IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DANA ALIX ZZYYM,

Plaintiff-Appellee,

v.

MICHAEL R. POMPEO, in his official capacity as Secretary of State,

and

STEVEN J. MULLEN, in his official capacity as Director of the Colorado Passport Agency for the United States Department of State,

Defendants-Appellants.

No. 18-1453

REPLY IN SUPPORT OF MOTION FOR A STAY OF THE DISTRICT COURT'S INJUNCTION PENDING APPEAL

Zzyym's response confirms the need to stay the injunction ordering the State Department to depart from its longstanding practice of requiring passports to identify the bearer's sex as either male or female. As the Department's stay motion explained, this binary sex-designation policy, among other things, assists the Department in ensuring the integrity of passport data, which in turn aids law-enforcement and other agencies that rely upon such information. The district court nevertheless dismissed this policy as arbitrary and capricious, not because it thought the various objectives

underlying the policy were illegitimate, but simply because it deemed the policy insufficiently tailored to achieve those goals. It then issued an injunction that it acknowledged would put the Department to the "difficult choice" of either devoting $11 million and 24 months to modifying its information systems or issuing a unique passport that could harm U.S. foreign policy and national security. Mot. Ex. 2, at 7.

Zzyym's response leaves no doubt that a stay of such an extraordinary order is warranted. On the equities, Zzyym casually dismisses the foreign-relations and national-security judgments of a senior State Department official as well as the unnecessary expenditure of approximately $11 million of taxpayer money. By contrast, the only injury Zzyym allegedly faces from a stay is the need to travel during the pendency of this appeal with a passport containing a sex-designation matching the one on the driver's license submitted in Zzyym's passport application.

On the merits, Zzyym falls prey to the district court's errors, positing non-existent departures from existing policy and questioning the Department's judgment on particular considerations. But these scattershot arguments fail to establish that the Department's reasoning was so irrational that its longstanding policy should be upended even before this Court has a chance to review.

I. The Equities Clearly Favor A Stay

A. The injunction here forces the Department to choose between issuing a "one-off" passport posing national-security and foreign-policy risks or devoting dozens of months and millions of dollars to overhauling its information systems.

Mot. 18-21. Either horn of that dilemma threatens irreparable harm to the government and public, and Zzyym offers no meaningful response to these concerns.

With respect to issuing a "one-off" passport, Zzyym dismisses the attendant national-security and foreign-policy concerns as "entirely speculative." Resp. 12. But the district court itself acknowledged the risks identified by Assistant Secretary of State Risch as "reasonable and almost self-evident," and correctly recognized that it could not properly "substitute [its] views for the conclusion of a senior Department official" on such issues. Mot. Ex. 2, at 7. Zzyym is no better situated to second-guess the Executive's determinations. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). As Assistant Secretary Risch explained, issuing a passport that does not comply with the Department's publicized standards would, among other things, undermine the United States' ability to insist that other countries strictly adhere to their own passport standards, which would in turn make it more difficult for the United States to guard "against fraud, illegal entry, and terrorism," as "bad actors who are able to enter a foreign country may be able to exploit that access as the first step in an effort to travel to, or otherwise harm, the United States." Mot. Ex. 5. ¶¶ 11-12. Zzyym offers no basis for calling this reasoning into question, other than to assert that "appropriate notice" to other countries will address any harms. Resp. 13. But publicizing the issuance of a single, nonstandard passport would only call attention to the United States' failure to abide by its own published standards, thereby impeding its efforts to hold other countries to their own.

The Department's only alternative—spend approximately $11 million of taxpayer money and 24 months of agency resources to comply with a legally unsound injunction—would likewise involve irreparable injury. Mot. 18-20. Like the district court, Zzyym dismisses this substantial harm by insisting that under *Port City Properties v. Union Pacific Railroad Co.*, 518 F.3d 1186 (10th Cir. 2008), economic loss cannot constitute irreparable injury unless it is ruinous. Resp. 9-11. But as the Department's stay motion explained (Mot. 19), *Port City Properties*' discussion of non-irreparable economic loss that can be redressed through monetary damages occurred in the context of suits between *private* parties, 518 F.3d at 1190, whereas an unrecoverable economic loss to the government constitutes irreparable harm not just to the government, but also to the public at large. Unnecessary judicial "interference with the State's orderly management of its fiscal affairs"—including an order "[d]irecting" an "expenditure from the state treasury"—is "irreparable harm," as it threatens to "'"derange the operations of government, and thereby cause serious detriment to the public."' *Barnes v. E-Sys., Inc. Grp. Hosp. Med. & Surgical Ins. Plan*, 501 U.S. 1301, 1304 (1991) (Scalia, J., in chambers) (quoting *Dows v. City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871)) (staying injunction ordering state to issue tax refunds); *see also James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 544–45 (8th Cir. 1982) (per curiam) ("[G]ranting the stay serves the public interest by avoiding [increases] to the cost of the project, requiring greater expenditures from the public treasury.").

Zzyym fails to grapple with this critical distinction, characterizing the proposition that the government would be treated differently with respect to economic loss as "alarming." Resp. 10. But an application of the stay factors should not be blind to the fact that the defendant is the government, and Zzyym provides no substantive explanation for why the State Department should be treated like State Farm in this context. *Cf. Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (brackets omitted); *Nken v. Holder*, 556 U.S. 418, 435 (2009) (in "the traditional stay inquiry … the harm to the opposing party and … the public interest … merge when the Government is the opposing party"). In all events, this Court has held that "[i]mposition of monetary damages that cannot later be recovered … constitutes irreparable injury" even with respect to private parties. *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 770-71 (10th Cir. 2010). Whether or not that position is correct as applied to private litigants, there is no basis for subjecting the government to *less* favorable treatment.

B. Zzyym, by contrast, will sustain no irreparable harm from a stay. Although Zzyym asserts at the outset that a stay will prevent Zzyym "from leaving the country" (Resp. 1), Zzyym acknowledges more than halfway through the response that the Department is willing to issue Zzyym a passport reflecting the sex designated on the driver's license submitted with Zzyym's passport application. Resp. 14-15. Such a

passport would permit Zzyym to travel internationally during the pendency of this appeal, and would not impede Zzyym from obtaining a passport with a third sex designation were Zzyym to prevail.

Zzyym's alleged injury from a stay therefore reduces to the need to travel during this appeal with a passport that lacks Zzyym's preferred sex designation. Although Zzyym asserts that this is a burden of "constitutional" dimension (Resp. 14), the district court found no constitutional violation, and there is no constitutional right to express one's own identity on a government-issued diplomatic communication and travel document. *Cf. Bowen v. Roy*, 476 U.S. 693 (1986) (Free Exercise Clause does not preclude government from identifying welfare applicants through their Social Security numbers). Moreover, Zzyym evidently raised no objection ("constitutional" or otherwise) to using a driver's license with a female sex designation to operate an automobile (presumably on a regular basis) during the period in which Zzyym applied for a passport. Zzyym cannot explain why using a passport with the same sex designation to travel internationally (for the occasional conference) during this appeal would impose any substantial injury—let alone one that overwhelms the government's serious national-security and foreign-policy concerns with issuing a nonstandard passport.

II. The State Department Is Likely To Succeed On The Merits

Zzyym makes little effort to address the fundamental flaws in the district court's analysis of the merits—*i.e.*, impermissibly second-guessing the Department's

judgment through a heightened standard of review and mistaken understanding of the record. Mot. 12-18. Instead, Zzyym attempts (Resp. 15-16) to justify the district court's conflation of its arbitrary-and-capricious analysis with its assessment of the Department's statutory authority. Mot. 18. That argument is meritless: The Department did not deny Zzyym a passport because of Zzyym's "basic identity" (Resp. 16), but because Zzyym would only accept a passport that would require the Department to alter the contents of its diplomatic communications.

Zzyym then asserts that the binary sex-designation policy (1) departs from the Department's gender-change policy (Resp. 17-19); (2) conflicts with evidence in the administrative record (Resp. 19-21); and (3) fails to account for the possibility that four states might change their sex-designation policies (Resp. 21-22). Each contention lacks merit.

A. Zzyym contends that when a passport applicant identifies a sex different from that on the submitted identification documents, the Department's gender-change policy requires the passport to designate the sex listed on the applicant's medical certification or, absent such certification, the applicant's birth certificate. Resp. 18. Because Zzyym submitted medical certifications stating that Zzyym is intersex and an amended birth certificate with a sex designation of "unknown," Zzyym insists that the Department had to issue a passport with a third sex designation. *Id.*; *see* Resp. 4-5. But the Department's gender-change policy unambiguously states that the relevant medical certification must "specify the gender

correction to either male or female." Resp. Ex. B, at AR 185; *see also id.* at AR 186 (model medical certification) ("(Name of patient) has had appropriate clinical treatment for gender change to the new gender (specify new gender male or female)"). Likewise, when an applicant fails to provide a valid medical certification, "the gender listed on *her/his* birth documentation" controls, *id.* at AR 185 (emphasis added), and, in all events, the Department will "accept only un-amended birth certificates," AR 190. Contrary to Zzyym's suggestion (Resp. 20), applicants will not be subject to "criminal sanction[s]" for complying with these rules.

Zzyym's assertion that the sex-designation policy conflicts with other portions of the gender-change policy fares no better. Although two organizations mentioned in the gender-change policy—the World Professional Association for Transgender Health (WPATH) and the International Civil Aviation Organization (ICAO)—have made statements supporting a third sex designation (Resp. 19), nothing in this policy requires the Department to defer to these organizations on the issue. ICAO, for instance, establishes only technical specifications; it "does not have the authority to rule on whether a particular travel document will be acceptable in the United States or in other countries." https://go.usa.gov/xEP3Y. And Zzyym never explains how the Department's binary sex-designation policy is at odds with WPATH's precatory statement that "an option of X or Other … *may* be advisable" as a sex designation in legal documents. Resp. 19 (quoting Resp. Ex. D) (emphasis added). Nor is it apparent how statements in the gender-change policy that "gender is an integral part"

of identity and that some individuals are born with anatomy and/or chromosomal patterns that do "not fit typical definitions of male or female" call into question the rationality of the binary sex-designation policy. *Id.* Nor does Zzyym ever explain the relevance of unspecified "revisions" to the gender-change policy in 2016 (*id.*), none of which bear on the longstanding requirement that passports contain either a male or female sex designation.

B. Zzyym is no more successful in attempting to show that the Department's binary sex-designation policy contradicts evidence in the record. For instance, the fact that this policy will *not always* help the Department assist law-enforcement agencies (because not all law-enforcement records contain a sex designation) hardly renders it *irrational.* Resp. 20. And Zzyym's claim (*id.*) that the Department's gender-change policy undermines the Department's interest in assisting other agencies misses the point. Adding a third sex designation poses a distinct problem that is not implicated by the gender-change policy: Whether or not a binary sex designation for an individual who has changed genders may sometimes cause a mismatch with the information in other agencies' databases, the existence of a third sex designation will not correspond to the database fields for the myriad agencies who use only male or female sex fields. Mot. 17.

Zzyym similarly falls short in dismissing (Resp. 20) the Department's concerns regarding the lack of a medical "consensus o[n] what it means, biologically, for an individual to have a sex other than male or female." Mot. Ex. 3, at 86. As the

Department explained, in contrast to the designations of male and female, "there is no single, biological set of traits" captured by the term "intersex," but instead a range of "genetic, hormonal and physiological conditions" that are "highly distinct from one another, both as to their biological cause and as to their presentation (*i.e.*, whether the individual appears to be, and/or identifies as, male, female or neither)." *Id.* Given this uncertainty and variability, the Department concluded that a third sex designation would be an "unreliable … component of identity." *Id.* at 85. While Zzyym may disagree with this determination, the claim that "nothing in the record 'can account for why the binary sex designation is preferable'" (Resp. 20) is simply inaccurate.

Zzyym is on no firmer ground in discounting the Department's conclusion that modifying its passport information systems could require considerable cost and effort, simply because the Department did not provide a precise estimate. Resp. 20. Agencies have broad discretion in choosing when to quantify assessments made in their expert judgment. *See Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1176 (10th Cir. 2012) (agency's "decision not to quantify th[e] impact … was not arbitrary and capricious"). In any event, the Department's subsequent estimate that modifying its systems would take approximately 24 months and $11 million fully vindicates its initial determination.

C. Finally, Zzyym contends that the Department failed to consider relevant evidence because, at the time of its decision, four states were contemplating a change that would permit a third sex designation on certain identity documents. Resp. 21.

But a *possible* change in a handful of state sex-designation policies had no bearing on the Department's decision, made at a time when *no* relevant jurisdiction permitted a sex designation other than male or female. *See* Mot. Ex. 3, at 83. In any event, that those states have now adopted the change—or that "some foreign nationals" have "passports with an X gender marker" (Resp. 21)—does not undermine the Department's judgment to adopt a different policy on a nationwide basis. Contrary to Zzyym's assertion, the APA does not require the Department to adopt a sex-designation policy that conflicts with those of nearly every state, not to mention "the vast majority of countries" as well, Mot. Ex. ¶ 5.

In sum, both Zzyym and the district court commit the same fundamental error: They replace the APA's arbitrary-and-capricious standard with exacting scrutiny and the Department's judgment with their own. But an agency's judgment is not irrational simply because it could have made other choices. *Market Synergy Grp., Inc. v. DOL*, 885 F.3d 676, 683 (10th Cir. 2018). The Department, not Zzyym, is tasked with balancing the many considerations germane to its decision, and it reasonably explained why it chose to maintain its binary sex-designation policy. The APA requires no more.

CONCLUSION

The government requests that the Court stay the district court's injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2019, I electronically filed the foregoing Reply in Support of Motion for a Stay of the District Court's Injunction Pending Appeal using the appellate CM/ECF system, which, pursuant to Circuit Rule 25.4, constitutes service on all parties registered for electronic filing.

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