

No. 12-6151

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

KEITH CRESSMAN,

Plaintiff-Appellant,

v.

MICHAEL C. THOMPSON, et. al.,

Defendants-Appellees.

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

APPELLANT'S OPENING BRIEF

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Oral Argument is Requested

SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this matter under 28 U.S.C. §§ 1331, 1343, and 1367. Appellant Keith Cressman (Cressman) pursues claims for the violation of his free speech, due process, and free exercise of religion rights under the First and Fourteenth Amendments to the United States Constitution and 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988, as well as his rights under the Oklahoma Religious Freedom Act (51 Okl.St. § 251 *et. al.*).

This Court has appellate jurisdiction under 28 U.S.C. §§ 1291 and 1292 because the district court issued a final decision on May 16, 2012, simultaneously denying Cressman’s motion for preliminary injunction and granting Defendants’ motion to dismiss, dismissing this case in its entirety. From that Order, on June 13, 2012, Cressman filed a notice of appeal.

STATEMENT OF ISSUES PRESENTED

1. Identifying “Speech” for First Amendment Purposes: The Oklahoma license plate contains an image of a sculpture that depicts a Native American shooting his arrow into the heavens. Does this image constitute “speech” for First Amendment purposes?

2. The Compelled Speech Doctrine: The First Amendment prohibits the government from compelling individuals to speak non-commercial messages against their will unless doing so would be narrowly tailored to serve a compelling government interest. Do Oklahoma's statutes that compel Cressman to display an expressive image on his car's license plate violate his First Amendment rights?

STATEMENT OF CASE

I. NATURE OF CASE

This case involves an as-applied challenge to two Oklahoma statutes that compel Cressman to display an objectionable image on his car's license plate. By forcing Cressman to display this image, these statutes compel Cressman to speak when he would rather be silent.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On November 2, 2011, Cressman filed a verified complaint and a motion for a preliminary injunction against two officials with the Oklahoma Department of Public Safety. (Aplt. Appx. at 10; Aplt. Appx. at 30). These pleadings alleged violations of Cressman's constitutional (First and Fourteenth Amendments) and statutory (the Oklahoma Religious Freedom Act) rights against compelled speech because Oklahoma officials force Cressman to display a particular, objectionable image on his car's license plate. (*Id.*).¹

In response, the Oklahoma Public Safety officials filed a motion to dismiss,

¹ Cressman sued one official in his official capacity and the other official in her official and individual capacities. (Aplt. Appx. at 11-12, ¶¶ 9-10).

claiming insufficient service, lack of standing, and qualified immunity. (Aplt. Appx. at 82-83). The motion primarily challenged Cressman's standing to bring suit, questioning whether he named the proper officials in the action. (Aplt. Appx. at 108-12). Along with their motion to dismiss, the Public Safety officials also filed a response opposing Cressman's motion for preliminary injunction. (Aplt. Appx. at 122). This response did not dispute any of Cressman's factual allegations; they rested on legal contentions. (Aplt. Appx. at 136-148).

Though Cressman believed he had sued the proper parties, he amended his complaint on February 16, 2012 to add three members of the Oklahoma Tax Commission and the Chief of the Oklahoma Highway Patrol. (Aplt. Appx. at 184, 186-87, ¶¶ 9-10). Thereafter, the Public Safety officials filed another motion to dismiss on the same basis as before. (Aplt. Appx. at 208-09). And the Tax Commission officials likewise filed a motion to dismiss. (Aplt. Appx. at 240-42).

Following the briefing on these two motions, the district court denied the preliminary injunction motion and granted Defendants' motions to dismiss in the same Order, dated May 16, 2012, adopting a rationale that was not briefed by any party. (Aplt. Appx. at 339; Attachment 1).² The district court ruled that Oklahoma officials were not compelling Cressman to speak because the image on Oklahoma's license plate does not communicate a message and did not constitute "speech" under the First Amendment. (Aplt. Appx. at 343-355, 354 n.22; Attachment 1, at 5-16, 16 n.22). On the same day as

² The district court did not hold an evidentiary hearing on the preliminary injunction motion because this motion did not involve any disputed facts. *See* (Aplt. Appx. at 240 n.3; Attachment 1, at 2 n.3).

this Order, the district court also entered final judgment. (Aplt. Appx. at 356). Cressman filed his notice of appeal on June 13, 2012. (Aplt. Appx. at 357).

STATEMENT OF FACTS

Oklahoma's Standard License Plate and Cressman

Oklahoma requires all residents to display a standard license plate, a specialty license plate, or a personalized license plate from their non-commercial vehicles. (Aplt. Appx. at 189, ¶ 17; Aplt. Appx. at 34, ¶ 7). In 2007, Oklahoma decided to redesign its standard license plate. (Aplt. Appx. at 159-161). Under Oklahoma's new design, which went into effect in January 2009, the standard Oklahoma license plate would contain an image of a Native American shooting an arrow towards the sky. (Aplt. Appx. at 189, ¶ 19; Aplt. Appx. at 34, ¶ 8; Aplt. Appx. at 51).

In placing this particular image on the standard license plate, Oklahoma intended to communicate a message understandable to others who see the standard plate. (Aplt. Appx. at 190, ¶ 20; Aplt. Appx. at 35, ¶ 9; Aplt. Appx. at 159-161). Specifically, those who see the standard plate will understand that it communicates ideas and messages about Oklahoma, about Native American culture and practices, and about Oklahoma's connection to these Native American practices. (Aplt. Appx. at 190, ¶ 20; Aplt. Appx. at 35, ¶ 9; Aplt. Appx. at 159-161).

Prior to the launch, in August of 2008, Cressman learned about the newly redesigned plate adopted by Oklahoma. (Aplt. Appx. at 189, ¶ 18; Aplt. Appx. at 34, ¶ 8). Upon viewing the image on the new license plate, Cressman discerned that the image

communicated certain beliefs. (Aplt. Appx. at 190, ¶ 21; Aplt. Appx. at 35, ¶ 10). In particular, Cressman ascertained that the image on the Oklahoma plate depicted a sculpture called “Sacred Rain Arrow” by Allan Houser. (Aplt. Appx. at 190, ¶ 22; Aplt. Appx. at 35, ¶ 11).

The “Sacred Rain Arrow” sculpture depicts an Apache warrior who was selected in a time of drought to shoot a sacred rain arrow into the heavens to bring his people’s prayers for rain to the “spirit world” so that they would get rain. (Aplt. Appx. at 190, ¶ 23; Aplt. Appx. at 35, ¶ 12). Houser based the idea on a Native American legend. (Aplt. Appx. at 190, ¶ 24; Aplt. Appx. at 35, ¶ 13). According to this legend, a warrior was sent to a medicine man during an unrelenting drought. (Aplt. Appx. at 190, ¶ 24; Aplt. Appx. at 35, ¶ 13). Having convinced the medicine man to bless his bow and arrows, the warrior knelt down and propelled his arrows into the sky to curry favor with the “rain god.” (Aplt. Appx. at 190, ¶ 24; Aplt. Appx. at 35, ¶ 13).

Houser’s sculpture, and the corresponding image on the Oklahoma’s license plate, retell this story of a Native American who believes in sacred objects, multiple deities, the divinity of nature, and the ability of humans to use sacred objects to convince gods to alter nature. (Aplt. Appx. at 191, ¶ 25; Aplt. Appx. at 35-36, ¶ 14). The underlying message promotes pantheism, panentheism, polytheism, and/or animism and promotes particular Native Americans’ social and cultural practices that accept these ideas. (Aplt. Appx. at 191, ¶ 25; Aplt. Appx. at 35-36, ¶ 14).

Cressman only wants to accept, endorse, and display images from his car that he finds religiously acceptable and that he chooses. (Aplt. Appx. at 191, ¶ 27; Aplt. Appx. at

36, ¶ 16). He wishes to remain silent with respect to images, messages, and practices that he cannot endorse or accept. (Aplt. Appx. at 191, ¶ 27; Aplt. Appx. at 36, ¶ 16).³ Consequently, Cressman cannot display the license plate with the “Sacred Rain Arrow” image from his car without violating his sincerely-held religious beliefs. (Aplt. Appx. at 191, ¶ 26; Aplt. Appx. at 36, ¶ 15).

Cressman’s Efforts to Avoid Displaying the Image on the Oklahoma License Plate

Aside from having a standard license plate, Cressman’s only option is to place a personalized license plate or a specialty license plate on his car. (Aplt. Appx. at 191-92, ¶ 28; Aplt. Appx. at 36, ¶ 17). 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. (Aplt. Appx. at 191-92, ¶ 28; Aplt. Appx. at 36, ¶ 17). Cressman later chose a cheaper specialty license plate, but this plate still cost more than a standard license plate, \$18.00 initially and \$16.50 for renewals. (Aplt. Appx. at 191-92, ¶ 28; Aplt. Appx. at 36, ¶ 17). Desiring to discontinue the brunt of an extra expense just to avoid expressing an objectionable message, Cressman considered covering up the “Sacred Rain Arrow” image on the standard license plate (without covering up anything else on the license plate). (Aplt. Appx. at 192, ¶ 29;

³ In addition to this general aspiration, Cressman does not wish to communicate approval of pantheism, panentheism, henotheism, polytheism, or animism. (Aplt. Appx. at 189, ¶ 16; Aplt. Appx. at 34, ¶ 6). He adheres to historic Christian beliefs, including monotheism and the concept of the Trinity. (Aplt. Appx. at 188, ¶ 12; Aplt. Appx. at 33, ¶ 2). Cressman’s conscience does not allow him to honor or acknowledge anyone or anything as God other than the one true God. (Aplt. Appx. at 188-89, ¶¶ 13-15; Aplt. Appx. at 33-34, ¶¶ 3-5). To do so would cause him to violate his sincerely-held beliefs. (Aplt. Appx. at 191, ¶ 26; Aplt. Appx. at 36, Aff., ¶ 15).

Aplt. Appx. at 37, ¶ 18; Aplt. Appx. at 52).

To determine whether he would be allowed to do this, Cressman went to the Oklahoma Tax Commission's Motor Vehicle Division in Oklahoma City on December 7, 2009. (Aplt. Appx. at 192, ¶ 30; Aplt. Appx. at 37, ¶ 19). There, he spoke with a clerk and explained his objections to the image on the license plate. (Aplt. Appx. at 192, ¶ 30; Aplt. Appx. at 37, ¶ 19). He hoped he could cover up the image of the sculpture on the license plate, provided he did not cover up anything else. (Aplt. Appx. at 192, ¶ 30; Aplt. Appx. at 37, ¶ 19). But the clerk advised Cressman that this action would subject him to a penalty. (Aplt. Appx. at 192, ¶ 30; Aplt. Appx. at 37, ¶ 19). The clerk then directed Cressman to the "enforcing officer" at the Department of Public Safety for further elaboration of the ramifications. (Aplt. Appx. at 192, ¶ 30; Aplt. Appx. at 37, ¶ 19).

Abiding by this directive, Cressman went to the Oklahoma Department of Public Safety and spoke with Paula Allen, the official in charge of interpreting policies for the Department of Public Safety. (Aplt. Appx. at 192, ¶ 31; Aplt. Appx. at 37, ¶ 20). Cressman explained his concerns and reiterated his request to cover the image of the sculpture on a standard license plate. (Aplt. Appx. at 193, ¶ 32; Aplt. Appx. at 37-38, ¶ 21). He also inquired about the existence of any law prohibiting this idea. (Aplt. Appx. at 193, ¶ 32; Aplt. Appx. at 37-38, ¶ 21). Allen warned Cressman that he could not cover up the objectionable image on his standard license plate without violating 47 Okl.St. Ann. § 4-107. (Aplt. Appx. at 193, ¶ 32; Aplt. Appx. at 38, ¶ 22).

To confirm this conclusion, Allen called an official with the Oklahoma Highway Patrol, who promptly verified that Cressman would be prosecuted for covering up the

image on a license plate. (Aplt. Appx. at 193, ¶ 34; Aplt. Appx. at 38, ¶ 23). Allen then reiterated this policy to Cressman. (Aplt. Appx. at 193, ¶ 34; Aplt. Appx. at 38, ¶ 24).

Oklahoma's Statutes that Compel Cressman to Speak

After this conversation with Allen, Cressman went home and reviewed 47 Okl.St. Ann. § 4-107. (Aplt. Appx. at 194, ¶ 37; Aplt. Appx. at 39, ¶ 26).⁴ 47 Okl.St. Ann. § 4-107 also works in conjunction with 47 Okl.St. Ann. § 1113. (Aplt. Appx. at 194-95, ¶ 39; Aplt. Appx. at 39, ¶ 26). From his review of these statutes, Cressman drew the same

⁴ 47 Okl.St. Ann. § 4-107(a) reads as follows:

Any person or persons who shall destroy, remove, cover, alter or deface, or cause to be destroyed, removed, covered, altered or defaced, the engine number or other distinguishing number of any vehicle in this state, without first giving notice of such act to the Oklahoma Tax Commission...shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the State Penitentiary for a term of not less than one (1) year nor more than five (5) years.

(Aplt. Appx. at 194, ¶ 37; Aplt. Appx. at 43).

47 Okl.St. Ann. § 4-107(d) reads as follows:

A person who removes a license plate from a vehicle or affixes to a vehicle a license plate not authorized by law for use on said vehicle with intent to conceal or misrepresent the identity of the vehicle or its owner shall, upon conviction, be guilty of a misdemeanor.

(Aplt. Appx. at 194, ¶ 38; Aplt. Appx. at 43).

47 Okl.St. Ann. § 1113 reads as follows:

...the Oklahoma Tax Commission or Corporation Commission, as applicable, shall assign to the vehicle described in the application a distinctive number, and issue to the owner of the vehicle a certificate of registration, one license plate and a yearly decal....The license plate shall be securely attached to the rear of the vehicle, except truck-tractor plates which shall be attached to the front of the vehicle....The license plate, decal and all letters and numbers shall be clearly visible at all times. The operation of a vehicle in this state, regardless of where such vehicle is registered, upon which the license plate is covered, overlaid or otherwise screened with any material, whether such material be clear, translucent, tinted or opaque, shall be a violation of this paragraph.

(Aplt. Appx. at 194-95, ¶ 39; Aplt. Appx. at 45-46).

conclusion as Allen did --- that he could not cover up the image of the “Sacred Rain Arrow” sculpture on a standard license plate without violating Oklahoma’s statutes and subjecting himself to criminal sanctions. (Aplt. Appx. at 195, ¶ 42; Aplt. Appx. at 39, ¶ 27).⁵

The only way Cressman can comply with state law and avoid speaking an objectionable message is to pay extra fees for a specialty license plate. (Aplt. Appx. at 195, ¶ 42; Aplt. Appx. at 39, ¶ 27). This prospect is intolerable for Cressman because he does not want to incur an additional fee to avoid saying something he does not want to say. (Aplt. Appx. at 195-96, ¶ 43; Aplt. Appx. at 39, ¶ 28).

Confirmation of Application of Oklahoma’s Statutes

Hoping to avoid unnecessary litigation, Cressman sent a letter, through counsel, to various Oklahoma state officials on March 10, 2010. (Aplt. Appx. at 196, ¶ 44; Aplt. Appx. at 39-40, ¶ 29; Aplt. Appx. at 53-57). This letter requested that the state officials let Cressman cover up the objectionable image on a standard license plate and to stop violating Cressman’s rights. (Aplt. Appx. at 196, ¶ 45; Aplt. Appx. at 40, ¶ 30; Aplt. Appx. at 53-57). The letter sought relief within three weeks; to date, no one from Oklahoma has responded to this plea. (Aplt. Appx. at 196, ¶¶ 45-46; Aplt. Appx. at 40, ¶ 31; Aplt. Appx. at 53-57).

Effect of Oklahoma’s Statutes on Cressman

Due to the steadfast stance of Oklahoma officials, Cressman must pay extra

⁵ The violation of 47 Okl.St. Ann. § 4-107 or 47 Okl.St. Ann. § 1113 constitutes a criminal offense that can lead to fines and/or incarceration. (Aplt. Appx. at 194-95, ¶ 38, 40-41).

money for a specialty plate, subject himself to criminal penalties, or violate his own conscience. (Aplt. Appx. at 197, ¶¶ 48-49; Aplt. Appx. at 40-41, ¶¶ 32-35). None of these options sits well with Cressman. (Aplt. Appx. at 197, ¶ 49; Aplt. Appx. at 41, ¶ 35). He does not want to violate the law and subject himself to fines and prison. (Aplt. Appx. at 197, ¶¶ 50-51; Aplt. Appx. at 41, ¶ 36). Neither does Cressman want to continue to pay extra money to remain silent. (Aplt. Appx. at 197-98, ¶ 52; Aplt. Appx. at 41, ¶ 36). Cressman objects to the notion that he must incur additional expense to safeguard his own beliefs. (Aplt. Appx. at 197-98, ¶ 52; Aplt. Appx. at 41, ¶ 36). He only wants to be treated like other citizens in Oklahoma who have the ability to display a license plate at a standard cost without expressing a message contrary to their earnest beliefs. (Aplt. Appx. at 197-98, ¶ 52; Aplt. Appx. at 41, ¶ 36).

SUMMARY OF ARGUMENT

Although the government may promote ideas using its own voice, it may not force private citizens to serve as an unwilling mouthpiece. The State of Oklahoma places this undue burden on Cressman -- requiring him to display the “Sacred Rain Arrow” image on his car’s license plate against his will. As enunciated by the Supreme Court in *Wooley v. Maynard*, 430 U.S. 705, (1977), a state cannot legitimately make a citizen communicate a message through a car’s license plate. *Id.* at 717. A license plate serves as a “mobile billboard” for the one in the vehicle. *Id.* at 715.

The “Sacred Rain Arrow” image on Oklahoma’s license plate is no exception to this constitutional principle. Because this image plainly communicates a message,

Cressman has the First Amendment right to choose whether to communicate this particular message on his property. He has the right to remain silent and to avoid objectionable messages. To remedy this forced speech dilemma, Cressman respectfully asks this Court to reverse the court below, re-instate his claims, and enjoin two Oklahoma statutes, allowing Cressman to regain his “right to refrain from speaking” that is so fundamental to “the broader concept of ‘individual freedom of mind.’” *Id.* at 714.

STANDARD OF REVIEW

This appeal is from the lower court’s Order granting a Rule 12(b)(6) motion to dismiss and denying Cressman’s motion for preliminary injunction.

A 12(b)(6) motion is reviewed *de novo*. *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). To overcome a motion to dismiss, Cressman need allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). And, in assessing plausibility, this Court is to construe the complaint in the light most favorable to Cressman, accepting all factual allegations as true. *Ellis ex rel. Estate of Ellis v. Ogden City*, 589 F.3d 1099, 1102 (10th Cir. 2009).

As for a preliminary injunction ruling, legal conclusions are reviewed *de novo*. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). When free speech is implicated (as it is here), factual conclusions also require an independent examination of the whole record, without deference to the trial court. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984). For such examination, this Court reviews constitutional facts and ultimate conclusions regarding a First Amendment challenge *de novo*. *Weinbaum v.*

City of Las Cruces, 541 F.3d 1017, 1029 (10th Cir. 2008).

A preliminary injunction contemplates consideration of four factors: 1) likelihood of success on the merits, 2) irreparable injury, 3) the absence of substantial harm to others, and 4) a positive impact of a preliminary injunction on the public interest. *Att'y Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776 (10th Cir. 2009). Because this appeal turns on constitutional facts, an injunction should issue as long as Cressman can demonstrate a likelihood of success on the merits of his First Amendment claim. *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Although this Court subjects some preliminary injunction motions to heightened scrutiny --- if they alter the *status quo*, are mandatory, or afford the movant all relief attainable at trial, *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 975-76 (10th Cir. 2004) --- Cressman does not seek a disfavored injunction.⁶ Rather, he seeks to maintain the *status quo* by prohibiting two statutes from being applied to him.

ARGUMENT

Cressman seeks relief from this Court in two respects: 1) to reverse the district court's ruling on the motion to dismiss, thereby reinstating his claims and 2) to reverse the district court's ruling on the preliminary injunction, directing that two Oklahoma statutes be enjoined as applied to him.

⁶ The district court endorsed this conclusion in its discussion of the standard for reviewing a motion for preliminary injunction. (Aplt. Appx. at 345 n.11; Attachment 1, at 7 n.11).

In evaluating these requests, this Court would typically make use of two discrete analyses since motions to dismiss assess the complaint and motions for preliminary injunctions assess evidence outside the complaint. But, Oklahoma officials have not offered any countervailing evidence regarding any of the factual allegations supporting Cressman's preliminary injunction motion. The district court correctly accepted all of Cressman's allegations as true, dispensing with a preliminary injunction hearing. (Aplt. Appx. at 340 n.3; Attachment 1, at 2 n.3). *Accord Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *Walter E. Heller & Co., Inc. v. Cox*, 379 F.Supp. 299, 301-02 (S.D.N.Y. 1974); *Corning Glass Works v. Lady Cornella, Inc.*, 305 F.Supp. 1229, 1231 (E.D. Mich. 1969). Provided that Cressman can establish his legal entitlement to relief, the record sets up well for this Court to instruct the district court to grant Cressman's preliminary injunction motion.

Cressman is able to establish his legal claim because Oklahoma statutes are coercing him to display an undesirable image on his car's license plate, in violation of the First Amendment's compelled speech doctrine. By proving this claim, Cressman will not only (I) demonstrate a valid legal claim entitling him to relief; he will also (II) demonstrate his entitlement to a preliminary injunction protecting his First Amendment freedoms.

I. CRESSMAN STATES A VALID FIRST AMENDMENT CLAIM

Oklahoma is compelling Cressman to speak, *i.e.* display an expressive, objectionable image on his car's license plate, when Cressman would prefer to remain silent.

“The Supreme Court has long held that the government may not compel the speech of private actors.” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1283 (10th Cir. 2004). Acknowledging this touchstone, this Court has given three factors due consideration: whether the compelled speech is private, whether the speech is compelled, and whether the speaker’s interest in remaining silent outweighs the government’s interest in compelling speech. *See Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1230-32 (10th Cir. 2009); *Phelan v. Laramie County Community College Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000). In addition to these considerations, there is another relevant inquiry applicable to all speech claims: whether the activity at stake involves “speech” protected under the First Amendment.

Cressman demonstrates the requisite elements in showing the following: A) the “Sacred Rain Arrow” image constitutes protected speech, B) the “Sacred Rain Arrow” image conveys a message on Oklahoma’s license plate, C) the “Sacred Rain Arrow” image is private – not government – speech on Oklahoma’s license plate, D) Oklahoma statutes compel Cressman to convey message he would rather not convey on his license plate, and E) compelling Cressman to speak is not narrowly tailored to serve any compelling state interest.

A. The “Sacred Rain Arrow” Image Constitutes Speech Protected by the First Amendment

To prevail on his compelled speech claim, Cressman must initially establish that the expression being compelled (the “Sacred Rain Arrow” image) falls under the ambit of the First Amendment. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 283 (5th

Cir. 2001) (explaining that, for compelled speech claim, “[t]he threshold question, then, is whether the expression at issue is entitled to protection under the First Amendment.”). Cressman clears this hurdle. The district court went too far in demanding that the “Sacred Rain Arrow” image present a particularized, universally understood, ideological position to qualify as protected speech. Aplt. Appx. at 347-54; Attachment 1, at 9-16). The “Sacred Rain Arrow” image - whether considered pure speech or an expressive symbol - is expression worthy of constitutional protection.

1. Images are pure speech

Though the lower court consistently referred to the “Sacred Rain Arrow” image as an image (Aplt. Appx. at 339, 341-42, 347-350, 352-54; Attachment 1, at 1, 3-4, 9-12, 14-16), the court analyzed the depiction as symbolic speech. (Aplt. Appx. at 347-54; Attachment 1, at 9-16). Images and symbols are not the same. While an image is a visual representation of something, a symbol stands for - or suggests - something else by reason of relationship.⁷ Due to the expressive qualities associated with images, they are recognized as pure speech. *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); *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

⁷ This is how the words “image” and “symbol” are currently defined in Merriam-Webster dictionary, <http://www.Merriam-Webster.com>.

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 evaluated much 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 as expressive conduct).

The district court's oversight is significant. Had the court analyzed the image as pure speech, the outcome below would have likely been different. *See Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (distinguishing expressive activity from pure speech). The court rejected Oklahoma's defense on the merits, concluding that the "Sacred Rain Arrow" image on a license plate is private – not government - speech. (Aplt. Appx. at 344-46 n.12; Attachment 1, at 7-8 n. 12). The court tripped on whether the speech was truly speech. But despite this misstep, the district court still could have dealt with the matter properly -- except for its insistence that the image be particularized and ideological for protection (coupled with the court's refusal to acknowledge the image as particularized and ideological).

2. Even if considered symbolic speech, the "Sacred Rain Arrow" image is expressive and deserving of protection

To garner protection under the Free Speech clause, an activity or item must be "sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Because expressive symbols and conduct can be capable of various interpretations, yet contain communicative elements, the Eleventh Circuit has concluded 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.” *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (emphasis in original). Under this test, an object constitutes speech if a reasonable observer understands that it is expressive, even if not all observers agree on what it expresses. See *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 66 (2006) (suggesting “reasonable observer” standard for expressive conduct claims). After erroneously pegging the “Sacred Rain Arrow” image as symbolic speech, the district court erred further in demanding that Cressman prove a particularized and ideological message.

a. image need not be particularized for protection

In *Spence*, the Supreme Court analyzed a symbol consisting of an upside down American flag and a peace sign. Finding this symbol sufficiently expressive, the Court emphasized that there was an “intent to convey a particularized message...and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.” *Id.* at 410-11. Following this decision, some courts took this language to be a test. See, e.g., *IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 391-92 (4th Cir. 1993) (analyzing expressive component of “ugly woman” contest).

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 reasoned 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.*

In the face of *Hurley’s* repudiation of the “particularized message” test, some courts have persisted in utilizing *Spence* rhetoric as a test. *E.g. Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2nd Cir. 2003). The district court is the latest to do so, forcing Cressman to pinpoint one particularized message --- a religious message --- communicated by the “Sacred Rain Arrow” image. *See* (Aplt. Appx. at 350; Attachment 1, at 12) (“...the court still would not find that the observer would likely view the driver of a car with a standard Oklahoma license plate to be telling him anything about the driver’s religious beliefs.”); (Aplt. Appx. at 352; Attachment 1, at 14) (“A reasonable viewer simply could not glean a religious message from the Native American image on the license plate or impute such to the driver.”); (Aplt. Appx. at 353; Attachment 1, at 15) (“Though the Native American image conceivably sends a message on some level, it is not a particularized message that viewers will likely understand.”) (emphasis added).

The U.S. Court of Appeals for the Third Circuit, in *Troster v. Pennsylvania State Dep’t. of Corrections*, rightly concluded that *Hurley* did away with the particularized message test. 65 F.3d 1086, 1090 (3d. Cir. 1995). The Fourth Circuit, in *Holloman*, referred to *Hurley’s* effort as “liberalizing” the test, and similarly jettisoned the particularized message requirement. 370 F.3d at 1270. This Court – assuming that it finds the analysis of symbolic speech necessary - ought to join the Third and Eleventh Circuits in adhering to *Hurley* and dropping the particularized message requirement.

Specifically, the test pronounced by the Eleventh Circuit in *Holloman* (symbolic speech need only be perceived as some sort of message) would be appropriate for 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); *Nurre v. Whitehead*, 580 F.3d 1087, 1093 (9th Cir. 2009) (purely instrumental music); *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”). Moreover, the *Holloman* test tracks how humans communicate. We regularly use symbols and words to simultaneously convey multiple, imprecise, and/or non-cognitive messages.⁸ Frequently, audiences are 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,

⁸ 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). Indeed, the D.C. Circuit recently prohibited an attempt to compel the display of anti-smoking images because these images were used to “shame and repulse” or “denigrate.” *R.J. Reynolds Tobacco Co. v. Food and Drug Admin.*, --- F.3d ----, 2012 WL 3632003, at *3 (D.C. Cir. 2012). The underlying premises of this decision are that ambiguous images convey a message and that speakers cannot be compelled to display ambiguous images they object to.

perhaps amusing to others. To still others, it probably means nothing at all.”). Ambiguous works with differing messages 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 a vast amount of valuable communication.⁹

b. image need not be ideological for protection

The district court further held Cressman responsible for proving that the message has an ideological bent. This burden was imposed in a round-about way. The district court recognized that First Amendment protection does not depend on the ideological character of the speech. (Aplt. Appx. at 348-49 n.15; Attachment 1, at 10-11 n.15). But then, in the same breath, the court postulated that Cressman would have to show this anyway because he asserted an ideological - specifically, a religious - concern about the message. (Aplt. Appx. at 348-49 n.15; Attachment 1, at 10-11 n.15).

The court below presupposes what appears to be a two-track system for judging expressive conduct. If the claim merely concerns an objection, a particular message must be shown, but if the claim relates to ideology, then, the ideology of that message must also be identified. The court is mistaken on both counts. And, in placing this ideological requirement on Cressman, the court goes against clear precedent in this circuit.

In *Axson-Flynn v. Johnson*, this Court entertained a compelled speech claim brought by Axson-Flynn, a Mormon, who was pressured to utter words in an acting class

⁹ Nevertheless, the “Sacred Rain Arrow” image - being a reproduced image of representational art - does in fact convey a particularized message. *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).

that she considered religiously offensive. 356 F.3d 1277, 1281 (10th Cir. 2004). This Court, in finding a viable free speech claim, concluded that the forced speech need not be ideological to substantiate a claim. *Id.* at 1284 n.4. Notwithstanding her ideologically-motivated objections, all Axson-Flynn had to show was that she was “uncomfortable” with the words she was compelled to say in a play. *Id.* at 1290. Likewise, all Cressman need show is that he does not wish to communicate the compelled message.¹⁰

B. The “Sacred Rain Arrow” Image Conveys a Message on Oklahoma’s License Plate

The “Sacred Rain Arrow” image constitutes speech, and the communication does not come to an 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 often supply messages promoting state “history” or “pride” on license plates. *Wooley*, 430 U.S. at 716. Oklahoma officials admit 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....” (Aplt. Appx. at 159). Private individuals also use license plates because they want to convey messages. *See Choose Life Illinois, Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008)

¹⁰ Yet, as discussed *infra*, pp. 33-37, the “Sacred Rain Arrow” image is in fact ideological in nature.

“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 expressive nature of the “Sacred Rain Arrow” image on a license plate can hardly be denied.

The district court overlooked this important factor by analogizing this case to *Troster*. (Aplt. Appx. at 351-52; Attachment 1, at 13-14).¹¹ But the analogy breaks down because *Troster* involves a factually different context. In *Troster*, a government employee attempted to preliminarily enjoin a rule requiring him to display an American flag patch on his uniform. 65 F.3d at 1092. The Third Circuit found no compelled speech because “observers would [not] likely understand the patch or the wearer to be telling them anything about the wearers’ beliefs.” *Id.* Consequently, 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.*

¹¹ According to the district court, *Troster* relied on “the prevalence of an image when considering its expressive or communicative effect.” (Aplt. Appx. at 350-51; Attachment 1, at 12-13). As a result of this interpretation, the district court denied the expressive effect of the “Sacred Rain Arrow” image because it appears on every standard Oklahoma license plate. *See* (Aplt. Appx. at 350-52; Attachment 1, at 12-14) (emphasizing that “[h]undreds of thousands of Oklahoma residents drive vehicles with license tags that display the Native American image.”). Whether this interpretation of *Troster* is right or wrong, the prevalence of a message cannot determine its expressive nature, at least not in the license plate context, in light of *Wooley*. In *Wooley*, the Supreme Court found compelled speech (and thus speech) even though every person in New Hampshire had to display the New Hampshire license plate. By emphasizing the prevalence of the “Sacred Rain Arrow” image, the district court followed the *Wooley* dissent instead of the *Wooley* majority. *See Wooley*, 430 U.S. at 720 (Rehnquist, J., dissenting) (arguing that “[t]he State has not forced appellees to ‘say’ anything” because it “simply required that **all** noncommercial automobiles bear license tags with the state motto...” (emphasis added)).

But while *Troster* involved a uniform, this case concerns a license plate. This distinction is critical because license plates generally convey messages and act as billboards; uniforms do not. The background assumptions associated with license plates are more conducive to expression than those assumptions associated with clothing. Thus, speech is invariably found in the license plate setting, but rarely found with clothing and uniforms. Compare *Roach v. Stouffer*, 560 F.3d 860, 863-68 (8th Cir. 2009) (reviewing license plate cases) with *Brandt v. Board of Educ. of City of Chicago*, 480 F.3d 460, 465-66 (7th Cir. 2007) (discussing clothing cases).

The *Byrne v. Rutledge* decision is instructive. There, the Second Circuit discerned 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 only difference between the expression in *Byrne* and the expression in *Troster* is the context of that expression (uniforms vs. license plates). Context dictates the result.

C. The Speech on Oklahoma’s License Plate is Private, not Government, Expression

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*, 235 F.3d at 1247. Therefore, the “crucial question” is whether Oklahoma “is compelling others to espouse...certain ideas and beliefs.” *Id.* Here, there is little doubt that Oklahoma officials are compelling Cressman to speak by forcing him to

display an image on his private property, that is, on the license plate on his own car. Messages on standard license plates represent private speech. *See Wooley*, 430 U.S. at 707-08.

In *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 argued below that *Wooley* has probably been overruled. The suggestion is dubious. The Supreme Court has never indicated this, 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).¹² The district court determined

¹² There is some on-going dispute regarding specialty license plates, with one appellate court considering it government speech. *See Roach*, 560 F.3d at 868 (discussing case law in various circuits).

appropriately that *Wooley* remains good law. (Aplt. Appx. at 345-46 n.12; Attachment 1, at 7-8 n.12).

D. Oklahoma is Compelling Cressman to Speak Objectionable Message When He Would Rather Remain Silent

A compelled speech claim contemplates the government taking some action to compel 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, 719-21 (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. *See* (Aplt. Appx. at 195, ¶¶ 40-41). Hence, Cressman cannot avoid the requirement of license plate, nor cover up anything on the license plate,

without subjecting himself to criminal penalty.¹³

This conclusion is further confirmed by the words and actions of Oklahoma officials. Before this litigation began, two state officials informed Cressman that he could not avoid the “Sacred Rain Arrow” image or cover it up on his license plate without violating state statutes. (Aplt. Appx. at 192-93, ¶¶ 30-33).¹⁴ One official confirmed this conclusion with the Oklahoma Highway Patrol. (Aplt. Appx. at 193, ¶¶ 34-35). When Cressman wrote to high ranking Oklahoma officials and requested permission to avoid displaying the image on his license plate, no one responded to Cressman’s plea. (Aplt. Appx. at 196-97, ¶¶ 44-47). And, after Cressman initiated this lawsuit, Oklahoma defended its right to punish Cressman for not complying with statutes. (Aplt. Appx. at 122-149). As the district court observed, all these actions confirm the language of Oklahoma’s statutes and prove that Cressman cannot avoid displaying the “Sacred Rain Arrow” image on his license plate without suffering penalty. (Aplt. Appx. at 344 and n.9; Attachment 1, at 6 and n.9).¹⁵ This penalty adversely affects Cressman in two respects: 1)

¹³ 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).

¹⁴ One of these officials invoked 47 Okl. St. § 4-107 rather than 47 Okl.St. Ann. § 1113 as the basis for preventing Cressman from covering his license plate. (Aplt. Appx. at 192-93, ¶¶ 30-33). But no matter which statute is referenced, Oklahoma officials still communicated Oklahoma’s intent to prohibit Cressman from covering his license plate.

¹⁵ Although Oklahoma allows drivers to display a personalized or vanity on their car, this option does not address Cressman’s concern because a personalized or vanity plate costs more than a standard license plate. (Aplt. Appx. at 189, 191-92, 197-98, ¶¶ 17, 28, 52). This difference equates to Cressman being effectively taxed and penalized for exercising his First Amendment right to remain silent, triggering a compelled speech concern.

his desire to be silent and 2) his desire to avoid displaying an objectionable message.

1. Cressman wants to remain silent

Cressman does not want to display the “Sacred Rain Arrow” image from his vehicle because he “only wants to accept, endorse, and display images from his car that he finds religiously acceptable and that he chooses.” (Aplt. Appx. at 191, ¶ 27). Cressman need not explain his objection any further to demonstrate compelled speech because the First Amendment protects Cressman’s right to remain 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 compel speech even if it happens to be ideologically agreeable. *Axson-Flynn*, 356 F.3d at 1284 n.4. Cressman only needs 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.*

“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 personalized license plate from his car. No matter which option Cressman takes, he is penalized.

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.”).

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 whenever it requires a person to speak unwillingly, no matter what message the government foists on that person and no matter why that person objects to the compelled speech.¹⁶ By forcing an unwilling person to speak any message, the government is treating that person as a puppet, undermining that person’s 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

¹⁶ This is not to say the government may never compel speech. The government may compel all sorts of speech if it can justify doing so in a given context. For example, in the commercial context, the government may compel “purely factual and uncontroversial information” unless it is “unjustified or unduly burdensome.” *Zauderer v. Office of Disciplinary Counsel of Sup.Ct. of Ohio*, 471 U.S. 626, 651 (1985). But the First Amendment requires the government to justify compelling speech.

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 – as suffered by Cressman - relates to being forced to speak at all. *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.”).

2. Cressman objects to “Sacred Rain Arrow” image

Although Cressman need not pinpoint any ideological concern with the “Sacred Rain Arrow” image, he can certainly do so. The image is in fact ideological in nature.

Refusing to acknowledge the source of “Sacred Rain Arrow” image, the district court calls it a “Native American” image, as though it is some generic depiction of a Native American. (Aplt. Appx. at 341 n.1; Attachment 1, at 3 n.7). The image reflects otherwise, showing a young Apache warrior shooting an arrow into the sky, which, indisputably, was carried out to draw attention of a “rain god” and thereby generate rain. Specifically, the “Sacred Rain Arrow” image expresses certain Native American cultural and religious practices that promote pantheism, panentheism, polytheism, and/or animism, and these ideas conflict with Cressman’s own religious beliefs. (Aplt. Appx. at 188-89, 191, ¶¶ 11-16, 25-26).

The Oklahoma license plate communicates such messages because it depicts a sculpture by Allan Houser entitled “Sacred Rain Arrow” showing a Native American shooting an arrow into the clouds. (Aplt. Appx. at 189-91, ¶¶ 19-25). The name of the sculpture is “Sacred Rain Arrow,” confirming the Native American’s purpose for

shooting the arrow -- as well as the religious nature of his act.¹⁷ These details, along with the common background knowledge that many Native Americans engaged in animistic religious and cultural practices, make it quite reasonable for Cressman to pick up on objectionable practices in the “Sacred Rain Arrow” image.

The district court discounted Cressman’s concerns on the basis 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.” (Aplt. Appx. at 350; Attachment 1, at 12). But like any work of visual art, the “Sacred Rain Arrow” image sends its message by visual cues and through the implicit knowledge of the viewer. Even though the image does not say “this is a Native American engaging in a religious/cultural act,” the image still communicates this very idea.

Obviously, the dress and appearance reveals that the gentleman shooting the arrow must be a Native American. And he is not hunting or conducting target practice. The image shows him shooting into the clouds, *i.e.* the heavens. (Aplt. Appx. at 51). Given the background perception about Native Americans --- that many believed in and practiced animistic activities --- an individual like Cressman could reasonably interpret an image of a Native American shooting an arrow into the clouds as depicting acts associated with pantheism, panentheism, polytheism, and/or animism. And this interpretation derives solely from the plate itself. It does not depend on viewers

¹⁷ The district court was wrong to find no speech “even assuming a reasonable observer knew of the image’s genesis.” (Aplt. Appx. at 350; Attachment 1, at 12).

connecting the image to Allan Houser's "Sacred Rain Arrow" sculpture.¹⁸

And yet, it would not be difficult for Oklahoma citizens to perceive a reference to Houser's sculpture. The image on Oklahoma's plate certainly depicts a sculpture. (Aplt. Appx. at 51). And Houser's "Sacred Rain Arrow" sculpture is well known in Oklahoma, especially since Oklahoma news outlets reported Oklahoma's selection of this sculpture for its license plate. *See, e.g.,* <http://newsok.com/new-oklahoma-license-plateunveiled/article/3277784> (last visited June 28, 2012); http://www.tulsaworld.com/news/article.aspx?articleID20080802_16_A1_spancl454650 (last visited June 28, 2012). There is no reason to ignore such important background when assessing an image's meaning. It was only because Mary Beth Tinker wore her black armband at a particular time and into a particular local and national context that her armband communicated any message. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969). *See also Brown v. Louisiana*, 383 U.S. 131 (1966) (sit-in by African American students in "whites only" library communicated opposition to segregation); *Stromberg v. California*, 283 U.S. 359 (1931) (flying red flag communicated support for communism). Likewise, Oklahoma displayed its image in a particular local context fraught with information connecting this image to Houser's sculpture. While residents elsewhere may lack the knowledge needed to perceive the source of the "Sacred Rain Arrow" image, an Oklahoma resident like Cressman has the

¹⁸ Houser's sculpture does not explicitly identify the shot arrow as sacred or identify why the arrow is shot. Nor does the sculpture explicitly indicate the man is a Native American or that the man is shooting at clouds. Notwithstanding, the sculpture uses cues to communicate that the man is a Native American engaged in a ritualistic exercise.

context necessary to understand it.

This context, combined with the visual cues in the “Sacred Rain Arrow” image, makes it reasonable for Cressman to perceive the depiction of pantheistic, panentheistic, polytheistic, and/or animistic practices on Oklahoma’s license plate. Thus, even under the strictest interpretation of the compelled speech doctrine, one where Cressman must identify an ideological objection to an ideological message, Cressman can still pinpoint compelled speech.¹⁹

E. Compelling Cressman to Speak is not Narrowly Tailored to Serve any Compelling State Interest

This Court must also determine if Oklahoma officials’ decision to compel speech is narrowly tailored to serve a compelling state interest. These officials cannot begin to meet their difficult burden here.

The government can compel “school sponsored” speech in a classroom setting as long as it is reasonably related to legitimate pedagogical concerns. *Axson-Flynn*, 356 F.3d at 1290; *Corder*, 566 F.3d at 1231. And the government can compel commercial speech so long as it is “purely factual and uncontroversial” and doing so is not “unduly burdensome.” *Zauderer*, 471 U.S. at 651. But for Oklahoma officials to compel speech in this context 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. at 797-98 (subjecting

¹⁹ The compulsion violates Cressman’s free exercise of religion, which is subsumed by the compelled speech claim.

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.’”).²⁰

Oklahoma officials cannot meet this standard in light of *Wooley v. Maynard*. Just like this situation, *Wooley* confronted a state statute imposing criminal penalties on someone for partially covering his license plate. 430 U.S. at 707-08. The state tried to justify 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 this identification interest because the citizen in *Wooley* only wanted to cover the state motto on his license plate without covering any other identifying number or letter on his license plate. *Id.* As a result, 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 need to promote an ideology “cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.” *Id.* at 717.

It follows, then, that Oklahoma officials cannot rely on identification or promotion to compel Cressman to speak. Although Oklahoma needs to identify vehicles, Cressman does

²⁰ As the *Riley* Court explained, laws that compel speech “necessarily” alter the content of a person’s speech and are therefore content-based laws. *Riley*, 487 U.S. at 795. *See also Greater Baltimore Center for Pregnancy Concerns, Inc.*, 683 F.3d at 552 (noting that “laws that compel speech are normally considered ‘content-based regulation[s] of speech’ and therefore are subject to strict scrutiny.”).

not seek to cover any letters or numbers on his license plate, just the objectionable image. (Aplt. Appx. at 192, ¶ 29; Aplt. Appx. at 37, ¶ 18; Aplt. Appx. at 52). Therefore, like the citizen in *Wooley*, Cressman does not impede Oklahoma officials' ability to identify vehicles. And though Oklahoma may benefit from promoting certain messages, it may not use Cressman to disseminate those messages. No matter whether Oklahoma seeks to convey a message about religion, history, tourism, Oklahoma, or Native Americans, Oklahoma's need to disseminate such messages does not outweigh Cressman's interest.²¹

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

II. CRESSMAN IS ENTITLED TO PRELIMINARY INJUNCTION

Having established the violation of his constitutional rights, Cressman can easily prove the other factors justifying a preliminary injunction.

A. Cressman Will Likely Succeed on Merits of his First Amendment Claim

As shown, Cressman has stated a valid compelled speech claim under the First Amendment, and because there is no factual dispute in the record, Cressman has proven the likely success of his claims. Thereby, Cressman also satisfies the other elements for a

²¹ Before the district court, Oklahoma officials also tried to justify its compelled speech as necessary to produce revenue. (Aplt. Appx. at 140-41). Cressman, though, does not object to paying for the standard license plate. He merely wants to cover the objectionable image on his license plate.

preliminary injunction. *See Johnson*, 194 F.3d at 1163 (upon showing a likelihood of success on the merits in the First Amendment context, other factors are satisfied).

B. Cressman is Suffering Irreparable Harm

Cressman can establish irreparable harm since, without the requested injunction, he is kept from exercising his constitutional right to remain silent by the threat of penalty. (Aplt. Appx. at 197-98, ¶¶ 48-53; Aplt. Appx. at 40-41, ¶¶ 33-36). The loss of his First Amendment right is thus actual and imminent, and such a loss constitutes irreparable injury. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005).

C. Injunction Will Not Harm Oklahoma

Cressman only requests injunctive relief to force Oklahoma officials to comply with the First Amendment. Cressman is not seeking to facially enjoin the challenged statutes; he only seeks as-applied relief. This narrow injunction can cause no harm to Oklahoma since “Oklahoma does not have an interest in enforcing a law that is likely constitutionally infirm [as applied to Cressman].” *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010).

D. Public Interest Favors Cressman’s Requested Injunction

While Oklahoma has no legitimate interest in enforcing its statutes in unconstitutional ways, the public has a strong interest in protecting constitutional rights. This principle applies with particular force to First Amendment freedoms since free speech and freedom of the mind are so important to our society and our democracy. *See Pacific Frontier*, 414 F.3d at 1237 (“Vindicating First Amendment freedoms is clearly in

the public interest.”). *Accord Awad v. Ziriya*, 670 F.3d 1111, 1132 (10th Cir. 2012). In this matter, the public interest is best served by this Court issuing an injunction that protects Cressman’s freedom to choose when to speak and when not to speak.

STATEMENT REGARDING ORAL ARGUMENT

Cressman respectfully requests oral argument. On this appeal, this Court has the opportunity to determine the scope of the compelled speech doctrine. Due to the importance and novelty of the issues at hand, as well as the fundamental rights at stake, this appeal is well-deserving of careful consideration. Oral argument will aid this consideration.

CONCLUSION

Oklahoma’s statutes compel Cressman to display an expressive image from his car’s license plate even though Cressman objects to doing so. This Court cannot allow Oklahoma to compel speech in this way just because it involves an image rather than words. Compelled images threaten the rights of conscience and freedom of mind just as much as compelled words. Because Oklahoma’s statutes effectively force Cressman to speak a message against his will and strike at the heart of the compelled speech doctrine, Cressman asks this Court to reverse the district court, re-instate his claims, and grant his motion to preliminarily enjoin Oklahoma’s statutes as-applied to him.

Respectfully submitted this 30th day of August, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Plaintiff-Appellant has been produced using proportionately spaced 14-point Times New Roman typeface. According to the “word count” feature in the Microsoft Word 2010 software, this brief contains 10,189 words.

/s/ Nathan W. Kellum
Nathan W. Kellum

CERTIFICATE OF SERVICE

I certify that on August 30, 2012, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users, and by delivering a true and correct copy to a third-party commercial carrier for delivery within two (2) business days to their address of record.

/s/ Nathan W. Kellum

ATTACHMENTS

Preliminary Injunction Ruling

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

KEITH CRESSMAN,)	
)	
Plaintiff,)	
vs.)	NO. CIV-11-1290-HE
)	
MICHAEL C. THOMPSON, in his official)	
capacity as Secretary of State and Security)	
and as the Commissioner of Public)	
Safety for the State of Oklahoma, <i>et al.</i> ,)	
)	
Defendants.)	

ORDER

Plaintiff Keith Cressman filed this action pursuant to 42 U.S.C. §§ 1983, 1988 and 51 Okla. Stat. § 251 against Michael C. Thompson, Secretary of Safety and Security and the Commissioner of Public Safety for the State of Oklahoma, Paula Allen, a licensing services hearing officer with the Oklahoma Department of Public Safety, Thomas Kemp Jr., Jerry Johnson, and Dawn Cash, Chairman, Vice-Chairmen and Secretary-member of the Oklahoma Tax Commission, and Kerry Pettingill, Chief of the Oklahoma Highway Patrol.¹ Plaintiff challenges Oklahoma statutes which prohibit him from covering the image on the standard passenger vehicle license plate of a Native American shooting an arrow, which he alleges to be repugnant to his religious beliefs.

In his first amended complaint plaintiff alleges defendants have deprived him of his

¹*Allen was sued in both her individual and official capacities. The other defendants were sued only in their official capacities.*

First² and Fourteenth Amendment rights and his rights under the Oklahoma Religious Freedom Act (“RFA”). He seeks injunctive and declaratory relief and nominal damages. Along with his complaint, plaintiff filed a motion seeking a preliminary injunction. Defendants have filed motions to dismiss, arguing, among other things, that plaintiff lacks standing and that the complaint fails to state a claim upon which relief can be granted. The various motions are fully briefed and at issue. The court concludes plaintiff’s motion should be denied, the motion of defendants Thompson and Allen granted, and the case dismissed.³

Background

In this action plaintiff is challenging 47 Okla. Stat. § 4-107⁴ and §1113⁵ because, he

²*Plaintiff asserts a claim for compelled speech in violation of the First Amendment and a claim under the Free Exercise Clause of the First Amendment.*

³*Plaintiff did not request an evidentiary hearing and the court concludes one is not required as defendants’ response to plaintiff’s motion creates no genuine issue as to a material fact. Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997); see Reynolds and Reynolds Co. v. Eaves, 1998 WL 339465, at *3 (10th Cir. 1998) (unpublished) (“Reynolds has failed to cite any Tenth Circuit authority that requires a district court to hold an evidentiary hearing prior to granting or denying a preliminary injunction motion.”).*

⁴*The statute provides in pertinent part that : “A person who removes a license plate from a vehicle or affixes to a vehicle a license plate not authorized by law for use on said vehicle with intent to conceal or misrepresent the identity of the vehicle or its owner shall, upon conviction, be guilty of a misdemeanor.” 47 Okla. Stat. § 4-107(d).*

⁵*Section 1113 provides further regulations regarding vehicle license plates, including a requirement that: “The license plate, decal and all letters and numbers shall be clearly visible at all times. The operation of a vehicle in this state, regardless of where such vehicle is registered, upon which the license plate is covered, overlaid or otherwise screened with any material, whether such material be clear, translucent, tinted or opaque, shall be a violation of this paragraph.” 47 Okla. Stat. §1113(2).*

asserts, they “compel him to speak and express on his car license plate a message that is contrary to his sincerely held religious beliefs.” Plaintiff’s brief, p. 1.⁶ His claims are based on the alleged effects of an image he alleges to be based on a sculpture called “Sacred Rain Arrow.” The image appears on the State of Oklahoma’s standard vehicle license plates.⁷ As described by plaintiff, the sculpture “depicts a young Native American shooting an arrow towards the sky with the hope of calling for rain from the ‘spirit world.’” First Amended Complaint, ¶19. It is based, plaintiff states, on a Native American legend in which a warrior went to a medicine man during a drought, convinced him to bless his bow and arrows and then shot his arrows into the sky, hoping to gain favor with the rain god. Plaintiff asserts that “the image depict[s] and communicate[s] Native American religious beliefs in contradiction to his own Christian religious beliefs.” *Id.* at ¶21. Because the “message, connotation and purpose” of the sculpture and the license plate with its image are “antithetical to Cressman’s sincerely-held religious beliefs,” plaintiff alleges he cannot display the image on his vehicle. *Id.* at ¶26. He “wants to remain silent with “images, messages, and practices that he cannot endorse or accept,” *id.* at ¶27, and does not want his car to serve as a billboard for them.

While he originally purchased a specialty license plate to avoid displaying the “standard license plate with the objectionable message,” plaintiff states he decided he did not

⁶*The pertinent facts are taken from the first amended complaint and plaintiff’s affidavit, which is attached to his preliminary injunction motion.*

⁷*In his pleadings, plaintiff refers to the image as the Sacred Rain Arrow image. However, there is no writing on the license plate linking the image to the sculpture or referring to the image by that or any other name. For purposes of the litigation, the court will refer to the image as the Native American image.*

want to continue to pay extra to “avoid expressing a message contrary to his religious beliefs.” *Id.* at ¶¶ 28, 29. On December 7, 2009, he went to the Motor Vehicle Division of the Oklahoma Tax Commission to determine if he could cover up the image of the sculpture on his license plate without violating state law. He alleges he spoke with a clerk and explained his religious objections to the image on the license plate. The clerk told plaintiff he would probably get a ticket but suggested he check with the enforcing officer at the Department of Public Safety (“DPS”). Plaintiff then proceeded to DPS and spoke with defendant Paula Allen, an official alleged to be “in charge of interpreting policies for the Department of Public Safety.” *Id.* at ¶31. He again explained his religious objections, asked if he could cover the image of the sculpture on his license tag without violating the law and asked, if such action was illegal, what law he would be violating. Ms. Allen directed plaintiff to 47 Okla. Stat. § 4-107, which, she stated, prohibited the concealment of any portion of the licence plate, tag or frame. With plaintiff present, Ms. Allen called an official with the Highway Patrol, who confirmed that plaintiff would be subject to prosecution if he covered the image of the sculpture on the license plate.

According to the complaint, after he left DPS plaintiff reviewed 47 Okla. Stat §§ 4-107 and 1113 and concluded he could not conceal the Native American image without violating the law and subjecting himself to criminal sanctions. Plaintiff alleges that to comply with the law and “avoid endorsing a message contrary to [his] religious beliefs,” he is “being forced to pay fees for a specialty license plate.” *Id.* at ¶ 42. In an effort to avoid litigation plaintiff, through counsel, wrote several state officials, explaining his objection to

the Native American image and asking that he be permitted to cover it up or obtain a free vanity plate. He alleges no one responded.

Plaintiff asserts that, “[d]ue to the steadfast stance of Oklahoma officials, [he] must either pay extra amounts of money for a speciality plate, subject himself to criminal penalties, or go against his conscience.” Plaintiff’s brief, p. 6. He states that he simply wants to be treated like all other Oklahoma citizens and be allowed to “display a license plate at a standard cost without expressing a message contrary to his earnest religious beliefs.” *Id.* He asks the court to enjoin defendants Thompson and Allen and their agents and employees from applying 47 Okla. Stat. § 4-107 or § 1113 to him and to order them to allow him to cover up the Native American image on his license plate. Alternatively, he asks the court to compel defendants and their agents and employees to provide him with a vanity license plate for the same price as a standard license plate.

Standing

Before the court addresses the merits of plaintiff’s motion for injunctive relief, it must consider defendants’ argument that plaintiff lacks standing.⁸ “The Supreme Court’s ‘standing jurisprudence contains two strands: Article III standing, which enforces the Constitution’s case-or-controversy requirement, ... and prudential standing which embodies ‘judicially self-imposed limits on the exercise of federal jurisdiction.’” Wilderness Soc’y v. Kane Cnty., 632 F.3d 1162, 1168 (10th Cir. 2011) (quoting Elk Grove Unified Sch. Dist. v. Newdow, 542

⁸*This and several other arguments were raised by defendants in their motion to dismiss.*

U.S. 1, 11 (2004))). This case presents a question of Article III standing, which, to establish, a plaintiff must show “(1) that he or she has ‘suffered an injury in fact;’ (2) that the injury is ‘fairly traceable to the challenged action of the defendant;’ and, (3) that it is ‘likely’ that ‘the injury will be redressed by a favorable decision.’” Awad v. Ziriax, 670 F.3d 1111, 1120 (10th Cir. 2012) (quoting Ariz. Christian Sch. Tuition Org. v. Winn, ___ U.S. ___, (2011)).

Plaintiff’s allegations suffice to establish standing to pursue this case. Plaintiff alleges he has had to incur the additional expense of purchasing a specialty license plate to avoid driving a vehicle with a tag bearing what he considers to be an objectionable image. Also, while he has not been arrested, plaintiff has been informed by state officials that covering up the image is a violation of Oklahoma law, specifically 47 Okla. Stat. § 4-107. See Consumer Data Indus. Ass’n v. King, ___ F.3d ___, ___, 2012 WL 1573563, at *2 (10th Cir. 2012) (“[T]he existence of a statute implies the threat of its enforcement, and the association was entitled to bring a pre-enforcement challenge based on the probability of future injury.”). He has shown that he was unable to obtain a waiver of § 4-107’s enforcement from the State, his injuries are traceable to the enforcement of state law,⁹ and a favorable judgment from this court would redress his injuries. See *id.* (complete redressability not required); Weinbaum

⁹*Defendants have not asserted that what plaintiff seeks to do – cover up the Native American image on his license plate – would be permissible under State law or allowed by law enforcement officials. Their silence in this regard, coupled with the lack of response to plaintiff’s March 10, 2010, letter, suffices to demonstrate that plaintiff faces a credible threat of prosecution if he covers up a portion of his license tag. See King, ___ F.3d at ___ n.1, 2012 WL 1573563 at *4 n.1 (“The threat of injury may be negated by the government defendant’s renouncing any intention to enforce the challenged law.”).*

v. City of Las Cruces, 541 F.3d 1017, 1028-29 (10th Cir. 2008).¹⁰

Preliminary Injunction

To prevail on his motion for a preliminary injunction, plaintiff “must show that four factors weigh in his favor: ‘(1) [he] is substantially likely to succeed on the merits; (2) [he] will suffer irreparable injury if the injunction is denied; (3) [his] threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest.’” Awad, 670 F.3d at 1125 (quoting Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC, 562 F.3d 1067, 1070 (10th Cir.2009)).¹¹ Plaintiff claims he is likely to succeed on the merits of his First Amendment claim because 47 Okla. Stat. §4-107 and 1113 “require him to express an objectionable message from his car license plate while his conscience requires him to do otherwise.” Plaintiff’s brief, p. 7. He asserts that the government cannot compel the speech of private citizens and that he satisfies the three components of a compelled speech claim, which he identifies as—private speech;¹² compelled

¹⁰Although the issue is not raised by defendants, the court concludes the case is ripe for review. Plaintiff has demonstrated “a credible threat of enforcement, and should not be required to await and undergo [enforcement] as the sole means of seeking relief.” King, ___ F.3d at ___ (internal quotations omitted); Awad, 670 F.3d at 1124 (“[I]f a threatened injury is sufficiently imminent to establish standing, the constitutional requirements of the ripeness doctrine will necessarily be satisfied.”) (internal quotations omitted).

¹¹Defendants argue that plaintiff seeks a disfavored injunction, which would be subject to a more strenuous preliminary injunction standard. See Awad, 670 F.3d at 1125. While it appears the relief sought principally involves only the issuance of a prohibitory injunction, the court need not decide the issue because plaintiff fails to satisfy the requirements of the less demanding traditional preliminary injunction test.

¹²The court has treated the license plate as private, rather than government, speech. Defendants’ argument to the contrary is based on cases involving specialty license plates, whose vehicle owners, unlike plaintiff here, elected to disseminate the displayed message. While the

speech; and that the speaker's interest in remaining silent outweighs the government's interest in compelling the speech.¹³ While the court does not question the sincerity of plaintiff's religious convictions, it nonetheless concludes he has not met his burden of demonstrating that he has been forced to engage in compelled speech and "be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." Wooley v. Maynard, 430 U.S. 705, 715 (1977),

The Constitution's prohibition on compelled speech was first recognized by the Supreme Court in West Virginia State Bd. of Education v. Barnette, 319 U.S. 624 (1943). Recognizing that the First Amendment shields more than written or spoken words, the Court held in Barnette that a state law compelling schoolchildren to salute the flag and recite the Pledge of Allegiance was unconstitutional. In Wooley, 430 U.S. at 705, the Supreme Court again addressed the issue of compelled speech when it struck down a New Hampshire law requiring passenger vehicles to bear license plates with the state motto "Live Free or Die." It concluded a state could not "constitutionally 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. While

continuing validity of Wooley might be questioned for various reasons, including the proliferation of speciality license plates, the court is bound by the Supreme Court's conclusion that standard license plates implicate private speech interests because of the connection of any message on the plate to the driver or owner of the vehicle.

¹³*Plaintiff based his request for injunctive relief solely on his First Amendment compelled speech claim. He does not discuss his free exercise or Fourteenth Amendment claims in his briefs, and there is nothing alleged to suggest any claim that is different, in substance, from his compelled speech claim.*

the Supreme Court has further developed the doctrine of compelled speech in other contexts, e.g. Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (government-compelled subsidy of government's own speech), the issue here, as framed by the plaintiff, is whether he, like the plaintiffs in Wooley, is being compelled by the State to convey an ideological message.

This factual scenario falls within the class of cases the Supreme Court has characterized as “true ‘compelled speech’ cases,” those “in which an individual is obliged personally to express a message he disagrees with, imposed by the government.” Johanns, 544 U.S. at 557. Plaintiff claims that he is being forced to use his own “private property as a ‘mobile billboard’” for a religious message or “suffer a penalty.” Wooley, 430 U.S. at 715. However, this case is distinguishable from Wooley in that it involves “symbolic speech,” rather than written or verbal expression. Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 282 (5th Cir. 2001) (“The First Amendment protects not only verbal and written expression, but also symbols and conduct that constitute ‘symbolic speech.’”). “[T]he compulsion to which [plaintiff] objects does not involve words, which convey a clear ideological message.” Troster v. Pennsylvania State Dep’t of Corrections, 65 F.3d 1086, 1091 (3d Cir. 1995). While symbols and conduct can fall within the scope of the First and Fourteenth Amendments, they must be “sufficiently imbued with elements of communication.” Zalewska, 316 F.3d at 319 (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)).

To establish his claim, plaintiff must show the State’s “intent [through its use of the Native American image] to convey a ‘particularized message’ along with a great likelihood

that the message will be understood by those viewing it.” Zalewska v. County of Sullivan, 316 F.3d 314, 319 (2nd Cir. 2003); Spence v. Washington, 418 U.S. 405, 409-11 (1974) (conduct may be “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments,” if “[a]n 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.”); Littlefield, 268 F.3d at 283; Colacurcio v. City of Kent, 163 F.3d 545, 549 n. 1 (9th Cir.1998); see Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004) (applying liberalized Spence test which asks, in determining whether conduct is expressive, “whether the reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message”). The image need not, though, “necessarily embody ‘a narrow, succinctly articulable message.’” Zalewska, 316 F.3d at 319 (quoting Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569 (1995)).¹⁴

Plaintiff assumes, with minimal discussion, that he is being required to disseminate an ideological message.¹⁵ Having examined the State’s standard license plate, which is

¹⁴Some courts have interpreted the Supreme Court’s subsequent decision in Hurley, 515 U.S. at 557, to have liberalized the Spence test. Others have not. Compare Troster, 65 F.3d at 1090 with Colacurcio, 163 F.3d at 549 n. 1. Regardless of the test applied, plaintiff cannot demonstrate that driving a vehicle with a standard Oklahoma license tag is “sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendments.” Zalewska, 316 F.3d at 319.

¹⁵The court recognizes that “First Amendment protection does not hinge on the ideological nature of the speech involved.” Axson-Flynn v. Johnson, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004); see Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219, 1230 (10th Cir. 2009) (“[C]ompelled statements of fact ... like compelled statements of opinion, are subject to first Amendment

described in the First Amended Complaint and a photograph of which is attached as Exhibit D to plaintiff's preliminary injunction motion, the court disagrees.

The challenged image "depict[s] a statute of a Native American shooting an arrow into the sky." Defendants' Exhibit 5.¹⁶ Plaintiff argues that it communicates a message about Native American religion, attesting that the

sculpture and image on the license plate retell the story of this Native American who believed in sacred objects and in multiple deities and in the divinity of nature and in the ability of humans to use sacred objects to convince gods to alter nature. The underlying narrative of this story, and of the license plate where the story is depicted, communicates the promotion of pantheism, panentheism, polythiesm, and/or animism and promotes those particular Native Americans' social and cultural practices that accept these religious ideas.

Plaintiff's motion, ¶ 14. However, plaintiff states in his amended complaint that he "learned that the image on the license plate was a depiction of a sculpture called 'Sacred Rain Arrow' by Allen Houser," First Amended Complaint, ¶ 22, and "learned" that the sculpture was

*scrutiny.'") (quoting Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 62 (2006)). Plaintiff comments in his brief that his First Amendment rights can be violated even if he does not "object to the particular ideological viewpoint communicated," plaintiff's brief, p. 11 n.7, or if the State is forcing him to express a message "about its history or individualism or life or freedom," rather than about religion. *Id.* at p. 17. However, plaintiff's claims in this case are based on his assertion that he is being forced to convey an objectionable religious message. See e.g. First Amended Complaint, ¶1 ("This is a civil rights action challenging 47 Okl. St. § 4-107 and 47 Okl. St. § 1113 that compel Plaintiff Keith Cressman to express a message on the license plate of his vehicle that is contrary to his sincerely-held religious beliefs."). See generally Troster, 65 F.3d at 1091 n.2 ("Although other Supreme Court cases involved First Amendment challenges to required statements that were not ideological, . . . these are more properly viewed as 'compelled disclosure' cases, rather than 'intellectual individualism' cases like Barnette, Wooley, and Abood.").*

¹⁶In addition to the Native American image and the tag number, "Oklahoma" appears at the top of the tag and "Native America" at the bottom. Plaintiff does not discuss the significance or impact of the words "Native America." They do not, though, add support to his argument that the license plate is signaling a religious message.

based on a Native American Legend. Nothing 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.¹⁷ While plaintiff clearly links the image to the sculpture and legend, nothing on the license plate, itself, makes or suggests that connection. It is only through further independent research of the sort plaintiff alleges he undertook, that a person would learn the underlying facts and circumstances which plaintiff alleges to constitute the offensive message. But even assuming a reasonable observer knew of the image's genesis, the court still would not find that the observer would likely view the driver of a car with a standard Oklahoma license plate to be telling him anything about the driver's religious beliefs. Cf. Holloman, 370 F.3d at 1270 ("Even if students were not aware of the specific message Holloman was attempting to convey, his fist clearly expressed a generalized message of disagreement or protest directed toward [the teacher], the school, or the country in general.").

Hundreds of thousands of Oklahoma residents drive vehicles with license tags that display the Native American image. See Troster, 65 F.3d at 1090 (in determining whether conduct is protected by the First Amendment the court considers "the nature of [the] activity, combined with the factual context and environment in which it was undertaken.") (quoting Spence, 418 U.S. at 409-10). While the Supreme Court did not consider that fact significant in Wooley, at least one court has subsequently considered the prevalence of an

¹⁷The State's name is derived from two Choctaw words literally meaning "red people." See *About Oklahoma*, http://travelok.com/about_us. As the Tenth Circuit noted in Weinbaum, 541 F.3d at 1033 n.18: "American towns, cities, and counties commonly incorporate the subject matter of their name into their seals and flags. . . . [T]he City of Palo Alto, which translates as 'Tall Tree,' displays a tall tree on its seal."

image when considering its expressive or communicative effect.

In Troster the Third Circuit had to determine whether a state employee, who was required by a Pennsylvania State Department of Corrections regulation to display an American flag patch on his uniform, was “engag[ing] in any conduct sufficiently imbued with elements of communication that the regulation might be forbidden by the First Amendment’s proscription against compelled speech. Troster, 65 F.3d at 1087. Troster objected to being compelled to display the flag because he “believe[d] that state-compelled display desecrates the flag and debases it.” *Id.* at 1088. The appellate court concluded that it was “not apparent from the record that the conduct required of Troster—passively wearing the flag patch—is ... demonstrative of an attitude or belief.” *Id.* at 1091. The court disagreed with Troster that it was “readily inferable that wearing a flag patch on a corrections officer’s uniform would be seen by most, if not all, observers as showing respect for the flag.” *Id.* at 1091 n.4 (internal quotations omitted). The court noted that “Troster was one of an entire force of corrections personnel required to wear the flag patch on their uniforms,” *id.* at 1092, and there was evidence that “the uniforms of a large number of organizations ha[d] flag patches on them.” *Id.* The court also noted that, “[i]n contrast to Wooley, Barnette, and Abood,¹⁸ the compulsion to which Troster objects does not involve words” *Id.* at 1091.

The Third Circuit’s decision was based in part on Troster’s failure to provide any evidence “suggesting that anyone (other than himself) would be likely to view the wearing

¹⁸Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

of the patch as communicative or expressive, or that people who wear such uniforms with such flag patches actually assert anything to anyone.” *Id.* at 1092. Here, even if plaintiff had produced evidence that others might perceive him to be signaling a message about his religious beliefs by driving a car bearing the standard Oklahoma license plate, the court would still conclude that plaintiff has not been coerced to speak in violation of the First Amendment. A reasonable viewer simply could not glean a religious message from the Native American image on the license plate or impute such to the driver. Observers of the image “are presented with a symbol that has various and somewhat imprecise ideas associated with it.” *Id.* at 1091. They are not presented with a “particularized message” that is likely, much less highly likely to be “understood by those who view[] it.” Pierce v. Heuckendorf, 1994 WL 170791 at * 2 (10th Cir. 1994) (unpublished) (quoting Spence, 418 U.S. at 410-11).

Support for this conclusion is found in cases in which courts have found an individual’s use of a symbol to be expressive. For example, in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), the Supreme Court concluded that “the wearing of black armbands in a school environment conveyed an unmistakable message about a contemporaneous issue of intense public concern—the Vietnam hostilities.” Spence, 418 U.S. at 410. Similarly the student in Spence was found to have been expressing an idea when he displayed a flag bearing a peace symbol, as his “activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment.” *Id.*

The Supreme Court has cautioned that it “cannot accept 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 409 (internal quotations omitted). *See generally Weinbaum*, 541 F.3d at 1038¹⁹ (“[W]e need not ask whether there is any person who could find an endorsement of religion ... or whether some reasonable person might think [the State] endorses religion. Instead, we must simply view the symbol through an objective observer’s eyes.”) (internal quotations and citations omitted). Yet that is essentially what plaintiff is asking the court to do here. Though the Native American image conceivably sends a message on some level, it is not a particularized message that viewers will likely understand. Unlike the State of New Hampshire, the State of Oklahoma is not, through the image of the Native American on its license plates, attempting to “foster[] public adherence to an ideological point of view,” or “disseminate an ideology.” *Wooley*, 430 U.S. at 715, 717. *See generally Weinbaum*, 541 F.3d at 1035 (“The effect of these symbols is to identify the cities by referring (via pictographic shorthand) to the cities’ name.”).²⁰

¹⁹*Weinbaum* involved an Establishment Clause challenge to a city seal and other public property that displayed, in various forms, three crosses.

²⁰While it appears the Supreme Court has found a violation of the First Amendment right against compelled speech only “in the context of forced speech that requires the private speaker to embrace a particular government-favored message,” *Miller v. Mitchell*, 598 F.3d 139, 152 n.14 (3d Cir. 2010) (internal quotations omitted), appellate courts have “held that the First Amendment right against compelled speech is not limited to the government’s requiring a speaker to express a certain viewpoint or message; requiring content-neutral speech may violate the First Amendment.” *Id.*; see *Axson-Flynn*, 356 F.3d at 1284 n.4. While the “harm occurs regardless of whether the speech is ideological,” *Axson-Flynn*, 356 F.3d at 1284 n.4, there still must be “speech” involved to trigger First Amendment protection.

The conclusion that the State of Oklahoma is not “compelling others to espouse ... certain ideas and beliefs,” Phelan v. Laramie Cnty. Cmty. Coll. Bd. of Trs., 235 F.3d 1243, 1247 (10th Cir. 2000), 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.²¹ The lack of “compelled speech” also fatally undermines plaintiff’s Free Exercise and Due Process claims. As a result plaintiff’s allegations, assumed to be true, fail “to state a [federal] claim to relief that is plausible on its face.” Corder v. Lewis Palmer Sch. Dist. No. 38, 566 F.3d 1219, 1224 (10th Cir. 2009) (internal quotations omitted).

The failure to state a claim controls the result both as to plaintiff’s request for a preliminary injunction and defendants’ motion to dismiss. Accordingly, plaintiff’s motion for preliminary injunction [Doc. #3] is **DENIED** and the motion to dismiss filed by defendants Thompson and Allen [Doc. #31] is **GRANTED**.²² The deficiencies in plaintiff’s claims are legal in nature rather than anything that can be cured by further pleading. Plaintiff’s claims asserted under the First and Fourteenth Amendments are therefore


²¹*As plaintiff has not shown he is substantially likely to prevail on the merits of his free speech claim, it is unnecessary to address the remaining elements that must be established for a preliminary injunction to issue.*

²²*While the primary focus of defendants’ brief was not on the question of whether there was compelled speech, the issue was discussed. See Doc. #17, pp. 15 -16, Doc. # 38, p. 7. Protected speech also is an essential element of plaintiff’s claim, which he had to establish (or show a likelihood of establishing) to obtain injunctive relief.*

dismissed with prejudice pursuant to Fed.R.Civ.P. 12(b)(6). The court declines to exercise supplemental jurisdiction over plaintiff's claim asserted under the Oklahoma Religious Freedom Act, which is dismissed without prejudice. The motion to dismiss filed by defendants Kemp, Jr., Johnson and Cash [Doc. #35] is **DENIED** as being moot.

IT IS SO ORDERED.

Dated this 16th day of May, 2012.



JOE HEATON
UNITED STATES DISTRICT JUDGE