

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

Civil Action No.: 1:15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

MICHAEL R. POMPEO, in his official capacity as Secretary of State; and
STEVEN J. MULLEN, in his official capacity as the Director of the Colorado Passport Agency
for the United States Department of State,

Defendants.

**PLAINTIFF DANA ZZYYM’S OPPOSITION TO DEFENDANTS’
MOTION FOR STAY OF THE COURT’S INJUNCTION PENDING APPEAL**

On September 19, 2018, this Court held that Defendants with the U.S. Department of State (“DOS”)¹ violated the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A) and (C), by refusing to issue an accurate full-validity U.S. passport to Plaintiff Dana Zzyym (“Dana”)—a nonbinary intersex U.S. citizen—bearing a gender marker other than “M” or “F”. Order, ECF No. 88. Consequently, this Court entered a Final Judgment declaring that DOS exceeded its authority under the Passport Act of 1926 by withholding a passport from Dana and, further, that the agency’s binary-only gender marker policy is arbitrary and capricious. ECF No. 89. This Court also enjoined DOS “from relying upon its binary-only gender marker policy to withhold the requested passport from Dana Zzyym.” *Id.* The agency subsequently filed its Notice of Appeal. ECF No. 93.

¹ Defendants are Michael R. Pompeo, in his official capacity as Secretary of State, and Steven J. Mullen, in his official capacity as the Director of the Colorado Agency for the U.S. Department of State (succeeding former Director Sherman Portell in office). Unless otherwise noted, Plaintiff refers to Defendants jointly as DOS or “the agency.”

After four long years of precluding Dana from leaving the country (a penalty that no law abiding citizen, much less a U.S. Navy Veteran should have to suffer), DOS seeks to magnify the harm by requesting to stay the narrowly-tailored injunction that applies only to Dana. *See* Motion to Stay the Court’s Injunction Pending Appeal (“Motion”), ECF No. 98. Importantly, DOS concedes that the agency can issue Dana an accurate U.S. passport in approximately four weeks without updates to its system; but the agency refuses. Here, DOS cannot prove that *any* of the stay factors weigh in its favor because (1) DOS proffers nothing more than speculative harm, (2) the relative cost to DOS and administrative inconvenience is not irreparable harm, (3) DOS urges this Court to adopt a relaxed standard abrogated by the Tenth Circuit, (4) DOS omits discussion of the likelihood of success on *both* APA violations that form the basis for the injunction, and (5) DOS cannot establish a substantial likelihood of success the policy was the product of a rational decision making process. Moreover, the other “harm” factors decidedly tip in Dana’s favor. A stay is extraordinary relief and DOS cannot meet the heavy burden. This Court should deny the Motion.

LEGAL STANDARD

Under Fed.R.Civ.P. 62(c), this Court may “suspend, modify, restore, or grant an injunction on terms... that secure the opposing party’s rights” while an appeal is pending from final judgment that grants an injunction. However, “[a] stay is an intrusion into the ordinary processes of administration of judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the [movant].” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal citations and quotation marks omitted). The party requesting a stay, here DOS, bears the burden of showing that the circumstances justify an exercise of this Court’s discretion. *Id.* at 433-34.

When considering a stay pending appeal, this Court “must address four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether

the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). “The first two factors . . . are the most critical,” and the “possibility” of success or irreparable injury is insufficient to satisfy them. *Id.* (internal quotation marks omitted).

ARGUMENT

I. SPECULATIVE HARM DOES NOT AMOUNT TO IRREPARABLE INJURY FOR THE AGENCY, NOR DOES TIME AND MONEY.

DOS has not shown it would be irreparably injured absent a stay. DOS concedes that it can “override certain of its systems” in order to produce, within a period of “approximately four weeks,” “a passport bearing an ‘X’ marker *without undertaking significant changes to its information technology systems.*” Motion to Stay the Court’s Injunction Pending Appeal (“Motion”), ECF No. 98, at 7 (emphasis added). Nevertheless, DOS asserts injury because it speculates that Dana, the sole bearer of such a passport might face “problems at foreign borders,” “*could be* subject to significant delays in returning home” “*if* the passport were to be lost or stolen overseas,” and “*could* thus face additional screening in attempting to reenter the United States.” *Id.* (emphasis added). According to DOS, these short-term burdens *to Dana* cannot be abated “in the absence of significant modifications” to its systems, which “would take approximately 24 months and cost roughly \$11 million. . . .” *Id.* at 2. Finally, the government claims injury to its own “sovereign interests” because “[t]he production of even a single standard or emergency passport with an ‘X’ sex marker, in contravention of DOS’s published policies, would likely undermine the U.S. Passport’s status as the gold standard identity and travel document[.]” *Id.* at 9. (emphasis added). None of these speculative injuries constitute irreparable harm to DOS absent a stay.

a. DOS Cannot Claim Theoretical Harm To Dana As Its Own

Curiously, DOS characterizes the purported injury in the form of potential “delay, inconvenience, or denial of entry at foreign borders” for “the bearer of the passport” (Dana), not to the movant (DOS). *Id.* at 2. DOS explains that, absent the system upgrades, the “sex field information on such a passport would not match the information in DOS’s databases” and, therefore, the Department of Homeland Security “could not rely solely on DOS databases when presented with such a passport, and the bearer could thus face additional screening in attempting to reenter the United States.” *Id.* at 7. DOS does not explain, however, how speculative delays *for Dana* create irreparable harm *for the agency*, particularly in light of its own admissions that “gender is just one of many fields used to crosscheck a passport applicant/holder’s identity with other systems” and that “in some systems the gender field isn’t even used or reliable.” *Zzyym v. Pompeo*, 15-cv-02362-RBJ, 2018 WL 4491434, at *6 (D. Colo. Sept. 19, 2018) (*Zzyym II*). Moreover, the agency’s alleged “matching” justification is all the more perplexing since Dana obtained a corrected Colorado driver’s license bearing a non-binary gender marker of “X” on November 30, 2018. *Zzyym Decl.* ¶ 3-7.²

To the extent DOS claims that Homeland Security officials may be confused when presented with a passport with an “X” gender marker by a single person, any purported “confusion” can be

² Colorado’s experience suggests that system updates to include other gender markers on identity documents can be accomplished easily. *See* Colorado to offer non-binary sex identifier on driver licenses and IDs, Colorado Department of Revenue (CDOR), News Release, Nov. 8, 2018, <https://www.colorado.gov/pacific/sites/default/files/Colorado%20to%20offer%20non-binary%20sex%20identifier%20on%20driver%20licenses%20and%20IDs.pdf> (last visited Dec. 20, 2018); FAQ: Non-binary Sex Identifier on Driver Licenses and ID Cards, CDOR, Nov. 8, 2018, <https://www.colorado.gov/pacific/sites/default/files/FAQ%20X%20sex%20identifier%2011.08.18%20%284%29.pdf> (last visited Dec. 20, 2018). Michael Hartman, the CDOR Executive Director explained, “It’s a pretty quick update to the system.” *See* Colorado to allow use of X as sex identifier on driver’s licenses starting this month, *The Denver Post*, Nov. 8, 2018, <https://www.denverpost.com/2018/11/08/colorado-drivers-license-x-gender/> (last visited Dec. 20, 2018).

alleviated by numerous reasonable solutions (e.g., notice to officials, establishing a point of contact for Dana should issues arise).³ Such speculation, unsupported by the record, does not meet the stringent requirement of irreparable harm. *See First. Sav. Bank, F.S.B. v. First Bank Sys., Inc.*, 163 F.R.D. 612, 615 (D. Kan. 1995) (denying stay where movant provided no evidence that “confusion [would be] long-term, significant, unmanageable, or particularly harmful.”); *see also Baskin v. Bogan*, 983 F.Supp.2d 1021, 1029 (S.D. Ind. 2014) (concern about confusion or administration of marriage laws “does not apply” where “court is faced with one injunction affecting one couple in a State with a population of over 6.5 million people.”) Further, U.S. customs and border officials already encounter “X” passports of foreign nationals entering the United States, indicating that officials would have little difficulty processing the entry (or exit) of one American citizen.

DOS’s concern whether Dana may encounter problems with entry at foreign borders or hostile laws is similarly theoretical and, in any event, would not cause irreparable harm to DOS. *See Zzyym v. Kerry*, 220 F.Supp.3d 1106, 1114 (D. Colo. 2016) (“*Zzyym I*”) (“Is this pure speculation? ...And if a third gender marker did lead to inconvenience or difficulty entering other countries, isn’t that solely the problem of the passport holder who made the choice?”). Absent any record evidence, DOS assumes a categorical bar for “X” passports exists at many foreign borders despite the fact that the International Civil Aviation Organization “now specif[ies] that sex should be designated by” M, F, or X. *See Zzyym II*, at *7. Additionally, DOS itself points out an obvious solution: “[C]ountries that issue ‘X’ passports often provide warnings to their citizens who request an ‘X’ sex marker, advising them that they may face possible complications in using such passports to enter other

³ Similar proactive efforts can be taken by the agency to address its theoretical scenario that Dana’s passport might be lost or stolen by printing two passports at the outset—one for Dana and one for DOS to retain should it need to send the travel document to a U.S. consulate or embassy in the event of an emergency.

countries.” Motion, Risch Decl. ¶ 8. Even where a foreign country’s laws are hostile to particular minority groups (*e.g.*, LGBT travelers), DOS issues a travel advisory; it does not bar travel from members of the group or withhold a citizen’s passport.⁴ DOS cannot demonstrate that such imagined risks to *Dana* cause the agency irreparable harm.

b. DOS’s Alleged Harm Is Primarily Money And Time—Both Insufficient To Show That The Extraordinary Relief Of Stay Is Warranted.

Economic loss usually does not, in and of itself, constitute irreparable harm. *See Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008). “To successfully shoehorn potential economic loss into a showing of irreparable harm, a [movant] must establish that the economic harm is so severe as to ‘cause extreme hardship to the business’ or threaten its very existence.” *Coal. for Common Sense in Gov’t Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008). The movant must show that it will suffer harm that is “more than simply irretrievable, it also must be serious in terms of its effect on the [movant].” *Id.*; *see also Sterling Commercial Credit-Mich., LLC v. Phx. Indus. I, LLC*, 762 F. Supp. 2d 8, 16 (D.D.C. 2011) (“The critical consideration under this exception is the effect that the purported economic harm will have on a movant’s business or its very existence—not any monetary amount *per se.*”).⁵

Here, DOS alleges that updating its systems to support a passport “bearing an ‘X’ in the sex

⁴ *See* LGBTI Travel Information, U.S. Dep’t of State, Bureau of Consular Affairs, available at <https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/lgbti.html> (last visited Dec. 19, 2018).

⁵ Defendants erroneously cite *Time Warner Entm’t Co. L.P. v. Atriums Partners, L.P.*, No. 02-2343, 2003 WL 111446, at *2 (D. Kan. 2003), for the proposition that “‘potentially substantial costs,’ which could be rendered unnecessary if party [sic] prevailed on appeal, weighed against issuing injunction pending appeal.” Motion, at 6. In fact, the court found that Time Warner, the *movant*, failed to demonstrate irreparable harm because there was no evidence it would be unable to calculate potential losses and had an alternate remedy in the form of money damages. The court’s reference to “potentially substantial costs” referred to the harm *non-movants* Atrium and Everest might suffer under a wholly different prong of the four-factor test (*i.e.*, the harm to other parties), which does not require a showing of “irreparable” harm.

field” would “cost roughly \$11 million and take approximately 24 months.” Motion, at 10. As an initial matter, this Court’s order only requires that the agency refrain from using its binary-only policy as a basis to deny Dana’s passport application. Regardless, DOS concedes it can issue an accurate passport document to Dana without such outlay. DOS also fails to offer any evidence of the effect the purported economic harm will have on the agency—an omission that forecloses its assertion of irreparable injury based on economic loss. Notably, economic injuries far surpassing the injury alleged by DOS here have not been sufficiently grave to constitute irreparable harm. *See, e.g., Steele v. United States*, 287 F. Supp. 3d 1, 5 (D.D.C. 2018) (denying stay and finding no irreparable harm to the government where loss of \$37.6 million would constitute 0.3% of the IRS’s yearly budget). By comparison, the Fiscal Year 2019 budget for DOS is \$37.8 billion.⁶ In terms of effect on the agency, the estimated \$11 million expenditure required to update its systems is a mere 0.03% of the agency’s yearly budget. Therefore, the cost of updating DOS systems to support an “X” marker on a U.S. passport falls considerably short of the bar for irreparable harm.

DOS also takes issue with the estimated 24-month timeline for the agency to complete its system upgrade. Yet, “[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Moreover, any irreparable injury asserted “must be likely to occur *before* the matter is resolved on appeal.” *Pueblo of Pojoaque v. State*, 233 F. Supp. 3d 1021, 1141 (D.N.M. 2017) (*citing Nken*, 556 U.S. at 434) (emphasis in original). Here, none of the declarants supporting the Motion provide this Court with any information about when the system upgrade might commence and when specific costs might be incurred, including whether costs are incremental. *See*

⁶ *See* Congressional Budget Justification, United States Department of State, Feb. 12, 2018, at i, <https://www.state.gov/documents/organization/277155.pdf> (last visited Dec. 20, 2018).

id. at 1145-46 (explaining that movant “glosses over” details of when harm is likely to occur and concluding “harms are thus speculative, because it has not ‘show[n] a significant risk of irreparable harm... [that] is likely to occur before the [Tenth Circuit resolves the appeal].” (alterations in original)).⁷ The agency’s failure to demonstrate anything more than relatively insignificant economic impact and administrative inconvenience is fatal to its motion for the extraordinary relief of a stay of the injunction pending appeal.

c. DOS Cannot Demonstrate Any Other Real Harm, Much Less Irreparable Harm.

“To constitute irreparable harm, an injury must be certain, great, actual, and ‘not theoretical.’” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wis. Gas. Co.*, 758 F.2d at 674.). Irreparable injury cannot rest on a “possibility” of future harm and such injury must be “of such *imminence* that there is a clear and present need for equitable relief.” *Id.* (emphasis in original). Nevertheless, DOS claims an entirely speculative parade of horrors that might occur with the issuance of just “one valid passport that does not conform to publicized U.S. standards and exemplars[.]” Motion, Risch Decl. at ¶ 7. Among them, DOS invokes vague claims of “national security,” possible dilution of its “gold standard” passport status, unsubstantiated risks of “bad actors” who seek to travel “unlawfully or for a malicious purpose,” and “increased disruption, inconvenience and delay” for all travelers (i.e., Americans whose passport bear an “M” or “F” sex marker). Motion, at 9-10. DOS even suggests that an accurate passport for Dana—one that now *matches* Dana’s Colorado driver’s license—might somehow impair the government’s ability to “defend against fraud, illegal entry, and terrorism.” *Id.* at 10.

⁷ The Tenth Circuit’s median time from the filing of a notice of appeal to the disposition of an appeal is 8.4 months. *See* Federal Court Management Statistics, U.S. Court of Appeals—Judicial Caseload Profile: Tenth Circuit, at 24 (reporting period: September 30, 2017, to September 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0930.2018.pdf.

Vague and unsupported predictions of what other countries might think about a validly-issued U.S. passport with a “X” gender marker do not suffice to show irreparable harm. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (“Purely speculative harm will not suffice.”) Nor do the agency’s threadbare recitals about “national security” and criminals who could exploit the introduction of passport bearing a gender marker other than “M” or “F”. The Supreme Court has rebuked such unsubstantiated invocations, particularly where personal liberties are at stake. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017) (explaining that “national-security concerns must not become a talisman used to ward off inconvenient claims—a ‘label’ used to ‘cover a multitude of sins.’”).

These purely speculative and conclusory harms flow from a single premise—that the U.S. passport is backed up by a “robust set of *publicized* [documents]” and DOS undertakes “substantial effort to notify all countries about the impending change and send exemplars of the document so that foreign authorities can recognize the valid document.” Motion, at 9 (emphasis added). Yet, substantial effort to alert others about the injunction resulting in a passport for Dana is not tantamount to irreparable harm. DOS need only issue appropriate notice to alleviate its concern that foreign and domestic border officials will question the authenticity of Dana’s passport. Indeed, in cases considerably more complex than the adjudication of a single passport application, the government has shown time and again its ability perform such administrative feats.⁸

⁸ *See, e.g.*, Application For Stay Of The Mandate Of The United States Court Of Appeals For The Ninth Circuit Affirming the Modified Preliminary Injunction, *Trump v. Hawaii*, No. 16-1540, at 32 (Sept. 11, 2017) (“The government began implementing the Order...which entailed extensive, world-wide coordination among multiple agencies and issuance of guidance to provide clarity and minimize confusion.”), <http://www.scotusblog.com/wp-content/uploads/2017/09/17A275-Trump-v.-Hawaii-App.-Stay.pdf> (last visited Dec. 20, 2018).

II. FOUR WEEKS OF MINOR ADMINISTRATIVE INCONVENIENCE FOR DOS IS NOTHING COMPARED TO THE SUBSTANTIAL HARM DANA WILL CONTINUE TO SUFFER.

The balance of the equities weighs firmly against granting a stay. For over four years now, Dana has suffered immense harm caused by DOS. There is no dispute that “[d]enial of a passport has the undoubted practical consequence of effectively limiting travel” *Lynd v. Rusk*, 389 F.2d 940, 942 (D.C. Cir. 1967); *see also* 8 U.S.C. § 1185(b) (prohibiting travel without valid U.S. passport). In terms of the gravity of harm to Dana, the Supreme Court has observed that “losing the ability to travel abroad is itself a harsh penalty[.]” *Vartelas v. Holder*, 132 S. Ct. 1479, 1482 (2012).

This “harsh penalty” is all the more apparent given missed travel opportunities and conference meetings stemming directly from “unreasonable delays Dana has faced[.]” *Zzyym II*, at *10. Specifically, the agency’s refusal to issue an accurate passport for Dana precluded Dana from attending international intersex conferences in Mexico City (2014) and Amsterdam (2017). *Id.* at *5. By issuing a stay, Dana remains confined to the United States. Notably, during the appeal, Dana anticipates attending the March 2019 ILGA World Conference located in Wellington, New Zealand. *Zzyym Decl.* ¶ 11. In order to reserve a place at the conference, Dana anticipates filing a registration application prior to the March 1, 2019 deadline. *Zzyym Decl.* ¶ 13. If the injunction were stayed, Dana would remain without a passport and a stay would curtail these (and any future) travel plans.

The substantial harm to Dana outweighs any slight administrative inconvenience to the agency. DOS attempts to downplay the harm to Dana by offering to issue a passport with an incorrect “M” or “F” gender marker to facilitate international travel. Motion, at 11. Aside from the indignity and attendant constitutional infirmities, the relevant legal question for this Court is not whether the agency can offer a second-class substitute to Dana (i.e., an inaccurate passport with explanatory “endorsement” language on the last two pages.). Rather, the correct inquiry is what harm DOS might

suffer by following the injunction. The answer is minimal, if any. The agency already admitted to being able to issue “a passport bearing an ‘X’ marker *without undertaking significant changes to its information technology systems*” in “approximately four weeks.” Motion, at 7 (emphasis added). Four weeks of effort by DOS employees in order to issue Dana a valid and accurate U.S. passport pales in comparison to the immense harm to Dana if the injunction is stayed.

III. THE PUBLIC INTEREST WEIGHS IN FAVOR OF DENYING THE STAY

The public interest would be harmed, not served, by the continued enforcement of the binary-only gender policy to preclude Dana from obtaining an accurate passport. This Court correctly concluded that DOS exceeded the bounds of the Passport Act, *see Zzyym II*, at *8, and the public is served by ensuring that the agency processes passport applications based on non-discriminatory and reasoned criteria. “Where the government’s actions thwart Congressional intent and undermine Congressionally-enacted statutes, the public interest is best served by curtailing those actions.” *Doe v. Trump*, 284 F.Supp.3d 1172, 1179 (W.D. Wash. 2018). Further, even though the government has compelling interests in national security, the agency “cannot simply rely on unspecified security concerns.” *Id.* (citing *Ziglar*, 137 S. Ct. at 1862).

IV. THE AGENCY CANNOT DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS.

a. The Tenth Circuit Rejected Any Relaxed Standard And, In Any Event, DOS Has Not Shown The Other Three “Harm” Factors Weigh In Its Favor.

DOS cannot make a “strong showing” of likelihood of success on the merits. *See Nken*, 556 U.S. at 426. DOS erroneously urges this Court to apply a lesser “serious question standard” for evaluating the agency’s likelihood-of-success on the merits—a standard that has been abrogated by the Tenth Circuit in *Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276 (10th Cir. 2016). *See* Motion, at 4, 11. In *Diné*, the Tenth Circuit held that any modified test that relaxes

any one of the prongs for preliminary relief is inconsistent with the Supreme Court’s decision in *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008). Although *Diné* involved a preliminary injunction, courts often observe the “substantial overlap” between stays and injunctions, explaining that the Supreme Court has largely articulated the same requirements for both. *See, e.g., Pueblo of Pojoaque*, 233 F. Supp. 3d at 1092-93 (discussing *Diné*, *Winter*, and *Nken* at length). The *Pueblo of Pojoaque* court rejected the same arguments DOS advances here and concluded that the Tenth Circuit’s decision in *Diné* “likely applies with equal force to the stay-pending-appeal context.” *Id.*; accord *In re Kim*, No. 16-cv-0292, 2018 WL 5267157, at *1 (D. Colo. Oct. 23 2018); *Blue Valley Hosp., Inc. v. Azar*, No. 18-2176, 2018 WL 2986686, at *3 (D. Kan. June 14, 2018).

Regardless, this Court need not wade into such territory because, even assuming the relaxed “serious question standard” survives *Diné* in a stay context (it does not), the other three “harm” factors do not tip decidedly in the agency’s favor. Therefore, in either event, the traditional standard applies and DOS cannot demonstrate a substantial likelihood of success on the merits.

b. DOS Cannot Prove Any Chance of Success When It Wholly Failed To Address The Second Basis For The Injunction: The Agency Exceeded Its Authority.

DOS must demonstrate a strong showing of a likelihood of success for *each* count that forms the basis of the injunction. *See Mich. State A. Philip Randolph Inst. v. Johnson*, No. 18-1910, 2018 WL 4214710, at *5 (6th Cir. Sept. 5, 2018) (“The district court’s injunction is based on each of the three counts, and if the Secretary has little likelihood of success on any one of them, the stay must be denied.”). This Court correctly held that (1) “the Department’s [binary-only] gender policy is arbitrary and capricious under the APA,” and, (2) “the denial of Dana’s passport application is in excess of the Department’s statutory authority.” *Zzyym II*, at *1. Accordingly, this Court entered final judgment with respect to *both* counts, granting declaratory relief for each, and enjoined DOS “from relying upon its binary-only gender marker policy to withhold the requested passport from

Dana Zzyym.” Final Judgment 1, ECF No. 89.

DOS makes no attempt to discuss, evaluate, or otherwise demonstrate the likelihood of success with respect to this Court’s decision that the agency exceeded its statutory authority. Since DOS failed to make *any* showing that denying Dana’s passport fell within the agency’s authority, this Court should deny the stay. *See Nken*, 556 U.S. at 433 (“A stay is not a matter of right, even if irreparable injury might otherwise result.”) However, even if it had tried, this Court was correct. While DOS may deny a passport for reasons not specified in the Passport Act, Congress did not grant unbridled discretion to withhold a passport for any substantive reason the Secretary of State may choose. *See Haig v. Agee*, 520 U.S. 280, 290 (1981); *Kent v. Dulles*, 357 U.S. 116, 128 (1958). Withholding a passport based on Dana’s inability to truthfully mark either “M” or “F”, and not because of Dana’s conduct, clearly crosses the line. *See Zzyym II*, at * 8 (“We don’t have a case where the applicant is being denied on grounds related to national security, foreign policy, citizenship, allegiance, or criminal or unlawful conduct.”)

c. The Agency Cannot Make A Strong Showing of Success When Its Binary-Only Passport Policy Was Not The Product Of Rational Decision Making.

DOS also cannot make a strong showing that it will succeed on appeal where this Court, applying the correct legal standard, held that the decision making process that led to its policy is arbitrary and capricious. While the “agency’s decision is entitled to the presumption of regularity,” DOS is not shielded from a “thorough, probing, in-depth review.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). A court must “hold unlawful and set aside agency, findings, and conclusions” that it finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A).

The main thrust of the agency’s argument is that DOS “*identified* five reasons in support” of the policy and the Court erred when it “*identified* what it saw as shortcomings in the reasons.”

Motion, at 3. The APA, however, does not permit a court to rubber stamp agency decisions after the agency *articulates* its reasons. Meaningful review requires a court to “ascertain whether the agency examined the relevant information and articulated a rational connection between the facts found and the decisions made.” *Olenhouse*, 42 F.3d at 1574. Agency’s action must be set aside “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

DOS largely recounts the same arguments presented to, and subsequently rejected by, this Court. *See* Motion, at 12-13. DOS did not engage in reasoned decision making. This Court flagged specific deficiencies for DOS in *Zyym I*, and gave the agency an opportunity to reconsider its decision. 220 F. Supp.3d at 1112-14. Following remand, the agency recycled its reasons regarding “accuracy and reliability.” *Zyym II*, at *6. “[W]hen one looked deeper” to examine whether a rational connection had been established, DOS reasons were unsupported by the record. *Id.* “[T]he only ‘new’ evidence... cuts against the Department.” *Id.* Specifically, the agency was intolerably mute about developments that “at least four U.S. states and territories now issue identification cards with a third gender option.” *Id.*; *see also Zen Magnets, LLC v. Consumer Product Safety Commission*, 841 F.3d 1141, 1150 (10th Cir. 2016). (“An agency does, however, have an obligation to deal with newly acquired evidence in some reasonable fashion[.]”)

The agency’s “no medical consensus” rationale is similarly unavailing. To satisfy the “reasoned analysis” standard DOS must “display awareness that it *is* changing position.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). By way of example, DOS ignored the

Foreign Affairs Manual without explanation, including rules noting intersex people are born with sex characteristics that “do not fit into the typical notions of either male or female bodies” and its expressed deference to WPATH. *Zzyym II*, at *7 (emphasis added). DOS also failed “to account for why the “binary sex designation is preferable.” *Id.* An agency cannot “merely recite the terms ‘substantial uncertainty’ as a justification for its actions.” *State Farm*, 463 U.S. at 52.

Finally, DOS failed to undertake a level of effort (LOE) estimation explaining the time and cost to add a third gender marker on a U.S. passport. *Zzyym II*, at *8. Despite protracted litigation, multiple rounds of briefing, and two hearings before this Court, we learn for the first time in the Motion that supporting the change “would take approximately 24 months and cost roughly \$11 million.” Motion, at 2. However, this information is not in the administrative record, and a reviewing court cannot factor this novel revelation on appeal. A court “may uphold agency action only on grounds that the agency invoked when it took the action.” *Michigan v. EPA*, 135 S.Ct. 2699, 2710 (2015). Ultimately, the binary only gender policy was not the product of rational decision making and DOS cannot make a substantial showing of the likelihood of success on appeal.

CONCLUSION

For all the foregoing reasons, this Court should deny the Motion.

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Respectfully submitted,

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

Civil Action No.: 1:15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

MICHAEL R. POMPEO, in his official capacity as Secretary of State; and
STEVEN J. MULLEN, in his official capacity as the Director of the Colorado Passport Agency
for the United States Department of State,

Defendants.

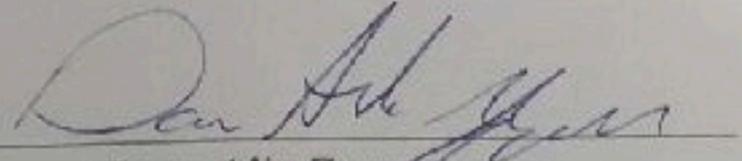
**DECLARATION OF
DANA ALIX ZZYYM**

I, Dana Alix Zzyym, do hereby state and declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am the plaintiff in the above-captioned lawsuit. This declaration is based on my personal knowledge unless otherwise stated.
2. This declaration is submitted in support of Plaintiff Dana Alix Zzyym's Opposition to Defendants' Motion For Stay Of The Court's Injunction Pending Appeal.
3. On Friday, November 30, 2018, I appeared at a local office of The Colorado Department of Revenue—Division of Motor Vehicles (DMV) in order to correct the sex identifier on my Colorado driver's license.
4. After providing the DMV employee appropriate documentation, the sex identifier on my Colorado driver's license was corrected from "F" (female) to "X" (non-binary). I received a temporary driver's license card on the same day with "X" in the sex field.
5. On Monday, December 3, 2018, I returned to the same local office of the DMV in order to obtain Veteran designation on my Colorado driver's license based on my service in the United States Navy. I received an updated temporary driver's license card reflecting the Veteran designation.
6. On Monday, December 17, 2018, I received my permanent Colorado driver's license in the mail from the DMV.

7. A true and accurate copy of my new Colorado driver's license (with redactions of personally identifiable information and for privacy) is attached as **Exhibit 1**.
8. With reasonable notice, I am willing to appear before a passport official at the Colorado Passport Agency to present my Colorado driver's license for inspection in connection with my application for a full-validity United States passport that is the subject of the above-captioned lawsuit.
9. I am an intersex human rights activist and I use gender neutral "they", "them" and "their" pronouns.
10. I am the Associate Director of the Intersex Campaign for Equality (formerly the United States affiliate of the Organisation Intersex International).
11. Should I receive a valid and accurate U.S. passport, I plan to attend the ILGA World Conference located in Wellington, New Zealand.
12. ILGA, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, is the world federation of national and local organizations dedicated to achieving equal rights for lesbian, gay, bisexual, trans and intersex people across the globe.
13. The conference dates are March 18-22, 2019. The registration deadline is March 1, 2019. Conference information is available at <https://www.ilga.org/world-conferences>.
14. It is my understanding that New Zealand is one of several countries that conforms to International Civil Aviation Organization (ICAO) standards, including allowing for "X" in the sex field.

I declare under penalty of perjury that the foregoing statements are true and correct.
Executed on December 19, 2018.



Dana Alix Zzyym
Plaintiff

Exhibit 1

