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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALLIANCE FOR CONSTITUTIONAL SEX OFFENSE LAWS, INC. et al., Plaintiffs, v. DEPARTMENT OF STATE et al., Defendants.	NO. 2:18-CV-256 JFW (PLA) **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Hearing Date: June 25, 2018 Hearing Time: 1:30 p.m. Courtroom: 7A

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INTRODUCTION

Plaintiffs in this action—an organization, the Alliance for Constitutional Sex Offense Laws, Inc. ("ACSOL"), and two anonymous individuals who claim to be registered sex offenders under California law[1]—assert claims against the Department of State and Acting Secretary John J. Sullivan (collectively, "Defendants" or "the Department") under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, in connection with the Department's 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). Plaintiffs assert three claims, all of which are subject to dismissal. First, Plaintiffs assert that the Department violated the APA's procedural requirements by amending 22 C.F.R. § 51.60—which governs denial and restriction of passports— without notice and comment. However, Plaintiffs fail to state a claim upon which relief can be granted. The challenged amendment incorporates the IML's requirement that any passport issued to covered sex offenders, who have been convicted of a sex offense against a minor, must contain a unique identifier indicating that the bearer is a covered sex offender. Because the amendment merely conforms the Department's regulation to the IML's mandate, it qualifies as an interpretive rule exempt from notice and comment procedures. Alternatively, even if the amendment is viewed as a legislative rule, notice and comment was unnecessary, within the meaning of the

[1] The two individual plaintiffs, identified as Doe #1 and Doe #2, applied for leave to proceed under pseudonym on February 1, 2018 [ECF 14], before counsel for Defendants entered an appearance in this action. The application stated that "Plaintiffs are willing to disclose their true identities to Defendants." Pls. App. at 4. However, Plaintiffs' counsel has declined to provide this information to Defendants' counsel after repeated requests and also has not served Plaintiffs' sealed filing at ECF 15 on Defendants. Defendants therefore reserve the right to raise additional grounds for dismissal based on this withheld information.

APA's "good cause" exception, given the Department's obligations under the IML.

Plaintiffs' second claim, also a notice and comment procedural challenge, should also be dismissed. The subject of this claim—a Department website update—does not qualify as a rule at all. Rather, the update simply announced that the IML's passport identifier requirement was now in effect. The details that Plaintiffs point to as constituting a rule, regarding the form of the identifier as an endorsement, reflect changes that the Department had already made to its Foreign Affairs Manual ("FAM"). Plaintiffs have not challenged those changes directly, but even if they had, the Department's use of endorsements is a matter committed to its discretion, not subject to judicial review. Moreover, the relevant FAM provision is a procedural rule instructing Department employees on endorsements and thus is exempt from notice and comment rulemaking procedures.

Plaintiffs' third claim asserts that the Department exceeded its statutory authority and abused its discretion in determining that it would not issue passport cards—a type of passport in the form of a plastic card (similar to a driver's license) valid only for land and sea crossings between the United States and Mexico, Canada, the Caribbean and Bermuda—to covered sex offenders because passport cards cannot contain the required unique identifier[2]. Plaintiffs lack standing to assert this claim. The inability to obtain a passport card does not qualify as an injury when Plaintiffs may obtain a passport book, which is valid everywhere a passport card would be valid, and indeed can be used in many circumstances—such as air travel—where a passport card cannot. Moreover, the Department's decision is well within its statutory authority to issue rules, regulations, and procedures governing the issuance of passports. Indeed, the Department's pre-existing system of endorsements already excluded passport cards. The

[2] The IML requires that the identifier be "affixed to a conspicuous location on the passport" and "indicat[e]," in a way that can be understood by foreign authorities, "that the [passport bearer] is a covered sex offender." 22 U.S.C. § 212b(c)(2).

Department's promulgation of 22 C.F.R. § 51.60(g) reflects the practical reality that passport cards, unlike passport books, do not have pages, so it is not possible to affix an endorsement to a passport card, particularly when Congress intended the unique identifier to be understood by foreign officials. The Department's rule should be upheld as reasonable, and this action should be dismissed.

BACKGROUND

1. Statutory and Regulatory Background Prior to the IML

"Sex offender registration and notification programs have been in place in the United States for more than 25 years." *Doe v. Kerry*, No. 16-cv-654, 2016 WL 5339804, at *1 (Sept. 23, 2016) (setting forth relevant legislative and regulatory history). States "began enacting registry and community-notification laws" in the early 1990's in order "to monitor the whereabouts of individuals previously convicted of sex crimes." *Nichols v. United States*, 136 S. Ct. 1113, 1116 (2016). "By May 1996, all 50 states and the District of Columbia had registration systems for released sex offenders in place." *Doe*, 2016 WL 5339804, at *1 (citing H.R. Rep. 105-256 at 6 (1997), 1997 WL 584298).

In addition, in 1994, Congress passed the Jacob Wetterling Crimes Against Children Registration Act ("Wetterling Act"), Pub. L. No. 103-322, § 170101, 108 Stat. 1796 (1994), which "conditioned federal funds on States' enacting sex-offender registry laws meeting certain minimum standards." *Nichols*, 136 S. Ct. at 1116. Among other things, the Wetterling Act "established guidelines for states to track sex offenders, particularly when they moved to another jurisdiction." *Doe*, 2016 WL 5339804, at *1 (citing Wetterling Act § 170101(b)(4)–(5); H.R. Rep. 103-392 at 6, 1993 WL 484758). In 2006, Congress enacted the Sex Offender Registration and Notification Act ("SORNA"), part of the Adam Walsh Child Protection and Safety Act. Pub. L. No. 109-248, §§ 102–155, 120 Stat. 587 (codified in part at 42 U.S.C. §§ 16901 *et seq.*). With SORNA, Congress aimed to "make more uniform what had remained 'a patchwork of federal and 50 individual

state registration systems,' with 'loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming 'missing' or 'lost.'" *Nichols*, 136 S. Ct. at 1119. SORNA thus sought to standardize the information state registries would collect, as well as the minimum periods of registration for different sex offenses. *Doe*, 2016 WL 5339804, at *2 (citing 42 U.S.C. §§ 16911, 16914). Like the Wetterling Act, SORNA required sex offenders to provide notice to state registries of any change of address. *Nichols*, 136 S. Ct. at 1116. With respect to keeping track of registrants who travel internationally, SORNA directed the Attorney General, Secretary of State, and Secretary of Homeland Security to "establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register." 42 U.S.C. § 16928.

The Attorney General's National Guidelines for Sex Offender Registration and Notification ("SORNA Guidelines" or "Guidelines") also addressed international travel. The Guidelines were largely aimed at enhancing the effectiveness of tracking registrants "as they move among jurisdictions," so that they would not "simply disappear" when they moved from one jurisdiction to another. 73 Fed. Reg. 38030, 38066 (2008). The Guidelines explained that, while "[a] sex offender who moves to a foreign country may pass beyond the reach of U.S. jurisdictions," including any jurisdiction's registration requirements, "effective tracking of such sex offenders remains a matter of concern to the United States" – not only because those offenders may return to the United States, but also because "foreign authorities may expect U.S. authorities to inform them about sex offenders coming to their jurisdictions from the United States, in return for their advising the United States about sex offenders coming to the United States from their jurisdictions." *Id.* at 38066. The Guidelines thus directed state registries to require registrants to notify the registry if they intended to live, work, or attend school outside the United States; the registry in turn was required to notify the U.S. Marshals Service. *See id.* at 38067. Later supplemental Guidelines continued the

effort to develop "a system for consistently identifying and tracking sex offenders who engage in international travel," by requiring state registries to collect information from registrants regarding their intended travel outside the United States. 75 Fed. Reg. 27362, 27364 (2010) (proposed supplemental SORNA guidelines); *see* 76 Fed. Reg. 1630, 1637–38 (2011) (final guidelines). Prior to 2016, the U.S. Marshals Service ("USMS"), in cooperation with the United States' INTERPOL bureau, was already engaged in efforts to notify relevant foreign authorities regarding the travel plans of registered sex offenders, based in part on this information. *Doe*, 2016 WL 5339804, at *3.

Alongside its concerns about registered sex offenders who travel internationally, Congress has long recognized the specific problems of international child sex trafficking and child sex tourism. In 1910, Congress enacted the White Slave Traffic (Mann) Act, which among other things prohibits the transport of minors in foreign commerce for the purpose of prostitution. *See* Act June 25, 1910, c. 395, 36 Stat. 826 (codified as amended at 18 U.S.C. §§ 2421–2424). In 1994, Congress added a provision criminalizing travel to another country for the purpose of engaging in sexual activity with a minor. Pub. L. No. 103-322, § 160001(g), 108 Stat. 1796 (1994) (codified as amended at 18 U.S.C. § 2423(b)). Despite these efforts, Congress has reported that U.S. persons are continuing to engage in child sex tourism. *See* H.R. Rep. 107-525 (2002), 2002 WL 1376220 ("child-sex tourism is a major component of the worldwide sexual exploitation of children and is increasing"). In 2007, the Department of Homeland Security, ICE Homeland Security Investigations ("HSI"), initiated Operation Angel Watch to notify destination countries of the travel plans of those registered sex offenders whose offenses involved child victims. *Doe*, 2016 WL 5339804, at *4–5.

2. International Megan's Law

With its 2016 enactment of the International Megan's Law, Congress sought to build upon existing programs and steps being taken to combat child exploitation.

The IML seeks to strengthen and further integrate the existing federal notification programs operated by USMS and ICE HSI,[3] and to close a loophole that otherwise allows registered sex offenders to evade notifications. The purpose of the IML, which was passed on February 8, 2016, is to "protect children and others from sexual abuse and exploitation, including sex trafficking and sex tourism." IML, Pub. L. No. 114-119, Preamble. In the IML's congressional findings, Congress observed that "[l]aw enforcement reports indicate that known child-sex offenders are traveling internationally." *Id.* § 2(4). Congress further found that "[t]he commercial sexual exploitation of minors in child sex trafficking and pornography is a global phenomenon," with millions of child victims each year. *Id.* § 2(5).

The IML in large part builds on the existing notification programs operated by USMS and ICE HSI in order to provide advance notice to other countries when registered sex offenders in the United States intend to travel internationally, while also encouraging reciprocal arrangements with foreign governments to receive notifications about sex offenders' travel to the United States. *Id.* Preamble & §§ 4, 5, 7. Among other things, the IML establishes an "Angel Watch Center" within DHS that continues the activities of Operation Angel Watch. *Id.* § 4(a).

The IML also attempts to close a loophole through which an offender might circumvent notification procedures: specifically, where an offender might seemingly comply with IML requirements by providing notice of travel to one country, and might appear on a flight manifest as traveling to that country, but might then travel from that first destination country to a second destination country without disclosure to U.S. authorities. In order to prevent offenders whose offenses

[3] The need for greater information sharing in these programs was highlighted in a 2013 GAO report. *See* GAO-13-200, Registered Sex Offenders: Sharing More Information Will Enable Federal Agencies to Improve Notifications of Sex Offenders' International Travel (Feb. 2013), *available at* http://www.gao.gov/products/GAO-13-200.

involved a child victim "'from thwarting I[ML] notification procedures by country hopping to an alternative destination not previously disclosed,'" the IML includes a requirement that the passports of such offenders contain a unique identifier "that would allow such individuals to be identified once they arrive at their true destination." *Doe*, 2016 WL 5339804, at *4–5 (quoting 162 Cong. Reg. H390 (daily ed. Feb. 1, 2016) (statement of Rep. Smith)).

The IML's passport identifier provisions divide responsibility for implementing their requirements. First, the IML delegates sole responsibility for identifying who qualifies as a "covered sex offender" for purposes of the passport identifier provisions to the Angel Watch Center. Only individuals who have been convicted of a sex offense against a minor and are "currently required to register under the sex offender registration program of any jurisdiction" qualify as covered sex offenders for purposes of this provision. *See* IML § 8(a) (codified at 22 U.S.C. § 212b(c)). The Angel Watch Center is the entity that determines who meets those criteria and "provide[s] a written determination to the Department of State regarding the status of an individual as a covered sex offender . . . when appropriate." IML § 4(e)(5); *see also* 22 U.S.C. § 212b(a). The Angel Watch Center is also charged with providing a written determination that an individual is no longer subject to the passport identifier requirements if such an individual reapplies for a new passport when the individual "is no longer required to register as a covered sex offender." 22 U.S.C. § 212b(b)(2).

Second, the IML imposes certain requirements on the Secretary of State. *See* IML § 8(a) (codified at 22 U.S.C. § 212b). The IML directs the Secretary "not [to] issue a passport to a covered sex offender unless the passport contains a unique identifier," and further states that the Secretary "may revoke a passport previously issued without such an identifier of a covered sex offender." 22 U.S.C. § 212b(b)(1). The IML also authorizes the Secretary to "reissue a passport that does not include a unique identifier" when an individual reapplies for a passport

and the Angel Watch Center has provided a written determination that the individual is no longer required to register as a covered sex offender. *Id.* § 212b(b)(2).

3. The Department of State's September 2, 2016 Final Rule

The Department of State issued a Final Rule on September 2, 2016, in order to "incorporate[] statutory passport denial and revocation requirements" added by recently-passed laws, including the IML. Dep't of State, Final Rule, 81 Fed. Reg. 60608-01, 60608 (Sept. 2, 2016), *corrected by* Dep't of State, Correction, 81 Fed. Reg. 66184-01 (Sept. 27, 2016). In issuing the Final Rule, the Department invoked "the 'good cause' exemption of 5 U.S.C. § 553(b)," which allows an agency to issue a rule "without notice and comment." 81 Fed. Reg. at 60608. The Department explained that the Final Rule qualifies for that exception "[b]ecause this rulemaking implements the Congressional mandate[]" set forth in the IML, and thus "public comments on this rulemaking would be unnecessary, impractical, and contrary to the public interest." *Id.*

The Rule amended the Department's regulation addressing "denial and restriction of passports," in relevant part, by incorporating the IML's requirement that the Department "may not issue a passport" to a "covered sex offender . . . , unless the passport, no matter the type, contains the conspicuous identifier placed by the Department as required by 22 U.S.C. 212b." *Id.* at 60609 (adding 22 C.F.R. § 51.60(a)(4)).[4] The Rule also added a provision stating that the Department "shall not issue a passport card to an applicant who is a covered sex offender." *Id.* (adding 22 C.F.R. § 51.60(g)). The Department explained that this addition was necessary because "passport cards are not able to contain the unique identifier required by 22 U.S.C. 212b." *Id.* at 60608.

[4] The original Final Rule referred to covered sex offenders "as defined in 42 U.S.C. 16935a." 81 Fed. Reg. at 60608-09. The Correction to the Final Rule corrected the reference by changing it to 22 U.S.C. § 212b(c)(1). 81 Fed. Reg. at 66184.

In its Correction to the Final Rule, the Department added a paragraph to the Rule's supplementary information, indicating that, pursuant to 22 U.S.C. § 212b(f), the passport identifier provisions would not be applied until the certification to Congress required under the IML had been made. 81 Fed. Reg. at 66184. The Department further indicated that updates regarding the implementation of the provisions would be posted on http://travel.state.gov. *Id.*

4. Ms. Bellucci's Petition for Modification and the Department's Response

By letter dated September 12, 2016, Janice Bellucci, an attorney who currently represents Plaintiffs in this action, submitted a Petition for Modification of the September 2, 2016 Final Rule. Compl. ¶ 24; Exhibit A (attached hereto).[5] Among other things, the Petition asserted that the Rule improperly denied passport cards to covered sex offenders and that it improperly invoked the APA's good cause exception to notice and comment rulemaking. *Id.* at 6, 7–8.

The Department responded to the Petition by letter dated October 14, 2016. Compl. ¶ 25; Exhibit B (attached hereto). In regard to the denial of passport cards, the Department explained that, pursuant to the IML, passport books issued to covered sex offenders would be "endorsed with a short written statement," but "[d]ue to the physical and technological limitations of passport cards, the Department cannot print endorsements on passport cards." *Id.* However, covered sex offenders would be able to apply for and receive a passport book, including the

[5] Because the Petition and the Department's response thereto are referenced and relied upon in Plaintiffs' Complaint, they are incorporated by reference, and the Court may treat these documents as "part of the complaint." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). However, to the extent the Complaint is inaccurate in its description of the Petition, the document itself controls. Here, Plaintiffs assert that Ms. Bellucci submitted the Petition on September 9, 2016, and that she did so on behalf of Plaintiff ACSOL. Compl. ¶ 24. However, the Petition is dated September 12, 2016, and does not indicate that Ms. Bellucci's submission was on behalf of ACSOL or any other party. *See* ex. A at 1.

endorsement, instead of a passport card. *Id.* The Department also explained that the "good cause" exemption of 5 U.S.C. § 553(b) validly applies because the Final Rule implemented "the terms of the IML," in accord with the Department's obligation "to implement U.S. law as passed by Congress and signed by the President," making public comment "unnecessary." Ex. B at 2.

5. The Department's Use of an Endorsement as the Required Identifier

As reflected in the Department's Foreign Affairs Manual, the Department has an established procedure for indicating "the circumstances under which a passport was issued or can be used," including whether "[t]he bearer has a certain status" or whether "[t]here is some other relevant information about the bearer of the passport," which involves inserting an endorsement—in the form of written text—in a passport book. *See* 7 FAM 1310 app. B(a) (attached hereto as Exhibit C).[6] The Department issues changes to the FAM, including changes to the list of endorsements in 7 FAM 1320 Appendix B, through Change Transmittals. *See* 2 FAH-1 H-113.1-3(a) (relevant excerpt attached hereto as Exhibit D). Thus, in order to implement the IML's passport identifier requirement, in conjunction with its amendment of 22 C.F.R. § 51.60, the Department issued a Change Transmittal adding to its list a new endorsement, designated by code 79, which states that "The bearer was convicted of a sex offense against a minor, and is a covered sex offender pursuant to 22 U.S.C. 212b(c)(1)." CON-736 (Oct. 4, 2017) (identifying

[6] The FAM and associated Foreign Affairs Handbooks ("FAHs") are available on the Department's website at https://fam.state.gov/, which indicates that the policies and procedures contained therein "convey codified information to Department staff and contractors so they can carry out their responsibilities in accordance with statutory, executive and Department mandates." The Court may take judicial notice of FAM provisions as a "matter of public record," without converting this motion to dismiss into a motion for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Cited provisions are attached hereto for the Court's convenience.

changes to 7 FAM 1320 app. B) (attached hereto as Exhibit E).[7]

In accord with its prior statement that it would post any updates regarding the implementation of the passport identifier provisions on http://travel.state.gov, 82 Fed. Reg. at 66184, on October 30, 2017, the Department posted an update on http://travel.state.gov, indicating that the IML's passport identifier requirements were going into effect. *See* Compl. ex. A. The update also described the new passport endorsement that the Department had added to the FAM for this purpose. *See id.* The current version of this announcement indicates that the IML's passport identifier requirements went into effect on October 31, 2017. Compl. ¶ 29 (citing Department webpage); *see also* Exhibit F.

6. Procedural History

Plaintiffs filed suit on January 11, 2018, raising two claims under the APA. First, Plaintiffs claim that the Department violated the APA's rulemaking provisions by issuing the September 2, 2016 Final Rule and the October 30, 2017 "press release" without notice and comment. Compl. ¶¶ 34–39. Second, Plaintiffs claim that the Department exceeded its authority when it determined that it would not issue passport cards to covered sex offenders as defined in 22 U.S.C. § 212b(c)(1). Compl. ¶¶ 41–42. Plaintiffs assert a third claim seeking declaratory relief under the Declaratory Judgment Act. Compl. ¶¶ 43–45.

STANDARD OF REVIEW

Defendants move to dismiss Count II of the Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction, on the grounds that Plaintiffs fail to establish their standing to assert Count II. In reviewing a motion to dismiss under Rule

[7] The Department added an additional endorsement, designated by code 116, for use in Emergency Photo Digitized Passports (EPDPs), issued by overseas posts for temporary use by the bearer. *Id.* The text of that endorsement states that "Bearer is a covered sex offender per 22 U.S.C. 212b(c)(1) and her/his passport must be endorsed." *See* 7 FAM 1320 app. B.

12(b)(1), a court is guided by the principle that "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Thus, a court is "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears," *Stock W., Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir.1989), and the plaintiff bears the burden of establishing that such jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936); *Tosco Corp. v. Cmtys. for a Better Env't*, 236 F.3d 495, 499 (9th Cir. 2001).

When considering standing based on the face of the complaint, the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), apply in full force. *See City of Los Angeles v. Citigroup Inc.*, 24 F. Supp. 3d 940, 945 (C.D. Cal. 2014) (citing *Perez v. Nidek Co.*, 711 F.3d 1109, 1113 (9th Cir. 2013); *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1131 (9th Cir. 2012)). Thus, a complaint must allege "sufficient factual matter [in support of Article III standing], accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). "[C]onclusory and barebones" allegations in a complaint are insufficient to establish standing and cannot withstand a motion to dismiss. *Perez*, 711 F.3d at 1113.

Defendants also move to dismiss this action in its entirety under Rule 12(b)(6) because the Complaint fails to "state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Dismissal for failure to state a claim "can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pac. Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). "Threadbare recitals of the elements of a cause of action" are insufficient; rather, the complaint's factual allegations, while taken as true, must "state[s] a plausible claim for relief [in order to] survive[] a motion to dismiss." *Iqbal*, 556 U.S. at 679 (citing *Bell Atlantic Corp.*, 550 U.S. at 555).

In reviewing a motion under Rule 12(b)(6), the Court may consider the facts alleged in the complaint, documents attached to or relied upon in the complaint, and matters of which the Court may take judicial notice. *Lee*, 250 F.3d at 688. Documents attached to the complaint, or whose contents are alleged in the complaint, are deemed part of the complaint for purposes of this review. *Hal Roach Studios v. Richard Reiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1990). Such documents may be examined in their entirety for purposes of assessing the plausibility of other assertions in a complaint, and a court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the complaint." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (internal quotation omitted). In addition, the Court "may take judicial notice of matters of public record." *Lee*, 250 F.3d at 688. And although, for purposes of a Rule 12(b)(6) motion, the Court should generally accept all allegations of material fact in the Complaint as true, the "court need not [ ] accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. . . . Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell*, 266 F.3d at 988. The district court has broad discretion to dismiss claims under Rule 12(b)(6) when they have no legal merit. *Wood v. McEwen*, 644 F.2d 797, 800 (9th Cir. 1981).

ARGUMENT

I. THE PROCEDURAL CHALLENGES IN COUNT I OF PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED

Count I of Plaintiffs' Complaint should be dismissed under Rule 12(b)(6) because the Department was not required to follow notice and comment rulemaking procedures when issuing either the September 2, 2016 Final Rule or the October 30, 2017 website update. The APA generally requires agencies to follow notice and comment procedures when issuing a "legislative" or "substantive" rule. *Lincoln v. Vigil*, 508 U.S. 182, 196 (1993). However, the APA

sets forth two express exceptions to this requirement. First, notice and comment procedures do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A). Second, the procedures do not apply "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." *Id.* § 553(b)(B). A court reviews an agency's invocation of the good cause exception on a "case-by-case" basis, "sensitive to the totality of the factors at play." *Nat. Res. Def. Council, Inc. v. Evans*, 316 F.3d 904, 911 (9th Cir. 2003). As discussed below, these exceptions are applicable here. Plaintiffs thus fail to state a claim upon which relief can be granted.

A. Notice and Comment Was Not Required for the September 2, 2016 Final Rule

The Department did not violate the APA by amending 22 C.F.R. § 51.60 without notice and comment in order to conform the regulation to the IML. The Department's September 2, 2016 Final Rule qualifies as interpretive in nature, and thus exempt from notice and comment requirements. Alternatively, the Department properly invoked the "good cause" exception to notice and comment set forth in § 553(b)(B).

1. The Final Rule Is Interpretive Rather than Legislative in Nature

The Ninth Circuit has distinguished "interpretative rules" from "legislative rules," which "create rights, impose obligations, or effect a change in existing law." *Hemp Indus. Ass'n v. DEA*, 333 F.3d 1082, 1087 (9th Cir. 2003). Interpretive rules, on the other hand, "merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule." *Id.*; *see also Mora-Meraz v. Thomas*, 601 F.3d 933, 940 (9th Cir. 2010) ("Generally, agencies issue interpretive rules to clarify or explain existing law or regulations so as to advise the

public of the agency's construction of the rules it administers." (internal quotation omitted)). Courts have explained that Congress's purpose "in imposing notice and comment requirements for rulemaking—to get public input so as to get the wisest rules"—"is not served" when an agency is merely setting forth "what the law already is." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 680 (6th Cir. 2005) (explaining that, in such a circumstance, the agency is determining "not 'what is the wisest rule,' but 'what is the rule'"); *see Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (an interpretive rule "merely explicat[es] Congress' desires" while a legislative rule "add[s] substantive content"). Thus, in *Mora-Meraz*, the Court of Appeals held that a Bureau of Prisons requirement imposed on inmates seeking to enter a residential drug abuse program was interpretive because it "flow[ed] directly from" a requirement already set forth in a BOP manual, and thus "does no more than clarify or explain existing law." *Mora-Meraz*, 601 F.3d at 940 (internal quotation omitted).

The Ninth Circuit has identified three circumstances indicating a rule is legislative rather than interpretive: First, "when, in the absence of the rule, there would not be an adequate legislative basis for enforcement action"; Second, "when the agency has explicitly invoked its general legislative authority"; and third, "when the rule effectively amends a prior legislative rule." *Hemp Indus. Ass'n*, 333 F.3d at 1087.

Here, none of those circumstances are present. First, the IML itself provides the authoritative legislative basis for the passport identifier requirements. There can be no dispute that the IML-related amendments in the September 2, 2016 Final Rule simply incorporate into an existing Department regulation the changes that were already required pursuant to the statute. *See* 81 Fed. Reg. at 60608 (explaining that the amendments "incorporate[] statutory passport denial and revocation requirements" and "implement[] the Congressional mandate[]" set forth in the IML); ex. B at 2 (explaining that the Final Rule implemented "the terms of

the IML"). A comparison of the statutory text in 22 U.S.C. § 212b with the added regulatory text in the Final Rule shows that the Final Rule provisions come straight from the statute. The new 22 C.F.R. § 51.60(a)(4), prohibiting the Department from issuing a passport to a covered sex offender unless the passport contains the required identifier, derives from 22 U.S.C. § 212b(b)(1), incorporating the definitions in § 212b(c). The new 22 C.F.R. § 51.60(g), prohibiting the Department from issuing a passport card to a covered sex offender, is also required by 22 U.S.C. § 212b(b)(1) because, as the Department explained, "passport cards are not able to contain the unique identifier required by" the statute. 81 Fed. Reg. at 60608. As such, the Final Rule is interpretive, rather than legislative, in nature and thus exempt from notice and comment requirements.

Second, the Department did not invoke its general legislative authority when issuing the September 2, 2016 Final Rule; to the contrary, the Department stated that it was implementing the IML. Third, although the Final Rule amends the prior version of 22 C.F.R. § 51.60, the IML's enactment had already served to invalidate the prior regulation to the extent it was inconsistent with the statute. *Brown v. Harris*, 491 F. Supp. 845, 847 (N.D. Cal. 1980) (recognizing that a regulation that is "out of harmony with the statute[] is a mere nullity" (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)). The Final Rule thus qualifies as interpretive under Ninth Circuit criteria.

2. The Department Properly Invoked the Good Cause Exception

In addition, even if the September 2, 2016 Final Rule is viewed as a legislative rule, it qualifies for the "good cause" exception to notice and comment. As the Department explained when invoking the exception, and again when responding to Ms. Bellucci's petition, notice and comment procedures were "unnecessary" within the meaning of the good cause exception because the amendments simply conformed the Department's regulation to the statute that

Congress had enacted. Courts have repeatedly upheld an agency's invocation of the good cause exception in similar circumstances. *See, e.g.*, *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223–24 (Fed. Cir. 1995) (upholding Customs' invocation of good cause exception where formal notice and comment was "unnecessary because Congress . . . [had] directed Customs to change the regulations"); *Metzenbaum v. Fed. Energy Regulatory Comm'n*, 675 F.2d 1282, 1291 (D.C. Cir. 1982) (notice and comment was "unnecessary" for FERC orders that were "nondiscretionary acts required by" a statutory waiver, "and might even have been 'contrary to the public interest,' given the expense that would have been involved in a futile gesture" (citation omitted)); *McChesney v. Petersen*, 275 F. Supp. 3d 1123, 1136 (D. Neb. 2016) (good cause exception applied because "[n]o extent of notice or commentary could have altered the Commission's obligation to implement the [statute]"); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2015 WL 729701, at *3–4 (E.D. La. Feb. 19, 2015) (because "[t]he mere technical implementation of a statute makes notice and comment unnecessary," EPA had good cause to bypass notice and comment where it "had no discretion" in promulgating an inflation adjustment on the timetable and according to the formula mandated by Congress).

Plaintiffs' Complaint identifies no cognizable basis for the claim that notice and comment was required here. The Complaint fails to identify any aspect of the Final Rule that was within the Department's power to alter based on comments. While Plaintiffs assert that the Department's invocation of the good cause exception was insufficient, Compl. ¶ 36, that claim should be rejected based on the Final Rule itself, which sufficiently explains the Department's justification by stating that the Rule implements Congressional mandates. *See* 81 Fed. Reg. at 60608. Elsewhere in the Complaint, Plaintiffs also assert that the September 2, 2016 Final Rule is "incomplete." Compl. ¶ 26. However, such a suggestion has no

bearing on the standards applicable to notice and comment rulemaking.[8] Plaintiffs thus fail to state a cognizable claim that the Department violated the procedural requirements of 5 U.S.C. § 553 when issuing of the September 2, 2016 Final Rule.

B. Notice and Comment Was Not Required for the October 30, 2017 Website Update

1. The Website Update Is Not a "Rule"

Plaintiffs also raise a procedural notice-and-comment challenge with respect to the Department's October 30, 2017 website update. However, that claim should be dismissed as well because the website update does not qualify as a rule at all, much less one that requires notice and comment. As described above, the October

[8] Moreover, Plaintiffs' assertions in this regard lack merit. Plaintiffs express a fear that a covered sex offender could be stranded in a foreign country due to revocation of his passport. *See* Compl. ¶ 26(b). However, even assuming a plausible basis to suggest a covered sex offender's passport might be revoked while in another country, the Department's procedures for issuing a replacement or emergency passport would be available in such a circumstance. *See* https://travel.state.gov/content/travel/en/ international-travel/emergencies/lost-stolen-passport-abroad.html. Indeed, as described above, the Department has identified a separate endorsement for emergency passports issued by consulates abroad, which would allow a covered sex offender to be issued a passport of limited (1-year) duration, subject to a note that the bearer's passport must be endorsed. *See* ex. C (code 116). The Department thus had no reason to address replacement of a revoked passport in the Final Rule, which amended the regulation governing denial and restriction of passports, 22 C.F.R. § 51.60, not the separate regulation governing revocation or limitation of passports, 22 C.F.R. § 51.62

Plaintiffs also suggest that the Final Rule should have addressed the "form, content, and placement of the Identifier within a passport book or passport card." Compl. ¶ 26(c). However, the Department already had in place a mechanism to convey information about a passport bearer's status—the endorsement mechanism set forth in the FAM. As described above, the Department applied that mechanism here by adding a new endorsement to the FAM through a Change Transmittal. That process was separate from the amendment of 22 C.F.R. § 51.60 to conform to the terms of the IML. Moreover, as discussed below, the addition of an endorsement to an internal guidance manual also did not require notice and comment rulemaking.

30, 2017 website update announced that the IML's passport identifier provisions were now in effect and described the content of the relevant endorsement, as it had already been added to the FAM. The announcement did not cause the passport identifier provisions to go into effect; rather, under the terms of the IML, those provisions went into effect upon the certification to Congress described in 22 U.S.C. § 212b(f). The announcement also did not implement the IML's passport identifier requirements. Rather, those requirements were implemented when the Department amended 7 FAM 1300 app. B to add the endorsement for covered sex offenders. Instead of performing any substantive act, the announcement simply updated the public regarding the status of the Department's implementation of the IML's requirements, in accord with the Department's statement that it would provide such updates. *See* 81 Fed. Reg. at 66184. Thus, the announcement in no way served to "implement, interpret, or prescribe law or policy," as would be necessary for a "rule" within the meaning of the APA. 5 U.S.C. § 551(4). *Cf. Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). Accordingly, the Department did not have to follow notice and comment rulemaking procedures in order to update its website on October 30, 2017.

2. Notice and Comment Was Not Required to Add a New Endorsement to the FAM

Because Plaintiffs specifically identify the website update as the subject of their challenge, the Court should dismiss this aspect of their claim without further analysis. However, even if the Court were to construe Plaintiffs' challenge, more broadly than the terms of the Complaint fairly allow, as claiming that the Department was required to follow notice and comment in connection with its use of an endorsement to implement the IML's passport identifier requirements, that claim nevertheless should be dismissed. The APA does not provide for judicial review of agency action that is "'committed to agency discretion by law.'" *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 861 F.3d 944, 951–52 (9th Cir. 2017)

(quoting 5 U.S.C. § 701(a)(2)). "This exemption applies where '[a] statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Here, the Department is vested with the authority "to grant and issue passports." 22 U.S.C. § 211a. While Congress has set forth broad parameters regarding the issuance and revocation of passports, the Department's decisions regarding the *appearance, form, design, material, and content* of those passports are wholly within its discretion. Such discretion makes sense, given that "[a] passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer"; it is thus "in the character of a political document, by which the bearer is recognized, in foreign countries, as an American citizen; and which, by usage and the law of nations, is received as evidence of the fact." *Haig v. Agee*, 453 U.S. 280, 292–93 (internal quotation omitted). Congress left to the Department the task of designing a document that would serve this purpose and be recognized as such by other countries.

The Department, in turn, has retained that broad discretion. This is not a situation like that in *ASSE Int'l, Inc. v. Kerry*, 803 F.3d 1059, 1068–70 (9th Cir. 2015). There, the court recognized that Congress had vested the Department with broad discretion to create foreign exchange programs, but concluded that because the Department had promulgated regulations governing the administration of such programs, the Department's adherence to those regulations was subject to judicial review. *Id.* at 1069. Here, in contrast, the Department has not promulgated regulations governing the physical characteristics of a passport or the manner in which information is presented in a passport. To the contrary, the Department's regulations reinforce the fact that such matters are within the Department's sole discretion. Indeed, the regulations state that passports remain United States property even when held by individuals. 22 C.F.R. § 51.7(a) ("A passport at all

times remains the property of the United States and must be returned to the U.S. Government upon demand."); *id.* § 51.66 ("The bearer of a passport that is revoked must surrender it to the Department or its authorized representative on demand."). Individuals have absolutely no editorial control over the information contained in a passport. *See id.* § 51.9 ("Except for the convenience of the U.S. Government, no passport may be amended."); *see also* 18 U.S.C. § 1543 (imposing criminal penalties on those who "mutilate[]" or "alter[] any passport").

Consistent with the long-standing discretion vested in the Department in this regard, the IML did not set forth any meaningful standards by which a court could evaluate the Department's specific decisions regarding the appearance or form of the required passport identifier. The IML defines "unique identifier" as "any visual designation affixed to a conspicuous location on the passport indicating that the individual is a covered sex offender." 22 U.S.C. § 212b(c)(2). Congress thus left to the Department's discretion what "visual designation" would be used, and where it would be placed, as long as the location was "conspicuous." Because a Court could not meaningfully review the Department's determination that an endorsement satisfies this definition, review under the APA, including the procedural requirements of 5 U.S.C. §§ 553 and 706(2)(C), is barred.

In addition, the FAM provision setting forth instructions to Department personnel regarding the inclusion of endorsements in passports is a procedural rule not subject to notice and comment requirements. *See S. Cal. Edison Co. v. FERC*, 770 F.2d 779, 783 (9th Cir. 1985) ("The express exemption under [§] 553(b)(3)(A) extends to technical regulation of the form of agency action and proceedings." (internal quotation omitted)); *cf. Am. Hosp. Ass'n*, 834 F.2d at 1050 (agency procedures for carrying out enforcement obligations fall within § 553's exception). As another court has recognized, the FAM "is an internal guideline that sets forth agency practice and procedures." *Patel v. U.S. Dep't of State*, No. 11-CV-6-WMC, 2013 WL 3989196, at *4 (W.D. Wis. Aug. 2, 2013). As such, notice and comment

rulemaking was not required when the Department added a new endorsement to the list for purposes of complying with the IML. Plaintiffs thus fail to state a claim upon which relief may be granted with respect to the Department's October 30, 2017 website update or its change to the FAM's list of endorsements.

II. PLAINTIFFS' CHALLENGE IN COUNT II TO THE DEPARTMENT'S AUTHORITY SHOULD BE DISMISSED

Count II of the Complaint asserts that the Department's September 2, 2016 Final Rule violated 5 U.S.C. § 706(2)(A) and (C) by promulgating 22 C.F.R. § 51.60(g), which restricts the issuance of passport cards to covered sex offenders. Compl. ¶¶ 41–42. According to Plaintiffs, the Department lacks the authority to deny passport cards because "[t]he IML merely provides that passport cards must be issued to Registrants with a 'unique identifier.'" *Id.* ¶ 42. This claim should be dismissed under Rules 12(b)(1) and (b)(6).

A. Plaintiffs Identify No Injury-in-Fact Fairly Traceable to the Passport Card Restriction

As an initial matter, Plaintiffs lack standing to raise this claim. "A plaintiff must demonstrate standing 'for each claim he seeks to press' and for 'each form of relief sought.'" *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 969 (9th Cir. 2009) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). For claims seeking injunctive relief, a plaintiff must show that a future injury is not simply "possible" but "certainly impending." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 408 (2013). Thus, in order to establish standing with respect to Count II, Plaintiffs must identify a certainly impending injury in fact that is "concrete, particularized, and actual or imminent," and is fairly traceable to the provision in § 51.60(g) that covered sex offenders may not be issued passport cards, though they may continue to be issued passport books that bear the required endorsement. *Clapper*, 568 U.S. at 409.

Here, the Complaint identifies no injury-in-fact resulting from the inability

to obtain passport cards rather than passport books. Compl. ¶¶ 7–9. Indeed, neither of the two anonymous individual Plaintiffs identify any desire to obtain a passport card, nor do they describe travel plans that indicate that a passport card, rather than a passport book, would be appropriate. *Id.* ¶¶ 8–9. Unlike a passport book, a passport card "is not a globally interoperable international travel document." 22 C.F.R. § 51.3(e). For one thing, passport cards cannot be used for international air travel; rather, they are valid "only for departure from and entry to the United States through land and sea ports of entry between the United States and Mexico, Canada, the Caribbean and Bermuda." *Id.*; *see generally* Dep't of State, Proposed Rule, 71 Fed. Reg. 60928-01 (Oct. 17, 2006) (explaining background of Department's decision to begin issuing passport cards); Final Rule, 72 Fed. Reg. 74169-01 (Dec. 31, 2007). Passport books, on the other hand—which Plaintiffs presumably *can* obtain, provided they contain the required endorsement—have no such limitations. Indeed, a passport book can be used anywhere a passport card can be used, as well as in many circumstances where a passport card cannot be used. The inability to obtain a passport card, then, has no conceivable impact on Plaintiffs' ability to travel internationally, and no other injury for purposes of Count II is plausibly identified in the Complaint.

B. The Department Acted Within Its Statutory Authority and Did Not Abuse Its Discretion When Promulgating 22 C.F.R. § 51.60(g)

Even aside from Plaintiffs' lack of standing, Count II is also subject to dismissal under Rule 12(b)(6) because the Department acted well within its discretion in promulgating § 51.60(g). Nothing in the IML requires the Department to issue passport cards to covered sex offenders; to the contrary, the IML *prohibits* the Department from issuing any form of passport to a covered sex offender *unless* it contains the required "unique identifier." 22 U.S.C. § 212b(b)(1). The Department's decision that it would not issue passport cards to covered sex offenders because the IML endorsement could not be printed on passport cards

therefore is entirely consistent with the IML.

Moreover, the Department had the authority to make that decision. Pursuant to 22 U.S.C. § 211a, the Secretary is vested with broad authority to grant and issue passports "under such rules as the President shall designate and prescribe." The President then delegated to the Secretary the authority conferred upon him by § 211a "to designate and prescribe for and on behalf of the United States rules governing the granting, issuing, and verifying of passports." E.O. 11295 (Aug. 5, 1966). Pursuant to that authority, the Department established the passport card as a type of passport in 2007. *See* 72 Fed. Reg. at 74173 (promulgating 22 C.F.R. § 51.3). The Department also acted pursuant to that authority when establishing a system of passport endorsements, with the internal procedures for processing such endorsements set forth in 7 FAM 1300 Appendix B.

Moreover, prior to the IML, the Department had already determined that endorsements generally could not be applied to passport cards. The left-hand column of Appendix B identifies the type of passport to which an endorsement may be applied. Any endorsement that omits "CARD" in the left-hand column cannot be applied to a passport card. The only endorsement identified in Appendix B that *can* be applied to a passport card is Endorsement 03, which takes the form of a single letter, "R"—evidently short enough that it can be printed on a passport card to indicate that it is a replacement. *See* ex. C, at 4. The Department could not take that approach here because the unique identifier required by the IML must be "conspicuous" and is intended to be understood by foreign officials at international border crossings. Thus, § 51.60(g) merely indicates that the same restriction applicable to all other endorsements that require text of more than a single letter—that they cannot be printed on passport cards—also applies to the IML endorsement. The Department did not exceed its statutory authority or abuse its discretion in promulgating that provision. Count II thus fails to state a claim upon which relief can be granted.

III. PLAINTIFFS' CLAIM IN COUNT III FOR DECLARATORY RELIEF SHOULD BE DISMISSED

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

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action in its entirety.

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Respectfully submitted,

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