PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEFFREY T. MAEHR, Plaintiff - Appellant, v. UNITED STATES DEPARTMENT OF STATE, including Secretary of State Antony Blinken*, in his official capacity, Defendant - Appellee.	No. 20-1124

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:18-CV-02948-PAB-NRN)

(Filed Jul. 20, 2021)

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* Pursuant to Fed. R. App. P. 43(c)(2) Mike Pompeo is replaced by Antony Blinken as appellee in this case.

Ugolini, Attorney, Arthur T. Catterall, Attorney, and Jason R. Dunn, United States Attorney with her on the brief), Tax Division, U.S. Department of Justice, Washington, D.C., for Defendant - Appellee.

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

PER CURIAM

In this appeal, we affirm the judgment of the district court. This disposition is addressed in two opinions: one by Judge Lucero, and one by Judge Matheson.

Parts I, II, and III of Judge Lucero's opinion constitute the unanimous opinion of the court. Part I provides relevant background. Part II concludes the district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 702. Part III rejects Mr. Maehr's arguments concerning the Privileges and Immunities clauses and the common law principle of *ne exeat republica*.

Judge Matheson's opinion, joined by Judge Phillips, is the majority opinion on Mr. Maehr's substantive due process challenge. On this issue, Judge Lucero concurs in the judgment in Part IV of his opinion.

LUCERO, Senior Circuit Judge.

Six years ago, the federal government instituted a new approach to encourage delinquent taxpayers to pay up: threaten to withhold or revoke their passports until their tax delinquency is resolved. No nexus between international travel and the tax delinquency needs be shown; the passport revocation serves only to incentivize repayment of the tax debt. We are the first circuit to review the constitutionality of this approach.

Appellant Jeffrey T. Maehr is one of the Americans caught in the snares of this scheme. He challenged the lawfulness of the United States Department of State's revocation of his passport, arguing that it violates substantive due process, runs afoul of principles announced in the Privileges and Immunities clauses,[1] and contradicts caselaw concerning the common law principle of ne exeat republica. The district court rejected all three of his challenges. We affirm the district court on each of these arguments.

I

In 2015, Congress passed and the President signed into law the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. 114-94, 129 Stat. 1312 (2015), an omnibus transportation bill that included a provision permitting the denial or revocation of

[1] Maehr finds support for this theory in both the Privileges and Immunities Clause of Article IV, Section 2 and the Privileges or Immunities Clause of the Fourteenth Amendment. We refer to them collectively as "the Privileges and Immunities clauses."

passports for taxpayers with significant tax debts. Under the FAST Act, if a taxpayer is subject to a delinquent federal tax debt of $50,000[2] or more, the IRS may certify the delinquency to the Secretary of the Treasury, who in turn transmits the certification to the Secretary of State. I.R.C. § 7345. The Secretary of State is thereafter prohibited from issuing a new passport to the taxpayer and is authorized, though not required, to revoke a previously issued passport.[3] 22 U.S.C. § 2714a(e)(1), (2). These consequences remain with the taxpayer until any of several circumstances occur, such as full satisfaction of the tax debt, entry into an installment agreement with the IRS, or a finding that the original certification was erroneous. I.R.C. § 7345(c).

The scheme's rationale appears to have been simply to use the threat of passport revocation as an incentive for tax compliance. No direct connection between tax delinquency and international travel, such as evidence the delinquent taxpayer is secreting assets overseas, is required to effect a passport revocation. Review of the legislative history also yields no evidence that passport revocation was aimed at, for example, thwarting delinquent taxpayers from fleeing the country or evading tax collection. See Michael S. Kirsch, Conditioning Citizenship Benefits on Satisfying Citizenship Obligations, 2019 U. Ill. L. Rev. 1701, 1712

[2] This amount is adjusted for inflation beginning in 2016.

[3] For ease of reference, we will refer to both the denial of new passports and the revocation of passports previously issued as "revocation."

(2019) ("[T]he GAO Report, upon which the FAST Act limitations are based, did not explicitly mention [an anti-fleeing rationale], focusing instead on the tax compliance incentives associated with the passport limitations."). Rather, a straightforward incentive mechanism—making tax delinquency more painful by inhibiting one's ability to enter or exit the country—explained why the Senate Finance Committee "believe[d] that tax compliance [would] increase if issuance of a passport is linked to payment of one's tax debts." S. Rep. No. 114-45, 57 (2015).

Passport revocation under the FAST Act is thus an example of a species of tax penalties known as collateral sanctions. "Unlike traditional tax penalties that require noncompliant taxpayers to pay money to the taxing authority, collateral tax sanctions require noncompliant taxpayers to forfeit a nonmonetary government benefit or service." Joshua D. Blank, Collateral Compliance, 162 U. Pa. L. Rev. 719, 728 (2014). They "increasingly apply to individuals who have failed to obey the tax law," perhaps because they "can promote voluntary tax compliance more effectively than the threat of additional monetary tax penalties." Id. at 720. States and the federal government impose a variety of collateral tax sanctions, ranging from diminished housing assistance to the cancelling of driver's licenses. Id. at 739-40. Passport revocation had not been used to thwart tax delinquency until the FAST Act, but it has been used in the context of non-payment of child support. See 42 U.S.C. § 652(k).

Appellant Jeffrey T. Maehr is among the many[4] Americans whose tax delinquency rendered him subject to passport revocation under the FAST Act. Despite a number of challenges to a 2011 IRS tax assessment,[5] Maehr owes approximately $250,000 in taxes. In 2018, the IRS certified Maehr's tax delinquency, and the State Department subsequently revoked Maehr's passport. Maehr then filed a complaint challenging the authority of the Department of State to revoke passports on the basis of tax debts.[6]

The district court granted the Department of State's motion to dismiss for failure to state a claim. It concluded that it would have subject-matter jurisdiction on the basis of the writ of mandamus if, and only if, the Department of State acted unconstitutionally in revoking Maehr's passport. Because the district court held that passport revocation under the FAST Act is supported by a rational basis and not otherwise unconstitutional, it dismissed Maehr's claim for want of jurisdiction. This appeal followed.

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[4] According to the IRS, some 436,400 taxpayers qualified for passport revocation under § 7345 as of April 2018. Nat'l Taxpayer Advocate, Objectives Report to Congress, FY 2019, vol. 1, at 80.

[5] See, e.g., Maehr v. Comm'r of Internal Revenue, 480 F. App'x 921 (10th Cir. 2012); Maehr v. United States, 767 F. App'x 914 (Fed. Cir. 2019). Though he continues to dispute his tax assessment, Maehr stipulates for purposes of this appeal that he owes the amount in question to the IRS.

[6] Due to a suggestion made by the presiding magistrate judge, pro bono counsel agreed to represent Maehr in this case of first impression. We thank the pro bono counsel for their help with this matter.

II

After spilling a great deal of ink thrashing out the issues of subject-matter jurisdiction and sovereign immunity before the district court, the parties appear to have settled on a mutually satisfactory resolution. Both Maehr and the Department of State now identify 28 U.S.C. § 1331 as a basis for the district court's subject-matter jurisdiction and 5 U.S.C. § 702 of the Administrative Procedure Act (APA) as an applicable waiver of sovereign immunity. We conclude the same.

Because Maehr seeks an injunction ordering the Department of State to return his passport, we are asked to "exercise[ ] [our] traditional powers of equity . . . to prevent violations of constitutional rights." Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231 (10th Cir. 2005). These powers flow from the long-recognized "jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." Bell v. Hood, 327 U.S. 678, 684 (1946). "Bell v. Hood held that suits for relief directly under the Constitution fall within [the] grant of jurisdiction" provided by § 1331. Simmat, 413 F.3d at 1232. "Section 1331 thus provides jurisdiction for the exercise of the traditional powers of equity in actions arising under federal law." Id. The district court therefore had jurisdiction under § 1331, and we have appellate jurisdiction under 28 U.S.C. § 1291.

Sovereign immunity is no bar to our or the district court's exercise of jurisdiction. Section 702 of the APA waives sovereign immunity for actions "stating a claim

that an agency . . . acted or failed to act . . . under color of legal authority." "This waiver is not limited to suits under the Administrative Procedure Act." Simmat, 413 F.3d at 1233. It is therefore applicable to a claim that the Department of State acted unconstitutionally by revoking Maehr's passport.[7] Consequently, the district court was free to exercise the jurisdiction conveyed by § 1331.

Without the benefit of briefing from either party on the applicability of § 702, the district court was left to determine whether jurisdiction and waiver of sovereign immunity was properly founded on a theory of mandamus, see 28 U.S.C. § 1361, or on the judicial review created by passport revocation itself, see § 7345. Our resolution of jurisdiction and sovereign immunity on the basis of § 1331 and § 702, respectively, obviates any need to consider that debate. We turn to the merits.

III

The opinion of the court is unanimous as to two of the arguments raised by Mr. Maehr. The first concerns the Privileges and Immunities clauses; the second

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[7] While § 702 does not appear to have been briefed to the district court by either party as a means of avoiding sovereign immunity, there is no issue with regards to forfeiture of the argument. "[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." Henderson ex rel. Henderson v. Shinseki, 562 U.S. 428, 434 (2011).

relies on the common law principle of ne exeat republica. Each will be addressed in turn.

A

Maehr contends that the Privileges and Immunities Clause of Article IV, Section 2 and the Privileges or Immunities Clause of the Fourteenth Amendment encompass the right to international travel and thereby limit the federal government's ability to restrict such travel. His argument is implausible. These clauses apply to states, not the federal government, and Maehr can articulate no way around this fact. Even if the clauses could somehow constrain the federal government, no Supreme Court decision has ever interpreted these clauses as at all relevant to a right to international travel.

As even Maehr admits, the Privileges and Immunities clauses apply only to the states, not to the federal government. Maehr is right to so concede because the limited applicability of the clauses to states is well-settled. See Slaughter-House Cases, 83 U.S. 36, 77 (1872) ("[The Privileges and Immunity Clause's] sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens . . . the same . . . shall be the measure of the rights of citizens of other States within your jurisdiction."); Pollack v. Duff, 793 F.3d 34, 41 (D.C. Cir. 2015) (collecting cases). Because this case concerns a federal statute enforced by federal actors, the clauses are of no relevance.

To evade this unavoidable conclusion, Maehr asks us to make a leap: we should consider the Privileges and Immunities clauses "reverse incorporated" against the federal government. For this proposition he cites Bolling v. Sharpe, 347 U.S. 497 (1954) and its progeny, which held that the federal government's duty to avoid segregation and other racial classifications cannot be any less stringent than that of the states. Yet these cases addressed only racial discrimination; they were not written so broadly as to encompass all "constitutional civil rights protections," as Maehr claims. They were also rooted in different constitutional provisions and a significantly different context. "[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources. . . ." McLaughlin v. Florida, 379 U.S. 184, 185 (1964). Bolling's reverse incorporation was necessary to avoid the "unthinkable" result that the District of Columbia could continue its policy of school segregation in the wake of Brown v. Board of Education merely because it fell under the federal government's umbrella. 347 U.S. at 500. In contrast, reverse incorporation of the Privileges and Immunities clauses would be not only novel but also devoid of any support from the clauses' text or context.

Even if the Privileges and Immunities clauses applied to the federal government, they would be of no import in this case because the right to international travel is not a privilege or immunity encompassed by the clauses. Maehr is correct that the scope of these clauses, as limited by the Slaughter-House Cases, does

include the "right to travel." See Zobel v. Williams, 457 U.S. 55, 78-81 (1982) (O'Connor, J., concurring). But that right to travel has always been interpreted to mean interstate travel, never international travel—an unsurprising fact given the clauses' limited application to states, which lack any role in the regulation of international travel. The entirety of Maehr's argument to the contrary appears to be that in Saenz v. Roe, 526 U.S. 489 (1999), the Court referred to "the right to travel" as a privilege of citizenship without explicitly differentiating between interstate and international travel, and defined this right in broad terms as "the right to go from one place to another." Id. at 500. But just two pages earlier, the Court mentioned that the constitutional right in question was the "right to travel from one state to another." Id. at 498 (quotation omitted). This makes sense: the case was about a California statute that limited the welfare benefits available to out-of-state citizens who had recently moved to California. Maehr does not provide any further explanation of how he finds a right to international travel in the text or caselaw of the Privileges and Immunities clauses.

The Privileges and Immunities clauses do not apply to the federal government and do not protect any right to international travel. For either of these reasons, the district court was correct to reject the argument.

B

The writ of ne exeat republica is "a form of injunctive relief ordering the person to whom it is addressed not to leave the jurisdiction of the court or the state." United States v. Barrett, 2014 WL 321141, *1 (D. Colo. Jan. 29, 2014). It is essentially "a form of civil arrest" that can be used to confine a person to the country, a particular jurisdiction, or even his house. Aetna Cas. & Sur. Co. v. Markarian, 114 F.3d 346, 349 (1st Cir. 1997). The Internal Revenue Code permits its use to enforce tax obligations. I.R.C. § 7402. Our circuit has never announced a standard for the issuance of ne exeat writs, but other courts have invoked the four-factor test for preliminary injunctions. See, e.g., Barrett, 2014 WL 321141, at *7.

Maehr contends that a similar standard should apply to passport revocation under the FAST Act given that scheme's similar purpose to ne exeat writs issued under I.R.C. § 7402. He cites United States v. Shaheen, 445 F.2d 6 (7th Cir. 1971), which vacated a ne exeat writ issued against a delinquent taxpayer that barred him from leaving the jurisdiction because he intended to depart the United States. The court, after noting that the right of international travel is constitutionally protected, explained that when "relief impinges upon a constitutionally protected personal liberty, . . . the Government has the burden of demonstrating that [it] is a necessary, and not merely coercive and convenient, method of enforcement." Id. at 10–11. Maehr urges that a similar burden should apply to passport revocation under the FAST Act.

Writs of ne exeat differ significantly from FAST Act passport revocations in three ways. First, the scope of ne exeat is much broader, restricting freedom of movement domestically as well as internationally. Second, writs of ne exeat can be issued even if the underlying tax debt is contested by the taxpayer, see, e.g., Shaheen, 445 F.2d at 10, whereas the FAST Act requires that the taxpayer's rights to challenge a contested liability have lapsed or been exhausted prior to passport revocation. I.R.C. § 7345(c). Third, ne exeat is an essentially equitable common law remedy that has been codified in statute, making it sensible that courts have required showings of evidence paralleling those required for preliminary injunctions. Passport revocation under the FAST Act, in contrast, is a purely statutory and legal scheme with built-in due process protections.

Ne exeat is readily distinguishable from passport revocation under the FAST Act. The caselaw governing ne exeat is therefore inapplicable to this case. We affirm the district court's rejection of this argument.

IV

Maehr contends that the revocation of his passport based on his tax delinquency amounted to an infringement of his right to international travel in violation of substantive due process. I ultimately agree with my colleagues that Maehr inadequately briefed the issue to permit the resolution that I conclude the law otherwise requires. Because of the importance of

the right at stake, I write this part separately to provide an analysis of the intersection of substantive due process and the right of international travel.

"[A]djudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment. Its boundaries are not susceptible of expression as a simple rule." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 849 (1992). Substantive due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society." Id. at 850 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). "This 'liberty' is not a series of isolated points," but rather a "rational continuum" that recognizes "that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." Poe, 367 U.S. at 543 (Harlan, J., dissenting).

Ordinarily, this continuum collapses into two poles. If a liberty interest protected by the Due Process Clause is deemed fundamental, it is reviewed under strict scrutiny, meaning any infringement must be "narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993). A liberty interest less than fundamental generally receives rational basis review, which demands only that a governmental infringement on the interest "be rationally related to legitimate government interests." Washington v. Glucksberg, 521 U.S. 702, 728 (1997); see also

Dias v. City and Cty. of Denver, 567 F.3d 1169, 1181 (10th Cir. 2009).

I would not lightly step away from the default options governing substantive due process claims, but neither would doing so blaze an entirely new trail. There are significant exceptions in Supreme Court caselaw to the typical framework for substantive due process claims. Perhaps the most notable emerges from abortion caselaw, in which the Supreme Court has fashioned an "undue burden" standard that breaks from both strict scrutiny and rational basis. See Casey, 505 U.S. at 874 (1992). The Court explained that such a standard is an "appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." Id. at 876. Similarly, in Obergefell v. Hodges, the Court held that the right to marry is fundamental but struck down laws that barred same-sex couples from exercising this right without applying strict scrutiny. 576 U.S. 644, 675-76 (2015). Though the default, the two-tiered approach to substantive due process claims is not rigidly adhered to by the Supreme Court.

In order to determine the appropriate level of scrutiny to use in evaluating a substantial infringement on international travel, I am guided by several sources and authorities. I proceed with "careful respect for the teachings of history" and "solid recognition of the basic values that underlie our society." Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (quotation omitted). "History and tradition guide and discipline" the inquiry. Obergefell, 576 U.S. at 664. And although my

research leads me to no authority that squarely controls the outcome of this inquiry, I look to Supreme Court precedent that speaks to the question at issue.

A

That the right to international travel is deeply woven into our history and tradition is hard to deny. The Magna Carta established that it "shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm." 1215 Magna Carta, Section 42. Similar notions appear in Blackstone: "By the common law, every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave. . . ." Sir William Blackstone, Commentaries on the Laws of England, Book I, Ch. 7 at 265.[8] The colonists carried this tradition forward by citing British restraints on movement both between the colonies and beyond as causes for the Revolutionary War. See Kahn, International Travel at 285-86.

Nor did the American commitment to freedom of movement abate after its founding. Movement between the United States and Canada, for example, was both commonplace and protected by treaty. See Treaty of Amity, Commerce and Navigation (Jay Treaty),

[8] I note, however, that this right "waxes and wanes over the course of English legal history." Jeffrey Kahn, International Travel and the Constitution, 56 UCLA L. Rev. 271, 339 n.371 (2008).

Eng.-U.S., art. III, Nov. 19, 1794, 8 Stat. 116, 117. "[F]reedom of travel was in the nineteenth century a dominant theme in our foreign policy." Charles E. Wyzanski, Jr., "Freedom to Travel," Atlantic Monthly 67 (Oct. 4, 1952). As Nathaniel Hawthorne wrote while serving as American consul to Liverpool in the 1850s, "Sitting . . . in the gateway between the Old World and the New, where the steamers and packets landed the great part of our wandering countrymen, and received them again when their wanderings were done, I saw that no people on earth have such vagabond habits as ours." Our Old Home: A Series of English Sketches (1863). Hawthorne was not alone in enshrining travel as a distinctly American characteristic. "The American is a migratory animal. He walks the streets of London, Paris, St. Petersburg, Berlin, Vienna, Naples, Rome, Constantinople, Canton, and even the causeways of Japan, with as confident a step as he treads the pavements of Broadway." Robert Tomes, "The Americans on Their Travels," Harper's New Monthly Magazine 31 (1865). In both law and the popular imagination, international travel was accorded special import.

Only in the twentieth century did the American federal government begin imposing significant regulations on international travel. See Kahn, International Travel at 313-17. Even then, supporters of these regulations made clear that they conceived of their efforts as in harmony with the Anglo-American tradition of protecting the right of international travel. For example, when the Deputy Under Secretary of State testified before the Senate Committee on Foreign Relations

regarding proposed watershed passport legislation, he explained, "I find nothing in the legislation which the administration has proposed on this subject in contradiction to the principles stated in the Magna Carta. The policy of our Government is to promote the travel of its citizens. . . . However, as recognized in the Magna Carta the State has an obligation for the common good to exercise some controls over passports in times of war and national emergency." Passport Legislation: Hearing on S. 2770, S. 3998, S. 4110, and S. 4137 Before the S. Comm. on Foreign Relations, 85th Cong. 19 (1958) (statement of Robert D. Murphy, Deputy Under Secretary of State, Dep't of State). Thus even as the federal government expanded its control over international travel, it did so in recognition of the American tradition with which its efforts were in tension and argued that its limitations fit within the narrow historic exceptions to unfettered travel. Tax compliance incentives were certainly not of a piece with those exceptions.

At a more fundamental level, the right to international travel seems to me a prerequisite for the freedom guaranteed by the Constitution. It is true that a large percentage of Americans manage to live substantially free lives without ever traveling internationally.[9] Indeed, in our culture, international travel is often viewed as more of a luxury than a right, much less a

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[9] A recent survey found that 40% of Americans had never left the United States. John Bowden, Survey: 11 Percent of Americans Have Not Traveled Outside Home State, The Hill (May 3, 2019), https://thehill.com/policy/transportation/441989-11-percent-of-americans-have-not-traveled-outside-their-state-survey.

bedrock right undergirding our nation's ordered liberty. That said, freedom to leave one's country and explore the world beyond national borders strikes me as a deep and fundamental component of human liberty. It is for good reason that such freedom has been called "a natural right," Shachtman v. Dulles, 225 F.2d 938, 941 (D.C. Cir. 1955) and "a necessary attribute of democratic society," Leonard B. Boudin, The Constitutional Right to Travel, 56 Colum. L. Rev. 47, 49 (1956). To permit the government power to deny its citizens access to the outside world without a strong reason to do so seems inimical to the liberty that is every American's birthright. Further, if I imagine America in the absence of the right, with the citizenry entirely deprived of the right of international travel and the borders closed to all, it would be impossible to consider our country truly free. These considerations lead me to conclude that the right to international travel is implicit in the basic liberty protected by due process.

Moreover, the right to travel internationally is all but indispensable for the exercise of another long-established right: the right of expatriation, or the right to quit one's country and renounce one's citizenship. In 1868, Congress enacted legislation to protect this right, declaring, "[T]he right to expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness. . . ." Act of July 27, 1868, 15 Stat. 223. It therefore "declared inconsistent with the fundamental principles of this government" any governmental action that "denies, restricts, impairs, or questions the

right of expatriation." Id. at 224; see also Mackenzie v. Hare, 239 U.S. 299, 309 (1915) ("In 1868 Congress explicitly declared the right of expatriation to have been and to be the law."). Expatriation is contingent on exit. If the right of expatriation is deeply woven into our country's history, so too is the concomitant right to travel beyond our borders.

In light of the "history and tradition [that] guide and discipline" the inquiry, Obergefell, 576 U.S. at 664, there is strong reason to conclude that the right of international travel cannot be substantially limited without passing muster under some form of heightened scrutiny.

B

History and tradition establish the importance of the right to international travel, importance which suggests heightened scrutiny of incursions on that right. Supreme Court precedent bolsters that suggestion.

Two cases illustrate the importance the Court has ascribed to international travel. In similar cases, the Supreme Court twice struck down the State Department's denials of passports to Communists on the basis of their political affiliations. Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Sec'y of State, 378 U.S. 500 (1964). Though these cases implicated First Amendment protections as well as the right to international travel, the Court's analysis was not circumscribed by

that context; its reasoning repeatedly highlighted the importance of the right to international travel.

Kent, a case concerning the denial of passports to Americans on the basis of their alleged Communist beliefs, 357 U.S. at 117-19, emphasized history and tradition in its evaluation of international travel: "Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage." 357 U.S. at 126. This heritage suggested the profound import of freedom of movement both within and across borders, which "may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." Id. While the Court in Kent declined to decide the case on the basis of the constitutional protections afforded the right to international travel, relying instead on statutory grounds, it indicated that by doing so, it avoided "important constitutional questions." Id. at 130. This dictum hinted at the heightened review that the Court would later bring to bear when the constitutional question was squarely presented.

Six years after Kent was decided, the Court turned to the constitutional dimensions of the right to international travel in Aptheker. In Aptheker, the Court considered the constitutionality of a statute that made it a crime for a member of a Communist organization to attempt to use or obtain a passport. 378 U.S. at 507. The Court determined that statutes that impose substantial restrictions on the right to international travel were to be evaluated under the following standard: "Even though the governmental purpose be legitimate

and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[10] Id. at 508 (quotation omitted). In more ways than one, the statute enacted by Congress did not achieve its end by way of narrow means. See id. at 512-14. "The prohibition against travel is supported only by a tenuous relationship between" means and ends, and "[t]he broad and enveloping prohibition indiscriminately excludes plainly relevant considerations." Id. at 514. Moreover, Congress had "within its power less drastic means of achieving the congressional objective." Id. at

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[10] The context for this statement makes clear that the "fundamental personal libert[y]" at issue was the right to international travel rather than any First Amendment right. Preceding that statement was this: "Although previous cases have not involved the constitutionality of statutory restrictions upon the right to travel abroad, there are well-established principles by which to test whether the restrictions here imposed are consistent with the liberty guaranteed in the Fifth Amendment." Id. at 507-08. There is no indication from this context that the Court viewed the standard it announced as contingent on travel restrictions also burdening First Amendment rights.

My colleagues note that dictum from a later Supreme Court case, Regan v. Wald, 468 U.S. 222 (1984), described the First Amendment interests at stake in Kent and Aptheker as "controll[ing]." Id. at 241. We are indeed free to consider, though need not be controlled by, subsequent Court "elaboration" of its earlier cases. See Indep. Inst. v. Williams, 812 F.3d 787, 793 (10th Cir. 2016). But contradictory dictum is not elaboration: That characterization is belied by the reasoning actually employed in those cases. The Supreme Court has nowhere indicated that it no longer considers Kent and Aptheker good law. It therefore remains binding precedent.

512 (quotation and footnote omitted). The statute was therefore "unconstitutional on its face." Id. at 514.

From these two cases, I discern several features of the standard to be applied to international travel limitations. When such a limitation is substantial, it is not automatically justified by virtue of its underlying governmental purpose being "legitimate," or even "substantial." Id. at 508 (quotation omitted). The limitation must also be tailored. Aptheker identifies a number of considerations that bear on whether a limitation is sufficiently tailored, including how "broadly" a liberty interest is "stifle[d]," whether "less drastic means of achieving" the governmental purpose were available, and whether the limitation "indiscriminately excludes plainly relevant considerations." Id. at 508, 512, 514 (quotation omitted).

Subsequent Supreme Court decisions concerning international travel have not undermined the force of Kent and Aptheker. I consider three in detail: Zemel v. Rusk, 381 U.S. 1 (1965); Califano v. Aznavorian, 439 U.S. 170 (1978); and Haig v. Agee, 453 U.S. 280 (1981).

Zemel addressed location-specific international travel restrictions made in light of national security concerns. In Zemel, the Court upheld the Department of State's prohibition on travel to or within Cuba without specific authorization, a prohibition issued in the immediate aftermath of the Cuban missile crisis. 381 U.S. at 3, 16. After citing Kent and Aptheker for the protection afforded travel by the Due Process Clause, the Court explained that "the fact that a liberty cannot

be inhibited without due process of law does not mean that it can under no circumstances be inhibited." Id. at 14. "The requirements of due process are a function not only of the extent of the governmental restriction imposed, but also of the extent of the necessity for the restriction." Id. (footnote omitted). The need to limit travel to Cuba in the early days of the Castro regime was, in the view of the Court, severe: "[T]he restriction which is challenged in this case is supported by the weightiest considerations of national security. . . ." Id. at 16. Those "weightiest considerations" sufficed to justify the Cuba-specific restrictions on international travel. Id.

Aznavorian concerned incidental burdens on international travel. The Aznavorian Court upheld a statute that conditioned Supplemental Security Income benefits on the beneficiary's presence within the United States against a claim that the statute violated the right to international travel. 439 U.S. at 171, 175. Significantly, the Court distinguished the case before it from Kent, Aptheker, and Zemel because the statute in question did not have "nearly so direct an impact on the freedom to travel internationally as occurred in" those three cases. Id. at 177. Had the Court been reviewing Kent and Aptheker under a rational basis standard, those cases likely would have passed muster under that relaxed review. Instead, the Court emphasized that the statute before it "does not limit the availability or validity of passports," but instead "merely withdraws a governmental [welfare] benefit . . . after an extended absence from this country." Id. In light of

the merely "incidental" burden on international travel occasioned by the statute, it was enough that "the provision [was] rationally based." Id. at 177-78.

Agee, like Zemel, is a case in which international travel was restricted by reason of paramount national security concerns. After Philip Agee, a former CIA agent, began a campaign to disclose confidential information, including the identities of undercover CIA agents and sources, the Secretary of State revoked his passport. Agee, 453 U.S. at 283-86. The Court upheld this revocation on constitutional grounds. "[T]he freedom to travel abroad with a 'letter of introduction' in the form of a passport issued by the sovereign is subordinate to national security and foreign policy considerations; as such, it is subject to reasonable governmental regulation." Id. at 306. Revocation of a passport used to jeopardize national security was such a reasonable governmental regulation. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." Id. at 307 (quoting Aptheker, 378 U.S. at 509). The Court further emphasized that passport revocation was no broader a means of achieving this paramount governmental interest than necessary: "Restricting Agee's foreign travel, although perhaps not certain to prevent all of Agee's harmful activities, is the only avenue open to the Government to limit these activities." Id. at 308.

I read these three cases as entirely in accordance with the standard hinted at in Kent and announced in Aptheker. Zemel and Agee both arose in the context of significant threats to national security, with the former

coming in reaction to the harrowing days of the Cuban missile crisis and the latter a response to a public disclosure campaign that jeopardized the lives of CIA assets. In both cases, the Court characterized the governmental interest served by the travel restriction as profound: "the weightiest considerations" in Zemel, "no governmental interest more compelling" in Agee. 381 U.S. at 16; 453 U.S. at 307. Notwithstanding the supreme import of the governmental interest being advanced, the travel restrictions in each case swept no more broadly than necessary. The travel restriction in Zemel was limited to Cuba and permitted individual-specific exceptions, while the passport revocation in Agee was "the only avenue open to the Government to limit [Agee's] activities." 453 U.S. at 308. In both cases, the opinions paid heed to the strength of the governmental interest and the tailoring of means to ends that Aptheker requires. Aznavorian, meanwhile, addressed only an "incidental effect" on international travel by a statute not primarily aimed at restricting it. 439 U.S. at 177. The statute therefore did not "broadly stifle" international travel, unlike the restrictions addressed by Aptheker. 378 U.S. at 508.

My review of Supreme Court precedent discerns a standard that clearly falls somewhere between rational basis and strict scrutiny. As I read it, the rule the Supreme Court has both announced and remained faithful to is as follows: substantial restrictions on international travel must advance a "legitimate and substantial" interest and must not sweep much more broadly than necessary. Aptheker, 378 U.S. at 508

(quotation omitted). That rule closely resembles the language used to describe intermediate scrutiny.[11] See Clark v. Jeter, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective."); United States v. Reese, 627 F.3d 792, 802 (10th Cir. 2010) ("To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective." (quotation omitted)).

Before determining whether intermediate scrutiny is the appropriate standard to apply, I attend to substantive due process caselaw governing the different levels of scrutiny.

C

I readily acknowledge that substantive due process claims are generally evaluated under either of two tiers of scrutiny: strict scrutiny or rational basis. But

[11] It also resembles strict scrutiny insofar as that standard has actually been applied. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) ("[W]e wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" (quotation omitted)); see also Adam Winkler, Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts, 59 Vand. L. Rev. 793, 795-96 (2006). The rigidity and inconsistency of the current substantive due process regime suggests to me the infirmity of this atextual approach to the unenumerated constitutional rights. See generally Joel Alicia and John D. Ohlendorf, Against the Tiers of Constitutional Scrutiny, Nat'l Affs. 72 (Fall 2019).

this bifurcated analytical scheme did not arise within and has not been applied to international travel. This context requires a less simplistic, far more sophisticated analysis. My review indicates that the two-fold approach is in significant tension with the procedure the Supreme Court developed in Kent and Aptheker and carried forward in Zemel, Aznavorian, and Agee. Those cases neither reject the proposition that international travel is a fundamental right nor do they diminish international travel by declaring it subject to mere rational basis review. Instead, they weave a much finer fabric. To pass constitutional review, laws limiting international travel may not require a compelling governmental interest, as strict scrutiny would demand. But on the other hand, the Court's cases do not consign international travel to the cavernous abyss of rational basis review.

The importance attached to international travel both historically and culturally is in discord with the typically forgiving evaluation that rational basis review entails. Freedom to cross borders has deep roots into antiquity. In Anglo-American legal history, the liberty to explore lands beyond national borders is a significant aspect of human freedom. The right to exit is itself a safeguard against governmental incursions on other rights and has found legal protection dating far back into our nation's past. Though Supreme Court authority more than these considerations primarily shape my analysis, I am mindful of the historical protection due international travel.

Intermediate scrutiny is the best way to remain faithful to both the full spectrum of Supreme Court caselaw and the role of international travel in the history of our nation and its conception of a well-ordered liberty. It is the appropriate standard under which to review substantial restrictions on international travel. Such a holding might appear to be a departure from the garden-variety two-tiered approach to substantive due process, but it best accords with the international travel cases which form the jurisprudential foundation of our review.[12]

As explained by my colleagues, appellant Maehr did not brief the intermediate scrutiny standard in a manner adequate to permit resolution on the basis of intermediate scrutiny in this case. Maehr did not advocate for intermediate scrutiny; instead, his argument was that international travel is a fundamental right. Appellee Department of State advocated for rational basis review as the appropriate standard. For reasons explained above, I do not agree that either is

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[12] This accordance is further suggested by the openness shown by other courts to intermediate scrutiny for international travel restrictions. See, e.g., Eunique v. Powell, 302 F.3d 971, 978 (9th Cir. 2002) (McKeown, J., concurring) ("Given the importance of international travel . . . intermediate scrutiny should be the benchmark."); Malhan v. Tillerson, 2018 WL 2427121, at *5 (D.N.J. May 30, 2018) ("The Court . . . finds that both rational basis review and intermediate scrutiny are met" by a passport revocation statute for non-payment of child support); Risenhoover v. Washington Cty. Cmty. Servs., 545 F. Supp. 2d 885, 890 (D. Minn. 2008) ("Assuming arguendo that the Government needs an important reason to interfere with an individual's right to international travel. . . .").

the proper standard of review in cases involving international travel. Because neither party advocated for what I consider to be the proper standard, I must leave the judgment of the district court undisturbed. For procedural reasons, then, I concur in the judgment.

V

The judgment of the district court is AFFIRMED.

MATHESON, Circuit Judge.

Mr. Maehr argues that international travel is a fundamental right protected by the Fifth Amendment Due Process Clause and that the revocation of his passport thus must be reviewed under strict scrutiny. Supreme Court case law constrains us to affirm the district court's dismissal of the substantive due process claim.[1]

I. DISCUSSION

A. *Legal Background*

1. Due Process Framework

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without

[1] As explained in the per curiam introduction, Judge Phillips joins this separate opinion, which is thus the opinion of the court on Mr. Maehr's substantive due process claim. Judge Lucero concurs only in the judgment affirming dismissal of that claim.

due process of law." U.S. Const. amend. V. The substantive due process doctrine "bars certain government actions regardless of the fairness of the procedures used to implement them." *Abdi v. Wray*, 942 F.3d 1019, 1027 (10th Cir. 2019) (quotation omitted). The Supreme Court has found substantive due process violations when (1) government action infringes a "fundamental right" without a "compelling government interest," *see Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (quotation omitted), or (2) government action deprives a person of life, liberty, or property in a way that "shocks the conscience," *see Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998).

In our circuit, "we apply the fundamental-rights approach when the plaintiff challenges *legislative action*, and the shocks-the-conscience approach when the plaintiff seeks relief for tortious *executive action*." *Halley v. Huckaby*, 902 F.3d 1136, 1153 (10th Cir. 2018). We apply the fundamental rights approach when, as here, the plaintiff challenges "the concerted action of several agency employees, undertaken pursuant to broad government policies," which is "akin to a challenge to legislative action." *See Abdi*, 942 F.3d at 1027-28 (emphasis omitted).

Under the fundamental rights framework developed in *Glucksberg*, our analysis has three steps. First, we "must determine whether a fundamental right is at stake either because the Supreme Court or the Tenth Circuit has already determined that it exists or because the right claimed to have been infringed by the government is one that is objectively among those

'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty' such that it is 'fundamental.'" *Abdi*, 942 F.3d at 1028 (quoting *Glucksberg*, 521 U.S. at 720-21).

Second, we "must determine whether the claimed right—fundamental or not—has been infringed through either total prohibition or 'direct and substantial' interference." *Id.* (alteration omitted) (quoting *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978)).

Third, we apply the appropriate level of scrutiny. *See id.* "If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009) (citing *Glucksberg*, 521 U.S. at 721). In other words, we apply strict scrutiny. *See id*. "But if an enactment burdens some lesser right, the infringement is merely required to bear a rational relation to a legitimate government interest." *Id.* (citing *Glucksberg*, 521 U.S. at 728); *see also Reno v. Flores*, 507 U.S. 292, 305 (1993) ("The impairment of a lesser interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose.").

The parties do not dispute that the revocation of a passport substantially interferes with the ability to travel internationally. We thus must determine whether (1) international travel is a fundamental right, and (2) the legislation here passes the applicable level of scrutiny.

2. **Fundamental Rights**

a. *General background*

The Supreme Court has recognized a narrow category of rights that are, "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (quotations and citations omitted). These fundamental rights include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion." *Id.* at 720 (citations omitted).

When it comes to recognizing new fundamental rights, the Supreme Court has counseled judicial restraint "because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *See Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *see also Glucksberg*, 521 U.S. at 720. So "identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008) (alteration and quotation omitted). The plaintiff bears the burden of demonstrating a right is fundamental. *See id.*

b. *Interstate travel*

Long ago, the Supreme Court explained the right of interstate travel is inherent in the fact that "[t]he

people of these United States constitute one nation." *See Crandall v. Nevada*, 73 U.S. 35, 43 (1867). Other rights—for example, to petition the federal government at the "seat of government" or to access "the courts of justice in the several States"—would be frustrated if interstate travel were impeded. *See id.* at 44. In the modern era, "[t]he right of interstate travel has repeatedly been recognized as a basic constitutional freedom." *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 254 (1974).

Though this "right finds no explicit mention in the Constitution, . . . freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.* at 758; *see also Saenz v. Roe*, 526 U.S. 489, 498 (1999) ("The word 'travel' is not found in the text of the Constitution. Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." (quoting *United States v. Guest*, 383 U.S. 745, 757 (1966)). The right is "fundamental to the concept of our federal union." *Guest*, 383 U.S. at 757. Laws burdening the right of interstate travel are therefore subject to strict scrutiny. *See Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Dunn v. Blumstein*, 405 U.S. 330, 338-39 (1972).[2]

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[2] As we recognized in *Abdi*, "the textual source of the right has been the subject of some debate." 942 F.3d at 1029. The Supreme Court has found support for the right in the Fifth and Fourteenth Amendment Due Process Clauses, *see Jones v. Helms*, 452 U.S. 412, 418 (1981), the Fourteenth Amendment Privileges or

B. ***Analysis***

Under Supreme Court precedent, (1) the right of international travel is not fundamental, and (2) the statute here passes rational basis review.

1. **International Travel Is Not a Fundamental Right**

Mr. Maehr has not shown that, within the "binary fundamental-versus-ordinary categorization" of rights within the substantive due process framework, *see* Aplt. Br. at 36, international travel falls on the fundamental side. We (a) recount the primary cases Mr. Maehr relies on, (b) discuss more recent cases from the Supreme Court, and (c) explain why the Supreme Court's cases do not support Mr. Maehr's position.

a. *Kent*, *Aptheker*, and *Zemel*

Mr. Maehr primarily relies on three Supreme Court cases.

Immunities Clause, *see Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring), the Article IV Privileges and Immunities Clause, *see Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) (citing *Paul v. Virginia*, 75 U.S. 168, 180 (1869)), and the Interstate Commerce Clause, *see Guest*, 383 U.S. at 759. It also has found an Equal Protection Clause violation when a durational residence requirement penalized the right of interstate travel. *See Mem'l Hosp.*, 415 U.S. at 269-70. The textual source of the right of interstate travel is not material here. For our purposes, it is sufficient that the right is "fundamental," *Guest*, 383 U.S. at 757; *Abdi*, 942 F.3d at 1028, and restrictions on it are subject to strict scrutiny, *see Dunn*, 405 U.S. at 338-39.

First, in *Kent v. Dulles*, 357 U.S. 116 (1958), the Supreme Court, on statutory grounds, held Congress had not delegated to the Secretary of State the power to deny passport applications to alleged communists. *See id.* at 129-30. The Court noted in dicta that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment," and "[t]ravel abroad, like travel within the country, may be necessary for a livelihood." *See id.* at 125-26. It reserved the question of whether it would be constitutional for the Secretary of State to "withhold passports to citizens because of their beliefs or associations." *See id.* at 130.

Second, in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), the Court addressed the constitutional question reserved in *Kent*. *See id.* at 505-07. The statute at issue in *Aptheker* made it a crime if "any member of a Communist organization which has registered or has been ordered to register . . . attempts to use or obtain a United States passport." *Id.* at 509. The statute applied "whether or not the member actually knows or believes that he is associated with what is deemed to be a [Communist] organization." *See id.* at 509-14. The Court found the statute

> Swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment. The prohibition against travel is supported only by a tenuous relationship between the bare fact of organizational membership and the activity Congress sought to proscribe. The broad and enveloping

> prohibition indiscriminately excludes plainly relevant considerations such as the individual's knowledge, activity, commitment, and purposes in and places for travel. The section therefore is patently not a regulation narrowly drawn to prevent the supposed evil, yet here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms.

Id. at 514 (quotation and citations omitted).

The Court also found the statute could not be applied constitutionally to the plaintiffs. *See id.* at 515-17. It noted that "freedom of travel is a constitutional liberty closely related to rights of free speech and association." *Id.* at 517.

Third, in *Zemel v. Rusk*, 381 U.S. 1 (1965), the Court affirmed the constitutionality of the Secretary of State's refusal to validate passports of United States citizens bound for Cuba for reasons of foreign policy and national security. *See id.* at 3, 13, 16. The Court seemed to suggest the right of international travel is comparable to the right of interstate travel. It observed that travel within the United States can be restricted to a specific area for the sake of "the safety and welfare of the area or the Nation as a whole. So it is with international travel." *See id.* at 15-16.

b. *Recent trends*

Since 1978, the Supreme Court has been more restrained about constitutional protection for international travel than it was in *Kent*, *Aptheker*, and *Zemel*.

In *Califano v. Aznavorian*, 439 U.S. 170 (1978), the Court applied rational basis review to uphold a statute that prohibited a Social Security recipient from receiving benefits after spending time abroad, a prohibition which had "an incidental effect on international travel." *See id.* at 171, 177-78. Referring to *Kent*, *Aptheker*, and *Zemel*, the Court noted, "The freedom to travel abroad has found recognition in at least three decisions of this Court," but there is a "crucial difference between the freedom to travel internationally and the right of interstate travel." *Id.* at 175-76. The latter "is virtually unqualified," while the " 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment." *Id.* (quotation omitted). The Court held that "legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel," *id.* at 176-77—that is, strict scrutiny.

In *Haig v. Agee*, 453 U.S. 280 (1981), the Court reiterated this distinction between the fundamental right of interstate travel and a lesser right to travel internationally. In reviewing the Secretary of State's revocation of a former CIA employee's passport for reasons of national security, the Court stated that "the

freedom to travel outside the United States must be distinguished from the *right* to travel within the United States." *Id.* at 282-89, 306 (1981).

In *Regan v. Wald*, 468 U.S. 222 (1984), the Court upheld a federal regulation prohibiting travel to Cuba. *See id.* at 244. Citing *Aznavorian* and *Agee*, it observed that "[i]n [*Kent*], the constitutional right to travel within the United States and the right to travel abroad were treated indiscriminately," but "[t]hat position has been rejected in subsequent cases." *Id.* at 241 n.25.

c. *Conclusion*

We disagree with Mr. Maehr that the Supreme Court's cases establish a fundamental right to travel internationally.

When analyzing Supreme Court cases, we must interpret older ones "in light of more recent Supreme Court elaboration." *See Independence Inst. v. Williams*, 812 F.3d 787, 793 (10th Cir. 2016). The Court's more recent decisions subordinate the "freedom" to travel internationally to the "right" of interstate travel. *See Agee*, 453 U.S. at 306 (emphasis omitted). Without direction from the Court to do otherwise, we decline to place international travel among those rare rights that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *See Glucksberg*, 521 U.S. at 721 (quotations omitted).

Moreover, the Supreme Court's language that most supports Mr. Maehr's position comes from *Kent* and *Aptheker*, in which First Amendment rights were at stake. Indeed, the Supreme Court has suggested that "First Amendment rights . . . controlled in *Kent* and *Aptheker*." *See Regan*, 468 U.S. at 241; *see also Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990) ("[I]n *Regan* . . . , the Court suggested that *Kent* and *Aptheker* should be as 'controlled' primarily by First Amendment concerns." (quoting 468 U.S. at 241)). Mr. Maehr has not argued that his First Amendment rights are implicated in this case.

Other circuits have concluded similarly in cases where a parent has challenged a passport revocation for failure to make child support payments. After canvassing the cases discussed above, a Ninth Circuit judge noted that "[a]t an early point in the development of Supreme Court jurisprudence in this area, the Court seemed to suggest that restrictions upon travel must be looked upon with a jaded eye," but the Court has since "suggested that rational basis review should be applied" to passport revocations that do not raise First Amendment concerns. *See Eunique v. Powell*, 302 F.3d 971, 973-74 (9th Cir. 2002).[3] Also, the Second

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[3] Judge Kleinfeld dissented, finding a fundamental right of international travel subject to strict scrutiny. *See Eunique*, 302 F.3d at 979, 981. Judge McKeown concurred. Though she agreed the Supreme Court "has not . . . declared international travel to be a fundamental right," she also said, "considering the nature of the right to travel internationally, . . . intermediate scrutiny comes the closest to being the proper standard when First Amendment concerns are not implicated." *Id.* at 976.

Circuit summarily affirmed a district court's determination that a substantive due process challenge to a passport revocation was subject to rational basis review. *See Weinstein v. Albright*, No. 00-cv-1193-JGK, 2000 WL 1154310, at *5-6 (S.D.N.Y. Aug. 14, 2000), *aff'd*, 261 F.3d 127, 133 (2d Cir. 2001).[4]

* * * *

Although Mr. Maehr has presented colorable arguments about the importance of international travel as a matter of policy, he has not shown there is a fundamental right of international travel by citing to cases from "the Supreme Court or the Tenth Circuit." *See Abdi*, 942 F.3d at 1028. In recent years, the Supreme Court has distanced itself from any implication from *Kent*, *Aptheker*, and *Zemel* that constitutional protection for international travel is on par with

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We have never applied intermediate scrutiny to a substantive due process claim. Guided by the Supreme Court's "oft-stated reluctance to expand the doctrine of substantive due process," *Chavez v. Martinez*, 538 U.S. 760, 776 (2003), and the general principal that "we rely on the parties to frame the issues for decision," *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation omitted), we decline to do so here.

Mr. Maehr has not argued, either in the district court or on appeal, that we should apply intermediate scrutiny to the statute at issue. Rather, he seems to reject both a rational basis and intermediate scrutiny approach. *See* Aplt. Br. at 45-46. He argues that the right of international travel is "fundamental" within the substantive due process framework's "binary fundamental-versus-ordinary categorization." Aplt. Br. at 36.

[4] A leading constitutional scholar agrees that the Supreme Court's "[l]ater cases have made it clear that only rational basis review is used for restrictions on foreign travel." Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 940 (6th ed. 2019).

interstate travel. *Aznavorian* and *Haig* in particular counsel against finding a fundamental right to travel internationally. "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground" in the area of substantive due process. *See Collins*, 503 U.S. at 125. We decline to break new ground today.[5]

We thus need not address whether restrictions on international travel may be subject to intermediate scrutiny.

2. **Rational Basis Review**

Because Mr. Maehr has not established a fundamental right of international travel, we "must consider" whether the government's actions taken under 26 U.S.C. § 7345 were constitutional "under the less-exacting standards of rational basis review." *See Seegmiller*, 528 F.3d at 771-72.

Under rational basis review, we will uphold a law "if there is any reasonably conceivable state of facts that could provide a rational basis for the [infringement]." *See FCC v. Beach Comm'cns, Inc.*, 508 U.S. 307, 313 (1993). This requires "no more than a 'reasonable

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[5] Mr. Maehr also has not convinced us that the right is fundamental based on the history of Anglo-American law dating back to Magna Carta. We decline to find a fundamental right from the thinly sourced 800-year history he presents. By comparison, in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court relied on multiple amicus briefs and detailed historical arguments to determine the meaning of the Second Amendment. *See id.* at 576-628.

fit' between governmental purpose . . . and the means chosen to advance that purpose." *Flores*, 507 U.S. at 305. "Our rational basis review is highly deferential toward the government's actions," and "[t]he burden is on the plaintiff to show the governmental act complained of does not further a legitimate state purpose by rational means." *Seegmiller*, 528 F.3d at 772.

The statute before us, 26 U.S.C. § 7345, passes rational basis review. As Mr. Maehr concedes, the federal government has a legitimate interest in "conserving or raising money" through taxes. *See* Aplt. Br. at 29. Congress's decision to further this legitimate interest by providing for revocation of passports for those who have a "seriously delinquent tax debt," 26 U.S.C. § 7345(a), is rational. For example, Congress could rationally conclude that seriously delinquent taxpayers should be restricted from leaving the country to prevent the secretion of assets overseas or to increase compliance.[6]

II. **CONCLUSION**

We affirm the district court's dismissal of Mr. Maehr's substantive due process claim.

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[6] Under the statute, among other things, the "unpaid, legally enforceable Federal tax liability" must exceed $50,000. 26 U.S.C. § 7345(b)(1)(B). We need not address whether a statute that would revoke the passport of a nontaxpayer with a lower outstanding unpaid tax liability, or that swept more broadly than this statute in other ways, would pass rational basis review.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 18-cv-02948-PAB-NRN

JEFFREY T. MAEHR,

Plaintiff,

v.

UNITED STATES Department of State, including Secretary of State Mike Pompeo, in his official capacity,

Defendant.

ORDER

(Filed Feb. 28, 2020)

This matter is before the Court on the magistrate judge's Report and Recommendation on Defendant's Motion to Dismiss Plaintiff's Amended Complaint [Docket No. 55] entered on September 27, 2019. Magistrate Judge N. Reid Neureiter recommends that defendant's motion to dismiss [Docket No. 46] be granted. Docket No. 55 at 1. On October 10, 2019, the United States[1] and plaintiff filed objections to the magistrate

[1] Plaintiff purports to sue the United States State Department and Secretary of State Mike Pompeo. *See* Docket No. 32. In its motion to dismiss, defendant argues that only the United States may be named as a defendant in plaintiff's lawsuit. Docket No. 46 at 17-18. Defendant relies upon 22 U.S.C. § 2714a(e)(3), which provides that "the Secretary of State . . . shall not be liable to an individual for any action with respect to a certification by

judge's recommendation. Docket No. 58; Docket No. 59. Each party responded to the opposing party's objections on October 24, 2019. Docket No. 60 (defendant's response); Docket No. 61 (plaintiff's response).

I. BACKGROUND

The background facts and procedural history in this case are set out in the magistrate judge's recommendation and will not be repeated unless necessary for purposes of this order. In or about 2010, the Internal Revenue Service ("IRS") determined that plaintiff owed the government approximately $250,000 in federal taxes and penalties based on tax years 2003-06. Docket No. 32 at 4, ¶ 13. The IRS certified that plaintiff had a "seriously delinquent" tax debt – i.e., debt exceeding $50,000 – under 26 U.S.C. § 7345. *Id.* at 5, ¶ 17. On December 4, 2018, defendant sent a letter to plaintiff ordering him to surrender his passport to the State Department. *Id.*, ¶¶ 17-18. Plaintiff voluntarily surrendered his passport. *Id.*, ¶ 20.

Plaintiff argues that the revocation of his passport violated his constitutional right to travel. *Id.* at 7-8, ¶¶ 30-31, 33. He seeks an injunction ordering defendant to reinstate his passport, a declaration that the statute under which his passport was revoked, 26

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the Commissioner of Internal Revenue under § 7345 of Title 26." However, as explained in this order, plaintiff does not bring an action challenging his certification as a seriously delinquent tax debtor. *See* Docket No. 32 at 1, ¶ 1. Rather, he challenges the constitutionality of § 7345. *Id.*, ¶ 2.

U.S.C. § 7345, is unconstitutional, and an award of fees and costs. *Id.* at 11-12.

Magistrate Judge Neureiter recommends that defendant's motion to dismiss be granted and the case be dismissed with prejudice. Docket No. 55 at 19. Both parties filed objections to the recommendation. Docket No. 58; Docket No. 59.

II. STANDARD OF REVIEW

The Court must "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). An objection is "proper" if it is both timely and specific. *United States v. One Parcel of Real Prop. Known as 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). A specific objection "enables the district judge to focus attention on those issues – factual and legal – that are at the heart of the parties' dispute." *Id.* In the absence of a proper objection, the Court may review a magistrate judge's recommendation under any standard it deems appropriate. *See Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991); *see also Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings").

III. ANALYSIS

A. Jurisdiction

Defendant partially objects to the magistrate judge's order insofar as the magistrate judge determined that subject matter jurisdiction exists in this case. *See* Docket No. 55 at 9; *see also* Docket No. 58 at 2. Whether a court has subject matter jurisdiction is a threshold inquiry that must be determined before proceeding to the merits of a party's claims. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "If a district court lacks jurisdiction, it has no authority to rule on the merits of a plaintiff's claims." *Lemarie v. FAA*, 2013 WL 6858697, at *1 (W.D. Okla. Dec. 30, 2013).

In its motion to dismiss, defendant argued that plaintiff's complaint contained a jurisdictional defect in that it did not clearly set out a basis for a waiver of the government's sovereign immunity. Docket No. 46 at 17.[2] In response, plaintiff argued that the Court has mandamus jurisdiction under 28 U.S.C. § 1361, which provides that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or

[2] Plaintiff's complaint also alleges that the Court has subject matter jurisdiction under 28 U.S.C. § 1331. However, this section "does not waive the government's sovereign immunity," and "district court jurisdiction cannot be based on § 1331 unless some other statute waives sovereign immunity." *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (quoting *Neighbors for Rational Dev., Inc. v. Norton*, 379 F.3d 960-61 (10th Cir. 2004)).

any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361. The magistrate judge "agree[d] that the relief sought here is generally in the nature of a mandamus action" and determined that the Court has subject matter jurisdiction. Docket No. 55 at 9.

Section 1361 of Title 28 provides "mandamus jurisdiction to all federal district courts." *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1235 (10th Cir. 2005). "[A]pplication of the mandamus remedy to require a public official to perform a duty imposed upon him in his official capacity is not limited by sovereign immunity." *Id.* at 1234. "The Supreme Court has made clear that the writ of mandamus is a 'drastic' remedy that is 'to be invoked only in extraordinary circumstances.'" *Soc. Sec. Law Ctr., LLC v. Colvin*, 542 F. App'x 720, 722 (10th Cir. 2013) (unpublished) (quoting *Allied Chem. Corp. v. Daiflin, Inc.*, 449 U.S. 33, 34 (1980)).

However, "[t]he common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Defendant argues that plaintiff has failed to exhaust his administrative remedies here. Docket No. 58 at 4. Specifically, defendant argues that plaintiff has other potential remedies under 26 U.S.C. § 7345, which provides that, once it has been certified by the Commissioner of the IRS that a taxpayer has "a seriously delinquent tax debt" and this certification was been transmitted to the Secretary of State for revocation of a passport, "the taxpayer may bring a civil

action against the United States in a district court of the United States, or against the Commissioner in the Tax Circuit, to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification." 26 U.S.C. § 7345(a), (e)(1).

Plaintiff contends that he was not required to file an action under § 7345(e) because that provision cannot provide the relief he seeks here. Docket No. 61 at 7. Plaintiff challenges not the certification of his delinquent status, but the constitutionality of defendant's revocation of his passport. *Id.* The Court agrees with plaintiff that the nature of relief he seeks here is not of the kind that he could receive under 26 U.S.C. § 7345(e). This section permits a taxpayer to challenge the Commissioner of Internal Revenue's certification of delinquency, not the resulting passport revocation by the Secretary of State. *See* 26 U.S.C. § 7345(e); *see also Wall v. United States*, 2019 WL 7372731, at *2 (Fed. Cl. Dec. 31, 2019) (stating that 26 U.S.C. § 7345(e) "empowers a U.S. district court or the Tax Court to determine if the certification of revocation of a passport was erroneous"). Plaintiff, in this lawsuit, does not challenge the Commissioner's certification of his delinquency. *See* Docket No. 32 at 1, ¶ 1 ("[T]his amended complaint will not attack the tax assessments, the deficiency determinating, or the tax debt generally."). Rather, "[t]he narrower purpose of [the lawsuit] is to challenge the Government's purported revocation of [plaintiff's] passport under the FAST Act, 26 U.S.C. § 7345." *Id.*, ¶ 2; *see also id.* at 7, ¶ 30 (alleging that the "passport revocation regime" in 26 U.S.C. § 7345

creates an unconstitutional deprivation of the right to travel); *see also* 22 U.S.C. § 2714a(e)(2) (providing the Secretary of State with authority to revoke the passport of individuals who have been certified delinquent under 26 U.S.C. § 7345). Because the basis of plaintiff's lawsuit could not have been raised in a challenge under § 7345(e), the Court finds that plaintiff was not required to have filed suit under that statute to exhaust his administrative remedies.

Defendant argues that "the Court cannot issue a mandamus order against the Secretary of State without invading the discretionary authority vested in another branch of government." Docket No. 58 at 5. Mandamus relief is available only if the plaintiff demonstrates that the defendant owes the plaintiff a clear, nondiscretionary duty. *Heckler*, 466 U.S. at 616. It is a "well-taken rule" that, "to the extent a statute vests discretion in a public official, his exercise of that discretion should not be controlled by the judiciary." *Carpet, Linoleum and Resilient Tile Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981). Defendant argues that, because "[i]ssuing and revoking passports are inherently discretionary activities," it would be "inappropriate for the Court to order the Secretary of State to reissue a passport to a de-certified taxpayer." Docket No. 58 at 5. Plaintiff, however, contends that defendant "did not exercise any executive discretion in following 22 U.S.C. § 2714a(e)(2) – it simply revoked [plaintiff's passport] because [he] owed the Government money, as the statute directs." Docket No. 61 at 8. In addition, he argues that his lawsuit does

not "interfere with the State Department's executive discretion because the State Department has no discretion to violate the Constitution." *Id.*

Both parties are correct. Contrary to plaintiff's assertion, 22 U.S.C. § 2714a does not "direct" the Secretary of State to revoke an individual's passport when certain conditions are met. *See* 22 U.S.C. § 2714a(e)(2) ("The Secretary of State *may* revoke a passport previously issued to any individual described in paragraph (1)(A)" (emphasis added). By comparison, a preceding provision in the statute expressly prohibits the Secretary of State from issuing a passport to an individual who has been certified as delinquent under § 7345: "the Secretary of State shall not issue a passport to any individual who has a seriously delinquent tax debt described in [26 U.S.C. § 7345]." 22 U.S.C. § 2714(a)(e)(1)(A). "Statutory use of the word 'may' is presumed to grant discretionary power, absent a showing that it was indented to have mandatory effect." *Brown v. Cooke*, No. 06-cv-01092-MSK-CBS, 2009 W L 641301, at *6 (D. Colo. Mar. 9, 2009); *cf. Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (recognizing that provision in the Passport Act which states that the Secretary of State "may" issue passports "recognizes substantial discretion").

"No government actor has 'discretion' to violate the Constitution, statutes, regulations or rules that bind them." *Limone v. United States*, 497 F. Supp. 2d 143, 203 (D. Mass. 2007) (citing *Muniz-Rivera v. United States*, 326 F.3d 8, 15 (1st Cir. 2003)); *see also Urlacher v. Lashaway*, 2017 WL 8942555, at *8 (W.D. Wash. May 4, 2017) ("Although a state's sovereignty generally

allows it to choose how to meet Constitutional requirements[,] it does not provide it with the discretion to violate the Constitution."). With respect to mandamus actions challenging purported discretionary actions, if the defendant violates a person's constitutional rights, the defendant "cannot avoid 1361 jurisdiction." *Murray v. Vaughn*, 300 F. Supp. 688, 697 (D. R.I. 1969). Thus, in order for the Court to determine whether it has mandamus jurisdiction over plaintiff's case, it necessarily must determine whether defendant acted unconstitutionally. The magistrate judge determined that it did not. Docket No. 55 at 19. Accordingly, in analyzing the constitutionality question, the Court will address plaintiff's objections to the magistrate judge's order [Docket No. 59].

B. Constitutionality

The magistrate judge determined that defendant did not violate the constitution when it revoked plaintiff's passport. Docket No. 55 at 19. Accordingly, in analyzing the constitutionality question, the Court will address plaintiff's objections to the magistrate judge's order. In his order recommending dismissal of plaintiff's lawsuit, the magistrate judge rejected plaintiff's arguments that (1) the revocation of his passport violated plaintiff's right to international travel under the Privileges and Immunities Clause in Article IV, Section 2 of the United States Constitution, Docket No. 55 at 12; and that (2) the right of international travel is a fundamental right, and the revocation of his passport violated this right under the due process clause of the

Fifth Amendment. *Id.* at 13-14. The magistrate judge also rejected plaintiff's argument that, even if the right to international travel is not a fundamental right, the government's revocation of his passport violated his due process rights because defendant did not make the required showing to justify a writ *ne exeat republica*. Docket No. 55 at 18. Plaintiff objects to each of these findings.

1. Privileges and Immunities Clause

Plaintiff first objects to the magistrate judge's finding that the right of international travel is not protected by the Privileges and Immunities Clause. Docket No. 55 at 13. The magistrate judge found that Supreme Court precedent has consistently analyzed the right of international travel in the context of Fifth Amendment due process jurisprudence rather than Privileges and Immunities jurisprudence. *Id.* The magistrate judge "decline[d] to expand on the [limited] list of rights recognized by the Supreme Court as protected by the Privileges and Immunities Clause to include the right to international travel." *Id.* Plaintiff objects to this finding, arguing that the right of international travel is "an established constitutional right, grounded in the Fifth Amendment,"[3] and that, because the right

[3] Plaintiff states that he "mistakenly argued below that the right of international travel was grounded in Article IV Section 2 Privileges and Immunities Clause." Docket No. 59 at 14 n.8. He acknowledges that the Privileges and Immunities Clause "is not the source of any privileges, but protects recognized privileges from abridgment by the states." *Id.*

of interstate travel is protected under the Privileges and Immunities Clause, the right of international travel should also be protected. Docket No. 59 at 14.

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, sec. 2. This clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Defendant argues that plaintiff has conceded the fact that the Privileges and Immunities Clause "applies against state action only," Docket No. 60 at 13, which refers to plaintiff's acknowledgment that the clause "protects recognized privileges from abridgement by the states." *See* Docket No. 59 at 14 n.8. A number of circuit courts have held that the Privileges and Immunities Clause does not apply to federal action. *See Pollak v. Duff*, 793 F.3d 34, 41 (D.C. Cir. 2015) (citing cases); *see also Hague v. Committee for Indus. Org.*, 307 U.S. 496, 511 (1939) (stating that the Privileges and Immunities Clause "prevents a state from discriminating against citizens of other states in favor of its own"). Plaintiff cannot challenge federal action in the context of the Privileges and Immunities Clause. *See Robinson v. Huerta*, 123 F. Supp. 3d 30, 44 (D.D.C. 2015) (finding that pro se plaintiff's claim that his right to interstate travel had been violated had "no basis" in the Article IV Privileges and Immunities Clause and liberally construing complaint as alleging

a violation of his right to interstate travel as protected by the Fifth Amendment Due Process Clause).

In his objections, plaintiff revised his argument to claim that the right to international travel is a fundamental right "grounded in the Fifth Amendment." Docket No. 59 at 14. The Court agrees with the magistrate judge that the right to international travel is more appropriately analyzed in the Fifth Amendment Due Process context. *See Robinson*, 123 F. Supp. 3d at 44; *see also* Docket No. 55 at 13. As a result, the Court overrules plaintiff's objection concerning his Privileges and Immunities Clause argument.

2. Fifth Amendment Due Process

Plaintiff objects to the magistrate judge's finding that (1) the right of international travel is not a fundamental right, Docket No. 55 at 16, and (2) that § 7345 is not unconstitutional because it is rationally related to a legitimate government interest. *Id.* at 17. In determining the right to travel internationally, the Court looks to Supreme Court precedent. *See Abdi v. Wray*, 942 F.3d 1019, 1029 (10th Cir. 2019). Plaintiff argues that the "controlling Supreme Court case law describes the right of international travel as a fundamental right." Docket No. 59 at 11. Plaintiff relies on three Supreme Court cases to support his argument: *Kent v. Dulles*, 357 U.S. 116 (1958), *Aptheker v. Secretary of State*, 378 U.S. 500, 501 (1964), and *Zemel v. Rusk*, 381 U.S. 1 (1965). *Id.*

In *Kent*, the Supreme Court held that the Secretary of State did not have the authority to issue regulations permitting the denial of passports to suspected Communists. 357 U.S. at 129-30. Although the Supreme Court stated that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment," *id.* at 125, the *Kent* court "[did] not reach the question of constitutionality" or "decide the extent to which [the right] can be curtailed." *Id.* at 127, 129; *see also Doe v. Haslam*, 2017 WL 5187117, at *15 (M.D. Tenn. Nov. 9, 2017) ("At most, . . . *Kent* offers *dicta* suggesting that the right to constitutional international travel is entitled to some protection, but leaving open the question of how much protection that is."). Thus, contrary to plaintiff's argument, *Kent* does not stand for the proposition that the right to travel internationally is a fundamental right.

Aptheker, meanwhile, held that a provision of the Subversive Activities Control Act, which prevented members of the Communist Party from obtaining or using passports, was unconstitutional on its face. 378 U.S. at 505, 509, 517. The Supreme Court reiterated that the right to travel is important to individual liberty and could not be deprived without due process of law. *Id.* at 505. It determined that the challenged Control Act provision "swe[pt] too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment" to be deemed constitutional. *Id.* at 514. And while the *Aptheker* court decided that the provision was not narrowly drawn to prevent the proposed

evil, *see id.*, which mirrors the test applied to fundamental rights,[4] the Court did not expressly hold that the right of international travel is a fundamental right. *See generally id.*

Finally, plaintiff relies upon *Zemel*, which states that "[t]he right to travel within the United States is of course . . . constitutionally protected," but that such protection is not without its limits. 381 U.S. at 15. The *Zemel* court went on to say, "[s]o it is with international travel." *Id.* at 16. In this case, the Supreme Court affirmed the constitutionality of the Secretary of State's authority to refuse passports of United States citizens for travel to Cuba, as the restriction was "supported by the weightiest considerations of national security." *Id.* Plaintiff argues that *Zemel* stands for the proposition that the international right to travel is a fundamental right because its "analysis did not treat the right of international travel as less than a fundamental right, or less important than the right of interstate travel." Docket No. 59 at 5. Plaintiff's argument is tenuous at best. That the Supreme Court analogized the importance of the right of international travel to the right of interstate travel does not mean that the Supreme Court has held that international travel is equal in force to the right of interstate travel or constitutes a fundamental right.

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[4] "If a legislative enactment burdens a fundamental right, the infringement must be narrowly tailored to serve a compelling government interest." *Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1181 (10th Cir. 2009).

A later Supreme Court case, *California v. Aznavorian*, 439 U.S. 170 (1978), confirms that conclusion from earlier cases that there is no fundamental right to international travel. In *Aznavorian*, the Supreme Court noted that, while the constitutional right of interstate travel is "virtually unqualified," the right of international travel "has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment." *Id.* at 176 (quoting *United States v. Guest*, 383 U.S. 745, 757-78 (1966)). "Thus, legislation which is said to infringe the freedom of travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel." *Id.* at 176-77. Plaintiff argues that this Court should not follow what he regards as dicta in *Aznavorian* over the "the fundamental [right] status recognized in *Kent*, *Aptheker* and *Zemel*." Docket No. 59 at 7. But, as set out above, this trilogy of cases does not establish that the right of international travel enjoys fundamental right status, a proposition which a number of circuit courts have rejected. *See Eunique v. Powell*, 302 F.3d 971, 974 (9th Cir. 2002); *Hutchins v. Dist. of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999); *Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir. 2001); *see also Abdi v. Wray*, 942 F.3d 1019, 1020 (10th Cir. 2019) (recognizing a distinction between the rights to interstate and international travel, but declining to decide whether the right to international travel is fundamental).[5] The Court finds that the right

[5] On November 26, 2019, defendant filed a notice of supplemental authority alerting the Court to the recently decided Tenth

of international travel is not a fundamental right, and is therefore subject to rational basis scrutiny.[6]

In his recommendation, the magistrate judge found that § 7345 meets the rational basis test. Docket No. 55 at 17. Plaintiff's objection to the magistrate judge's application of the rational basis test is limited to an argument that the magistrate judge "erroneously relied on decisions from some lower federal courts upholding the constitutionality of a similar passport revocation regime to collect child support debts." Docket No. 59 at 12. He does not argue that the magistrate judge otherwise erred in applying the rational basis test. *See id.* Instead, plaintiff argues that the child support cases relied upon by the magistrate judge are distinguishable because "child support debts are not ordinary debts" and that, while there is a common law tradition of permitting courts to use their contempt powers to compel parents to pay child support debts, there is no comparable common law tradition of using contempt power to compel debtors to pay tax debts. *Id.* at 13.

Circuit decision in *Abdi*. Docket No. 62 at 1. Plaintiff filed a response on December 4, 2019, arguing that the *Abdi* decision supports his position that the right of international travel is a fundamental right. Docket No. 63 at 1. The Court disagrees. As set out above, and as acknowledged by plaintiff, see Docket No. 63 at 4, the Tenth Circuit did not rule in *Abdi* whether the right of international travel is fundamental. *See Abdi*, 942 F.3d at 1026.

[6] "[I]f an enactment burdens some lesser right [than a fundamental right], the infringement is merely required to bear a rational relation to a legitimate government interest." *Dias*, 567 F.3d at 1181.

The Court rejects plaintiff's argument and agrees with the magistrate judge's finding that § 7345 meets the rational basis test. Regardless of whether the child support cases are distinguishable, plaintiff has made no argument that the collection of substantial delinquent tax debts is not a legitimate government interest.[7] The Court finds that it is a legitimate interest. *See United States v. First. Nat. Bank of Chicago*, 699 F.2d 341, 346 (7th Cir. 1983) (stating that the United States' interest in collecting taxes "is of importance to the financial integrity of the nation"). Accordingly, the Court will overrule plaintiff's objection.

3. Writ **Ne Exeat Republica**

Plaintiff argued in response to defendant's motion to dismiss that, even if international travel is not a fundamental right, the revocation of his passport nevertheless violated his due process rights because it was not "limited by *ne exeat* principles." Docket No. 52 at 29. In his argument, plaintiff invokes the "established Anglo-American common law tradition[]" that the government cannot compel payment of debt through means of coercion. *Id.* at 29-30.

The power to issue a writ *ne exeat republica* is codified at 26 U.S.C. § 7402, which provides that district courts "shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of

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[7] In addition, plaintiff makes no argument that the revocation statute is not rationally related to such interest. *See* Docket No. 59.

ne exeat republica, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws." 26 U.S.C. § 7402(a). To issue a writ *ne exeat republica*, a court must be satisfied that "the restraint of liberty is a necessary, and not merely coercive and convenient, method of enforcement." *United States v. Shaheen*, 445 F.2d 6, 11 (7th Cir. 1971).

The magistrate judge found that "[a] showing of the predicates required for a writ *ne exeat republica* is not applicable and not required before the Department of State can revoke a passport for a taxpayer certified [as seriously delinquent] by the IRS." Docket No. 55 at 18. The magistrate judge reasoned that, while the common law writ was one tool that could be used to enforce the tax laws, § 7345 is simply an additional mechanism for the government to ensure the repatriation of tax debts. *Id.* at 18-19. Thus, the magistrate judge found that the fact that the *ne exeat republica* writ requirements were not met did not render the passport revocation in violation of plaintiff's due process rights. *Id.* at 19.

Plaintiff objects to the magistrate judge's decision, but does not set forth any specific points of error; rather, plaintiff simply reargues his assertions from the motion to dismiss stage. *See* Docket No. 59 at 7-11. In the absence of a proper objection, the Court reviews the magistrate judge's recommendation to satisfy itself that there is no clear error on the face of the record. *Summers*, 927 F.2d at 1167. Whether reviewing for

clear error or conducting *de novo* review, the Court finds no error in the magistrate judge's decision. The statute under which the government revoked plaintiff's passport, 26 U.S.C. § 7345, is separate and distinct from 26 U.S.C. § 7402, which provides that "[t]he remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce [internal revenue] laws." 26 U.S.C. § 7402(a). Section 7345 has only one prerequisite for revocation eligibility – that the debtor has been certified as an individual with a seriously delinquent tax debt by the Commissioner of the IRS. 26 U.S.C. § 7345(a).

The Court finds that plaintiff has not demonstrated a constitutional violation resulting from the revocation of his passport. Accordingly, the Court finds that plaintiff has failed to establish that he is challenging the refusal to uphold a non-discretionary, ministerial duty, as required for mandamus jurisdiction. *See* 22 U.S.C. § 2714a(2)(A) ("The Secretary of State *may* revoke a passport previously issued to any individual described in paragraph (1)(A)." (emphasis added)). The Court finds that it therefore does not have jurisdiction over this case and will dismiss plaintiff's complaint. *See Parrot v. Cary*, 234 F. Supp. 572, 574-75 (D. Colo. 1964) (dismissing case for lack of mandamus jurisdiction because challenged duties were discretionary in nature); see *also Nickerson v. United States*, 2007 WL 9662632, at *5 (D.N.M. Oct. 31, 2007) (recognizing that mandamus jurisdiction did not exist when challenged action was discretionary).

IV. CONCLUSION

For these reasons, it is

ORDERED that United States' Partial Objection to Magistrate's Report and Recommendation [Docket No. 58] is **SUSTAINED**. It is further

ORDERED that Maehr's Objections to Magistrate Judge Neureiter's Recommendation to Dismiss [Docket No. 59] are **OVERRULED**. It is further

ORDERED that the Report and Recommendation on Defendant's Motion to Dismiss Plaintiff's Amended Complaint [Docket No. 55] is **ACCEPTED IN PART**. It is further

ORDERED that defendant's Motion to Dismiss Plaintiff's Amended Complaint [Docket No. 46] is **GRANTED**. It is further

ORDERED that plaintiff's Amended Complaint [Docket No. 32] is **DISMISSED WITHOUT PREJUDICE**. It is further

ORDERED that, within 14 days of the entry of this order, defendant may have its costs by filing a bill of costs with the Clerk of Court. It is further

ORDERED that this case is closed.

DATED February 28, 2020.

BY THE COURT:

/s/ Philip A. Brimmer
PHILIP A. BRIMMER
Chief United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 18-cv-02948-PAB-NRN

JEFFREY T. MAEHR,

Plaintiff,

v.

UNITED STATES Department of State, including Secretary of State Mike Pompeo, in his official capacity,

Defendants.

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT (DKT. #46)

(Filed Sep. 27, 2019)

N. Reid Neureiter
United State Magistrate Judge

This case is before the Court pursuant to the Order (Dkt. #47) issued by Chief Judge Philip A. Brimmer referring Defendant United States' Motion to Dismiss Plaintiff's Amended Complaint. Dkt. #46. The Court has carefully considered the motion, response (Dkt. #52), and reply. Dkt. #53. On September 12, 2019, the Court heard argument on the motion. *See* Dkt. #54. The Court has taken judicial notice of the Court's file, considered the applicable Federal Rules of Civil

Procedure and case law, and recommends that Defendant's Motion to Dismiss be granted. This matter involves the constitutionality of a federal statute that authorizes the revocation of the passport of American citizens found to be seriously delinquent in their payment of income tax to the Internal Revenue Service. I find the statute at issue constitutional as applied to Mr. Maehr.

BACKGROUND

I. Procedural History

Mr. Maehr initiated this action by filing pro se a pleading titled "D. Statement of Claims – U.S. District Court, Colorado." Dkt. #1. On November 23, 2018, Mr. Maehr filed an amended complaint. Dkt. #6. On December 20, 2018, Magistrate Judge Gordon P. Gallagher ordered Mr. Maehr to file a second amended complaint to clarify his claims. On January 23, 2019, Mr. Maehr filed a second amended complaint (Dkt. #13) asserting two claims for relief: first, that the State Department violated his right to due process by revoking his passport before the issue of whether he has a seriously delinquent tax debt has been resolved; and second, against the United States Congress. Judge Gallagher dismissed Mr. Maehr's claim against the United States Congress leaving Mr. Maehr's claim against the State Department. Dkt. #14. Mr. Maehr contends that the law requiring the IRS to transmit certification of a seriously delinquent tax debt to the Secretary of State for action with respect to denial,

revocation, or limitation of a passport, is unconstitutional. *See* 26 U.S.C. § 7345 & 22 U.S.C. § 2714a.

This Court appointed counsel to represent Mr. Maehr on March 20, 2019, and an Amended Complaint (Dkt. #32), which is the operative complaint here, was filed on April 23, 2019.[1]

II. Mr. Maehr's Allegations

The IRS assessed Mr. Maehr with a tax deficiency for tax years 2003 through 2006 of approximately $250,000. Mr. Maehr has been litigating the validity of his tax liability for many years, and before many different courts. *See* Dkt. #46 at 1 n.2 (collecting cases). In this lawsuit, Mr. Maehr does not concede or challenge the validity or accuracy of the tax assessment process, or the Government's right or ability to collect this alleged debt from him. Instead, Mr. Maehr challenges the Government's right and ability to collect his alleged tax debt by depriving him of his constitutional right to travel internationally, which Mr. Maehr contends is a fundamental right.

Specifically, Mr. Maehr is challenging the Government's revocation of Mr. Maehr's passport under the Fixing America's Surface Transportation Act, 26 U.S.C. § 7345 ("FAST"). This relatively new statute directs the IRS to identify taxpayers who meet certain criteria

[1] The Court is very appreciative of excellent work of pro bono counsel for Mr. Maehr from the Polsinelli law firm in clarifying the difficult constitutional issues presented in this case of first impression.

for "seriously delinquent tax debt," and then certify the identities of those taxpayers to the State Department. The State Department then, under 22 U.S.C. §§ 2714a(e)(1)(A) & (2)(A), "shall not issue a passport to any individual who has seriously delinquent tax debt" and "may revoke a passport previously issued to any individual" who has been certified by the IRS.

Here, the State Department revoked Mr. Maehr's passport after the IRS certified that Mr. Maehr has a seriously delinquent tax debt. Dkt. #32 at ¶¶ 17-18 & Ex. 1. The State Department's passport revocation letter ordered Mr. Maehr to surrender his passport to the State Department and advised Mr. Maehr that he may re-apply for a passport once the IRS certifies that he has paid the alleged tax debt. *Id.* Mr. Maehr surrendered his passport and states that he is now prohibited from travelling internationally.[2] *Id*. ¶¶ 19-20.

Mr. Maehr asserts three claims for relief, all arising from the State Department's decision to revoke his passport on December 4, 2018. First, Mr. Maehr seeks a declaratory judgment that the passport revocation regime under § 7345 is unconstitutional unless the common law constraints applied to the Government's

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[2] Mr. Maehr suggests that because of the implementation of the REAL ID requirements, which would require residents of states that have not complied with the REAL ID requirements traveling by airplane within the United States to use a passport, his right to interstate travel may be implicated as well. However, Mr. Maehr does not allege that he is currently prevented from interstate travel. As such, the Court will consider only the impact on Mr. Maehr's right to international travel.

use of a writ *ne exeat republica*[3] are also applied to a decision to revoke a passport. Mr. Maehr argues that § 7345 is unconstitutional as applied to him because the Government cannot establish, as required for a writ *ne exeat republica*, that Mr. Maehr intends to secrete assets abroad or that Mr. Maehr has assets abroad that he refuses to repatriate and use to pay his alleged tax debt.

In his second claim for relief, Mr. Maehr seeks a mandatory injunction requiring the State Department to reverse its December 8, 2018 decision to revoke his passport. Dkt. #32 at ¶35.

Finally, Mr. Maehr alleges that the Government's defense of its allegedly unconstitutional application of § 7345 is without substantial justification, and Mr. Maehr is accordingly entitled to an award of attorney fees and costs incurred by Mr. Maehr under the Equal Access to Justice Act, 28 U.S.C. § 2412.

III. FAST Statute Legislative History

Congress enacted 26 U.S.C. § 7345 in late 2015 after considering for several years the issue of passport restrictions to increase tax compliance. *See* Fixing America's Surface Transportation Act, § 32101(a), Pub.

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[3] A writ of *ne exeat republica*, codified at 26 U.S.C. § 7402(a), authorizes federal courts to issue a writ to prevent a judgment debtor from leaving the country in order to avoid payment of the debt. The government is required to establish certain predicates before a writ will issue. *See also United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971).

L. No. 114-94, 129 Stat. 1312, 1729 (2015) (the "FAST Act"). In 2011, the Governmental Accountability Office ("GAO") provided a research report on the issue in response to Congressional committee requests. *See* GAO-11-272, Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes (Mar. 2011) at 4.3. The GAO reported that, as of September 30, 2008, the State Department had issued passports to over 224,000 individuals who owed over $5.8 billion in taxes. *Id*. at 2. The GAO observed that legislation tying passports to tax compliance could help generate substantial revenues, and "increase tax compliance for tens of millions of Americans[.]" *Id*. at 16. Such legislation could impact not only those individuals who already had tax debts, but also "serve as an incentive to individuals wishing to obtain passports to comply with their tax obligations, thus reducing the level of tax delinquencies and promoting compliance." *Id.*

In 2015, the Senate Finance Committee noted that "the amount of unpaid Federal tax debts continues to present a challenge to the IRS[,]" and that "a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued." Sen. Rep. 114-45 at 57. The committee recognized that federal law permitted the State Department to deny or revoke passports for various reasons, but the Department did not have authority to consider federal tax debts. *Id.* The committee reasoned that "that tax compliance will increase if the issuance of a passport is linked to payment of tax debts." *Id.* at 57. It also considered cost and

revenue findings from the Congressional Budget Office and the Joint Committee on Taxation, which estimated that such legislation could increase revenues by about $400 million between 2016 and 2025. *Id.* at 63.

The Senate and the House both approved versions of the bill. A House conference report reconciling the two echoed the Senate committee's concern that the State Department had authority to restrict passports for child support debts of over $2,500, but not tax debts. H. Rep. 114-357 at 530. However, Congress recognized the need to build in taxpayer protections by carefully defining "seriously delinquent tax debt" and allowing revocation "only after the IRS has followed its examination and collection procedures under current law and the taxpayer's administrative and judicial rights have been exhausted or lapsed." *Id.* at 531-32.

IV. FAST Statute

Under FAST, the IRS is required to certify that a taxpayer meets the criteria for "seriously delinquent tax debt." The statute directs the Secretary of the Treasury to inform the State Department of the certification. 26 U.S.C. § 7345(a). The statute defines "seriously delinquent" tax debt to include debts of $50,000 or more, indexed for inflation. See *id* §§ 7345(b) and (f).

Before the IRS can certify a tax debt, it must be assessed, *id.* § 7345(b)(1)(A), which means the tax liability must be formally recorded. *Id.* § 6203. For purposes relevant here, a tax liability will not be recorded by the IRS until the amount of the liability has been

determined through an administrative process that provides the taxpayer with notice and an opportunity to challenge the IRS's position. That process includes the right to petition the United States Tax Court for a redetermination (without having to pay the disputed amount first), and the right to appeal an adverse Tax Court decision to the Court of Appeals for the relevant circuit. *See id.* §§ 6213(a) and 7482. The IRS generally cannot make an assessment until the taxpayer's time to petition the Tax Court has lapsed, or, if the taxpayer does petition the Tax Court, the decision has become final. *See id*. §§ 6213(a) (providing timelines) & 6215.

In addition, before the IRS can certify that a taxpayer has seriously delinquent debts, the IRS must attempt to collect the debt through a specific administrative process. It must file a lien notice pursuant to 26 U.S.C. § 6323 or make a levy pursuant to 26 U.S.C § 6331. *See id.* § 7345(b)(1)(C). If the IRS records a lien or makes a levy, it must generally provide the taxpayer an opportunity to challenge the notice or levy administratively, separate and apart from the taxpayer's right to challenge the underlying debt. *See id.* §§ 6320 and 6330 (notice and hearing procedures for liens and levies, respectively). These taxpayer challenges are sometimes known as "collections due process," or "CDP," proceedings. If the taxpayer chooses to exercise CDP rights, the IRS cannot certify the taxpayer until the process has concluded. *Id.* §§ 7345(b)(1)(c)(i) (right to challenge lien notice, under 26 U.S.C. § 6320) and 7345(b)(2)(B)(i) (right to challenge levy, under 26 U.S.C. § 6330).

The IRS cannot issue a certification if the taxpayer is paying down the debt under a payment plan or settlement agreement, even if the taxpayer still owes more than the threshold amount. *Id*. § 7345(b)(2)(A). Subsection(b)(2)(A) protects taxpayers who may never pay their entire obligation if they are making payments on a valid offer in compromise pursuant to 26 U.S.C. § 7122.[9]

Certification is not permanent. If the debt is satisfied (whether because the taxpayer pays it, or because the IRS has succeeded in collecting it through its own efforts), the IRS must notify the State Department. *See id.* § 7345(c)(2)(A). The same is true if the debt becomes unenforceable, i.e., the statute of limitations for collections has run. *Id.* The taxpayer can also obtain reversal by seeking "innocent spouse" relief under 26 U.S.C. § 6015, or entering into an approved payment plan, even if the debt remains above the statutory threshold. *See id.* §§ 7345(c)(2)(B) & (C). Relatedly, the statute provides a right to challenge erroneous certifications in federal district court (as Mr. Maehr has done) or in the United States Tax Court, and requires that the IRS provide notice of the certification and the right to challenge it. *See id*. §§ 7345(d) & (e).

Finally, even if an individual has been certified, the State Department may issue a passport "in emergency circumstances or for humanitarian reasons," or to allow a taxpayer who is overseas to return home. 22 U.S.C. §§ 2714a(e)(1)(B) and (e)(2)(B).

ANALYSIS

I. Jurisdiction

The United States argues that Mr. Maehr's Amended Complaint suffers from a jurisdiction defect, arguing that 28 U.S.C. § 1331 does not waive the government's sovereign immunity absent a waiver of sovereign immunity found in another statute. *See Merida Delgado v. Gonzalez*, 428 F.3d 916, 919 (10th Cir. 2005). Mr. Maehr, however, argues that this is, at its core, a mandamus action, seeking relief based on rights granted under the United States Constitution. The mandamus statute (cited by Mr. Maehr in his response to the Government's motion to dismiss but not in his Amended Complaint[4]), 28 U.S.C. § 1361 "provides federal district courts with original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Trackwell v. U.S. Gov't*, 472 F.3d 1242, 1244–45 (10th Cir. 2007). *See also Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1234 (10th Cir. 2005) (mandamus remedy applied "to require a public official to perform a duty imposed upon

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[4] At oral argument and in his response to the Government's motion to dismiss, Mr. Maehr offered to amend his complaint to address the Government's assertions that he did not clearly allege the basis for subject matter jurisdiction. The Court does not recommend that Mr. Maehr be required or allowed to amend his complaint because doing so would be futile for the reasons stated in this Recommendation. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("[T]he district court may dismiss without granting leave to amend when it would be futile to allow the plaintiff an opportunity to amend his complaint.").

him in his official capacity is not limited by sovereign immunity"). The Court agrees that the relief sought here is generally in the nature of a mandamus action. Therefore, the Court finds it has subject matter jurisdiction.

The Government also argues that because the FAST Act specifically provides that the State Department "shall not be liable to an individual for any action with respect to a certification" by the IRS, 22 U.S.C. § 2714(e)(3), the State Department is not a properly named defendant. Instead, the Government argues, Mr. Maehr is required to name the "United States" as the defendant for any challenges to certification by the IRS. *See id.* § 7345(e). However, as outlined above, Mr. Maehr is not challenging the certification by the IRS. Rather, Mr. Maehr seeks an order that the State Department's decision to revoke his passport is unconstitutional and therefore void. As such, the Court finds that the United States Department of State is a proper defendant. Nevertheless, to the extent the "United States" should be a named Defendant, the Court recommends the caption be amended to include the "United States of America" as a Defendant. This is, at best, form over substance.

II. United States' Motion to Dismiss (Dkt. #46)

The Government moves for dismissal of Mr. Maehr's claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Government argues that the Amended Complaint fails because Mr. Maehr cannot sufficiently

allege that the FAST statute is an impermissible restriction on any fundamental constitutional right.

Rule 12(b)(6) provides that a defendant may move to dismiss a claim for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (citations and quotation marks omitted).

"A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff." *Hall*, 935 F.2d at 1198. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). However, legal conclusions are not presumed to be true. *Khalik v. United Airlines*, 671 F.3d 1188, 1190-91 (10th Cir. 2012). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Under this standard, "the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims." *Ridge at Red Hawk, LLC v. Schneider*,

493 F.3d 1174, 1177 (10th Cir. 2007). "The nature and specificity of the allegations required to state a plausible claim will vary based on context." *Safe Streets All. v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (quoting *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215 (10th Cir. 2011)).

Here, Mr. Maehr's Amended Complaint is not lacking in factual allegations, nor is there any dispute relating to the pertinent facts. Rather, assuming all of the factual allegations are true, this Court finds that the State Department's revocation of Mr. Maehr's passport was not unconstitutional, and therefore recommends that the Government's Motion to Dismiss be granted.

A. Mandamus

The granting of mandamus relief is a matter of judicial discretion, but a plaintiff must first show eligibility by establishing "(1) that he has a clear right to relief, (2) that the [defendant's] duty to perform the act in question is plainly defined and peremptory, and (3) that he has no other adequate remedy."[5] *Rios v. Ziglar*,

[5] The Government argues that Mr. Maehr has not exhausted his available remedies under the FAST statute, which provides a mechanism for a certified taxpayer to challenge the IRS's decision. However, Mr. Maehr argues he is not challenging the IRS's certification, but the State Department's revocation of his passport, and therefore the FAST statute provision that allows challenges to the IRS's decision is not applicable here. The Court agrees. The letter from the State Department to Mr. Maehr advises him that "there is no administrative or appeal before the Department of State," (Dkt. #32-1), and the Government does not

398 F.3d 1201, 1206 (10th Cir. 2005). *See also Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (For mandamus to issue, the petitioner "must also show that his right to the writ is clear and indisputable.") (internal quotations omitted). "[M]andamus is an extraordinary remedy that is granted only in the exercise of sound discretion." *Miller v. French*, 530 U.S. 327, 339 (2000) (internal quotations omitted).

Here, Mr. Maehr seeks a writ ordering the State Department and the Secretary of State Mike Pompeo to nullify the decision to revoke Mr. Maehr's passport pursuant to 22 U.S.C. § 2714a without proving the requirements of *ne exeat republica*.

Under the first requirement, to show that he has a clear right to relief, Mr. Maehr has the burden of establishing that the revocation of his passport is a violation of his constitutional right to travel. He alleges that the right to international travel is a fundamental right under the constitution that cannot be deprived by the Department of State solely on the basis of the IRS certification under FAST. He argues that this right is protected by the Privileges and Immunities Clause, the Due Process Clause of the Fifth Amendment, and Supreme Court precedent. The Court will address each in turn.

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argue that Mr. Maehr has any other avenue by which to challenge the State Department's decision to revoke his passport.

B. Privileges and Immunities

Mr. Maehr first argues that the Privileges and Immunities Clause in Article IV, Section 2 of the Constitution prevents Congress from restricting the right to international travel. Mr. Maehr acknowledges that there is no direct precedent to support his argument but argues that the right can be newly recognized as a constitutional right that stems from national citizenship.

According to Mr. Maehr, the Supreme Court left this possibility open when it provided a nonexhaustive list of civil rights protected by the Privileges and Immunities clause, *see Twining v. New Jersey*, 211 U.S. 78 (1908), and later added the right "to carry on interstate commerce," *Crutcher v. Commonwealth*, 141 U.S. 47, 57 (1891), and the right to own real property, *Oyama v. California*, 332 U.S. 633 (1948). Mr. Maehr argues that the right to travel internationally has been recognized by the Supreme Court as a "right of constitutional dimension." It is true that the Supreme Court described the right to international travel as a "constitutional liberty closely related to rights of free speech and association," *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964), relying on a Supreme Court opinion issued several years earlier:

> The right to travel is a part of the "liberty" of which the citizen cannot be deprived without the due process of law under the Fifth Amendment. . . . Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual

> as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.

Kent v. Dulles, 357 U.S. 116, 125-26 (1958). However, as outlined below, the subsequent Supreme Court authority that addresses the right to international travel does so in the context of substantive due process under the Fifth Amendment and distinguishes the right to international travel from the right to interstate travel, which is a well-established fundamental right.

Accordingly, based on the weight of authority, this Court declines to expand on the list of rights recognized by the Supreme Court as protected by the Privileges and Immunities Clause to include the right to international travel. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (referring to the recognition of a new liberty interest protected by Due Process, stating that courts must "exercise the utmost care" when "asked to break new ground in this field").

C. Substantive Due Process

Having found that the right to international travel is not a right protected under the Privileges and Immunities Clause, this Court turns its analysis to that of the protection of the right to international travel afforded under the Due Process Clause of the Fifth Amendment, which guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

Here, Mr. Maehr asserts that the Department of State's revocation of his passport fails to afford him with substantive due process as required under the Fifth Amendment. Substantive due process "protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." *Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty., Colo.*, 732 F. App'x 624, 629 (10th Cir. 2018), *cert. denied sub nom. Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty., Colo.*, 139 S. Ct. 862 (2019) (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)) (citation and internal quotation marks omitted). The Supreme Court has carefully delineated fundamental rights and applies strict scrutiny to legislation infringing on those rights. *Obergefell v. Hodges*, — U.S. —, 135 S. Ct. 2584, 2597 (2015) (noting that the "fundamental liberties protected" by the Due Process Clause "include most of the rights enumerated in the Bill of Rights" as well as "certain personal choices central to individual dignity and autonomy."). "The Court applies rational basis review to non-fundamental rights, precisely because they are non-fundamental." *Dawson*, 732 F. App'x at 629.

The substantive due process inquiry thus starts by first defining the "type" of right at stake. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997)). Once that baseline is established, the Court applies the level of review that corresponds to the right identified. *Dawson*, 732 F. App'x at 629.

The 10th Circuit has described the analysis as requiring that the Court first "carefully describe the asserted fundamental liberty interest," and second,

> decide whether the asserted liberty interest, once described, is objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed, which would render the liberty interest a fundamental right.

Id. (citing *Seegmiller v. LaVerkin City*, 528 F.3d 762, 769 (10th Cir. 2008) and *Glucksberg*, 521 U.S. at 721 & 770) (citations and internal quotation marks omitted).

Here, Mr. Maehr alleges that the right to international travel is a fundamental right objectively and deeply rooted in the nation's history, citing the 1958 Supreme Court opinion in *Kent v. Dulles*, in which the Court discussed the right to travel in general as a right that emerged at least as early as the Magna Carta. 357 U.S. at 125. Mr. Maehr urges this Court to follow the language in *Kent v. Dulles* as controlling and ignore dicta from the Supreme Court in *California v. Aznavorian*, which distinguished the right to interstate travel from the right to international travel:

> [T]he "right" of international travel has been considered to be no more than an aspect of the "liberty" protected by the Due Process Clause of the Fifth Amendment. As such this "right," the Court has held, can be regulated within the bounds of due process. . . . Thus, legislation which is said to infringe the freedom to

> travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel.

439 U.S. 170, 176-77 (1978). Mr. Maehr also argues that *Aznavorian's* dicta is the source in subsequent, wrongly-decided opinions by lower courts, and that the courts should have followed *Kent v. Dulles* and recognized the right to international travel as a fundamental right.

However, as the Government points out, the Supreme Court has a history of upholding restrictions on citizens' international travel in the interests of foreign affairs and national security. *See, e.g.*, *Regan v. Wald*, 468 U.S. 222, 242-44 (1984) (upholding regulations "preventing travel to Cuba by most American citizens"); *Haig v. Agee*, 453 U.S. 280, 293 (1981) ("The history of passport controls since the earliest days of the Republic shows congressional recognition of Executive authority to withhold passports."). Moreover, even after *Aznavorian*, the Supreme Court has indicated that there is no fundamental right to international travel. *See Haig*, 453 U.S. at 307 (rejecting the argument that the right to international travel is equivalent to the constitutional right to interstate travel, noting that the Supreme Court "has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel").

Following the Supreme Court's lead, lower courts have applied rational basis review to restrictions on international travel. *See Eunique v. Powell*, 302 F.3d 971,

972– 74 (9th Cir. 2002); *Weinstein v. Albright*, 261 F.3d 127, 140 (2d Cir. 2001). Both of these cases involved a review of the revocation of passports belonging to parents who owe back child support. Mr. Maehr contends that the FAST statute is distinguishable from the child support statute because that type of debt—child support—is not an ordinary debt, as distinguished from the tax debt owed by Mr. Maehr, and serves a more compelling government interest—child welfare—that can justify the "extreme measure" of passport revocation. The Court is not convinced. The collection of significant amounts of seriously delinquent tax debt is an important and compelling governmental interest. *Bull v. United States*, 295 U.S. 247, 259 (1935) ("[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need.").

Here, Mr. Maehr contends that the Government interests advanced by the FAST statute are not substantial enough to justify the revocation of his passport. The Government maintains that the right to international travel is a liberty that is subject to reasonable governmental regulation, which the FAST statute is. *See Haig*, 453 U.S. at 306 (1981) (noting that "the freedom to travel abroad . . . is subordinate to national security and foreign policy considerations" and "as such, it is subject to reasonable government regulation."). The Government argues that the federal interests served by the FAST statute are compelling enough, and the statutory scheme is narrow enough, to qualify as "reasonable government regulation."

In terms of the traditional substantive due process test, the Government concedes that the right to travel internationally is a protected liberty interest, but argues that it is not a fundamental right, such that the Government can restrict international travel so long as there is a rational basis for the restriction. There is no doubt that the FAST legislation, the purpose of which is to enforce the Tax Code and raise revenues, is a legitimate legislative action that satisfies the rational basis test. Moreover, the Court finds that even if strict scrutiny were to apply, the Government has advanced an important and substantial reason for the FAST legislation, and that the statute is narrowly tailored to apply only to specifically defined, "seriously delinquent" taxpayers. To this extent, the Court finds the FAST statute constitutional. The legislation advances an important and substantial governmental objective: the collection of taxes from seriously delinquent taxpayers. It limits the right to travel only after giving fair notice and giving the delinquent taxpayer numerous other methods to address the tax delinquency.

D. Writ *Ne Exeat Republica*

Mr. Maehr also argues that even if the right to travel internationally is not a fundamental right, the Government cannot use such extreme measures to coerce debtors to pay what Mr. Maehr calls "ordinary debt." Mr. Maehr argues that because basic principles of Anglo-American law do not allow courts to use extraordinary equitable powers to coerce payment of

debt, the Government cannot compel payment using the FAST statute's passport revocation "regime."

Mr. Maehr asserts that the revocation of a passport, without a showing as required under writ *ne exeat republica*, exceeds the bounds of due process because it "collects debts by abridging debtors' constitutional rights as a means of coercing payment." Dkt. #52 at 29. The predicates for the common law writ *ne exeat republica*, codified at 26 U.S.C. § 7402(a), require the government to show that a delinquent taxpayer is attempting to secrete assets abroad or is refusing to repatriate assets that can be used to pay the tax debt. *See, e.g.*, *United States v. Shaheen*, 445 F.2d 6 (7th Cir. 1971). Section 7402(a) states:

> The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

The Government argues that this statute is not applicable to the revocation of passports by the State Department under FAST, and that a showing of the predicates required for a writ *ne exeat republica* is not

the only way a passport may be revoked to comply with the requirements of Due Process. This Court agrees. A showing of the predicates required for a writ *ne exeat republica* is not applicable and not required before the Department of State can revoke a passport for a taxpayer certified by the IRS under the FAST statute. The common law writ was one mechanism used to enforce the tax laws. In its wisdom, Congress decided to give the IRS an additional tool, via the FAST statute, to enforce those laws. Plaintiff cited no precedent suggesting that Congress is barred from creating an additional enforcement tool because a different enforcement tool was previously used at common law and subsequently codified in § 7402. Indeed, § 7402 is explicit that the writ of *ne exeat republica* (among other listed remedies) is "in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

CONCLUSION

Accordingly, this Court finds that Mr. Maehr cannot carry his burden to demonstrate that the State Department's decision to revoke his passport based on the certification by the IRS under the FAST statute is unconstitutional. The Court also finds that amendment of the Complaint would be futile.

RECOMMENDATION

WHEREFORE, for the foregoing reasons, it is hereby **RECOMMENDED** that Defendant United

States' Motion to Dismiss (Dkt. #46) be **GRANTED**, and that Plaintiff's Amended Complaint (Dkt. #32) be **DISMISSED WITH PREJUDICE**.

NOTICE: Pursuant to 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(2), the parties have fourteen (14) days after service of this recommendation to serve and file specific written objections to the above recommendation with the District Judge assigned to the case. A party may respond to another party's objections within fourteen (14) days after being served with a copy. The District Judge need not consider frivolous, conclusive, or general objections. A party's failure to file and serve such written, specific objections waives *de novo* review of the recommendation by the District Judge, *Thomas v. Arn*, 474 U.S. 140, 148-53 (1985), and also waives appellate review of both factual and legal questions. *Makin v. Colorado Dep't of Corrections*, 183 F.3d 1205, 1210 (10th Cir. 1999); *Talley v. Hesse*, 91 F.3d 1411, 1412-13 (10th Cir. 1996).

BY THE COURT

Date: September 27, 2019 /s/ N. Reid Neureiter
Denver, Colorado

N. Reid Neureiter
United States
Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JEFFREY T. MAEHR, Plaintiff - Appellant, v. UNITED STATES DEPARTMENT OF STATE, including Secretary of Antony Blinken, in his official capacity, Defendant - Appellee.	No. 20-1124 (D.C. No. 1: 18-CV-02948-PAB-NRN) (D. Colo.)

ORDER

(Filed Sep. 17, 2021)

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge and **PHILLIPS**, Circuit Judge.

Appellant's petition for rehearing is denied. Judge Lucero voted to grant panel rehearing.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Christopher M. Wolpert
CHRISTOPHER M. WOLPERT,
Clerk