

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 3, 2019

Elisabeth A. Shumaker
Clerk of Court

DANA ALIX ZZYYM,

Plaintiff - Appellee,

v.

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

Defendants - Appellants.

No. 18-1453
(D.C. No. 1:15-cv-02362-RBJ)
(D. Colo.)

ORDER

Before **MATHESON** and **McHUGH**, Circuit Judges.

Michael R. Pompeo and Steven J. Mullen (collectively, “the State Department”) filed a motion for a stay of the district court’s injunction prohibiting the State Department from denying Dana Alix Zzyym’s passport application on the basis of the State Department’s requirement that a passport designate the bearer’s sex as either male or female. Zzyym filed a response in opposition to the motion, and the State Department filed a reply in support of the motion.

The Supreme Court has explained that “[a] stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion,

and the propriety of its issue is dependent upon the circumstances of the particular case.” *Nken v. Holder*, 556 U.S. 418, 433 (2009) (internal quotation marks and citation omitted). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Id.* at 433-34.

When deciding whether to exercise its discretion to grant a stay, this court considers the following four factors:

(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 434 (internal quotation marks omitted). The Supreme Court has indicated that “[t]he first two factors of the traditional standard are the most critical.” *Id.*

Based on the materials currently before the court, we conclude the State Department has not met its burden of showing that the circumstances justify this court granting a stay of the district court’s injunction pending appeal. In particular, there is ambiguity surrounding the question of whether Zzyym has a passport application currently pending before the State Department, which impacts the Department’s ability to show it will suffer irreparable harm in the absence of a stay pending appeal.

Zzyym submitted a passport application in September 2014, requesting that the State Department issue Zzyym a passport with an “X” in the sex field. The Colorado Passport Agency ultimately denied the application in December 2014 because “the Department of State requires the sex field on United States passports to be listed as ‘M’ or ‘F.’” *Aplt. App.* at 76. Zzyym was told that to obtain a passport, Zzyym would need

to re-apply on a new application. Zzyym sought reconsideration of the denial. In April 2015, the State Department notified Zzyym that the denial was final and that Zzyym would need to submit a new passport application in order to obtain a passport.

Zzyym filed the underlying complaint in October 2015. The State Department then moved for judgment on the administrative record. The district court determined that the State Department had not followed a rational decisionmaking process in deciding to implement its binary-only gender marker policy, and it remanded to the State Department to either shore up the record or reconsider its policy. In March 2017, Zzyym again requested the State Department issue either a standard passport or a temporary passport with the “X” marker in the sex field. In May 2017, the State Department denied Zzyym’s request and stated that Zzyym would need to file a new passport application. The State Department also issued a memorandum indicating that it had decided to maintain its policy of allowing only “M” and “F” sex designations in passports. Zzyym moved to reopen the proceedings in district court and the court granted the motion. In July 2017, Zzyym filed a supplemental complaint stating that resubmitting a passport application to the State Department would be futile. On September 19, 2018, the district court entered judgment and an injunction in Zzyym’s favor. There is no evidence in the record indicating that Zzyym filed a new passport application after that date.

Although the parties have made statements in their filings that imply there is a pending application, the foregoing suggests that there is no passport application currently pending with the State Department and that the district court’s injunction will have no effect until Zzyym files a new passport application. The following facts also suggest that

there is no pending passport application: (1) there has been no stay in place since the September 19, 2018 judgment; (2) the government waited over two months after judgment (until December 3, 2018) to seek a stay pending appeal; (3) the government did not ask for an emergency stay from the district court or this court; and (4) at least six months have passed and the government has not issued a passport to Zzyym even though the district court entered judgment and an injunction in Zzyym's favor. Given these circumstances, the State Department has not shown it will suffer irreparable harm in the absence of a stay. If there is no pending passport application, then the State Department is not required to do anything and the district court's order enjoining the State Department from relying on its binary-only gender marker policy to withhold a passport from Zzyym has no current effect.

For the foregoing reasons, we deny the State Department's motion for a stay pending appeal. This denial is without prejudice to the State Department filing a renewed motion for a stay pending appeal that addresses the issues raised in this order.

Entered for the Court



ELISABETH A. SHUMAKER, Clerk