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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.: 4:16-CV-654-PJH

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[Filed concurrently with:
(1) Supplemental Declaration of John Doe #3;
(2) Declaration of John Doe #5;
(3) Declaration of John Doe #6; and
(4) Declaration of John Doe #7]

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

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Plaintiffs respectfully submit this reply memorandum in support of their Motion (Dkt. #14) to enjoin implementation of Sections 4(e), 5, 6, and 8 of Public Law No. 114-119 (the "IML").

I. INTRODUCTION

Plaintiffs agree with Defendants that the prevention of international child sex trafficking and child sex tourism are important government interests. Plaintiffs also agree that Congress possesses the requisite authority to legislate on the subject of these heinous crimes. Plaintiffs disagree, however, with the methods selected by Congress to address them and contend that those methods violate several preeminent provisions of the United States Constitution.

In their opposition to Plaintiffs' Motion, Defendants failed to address many of the issues raised by Plaintiffs and instead attempted to obfuscate and sidestep those issues by uncritically assuming the constitutionality of any law to which a public safety rational can be ascribed. In so doing, Defendants fail to recognize that, for the purposes of this constitutional challenge to the IML, the question is not whether Congress has a generalized interest in stopping child sex trafficking, but whether the *particular means* of pursuing that interest through the IML are constitutionally permissible and appropriately tailored.

They manifestly are not. As detailed in the Motion, the IML reduces public safety by failing to hinder or expose those whose international travel actually involves child sex trafficking or tourism. Indeed, according to the leading organization in the field of sex offender research:

> [T]he IML *fails to identify* those who actually engage in human sex trafficking because those individuals are more likely to be motivated by financial incentives (rather than sexual deviance) and are more likely to be involved in organized criminal activities than they are to be registered as "sex offenders."

(Declaration of the ATSA ¶29, filed concurrently with the Motion (emphasis added).)

Defendants failed to refute the voluminous evidence that the IML will, in the vast majority of cases, disrupt, prevent, or render unsafe the legitimate travel of hundreds of thousands of individuals. This includes essential travel for family emergencies, for visits to spouses and children, and for critical business purposes. Indeed, since the IML was signed into law on February 8, 2016, numerous individuals have contacted Plaintiffs' counsel to detail the particular ways in which the IML, if implemented, will endanger their lives and livelihoods, among other grave consequences.

For example, Plaintiff John Doe #7 is a dual citizen of the U.S. and Iran, who must travel to Iran to visit his elderly father and to claim the property that he will inherit. (See Declaration of John Doe #7 ("Doe #7 Decl.") ¶¶1-2, 11-13, filed concurrently herewith.) Because all sex offenses are punishable by death in Iran, Plaintiff John Doe #7 will be killed if the Iranian government or the public learns of his sex offense due to either U.S. government notification or a "conspicuous" identifier on his passport. (See id. ¶¶ 14-15 & Ex. A.)

Plaintiff John Doe #5, an airline pilot, flies cargo "as needed" to different countries with little or no advanced notice of the countries to which he is flying. (Declaration of John Doe #5 ¶¶ 1-12, filed concurrently herewith.) For John Doe #5, the IML will render it impossible for him to work and support his family because he cannot satisfy the IML's requirement that his travel destinations be disclosed to the government at least 21 days in advance. (Id. ¶11.)

Plaintiff John Doe #6 is a United States resident whose wife resides in Taiwan. (Declaration of John Doe #6 ¶¶4-11, filed concurrently herewith.) Despite eight prior visits to Taiwan since his marriage, John Doe #6 was summarily denied entry and deported from Taiwan in June 2013 after Defendants sent information about his offense, which involved no physical contact with any victim. (Id. ¶¶8-12.) John Doe #6 has been unable to visit his wife since 2013 and remains banned from Taiwan with no hope of sustaining his marriage because of Defendants' notifications. (Id.)

Plaintiffs' stories[1] represent a small sample of a myriad of injuries certain to be inflicted upon those who travel internationally, as well as upon those who decline to travel for fear of the stealth and uncertain application of this law. For the reasons set forth below, Plaintiffs respectfully submit that a preliminary injunction is necessary in this case to maintain the status quo and to forestall the IML's foreseeable irreparable injuries while Plaintiffs claims are adjudicated.

II. THIS IS NO NEXUS BETWEEN REGISTRATION AND SEX TRAFFICKING

Defendants offer citations from only three sources to substantiate their claim that the IML is rationally related to the government's interest in combating international child sex trafficking. None of these references provides even a scintilla of evidence that the IML will achieve its purported

[1] Pursuant to F.R.C.P. 15(a)(1)(A), Plaintiffs filed their First Amended Complaint on March 9, 2016 naming three additional plaintiff whose declarations are cited herein. (See Dkt. #31.)

goals, and none was considered by Congress when the IML was passed. In addition, none of the studies involved the general population of the sex offender registries (to which the IML applies), and none is remotely related to international sex trafficking. The citations are:

(1) General legislative "findings" that "sex offenders [are] a particularly apt class of offenders for registration," which are exemplified by the oft-quoted opinion in McKune v. Lile. (See Oppo. at 3:18-24.) The statistics cited in McKune (a relatively rare case about rape at gunpoint) have been analyzed and debunked in recent scholarship addressing the pervasive misunderstanding in society and within the judiciary that those convicted of sex offenses suffer high re-offense rates. (See Motion at 7-10 & n. 20, citing Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 CONSTITUTIONAL COMMENTARY 495, 497-500 (2016).)[2] Such boilerplate "legislative findings" merely parrot myths regarding sex offender recidivism and pass as evidence despite voluminous empirical research establishing the opposite. (See Ellman, at 508 ("The Supreme Court['s] endorsement . . . . has transformed random opinions by self-interested nonexperts into definitive studies offered to justify law and policy, while real studies by real scientists go unnoticed."). See also ATSA Decl. ¶¶ 13-20, 25, 34-35 (noting reliance upon "moral panic" and "statistically improbable crimes" in sex offender legislation.)

(2) Citations to H.R. No. 109-218 (2005), which supposedly confirms "the statistical likelihood of re-arrest for similar crimes," and that "offenders had significantly more victims than were reported or known to law enforcement." (Oppo. at 3:24-4:2.)[3] Significantly, H.R. No. 109-218 was issued in 2005 in connection with SORNA and the establishment of sex offender registries, not child sex trafficking or the IML, for which no study exists. The source of the Report's conclusions is a brief 2001 U.S. Department of Justice survey[4] of vaguely described studies concerning the "hypothesis" of underreported re-offense rates (the label is the DOJ's). These studies exclusively examined narrow populations of individuals imprisoned for serious contact offenses, which do not represent the general population of registries in terms of both the offenses

[2] *Available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616429.

[3] The relevant page from H.R. 109-218 is available at http://thomas.loc.gov/cgi-bin/cpquery/2?&sid=cp109Jua3T&refer=&r_n=hr218p1.109&db_id=109&item=2&&sid=cp109Jua3T&r_n=hr218p1.109&dbname=cp109&hd_count=2&item=2&&sel=TOC_97307&

[4] Id. at n.6, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rsorp94.pdf.

committed and the fact that Registrants are necessarily not incarcerated, and in most cases committed their offense years in the past. Also, the Report's claims regarding unreported victims are based exclusively on "estimations" derived from imprecise polygraph readings of high-risk, then-incarcerated offenders. Cf. U.S. v. Scheffer, 523 U.S. 303, 309 (1998) ("[T]he scientific community remains extremely polarized about the reliability of polygraph techniques.")

(3) Finally, Defendants state that "Congress has received information indicating that U.S. persons are continuing to engage in child sex tourism." (Oppo. at 7:23-8:2.) The citation is to H.R. 107-525 (2002), which contains generalized statements regarding the need to address sex tourism, without presenting empirical evidence. It is important to note that this Report *makes no representation that either U.S. passport holders or Registrants have traveled abroad to commit sex offenses, a fact recently confirmed by the United States Department of State*. (See Motion at 10.)

In sum, Defendants failed to cite any evidence that the IML will advance the government's important interest of protecting children from international child sex trafficking. Indeed, Defendants' citations reinforced the fact that Congress passed the IML without any hearings or any other factual basis for its provisions beyond their unsupported assumptions that the class of individuals labeled as "sex offenders" has a uniformly high rate of re-offense. It should be noted that, while sex trafficking is a serious matter, the emotional intensity surrounding this issue increases the risk that the government's efforts to combat it will be imprecise, rushed, and as the Sixth Circuit recently found in one high-profile case, apt to steamroll constitutional rights on a wide scale based upon inaccurate beliefs regarding sex trafficking and those involved in it. See United States v. Fahra, No. 13-5122, 2016 U.S. App. LEXIS 4174, at *8-9, *10-11, *37-38 (6th Cir. Mar. 2, 2016) (affirming District Court's judgment of acquittal in alleged sex trafficking conspiracy involving 30 defendants for lack of evidence where Circuit Court noted its "acute concern, based on our painstaking review of the record, that this story of sex trafficking and prostitution may be fictitious and the prosecution's two primary witnesses [] unworthy of belief.").[5]

[5] See Elizabeth Brown, *The Biggest Sex-Trafficking Bust in FBI History Was Totally Bogus*, Reason.com, Mar. 42016, http://reason.com/blog/2016/03/04/the-somali-sex-slave-ring-that-wasnt.

III. THE IML'S NOTIFICATION PROVISION IS IRRATIONALLY OVERBROAD

On the dispositive issue of whether the Notification Provision of the IML is rationally related to the government's interest, Plaintiffs' citations and evidence demonstrate a likelihood of success on the merits, while Defendants merely confuse the record and offer conclusory arguments.

A. The Existing "Angel Watch" Program is Irrelevant to Plaintiffs' Motion

In their opposition, Defendants attempted to portray the IML as a benign continuation of the existing "Angel Watch" program, which has operated secretly since 2007 in the absence of constitutional review. Defendants' reliance upon that program is misleading for several reasons. First, Plaintiffs are not challenging the secret program, but instead are challenging separate legislation that (in Defendants' words) "builds upon," "strengthens," and "closes a loophole" in that program. (Oppo. at 9:1-4, 9:15.) Defendants do not cite nor could they cite authority for the proposition that the existence of a secret program somehow immunizes from judicial review a newly enacted and admittedly more expansive statute.

Moreover, Defendants' characterization of the existing Angel Watch program is inaccurate. Defendants have alleged that the Angel Watch program "do[es] not make notifications regarding persons not currently subject to registration requirements." (Oppo. at 10:19-21.) This statement is patently false. As set forth in his concurrently filed supplemental Declaration, Defendants notified a foreign government that Plaintiff John Doe #3 was traveling to that country. He was summarily deported *despite the fact that he had been previously removed from California's sex offender registry*. (Doe #3 Decl. ¶¶ 3, 11-12.) Defendants' erroneous representation regarding a program that the IML admittedly "builds on" underscores the need for judicial review of the IML's Notification Provision.

B. Defendants Effectively Admitted IML is Facially Overbroad

Defendants effectively admitted that the IML is facially overbroad by vowing to apply the statute more narrowly than it is written. As Defendants have conceded, the Notification Provision of the IML applies to anyone convicted of a sex offense against a minor, even those exempted from state registration requirements, because they have been deemed to be rehabilitated. (Oppo. at 10:13-18.) With this concession, Defendants attempted to side-step the IML's plain language by

promising that, contrary to the law's plain language, their application of the law in the future will somehow be limited to those individuals "whose travel plans, along with other factors, suggest an intent to engage in child sex tourism." (See Oppo. at 1:17-21. See also id. at 9:24, stating same, but without identifying factors.)

As a preliminary matter, it is difficult to imagine any set of criteria that could "suggest," with any degree of accuracy, "intent" to engage in a crime. Cf. Robinson v. California, 370 U.S. 660, 666 (1962). (Constitution forbids defining offenses based of "status" or mere propensity.) In addition, Defendants failed to present authority for the proposition that a facially unconstitutional law may evade judicial review because a small handful of federal government officials sign declarations in which they promise to apply the law in some other way. This is particularly true where such promises fail to articulate any criteria by which that discretion will be exercised, and where Defendants *concede that they and other officials will retain the discretion to issue notifications regarding individuals who are not listed on the registry*. (See Oppo. at 22:13-20 (Notifications regarding "individuals not registered as a sex offender in any jurisdiction . . . serve the same important government interest.").) Indeed, these undisclosed criteria are presumably the basis for Defendants' above-referenced erroneous representation that the existing Angel Watch program issues no notifications regarding individuals currently exempt from state registries. In any case, Defendants' argument is tantamount to an admission that the IML is overbroad on its face because it includes hundreds of thousands of individuals who present no risk of engaging in a future sex offense.[6]

C. The Due Process Cases Cited by Defendants are Not Applicable

The cases cited by Defendants in support of the IML under the Due Process right to international travel are distinguishable, and one of those cases actually supports Plaintiffs. First, Freedom to Travel Campaign v. Newcomb is inapplicable to this case because that case concerns whether the government's interest in preventing money laundering justified its ban on travel to

[6] Additionally, the fact that the IML will emblazon a "conspicuous unique identifier" on every Registrant's passport without regard to that Registrant's risk of engaging in international child sex trafficking (or their risk of dodging the IML's notification scheme pursuant to the highly unlikely "loophole" scenario identified by Defendants) undermines Defendants' claim that the IML will be applied in a surgically precise fashion because the identifier is mandatory for all Registrants.

Cuba. 82 F.3d 1431, 1438-39 (9th Cir. 1996). Newcomb does not, however, consider whether the travel ban was related to that interest, which is a central issue in this case.

Second, Litmon v. Harris actually supports Plaintiffs because that case addresses the question of whether rational basis review supported special registration requirements for those adjudicated to be "sexually violent predators" ("SVPs"). 768 F.3d 1237, 1241 (9th Cir. 2014). SVPs are a very small subset of those convicted of sex offenses. Specifically, SVPs have been convicted of a "sexually *violent* offense," have "a diagnosed mental disorder," *and* have been deemed "likely [to again] engage in sexually violent criminal behavior." Id. at 1243 (quoting Cal. Welf. & Inst. Code § 6600(a)(1)). The Litmon Court ruled that SVPs are "not similarly situated" to other sex offenders (whose registration requirements are less onerous) due to an SVP's demonstrated "criminal history of sexual violence and their higher risk of recidivism." Id. at 1244.

The evidence-based approach upheld in Litmon precisely highlights the infirmities of the IML's notification scheme. That is, in enacting the IML, Congress made no attempt to identify those Registrants whose prior offense indicates a risk of any future re-offense, much less a risk of engaging in child sex tourism, despite the fact that such data is readily available from various state and federal government agencies. Defendants offered no response to this fact, other than to suggest that Defendants may, in their discretion, opt not to enforce the law as written.[7]

D. Defendants Failed to Address or Distinguish Cases Cited by Plaintiffs

Defendants also failed to distinguish or even to respond to the Due Process cases cited by Plaintiffs. Contrary to Defendants' assertion, Aptheker v. Secretary of State is not a case about an infringement of political rights, but is instead about the circumstances under which Congress may burden the international right to travel. See 378 U.S. 500, 503-04 n. 4 (Declining to review right-of-

[7] The remaining cases cited by the government concern economic legislation and other matters which have historically received the most deference from courts. See FCC v. Beach Commcn's, 508 U.S. 307 (1993) (economic legislation); Fields v. Legacy Health Sys., 413 F.3d 943 (9th Cir. 1995) (statutes of limitation); U.S. v. Pollard, 326 F.3d 379 (3d Cir. 2003) (equal protection case not alleging interference with a constitutional right). This is opposed to judicial review of legislation impacting the constitutional rights of socially disfavored groups, which receives more exacting scrutiny. Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O'Connor, J., concurring). Conspicuously, the Government fails to respond to Plaintiffs' cases applying rational basis review to strike down laws like the IML that burden a large class of socially disfavored individuals in ways that will not achieve the government's purported interest. (See Motion at 17-19 (citing rational basis cases).)

association claim because "[o]ur disposition of this case [under the right to travel] makes it unnecessary to review these contentions."). As Defendants acknowledge, the Court used rational basis review to strike down a law that infringed the right to international travel based on a "tenuous relationship" between a traveler's "organizational membership" and activity supposedly threatened by that membership. (Oppo. at 21:21-26, citing Aptheker, 378 U.S. at 514.) This is precisely what the IML does when it assumes that "bare membership" in the category labeled "sex offender" bespeaks an equal and high risk of involvement in the relatively rare crime of child sex trafficking.

Defendants also fail to address a recent decision by the California Supreme Court, In re Taylor, which is applicable to the facts in this case. In Taylor, the Court employed rational basis review to strike down a blanket restriction forbidding all individuals on parole for a sex offense from living within 2,000 feet of a school or park. 60 Cal 4th 1019 (2015). The Court held that Due Process forbids the imposition of such injurious restrictions because the law did not increase public safety or account for the parolee's individual risk factors. Id. at 1042. The Taylor Court's ruling applied even though the individuals subject to the restrictions were parolees who enjoy fewer constitutional rights than do non-parolees, *as are the vast majority of Registrants*. See id. at 1038.

E. Defendants Mischaracterized Plaintiffs' Due Process Arguments

Finally, rather than respond to Plaintiffs' proffered evidence and testimony on their Due Process claim, including but not limited to ATSA's Declaration,[8] Defendants dismissively concluded that "Plaintiffs simply disagree with the premise underlying sex offender registration requirements." (Oppo. at 22 n.7.) This bald assertion is false. First, Plaintiffs are not challenging registration requirements or sex offender registries which, unlike the IML, distinguish among the various risks posed by individuals on those registries. Rather, Plaintiffs challenge the *equivalence* of an individual's mere presence on a registry with a risk of engaging in a rare crime when no rational basis exists for such equivalence. Second, Plaintiffs do not "simply disagree" with the

[8] ATSA is the preeminent organization in the field of sex offender research and treatment. ATSA's Declaration explains in detail the current empirical research regarding the wide variation of risk of re-offense within the sex offender registries. The Declaration also explains how the IML irrationally ignores this data in favor of "misconceptions" that will impose "enormously disproportionate" costs on society, as well as the tendency of such legislation to "increase risk of re-offense and decrease public safety." (ATSA Decl. ¶¶1, 8-12 & Ex. A, 13-23, 24-25.)

IML's premise, but present voluminous evidence of the IML's irrationality, *including the declaration testimony of leading experts in the field of sex offender research and treatment who oppose this law*. Defendants offered no response to this testimony or evidence, but instead invoked the federal government's interest in combating sex trafficking and tourism, which is neither contested nor sufficient to curtail constitutional rights to the degree threatened by the IML.

IV. THE IML'S PASSPORT IDENTIFIER PROVISION COMPELS SPEECH NOTWITHSTADING THE GOVERNMENT SPEECH DOCTRINE

Plaintiffs repeat their claim that the Passport Identifier Provision of the IML compels speech in violation of the First Amendment. (See Motion at 2, 4, 11-16.) Defendants' response to this claim misstated the compelled speech doctrine, relied on the doctrine of government speech which is irrelevant to this motion, and failed to address and distinguish numerous cases cited by Plaintiffs.

A. The Government Speech Doctrine is Irrelevant

In this case, the IML mandates the placement of a "conspicuous unique identifier" on a Covered Individual's passport for the purpose of communicating that the individual is a sex offender who has either engaged in or is likely to engage in child sex trafficking. Plaintiffs do not contest that this message is government speech. Rather, the issue is whether the IML compels the individual to communicate that government speech to the public by displaying it on his passport.

The primary case cited by Defendants, Walker v. Texas Sons of Confederate Veterans, is inapplicable to Plaintiffs' claim because Walker is a case about *viewpoint discrimination* in government speech, not *compelled* government speech. Unlike Plaintiffs in this case, the plaintiff in Walker actually sought to use government property to communicate a private message, but was not allowed to do so. 135 S.Ct. 2239, 2245, 2253 (2015). The Walker Court twice clarified 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. Id. at 2246, 2253 (citing cases).

B. Government Property is Not Immunized from Compelled Speech Claims

Defendants next argued that "Plaintiffs have not cited any decision where a court has recognized an individual's First Amendment interest in the factual content of a government-issued identification document such as a passport." (Oppo. at 18:11-14.) This statement is false.

First, Defendants are incorrect that speech appearing on government property cannot be the subject of a compelled speech claim. Gralike v. Cook, 191 F3d. 911, 918-19 (8th Cir. 1999) (Compelled speech in the form of ballot labels regarding candidates' positions on term limits "*was particularly harmful because they appear on the ballot, an official document produced by the state*." (emphasis added)). Second, Defendants do not and cannot cite authority for the proposition that government speech is immunized from compelled speech claims simply because it appears on government property, particularly where (as here) the individual is required to personally display and communicate the speech with his own hands for the purpose of identifying himself, and where the individual rather than the government will bear all consequences of that speech. Cf. Ariz. Life Coalition, Inc. v. Stanton, 515 F.3d 956, 968 (9th Cir. 2008) (Messages on license plates are private speech, in part because the driver bears the "ultimate responsibility for the content of the speech.").

The 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. PG&E v. Pub. Utilities Comm'n, 475 U.S. 1, 18 (1986) (emphasis added). As many courts have affirmed, "[c]ompelled Speech is particularly suspect because . . . . [l]isteners may have trouble discerning whether the message is the state's, not the speakers, *especially where the 'speaker [is] intimately connected with the communication advanced*.'" Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014) (emphasis added; quotation omitted). By design, information on a passport is attributed to the passport holder rather than to the government because it is about the passport holder. The passport holder is thereby converted into a mouthpiece for whatever government message appears on his passport. Cf. Wooley, 430 U.S. at 715 (Compelled display of government motto on private automobile converts individual into government's "mouthpiece."). To the extent that there are no cases directly addressing this issue with respect to passports, it is because the affixation of conspicuous unique identifiers to the passports of United States citizens is without historical precedent – a critical factor in this case which Defendants failed to acknowledge.[9]

[9] As to Defendants' argument that the Passport Identifier Provision of the IML merely communicates "factual content," Plaintiffs' Motion addresses this erroneous characterization at pages 12-13. See R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1216-17 (D.C. Cir. 2012) (Cigarette warnings depicting health risks "cannot rationally be viewed as pure attempts to convey information to consumers. They are unabashed attempts to evoke emotion . . . and to browbeat

C. Defendants Otherwise Misstate the Compelled Speech Doctrine

Without any citation to authority, Defendants argued that compelled speech cases are limited to situations in which there is "a possibility that the speech may nevertheless be attributed to the individual, or the individual may be deemed to endorse the message that the government seems to convey." (Oppo. at 16:20-25, 17:16-18.) This is not an accurate statement of the compelled speech doctrine . While risks of misattribution or perceived endorsement are *some of the reasons* compelled speech may violate 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 *simply remain 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 company's products would injure speaker by "requiring a 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 speaker to affix warning labels that "undermine its own economic interest."); Gralike, 191 F3d. at 918-19 (Ballot labels force candidates to "denounce" themselves.).

Critically, the *sole case* cited by Defendants on the issue of whether a conspicuous passport identifier constitutes compelled speech is ***not a compelled speech case***. That is, R.J. Reynolds v. Shewry is 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 that were *produced* by the government, *run* by the government, and that *did not involve* the company. 423 F.3d 906, 914, 920 (9th Cir. 2005). As such, the Shewry ruling addressed the narrow issue of a "nexus" between "excise taxation" and the government's power under the taxing and spending clause to fund its own speech. Id. at 914, 920-23. Shewry did not involve (as here) a private individual being forced to personally speak a government message, or the compelled speech analysis germane to that distinct claim. Id. at 914, 925. Even Defendants acknowledged that Shewry involved no claim by the

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consumers into quitting."). Defendants also assert that cases "involving compelled *private* speech" such as *Riley v. National Federation* do not apply to compelled *government* speech. The distinction is nonsensical. *Riley* involved a government's attempt to compel disclosure of information *that it desired to have disclosed*. 487 U.S .781, 785 (1988). The constitutional infirmity of compelling *any* speech it is the private party's right to refrain from speaking, regardless of the source of that information.

company that it was being forced to directly speak the government's message. (Oppo. at 17:18-23.) Shewry therefore provides no authority for Defendants' assertion that "courts have rejected [compelled speech claims]" "where there is no possibility of attribution or perceived endorsement" (see id.) because those issues were neither raised by the parties nor implicated by that decision.

A more pertinent analogy between the IML's Passport Identifier Provision and cases involving government-mandated warning labels is R.J. Reynolds, Inc. v. FDA, which unequivocally supports Plaintiffs. 696 F.3d 1205 (D.C. Cir. 2012). In R.J. Reynolds, the FDA required cigarette manufacturers to affix graphic warning labels on their cigarette packages. Id. at 1208. The purpose of the labels was both to reduce smoking rates by evoking an "emotional response" in the public, and to "communicate public health information." Id. at 1216-17. *Without addressing the issues of attribution or identity of the speaker*, the Court held that the labels unconstitutionally compelled speech because the government failed to produce evidence that labels would serve the government's interest in reducing the number of smokers or increasing public health. Id. at 1219-20. [10]

Thus, for reasons made clear in this case, the compelled speech doctrine exists to prevent private individuals – including individuals labeled as sex offenders – from having to bear a government message that they have engaged in or are likely to engage in child sex trafficking because the First Amendment protects an individual's right to avoid stigmatizing or otherwise injuring himself or herself with another's speech.

D. Defendants Made No Effort to Satisfy Strict Scrutiny

Defendants made no serious effort to justify the Passport Identifier Provision of the IML under strict scrutiny. Instead, Defendants' brief provided additional confirmation that the Passport Identifier Provision is neither narrowly tailored nor the least restrictive means by listing the various laws that directly address international child sex trafficking and tourism. (Oppo. at 7.)

[10] The D.C. Circuit later clarified the holdings of R.J. Reynolds and National Association (cited herein and in the Motion) as concerns a narrow commercial speech issue unrelated to the holdings cited above. See Am. Meat Inst. v. USDA, 760 F.3d 18, 22-23 (D.C. Cir. 2014).

V. PLAINTIFFS HAVE ESTABLISHED STANDING AND RIPENESS

A. Plaintiffs' First Amendment Claim is Ripe and Plaintiffs have Standing

Defendants argued that constitutional review of the Passport Identifier Provision of the IML is unripe because "numerous steps" must occur before the identifier is placed on passports, which may take between six to nine months to complete. Conspicuously, Defendants cited no authority holding that a delay in the implementation of a statute (particularly such a brief delay) renders a case unripe. This is because delayed implementation is categorically insufficient to render review of a statute unripe where, as here, enforcement is certain and the law's application to the plaintiffs is mandatory. Cent. Delta Water Agency v. U.S., 306 F.3d 938, 947-48 (9th Cir. 2002) (Plaintiff had standing to challenge "threatened" injury from planned agency action several months in advance where plaintiffs "raised a material question of fact . . . whether they suffer a substantial risk of harm" from scheduled agency action.). See also Lake Carriers' Ass'n v. Macmullan, 406 U.S. 498, 506-08 (1972) (delay in implementing statute does not defeat ripeness when enforcement is certain).

Separately, Plaintiffs' First Amendment claim is also ripe because it presents purely legal questions requiring no factual development. See Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1434 (9th Cir. 1996) ("Legal questions that require little factual development are likely to be ripe."). Defendants do not and cannot contest this. Indeed, the ripeness of Plaintiffs' claims is established by the Newcomb case (cited by Defendants) which held that a due process challenge to the government's ban on travel to Cuba was ripe because the plaintiffs in that case were not required to futilely apply for travel permits. Id. at 1435. See also City of Auburn v. Qwest Corp., 260 F.3d 1160, 1171 (9th Cir. 2001) (ripeness "does not require Damocles' sword to fall before we recognize the realistic danger of sustaining a direct injury"). Finally, Plaintiffs' standing is established by the certainty of injury once Passport Identifiers are affixed to passports. Cent. Delta, 306 F.3d at 948; LSO, Ltd. v. Stroh, 205 F.3d 1146, 1154-55 (9th Cir. 2000) ("[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward finding standing.").

B. Plaintiffs have Standing to Challenge the IML's Notification Provision

Defendants' allegations regarding Plaintiffs' challenge to the IML's Notification Provision misstate the record as well as Plaintiffs' travel plans and histories. Defendants first argue that no

injury will be traceable to the IML because past notifications have been issued pursuant to the Angel Watch program. This argument is nonsensical legerdemain. As stated above, Plaintiffs are not challenging the Angel Watch program that existed prior to the IML, but the IML itself, which Defendants conceded will "build upon" and "strengthen" that program, *including by establishing a totally new administrative agency responsible for issuing notifications*. By Defendants' own admission, the current Angel Watch program will cease and future notifications of international travel will be issued under the IML by a new organization. Defendants did not present nor could they present authority for the proposition that injuries inflicted by a new organization are categorically immune from judicial review because a federal government official does not currently "anticipate" (Oppo. at 13:16) that its activities will differ from those of some earlier program.

Defendants' remaining arguments on the issue of standing concern the travel plans and histories of each Plaintiff, but each incorrectly describes the record and the law. Defendants claimed that Plaintiffs John Does Nos. 1 through 3 "cite no concrete travel plans," but this is neither true nor required. Desert Outdoor Advertising v. City of Moreno Valley, 103 F.3d 814, 818 (9th Cir. 1996) (standing does not require "futile" exercises, such as engaging in conduct that is clearly within the ambit of the challenged law). Indeed, both Plaintiffs John Does. Nos. 1 and 3 "routinely" travel internationally as pled in the Complaint, as does Plaintiff John Doe #5. (See Amended Complaint ¶¶13, 15, 17; Doe #5 Decl.) Plaintiff John Doe #4 also routinely traveled internationally to visit his wife until he was twice stopped and deported pursuant to government notifications, the second of which was based on a false report by the United States that he had committed another offense. (Amended Complaint ¶16; Declaration of John Doe #4 ¶¶5, 19, filed concurrently with the Motion.) The certain application of the IML to Plaintiffs, the past erroneous issuance of notices regarding Plaintiffs John Does Nos. 3 and 4, and Plaintiffs' demonstrated need and intention to travel internationally, among many other factors described in the Amended Complaint, are sufficient to establish standing. See, e.g., LSO, 205 F.3d at 1154-55 (Standing is established by prior enforcement and failure of the government to "disavow application of the challenged provision.").

VI. PLAINTIFFS SATISFY THE ELEMENTS OF A PRELIMINARY INJUNCTION

Finally, Defendants' arguments regarding the elements of an injunction ignored the sliding scale approach employed by the Ninth Circuit, in which "serious questions going to merits" justify an injunction if the balance of equities tips sharply in the Plaintiffs' favor. (See Motion at 11 (citing cases).) Plaintiffs respectfully maintain that this standard has been satisfied in this case. As to the threat of irreparable harm, Defendants conceded that constitutional injuries constitute such harm, but then argue that no such injury will befall Plaintiffs because Defendants dispute Plaintiffs' constitutional claims. This argument is purely circular, and in any event, it is not comprehensive. Plaintiffs have alleged that irreparable harm from the IML will take the form of disrupted and destroyed family lives, the impossibility of travel necessary to sustain their livelihoods, and in the case of Plaintiff John Doe #7, a certain risk of physical injury or death when foreign government authorities and the public learn of his conviction. (Doe #7 Decl. ¶¶14-15.)

Defendants' arguments regarding balance of hardships and the public interest are likewise erroneous or inapplicable. Again, Plaintiffs have not challenged the existing Angel Watch program, and the government will suffer no hardship if the IML is enjoined because, as Defendants concede, its implementation is not yet complete and an injunction will therefore serve the purpose of F.R.C.P. 65 by maintaining the status quo. See Chalk v. U.S. District Court, 840 F.2d 701, 704 (9th Cir. 1988). Defendants' invocation of public safety rationales and general deference owed to legislative enactments are inapposite because "it is always in the public interest to prevent the violation of a party's constitutional rights." Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012).

VII. CONCLUSION

For all the reasons stated above, Plaintiffs respectfully request that the Court issue a Preliminary Injunction enjoining implementation of Sections 4(e), 5, 6, and 8 of the IML pending a trial on the merits of Plaintiffs' claims.

Dated: March 10, 2016

LAW OFFICE OF JANICE M. BELLUCCI

By: /s/ *Janice M. Bellucci*
Janice M. Bellucci
Attorney for Plaintiffs

PROOF OF SERVICE

I, the undersigned, certify and declare that I am over the age of 18; I am a resident of the County of San Luis Obispo, State of California, and not a party to the above-entitled cause. On March 11, 2016, I served a true copy of the **REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** as follows:

KATHRYN L. WYER
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, N.W.
Washington, DC 20530
kathryn.wyer@usdoj.gov

CM/ECF NOTICE OF ELECTRONIC FILING: I filed the document(s) electronically with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or other means permitted by the court rules and agreed to by the parties.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 11th day of March, 2016, in Oceano, California.

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