Right not to Speak

While the "right to speak" (*i.e.*, the free speech doctrine), and "the right to not speak" (*i.e.*, the compelled speech doctrine) may be two sides of the same coin, both finding their origin in the First Amendment, they are definitely two distinct views of the *free speech* clause. However, each should be viewed through the prism of logic and reason that developed the law taking into account the facts and the *context* in which each case was decided. See *Texas v. Johnson*, 491 U.S. 397, 405, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) ("for First Amendment purposes, we have considered the *context* in which it occurred"). Cressman's argument commingles those two views of this important freedom ignoring logic, reason, and the *context* in which the amalgamated law was created.

The modern view of the **compelled speech doctrine** finds its origin in *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), where the Court held that a school board could not compel its students to participate in the salute and pledge of allegiance under threat of a criminal penalty.

In doing so, the Court discussed (in very board terms) the *free speech* clause and the rights contained under the First Amendment[3]:

> Symbolism is a primitive but effective way to communicate ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the alter and shrine, the clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones. Associated with many of these symbols are appropriate gestures of acceptance or respect; a salute, a bowed or bared head, a bended knee. A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. *Id*. at 632-33.

In *U. S. v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968), O'Brien argued that the federal criminal statute he was charged with ("mutilation of Selective Service card") violated his right to symbolically speak, claiming the purpose of the statute was to suppress his freedom of speech. The Court rejected his, ***as applied*** to him argument, that his actions were "symbolic speech" of demonstrating against the war and the draft, because the Court could not "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.* at 376. The Court

[3] From an historical perspective, it could be argued that the Court was reminded of what was going on in Nazi Germany at the time.

also rejected his second argument that Congress' purpose in enacting that statute was to suppress speech, because the Court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." "Motives or purposes are a hazardous matter." *Id*. at 387.

Then in 1974 the Court decided *Spence v. State of Wash.*, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974), where a student was challenging a state law making it a crime to display the U.S. flag with any "superimposed figures, symbols, or other extraneous material." The flag was displayed out the student's apartment window with a large peace symbol fashioned on it with removable tape as a **protest** of the invasion of Cambodia and the killings at Kent State. The Court found that, ***as applied*** in that *context,* the statute impermissibly infringed the students protected expression.

> To be sure, [the student] did not choose to articulate his views through printed or spoken words. It is therefore necessary to determine whether his activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. O'Brien*,[] 'we cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea.' But the nature of [the student's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that he engaged in a form of protected expression. *Id*. at 409.

Wooley[4] was decided in 1977, and then the Court held in *Texas v. Johnson*, 491 U.S. 397 (1989), that a state statute making it a crime to desecrate the U.S. flag was *overly broad* in violation of the First Amendment. Johnson was charged with burning a U.S. flag outside the Republican Convention in Dallas, Texas. The Court viewed the flag burning as "pregnant with expressive content" and that "[t]he expressive, overly political nature of this conduct was both intentional and overwhelmingly apparent." *Id*. at 405-06. The Court concluded that Johnson's flag burning conduct was "sufficiently imbued with elements of communication, to implicate the First Amendment." *Id*. at 406. In doing so, the court announced what has become known as the *Spence-Johnson* test. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, the Court will ask whether "[a]n intent to convey ***a particularized message*** was present, and [whether] the likelyhood was **great** that the message would be understood by those who viewed it." [emphasis added]. *Id*. at 404.

It was the *Spence-Johnson* test that the District Court apparently used to decide this case, and which Cressman criticizes on appeal. Cressman argues that the *Spence-Johnson* test was either completely eliminated (or at least modified) by *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 115 S. Ct. 2338,

[4] Discussed *supra.,* 430 U.S. 705 (1977).

132 L. Ed. 2d 487 (1995). However, in making such an argument, Cressman fails to take into consideration the ***context*** in which *Hurley* was decided, or **who's message** was at issue.

The facts and circumstances of *Hurley* are unique, to say the least. In that case, a private group had for a number of years organized an Irish-American parade down the streets of Boston on St. Patrick's Day for the expressed purpose of celebrating their Irish heritage. Another private group wanted to join in that private parade. That group wanted to express their message of gay, lesbian, and bisexual rights in the same parade. The gay, lesbian and bisexual rights group claimed that a Massachusetts' "public accommodation law" **required** the private organizers of the parade to include them in their parade despite the organizers desire to exclude them. The organizers of the parade claimed that to force them to include, **a group who wanted to impart a message that they did not wish to convey**, violated their First Amendment **compelled speech rights**. In that unique *context*, the Court held that:

> Since all speech inherently involves choices of what to say and what not to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'. Although the State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information, outside that context it may not compel affirmance of a belief which the speaker disagrees. Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject perhaps, to

> the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.(internal quotations and citations omitted). *Id.* at 573-74.

Hurley stands for the proposition that the First Amendment prohibits the government from requiring one **private citizen** to speak about (or adopt) another **private citizen's** viewpoint on a subject that they want to remain silent about. It was a decision based on logic and reason in the unique *context* of the "public accommodation law" forcing one citizen to adopt another private citizen's point of view in a private parade. Even though not expressly stated, the Court was not going to render a decision that would require a District Court (in the future) to issue an order allowing the KKK to march in a private parade sponsored by the Black Panthers based on a "public accommodation law."

The ***context*** of Cressman's claim revolve around a state issued vehicle license plate.[5] License plates identify the owners of a vehicle and assist law enforcement in

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[5] Although the facts of the cases differ slightly, it is notable that four U.S. courts of appeals have found **specialty license** plates to be private speech. See *Roach v. Stouffer*, 560 F.3d 860, 868 (8th Cir. 2009); *Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 864 (7th Cir. 2008); *Arizona Life Coal. Inc. v. Stanton*, 515 F.3d 956, 968 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm'n of Virginia Dep't of Motor Vehicles*, 288 F.3d 610, 621 (4th Cir. 2002). By contrast, more recently, the U.S. Court of Appeals for the Fourth Circuit held that license plates are a hybrid of government and private speech, and the U.S.

enforcing traffic and criminal laws. They also serve as a means of identification for the general public when reporting traffic violations or criminal activity to local authorities. Even though Cressman argues that he only wants to cover the Native-American and not any of the identifying numbers or letters, such conduct could still hinder law enforcement and the public from readily recognizing the vehicle's state of origin, especially if Cressman were to travel outside the state. The Native-American, not only serves as a marketing tool for the state, it also serves as an easy identification tool for law enforcement and the public, making the vehicle's state of origin easily identifiable. See *State v. Ceasar*, 2010 OK CR 15, 237 P.3d 792, 794 (Driving is a privilege, not a right).

West Virginia State Board v. Barnette and *Hurley v. Irish-American Gay, Lesbian and Bi-sexual Group of Boston* are pure "**compelled speech**" cases . Whereas, *United States v. O'Brien*, *Spence v. State of Washington*, and *Texas v. Johnson* are ***symbolic*** "**protest free speech**" cases. *Wooley v. Maynard*, even though argued as a "compelled speech" case, actually contains claims and arguments from both "compelled speech" cases, and ***symbolic*** "protest free speech" cases. The main distinction between the court's "compelled speech" cases and its' ***symbolic*** "protest

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Court of Appeals for the Sixth Circuit also determined them to be **government speech**. See *Am. Civil Liberties Union of Tennessee v. Bredesen*, 441 F.3d 370, 379-80 (6th Cir. 2006); *Planned Parenthood Of S. Carolina Inc. v. Rose*, 361 F.3d 786, 799 (4th Cir. 2004).

free speech" cases, is the court's ***focus*** of **who's message** is at issue, and the **type of message** at issue. The ***focus*** of the court's "protest free speech" cases was on whether "**the <u>person</u>** being charged with a crime" was sufficiently attempting to communicate **<u>their</u>** message in **protest** of some ***ideology***.[6] The ***focus*** of the Court's "compelled speech" cases is whether **"the <u>government</u>"** is attempting to force a person to adhere to, or speak about, an ***ideological message*** which that person objects. The distinction between *Wooley* and Cressman's claim in this case, is the **clear** "***ideological message***" that the State of New Hampshire had ***<u>intended</u>*** it's citizens to adopt in *Wooley*. New Hampshire wanted its citizens to communicate **<u>the state's</u> *ideological message*** (*i.e.*, State motto) – "Live Free, or Die" – by placing it on their vehicles. See *Wooley*, 430 U.S. at 717("where the **<u>state's</u> interest** is to disseminate an ***ideology***, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message"). The plaintiffs in *Wooley* were "protesting" the **<u>state's</u> *ideological message*** claiming they did not want it on their vehicle; whereas Cressman, in this case, has testified that by covering the Native-American on the state's standard license plate he does not wish to "protest anything" to anyone else. [App. Appx., p.

[6] ***ideology*** - the body of doctrine, myth, belief, etc., that guides an individual, social movement, institution, class, or large group. *Dictionary.com*

109, ln. 20-25; p. 110, ln. 1-18]. Simply stated, Cressman's **real objection** is that he does not want the Native-American on his vehicle for "religious reasons", *i.e.*, because it is a religion not his own and he would "rather say nothing." [App. Appx., p. 96, ln. 10-13]. That is a pure "*free exercise*" claim, though pled, not appealed in this case. That "real objection" is supported further by his objection to the State providing him with a "plain white tag" and his belief that such would create a "stigma" (in his mind) if it was only provided to those claiming a religious objection. [App. Appx., p. 116, ln. 18-25; p. 117, ln. 1-25]. See also *Wooley*, *supra*. at fn. 10. Such argument severely undermines Cressman's claim in this case.

Furthermore, there was absolutely no evidence at trial that the State of Oklahoma was attempting to force those who choose to display the state's official license plates on their personal vehicles, to adhere to any "***ideological message***" except that Oklahoma is "Native America", which is not "ideological" in nature, but rather "historical" in nature[7], which Cressman has testified that he does object. [App. Appx., p. 122, ln. 12-15 (***Q***. You don't have any objection to the state of Oklahoma trying to market itself as Native America, do you? ***A***. I do not.")]. Therefore, *Wooley* is not applicable to the facts and claims that Cressman raises in this case, and the District Court was correct in its decision to deny him an injunction against the DPS

[7] Oklahoma literally means "land of the red man." see, http://en.wikipedia.org/wiki/ List_of_U.S._state_nicknames.

Defendants. However, even it the Native-American does qualify as speech on some level, it would qualify as "government speech." With the creation of the **government speech doctrine** (created by the Court after *Wooley*), this Court need not even conduct any free-speech analysis.

C. The Native American Image on the State's Standard License Plate is not Speech, but if it is Speech, it is Government Speech, Exempt from Free Speech Analysis

A Government's own speech is exempt from First Amendment free-speech scrutiny even when it has the effect of limiting private speech. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896 (2005). Beginning in 1991, the Supreme Court began laying the groundwork for what has evolved into the **government speech doctrine**. *Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991). In *Rust*, the Supreme Court upheld federal regulations which limited the ability of recipients of federal funds from engaging in abortion-related activities. In doing so, the Court held that the government was exercising the authority it possesses to subsidize family-planning services that will lead to conception and child birth, and declined to promote or encourage abortion. The Court stated:

> The government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In so doing, the

> government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. *Id.* at 193.

The Court held that this is not a case of the government suppressing a dangerous idea, but of a prohibition on a project grantee or its employees from engaging in activities outside the project's scope. The Court explained that the government does not unconstitutionally discriminate on the basis of viewpoint when it chooses to fund a program dedicated to advancing certain permissible goals and thereby discouraging alternative goals. *Id.* at 194. The Court reiterated its holding in *Rust* in the case of *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) wherein it held:

> We recognize that when the government appropriates public funds to promote a particular policy of its own, **[the government] is entitled to say what it wishes** ... When the government disperses public funds to private entities to convey a governmental message, **it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted** by the grantee. *Id*. at 833. (Emphasis added).

The Court further defined **government speech** in *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005). In that case the Court considered whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. The Court stated that the "... dispositive question [was] whether the generic advertising at issue is the government's own speech and, therefore, is exempt from First Amendment scrutiny." *Id*. at 553. The Beef Promotion and

Research Act of 1985 established a federal policy of promoting and marketing the consumption of beef using funds raised by an assessment on cattle sales and importation. The statute directed the Secretary of Agriculture to implement a policy promoting beef products. The Court held that when the government sets the overall message to be communicated and approves every word that is disseminated, "... it is not precluded from relying on the government speech doctrine merely because it solicits assistance from non-government sources in developing specific messages." *Id*. at 562. "Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech." *Id.* at 562. The Court explained that the compelled funding of government speech is subject to democratic accountability and citizens who are dissatisfied may remove the legislators who enacted the underlying programs at the next election. *Id*. at 563.

Of course a government may not use the government speech doctrine to establish a religion. See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). But just because the government speaks about a religion, does not automatically implicate the First Amendment's prohibition under the Establishment Clause. In *Van Orden v. Perry*, 545 U.S. 677 (2005), a Texas resident brought a § 1983 action against several state officials, seeking a declaration that the display of a monument inscribed with the Ten Commandments on the

grounds of the Texas State Capitol park area violated the First Amendment's Establishment Clause. He was asking the Court to issue an injunction requiring the State officials to remove the monument. After discussing the "two-faces" the Court's precedent seemed to demonstrate and it's own conflicted application of the ***Lemon*** test *(Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)), the Court held that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capital grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Id.* at 685. The Court held that because "Texas has treated its Capital grounds monuments as representing the several strands in the State's political and legal history... The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government." *Id.* at 691-92. The Court refused to hold that the questioned monument violated the Establishment Clause of the First Amendment. *Id*. at 692.

In *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009), a religious organization brought a § 1983 action alleging that its free speech rights were violated by the city's denial of its request to erect a monument in a park in which a Ten Commandments monument already stood. The Court held that "although a park is a

traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause." *Id.* at 464. Continuing the Court held that:

> If petitioners were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. **A government entity has the right to 'speak for itself.' [I]t is entitled to say what it wishes, and to select the views that it wants to express. Indeed, it is not easy to imagine how government could function if it lacked this freedom**. If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed. A government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message. (Emphasis added and citations omitted). *Id.* at 467-69.

The Court did state that "[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation. Permanent monuments displayed on public property typically represent government speech." *Id.* at 470.

> Governments have long used monuments to speak to the public. Since ancient times, kings, emperors, and other rulers have erected statues of themselves to remind their subjects of their authority and power. Triumphal arches, columns, and other monuments have been built to

> commemorate military victories and sacrifices and other events of civic importance. A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for the construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure. *Id*. at 470.

In concluding that the plaintiff's First Amendment free-speech rights were not infringed upon by the city, the court held that: "The meaning conveyed by a monument is generally not a simple one like 'Beef. It's What's for Dinner.' Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." (citations omitted). *Id.* at 474.

> **Contrary to respondent's apparent belief, it frequently is not possible to identify a single message that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor.** By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument's donor or creator. Indeed, when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument's significance. By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument. (Emphasis added and citations omitted). *Id.* at 476-77.

The same reasoning is true in this case. The Task Force, and ultimately the Legislature, that selected the Native-American for the state's official standard license

plate, did not intend to establish a religion, or to adopt Allan Houser's inspiration or even endorse a Native-American legend, nor even to adopt the artist's inspiration who drew the Native-American for the new design. They instead merely wanted to celebrate and market the state's rich Native-American culture and history. "Contrary to [Cressman's] apparent belief, it frequently is not possible to identify a single message that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor." *Pleasant Grove*, *supra*. at 476. Therefore, like the statement "Beef. It's What's for Dinner," in *Johanns*, or the Ten Commandments monuments in *Pleasant Grove* and *Van Orden*, celebrating those communities' history and culture. The Native-American on Oklahoma's official standard license plate does not implicate the First Amendment free-speech clause because it is **government speech** celebrating Oklahoma's rich Native-American history and culture. Such **government speech** is exempt from free-speech analysis, because the State "has the right to speak for itself" and "to select the views that it wants to express." *Pleasant Grove*, 555 U.S. at 467-69. Furthermore, the State "may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted." *Rosenberger, supra*., at 833. The challenged statute in this case could be interpreted (though it was probably not enacted for that purpose)

as protecting the State's message it wishes to portray on it's official license plates that "OKLAHOMA is NATIVE AMERICA." While it maybe true that Cressman "may challenge compelled support of private speech, ... [he has] no First Amendment right not to fund government speech." *Johanns*, *supra*. at 563 (emphasis added). Cressman's only real remedy is at the voting poll. As the Court explained in *Johanns*, "compelled funding of government speech is subject to democratic accountability and citizens who are dissatisfied may remove the legislators who enacted the underlying programs at the next election." *Johanns*, *supra*. at 563. Clearly the placement of the Native-American on the State's official standard license plate can be "best viewed as a form of **government speech** and is therefore not subject to scrutiny under the Free Speech Clause." *Pleasant Grove*, *supra*. at 464. (emphasis added). This Court need only determine that the Native-American on the state's official license plate is **government speech** and that the state statute in question in this case is not unconstitutional ***as applied*** to Cressmen because it serves an important governmental purpose, *i.e.*, establishing vehicle ownership and identification. Clearly the State can "speak for itself" (*Pleasant Grove*) and even "take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted". (*Rosenberger*, *supra*. at 833). Cressman's actions (or desired actions) of covering the Native-American would frustrate that legitimate and important state police power.

CONCLUSION

In reality, Cressman wants to assert his "*free exercise* rights" in this case, which he has abandoned. And even though he claims to not be challenging the State's standard license plate under the "*establishment clause*," his testimony and his actions do not support that denial. He does not have ***standing*** in this case, and the District Court's decision to deny him an injunction to stop the enforcement of 47 O.S. § 1113, was correct. This Court should expressly hold that the Native-American is **government speech** celebrating Oklahoma's Native American history, not subject to free speech analysis, and deny Cressman his requested relief.

NECESSITY OF ORAL ARGUMENT

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 12,659 words.

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

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

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CERTIFICATE OF SERVICE

I certify that on this 30th day of May 2014, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and transmitted the original and seven copies of the foregoing to the Clerk of the Court via U.S. Mail, postage prepaid and a copy to be served by U.S. Mail, postage prepaid on:

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