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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' MOTION TO DISMISS

Hearing Date: June 22, 2016
Hearing Time: 9:00 am
Courtroom: Courtroom 3
Judge: Hon. Phyllis J. Hamilton

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NOTICE OF MOTION AND MOTION TO DISMISS

Please take notice that on June 22, 2016, at 9:00 a.m., before the Honorable Phyllis J. Hamilton, Courtroom 3, 1301 Clay Street, Oakland, California, 94621, Defendants will and hereby do move this Court for an order dismissing all claims asserted against them for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). This motion is based on this Notice, the Court's files and records in this action, the Amended Complaint, the accompanying Memorandum of Points and Authorities, and any other matter the Court may consider at any oral argument that may be presented in support of this motion or that may be judicially noticed.

RELIEF SOUGHT

Defendants move for dismissal of all claims.

ISSUES TO BE DETERMINED

Whether this case should be dismissed for lack of subject matter jurisdiction or because Plaintiffs have not plausibly stated a claim upon which relief can be granted on the merits.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Plaintiffs—seven individuals who have been convicted of sex offenses involving minors—seek to enjoin and declare facially unconstitutional 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). The provisions at issue continue and build upon existing programs operated 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. These international notifications seek to protect children and others from sexual abuse and exploitation, including sex trafficking and child sex tourism, the latter understood to include any sexual activity with a child while traveling in a foreign country. The IML also 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 include an identifier in the passports of registered sex offenders whose offenses involved sexual crimes against minors.

Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction. As the Court has already held when denying Plaintiffs' Motion for Preliminary Injunction, Plaintiffs lack standing to challenge the IML's notification provisions because, even if the IML were enjoined, the existing programs run by ICE HSI and USMS would continue to operate. Plaintiffs' asserted injuries related to notifications are not fairly traceable to the IML and would not be redressed by the relief that they seek. Moreover, as this Court has also recognized, Plaintiffs' challenges to the passport identifier provision—which will not go into effect until a number of prerequisite steps are completed—are unripe. Plaintiffs also fail to allege a plausible certainly impending injury in regard to the passport identifier provision. Accordingly, this action should be dismissed in its entirety for lack of jurisdiction.

Even if the Court reaches the merits of Plaintiffs' claims, this action should be dismissed for failure to state a claim upon which relief can be granted. The Court should reject Plaintiffs' "compelled speech" challenge to the IML's passport identifier provision because such an identifier does not implicate the First Amendment. Any speech in passports is indisputably government speech, and an identifier in a U.S. passport indicating the passport holder is a registered sex offender does not convey a message that is attributable to or would appear to be endorsed by the individual passport holder.

Plaintiffs' other claims, though numerous, are foreclosed by a significant body of Supreme Court and Ninth Circuit precedent, which has rejected the notion that sex offenders qualify as a protected class; recognized that any stigma associated with an individual's status as a sex offender derives from the individual's conviction, not from registration and notification requirements; and determined that such registration and notification requirements are nonpunitive and rationally related to governmental interests in protecting public safety. In light of those holdings, Plaintiffs' substantive due process and equal protection claims—both subject to rational basis review—must fail. The Government has compelling interests in preventing

sexual exploitation and child sex tourism 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. The IML's international notification and passport identifier provisions are rationally related to advancing these significant interests.

Plaintiffs' procedural due process claims similarly fail to allege any plausible deprivation of a liberty interest caused by the IML provisions, and no additional process is due where the IML's criteria for international notifications and for the passport identifier depend on sex offender conviction and registration status. Finally, Plaintiffs' *ex post facto* claim should be rejected because Plaintiffs cannot plausibly allege that communications between government authorities of accurate information regarding an individual's criminal history are punitive in nature, nor that they are excessive. Indeed, in comparison to the community notifications that have repeatedly been upheld, which involve public website posting and other methods of public dissemination of sex offender conviction information, the international notification and passport identifier provisions at issue here are relatively restricted in their scope. In this narrower context, Plaintiffs are essentially seeking to halt communications that the United States government has deemed appropriate to convey to foreign authorities and are intended in part to encourage reciprocal communications from foreign governments. The Court should not place constraints on such inter-government communication, which implicates broader foreign relations and international law enforcement concerns that more appropriately fall within the sphere of the political branches. For all these reasons, this action should be dismissed.

STATUTORY AND REGULATORY BACKGROUND

1. State and Federal Sex Offender Registration and Notification Legislation

States "began enacting registry and community-notification laws" in the early 1990's in order "to monitor the whereabouts of individuals previously convicted of sex crimes." *Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016). In 1994, Congress enacted the Jacob Wetterling Crimes Against Children Registration Act ("Wetterling Act"), Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994), which "conditioned federal funds on States' enacting sex-offender

registry laws meeting certain minimum standards." *Nichols*, 136 S. Ct. at 1116. 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). By May 1996, all 50 states and the District of Columbia had some sort of registration system for released sex offenders. *See* H.R. Rep. 105-256 at 6 (1997), 1997 WL 584298.

In 2006, Congress enacted 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.). SORNA's purpose was to "make more uniform what had remained 'a patchwork of federal and 50 individual state registration systems,' with 'loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost.'" *Nichols*, 136 S. Ct. at 1119. Among other things, SORNA revised the Wetterling Act's notification obligations by requiring sex offenders to notify one jurisdiction of any change of address; "that jurisdiction must then notify a list of interested parties, including the other jurisdictions." *Id.* at 1116. SORNA also 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.[1] SORNA also identified USMS as the federal agency primarily responsible for enforcing sex offender registration requirements. 42 U.S.C. § 16941(a).

2. SORNA Guidelines

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 avoiding 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, when proposing supplemental guidelines, the Attorney General indicated that federal agencies were continuing to develop "a system for consistently identifying and

[1] 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.

tracking sex offenders who engage in international travel," and that in furtherance of that effort, the supplemental guidelines would require registries to "require[] [registrants] 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; *see* 76 Fed. Reg. 1630, 1637-38 (final guidelines)

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 added 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)). Despite these efforts, Congress has reported that U.S. persons are continuing to engage in child sex tourism. *See* H.R. Rep. 107-525 (2002), 2002 WL 1376220 ("child-sex tourism is a major component of the worldwide sexual exploitation of children and is increasing").

4. International Megan's Law

Through the recently enacted International Megan's Law, Congress sought to build upon existing programs and steps being taken to combat child exploitation. The IML seeks to strengthen and further integrate existing ICE HSI and USMS notification programs,[2] 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

[2] The need for greater information sharing in these programs 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.

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 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). The Angel Watch Center will essentially carry on activities of Operation Angel Watch, a program that has been operated by ICE HSI since 2010. *See* Declaration of Acting Deputy Assistant Director Patrick J. Lechleitner ("Lechleitner Decl.," ECF 30-2) ¶ 5.[3] 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 information to the destination country about [the] sex offender." IML § 4(e)(1)-(3).

The IML also provides 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,

[3] Operation Angel Watch operates under Title 19 law enforcement authorities and bilateral arrangements and 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) 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, in certain circumstances).

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). Again, this provision builds upon an existing international Traveling Sex Offender notification program that USMS has operated since at least 2011. Declaration of Eric C. Mayo ("Mayo Decl.," ECF 30-1) ¶¶ 3-10. USMS may also "receive incoming notifications concerning individuals seeking to enter the United States who have committed offenses of a sexual nature." IML § 5(a)(3). Incoming notifications 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, and the agencies anticipate no change in this regard. Lechleitner Decl. ¶¶ 12, 14; Mayo Decl. ¶¶ 5-8, 10.

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); *see Nichols*, 136 S. Ct. at 1119 (pointing to this provision as assuring that "sex offenders will [not] be able to

escape punishment for leaving the United States without notifying the jurisdictions in which they lived while in this country").

b. Passport Identifier Provisions

The IML also attempts to close a loophole through which an offender might circumvent notification procedures: specifically, where an offender might seemingly comply with IML requirements by providing notice of travel to one country, and might even 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 solely on registered sex offenders whose offenses involved a child victim, the IML's passport identifier provision is intended to prevent such offenders "from thwarting I[ML] notification procedures by country hopping to an alternative destination not previously disclosed," by allowing 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). Under this new statutory procedure, the IML first 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.," ECF 30-3) ¶ 4.

PROCEDURAL HISTORY

Plaintiffs filed their original complaint on February 9, 2016, the day after the IML was signed into law. ECF 1. Plaintiffs filed a Motion for Preliminary Injunction on March 4, 2016. ECF 14. An Amended Complaint, adding three Plaintiffs, was filed on March 9, 2016. ECF 31. On April 13, 2016, the Court denied Plaintiffs' Motion for Preliminary Injunction, holding that Plaintiffs lacked standing to challenge the IML's notification provisions and that Plaintiffs' challenge to the IML's passport identifier provision was unripe. Order of Apr. 13, 2016 (ECF 41), at 5-10.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(1), a court is guided by the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Thus, a court is "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears," *Stock W., Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989), and the plaintiff bears the burden of establishing that such jurisdiction exists. *KVOS, Inc. v. Assoc. Press*, 299 U.S. 269, 278 (1936); *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001). The court's review "is not restricted to the pleadings;" rather, the court "may review extrinsic evidence to resolve any factual disputes which affect jurisdiction." *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1074 (N.D. Cal. 2007) (citing *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.1988)).

Under Rule 12(b)(6), a pleading may be dismissed when it fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pac. Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "Threadbare recitals of the elements of a cause of action" are insufficient; rather, the complaint's factual allegations, while taken as true, must "state[] a plausible claim for relief [in order to]

survive[] a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In reviewing a motion under Rule 12(b)(6), the Court may consider the facts alleged in the complaint, documents attached to or relied upon in the complaint, and matters of which the Court may take judicial notice. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). The district court has broad discretion to dismiss claims under Rule 12(b)(6) when they have no legal merit. *Wood v. McEwen*, 644 F.2d 797, 800 (9th Cir. 1981).

ARGUMENT

I. 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.

A. This Court Has Already Held Plaintiffs Lack Standing to Challenge the IML's International Notification Provisions (IML §§ 4-6) (Counts 2-7)

In its Order of April 13, 2016, this Court has already recognized that Plaintiffs "have not

identified a 'certainly impending' future injury caused by" the IML's notification provisions. Order of Apr. 13, 2016, at 6. As the Court explained, "[b]oth the USMS and ICE HSI have had international notification provisions in place for over five years, and representatives of both agencies have indicated that the agencies do not anticipate that the nature of their notifications will change as a result of the IML." *Id.* at 7 (citing Lechleitner Decl. ¶ 14; Mayo Decl. ¶ 10). Indeed, the procedures used by those preexisting programs "identify only registered sex offenders who travel," *id.*, and the programs provide notifications only in connection with registered sex offenders, Lechleitner Decl. ¶¶ 8, 12; Mayo Decl. ¶¶ 5, 7-8. The IML delegates to DHS and USMS the discretion to continue that practice. *See* IML §§ 4(e)(3), 5(a). The Court recognized that, "[b]ecause plaintiffs are not challenging the pre-existing notification" programs operated by USMS and ICE HSI, "they have not shown that an alleged injury resulting from implementation of the IML would be redressable," nor would any injury relating to notifications be "fairly traceable to the IML." Order of Apr. 13, 2016, at 7.

This action should be dismissed for the same reasons that the Court explained in its Order. As with their original Complaint, Plaintiffs seek to enjoin IML §§ 4(e), 5, and 6 through their Amended Complaint. But even if those provisions were enjoined, ICE HSI and USMS would continue to provide international notifications under existing authorities. Ultimately, the practical import of the IML involves the internal framework of the international notification process, including enhanced communication between DHS and USMS regarding traveling sex offenders. *See, e.g.*, IML §§ 4(a) (establishing the "Angel Watch Center"), (e)(1)-(2), (4) (coordination between the Angel Watch Center and USMS), 5(a)(2)-(3) (USMS's sharing of information regarding traveling sex offenders with other authorities). These internal program modifications do not expand the sex offenders subject to international notification and provide no basis for standing to assert a facial challenge to the IML.

B. Other Factors Also Show Plaintiffs Lack Standing to Challenge Either the Notification or the Passport identifier Provisions (IML § 8) (Counts 1-2, 4-7)

In addition to the reasons already recognized by this Court with respect to Plaintiffs' challenge to the IML's notification provisions, Plaintiffs' specific allegations also fail to identify

a cognizable "certainly impending" injury with respect to either the notification or the passport identifier provisions. Notably, the fact that a person is the subject of a communication between a federal agency and a government authority in another country is not itself a cognizable injury. The international notifications at issue are provided to destination countries through existing international law enforcement channels and contain only factual information regarding the criminal history of U.S. persons traveling to those countries. The Supreme Court has recognized that public community notifications authorized under SORNA and state registration and notification laws, even when publicly posted on the Internet, do not qualify as punishment. *Smith v. Doe*, 538 U.S. 84, 98 (2002) ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment."). The Court thus rejected arguments that the government's notification was inherently stigmatizing, holding that any stigma, as well as other negative consequences, "flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id.* at 100. Here, the same reasoning applies. Indeed, the notifications here are not publicly disseminated. Rather, they are provided to foreign authorities through INTERPOL channels and ICE HSI Attachés. IML §§ 4(e)(3), 5(a)(2); Lechleitner Decl. ¶ 13; Mayo Decl. ¶ 6. Similarly, any markings that the State Department places on a U.S. passport are designed to communicate information about an individual to customs officials at international border crossings. Plaintiffs therefore have not alleged a plausible injury grounded in notions of stigma or harm to reputation that is sufficient to sustain their standing.

In addition, to the extent Plaintiffs seek to establish standing based on the potential reactions of foreign authorities to the information provided in international notifications or in a passport, such an alleged harm necessarily relies on speculation regarding what the reaction of a particular foreign country to information about a particular individual might be. *Smith*, 538 U.S. at 100 (recognizing asserted reactions of landlords and employers to sex offender status was "conjecture"). Plaintiffs thus have not alleged a cognizable injury-in-fact based on infringements of their ability to travel (Count 3), to maintain employment (Count 4), or to associate with family members in other countries (Count 5).

To the extent each Plaintiff relies on his individual circumstances to support standing, these claims also fail to identify a cognizable "certainly impending" injury. Doe #1 refers to "routine" travel but fails to explain what that means or to identify any specific travel plans. Am. Compl. ¶ 13. Doe #2 has no passport and cites no specific plan to obtain one. *Id.* ¶ 14. Doe #3 is not required to register as a sex offender in any jurisdiction, *id.* ¶ 15, so he is not subject to international notifications. Lechleitner Decl. ¶ 12; Mayo Decl. ¶ 8. Doe #4 has explained that he is currently able to visit the Philippines—the only country he seeks to visit—without restriction. Decl. of Doe #4 (ECF 25) ¶ 20. Doe #5 claims he cannot provide 21 days' advance notice of international travel, Am. Compl. ¶ 17, but the IML imposes no such requirement. IML § 6(a). Doe #6 indicates that he is already barred from traveling to Taiwan—the only country he identifies as an intended destination—for the next two to seven years. Am. Compl. ¶ 18. Doe #7 indicates he wishes to travel to Iran after his father's death, but his father is not deceased. Am. Compl. ¶ 19.

Moreover, with respect to the passport identifier provision, 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. In addition, Doe #3 is not a registered sex offender and is thus not subject to that provision. *See* IML § 8(a) (identifying "covered sex offenders" subject to the passport identifier provision as those "currently required to register under the sex offender registration program of any jurisdiction"). Similarly, Doe #7, as someone born to an Iranian parent in Iran, likely qualifies as an Iranian citizen under the laws of Iran and thus must use an Iranian passport when entering Iran.[4] His intended travel to Iran would therefore be unaffected by the IML's passport identifier provision.

For all these reasons, this action should be dismissed for lack of standing.

II. PLAINTIFFS' CHALLENGES TO THE IML'S PASSPORT IDENTIFIER PROVISION ARE UNRIPE (COUNTS 1, in part 2 & 4-7)

The Court also lacks jurisdiction over Plaintiffs' challenges to the passport identifier

[4] *See* https://travel.state.gov/content/passports/en/country/iran.html.

provision on ripeness grounds. 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 determining ripeness, 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).

Here again, the Court has already recognized that Plaintiffs' challenge to the IML's passport identifier provision is not ripe for review. Order of Apr. 13, 2016, at 8-9. As the Court recognized, "[w]hile the State Department has identified numerous steps that it must complete before the Department begins placing the passport identifier into the passports of covered sex offenders, none of those steps had been completed as of the date of [the] declaration" previously provided by the State Department. *Id.* at 9 (citing Rolbin Decl. ¶ 5). These steps include developing a timeline and plan, submitting a report to Congress, making necessary technological modifications, and issuing regulations and guidance. Rolbin Decl. ¶¶ 4-5. The Court held that, at this point, any challenge to the passport identifier provision was not fit for judicial review because "based solely on the statutory language, it is not clear, for example, what form the identifier will take, which citizens will be required to carry a passport with the identifier, or whether the identifier will appear on the face of the passport or will be readable only by a scanner." Order of Apr. 13, 2016, at 8. Accordingly, Count 1 and, to the extent they challenge the passport identifier provision, Counts 2 and 3-7 should be dismissed on ripeness grounds.

III. COUNT 1 SHOULD BE DISMISSED BECAUSE THE IML'S PASSPORT IDENTIFER PROVISION DOES NOT COMPEL SPEECH IN VIOLATION OF THE FIRST AMENDMENT

Even if the Court reaches the merits of Plaintiffs' claims, it should conclude that Count 1 of Plaintiffs' Amended Complaint, which asserts that the IML's passport identifier provision compels speech in violation of the First Amendment, fails to state a claim upon which relief can be granted. Factual information in a U.S. passport is unquestionably government speech that would not be attributed to nor deemed to be endorsed by the passport holder, and in such

circumstances individual First Amendment interests are not implicated. Plaintiffs' First Amendment claim should therefore be dismissed.

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 a U.S. passport, the information contained in that passport is clearly 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").

In sum, because the passport identifier required under the IML is government speech, individual First Amendment interests are not implicated. Although a narrow exception to this rule exists where government speech could nevertheless be attributed to an individual, or where

[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.

an individual may be deemed to endorse the message that the government seeks to convey, that exception is inapplicable here. For example, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court held that individuals retained a First Amendment interest when a state issued license plates bearing the motto "Live Free or Die" because an individual was essentially forced "to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable," and because 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), 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]

But 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 message. To the contrary, like the anti-industry ads at issue in *R.J. Reynolds*, it would be

[6] The Supreme Court in *Cooke v. Gralike*, 531 U.S. 510, 523 (2001), upheld the Circuit's ruling, but did so on the ground that the state law violated the Elections Clause because it improperly sought to influence individual voting choices. The Supreme Court's choice of analysis, which is better suited to the facts of that case, calls into question whether the Circuit's holding is good law; it seems questionable that language on a state ballot critical of a candidate would reasonably be viewed by others as endorsed by the candidate himself.

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").

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, or even advising foreign countries not to admit traveling sex offenders. Count 1 should therefore be dismissed.

IV. PLAINTIFF'S SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED (COUNTS 2, 6)

Plaintiffs' challenge to the IML's notification and passport identifier provisions on both substantive due process and equal protection grounds should also be dismissed because Plaintiffs do not plausibly allege that these provisions fail under rational basis review.

In regard to Plaintiffs' substantive due process claim, a court "must first consider whether the statute in question abridges a fundamental right." *United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012). Courts have emphasized that a "careful description" of the asserted right is required. *Id.* (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *see also Raich v. Gonzales*, 500 F.3d 850, 863 (9th Cir. 2007) (Supreme Court "instructs courts to adopt a narrow definition of the interest at stake"). Unless a fundamental right is implicated, 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).

Count 2 of Plaintiff's Amended Complaint characterizes the asserted right as a "right to be free from arbitrary, unreasonable, and oppressive state action that bears no rational relationship to the State's goal of protecting the public," and also refers to a "right to be free from governmental stigmatization that falsely implies that they are individuals who pose a current risk to public safety." Am. Compl. ¶¶ 59-60. These descriptions are overly broad and in any event do not identify any right that has been recognized as "fundamental."[7] The Ninth Circuit has repeatedly recognized that individuals "convicted of serious sex offenses do not have a fundamental right to be free from" sex offender registration and notification requirements. *Litmon v. Harris*, 768 F.3d 1237, 1241-42 (9th Cir. 2014) (quoting *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004)). Indeed, in *Juvenile Male*, the Ninth Circuit rejected the notion that *any* fundamental rights were conceivably implicated by the registration requirement at issue, citing holdings in other circuits, for example, "that sex offenders do not have a fundamental right to

[7] In their Motion for Preliminary Injunction, Plaintiffs argued that the IML's notification provisions deprived them of a "fundamental right to travel." Pl. PI Mem. at 16. However, the Court's decision denying Plaintiffs' Motion recognized that "there is no such fundamental right to international travel." Order of Apr. 13, 2016, at 6 (citing *Haig*, 453 U.S. at 306-07; *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1438-39 (9th Cir. 1996). In any event, Plaintiffs do not identify a right to travel as implicated in Count 2 of their Amended Complaint.

avoid publicity." *Juvenile Male*, 679 F.3d at 1012 (citing *United States v. Ambert*, 561 F.3d 1202, 1209 (11th Cir. 2009)). Moreover, as explained above, the Supreme Court has rejected the notion that any stigma associated with a convicted sex offender is attributable to registration or notification requirements. *Smith*, 538 U.S. at 98, 101 (stigma and other consequences "flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record"); *see also Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (recognizing prior holding that "mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest" (citing *Paul v. Davis*, 424 U.S. 693 (1976))).

Here, Plaintiffs' asserted right must be construed even more narrowly than those asserted in other sex offender notification cases. Plaintiffs seek to prevent the federal government from communicating with government authorities in other countries, either through notifications or by including an identifier in an individual's passport, regarding the criminal history of convicted sex offenders. But especially in this context, there is no basis for deeming such an asserted right to be fundamental. Indeed, it is far from clear that Plaintiffs can claim any liberty or property interest in avoiding the transmission of accurate information about an individual's criminal history to authorities in a country where that individual intends to travel. To the contrary, the political branches have considerable discretion over such inter-governmental communication, stemming from foreign affairs and law enforcement interests. *Freedom to Travel Campaign*, 82 F.3d at 1439 (recognizing that matters "relating to the conduct of foreign relations" are "largely immune from judicial inquiry or interference" (internal quotation omitted)). Absent a liberty or property interest, Plaintiffs have no substantive due process claim. *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) ("To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property.").

Even if a liberty interest is implicated by the IML's notification or passport identifier provisions, these provisions readily withstand rational basis review. Under such review, a legislature need not articulate its justifications; rather, "any reasonably conceivable" basis is sufficient to uphold a statute, and indeed those attacking the law's constitutionality have the burden "to negat[e] every conceivable basis which might support it." *FCC v. Beach Commc'ns*,

Inc., 508 U.S. 307, 313-14 (1993). The Ninth Circuit has repeatedly found that sex offender registration and notification provisions are rationally related to legitimate government purposes. *Litmon*, 768 F.3d at 1241-42 ("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."); *Juvenile Male*, 670 F.3d at 1009 (rejecting equal protection challenge to SORNA under rational basis review); *Tandeske*, 361 F.3d at 597 (rejecting substantive due process challenge to Alaska's sex offender registration laws under rational basis review). The same result is required here. By notifying authorities in a destination country—either through an Angel Watch or USMS notification or through a passport identifier—that a registered sex offender intends to travel there, Congress could rationally have concluded that the IML would protect children and others in those countries from sexual abuse and exploitation, facilitate cooperation with other countries in preventing such abuse, raise awareness of the whereabouts of registered sex offenders who cross international borders, and encourage reciprocal notifications from other countries about sex offenders who intend to travel here. *See* IML 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").

Moreover, these interests undoubtedly qualify as substantial. 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 substantial 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 encourages reciprocal cooperation by other countries. In addition, the United States' foreign relations interests are affected by the prospect of its citizens committing sexual crimes against children or others in foreign countries. The connection between these substantial governmental interests and the IML's provisions is clear and is certainly not wholly arbitrary for purposes of rational basis review. Plaintiffs thus fail to state a plausible substantive due process claim.

An identical analysis applies with respect to Plaintiffs' equal protection claim. *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir.1997) ("[T]he rational basis test is identical under the two rubrics [of equal protection and due process]."). The same rational basis review applies to this claim because Plaintiffs fail to identify a protected or suspect class. *See Juvenile Male*, 670 F.3d at 1009. While Plaintiffs assert that heightened scrutiny is warranted for laws that "target" individuals convicted of sex offenses, who "constitute a discrete and insular minority," Am. Compl. ¶¶ 77-78, the Ninth Circuit has repeatedly rejected the argument that sex offenders are a suspect class. *See Juvenile Male*, 670 F.3d at 1009 ("We have previously rejected the argument that sex offenders are a suspect or protected class." (citing *United States v. LeMay*, 260 F.3d 1018, 1030-31 (9th Cir. 2001))).[8] Plaintiffs therefore fail to state a plausible equal protection claim. *See id.*; *see also Doe v. Moore*, 410 F.3d 1337, 1342–48 (11th Cir. 2005) (rejecting equal protection challenge to Florida's sex offender law); *Cutshall v. Sundquist*, 193 F.3d 466, 482–83 (6th Cir. 1999) (rejecting equal protection challenge to Tennessee sex offender law).

[8] *Cf. Campbell v. Eagen*, No. 1:15-CV-1276, 2016 WL 336097, at *3 (W.D. Mich. Jan. 28, 2016) ("convicted sex offenders are not a suspect class"); *Dixon v. State*, No. 3:13-00466-JWD-RLB, 2016 WL 126750, at *2 (M.D. La. Jan. 11, 2016) (same); *Noble v. Macomber*, No. CV 14-1429-JVS (KS), 2015 WL 10376158, at *5 (C.D. Cal. Dec. 21, 2015) ("states have a legitimate governmental interest in imposing greater restrictions on the reentry of sex offenders into the community"), *r&r. adopted*, 2016 WL 777850 (C.D. Cal. Feb. 26, 2016).

V. PLAINTIFFS' PROCEDURAL DUE PROCESS CLAIMS SHOULD BE DISMISSED (COUNTS 3-5)

Plaintiffs also raise three procedural due process claims based on different alleged liberty interests. The analysis is the same for each, however, and all three claims should be dismissed. To state a cognizable procedural due process claim, a plaintiff must plausibly allege "(1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; [and] (3) lack of process." *Wright v. Riveland*, 219 F.3d 905, 913 (9th Cir. 2000). In this case, Plaintiffs assert interests in international travel (Count 3); earning an income (Count 4); and associating with family (Count 5). Am. Compl. ¶¶ 63-64, 68-69, 72-73. However, while international travel, employment, and family association generally qualify as liberty interests, Plaintiffs fail to state a claim with respect to the second part of the procedural due process test because, contrary to their allegations, the IML's notification and passport identifier provisions do not establish a "blacklist" that prevents individuals subject to these provisions from traveling, working, or associating with their families. Rather than describing the statutory provisions themselves, Plaintiffs' claims rely on general assumptions regarding the reaction of any particular destination country to any particular notification. The Supreme Court in *Smith* regarded similar assertions as "conjecture" because the plaintiffs failed to provide evidence of "substantial" deprivations that registered sex offenders could not have encountered anyway, given that their convictions were already public. *Smith*, 538 U.S. at 100. Here, given that Plaintiffs seek to bring a facial challenge to the IML, their allegations that every individual subject to the IML's provisions would be entirely barred from international travel and prevented from working or associating with family members cannot be deemed plausible.[9]

In connection with Counts 3 and 5, Plaintiffs also assert an interest in being "free from governmental stigmatization." Am. Compl. ¶¶ 65, 74. However, Plaintiffs fail to make the

[9] A plaintiff can succeed on a facial challenge only by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the "law is unconstitutional in all of its applications." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2450-51 (2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). Speculation about hypothetical scenarios is generally not a proper basis to invalidate a statute on its face. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008) (in facial challenge, must not "go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.").

necessary showing for a "stigma plus" claim. Such a claim requires Plaintiffs to show "the public disclosure of a stigmatizing statement by the government, the accuracy of which is contested, plus the denial of some more tangible interest." *Ulrich v. City & Cty*, 308 F.3d 968, 982 (9th Cir. 2002). Plaintiffs' failure to make plausible allegations regarding deprivations of other interests thus dooms this claim as well. Moreover, nothing in the IML allows for the transmission of inaccurate information. Rather, the information conveyed is accurate information regarding an individual's prior sex offense. In addition, communications between the federal government and foreign authorities cannot plausibly be deemed "public" disclosure, particularly where the underlying information is already in fact public, in conviction records and sex offender registries.

Even if Plaintiffs had sufficiently alleged the deprivation of a liberty or property interest, their claims would still fail because the Supreme Court has already held that no additional process is due when a law's requirements "turn on an offender's conviction alone," which "a convicted offender has already had a procedurally safeguarded opportunity to contest." *Conn. Dep't of Pub. Safety*, 538 U.S. at 7; *see Juvenile Male*, 670 F.3d at 1014; *Tandeske*, 361 F.3d at 596. Here, the IML's provisions apply based on conviction and registration status alone. IML §§ 4(f), 5(h), 8(a). As in *Conn. Dep't*, additional fact-finding on whether a particular offender is "currently dangerous or not" would be a "bootless exercise" because the IML does not condition its applicability on such a determination. *Conn. Dep't of Pub. Safety*, 538 U.S. at 7-8. Thus, Plaintiffs' procedural due process claims should be rejected.

Plaintiffs allege no facts that could support a different result. Indeed, Counts 4 and 5 do not identify any additional process that they claim is required. In Count 3, which challenges only the international notification provisions, Plaintiffs suggest that individuals should be notified in advance about any notifications and that the IML contains an inadequate redress process. Am. Compl. ¶ 64. However, the IML does provide advance notice by defining the category of those subject to notifications based on conviction and registration status. Moreover, the IML directs the Angel Watch Center and USMS to adopt mechanisms to "receive complaints from individuals affected by erroneous notifications" and to take corrective action in the event errors are identified. IML § 4(e)(7), 5(g). Any claim that Plaintiffs will be subjected to erroneous

notifications that cannot adequately be corrected by these means is pure speculation. Plaintiffs' facial procedural due process claims should therefore be dismissed.

VI. PLAINTIFFS' EX POST FACTO CLAIM SHOULD BE DISMISSED (COUNT 7)

Plaintiffs allege that the IML's notification and passport identifier requirements impose retroactive punishment in violation of the Ex Post Facto Clause. Am. Compl. ¶ 84. The Supreme Court has addressed, and rejected, similar arguments in connection with sex offender registration and notification laws. *Smith*, 538 U.S. at 106. As the Court has explained, such a claim requires the court to determine whether a legislative regulatory scheme was intended to be punitive or civil in nature, and if the scheme is deemed civil, whether it is "so punitive either in purpose or effect as to negate [the] intention to deem it civil." *Id.* at 92 (internal quotation omitted). The Court held in *Smith* that Alaska's registration and public notification requirements were neither punitive nor excessive. *Id.* at 104-05. Here, the notification and passport identifier provisions of the IML are even farther removed from anything that could be deemed punitive. Again, both the international notifications and the passport identifier at issue constitute communications from the federal government to authorities in other countries of accurate information regarding individuals' criminal history, which is already public information. As explained above, these requirements are rationally related to important government interests. Count 7 of Plaintiffs' Amended Complaint should therefore be dismissed.

VII. PLAINTIFFS' CLAIM FOR DECLARATORY RELIEF SHOULD BE DISMISSED (COUNT 8)

Plaintiffs' separate claim in Count 8 seeking a declaratory judgment cannot survive if their other claims are dismissed. *Shell Gulf of Mexico Inc. v. Ctr. for Biological Diversity, Inc.*, 771 F.3d 632, 635 (9th Cir. 2014) (Declaratory Judgment Act "does not create new substantive rights, but merely expands the remedies available" where a right already exists). Because Counts 1-7 are subject to dismissal, this claim should be dismissed as well.

CONCLUSION

For the foregoing reasons, this action should be dismissed with prejudice.

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