

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN DOE, TWO, et al.,
Plaintiffs,
v.
JOHN KERRY, et al.,
Defendants.

Case No. 16-cv-0654-PJH

**ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiffs' motion for preliminary injunction came on for hearing before this court on March 30, 2016. Plaintiffs appeared by their counsel Janice M. Bellucci, and defendants appeared by their counsel Kathryn L. Wyer. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby DENIES the motion.

BACKGROUND

This case involves a constitutional challenge to the implementation of the International Megan's Law to Prevent Child Exploitation and Other Sexual Crimes Through Advanced Notification of Traveling Sex Offenders ("IML"), Pub. L. No. 114-119, 130 Stat. 15 (2016), which was signed into law by the President on February 8, 2016.

1 Plaintiffs filed the complaint on February 9, 2016, and filed the present motion on March
2 4, 2016.¹

3 The IML was enacted to “protect children and others from sexual abuse and
4 exploitation, including sex trafficking and sex tourism.” IML, Preamble. In enacting the
5 IML, Congress noted that “[l]aw enforcement reports indicate that known child-sex
6 offenders are traveling internationally.” IML § 2(4). Congress found that “[t]he
7 commercial sexual exploitation of minors in child sex trafficking and pornography is a
8 global phenomenon,” with millions of child victims each year. Id. § 2(5).

9 Congress further observed that the registration and notification provisions of the
10 Sex Offender Registration and Notification Act (“SORNA”), enacted in 2006 as part of the
11 Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, §§ 102-155, 120 Stat.
12 587, were intended to “protect children and the public at large by establishing a
13 comprehensive national system for the registration and notification to the public and law
14 enforcement officers of convicted sex offenders.” IML § 2(3). In Nichols v. United States,
15 __ S.Ct. __, 2016 WL 1278473 (U.S. Apr. 4, 2016), the Supreme Court recognized that
16 SORNA's purpose was to “make more uniform what had remained ‘a patchwork of
17 federal and 50 individual state registration systems,’ with ‘loopholes and deficiencies’ that
18 had resulted in an estimated 100,000 sex offenders becoming ‘missing’ or ‘lost.’” Id.,
19 2016 WL 1278473 at *5 (citation omitted).

20 Thus, the IML builds on the existing notification programs operated by the United
21 States Marshals Service (“USMS”) and the Department of Homeland Security’s ICE HSI
22 in order to provide advance notice to other countries when registered sex offenders in the
23 United States intend to travel internationally, and to encourage reciprocal arrangements
24 with foreign governments to receive notifications from those countries when sex
25 offenders seek to travel to the United States. IML Preamble & § 7; see also Declaration
26 of Acting Deputy Assistant Director Patrick Lechleitner (“Lechleitner Decl.”) in opposition
27

28 ¹ Plaintiffs filed a first amended complaint on March 9, 2016, but the original complaint is
the operative complaint for purposes of the present motion.

1 to plaintiffs' motion, ¶¶ 4-7; Declaration of Eric C. Mayo ("Mayo Decl.") ¶¶ 3-5, 10.

2 In the IML, Congress criminalized the "knowin[g] fail[ure] to provide information
3 required by [SORNA] relating to intended travel in foreign commerce." IML § 6(b)(2).
4 Such information includes "anticipated dates and places of departure, arrival, or return[;]
5 carrier and flight numbers for air travel [;] destination country and address or other
6 contact information therein," et cetera. Nichols, 2016 WL 1278473 at *5 (quoting IML
7 § 6(a)(1)(B)).

8 The IML establishes an "Angel Watch Center" within ICE HSI's Child Exploitation
9 Investigations Unit, IML § 4(a), intended to carry on the activities of the former Operation
10 Angel Watch. Lechleitner Decl. ¶ 14. Among other things, where the Angel Watch
11 Center has identified internationally traveling individuals convicted of sexual offenses
12 against minors and where certain conditions are satisfied, the IML provides that the
13 Center "may transmit relevant information to the destination country about [the] sex
14 offender." IML § 4(e)(1)-(3).

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

27 The IML attempts to close a loophole in the notification procedures, whereby an
28 offender might seemingly comply with IML requirements by providing notice of travel to

1 one country, and might appear on a flight manifest as traveling to that country, but might
2 then travel from that first destination country to his actual destination somewhere else
3 without detection by U.S. authorities. The IML tasks the Angel Watch Center with
4 “provid[ing] a written determination to the Department of State regarding the status of an
5 individual as a covered sex offender . . . when appropriate.” IML § 4(e)(5). Only
6 individuals who have been convicted of a sex offense against a minor and are “currently
7 required to register under the sex offender registration program of any jurisdiction” qualify
8 as covered sex offenders for purposes of this provision. See id. § 8(c).

9 The IML prevents registered sex offenders whose offenses involved a child victim
10 from “thwarting [IML] notification procedures by country hopping to an alternative
11 destination not previously disclosed,” by directing the State Department to “develop a
12 passport identifier” that would allow such individuals to be identified once they arrive at
13 their true destination. 162 Cong. Rec. H390 (daily ed. Feb. 1, 2016) (statement of Rep.
14 Smith). The Secretary of State is directed not to issue a passport to individuals identified
15 by the Angel Watch Center as covered sex offenders unless the passport contains a
16 unique identifier. Id. § 8(b). The Secretary of State may also revoke a passport
17 previously issued to such an individual if it does not contain such an identifier. Id.

18 Plaintiffs now seek a preliminary injunction to halt enforcement of §§ 4(e), 5, 6,
19 and 8 of the IML.

20 **DISCUSSION**

21 A. Legal Standard

22 An injunction is a matter of equitable discretion and is “an extraordinary remedy
23 that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”
24 Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 22 (2008); see also Munaf v. Geren,
25 553 U.S. 674, 689-90 (2008). A preliminary injunction “should not be granted unless the
26 movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong,
27 520 U.S. 968, 972 (1997) (per curiam) (citation omitted).

28 A plaintiff seeking a preliminary injunction must establish that he is likely to

1 succeed on the merits, that he is likely to suffer irreparable harm in the absence of
2 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in
3 the public interest. Winter, 555 U.S. at 20. Alternatively, the plaintiff may demonstrate
4 that the likelihood of success is such that “serious questions going to the merits were
5 raised and that the balance of hardships tips sharply in the plaintiff’s favor,” so long as
6 the other two elements of the Winter test are met. Alliance for Wild Rockies v. Cottrell,
7 632 F.3d 1127, 1131-32 (9th Cir. 2011).

8 Showing “serious questions going to the merits” requires more than establishing
9 that “success is more likely than not,” and it requires a plaintiff to demonstrate a
10 “substantial case for relief on the merits.” Leiva-Perez v. Holder, 640 F.3d 962, 967 (9th
11 Cir. 2011). And even where success on the merits is likely or “serious questions” are
12 raised an injunction “is not a remedy which issues as of course.” Weinberger v. Romero-
13 Barcelo, 456 U.S. 305, 311 (1982).

14 B. Plaintiffs’ Motion

15 Plaintiffs argue in their motion that they are likely to succeed on the claims
16 asserted in the first, second, and third causes of action in the complaint, and that
17 because they can show likelihood of success, there is a presumption of likelihood of
18 irreparable harm.

19 In the first cause of action, plaintiffs allege that the passport identifier provision
20 unlawfully compels speech, in violation of the First Amendment. Cplt ¶¶ 52-54. In the
21 second cause of action, plaintiffs assert that by enforcing the notification and passport
22 identifier provisions of the IML against all individuals convicted of offenses involving a
23 minor without regard to the details of those offenses or the current threat posed by such
24 individuals, defendants deprive plaintiffs and other affected persons of the Fifth
25 Amendment’s right to be free from arbitrary, unreasonable, and oppressive state action
26 that bears no rational relationship to the stated goal of protecting the public. Cplt ¶¶ 55-
27 58. In the third cause of action, plaintiffs allege that the notification provision of the IML
28 operates as “an international travel blacklist” for individuals required to register as sex

1 offenders for offenses involving a minor, and that it deprives them of their liberty interests
2 under the Fifth Amendment to travel without unreasonable burdens imposed by the
3 government. Cplt ¶¶ 59-63.

4 Plaintiffs challenge two of the IML's principal provisions – the “notification”
5 provision and the “passport identifier” provision. They contend that they are likely to
6 succeed with regard to their assertion that the notification provision violates substantive
7 due process and the right to travel, and with regard to their contention that the passport
8 identifier compels speech and violates the right to due process.² The court finds that
9 plaintiffs have not established likelihood of success with regard to either the claim that the
10 notification provision is facially unconstitutional or the claim that the passport identifier
11 provision is facially unconstitutional.

12 Plaintiffs allege that the notification provisions violate substantive due process and
13 burden a fundamental right – the right to travel – and thus must be subjected to strict
14 scrutiny. However, while there may be a fundamental right to domestic travel, there is no
15 such fundamental right to international travel. See Haig v. Agee, 453 U.S. 280, 306-07
16 (1981); Freedom to Travel Campaign v. Newcomb, 82 F.3d 1431, 1438-39 (9th Cir.
17 1996).

18 Moreover, plaintiffs have failed to establish that they have standing to challenge
19 the notification provision, because they have not identified a “certainly impending” future
20 injury caused by this provision. To establish Article III standing, an injury must be
21 “concrete, particularized, and actual or imminent; fairly traceable to the challenged action;
22 and redressable by a favorable ruling.” Monsanto Co. v. Geertson Seed Farms, 561 U.S.
23 139, 149 (2010). A plaintiff’s obligation to demonstrate standing is an “essential and
24 unchanging” prerequisite to a court’s jurisdiction to consider the plaintiff’s claims. Lujan
25 v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

26 _____
27 ² The court notes, however, that at the hearing, plaintiffs’ counsel stated that “for
28 purposes of the motion only,” plaintiffs’ position is that they are likely to succeed with
regard to the second and third causes of action, but not with regard to the first cause of
action (or the other causes of action not listed here).

1 A plaintiff must establish standing for each claim asserted and for each form of
2 relief sought. Oregon v. Legal Servs. Corp., 552 F.3d 965, 969 (9th Cir. 2009). Because
3 plaintiffs in the present case seek only declaratory and injunctive relief, they must identify
4 an “imminent prospect of future injury.” Ervine v. Desert View Reg’l Med. Ctr. Holdings,
5 753 F.3d 862, 868 (9th Cir. 2014). Such a future injury “must be certainly impending to
6 constitute injury in fact,” and “allegations of possible future injury are not sufficient.”
7 Clapper v. Amnesty Int’l USA, 133 S.Ct. 1138, 1147 (2013).

8 Both the USMS and ICE HSI have had international notification provisions in place
9 for over five years, and representatives of both agencies have indicated that the agencies
10 do not anticipate that the nature of their notifications will change as a result of the IML.
11 See Lechleitner Decl. ¶ 14; Mayo Decl. ¶ 10. Moreover, the Operation Angel Watch and
12 USMS notification schemes currently in effect utilize procedures to identify only
13 registered sex offenders who travel, and do not make notifications regarding persons not
14 currently subject to registration requirements. See Lechleitner Decl. ¶ 12; Mayo Decl.
15 ¶¶ 5, 7-8.

16 Because plaintiffs are not challenging the pre-existing notification provisions, they
17 have not shown that an alleged injury resulting from implementation of the IML would be
18 redressable. Further, any injury that plaintiffs might be asserting relating to such
19 notifications would not be fairly traceable to the IML, and cannot be said to be “certainly
20 impending.” In light of these facts, the court finds that plaintiffs cannot show a likelihood
21 of success on the notification claim.

22 As for the passport identifier provision, the statutory language makes clear that no
23 such requirement is yet in effect, and that it will not take effect until after the Secretaries
24 of Homeland Security and State and the Attorney General have developed a process for
25 implementation, submitted a joint report to Congress regarding this proposed process,
26 and, finally, certified that the process has been successfully implemented. See IML
27 §§ 8(f), 9(a)-(b).

28 Defendants' declarant Jonathan M. Rolbin is the Director of Legal Affairs & Law

1 Enforcement Liaison for the Passport Services Directorate in the Bureau of Consumer
2 Affairs, U.S. Department of State. Rolbin Decl. ¶ 1. He is also the official charged with
3 responsibility for overseeing the U.S. State Department's role in the implementation of
4 the "passport identifier" provision set forth in IML § 8. Rolbin Decl. ¶ 2.

5 Mr. Rolbin notes that § 4(e)(5) of the IML indicates that the new Angel Watch
6 Center will identify the individuals to whom the passport identifier requirements would
7 apply and convey this information to the State Department. In addition, IML § 9 requires
8 that the Secretary of Homeland Security, the Secretary of State, and the Attorney
9 General develop a process to implement § 4(e)(5) and § 8 and submit a report to a
10 number of congressional committees regarding that process by 90 days after the date of
11 enactment, or May 9, 2016. The report is to contain a description of the proposed
12 process and a timeline and plan for implementation of the process, and is to identify the
13 resources required to effectively implement the process. Rolbin Decl. ¶ 4.

14 Mr. Rolbin states that as of the date of his declaration (March 2, 2016), the State
15 Department had not completed the necessary process to begin implementation of § 8,
16 and thus, no U.S. passports have received the unique identifiers required by the IML.
17 Rolbin Decl. ¶ 3. Nor, he asserts, is the State Department prepared to begin placing
18 such identifiers on U.S. passports at this time. Id. Here, based solely on the statutory
19 language, it is not clear, for example, what form the identifier will take, which citizens will
20 be required to carry a passport with the identifier, or whether the identifier will appear on
21 the face of the passport or will be readable only by a scanner. Thus, because significant
22 steps must be taken before the passport identifier can be implemented, the court finds
23 that plaintiffs' challenge is not yet ripe.

24 The ripeness doctrine avoids "premature adjudication" of disputes. See Scott v.
25 Pasadena Unif. Sch. Dist., 306 F.3d 646, 662 (9th Cir. 2002). It also "prevents courts
26 from deciding abstract issues that have not yet had a concrete impact on the parties."
27 Vieux v. E. Bay Reg'l Park Dist., 906 F.2d 1330, 1344 (9th Cir. 1990). In order to
28 determine whether a claim is ripe, courts focus on "the fitness of the issues for judicial

1 decision" and "the hardship to the parties of withholding court consideration." Nat'l Park
2 Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 808 (2003).

3 In short, the timeline and plan required to be submitted to the congressional
4 committees have not yet been completed. While the State Department has identified
5 numerous steps that it must complete before the Department begins placing the passport
6 identifier into the passports of covered sex offenders, none of those steps had been
7 completed as of the date of Mr. Rolbin's declaration. Rolbin Decl. ¶ 5. Mr. Rolbin's "best
8 estimate" is that the State Department "will not be prepared to implement the passport
9 identifier provisions[] until at least some time in the fourth quarter of calendar year 2016."
10 Rolbin Decl. ¶ 6.

11 Mr. Rolbin also indicates in his declaration that the State Department "intends to
12 publish regulations regarding the denial/revocation of a passport without a passport
13 identifier." Rolbin Decl. ¶ 5(c). At the hearing, the court asked defendants' counsel
14 whether the promulgation of regulations relating to implementation of the IML would
15 require the publishing of proposed regulations followed by a public notice and comment
16 period. Defendants' counsel was unable to provide a response.

17 The current status of the passport identifier provision – in particular, that the
18 implementation of the provision has not been settled – appears to have resulted in
19 plaintiffs being unable to articulate which acts they want the court to enjoin. In their
20 proposed order, submitted with the motion, plaintiffs requested that the court enjoin the
21 Secretary of State "from affixing any mark on a United States passport that indicates, or
22 is intended to indicate, that the passport holder has been convicted of a sex offense, has
23 engaged in child sex trafficking, or is likely to engage in child sex trafficking." This
24 request was phrased in the disjunctive.

25 However, at the hearing, plaintiffs' counsel indicated that plaintiffs would not
26 oppose the passport identifier "if it were limited to [those with] convictions for child
27 trafficking and tourism." In other words, plaintiffs do not necessarily seek to enjoin the
28 entire passport identifier provision. Plaintiffs' counsel reiterated that the purpose of the

1 IML was to address child sex trafficking, which she asserted was not what her clients
2 were convicted of and not what resulted in their being required to register as sex
3 offenders.³

4 For these reasons, the court finds that the claim regarding the passport identifier is
5 not yet ripe for resolution. The consequence for purposes of the present motion is that
6 plaintiffs cannot clearly articulate which acts they seek to have enjoined, or why.
7 Accordingly, plaintiffs fail to show a likelihood of success on the passport identifier claim.

8 **CONCLUSION**

9 In accordance with the foregoing, the court hereby DENIES plaintiffs' motion for a
10 preliminary injunction.

11
12 **IT IS SO ORDERED.**

13 Dated: April 13, 2016



PHYLLIS J. HAMILTON
United States District Judge

14
15
16
17
18
19
20
21
22
23
24
25
26
27 _____
28 ³ Based on this argument and the declarations submitted by the individual plaintiffs in
this case, the court questions whether plaintiffs are mounting a facial constitutional
challenge, as they claim, as opposed to an as-applied challenge. Nevertheless, the court
finds it unnecessary to resolve that issue at this time.