

H.R. 1268

Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (Enrolled as Agreed to or Passed by Both House and Senate)

TITLE II--IMPROVED SECURITY FOR DRIVERS' LICENSES AND PERSONAL IDENTIFICATION CARDS

SEC. 201. DEFINITIONS.

In this title, the following definitions apply:

- (1) DRIVER'S LICENSE- The term `driver's license' means a motor vehicle operator's license, as defined in section 30301 of title 49, United States Code.
- (2) IDENTIFICATION CARD- The term `identification card' means a personal identification card, as defined in section 1028(d) of title 18, United States Code, issued by a State.
- (3) OFFICIAL PURPOSE- The term `official purpose' includes but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary shall determine.
- (4) SECRETARY- The term `Secretary' means the Secretary of Homeland Security.
- (5) STATE- The term `State' means a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States.

SEC. 202. MINIMUM DOCUMENT REQUIREMENTS AND ISSUANCE STANDARDS FOR FEDERAL RECOGNITION.

(a) Minimum Standards for Federal Use-

- (1) IN GENERAL- Beginning 3 years after the date of the enactment of this division, a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section.
- (2) STATE CERTIFICATIONS- The Secretary shall determine whether a State is meeting the requirements of this section based on certifications made by the State to the Secretary. Such certifications shall be made at such times and in such manner as the Secretary, in consultation with the Secretary of Transportation, may prescribe by regulation.

(b) Minimum Document Requirements- To meet the requirements of this section, a State shall include, at a minimum, the following information and

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features on each driver's license and identification card issued to a person by the State:

- (1) The person's full legal name.
- (2) The person's date of birth.
- (3) The person's gender.
- (4) The person's driver's license or identification card number.
- (5) A digital photograph of the person.
- (6) The person's address of principle residence.
- (7) The person's signature.
- (8) Physical security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.
- (9) A common machine-readable technology, with defined minimum data elements.

(c) Minimum Issuance Standards-

(1) IN GENERAL- To meet the requirements of this section, a State shall require, at a minimum, presentation and verification of the following information before issuing a driver's license or identification card to a person:

(A) A photo identity document, except that a non-photo identity document is acceptable if it includes both the person's full legal name and date of birth.

(B) Documentation showing the person's date of birth.

(C) Proof of the person's social security account number or verification that the person is not eligible for a social security account number.

(D) Documentation showing the person's name and address of principal residence.

(2) SPECIAL REQUIREMENTS-

(A) IN GENERAL- To meet the requirements of this section, a State shall comply with the minimum standards of this paragraph.

(B) EVIDENCE OF LAWFUL STATUS- A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person--

(i) is a citizen or national of the United States;

(ii) is an alien lawfully admitted for permanent or temporary residence in the United States;

(iii) has conditional permanent resident status in the United States;

(iv) has an approved application for asylum in the United States or has entered into the United States in refugee status;

(v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;

(vi) has a pending application for asylum in the United States;

(vii) has a pending or approved application for temporary protected status in the United States;

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- (viii) has approved deferred action status; or
- (ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

(C) TEMPORARY DRIVERS' LICENSES AND IDENTIFICATION CARDS-

(i) IN GENERAL- If a person presents evidence under any of clauses (v) through (ix) of subparagraph (B), the State may only issue a temporary driver's license or temporary identification card to the person.

(ii) EXPIRATION DATE- A temporary driver's license or temporary identification card issued pursuant to this subparagraph shall be valid only during the period of time of the applicant's authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.

(iii) DISPLAY OF EXPIRATION DATE- A temporary driver's license or temporary identification card issued pursuant to this subparagraph shall clearly indicate that it is temporary and shall state the date on which it expires.

(iv) RENEWAL- A temporary driver's license or temporary identification card issued pursuant to this subparagraph may be renewed only upon presentation of valid documentary evidence that the status by which the applicant qualified for the temporary driver's license or temporary identification card has been extended by the Secretary of Homeland Security.

(3) VERIFICATION OF DOCUMENTS- To meet the requirements of this section, a State shall implement the following procedures:

(A) Before issuing a driver's license or identification card to a person, the State shall verify, with the issuing agency, the issuance, validity, and completeness of each document required to be presented by the person under paragraph (1) or (2).

(B) The State shall not accept any foreign document, other than an official passport, to satisfy a requirement of paragraph (1) or (2).

(C) Not later than September 11, 2005, the State shall enter into a memorandum of understanding with the Secretary of Homeland Security to routinely utilize the automated system known as Systematic Alien Verification for Entitlements, as provided for by section 404 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (110 Stat. 3009-664), to verify the legal presence status of a person, other than a United States citizen, applying for a driver's license or identification card.

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(d) Other Requirements- To meet the requirements of this section, a State shall adopt the following practices in the issuance of drivers' licenses and identification cards:

- (1) Employ technology to capture digital images of identity source documents so that the images can be retained in electronic storage in a transferable format.
- (2) Retain paper copies of source documents for a minimum of 7 years or images of source documents presented for a minimum of 10 years.
- (3) Subject each person applying for a driver's license or identification card to mandatory facial image capture.
- (4) Establish an effective procedure to confirm or verify a renewing applicant's information.
- (5) Confirm with the Social Security Administration a social security account number presented by a person using the full social security account number. In the event that a social security account number is already registered to or associated with another person to which any State has issued a driver's license or identification card, the State shall resolve the discrepancy and take appropriate action.
- (6) Refuse to issue a driver's license or identification card to a person holding a driver's license issued by another State without confirmation that the person is terminating or has terminated the driver's license.
- (7) Ensure the physical security of locations where drivers' licenses and identification cards are produced and the security of document materials and papers from which drivers' licenses and identification cards are produced.
- (8) Subject all persons authorized to manufacture or produce drivers' licenses and identification cards to appropriate security clearance requirements.
- (9) Establish fraudulent document recognition training programs for appropriate employees engaged in the issuance of drivers' licenses and identification cards.
- (10) Limit the period of validity of all driver's licenses and identification cards that are not temporary to a period that does not exceed 8 years.
- (11) In any case in which the State issues a driver's license or identification card that does not satisfy the requirements of this section, ensure that such license or identification card--
 - (A) clearly states on its face that it may not be accepted by any Federal agency for federal identification or any other official purpose; and
 - (B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose.
- (12) Provide electronic access to all other States to information contained in the motor vehicle database of the State.
- (13) Maintain a State motor vehicle database that contains, at a minimum--
 - (A) all data fields printed on drivers' licenses and identification cards issued by the State; and

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(B) motor vehicle drivers' histories, including motor vehicle violations, suspensions, and points on licenses.

SEC. 203. TRAFFICKING IN AUTHENTICATION FEATURES FOR USE IN FALSE IDENTIFICATION DOCUMENTS.

(a) Criminal Penalty- Section 1028(a)(8) of title 18, United States Code, is amended by striking `false authentication features' and inserting `false or actual authentication features'.

(b) Use of False Driver's License at Airports-

(1) IN GENERAL- The Secretary shall enter, into the appropriate aviation security screening database, appropriate information regarding any person convicted of using a false driver's license at an airport (as such term is defined in section 40102 of title 49, United States Code).

(2) FALSE DEFINED- In this subsection, the term `false' has the same meaning such term has under section 1028(d) of title 18, United States Code.

SEC. 204. GRANTS TO STATES.

(a) In General- The Secretary may make grants to a State to assist the State in conforming to the minimum standards set forth in this title.

(b) Authorization of Appropriations- There are authorized to be appropriated to the Secretary for each of the fiscal years 2005 through 2009 such sums as may be necessary to carry out this title.

SEC. 205. AUTHORITY.

(a) Participation of Secretary of Transportation and States- All authority to issue regulations, set standards, and issue grants under this title shall be carried out by the Secretary, in consultation with the Secretary of Transportation and the States.

(b) Extensions of Deadlines- The Secretary may grant to a State an extension of time to meet the requirements of section 202(a)(1) if the State provides adequate justification for noncompliance.

SEC. 206. REPEAL.

Section 7212 of the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law 108-458) is repealed.

SEC. 207. LIMITATION ON STATUTORY CONSTRUCTION.

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Nothing in this title shall be construed to affect the authorities or responsibilities of the Secretary of Transportation or the States under chapter 303 of title 49, United States Code.

No. 18-1453

**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.

On Appeal from the United States District Court for the District of Colorado

District Court Case No. 15-cv-2362 (Judge R. Brooke Jackson)

**BRIEF OF THE NATIONAL CENTER FOR TRANSGENDER EQUALITY
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE**

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**Not admitted in the Tenth Circuit*

CORPORATE DISCLOSURE STATEMENT

Amicus does not have a parent corporation and is not a publicly-held corporation.

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AUTHORITY TO FILE

Amici file this brief with the consent of both parties.

STATEMENT OF AMICUS CURIAE

Amicus **National Center for Transgender Equality** (“NCTE”) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people and their families through education, advocacy, and research. NCTE works with policymakers and communities around the country to develop fair and effective public policies, and has worked with many federal and state agencies to develop and implement streamlined and modernized gender marker change policies. NCTE worked closely with the Department of State to create its current policy on gender markers. NCTE also provides information and assistance to individuals obtaining corrected gender markers on their U.S. passports. As such, NCTE has an interest in the correct interpretation of the current policy and the reasoning behind it.

BACKGROUND

The Department’s current gender change policy defers to medical authorities on what treatment any individual may need, and allows applicants to change the gender marker on their passport whenever a treating physician indicates that the person had received clinically appropriate treatment for transition. App’x 86. It also specifies that intersex people may adjust the documentation to specify the appropriate gender marker. *Id.*

Prior to 2010, the Department of State (“the Department”) required applicants to submit proof of surgical procedure before permitting them to change the gender marker on their passports. That policy prevented many transgender and intersex people from obtaining an accurate updated gender marker on their passport, and was amended partly in response to recommendations from amicus.

Transgender people are people who have a gender identity (the innate knowledge of one’s own gender that all people have) that is different from the gender they were assigned at birth. Many transgender people are men or women—that is, their gender identity is male or female. Many other transgender people are nonbinary—that is, their gender identity is neither male nor female. For people who are not male or female, the appropriate gender marker is a gender-neutral designation, typically an “X.”

Intersex people are born with sex characteristics (including genitals, gonads, and chromosome patterns) that do not fit typical notions of male or female bodies. Intersex people can be of any gender identity. Some intersex people are nonbinary, but most identify as men or women.

Gender dysphoria is the medical diagnosis for distress associated with the incongruence between one’s gender identity and one’s assigned gender at birth. Am. Psychiatric Ass’n, Diagnostic and Statistical Manual of Mental Disorders 453 (5th ed. 2013) (“DSM-V”). Transgender people often need treatment for gender dysphoria. Like for many other conditions, that treatment is individualized. World Professional Association for Transgender Health (“WPATH”), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 5 (7th Version, 2011), App’x 99 (“SOC”). Appropriate treatment may

include psychological, hormonal, surgical, or other treatment, depending on the needs of the patient and any other medical conditions they may have. *Id.* While some transgender people need surgery on one or more body sites to alleviate symptoms of dysphoria, others do not need any surgical treatment. *Id.* Additionally, many transgender people who require surgical treatment are unable to afford it. American Medical Association, *Health Insurance Coverage for Gender-Affirming Care of Transgender Patients* (2019), <http://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf>.

Under the current policy and applying the current standard, Dana Zzyym and other nonbinary applicants should be able to receive a passport with an appropriate gender-neutral designation.

SUMMARY OF ARGUMENT

The Department will not permit Dana Zzyym to receive a passport accurately indicating that they are neither male nor female because of a supposed “lack of medical consensus” about what that means. The Department defers to an individual’s physician about the appropriate gender marker for men and women, but not for nonbinary people.

The Department has no valid reason for denying an accurate gender-neutral marker to nonbinary applicants who follow the designated procedure. It has disregarded its current policy, the reasons it had for adopting that policy, and the medical standards to which it has otherwise deferred. It has not indicated awareness of, much less a reasoned basis for, departing from its usual practice of listing an accurate gender on passports upon receipt of medical documentation. For those reasons, its decision is arbitrary and capricious.

ARGUMENT

While judicial review of agency action under the Administrative Procedures Act is narrow, it is nonetheless “probing” and “in-depth.” *Qwest Commc'ns Int'l, Inc. v. F.C.C.*, 398 F.3d 1222, 1229 (10th Cir. 2005). An agency action may be arbitrary and capricious under a number of circumstances, including if the agency’s “explanation for its decision . . . runs counter to the evidence before the agency.” *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Department argues that its existing gender change policy and the logic underlying it only applies to women and men, but not to people of any other gender. It claims that deferring to medical authority, consistent with existing policy, would not be appropriate for people other than men or women because “there is no comparable medical consensus of what it means, biologically, for an individual to have a sex other than male or female.” Opening Brief at 15 (internal citations omitted). This rationale misconstrues the existing policy, the reasons for adopting that policy, and the medical standards deferred to in that policy.

I. It is Arbitrary to Acknowledge the Gender of Men and Women but not the Gender of Nonbinary People.

The gender change policy maintained by the Department for the last decade reflects an understanding that the Department should identify people not according to preconceived notions about gender but according to their actual gender—that is, the gender that individuals know themselves to be, receive appropriate treatment related to, and are generally known as. This understanding mirrors the medical consensus that when a person’s sex-related traits do not all

align with their gender identity, the person should be treated in accordance with their gender identity. Beyond reflecting a medical consensus and addressing an important community need, policies that acknowledge people's actual gender best serve government interests in accurately identifying individuals.

Early Department policies were based on inaccurate ideas that all women have a certain physical appearance and body parts, and that all men have a certain physical appearance and body parts. For example, prior to 1992, the Department only permitted people to use passport photos that reflected an appearance consistent with the sex listed on the passport. In 1992, the Department changed that requirement, requiring photos to "reflect the applicant's current and true appearance" rather than a "preconceived 'male' or 'female' appearance." U.S. Department of State, *History of the Designation of Sex in U.S. Passports 2* (May 1, 2017), AR 88.

Prior to 2010, the Department only permitted changes to the gender markers on passports when people had had surgical treatment for gender dysphoria. That policy was based on an idea that all women and all men should have the same sort of external genitalia and that surgery produced those results. In 2010, the Department changed its policy, acknowledging that it was more appropriate to rely on contemporary medical standards and defer to individual doctors on whether their patients had had "appropriate clinical treatment for gender transition." Action Memo for Assistant Secretary Jacobs from CA/OCS Michele Thoren Bond, Subject 7 FAM 1300

Appendix M – Gender Change (May 14, 2010), AR 120.¹ This change in policy reflected a similar move away from preconceived notions of consistent correspondence between physical characteristics and gender.

All the reasons for adopting this policy for transgender women and men also apply to nonbinary people. A consensus among leading medical organizations and experts in transgender health acknowledges that people have a range of gender identities, with male and female only two of many possibilities. *See e.g.* American Psychological Association, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People 834 (2015) (“Gender identity is defined as a person’s deeply felt, inherent sense of being a girl, woman, or female; a boy, a man, or male; a blend of male or female; or an alternative gender”); DSM-V at 451 (“Gender identity...refers to an individual’s identification as male, female, or, occasionally, some category other than male or female”); WPATH SOC at 9 (“Other individuals affirm their unique gender identity and no longer consider themselves to be either male or female.”).

Like for anyone else whose sex-related traits do not all align with their gender identity, the medical consensus is that nonbinary people should be treated in accordance with their gender identity. *See* Brief of Amici Curiae Am. Acad. Of Pediatrics, Am. Psychiatric Assoc., Am. College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. School Bd. v. G.G.*, 2017 WL 1057281 at *3 (“The international medical consensus regarding treatment for gender dysphoria is to assist the patient to live in

¹ References to “AR” are to the administrative record—the full version of which appears in the district-court record at Document 64.

accordance with his or her gender identity, thus alleviating the distress.”). Research has demonstrated that failing to treat transgender people, including nonbinary people, according to their gender identity can cause significant harms; meanwhile, when transgender people are able to live according to their gender identity, their health, safety, and wellbeing is substantially improved. See American Medical Association, *LGBTQ Change Efforts Issue Brief* (2019), <https://www.ama-assn.org/system/files/2019-03/transgender-conversion-issue-brief.pdf>. In fact, one study found a drastic reduction in suicide attempts for transgender people, including nonbinary transgender people, who had even just one identity document that accurately reflected their gender identity. Greta R. Bauer, et al. *Intervenable factors associated with suicide risk in transgender persons: a respondent driven sampling study in Ontario, Canada*. 15.1 BMC Pub. Health 525 (2015).

The government’s interest in accurately identifying people also supports recognizing people by the gender they know themselves to be and generally express to others. For many nonbinary people, everyone in their personal and professional lives know them as nonbinary. It is for these reasons that ten states and the District of Columbia now acknowledge nonbinary genders on driver’s licenses;² eight states and New York City now acknowledge nonbinary genders on birth certificates;³ and several municipalities⁴ and other countries⁵ do the same.

² Arkansas Driver Services Instructions, <https://transequality.org/sites/default/files/docs/id/AR%20Drivers%20License%20gender%20change%20guidance.pdf>; California Gender Recognition Act, SB 179, https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB179; See Colorado Department of Revenue, Change your Sex, <https://www.colorado.gov/pacific/dmv/change-your-sex>; See NBC News, *Hoosier ally? Pence's home state quietly begins issuing nonbinary IDs* (Mar. 12, 2019), <https://www.nbcnews.com/feature/nbc-out/hoosier-ally-pence-s-home-state-quietly-begins-issuing-nonbinary->

The Department has already concluded that a statement from an individual and their doctor is the best way to ensure accurate identification of gender for purposes of passports. That is no less true for nonbinary people.

[n982106](#); See Maine Gender Marker Form, <https://www1.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf>; See Nevada Department of Motor Vehicles, Name Changes, <http://www.dmvnv.com/namechange.htm>; See SB 196, 2019 Gen. Assemb., Reg. Sess. (Md. 2019) <http://mgaleg.maryland.gov/2019RS/bills/sb/sb0196T.pdf>; See MN Driver and Vehicle Services Self-Designated Descriptors, <https://dps.mn.gov/divisions/dvs/Pages/self-designated-descriptors.aspx>; Oregon Driver & Motor Vehicle Services Instructions, https://www.oregon.gov/ODOT/DMV/Pages/driverid/chg_gender_designation.aspx; Vermont DMV Press Release (Mar. 13, 2019), <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer>; DC Gender Self-Designation Form, <https://dmv.dc.gov/sites/default/files/dc/sites/dmv/publication/attachments/DC%20DMV%20Form%20Gender%20Self-Designation%20English.pdf>.

³ California Gender Recognition Act, SB 179; https://leginfo.legislature.ca.gov/faces/billCompareClient.xhtml?bill_id=201720180SB179; CT Dept. of Public Health Testimony on Senate Bill 388, (Feb. 25, 2019), <https://www.cga.ct.gov/2019/PHdata/Tmy/2019SB-00388-R000225-Department%20of%20Public%20Health-TMY.PDF>; Nev. Admin. Code § 440.030, [https://www.leg.state.nv.us/Register/RegsReviewed/\\$R066-16A.pdf](https://www.leg.state.nv.us/Register/RegsReviewed/$R066-16A.pdf); New Jersey Babs Siperstein Law, https://www.njleg.state.nj.us/2018/Bills/A2000/1718_R2.PDF; See SB 20, 2019 Leg., 54th Sess. (N.M. 2019), signed March 2019, <https://legiscan.com/NM/text/SB20/id/1978653>; Oregon Health Authority House Bill 2673 Information Sheet, <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>; Washington Wash. Admin. Code § 246-490-075, <http://app.leg.wa.gov/WAC/default.aspx?cite=246-490-075>; NBC News, *Utah among growing number of states issuing gender-neutral IDs*, (Mar. 18, 2019), <https://www.nbcnews.com/feature/nbc-out/utah-among-growing-number-states-issuing-gender-neutral-ids-n984326>; New York City Health Code Article 207, <https://www1.nyc.gov/assets/doh/downloads/pdf/notice/2018/noa-amend-article207-section207-05.pdf>.

⁴ These municipalities include major cities like Chicago, Elaine Chen, *Who Will Benefit From the Chicago Municipal ID?*, (Nov. 28, 2017), <https://southsideweekly.com/will-benefit-chicago-municipal-id/>, New York City, , Matthew Rodriguez, *New York City Now Has a Third Gender Option on Its ID Cards*, (Jan. 15, 2019), <https://www.out.com/news-opinion/2019/1/15/new-york-city-offers-third-gender-option-city-issued-idnyc-cards>; and Philadelphia, A.D. Amorosi, *Gender-free municipal ID cards are close to becoming reality in Philly*, (Feb. 28, 2019), <http://www.epgn.com/news/14312-gender-free-municipal-id-cards-are-close-to-becoming-reality-in-philly>. Even those that do not offer an option of designating an X often offer the option of leaving gender off the ID. See, e.g., City of Minneapolis, Ordinance No. 2018-078, https://lms.minneapolismn.gov/Download/MetaData/10432/2018-00135%20Ord%20078_Id_10432.pdf;

⁵ Countries include Nepal, India, Malta, Denmark, Bangladesh, Australia, and New Zealand. Aaron Macarow, *These Eleven Countries are Way Ahead of the US on Trans Issues*, (Feb. 9, 2015), <https://archive.attn.com/stories/868/transgender-passport-status>.

II. It is Arbitrary to Defer to Prevailing Medical Standards and Individual Medical Providers for Transgender Men and Women, but not for Transgender People with Nonbinary Genders.

The Department asserts that it treats nonbinary people differently from men and women because of a “lack of consensus as to what it would mean to undergo gender transition to a sex other than male or female,” Opening Brief at 20, and a lack of “consensus on what it means, biologically, for an individual to have a sex other than male or female” *Id.* But the sources the Department has considered and deferred to support the contrary conclusion.

The Department has acknowledged that it lacks relevant medical expertise, and has explicitly opted to defer to the World Professional Association for Transgender Health Standards of Care (SOC). Action Memo for Assistant Secretary Jacobs from CA/OCS Michele Thoren Bond, Subject 7 FAM 1300 Appendix M – Gender Change (May 14, 2010), AR 120. The Department has offered no credible reason for not continuing to defer to the SOC when it comes to identifying nonbinary people. It has not even demonstrated awareness that it has opted to depart from the SOC. As such, it has not shown a “reasoned analysis.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

The SOC explicitly acknowledge that some people are neither men nor women, noting “considerable diversity in [transgender people’s] gender identities, roles, and expressions.” SOC at 9. The SOC go on to describe transgender people who do not identify as “either male or female” and “affirm[] their unique experiences that may transcend a male/female binary understanding of gender.” *Id.* The SOC then list the forms of treatment and other support that can alleviate gender dysphoria, including, among others, changes in name and gender marker on

identity documents. This list is the same for men, women, and nonbinary people with gender dysphoria. *Id.* at 9-10. Indeed, no part of the SOC suggest any differences in treatment for nonbinary people compared with men and women. Mental health professionals are specifically instructed that they should “not impose a binary view of gender.” *Id.* at 16; *accord* American Psychological Association, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People 835 (2015) (“A nonbinary understanding of gender is fundamental to the provision of affirmative care for TGNC people.”). The SOC also define “transgender” as an “adjective to describe a diverse group of individuals who cross or transcend culturally defined categories of gender” and “genderqueer” as an “identity label that may be used by individuals whose gender identity and/or role does not conform to a binary understanding of gender as limited to the categories of man or woman, male or female.” *Id.* at 96-7.

The WPATH SOC also refer to the DSM-V, the American Psychiatric Association’s Diagnostic and Statistical Manual. SOC at 5. The DSM-V explicitly acknowledges that nonbinary people, in addition to women and men, may experience gender dysphoria. It defines gender identity as “an individual’s identification as male, female, or, occasionally, some category other than male or female” and consistently refers to symptoms of gender dysphoria in terms equally applicable to men, women, and nonbinary people, DSM-V at 451. For example, one symptom of gender dysphoria is “[a] strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one’s assigned gender).” *Id.* at 452.

The WPATH SOC also cite numerous sources describing nonbinary gender and appropriate treatment for nonbinary people, including a 2008 article by Walter Bockting, a

psychologist and former president of WPATH. *See* SOC at 8, 9, 61, 73, 96. In it, Dr. Bockting acknowledges that prior to the 1990s, treatment for gender dysphoria followed a binary conception of gender, but that in fact many transgender people “describe their gender identities in ways that transcend a dichotomous view of gender” and that “gender diversity is consistent with examples of gender variance found historically and cross-culturally.” Walter O. Bockting, *Psychotherapy and the real-life experience: From gender dichotomy to gender diversity*. 17 *Sexologies* 211, 214 (2008). Given this diversity, Bockting observes that best practices for clinical management involve an “individualized, client-centered approach...that is able to accommodate a variety of gender identities and expressions.” *Id.* He states that to achieve the best outcomes, psychologists should help clients to accept their actual gender identity, whatever it is, rather than to engage in futile and harmful efforts to fit their gender identity into a binary. *Id.*

The Department has shown no awareness that it has rejected its avowed deference to the SOC, which apply equally to nonbinary people. Precisely the same standards that it employs in its current gender change policy can and ought to be applied to a gender-neutral designation. Like for anyone else with gender dysphoria, nonbinary people may receive treatment to alleviate their symptoms. Like for anyone else with gender dysphoria, that treatment could take any of several different forms, depending on the needs of the individual. No evidence-based rationale supports reaching a different conclusion for how to treat nonbinary people.

III. The Department Has Offered No Adequate Reason to Treat Nonbinary People Differently When They Are Also Intersex.

The Department asserts that it has chosen not to accurately reflect the gender of nonbinary people who are intersex because “there is no single, biological set of traits captured by the term intersex, but instead a range of genetic, hormonal, and physiological conditions that are highly distinct from one another.” While it is true that not all intersex people have similar physical traits, that is equally true for intersex men and women, yet the Department has chosen to accurately reflect their gender.

In 2010, the Department amended its policy to eliminate the requirement that intersex people undergo treatment for gender transition. As amicus pointed out in a letter to the Department, some intersex people had their sex incorrectly listed on their birth certificate “due to an error of medical diagnosis, and a correct gender assignment may have been made months or years later.” Recommendations Regarding Gender- and Intersex-Related Revisions to FAM on behalf of Council for Global Equality, National Center for Lesbian Rights, National Center for Transgender Equality, and National Gay & Lesbian Task Force to Barry J. Conway (Aug. 30, 2010), AR 134. Accordingly, the Department revised the language to ensure that intersex people could receive a correct gender marker by providing documentation that they were born with intersex traits, with no further evidence of biological, hormonal or physiological characteristics or treatment required. Action Memo for Assistant Secretary Jacobs – CA from CA/OCS James D. Pettit, Subject 7 FAM 1300 Appendix M –Gender Changes (Dec. 8, 2010), AR 136.

There is no basis for deciding that bodily variation among nonbinary people who are intersex is less acceptable than bodily variation among intersex men and women, or in nonbinary

people who are not intersex. There is no reasoned basis for the Department to conclude that nonbinary people who are intersex should have inaccurate identification while others should have accurate identification.

Based on the evidence before the agency, the most accurate way to identify Zzyym's gender, consistent with existing evidence, is with an X.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the district court's ruling that the Department's action was arbitrary and capricious.

Respectfully submitted,

s/ Mark Silverstein

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CERTIFICATE OF COMPLIANCE

This brief complies with the Federal Rule of Appellate Procedure 29(a)(4) by including the corporate disclosure required by Rule 26.1, and a table of contents; a table of authorities; a statement of identity, interest, and source of authority to file of amicus curiae, and is no more than one-half of the maximum length authorized by the rules for a party's principal brief.

s/ Mark Silverstein
Mark Silverstein

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Mark Silverstein

Mark Silverstein

No. 18-1453

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

DANA ALIX ZZYYM,
Plaintiff-Appellee,

vs.

MICHAEL R. POMPEO, ET AL., Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLORADO, DISTRICT COURT CASE NO. 15-CV-2362 (JUDGE R. BROOKE JACKSON)

**BRIEF OF *AMICUS CURIAE* INTERSEX & GENDERQUEER RECOGNITION PROJECT
IN SUPPORT OF PLAINTIFF-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Intersex & Genderqueer Recognition Project states that it is a non-stock entity under the fiscal sponsorship of the Social Good Fund; it has no parent corporation; and no publicly held corporation has an ownership interest in it.

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GLOSSARY

AFAB	assigned female at birth
AMAB	assigned male at birth
cisgender	gender identity matches sex assigned at birth
Department	United States Department of State
DHS	United States Department of Homeland Security
ID	identification document
IDAHOT	International Day Against Homophobia and Transphobia
IGRP	Intersex & Genderqueer Recognition Project
intersex	born with variations in sex characteristics that do not fit typical definitions for male or female bodies
transgender	gender identity differs from sex assigned at birth
TSA	United States Transportation Security Administration
UUFSMA	Unitarian Universalist Fellowship of San Miguel de Allende

Pursuant to Fed. R. App. P. 29(a)(2) and the consent of the parties, Intersex & Genderqueer Recognition Project (IGRP) respectfully submits this brief as *amicus curiae* in support of plaintiff-appellee Dana Alix Zzyym and affirmance of the judgment entered by the district court.

**IDENTITY, INTEREST, AUTHORITY, AND
INDEPENDENCE OF AMICUS CURIAE**

Identity. IGRP is the first, and leading, organization in the United States to address the rights of people to identify as nonbinary or gender-neutral on government-issued documents. IGRP is a non-profit legal organization engaged in litigation, education, and advocacy. IGRP's membership and its advisory committee consist of intersex and transgender persons who have faced discrimination due to their nonbinary gender identities and perceived failure to conform to gender stereotypes.

Interest. IGRP has an interest in the Court's consideration of this case, which directly affects its members' rights to obtain a passport with an accurate gender marker. IGRP fully supports Zzyym's challenge to the policy of the United States Department of State (Department) requiring that a United States passport identify the bearer's sex as either male or female. In this brief, IGRP provides the Court with additional voices and examples of nonbinary people across the country, both those who are intersex and those who are not, so that the Court may better

understand the context and ramifications of the parties' dispute. In particular, IGRP submits the relevant stories of seven of its constituents.

Authority. All parties have consented to the filing of this brief.

Independence. No party's counsel authored this brief in whole or in part, and no party or person other than amicus, its members, or their counsel contributed money to fund its preparation and filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should affirm the decision of the district court, which correctly held that the Department's policy recognizing only male and female gender and refusing to issue a passport to Dana Zzyym on the basis that they are neither male nor female and refused to commit perjury by claiming to be either male or female is arbitrary and capricious. IGRP offers the unique perspective of nonbinary people who can explain the impact the Department's refusal to issue a passport with a gender-neutral marker has on nonbinary people in addition to Dana.

Charlie and **A.C.** have gender-neutral birth certificates from New York City. **Mel** has a gender-neutral driver's license from Utah and a gender-neutral birth certificate from Nevada. **Xin** and **Char** have gender-neutral driver's licenses, birth certificates, and court orders from California. **C.P.** will be able to get their gender-neutral driver's license in Maryland by the end of the year. **Violette** is a United States citizen born abroad who has a gender-neutral driver's license and

court order from Oregon and is obtaining a gender-neutral birth certificate from Ontario, Canada. Yet, under the Department's policy, none of these individuals can obtain a United States passport that accurately reflects their gender.

Through the personal stories of these people, IGRP seeks to provide the Court a broader view of nonbinary citizens and to help it understand the critical importance of having access to a passport reflecting an accurate gender marker. The challenges confronted by IGRP's constituents are neither isolated nor rare. Hundreds of thousands of people throughout the country face discrimination and hardship because of their nonbinary genders. By denying them access to a passport that accurately reflects their gender, the Department is denying them the right to participate in society and the recognition of who they really are.

ARGUMENT

I. Introduction to Gender Identity.

Gender identity refers to a person's inner sense of belonging to a particular gender; it is an innate, core component of human identity, with a strong biological basis.¹

¹ Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL'Y REV. 241, 259–60 (2015) (reviewing scientific research); Milton Diamond, *Transsexuality Among Twins: Identity Concordance, Transition, Rearing, and Orientation*, 14 INT'L J. OF TRANSGENDERISM 24 (2013).

“Humans are socially conditioned to view sex and gender as binary attributes. From the moment we are born—or even before—we are definitively labeled ‘boy’ or ‘girl.’”² Individuals whose gender identity falls within these traditionally recognized confines of “male” and “female” are “binary.” Both cisgender people (those whose gender identity matches the sex they were assigned at birth) and transgender people (those whose gender identity does not match the sex assigned at birth) can have a binary gender of male or female.

But hundreds of thousands of Americans have a gender identity that is neither male nor female.³ “[S]cience points to a much more ambiguous reality ... The more we learn about sex and gender, the more these attributes appear to exist

² Amanda Montañez, *Beyond XX and XY: The Extraordinary Complexity of Sex Determination*, SCI. AM., Sept. 2017, 50–51, available at <https://www.scientificamerican.com/article/beyond-xx-and-xy-the-extraordinary-complexity-of-sex-determination/>.

All internet URLs cited in this brief were last visited on May 15, 2019.

³ ANDREW R. FLORES ET AL., WILLIAMS INSTITUTE (UCLA), HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>, at 3 (1.4 million, or 0.6%, of U.S. adults identify as transgender); SANDY E. JAMES ET AL., NAT’L CTR FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>, at 45 & Fig. 4.2 (hereinafter TRANSGENDER SURVEY) (35% of adult transgender population identifies as nonbinary).

on a spectrum.”⁴ The terms “nonbinary” and “gender-neutral” recognize this reality. Indeed:

Determination of biological sex is staggeringly complex, involving not only anatomy but an intricate choreography of genetic and chemical factors that unfolds over time. Intersex individuals—those for whom sexual development follows an atypical trajectory—are characterized by a diverse range of conditions . . . [T]he gender with which a person identifies does not always align with the sex they are assigned at birth, and they may not be wholly male or female.^[5]

Nonbinary individuals may or may not use the singular form of “they/them/their” or other gender-neutral pronouns. They may describe themselves using the term “nonbinary”; use more specific gender-neutral terms such as “agender,” “genderqueer,” “gender fluid,” “Two Spirit,” “bigender,” “pangender,” “gender nonconforming,” or “gender variant”; or not identify with any gender at all.⁶

“Intersex” means having been born with variations in sex characteristics that do not fit typical definitions for male or female bodies. Of the more than 490,000⁷

⁴ Montañez, *supra* n.2.

⁵ *Id.* (footnote omitted).

⁶ TRANSGENDER SURVEY, *supra* n.3, at 44 & Fig. 4.1.

⁷ *See id.* at 45 & Fig. 4.2 (35% of adult transgender population identifies as nonbinary); FLORES, *supra* n.3, at 3 (1.4 million transgender adults in U.S.).

adults in the U.S. with nonbinary gender identities, most were not born intersex.⁸ However, some were. Dana Zzyym is intersex. IGRP constituent Violette is intersex. The other six people whose personal stories are recounted below are not intersex, but they are nonbinary.

II. The Stories of IGRP's Constituents⁹

Dana Zzyym's story is not unusual. The denial of IDs with accurate gender markers has similarly impacted IGRP's constituents. All seven people whose stories are told here would obtain a United States passport with a nonbinary "X" gender marker but for the Department's unlawful policy; if permitted by the Department, Violette also would update their¹⁰ gender marker on their Certificate of United States Citizen Born Abroad.

⁸ TRANSGENDER SURVEY, *supra* n.3, at 44 & Fig. 4.1. *See also* Intersex Soc'y of N. Am., HOW COMMON IS INTERSEX?, <http://www.isna.org/faq/frequency> (citing studies: "[A]bout 1 in 1500 to 1 in 2000" children are "born [with] noticeably atypical in terms of genitalia," "[b]ut a lot more people than that are born with subtler forms of sex anatomy variations, some of which won't show up until later in life.").

⁹ The personal stories cited and quoted in this section are on file with amicus IGRP.

¹⁰ Though not all nonbinary people do, IGRP's constituent storytellers all use singular "they/them/their" pronouns. Singular "they" pronouns have been used since the 14th century. *They*, OXFORD ENGLISH DICTIONARY (3rd ed. 2005).

A. Mel Van De Graaff

Mel Van De Graaff is a 27-year-old nonbinary person living in Salt Lake City, Utah who was assigned female at birth (AFAB). They describe their experience vividly:¹¹

I can remember as early as age 4 feeling like there was something wrong with me. Everyone was telling me that I was supposed to graduate high school, have children, and raise them as a happy family in the church. Whenever I tried to voice my objections, I would be completely overruled. [People would say] “That’s not how it’s done” or “God made you for this reason.”

Kids picked on me at school. The girls didn’t see me as a girl and the boys didn’t see me as a boy. I didn’t have anywhere I fit in, and that led to me getting bullied. A lot.

I sometimes wondered if I was a boy, because I knew I wasn’t a girl. But that didn’t fit either. It was like going from wearing a shirt that’s too big to wearing pants that are too big. Neither fit. But I kept wearing these ill-fitting clothes.

When I was 15, I tried to take my life because I felt like I was an abomination. Everywhere around me, I heard messages that I was wrong because I didn’t do what girls were supposed to do and I wasn’t born a boy and should

¹¹ Mel’s story also has been reported by the press. See Taylor Stevens, *Disrupting the Binary: Members of Westminster’s Gender Queer Community Look To Live a Life Without Gender*, THE FORUM, Apr. 26, 2018, <https://www.wcforummedia.com/disrupting-the-binary-members-of-westminsters-gender-queer-community-look-to-live-a-life-without-gender/>.

stop trying to get away from the gifts God gave me from birth.

I turned 18, graduated high school, and moved out to go to college. I met several trans people, and their narratives explained so much of what I went through as a child. Being born in the wrong body, being socialized as something you're not. But I didn't feel trans, because I knew I wasn't a boy. So, I still didn't have a way to explain what was happening to me.

A year after I graduated, I found the term "nonbinary" and it felt like for the first time in my life I found a shirt AND pants that fit me. Suddenly, I had the narrative to explain what had happened to me....

[L]ater, I started HRT [hormone replacement therapy] so my body would be closer to my identity.

A little while after I started HRT, I saw that Sara Kelly Keenan got the nation's first intersex birth certificate. That article was so inspiring to me, because it showed that I didn't have to legally be male or female. I vowed that I would do whatever it took to get legal documentation that reflected my gender identity.

Utah is a very red state. I had asked around, and no one had heard of nonbinary gender markers at all, let alone in this state. So many people said it couldn't be done. But I knew I had to try. Even if the marker wasn't granted, if I tried and did my best to get it changed, then I could still live with myself with the hope that one day the law would change.

[Later, a Utah judge] granted the marker change [for my driver's license]. I was in a daze for the rest of the day. It had taken several months to get there, and I was finally there.

But that wasn't the end. Because I was born in Nevada, I had to ... get my birth certificate updated [there]. It took

a couple months of back and forth with their office of vital records, but they gave me a gender X certificate with my correct name. It wasn't until September [2018] that I received a license with an X [gender marker] on it. Utah's DMV had to update their systems so that an X could be put in the gender field. Overall, the process took ten months. It felt like a long time, but I know that many people have gone through a longer process.

Even with proper state documents, as a young person looking for a new job Mel still faces issues because their federal ID still doesn't reflect their gender identity. They can't use their passport for travel or for verification of eligibility to work because it doesn't match their gender on any of their other records:

My documents are a mess right now. My social security was changed to M, my passport says F, and my birth certificate and driver's license are X. I'm scared that I'll get accused of fraud since my documents don't match. I haven't been able to plan vacations abroad because my passport doesn't reflect who I am.

B. Xin Farrish and Char Crawford

Xin Farrish and Charlotte Crawford are a married couple living in San Francisco, California. Both Xin and Char are nonbinary. Xin is 37 years old, AFAB, and manages a café. Char is 35, assigned male at birth (AMAB), and works as a butcher at a grocery store.

In 2017 Xin and Char were invited by the Unitarian Universalist Fellowship of San Miguel de Allende (UUFSMA) in Mexico to present on behalf of IGRP on the experiences of nonbinary people for International Day Against Homophobia

and Transphobia (IDAHOT). After arranging transportation, housing, and funding for the trip, the couple made plans to obtain passports. They had been watching Zzyym's case closely and were hoping the Department would change its policy, because Xin and Char are unwilling to commit perjury to obtain passports. The Department did not relent, and because the Department's rules prevent them from submitting truthful passport applications, Xin and Char were unable to make the trip. UUFSMA again extended invitations to the couple to present at IDAHOT in 2018 and 2019. They will not be able to fulfill the request because they cannot obtain accurate passports.

But the harm caused by the Department's policy doesn't stop there. In April 2019, Char writes:

My spouse Xin and I had intended to travel to Mexico this year to attend the wedding of my cousin.

The extended family of my cousin's fiancé are Mexican, and there were serious concerns about their ability to safely travel in the US due to our current political climate. So, it was an easy decision for my cousin to hold her wedding in Mexico to try to avoid those issues.

As a result of this, though, my spouse and I will be unable to attend this wedding. I won't be able to show up for my younger cousin. We grew up in a close-knit family. We shared birthdays and holidays, life milestones, and casual dinner get-togethers. Without an accurate passport, I won't be able to join my cousin to celebrate this incredibly important day of love and family.

My spouse and I currently have doctors' notes, signed court orders, birth certificates, and RealID California driver licenses which all accurately indicate our gender as "nonbinary" or "X". It is important that our passports correspond to these documents. It seems deeply unwise to try to cross international borders with mismatched documents.

Without an accurate passport, I won't be able to join my cousin [at their wedding in Mexico] to celebrate this incredibly important day of love and family.

C. C.P. Hoffman

C.P. "Charlie" Hoffman, is a 40-year-old, AMAB, nonbinary attorney and writer who lives in Silver Spring, Maryland. C.P. reports:

I am out as nonbinary at work, in my writing, with my friends, and with my family—in all aspects of my life except for legal documents like my passport that I am unable to change.

Being nonbinary is an important part of my life, a part that I am open and honest about to the world, and yet the State Department's policy bars me from claiming it when it comes time to actually travel the world.

C.P.'s family and coworkers recognize and are supportive of their nonbinary identity:

My eight year old daughter, [T.], calls me Charlie (since none of the gender-neutral terms for "parent" felt right for us) and lectures other people about the importance of not misgendering people and animals; my mom protested at the Indiana statehouse when the legislature considered a bill to bar gender-neutral markers on driver's licenses; my partner, Karen, a professor of environmental science, has started introducing herself with her pronouns as a

way of being inclusive of me and other nonbinary folks;
my co-workers come to me when unsure how to write
something in a gender-neutral way.

C.P. recently spoke before the Maryland General Assembly in support of state legislation to provide nonbinary persons like themselves accurate gender markers on their state ID or driver's license. The bills passed with veto-proof majorities.¹² C.P. plans to update their driver's license the day the "X" marker is available, and also is looking to have their Indiana birth certificate corrected.

As C.P explains:

While many people may take it for granted, we are asked for ID on a surprisingly-frequent basis—not just when we travel, but when we go out with friends, fill prescriptions, pick up packages, buy a bottle of wine, rent a car, enter many government or corporate offices, and, in many places, when we vote. Having ID that does not correspond to our gender identity puts nonbinary individuals such as myself at risk because we never know who will be looking at it or what assumptions about our gender they may have made before doing so.

For this reason, I have been actively involved in getting legislation passed in Maryland to allow nonbinary and other individuals to have an X gender marker...

C.P. also describes the daily impact of the Department's policy on them:

As someone who has traveled abroad extensively for work, education, and pleasure, having a passport that

¹² See *infra* n.34 & accompanying text.

recognizes me for the person I am is critically important...

While the situations in which we use our passports may be less frequent, the same safety considerations apply. Our passports are the first things we present when entering another country, and we are judged by how well we conform to the photographs and descriptions on them. It is not uncommon for transgender and nonbinary individuals to experience problems at the border because their appearance does not conform to preconceptions about what the gender listed on their passport should look like. But while binary transgender individuals can apply for a passport representative of their gender identity in order to minimize these situations, nonbinary individuals such as myself cannot. ...

I have had a passport since I was 17, but I haven't renewed my current passport since it expired last year, as I have struggled with the binary choice of genders with which I am currently presented, as well as serious concerns (especially as an attorney) about perjuring myself on the application if I stated either binary gender. Instead, I currently find myself without a passport, unable to share many of the important places in my life, such as Halifax, Nova Scotia, or Montreal, Quebec, with Karen, and she, likewise, has been unable to share places important to her with me.

Nonbinary individuals like myself want to be able to travel the world in safety and without having to lie about who we are. We merely ask this court to please help us do so.

D. A.C. Dumlaui

A.C. is 29 years-old, AFAB, transgender, nonbinary, and Asian-American.

A.C. graduated from Vassar, works as a program manager, and resides in

Brooklyn, New York. They recently were able to get the originally assigned “F” gender marker on their New York City birth certificate corrected to an “X” marker.

A.C. has these concerns:

I regularly experience scrutiny in the world: I was assigned female at birth and am regularly assumed to be a cisgender woman. At the same time, my gender expression and presentation are androgynous, leaning towards masculine. Because of my short haircut and the “men’s” clothing I wear, people visually mistake me as male sometimes as well. When it comes to getting my ID checked, I have a lot of anxiety. This is somewhat alleviated by the fact that my current picture on my passport is a recent one: with a short haircut and looks like me in person, but I always feel anxious if they’re going to say anything about my gender marker.

I wonder and worry about what will happen if I need to use my birth certificate for proof of any application for an ID or otherwise moving forward, because it now has an X gender marker. It is a lie for me to select the F or Female gender marker when applying for IDs or using my ID at any security checkpoint. It does not feel good that my documents are mismatched.

E. Violette Skye Boys

Jonny Violette Skye Boys was born in Ontario, Canada and resides in Salem, Oregon. Violette is a 43-year-old AMAB homemaker who, like Dana Zzyym, was born intersex and is neither male nor female.

Since July 2017, Violette’s Oregon driver’s license has correctly identified them by an “X” gender marker. They also received a court order of their nonbinary gender from the Marion County (Oregon) Court in January 2018. As a

United States citizen born abroad, Violette also has applied for a nonbinary gender marker on their Ontario birth certificate.¹³ In addition to needing an accurate gender marker on their passport, Violette needs the Department to update their gender marker to “X” on their form FS-545 Certificate of United States Citizen Born Abroad. Violette explains:

I was born intersex in 1976, while my parents were in Canada as missionaries... We moved to Cincinnati when I was six years old... As an intersex person, my sex chromosomes don't match up with what has been simplified in medical science as “normal”; my chromosomes are XXY. My legal gender congruently is nonbinary.

My body has traits that are on the biological sex spectrum... [but] I was assigned “male” at birth, and treated that way medically my whole life.

As a result, Violette suffered dramatically:

At the age of 30 doctors decided my testosterone levels were too low and put me on a decade long regimen of testosterone therapy. It raised my cholesterol, made my blood thick, my legs ache, and I developed varicose veins.

After fighting to have my estrogen levels checked, doctors discovered that my body was converting testosterone into estrogen at an extremely high level. My GP told me to go off testosterone because it was giving

¹³ Ontario has issued nonbinary birth certificates since May 2018. Ariel Jao, *Gender ‘X’: Ontario Issues its First ‘Nonbinary’ Birth Certificate*, NBC NEWS (May 7, 2018), <https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676>.

me more health problems than it was worth. It turns out that for my variation of intersex, artificial testosterone, once stopped, terminates our bodies' ability to create any sex hormones. After a year of perimenopause symptoms my doctor put me on Estradiol and my body returned to a healthy functioning level...

As Violette explains, having accurate options for ID is critical for daily living:

As governments around the world adopt X markers for birth certificates, federal ID's, passports, marriage and death certificates, the US Department of State is currently lagging, while other advanced nations around the world are adopting policies and documentation to recognize "other genders" as well as intersex [folks] via an X marker. All major US airlines have agreed to offer new gender options when purchasing tickets because of the number of US states that are updating their ID's to adopt X markers, which meet the Real ID Act's stipulations.

Having documents that allow me to not be trapped with only two binary options based on antiquated science would allow me, as an intersex person who is not male or female, to live a fuller life. Having a passport that matches my legal gender and state ID would make it so that my wife and I could travel outside of the US. At present if I attempt to get a passport I would have to lie and check "female" or "male", which I refuse to do. I want to travel to Europe and South Africa to visit friends, but I can't, because my government is stuck in an old way of thinking about biological sex and gender.

F. Charlie Arrowood

Charlie is a Long Island native, a current resident of Roslyn Heights, New York, and a graduate of Tulane University and New York Law School. Charlie

was AFAB and has since obtained an “X” designation on their New York City birth certificate:

I was born in New York City in 1987 and assigned female at birth...

I knew there were things about my body and identity that were not female, but I also knew I definitely did not feel like a man, nor did I have any interest in “being” one, whatever that meant. I knew there was a disconnect between what I saw in my mind’s eye and what others saw.

Then I met a nonbinary person and realized just because I was not female did not mean I had to be male. While society is extremely binary, as evidenced by this very case, I always felt like neither “girl” nor “boy” clicked. I simply did not have the vocabulary or resources to name it or do anything about it...until I did.

Recognizing the difficulties they faced upon entering the legal profession were not unique to them, Charlie shifted gears and “began working at a nonprofit that helps transgender people change their documents and obtain health insurance coverage for their transition-related care.” As Director of Name & Gender Recognition with Transcend Legal, Charlie assists transgender youth and adults with legal name and gender changes.

Charlie has undergone surgery and hormone therapy, as many other nonbinary people have done, to more closely conform their body to their nonbinary identity, but still has a nonbinary gender identity:

My voice is now deeper, I have facial hair, and people think because I do not “look female,” that must mean I am male. But I was never transitioning “towards male,” just away from female...

This has come with its own set of problems, particularly when Charlie uses their previously issued passport, which has an “F” marker. As Charlie recounts:

Once when traveling, the TSA agent put “male” into the body scanner based on my appearance, and my chest pinged as an anomaly. A male TSA agent started patting me down, [then] shouted across the security screening area for a woman to come pat me down because I was female. I was brought into a separate screening room while security personnel went back and forth about what to do. The whole affair lasted maybe 15 minutes, but ten years later, it still plays like a day-long saga in my mind. It was traumatizing and the specter of it happening again loomed large every time I had to go anywhere. I registered for TSA Pre-Check so I could avoid body scanners in airports. But that does not help me when I am traveling internationally, which I currently cannot do if I want to avoid potentially complicated security encounters, especially when traveling with my wife and two small children.

For now, Charlie, like many others, remains trapped:

When a person applies for an identity document, they are required to attest that the information they are submitting is accurate. Not allowing people to apply for anything but M or F gives them no choice but to perjure themselves on official applications. Respondent can say what they want about how “legitimate” my nonbinary identity is, but the fact is I have a nonbinary body... If my passport says M or F, that is going to result in complications and a potential risk to my safety...

[H]aving documents that do not reflect who I am causes me distress every day. In my job assisting people with document changes, approximately 1/3 of my clients are nonbinary. The first thing they ask me is whether an X gender designation is available and on what documents. They share the same stories about their experiences, the same distress about having incorrect documentation, and all I can say is, “I sympathize.”

As a result of irrational policies like that of the Department, Charlie says:

My documents are a mess, thanks to bureaucracy. My driver’s license says male, my birth certificate says X, my passport and Social Security say female, and none of it matters...except to me.

III. The Department’s Policy Is Irrational

Under the Department’s male-or-female, binary-only gender marker policy, passport applicants with nonbinary gender identities must lie on their applications under penalty of perjury.¹⁴ The Department’s claim that this policy ensures passport integrity and data reliability for other agencies is wrong and illogical.

First, as discussed below in more detail, jurisdictions across the country already issue or soon will obtain nonbinary driver’s licenses, birth certificates, and other government-issued IDs.

¹⁴ See U.S. DEP’T OF STATE, APPLICATION FOR A U.S. PASSPORT (DS-11, OMB Control No. 1405-0004) (June 2016), *available at* <https://eforms.state.gov/Forms/ds11.pdf> (requiring selection of “M” or “F” sex, and a declaration that “under penalty of perjury ... the statements made on the application are true and correct [and] I have not knowingly and willfully made false statements ... in support of this application”).

Second, a third gender marker option (“X”) is consistent with the International Civil Aviation Organization’s standards and with the practice of the Department of Homeland Security (DHS) for air travel. Thus, commercial airlines also already use “X” gender markers when collecting Secure Flight data.¹⁵ This is the *same data* transmitted to and used by the United States Transportation Security Administration (TSA) (which is part of DHS) to determine which individuals pose security threats.¹⁶ TSA *encourages* this practice.¹⁷

Third, the Department already does not require a binary transgender person to obtain a gender marker for their passport that matches their other identity

¹⁵ See, e.g., Morgan Gstalter, *United Airlines Becomes First US Airline to Add Non-Binary Gender Booking Options*, THE HILL, March 23, 2019, <https://thehill.com/policy/transportation/aviation/435413-united-airlines-to-be-first-airline-offering-nonbinary-gender>.

¹⁶ See Security Screening, TRANSPORTATION SECURITY ADMINISTRATION, https://www.tsa.gov/travel/security-screening#quickset-security_screening_quicktabs_5 (“[T]he Secure Flight program collects ... gender ... to conduct effective matching” to “trusted traveler lists and watchlists.”); Secure Flight Q&A II, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/blog/2009/08/12/secure-flight-qa-ii> (hereinafter “Secure Flight”) (“information will be sent to Secure Flight to perform watch list matching”).

¹⁷ See, e.g., Transgender Passengers, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/transgender-passengers> (“When making a reservation, you are encouraged to use the same name, gender and birth date as indicated on your government-issued ID.”); Secure Flight, *supra* n.16, (“The gender provided when making the reservation should match the gender indicated on the passenger’s government-issued identification.”).

documents,¹⁸ showing that having passports be consistent with other agencies' gender records actually is not important to the Department.

As noted, many jurisdictions already have, or soon will, issue IDs with a non-binary gender designation. Arkansas,¹⁹ California,²⁰ Colorado,²¹ Indiana,²²

¹⁸ The Department requires only a medical certification based upon an individual physician's opinion that "[y]ou have had appropriate clinical treatment for transition from male to female or female or male." Change of Sex Marker, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/change-of-sex-marker.html>.

¹⁹ Kate Sosin & Nico Lang, *Arkansas—Yes, Arkansas—Quietly Begins Issuing Gender-Neutral IDs to Non-Binary People*, INTO, Oct. 16, 2018, <https://www.intomore.com/impact/arkansas-yes-arkansas-quietly-begins-issuing-gender-neutral-ids-to-non-binary-people> (“[T]he Arkansas Department of Finance and Administration ... confirmed ... that policy has been on the books ... [since] December 2010.”).

²⁰ CAL. HEALTH & SAFETY CODE § 103425, *et seq.* (2018); CAL. VEH. CODE § 12800(a)(2) (2018).

²¹ COLO. CODE REGS. § 204-32 (2018 & 2019).

²² Kelly Hwang, *Indiana Becomes the 6th State To Offer a New Gender Option on Driver's Licenses*, INDY STAR, Mar. 12, 2019, updated Mar. 20, 2019, <https://www.indystar.com/story/news/2019/03/12/indiana-drivers-licenses-now-have-x-gender-option/3138447002/>.

Maine,²³ Minnesota,²⁴ New Jersey,²⁵ New York City,²⁶ Oregon,²⁷ Utah,²⁸ Washington,²⁹ and Washington, D.C.³⁰ all provide for gender markers other than

²³ Kelley Bouchard, *Maine Begins Putting ‘Non-Binary’ on Driver’s Licenses for Those not ‘F’ or ‘M’*, PORTLAND PRESS HERALD, June 11, 2018, <https://www.pressherald.com/2018/06/11/maine-bmv-will-offer-non-binary-gender-licenses/>.

²⁴ *Third Gender Option Important for People Who Identify as “Non-Binary”*, ABC 6 NEWS, Oct. 8, 2018, <https://www.kaaltv.com/news/rochester-minnesota-drivers-license-gender-option-non-binary-x-transgender-latest/5100805/>.

²⁵ N.J. REV. STAT. § 26:8-40.12 (2018). *See also* N.J. DEP’T OF HEALTH, OFFICE OF VITAL STATISTICS & REGISTRY, REQUEST FORM AND ATTESTATION (REG-L2) TO AMEND SEX DESIGNATION TO REFLECT GENDER IDENTITY ON A BIRTH CERTIFICATE—ADULT (Feb. 2019), *available at* https://www.nj.gov/health/forms/reg-l2_1.pdf.

²⁶ City of New York, *Health Department Announces New Law Offering Third Gender Category on Birth Certificates Takes Effect Tuesday*, Dec. 31, 2018, <https://www1.nyc.gov/site/doh/about/press/pr2018/pr104-18.page>.

²⁷ OR. DEP’T OF TRANS., APPLICATION FOR DRIVING PRIVILEGES OR ID CARD (735-175) (May 2018), *available at* <https://www.oregon.gov/ODOT/Forms/DMV/173fill.pdf>; OR. HEALTH AUTH., APPLICATION TO CHANGE THE NAME AND/OR SEX ON A RECORD OF LIVE BIRTH TO SUPPORT GENDER IDENTITY (OHA 2673) (Jan. 2018), *available at* <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>.

²⁸ Taylor Stevens, *Utahn Becomes One of the First in the State to Receive Nonbinary ‘X’ Markers on Birth Certificate and Driver License*, SALT LAKE TRIB., Oct. 8, 2018, <https://www.sltrib.com/news/politics/2018/10/08/male-female-x-utahn/>.

²⁹ WASH. ADMIN. CODE § 246-490-075 (2018).

³⁰ Office of the Mayor, District of Columbia, *Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards*, June 23, 2017, <https://mayor.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and>.

“male” or “female” on IDs, driver’s licenses, or birth certificates. Today, the more than 68,500 nonbinary people residing in these jurisdictions can get state-issued IDs with accurate gender markers.³¹ Nevada and Vermont also are poised to add a nonbinary option for IDs and licenses shortly,³² and Nevada state already provided one of IGRP’s constituent story-tellers a nonbinary birth certificate. Most of these documents—the same types used for identity and citizenship purposes when applying for a passport³³—use an “X” marker to designate intersex or nonbinary gender.

³¹ FLORES, *supra* n.3, at 3–4 Tbl.1 (estimated 195,900 transgender individuals in previously listed states and D.C., not including New York City; New York State adds 78,600 more people); TRANSGENDER SURVEY, *supra* n.3, at 45 & Fig. 4.2 (35% of adult transgender population identifies as nonbinary).

³² Camalot Todd, *DMV Makes It Easier To Change Gender on Nevada Driver’s Licenses, IDs*, LAS VEGAS SUN, June 7, 2018, <https://lasvegassun.com/news/2018/jun/07/dmv-makes-it-easier-to-change-gender-on-drivers-li/>; Vt. Dep’t of Motor Vehicles, *New License/ID Will Allow Third Gender Option Starting This Summer*, Mar. 13, 2019, <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer>.

³³ *See* Photo Identification, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/passports/requirements/identification.html>; Children Under 16, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/under-16.html>.

Additionally, Maryland recently passed a bill with a veto-proof majority to provide a third gender marker on driver's licenses and state IDs.³⁴ Bills to provide nonbinary designations on state IDs, driver's licenses, and birth certificates are pending in Arizona,³⁵ Connecticut,³⁶ Illinois,³⁷ Massachusetts,³⁸ New Hampshire,³⁹ and New York.⁴⁰ In other states, like Rhode Island, advocates are working with agencies to add nonbinary gender options to identity documents without the need for legislation.⁴¹

As long as nonbinary individuals may obtain passports with only a male or female designation, those passports will not accurately reflect their identity. The Department's current policy does not enhance security or the integrity and reliability of identity documents; rather, it achieves the opposite result. This

³⁴ SB 196, 2019 Leg., 439th Sess. (Md.); HB 421, 2019 Leg., 439th Sess. (Md.).

³⁵ HB 2289, 54th Leg., 1st Reg. Sess. (Ariz. 2019); SB 1454, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

³⁶ Substitute for HB 5505, 2019 Leg., Jan. Sess. (Conn.).

³⁷ HB 3534, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

³⁸ S. 2213, 191st Leg., Reg. Sess. (Mass. 2019); H. 3664, 191st Leg., Reg. Sess. (Mass. 2019).

³⁹ HB 446, Reg. Sess. (N.H. 2019); HB 669, Reg. Sess. (N.H. 2019).

⁴⁰ S. 56-A, Reg. Sess. (N.Y. 2019).

⁴¹ Samantha Allen, *How the Non-Binary Revolution Hit the West Coast*, DAILY BEAST, Feb. 8, 2018, <https://www.thedailybeast.com/how-the-non-binary-revolution-hit-the-west-coast>.

problem will continue to worsen as more Americans obtain other government-issued identity documents with “X” gender markers. The Department should be required to allow nonbinary people to obtain passports with an “X” gender marker.

CONCLUSION

Through its work and membership, IGRP knows all too well that Dana Zzyym isn’t the only one impacted by the Department’s arbitrary policy. Gender identity is neurologically hardwired,⁴² and nonbinary people can’t just pick one as the Department suggests.⁴³ The availability of nonbinary gender markers on state IDs and birth certificates has benefitted thousands of nonbinary people *and has harmed no one*.

IGRP respectfully requests that this Court uphold the ruling of the lower court that Department’s arbitrary and capricious denial of Dana Zzyym’s passport application for requesting an accurate gender marker violated the Administrative Procedure Act, so as to ensure that the Department may no longer apply its discriminatory binary-gender-only policy to prevent intersex and other gender nonbinary persons from applying for or receiving a passport.

⁴² Vanderhorst, *supra* n.1.

⁴³ [App’x 67](#) (“If you wish to receive a passport listing you as female ... please return a signed statement indicating that to our office. If you wish to receive a passport listing you as male, please refer to the second page of this letter.”).

Dated: May 15, 2019.

Respectfully submitted,

s/ Benjamin N. Simler

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, a copy of this **BRIEF OF AMICUS CURIAE INTERSEX & GENDERQUEER RECOGNITION PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE** was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Benjamin N. Simler

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Fed. R. App. P. 29(a)(4)(G), 29(a)(5), and 32(g)(1), undersigned counsel states that this brief complies with the applicable type-volume limitations, because this brief, exclusive of the items listed in Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), contains 6,100 words, and was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

s/ Benjamin N. Simler

CERTIFICATE OF COMPLIANCE WITH ECF USER MANUAL

All required privacy redactions have been made to this document. Said document has been scanned for viruses with Windows Defender Version 1.293.1657.0 which runs real time virus scans and is updated every two hours, and according to this program is free of viruses. Any hard copies of this document to be submitted to the Court are exact copies of the version submitted electronically,

with the exception that the hard copies have a cover sheet printed on green paper as required by Fed. R. App. P. 29(d).

s/ Benjamin N. Simler

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.....
(Original Signature of Member)

116TH CONGRESS
1ST SESSION

H. R. _____

To require the Secretary of State to require the inclusion of a gender neutral designation in a passport, passport card, or Consular Report of Birth Abroad, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. KHANNA introduced the following bill; which was referred to the
Committee on _____

A BILL

To require the Secretary of State to require the inclusion of a gender neutral designation in a passport, passport card, or Consular Report of Birth Abroad, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. INCLUSION OF GENDER NEUTRAL DESIGNA-**
4 **TION OPTION IN PASSPORTS.**

5 (a) IN GENERAL.—Notwithstanding any other provi-
6 sion of law, the Secretary of State shall, not later than
7 one year after the date of the enactment of this section,

1 permit an applicant for a passport, passport card, or Con-
2 sular Report of Birth Abroad to record gender in an appli-
3 cation for such passport, passport card, or Consular Re-
4 port of Birth Abroad with a sex data element authorized
5 by the International Civil Aviation Organization (ICAO)
6 specified in ICAO Doc 9303, Machine Readable Travel
7 Documents.

8 (b) GENDER DESIGNATION.—

9 (1) IN GENERAL.—The Secretary of State, in
10 accordance with subsection (a), shall permit an ap-
11 plicant for a passport, passport card, or Consular
12 Report of Birth Abroad to use an “unspecified” (X)
13 gender designation. Such designation shall be made
14 available without restriction to all applicants for a
15 passport, passport card, or Consular Report of Birth
16 Abroad.

17 (2) PROHIBITIONS.—The Secretary of State
18 may not—

19 (A) deny the issuance of a passport, pass-
20 port card, or Consular Report of Birth Abroad
21 to an otherwise qualified applicant based solely
22 on a request by such applicant for an “unspec-
23 ified” (X) gender designation; or

24 (B) require such an applicant to select the
25 “unspecified” (X) gender designation on an ap-

1 plication for passport, passport card, or Con-
2 sular Report of Birth Abroad, including, with-
3 out limitation, an applicant who has one or
4 more identity documents bearing a sex or gen-
5 der designation other than male (M) or female
6 (F).