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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**OAKLAND DIVISION**

JOHN DOE #1, *et al*.;

Plaintiffs,

v.

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

Defendants.

Case No.: 16-CV-00654-PJH

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

**Date:** **July 20, 2016**
**Time:** **9:00 a.m.**
**Location:** **Courtroom 3**
**Judge:** **Hon. Phyllis J. Hamilton**

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Plaintiffs hereby respectfully submit this opposition to Defendants' Motion to Dismiss the Amended Complaint in this action (Doc. 43, the "MTD").

## I. STATEMENT OF ISSUES

Whether Plaintiffs' Amended Complaint adequately pleads jurisdiction to challenge the IML,[1] and whether the Amended Complaint adequately pleads claims entitling Plaintiffs to relief.

## II. INTRODUCTION

At the outset, Plaintiffs wish to emphasize that this is not a case about the strength of the government's interest in protecting children, in cooperating with foreign governments to deter crime, or even the government's interest in combating sex trafficking and sex tourism. Plaintiffs agree that these interests are worthwhile. However, as with any subject that implicates a government interest, the Constitution does not allow Defendants to pursue its objectives by any conceivable means, particularly where those means are demonstrably arbitrary, irrationally administered, and likely to produce harm in gross disproportion to their objectives. (See Generally Declaration of Association for the Treatment of Sexual Abusers in Support of Plaintiffs' Motion for Preliminary Injunction ("ATSA Decl.") (Doc. 18), reflecting opinions from leading experts in the field of sex offender management and treatment that the IML is irrational and harmful.)

This is especially true of the IML's Passport Identifier Provision, which purports to remedy an unlikely scenario involving a small number of travelers by forcing *every* affected traveler to bear a "Scarlet Letter" on their passports regardless of the purpose for which they are traveling. This mark would necessarily be displayed by the passport holder during all lawful international travel, as well as for some domestic air travel due to federal legislation adopted in 2005 that mandates minimum standards for identification documents when boarding domestic aircraft.[2] The historically

[1] Citations herein to the IML refer to the International Megan's Law to Prevent Child Exploitation and Other Sex Crimes Through Advanced Notification of Traveling Sex Offenders, 114 P.L. 119, 130 Stat. 15 (2016).

[2] See *Statement by Secretary Jeh C. Johnson on the Final Phase of REAL ID Act Implementation* (Jan. 8, 2016), ("Effective January 22, 2018, air travelers with a driver's license or identification card issued by a state that does not meet the requirements of the REAL ID Act [109 P.L. 13, 119 Stat. 308 (2005)] . . . must present an alternative form of identification acceptable to the Transportation Security Administration. . . . such as a Passport."), *available at* https://www.dhs.gov /news/2016/01/08/statement-secretary-jeh-c-johnson-final-phase-real-id-act-implementation.

unprecedented nature of adding a "conspicuous unique identifier" to the passports of socially disfavored individuals underscores the need for review of this legislation on its merits.

As discussed below, Defendants seek to evade adjudication of the merits by invoking the doctrines of ripeness and standing, yet the MTD conspicuously lacks citations to case law supporting the application of those doctrines to this case. (See, e.g., MTD at 12-14 (no citations in support of standing arguments; MTD at 15 (no citations to cases addressing ripeness.) Defendants also do not attempt to explain in the MTD why the separation of powers concerns that animate those doctrines would be served by a dismissal of this action. Indeed, while standing and ripeness are important for protecting the separation of powers in general, "[s]eparation of powers can be undermined either by overexpansion of the role of the federal courts *or by undue restriction*." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.3.1 (4th Ed. 2003). See also Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S.Ct. 1377, 1386 (2014) (The standing doctrine is "in some tension with . . . the principal that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging."). Because Plaintiffs' claims do not implicate the concerns against which the justiciability doctrines protect, and because Plaintiffs' claims are otherwise adequately pled, the MTD should be denied.

## III. STATEMENT OF FACTS

Plaintiffs are seven individuals who travel or intend to travel internationally and to whom the IML plainly applies, and on whom this legislation will impose massively disruptive consequences for familial relationships, livelihoods, and physical safety. Defendants' MTD relies on several contested factual assertions, as well as disputed interpretations of the IML, some of which are contradicted in Defendants' earlier briefing in response to Plaintiffs' Motion for Preliminary Injunction. These disputed issues are not proper bases for a motion to dismiss because all inferences under Rule 12(b) are to be drawn in Plaintiffs' favor. Maya v. Centex Corp., 658 F.3d 1060, 1068, 1070 (9th Cir. 2011). Additionally, as discussed immediately below, Defendants' recitation of the facts is incomplete and ignores facts critical to Plaintiffs' claims such as the context in which the IML's provisions will operate.

**A. The IML Is Not a Sex Offender Registry But Is Instead a Program Expressly Aimed at Deterring International Child Sex Trafficking and Child Sex Tourism**

The MTD devotes many of its pages to the history of sex offender registries and notification requirements, as well as to the IML's relationship to this continuously expanding scheme. However, none of this history is relevant to the pleading stage of this matter, which is focused upon the unique provisions of the IML and the claims asserted by Plaintiffs against those provisions.

Critically, the IML is not a sex offender registry and does not operate as a sex offender registry. There are, in fact, material differences between the IML and sex offender registries. For example, sex offender registries are passive systems in which the government makes certain data available to the public, but the public must take affirmative action in order to obtain that data. See e.g., Smith v. Doe, 538 U.S. 84, 91 (2003) (Notification of non-confidential registry information limited to posting on public website). In contrast, the IML is an *active notification system*, which involves the affirmative communication of material by the federal government without any affirmative action required by the recipient, and which advocates, expressly or impliedly, that future action be taken by the recipient. IML § (4)(e)(2)(a).

Moreover, whereas public sex offender registries simply make information available without regard to the severity of the offense or the risk posed by the Registrant, the IML is specifically designed to address the discrete and relatively rare crimes of international child sex trafficking and tourism by means that supposedly identify and warn of individuals who have engaged in, or are likely to engage in, that activity. Defendants have already represented in their briefing on Plaintiffs' Motion for Preliminary Injunction that notifications are not sent regarding all Registrants, but instead are sent regarding those whom a set of criteria allegedly "suggest an intent to engage in child sex tourism or child sex trafficking in other countries." (Opposition to Plaintiffs' Motion for Preliminary Injunction, at 1:17-21 and 9:24 (hereinafter, "PI Opposition Brief") Doc. 30).) Thus, the context of the IML and the acknowledged terms of its operation mean that the IML is not a benign adaptation of a passive registry, the type previously upheld by the courts, and Plaintiffs' claims are therefore fundamentally different from those asserted in cases about sex offender registries. This, in turn, distinguishes the cases cited by Defendants regarding such registries.

**B. The MTD Relies on Disputed Factual Assertions and Mischaracterizations of the IML that are Improper at the Pleading Stage**

Based upon declarations submitted in opposition to Plaintiffs' Motion for Preliminary Injunction, a central contention of Defendants' MTD is that the pre-IML notification scheme dubbed Operation Angel Watch "do[es] not make notifications regarding persons not currently subject to registration requirements, and the agencies anticipate no changes in this regard [when operating under the IML]." (MTD at 8:15-18.)

There are several problems with this contention. First, it is flatly incorrect: Plaintiff John Doe #3 was subject to notification in 2013 despite his removal from the California registry two years earlier. (See Declaration of Plaintiff John Doe #3 attached hereto as Exhibit A.) Second, the IML itself expressly permits notifications for individuals who are not listed on any registry, as Defendants have acknowledged *and defended*. (See IML § 3(10) (IML's definition of "sex offense against a minor" includes those convicted of "sex offenses" as defined by federal law irrespective of registration requirements); PI Opposition Brief, at 22:13-20 (Notifications regarding "individuals not registered as a sex offender in any jurisdiction . . . serve the same important interest.").) Third, declarations stating what a handful of federal officials currently "anticipate" about the future application of a statute that they will not necessarily administer are meaningless and insufficient to foreclose constitutional review of that statute, particularly where such predictions concern activity undertaken prior to the statute's enactment which contradict the statute's express terms.

Relatedly, Defendants' MTD rests on unverified representations regarding the operation of the pre-IML Angel Watch program which are contestable and which deserve to be explored in discovery and litigated on the merits. For example, Defendants' primary argument on the issue of standing is that injuries flowing from notifications issued pursuant to the IML are not traceable to the IML because the same notifications could properly be sent pursuant to the authorities for the Angel Watch program if the IML were enjoined. Yet, there is a lack of evidence in this case that the Angel Watch program has been operating properly pursuant to statutory or regulatory authority. For example, footnote 3 of the MTD purports to list the authorities by which Angel Watch has previously operated. In that footnote, Defendants cite only one statute that authorizes international

notifications "*in certain circumstances*," namely 19 U.S.C. § 1628(a)(1).[3] Pursuant to that statute, travel notifications are authorized only when "the Secretary [of State] obtains assurances from [international law enforcement] agencies that such information will be held in confidence and used only for the law enforcement purposes for which the information is provided." Id. § 1628(b)(1). In addition, the statute forbids the issuance of notifications to "any foreign customs or law enforcement agency that has violated any assurances described in paragraph (1)." Id., subd. (b)(2). Nowhere in the MTD do Defendants mention these prerequisites to international notification or establish that the statutory prerequisites have been satisfied for each of the many countries to which notifications have been or will be sent pursuant to the IML. Thus, in the absence of the IML, it is not clear that Defendants may legally issue travel notifications of the type authorized by the IML, which Defendants have admitted will "build on" and "expand" the Angel Watch program.[4]

In sum, Defendants' attempts to minimize the differences between the Angel Watch program and the IML are not supported by their own briefs or by the IML itself, and raise serious questions about the legality of Defendants' travel notification scheme under either set of authorities. For the reasons set forth below, these contestable factual assertions are not the proper basis for dismissal.

## IV. LAW GOVERNING MOTIONS TO DISMISS UNDER 12(b)(1)

"For the purpose of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party." Maya v. Centex Corp., 658 F.3d 1060, 1068, 1070 (9th Cir. 2011) (reversing District Court's dismissal under Rule 12(b)(1) for failing to accept the facts pled by Plaintiffs as true). See also Bernhardt v. County of Los Angeles, 279 F.3d 862, 869-70 (9th Cir. 2002) (Reversing District Court's dismissal on redressability and traceability grounds where defendant had alleged alternative sources of injury independent of challenged policy because plaintiff "is entitled at this stage of the litigation to have her allegations accepted as true.").

[3] Footnote 3 of the MTD mistakenly cites this statute as *18* U.S.C. § 1628(a)(1).

[4] Defendants also allege that the IML "do[es] not expand the sex offenders subject to international notification" (MTD at 12:22-24), yet this is plainly false since Defendants previously admitted that the Angel Watch program was limited in scope, and the express terms of the IML do exactly that. (Defendants' PI Opposition Brief (Doc. 30), at 8:3-8.)

In this matter, Plaintiffs' pleadings are entitled to additional deference because the facts underlying Defendants' arguments regarding standing and ripeness are disputed and go directly to the merits. THE RUTTER GROUP: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 9.87 (2015) ("Most courts *deny* Rule 12(b)(1) motions where defendant *disputes* the facts underpinning subject matter jurisdiction, and those facts are 'inextricably intertwined' with the merits of plaintiff's claims." (emphasis in original) (citing Wilshire Courtyard v. Cal. Franchise Tax Bd., 729 F.3d 1279, 1284 n.4 (9th Cir. 2013)) See also U.S. v. Funds in the Amount of $239,400, 795 F.3d 639, 642-43, 647 (7th Cir. 2015) ("At the pleading stage, a plaintiff need only allege, not prove, facts establishing standing"; district court erred in requiring plaintiff to show that claim is "legitimate.").

**A. Numerous Cases Establish Plaintiffs' Standing to Challenge the IML's Notification Provision**

The purpose of the standing doctrine is to ensure Plaintiffs "have alleged such a stake in the outcome of the controversy as to ensure the concrete adverseness which sharpens the presentation of issues" and avoids unnecessary advisory opinions. E.g., Duke Power Co. v. Carolina Env. Study Gp., 438 U.S. 59, 72 (1978). Where an injunction is sought against an unlawful statute, plaintiff need allege only a "credible threat" of enforcement; plaintiff need not "bet the farm" by risking sanction under the law before challenging its constitutionality. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 (2007). This is especially true where, as here, the statute has been previously enforced against the plaintiffs. Minn. Citizens Concerned for Life v. FEC, 113 F.3d 129, 131 (8th Cir. 1997) ("[W]hen government action or inaction is challenged by a party who is a target or object of that action . . . 'there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.'").

**1. There is no authority that shields a statute from review simply because an earlier, secret program allegedly sanctioned similar activities**

Defendants first argue that Plaintiffs lack standing because the IML's Notification Provision merely continues the secret Angel Watch program, and that a ruling specific to the IML would therefore not redress an injury flowing alternatively from the Angel Watch program. As discussed above, this argument wrongly assumes that the IML and the Angel Watch program are equivalent,

as well as Defendants' authority to issue similar travel notifications under the Angel Watch program, which are improper on a motion to dismiss. Nevertheless, even if Defendants' characterizations of the Angel Watch program were uncontested, Defendants' argument misapplies the standing doctrine for several independent reasons, as evidenced by Defendants' failure to cite a single authority in support of that argument.

**(a) Redressability and Traceability Concern the Court's Power to Remedy the Claimed Injury, Even if the Same Injury May Flow from Elsewhere**

First, numerous cases hold that a defendant cannot avoid constitutional scrutiny of a challenged law or action simply by contending that a plaintiff's injury could have resulted from a separate and unchallenged action or statute. E.g., Larson v. Valente, 456 U.S. 228, 243 n.15 (1982) (A party "satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury."); Bernhardt, 279 F.3d at 869-70.

Specifically***, where an injury potentially flows from two laws and only one is challenged, a persistent injury from one law does not deprive the plaintiff of standing to challenge the second law***. E.g., Minn. Citizens Concerned, 113 F.3d at 130-131 (Nonprofit group had standing to challenge FEC's campaign finance regulation promulgated pursuant to statute notwithstanding fact that group would still suffer injury from the statute if regulation was struck down, because only the court's power to redress injury from the regulation was relevant to standing inquiry.) .

This rule has been recognized since 1978 in the Duke Power Company case, in which the Supreme Court considered a constitutional challenge to a statute that set caps on damages from nuclear plants. 438 U.S. 59. The plaintiffs in that case alleged that the threatened injury from the plants (e.g., radiation exposure and fear of a nuclear accident) was caused by the statute because the plants would not have been opened "but for" the statute's liability shield. Id. at 73. In ruling that the plaintiffs had standing, the Supreme Court explained that redressability was satisfied *even if power plants would have continued operating and injuring the plaintiffs absent the statute's liability shield*, and stated that a proposed source of alternative injury "is not responsive to the simple

proposition that private power companies now do in fact operate the . . . plants injuring appellees, and that their participation would not have occurred but for the enactment[.]" Id. at 77-78.

Similarly, in this case, Defendants acknowledge that the IML will be the basis for notifications going forward, which is the sole period for which Plaintiffs' Amended Complaint seeks relief. (MTD at 7:13-14.) Even if the nature of, and authorities for, the Angel Watch program were uncontested and had not admittedly changed and expanded overtime, the issue for standing purposes is whether the court has the power to redress the injury *flowing from the statute challenged in this case*. Minn. Citizens Concerned, 113 F.3d at 130-131. In other words, it is the ability of the court to redress injury flowing from the challenged statute that establishes "redressability" and thereby prevents the court from issuing unnecessary advisory opinions, not the total absence of hypothetical alternative means of harm to Plaintiffs. The latter rule would, in fact, result in perverse results, such as a *de facto* bar to constitutional review of legislation whenever the executive branch threatened to continue the same activity by means of another clandestine or unexamined regulatory program. Defendants could not, and do not, cite any authority for the proposition that a new federal law which admittedly augments an existing program may forever evade constitutional review because a previous, secret program allegedly authorized similar behavior to which Defendants may revert. Indeed, the case law establishes the opposite.

**(b) There is No Distinction Between the IML and Angel Watch for Redressability/Traceability Purposes**

Second, for the purpose of a constitutional challenge to the IML's Notification Provision, the distinction between the IML and Angel Watch is specious because *Plaintiffs challenge the constitutionality of any notification scheme no matter what the authority*. That is, Plaintiffs' claims do not concern whether the IML was properly enacted, but instead concern whether the government action authorized by the IML is constitutionally permissible. In the former case, *e.g.*, if Plaintiffs had alleged that Congress lacked the authority to enact the IML, the injury would be the enactment of the IML itself and not actions undertaken due to the IML. However, in this case, Plaintiffs' claims relate to *any* notification regardless of the putative authority for those notifications. Thus, even if Defendants are correct that the same notifications would be issued pursuant to the prior

Angel Watch authorities if the IML were struck down, the resulting injury is still redressable since Plaintiffs' claims are constitutional and a ruling on those claims would apply to Defendants' actions regardless of the authority under which they sought to issue notifications. This is particularly true here because Plaintiffs' claims include a cause of action for declaratory relief that would apply prospectively to any future notification activities regardless of their purported source.

2. **Government Communications to Third Parties Constitute "Injury in Fact"**

Defendants next argue "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." (MTD at 13:2-3.). Yet, Defendants cite no case in support of this proposition, and longstanding precedents *involving government communications* have found standing in cases conceptually identical to this one where the government's action induced a third party to interfere with the plaintiffs' exercise of rights.

For example, in Bantam Books v. Sullivan, the Supreme Court ruled that book publishers had standing to challenge a program in which the state issued warnings to third party book distributers that the publishers' books may contain obscenity, even though the state took no direct action to suppress the publishers' rights to distribute their books. 372 U.S. 58, 66-67 (1963). Following Bantam Books, the Ninth Circuit held that a purveyor of erotic art had standing to sue a government entity that had pressured a convention hall to deny the art purveyor a site for its artistic displays. LSO, Ltd. v. Stroh, 205 F.3d 1146, 1150 (9th Cir. 2000). Although the government's communications (specifically, threatened denial of a liquor license) were directed to a third party and not the plaintiff, the Ninth Circuit ruled in that case that the plaintiff had suffered injury because its First Amendment rights had been adversely impacted by the communications. Id. at 1153.[5]

In the instant case, the same logic applies: Defendants' notifications to foreign governments are specifically designed to, and actually, result in significant burdens to Plaintiffs' international

[5] Notably, both the courts in Bantam Books and LSO found standing based on the additional "pragmatic consideration" that the individuals subject to the communications were the only parties capable or likely to challenge the legality of the government's actions. LSO, 205 F.3d at 1153. The same consideration likewise supports standing in this case because Plaintiffs are the only parties capable of or likely to challenge the IML.

travel and other rights. It is the injury flowing from *those communications* that provides standing, and Defendants are incorrect that government communications cannot constitute injury in fact for standing purposes, even when (as discussed immediately below) the ultimate injury results from a decision by a third party.

Defendants cite Smith v. Doe for the proposition that "state registration and notification laws . . . do not qualify as punishment," but Smith is inapposite to this case because Smith did not consider affirmative government notifications designed to affect a specific liberty interest such as international travel. Instead, Smith addresses the narrow issue of whether publicly accessible sex offender registries are ex post facto punishments, and furthermore the Court in Smith did not address standing. 538 U.S. 84 (2003). By comparison, in this case Plaintiffs' allegations of harm are far more specific and tangible than those in Smith and involve different legal issues and standards of proof, including evidence that the purpose of the IML is to impact Plaintiffs' international travel rights in precisely the way it already has. Cf. Bantam Books, 372 U.S. at 67 ("We are not the first court to look through form to the substance and recognize" standing based on the intended incidental effects of state action.). For this reason, Smith and similar cases are inapposite to Plaintiffs' pleading in this case.

**3. Plaintiffs' Claims are Not Foreclosed Because their Injuries Flow in Part from the Actions of Third Parties**

Similarly, Defendants argue that Plaintiffs' injuries are speculative because they flow in part from independent decisions by third parties who receive Defendants' notifications or view the passport identifiers. Yet, courts routinely find standing to sue for injuries caused by a chain of events in which the government is but a single contributor. E.g., Bennett v. Spear, 520 U.S. 154, 167-69 (1997) (The "fairly traceable" element of standing does not mean that "the defendant's actions are the very last step in the chain of causation," and "does not exclude injury *produced by determinative or coercive effect upon the action of someone else*;" dismissal under Rule 12(b)(1) reversed for failing to accept truth of facts as pled in complaint. (emphasis added)). Indeed, the Ninth Circuit has prescribed a relatively low bar for standing in such cases:

> [T]o survive a motion to dismiss for lack of constitutional standing, plaintiffs must establish a 'line of causation' between defendants' actions and their alleged harm that is more than 'attenuated.' A causal chain does not fail simply because it has several 'links,' provided those links are 'not hypothetical or tenuous' and remain 'plausibl[e].'"

Maya v. Centex Corp., 658 F.3d 1060, 1070 (9th Cir. 2011) (Homebuyer plaintiffs had standing to sue developer for loss of value to homes caused by developer's marketing activities which allegedly induced unworthy buyers to purchase homes in plaintiffs' neighborhood and caused housing bubble; reversing district court's dismissal under Rule 12(b)(1) (citing numerous cases).). See also Franklin v. Mass., 505 U.S. 788, 801-03 (1992) (fact that injury results in part from independent actions of third parties with discretion to implement government's decision not a bar to standing); Bantam Books (same); LSO, 205 F.3d at 1150 (same); Knox v. United States DOI, 759 F. Supp. 2d 1223, 1233-34 (D. Idaho 2010) (denying motion to dismiss and ruling that gambling addicts had standing to sue federal Interior Secretary for financial losses suffered from video gambling machines despite long chain of causation).

In this case, the link between Defendants' notifications and the impact on Plaintiffs' international travel rights is not attenuated or hypothetical, because Plaintiffs have alleged (in part based on prior successful, pre-notification international travels) that they would not suffer injury in the absence of Defendants' notifications. Plaintiffs' allegations are also supported by statements from foreign customs officials which attribute the denial of entry to Defendants' communications. (E.g., Amended Complaint ¶18.) Thus, not only is injury from Defendants' notifications "plausible" – it is the intended result. These allegations are therefore sufficient to establish standing at the pleading stage. See Maya, 658 F.3d at 1070; Bennett, 520 U.S. at 167-69.

4. **Plaintiffs Have Adequately Pled Individual Grounds for Standing**

Again in the absence of authority, Defendants selectively cite from the facts pled by Plaintiffs and quibble with the sufficiency of each fact to establish standing. In addition to inaccurate citations and inferences improperly drawn in their favor at the pleadings stage, Defendants' arguments ignore the law of standing which holds that when multiple plaintiffs assert challenges to the same law, "the presence of *one party* with standing assures that the controversy before the court is justiciable." E.g., Dept. of Commerce v. U.S. House of Representatives, 525

U.S. 316, 330 (1999) (citing cases; emphasis added). Here, several Plaintiffs have pled that they routinely travel internationally, and Plaintiffs John Does Nos. 3 and 4 have already been subject to notifications, which is itself unequivocally sufficient to establish standing.[6] LSO, Ltd., 205 F.3d at 1154-55 (9th Cir. 2000) (Standing is established by prior enforcement and the government's failure "disavow application of the challenged provision"). Also, Plaintiff John Doe #5 is an airline pilot (which the MTD conspicuously ignores) who flies internationally, and who is therefore manifestly subject to the IML's requirements.[7] Because these and the other Plaintiffs have adequately pled facts sufficient to establish standing, Defendants' MTD should be denied.

**B. Plaintiffs' Challenge to the IML's Passport Identifier Provision is Ripe and Plaintiffs Have Standing**

Defendants next argue that Plaintiffs' First Amendment and other claims against the IML's Passport Identifier provision are unripe because the form of the "conspicuous unique identifier" contemplated by the IML is not yet designed or affixed to passports, and because the applicable procedures may not be completed two-to-five months after the MTD is heard.[8] As reflected by the absence of citations to case law, Defendants' ripeness arguments misconstrue the nature of Plaintiffs' claims as well as the very purpose of the ripeness doctrine.

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[6] Although Defendants argue that Plaintiff John Doe #3 lacks standing because he is not currently required to register in any jurisdiction, the fact remains that the IML and the prior Angel Watch program expressly authorize notifications regarding non-Registrants, and one such notification was actually provided about him to the Philippines. Defendants ignore this and aver that such notifications will not be issued, but provide no authority for the proposition that self-serving declarations by a handful of federal officials promising not to enforce the statute as written can deprive an injured plaintiff of standing. Cf. Larson v. Valente, 456 U.S. 228, 238-42 (1982) (Where government disputed standing of organization to challenge regulation of religious organization on grounds that organization was not a religious in character and would therefore not be subject to statute, standing was established by the prior application of statute by government and the potential future application regardless of whether organization may ultimately be exempt from statute.).

[7] Among these requirements imposed by the IML is that a traveler provide at least 21 days notice of intent to travel, which Plaintiff John Doe #5 cannot satisfy because of the demands of his job. Defendants are simply incorrect in asserting that the IML does not impose this requirement (see IML § 6 ("*Requirement that Sex Offenders Provide International Travel Related Information to Sex Offender Registries*"), but in any case this is not the only basis on which Plaintiff John Doe #5 has established his standing.

[8] This figure was the "best estimate" offered by Defendants' declarant regarding the date on which conspicuous passport identifiers would begin appearing. (See Declaration of Jonathan M. Rolbin filed in support of Defendants' PI Opposition ¶6 (Doc. 30-3).)

1. **Cases Applying the Ripeness Doctrine Support Plaintiffs**

The ripeness doctrine exists to prevent the premature adjudication of disputes when additional time or factual development is necessary to resolve the claim. E.g., Abbot Labs. v. Gardner, 387 U.S. 136, 148-49 (1967). However, where no factual development is necessary to resolve the claims, *the claim are ripe even if the challenged law has not yet been implemented*. "The Supreme Court has [] observed that '[w]here the inevitability of the operation of a statute against certain individuals is patent, *it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect*." Ariz. v. Atchison, T.&S.F.R. Co., 656 F.2d 398, 402-03 (9th Cir. 1981) (Plaintiffs' suit filed six months before statute implemented was ripe because all facts relevant to the claim were then known) (emphasis added). See also Cent. Delta Water Agency v. U.S., 306 F.3d 938, 947-48 (9th Cir. 2002) (Plaintiff's claims justiciable "several months in advance" of planned agency action where plaintiffs "raised a material question of fact . . . whether they suffer a substantial risk of harm"). This is especially true in First Amendment cases like this one, in which the standing and ripeness doctrines are relaxed to permit the claims to be heard. LSO, Ltd., 205 F.3d at 1154-55 ("[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward finding standing.").

2. **Because Plaintiffs Have Asserted Facial Challenges to the Passport Identifier Provision, The Identifier's Development and Appearance are Irrelevant**

Critically, in this action, Plaintiffs have not asserted an as-applied challenge to the IML's Passport Identifier Provision, or any challenge whatsoever to the legality of the State Department's regulations implementing the IML, because such a challenge would not be ripe until those regulations are implemented and applied to the Plaintiffs. Rather, Plaintiffs have asserted a *facial* challenge to the IML's Passport Identifier Provision, which presents only legal issues and does not turn on the facts of the identifier's ultimate appearance, placement, the procedure by which those factors are to be developed, or the Identifier's consequence for any specific Plaintiff.

For ripeness purposes, the distinction between facial and as-applied challenges is critical because a delay in implementation of a law is sufficient to render an as-applied claim unripe, but

does not render a facial challenge unripe. See, e.g.,, Zilber v. Moraga, 692 F. Supp. 1195, 1200-01 (N.D. Cal. 1988) ("The distinction between facial and as-applied challenges for purposes of final decision ripeness flows naturally from the differing nature of the two types of claims.").

For example, the case of Hotel Employees and Restaurant Employees International Union v. Nevada Gaming Commission concerned the pre-enforcement review of certain mandatory disclosure regulations that had not yet been enforced against the plaintiffs. 984 F.2d 1507, 1510 (9th Cir. 1993). The Ninth Circuit held that the facial challenges were ripe notwithstanding the lack of a factual record of enforcement because the regulations clearly applied to the plaintiffs, and that resolution of the facial challenges – which presented only legal questions – would not be aided by awaiting a fuller record. Id. at 1512-13. The Ninth Circuit distinguished the ripe facial challenge from the separate as-applied challenges which were unripe because the regulations had not been applied to the plaintiffs. Id. at 1513. See also Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1434-35 (9th Cir. 1996) (Because "[l]egal questions that require little factual development are likely to be ripe," plaintiff's facial challenge to regulations restricting travel to Cuba was ripe notwithstanding plaintiffs' failure to apply for a license since suit presented "pure questions of law that require no factual development.").

In the instant case, Plaintiffs challenge the constitutionality of *any* "conspicuous unique identifier" as authorized by the IML, regardless of its form, placement, or the regulations promulgated to achieve this statutory mandate. The regulatory procedures and other steps that Defendants must observe before the initiation of the Identifier are irrelevant and do not implicate ripeness because Plaintiffs' facial challenge does not turn on any of those things, and the agency's completion or lack of completion does not bear on the resolution of Plaintiffs' claims. Conspicuously, Defendant's do not allege otherwise. Defendants also do not explain how the completion of procedural steps during the next two to five months would better focus or otherwise improve the presentation of issues in this case. Rather, Defendants assume that ripeness can be defeated by simply alleging a delay in the implementation of a statute, but this formalistic objection does not establish that a facial constitutional claim is unripe. See Ams. for Med. Rights v. Heller, 2 F. Supp. 2d 1307, 1310-11 (D. Nev. 1998) (Facial First Amendment challenge to ballot initiative

ripe notwithstanding fact that "advocates must meet several requirements before it qualifies to be on the ballot" because the completion of these requirements would not be "pertinent and helpful to the Court's decision in the case.").

Separately, Plaintiffs' First Amendment claim is also ripe because it challenges Congressional legislation, not an agency's implementing regulations. That is, where the claims concern the legality of legislation as compared to administrative regulations, courts have held the claims are ripe even when the implementing regulations are not yet issued. Alpine Ridge Gp. v. Kemp, 764 F. Supp. 1393, 1396 (W.D. Wash. 1990) *aff'd* 955 F.2d 1382 (9th Cir. 1992), *rev'd on other grounds sub nom.* Cisneros v. Alpine Ridge Gp., 508 U.S. 10 (1993) (Defendant's ripeness argument "has no merit" because "Plaintiffs make it perfectly clear that they are challenging the constitutionality of the legislation on its face as violative of their contract rights. They are not asking the court to examine the manner in which Section 801 will be applied to each individual."). See also Zilber, 692 F. Supp. at 1200 (Because challenge to ordinance was facial, "there is no need for a final decision by the enforcing authority as to how the law will be applied." (Citing Agins v. Tiburon, 447 U.S. 255, 260 (1980)). In the instant case, Defendants' MTD attempts to confuse the issues by mischaracterizing Plaintiffs' facial challenge to the IML statute as an as-applied challenge to the implementing regulations. Yet, because Plaintiffs have pled only a facial challenge against the IML's Passport Identifier Provision, this claim is ripe for review.[9]

## V. STANDARD GOVERNING MOTION TO DISMISS UNDER 12(b)(6)

Separately, Defendants also allege that each of Plaintiffs' eight claims fails to state an entitlement to relief pursuant to Rule 12(b)(6). Conspicuously, Defendants fail to cite the standard for dismissal for failure to state a claim and to apply this standard to the Amended Complaint. Rather, Defendants attempt to prematurely dispute the merits of Plaintiffs' claims, which is not a proper basis to dismiss any of Plaintiffs' claims. A motion to dismiss under Rule 12(b)(6) cannot be

[9] Defendants also allege that the brief delay in implementation of the IML defeats standing, which is incorrect for the same reason that the delay does not defeat ripeness. Defendants further allege that Plaintiffs' lack standing because Plaintiff John Doe #3 is not subject to the Passport Identifier Provision, and because Defendants believe that Plaintiff John Doe #7 "likely" has an Iranian passport. These speculative assertions are irrelevant and in any case do not defeat the standing of the remaining five Plaintiffs to challenge the Passport Identifier Provision.

granted unless it appears to a legal certainty that plaintiffs have not alleged either a "cognizable legal theory" or facts sufficient "to support a cognizable legal theory." Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir. 2010). Plaintiffs' complaint need only state a "plausible" entitlement to relief, which is not "akin" to probable and must be allowed to proceed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote or unlikely." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556, 570 (2007). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Id. at 563. Plaintiffs' claims meet this standard.

**A. Plaintiffs Adequately Plead Their First Amendment Compelled Speech Claim Against the IML's Passport Identifier Provision Under Numerous Cases**

The first claim in the Amended Complaint is that the IML's Passport Identifier Provision compels speech by forcing individuals to communicate a message written by the government whenever they display their passport. "In order to make out a valid compelled-speech claim, a party must establish (1) speech; (2) to which he objects; that is (3) compelled by some government action." Cressman v. Thompson, 798 F.3d 938, 951 (10th Cir. 2015). Laws that compel speech are presumptively invalid. E.g., Riley v. Nat'l Fed'n for the Blind, 487 U.S. 781, 795-98 (1988). As to the first two elements, Defendants do not contest that the Passport Identifier Provision constitutes speech, and do not contest that the speech is objectionable to the passport holder. The dispute, therefore, is whether the passport holder is compelled to utter that speech.

**1. Plaintiffs do not Contest that the Passport Identifier is Government Speech**

Defendants first argue that Plaintiffs "First Amendment interests are not implicated" because "the passport identifier required under the IML is government speech." (MTD at 16:23-24.) Plaintiffs do not contest that the Passport Identifier is government speech, and in any event the "government speech" issue is irrelevant to this case because Plaintiffs assert a *compelled* speech claim, a claim that frequently involves government speech. The appropriate issue in a compelled speech claim is whether the government may compel Plaintiffs' to bear the government's message. The primary case cited by Defendants, Walker v. Texas Sons of Confederate Veterans (an

inapposite case about *viewpoint discrimination* in government speech) actually supports Plaintiffs' claims because the Court twice clarified in that case that it was not ruling on the question of compelled government speech, and twice affirmed that private individuals may not be compelled to utter government speech. 135 S.Ct. 2239, 2245-46, 2253 (2015) (citing cases).

**2. Plaintiffs Have Alleged a Cognizable Compelled Speech Claim**

Defendants' MTD fails to establish that Plaintiffs' compelled speech claim is not cognizable. First, and dispositively, there is no case which holds that speech written by the government that appears on a government ID and other government property cannot give rise to a compelled speech claim. Indeed, all of the cases which address this issue also involved compelled government speech and support Plaintiffs' claims. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (Mandatory display of state motto on license plate converts driver into government's "mouthpiece"); Gralike v. Cook, 191 F.3d 911, 918-19 (8th Cir. 1999), *aff'd* Cook v. Gralike, 531 U.S. 510 (2001) (Mandate that pejorative notation "DISREGARDED VOTERS INSTRUCTION" appear beside candidate's name on ballot was compelled speech notwithstanding fact that government authored the speech and posted it on a government document.). See also PG&E v. Pub. Utilities Comm'n, 475 U.S. 1, 18 (1986) ("[T]he compelled speech doctrine exists to prevent "forced association with potentially hostile views" and "does not depend on who 'owns' the [] 'space'" on which the speech is placed.").

**(a) The Compelled Speech Doctrine is Not "Narrow"**

Defendants attempt to distinguish these and other compelled speech cases by characterizing the compelled speech doctrine as a "narrow exception" limited to cases in which the government speech could be *attributed to*, or seen as *endorsed by*, the individual. (MTD at 16:23-17:2.) This summary of the compelled speech doctrine is inaccurately narrow. While risks of misattribution and perceived endorsement are *some of the reasons* that compelled speech violates the constitution, they are not the *only* reasons. Additional reasons include a risk that the compelled government speech will *harm the speaker*, as well as the speaker's constitutional right to *refrain from speaking*. Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (Compelled disclosure of controversially sourced "conflict minerals" present in products would injure speaker by "requiring company to publicly condemn itself."); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1212

(D.C. Cir. 2012) (Government may not compel cigarette manufacturer to affix warning labels that "undermine its own economic interest."). Cf. Ariz. Life Coalition Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008) (Application of First Amendment protections turns in part on who bears "ultimate responsibility for the content of the speech.").

This broad reading of the compelled speech doctrine is confirmed by the Gralike case, in which the Eighth Circuit ruled that a pejorative ballot label offended the First Amendment by "forc[ing] candidates to speak in favor of" a certain issue, and by "not allow[ing] candidates to remain silent on the issue, which is precisely the type of state-compelled speech which violates the First Amendment right not to speak." Gralike, 191 F3d. at 917-19. Defendants' attempt to mischaracterize Gralike as a narrow holding about misattribution is belied by simply reading the entire opinion.[10]

The sole case cited by Defendants on the issue of whether a conspicuous passport identifier constitutes compelled speech is wholly inapplicable to this case, both factually and doctrinally. That is, R.J. Reynolds v. Shewry *is not a compelled speech case*, but is instead a "compelled subsidy" case brought by a company that was compelled to pay an excise tax from which money was used to fund anti-smoking advertisements *produced* by the government, *run* by the government, and that *did not mention* the company. 423 F.3d 906, 914, 920 (9th Cir. 2005). Shewry therefore provides no authority for Defendants' claim that "courts have rejected [compelled speech claims]" "where there is no possibility of attribution or perceived endorsement" (MTD at 17:13-15) because those issues were neither raised by the parties nor implicated by that decision.

[10] Defendants also speculate that the United States Supreme Court's decision to affirm the Eighth Circuit's ruling in Gralike on grounds other than compelled speech "calls into question whether the Circuit's hold is good law." (MTD at 17 n.6.) But this conclusion is again belied by simply reading the Supreme Court's opinion, in which the Supreme Court "agreed with" the characterization of the unconstitutional ballot labels as a "Scarlet Letter." Cook v. Gralike, 531 U.S. at 525 ("The general counsel to petitioners office, no less, has denominated these labels as 'the Scarlet Letter.' We agree with the sense of these descriptions."). Thus, far from casting doubt on the Eighth Circuit's compelled speech holding in Gralike, the Supreme Court's referenced it approvingly.

**(b) The Passport Identifier is Not "Factual" Speech, but the Compelled Speech Doctrine Applies Even if it Was**

Finally, Defendants suggest that the Passport Identifier does not implicate the First Amendment because the compelled speech is allegedly "factual," but it is axiomatic that the compelled speech doctrine applies with equal force to factual information as well as to ideological or political information. Riley, 487 U.S. 797-98 (compelled disclosure of factual financial information violated First Amendment right to refrain from speaking). Moreover, Plaintiffs dispute that the Passport Identifier is strictly limited to factual information because that identifier communicates much more, such as by falsely indicating that the passport holder has engaged in or is likely to engage in sex trafficking and tourism crimes. See Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) (Because "context matters" in compelled speech claims, court looks to messages implied by the speech, as well as to the government's intent in compelling the speech). The Identifier is also part of a scheme to encourage third parties to take action desired by the government, such as reciprocal notifications. Id. at 246 (compelled speech doctrine forbids government from coopting private speaker in service of government objectives or actions); Riley, 487 U.S. at 797-98 (same). In sum, the MTD's reliance on contested facts and disputable interpretation of the case law is not a proper basis for dismissal. Plaintiffs have pled facts consistent with the compelled speech doctrine as applied in numerous cases, and Defendants provide no citations establishing that Plaintiffs' entitlement to recovery is foreclosed as a matter of law. For those reasons, the MTD should be denied as to Plaintiffs' First Amendment claim.

**B. Plaintiffs' Substantive Due Process and Equal Protection Claims are Adequately Pled**

Plaintiffs concede that their substantive due process and equal protection claims are entitled to rational basis review under the current law. Nevertheless, Plaintiffs have adequately pled these claims based on numerous cases that strike down analogous restrictions on socially disfavored populations where the basis for those restrictions is arbitrary, irrational, and disproportionately harmful.

1. **Plaintiffs are not Challenging a Sex Offender Registry**

Defendants first seek dismissal on the basis of sex offender registry cases that do not address either the unique provisions of the IML or claims analogous to those pled by Plaintiffs. Again, the IML is not a sex offender registry but instead is an affirmative notification scheme in which information regarding individuals is communicated by the government in a context that indicates a current risk of involvement in specific criminal activity, and for the purpose of impacting their ability to travel internationally. All of the cases cited by Defendants are inapposite because they involve challenges to either the registration requirements themselves or to the availability of registry information on websites, not to affirmative notifications issued in contexts similar to the IML. See Litmon v. Harris, 768 F.3d 1237, 1241 (9th Cir. 2014) (challenge to registration requirement only); United States v. Juvenile Male, 670 F.3d 999, 1002 (2012) (same); Smith v. Doe, 538 U.S. 84, 91 (2003) (challenge to registration requirement and website); Doe v. Tandeske, 361 F.3d 594, 596 (2004) (same); Cutshall v. Sundquist, 193 F.3d 466, 470 (6th Cir. 1999) (same); Doe v. Moore, 410 F.3d 1337, 1341 (11th Cir. 2005) (same, plus DNA collection statute); Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1, 5 (2003) (challenge to website only).

2. **Plaintiffs are Entitled to Litigate their Equal Protection and Substantive Due Process Claims**

Plaintiffs' equal protection and substantive due process claims are based on the right to international travel as well as the right to be free from arbitrary, irrational, and capricious state action. Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964) (striking down an overbroad passport restriction based on "bare fact of membership in a group" in a case substantially similar to this one under the due process right to international travel).[11] In the context of a constitutional adjudication of a fundamental liberty interest, such as the right to travel internationally, rational basis review is not an automatic rubber-stamp of Congressional acts. See, e.g., Romer v. Evans, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential standards, we insist on knowing the classification adopted and the object to be obtained.").

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

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

For example, courts have used rational basis review to strike down laws that disadvantage groups when the evidence supporting the government's purported interest is scant or contradicted by other evidence. See U.S.D.A v. Moreno, 413 U.S. 528, 356-58 (1973) (Denial of food stamps to households comprised of non-relatives violated due process because evidence suggested a legislative animus toward "hippie communes" seeking food stamp benefits.); Plyler v. Doe, 457 U.S. 202, 228 (1982) (interest served by excluding undocumented children from schools was contradicted by other evidence and therefore irrational). Courts have also aggressively scrutinized the rationality of legislation when the burdens imposed on a disfavored class of persons are pronounced. See United States v. Windsor, 133 S. Ct. 2675, 2693, 2696 (2013) (without invoking heightened scrutiny, striking down federal Defense of Marriage Act on due process grounds notwithstanding "Congress[']s] great authority to design laws to fit its own conception of sound national policy").

Thus, where a vulnerable minority's liberty interests are at issue, rational basis review does not mean blind acceptance of the government's rationale for the Congressional action or superficial assertions that the legislation serves a government interest. Rather, these courts examined whether the stated purpose would actually be served, Plyler, 457 U.S. at 228, as well as the law's overbreadth, Aptheker, 378 U.S. at 505, Moreno, 413 U.S. at 356-58, and measured the lack of proportion between the harm inflicted by the law and its purported benefits. Romer, 517 U.S. at 635. Indeed, *the same rational basis analysis has been applied to strike down laws disadvantaging Registrants*, where the evidence of the law's effectiveness is miniscule but its burden is overwhelmingly disruptive and injurious to constitutional rights. See In re Taylor, 60 Cal. 4th 1019, 1036, 1038, 1042 (2015) (Invalidating sex offender residency restrictions on federal due process grounds because they applied in a blanket fashion to all Registrants without regard to the details of

their individual offenses, resulting in numerous injuries such as homelessness, lack of access to services, and effective banishment from whole communities).

3. **Plaintiffs will Produce Additional Evidence of Irrationality**

Defendants' MTD proceeds from the assumption that the IML is a rational and constitutionally appropriate means of pursuing the government's interest, but that assertion provides no grounds for dismissal because the rationality of the IML's operations and the individuals subject to its provisions is disputed and, in fact, is at the heart of Plaintiffs' substantive due process and equal protection claims. As previewed in the papers filed in connection with Plaintiffs' Motion for Preliminary Injunction, Plaintiffs will produce additional evidence of the IML's irrationality, including documents published by Defendants' agencies, various state sex offender management boards, and experts in the field of sex offender recidivism and treatment who have submitted declarations specifically in opposition to this law. (See Generally ATSA Declaration (Doc. 18).)

This irrationality is underscored by the IML's conclusory and thin legislative "findings" (see IML § 2), its passage without substantive consideration by either House of Congress (See Amended Complaint ¶¶52-54), and its irrational assumption that sex offenders constitute one monolithic and homogenous class of people to whom blanket legal restrictions can be uncritically applied without attention to their current risk to public safety. State and federal courts – including the Ninth Circuit – are increasingly recognizing the constitutional infirmities of precisely this indiscriminate enforcement of regulations based solely on the designation "sex offenders." E.g., United States v. Wolf Child, 699 F.3d 1082, 1093-94 (9th Cir. 2012) (Reversing District Court's order upholding probation condition against defendant's contact with his own minor children on grounds that he was a "convicted sex offender" because "[n]ot all sex offenders are the same; nor are all who plead guilty to a particular type of offense," and therefore the label "sex offender" does not amount to evidence of future risk.). Accord Taylor, 60 Cal. 4th at 1036, 1038, 1042.

In this case, the IML similarly makes no meaningful distinction among those labeled "sex offenders," a uselessly broad spectrum of crimes that run from violent contact offenses to those that do not involve violence or contact and that do not pose a risk of future harm, such as sexting, consensual teen sex, or adolescent horseplay such as giving "wedgies." See U.S. v. D.W., 2015

U.S. Dist. LEXIS 82996, at *2 (E.D.N.Y. June 25, 2015). In light of the numerous cases striking down legislation that targets or disadvantages socially disfavored groups using rational basis review, Plaintiffs' substantive due process and equal protection claims are cognizable and adequately pled.

**C. Plaintiffs' Procedural Due Process Claim is Adequately Pled**

After conceding that deprivations of the right to international travel are sufficient to state a procedural due process claim, Defendants seek dismissal of those claims against the IML's Notification Provision based upon mischaracterizations of Plaintiffs' pleading as well as improper reliance on contested facts – some of which have been admitted by Defendants in prior briefs.

First, without any citation to the Amended Complaint, Defendants allege that Plaintiffs have pled only a facial challenge to the IML's Notification Provision, but this is false as Plaintiffs' claims also include as-applied challenges which consider the specific facts of each Plaintiffs' travel history and registrable offenses. (Amended Complaint ¶¶58-90.)

Second, in stark contrast to their briefing in the PI Opposition Brief, Defendants now claim that the IML does nothing more than transmit "factual information" about a traveler's criminal history. Yet, Defendants' previous brief and declarations, as well as the IML itself, establish that the IML's notifications are based not only on criminal history, but also on the application of various factors allegedly designed to predict a "likelihood" of engaging in international sex trafficking and sex tourism, and that notifications are sent based on a supposed current risk of engaging in such activities. (PI Opposition Brief, at 1:17-21 (Doc. 30)). This component of the IML's Notification Provision, which the MTD omits, is integral to Plaintiffs' pleading and warrants discovery and litigation on the merits, particularly because two Plaintiffs have been subject to notifications based upon records that display no rational risk of engaging in child sex trafficking or tourism.

Third, Defendants baldly assert that Plaintiffs have not adequately pled the deprivation of a liberty interest because "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." (MTD at 23:8-13.) This is nothing more than a dispute with the facts asserted in the Amended Complaint as well as with the merits of Plaintiffs' claims, which are improper at the pleading stage. Moreover, while Plaintiffs allege that the IMLs' Notification

Provision operates as a *de facto* "no-fly" list – which is entitled to be taken as true at the pleading stage – Plaintiffs *also* allege that the IML imposes material *impediments* to international travel that are likewise sufficient to state a procedural due process claim. See Latif v. Holder, 28 F. Supp. 3d 1134, 1149 (D. Or. 2014) (Even when not an outright ban on travel, inclusion on "no-fly" list deprives listees of right to international travel by inducing carriers and governments to reject listees.).

Fourth, regarding the deprivation of their liberty interests from the notifications, Plaintiffs do not rely on "general assumptions" regarding the likely consequence of the travel notifications, because two Plaintiffs have already been denied entry into foreign countries due to Defendants' notifications, and because such denials are a routine and intended consequence of the notifications. This distinguishes the IML's affirmative notification scheme from that considered in Smith v. Doe because that Court in that case did not address the potential for harm from affirmative notifications.

Fifth, Defendants' contention that the notifications are not stigmatizing, and that they are not widely published, is merely another dispute with the merits and one that defies common sense because the context of the IML communicates not only that one is a registered sex offender, but also that one has engaged in, or is likely to engage in, child sex tourism or trafficking. See Neal v. Shimoda, 131 F.3d 818 (9th Cir. 1997) ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender," even when those inmates were convicted of sex offenses.); Mohamed v. Holder, 995 F. Supp. 2d 520, 526, 538 (E.D. Va. 2014) (submission of Plaintiff's name on list of suspected terrorists to law enforcement agencies sufficient to state claim for procedural due process violation; denying motion to dismiss). While Defendants vow that "nothing in the IML allows for the transmission of inaccurate information," this is precisely a point that Plaintiffs dispute because: (1) Defendants have twice issued admittedly inaccurate notifications regarding Plaintiffs John Doe Nos. 3, and 4; (2) Plaintiffs dispute the accuracy of the procedures by which the government determines that a traveler is at risk for engaging in international sex trafficking and sex tourism; and (3) Plaintiffs dispute the factual accuracy and reasonableness of any statement that they are at risk for engaging in such activities and the other justifications proffered for the IML's notification scheme in light of the harm it causes.

Finally, Defendants cite Conn. Department of Public Safety v. Doe, and other cases for the proposition that procedural due process claims do not lie when the alleged sigma by the government "turns on an offender's conviction alone." (MTD at 24:10-19.) Yet in those cases (which again concern sex offender registries and not affirmative notification schemes), it is uncontested that inclusion in a sex offender registry is *not* based upon a "determination that any individual included in the registry is currently dangerous." Conn. Dept. of Pub. Safety v. Doe, 538 U.S. 1, 5 (2003). Because the IML is based on precisely the opposite premise, these cases actually support Plaintiffs' claims that the IML lacks procedural due process protections and should be litigated on the merits.

**D. Plaintiffs' Ex Post Facto Claim is Adequately Pled**

Defendants cite no applicable authority for the proposition that government communications schemes which irrationally and unjustifiably deny individuals the freedom to travel internationally to visit family members, to conduct business, and which subject travelers to risk of physical harm are not "so punitive either in purpose or effect as to negate [the State's] intention to deem [the IML] civil." Smith v. Doe, 538 U.S. at 92. Plaintiffs are entitled to litigate this claim also as pled in the Amended Complaint.

## VI. CONCLUSION

For all these reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss and allow Plaintiffs' claims to proceed.

Dated: April 28, 2016

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