

**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, *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 U.S. Department of State*,

Defendants.

MOTION TO STAY THE COURT’S INJUNCTION PENDING APPEAL

Defendants 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 U.S. Department of State (DOS), respectfully move for a stay of the September 19, 2018 injunction prohibiting Defendants “from relying upon [their] binary-only gender marker policy to withhold the requested passport from [Plaintiff] Dana Zzyym.” Final Judgment 1, ECF No. 89. The Defendants filed a Notice of Appeal on November 19, 2018. ECF No. 93. The grounds for a stay of the Court’s injunction pending appeal are set forth below.

In sum, at present, DOS’s information technology systems are incapable of producing a passport bearing an “X” sex designation while also properly recording that information in DOS’s databases. In order to ensure that even a single passport issued to Plaintiff with an “X” sex designation functions properly like a passport with an “M” or “F” designation, a host of modifications would be required to the entire system for issuing passports and recording their

information. The Department estimates these modifications would take approximately 24 months and cost roughly \$11 million. And although it is possible to create a passport bearing an “X” designation outside of the Department’s normal processes, such a passport would not function properly. In particular, the sex field information would not be reflected in all of the pertinent databases of DOS or other federal agencies, including U.S. Customs and Border Protection. As a result, use of the passport would likely lead to significant delays and inconvenience when entering the U.S. and create difficulties for the bearer if the passport were to be lost or stolen overseas. Nor would such a passport comply with DOS’s published policies, likely leading to delay, inconvenience, or denial of entry at foreign borders. More generally, the production of any passport out of compliance with DOS’s published policies would undermine the Government’s efforts to fight fraud, detect illegal entry, and prevent terrorism, and would undermine the credibility of all U.S. passports, causing harm to U.S. travelers.

In contrast to the harms to the Government and public described above, a stay pending appeal will not substantially injure Plaintiff. During the pendency of the appeal, Plaintiff may still receive an interim passport with an “M” or “F” marker. Such a passport would permit Plaintiff to travel abroad without impediment, alleviating any irreparable harm Plaintiff could otherwise incur.¹

Finally, Defendants have made a strong showing that they are likely to succeed on the merits. In this regard, for the reasons set forth below, this Court need not find that its decision was in error in order to stay its injunction, given the balance of harms at stake and the serious questions

¹ DOS is also capable of producing a passport with an endorsement indicating, for instance, that Plaintiff is intersex and that the sex field should be read as “X.” *See Reynolds Decl.* ¶ 16.

of law at issue. In any event, Defendants respectfully submit that the Court misapplied the Administrative Procedure Act's (APA) arbitrary and capricious standard, which requires the agency to do nothing more than examine the relevant data and articulate a rational connection between the facts found and the decision made. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994). DOS did just that: it identified five reasons in support of its decision to retain the sex-designation policy. A.R. 83–86. Although the Court identified what it saw as shortcomings in these reasons, the key inquiry is whether a rational decision maker could arrive at the challenged policy based on those reasons.

In light of the above arguments, and those set forth further below, the Court should stay its injunction pending appeal.

I. Legal Standard

District courts have the inherent authority to stay their injunctions pending appeal. *See Nken v. Holder*, 556 U.S. 418, 421 (2009); *see also* Fed. R. Civ. P. 62(c). Such authority “has historically been justified by the perceived need ‘to prevent irreparable injury to the parties or to the public’ pending review.” *Nken*, 556 U.S. at 432 (quoting *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 9 (1942)). The proper exercise of discretion varies depending on the circumstances of the case. *See id.* at 433. In this regard, several factors offer guidance: “(1) whether the stay applicant has made a strong showing that [the applicant] 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)).

With respect to the first factor, “[i]t is not enough that the chance of success on the merits

be ‘better than negligible.’” *Id.* (quoting *Sofinet v. INS*, 188 F.3d 703, 707 (7th Cir. 1999)). However, when the final three “harm” factors weigh in favor of the movant, “probability of success is demonstrated when the [movant] has raised ‘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) (quoting *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246–47 (10th Cir. 2001)); *In re Revel AC, Inc.*, 802 F.3d 558, 569–71 (3d Cir. 2015).²

One final gloss guides the Court’s discretion in this case. When, as here, the government’s “asserted injury is exclusively one involving the public interest,” the second and fourth factors are “necessarily conflated.” *Mainstream Mktg. Servs., Inc.*, 345 F.3d at 852; *cf. Nken*, 556 U.S. 435 (observing that the third and fourth factors merge when the government is the opposing party).

² While the probability of success factor is never relaxed in the context of whether to grant preliminary relief, *see Diné Citizens Against Ruining Our Environment v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016), the same does not hold in the context of whether to grant a stay, *see Mainstream Mktg. Servs., Inc.*, 345 F.3d at 852–53. First, the contrary result would be impractical; the movant would have to ask the district court, which already ruled against it, to find itself in error. This is not the case. The core purpose of a stay is to prevent irreparable harm that may result during an appeal. *See Nken*, 556 U.S. at 432. Indeed, district courts regularly stay their injunctions pending appeal without finding themselves in error. *See, e.g., Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 842 (D.C. Cir. 1977) (holding that the district court did not abuse its discretion by entering a permanent injunction and then staying it pending appeal); *Thiry v. Carlson*, 891 F. Supp. 563, 567 (D. Kan. 1995) (granting stay pending appeal of court’s own order dissolving preliminary injunction). Second, relaxing this factor in the context of a stay is consistent with the notion that “‘no one aspect’ of the stay analysis ‘will necessarily determine its outcome.’” *In re Revel AC, Inc.*, 802 F.3d at 570 (quoting *Del. River Port Auth. v. Transamerican. Trailer Transp.*, 501 F.2d 917, 920 (3d Cir. 1974)). For example, if the movant has shown that it would suffer irreparable harm and that the respondent would not suffer a substantial injury, “a court may enter [a stay] even if the [movant] didn’t ‘demonstrate as strong a likelihood of ultimate success as would generally be required.’” *Id.* (quoting *Del. River Port Auth.*, 501 F.2d at 923).

II. Argument

For the following reasons, all four stay factors weigh in Defendants' favor.

A. The Injunction Will Irreparably Harm Defendants and the Public Interest Lies in Their Favor.

As set forth in the declarations of Carl C. Risch, Assistant Secretary of State for Consular Affairs, attached as Exh. A, and Kenneth J. Reynolds, Director of the Office of Consular Systems and Technology, attached as Exh. B, compliance with the Court's injunction during the pendency of Defendants' appeal would cause significant and irreparable harm to Defendants and the public.

The Court's judgment enjoined Defendants from "relying upon [their] binary-only gender marker policy to withhold the requested passport from Dana Zzyym." Final Judgment, ECF No. 89. In the initial passport application, Plaintiff requested a standard U.S. passport bearing an "X" in the sex field. A.R. 7, 9. While DOS was reevaluating its sex designation policy on remand, Plaintiff also requested a "temporary passport bearing an X or other third-gender marking in the sex field" as an alternative to permit Plaintiff to attend an international conference. A.R. 67. Thus, Defendants understand the Court's injunction to order that Defendants produce for Plaintiff a fully functioning standard or emergency U.S. Passport with an "X" marker in the sex field.

Defendants, however, are unable to produce the requested fully functioning ePassport at this time. Reynolds Decl. ¶ 2.³ To produce and issue any passport, DOS relies on a variety of different information technology systems, many of which contain custom built software. *Id.* ¶ 6. These systems were developed over time, and communicate with each other in complex and

³ The standard U.S. Passport that DOS issues is an electronic passport, or ePassport, meaning that it contains an electronic chip containing secure digitized image and biographic data about the bearer. Reynolds Decl. ¶ 3.

sometimes idiosyncratic ways. *Id.* ¶¶ 12–14. Currently, these systems are not capable of producing a fully functioning passport with an “X” sex marker. *Id.* ¶ 2.

DOS has determined the resources and time necessary to modify these various systems to support the use of an “X” sex marker. *Id.* ¶¶ 11, 15. In order for a passport with an “X” sex marker to function properly, the entire system for processing passports must be modified. DOS estimates that, due to the age and complexity of its systems, it would take approximately 24 months and \$11 million to perform the necessary technical modifications to support the change. Reynolds Decl. ¶¶ 11, 15. And this estimate does not take into account additional changes that may be necessary to the information technology systems of other federal agencies, many of which exchange passport application and issuance data with DOS. *Id.* ¶ 15. Thus, the actual cost to the federal government to ensure that a passport with an “X” sex marker would function properly could be even greater than DOS’s estimate. It would make little sense to require the Government to incur these significant costs now, when doing so may be rendered unnecessary if the Government prevails on appeal. *See Time Warner Entm’t Co., L.P. v. Atriums Partners, L.P.*, No. CIV.A. 02-2343-CM, 2003 WL 111446, at *2 (D. Kan. Jan. 8, 2003) (concluding that “potentially substantial costs,” which could be rendered unnecessary if party prevailed on appeal, weighed against issuing injunction pending appeal).

To be sure, DOS has considered whether it is possible to produce a “one-off” passport with an “X” sex marker outside of its normal processes. Reynolds Decl. ¶ 7. In its May 1, 2017 memorandum titled “Sex Designation Policy for U.S. Passports,” DOS concluded that, at that time, its systems were “incapable of printing a passport that does not include an ‘M’ or ‘F’ in both the printed and machine-readable areas of the passport.” A.R. 86. Upon further investigation, it

appears now that it may be possible for DOS to override certain of its systems, and thereby produce either a standard or emergency passport bearing an “X” marker without undertaking significant changes to its information technology systems. Reynolds Decl. ¶¶ 7, 17. DOS estimates that it would take approximately four weeks to override the necessary systems and produce such a passport. *Id.* ¶¶ 7, 18.

However, a “one-off” passport produced through this method would likely produce a host of significant problems for the bearer of the passport, the federal government, foreign governments, and the public at large. Because of this, DOS has never issued a “one-off” passport along these lines, at least in the 37 years since it began issuing machine-readable passports. Risch Decl. ¶ 7. First, the sex field information on such a passport would not match the information in DOS’s databases (which, as explained, cannot support an “X” sex marker in the absence of significant modifications). Reynolds Decl. ¶ 8. DOS shares the information in its databases with the Department of Homeland Security and its subcomponents such as U.S. Customs and Border Protection and U.S. Citizenship and Immigration Services. *Id.* ¶ 9; A.R. 86. As a result, Department of Homeland Security officials at ports of entry 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. Reynolds Decl. ¶ 9. Likewise, if the passport were to be lost or stolen overseas, the bearer could be subject to significant delays in returning home. Typically, when a U.S. citizen loses a passport overseas, a U.S. consulate or embassy can issue an emergency passport in one business day. *Id.* ¶ 10. But a consulate or embassy could require as long as four weeks to replace a “one off” passport created outside of DOS’s normal processes. *Id.* ¶ 7, 10, 18.

Such a passport would likely also lead to problems at foreign borders. Risch Decl. ¶ 7.

Foreign customs and border officials are aware of U.S. passport regulations and policies, and are aware that U.S. passports use only “F” or “M” sex markers. *Id.* Indeed, it does not appear that DOS has ever issued a one-off passport inconsistent with its published standards and exemplars. *See Id.* Foreign officials are likely to flag a U.S. passport containing an “X” sex marker as anomalous and may question its authenticity. *Id.* This would likely lead to additional scrutiny for the bearer of the passport, including additional vetting, inconvenience, and delay, as well as possible denial of entry into the foreign country. *Id.*

These problems are likely to arise even when travelling to countries that issue passports with an “X” sex marker themselves. *Id.* ¶ 8. Regardless of their own passport policies, when confronted with a U.S. passport with an “X” a marker, officials in such countries are likely still to flag the passport as inconsistent with publicized U.S. standards and question its authenticity. *Id.* The risk is greater in travelling to the majority of countries, which do not recognize a third sex marker for their own passports, and is perhaps greatest if the bearer attempts to travel to countries with domestic laws that do not recognize the existence of intersex individuals. *Id.* In that latter circumstance, the bearer not only might be denied entry, but might also be subjected to local laws in an arbitrary or inconsistent manner. *Id.*

Even if the individual traveler is willing to accept the above-described risks when travelling abroad, the United States has its own sovereign interests in the proper functioning of passports to facilitate international travel. *Id.* ¶ 9; *see Haig v. Agee*, 453 U.S. 280, 292 (1981) (“A passport is, in a sense, a letter of introduction in which the issuing sovereign vouches for the bearer and requests other sovereigns to aid the bearer.”). As Assistant Secretary Risch explains,

The Department issues passports to U.S. citizens to facilitate the international travel of U.S. citizens, and has designed the U.S. passport to advance that purpose,

including by using physical and electronic security features that ensure the credibility of the U.S. passport worldwide. By contrast, issuing a U.S. passport that could cause delays and obstacles for the bearer, rather than removing them, is contrary to U.S. policy and the strongly held interests of the U.S. government.

Risch Decl. ¶ 9.

Under the Constitution, “the President ha[s] primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations.” *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2097 (2015) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 580 (2004) (Thomas, J. dissenting)). In furtherance of its sovereign interests, the federal government has dedicated significant effort and resources to establishing the U.S. Passport as the “gold standard” international travel document. Risch Decl. ¶ 6. This status is grounded both in the quality of the document itself and in the document’s credibility—that it reflects information that is accurate and is backed up by a robust set of publicized DOS regulations and policies. *Id.* ¶¶ 6, 9. For these reasons, whenever DOS implements a change to its passport standards (even a minor one), it 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.” *Id.* ¶ 6. This helps ensure that U.S. passports are recognized as a valid travel document wherever they are presented, and “helps to minimize the risk that a foreign border or customs official might fail to recognize the passport’s validity and disrupt the travel of a U.S. traveler.” *Id.*

The 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, for several reasons. *Id.* ¶ 7. First, the use of such a passport could “undermine the confidence that other countries rightfully have in our process for ensuring the validity of our passports, and thus give rise to doubts about the credibility of all U.S.

passports.” *Id.* ¶ 10. In turn, this may cause foreign officials to give increased scrutiny to U.S. passports and U.S. travelers generally. *Id.* This would prove to the detriment of the Government and the public, as travelers would experience increased disruption, inconvenience, and delay. *Id.* ¶ 10.

Similarly, a foreign government’s willingness to accept such a passport could undermine the United States’ interest in promoting a reliable and secure system of international travel. As Assistant Secretary Risch explains, foreign governments “could be more inclined to accept, or less able to refuse, similarly nonconforming passports issued by other countries in the future.” *Id.* ¶ 12. This complication raises security concerns for the United States and other countries, as bad actors could exploit this vulnerability to cross borders. *See id.*

Finally, the U.S. Government relies on the information and exemplars provided by other countries in order to police the use of fraudulent or altered passports at our own borders. *Id.* ¶ 11. The more reliable those foreign standards and exemplars are, the better the U.S. Government can defend against fraud, illegal entry, and terrorism. *Id.* By issuing a passport not in compliance with DOS’s *own* standards, the Government undermines its ability to insist that other countries abide by their own standards. *Id.* To protect all of these interests, the United States simply does not issue “one-off” passports. *Id.* ¶ 7.

In sum, DOS is unable at this time to produce by its standard processes a fully functioning U.S. passport bearing an “X” in the sex field. A “one-off” passport with an “X” sex marker would not function properly without systematic changes, and the changes necessary to achieve that capability would cost roughly \$11 million and take approximately 24 months. Specifically, a “one off” passport with an “X” designation would likely lead to delays, inconvenience, and denials of

entry for the bearer. The Government, in turn, could face harms to its abilities to detect unlawful conduct, as well as to its sovereign interests in the U.S. passport system generally.

B. A Stay Pending Appeal Would Not Substantially Injure Plaintiff.

In contrast to the irreparable harm the injunction would cause Defendants and the public, a stay pending appeal would not substantially injure Plaintiff. Most importantly, a stay would not inhibit Plaintiff's ability to travel internationally, the primary purpose of a passport. A.R. 84. Defendants have offered Plaintiff a fully functional standard passport with an "F" or, subject to a physician certification, an "M" in the sex field. *Id.* at 23–24. That option remains available to facilitate Plaintiff's travel pending appeal. *Id.* at 80. Accordingly, a stay pending appeal would not cause Plaintiff substantial harm.⁴

C. Defendants Have a Strong Probability of Success on the Merits.

The probability of success factor counsels in favor of a stay as well. Because the harm factors weigh decidedly in Defendants' favor, Defendants must show that they have "raised '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.'" *Mainstream Mktg. Servs., Inc.*, 345 F.3d at 853 (quoting *Prairie Band of Potawatomi Indians*, 253 F.3d at 1246–47). Not only have they done this, they have also made a strong showing that they are likely to succeed on the merits.

⁴ DOS is also capable of producing a standard passport with an endorsement addressing Plaintiff's request for an "X" designation. Reynolds Decl. ¶ 16. An endorsement is "an official indication of the circumstances under which a passport was issued or can be used, and can be used to provide relevant information about the passport or its bearer." *Id.* DOS has the ability to print an endorsement in Plaintiff's passport that indicates, for instance, that although the marker in the sex field is an "F" or an "M", Plaintiff is intersex and the sex field should be read as "X".

First, Defendants respectfully submit that denying Plaintiff's passport application was not arbitrary and capricious. "An agency's action is entitled to a presumption of validity, and the burden is upon the petitioner to establish the action is arbitrary or capricious." *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1221 (10th Cir. 2009). "The scope of review under this standard is narrow and a court is not to substitute its judgment for that of the agency." *Mkt. Synergy Grp., Inc. v. DOL*, 885 F.3d 676, 683 (10th Cir. 2018) (citing *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011)). Review under the APA is therefore "very deferential to the agency." *Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1161 (10th Cir. 2014). DOS provided five reasons in support of its decision to retain its sex designation policy. A.R. 83–86. Among these, DOS indicated that altering its systems "would be expensive and time-consuming." A.R. 86. Consistent with this representation, DOS has determined that the necessary modifications would cost roughly \$11 million and take approximately 24 months to complete. *See Reynolds Decl.* ¶ 15. In part on this basis, Defendants have a strong likelihood to withstand arbitrary and capricious review. At a minimum, they have raised a serious question ripe for litigation and deserving of more deliberate investigation.

DOS's other grounds for denying Plaintiff's application were equally rational. They too raise serious questions that deserve further review, particularly in light of the fact that Defendants were not afforded an opportunity to brief any arbitrary and capricious claims that Plaintiff raised regarding DOS's 2017 decision to deny Plaintiff's passport application.⁵ For example, with respect to DOS's 2017 decision, DOS explained that its binary sex designation policy enhances the

⁵ Defendants did not respond to any arbitrary and capricious claims in large part because Plaintiff's opening and reply briefs, ECF Nos. 65, 70, did not argue that DOS's 2017 decision should be vacated on that basis.

agency's certainty in identifying applicants and reciprocally aids law enforcement when matching their information against passport data. A.R. 83–85. The Court dismissed these justifications on several grounds, including that not all law enforcement data shared with DOS designates an individual's sex. *See Zzyym v. Pompeo*, No. 15-CV-02362-RBJ, 2018 WL 4491434, at *6 (D. Colo. Sept. 19, 2018). But the fact that a sex designation will not always be helpful when comparing passport data to law enforcement records does not mean that reliance on such a marker generally is irrational. There is nothing irrational about maintaining a policy that is helpful most of the time, even if on occasion it is not.

The Court also noted that in certain circumstances DOS permits passport applicants to be designated as a sex different than the sex listed on other government identity documents. *Id.* at *10. But DOS does so only when in receipt of a physician's letter attesting to gender transition treatment, thereby protecting the utility of the sex marker for identification purposes when adjudicating passport applications. A.R. 83. In any case, the fact that DOS in rare circumstances permits an inconsistency between a passport application and a government document shows only that the sex marker may occasionally be less useful in confirming the identity of a passport applicant. It does not render irrational DOS's reliance generally on the sex marker as a tool to establish identify.

Finally, the Court pointed to the fact that a handful of jurisdictions have begun issuing identification cards with a third gender option. *See Zzyym*, 2018 WL 4491434, at *6. Despite this fact, the overwhelming majority of the records on which DOS relies to issue passports still designate the bearer's sex as either male or female. It is thus rational for DOS to conclude that its binary sex designation policy helps ensure that passport information is accurate and reliable. In

any event, at a minimum, the Court's decision on these claims raises serious, substantial, difficult, and doubtful questions as to make the issue ripe for litigation and deserving of more deliberate investigation.

III. Conclusion

For the foregoing reasons, the Court should grant Defendants' motion to stay the Court's injunction pending appeal.

Dated: December 3, 2018

Respectfully submitted,

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CERTIFICATE OF CONFERRAL

I certify that on November 30, 2018 and December 3, 2018, I conferred with Plaintiff's counsel to attempt to resolve the matters raised in this motion. Plaintiff's counsel indicated that Plaintiff would oppose the motion.

/s/ Benjamin T. Takemoto
BENJAMIN T. TAKEMOTO

Exhibit A

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
Civil Action No. 15-cv-02362-WYD

DANA ALIX ZZYYM,

Plaintiff,

v.

MICHAEL POMPEO, ET AL.,

Defendants.

DECLARATION OF CARL C. RISCH

I, Carl C. Risch, do hereby state and declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am the Assistant Secretary of State for Consular Affairs of the U.S. Department of State (the “Department”). Under the direction of the Secretary of State, I am responsible for the formulation and implementation of policy relating to immigration, provision of consular services, and determination of U.S. citizenship. Specifically, I direct policies, procedures, and regulations relating to functions of the Bureau, including the adjudication and issuance of passports, visas, and related services; protection and welfare of U.S. citizens and interests abroad, provision of third-country representation, and the determination of U.S. citizenship/nationality. I provide guidance and recommendations on related foreign policy issues to Department of State principals and to U.S. embassies and consulates. The statements made herein are based on information gathered through the execution of my official duties with the Department. I have served in my current position since August 11, 2017, and previously served in several senior leadership positions with U.S. Citizenship and Immigration Services (“USCIS”).

2. This declaration is submitted in support of Defendants’ Motion for a Stay of the Court’s Injunction Pending Appeal. This declaration is based on my

personal knowledge and on information conveyed to me by others within the Department's Bureau of Consular Affairs ("CA").

The Executive Branch Has Strong Foreign Policy Interests in the U.S. Passport and its Content

3. A U.S. passport is both a travel document permitting a U.S. citizen to transit between the United States and other countries, and a diplomatic communication between sovereign nations. In the text of the document, the United States identifies the bearer as a U.S. national, and requests that any foreign sovereign to which the document is presented provide the bearer entry and safe passage. Indeed, on the very first page, there is a diplomatic entreaty: "The Secretary of State of the United States of America hereby requests all whom it may concern to permit the citizen/national of the United States named herein to pass without delay or hindrance and in case of need to give all lawful aid and protection." The passport remains the property of the U.S. Government and must be surrendered upon demand. The Executive Branch has a strong foreign policy interest in controlling the content of its diplomatic communications with foreign states, including the diplomatic communication represented by a U.S. Passport.

4. The Department determines what information a passport may contain and regulates the manner in which a passport may be altered by its bearer (*e.g.*, by adding a signature or emergency contact information where space is provided for such purposes). In so doing, the Department is guided by the need for uniformity in design and presentation in order to ensure consistency and security as to the document. To facilitate the acceptance of U.S. passports by foreign border officials, the Department designs passports to be compliant with the international standards and specifications for machine-readable travel documents promulgated by the International Civil Aviation Organization (ICAO).

5. Like the United States, the vast majority of countries use the binary sex designations of "F" and "M" in their passports. Since 1999, ICAO standards have allowed, but do not require, countries to permit a third option: "unspecified." Although several countries have begun to offer a third option in their passports, most countries have not.

6. The United States has a sovereign interest in ensuring that U.S. citizens are freely able to traverse international borders without undue hindrance. To that end, the United States has expended a great deal of effort and resources in establishing the U.S. passport as a “gold standard” of international travel documents, and has a sovereign interest in preserving that hard-won status. The Department takes great care to ensure that the U.S. passport is secure, reliable, and recognized around the world as the gold standard of identity and travel documents. For this reason, whenever the Department implements a change, however minor, to the U.S. passport, it 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. This process ensures that the U.S. passport is recognized as a valid travel document wherever it is presented, and helps to minimize the risk that a foreign border or customs official might fail to recognize the passport’s validity and disrupt the travel of a U.S. traveler.

**Issuance of one U.S. Passport with an “X” Sex Marker
Would Impair the United States’ Interest in Ensuring
that U.S. Passports are Universally Accepted as Reliable.**

7. The issuance of one valid U.S. passport that does not conform to publicized U.S. standards and exemplars would undermine its “gold standard” status, to the detriment of the U.S. government and all U.S. travelers. To the best of my knowledge, since the United States began issuing machine-readable passports in 1981, the Department has never issued a unique passport inconsistent with our published standards and exemplars. Furthermore, I am not aware of any other country that has issued a unique passport inconsistent with its published standards and exemplars. Rather, countries worldwide are aware that U.S. passports use only “F” or “M” as sex markers, and the Department has not announced any intention to depart from that policy. As a result, foreign border and customs officials are likely to identify a U.S. passport containing an “X” designation as an anomaly and may question its authenticity. It is likely that such a passport would be subjected to additional scrutiny, and the bearer would be subject to additional vetting, inconvenience, and delay, and possibly even denial of entry, as a consequence.

8. This would be the case even when traveling to countries that themselves issue passports with an “X” sex marker, simply because it is inconsistent with the

publicized U.S. standards and exemplars. The risk is greater in the majority of countries, which do not recognize a third sex marker in their own identification system, and could be even greater in countries whose laws do not recognize the existence of intersex, non-binary, or transgender individuals, where individuals could be denied entry, or could be subjected to local laws in an arbitrary or inconsistent manner. Indeed, countries 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 countries.

9. While it is true that an individual traveler may be willing to accept the risk of using a passport with an “X” sex marker, the United States has a sovereign interest in not creating problems for its own citizens through a document of its own issuance and manufacture. The Department issues passports to U.S. citizens to facilitate the international travel of U.S. citizens, and has designed the U.S. passport to advance that purpose, including by using physical and electronic security features that ensure the credibility of the U.S. passport worldwide. By contrast, issuing a U.S. passport that could cause delays and obstacles for the bearer, rather than removing them, is contrary to U.S. policy and the strongly held interests of the U.S. government.

10. Beyond the possible inconvenience to a U.S. citizen traveling with such a unique passport, the system of international travel depends on countries issuing passports that conform to their published standards and policies. Issuance of one unique passport, not in conformity with the United States’ published standards, could undermine the confidence that other countries rightfully have in our process for ensuring the validity of our passports, and thus give rise to doubts about the credibility of all U.S. passports. This in turn could lead foreign officials in some countries to give increased scrutiny to U.S. passports and U.S. travelers generally, and cause disruption, inconvenience, and delay for U.S. travelers.

**Issuance of one U.S. Passport that Is Inconsistent with
Published Exemplars Would Create a National Security
Risk.**

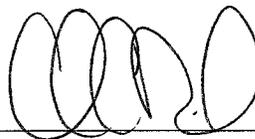
11. The issuance of a U.S. passport that does not conform to the United States’ published standards could harm U.S. interests in additional ways. First, the United

States relies on information and exemplars provided by other countries to protect against the use of fraudulent and altered passports by persons who seek to travel to the United States unlawfully or for a malicious purpose. In this context, leadership by example bolsters the United States' ability to secure commitments from other countries to be similarly transparent about their own passport standards and abide by those standards. Having reliable standards and exemplars from foreign countries provides the U.S. government with an important tool to protect the United States against fraud, illegal entry, and terrorism. By deviating from our own standards for passport issuance, we undermine our ability to insist that other countries abide by theirs, and thus diminish this important tool. Providing a unique passport with an "X" marker, even temporarily in response to litigation, would undercut significant policy interests.

12. In addition, to the extent that foreign officials were to accept a unique U.S. passport, even after additional scrutiny, they could be more inclined to accept, or less able to refuse, similarly nonconforming passports issued by other countries in the future. This would further undermine the reliability of the system of international travel. Moreover, persons who wish to enter foreign countries unlawfully or maliciously could exploit such relaxed scrutiny by using forged nonconforming passports, thereby creating a security vulnerability for those countries. Not only is it contrary to the United States' interests to take steps that could impair the national security of other countries, it may also directly harm the United States' own national security, 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.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and understanding.

Dated: November 29, 2018

A handwritten signature in black ink, consisting of several overlapping loops and a final vertical stroke, positioned above a horizontal line.

Carl C. Risch
Assistant Secretary of State for Consular Affairs

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO
Civil Action No. 15-cv-02362-WYD

DANA ALIX ZZYYM,

Plaintiff,

v.

MICHAEL POMPEO, ET AL.,

Defendants.

DECLARATION OF KENNETH J. REYNOLDS

I, Kenneth J. Reynolds, do hereby state and declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am the Director of the Office of Consular Systems and Technology (CST) in the Bureau of Consular Affairs (CA) of the U.S. Department of State (the Department). In this position I oversee the design, development, testing, deployment, and operations and maintenance of the information technology (IT) mission systems in support of the Consular Affairs passport, overseas citizens' services, and visa operations. The statements made herein are based on information gathered through the execution of my official duties with the Department. I have served in CST for around five years, and have been in my current position for approximately two years and six months.

2. This declaration is submitted in support of Defendants' Motion to Stay the Court's Injunction Pending Appeal. As set forth below, the Department is not able to produce a standard, fully integrated U.S. ePassport with an "X" sex marker at this time, and the modifications necessary to do so would require an estimated 24 months and \$11 million.

3. The standard U.S. Passport is an electronic passport, or ePassport. This means that it contains an electronic chip that may be read by border agencies

worldwide and which houses secure digitized image and biographic data about the bearer. It also has public key infrastructure technology that is used to substantiate the authenticity of the data stored on the chip. An ePassport contains identifying information about the bearer, including the bearer's sex, in three places: printed in the Visual Inspection Zone (VIZ) of the passport's biographic data (or biodata) page; printed in the Machine-Readable Zone (MRZ) of the biodata page; and encoded digitally on the chip. To enhance security, the biodata recorded in each of these places must match, including the appropriately documented sex marker. The Department's ePassport issuance process has quality control checks in place to prevent an ePassport from being issued with inconsistent biodata.

4. CA is currently not able to produce an ePassport with a sex marker other than "M" or "F" that would be fully integrated and recognized by our systems. To produce a single ePassport that would be supported through CA's systems would require changes to several of CA's systems, as well as possible corresponding changes to our interagency partners' systems. As explained below, I estimate it would take approximately 24 months and \$11 million to fully integrate the sex marker addition and produce an ePassport, depending on resource availability.

The Process of Producing a Valid U.S. ePassport

5. U.S. ePassports can only be produced using CA systems implemented to support the adjudication, issuance, and printing of U.S. Passports. At this time, a U.S. ePassport can only be printed with an "M" or an "F" using these systems, as these are the only options offered or recognized by the systems for the sex field. An operator or user entry to use a different character for the sex marker is not allowed by CA systems.

6. There are approximately 20 information technology systems containing a significant amount of custom software built and integrated over time that provide the necessary capabilities to support the life-cycle of an ePassport. These include the systems that handle application ingest, identity proofing, application adjudication, passport printing and issuance, and data reporting, all steps that must be completed as part of the process of producing an ePassport. Each of these systems have to be evaluated and modified appropriately to ensure an additional sex marker would be recognized and supported. CST has already identified over

250 procedures (sets of software instructions) and/or data fields, within various systems, that incorporate the sex marker. Many of these procedures and/or fields do not accept “X” as a permissible input or output. Some procedures and/or fields would have to be modified in order to support an “X” option, and others still require analysis to determine whether changes would be required.

7. CA has considered the possibility of printing a single ePassport with an “X” sex marker as a “one-off,” outside of the normal processes. It appears that it is possible to override and incorporate “one-time” modifications to certain systems to change the sex marker in the issuance system’s database, to an “X.” This would allow the passport to be printed with an “X” in the VIZ, a “<” in the MRZ, and a fully functioning chip. Based upon results in a test environment, it would take approximately four weeks to produce such a “one off” passport, including time to test the necessary changes for operational systems. If problems are encountered during testing, that time estimate may change.

8. Issuing such a passport, however, would result in a mismatch with the sex field information in the Department’s internal records system. That system currently supports only “M”, “F”, and “U” sex markers, not “X”. Thus, without the long-term system modifications mentioned previously, including modifications to the Department’s system of record for Passport services, issuing a “one off” passport with an “X” marker would fail to create a matching record in the Department’s records system.

9. This records system is the source from which automated data transfers are executed to supply other Federal agencies, including the Department of Homeland Security (DHS), with information about issued U.S. Passports. I am not aware whether the Department has ever tried to send a record with a “U” to DHS via data transfer. As a result, it is unknown whether the DHS system(s) would accept such a transfer. In either case, unless both the Department’s records system and any corresponding DHS systems were modified to accept an “X” sex marker, there would be a mismatch between the data on the “one off” ePassport and the system(s) DHS uses to process individuals at a port of entry. It is likely that this mismatch would lead DHS officials at ports of entry to require additional screening.

10. A “one off” passport also would take longer to replace if lost or stolen overseas than a standard passport. When a U.S. citizen’s standard ePassport is lost or stolen overseas, he or she can go to any embassy or consulate and, if he or she has urgent travel needs, obtain an Emergency Photo-Digitized Passport (EPDP) by the next business day. Because producing an EPDP with an “X” sex marker requires the use of modified software, as described in paragraph 18 below, it would be highly unlikely, if not impossible, to produce an EPDP with an “X” sex marker on this timeline.

Systems Changes Necessary to Produce a Fully-Integrated ePassport.

11. To create a fully-integrated ePassport, CA would have to implement significant changes to existing software systems. I estimate that such changes would take approximately 24 months and \$11 million, depending on resource availability.

12. These estimates are based on several considerations. CA currently operates and supports over 60 distinct information technology systems used for consular services. Approximately 30% of these systems specifically support U.S. Passport application processing and adjudication, both domestically and overseas and contain a significant amount of custom applications. Most of these systems are over a decade old, and as a result, they are not designed in a way that enables significant technology changes to be made routinely or quickly. This includes approximately 500 distinct databases that are used, at least in part, to support adjudication and issuance of U.S. passports.

13. Each of CA’s various systems was initially built to perform a specific function or purpose, and was not necessarily designed with other systems in mind. In other words, at the time these systems were built, they did not take into account CA’s larger “ecosystem” of now-established systems and processes. Over time, these systems were modified and updated, but changes took place independently, without a consistent set of design principles or common approach to integration across systems. As technology advanced and the Department developed a need to centralize its data and processes, and to share more data with other agencies, CA developed centralized systems, which then had to be grafted to the existing systems

supporting CA's field offices. This process required CA's existing systems to be individually modified in order to communicate with the new centralized systems. Consequently, some of CA's systems communicate in such a way that changes to one system can result in unintended consequences, or "ripple effects," for another system. Additionally, prior system adjustments have sometimes created unintended defects which forced CA to come up with workarounds unique to particular systems.

14. Due to the large number of legacy systems in field offices around the world, the complicated and varied ways in which CA's systems have been modified to communicate with one another, and existing, ad hoc workarounds, there are significant practical challenges to implementing changes across CA's systems. Even for minor changes, a lengthy amount of time is typically needed to implement necessary modifications.

15. I estimate that to make all the modifications necessary to allow CA to issue ePassports with a third sex marker option would take approximately 24 months, at a cost of roughly \$11 million. The time estimate assumes that already-planned CST system development efforts continue as currently planned, and that system modifications would not begin until necessary resources are in place, including additional hiring and funding increases for existing contracts. I estimate that this hiring and increase in funding may require 6-8 months before CST could initiate sex marker system changes. Both the time and resource estimates do not include changes that may be required to other agency systems, such as the Department of Treasury's systems, which are used to perform data entry and automated transmission of passport applications to the Department of State, or to the systems of federal agencies that currently accept automated transmission of ePassport issuance data, including sex marker data, from the Department. Moreover, neither estimate accounts for related policy or regulatory changes that may be required, such as approval of form changes by the Office of Management and Budget, nor do they take into account workflow or resource requirements unrelated to technology.

Alternative Options for Facilitating Plaintiff's International Travel.

16. Without making any modifications to its systems, CA could issue Plaintiff a standard ePassport and address Plaintiff's request to have Plaintiff's sex

identified as “X” through a customized endorsement. An endorsement is an official indication of the circumstances under which a passport was issued or can be used, and can be used to provide relevant information about the passport or its bearer. Such an ePassport would have an “M” or an “F” in the sex field in the VIZ, MRZ, and the chip. This ePassport would be issued through CA’s regular process.

17. CST has also investigated producing for Plaintiff a type of passport known as an Emergency Photo-Digitized Passport (EPDP). An EPDP differs from an ePassport in several ways. For example, it has a shorter validity period, typically one year; fewer visa pages; and can only be printed at overseas posts. An EPDP contains a photograph of the bearer and the bearer’s biographic data within the VIZ and the MRZ. The EPDP lacks an electronic chip containing digitized image and biographic data.

18. As with the ePassport, we have determined in a test environment that it appears to be possible for CA systems administration personnel to override and incorporate “one-time” modifications to change the sex marker in the issuance system’s database to an “X”. This would allow CA to print an EPDP at an overseas post, using modified software, with an “X” in the VIZ and a “<” in the MRZ. Like all EPDPs, this passport would not have an electronic chip, and would require the bearer to renew it more frequently than a standard ePassport. It would take approximately four weeks to produce a one-off EPDP using this technique, including time to test the necessary changes for operational systems. If problems are encountered during testing, the time to produce the EPDP may change.

19. This process would have to be repeated if a replacement EPDP had to be issued for any reason. For example, if the first EPDP was lost or stolen, issuing a replacement EPDP with an “X” sex marker could require as much as four weeks, rather than the next business day standard for issuing an ordinary EPDP. This same process would be used to replace a lost or stolen ePassport issued as described in paragraph 10.

20. As with the ePassport, an “X” sex marker printed on the EPDP would not match the issuance data in CA’s authoritative record systems, which at this time are not capable of accepting an “X” sex marker.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and understanding.

Dated: December 3, 2018



Kenneth J. Reynolds