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9 **UNITED STATES DISTRICT COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **OAKLAND DIVISION**

13 JOHN DOE #1 et al.,
14 Plaintiff,
15 v.
16 JOHN KERRY, in his official capacity as
Secretary of State of the United States et al.,
17 Defendants.

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

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

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

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1 **STATEMENT OF ISSUE TO BE DECIDED**

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

6 **INTRODUCTION**

7 Plaintiffs—four individuals who have been convicted of sex offenses involving minors—
8 seek an emergency injunction to halt implementation of certain provisions of the International
9 Megan’s Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced
10 Notification of Traveling Sex Offenders (“IML”), Pub. L. No. 114-119, 130 Stat. 15 (2016).
11 Plaintiffs’ request for a preliminary injunction should be denied because they have not shown a
12 clear entitlement to this extraordinary remedy. The provisions at issue build upon existing
13 statutory and regulatory authorities, as well as longstanding efforts by the Department of
14 Homeland Security (“DHS”)’s Immigration and Customs Enforcement (“ICE”), Homeland
15 Security Investigations (“HSI”) and by the United States Marshals Service (“USMS”) to
16 communicate with foreign governments regarding registered sex offenders planning to cross
17 international borders. The IML continues the notifications already provided through ICE HSI’s
18 Operation Angel Watch, which seeks to prevent child sex trafficking or tourism¹ by U.S. citizens
19 or lawful permanent residents abroad by identifying registered sex offenders whose travel plans,
20 along with other factors, suggest intent to engage in child sex tourism or child sex trafficking in
21 other countries. The IML also continues the USMS’s existing international notification program
22 focused on registered sex offenders leaving or entering the United States as part of broader
23 efforts to notify relevant jurisdictions when such offenders change location. In addition to
24 building upon these already-existing operations, the IML attempts to address circumstances
25 where individuals evade such notifications by traveling to an intermediate country before
26 proceeding to their actual final destination; it does this by requiring the State Department to

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

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

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

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

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

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

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

14 **LEGISLATIVE AND ADMINISTRATIVE BACKGROUND**

15 **1. State and Federal Sex Offender Registry Legislation**

16 States began to develop sex offender registration programs in the late 1980s in order to
17 protect the public, particularly children, from repeat offenders. *See* H.R. Rep. 109-218(I) at 28
18 (2005), 2005 WL 2210642. Legislatures have found sex offenders a particularly apt class of
19 offenders for registration. "Sex offenders are a serious threat in this Nation," and "[w]hen
20 convicted sex offenders reenter society, they are much more likely than any other type of
21 offender to be rearrested for a new rape or sexual assault." *McKune v. Lile*, 536 U.S. 24, 32-33
22 (2002) (citing Univ. of New Hampshire, Crimes Against Children Research Center, Fact Sheet 5;
23 Sex Offenses 24; U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners
24 Released in 1983, p. 6 (1997)). Studies confirm not only the statistical likelihood of rearrest for
25 similar crimes but findings that offenders had significantly more victims than were reported or
26 known to law enforcement. H.R. Rep. 109-218(I) at 29. Polygraph examinations on a sample of
27 sex offenders with fewer than two known victims (on average) found that offenders actually had
28 an average of 110 victims and 318 offenses. *See id.* Another study found that imprisoned sex

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

4 In 1994, Congress enacted the first federal standards in order to set uniform minimum
5 criteria for sex offender registration. *See* Jacob Wetterling Crimes Against Children Registration
6 Act (“Wetterling Act”), Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994); H.R. Rep. 103-
7 392 at 6. By May 1996, all 50 states and the District of Columbia had some sort of registration
8 system for released sex offenders in place. *See* H.R. Rep. 105-256 at 6 (1997), 1997 WL 584298.
9 Both the Supreme Court and the Ninth Circuit have upheld state sex offender registry
10 requirements against constitutional challenges. *See Conn. Dep’t of Pub. Safety v. Doe*, 538 U.S.
11 1, 7 (2003) (holding Connecticut registry law conformed to procedural due process requirements,
12 and that registrants were not entitled to a hearing on the question of whether they were “currently
13 dangerous” because “Connecticut has decided that the registry information of *all* sex offenders—
14 currently dangerous or not—must be publicly disclosed”); *Smith v. Doe*, 538 U.S. 84, 105-06
15 (2003) (rejecting claim that Alaska’s registry requirement imposed a retroactive punishment in
16 violation of the *Ex Post Facto* Clause); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004) (per
17 curiam) (rejecting substantive due process challenge to Alaska’s registration and notification
18 requirements because the state’s “legitimate nonpunitive purpose of public safety” was
19 “advanced by alerting the public to the risk of sex offenders in their community,” and the relative
20 lengths of reporting requirements for different offenses were “reasonably related to the danger of
21 recidivism” (internal quotation omitted)).

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

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

1 govern state sex offender registration and notification programs by enacting the Sex Offender
2 Registration and Notification Act (“SORNA”), part of the Adam Walsh Child Protection and
3 Safety Act. Pub. L. No. 109-248, §§ 102-155, 120 Stat. 587 (codified in part at 42 U.S.C.
4 §§ 16901 *et seq.*); *see* H.R. Rep. 109-218(I), at 27 (emphasizing “gaps and problems with
5 existing Federal and State laws” due to “lack of uniformity” in State registration requirements
6 and notification obligations). As spending clause legislation, SORNA conditions full Byrne
7 Justice Assistance Grant funding on a state’s substantial implementation of certain requirements.
8 42 U.S.C. § 16925(a). State registries must collect specific information, such as names,
9 addresses, physical descriptions, criminal history information, and photographs of offenders. *Id.*
10 § 16914(a), (b). SORNA also sets minimum periods of registration based on the nature and
11 seriousness of the sex offense and the offender’s history of recidivism. *Id.* §§ 16911(2)-(4),
12 16915. SORNA requires that a state notify certain federal agencies and other jurisdictions
13 regarding its registrants. *Id.* § 16921. SORNA also provides for public dissemination of certain
14 information on Internet sites. *Id.* § 16918. To ensure that sex offenders comply with their
15 registration obligations, SORNA enacted 18 U.S.C. § 2250, which establishes criminal liability
16 for a sex offender subject to federal jurisdiction who “knowingly fails to register or update a
17 registration” in accord with SORNA’s requirements. *See* Pub. L. No. 109-248, § 141(a).

18 At the federal level, SORNA directed the Attorney General, Secretary of State, and
19 Secretary of Homeland Security to “establish and maintain a system for informing the relevant
20 jurisdictions about persons entering the United States who are required to register.” 42 U.S.C.
21 § 16928. It also reauthorized the National Sex Offender Registry (“NSOR”), which includes
22 information about all individuals required to register in any state registry, *id.* § 16919, and the
23 National Sex Offender Public Website that allows anyone to search for such information by
24 name or within specified areas, *id.* § 16920; *see* <http://www.nsopw.gov>.² SORNA also identified
25 USMS as the federal agency primarily responsible for enforcing sex offender registration

26 _____
27 ² NSOR was originally created in 1996. *See* Pam Lynchner Sexual Offender Tracking and
28 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>.

1 requirements. 42 U.S.C. § 16941(a).

2 **2. SORNA Guidelines and USMS International Notification Efforts**

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

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

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

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

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

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

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

3 In 2007, DHS began operating an international notification program specifically focused
4 on the risk of sex offenders crossing international borders in order to engage in child sex tourism.
5 Declaration of Acting Deputy Assistant Director Patrick J. Lechleitner (“Lechleitner Decl.,”
6 attached hereto) ¶ 5. At first focused on those traveling from Los Angeles International Airport
7 to Southeast Asia, the program, Operation Angel Watch, was moved to ICE HSI headquarters in
8 2010. *Id.* Operation Angel Watch operates under Title 19 law enforcement authorities and
9 bilateral agreements with foreign governments. *See* 19 U.S.C. § 1589a (authorizing “customs
10 officers”—which include ICE HSI Special Agents, *see* 19 U.S.C. § 1401(i), to investigate any
11 violation of federal law, including violations of 18 U.S.C. §§ 1591 (sex trafficking of children or
12 by force, fraud, or coercion) and 2251 (sexual exploitation of children), as well as § 2423
13 discussed above); 19 C.F.R. § 103.33 (providing authorization, pursuant to 18 U.S.C.
14 § 1628(a)(1), to customs officers to exchange information or documents with foreign customs
15 and law enforcement agencies if necessary to “[e]nsure compliance with any law or regulation
16 enforced or administered by [DHS]”).

17 Operation Angel Watch primarily uses the comparisons of passenger information
18 received from carriers pursuant to 19 C.F.R. § 122.75a with NSOR data to identify registered sex
19 offenders whose offenses involved child victims. Lechleitner Decl. ¶¶ 8-9. Operation Angel
20 Watch provides notifications to destination countries when it determines, based on an assessment
21 of various factors, a likelihood of intended child sex tourism. *Id.* ¶¶ 10-11. ICE HSI, through
22 Operation Angel Watch, provided notice of travel from the United States of approximately 2,300
23 convicted child sex offenders in 2014, and 2,100 such offenders in 2015.³

24 **4. International Megan’s Law**

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

26
27 ³ICE News Release (June 26, 2015), *available at* <https://www.ice.gov/news/releases/ice-uk-national-crime-agency-enhance-joint-efforts-combat-child-exploitation>; ICE News Release (Feb.
28 9, 2016), *available at* <https://www.ice.gov/news/releases/ice-authorized-create-angel-watch-center-expand-child-protection-efforts-following>.

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

14 **a. Notification Provisions**

15 The IML builds on the existing notification programs operated by USMS and ICE HSI in
16 order to provide advance notice to other countries when registered sex offenders in the United
17 States intend to travel internationally, while also encouraging reciprocal arrangements with
18 foreign governments to receive notifications from those countries when sex offenders seek to
19 travel to the United States. *Id.* Preamble & § 7. In regard to notifications to foreign destination
20 countries, the IML establishes an Angel Watch Center within ICE HSI's Child Exploitation
21 Investigations Unit. *Id.* § 4(a). Essentially, the Angel Watch Center will carry on the activities of
22 Operation Angel Watch. Lechleitner Decl. ¶ 14. Among other things, where the Center has
23 identified internationally traveling individuals convicted of sexual offenses against minors and
24 where certain conditions are satisfied, the IML provides that the Center "may transmit relevant
25

26 ⁴ The need for greater information sharing among agencies, particularly those involved in the
27 USMS notification program and Operation Angel Watch, was highlighted in a 2013 GAO report.
28 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>.

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

2 The IML also continues USMS’s notification program, *see* Mayo Decl. ¶ 10, providing
3 that USMS, through its National Sex Offender Targeting Center, “may—transmit notification of
4 international travel of a sex offender to the destination country of the sex offender, including to
5 the visa-issuing agent or agents” of the destination country, IML § 5(a)(1), and also may “share
6 information relating to traveling sex offenders with other Federal, State, local, and foreign
7 agencies and entities, as appropriate,” *id.* § 5(a)(2). Such notifications may be transmitted
8 “through such means as are determined appropriate” by USMS, “including through the
9 INTERPOL notification system and through Federal Bureau of Investigation Legal attaches.” *Id.*
10 § 5(e). In addition, USMS may also “receive incoming notifications concerning individuals
11 seeking to enter the United States who have committed offenses of a sexual nature.” *Id.*
12 § 5(a)(3). Any such incoming notification must be provided immediately to DHS. *Id.*

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

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

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

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

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

6 **b. Passport Identifier Provisions**

7 Finally, the IML attempts to close a loophole in the notification procedures, whereby an
8 offender might seemingly comply with IML requirements by providing notice of travel to one
9 country, and might appear on a flight manifest as traveling to that country, but might then travel
10 from that first destination country to his actual destination somewhere else without detection by
11 U.S. authorities. Focusing specifically on registered sex offenders whose offenses involved a
12 child victim, the IML prevents such offenders "from thwarting I[ML] notification procedures by
13 country hopping to an alternative destination not previously disclosed," by directing the State
14 Department to "develop a passport identifier" that would allow such individuals to be identified
15 once they arrive at their true destination. 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016)
16 (statement of Rep. Smith). First, the IML tasks the Angel Watch Center with "provid[ing] a
17 written determination to the Department of State regarding the status of an individual as a
18 covered sex offender . . . when appropriate." IML § 4(e)(5). Only individuals who have been
19 convicted of a sex offense against a minor and are "currently required to register under the sex
20 offender registration program of any jurisdiction" qualify as covered sex offenders for purposes
21 of this provision. *See id.* § 8(a) (adding § 240(c)(1) to Pub. L. No. 110-457). The Secretary of
22 State is then directed not to issue a passport to individuals identified by the Angel Watch Center
23 as covered sex offenders unless the passport contains a unique identifier. *Id.* § 8(a) (adding
24 § 240(b)). The Secretary of State may also revoke a passport previously issued to such an
25 individual if it does not contain such an identifier. *Id.*

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

1 process has been successfully implemented. *See id.* §§ 8 (adding § 240(f) to Pub. L. No. 110-
 2 457), 9(a)-(b). The report to Congress, including “a description of the proposed process and a
 3 timeline and plan for implementation of that process,” as well as a description of “the resources
 4 required to effectively implement that process,” is to be submitted by May 9, 2016 (90 days after
 5 the IML’s enactment on February 8, 2016)). *Id.* § 9(b); Declaration of Jonathan M. Rolbin
 6 (“Rolbin Decl.,” attached hereto) ¶ 4.

STANDARD OF REVIEW

8 A preliminary injunction is an “extraordinary and drastic remedy” that “may only be
 9 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Munaf v. Geren*, 553
 10 U.S. 674, 689-90 (2008); *Winter v. NRDC*, 555 U.S. 7, 22 (2008). A party seeking such relief
 11 “must demonstrate (1) that it is likely to succeed on the merits, (2) that it is likely to suffer
 12 irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in its
 13 favor, and (4) that an injunction is in the public interest.” *Earth Island Inst. v. Carlton*, 626 F.3d
 14 462, 469 (9th Cir. 2010). Plaintiffs bear the burden of demonstrating that each of these four
 15 factors is met. *DISH Network Corp. v. FCC*, 653 F.3d 771, 777 (9th Cir. 2011). In addition,
 16 because preliminary injunctions are meant to ““preserve the relative positions of the parties until
 17 a trial on the merits can be held,”” *Tamara v. El Camino Hosp.*, 964 F. Supp. 2d 1077, 1081-82
 18 (N.D. Cal. 2013) (quoting *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)), requests for a
 19 mandatory injunction that would change the status quo “are subject to heightened scrutiny and
 20 should not be granted ‘unless the facts and law clearly favor the moving party,’” *id.* (quoting
 21 *Dahl v. HEM Pharms. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993)).

ARGUMENT

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

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

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

1 reaching the merits of a claim would force a court to decide the constitutionality of actions taken
2 by a coordinate Branch of the Federal Government. *Clapper v. Amnesty Int’l USA*, 133 S. Ct.
3 1138, 1147 (2013). “A plaintiff must demonstrate standing ‘for each claim he seeks to press’ and
4 for ‘each form of relief sought.’” *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir.
5 2009) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). Thus, to establish
6 standing for their claims here, Plaintiffs must identify for each an injury in fact, fairly traceable
7 to the distinct IML provisions that they challenge, and redressable by a favorable ruling, that is
8 “concrete, particularized, and actual or imminent.” *Id.* Because Plaintiffs seek only injunctive
9 and declaratory relief, they must identify an “imminent prospect of future injury.” *Ervine v.*
10 *Desert View Regional Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014). Such a future
11 injury “must be certainly impending to constitute injury in fact,” whereas “allegations of possible
12 future injury are not sufficient.” *Clapper*, 133 S. Ct. at 1147.

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

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

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

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

18 The Court also lacks jurisdiction over Plaintiffs' challenge to the IML's passport
19 identifier provision on ripeness grounds because, as the State Department's declarant has
20 explained, the provision will not go into effect until late 2016 at the earliest. Rolbin Decl. ¶ 6.
21 The ripeness doctrine avoids "premature adjudication" of disputes, *Scott v. Pasadena Unif. Sch.*
22 *Dist.*, 306 F.3d 646, 662 (9th Cir. 2002), and "prevents courts from deciding abstract issues that
23 have not yet had a concrete impact on the parties," *Vieux v. E. Bay Reg'l Park Dist.*, 906 F.2d
24 1330, 1344 (9th Cir. 1990). In order to determine whether a claim is ripe, courts focus on "(1) the
25 fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court
26 consideration." *Nat'l Park Hospitality Assn. v. Dep't of Interior*, 538 U.S. 803, 808 (2003);
27 *accord Acura of Bellevue v. Reich*, 90 F.3d 1403, 1408 (9th Cir. 1996). As explained above,
28 before the IML's passport identifier provision goes into effect, the Departments of Homeland
Security, State, and Justice must develop a process for its implementation, must submit this

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

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

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

23 The Supreme Court has held that “[w]hen . . . the government sets the overall message to
24 be communicated and approves every word that is disseminated, it is government speech.” *Ariz.*
25 *Life Coal. Inc. v. Stanton*, 515 F.3d 956, 963 (9th Cir. 2008) (quoting *Johanns v. Livestock Mktg.*
26 *Ass’n*, 544 U.S. 550, 561-62 (2005)). Recently applying this reasoning in *Walker v. Texas Div.*,
27 135 S. Ct. 2239 (2015), the Court held that specialty license plates were “essentially, government
28 IDs,” and that the messages they contained thus qualified as government speech. *Id.* at 2249

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

5 Here, because the Government controls every aspect of the issuance and appearance of
6 U.S. passports, no lengthy analysis is required to conclude that the information contained in a
7 U.S. passport is government speech.⁵ A U.S. passport is a government-issued document. *See* 22
8 U.S.C. § 211a. Indeed, passports remain United States property even when held by individuals.
9 22 C.F.R. § 51.7(a) (“A passport at all times remains the property of the United States and must
10 be returned to the U.S. Government upon demand.”); *id.* § 51.66 (“The bearer of a passport that
11 is revoked must surrender it to the Department or its authorized representative on demand.”).
12 Individuals have absolutely no editorial control over the information contained in a passport. *See*
13 *id.* § 51.9 (“Except for the convenience of the U.S. Government, no passport may be amended.”);
14 *see also* 18 U.S.C. § 1543 (imposing criminal penalties on those who “mutilate[]” or “alter[] any
15 passport”). Because the passport identifier required under the IML is government speech, cases
16 cited by Plaintiffs such as *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988), involving
17 compelled *private* speech, do not apply. *See id.* at 795 (holding that required disclosures by
18 professional fundraisers were a “content-based regulation of speech” because “[m]andating
19 speech that a speaker would not otherwise make necessarily alters the content of the speech”).

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

26
27 ⁵ In light of the Supreme Court’s decision in *Walker*, the Ninth Circuit’s reliance in *Ariz. Life*
28 *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.

1 which Plaintiff chiefly relies. There, the Supreme Court considered “whether the State may
2 constitutionally require an individual to participate in the dissemination of an ideological
3 message”—the state motto “Live Free or Die,” appearing on the state license plate—“by
4 displaying it on his private property”—the individual’s personal vehicle—“in a manner and for
5 the express purpose that it be observed and read by the public.” *Id.* at 713. In holding that the
6 state could not compel such participation, the Court emphasized that the license plate motto
7 essentially “force[d] an individual, as part of his daily life indeed constantly while his
8 automobile is in public view to be an instrument for fostering public adherence to an ideological
9 point of view he finds unacceptable,” and that the state “in effect require[d]” individuals to “use
10 their private property as a ‘mobile billboard’ for the State’s ideological message or suffer a
11 penalty.” *Id.* at 715. The Court further determined that there was no “countervailing interest . . .
12 sufficiently compelling to justify” the requirement. *Id.* at 716. In *Gralike v. Cooke*, 191 F.3d 911
13 (8th Cir. 1999), another case cited by Plaintiffs, the court invalidated a state law providing for
14 labels on election ballots identifying candidates as opposed to term limits because “[o]nce the
15 label is on the ballot, it ascribes a point of view to the labeled candidate.” *Id.* at 919.⁶

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

24 Here, Plaintiffs’ First Amendment interests are not implicated by government speech in a
25 U.S. passport because no one could reasonably attribute factual information contained in a U.S.
26 passport to the passport holder, nor assume that the passport holder necessarily endorsed such a
27

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

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

15 Even if First Amendment interests were implicated, the Government has a compelling
16 interest supporting the IML's passport identifier provision. There can be no dispute that
17 protecting children from sexual exploitation qualifies as a compelling interest. *New York v.*
18 *Ferber*, 458 U.S. 747, 757 (1982) (“The prevention of sexual exploitation and abuse of children
19 constitutes a government objective of surpassing importance.”); *Ashcroft v. Free Speech Coal.*,
20 535 U.S. 234, 244 (2002) (“The sexual abuse of a child is a most serious crime and an act
21 repugnant to the moral instincts of a decent people”). Congress has found that certain U.S.
22 passport holders travel to other countries to exploit children through sex tourism and sex
23 trafficking. IML § 2(4). In response to this finding, Congress established a scheme of notifying
24 such countries concerning travel by a registered sex offender whose offense involved a child
25 victim. *Id.* § 4(e). As explained by Representative Smith, the purpose of the passport identifier
26 provision is to prevent registered child sex offenders from evading this notification scheme by
27 first traveling to a country without a significant child sex tourism industry and traveling from
28 there to the actual destination country. 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016) (statement

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

5 **D. The IML’s Notification Provisions Do Not Violate Plaintiffs’ Right to Travel**
6 **Internationally**

7 Plaintiffs are also unlikely to succeed on the merits of their claim that the IML’s
8 notification provisions violate a Fifth Amendment due process right to international travel. In a
9 substantive due process analysis, absent differential treatment of a “protected class” or
10 implication of a “fundamental right,” a challenged law must be upheld as long as it is “rationally
11 related to a legitimate government goal.” *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d
12 1189, 1191 (9th Cir. 2013). Rational basis review applies here. Plaintiffs refer to “the right to
13 travel internationally” as a “fundamental right.” Pl. Br. at 18. It should be noted as an initial
14 matter that the IML’s notification provisions do not prohibit international travel. As is clear from
15 the agencies’ descriptions of how the notifications currently operate, even where a notification is
16 made, under either the USMS’s notification program or Operation Angel Watch, the United
17 States does not provide any recommendation to the destination country regarding what action to
18 take in light of the provided information. Lechleitner Decl. ¶ 13; Mayo Decl. ¶ 6. Moreover,
19 information about registered sex offenders is publicly available on the Internet, including on the
20 National Sex Offender Public Website. While the notifications no doubt make it easier for
21 destination countries to come across this information, anyone who chose to look could likely find
22 out about a traveler’s sex offender status and registration from public sources on the Internet.

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

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

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

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

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

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

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

1 offenders' convictions for past crimes and the Government's interests behind providing
2 international notifications, as described above. While Plaintiffs appear to disagree with
3 Congress's assessment that registered sex offenders pose a risk of reoffending, they have not
4 shown that the assessment is purely arbitrary and they therefore cannot succeed in demonstrating
5 that the notification provisions are invalid on that basis. *See FCC. v. Beach Commcn's*, 508 U.S.
6 307, 313–14 (1993) (“A legislative choice is not subject to courtroom fact-finding and may be
7 based on rational speculation unsupported by evidence or empirical data.”); *Fields v. Legacy*
8 *Health Sys.* 413 F.3d 943, 955 (9th Cir. 2005) (“In essence, a legislative classification subject to
9 rational basis scrutiny must be wholly irrational to violate equal protection.”); *cf. United States*
10 *v. Pollard*, 326 F.3d 397, 408-09 (3d Cir. 2003) (upholding a requirement that those traveling
11 from Virgin Islands undergo questioning because plaintiff could not show there was no
12 conceivable basis for this distinction).⁷

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

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

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

4 **II. PLAINTIFFS HAVE NOT SHOWN IRREPARABLE HARM**

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

18 In regard to the passport identifier provision, Plaintiffs do assert a risk of physical injury,
19 should they travel with a passport containing the identifier described in IML § 8. Pl. Br. at 23.
20 However, there is no immediate prospect that any of the Plaintiffs will engage in such travel. As
21 explained above, the passport identifier provision will not go into effect until a number of
22 prerequisite steps have occurred. Rolbin Decl. ¶¶ 4-6. Until the provision is in effect, no passport
23 will be issued containing an identifier.⁸ Moreover, the Declaration of Charlene Steen submitted
24 by Plaintiffs does not establish a risk of physical injury caused by passport identifiers. *See* ECF
25 No. 15. Nothing in that declaration suggests that anyone who would normally be in a position to
26 see someone’s passport—for example, border officials, law enforcement, or hotel registration
27

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

1 clerks—would be likely to injure the passport holder based on such an identifier. Plaintiffs’
2 allegations are speculative compared to the demonstrations of a risk of physical injury that courts
3 have found to establish irreparable harm. *See, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1164,
4 1192 (N.D. Cal.) (transgender inmate demonstrated ongoing risk to physical and psychological
5 health due to current policy against providing sex reassignment surgery), *appeal dismissed and*
6 *remanded*, 802 F.3d 1090 (9th Cir. 2015); *Save Our Summers v. Wash. State Dep’t of Ecology*,
7 132 F. Supp. 2d 896, 905-06 (E.D. Wash. 1999) (risk of physical injury to children with
8 respiratory ailments from continued open burning of wheat stubble was sufficient to show
9 irreparable harm).

10 **III. THE BALANCE OF HARDSHIPS WEIGHS AGAINST AN INJUNCTION**

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

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

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

6 **IV. THE PUBLIC INTEREST WEIGHS AGAINST AN INJUNCTION**

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

23 **CONCLUSION**

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

25 Dated: March 4, 2016

Respectfully submitted,

26
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28 BRIAN J. STRETCH

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