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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**OAKLAND DIVISION**

JOHN DOE #1, an individual;
JOHN DOE #2, an individual;
JOHN DOE #3, an individual; and
JOHN DOE #4, an individual;

Plaintiffs,

v.

JOHN KERRY, in his official capacity as Secretary of State of the United States; JEH JOHNSON, in his official capacity as Secretary of Homeland Security; LORETTA LYNCH, in her official capacity as Attorney General of the United States; SARAH SALDANA, in her official capacity as Assistant Secretary of Immigration and Customs Enforcement; R. GIL KERLIKOWSKE, in his official capacity as Commissioner of U.S. Customs and Border Protection; DAVID HARLOW, in his official capacity as Acting Director of the United States Marshals Service; and DOES 1 to 20, inclusive,

Defendants.

Case No.: 4:16-CV-654-PJH

**NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM OF POINTS AND AUTHORITIES**

**[Filed concurrently with:**
**(1) Declaration of the Association for the Treatment of Sexual Abusers (ATSA);**
**(2) Declaration of Thomas J. Tobin, Ph.D.;**
**(3) Declaration of Charlene Steen, Ph.D.;**
**(4) Declaration of Alexander J. Landon, J.D.;**
**(5) Declaration of John Doe #3;**
**(6) Declaration of John Doe #4; and**
**(7) [Proposed Order]**

**Date:** **March 30, 2016**
**Time:** **9:00 a.m.**
**Location:** **Courtroom 3**
**Judge:** **Hon. Phyllis J. Hamilton**

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## NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, on March 30, 2016, at 9:00 a.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Phyllis J. Hamilton, located at 1301 Clay Street, Oakland, CA 94621, Plaintiffs John Doe #1, *et al*. will and hereby do move for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65.

Plaintiffs' motion seeks to enjoin Defendants John Kerry, Jeh Johnson, Loretta Lynch, Sarah Saldana, R. Gil Kerlikowski, and David Harlow, as well as their successors in office and their respective agencies, from implementing, enforcing, or otherwise giving effect to Sections 4(e), 5, 6, and 8 of Public Law No. 114-119, designated as the "International Megan's Law to Prevent Child Exploitation and Other Crimes Through Advanced Notification of Traveling Sex Offenders" (the "IML"), on the grounds that those sections of the IML violate the First and Fifth Amendments to the United States Constitution, and that irreparable harm will result to Plaintiffs and to the public if the IML is not enjoined pending a trial on the merits of Plaintiffs' claims.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

The IML is a historically significant and facially discriminatory law that does not increase public safety and virtually guarantees a significant and needless risk of physical harm to approximately one million individuals required to register as sex offenders in this country (hereinafter, "Registrants"). As discussed herein and in the declarations submitted herewith, *leading authorities in the treatment and supervision of Registrants such as the Association for the Treatment of Sexual Abusers (ATSA) oppose the IML* on the grounds that it defies the well-developed body of research demonstrating a low re-offense rate for Registrants, will not protect the public, and will instead lead to numerous harmful consequences for Registrants, their families, and society. (See Generally Declaration of the Association for the Treatment of Sexual Abusers ("ATSA Decl.") and Declaration of Thomas J. Tobin, Ph.D. ("Tobin Decl."), both filed concurrently herewith.)

Significantly, as part of this law, and for the first time in the history of the United States, American citizens will be forced by the Government to label and stigmatize themselves on a document foundational to citizenship: their United States passport. Pursuant to the IML, Registrants who have committed even minor offenses such as "sexting" will be forced to publicly identify themselves as sex offenders – and as actual or likely child sex traffickers – whenever and wherever they display their passport in the United States and abroad, including to hostile law enforcement agencies and populations in foreign countries. In addition, the IML will establish an international travel blacklist whereby information regarding Registrants and other Covered Individuals is communicated to a destination country without regard to the Covered Individual's current risk of committing any sex offense, much less child sex trafficking.

As set forth below, the addition of "unique identifiers" to the passports of American citizens constitutes compelled speech in violation of the First Amendment. Further, the IML violates the Due Process clause of the Fifth Amendment because the government has no rational basis for imposing the IML's punitive measures on a population which, as a class, is uniquely subject to discriminatory legislation and poses no measurable risk of committing the heinous, yet uncommon, offense that the IML purportedly seeks to prevent.

## II. BACKGROUND AND PARTIES

Plaintiffs John Does Nos. 1 through 4 ("Plaintiffs") are individuals who were previously convicted of "sex offenses" involving minors. However, application of the label "sex offender" to Plaintiffs obfuscates the vast differences between Plaintiffs and individuals who have actually engaged in child sex trafficking. (See Complaint ¶¶13-16, 32-33.)

For example, Plaintiff John Doe #3 was convicted in 2003 of having sexual contact with a 16-year-old whom he believed to be 19. Since that time he has had his convictions expunged, has received two state judicial declarations that he is rehabilitated, and has been exempted from the requirement to register as a sex offender in California. (Id. ¶3; Declaration of John Doe #3 ("Doe #3 Decl.") ¶¶ 6-14, filed concurrently herewith.) Plaintiff John Doe #4, a 27-year veteran of the U.S. Marine Corps, pled guilty to a misdemeanor "violation of privacy" that initially did not include a requirement to register as part of his plea; however, that requirement was later levied upon him.

(Complaint ¶16; Declaration of John Doe #4 ("Doe #4 Decl."), at 1, filed concurrently herewith.) It was his first and only criminal offense, and he has not re-offended. (Id.) Plaintiff John Doe #1's offense is over 25 years old and is his only criminal offense. (Complaint ¶13.) He has not re-offended and is currently an executive in an international manufacturing firm who travels frequently for business. Plaintiff John Doe #2 was convicted of an offense in 2007 involving chatting with an individual on-line who he never met, his first and only offense. (Complaint ¶14.)

Notably, none of the Plaintiffs in this case have either engaged in or been convicted of child sex trafficking, and they do not indicate any risk of engaging in child sex trafficking in the future. The unique individual circumstances of Plaintiffs as well as most Registrants reveal the patent irrationality of the IML, which treats "sex offenders" as one homogenous and monolithic group by subjecting them to uniform deprivations regardless of the details of their offense and – more importantly – that they are likely to engage in child sex trafficking. (ATSA Decl. ¶25-26 ("The International Megan's Law (IML) is based upon several misconceptions and is too broad because it sweeps up different people and treats them the same.").) Further, by relying upon superficial reasoning and irrational prejudice against Registrants, the IML disregards the significant volume of empirical evidence on this topic, which demonstrates that Registrants have a low rate of re-offense and are overwhelmingly unlikely to engage in sex trafficking unless they have already done so. (See Section IV(D) below; ATSA Decl. ¶¶16-50; Tobin Decl. ¶¶17-20.) This treatment will result in massive disruptions and often dangerous consequences to them, their families and friends, their business colleagues, and their livelihoods.[1]

Disturbingly, the IML and its punitive provisions were never the subject of a substantive discussion or debate in either the U.S. House of Representatives or the U.S. Senate. (See Complaint ¶¶49-51.) Rather, the IML was passed by both houses of Congress by a voice vote pursuant to a "suspension of the rules," a method designed to facilitate the passage of routine and non-controversial legislation, not controversial and historically significant legislation such as the IML.[2]

[1] See Doe #1 Decl. ¶¶9-12; Doe #3 Decl. ¶15-19; Doe. #4 Decl., at 4-6, discussing the irreparable harm threatened by the IML to Plaintiffs. See also ATSA Decl. ¶¶26-27; Tobin Decl. ¶26.

[2] Indeed, the House vote on H.R. 515 was one in a series of eight votes taken on other bills that were truly noncontroversial, such as funding for a Veterans' memorial.

The lack of substantive consideration of the IML underscores the urgent need for judicial review of this legislation. See United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision [at issue]."). For this and other reasons, Plaintiffs respectfully submit that a preliminary injunction is necessary to forestall the punitive, dangerous, disruptive, and senseless effects of the IML while the merits of Plaintiffs' claims can be adjudicated.

## III. STATEMENT OF FACTS

Plaintiffs seek to enjoin two provisions of the IML, herein designated the "Passport Identifier Provision" (Section 8) and the "Notification Provision" (Sections 4(e), 5, and 6).

### A. The IML's Passport Identifier Provision

The Passport Identifier Provision of the IML mandates that the Secretary of State shall mark all passports issued to Covered Individuals[3] who are currently listed on a state sex offender registry with a "conspicuous" "unique identifier." IML § 8(a). The IML defines this identifier as "any visual designation affixed to a conspicuous location on the passport indicating that the individual is a covered sex offender." Id. The IML also allows the Secretary of State to revoke passports of Covered Individuals in order to add "unique identifiers" to their new passports. Id.

Therefore, Covered Individuals who display their passports in connection with international travel, or for the purposes of identification domestically or overseas, will be forced to identify themselves not only as a "sex offenders," but also as actual or potential child sex traffickers.

The "unique identifier" will be available to anyone with a view of, or access to, a Covered Individual's passport, within any number of potentially dangerous populations and environments. Tellingly, the IML exempts the Secretary of State and other federal officials from liability arising from harm created by the Passport Identifier Provision, bespeaking the Government's awareness of the dangers and possible misuses that this law invites.[4] IML § 8.

[3] As used herein, "Covered Individual" mirrors the IML's definition of "Covered Sex Offenders," which includes "an individual who is a sex offender by reason of having committed a sex offense against a minor." IML § 3(3). The IML's definition of "sex offense" incorporates those set forth in section 111 of the Adam Walsh Act, 42 U.S.C. § 16911. See IML § (10).

[4] See Declaration of Charlene Steen filed concurrently herewith, documenting numerous physical attacks and even murders of Registrants that occurred solely because of their presence on registries.

1 B. **The IML's Notification Provision**

2 The Notification Provision of the IML will create a new federal organization within the
3 Department of Homeland Security ("DHS") to compile and disseminate to other countries an
4 international travel blacklist of Covered Individuals, which will include – incredibly – *individuals*
5 *who are not required to register as a sex offender in any jurisdiction*. IML § 3(3).

6 This organization, designated the "Angel Watch Center," will compile the blacklist from
7 various sources, including from the Covered Individuals themselves, who are required by the IML
8 to self-report detailed travel itineraries before they embark upon international travel. IML §§ 4(a),
9 (e)(1); 6. If Covered Individuals fail to report, they face criminal prosecution, fines, and/or
10 imprisonment of up to 10 years.[5] IML § 6(b).

11 Plaintiffs have already experienced the Draconian consequences of a similar international
12 blacklist in the hands of foreign travel authorities because the federal government has admittedly
13 operated a similar program known as "Operation Angel Watch" since at least 2007.[6] For example,
14 Plaintiff John Doe #4 is married to a Philippine citizen, who is forbidden to enter the United States
15 because of visa restrictions. (See Doe #4 Decl., at 2.) During his term of probation, which has now
16 concluded, Plaintiff John Doe #4 was permitted by the court and the probation department to visit
17 his wife in the Philippines, and routinely did so without incident. (Id. at 1.) However, on
18 December 30, 2012, Plaintiff John Doe #4 was detained without prior notice by Philippine officials,
19 forbidden to enter the country, and deported because the DHS had issued a "sex offender alert"
20 regarding him. (Id. at 2.) Over the next several months, Plaintiff John Doe #4 and his wife
21 successfully petitioned the Philippine government for permission to reenter that country, and
22 ultimately received it. (Id. at 3.) However, approximately one year later, Plaintiff John Doe #4 was
23 again denied entry to the Philippines because the U.S. government issued a second "sex offender
24
25 [5] Specifically, Covered Individuals are to report "any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and
26 purpose of travel, and any other itinerary or other travel-related information required by the Attorney General." IML § 6. The self-reporting obligation amends the Adam Walsh Act, 42 U.S.C. § 16911, *et seq*. and is applicable to
27 Covered Individuals in states whose registration system complies with that Act.
[6] See U.S. Immigration and Customs Enforcement, News Release (Feb. 2, 2016), *available at*
28 https://www.ice.gov/news/releases/ice-authorized-create-angel-watch-center-expand-child-protection-efforts-following#wcm-survey-target-id.

alert" falsely indicating that he had been convicted of another sex offense in the United States. (Id. at 3-4.) The United States government has failed to rectify or correct this error. (Id.)

**C. The IML is Historic in its Effect and Discriminatory Intent**

The purpose and effect of the IML is to create a suspect class of international travelers based on nothing more than their inclusion in an abstract category – "sex offender" – which is uniquely associated with misinformation, fear, and prejudice at this time in American culture. As the Association for the Treatment of Sexual Abusers explains in its declaration submitted herewith in opposition to the IML:

> The media has played a significant role in creating "moral panic" about anyone labeled a "sex offender." This is largely due to their focus upon low probability, low frequency crimes such as the sexual assault and murder of Megan Kanka in 1994. It is increased media coverage, not an increase in the frequency of sexual assaults upon and murders of children domestically, that has resulted in society's current concerns.

(ATSA Decl. ¶¶33-34. See also Tobin Decl. ¶18 ("The public, including elected officials, often believe the risk of re-offense is much higher due to inaccurate media reports.").)

Specifically, a Covered Individual in the IML is defined as "an individual who is a sex offender by reason of having committed a sex offense against a minor." IML § 3(3). A "sex offense against a minor" includes a broad spectrum of offenses that range from violent rapes, to crimes involving no contact with victims (such as viewing child pornography), to consensual "Romeo and Juliet" romances in which one of the two teenaged participants was over 18 years of age [which may even have been legal in another state, given the disparity in age-of-consent laws], to misdemeanor offenses such as public urination, and ultimately to comparatively innocuous offenses such as "sexting" or "streaking," which have recently, and controversially, been designated as "sex offenses" in some states.[7] IML § 3(10). See, e.g., Nunez v. Holder, 594 F.3d 1124, 1133-38 (9th Cir. 2010) (discussing broad range of conduct to which California's misdemeanor indecent exposure statute has been applied.).[8] Illogically, the IML assumes that all such conduct predicts an equally high risk of committing a *child sex trafficking* offense. This includes:

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[7] See, e.g., California Penal Code section 290, listing over three dozen "sex offenses."

[8] See also Declaration of Alexander L Landon ¶11, filed concurrently herewith (As a criminal law practitioner, I frequently speak with individuals who have been convicted of sex offenses . . . . [including] public indecency (public

- Individuals who committed their offense decades ago, who have never re-offended, and who have since established successful careers, such as Plaintiff John Doe #1.
- Individuals who committed their offense while a minor *and/or who are still minors*. Critically, according to the U.S. Department of Justice, minors comprise over 25 percent of those listed on the nation's registries.[9]
- Individuals who are no longer required to register as sex offenders in their jurisdiction due to the passage of time, such as the thousands who will this year be removed from New York's sex offender registry after completing their twenty-year registration period that commenced in 1996.[10]
- Individuals who have been deemed rehabilitated, or whose convictions have been expunged, such as Plaintiff John Doe #3. (Doe #3 Decl. ¶¶ 6-14 & Ex. C. See also below Section IV (A)(2)(b)(2), at p. 22-23.)

### D. The IML Relies on Myths About High Re-offense Rates for Registrants and Fails to Distinguish Among Risk Levels Within the Registries

Sex trafficking, and especially child sex trafficking, is a rare crime in this country. As stated in an earlier version of the IML introduced in 2010, the U.S. Department of Justice obtained an average of only ten convictions per year during a seven-year period from 2003 through 2009.[11] Significantly, there are no known reported cases of any child sex trafficking offense involving a Covered Individual, which is in part because sex trafficking is often linked to financial and economic motives rather than sexual motives. (ATSA Decl. ¶ 28; Tobin Decl. ¶¶23-24.)

In light of data regarding sex offenses and recidivism, the rarity of child sex trafficking offenses is not surprising. According to state and federal government data, *virtually all new sex offenses, including sex trafficking and child sex tourism, are not committed by Registrants*. The U.S. Department of Justice confirms that the vast majority of children are victimized in domestic settings by family members and other acquaintances who are not on a sex offender registry.[12] The California Department of Corrections and Rehabilitation ("CDCR") has concluded that "first-time

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urination and streaking after high school graduation), creation and distribution of child pornography (nude 'selfies' sent to fellow high school students), and statutory rape (teen sex).").

[9] David Finkelhor, *et al*., *Juveniles Who Commit Sex Offenses Against Minors,* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE JUSTICE BULLETIN 1, 1 (Dec. 2009), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/227763.pdf.

[10] See N.Y. Corrections Law § 168-h(a).

[11] See H.R. 5138, 111th Cong., Report No. 111-568, Part 1, § 2(a)(12), *available at* https://www.gpo.gov/fdsys/pkg/BILLS-111hr5138rh/html/BILLS-111hr5138rh.htm.

[12] See Bureau of Justice Statistics: Sexual Assault of Young Children as Reported to Law Enforcement 10 (2000), *available at* http://www.bjs.gov/content/pub/pdf/saycrle.pdf.

1 offenders" accounted for "95.9% of all arrests for any [registrable sex offense], 95.9% of all arrests
2 for rape, and 94.1% of all arrests for child molestation."[13]

3 According to state government data, and contrary to popular myth, the re-offense rate for
4 individuals listed on a sex offender registry is low, making registration a useless proxy for risk.
5 (ATSA Decl. ¶¶13, 25.) Risk of re-offense varies with many factors, such as the type of offense
6 committed, the current age of the offender, whether the offender committed a previous offense, and
7 the length of time since the offense. (ATSA Decl. ¶¶14-15; Tobin Decl. ¶18.)[14]

8 Incorporating these factors, psychologists and several state agencies employ sophisticated
9 psychological assessments to measure a specific offender's risk of re-offense, such as California's
10 SARSATO tool, which is used in part to categorize individual offenders as low-risk, medium-risk,
11 or high-risk. (ATSA Decl. ¶¶16-14; Tobin Decl. ¶¶17-18.)[15] Many Registrants are statistically
12 unlikely to re-offend, and of those that are, the risk of re-offense diminishes with each passing year
13 *and ultimately disappears*. (Tobin Decl. ¶19; ATSA Decl. ¶¶18-20.)[16] Research by Dr. Karl
14 Hanson, the foremost authority on this topic, confirms that even *high risk* sex offenders who have
15 not re-offended in 17 years are no more likely to commit a new sex offense than someone who has
16 never committed a sex offense. (ATSA Decl. ¶¶16-20.) For medium-risk offenders, that threshold
17 is 12.5 years. (Id. ¶19.) The risk of re-offense is lowered further still when the Registrant is
18 employed, cooperates with supervision, and participates in treatment. (Tobin Decl. ¶19 (noting a
19 26%-40% diminution of risk for individuals who engage in counseling); ATSA Decl. ¶¶21-23.)
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[13] CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, A BETTER PATH TO COMMUNITY SAFETY 2 & n. 4 (2014) (emphasis added).

[14] While the rate at which Registrants recidivate by committing crimes *other* than sex offenses may be higher, recent research *by state governments* demonstrates that this phenomenon is largely caused by the numerous legal restrictions that destabilize the lives of registrants and impede their reintegration into society, such as the provisions of the IML challenged in this action. See CAL. SEX OFFENDER MGMT. BOARD, HOMELESSNESS AMONG CALIFORNIA'S REGISTERED SEX OFFENDERS: AN UPDATE (Aug. 2011), *available at* http://www.casomb.org/docs/Residence_Paper_Final.pdf. See also Tobin Decl. ¶15; ATSA Decl. ¶¶24-25.

[15] See, e.g., CAL. SEX OFFENDER MGMT. BOARD, 2015 YEAR-END REPORT 2-3, 10-11 (Feb. 2016) ("CASOMB 2015 Report") (Discussing the effectiveness of California's "State Authorized Risk Assessment Tool for Sex Offenders" (SARSATO) tool for predicting re-offense rates and for differentiating between high-risk and low-risk offenders, since "there is little or no benefit from continuing to invest resources to monitor those who are at low risk to reoffend."), *available at* http://www.casomb.org/docs/CASOMB_End-of-Year-Report_2015.pdf.

[16] R. Karl Hanson, *et al.*, *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 (15) J. OF INTERPERSONAL VIOLENCE 2792, 2802 (2014).

Even if differences within risk tiers are ignored, the aggregate risk of re-offense among Registrants still remains low. The U.S. Department of Justice reports that the overall re-offense rate for all sex offenders nationwide is only 5.3 percent.[17] Indeed, the CDCR reports that the re-offense rate for California registrants on parole is 0.8 percent, the lowest re-offense rate for any crime except murder.[18] Yet, the MIL illogically treats all Covered Individuals as if they have an identical risk of committing a rare child sex trafficking crime when they travel internationally.

This mismatch between risk and regulatory burden is typical of sex offender regulations in general, which are uniquely motivated by misinformation, fear, and prejudice, and defy the currently available *government* data and other empirical evidence regarding re-offense rates for Registrants. Even the U.S. Department of Justice notes that "[d]espite the intuitive value of using science to guide decision-making, laws and policies designed to combat sexual offending are often introduced or enacted in the absence of empirical support."[19]

The myth of high sex offender re-offense rates is pervasive and can be found even in judicial decisions. However, recent scholarship has exposed that myth, including the U.S. Supreme Court's reliance on an alleged 80% rate of re-offense. According to that research, the re-offense rate referenced by the Court was ultimately traced to an uncited assertion in a lay magazine, *Psychology Today*, by a counselor with no research credentials.[20]

Consistent with this dearth of support, the IML conspicuously lacks analysis, empirical data, or even facts. Instead, the "findings" proffered in support of the IML are limited to the following observation: "Law enforcement reports indicate that known child-sex offenders are traveling internationally." See IML § 2(4)-(6); Complaint ¶35. The IML does not and could not provide a nexus between "sex offenders" travelling internationally and their participation in sex trafficking.

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[17] U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Sex Offenders Released from Prison in 1994, at 7 (Nov. 2003), *available at* http://www.bjs.gov/content/pub/pdf/rsorp94.pdf.

[18] ATSA Decl. ¶19. See also CALIF. DEPT. OF CORRECTIONS AND REHABILITATION, 2014 OUTCOME EVALUATION REPORT 30 (July 2015), *available at* http://www.cdcr.ca.gov/Adult_Research_Branch/ Research_ Documents/2014_Outcome_Evaluation_Report_7-6-2015.pdf.

[19] U.S. DEPARTMENT OF JUSTICE, SMART OFFICE, SEX OFFENDER MGMT. ASSESSMENT AND PLANNING INITIATIVE 7 (Oct. 2014), *available at* http://www.smart.gov/SOMAPI/printerFriendlyPDF/complete-doc.pdf

[20] See Ira Mark Ellman and Tara Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONSTITUTIONAL COMMENTARY, 495, 495-499 & n.14 (Forthcoming 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616429.

One oft-cited[21] source regarding the alleged risk of Registrants engaging in international child sex trafficking is a 2012 report by the Government Accountability Office ("GAO") entitled "Passport Issuance: Current Situation Results in Thousands of Passports Issued to Registered Sex Offenders." In that report, the GAO states that the number of passports issued to Registrants was 4,500, or 0.03%, of the 16,000,000 passports issued in 2012.[22] The reader of this report is apparently left to infer that Registrants have used their passports for something other than legitimate travel. However, in published commentary to that report, the U.S. State Department labeled the report "very misleading" and dissected its sensationalistic implications by exposing the lack of evidence that Registrants had engaged in sex trafficking of any kind. Specifically, the U.S. State Department stated: "*GAO found no evidence that the offenders used their passports to commit sex offenses abroad. . . . The report appears to suggest, without any foundation, that the Department's issuance of passports to certain Americans facilitated their commission of sex offenses abroad.*"[23]

In sum, despite the massive disruptions needlessly imposed on the lives of Covered Individuals and their families, hollow arguments like these are routinely and unquestioningly asserted in support of Draconian regulations of Registrants at all levels of government. This occurs despite the fact that many government policy experts advocating for evidence-based approaches recognize the large variation in risk within the registries.[24] The IML is the most recent example of a law that mindlessly ignores these realities. (See Tobin Decl. ¶27; ATSA Decl. ¶¶24-27.)

## IV. STANDARD FOR PRELIMINARY INJUNCTION

A party seeking a preliminary injunction must demonstrate: (1) a likelihood of success on the merits; (2) likelihood of irreparable harm; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20

[21] See Chris Smith, *An Important Step to Reduce Child Sex Tourism*, Washington Post, February 7, 2016, *available at* https://www.washingtonpost.com/opinions/an-important-step-to-reduce-child-sex-tourism/2016/02/07/86c81f14-cc10-11e5-a7b2-5a2f824b02c9_story.html (Rep. Smith, a principal author of the IML, cites the GAO report in defense of the IML).

[22] United States Government Accountability Office: Passport Issuance – Current Situation Results in Thousands of Passports Issued to Registered Sex Offenders (June 2012), *available at* http://www.gao.gov/products/GAO-10-643.

[23] *Id*. Appendix II: Comments from the Department of State, at 17-20 (emphasis added).

[24] For example, the California Sex Offender Management Board advocates the "'Risk Principal,' which states that those at higher risk should receive greater attention, but that there is little or no benefit from continuing to invest resources to monitor those who are at lower risk of reoffending." CASOMB 2015 Report, *supra* note 12, at 3.

1 (2008). The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions in which
2 the four Winter factors are balanced, such that a preliminary injunction may issue when "serious
3 questions going to the merits [are] raised and the balance of hardships tips sharply in the plaintiff's
4 favor." Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011); Sierra On-
5 Line, Inc. v. Phoenix Software, Inc., 739 F.3d 1127, 1131-32 (9th Cir. 1984) (A "serious question"
6 is one in which the plaintiff "has a fair chance of success on the merits."). See also Singer Mgmt.
7 Consultants, Inc. v. Milgram, 650 F.3d 223, 229 (3d Cir. 2011) ("[L]likelihood of success" means
8 "a reasonable chance, or probability, of winning . . . . [I]t does not mean more likely than not.");
9 Leiva-Perez v. Holder, 640 F.3d 962, 966 (9th Cir. 2011) (same).

10 **A. Factor 1: Likelihood of Success on the Merits**

11 Plaintiffs seek a preliminary injunction against the Passport Identifier Provision on
12 compelled speech grounds and against the Notification Provisions on Due Process grounds.

13 ***1. The Passport Identifier Provision Compels Speech***

14 Laws that compel speech are presumptively invalid. Riley v. Nat'l Fed'n of Blind, 487 U.S.
15 781, 795-98 (1988); Greater Balt. Ctr. for Pregnancy Concerns v. Mayor and City Council, 683 F.3d
16 539, 553-55 (4th Cir. 2012) ("Greater Baltimore"). The government may rebut this presumption of
17 invalidity only by overcoming strict scrutiny review. Id. "In order to make out a valid compelled-
18 speech claim, a party must establish (1) speech; (2) to which he objects; that is (3) compelled by
19 some government action." Cressman v. Thompson, 798 F.3d 938, 951 (10th Cir. 2015).

20 a) The IML Compels Speech

21 Because of its design and context, the Passport Identifier Provision of the IML
22 communicates not only that the individual is a sex offender, but also that he has engaged in, or is
23 likely to engage in, child sex trafficking. This identifier, therefore, is speech. See Stuart v.
24 Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) (Because "context matters" in compelled speech claims,
25 court looks to messages implied by the speech, as well as to the government's intent in compelling
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1 the speech.). Indeed, the IML's principal author admits that the law is designed to induce foreign
2 governments to deny entry to Covered Individuals based on the designation "sex offender."[25]
3 It is axiomatic that the government cannot commandeer a private person to communicate a
4 government message. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (State may not turn drivers
5 into "mobile billboards" by mandating display of state motto "Life Free or Die" on license plates).
6 That is because the First Amendment protects not only "the right to speak" but also "the right to
7 refrain from speaking at all." Id. at 714.
8 Significantly, the First Amendment applies to compelled speech regardless of whether it is
9 factual or ideological. Riley, 487 U.S. at 797-98. This is especially true where the government
10 motive in compelling disclosure of the factual information is to imply a secondary message and to
11 encourage a third party listener to take an action desired by the government. See Id. (State could not
12 compel charities to disclose proportion of donated funds diverted to operations in order to "dispel
13 misperceptions" among donors about uses of funds); Stuart, 774 F.3d at 246 (affirming issuance of
14 preliminary injunction where purpose and effect of law compelling physicians to display ultrasound
15 images before abortions was to advance state's pro-life objectives); Greater Baltimore, 683 F.3d at
16 548-50 (same result as to compelled factual statements intended to advance opposite objectives).
17 Further, the compelled speech doctrine is not limited to political speech or context, but
18 applies to speech on any topic, particularly a controversial one. See Riley, 487 U.S. at 797-98;
19 Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc., 133 S.Ct. 2321, 2327 (2013) (law
20 conditioning receipt of federal funds on recipient's adoption of particular policy regarding sex
21 trafficking would "plainly violate the First Amendment" if "enacted as a direct regulation of
22 speech;" affirming preliminary injunction); Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C.
23 Cir. 2015) ("National Association") (requiring manufacturers to disclose presence of controversially
24 sourced "conflict minerals" in their products was compelled speech). Finally, the compelled speech
25 doctrine especially applies when the compelled speech would injure the speaker, see Riley, 487 U.S.
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[25] The IML's author, Rep. Chris Smith, stated in the Congressional Record that the IML will allow "countries to . . . deny entry or visa, monitor travel, or limit travel." Cong. Rec. Feb 1. 2016 H390.

at 800, or when there is a risk that the government's message will be attributed to the speaker. Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Gp. of Boston, 515 U.S. 557, 576 (1995).

The case of Gralike v. Cook is instructive as its facts are similar to the facts in this case. 191 F.3d 911(8th Cir. 1999), *aff'd on other grounds* Cook v. Gralike, 531 U.S. 510 (2001). In Gralike, a Missouri law directed that the label "DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS" appear on ballots next to the names of candidates who did not adopt a particular position regarding term limits. Id. at 914. The Eighth Circuit ruled that this label impermissibly compelled speech by "forc[ing] candidates to speak in favor of term limits." Id. at 917-18. The label thereby "did not allow candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak." Id.

Consistent with the First Amendment's proscription on compelling "factual" speech that impliedly advocates a government message or objective, the Eighth Circuit noted that the ballot labels communicated "a negative impression" of the candidate and "impli[ed] that the candidate cannot be trusted to carry out the people's bidding, which in turn casts doubt on his or her suitability to serve in Congress." Id. at 918. In affirming this ruling on other grounds, the Supreme Court agreed that the Missouri ballot label was a "Scarlet Letter." Cook v. Gralike, 531 U.S. at 525.

Here, the Passport Identifier Provision of the IML threatens *every* injury for which the compelled speech doctrine exists. That is, regardless of the bare "factual" information of a Covered Individual's conviction, the Passport Identifier Provision impliedly communicates much more – that he is or will be a child sex trafficker. Like the ballot label in Gralike and the mandated disclosures in Riley, Stuart, and National Association, the IML's passport identifier is a "pejorative" label designed to create "a negative impression." In fact, the purpose of that label is precisely to achieve a government objective, that is, to deny the passport holder entry to a foreign country. Using a private speaker to communicate such a message is "quintessential compelled speech." Stuart, 774 F.3d at 246.

b) Plaintiffs Object to and Disagree With the Speech

Regarding the second element of their compelled speech claim, Plaintiffs object to and disagree with both the designation "sex offender," as well as the false message that they have

1 engaged in or are likely to engage in child sex trafficking. The compelled speech doctrine exists
2 precisely to prevent individuals, such as Plaintiffs, from having to suffer the collateral social
3 consequences of carrying the government's message, particularly one that amounts to a proverbial
4 "Scarlet Letter." See Hurley, 515 U.S. at 537 (An individual's "right to tailor [his] speech" "applies
5 . . . equally to statements of fact the speaker would rather avoid."); Gralike, 191 F.3d at 918.

6 c) Even if the Passport Identifier is Government Speech, Plaintiffs
7 Cannot be Compelled to Communicate It

8 The final element of Plaintiffs' compelled speech claim is satisfied because the Passport
9 Identifier of the IML is a mandatory component of a passport, which is legally required to be
10 displayed when Plaintiffs travel internationally or use their passports for identification domestically.

11 It may be argued that the Passport Identifier Provision is "government speech" because it
12 appears on an official government document. Cf. Walker v. Tex. Div., Sons of Confederate
13 Veterans, 576 U.S. __; 135 S. Ct. 2239, 2249 (2015) (As "government IDs," automobile license
14 plates contain government speech.). However, the issue of government speech is irrelevant in this
15 case because, even if passports are entirely composed of government speech, a private individual
16 cannot be compelled to utter that speech. Id. at 2253. Accord Wooley, 430 U.S. at 715.[26]

17 d) The Passport Identifier Provision Cannot Withstand Strict Scrutiny

18 A government regulation that compels noncommercial speech is subject to strict scrutiny
19 review, which means that the regulation must both be narrowly tailored to serve a compelling
20 governmental interest, and be the least restrictive means of achieving that interest. E.g., United
21 States v. Playboy Entm't Group., Inc., 529 U.S. 803, 813 (2000); Riley, 487 U.S. at 797-98.

22 The IML Passport Identifier Provision cannot withstand strict scrutiny in this case because
23 the government does not have a sufficient interest in *compelling speech* to advance its interest. See
24 PG&E, 475 U.S. at 19. To survive strict scrutiny, the government must put forth evidence that the
25 compelled speech "would in fact alleviate the harms it cited to a material degree." E.g., National
26 Association, 800 F.3d at 526-27. The government cannot meet its burden with "anecdote and

27 [26] The government speech doctrine applies in viewpoint discrimination cases and essentially holds that the government
28 is permitted to regulate the content of its own messages without accommodating the viewpoints of others. Gomez v. Campbell-Ewald Co., 768 F.3d 871, 877 (9th Cir. 2014). It is not at issue in this case.

supposition." Greater Baltimore, 683 F.3d at 556 (Although protecting health is generally a sufficient interest, government "must identify an actual problem in need of solving" with evidence that the specific problem designed to be resolved by compelling speech actually exists.).

As discussed above, the Passport Identifier Provision of the IML is so broadly applied as to be meaningless as a proxy for risk of engaging in child sex trafficking. Other than the IML's "finding" that "Law enforcement reports indicate that known child-sex offenders are traveling internationally," there is a total lack of evidence that their international travel indicates such a risk, belying any claimed government interest in compelling the speech. Cf. Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 73-74 (2d Cir. 1996) (Even under deferential standard for compelled commercial speech, mere consumer interest in mandated disclosure of hormones in milk did not justify compelling such disclosure absent evidence of harm; ordering preliminary injunction).

Indeed, dispositively, *Congress held no hearings regarding the historic significance or the likely effects of the Passport Identifier Provision. In fact, Congress held no substantive discussion or debate on any portion of the IML whatsoever*. Cf. Nat'l Ass'n of Mfrs., 800 F.3d at 527 (Where Congress held no hearings on likely effectiveness of compelled "conflict minerals" disclosure, and where evidence of the disclosure's effectiveness conflicted in the record, the effectiveness of compelling the speech was "not proven to the degree required by the First Amendment.").

Furthermore, the federal government already pursues its goal of reducing sex trafficking by other means, such as directly criminalizing it, funding campaigns against it, and supporting international investigations and relief efforts. Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729, 2741 & n.9 (2011) ("The state does not have a compelling interest in each marginal percentage point by which its goals are advanced." ).

In addition, the Passport Identifier Provision of the IML is not the least restrictive means of serving its purported interest because, as a threshold matter, the intended function of the IML's Passport Identifier is not clear. Presumably, Congress intends that a foreign customs official will view the "unique identifier" and will, on the basis of that identifier, deny entry to the passport holder and thereby avert a risk of child sex trafficking. Yet it is easy to predict that the result will be something different in most cases in which the passport is viewed because passports are routinely

used for identification in contexts other than entry into a foreign country, and can be viewed by any third parties who happen to see them or pick them up. The Passport Identifier will therefore necessarily be employed in situations and by people who have no ability to reduce the risk of child sex trafficking. Instead, many of these situations will increase the risk of harm *to passport holders or those with whom they travel*, which is a quintessential lack of narrow tailoring. Greater Baltimore, at 683 F.3d at 557 ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." (quoting Frisby v. Schultz, 487 U.S. 474, 485 (1988)). Finally, the IML's Passport Identifier is redundant of information already provided by the federal government and state governments online, which belies any claim that the IML is the least restrictive means. Gralike, 191 F.3d at 921.

In conclusion, the branding of an entire class of individuals through the addition of a "unique identifier" to their passports on the miniscule chance that they are traveling for the purpose of child sex trafficking reveals *no* tailoring, much less narrow tailoring. The Passport Identifier Provision of the IML, therefore, is unconstitutional compelled speech in violation of the First Amendment.

### 2. *The IML's Notification Provision Violates Substantive Due Process and the Right to Travel*

The Notification Provisions of the IML fails any standard of review under the Due Process clause because it irrationally infringes upon the rights of American citizens to travel internationally, succeeds only in disadvantaging an unpopular minority, and fails to increase public safety. (ATSA Decl. ¶24 ("There is no indication that legislation has a positive effect in reducing the rate of re-offense for 'sex offenders.'").)

#### a) Standard of Review Under the Due Process Clause

The right to international travel is a liberty interest protected by the Fifth Amendment. Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964). Plaintiffs allege that the Notification Provision of the IML violates the substantive due process guarantee of the right to travel internationally because it is not rationally related to a legitimate government interest.

In the context of a constitutional adjudication of fundamental rights, such as the right to travel internationally, rational basis review is not an automatic rubber-stamp of Congressional acts.

See, e.g., Romer v. Evans, 517 U.S. 600, 632 ("[E]ven in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the classification adopted and the object to be obtained."); St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013) ("[A]lthough rational basis review places no affirmative evidentiary burden on the government, *plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality*." (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314-15 (1993)) (emphasis added)).

As demonstrated below, the Supreme Court and the Ninth Circuit have "applied a more searching form of rational basis review" when a law displays animus or disregard toward a particular group of disadvantaged or politically unpopular people in connection with that group's exercise of a fundamental right. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). See also United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (citing cases).

For example, courts have used rational basis review to strike down laws that disadvantage groups when the evidence supporting the government's purported interest is scant or contradicted by other evidence. See Plyler v. Doe, 517 U.S. 202, 228 (1982) (asserted interest in preserving resources by excluding undocumented children from public school is irrational because "the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc."). Similar rationales have been applied to strike down economic legislation that lacks evidence of benefit beyond protecting a favored market participant. Merrifield v. Lockyer, 547 F.3d 978, 991-92, 989 (9th Cir. 2008) ("[T]he singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals, or safety."). Accord Castille, 712 F.3d at 223.

Significantly, courts have also scrutinized the rationality of legislation that makes distinctions regarding sexuality in connection with fundamental rights, and struck down laws in the face of many conceivable and historically grounded rational bases when the burdens imposed on the targeted class are pronounced. See United States v. Windsor, 133 S. Ct. 2675, 2693, 2696 (2013) (without invoking heightened scrutiny, striking down federal Defense of Marriage Act on Due Process grounds notwithstanding "Congress['s] great authority to design laws to fit its own

conception of sound national policy"); Romer, 517 U.S. at 633, 635 ("[I]dentif[ing] individuals by a single trait and [denying] them protection across the board" fails rational basis review.).

Thus, where a vulnerable minority's fundamental rights (such as the right to travel internationally) are at issue, courts did not simply accept the government's rationale for the Congressional action, or accept a merely superficial assertion that the legislation serves a government interest. Rather, courts examined evidence regarding whether the stated purpose would actually be served, Plyler, 517 U.S. at 228, as well as the law's overbreadth, Aptheker, 378 U.S. at 505, Moreno, 413 U.S. at 356-58, and measured the lack of proportion between the harm inflicted by the law and its purported benefits. Romer, 517 U.S. at 635.

It is important to note that courts have used rational basis review to strike down laws disadvantaging Registrants, where the evidence of the law's effectiveness is miniscule but its burden is overwhelmingly disruptive and injurious to constitutional rights. See In re Taylor, 60 Cal. 4th 1019, 1036, 1038, 1042 (2015) (Invalidating sex offender residency restrictions on federal due process grounds because they applied in a blanket fashion to all Registrants without regard to the details of their individual offenses, resulting in numerous injuries such as homelessness, lack of access to services, and effective banishment from whole communities).

Further, the U.S. Supreme Court invoked rational basis review to strike down an overbroad and inadequately justified passport restriction in a case substantially similar to this one.[27] In Aptheker v. Secretary of State, the Court invalidated a statute that denied passports to members of the Communist party, which had been defended on national security grounds. 378 U.S. 500, 502, 509 (1964). The Court in that case held that the law infringed the individuals' Fifth Amendment right to international travel because it was not "narrowly drawn to prevent the supposed evil [of international travel to commit crimes]," explaining:

> The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to

[27] Although the Notification Provision is not technically a denial of a passport, the prevention of international travel is certainly within the statutes intent and effect, (See Footnote 26, *supra*) and the difficulties it imposes are sufficient to constitute an infringement of the right to travel. Latif v. Holder, 28 F. Supp. 3d 1134, 1149 (D.Or. 2014) (Even where not an outright ban on travel, inclusion on "no-fly" list deprives listees of right to travel by inducing carriers and governments to reject them, thereby "turn[ing] routine international travel into an odyssey that imposes significant logistical, economic, and physical demands on travelers.")

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

> proscribe. The broad and enveloping prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and the purpose in and plans for travel. . . ***[P]recision must be the touchstone of legislation so affecting basic freedoms***.

Id. at 514 (citation omitted; emphasis added). Critically, the Court in that case noted the irrationality of assuming that all members of the group would engage in the activity feared by Congress, as well as the statute's failure to acknowledge totally legitimate purposes of international travel, such as visiting relatives. Id. at 505, 511. Accord Plyler, 517 U.S. at 228.[28]

b) The IML is Irrational for Numerous Reasons

The rationales of Aptheker, Taylor, Moreno, Plyler, Romer, Windsor, Merrifield, Castille, and other cases protecting fundamental rights for politically vulnerable minorities apply forcefully in this case. As discussed below, the IML is irrational for at least three related reasons: overbreadth, disregard of adjudicated determinations of risk, and severe infringement of a fundamental right.

(1) *Overbreadth*

First, the Notification Provision of the IML applies in a blanket fashion to all individuals convicted of a sex offense involving a minor, regardless of their risk of engaging in child sex trafficking. As in Aptheker and Taylor, the deprivation of an individual's right to travel internationally is based upon an alleged relationship between risk of engaging in child sex trafficking and the fact that an individual was convicted of a sex offense involving a minor, regardless of whether that individual is currently required to register for that offense. As demonstrated above, there is no evidence that the commission of a sex offense involving a minor renders an individual likely to travel abroad for the purpose of committing another sex offense, in general, or child sex trafficking, in particular. While the notification provision of the IML may be rational as applied to Covered Individuals who have engaged in child sex trafficking, the theoretical application of that provision to a small minority within a much larger targeted class is not sufficient to withstand constitutional scrutiny. See Aptheker, 378 U.S. at 505 (Rejecting government's argument that passport ban for all members of political party is rational because a few members may travel abroad for nefarious purposes).

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[28] Although Aptheker involved a law targeting political affiliation, the Court made clear that the right to travel, rather than rights of association, were at issue. 378 U.S. at 505-508.

1 The IML's irrationality is further demonstrated by its failure to differentiate among the
2 various risks posed by Covered Individuals, and its implicit determination that all Covered
3 Individuals pose the same high risk, in perpetuity. Cf. City of Cleburne v. Cleburne Living Center,
4 473 U.S. 432, 439 (1985) (Rational basis review under Equal Protection Clause "is essentially a
5 direction that all persons similarly situated should be treated alike."). As reflected in the above-
6 referenced government data and in the declarations of Plaintiffs' experts submitted herewith,
7 numerous factors contribute to an individual's actual risk profile, including but not limited to the
8 type of offense, its age, the age of the offender at the time of the offense, and so on.

9 After a given period of time, even high risk sex offenders demonstrate no greater risk of re-
10 offense than persons never convicted of a sex offense,[29] yet the IML imposes the Notification
11 Provision on Covered Individuals for life despite the fact that some Registrants *never* display a
12 statistically demonstrated risk of re-offense.[30] Further, Registrants as a class display a low risk of
13 re-offending,[31] particularly when their conviction occurred decades in the past. The failure of the
14 IML to consider such evidence, along with its emotionally fueled appeals to the safety of children
15 (as significant as that motive is), merely confuses the issues and does not provide a rational basis
16 sufficient to infringe fundamental constitutional rights. See City of Cleburne, 473 U.S. at 447-48
17 (Striking down zoning ordinance under rational basis review because the general public's "negative
18 attitudes, or fear, unsubstantiated by factors properly cognizable in a zoning proceeding [i.e.,
19 evidence]" did not justify unique zoning restrictions for substance abuse and mental health
20 facilities.); Aptheker, 378 U.S. 514 ("[P]recision must be the touchstone of legislation so affecting
21 basic freedoms." (quoting NAACP v. Button, 371 U.S. 431, 438 (1963)); ATSA Decl. ¶¶33-34.)[32]

22

23 [29] See Section III(D) above, at pp. 8-9.
[30] ATSA Decl., ¶18.
24 [31] See Section III(D) above, at pp. 8-10.
[32] Comments in the U.S. House of Representatives by Rep. Chris Smith, the principal author of the IML, revealed the
25 law's grossly imprecise application when Rep. Smith asserted that the IML is necessary to prevent harm by
"[p]edophiles and other sexual predators." Cong. Rec. Feb 1. 2016 H390. However, in declarations submitted
26 herewith, both ATSA and Dr. Thomas Tobin, explain that "sexual predators" are not at risk for harming anyone
because, once identified, they are civilly committed and not released from prison. (Tobin Decl. ¶¶25-26; ATSA Decl.
27 ¶¶29-34.) Furthermore, "pedophiles" are, specifically, those who have been medically diagnosed as being sexually
attracted to children. They are not synonymous a person who has committed crimes involving a child, who may nor
28 may not also be a pedophile. (Id.)

(2) *Disregard of Adjudicated Determinations of Risk*

Second, the irrationality of the Notification Provision is further evidenced by its applications to individuals whose risk to public safety has already been adjudicated and determined to be non-existent. For example, Plaintiff John Doe #3 was convicted of a sex offense that has now been expunged. (Doe #3 Decl., ¶11.) He is no longer required to register as a sex offender (Id. ¶¶ 11, 13 & Ex. B.) and two separate state judicial proceedings have established that he is rehabilitated. First, a California court determined that "clear and convincing evidence" established John Doe #3's "rehabilitat[ion]" and his "moral qualifications" to practice law. (Id. ¶12 & Ex. A.) Second, John Doe #3 applied for and received a "Certificate of Rehabilitation" from a state court confirming that he is no longer a danger to society, declaring him to be "fit to exercise all civil and political rights of citizenship," and entitling him to permanent removal from California's sex offender registry. (See Cal. Penal Code § 4852.17; Id. ¶14 & Ex. C.) This was another lengthy process involving the testimony of multiple witnesses, the input of law enforcement, and evaluations by mental health professionals. (See Declaration of Alexander J. Landon ¶¶6-10, filed concurrently herewith (discussing rigorous criteria for obtaining Certificates of Rehabilitation in California).)[33]

There are hundreds of individuals in California who have received certificates of rehabilitation, and many thousands of individuals in other states who have been removed from the registry through other procedures, yet the IML treats these individuals as if they had never been removed, and as if they are as likely to engage in child sex trafficking. Significantly, in the case of John Doe #3, the IML purports to overrule the judgments of two state tribunals, *and to effectively eliminate the rights restored to him by the State of California*. This judgment is not only irrational, it is also categorically baseless, and therefore unconstitutional. Cf. Windsor, 133 S. Ct. at 2696 (Rational basis review invalidated federal law that declined to recognize state marriages, as "no legitimate purpose overcomes the purpose and effect to disparage and it injure" a class in connection with *rights that have been granted by a state*.); Moreno, 413 U.S. at 356-58 (Rational basis review prevented government from citing desire to combat fraud as basis for food stamp program exclusion where excluded individuals were among those least likely to commit fraud.)

[33] See also California Penal Code section 4852.1 (discussing various records that are considered).

(3) *Impact on Fundamental Right*

Third, the IML constitutes a direct and intentional infringement of a fundamental right, the right to travel internationally. This distinguishes the IML from a typical piece of economic legislation or other enactment that is entitled to routine deference by the courts. As numerous cases establish, where a fundamental right is infringed, rational basis review is employed to ensure that the law is not motivated by animus toward a targeted class and that Congress is not abdicating its responsibility to a disfavored minority by burdening their rights without adequate consideration of the law's effects upon them. Windsor, 133 S. Ct. at 2692 ("[D]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision [at issue].").

Although the IML will do virtually nothing to prevent international child sex trafficking, the IML will massively disrupt a Covered Individual's legitimate international travel for business and personal purposes, often by preventing such travel from occurring at all. (See Generally Doe #4 Decl.) This is precisely the type of disproportionate disadvantage against an unpopular minority that rational basis review has been invoked to strike down. Numerous Registrants, including Plaintiff John Doe #4, have experienced a foreshadowing of the Kafkaesque travel regime that the government eagerly announced (on the day after the bill was signed into law) that it will now implement on a wide scale.[34] Accordingly, since the effect of the IML is to seriously disadvantage a particular disfavored group without serving its purported objective of preventing child sex trafficking, it cannot survive rational basis review.

**B. Factor 2: Irreparable Harm**

The second factor required for a preliminary injunction is irreparable harm. "[T]he deprivation of constitutional rights unquestionably constitutes irreparable injury." E.g., Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012). See also Elrod v. Burns, 427 U.S. 347, 373 (1976); Assoc. General Contractors of Cal. v. Coalition for Econ. Equity, 950 F.2d 1401, 1412-13 (9th Cir. 1991) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm.").

[34] See Footnote 6, above.

Here, the threat of irreparable injury to Plaintiffs and others with whom they travel is exponentially increased by the physical risks that the IML would invite when Plaintiffs are forced to publicly identify themselves as actual or potential child sex traffickers. (See Steen Decl. filed concurrently herewith, detailing numerous physical attacks that occurred solely because the victim was labeled a sex offender.") See also Doe v. City of Simi Valley, 2012 U.S. Dist. LEXIS 191137, at *12 (C.D. Cal. Oct. 29, 2009) (Public labeling of Registrants on Halloween "poses a danger to sex offenders, their families and their property. . . . . [I]ts function and effect is likely to approximate that of Hawthorne's Scarlet Letter – . . . potentially subjecting them to dangerous mischief common on Halloween night and to community harassment in the weeks and months following[.]). Such risk of harm is exponentially increased when Covered Individuals will be branded on their passports as child sex traffickers in foreign jurisdictions, where protection will be less forthcoming from hostile law enforcement agencies and courts.

**C. Factors 3 and 4: Balance of Equities and Public Interest**

When a preliminary injunction is sought against the government on constitutional grounds, the "balance of equities" and "public interest" prongs can be considered together. See Farris v. Seabrook, 677 F.3d 858, 864 (9th Cir. 2012); Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009). The Ninth Circuit has affirmed that "it is always in the public interest to prevent the violation of a party's constitutional rights." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012). The law "clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his First Amendment claim." Klein, 584 F.3d at 1208.

## V. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request a preliminary injunction against Sections 4(e), 5, 6, and 8 of the IML while Plaintiffs' claims are adjudicated.

Dated: February 19, 2016

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