

**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

**MOTION FOR A STAY
OF THE DISTRICT 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,¹ respectfully request a stay of the district court's September 19, 2018 injunction prohibiting the State Department from denying

¹ Steven J. Mullen has replaced Sherman Portell as the Director of the Colorado Passport Agency and is automatically substituted as defendant-appellant under Federal Rule of Appellate Procedure 43(c)(2).

Plaintiff Dana Alix Zzyym's passport application on the basis of the Department's requirement that a passport designate the bearer's sex as either male or female. Ex. 1. The district court denied defendants' request for a stay on February 21, 2019. Ex. 2. Zzyym opposes this request.

INTRODUCTION

For decades, the United States, like the vast majority of other countries, has required its passports to identify a bearer's sex as either male or female. Among other things, this policy assists the State Department ensure the integrity of passport data, and in turn aids other agencies, particularly law-enforcement ones, that rely upon such information.

The district court nevertheless dismissed this longstanding and common policy as arbitrary and capricious and enjoined the Department from applying it to Zzyym, who had requested a passport with a third sex marker, "X," even though Zzyym's sex was designated as female on the driver's license submitted with the application. In doing so, the court did not question the facial reasonableness of the various grounds offered by the Department. Instead, it simply dismissed the Department's rationales as undermined by non-existent contradictions. But that is precisely the type of second-guessing that a court is ill-equipped to undertake in any arbitrary-and-capricious review, much less in an area involving sensitive considerations of foreign affairs and national security. *See Haig v. Agee*, 453 U.S. 280, 293 (1981) ("The history of passport controls since the earliest days of the Republic shows congressional

recognition of Executive authority to withhold passports on the basis of substantial reasons of national security and foreign policy.”).

Such a significant interference with Executive Branch policy should not be allowed to take effect absent this Court’s review. Without a stay pending appeal, the Department will be forced either to devote millions of dollars and dozens of months to overhauling its information systems or to create a “one-off” passport that would implicate its own foreign policy concerns and pose national security risks. Entering a stay, by contrast, would not prevent Zzyym from immediately obtaining a valid passport containing the sex designation that appeared on the driver’s license submitted with Zzyym’s passport application, and thus would in no way impair Zzyym’s ability to travel. The State Department therefore respectfully asks this Court to stay the district court’s injunction to preserve the status quo pending this appeal.

BACKGROUND

1. In 2014, Zzyym, a U.S. citizen, applied for a passport. Dkt. No. 1, at 9 (Compl. ¶ 34). Instead of checking the box next to “M” or “F” in the field asking for the applicant’s sex, Zzyym wrote “intersex,” Administrative Record (AR) 7,² which Zzyym later defined as those individuals who “are born with sex characteristics that do not fit typical binary notions of bodies designated ‘male’ or ‘female.’” *Id.* at 4 (Compl. ¶ 11). Along with the application, Zzyym submitted as proof of identity a

² The Administrative Record appears in the district court record at Docket Number 64.

Colorado driver's license, which listed Zzyym's sex as female (AR 12); a letter stating that Zzyym is intersex and requesting that the passport identify Zzyym's sex as "X" (AR 9); another letter from a doctor at the Department of Veterans Affairs (VA), stating that Zzyym is intersex (AR 15); and a Michigan birth certificate, which was amended in 2013 to indicate Zzyym's sex as "unknown" (AR 10).

The State Department passport agency responded that "X" is not an available option under Department policy. AR 23-24. The agency informed Zzyym, however, that it could issue a passport listing Zzyym's sex as female, as shown on the Colorado driver's license submitted with the application. AR 23.

Zzyym sought reconsideration (AR 26), and provided letters from two physicians (AR 28, 30). One letter stated that Zzyym "has had the appropriate clinical treatment for transition to intersex." AR 28. The other stated that Zzyym "was born as intersex," "has had surgery for transition to female genitalia," and that "it appears that her treatment for transition has been appropriate." AR 30.

The passport agency subsequently issued a final decision denying Zzyym's passport application. AR 33. It again pointed to the State Department's requirement that a passport indicate a bearer's sex as either male or female, and explained that Zzyym's application was denied because Zzyym did not want a passport issued unless it listed Zzyym's sex as "X." *Id.*

2. Zzyym brought suit under the Administrative Procedure Act (APA), alleging, as relevant here, that the State Department's denial of Zzyym's passport

application was arbitrary and capricious and also exceeded the Department’s statutory authority. Dkt. No. 1, at 2 (Compl. ¶ 2). The Department moved for judgment on the record with respect to Zzyym’s administrative claims. Dkt. No. 35. In support of its motion, the Department submitted a declaration from Bennett S. Fellows, a Division Chief in the Department’s Passport Services Directorate, identifying a number of rationales underlying the Department’s sex-designation policy. Dkt. No. 41-1. Key among them was the importance of the male or female sex designation for data integrity purposes—the designation is used to verify a passport applicant’s identity and eligibility, and provides useful data to other government agencies, including law-enforcement ones, after the passport is issued. *Id.* ¶¶ 5, 15, 16.

The district court denied the Department’s motion, concluding that “the administrative record contains no evidence that the Department followed a rational decisionmaking process in deciding to implement its binary-only gender passport policy.” Dkt. No. 55, at 6. It “remand[ed] the case to the Department to give it an opportunity either to shore up the record, if it can, or reconsider its policy.” *Id.* at 6-7.

On remand, the State Department reevaluated its sex-designation policy and decided to maintain it. In a May 2017 memorandum, the Department provided three categories of rationales for that decision: (1) the protection of the integrity of the passport as an identity document, (2) the utility of its data for law-enforcement and other purposes, and (3) the cost and effort that would be required to incorporate a

third sex designation into the information systems of the Department and other agencies. Ex. 3.³

First, the Department explained that its policy “is necessary to ensure that the information contained in U.S. passports is accurate and verifiable, and thus to ensure the integrity of the U.S. passport as proof of identity and citizenship.” Ex. 3, at 83.

The Department does not verify an applicant’s sex by conducting a physical examination, but instead relies on third-party identification documents such as original birth certificates, driver’s licenses, and identity cards. *Id.* At the time of Zzyym’s passport application, all government jurisdictions issuing documents the Department uses for identity verification designated the bearer’s sex as either male or female. *Id.* Therefore, “[i]ssuing a passport bearing a sex that is not supported by the underlying evidence of identity would compromise the Department’s ability to ensure the accuracy and verifiability of the information in U.S. passports.” *Id.*

In addition, the sex-designation policy helps ensure that passports are issued only to those who are eligible. Ex. 3, at 84. Department regulations specify classes of individuals who are not entitled to passports, including those “subject to felony arrest warrants, criminal court orders prohibiting them from leaving the country, or requests for extradition,” *id.*; see 22 C.F.R. § 51.60(b)(1), (2), (5), and the databases that the Department consults to determine whether an applicant falls within any of those

³ In citing the May 2017 memorandum, we reference the page numbers from the administrative record.

categories use only male and female sex designations, Ex. 3, at 84. Requiring an applicant to use either male or female sex designations, consistent with the applicant's government-issued identification, assists the Department in matching an applicant with the information in those databases. *Id.*

The Department also explained why its longstanding sex-designation policy was consistent with its more recent policy allowing transgender applicants to obtain passports designating a sex different from that on their government-issued identification documents. Ex. 3, at 85-86; *see* AR 169-77. Under that separate policy, the Department does not issue passports based solely on an individual's gender identity, but instead allows an applicant who has undergone gender transition and provides a medical certification, which must comply with accepted medical standards concerning gender transition, to designate the sex associated with the completed transition. Ex. 3, at 85-86. The Department explained, however, that there is no comparable medical "consensus on what it means, biologically, for an individual to have a sex other than male or female." *Id.* at 86. Given this medical uncertainty, the Department concluded that a "third sex" would be "unreliable as a component of identity" and therefore has declined to rely on medical certifications that an applicant is intersex. *Id.* at 85.

Second, including only male or female sex designations in passport data enhances the Department's ability to assist other federal and state agencies in carrying out their functions. Ex. 3, at 84. Adding a third sex designation to passports would

“introduce verification difficulties in name checks and complicate automated data sharing among these other agencies,” because “most if not all ... have designed their own systems to accommodate only two sexes.” *Id.* The ability of other agencies to access passport information for identification purposes is “particularly important” in the law-enforcement context, as those agencies consult U.S. passport data to “identif[y] crime victims and individuals in custody” and “to track[] or locat[e] persons of interest,” among other reasons. *Id.* Because those agencies’ databases use only male and female sex designations, adding a third sex designation to passports “could compromise law enforcement efforts to match, and thus identify, track, locate, contact, or arrest suspected or convicted criminals.” *Id.* at 85.

Third, the Department explained that altering its systems “to permit the issuance of passports with a third sex option would be expensive and time-consuming.” Ex. 3, at 86. To fully integrate a third sex designation into the Department’s passport systems would require substantial modification to “numerous systems within the Passport Directorate” and to “other systems within the Bureau of Consular Affairs, including systems used by overseas posts.” *Id.* Other agencies that rely on passport data, such as Customs and Border Protection, would likewise have to modify their information systems “to assure continued interoperability.” *Id.*

3. The district court again held that the Department’s sex-designation policy was arbitrary and capricious. Ex. 1, at 20. The court concluded that the Department’s passport-integrity rationale was “undermined” by its transgender policy,

which, in the court’s view, “ma[kes] it apparent that [the Department] did not actually rely on other jurisdictions’ gender data to verify passport applicants’ identities to the extent it argued.” Ex. 1, at 10. The court further held that the Department could not invoke considerations of the time and expense required to fully integrate a third sex designation into relevant databases, because the Department had not developed a precise estimate of the time needed and likely cost of that undertaking. Ex. 1, at 15. Despite acknowledging that “common sense would tell anyone that altering a system will necessarily involve some effort and money,” the court dismissed the Department’s conclusion as “the product of guesswork rather than actual analysis,” and thus not based on “reliable evidence.” *Id.* The court therefore concluded that the Department’s reliance on this consideration was irrational and that its denial of Zzyym’s passport application was arbitrary and capricious. *Id.*

Based solely on its arbitrary-and-capricious ruling, the district court further held that the State Department necessarily acted in excess of its statutory authority, reasoning that no “law authorizes the denial of a passport application without good reason.” Ex. 1, at 18. The court then enjoined the Department from relying on its sex-designation policy in adjudicating Zzyym’s passport application. *Id.* at 20.

4. The Department filed a motion for a stay pending appeal along with two declarations. The Declaration of Kenneth J. Reynolds, the Director of the Office of Consular Systems Technology, addressed the changes to information systems required to incorporate a third sex designation. Ex. 4 ¶¶ 11-15. Reynolds estimated such a

change would require approximately \$11 million and 24 months to implement. *Id.*

¶ 15. He also noted that the Department could create a “one-off” passport for Zzyym containing an X sex designation, but that such a passport would not be integrated into the Department’s information systems. *Id.* ¶¶ 4, 7, 8, 20.

The Declaration of Carl C. Risch, the Assistant Secretary of State for Consular Affairs, addressed the Executive Branch’s “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.” Ex. 5 ¶ 3. Assistant Secretary Risch explained that issuing passports that do not conform to the Department’s publicized standards—such as one listing the bearer’s sex as “X”—would undermine the reliability of U.S. passports as travel documents, because other countries could come to doubt the reliability of the Department’s process for issuing passports. *Id.* ¶ 10. He also noted that issuing non-conforming passports could pose a threat to national security. *Id.* ¶¶ 11-12. Specifically, having foreign countries issue passports only if they comply with their publicized standards helps the United States guard “against fraud, illegal entry, and terrorism.” *Id.* ¶ 11. If the Department issued passports that failed to conform to its own standards, that would undermine the United States’ ability to insist that other countries do so as well, creating security vulnerabilities for those nations that could be exploited to harm our own. *Id.*

5. The district court denied the Department’s motion for a stay. Ex. 2. It summarily dismissed the argument that the Department is likely to prevail on the

merits, *id.* at 8, and ruled that the equities did not tip in the Department’s favor, *id.* at 3-7. The court concluded that a stay would substantially injure Zzyym, despite recognizing that the Department is willing to issue Zzyym a passport designating a sex matching the one on the driver’s license submitted with Zzyym’s application. *Id.* at 7. The court ruled that the Department, by contrast, would not suffer an irreparable injury absent a stay. *Id.* The court deemed the costs of implementing the systemic changes necessary for a third-sex designation insufficient because it understood this Court’s precedent as establishing that “economic loss by itself is not irreparable harm,” even if the government is the party that would suffer the loss. *Id.* at 6. And while the court acknowledged the national security harms identified by the Department as “reasonable and almost self-evident,” it speculated that those injuries could be mitigated by publicizing the court-ordered sex designation. *Id.* at 7. If the Department determined that this proposed solution would not sufficiently mitigate the harm, the court concluded, then the Department could alter its information systems. *Id.* The court recognized that this could put the Department to “a difficult choice,” but believed that it was “not an impossible” one. *Id.*

ARGUMENT

Dismissing the longstanding and common policy of requiring passports to designate the bearer’s sex as either male or female as irrational, the district court ordered the Executive Branch to alter the content of its diplomatic communications. It did so despite acknowledging that it was subjecting the State Department to the

dilemma of either undertaking a multimillion-dollar, two-year overhaul of its information systems or creating an exception that would pose its own national security risks and foreign policy concerns. Such an extraordinary order should not be permitted to take effect until this Court has had a chance to address the merits. And preserving the status quo pending appeal will cause no substantial injury to Zzyym, who can obtain a passport containing the same sex designation as the one on the driver's license Zzyym submitted. The familiar stay factors therefore all weigh strongly in favor of a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

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

The district court erred in holding that the State Department's decision to retain the sex-designation policy was irrational. Under the APA, this Court "review[s] the district court's decision de novo" and "will not overturn the agency's action unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Wyoming v. USDA*, 661 F.3d 1209, 1226-27 (10th Cir. 2011) (quotation marks omitted). It is axiomatic that "[t]he scope of review under this standard is narrow and a court is not to substitute its judgment for that of the agency." *Market Synergy Grp., Inc. v. DOL*, 885 F.3d 676, 683 (10th Cir. 2018); *see Ron Peterson Firearms, LLC v. Jones*, 760 F.3d 1147, 1161 (10th Cir. 2014) (review under the APA is "very deferential to the agency"). Such narrow review is particularly appropriate here, given that in litigation involving "sensitive and weighty interests of national security and foreign affairs," the "evaluation of the facts by the Executive," and the policy the Executive

adopts based on those facts, “is entitled to deference.” *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33–34 (2010); *see also Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2095 (2015) (noting that “a passport ‘from its nature and object, is addressed to foreign powers’ and ‘is to be considered . . . in the character of a political document’” (quoting *Urtetiqui v. D’Arcy*, 34 U.S. (9 Pet.) 692, 699 (1835))). Much of the district court’s opinion, however, simply reflects a disagreement with the Department’s assessment of the problems inherent in including a third sex designation, a disagreement often founded on non-existent contradictions the court believed it had identified.

A. The Department explained that, at the time of Zzyym’s passport application, every jurisdiction that issues documents the Department uses to establish an applicant’s identity employed only male and female sex designations. Ex. 3, at 83. Allowing applicants to select a third sex designation would therefore impede the verification of the applicant’s identity, and consequently “undermine the integrity of the U.S. passport as an identity document.” *Id.* That explanation is entirely reasonable, and the district court never explained why the Department’s sex-designation policy does not help it verify the identity of passport applicants.

1. The district court instead concluded that this rationale is “undermined” by the Department’s willingness to issue Zzyym a passport with a male sex designation if Zzyym provided medical documentation required by its transgender policy, even though Zzyym’s driver’s license designated Zzyym as female. Ex. 1, at 10. But the Department’s willingness to permit a different sex designation in this limited

circumstance in no way calls into question whether it “actually rel[ies] on other jurisdiction’s gender data to verify passport applicants’ identities” (*id.*) in most cases—the relevant question in reviewing the Department’s explanation. *See Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1178 (10th Cir. 2012) (under arbitrary-and-capricious review, an agency’s “chosen methodology is entitled to deference” if the agency provides a reasonable explanation for it).

In any event, the Department explained why its transgender policy was consistent with its refusal to recognize a third sex designation. In light of a “medical consensus” concerning gender transition, the Department permits certain transgender applicants who have undergone gender transition to obtain a sex designation that does not match the one on their identification documents. AR 85. Because there is no comparable medical “consensus on what it means, biologically, for an individual to have a sex other than male or female,” the Department has not adopted the additional exception the district court desired. AR 86.

Put differently, the Department’s transgender policy permits all applicants who undergo gender transition to obtain a sex designation that does not match the one on their identification documents if they (1) provide the necessary medical certification and (2) designate their sex as either male or female. AR 175. Thus, an intersex person who completes gender transition and lists a sex in accordance with that transition may be permitted a passport consistent with that designation. The Department treats intersex individuals who identify as neither male nor female

differently from intersex individuals who have transitioned to one of those two sexes due to the lack of a medical consensus as to “what it would mean to” undergo gender transition to “a sex other than male or female.” AR 85-86. That is all that is required. *See Muvvekma Oblone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (agency does not act arbitrarily or capriciously in treating two groups differently if it “point[s] to a relevant distinction between the two cases”).

The district court, however, dismissed these concerns on the ground that the standards underlying the Department’s transgender policy, “recognize[] a third sex.” Ex. 1, at 13. But although those standards recognize the existence of individuals who do not identify as male or female (AR 658), as well as individuals with Disorders of Sexual Development, who are also known as intersex persons (AR 718), they do not identify any objective or medical consensus definition of “third sex” that could be reliably applied by the Department to verify an applicant’s identity (AR 86).

2. Similarly, the district court discounted the Department’s reliance on the sex-designation policy to ensure the integrity of passport data because sex “is just one of many fields used to crosscheck” an individual’s identity. Ex. 1, at 11. But the same can be said of *any* particular identifying feature. That a sex designation is helpful but unnecessary to identify an individual does not make the State Department’s concern about the accuracy of a passport’s description of that characteristic *irrational*.

The district court committed the same error in concluding—based on a representation by Zzyym’s counsel at oral argument—that the sex-designation policy

is arbitrary and capricious because four jurisdictions recently began to offer a third sex designation on identity cards. Ex. 1, at 11. That a handful of jurisdictions may no longer use only two sex designations does not render the Department's sex-designation policy irrational. In addition, "review of agency action generally focuses on the administrative record in existence at the time of the agency's decision," *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 791 n.3 (10th Cir. 2010) (quotation marks omitted), and, at the time of the Department's decision, no jurisdiction offered a third sex designation, as the Department's decisional memorandum explained, Ex. 3, at 83.

3. The Department also noted that the sex of a passport applicant is a "vital data point" that assists it in reliably using data from other agencies to identify passport applicants whose applicants may be denied for a variety of important reasons. Ex. 3, at 84. For example, the Department may refuse to issue a passport for individuals who are "subject to outstanding felony arrest warrants, criminal court orders prohibiting them from leaving the country, or requests for extradition," *id.*; or for minors who have "been abducted, wrongfully removed or retained in violation of a court order or decree," 22 C.F.R. § 51.60(e). *See generally* 22 C.F.R. §§ 51.60-51.62.

"Sex is one of the primary data points used by" the agencies whose databases provide the Department with information helpful to determining passport eligibility, and those databases use only male and female sex designations. Ex. 3, at 84. The sex-designation policy thus assists the Department in making accurate eligibility

determinations. *Id.* The district court nevertheless disregarded that explanation and provided no basis for deeming it irrational.

B. The district court also disregarded the Department’s explanation that the sex-designation policy enables it to assist other federal and state agencies in carrying out their functions. Ex. 3, at 84-85. Nothing in the district court’s opinion calls into question the Department’s determination that adding a third sex designation to passports would “introduce verification difficulties in name checks and complicate automated data sharing among these other agencies,” whose databases use only male and female sex designations. *Id.* at 84. And the Department determined that use of a third sex designation in passport databases would particularly “compromise” law-enforcement agencies’ ability to “match and thus identify, track, locate, contact, or arrest suspected or convicted criminals.” *Id.* at 85.

C. The district court also wrongly dismissed the Department’s concerns about the time and money necessary to integrate a third sex designation into its databases. Ex. 1, at 15. While acknowledging that “common sense” confirms “that altering a system will necessarily involve some effort and money,” the court faulted the Department for not providing a precise estimate of these burdens. *Id.* But the Department described the myriad agency systems that would require modification, and it explained that other agencies’ systems, such as Customs and Border Protection’s, would need to be altered as well to ensure proper data sharing. Ex. 3, at 84. The Department further determined that “considerable” effort and expense

would be required to coordinate those modifications to assure continuing operations.

Id. That expert determination, based on the Department’s understanding of the affected information systems, merits deference. *Cf. Hillsdale*, 702 F.3d at 1176 (agency’s “conclusion that [the] impact was unlikely to be significant, and its decision not to quantify this impact, was not arbitrary and capricious”).

D. Finally, the district court erred in holding that the Department exceeded its statutory authority because “neither the Passport Act nor any other law authorizes the denial of a passport application without good reason.” Ex. 1, at 18. That conflates two separate inquiries: whether the Department has the authority to require passport applicants to provide certain information, and whether it exercised that authority in a rational manner. In any event, the court’s statutory-authority holding is entirely parasitic on its arbitrary-and-capricious ruling and therefore fails for the same reasons.

II. The Remaining Factors Favor A Stay

A. The Department and the United States generally will suffer irreparable injury absent a stay, and when the government is a party, considerations of the public interest and harm to the government “merge.” *Nken*, 566 U.S. at 435.

At this time, it is impossible for the Department to produce a passport with an “X” sex designation that is fully integrated into its systems, and altering those systems to accommodate such a passport would take considerable time and resources. Ex. 4,

¶ 2. In processing passport applications and producing passports, the Department relies on approximately 20 distinct information systems, which contain a significant

amount of custom-built software and use approximately 500 distinct databases. *Id.*

¶¶ 6, 12. The systems were built over time for specific purposes, and the Department has had to modify them so that they can be used as part of a centralized system. *Id.*

¶ 13. Modifications in one system can produce unintended effects in others, and therefore even minor changes require a lengthy amount of time. *Id.* ¶¶ 13-14.

As the Department informed the district court, modifying the various passport systems to fully integrate a third sex designation would be expensive and time consuming. *See* Ex. 1, at 15. The Department estimates that it would take approximately 24 months and \$11 million to make the required changes. Ex. 4, ¶ 11, 15. And that estimate does not take into account the cost and effort that other agencies would have to expend to modify their systems. *Id.* ¶ 15. It would make no sense to require the government to incur those costs now, before this Court has an opportunity to pass on the correctness of the district court's decision.

The district court erroneously read this Court's precedent as establishing that economic loss can never constitute irreparable harm unless it is ruinous. Ex. 1, at 5, 6 (citing *Port City Props. v. Union Pac. R.R. Co.*, 518 F.3d 1186, 1190 (10th Cir. 2008)). But *Port City Properties'* discussion of the non-irreparability of economic loss given the availability of money damages was in the context of suits between *private* parties. 518 F.3d at 1190. An unrecoverable economic loss to the government, by contrast, harms the public at large in an irreparable manner.

The district court further suggested that the government could avoid the cost and effort of system-wide modification by issuing Zzyym a “one-off” passport with a third sex designation. Ex. 2, at 7. But Assistant Secretary Risch explained that issuing such a passport would impair important foreign policy interests—the Executive’s interests in controlling the content of its diplomatic communications with foreign states and ensuring the reliability of its passports. Ex. 5, ¶¶ 3, 10. The court nowhere addressed the injury to those sovereign interests. *See* Ex. 2, at 6. Assistant Secretary Risch also explained that issuing passports that do not conform to publicized standards would create a national security risk by undermining the United States’ ability to insist that other countries do so as well, which would harm the United States’ ability to guard “against fraud, illegal entry, and terrorism.” *Id.* ¶ 11. The district court described these concerns as “reasonable and almost self-evident,” but nevertheless speculated that those concerns could be mitigated if the Department publicized its issuance of a non-standard passport to Zzyym. Ex. 2, at 7. But that proposal misses the point: The national security harm follows not from a lack of publicity, but from issuing passports that fail to conform with the Department’s publicized standards. Ex. 5, ¶ 11.

The district court recognized that it could not properly “substitute [its] views for the conclusion of a senior Department official” concerning national security. Ex. 1, at 7. It therefore observed that if the Department determined that issuing Zzyym a nonconforming passport would harm national security even with the court’s proposed

solution, then the Department could instead comply with the injunction by modifying its entire passport system. *Id.* The court thus offered the Department a dilemma: issue Zzyym a nonconforming passport and create the national security risks Assistant Secretary Risch identified or expend substantial unrecoverable time and money to modify the Department's passport systems. Either choice entails irreparable injury to the government and the public.

B. By contrast, Zzyym would suffer no substantial injury from a stay pending appeal. The Department is prepared to issue Zzyym a passport with a female sex designation, consistent with the sex designation on the Colorado driver's license submitted as part of Zzyym's application. AR 23, 80. The core purpose and benefit of a passport is international travel, not an expression of one's sex, and the Department's willingness to issue a standard passport to Zzyym provides that benefit. Such a passport would allow Zzyym to travel internationally, and it would be no more irrational or injurious than Zzyym's apparent acceptance, at the time of Zzyym's passport application, of a Colorado driver's license with a female sex designation to enable Zzyym to operate a motor vehicle. And of course, it would not impair Zzyym's ability to obtain a passport with a third sex designation should Zzyym ultimately prevail.

CONCLUSION

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

Respectfully submitted,

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February 28, 2019

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No. 15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

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

Defendants.

ORDER

This matter is before the Court on the U.S. Department of State’s motion seeking judgment on the administrative record on plaintiff Dana Zzyym’s Administrative Procedure Act (“APA”) claims and dismissal of the claims contained within the remainder of Dana’s Complaint. ECF No. 35. The case was administratively closed in November 2016 after I found that the administrative record did not show that the Department’s decision-making process resulting in the gender policy was rational. ECF Nos. 55–56. I remanded the case to the Department for reconsideration of its policy. ECF No. 55. After reconsideration, the Department reaffirmed the gender policy in May 2017, and in June 2017 I reopened the case. The parties filed supplemental briefing with regard to the Department’s motion seeking judgment on the administrative record and to dismiss. ECF Nos. 58, 65, 68.

After considering the briefings, oral argument, and relevant law, the Court determines that (1) the Department’s 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 (Counts I and II). Because the APA grants Dana relief, the Court need not resolve the motion to dismiss on the constitutional claims or Dana's claim under the mandamus act (Counts III, IV, V).

I. BACKGROUND

Dana Alix Zzyym is an intersex individual.¹ ECF No. 1 at ¶1 (Complaint). In September 2014 Dana submitted an application for a United States passport. *Id.* at ¶34. Instead of checking the box labeled "M" for male or "F" for female on the application form, Dana instead wrote "intersex" below the "sex" category. ECF No. 34 at 2 (Administrative Record). By separate letter Dana informed the passport authorities that Dana was neither male nor female. *Id.* at 4. The letter requested "X" as an acceptable marker in the sex field to conform to International Civil Aviation Organization ("ICAO") standards for machine-readable travel documents. ECF No. 1 at ¶35.

It is undisputed that in every other respect Dana is qualified to receive a passport. However, the application was denied (and has since been denied a second time). ECF No. 34 at 18; Administrative R. [Dkt. 64-01 through 64-44] [hereinafter "R."], 79–80. Dana sued, contending that the State Department's denials of Dana's application and its underlying binary-only gender policy violate the APA, 5 U.S.C. § 706, as well as Dana's due process and equal protection rights under the Fifth Amendment of the U.S. Constitution. *See generally* ECF Nos. 1, 61 (Supplemental Complaint).

¹ Plaintiff explains: "Intersex' is an umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated 'male' or 'female.' In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some variations may not be visibly apparent at all." Complaint, ECF No. 1, at ¶11.

Procedural History

The Department issued its initial denial of Dana's passport application on September 24, 2014, explaining that "[t]he Department of State currently requires the sex field on United States passports to be listed as 'M' or 'F[,]'" and that the Department would be "unable to fulfill your request to list your sex as 'X.'" ECF No. 34 at 18. The Department nevertheless stated that it would issue Dana a passport listing gender as "female," which was the sex listed on the driver's license plaintiff submitted to prove Dana's identity during the application process. *Id.*

Alternatively, the Department explained that it could issue Dana a "male" passport if Dana provided "a signed original statement on office letterhead from [Dana's] attending medical physician" in which the doctor attested to Dana's "new gender." *Id.* at 19 (referencing 7 FAM 1300 App. M "Gender Change").

Dana chose neither. Instead, Dana submitted a letter to the Department on December 18, 2014 appealing the Department's decision. *Id.* at 29–30. Dana included with that appeal two sworn documents by physicians from the United States Department of Veterans Affairs Medical Center in Cheyenne, Wyoming (Dana served in the Navy) that verified Dana's sex as "intersex."² *Id.* at 31–32. Dana also met with people at the Colorado Passport Agency (part of the State Department) and informed them that Dana "did not wish a passport to be issued . . . unless it could be issued showing the sex as 'X.'" *Id.*

The Department nevertheless denied Dana's appeal on December 29, 2014, informing Dana that the Department could not accommodate the request for the same reasons it stated in its initial denial letter. *Id.*; ECF No. 1 at ¶38. The Department explained that Dana could still obtain a passport by reapplying and providing all required information on the passport

² Dana also included a birth certificate that had been amended in 2012 to list Dana's sex as "unknown." ECF No. 34 at 5; ECF No. 1 at ¶10.

application form—that is, checking either the box “M” for male or “F” for female. ECF No. 34 at 36. On February 26, 2015 Dana requested that the Department once again reconsider its decision or conduct a review hearing under 22 C.F.R. § 51.70(a). ECF No. 1 at ¶39. The Department denied both requests on April 10, 2015. *Id.* at ¶40.

Dana subsequently brought suit against the Secretary of State, who is currently Michael Pompeo,³ and Sherman Portell, the Director of the Colorado Passport Agency, in their official capacities on October 25, 2015. *Id.* The Complaint asserted (1) that the Department’s conduct was in violation of the APA because it was “arbitrary and capricious;” (2) that the conduct also violated the APA because it exceeded the Department’s Congressionally delegated authority; (3) that such action deprived plaintiff of due process in violation of the Fifth Amendment; (4) that it similarly deprived plaintiff of equal protection in violation of the Fifth Amendment; and (5) that the Court should issue a writ of mandamus to compel the Department to issue a passport accurately reflecting plaintiff as intersex. *Id.* at ¶¶48–95.

Several months later on March 18, 2016 defendants filed a motion seeking judgment on the administrative record on plaintiff’s APA claims and dismissal of the claims contained within the remainder of plaintiff’s Complaint. ECF No. 35. The Court held oral argument on that motion on July 20, 2016. ECF No. 51 (Transcript). On November 26, 2016, I ruled that the agency’s decision-making process was not rational based upon the evidence in the record and remanded the case to the Department for reevaluation of its gender policy. *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1114 (D. Colo. 2016).

In March 2017, while the Department was reevaluating the policy, Dana requested that the Department issue a full-validity or temporary passport bearing an “X” or other third-gender

³ Since the date this case was filed, the Secretary of State has changed three times and therefore so has the named defendant in this case.

marking in the sex field in order for Dana to attend an international conference. R. 67–69. The Department refused to issue the temporary passport but noted that it would soon complete its review of the policy. R. 75–76. On May 1, 2017 the Department denied Dana’s passport application for a second time and issued a memorandum in which it explained its decision to maintain the gender policy. R. 79–80, 82–90.

This case was reopened at Dana’s unopposed request, and as such the Department’s motion seeking judgment on the administrative record on plaintiff’s APA claims and dismissal of the claims contained within the remainder of Dana’s Complaint is ripe once more. ECF No. 35. On July 6, 2017 Dana filed a supplemental complaint to reflect the May 2017 denial of Dana’s passport application. ECF No. 61. As reflected in the supplemental complaint, Dana seeks “injunctive relief and a judicial declaration that the State Department has exceeded its authority under the Administrative Procedure Act (“APA”), 5 U.S.C. §706(2) and has violated the Fifth Amendment to the U.S. Constitution through agency actions which occurred after October 25, 2015.” ECF No. 61 at 2.

In October 2017 Dana filed a brief regarding the Department’s May 2017 decision to maintain the policy. ECF No. 65. The Department submitted the complete Administrative Record, ECF No. 64, and filed a response to Dana’s brief. ECF No. 68. On June 29, 2018 the Court heard oral argument regarding these briefs and the Department’s decision to maintain the policy. ECF No. 85. The case has now been fully briefed and is ripe for review.

II. STANDARD OF REVIEW

A. Motion for Judgment on the Administrative Record.

Under the APA, a court must “hold unlawful and set aside agency action, findings, and conclusions” that it finds to be, among other things: (1) “arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law;” or (2) “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]” 5 U.S.C. § 706(2)(A), (C). I discuss each standard below.

1. “Arbitrary or Capricious” Standard.

Typically, “[a]n 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. F.C.C.*, 567 F.3d 1215, 1221 (10th Cir. 2009). Once agency action is challenged as arbitrary or capricious, a district court reviews that action under the APA as if it were an appellate court.⁴ *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). As part of the appeal, the court “ascertain[s] whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made.” *Id.* at 1574 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)). That is, the court “must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment.” *Id.*

A court will set aside agency action “if the agency relied on factors which Congress has not intended for 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.” *Id.* (citing *State Farm*, 463 U.S. at 43) (internal quotation marks omitted).

Furthermore, “[b]ecause the arbitrary and capricious standard focuses on the rationality of an agency’s decisionmaking process rather than on the rationality of the actual decision, it is well-

⁴ As defendant explains, although in the District of Colorado a plaintiff or petitioner typically files the opening brief when “appealing” a government agency’s decision under the APA, the parties have agreed “with the Court’s approval, that defendants would file the first dispositive motion in this case,” and that their motion would address the APA claims. ECF No. 35 at 6 n.1.

established that an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Id.* at 1575 (citing *State Farm*, 463 U.S. at 50) (internal quotation marks and brackets omitted).

2. “Excess of Authority” Standard.

Plaintiff also challenges the Department’s conduct under the APA as being in excess of its Congressionally delegated authority. “Determination of whether the agency acted within the scope of its authority requires a delineation of the scope of the agency’s authority and discretion, and consideration of whether on the facts, the agency’s action can reasonably be said to be within that range.” *Olenhouse*, 42 F.3d at 1574 (citing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971)).

III. ANALYSIS

Plaintiff seeks a passport marked “X” to comport with plaintiff’s intersex identity. Citing its binary-only gender policy, the Department has refused.⁵ Plaintiff contends that the government’s unwillingness to adapt to the needs of intersex individuals is arbitrary, capricious, and not the result of rational decision making. Further, plaintiff contends that in contrast to policies it has implemented for others such as transgender individuals, the refusal to issue passports that reflect the gender of intersex people is of constitutional significance. Because the APA disposes of the claims, I will not address the constitutional issues (Counts III and IV).

A. APA Claims (Counts I and II).

⁵ I noted in my last order, and will note again here that the term “policy” is a bit of a misnomer. The policy which the Department claims requires it to issue passports only marked “M” for male or “F” for female is really a collection of rules pertaining to gender contained within the Foreign Affairs Manual. *See* ECF No. 34 at 20-27 (citing 7 FAM 1310 Appendix M, 7 FAM 1320 Appendix M, 7 FAM 1330 Appendix M, 7 FAM 1340 Appendix M, 7 FAM 1350 Appendix M, 7 FAM 1360 Appendix M, 7 FAM 1370 Appendix M, 7 FAM 1380 Appendix M, 7 FAM 1390 Appendix M). These rules do not explicitly state that the Department cannot issue a passport containing an alternative gender marking, and also do not contemplate the existence of a gender other than male or female. Rather, they simply explain how the Department deals with different issues related to gender on passport applications.

1. The Policy is Arbitrary and Capricious, 5 U.S.C. § 706(2)(A).

The APA empowers the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if it is not the product of reasoned decision making. This means, among other things, that an agency must provide an adequate evidentiary basis for its action and consider all important aspects of the problem before it.

As background: prior to 1976, passports issued by the Department did not include gender. ECF No. 51 at 18. However, the Department changed course and added a male and female checkbox. The applicant is required to choose one or the other. *Id.* In my order dated November 22, 2016 I found that the administrative record did not show that the Department’s decision-making process that resulted in the gender policy was rational. ECF No. 55. The reasons provided by the Department for the policy failed to show a reasoned decision-making process and instead seemed to be ad hoc rationalizations for the binary nature of the gender field. I remanded the case to the Department for reconsideration which, in effect, gave the Department an additional chance to bolster the record and show that the policy making underlying the gender policy was not arbitrary and capricious. The Department did indeed reconsider the policy, and it submitted an eight-page memorandum explaining its rationale and pointing to the evidence it relied upon in making its decision to deny Dana’s application once more. R. 82–90.

Now, for me to find that the Department’s policy making was not arbitrary and capricious, the May 2017 memorandum must display something more than what was before me in November 2016 that explains how and why the policy was created. In the Department’s memorandum, the Department first notes that it is aware that some countries and the

International Civil Aviation Organization (the UN agency that sets forth passport specifications) provide for the issuance of travel documents bearing an “X” in addition to “M” or “F”. R. 82.

The Department then provides five reasons for the gender policy:

1. **Sex Data Point Ensures Accuracy and Verifiability of Passport Holder’s Identity:** The policy is necessary to ensure that the information contained in US passports is accurate and verifiable, thus ensuring the integrity of the US passport as proof of identity and citizenship. Because the Department relies on third-party documentation issued by state, municipal, and/or foreign authorities who largely do not allow gender identifiers other than male or female to determine an applicant’s identity, the Department would have a more difficult job verifying the identity of a passport holder if a gender aside from male or female was used.
2. **Sex Data Point is Used to Determine Applicant’s Eligibility to Receive Passport:** The policy is necessary because the sex of a passport applicant (male or female) is a vital data point in determining whether someone is entitled to a passport. In order to determine whether an applicant is eligible to receive a passport, the Department must data-match with other law enforcement systems. Because “all such agencies recognize only two sexes,” the Department’s continued use of a binary option for the sex data point is the most reliable means to determine eligibility.
3. **Consistency of Sex Data Point Ensures Easy Verification of Passport Holder’s Identity in Domestic Contexts:** The policy is necessary to ensure that a passport can be used as a reliable proof of identity within the United States. The introduction of a “new, third sex option in US passport applications and Passport data systems could introduce verification difficulties in name checks and complicate automated data sharing among these other agencies.” The Department believes that this would “cause operational complications.”
4. **There is No Generally Accepted Medical Consensus on How to Define a Third Sex:** The policy is necessary because there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity verification. “Although the Department acknowledges that there are individuals whose gender identity is neither male nor female, the Department lacks a sound basis on which to make a reliable determination that such an individual has changed their sex to match that gender identity.”
5. **Altering Department System Would Be Expensive and Time-Consuming:** The policy is necessary because changing it would be inconvenient.

Looking at the proffered reasons and cited evidence provided by the Department, I find that the Department’s decision is arbitrary and capricious. I will address each of the Department’s

proffered reasons and explain why in my judgment they do not show that the gender policy is the product of a rational decision-making process.

i. Reasons One through Three Fail to Show Rational Decision Making

Reasons one through three essentially boil down to the same argument—*the Department needs to maintain the binary gender classification system for passports because this will ensure accuracy and reliability in cross-checking gender data with other identity systems.* R. 82–86.

The Department notes that the binary system is important at two points: (1) when determining if an applicant is eligible to receive a passport, and (2) when a passport holder seeks to use their passport as proof of identity. *Id.* After reviewing the memorandum and administrative record, I find that the Department failed to add any substantive arguments or evidence that wasn't previously before the Court when I rejected this argument in my November 2016 Order.

In that order, I noted that the Department's argument that the binary gender policy helped to ensure the accurate identification of passport applicants/holders failed when one looked deeper at the evidence in the administrative record. For example, I noted that the Department undermined its purported rationale when it informed Dana that Dana could receive a male passport if Dana provided a physician's letter attesting to that gender, even though Dana's Colorado driver's license listed Dana's gender as female. ECF No 55 at 10. The Department has established policies in place that passport specialists and consular officers must follow "when an applicant indicates a gender on the 'sex' line on the passport application with information different from some or all of the submitted citizenship and/or identity evidence[.]" R. 178; 7 FAM § 1310 App. M. By allowing this means of gender designation on the passport, the Department made it apparent that it did not actually rely on other jurisdictions' gender data to verify passport applicants' identities to the extent it argued.

Further, I noted that the administrative record included evidence that “not every law enforcement record from which data is input to this system designates an individual’s sex,” and “a field left blank in the system is assumed to reflect that the particular datum is unknown or unrecorded.” ECF No. 55 at 10 (citing declaration of Bennet Fellows, Division Chief at the Department). Therefore—in addition to the Department’s admission that gender is just one of many fields used to crosscheck a passport applicant/holder’s identity with other systems (other fields include one’s social security number, date of birth, name, etc.)—the Department also admitted that in some systems the gender field isn’t even used or reliable. As such, I held the Department’s insistence that a binary gender data option is necessary to ensure accuracy and reliability simply was not the case under the evidence provided and therefore was insufficient to show that the policy was the product of rational decision making.

Since that decision, the only “new” evidence in the record on this point cuts against the Department. Joining multiple countries and the International Civil Aviation Organization’s recognition of a non-binary gender classification system, at least four U.S. states and territories now issue identification cards with a third gender option.⁶ The Department was on notice of this when it reconsidered its policy.⁷ As such, the Department’s insistence that a binary gender system is necessary to accurately and reliably crosscheck a passport applicant/holder’s identity ignores the reality that some American passport applicants will have gender verification documents that exclusively list a gender that is neither female nor male.

⁶ These U.S. states are Washington, Oregon, California, and the District of Columbia. Further, at oral argument in June 2018, Dana represented that New York issued a birth certificate stating “intersex” in the sex field. *See* ECF No. 85 at 7.

⁷ *See* R. 189 (Department’s acknowledgment that other jurisdictions considering non-binary gender policy).

As support to its May 2017 letter, the Department offers a “History of the Designation of Sex in U.S. Passports,” to explain the basis for its 1976 decision to add a requirement that applicant’s designate either “male” or “female” in passport applications. R. 87–90. This brief history explained that the decision to add a sex marker to passport applications was made under the direction of the International Civil Aviation Organization (ICAO), which commissioned a panel of passport experts to address border security concerns resulting from the increase in international air travel. Apparently, the data field of “SEX (M-F)” was recommended because experts thought “[that with] the rise in the early 1970s of unisex attire and hairstyles, photographs had become a less reliable means for ascertaining a traveler’s sex.” R. 88. In a 1974 report “an ICAO panel confirmed that a holder’s sex should be included on passports because names did not always provide a ready indication, and appearances from the passport photograph could be misleading.” *Id.* Though this still doesn’t answer the question of why a traveler’s sex needed to be ascertained, the Department notes that at the time there was no consideration of a third sex marker as the passport book was based on the technical specifications of the ICAO, and the ICAO specified only male and female. *Id.*

But as noted already, the ICAO standards for machine-readable travel documents now specify that sex should be designated by “the capital F for female, M for male, or X for unspecified.” ECF 1 ¶ 35; ICAO Document 9303, *Machine Readable Travel Documents*, at IV-14 (7th ed. 2015) at 14. The Department does not explain its departure from adherence to this standard.

Overall, in these three rationales, the Department argues that the purpose of the sex designation on the passport is to ensure the accuracy and integrity of the document. The Department has maintained that the male and female markers “help identify the bearer of the

document, and ensure that the passport remains reliable proof of identification.” ECF 35 at 24. Dana submitted multiple medical certifications from licensed physicians attesting that she is neither male nor female, but intersex. Dana’s Complaint describes invasive and unnecessary medical procedures that doctors subjected Dana to as a child that attempted but failed to change Dana’s intersex nature. ECF 1 ¶ 15. I find that requiring an intersex person to misrepresent their sex on this identity document is a perplexing way to serve the Department’s goal of accuracy and integrity. In sum, taking the Department’s proffered rationales that I previously determined were inadequate with the new evidence in the administrative record regarding the growing body of jurisdictions that allow for a non-binary gender marker, I find that the Department failed to show that its decision-making process regarding the policy was rationale.

ii. Reason Four Fails to Show Rational Decision Making

The Department’s fourth asserted reason for maintaining the binary gender policy also fails. The Department argues that the policy is necessary because there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity. R. 85. However, by its own regulations, the Department relies upon a medical authority which plainly recognizes a third sex. *See* 7 FAM §1310(b). The Department defers to the medical “standards and recommendations for the World Professional Association for Transgender Health (WPATH), recognized as the authority in this field by the American Medical Association (AMA),” 7 FAM §1310(b) App. M. WPATH recognizes a third sex. R. 646–763. In addition, the administrative record includes the opinions of three former U.S. Surgeons General and the American Medical Association Board of Trustees that describe non-binary sex categories. ECF No. 65 at 13–14. The Department recognizes that it is medically established that an intersex person is born with mixed or ambiguous markers of sex that do not fit into the

typical notions of either male or female bodies. 7 FAM §1360 App. M; R. 185, 605, 765. The Department’s uncertainty about how it would evaluate persons “transitioning” to a third sex misses the ball – intersex people are born as they are.

In the May 2017 letter, the Department highlights that it is unable to recognize a third gender “partly due to the lack of consensus of what it means, biologically, for an individual to have a sex other than male or female.” R 86. However, the information relied upon in the administrative record also reflect a lack of consensus as to how individuals born intersex could be classified as either “male” or “female,” R. 947–65.⁸ This has not prevented the Department from requiring intersex people to elect, perhaps at random, as it doesn’t seem to matter to the Department which one of those two categories Dana chooses. Even if the Court ignored the Department’s deference to the WPATH, the justification that there is a lack of medical consensus, whereby “there are a number of genetic, hormonal and physiological conditions in which an individual is not easily classified as male or female,” R. 86, still fails to account for why the binary sex designation is preferable.

Taking this evidence together, the Department’s argument that the gender policy is necessary because there is no medically accepted consensus regarding a third sex is not rational and fails.

⁸ Moreover, Plaintiff offers evidence of the potential harmful effects of forcing an arbitrary binary classification upon people born intersex. ECF. 65 at 14. Re-Thinking Genital Surgeries on Intersex Infants, Elders, Satcher and Carmona (October 26, 2016), at <http://www.palmcenter.org/wp-content/uploads/2017/06/Re-Thinking-Genital-Surgeries-1.pdf> (“[A] consensus is emerging that concludes that children born with atypical genitalia should not have genitoplasty absent a need to ensure physical functioning.”). Dana’s Complaint reflects that attempts to sort intersex individuals into the categories of “male” or “female” upon birth have resulted in unnecessary and painful medical surgeries and harm to intersex individuals.

iii. Reason Five is not Sufficient

Finally, the Department arrives at what this Court suspects is the real reason that the Department has been so resistant to adding a third gender option to passports: money and time. The Department argues that switching the existing data systems—which are currently incapable of printing a passport that reflects a gender option other than “M” or “F”—would be considerably costly and timely. R. 86. However, the Department admits that it has not undertaken a level of effort (LOE) estimation on the time and cost that it would take to add the third sex designation option to the U.S. passport biodata page. *Id.* This does not ring of a rational decision. Without record evidence of or even an attempt at determining the time, cost, or coordination necessary, the Court cannot defer to the Department’s claims of administrative convenience. *See, e.g., Plyer v. Doe*, 457 U.S. 202, 227–28 (1982) (“There is no evidence in the record suggesting . . . any significant burden on the State’s economy.”). True, common sense would tell anyone that altering a system will necessary involve some effort and money. However, the Department’s rational here is the product of guesswork rather than actual analysis, and it does not rise to the level of reliable evidence that is needed to show that the Department’s policymaking was rational.

In sum, the Department added very little to the evidence and explanations that were before this Court in November 2016 when I determined that the Department’s policymaking was not the product of rational decision making. Even with the new memorandum and proffered reasons, I again find that the gender policy is arbitrary and capricious and not the product of rational decision making.

2. The Denial of Dana’s Passport Application Exceeds the Authority Delegated to the Department by Congress, 5 U.S.C. § 706(2)(C).

Dana challenges the policy under a second provision of the APA, section 706(2)(C), which empowers the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C). Dana argues that the Department is acting beyond its authority in denying the option for a non-binary gender option on the passport application. ECF No. 1 at 14–15.

The Department has the power to issue passports under the Passport Act of 1926 “under such rules as the President shall designate and prescribe for and on behalf of the United States.” 22 U.S.C. § 211a; *see* Exec. Order 11295. While this grant of authority does not expressly authorize the denial of passport applications nor specify particular reasons that passports may be denied, the Supreme Court has construed this power broadly. Defendant and plaintiff refer to the Supreme Court cases of *Kent v. Dulles* and *Haig v. Agee* to resolve the question of whether the Department is acting outside of its authority in withholding a passport from Dana.

Haig held that the Secretary has the power to deny passports for reasons not specified in the Passport Act. *Haig v. Agee*, 453 U.S. 280, 290 (1981). *Haig* concerned the Department’s revocation of a former employee of the CIA’s passport engaging in activities. There, the Supreme Court examined historical practices to conclude that the Executive did have “authority to withhold passports on the basis of substantial reasons of national security and foreign policy,” and that legislative history confirmed congressional recognition and of this power. *Id.* at 293. In *Kent v. Dulles*, the Supreme Court examined whether the Secretary of State had the authority to deny a passport based on suspicions that the passport applicant was a communist. Though the

Court concluded that the Secretary of State did not have authority to promulgate regulations denying passports to persons suspected of being communist, it also emphasized that the Department had a long history of exercising the power to deny passport applications based on grounds related to “citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other.” *Id.* at 127–28. Here, we don’t have a case where the passport applicant is being denied on grounds related to national security, foreign policy, citizenship, allegiance, or criminal or unlawful conduct. Indeed, 22 C.F.R § 51.60 identifies a number of discretionary and mandatory reasons that a passport can be denied, and these provisions relate to such grounds. None of the provisions setting forth reasons for mandatory and discretionary restrictions of passports in 22 C.F.R. § 51.60 apply to Dana. ECF No. 61 at 23. “It is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes,” *Haig* at 281; however a reason must be given, and *Kent* and *Haig* both hold that it must also be a good one.

The authority to issue passports and prescribe rules for the issuance of passports under 22 U.S.C. § 211a does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause as described in *Kent* and *Haig*. The Department contends that it was acting within its authority in requiring every applicant to fully complete the passport, *see* 2 C.F.R. §51.20(a). ECF No. 41 at 5. I agree, but Dana does not take issue with the regulation that requires fully completing a passport application. Dana’s issue is that there is not an option on the passport application that does not require Dana to untruthfully claim to be either male or female. ECF No. 61 ¶ 26. I have already held that the Department has acted arbitrarily and capriciously in maintaining a gender policy that requires Dana to inaccurately select M or F, when the administrative record does not provide a rational basis for this requirement. Because neither the Passport Act nor any other law authorizes the denial of a passport application without

good reason, and adherence to a series of internal policies that do not contemplate the existence of intersex people is not good reason, the Department has acted in excess of its statutory jurisdiction.

3. Injunctive Relief

In addition to declaratory judgment that defendant is in violation of the Administrative Procedure Act, plaintiff's requested relief includes an injunction "permanently restrain[ing] or enjoining Defendants from relying upon its male-or-female, binary-only gender marker policy to withhold the requested passport from Dana or any other individual." ECF No. 1 at 21. Because Dana is the only plaintiff in this case, I will only evaluate this request for relief with regards to Dana.

Section 706(1) of the Administrative Procedure Act directs a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." Section 706(2)(A) directs the court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law," and section 706(2)(C) directs the court to do the same with those "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." This Court has already given the Department an opportunity to shore up the record and show that its decision to deny Dana Zzyym a passport was the result of rational decision making. For the reasons explained above, the Department failed to do so. Dana has been pursuing a passport for close to four years now. I grant Dana's request for injunctive relief and enjoin the Department from relying upon its binary-only gender marker policy to withhold the requested passport from Dana.

B. Plaintiff's Claims for Mandamus Relief (Count V)

The grant of a writ of mandamus under 28 U.S.C.A. § 1361 requires a showing that no other adequate remedy is available. *See Rios v. Ziglar*, 398 F. 3d 1201, 1206 (10th Cir. 2005); *Mt. Emmons Mining co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997). Here, relief is available under the APA, and the available remedy under both statutes is essentially identical. *See, e.g., Mt. Emmons Min. Co.* 117 F. 3d at 1170; *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (citing *Carpet, Linoleum & Resilient Tile Layers, Local Union No. 419, Bhd. of Painters & Allied Trades, AFL-CIO v. Brown*, 656 F.2d 564, 567 (10th Cir. 1981)) (“ . . . 28 U.S.C. § 1331 gives the district court jurisdiction to issue a mandatory injunction. The injunctive remedy is provided for by the Administrative Procedure Act, 5 U.S.C. § 706(1), where a court reviewing agency action is authorized to ‘compel agency action unlawfully withheld.’ Thus, . . . we concluded that a mandatory injunction is essentially in the nature of mandamus, and jurisdiction can be based on either 28 U.S.C. § 1361, §1331, or both.”).

Ordering the defendant to issue the passport is, in substance, the same as enjoining the defendant from relying on its binary gender policy to withhold a passport, since that is the only basis on which the defendant has acted. Technically, however, because injunctive relief is available under the Administrative Procedure Act, and this relief is essentially identical to a writ of mandamus, the Court need not issue a writ of mandamus. Also, because the Administrative Procedure Act grants plaintiff relief, I will not proceed to the constitutional claims in Counts III and IV.

CONCLUSION AND ORDER

I find that the administrative record does not show that the decision making process that resulted in the policy in question was rational. The withholding of the passport from Dana Zzyym is in excess of statutory authority. Recognizing the unreasonable delays Dana has faced in the issuance of a passport with an intersex marker, the Court enjoins the Department from relying upon its binary-only gender marker policy to withhold the requested passport from Dana.

DATED this 19th day of September, 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", written in a cursive style. The signature is positioned above a horizontal line.

R. Brooke Jackson
United States District Judge

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

MICHAEL R. POMPEO, in his official capacity as the 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.

ORDER ON MOTION TO STAY JUDGMENT

Final Judgment was entered in this case on September 19, 2018, ECF No. 89. I held that the U.S. Department of State (“Department”) violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) and (C) and enjoined the Department from relying upon its binary-only gender marker policy to withhold the requested passport from Plaintiff Dana Zzymm (“Dana”). Defendants filed a Notice of Appeal on November 19, 2018, ECF No. 93, and now move to stay this judgment pending appeal, ECF No. 98. Plaintiff filed their response in opposition to this motion, ECF No. 101, and this motion became ripe with the filing of defendants’ reply, ECF No. 105. For the reasons set forth below, this motion is denied.

I. STANDARD OF REVIEW

District Courts have the authority to stay an injunction while an appeal is pending from the final judgment that granted the injunction. Fed. R. Civ. P. 62(c). However, “[a] stay is an intrusion into the ordinary process of administration of judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. 418, 427 (2009) (internal quotation marks and citations omitted). It is within this Court’s discretion to stay an injunction and the Department “bears the burden of showing that the circumstances justify an exercise of that discretion.” *Id.* at 434.

The Supreme Court has identified four factors that guide the issuance of a stay pending appeal: “(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.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The Tenth Circuit has held that “where the moving party has established that the three ‘harm’ factors tip decidedly in its favor, the ‘probability of success’ requirement is somewhat relaxed.” *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 852 (10th Cir. 2003). In these circumstances, the moving party need only to show that it “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.” *Id.* at 853. However, as I will explain, I do not conclude that the defendants demonstrate that the harm factors weigh so decidedly in their favor to justify a relaxed review of the probability of success factor. Therefore, the standard for factor

two is whether defendants show “a substantial likelihood of success on the merits of its appeal.”

Id.

II. ANALYSIS

A) The Harm Factors.

The Department argues that compliance with the Court’s injunction during pendency of the appeal would irreparably harm defendants and the public. Where, as here, the government’s “asserted injury is exclusively one involving the public interest,” the second and fourth prongs of the stay analysis overlap. *Mainstream Mktg. Servs., Inc.*, 345 F.3d at 852. As support, the defendants provide the declarations of Carl C. Risch, Assistant Secretary of State for Consular Affairs, ECF No. 98-1, and Kenneth J. Reynolds, Director of the Office of Consular Systems and Technology, ECF No. 98-2. In his declaration, Mr. Reynolds discusses the process of producing a valid U.S. electronic passport. An electronic passport or “ePassport” is the standard U.S. passport issued by the Department and contains an electronic chip containing secure digitized image and biographic data about the bearer. ECF No. 98-2 at ¶3. Mr. Reynolds describes the numerous information technology systems involved in producing ePassports that would need to be modified to ensure that an additional sex marker would be recognized and supported. He estimates that the changes to existing software systems to create a fully integrated ePassport would take approximately 24 months and cost \$11 million. *Id.* at ¶1.

Mr. Reynolds also states that the Bureau of Consular Affairs (“CA”) has considered the possibility of printing a single ePassport for Dana with an “X” sex marker as a “one-off,” outside of the normal processes. *Id.* at ¶7. Instead of updating all software systems to create a fully integrated ePassport, he can incorporate modifications to certain systems to change the sex

marker in the issuing system's database to an "X." Producing a one-off passport would take approximately four weeks. *Id.* at ¶7. Mr. Reynolds describes some drawbacks to the one-off passport: mismatches with Department of Homeland Security (DHS) systems could lead DHS officials at ports of entry to require additional screening for Dana, *id.* at ¶9, and a one-off passport would take longer to replace if lost or stolen, *id.* at ¶10. Mr. Reynolds describes another option as well: producing a type of passport known as an Emergency Photo-Digitized Passport (EPDP). *Id.* at 17. Unlike an ePassport, an EDPD does not have an electronic chip. It can only be printed at overseas posts, and would need to be renewed more frequently than an ePassport, typically every year. *Id.* at ¶16. This type of passport would also take approximately four weeks to produce. *Id.* at ¶18. Issuing a one-off EDPD passport has the same drawbacks as the ePassport: delays in re-issuance if lost or stolen and not matching data in the record systems potentially causing Dana additional screening. *Id.* at ¶¶18-20.

Mr. Risch, in his declaration, describes harms that he perceives the issuance of a one-off passport for Dana would cause. He states that the issuance of a single passport that does not conform to publicized U.S. standards would undermine the U.S. passport's status as the "gold standard" identity and travel document. ECF No. 98-1 at 7. He states that because the Department has not announced any intention to produce passports with anything other than "F" or "M" as sex markers, that the bearer of the one-off passport, Dana, would be subjected to additional vetting, inconvenience, delay, and possible denial of entry. *Id.* He further states that the issuance of a one-off passport to Dana could make foreign officials more likely to accept similarly nonconforming passports issued by other countries in the future, undermining the reliability of the system of international travel. ECF No. 98-2 at 5.

The Department argues the time and cost required to fully integrate changes to their system is irreparable injury. It argues further that pursuing an option that does not require investment in their software systems and takes four weeks, producing a “one-off” passport for Dana, would cause irreparable harm to “the U.S. passport’s status as the gold standard identity and travel document.” ECF No. 98 at 9-10.

Plaintiff argues that if the Department chooses to pursue the first option of updating their software systems, economic loss 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). Citing law from other circuits, plaintiff argues that “[t]o 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). Defendants point out that these cases refer to businesses, and not federal agencies. However, the reasoning in these cases is applicable to any entity. That is, that economic loss is not irreparable harm unless the movant can show that such an economic loss would cause it harm as an entity, for example by impairing its ability to perform its core functions.

Plaintiff asserts that an \$11 million expense would not amount to irreparable harm as that cost represents only .03 percent of DOS’s annual budget. The Department points out that plaintiff identifies no authority for comparing the cost of implementing the “X” sex marker to the entire DOS budget. Instead, the Department offers that the estimated cost of implementing the “X” marker changes would be 4.7 percent of the budget allocated to CA, Office of Consular Systems and Technology for systems development, operations and maintenance relating to the

Passport function for FY2019. ECF No. 105 at 2. It is the Department's burden to show that it would suffer an irreparable injury. The Department does not argue that an expenditure that amounts to 4.7 percent of the budget allocated to consular systems and technology for systems development, operations and maintenance for this year would impair its ability to perform these technological tasks related to the Passport function. Because the Tenth Circuit has held that economic loss by itself is not irreparable harm, I cannot conclude that updating its software systems would cause irreparable harm to the Department.

In reference to the one-off passport solution, plaintiff also argues that the Department cannot claim potential harm to Dana, such as travel delays, as irreparable harm to itself. Given that there are possible reasonable solutions to these issues, such as giving notice to passport officials, and that U.S. customs and border officials already encounter "X" passports of foreign nationals entering the United States, plaintiff suggests that the difficulty of processing this "X" passport may be overstated. ECF No. 101 at 4-6. I also note that Dana now has a Colorado driver license bearing gender marker of "X," undercutting some of the Department's "matching" concerns, and that Dana plans to use this passport to travel to a conference in New Zealand, a country that issues and accepts passports with a gender designation of "X".¹

Plaintiff also argues that the Department's arguments that a one-off passport would impair national security are speculative. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 ("National-security concerns must not become a talisman used to ward off inconvenient claims."). Much of the defendants' brief discusses how harm to the U.S. passport's reputation can harm national

¹ *See Information about Changing Sex/ Gender Identity*, Government of New Zealand Identity and Passports <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/> (Last Accessed Feb. 20, 2019).

security interests, and I find this to be a reasonable and almost self-evident argument. However, the Department's argument that the U.S. passport's reputation will be harmed in the first instance is premised on the fact that the U.S. passport is backed by a "robust set of *publicized* [Department of State] regulations and policies" and that the Department undertakes "substantial effort to notify all countries about [an] impending change and send exemplars of the document so that foreign authorities can recognize the valid document." ECF No. 98 at 9. I don't see why the Department cannot issue appropriate notice or publicize its issuance of Dana's passport in the same way to address concerns that the U.S. Passport's reputation will be harmed if a passport does not conform to information that the Department publicizes about U.S. passports. Yet, the Department asks that I do not substitute my views for the conclusion of a senior Department official, ECF No. 105 at 3, and I do not intend to do so. If the Department concludes that issuing a single passport to Dana even with appropriate notice will undermine the system of international travel as we know it, ECF No. 98 at 10, it can comply with the judgment by updating its software systems. While this may be a difficult choice for the Department, it is not an impossible choice. Complying with a judgment necessarily involves some harm to the party against whom a judgment is entered. Yet, the issuance of a stay is "an extraordinary remedy," *Nken*, 556 U.S. at 437 (J. Kennedy concurring), and the Department has not demonstrated irreparable harm to justify it.

To the third harm factor, the Department argues that a stay would not affect plaintiff, as the Department can issue Dana a passport with an "F" or "M" marker. However, the Department has made this offer throughout the course of this case's litigation, arguing at times that Dana's ability to obtain such a passport should render Dana's case meritless. I have addressed this

argument in past orders, and will not do so again here, finding that a stay will cause harm to Dana. *See* ECF Nos. 55, 88. Dana has missed travel opportunities for four years throughout the course of this litigation, and Dana would continue to miss travel opportunities if a stay is granted.

B) Likelihood of Success on the Merits of the Appeal.

Defendants must also demonstrate a substantial likelihood of success on the merits of an appeal to justify the issuance of the stay. Defendants raise some arguments regarding the Department's 2017 decision to deny Dana's passport application that they argue they did not have an opportunity to brief prior to this Court's judgment. After reviewing the briefings, I respectfully conclude that this factor also does not weigh in the defendants' favor.

ORDER

Defendants' Motion to Stay, ECF No. 98 is DENIED.

DATED this 21st day of February, 2019.

BY THE COURT:

A handwritten signature in black ink, appearing to read "R. Brooke Jackson", written in a cursive style.

R. Brooke Jackson
United States District Judge

EXHIBIT 3



United States Department of State

Washington, D.C. 20520

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MEMORANDUM

May 1, 2017

TO: CA/PPT – Regional Directors, Directors, Assistant Directors, Adjudication Managers, Fraud Program Managers, and Customer Service Managers

THROUGH: CA/PPT/I – Florence G. Fultz

FROM: CA/PPT/S – Barry J. Conway *BJC*

SUBJECT: Sex Designation Policy for U.S. Passports

In 2015, a lawsuit, *Zzyym v. Kerry*, No., 15-cv-02362-RBJ, was commenced against the Department in the United States District Court for the District of Colorado after the Department denied a U.S. passport to an applicant who stated that they were neither male nor female, but “intersex,” and requested a U.S. passport with their sex designated as “X.” Since 2015, a couple of other applicants have requested issuance of a passport reflecting a sex other than male or female.

A handful of countries allow passport applicants the option of selecting a sex other than male or female on their passport applications, and issue passports containing a third sex indicator, generally but not exclusively an “X”. The technical specifications of the International Civil Aviation Organization (ICAO) provide for the issuance of travel documents, including passports, with a third sex marker, identified as “unspecified” and represented by an “X” in the printed zone, and a filler character (“<”) in the machine-readable zone.

In light of the above and a November 22, 2016 decision of the court in *Zzyym* to remand the case, the Department has re-evaluated its policy with respect to the designation of a bearer’s sex on U.S. passports and passport applications, specifically, allowing only “M” and “F” sex designations in U.S. passports. Upon careful consideration, the Department has determined to maintain its existing policy, which is described in existing 7 FAM 1340, ACCEPTANCE AND ADJUDICATION OF PASSPORT APPLICATIONS, and 7 FAM 1300 APPENDIX M, GENDER CHANGE (“Appendix M”). For the benefit of Passport Adjudication Managers, Passport Adjudicators and other officials, the policy may be summarized as follows:

- The Department only issues passports with the sex designations “M” (male) and “F” (female).
- Every applicant for a passport must indicate their sex as either male or female by checking the appropriate box in the sex field of the application form.
- Where an applicant indicates a sex on their application matching the sex designated consistently in the applicant’s evidence of identity and

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citizenship (typically an original birth certificate and/or previous passport), the Department will issue a passport in the indicated sex, assuming the applicant otherwise establishes entitlement to a passport.

- Where an applicant indicates a sex on their passport application that does *not* match the sex designated in the applicant's evidence of identity and citizenship, or when the applicant's evidence of identity and citizenship is inconsistent, the applicant must provide a medical certification from a licensed physician that the applicant has undergone, or is undergoing, appropriate treatment for transition to the new sex, male or female, as appropriate. Sex reassignment surgery is not a prerequisite for issuance of a passport in a new sex.

The reasons for maintaining this policy are described below.

Accuracy and Reliability of Passport as an Identity Document

First, the Department's policy is necessary to ensure that the information contained in U.S. passports is accurate and verifiable, and thus to ensure the integrity of the U.S. passport as proof of identity and citizenship.

In verifying the sex of a passport applicant to be designated on their passport, the Department does not itself conduct physical or medical examinations, but instead relies primarily on third-party documentation issued by state, municipal, and/or foreign country authorities, just as it does to establish other aspects of an applicant's identity. Such documents include, among others, birth certificates, driver's licenses, and government-issued non-driver identification cards.

There are fifty-seven (57) U.S. jurisdictions that issue original birth certificates, identity cards and driver's licenses, and the Department is not aware of a single one with a policy providing for issuance of such documents bearing a sex other than male or female. Because the documentation that the Department relies upon to determine an applicant's sex exists in all, or almost all, cases in only two sexes, male and female, the Department cannot unilaterally allow applicants to select a third option. Issuing passports bearing a sex that is not supported by underlying evidence of identity would compromise the Department's ability to ensure the accuracy and verifiability of the information in U.S. passports, and thus undermine the integrity of the U.S. passport as an identity document.

The Department is aware that in a handful of individual cases in recent months, a few vital records authorities have issued amended birth certificates in a third sex, and that a very small number of state courts have issued court orders recognizing a sex change to a sex other than male or female. The Department, however, does not rely on *amended* government-issued documents or court orders as evidence of a change of sex, regardless of the sex requested. This is because the requirements for amending the sex designated on a birth certificate, or for obtaining a court order changing a person's sex, vary significantly by jurisdiction in terms of whether, how, and on what evidentiary basis such a court order or amended document can be obtained. The Department is therefore unable to determine from such an amended document alone whether the applicant can meet its standard for documenting a change of sex.

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Utility of an Applicant's Sex to Identify Persons Ineligible for Passports

Second, the sex of a passport applicant is a vital data point in performing the adjudication of passports. For example, we deny applications and revoke passports for the reasons set forth in 22 C.F.R. §§ 51.60-51.62. Individuals who may not be entitled to passports include those subject to outstanding felony arrest warrants, criminal court orders prohibiting them from leaving the country, or requests for extradition. The Department's name check clearance system and other systems used to verify the identity of applicants rely upon reliable sharing of accurate records from numerous government agencies (such as the Social Security Administration, Department of the Treasury, the Department of Health and Human Services, and state and federal law enforcement authorities) and the ability to reliably data-match with those sources. Sex is one of the primary data points used by these agencies in recordkeeping and ensures accurate matches with the information contained within these databases as we adjudicate. As far as the Department is aware, all such agencies recognize only two sexes.

Utility of the U.S. Passport and Passport Data for Law Enforcement and Other Purposes

Third, in addition to their primary use to facilitate international travel, U.S. passports serve important secondary purposes as proof of identity and citizenship for state and local governments and a wide variety of other public and private institutions. A U.S. passport is a uniquely reliable, and thus widely accepted, proof of identity for such purposes as issuing birth records, driver's licenses, identification cards, and vehicle registrations, as well as application and registration for employment, government benefits, education, medical treatment, financial services, and many others. U.S. passport data is shared with various federal and state agencies. The introduction of a new, third sex option in U.S. passport applications and Passport data systems could introduce verification difficulties in name checks and complicate automated data sharing among these other agencies. This would likely cause operational complications for those agencies as well, potentially impairing adjudication of social security benefits, immigration decisions, and other government functions. Adding a third sex marker to U.S. passports would thus cause operational complications for such entities, most if not all of which have designed their own systems to accommodate only two sexes.

A particularly important aspect of these secondary purposes is the use of passport data for law enforcement. Law enforcement agencies make use of passport data for a wide range of purposes, from identifying crime victims and individuals in custody, to tracking or locating persons of interest when they apply for a passport or use a passport to enter the United States. When an individual applies for or uses a U.S. passport, the Department (and/or U.S. Customs and Border Protection (CBP)) uses a computerized namecheck system that, among other things, identifies individuals who may be of interest to courts and law enforcement agencies.

An individual's sex is part of the biodata that is included in law enforcement and criminal justice computer systems used to make matches between travelers, passport applicants, and law enforcement database records that may pertain to them. To the best of the Department's knowledge, all U.S. law enforcement and criminal justice records use only male or female to identify the sex of individuals in their records. The compatibility of Passport systems with the

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systems that make use of its data furthers law enforcement interests by facilitating data-matching of passport records with records in those systems. Adding a third sex designation to Passport systems would impair that compatibility, which could compromise law enforcement efforts to match, and thus identify, track, locate, contact, or arrest suspected or convicted criminals.

Lack of Standards for Defining a Third Sex as a Component of Identity

Fourth, there is no generally accepted medical consensus as to how to define a third sex, making it unreliable as a component of identity. The Department recognizes that not all individuals live in the sex to which they were assigned at birth. Accordingly, the Department does issue U.S. passports bearing a sex that differs from the sex on an applicant's underlying evidence of identity. **However, the Department does not issue passports based on an individual's gender identity (i.e., their perception, or personal experience, of gender).** Rather, the Department issues a passport in a new sex only when the applicant "has had appropriate clinical treatment for gender transition to the new gender of either male or female." Although the Department is aware that there are individuals whose gender identity is neither male nor female,¹ the Department lacks a sound basis on which to make a reliable determination that such an individual has changed their sex to match that gender identity.

When adjudicating passports, the Department lacks the medical expertise to assess whether an individual has had "appropriate" clinical treatment to warrant the issuance of an identity document in the new sex. Therefore, since 2010, the Department has relied on the signed certification of a licensed physician that the applicant has had appropriate treatment. The Department adopted Appendix M in 2010 based upon the development of a medical consensus that sex-reassignment surgery was not a necessary step for transition, and that what constituted appropriate treatment for gender dysphoria had become more individualized. As a result, the Department does not take a position on what treatment is "appropriate" for transition, but instead relies on the certification of a licensed physician that an individual's course of treatment was appropriate for transition to male or female, in light of the medical consensus that has developed over time.

Broadly, the goal of treatment in such cases is to alleviate the individual's "gender dysphoria," typically by bringing their gender expression (physical, hormonal, and/or social) into alignment with their gender identity. "Appropriate" treatment, therefore, is treatment that successfully accomplishes such alignment with respect to the particular individual. Based on this medical consensus, the Department accepts that when such alignment is achieved, as established by the certification of a licensed physician that the individual's treatment is appropriate, it can rely on that certification to conclude that the individual has transitioned to the new sex, and therefore the Department may issue a passport in the new sex.

Review of recent expert declarations and medical literature confirms that there is no comparable consensus at this time as to the definition of a third sex, and therefore, what it would

¹ Examples of such other identities the Department has encountered to date are "born intersex," "transition to intersex," and "transition to a nonbinary gender." Other possibilities may be "both male and female" and "neither male nor female," "genderfluid," "genderqueer," or others.

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mean to align one's physical, hormonal, or social gender expression with such a new sex. This is partly due to the lack of consensus of what it means, biologically, for an individual to have a sex other than male or female. Rather, there are a number of genetic, hormonal and physiological conditions in which an individual is not easily classified as male or female (often referred to as disorders of sexual development, or DSDs). These DSDs 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).² In other words, there is no single, biological set of traits described by the terms "intersex" or "non-binary."

Thus, when a person's gender identity is something other than male or female, there is no consensus in the medical community as to what treatment, if any, would be "appropriate" for transition to such a third sex. Although applicants have submitted certifications from licensed physicians that they have "had appropriate treatment for transition to" another gender identity, such a certification reflects only the views of the individual doctor who signed them, and are not founded in a common medical understanding on which the Department is able to rely for purposes of documenting such applicant's identity.

Feasibility of adding a Third Sex Designation on U.S. Passports

Finally, altering Department systems to permit the issuance of passports with a third sex option would be expensive and time-consuming. At present, the Department's systems are incapable of printing a passport that does not include an "M" or "F" in both the printed and machine-readable areas of the passport. There is no work-around. To minimize the possibility of fraudulently issued passports, the Department specifically designed its Passport systems so that the printed biodata page must exactly match the biodata contained in the system. There is no way to disable this feature. Where circumstances under which a passport was issued require clarification of biodata information (such as an *a/k/a*), an endorsement may be added.

Although the Department has not undertaken a level of effort (LOE) estimation on the time and cost to add a third sex designation option to the U.S. passport biodata page, the time and cost to do so is anticipated to be considerable. In addition to altering numerous systems within the Passport Directorate, other systems within the Bureau of Consular Affairs, including systems used by overseas posts, would also need to be updated to conform to such a change. In addition, other diverse systems within the Department of State (*e.g.*, Human Resources) and in other federal agencies that rely on passport data (*e.g.*, Citizenship and Immigration Services (CIS) and CBP) would also require conforming updates to assure continued interoperability. These updates would have to be carefully coordinated, so that, for example, a data mismatch between CBP and Department of State systems does not cause problems for U.S. citizens attempting to enter the United States. The degree of coordination required to assure continuing operations without interruption, and the time and cost required to implement such coordination, should not be underestimated.

Therefore, please continue to adjudicate applications consistent with the Department's binary sex policy.

² Most individuals with a DSD self-identify as either male or female, but many do not.

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EXHIBIT 4

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

EXHIBIT 5

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.**

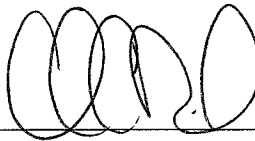
11. The issuance of a U.S. passport that does not conform to the United States’ published standards could harm U.S. interests in additional ways. First, the United

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

CERTIFICATE OF COMPLIANCE

I hereby certify that no privacy redactions are required for this filing; that no paper copies are required to be submitted; and that the electronic copy of this filing was scanned for viruses using Symantec Endpoint Protection, updated on February 27, 2019, and that no viruses were detected.

I hereby certify that this filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,193 words, excluding the parts of the filing exempted under Rule 32(f) according to the count of Microsoft Word 2013.

I further certify that this filing complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Garamond, a proportionally spaced font, using Microsoft Word 2016.

s/ Lewis S. Yelin

Lewis S. Yelin
Counsel for the defendants-appellants

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2019, I electronically filed the foregoing 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.

s/ Lewis S. Yelin _____

Lewis S. Yelin

Counsel for the defendants-appellants