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12 UNITED STATES DISTRICT COURT
 13 CENTRAL DISTRICT OF CALIFORNIA
 14 WESTERN DIVISION

16 JONATHAN KOTLER,

17 Plaintiff,

18 v.

19 KATHLEEN WEBB, in her official
 20 capacity as Director of the California
 21 Department of Motor Vehicles,

22 Defendant.

Case No.: 2:19-cv-02682 GW (SKx)

**PLAINTIFF’S OPPOSITION TO
 MOTION TO DISMISS**

Date: August 1, 2019

Time: 8:30 am

Courtroom: 9D

Judge: The Hon. George H. Wu

Action Filed: April 9, 2019

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INTRODUCTION AND SUMMARY OF ARGUMENT

1
2 Professor Jonathan Kotler is an avid soccer fan who sought to celebrate his
3 team's success with a personalized license plate. The Department of Motor Vehicles
4 denied Mr. Kotler's request based on its belief that the team's commonly used
5 slogan, which refers to the white jerseys the team wears, is offensive to "good taste
6 and decency." ECF No. 1, Compl. Exhibit 1; Cal. Veh. Code § 5105.

7 The Department's sole basis for dismissal is its argument that *custom* license
8 plate configurations—which are created by license plate applicants—are
9 government speech. *See* ECF No. 16, Dep't Mot. to Dismiss. The Department relies
10 extensively on the Supreme Court's decision in *Walker v. Texas Div., Sons of*
11 *Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), which upheld a Texas restriction
12 on specialty plate designs as government speech. But the Department says not a word
13 to disclose to this Court that *Walker* expressly left open the question presented here.
14 *Id.* at 2244 (declining to address the State's personalization program, which allows
15 "a vehicle owner [to] request a particular alphanumeric pattern for use as a plate
16 number, such as 'BOB' or 'TEXPL8'").

17 *Walker*, which "likely marks the outer bounds of the government speech
18 doctrine," *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017), cannot bear the strain the
19 Department puts on it. States have traditionally used license plate designs to express
20 government messages, such as "Hoosier Hospitality" (Indiana), "Green Mountains"
21 (Vermont), and "America's Dairyland." (Wisconsin). *Walker*, 135 S. Ct. at 2248. By
22 contrast, individuals use personalized license plate configurations as a forum for
23 personal expression, by celebrating their name ("BOB"), their car ("68VETT"), or
24 their pets ("LVMYDOG"), among many other things. *See Mitchell v. Md. Motor*
25 *Vehicles Admin.*, 450 Md. 282, 295 n.6 (2016). Although the Department fails to
26 acknowledge this distinction, California law expressly recognizes the personal
27 nature of personalized license plate configurations. It asks the applicant to supply
28 the government with "the meaning of each [proposed configuration]." *See* Cal. Code

1 Regs. tit. 13 § 206.00(c). And it draws a distinction between specialty plate designs
 2 that “publicize[] or promote[] a state agency,” Cal. Veh. Code § 5154, and the
 3 custom plate configurations at issue here that “contain[] a personalized message,”
 4 *id.* § 5060(d)(1)(C).

5 Further, the sheer number of personalized license plate configurations reveals
 6 their character as personal speech. California offers just 14 specialty plate designs,
 7 each having been requested in at least 7,500 license plate applications, Cal. Veh.
 8 Code § 5004.3(g)(1). Accordingly, California can ensure that each design it offers
 9 to the public endorses a particular government message.¹ But the government does
 10 not express its views through hundreds of thousands of personalized plates zipping
 11 throughout California, or else it would be “babbling prodigiously and incoherently.”
 12 *Tam*, 137 S. Ct. at 1758.

13 The Department does not even attempt to defend the regulation as a
 14 permissible restriction on personal speech. Nor could it. Just last week, the Supreme
 15 Court reiterated that “a law disfavoring ‘ideas that offend’ discriminates based on
 16 viewpoint, in violation of the First Amendment.” *Iancu v. Brunetti*, No. 18-302, 2019
 17 WL 2570622 at *4 (U.S. June 24, 2019). Yet the regulations at issue here
 18 discriminate based on viewpoint by design and in practice. The Department’s motion
 19 should be denied.

20 STATEMENT OF FACTS

21 A. Legal Background

22 California requires motorists to display license plates in a way that makes the
 23 plates “clearly visible.” Cal. Veh. Code § 5201. Each license plate contains a unique
 24 configuration, consisting of letters, numbers, or a combination of both. *Id.* §§ 5103,
 25 5105(a). Motorists in California have two options regarding their license plate
 26 configuration: they may request a sequential plate and “receive a **random** license
 27

28 ¹ Cal. Dep’t of Motor Vehicles, *Special Interest License Plates*,
<https://www.dmv.ca.gov/portal/dmv/detail/online/elp/elp>.

1 plate number” or choose a personalized plate and “create a **custom** license plate
2 number.” Cal. Dep’t of Motor Vehicles, *Special Interest and Personalized Plates*
3 (emphasis in original).²

4 The Department of Motor Vehicles administers an “environmental license
5 plate program” that allows motorists to create a custom configuration of numbers
6 and letters for their license plate. *See* Cal. Veh. Code § 5103. In exchange, motorists
7 pay fees of \$53 for issuance of the environmental license plates, and \$43 for renewal
8 of the plates. *See id.* § 5106(a)-(b). The money goes toward the California
9 Environmental Protection Program, which concerns projects related to “the
10 preservation and protection of California’s environment.” Cal. Pub. Res. Code §
11 21190. The program funds, among other things, “the control and abatement of air
12 pollution,” *id.* § 21190(a), “[t]he acquisition . . . of natural areas of ecological
13 reserves,” *id.* § 21190(b), and scientific research on “the impacts of climate change.”
14 *id.* § 21190(h).

15 Personalized “environmental” license plate configurations are very different
16 from specialty plate designs, which California calls “special interest license plates,”
17 Cal. Veh. Code § 5060, or “specialized license plates,” *id.* § 5154. *See Walker*, 135
18 S. Ct. at 2244 (“Here we are concerned only with . . . specialty license plates, not
19 with the personalization program.”). The former involve a personalized message
20 unique to one vehicle; the latter are issued to any eligible registrant after 7,500
21 applications have been submitted for the same design. Cal. Veh. Code §
22 5004.3(g)(1). California “special interest” plates consist of designs proposed by non-
23 profit groups, which then share in the revenue from their sale. *Id.* § 5060(g).
24 “Specialized plates” serve a similar revenue-raising function, *id.* § 5157, but “shall
25 have a design or contain a message that publicizes or promotes a state agency, or the
26 official policy, mission, or work of a state agency.” *Id.* § 5154. These “special” plates
27 are available to anyone registering a vehicle; however, special plates “containing a

28 _____
² <https://www.dmv.ca.gov/portal/dmv/detail/portal/ipp2/welcome>.

1 *personalized message* are subject to the fees required [for environmental plates] in
2 addition to any fees required by the special interest license plate program.” *Id.*
3 § 5060(d)(1)(C) (emphasis added).

4 An applicant for a personalized plate configuration under the environmental
5 license plate program must provide her name, the name of the recipient if the plate
6 is a gift, and “the applicant’s first, second, and third choices of the configuration of
7 letters and numbers to appear on license plates and the meaning of each [choice].”
8 *See* Cal. Code Regs. tit. 13 § 206.00(c). California law allows the Department to
9 “refuse to issue any combination of letters or numbers, or both, that may carry
10 connotations offensive to good taste and decency.” Cal. Veh. Code § 5105.

11 The implementing regulation instructs the Department to refuse all such
12 applications based on “criteria which includes, but is not limited to several factors.”³
13 Cal. Code Regs. tit. 13 § 206.00(c)(7)(D). Applying those “good taste and decency”
14 factors, Department officials must deny proposed configurations if they believe the
15 configuration: (1) has a sexual connotation or is a term of lust or depravity; (2) is a
16 vulgar term; a term of contempt, prejudice or hostility; an insulting or degrading
17 term; a racially degrading term; or an ethnically degrading term; (3) is a swear word
18 or term considered profane, obscene, or repulsive; or (4) has a negative connotation
19 to a specific group. *See id.* The regulations do not specify who makes the
20 determination whether a configuration “may carry connotations offensive to good
21 taste or decency.” ECF No. 1, Compl. ¶ 25. Apart from the descriptions above, the
22 regulations do not set out any guidelines to help the decisionmaker in his
23 determination of which proposed configurations “carry connotations offensive to
24 good taste and decency,” *id.* ¶ 26, nor do they specify what type of evidence the
25

26 ³ The regulation also requires the Department to “cancel and order the return of any
27 Environmental License Plate previously issued which contains any configuration of
28 letters and/or numbers which the department later determines may carry
connotations offensive to good taste and decency.” Cal. Code Regs. tit. 13
§ 206.00(c)(7)(D).

1 decisionmaker may consider or provide in rejecting an application for a personalized
2 license plate configuration.” *Id.* ¶ 27.

3 **B. Factual Background**

4 Jonathan Kotler is a professor at the Annenberg School for Communication
5 and Journalism at the University of Southern California. ECF No. 1, Compl. ¶ 6. An
6 expert in media law, Mr. Kotler has been quoted on First Amendment issues in
7 newspapers such as the *Los Angeles Times*, the *Houston Chronicle*, and the *Chicago*
8 *Tribune*. *Id.* ¶ 7. As an attorney, Mr. Kotler served as legal counsel to the California
9 First Amendment Coalition, *id.* ¶ 8, and argued before the Supreme Court of the
10 United States. *See City of Riverside v. Rivera*, 477 U.S. 561 (1986).

11 Mr. Kotler is an avid soccer fan, and has followed the sport since the 1950s.
12 *Id.* ¶ 10. His favorite soccer team is the London-based Fulham FC. *Id.* ¶ 11. Mr.
13 Kotler has been a Fulham season ticket holder for over a decade, and travels from
14 Los Angeles to London each year to see the team play in their stadium at Craven
15 Cottage. *Id.* ¶ 12. The team wears white jerseys, and fans often express their support
16 for the team through the shorthand “COYW,” which stands for “Come on You
17 Whites.” *Id.* ¶ 13. This commonly used term carries no racial connotation, *id.* ¶ 14,
18 and appears in the team’s newsletters, social media, and in media outlets such as
19 NBC. *See id.* ¶ 16 & Exhibit 2.

20 Mr. Kotler was elated after Fulham enjoyed one of its most successful seasons
21 in 2017-18 and it was promoted to the top league in England. *Id.* ¶ 17. To celebrate
22 that success, Mr. Kotler applied for a personalized license plate with the
23 configuration “COYW.” *Id.* ¶ 18. The Department denied the application. *See id.*
24 ¶ 29 & Exhibit 1. In a letter, the Department explained that it denied the proposed
25 configuration because “COYW” carried “connotations offensive to good taste and
26 decency.” *Id.* Citing the challenged regulation, the Department stated that it is
27 “difficult” to balance “an individual’s constitutional right to free speech and
28 expression while protecting the sensibilities of all segments of [the] population.” *Id.*

1 ¶ 30. The Department’s letter provided an address to which Mr. Kotler could submit
2 a letter of explanation for further review. *Id.* Mr. Kotler submitted letters from the
3 team’s chairman, an article from NBC, and other documents that used “COYW” or
4 “the Whites” to refer to Fulham’s soccer team. *See id.* ¶ 31 & Exhibit 2. The
5 Department responded with a letter providing no more than a cursory note that
6 “[u]pon review, [the Department is] remaining with [its] original determination that
7 that the configuration is unacceptable. ‘Come on You Whites’ can have racial
8 connotations.” *Id.* ¶ 32 & Exhibit 3.⁴

9 Mr. Kotler filed this federal civil rights lawsuit for injunctive and declaratory
10 relief. *See* ECF No. 1. The complaint set forth two claims. *See id.* First, that
11 California’s regulation of personalized license plates that “may carry connotations
12 offensive to good taste and decency” imposes content- and viewpoint-based
13 restrictions on speech, and is thus facially invalid under the First Amendment. *Id.* ¶¶
14 33-43. Second, that the regulation violates the First Amendment as applied to Mr.
15 Kotler, because the Department denied the proposed configuration without any
16 evidence that it carries any racial connotations or that its denial would further any
17 legitimate governmental interest. *Id.* ¶¶ 44-50. The Department filed a motion to
18 dismiss. *See* ECF No. 16. The Department’s sole argument in the motion is that
19 personalized license plate configurations are government speech. *See id.* This
20 opposition follows.

21
22
23 ⁴ The Department misstates Mr. Kotler’s position when it suggests that he “appears
24 to concede that it would be inappropriate for DMV to assign a [license plate
25 configuration] that is actually offensive” ECF No. 16, at 12. As is apparent from
26 the complaint, Mr. Kotler argues that the Department’s ban on “offensive”
27 personalized license plate configurations violates the First Amendment on its face,
28 regardless how the Department interprets any particular configuration. ECF No. 1,
Compl., ¶¶ 33-43; *Tam*, 137 S. Ct. at 1763 (“Giving offense is a viewpoint.”). Mr.
Kotler’s allegation that “[t]he phrase ‘Come on You Whites’ carries no racial
connotation” illustrates his claim that the Department’s enforcement of the
challenged regulation violates the First Amendment as applied to him. *Id.* ¶ 14.

STANDARD OF REVIEW

1
2 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the
3 claims asserted in the complaint. Dismissal is proper only if the complaint lacks a
4 cognizable legal theory or sufficient facts alleged under a cognizable legal theory.
5 *See Balisteri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). To survive
6 a motion to dismiss, the plaintiff's complaint "must contain sufficient factual matter,
7 accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v.*
8 *Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations omitted). "A claim has facial
9 plausibility when the plaintiff pleads factual content that allows the court to draw
10 the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

11 In evaluating the motion, the court construes the complaint in the light most
12 favorable to the plaintiff, and accepts all well-pleaded factual allegations as true, as
13 well as all reasonable inferences to be drawn from those allegations. *See Sprewell v.*
14 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of*
15 *reh'g*, 275 F.3d 1187 (9th Cir. 2001). The evidence that the court considers is limited
16 to the allegations on the face of the complaint (including any documents attached to
17 the complaint), matters which are properly judicially noticeable, contents of
18 documents that are alleged in the complaint, and "documents whose contents are
19 alleged in a complaint and whose authenticity no party questions, but which are not
20 physically attached to the pleading." *See Kneivel v. ESPN*, 393 F.3d 1068, 1076 (9th
21 Cir. 2005).

ARGUMENT

I. **PERSONALIZED LICENSE PLATE CONFIGURATIONS REPRESENT THE APPLICANT'S PERSONAL SPEECH, NOT GOVERNMENT SPEECH**

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23
24
25 An individual's speech on personalized license plates represent personal
26 speech, not government speech. This distinction is crucial because although the First
27 Amendment prohibits the government from abridging the freedom of speech, the
28 "Free Speech Clause . . . does not regulate government speech." *Pleasant Grove City*

1 *v. Summum*, 555 U.S. 460, 467 (2009); *see also* *Johanns v. Livestock Marketing*
2 *Ass’n*, 544 U.S. 550, 553 (2005) (“[T]he government’s own speech . . . is exempt
3 from First Amendment scrutiny.”).

4 The Supreme Court has urged “great caution before extending [its]
5 government-speech precedents.” *Tam*, 137 S. Ct. at 1758. The Court has observed
6 that, although the government-speech doctrine is essential to ensure that government
7 can express its own viewpoint, it is also “susceptible to dangerous misuse.” *Id.* “If
8 private speech could be passed as government speech by simply affixing a
9 government seal of approval, government could silence or muffle the expression of
10 disfavored viewpoints.” *Id.*

11 In *Walker*, the Supreme Court upheld Texas’s denial of a specialty plate
12 design, reasoning the specialty plate designs were government speech. *See Walker*,
13 135 S. Ct. at 2243-44. Over a four-Justice dissent, the *Walker* Court applied the
14 government-speech factors it had first established in *Summum*. First, the government
15 has long used specialty plate designs as a forum to communicate its message to the
16 public. *Id.* at 2246-47. Second, specialty plate designs were more closely identified
17 with the government than the motorist. *Id.* at 2248-49. Third, Texas exercised great
18 control over messages on specialty plates. *Id.* at 2249. The *Walker* Court observed
19 that these factors should be considered with “other relevant considerations” in
20 determining whether speech is government speech. *Eagle Point Education Ass’n v.*
21 *Jackson Cty. Sch. Dist. No. 9*, 880 F.3d 1097, 1103 (9th Cir. 2018) (the ultimate
22 question “is whether a reasonable observer would perceive the plate’s message as a
23 statement by” the government). The Supreme Court later observed that *Walker*
24 “likely marks the outer bounds of the government-speech doctrine.” *Tam*, 137 S. Ct.
25 at 1760. Applying the factors enunciated in *Summum*, speech on personalized license
26 plate configurations represents personal speech, not government speech.

1 **A. Personalized License Plates Have Historically Been Used to**
2 **Communicate Private Speech, Not Government Speech**

3 Personalized license plate holders have historically used personalized plates
4 to communicate their own private speech, not the government’s speech. The
5 Department’s current argument that Mr. Kotler has no First Amendment right to a
6 personalized license plate contradicts the Department’s earlier letter to Mr. Kotler,
7 which stated its position that “an *individual’s* constitutional right to free speech and
8 expression” must sometimes give way to “the sensibilities of all segments of [the]
9 population.” ECF No. 1, Compl. ¶¶ 29-30 & Exhibit 1 (emphasis added). As courts
10 have recounted in other cases, individuals use their personalized license plate
11 configurations to celebrate their name (“BOB”), their car (“68VETT”), their pets
12 (“LVMYDOG”), their optimism (“B HAP E”), and so on. *See Mitchell*, 450 Md. at
13 295 n.6. These plate configurations, like configurations on personalized plates in
14 California, are created exclusively out of the imagination of the individual, not the
15 government. The Department fails to recite a single example of a government
16 message displayed in the form of a personalized license plate configuration. The
17 only thing close to a government message the Department points to is the
18 identification of vehicles. *See* ECF No. 16, at 10. Yet an interest in identification is
19 served by both random plates and personalized plates—but only the latter also
20 include the private message of the registrant and only the latter are relevant here.
21 The Department’s failure to identify a government message conveyed by
22 personalized plates is unsurprising, because each personalized license plate
23 configuration may only appear on one vehicle; it would be inefficient and
24 incomprehensible for the government to disseminate its message on personalized
25 license plates. If the vast number of distinctive personalized license plate
26 configurations is transformed into government speech, then California would be
27 “babbling prodigiously and incoherently.” *Tam*, 137 S. Ct. at 1758.
28

1 Walker does not dictate otherwise. The Court there recounted over a century
2 of history of states conveying their own message on plate *designs*, but was careful
3 to draw a distinction between designs available to the public and personalized plates
4 that are associated with just one person. *See Walker*, 135 S. Ct. at 2248; *id.* at 2244
5 (“Here we are concerned only with . . . specialty license plates, not with the
6 personalization program.”). Those designs, in Texas and in other states, featured
7 classic examples of government messages such as “Idaho Potatoes,” “North to the
8 Future” (Alaska), “Hoosier Hospitality” (Indiana), “Green Mountains” (Vermont),
9 and “America’s Dairyland” (Wisconsin). *Id.* “States have used license plate slogans
10 to urge action, to promote tourism, and to tout local industries.” *Id.* States have *never*
11 used personalized license plate configurations to further any of those purposes.
12 Indeed, California law draws a distinction between specialty plate designs that
13 “publicize[] or promote[] a state agency,” Cal. Veh. Code. § 5154, and the custom
14 plate configurations at issue here that “contain[] a personalized message,” *id.*
15 § 5060(d)(1)(C).

16 **B. Personalized License Plates Are Closely Identified**
17 **with Individuals, Not the Government**

18 Personalized license plates are only ever identified with the license plate
19 holder rather than the government. As Maryland’s highest court observed, “[t]here
20 is nothing governmental about the message ‘BOB’ or ‘FROSTY’ or ‘68VETT’ or
21 ‘LVMYDOG’ or ‘B HAP E.’” *Mitchell*, 450 Md. at 295 n.6. Rather, “the natural
22 reaction of those who see the “BOB” vanity plate will be to think that the driver of
23 the vehicle is speaking and is saying, ‘Hey world, I’m Bob.’” *Id.* As the *Mitchell*
24 court recognized, a reasonable observer would, at most, assume that the Department
25 had permitted the vehicle owner to display the owner’s requested message on his
26 plate; a reasonable observer would not assume that the Department “has endorsed
27 the message as to make the message its own.” *Id.*⁵

28 ⁵ *See also Matwyuk v. Johnson*, 22 F. Supp. 3d 812 (E.D. Mich. 2014); *Byrne v. Rutledge*, 623 F.3d 46 (2d Cir. 2010); and *Morgan v. Martinez*, Civ. No. 3:14-02468,

1 California’s regulatory scheme also recognizes that license plate
2 configurations are identified with the license plate holder. The Department neither
3 creates nor suggests personalized license plate configurations. *Cf. Walker*, 135 S. Ct.
4 at 2248 (recounting state-created specialty plate designs). Instead, the person
5 applying for a personalized plate is responsible not just for creating the
6 configuration, but also supplying the Department with its meaning. *See* Cal. Code
7 Regs. tit. 13 § 206.00(c). It would be strange, to say the least, for the government to
8 ask individuals to provide the government with the meaning of the government’s
9 own message. Finally, California prohibits duplicative license plate configurations.
10 Cal. Veh. Code § 5105(a). As a result, each configuration is unique—much more so
11 than specialty plate designs, which generally require 7,500 applications for the same
12 plate before they will be issued, *id.* § 5004.3(g)(1), and even more so than bumper
13 stickers—which can be replicated on many cars—while there can be only one
14 “COYW” or “LVMYDOG” plate in the entire state. *See Brunetti*, 2019 WL
15 2570622, at *2 (“The owner of an unregistered mark may still use it in commerce
16 and enforce it against infringers. . . . But registration gives trademark owners
17 valuable benefits.”). This suggests that California created the personalized license
18 plate program not so the government can express its message, but so Californians
19 can make their unique contributions to the marketplace of ideas. *See Tam*, 137 S. Ct.
20 at 1766 (Kennedy, J., concurring) (“By mandating positivity, the law here might
21 silence dissent and distort the marketplace of ideas.”).

22 The Department’s arguments to the contrary are unpersuasive. First,
23 government approval of an individual’s message does not transform it into the
24 government’s message. ECF No. 16, at 12. The government also approves
25 trademarks, but there is no doubt that trademarks represent the individual’s speech.

26 _____
27 2015 WL 2233214 (D.N.J. May 12, 2015). Although those cases were decided
28 before *Walker*, the reasoning in those cases that a reasonable observer would
associate a personalized license plate configuration with personal speech survives
the Supreme Court’s decision in *Walker*.

1 *Tam*, 137 S. Ct. at 1757-60. Nor does government approval of a message necessarily
2 constitute an endorsement of that message. *Contra* ECF No. 16, at 11 (citing *Walker*,
3 135 S. Ct. at 2249). The Department takes the Supreme Court’s analysis in *Walker*
4 out of context. A specialty plate design might be viewed as the government’s
5 endorsement of a message, given that the government has historically endorsed
6 messages reflected in specialty plate designs. *See id.* at 2248-49 (surveying the
7 history of government messages on specialty plate designs in Texas and other states).
8 By contrast, the government has not used personalized license plates to broadcast
9 government messages. Thus, while a reasonable observer might surmise that the
10 government approved a message on a personalized license plate, she would not
11 assume that the government endorses that message. *Mitchell*, 450 Md. at 295 n.6.

12 Second, that license plates serve “governmental purposes of vehicle
13 registration and identification” does not transform the message conveyed by a
14 personalized plate into government speech. ECF No. 16, at 11. Trademarks also
15 serve important identification purposes. *See B&B Hardware, Inc. v. Hargis*
16 *Industries, Inc.*, 135 S. Ct. 1293, 1299 (2015) (“The principle underlying trademark
17 protection is that distinctive marks—words, names, symbols, and the like—can help
18 distinguish a particular artisan’s goods from those of others.”). But that does not
19 make trademarks government speech. *See Tam*, 137 S. Ct. at 1760. Personalized
20 license plates, like trademarks, serve multiple purposes. They not only help identify
21 vehicles, but also serve as a means of expression for the motorist. After all, standard
22 license plates serve an interest in identification just as well as a personalized license
23 plate. Yet California uses revenue it generates from personalized license plate
24 application and renewal fees to support environmental programs. The State is able
25 to generate that extra revenue because personalized license plates serve an interest
26 in addition to the identification interest already served by standard license plates: An
27 individual’s interest in self-expression.

1 **C. Personalized License Plate Applicants Largely Control**
2 **the Messages on Personalized License Plates**

3 The Department’s attempt to stretch *Walker* to include *personalized* license
4 plates finally snaps when it argues that it maintains strict control over the messages
5 on personalized license plates. In fact, each applicant supplies the entirety of the
6 message on her personalized license plate. The Department has never communicated
7 a message through a personalized license plate, and it explicitly asks applicants to
8 explain the meaning of the numbers and letters they provide to the state for their
9 personalized plates. *See* Cal. Code Regs. tit. 13 § 206.00(c).

10 Specialty plates, like those at issue in *Walker*, are simply not comparable to
11 personalized plates. Texas, for example, had approximately 350 specialty plates. *See*
12 *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting). Although that number is large, it
13 pales in comparison to the hundreds of thousands of personalized plates on
14 California’s roads. And while it is plausible that the “outer bounds” of the
15 government speech doctrine allows the government to convey hundreds of messages
16 through plate designs, *Tam*, 137 S. Ct. at 1760, the suggestion that the government
17 is speaking in hundreds of thousands of different ways through its control of
18 personalized plates is nonsensical.

19 The Department conflates control over the *forum* with control over the
20 *message*. In *Walker*, for example, Texas exhibited strict control over the *message*
21 that specialty plates could convey. Perhaps most obviously, Texas only allowed the
22 message on specialty plates to come from certain speakers. Specialty plates in Texas
23 could only come from one of three sources: (1) the Legislature; (2) a state-designated
24 private vendor; or (3) a non-profit. *Walker*, 135 S. Ct. at 2244-45. Personalized
25 plates, however, can come from any individual—in Texas or California. That’s why
26 the *Walker* Court explicitly limited its holding to specialty plates. *Id.* at 2244 (noting
27 that personalized plates are not covered by the opinion).

1 The Department points to the powers it has to punish license plate forgeries
2 as an example of the extant “control” it exercises over personalized license plates.
3 But the power to punish false license plates, or license plates that have been revoked,
4 is not similar in kind to the power to control the message. The only control that
5 California maintains over the message—as opposed to the forum—are the content-
6 based veto powers that Mr. Kotler is challenging as unconstitutional.

7 The Patent and Trademark Office’s (PTO) role in trademark registration
8 provides an example. The relevant statutes direct the PTO to “refuse[] registration
9 of certain marks.” 15 U.S.C. § 1052. The PTO cannot register a mark that “so
10 resemble[s] another mark as to create a likelihood of confusion.” *Id.* § 1052(d). It
11 cannot register a mark that is “merely descriptive” of the goods on which it is used.
12 *Id.* § 1052(e). It cannot register a mark containing the flag or insignia of any nation
13 or state. *Id.* § 1052(b). Despite the government’s role in regulating trademark
14 registration, however, the Supreme Court has squarely rejected the contention that
15 trademarks constitute government speech. *See Tam*, 137 S. Ct. at 1757-60. In *Tam*,
16 as in this case, the government’s control over forum does not give it *carte blanche*
17 to control the message.

18 *Walker* does not dictate otherwise. The control that the Court found relevant
19 in *Walker* was the State’s well-established control over the message on license plate
20 designs in “choos[ing] how to present itself and its constituency.” 135 S. Ct. at 2249.
21 Of course, Texas is free to promote its citrus industry, as it does, without also saying
22 that Florida’s oranges are better. *Id.* No such concerns about “control” exist with
23 personalized license plates because, again, California is not promoting its own
24 message through personalized license plates. There is no concern that the State will
25 be forced to issue a plate that conflicts with its preferred message. *See Mitchell*, 450
26 Md. at 296 (rejecting the Indiana Supreme Court’s reasoning in *Comm’r of Indiana*
27 *Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1207 (Ind. 2016), about the
28 State’s “control” over personalized license plates).

1 Unlike the 350 or so messages that Texas conveyed through the specialty
2 plates in *Walker*, California simply cannot maintain control over the millions of
3 messages on California’s roads. Simply because California may veto a message it
4 does not like does not transform the unique personal messages into government
5 speech. These are private messages, created by individuals, that the State has no
6 interest in endorsing or conveying. Indeed, the State would neither endorse nor
7 convey the hundreds of thousands of messages on personalized license plates merely
8 by administering a personalized license plate program. *See Tam*, 137 S. Ct. at 1757-
9 60.

10 **D. Other Factors Also Suggest that Personalized License Plate**
11 **Configurations Constitute Private Speech**

12 The Department relies on a passage from *Walker* that notes other facts that
13 tend to show that Texas’s specialty plates convey government speech. ECF No. 16,
14 at 14. But the Department misunderstands the passage. The *Walker* Court explained
15 that “the message conveyed by those designs is conveyed on behalf of the
16 government.” *Walker*, 135 S. Ct. at 2250. The Court explained that specialty plates
17 are “on government-mandated, government-controlled, and government-issued IDs
18 that *have traditionally been used as a medium for government speech.*” *Id.* (emphasis
19 added). Here, the Department makes no attempt to say that license plate
20 configurations have traditionally been used as a medium for government speech. Nor
21 could it. License plate configurations are either issued randomly—in which case any
22 message is completely absent—or they are issued at the request of an individual who
23 supplies the characters and meaning. The fact that relatively few messages are
24 selected by a State Board and placed on government-issued specialty license plates
25 *in a manner and place that the government has traditionally used for government*
26 *speech*, certainly tends to show that the government is speaking through specialty
27 plates. But the only similarity between those select few government messages on
28 specialty plates and the hundreds of thousands of individual messages displayed on

1 personalized plates is that they both appear on license plates. That is not enough to
2 transform inherently private speech into government speech. *See* Cal. Veh. Code
3 § 5060(d)(1)(C) (personalized plates “contain[] a personalized message”).

4 The *Walker* Court held that specialty plates convey government messages in
5 Texas. The same is true in California. Specialty plates convey a government
6 message. But never have license plate configurations—in Texas, California, or
7 elsewhere—been used for that purpose.

8 **II. THE DEPARTMENT’S RESTRICTIONS ON PERSONALIZED** 9 **LICENSE PLATES FAIL EVEN BEFORE FORUM ANALYSIS** 10 **APPLIES**

11 **A. Although Personalized License Plates Are Best Viewed as a** 12 **Designated Public Forum, California’s Personalized License Plate** 13 **Regulation is Unconstitutional Under Any Analysis**

14 A court uses forum analysis where a law restricts private speech on
15 government property. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473
16 U.S. 788, 800 (1985). Different levels of scrutiny apply depending on the type of
17 forum at issue, *id.*, but it is unnecessary for this Court to define the relevant forum.⁶
18 But the Department’s “good taste and decency” regulations cannot survive review
19 regardless of forum, because it is a “bedrock First Amendment principle” that the
20 government cannot discriminate against “ideas that offend.” *Tam*, 137 S. Ct. at 1751;
21 *Brunetti*, 2019 WL 2570622, at *3. This is true even in non-public forums, where
22 restrictions on speech must be reasonable, but still viewpoint neutral. *See*
23 *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 829
24 (1995).

25 ⁶ If this Court had to define the forum, personalized license plates would be a
26 designated public forum. The Department administers a personalized license plate
27 program in addition to an already existing standard license plate program, which
28 makes personalized plates a classic example of “public property which the state has
opened to the public as a place for expressive activity.” *Perry Ed. Ass’n v. Perry*
Local Educators Ass’n, 460 U.S. 37, 45 (1983).

1 If there is any truth to the Department’s argument that forum analysis is
2 unworkable here, it is this: The “good taste and decency” regulations fail with or
3 without any mention of forum analysis because they involve viewpoint
4 discrimination. Like the Supreme Court’s decisions in *Tam* and *Brunetti*, Mr.
5 Kotler’s claim is meritorious for that reason alone. Just as the Trademark Office’s
6 refusal to register Simon Tam’s or Erik Brunetti’s trademarks demonstrated that the
7 Lanham Act’s restrictions on “disparaging” or “immoral or scandalous” speech
8 involved unconstitutional viewpoint discrimination, the Department’s refusal to
9 issue Mr. Kotler’s license plate demonstrates that the “good taste and decency”
10 regulations involve unconstitutional viewpoint discrimination. In that way, forum
11 analysis is of limited relevance here, just as it was in *Tam* and *Brunetti*.

12 A law such as the “good taste and decency” regulations—or the Lanham Act’s
13 “disparagement” and “immoral or scandalous” standards—that discriminates based
14 on viewpoint is an “egregious form of content discrimination,” which is
15 “presumptively unconstitutional.” *Rosenberger*, 515 U.S. at 829. The Department
16 cannot respond to that presumption of unconstitutionality at the motion to dismiss
17 stage—nor has it tried to defend the viewpoint neutrality of its regulation. *See*
18 *Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 783 (9th Cir. 2012). Its motion
19 should therefore be denied.

20 Even if the regulation were not doomed by its viewpoint discrimination, it
21 would also fail traditional forum analysis because it is unreasonable. The regulation
22 fails the reasonableness requirement because it fails to “articulate some sensible
23 basis for distinguishing what may come [on] from what must stay [off]” of
24 personalized license plates. *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876,
25 1888 (2018). As detailed above, the regulations are vague in their particulars and
26 open ended in their limitations. Cal. Code Regs. tit. 13 § 206.00(c)(7)(D) (listing
27 “criteria which includes, but is not limited to several factors.”). But where a
28 government speech restriction violates viewpoint neutrality, as here, a court “need

1 not decide whether it is unreasonable in light of the purposes served by the forum.”
2 *Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001).

3 Judged either under the standards applied by the Supreme Court in *Tam* and
4 *Brunetti*, or under traditional forum analysis, the “good taste and decency”
5 regulations are unconstitutional.

6 **B. The Department’s Concerns with Forum Analysis**
7 **Misstate the Relevant Law**

8 The Department relies on *Walker* in arguing that forum analysis cannot apply
9 here. ECF No. 16, at 16. But *Walker* reached that conclusion only because it
10 determined that the speech at issue there was government speech. *See Walker*, 135
11 S. Ct. at 2250-52. As Mr. Kotler explained above (at Section I), personalized license
12 plate configurations constitute an individual’s private speech. *Walker* is inapposite
13 because it focused on license plate designs that the State made available to the
14 general public, rather than personalized plates that are unique to each individual.

15 Nor does *Summum* help the Department. As the Court noted in that case, there
16 is no issue with applying forum analysis where “a government program [is] capable
17 of accommodating a large number of public speakers without defeating the essential
18 function of the [program].” *Summum*, 555 U.S. at 478. The Court’s primary example
19 of such a program applies here: the First Amendment would apply “if a town created
20 a monument on which all of its residents (or all those meeting some other criterion)
21 could place the name of a person to be honored or some other private message.” *Id.*
22 at 480. In effect, that is what California has done here: invited all vehicle registrants
23 to place their “private message” on California license plates. Because each license
24 plate configuration must be unique, Cal. Veh. Code § 5105(a), the program here
25 must accommodate a large number of public speakers to further the identification
26 function of the program. And each additional participant enhances the revenue
27 function of the program by generating additional revenue for California’s
28 environmental programs. *See* Cal. Veh. Code § 5106(a)-(b).

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Respectfully submitted,

PACIFIC LEGAL FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PLAINTIFF’S OPPOSITION TO MOTION TO DISMISS has been served through the Court’s CM/ECF system on all registered counsel this 3rd of July, 2019.

DATED: July 3, 2019.

/s/ Wencong Fa

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