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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOHN DOE #1 et al.,

Plaintiff,

v.

JOHN KERRY, in his official capacity as Secretary of State of the United States et al.,

Defendants.

CASE NO. 4:16-CV-654-PJH

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Hearing Date: March 30, 2016
Hearing Time: 9:00 am
Courtroom: Courtroom 3
Judge: Hon. Phyllis J. Hamilton

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STATEMENT OF ISSUE TO BE DECIDED

Whether Plaintiffs have shown clear entitlement to a preliminary injunction of new notification provisions that simply build upon existing schemes that notify other countries regarding traveling registered sex offenders and of a passport identifier provision that will not be implemented until at least late 2016 due to a number of prerequisites still in progress.

INTRODUCTION

Plaintiffs—four individuals who have been convicted of sex offenses involving minors—seek an emergency injunction to halt implementation of certain provisions of the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders ("IML"), Pub. L. No. 114-119, 130 Stat. 15 (2016). Plaintiffs' request for a preliminary injunction should be denied because they have not shown a clear entitlement to this extraordinary remedy. The provisions at issue build upon existing statutory and regulatory authorities, as well as longstanding efforts by the Department of Homeland Security ("DHS")'s Immigration and Customs Enforcement ("ICE"), Homeland Security Investigations ("HSI") and by the United States Marshals Service ("USMS") to communicate with foreign governments regarding registered sex offenders planning to cross international borders. The IML continues the notifications already provided through ICE HSI's Operation Angel Watch, which seeks to prevent child sex trafficking or tourism[1] by U.S. citizens or lawful permanent residents abroad by identifying registered sex offenders whose travel plans, along with other factors, suggest intent to engage in child sex tourism or child sex trafficking in other countries. The IML also continues the USMS's existing international notification program focused on registered sex offenders leaving or entering the United States as part of broader efforts to notify relevant jurisdictions when such offenders change location. In addition to building upon these already-existing operations, the IML attempts to address circumstances where individuals evade such notifications by traveling to an intermediate country before proceeding to their actual final destination; it does this by requiring the State Department to

[1] "Child sex tourism" occurs "where an individual travels to a foreign country and engages in sexual activity with a child in that country." *Id.* § 2(6). This "is a form of child exploitation and, where commercial, child sex trafficking." *Id.*

include an identifier in the passports of registered sex offenders whose offenses involved sexual crimes against minors.

Plaintiffs have not shown they are likely to succeed in their challenges to either the notification or the passport identifier provisions. Indeed, Plaintiffs lack standing because they have not shown a certainly impending injury traceable to the IML provisions they seek to challenge. In addition, because the State Department has yet to make technical modifications or issue regulations or guidelines necessary to implement the passport identifier provision—and will not complete these steps before late 2016—Plaintiffs' challenge to that provision is unripe, and certainly presents no reason for the Court to address that issue on an emergency basis.

Plaintiffs' claim that the passport identifier provision is invalid under the First Amendment because it purportedly "compels speech" will not succeed on the merits. Any speech in passports is indisputably government speech, and markings in a U.S. passport identifying the holder as a registered sex offender do not convey a message that is attributable to or would appear to be endorsed by the individual passport holder. Similarly, Plaintiffs' assertion that the IML's notification provisions violate a fundamental "international right to travel" fails. Unlike a citizen's right to unfettered travel between States, the desire to travel internationally at most implicates a liberty interest, and the Government may place burdens on international travel if it has a rational basis for doing so. Here, the Government has compelling interests in preventing child sex tourism and trafficking by U.S. persons abroad; in facilitating cooperation between the United States and foreign governments regarding U.S. registered sex offenders who cross international borders; and in encouraging reciprocal notifications by foreign authorities regarding sex offenders seeking to enter this country. These interests are rationally related to the IML's international notification provisions.

A preliminary injunction would also be inappropriate because Plaintiffs have failed to demonstrate irreparable harm, and the balance of hardships and public interest weigh decidedly against an injunction. The presumption of harm that Plaintiffs urge based on their constitutional claims is unwarranted because Plaintiffs' claims lack merit. In addition, Plaintiffs' assertion of possible physical injury is speculative. The DHS and USMS notification schemes mentioned

above already have been in place and operating lawfully under existing authority for at least five years, and the IML's notification provisions do not provide any basis for emergency relief. Separately, the new passport identifier provision of the IML will not be implemented until a number of intermediate steps—including the promulgation of regulations and issuance of guidelines—are completed. In either circumstance, an emergency injunction is unnecessary and unwarranted. Rather, Plaintiffs' claims should be considered in the normal course of litigation.

The public interest in this case has been expressed by Congress in enacting a scheme designed to protect children and others from sexual abuse and exploitation, including sex tourism and sex trafficking. Its efforts should not be halted. Moreover, to the extent an injunction would require cessation of the notifications already provided through Operation Angel Watch and USMS's notification program, the public interest would be significantly harmed because DHS and USMS would be forced to discontinue notifications to other countries when registered sex offenders are scheduled to travel there.

LEGISLATIVE AND ADMINISTRATIVE BACKGROUND

1. State and Federal Sex Offender Registry Legislation

States began to develop sex offender registration programs in the late 1980s in order to protect the public, particularly children, from repeat offenders. *See* H.R. Rep. 109-218(I) at 28 (2005), 2005 WL 2210642. Legislatures have found sex offenders a particularly apt class of offenders for registration. "Sex offenders are a serious threat in this Nation," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 32-33 (2002) (citing Univ. of New Hampshire, Crimes Against Children Research Center, Fact Sheet 5; Sex Offenses 24; U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)). Studies confirm not only the statistical likelihood of rearrest for similar crimes but findings that offenders had significantly more victims than were reported or known to law enforcement. H.R. Rep. 109-218(I) at 29. Polygraph examinations on a sample of sex offenders with fewer than two known victims (on average) found that offenders actually had an average of 110 victims and 318 offenses. *See id.* Another study found that imprisoned sex

offenders had been able to commit sex crimes for an average of 16 years before being apprehended and convicted. *Id.* By 1993, sex offender registration programs existed in 24 states, including California. *See* H.R. Rep. 103-392 at 6 (1993), 1993 WL 484758.

In 1994, Congress enacted the first federal standards in order to set uniform minimum criteria for sex offender registration. *See* Jacob Wetterling Crimes Against Children Registration Act ("Wetterling Act"), Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994); H.R. Rep. 103-392 at 6. By May 1996, all 50 states and the District of Columbia had some sort of registration system for released sex offenders in place. *See* H.R. Rep. 105-256 at 6 (1997), 1997 WL 584298. Both the Supreme Court and the Ninth Circuit have upheld state sex offender registry requirements against constitutional challenges. *See Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (holding Connecticut registry law conformed to procedural due process requirements, and that registrants were not entitled to a hearing on the question of whether they were "currently dangerous" because "Connecticut has decided that the registry information of *all* sex offenders—currently dangerous or not—must be publicly disclosed"); *Smith v. Doe*, 538 U.S. 84, 105-06 (2003) (rejecting claim that Alaska's registry requirement imposed a retroactive punishment in violation of the *Ex Post Facto* Clause); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (per curiam) (rejecting substantive due process challenge to Alaska's registration and notification requirements because the state's "legitimate nonpunitive purpose of public safety" was "advanced by alerting the public to the risk of sex offenders in their community," and the relative lengths of reporting requirements for different offenses were "reasonably related to the danger of recidivism" (internal quotation omitted)).

A significant purpose of the Wetterling Act was to assist state registries in tracking registered sex offenders when they move to another jurisdiction. H.R. Rep. 103-392 at 6 (observing state programs lacked a notification mechanism when registrants move from one jurisdiction to another). The Wetterling Act thus required registrants who moved to another state to notify both the state of registry and the new state, and required law enforcement in the state of registry to notify law enforcement in the new state. Pub. L. No. 103-322, § 170101(b)(4)-(5).

In 2006, Congress moved further towards a comprehensive set of federal standards to

govern state sex offender registration and notification programs by enacting the Sex Offender Registration and Notification Act ("SORNA"), part of the Adam Walsh Child Protection and Safety Act. Pub. L. No. 109-248, §§ 102-155, 120 Stat. 587 (codified in part at 42 U.S.C. §§ 16901 *et seq.*); *see* H.R. Rep. 109-218(I), at 27 (emphasizing "gaps and problems with existing Federal and State laws" due to "lack of uniformity" in State registration requirements and notification obligations). As spending clause legislation, SORNA conditions full Byrne Justice Assistance Grant funding on a state's substantial implementation of certain requirements. 42 U.S.C. § 16925(a). State registries must collect specific information, such as names, addresses, physical descriptions, criminal history information, and photographs of offenders. *Id.* § 16914(a), (b). SORNA also sets minimum periods of registration based on the nature and seriousness of the sex offense and the offender's history of recidivism. *Id.* §§ 16911(2)-(4), 16915. SORNA requires that a state notify certain federal agencies and other jurisdictions regarding its registrants. *Id.* § 16921. SORNA also provides for public dissemination of certain information on Internet sites. *Id.* § 16918. To ensure that sex offenders comply with their registration obligations, SORNA enacted 18 U.S.C. § 2250, which establishes criminal liability for a sex offender subject to federal jurisdiction who "knowingly fails to register or update a registration" in accord with SORNA's requirements. *See* Pub. L. No. 109-248, § 141(a).

At the federal level, SORNA directed the Attorney General, Secretary of State, and Secretary of Homeland Security to "establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register." 42 U.S.C. § 16928. It also reauthorized the National Sex Offender Registry ("NSOR"), which includes information about all individuals required to register in any state registry, *id.* § 16919, and the National Sex Offender Public Website that allows anyone to search for such information by name or within specified areas, *id.* § 16920; see http://www.nsopw.gov.[2] SORNA also identified USMS as the federal agency primarily responsible for enforcing sex offender registration

[2] NSOR was originally created in 1996. *See* Pam Lynchner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236 § 2(a), 110 Stat. 3093. The National Sex Offender Public Website was originally created in 2005. *See* Press Release, Dep't of Justice (July 3, 2006), *available at* http://www.ojp.gov/newsroom/pressreleases/2006/BJA06041.htm.

requirements. 42 U.S.C. § 16941(a).

2. SORNA Guidelines and USMS International Notification Efforts

Pursuant to SORNA, 42 U.S.C. § 16912(b), the Attorney General issued National Guidelines for Sex Offender Registration and Notification ("SORNA Guidelines") in July 2008. *See* 73 Fed. Reg. 38030. In issuing these guidelines, the Attorney General noted that the effectiveness of registration and notification systems in states and other non-federal jurisdictions "depends on . . . effective arrangements for tracking of registrants as they move among jurisdictions," and that without such tracking, a registered sex offender could "simply disappear from the purview of the registration authorities by moving from one jurisdiction to another." *Id.* at 38045. The SORNA Guidelines are in large part aimed at strengthening the nationwide network of registration programs in order to avoid that result. *Id.* Moreover, while "[a] sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions," including any jurisdiction's registration requirements, "effective tracking of such sex offenders remains a matter of concern to the United States." *Id.* at 38066. Not only may such sex offenders return to the United States, but, as part of any "cooperative efforts between the Department of Justice (including the United States Marshals Service) and agencies of foreign countries," "foreign authorities may expect U.S. authorities to inform them about sex offenders coming to their jurisdictions from the United States, in return for their advising the United States about sex offenders coming to the United States from their jurisdictions." *Id.* Accordingly, the original SORNA Guidelines directed state registries to require registrants to notify the registry if they intended to live, work, or attend school outside the United States; the registry in turn was required to notify the U.S. Marshals Service. *See id.* at 38067.

In May 2010, in a notice of proposed supplemental guidelines, the Attorney General indicated that federal agencies were continuing to develop "a system for consistently identifying and tracking sex offenders who engage in international travel," and that in furtherance of that effort, he was adding a requirement to the guidelines that registrants "must be required to inform their residence jurisdiction of intended travel outside of the United States at least 21 days in advance of such travel." 75 Fed. Reg. 27362, 27364. Final supplemental guidelines, with this

requirement, were issued in January 2011. 76 Fed. Reg. 1630, 1637-38.

The international notification efforts that the Attorney General referenced were underway by 2011, involving joint operations by USMS, in cooperation with the United States' INTERPOL bureau, pursuant to USMS's law enforcement authorities under 42 U.S.C. § 16941(a) and 18 U.S.C. § 2250. *See* Declaration of Eric C. Mayo ("Mayo Decl.," attached hereto) ¶¶ 3-10. USMS primarily uses advance notifications provided by registered sex offenders, when available, as well as information obtained from DHS derived from a comparison of passenger data with information in NSOR, to identify registered sex offenders about to travel outside the United States, and to notify foreign authorities in the destination country regarding the travel plans of these individuals. *See id.* ¶¶ 5-8.

3. Previous Federal Efforts to Address Child Sex Trafficking and Tourism Abroad

Alongside the concerns generally posed by registered sex offenders who travel internationally, Congress has long recognized the specific problems of international child sex trafficking and child sex tourism. In 1910, Congress enacted the White Slave Traffic (Mann) Act, which among other things prohibits the transport of minors in foreign commerce for the purpose of prostitution. *See* Act June 25, 1910, c. 395, 36 Stat. 826 (codified as amended at 18 U.S.C. §§ 2421-2424). In 1994, Congress amended the Mann Act by adding a provision criminalizing travel to another country for the purpose of engaging in sexual activity with a minor. Pub. L. No. 103-322, § 160001(g), 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2423(b)); *see United States v. Bredimus*, 234 F. Supp. 2d 639, 644 (N.D. Tex. 2002) (upholding § 2423(b) against constitutional challenge pursuant to Congress's commerce power, which was "broad enough to include individuals who travel in foreign commerce for the purpose of engaging in sexual activity with minors"). Despite these efforts, Congress has received information indicating that U.S. persons are continuing to engage in child sex tourism. *See* H.R. Rep. 107-525 (2002), 2002 WL 1376220 (reporting that "child-sex tourism is a major component of the worldwide sexual exploitation of children and is increasing," and that, due to limited resources of foreign governments in combating such offenses, "[t]he Justice Department, Federal law enforcement agencies, the State Department and other U.S. entities expend significant

resources assisting foreign countries most afflicted with sex tourism to improve their domestic response to such criminal offenses").

In 2007, DHS began operating an international notification program specifically focused on the risk of sex offenders crossing international borders in order to engage in child sex tourism. Declaration of Acting Deputy Assistant Director Patrick J. Lechleitner ("Lechleitner Decl.," attached hereto) ¶ 5. At first focused on those traveling from Los Angeles International Airport to Southeast Asia, the program, Operation Angel Watch, was moved to ICE HSI headquarters in 2010. *Id.* Operation Angel Watch operates under Title 19 law enforcement authorities and bilateral agreements with foreign governments. *See* 19 U.S.C. § 1589a (authorizing "customs officers"—which include ICE HSI Special Agents, *see* 19 U.S.C. § 1401(i), to investigate any violation of federal law, including violations of 18 U.S.C. §§ 1591 (sex trafficking of children or by force, fraud, or coercion) and 2251 (sexual exploitation of children), as well as § 2423 discussed above); 19 C.F.R. § 103.33 (providing authorization, pursuant to 18 U.S.C. § 1628(a)(1), to customs officers to exchange information or documents with foreign customs and law enforcement agencies if necessary to "[e]nsure compliance with any law or regulation enforced or administered by [DHS]").

Operation Angel Watch primarily uses the comparisons of passenger information received from carriers pursuant to 19 C.F.R. § 122.75a with NSOR data to identify registered sex offenders whose offenses involved child victims. Lechleitner Decl. ¶¶ 8-9. Operation Angel Watch provides notifications to destination countries when it determines, based on an assessment of various factors, a likelihood of intended child sex tourism. *Id.* ¶¶ 10-11. ICE HSI, through Operation Angel Watch, provided notice of travel from the United States of approximately 2,300 convicted child sex offenders in 2014, and 2,100 such offenders in 2015.[3]

4. International Megan's Law

Through the recently enacted International Megan's Law, Congress sought to build upon

[3]ICE News Release (June 26, 2015), *available at* https://www.ice.gov/news/releases/ice-uk-national-crime-agency-enhance-joint-efforts-combat-child-exploitation; ICE News Release (Feb. 9, 2016), *available at* https://www.ice.gov/news/releases/ice-authorized-create-angel-watch-center-expand-child-protection-efforts-following.

existing programs and steps being taken to combat child exploitation. The IML seeks to strengthen and further integrate the USMS notification program and ICE HSI's Operation Angel Watch,[4] and to close a loophole that otherwise allows registered sex offenders to evade notifications. The purpose of the IML, which was passed on February 8, 2016, is to "protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism." IML, Preamble. In the IML's congressional findings, Congress observed that the SORNA provisions of the 2006 Adam Walsh Act were intended to "protect children and the public at large by establishing a comprehensive national system for the registration and notification to the public and law enforcement officers of convicted sex offenders." *Id.* § 2(3). In addition, "[l]aw enforcement reports indicate that known child-sex offenders are traveling internationally." *Id.* § 2(4). Congress further found that "[t]he commercial sexual exploitation of minors in child sex trafficking and pornography is a global phenomenon," with millions of child victims each year. *Id.* § 2(5).

a. Notification Provisions

The IML builds on the existing notification programs operated by USMS and ICE HSI in order to provide advance notice to other countries when registered sex offenders in the United States intend to travel internationally, while also encouraging reciprocal arrangements with foreign governments to receive notifications from those countries when sex offenders seek to travel to the United States. *Id.* Preamble & § 7. In regard to notifications to foreign destination countries, the IML establishes an Angel Watch Center within ICE HSI's Child Exploitation Investigations Unit. *Id.* § 4(a). Essentially, the Angel Watch Center will carry on the activities of Operation Angel Watch. Lechleitner Decl. ¶ 14. Among other things, where the Center has identified internationally traveling individuals convicted of sexual offenses against minors and where certain conditions are satisfied, the IML provides that the Center "may transmit relevant

[4] The need for greater information sharing among agencies, particularly those involved in the USMS notification program and Operation Angel Watch, was highlighted in a 2013 GAO report. *See* GAO-13-200, Registered Sex Offenders: Sharing More Information Will Enable Federal Agencies to Improve Notifications of Sex Offenders' International Travel (Feb. 2013), *available at* http://www.gao.gov/products/GAO-13-200.

information to the destination country about [the] sex offender." IML § 4(e)(1)-(3).

The IML also continues USMS's notification program, *see* Mayo Decl. ¶ 10, providing that USMS, through its National Sex Offender Targeting Center, "may—transmit notification of international travel of a sex offender to the destination country of the sex offender, including to the visa-issuing agent or agents" of the destination country, IML § 5(a)(1), and also may "share information relating to traveling sex offenders with other Federal, State, local, and foreign agencies and entities, as appropriate," *id.* § 5(a)(2). Such notifications may be transmitted "through such means as are determined appropriate" by USMS, "including through the INTERPOL notification system and through Federal Bureau of Investigation Legal attaches." *Id.* § 5(e). In addition, USMS may also "receive incoming notifications concerning individuals seeking to enter the United States who have committed offenses of a sexual nature." *Id.* § 5(a)(3). Any such incoming notification must be provided immediately to DHS. *Id.*

The IML notification provisions in §§ 4 (Angel Watch Center) and 5 (USMS) each contain two-part overlapping definitions of "sex offender," with the former including those who have been convicted of a sex offense against a minor as well as those required to register with a sex offender registry on the basis of an offense against a minor, *id.* § 4(f); and the latter including those who meet SORNA's definition of "sex offender" because they have been "convicted of a sex offense," 42 U.S.C. § 16911(1), as well as those required to register with a sex offender registry, IML § 5(h). The Operation Angel Watch and USMS notification schemes already in effect utilize procedures to identify only registered sex offenders who travel, and do not make notifications regarding persons not currently subject to registration requirements. Lechleitner Decl. ¶ 12; Mayo Decl. ¶¶ 5, 7-8.

Where either the Angel Watch Center or USMS decides not to transmit a notification abroad regarding a sex offender who intends to travel, the IML directs that it collect relevant data regarding that decision. IML §§ 4(e)(6)(C), 5(f)(3). Both the Angel Watch Center and USMS are also directed to establish a mechanism to receive, review, and respond to complaints from individuals "affected by erroneous notifications." *Id.* §§ 4(e)(7), 5(g).

In addition to these notification provisions, the IML amended the Adam Walsh Act by

specifically codifying the requirement in the SORNA Guidelines that those required to register with a jurisdiction's sex offender registry must provide information to the registry relating to any intended travel outside the United States. *Id.* § 6(a) (amending 42 U.S.C. § 16914).

In sum, through their motion, Plaintiffs seek to enjoin new IML statutory notification provisions that build upon pre-existing practices and statutory and regulatory authority.

b. Passport Identifier Provisions

Finally, the IML attempts to close a loophole in the notification procedures, whereby an offender might seemingly comply with IML requirements by providing notice of travel to one country, and might appear on a flight manifest as traveling to that country, but might then travel from that first destination country to his actual destination somewhere else without detection by U.S. authorities. Focusing specifically on registered sex offenders whose offenses involved a child victim, the IML prevents such offenders "from thwarting I[ML] notification procedures by country hopping to an alternative destination not previously disclosed," by directing the State Department to "develop a passport identifier" that would allow such individuals to be identified once they arrive at their true destination. 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith). First, the IML tasks the Angel Watch Center with "provid[ing] a written determination to the Department of State regarding the status of an individual as a covered sex offender . . . when appropriate." IML § 4(e)(5). Only individuals who have been convicted of a sex offense against a minor and are "currently required to register under the sex offender registration program of any jurisdiction" qualify as covered sex offenders for purposes of this provision. *See id.* § 8(a) (adding § 240(c)(1) to Pub. L. No. 110-457). The Secretary of State is then directed not to issue a passport to individuals identified by the Angel Watch Center as covered sex offenders unless the passport contains a unique identifier. *Id.* § 8(a) (adding § 240(b)). The Secretary of State may also revoke a passport previously issued to such an individual if it does not contain such an identifier. *Id.*

The passport identifier requirement will not take effect until the Secretaries of Homeland Security and State and the Attorney General first develop a process for implementation, then submit a joint report to Congress regarding this proposed process, and, finally, certify that the

process has been successfully implemented. *See id.* §§ 8 (adding § 240(f) to Pub. L. No. 110-457), 9(a)-(b). The report to Congress, including "a description of the proposed process and a timeline and plan for implementation of that process," as well as a description of "the resources required to effectively implement that process," is to be submitted by May 9, 2016 (90 days after the IML's enactment on February 8, 2016)). *Id.* § 9(b); Declaration of Jonathan M. Rolbin ("Rolbin Decl.," attached hereto) ¶ 4.

STANDARD OF REVIEW

A preliminary injunction is an "extraordinary and drastic remedy" that "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Winter v. NRDC*, 555 U.S. 7, 22 (2008). A party seeking such relief "must demonstrate (1) that it is likely to succeed on the merits, (2) that it is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its favor, and (4) that an injunction is in the public interest." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010). Plaintiffs bear the burden of demonstrating that each of these four factors is met. *DISH Network Corp. v. FCC*, 653 F.3d 771, 777 (9th Cir. 2011). In addition, because preliminary injunctions are meant to "'preserve the relative positions of the parties until a trial on the merits can be held,'" *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1081-82 (N.D. Cal. 2013) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)), requests for a mandatory injunction that would change the status quo "are subject to heightened scrutiny and should not be granted 'unless the facts and law clearly favor the moving party,'" *id.* (quoting *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993)).

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Plaintiffs Lack Standing Because They Do Not Face a Certainly Impending Injury Caused by the IML Provisions They Seek to Challenge

A plaintiff's obligation to demonstrate standing "is an essential and unchanging" prerequisite to a court's jurisdiction to consider the plaintiff's claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry must be "especially rigorous" when

reaching the merits of a claim would force a court to decide the constitutionality of actions taken by a coordinate Branch of the Federal Government. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "A plaintiff must demonstrate standing 'for each claim he seeks to press' and for 'each form of relief sought.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Thus, to establish standing for their claims here, Plaintiffs must identify for each an injury in fact, fairly traceable to the distinct IML provisions that they challenge, and redressable by a favorable ruling, that is "concrete, particularized, and actual or imminent." *Id.* Because Plaintiffs seek only injunctive and declaratory relief, they must identify an "imminent prospect of future injury." *Ervine v. Desert View Regional Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014). Such a future injury "must be certainly impending to constitute injury in fact," whereas "allegations of possible future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147.

Here, Plaintiffs fail to satisfy standing requirements because they have not identified a certainly impending future injury caused by the IML provisions they seek to challenge. In regard to Plaintiffs' challenge to the IML's notification provisions, both USMS and ICE HSI have had international notification programs in place for over five years, and neither agency anticipates that the nature of its notifications will change as a result of the IML. Lechleitner Decl. ¶ 14; Mayo Decl. ¶ 10. Any injury that Plaintiffs might allege relating to such notifications would therefore not be fairly traceable to the IML. Moreover, Plaintiff Does #1, #2, and #3 cite no concrete travel plans, Compl. ¶ 13, and the fact that Plaintiff Doe #2 does not have a passport, Compl. ¶ 14, suggests he faces no certainly impending injury from international notifications. In addition, because Plaintiff Doe #3 indicates that he is "not required to register as a sex offender in any jurisdiction," Compl. ¶ 15; *see also* Declaration of John Doe #3, at 3, ECF No. 24, he would not be identified through the methods currently used by ICE HSI and USMS to identify sex offenders intending to travel outside the United States. Lechleitner Decl. ¶¶ 8, 12; Mayo Decl. ¶¶ 5, 7-8. There is therefore no possibility in the foreseeable future that he would be subject to international travel notifications under the IML. Plaintiff Doe #4 alleges that he wishes to travel back and forth to the Philippines to see his wife. Compl. ¶ 16. However, he does not

allege that the IML's notification provisions will impact such travel. Although he alleges that Philippine authorities denied him entry in the past due to international travel notifications issued by DHS or by INTERPOL, he confirms that the Philippine government currently allows him to travel freely in and out of the country. *See* Declaration of John Doe #4, at 3-4.

In regard to Plaintiffs' challenge to the IML's passport identifier provision, IML § 8, no "certainly impending" injury traceable to this provision can plausibly be alleged because the State Department has not yet implemented this provision, and a number of steps must be completed, including the issuance of regulations and guidance, before it does so. *See* Rolbin Decl. ¶¶ 3-6. Moreover, Does #2 and #3 face no "certainly impending" injury because, according to the Complaint, Doe #2 has no passport, thus precluding any conclusion that he is otherwise entitled to one, and Doe #3 would not be subject to this provision since he is not a registered sex offender. In addition, Doe #4's assertion that, once implemented, the passport identifier will cause the Philippine authorities once again to deny his entry into that country, *see* Doe #4 Declaration at 4, is purely speculative and insufficient to establish standing.

B. Plaintiffs' Challenge to the IML's Passport Identifier Provision Is Unripe Because Significant Steps Must Be Taken Before the Provision Is Implemented

The Court also lacks jurisdiction over Plaintiffs' challenge to the IML's passport identifier provision on ripeness grounds because, as the State Department's declarant has explained, the provision will not go into effect until late 2016 at the earliest. Rolbin Decl. ¶ 6. The ripeness doctrine avoids "premature adjudication" of disputes, *Scott v. Pasadena Unif. Sch. Dist.*, 306 F.3d 646, 662 (9th Cir. 2002), and "prevents courts from deciding abstract issues that have not yet had a concrete impact on the parties," *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d 1330, 1344 (9th Cir. 1990). In order to determine whether a claim is ripe, courts focus on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Assn. v. Dep't of Interior*, 538 U.S. 803, 808 (2003); *accord Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996). As explained above, before the IML's passport identifier provision goes into effect, the Departments of Homeland Security, State, and Justice must develop a process for its implementation, must submit this

process to a number of congressional committees, and must engage in consultation with those committees regarding the proposed process. IML § 9. Only when the agencies have certified that the process has been successfully implemented will the provision go into effect. *Id.* § 8(a). Moreover the State Department has identified numerous steps that must be completed before it may begin implementation, including creating systems for receipt of data on covered sex offenders, modifying the passport issuance system to permit issuance of passports with a unique identifier, and issuing regulations and guidelines governing certain aspects of the provision. Rolbin Decl. ¶ 5. In light of these prerequisites to implementation, any challenge to the provision is not presently fit for judicial review. Nor would Plaintiffs face any hardship as a result of withholding court consideration until a later time since no identifier will be placed on any passport until the program is implemented. Plaintiffs are therefore unlikely to succeed in their challenge to the passport identifier provision because their claim is unripe.

C. The IML's Passport Identifier Provision Does Not Compel Speech in Violation of the First Amendment

Even if the Court reaches the substance of Plaintiffs' claims, it should conclude that Plaintiffs are unlikely to succeed on the merits. Plaintiffs challenge the IML's passport identifier provision on First Amendment grounds, claiming that it unconstitutionally compels those carrying passports that contain such identifiers to convey a message with which they disagree. Plaintiffs cannot prevail on this claim, however, because factual information contained in a U.S. passport is unquestionably government speech that would not be attributed to nor deemed to be endorsed by the passport holder. In such circumstances, the Supreme Court has confirmed that the government speech doctrine applies.

The Supreme Court has held that "'[w]hen . . . the government sets the overall message to be communicated and approves every word that is disseminated,' it is government speech." *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 963 (9th Cir. 2008) (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561-62 (2005)). Recently applying this reasoning in *Walker v. Texas Div.*, 135 S. Ct. 2239 (2015), the Court held that specialty license plates were "essentially, government IDs," and that the messages they contained thus qualified as government speech. *Id.* at 2249

(observing that "persons who observe designs on IDs routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf" (internal quotation omitted)); *see also Cressman v. Thompson*, 798 F.3d 938, 966 (10th Cir. 2015) (McHugh, J., concurring) (under *Walker*, slogan and graphic on Oklahoma license plate constituted government speech).

Here, because the Government controls every aspect of the issuance and appearance of U.S. passports, no lengthy analysis is required to conclude that the information contained in a U.S. passport is government speech.[5] A U.S. passport is a government-issued document. *See* 22 U.S.C. § 211a. Indeed, passports remain United States property even when held by individuals. 22 C.F.R. § 51.7(a) ("A passport at all times remains the property of the United States and must be returned to the U.S. Government upon demand."); *id.* § 51.66 ("The bearer of a passport that is revoked must surrender it to the Department or its authorized representative on demand."). Individuals have absolutely no editorial control over the information contained in a passport. *See id.* § 51.9 ("Except for the convenience of the U.S. Government, no passport may be amended."); *see also* 18 U.S.C. § 1543 (imposing criminal penalties on those who "mutilate[]" or "alter[] any passport"). Because the passport identifier required under the IML is government speech, cases cited by Plaintiffs such as *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988), involving compelled *private* speech, do not apply. *See id.* at 795 (holding that required disclosures by professional fundraisers were a "content-based regulation of speech" because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech").

Plaintiffs also miss the mark in their reliance on government speech cases where First Amendment interests were implicated. As demonstrated by those cases, to the extent an individual has a First Amendment interest where the speech at issue is government speech, that interest derives from the possibility that the speech may nevertheless be attributed to the individual, or the individual may be deemed to endorse the message that the government seeks to convey. Indeed, this was the situation in *Wooley v. Maynard*, 430 U.S. 705 (1977), the case upon

[5] In light of the Supreme Court's decision in *Walker*, the Ninth Circuit's reliance in *Ariz. Life Coal Inc.*, 515 F.3d at 964, on an analysis of several factors to determine whether a message conveys government or private speech may no longer apply. In any event, the factors identified in that case also confirm that information contained in a U.S. passport is government speech.

which Plaintiff chiefly relies. There, the Supreme Court considered "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message"—the state motto "Live Free or Die," appearing on the state license plate—"by displaying it on his private property"—the individual's personal vehicle—"in a manner and for the express purpose that it be observed and read by the public." *Id.* at 713. In holding that the state could not compel such participation, the Court emphasized that the license plate motto essentially "force[d] an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," and that the state "in effect require[d]" individuals to "use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715. The Court further determined that there was no "countervailing interest . . . sufficiently compelling to justify" the requirement. *Id.* at 716. In *Gralike v. Cooke*, 191 F.3d 911 (8th Cir. 1999), another case cited by Plaintiffs, the court invalidated a state law providing for labels on election ballots identifying candidates as opposed to term limits because "[o]nce the label is on the ballot, it ascribes a point of view to the labeled candidate." *Id.* at 919.[6]

On the other hand, where there is no possibility of attribution or perceived endorsement, as is the case here, courts have rejected any First Amendment claim based on government speech—even where the speech at issue is adverse to the individual. *See, e.g., R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906 (9th Cir. 2004) (rejecting a First Amendment challenge by tobacco companies to a message issued by the California Department of Health Services because the companies never "claimed that the ads at issue in this litigation could be or were attributed to them" and "[a] reasonable viewer could not believe that these anti-industry ads . . . were created, produced, or approved by" the companies).

Here, Plaintiffs' First Amendment interests are not implicated by government speech in a U.S. passport because no one could reasonably attribute factual information contained in a U.S. passport to the passport holder, nor assume that the passport holder necessarily endorsed such a

[6] Although the Supreme Court in *Cooke v. Gralike*, 531 U.S. 510 (2001), upheld the Circuit court's ruling, it did so on different grounds and did not address the issue of compelled speech.

message. To the contrary, like the anti-industry ads at issue in *R.J. Reynolds*, it would be reasonable to assume that the passport holder did not endorse the inclusion of negative factual information about himself in his passport. Because a passport is a government-issued identification document, it is well understood that every aspect of that document is controlled by the issuing government, not by the individual identified in the document. Indeed, the very purpose of a government ID is to provide the issuing government's verification of an individual's identity based on the government's determinations, which may not accord with the individual's own preferences. *See Haig v. Agee*, 453 U.S. 280, 292-93 (1981) (recognizing that passports serve a dual function—as "a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer," and as a "travel control document" representing "proof of identity and proof of allegiance to the United States"). Not surprisingly, Plaintiffs have not cited any decision where a court has recognized an individual's First Amendment interest in the factual content of a government-issued identification document such as a passport. Such information is in no sense the individual's speech.

Even if First Amendment interests were implicated, the Government has a compelling interest supporting the IML's passport identifier provision. There can be no dispute that protecting children from sexual exploitation qualifies as a compelling interest. *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people"). Congress has found that certain U.S. passport holders travel to other countries to exploit children through sex tourism and sex trafficking. IML § 2(4). In response to this finding, Congress established a scheme of notifying such countries concerning travel by a registered sex offender whose offense involved a child victim. *Id.* § 4(e). As explained by Representative Smith, the purpose of the passport identifier provision is to prevent registered child sex offenders from evading this notification scheme by first traveling to a country without a significant child sex tourism industry and traveling from there to the actual destination country. 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016) (statement

of Rep. Smith). Including an identifier in a passport is a narrowly tailored means to that end—certainly less restrictive than refusing to issue a passport to such individuals altogether, or even advising foreign countries not to admit traveling sex offenders. Plaintiffs are thus unlikely to succeed on the merits of this claim.

D. The IML's Notification Provisions Do Not Violate Plaintiffs' Right to Travel Internationally

Plaintiffs are also unlikely to succeed on the merits of their claim that the IML's notification provisions violate a Fifth Amendment due process right to international travel. In a substantive due process analysis, absent differential treatment of a "protected class" or implication of a "fundamental right," a challenged law must be upheld as long as it is "rationally related to a legitimate government goal." *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). Rational basis review applies here. Plaintiffs refer to "the right to travel internationally" as a "fundamental right." Pl. Br. at 18. It should be noted as an initial matter that the IML's notification provisions do not prohibit international travel. As is clear from the agencies' descriptions of how the notifications currently operate, even where a notification is made, under either the USMS's notification program or Operation Angel Watch, the United States does not provide any recommendation to the destination country regarding what action to take in light of the provided information. Lechleitner Decl. ¶ 13; Mayo Decl. ¶ 6. Moreover, information about registered sex offenders is publicly available on the Internet, including on the National Sex Offender Public Website. While the notifications no doubt make it easier for destination countries to come across this information, anyone who chose to look could likely find out about a traveler's sex offender status and registration from public sources on the Internet.

In any event, there is no fundamental right to international travel. The Supreme Court has recognized a "'right' of international travel" as "an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. *See Califano v. Aznavorian*, 439 U.S. 170, 176 (1978). However, this liberty interest is not the same as the "constitutional right of interstate travel," which is "virtually unqualified." *Id.* (internal quotation omitted). Rather, "the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations," and "as such, it

is subject to reasonable governmental regulation." *Haig*, 453 U.S. at 306. In *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996), the Ninth Circuit considered a right to travel challenge to federal asset control regulations restricting travel to Cuba. *Id.* at 1434. The court analyzed this claim as a substantive due process claim but concluded that because "[r]estrictions on international travel are usually granted much greater deference" than restrictions on interstate travel, the Government need only advance a rational, or at most an important, reason for imposing the ban." *Id.* at 1438-39. The court upheld the ban based on the Government's asserted interest in restricting the flow of currency into Cuba. *Id.*

The IML's notification provisions easily satisfy rational basis review. Congress has explained that these notifications are intended to inform destination countries that a registered sex offender intends to travel there, in order to protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism. *See* IML, Preamble. The notifications are also intended to facilitate cooperation with other countries in preventing sexual abuse and exploitation, including sex trafficking and sex tourism, to raise awareness of the whereabouts of registered sex offenders who cross international borders, and to encourage reciprocal notifications about sex offenders who intend to travel here. *See id.* Preamble, § 7; *see also* 73 Fed. Reg. at 38066 (discussing need for "effective tracking" of registered sex offenders who travel outside the country); 76 Fed. Reg. at 1637 (discussing development of "a system for consistently identifying and tracking sex offenders who engage in international travel").

These goals undoubtedly qualify as important. The United States has "a compelling interest in protecting children from abuse." *United States v. Stevens*, 559 U.S. 460, 471 (2010) (citing *Ferber*, 458 U.S. 747); *see also Doe v. Harris*, 772 F.3d 563, 577 (9th Cir. 2014) ("Unquestionably, the State's interest in preventing and responding to crime, particularly crimes as serious as sexual exploitation and human trafficking, is legitimate."). The United States also has a legitimate interest in sharing information with foreign governments regarding U.S. persons who, in its determination, pose a risk of violating both federal and foreign laws. *See, e.g.*, *United States v. Balsys*, 524 U.S. 666, 714 (1998) (observing that, over the 30 years prior to 1998, "the United States has dramatically increased its level of cooperation with foreign governments to

combat crime"); *Donovan v. FBI*, 579 F. Supp. 1111, 1119 (S.D.N.Y. 1983) (recognizing, in context of FOIA case, that an important aspect of law enforcement efforts abroad involved "agencies' willingness to exchange essential information"). In confronting recognized international problems like sex trafficking and sex tourism, such information-sharing by the United States undoubtedly encourages reciprocal cooperation by other countries. In addition, the United States' foreign relations interests are clearly affected by the prospect of its citizens committing sexual crimes against children or others in foreign countries. It is not irrational for Congress to conclude that providing notifications to destination countries regarding U.S. persons who are registered sex offenders and seek to travel to those countries will promote these important Government interests. *Cf. Litmon v. Harris*, 768 F.3d 1237, 1241-42 (9th Cir. 2014) ("It is not irrational for the California legislature to conclude that requiring those who have been convicted of sexually violent offenses to register in person every 90 days may deter recidivism and promote public safety.").

In arguing to the contrary, Plaintiffs rely on cases that are inapposite. For example, in *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964), which Plaintiffs erroneously contend is "substantially similar" to this case, the Supreme Court overturned the Government's revocation of passports solely on the ground that the passport holders were members of the Communist Party. *See id.* at 514. However, as a member of the Ninth Circuit has recognized, the Court in *Aptheker* was "dealing with a law which touched on First Amendment concerns because it keyed on mere association." *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002) (opinion of Fernandez, J.). Moreover, the Court in *Aptheker* noted that the "prohibition against travel [wa]s supported only by a tenuous relationship between the bare fact of organizational membership" and subversive activities abroad. *Aptheker*, 378 U.S. at 514. Similarly, in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court, applying rational basis equal protection analysis, found that a zoning ordinance that would prohibit a home for mentally disabled residents was drawing a distinction on "largely irrelevant" grounds. *Id.* at 448.

Plaintiffs' attempted analogy to these cases fails because no First Amendment interest is at stake here, and this is not a case where there is no relationship at all between registered sex

offenders' convictions for past crimes and the Government's interests behind providing international notifications, as described above. While Plaintiffs appear to disagree with Congress's assessment that registered sex offenders pose a risk of reoffending, they have not shown that the assessment is purely arbitrary and they therefore cannot succeed in demonstrating that the notification provisions are invalid on that basis. *See FCC. v. Beach Commcn's*, 508 U.S. 307, 313–14 (1993) ("A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."); *Fields v. Legacy Health Sy*s. 413 F.3d 943, 955 (9th Cir. 2005) ("In essence, a legislative classification subject to rational basis scrutiny must be wholly irrational to violate equal protection."); *cf. United States v. Pollard*, 326 F.3d 397, 408-09 (3d Cir. 2003) (upholding a requirement that those traveling from Virgin Islands undergo questioning because plaintiff could not show there was no conceivable basis for this distinction).[7]

Plaintiffs also assert that the notification provisions are irrational in requiring notifications regarding individuals who are not registered as a sex offender in any jurisdiction. Pl. Br. at 21. Under IML §§ 4(f) and 5(h), described above, individuals who have been convicted of a sex offense may meet the definitions of "sex offender," and some individuals who have been convicted of a sex offense may not currently be subject to registration requirements. However, the notifications in such circumstances serve the same important government interests identified above and do not warrant striking down the IML's notification provisions on their face under rational basis review. Moreover, the IML leaves discretion to ICE and the USMS regarding notifications. *See* IML § 4(e)(3) (Angel Watch Center "may" transmit relevant information to destination country); 5(a)(1) (USMS "may" transmit notifications to destination country). Currently, as explained above, only registered sex offenders are subject to notifications, and the methods used to identify sex offenders with international travel plans would not allow them to

[7] To a large extent, Plaintiffs simply disagree with the premise underlying sex offender registration requirements. But the validity of those requirements is not in dispute here. Nothing in the IML changes an individual's status as a registered sex offender. However, if an individual has a basis to challenge his current status, he may pursue that effort in the state or other jurisdiction where he is registered—as, indeed, Plaintiff Doe #3 has done in California—and, if successful, he would no longer be subject to international notifications.

identify anyone who was not already in a registry. Lechleitner Decl. ¶ 12; Mayo Decl. ¶¶ 5, 7-8. Plaintiffs therefore have not met their burden to show a likelihood of success on their right to travel claim.

II. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM

Plaintiffs not only fail to show a likelihood of success on the merits, but they also fail to show they will suffer irreparable harm if this case were to proceed without a preliminary injunction. Plaintiffs attempt to satisfy the irreparable harm requirement by relying on the notion that an allegation of "constitutional infringement" alone demonstrates irreparable harm. *See* Pl. Br. at 22. However, "such a presumption is inapposite where, as here, the plaintiffs fail to demonstrate 'a sufficient likelihood of success on the merits of [their] constitutional claims to warrant the grant of a preliminary injunction.'" *Marin All. for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1160 (N.D. Cal. 2011) (quoting *Assoc'd Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)). The constitutional violations that Plaintiffs allege are "too tenuous to support a presumption of irreparable harm." *Id.* (citing *Goldie's Bookstore v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)). Plaintiffs make no attempt to demonstrate any other form of irreparable harm in connection with the IML's notification provisions.

In regard to the passport identifier provision, Plaintiffs do assert a risk of physical injury, should they travel with a passport containing the identifier described in IML § 8. Pl. Br. at 23. However, there is no immediate prospect that any of the Plaintiffs will engage in such travel. As explained above, the passport identifier provision will not go into effect until a number of prerequisite steps have occurred. Rolbin Decl. ¶¶ 4-6. Until the provision is in effect, no passport will be issued containing an identifier.[8] Moreover, the Declaration of Charlene Steen submitted by Plaintiffs does not establish a risk of physical injury caused by passport identifiers. *See* ECF No. 15. Nothing in that declaration suggests that anyone who would normally be in a position to see someone's passport—for example, border officials, law enforcement, or hotel registration

[8] Of course, Plaintiff Doe #3 is not subject to the passport identifier provision at all since he is not a registered sex offender.

clerks—would be likely to injure the passport holder based on such an identifier. Plaintiffs' allegations are speculative compared to the demonstrations of a risk of physical injury that courts have found to establish irreparable harm. *See, e.g.*, *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1192 (N.D. Cal.) (transgender inmate demonstrated ongoing risk to physical and psychological health due to current policy against providing sex reassignment surgery), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015); *Save Our Summers v. Wash. State Dep't of Ecology*, 132 F. Supp. 2d 896, 905-06 (E.D. Wash. 1999) (risk of physical injury to children with respiratory ailments from continued open burning of wheat stubble was sufficient to show irreparable harm).

III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION

Plaintiffs also fail to show that the balance of hardships tilts in their favor. In order to assess whether Plaintiffs have met their burden regarding the balance of hardships, a district court must "balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotation omitted). Again, Plaintiffs do not identify any hardships other than the alleged constitutional violations asserted in their Complaint. *See* Pl. Br. at 23. Nor is there any reason to think that Plaintiffs would face any hardship if this case simply proceeds to consideration of their claims in the normal course. On the other hand, Defendants would face considerable hardship. An injunction would force Defendants to halt implementation of an Act of Congress. "The presumption of constitutionality which attaches to every Act of Congress is not merely a factor to be considered in evaluating success on the merits, but an equity to be considered in favor of [the United States] in balancing hardships." *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers).

Moreover, such hardship would be even more significant if an injunction were to impact or require the cessation of the Operation Angel Watch and USMS notification programs, which are addressed in the IML but have already been operating pursuant to other statutory and regulatory provisions for over five years. *See* Lechleitner Decl. ¶ 15; Mayo Decl. ¶ 11. If Defendants were to cease international notifications, destination countries would not receive

notice of the intended entry into their country of registered sex offenders, including those whom Operation Angel Watch has identified as potentially intending to engage in child sex trafficking or child sex tourism. *Id.* In addition, other countries that ceased receiving notifications from the USMS or Operation Angel Watch would in turn likely be less willing to provide reciprocal notifications to the United States. *Id.*

IV. THE PUBLIC INTEREST WEIGHS AGAINST AN INJUNCTION

For similar reasons, the public interest coincides with that of the United States. The public certainly has an interest in protecting children and others from sexual abuse and exploitation, including sex tourism and sex trafficking, and the challenged provisions of the IML were designed by Congress to serve that interest. Indeed, it is well established that "[t]he public interest may be declared in the form of a statute." *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (internal quotation omitted). Where the elected branches have enacted a statute based on their understanding of what the public interest requires, this Court's "consideration of the public interest is constrained . . . for the responsible public officials . . . have already considered that interest." *Id.* at 1126-27. Thus, "a court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (internal quotation omitted). In addition, as described, if an injunction were to impact notifications that are already being provided through Operation Angel Watch and USMS's notification program, the public interest would be significantly harmed from any resulting cessation of notice provided to foreign countries of the travel of certain registered sex offenders, and potential concomitant loss of notice by the United States of sex offenders traveling to this country.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be denied.

Dated: March 4, 2016

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