**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 15-cv-02362-RBJ

DANA ALIX ZZYYM,
Plaintiff,
v.
MICHAEL R. POMPEO and STEVEN J. MULLEN,
Defendants.

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**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY**

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Plaintiff's opposition does little to alter the conclusion that the standard for staying an injunction pending appeal is satisfied. First, regarding irreparable harm, Plaintiff focuses primarily on the fact that the U.S. Department of State (DOS) could, in approximately four weeks, issue a "one-off" passport without significant changes to DOS's information technology systems. But Plaintiff fails to recognize that DOS can produce such a passport on that timeline only because the passport would not be compatible with government systems. In effect, Plaintiff would reduce "compliance" to something that would not work properly or effectively and that would conflict with significant U.S. foreign policy and security interests (as outlined in Defendants' declarations). In contrast, Plaintiff faces little or no harm from a stay pending appeal. Plaintiff is hardly confined to the United States; Plaintiff may receive a passport with an "F" or "M" sex marker, which would allow for travel at least while the Tenth Circuit considers novel legal questions in Defendants' appeal. For these reasons, and those set forth in Defendants' opening submission, a stay of the Court's injunction pending appeal is warranted.

## I. Defendants Would Incur Irreparable Harm.

Plaintiff's opposition largely acknowledges that issuing a fully functional, fully integrated

passport with an "X" sex marker would result in serious harm to Defendants. Instead, Plaintiff primarily argues that a nonintegrated, "one off" passport would avoid such harm. Regardless, were the Court to order either passport, Defendants would suffer irreparable harm.

First, a fully functional passport with an "X" sex marker could be issued only at considerable cost to DOS: approximately $11 million over 24 months. *See* Reynolds Decl. ¶¶ 11–15, ECF No. 98-2. Plaintiff asserts that an $11 million expense would not amount to irreparable harm because that cost represents only 0.03 percent of DOS's annual budget. *See* Pl.'s Opp'n to Defs.' Mot. Stay at 7, ECF No. 101 [hereinafter Pl.'s Opp'n]. But Plaintiff points to no authority for comparing the cost of implementing the "X" sex marker to the entire DOS budget.[1] At any rate, an $11 million, 24 month effort to address an injunction with respect to a single passport by itself constitutes an excessive level of harm that warrants a stay pending appeal until the novel legal questions at issue are resolved. Moreover, the question of harm cannot be measured in mere percentage terms because funding of this project necessarily would detract from other significant missions of DOS.

Plaintiff also argues that an injunction that would take 24 months to implement does not cause irreparable injury as a matter of law. *See* Pl.'s Opp'n at 7–8. However, the cited authority merely notes that economic loss, to constitute irreparable harm, must "threaten[] the very existence of the movant's business," *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)—a standard that is inapplicable to a *federal agency*, which, of course, does not operate a business.

[1] The $11 million estimate is 4.7 percent of the $234.7 million allocated to the Bureau of Consular Affairs, Office of Consular Systems and Technology, for systems development, operations, and maintenance relating to the Passport function for FY 2019. Moreover, because this would increase previously proposed spending by more than $1 million, DOS would likely need to formally notify Congress before the funds can be used.

In any event, cost is but one of several irreparable injuries that Defendants would incur because of the Court's injunction. As set forth in the declaration of Assistant Secretary of State for Consular Affairs Carl C. Risch, significant foreign policy interests and national security risks would be implicated by issuing a one-off passport. Plaintiff incorrectly dismisses these concerns as "[v]ague and unsupported," Pl.'s Opp'n at 9. But these interests and risks, which are detailed in Defendants' motion to stay, *see* Defs.' Mot. Stay at 6–11, ECF No. 98, "are based on information gathered through the execution of [Assistant Secretary Risch's] official duties with [DOS]," Risch Decl. ¶ 1, ECF No. 98-1. Plaintiff has offered no reason for the court to substitute its views for the reasoned conclusion of a senior DOS official that issuing a passport with an "X" sex marker before DOS has disseminated published standards on such a passport would implicate serious foreign policy interests and national security risks. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010) ("evaluation of the facts" concerning national security and foreign affairs articulated in Executive Branch affidavit "is entitled to deference" and court should not "substitute" its "own evaluation of evidence" (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981))).[2] Under these circumstances, Defendants have shown that they would incur irreparable harm absent a stay.

## II. A Stay Pending Appeal Would Not Substantially Injure Plaintiff.

Next, Plaintiff incorrectly argues that immediate implementation of the Court's injunction is necessary for Plaintiffs' international travel. However, if the Court stays its injunction pending appeal, Plaintiff could still receive a fully functioning passport with an "F" or "M" in the sex field.

[2] The one case that Plaintiff cites on this issue reaffirms this deferential standard, *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017), and notes only that the standard is somewhat relaxed in domestic cases, *see id.* at 1862. This case, by contrast, concerns "a diplomatic communication between sovereign nations." Risch Decl. ¶ 3; *see also Haig v. Agee*, 453 U.S. 280, 292–93 (1981).

Plaintiff's reluctance to use such a passport to travel does not constitute substantial injury. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (discounting "self-inflicted" injury to party opposing injunction when balancing harms). Nor is there any support in the record for Plaintiff's assertion that the use of such passports could lead to "indignity and attendant constitutional infirmities," Pl.'s Opp'n at 10. First, the Court reached no such conclusion; it held that Defendants' action violated only the APA. *See Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1259 (D. Colo. 2018). And in any event, a stay pending appeal would not resolve the merits, which are to be litigated on appeal. Rather, the present issue is whether the significant and irreparable injury to Defendants outweighs any difficulty that Plaintiff faces in travelling. Because there is no such difficulty, the balancing test weighs decidedly in Defendants' favor.

**III. Defendants Have a Strong Probability of Success on Appeal.**

Finally, Defendants have demonstrated a strong probability of success on appeal. When all three harm factors weigh in Defendants' favor, the Tenth Circuit has instructed courts to consider whether there are "questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852–53 (10th Cir. 2003). *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016), which analyzed the legal standard for a *preliminary injunction* does not change this standard. Were the preliminary injunction standard to apply, a district court could stay its injunction only by finding that its decision was erroneous—an unlikely condition, particularly where equitable considerations support a stay. *See, e.g.*, *In re Revel AC, Inc.*, 802 F.3d 558, 569–71 (3d Cir. 2015).

On the merits issues, Plaintiff argues that Defendants failed to address the second basis for

the injunction, that DOS's 2017 decision exceeded its statutory authority. On the contrary: The Court held that DOS lacked statutory authority because "the Department has acted arbitrarily and capriciously," *Zzyym*, 341 F. Supp. 3d at 1260, and Defendants have argued, in seeking a stay, that they did not act arbitrarily and capriciously, Defs.' Mot. Stay at 11–14. As Defendants explained in their opening submission, the role of the Court is simply to evaluate whether there was "a rational connection between the facts found and the decision made." *See Mkt. Synergy Grp., Inc. v. DOL*, 885 F.3d 676, 683 (10th Cir. 2018). DOS's considerations demonstrate that it engaged in rational decision making and, under the Court's reasoning, acted within its statutory authority.

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This case presents novel legal questions that merit a stay pending further review, including whether to issue a fully functioning passport with an "X" sex marker or a "one off" passport in a manner that is inconsistent with current U.S. foreign policy interests and will not function in the same manner as a normal passport. For the above reasons, a stay pending appeal is warranted.

Dated: February 4, 2019

Respectfully submitted,

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