UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-2682-GW-SKx	Date	August 29, 2019
Title	*Jonathan Kotler v. Kathleen Webb*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie E. Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Wencong Fa	Peiyin P. Li, CAAG

PROCEEDINGS: DEFENDANT'S MOTION TO DISMISS COMPLAINT [16]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. The Court would DENY the Motion.

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Initials of Preparer JG

Kotler v. Webb; Case No. 2:19-cv-02682-GW-(SKx)
Tentative Ruling on Motion to Dismiss

I. Background

Plaintiff Jonathan Kotler sues Defendant Kathleen Webb in her official capacity as Director of the California Department of Motor Vehicles ("DMV"), claiming that Cal. Code Regs. tit. 13, § 206.00(c)(7)(D) violates the First Amendment, both on its face and as-applied to Kotler's request for a personalized license plate. *See generally* Complaint, Docket No. 1.

A. Factual Background

Kotler is an avid soccer (or football in non-American countries) fan whose favorite team (or club) is Fulham FC ("Fulham"). *Id.* ¶¶ 10-11. Fulham is a London-based club that play at Craven Cottage, a stadium on the banks of the River Thames. *Id.* ¶ 11. Kotler has been a season ticket holder for over a decade and travels to London yearly to attend matches. *Id.* ¶ 12. Fulham's players wear white jerseys and the team's slogan is "COYW," which stands for "Come on You Whites." *Id.* ¶ 13. The slogan allegedly refers to the color of Fulham's jerseys and carries no racial connotation. *Id.* ¶¶ 14-15. Fulham uses the slogan in its official marketing and publications. *See id.* ¶ 16. For example, Fulham's official hashtag on Twitter is #COYW. *Id.* ¶ 16. And the phrase is used in letters signed by Shahid Khan, the team's Pakistani-American owner. *Id.* Moreover, media outlets refer to Fulham as "the Whites." *Id.* Other sports teams throughout the world are referred to by the color of their jerseys: Chelsea (another London-based soccer club) are "the Blues," Liverpool Football Club are "the Reds," and New Zealand's national rugby team is the "All Blacks." *Id.* ¶ 15.

After Fulham won promotion to the English Premier League (the top division in English soccer) in the 2017-18 season, Kotler applied for a personalized license plate with the configuration "COYW." *Id.* ¶¶ 17-18. On June 1, 2018, Kotler received a letter from the DMV denying his application. *Id.* ¶ 29; *see also* Ex. 1. The letter stated that the license plate configuration was denied because it "carr[ies] connotations offensive to good taste and decency." Complaint ¶ 29. The letter also stated:

> I am sure you can appreciate how difficult it is to balance an individual's constitutional right to free speech and expression while protecting the sensibilities of all segments of our population. Please understand that this is a very difficult area to regulate and that not everyone feels the same way on any given subject. If you feel that

> the department denied your license plate selection in error, please submit a letter of explanation for further review . . .

See Ex. 1.

On July 3, 2018, Mr. Kotler submitted a letter of explanation to the DMV, explaining that "COYW" is a term commonly used to support the Fulham soccer team, and attaching several documents in which the team and the media either use the slogan or refer to the team as "the Whites." Complaint ¶ 31; Ex. 2. Two weeks later, the DMV stood by its initial denial, explaining: "Upon review, we are remaining with our original determination that the configuration is unacceptable. 'Come on You Whites' can have racial connotations." Complaint ¶ 32; Ex. 3.

B. Regulatory Scheme for California Personalized License Plates

"Environmental License Plates" are license plates "for which a registration number was issued in a combination of letters or numbers, or both, requested by the owner or lessee of the vehicle." Cal. Veh. Code § 5103. On top of regular registration fees, the applicant for an Environmental License Plate must pay an additional fee for the issuance of the personalized plates. *Id.* ¶ 5106. In order to obtain an Environmental License Plate, an applicant must submit the desired combination of letters or numbers that will be used as the registration number. *Id.* ¶ 5105. According to the statute, the DMV "may refuse to issue any combination of letters or numbers, or both, that may carry connotations offensive to good taste and decency." *Id.* The implementing regulations expand on what may be offensive to good taste and decency:

> The department shall refuse any configuration that may carry connotations offensive to good taste and decency, or which would be misleading, based on criteria which includes, but is not limited to, the following:
>
> 1. The configuration has a sexual connotation or is a term of lust or depravity.
>
> 2. The configuration is a vulgar term; a term of contempt, prejudice, or hostility; an insulting or degrading term; a racially degrading term; or an ethnically degrading term.
>
> 3. The configuration is a swear word or term considered profane, obscene, or repulsive.
>
> 4. The configuration has a negative connotation to a specific group.
>
> 5. The configuration misrepresents a law enforcement entity.
>
> 6. The configuration has been deleted from regular series license

> plates.
>
> 7. The configuration is a foreign or slang word or term, or is a phonetic spelling or mirror image of a word or term falling into the categories described in subdivisions 1. through 6. above.

Cal. Code Regs. tit. 13, § 206.00(c)(7)(D) (the "Challenged Regulation").

Environmental License Plates are distinct from "special interest license plates," Cal. Veh. Code § 5060, or "specialized license plates," *id.* § 5154. Specialized license plates "shall have a design or contain a message that publicizes or promotes a state agency, or the official policy, mission, or work of a state agency." *Id.* § 5154. Whereas the special interest license plate program allows a tax-exempt organization to submit a design for a license plate and share in revenue generated from the fees. *See id.* § 5060. In other words, the specialized and special interest license plates allow groups to design the format and/or message of the license plate, which drivers can then opt to put on their cars. Unlike Environmental License Plates, the special interest and specialized license plate programs do not necessarily have anything to do with the alphanumeric registration number on the license plate. However, a driver may opt to place a "personalized message" onto a special interest license plate, but he or she will be subject to the Environmental License Plate fees. *See id.* § 5060(d)(1)(C).

C. The Current Motion

As stated above, Kotler alleges that the Challenged Regulation violates the First Amendment both on its face, *see* Complaint ¶¶ 33-43, and as applied to his requested license plate, *id.* ¶¶ 44-50. Now, the DMV moves to dismiss Kotler's claims pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6). *See* Motion to Dismiss ("Motion"), Docket No. 16. Kotler opposes. *See* Opposition to Motion ("Opp'n"), Docket No. 19. And the DMV filed a reply. Reply, Docket No. 20.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support

a cognizable legal theory.").

In deciding a Rule 12(b)(6) motion, a court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Further, in deciding a Rule 12(b)(6) motion a court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh'g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996).

A court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a Rule 12(b)(6) motion has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of L.A.*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (citations omitted).

III. Discussion

A. Government Speech

The DMV's primary argument in support of dismissal is that the personalized configuration of numbers and letters on an Environmental License Plate constitutes government speech. *See* Motion at 9-16. In support, the DMV mainly relies on *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), which deals with a similar but not identical issue. Kotler meanwhile argues that *Walker* is distinguishable and that a customized configuration of numbers and letters on license plates represents private speech. *See* Opp'n at 9. The Court will thus begin its inquiry with an analysis of *Walker*.

1. Walker

The baseline holding in *Walker* (a 5-4 decision) was that the designs on Texas's "specialty license plates" constitute government speech and were therefore exempt from First Amendment

challenges. *Walker*, 135 S. Ct. at 2248-50; *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009).[1] Texas specialty license plates "contain[] the word 'Texas,' a license plate number, and one of a selection of designs prepared by the State." *Id.* at 2244. At that time, Texas selected the designs in three different ways. "First, the state legislature may specifically call for the development of a specialty license plate." *Id.* "Second, the [Texas Department of Motor Vehicles] Board may approve a specialty plate design proposal that a state-designated private vendor has created at the request of an individual or organization." *Id.*

> Third, the Board "may create new specialty license plates on its own initiative or on receipt of an application from a" nonprofit entity seeking to sponsor a specialty plate. Tex. Transp. Code Ann. §§ 504.801(a), (b). A nonprofit must include in its application "a draft design of the specialty license plate." 43 Tex. Admin. Code § 217.45(i)(2)(C). And Texas law vests in the Board authority to approve or to disapprove an application. *See* § 217.45(i)(7). The relevant statute says that the Board "may refuse to create a new specialty license plate" for a number of reasons, for example "if the design might be offensive to any member of the public . . . or for any other reason established by rule." Tex. Transp. Code Ann. § 504.801(c). Specialty plates that the Board has sanctioned through this process include plates featuring the words "The Gator Nation," together with the Florida Gators logo, and plates featuring the logo of Rotary International and the words "SERVICE ABOVE SELF."

Id. at 2244-45. As *Walker* made clear, it was "concerned only with . . . specialty license plates, not with the personalization program," whereby "a vehicle owner may request a particular

[1] In *Summum*, a religious organization asked Pleasant Grove City for permission to erect a monument in a municipal park. *Summum*, 555 U.S. at 465. The park in question already had fifteen permanent displays, at least eleven of which were donated by private groups or individuals. *Id.* The city denied the request. *Id.* at 466. The Supreme Court concluded that the city's denial was constitutional because the permanent monuments in the park represented government speech. *See id.* at 472-73. Noting that governments had used to monuments to portray messages since ancient times, the Supreme Court reasoned that the fact of private creation or donation did not necessarily alter that the government displaying the monument was the entity speaking. *Id.* at 470-471. However, in reaching this conclusion, the Supreme Court emphasized "that throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity." *Id.* at 471. Thus, the fact that governments historically have been choosy about which monuments to display, weighed in favor of finding that the fifteen monuments in Pleasant Grove City constituted government speech.

In declining to conduct the forum analysis that the plaintiff religious organization requested, the Supreme Court explained that "[t]he forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program." *Id.* at 478. The Court then remarked that parks can accommodate many speakers through demonstrations and parades, but only a few permanent monuments. *Id.*

alphanumeric pattern for use as a plate number, such as 'BOB' or 'TEXPL8.' " *Id.* at 2244.

The plaintiffs in *Walker*, the Texas Division of the Sons of Confederate Veterans, proposed a specialty license plate that included a Confederate battle flag. *Id.* The Texas DMV Board denied the application "explain[ing] that it had found 'it necessary to deny the plate design application, specifically the confederate flag portion of the design, because public comments had shown that many members of the general public find the design offensive, and because such comments are reasonable.' " *Id.* at 2245. A divided Fifth Circuit panel held that the specialty plate designs were private speech and that the denial of plaintiffs' application was viewpoint discrimination. *Id.* The dissenting judge argued that the plate designs were government speech.

To decide whether Texas's specialty plates represented government speech, the Court in *Walker* applied the three-factor test the Court had previously employed in *Summum*. *See id.* at 2247. As applied to the specialty license plates, the Supreme Court asked: (1) whether states had historically used license plates to convey messages to the public, *id.* at 2248, (2) whether the public closely identified the license plates with the state, *id.* at 2248-49, and (3) the extent to which the state exerted control over the messages conveyed on the specialty plates, *id.* at 2249-50.

First, *Walker* recognized that "the history of license plates shows that, insofar as license plates have conveyed more than state names and vehicle identification numbers, they long have communicated messages from the States." *Id.* at 2248. The opinion notes that New Hampshire's plates depict the "Old Man of the Mountain," Idaho's stated "Idaho Potatoes," and that Texas had plates commemorating special occasions such as "150 Years of Statehood." *See id.* Thus, the Supreme Court concluded that the first factor weighed in favor of finding that the specialty plates represented government speech. *Id.*

Next, the Supreme Court held that the license plate designs "are often closely identified in the public mind with the State." *Id.* (quoting *Summum*, 555 U.S. at 472). The majority reasoned:

> Each Texas license plate is a government article serving the governmental purposes of vehicle registration and identification. The governmental nature of the plates is clear from their faces: The State places the name "TEXAS" in large letters at the top of every plate. Moreover, the State requires Texas vehicle owners to display license plates, and every Texas license plate is issued by the State. See § 504.943. Texas also owns the designs on its license plates, including the designs that Texas adopts on the basis of proposals made by private individuals and organizations. *See* § 504.002(3). And Texas dictates the manner in which drivers may dispose of

> unused plates. *See* § 504.901(c). *See also* § 504.008(g) (requiring that vehicle owners return unused specialty plates to the State).

Walker, 135 S. Ct. at 2248. From this, the Supreme Court explained that "license plates are, essentially, government IDs. And issuers of ID 'typically do not permit' the placement on their IDs of 'messages with which they do not wish to be associated.' " *Id.* at 2249 (quoting *Summum*, 555 U.S. at 471). The Supreme Court also hypothesized that "a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate." *Walker*, 135 S. Ct. at 2249.

Lastly, *Walker* relied on the fact that Texas "ha[d] sole control over the design, typeface, color, and alphanumeric pattern for all license plates," and approval authority over specialty plates, to conclude that Texas controlled the message conveyed on the plates. *Id.* (citation omitted).

In concluding that the specialty license plate designs constitute government speech, the Supreme Court rejected some of plaintiffs' arguments that are relevant to this instant case as well. For example, the plaintiffs in *Walker* argued that at least those specialty license plates that were initially proposed by private parties did not constitute government speech. *See id.* at 2250. But again, the *Walker* opinion relied on *Summum*, which held that the privately financed or donated monuments still represented government speech. *Id.* at 2251. The plaintiffs attempted to distinguish *Summum* on the basis that there were only fifteen total monuments in the park, but the Supreme Court concluded that "there may well be many more messages that Texas wishes to convey through its license plates than there were messages that the city in *Summum* wished to convey through its monuments . . . [but] Texas's desire to communicate numerous messages does not mean that the messages conveyed are not Texas's own." *Id.* at 2251-52.

2. Post-Walker Caselaw

Since the Supreme Court's decision, two states' highest courts have addressed the question left open in *Walker* and presented here: whether the personalized alphanumeric combinations on license plates constitute government speech. *See Mitchell v. Md. Motor Vehicles Admin.*, 148 A.3d 319 (Md. 2016); *Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015). Of course, the courts came out opposite ways. In *Vawter*, the Indiana Supreme Court upheld the Indiana Bureau of Motor Vehicle's rejection of certain applications for personalized license plates. *See Vawter*, 45 N.E.3d at 1202. The Indiana court applied the three factors set forth in *Walker* and

reasoned that (1) "[w]hile the alphanumeric combinations on PLPs [personalized license plates] are individually chosen instead of created by the state, this difference is secondary and does not change the principal function of state-issued license plates as a mode of unique vehicle identification," *id.* at 1204; (2) "PLPs are *often* closely identified in the public mind with the State," *id.* at 1206 (internal quotation marks omitted); and (3) "Indiana 'maintains direct control' over the alphanumeric combinations on its PLPs" because the BMV must approve each combination and often rejects applications, *see id.* In sum, the Indiana Supreme Court saw no relevant difference between Indiana's personalized license plates and Texas's specialty plates. *Id.* at 1207.

The Court of Appeals of Maryland – the state's highest court – disagreed with *Vawter*'s conclusion and reasoning. *See Mitchell*, 148 A.3d at 327-28. In *Mitchell*, a Maryland driver sought and received a personalized license plate bearing the word "MIERDA." *Id.* at 322. Two years later, the Maryland Motor Vehicle Association ("MVA") rescinded the plate after it determined that MIERDA could mean "shit" in Spanish. *Id.* at 323. The driver sued and the Maryland court applied the three factors from *Walker*. *See id.* at 325-28. First, the court concluded that "although license plates in general function historically as government IDs for vehicles, vanity plates display additionally a personalized message with intrinsic meaning (sometimes clear, sometimes abstruse) that is independent of mere identification and specific to the owner." *Id.* at 326 (internal quotation marks and citation omitted). Second, the court explained that "[u]nlike the specialty plates at issue in *Walker*, vanity plates bear unique, personalized, user-created messages that cannot be attributed reasonably to the government. The fact that this kind of speech takes place on government property – a license plate – is not transformative in this context of private speech into government speech." *Id.* at 326-27. The Maryland court continued that:

> Although perhaps the perception of a governmental imprimatur is what makes "MIERDA" arguably clever or humorous in the first place, this stems from the public perception of State permission of private speech, not State endorsement or State expression. A fellow motorist who understood the primary Spanish meaning or English translation of "mierda" might think: "the MVA let you get away with that?," or "you pulled a fast one on the MVA!" Even these sentiments are rooted in an understanding that the vehicle owner, not the government, is the speaker, and that the speaker implicated the State in a private message that, surprisingly, the government permitted, but certainly did not endorse.

Id. at 327. Regarding the third *Walker* factor, the Maryland court concluded "[t]he MVA's statutory and regulatory authority to deny or rescind a vanity plate based on the content of its

message does not rise to the level of such tight control that the personalized messages become government speech." *Id.* (internal quotation marks and citations omitted). Basically, the Maryland court reasoned that "Maryland does not exercise 'direct control' over the 'alphanumeric pattern' displayed on vanity plates in the same or similar way that Texas controlled specialty plates." *Id.* Thus, the Maryland court held that the vanity plates constituted private speech:

> [B]ecause vanity plates represent more than an extension *by degree* of the government speech found on regular license plates and specialty plates. Vanity plates are, instead, fundamentally different *in kind* from the aforementioned plate formats. Maryland has not communicated historically to the public with vanity messages. Observers of vanity plates understand reasonably that the messages come from vehicle owners. Moreover, the MVA does not exercise control over vanity plate messages to the extent that *Walker* informs us Texas controlled specialty plates.

Id. at 328.

3. Analysis

The Court is inclined to conclude that the unique messages California drivers request for inclusion on Environmental License Plates constitute private rather than government speech. As the Supreme Court warned in *Matal v. Tam*, a post-*Walker* opinion:

> [W]hile the government-speech doctrine is important – indeed, essential – it is a doctrine that is susceptible to dangerous misuse. If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints. For this reason, we must exercise great caution before extending our government-speech precedents.

137 S. Ct. 1744, 1758 (2017). Addressing *Walker* specifically, the Supreme Court further cautioned that its prior opinion "likely marks the outer bounds of the government-speech doctrine." *Id.* at 1760. With these admonitions in mind, the Court will turn to the factors set forth in *Walker*.

First, while states have historically used license plates to distinguish between vehicles, and express certain messages through specialty license plate designs, *see Walker*, 135 S. Ct. at 2248, the Court is unaware of any history of states using the *customized* registration number configurations to speak. In other words, the Court would agree that certain *parts* of license plates have historically been employed to express state messages. As such, it is not shocking that various slogans affixed to series of license plates are considered government speech. Therefore, while Idaho may promote its potatoes, *see id.*, and California may emphasize the splendor of Yosemite,

the states express those messages by producing or allowing license plate designs that can then be attached to thousands of vehicles.

In contrast, the randomly assigned registration configurations unique to individual vehicles – while certainly achieving a significant state function – do not express a government-approved message in the same way as specialty plate designs. To the extent the individual registration number configurations broadcast any message at all, it is only because the state has allowed individual drivers to pick some combination of letters and numbers that carries significance to the driver. Hypothetically, if California had previously suggested configurations to drivers such as "GOCAL," "CAL1ST," "GLDNST," "BEARFLG," or other California themed combinations, the Court may be more inclined to find that this factor weighs in favor of government speech. However, without any evidence that states have historically used custom configuration combinations to speak, the Court would agree with *Mitchell* and conclude that this factor militates in favor of finding that the personalized Environmental License Plates are private speech. *See Mitchell*, 148 A.3d at 326.[2]

Turning to audience perception, the Court thinks it strains believability to argue that viewers perceive the government as speaking through personalized vanity plates. Although randomly-generated registration numbers, and license plates in general, may be closely identified with the state in the mind of the public, the same is not true of the personalized messages on vanity plates. Defendant argues that "[p]ersons who observe the registration number displayed on a license plate know that it must be approved and issued by the State, and interpret it as conveying information on behalf of the State." Motion at 11. But as the court in *Mitchell* noted, just because the public might know that the DMV must approve customized plates, it does not follow that the public assumes that the state is speaking. *Mitchell*, 148 A.3d at 327 (noting that the imprimatur of governmental approval may affect the public perception of the customized message, but it does not change the fact that the public understands the driver is the one speaking). Instead, common sense dictates that the public attributes any message on an Environmental License Plate to the

[2] *Vawter* merely finds that "[w]hile the alphanumeric combinations on PLPs are individually chosen instead of created by the state, this difference is secondary and does not change the principal function of state-issued license plates as a mode of unique vehicle identification." *Vawter*, 45 N.E.3d at 1205. Accepting that vehicle identification is the primary purpose of the alphanumeric combinations does not, however, negate the expressive message of the individually-chosen combinations. Thus, even if the expressive conduct is the "secondary purpose," the question as to who is the one speaking remains.

driver. Here, *Walker* is easily distinguishable. Approving a dozen, or a hundred, or even a thousand, specialty license plate designs that will be used on multiple vehicles – even when those designs are initially suggested by private individuals or groups – is different in kind from affixing a unique personal message to one vehicle. The public understands the difference.

Third, that the state has approval authority over the personalized configurations does not necessarily suggest the type of direct control required to transform private speech into government speech. In setting out this third factor, *Walker* explained that the city in *Summum* had been selective about the monuments it accepted, suggesting that it was speaking through its careful selection of some, but not other monuments. *Walker*, 135 S. Ct. at 2247; *see also Summum*, 555 U.S. at 471 ("But while government entities regularly accept privately funded or donated monuments, they have exercised selectivity."). Likewise, Texas had "rejected at least a dozen proposed designs," *Walker*, 135 S. Ct. at 2249, compared with the more than 350 it had approved, *id.* at 2255 (Alito, J., dissenting). Here, the Court finds it implausible that California has exhibited the same selectivity over proposed messages on Environmental License Plates. True, the DMV must approve any proposed plate, and may reject them if the configuration bears too close a similarity to another registration number, Cal. Code Regs. tit. 13, § 206.00(c)(7)(B), or if the combination of letters and numbers "may carry connotations offensive to good taste and decency or which would be misleading." Cal. Veh. Code § 5105(a). But, as Plaintiff notes, there are "hundreds of thousands of personalized license plates on California's roads." *See* Opp'n at 13. To suggest that the state has somehow meticulously curated the message of each of these plates, or of license plates in general, is nonsensical. Further, the fact that California wrote statutory and regulatory provisions to determine when to reject a proposed license plate suggests that the state is not very selective at all. The implication of the regulation is that the DMV will accept *any* proposed configuration as long as it is not offensive or confusing. The message of the configuration is only relevant if it may be offensive. Thus, the Court is inclined to conclude that California does not exert the type of direct control over the driver-created messages that would convert those messages into government speech.

Defendant's remaining arguments in favor of finding the personalized configurations on Environmental License Plates to be government speech also fail. First, while the DMV is correct that messages created by private parties may still be government speech, *see Walker*, 135 S. Ct. at 2251, for the reasons described above, the messages proposed by individual drivers for placement

on their cars are distinguishable from the license plate designs that Texas would adopt in *Walker*. Second, Defendant argues that the sheer number of personalized Environmental License Plates "does not determine whether the speech at issue is government speech." Reply at 2. While the number of license plates may not be determinative, it is certainly relevant, and the fact that there are potentially hundreds of thousands of personalized plates suggests that the government is not speaking. *See Tam*, 137 S. Ct. at 1758 ("If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently. It is saying many unseemly things. It is expressing contradictory views. It is unashamedly endorsing a vast array of commercial products and services. And it is providing Delphic advice to the consuming public.") (citation and footnote omitted). The number of license plates changes the calculus from the eleven monuments in question in *Summum* or even the hundreds of specialty plate designs in *Walker*.

Lastly, California law and the DMV's reaction to Kotler's request both suggest that California recognizes that the drivers' first amendment rights are implicated in the Environmental License Plate program. For example, Cal. Veh. Code § 5060(d)(1)(C) states that "[t]hose plates *containing a personalized message* are subject to the fees required pursuant to Sections 5106 and 5108 in addition to any fees required by the special interest license plate program." Cal. Veh. Code § 5060(d)(1)(C) (emphasis added). Further, in rejecting Plaintiff's proposed license plate, the DMV sent Kotler a letter stating, "I am sure you can appreciate how difficult it is to balance an individual's constitutional right to free speech and expression while protecting the sensibilities of all segments of our population." Complaint, Ex. 1

In sum, the Court would conclude that *Walker* is distinguishable and that an analysis of the three factors set out in that opinion dictates a different result when applied to the personalized configurations on Environmental License Plates. On a basic level, what it comes down to is that "a reasonable observer would perceive the plate's message" as the driver's rather than the state's. *See Eagle Point Education Ass'n v. Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1103 (9th Cir. 2018). Based on the allegations and the briefing, the Court would not expand the governmental speech doctrine beyond the "outer bounds" set forth in *Walker*. *Tam*, 137 S. Ct. at 1760.

B. Forum Analysis

The DMV argues that "forum analysis" is inapplicable because the personalized Environmental License Plates constitute government speech. *See* Motion at 16-19. As the Court

understands Defendant's briefing, the DMV does not argue that Plaintiff's claims are subject to dismissal even if the Environmental License Plate program is some type of forum. Similarly, Plaintiff argues that the Court need not engage in a forum analysis because the Challenged Regulation fails under any level of scrutiny since it involves viewpoint discrimination. *See* Opp'n at 16-18.

Courts typically engage in the so-called forum analysis when a law restricts private speech on government property. *See Walker*, 135 S. Ct. at 2250 (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 800 (1985)). The level of scrutiny applied in the forum analysis depends on the nature of the governmental property. *See Cornelius*, 473 U.S. at 800. The four types of fora that courts have articulated are the "traditional public forum," the "designated public forum," the "limited public forum," and the "nonpublic forum." *See Walker*, 135 S. Ct. at 2250-51.

Contrary to Defendant's contentions, *Walker* does not foreclose forum analysis here because *Walker*'s conclusion that forum analysis was inappropriate in that case was based on its determination that the Texas specialty plates were government speech. *See id.* at 2250 ("But forum analysis is misplaced here. Because the State is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."). Therefore, since here the Court would hold that the customized configurations on Environmental License Plates constitute private speech, forum analysis may be appropriate.

However, the Court questions whether Defendant's Motion to Dismiss is the proper procedural vessel by which to analyze the issue. The Court therefore asks the parties to discuss how the Court should proceed. For example, the Court is hesitant to conduct the forum analysis at this time because, although Plaintiff's complaint asks for declaratory and injunctive relief, he has yet to move for such relief. Further, the Court asks whether evidentiary submissions may aid any forum analysis.

IV. Conclusion

Based on the foregoing discussion, the Court would **DENY** the Motion.