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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-CV-02362-RBJ

DANA ALIX ZZYIM,

Plaintiff,

vs.

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

Defendants.

REPORTER'S TRANSCRIPT
Oral Argument

Proceedings before the HONORABLE R. BROOKE JACKSON,
Judge, United States District Court for the District of
Colorado, commencing on the 29th day of May, 2018, in
Courtroom A902, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff:

PAUL D. CASTILLO, Lambda Legal Defense & Education Fund, 3500
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For the Defendants:

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Proceedings reported by mechanical stenography;
transcription produced via computer.

1 APPEARANCES CONTINUED:

2 For the Defendants:

3 ROBERT C. SATROM and MATTHEW S. HACKELL, U.S. Department of
4 State, 600 19th St., NW, Washington, DC 20522

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* * * * *

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(The proceedings commenced at 9:01 a.m.)

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THE COURT: 15CV2362, Dana Alix Zzyym versus Michael

8

Pompeo.

9

Appearances.

10

MR. CASTILLO: Paul Castillo for plaintiff Dana

11

Zzyym.

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MS. PROUTY: Ann Prouty for plaintiff Dana Zzyym.

13

MR. LYNCH: Brian Lynch for plaintiff Dana Zzyym.

14

THE COURT: Thank you.

15

MR. CASTILLO: Your Honor, I also want to note that

16

our client is also in the courtroom.

17

THE COURT: All right. Thank you.

18

MR. PARKER: Your Honor, Ryan Parker for the

19

Department of Justice here representing the defendants.

20

THE COURT: All right.

21

MR. HACKELL: Matthew Hackell from the U.S.

22

Department of State.

23

MR. SATROM: Robert Satrom from the Department of

24

State.

25

THE COURT: Thank you, gentlemen and lady.

1 Plaintiff, proceed.

2 MR. CASTILLO: Good morning, Your Honor. May it
3 please the Court. Our client, Dana Zzyym, a U.S. citizen who
4 is neither male nor female, returns to this Court seeking
5 relief after the state department conducted its
6 judicially-mandated review of its binary-only gender policy,
7 which it relied upon to deny Dana's passport application for
8 the second time. In November 2016, this Court remanded the
9 case --

10 THE COURT: Are you reading this off a script?

11 MR. CASTILLO: I'm sorry?

12 THE COURT: Are you reading your argument off a
13 script?

14 MR. CASTILLO: I do have notations on the script,
15 yes.

16 THE COURT: Well, don't just read it. Talk to me.

17 MR. CASTILLO: Yes, Your Honor. Once this Court has
18 already remanded this action before the state department to
19 reconsider its decisions, and in its reconsideration, it,
20 again, reaffirmed its binary-only gender policy, which
21 violates both the equal protection and the due process
22 components of the Fifth Amendment to the United States
23 Constitution. In its review, it still provided five
24 justifications, many of which were before this Court when we
25 were here last time, and provided additional justifications

1 which do not meet even the lowest level scrutiny.

2 Looking at the justifications that they provided in
3 the administrative record at pages 82 to 86, the state
4 department articulated five specific reasons that they -- that
5 they say meets at least rational basis review. However, if
6 you look at the -- and examine the substance of those
7 justifications, they do not articulate a satisfactory
8 explanation for the actions, including failing to establish a
9 rational connection between the facts found and the choices
10 made.

11 THE COURT: Sounds like you're on their turf now.
12 You're arguing against their justifications on a rational
13 basis basis, but that's not the way you briefed it.

14 MR. CASTILLO: No, Your Honor. What we're saying is
15 it doesn't establish a rational connection which is part of
16 the arbitrary and capricious standard, but with respect to the
17 constitutional review, the claims that we have put forth
18 before this Court, first, that it's discrimination based on a
19 gender classification requires an exceedingly persuasive
20 justification. Moreover, the policy as applied to our client,
21 infringes on the fundamental rights to liberty and the
22 fundamental rights to international travel.

23 The justifications proffered in the justifications
24 memo that the government set forth simply do not meet any
25 level of scrutiny, although the government bears the burden to

1 establish that it meets at least high scrutiny under
2 discrimination based on sex or strict scrutiny because of
3 infringement of a fundamental right.

4 Taking the justifications that the government sets
5 forth in turn, the government, again, sets forth that the
6 justification for the gender change policy is that it requires
7 an accurate and verifiable identity document. However,
8 there's no rational link by requiring Dana, our client, who is
9 neither male nor female, to provide a materially false
10 statement about their gender in order to secure a passport
11 that will enable them to obtain international travel.

12 Since we've been --

13 THE COURT: Why was she willing to do that for a
14 driver's license then?

15 MR. CASTILLO: I'm sorry?

16 THE COURT: Why was Dana willing to do that for her
17 driver's license?

18 MR. CASTILLO: As the Court pointed out at the last
19 hearing, simply because a state may be discriminating with
20 regard to an underlying identity document does not make it any
21 more justifiable under the Constitution. And, in fact,
22 although not in the record, Dana did dispute the fact that
23 there was a gender marker event.

24 But the gender policy with regard to changing a
25 gender marker for transgender people, the Foreign Affairs

1 Manual specifically states that state -- underlying state
2 identity documents may vary with respect to the underlying
3 gender marker, in which case, the agency submits -- accepts
4 certification from physicians attesting to the fact of the
5 person's gender.

6 Here, in the record --

7 THE COURT: What do you mean states may vary?

8 MR. CASTILLO: The fact that some states do enable
9 individuals to change the gender marker with regard to birth
10 certificates and driver's licenses and other states don't or
11 have an incredibly high bar to be able to change that gender
12 marker.

13 THE COURT: What do you mean by gender marker?

14 MR. CASTILLO: The gender marker here with regard to
15 the field that is in the identity document, typically M for
16 male, F for female, and in some cases, and recently noted by
17 the Government, Oregon and California and the District of
18 Columbia, as well as the state of Washington, have since the
19 last hearing enacted procedures to be able to provide an X
20 gender marker on the driver's license.

21 THE COURT: So the form has -- what does the form
22 say?

23 MR. CASTILLO: The form states, for example, in
24 Oregon the form does have an option for an X, so it's M, F,
25 and X as options. X being unspecified in the state of Oregon.

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1 And any person may -- without any sort of physician statement
2 in the state of Oregon may submit a request to change their
3 gender marker to the unspecified X marker.

4 THE COURT: And then can they get a passport?

5 MR. CASTILLO: According to the state department --
6 you might ask them -- but they've indicated that there's no
7 way for a person to obtain a gender marker with anything other
8 than an M or F, and so --

9 THE COURT: Even though the official form in Oregon
10 says otherwise?

11 MR. CASTILLO: That's right. That's their
12 contention, Your Honor.

13 THE COURT: And in the brief it said Oregon and
14 District of Columbia. You've added two more now?

15 MR. CASTILLO: That is correct. The state of
16 California and the state of Washington now allow those gender
17 markers, and many other states are considering it. The state
18 of New York -- in New York City the birth certificate -- has
19 issued a birth certificate, in fact, with a designation of
20 intersex in the sex field. So we're now having driver's
21 licenses, birth certificates -- and just to be clear --

22 THE COURT: Was it just driver's licenses in Oregon,
23 for example, or is it any document?

24 MR. CASTILLO: Identity documents, specifically
25 driver's licenses and birth certificates. But I will point

1 out for the state of California, although they've passed the
2 law, they've enabled people to change their gender marker on
3 their driver's license and state IDs, the driver's license
4 provision goes into effect in January, so they've taken some
5 time.

6 In addition to the states jurisdictions that have
7 added, other countries as well, including our neighbor to the
8 north of Canada have also implemented, just as -- I think it's
9 now at least ten other countries who have implemented the X
10 gender field since the X, as unspecified, conforms to the
11 International Civil Aviation Organization, the United Nations
12 agency that prescribes the fields for travel documents.

13 So with respect to the state department's
14 justification, they were requiring our client to lie about who
15 they are, but more importantly, the so-called lack of medical
16 consensus is a red herring here, because I will first point
17 out that the designation of X is not a new gender. It does
18 not require the state to determine, you know, whether
19 physicians, you know, agree or disagree with the person's
20 gender. But rather, it's a gender-neutral option that gives
21 people like Dana and other people who have genders other than
22 M or F an accurate identity marker on their passport they can
23 use for international travel.

24 THE COURT: Why is that important in this case?
25 She's got two doctors from the VA.

1 MR. CASTILLO: That's right -- that's right, Your
2 Honor, and that brings up a second point. With respect to the
3 underlying documents, with respect to the physician
4 statements, they attest that Dana is neither female or male,
5 that, you know, Dana is intersex. And yet the state
6 department says, you know, that they are not medical experts.
7 That in cases, for example, for transgender Americans they
8 defer to physician statements. And yet, they -- in the
9 Foreign Affairs Manual they say we defer to the World
10 Professional Health Organization -- Association of Transgender
11 Health, which includes the medical standards of care for not
12 only transgender people, but people who are gender
13 nonconforming, such as our client, whether that be intersex or
14 who have a nonbinary identity.

15 So the very entity that the state department defers
16 to with respect to expertise in this field with respect to
17 transgender people, because of the fact that the WPATH
18 standards of care are supported by the American Medical Health
19 Association, they then ignore that same entity with respect to
20 our client, who is gender nonconforming. It makes no sense.
21 It is irrational.

22 THE COURT: So, Mr. Castillo, there is male, there is
23 female, transgender, intersex. Is that it? Does that cover
24 everything?

25 MR. CASTILLO: Well, I can't -- the people may

1 identify as other, having other gender identities.

2 THE COURT: What other? It's not a frivolous
3 question. The state department might wonder is there no end
4 to this, and I'm asking is there an end to it? Are there four
5 different types --

6 MR. CASTILLO: Well --

7 THE COURT: -- of identification?

8 MR. CASTILLO: And that's a good question, Your
9 Honor. And so just so there's a foundation here in the
10 record, with respect to transgender individuals, transgender
11 individuals is where their gender identity --

12 THE COURT: Is male or female.

13 MR. CASTILLO: Or it could be nonbinary as well for
14 transgender individuals. It's different than the sex that was
15 assigned to them at birth. And so as a result, they
16 experience, in many cases, gender dysphoria to which they seek
17 appropriate medical intervention and, you know, legal
18 documentation changes to alleviate the distress with regard to
19 the difference.

20 THE COURT: What gender was assigned to Dana at her
21 birth? Or his birth?

22 MR. CASTILLO: At birth the original birth
23 certificate, the sex field was left blank. At the age of
24 approximately five years old, the parents and the doctors
25 imposed irreversible unnecessary surgeries to make Dana

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1 conform and raise Dana as male, amended -- added the M
2 document -- gender marker to Dana's passport, and then it
3 wasn't until later that the -- Dana amended it again to -- it
4 currently displays a field of unknown. But at birth, it was
5 left blank, Your Honor.

6 THE COURT: Well, then why doesn't Dana fit within
7 transgender?

8 MR. CASTILLO: Well, Dana -- with regard to the
9 universal, you know, definition of transgender, depending on
10 the definition, it has been seen as an umbrella to include
11 intersex people. But Dana's gender identity as a person who
12 is neither male or female is consistent with the fact that
13 there's no gender marker at birth, and so where transgender
14 people is different, you know, than the sex assigned to birth.
15 Dana was not assigned a sex at birth, so -- you know, in
16 viewing it in terms of transgender individuals and differences
17 between the original birth certificate, there was nothing in
18 the birth certificate field.

19 THE COURT: The state department does accommodate
20 transgender people.

21 MR. CASTILLO: They do, Your Honor. They accommodate
22 their gender identity solely with a physician's statement.

23 THE COURT: But does the transgender person have to
24 pick M or F?

25 MR. CASTILLO: I believe the answer is yes as well,

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1 although many transgender people, like my client, do also have
2 nonbinary identities as well.

3 THE COURT: So the transgender person is born male,
4 let's say, and then identifies as female. May or may not have
5 had any surgery.

6 MR. CASTILLO: That's right, Your Honor. And it's
7 not required by the state department.

8 THE COURT: So the birth certificate said male, but
9 the person identifies as female, and applies for a passport,
10 and checks female, but supplies a birth certificate that says
11 male, but that's okay with the state department.

12 MR. CASTILLO: As long as they meet all the rest of
13 the criteria for securing a passport, yes, that's okay for the
14 state department.

15 THE COURT: Well, all the rest of the criteria are
16 not at issue in this case. Dana meets all those other
17 criteria.

18 MR. CASTILLO: That's correct, including the
19 submission of the physician statement.

20 THE COURT: So a person exactly like Dana, except, in
21 the hypothetical, born male, checks female, gets a passport.
22 May still have male genitalia, but gets a passport as female,
23 and that's fine with the state department.

24 MR. CASTILLO: That is fine for the state department.

25 THE COURT: So Dana's problem is that she's not

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1 willing to check either box, and, therefore, it's a dead end
2 for her.

3 MR. CASTILLO: They have a nonbinary gender identity,
4 yes, Your Honor. And the state department, in fact, does
5 concede that there are people who are -- who have nonbinary
6 gender identities, who identify as male or female, yet though
7 that class of people, just like Dana -- even though they were
8 to provide physician's statements, you know, attesting to the
9 fact -- just as transgender people do to their -- to the
10 gender identity, they are not able to secure a marker. But,
11 again --

12 THE COURT: But you say the state department
13 recognizes that there are those people.

14 MR. CASTILLO: That they do recognize there are those
15 people.

16 THE COURT: They're not denying the validity of being
17 intersex.

18 MR. CASTILLO: That is -- that is correct, or having
19 a nonbinary gender identity.

20 THE COURT: But they still won't give them a birth
21 certificate -- or a passport.

22 MR. CASTILLO: That's right, Your Honor. They -- and
23 let me clarify, Your Honor. They will only give them a
24 passport if the gender marker is male or female.

25 THE COURT: Right. And we've had this discussion

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1 before. If Dana would just check one of those two boxes, this
2 dispute wouldn't exist, but because she's not willing to check
3 a box -- and the reason is that she says it would be false.

4 MR. CASTILLO: It is.

5 THE COURT: That's why we're here.

6 MR. CASTILLO: That is correct, Your Honor.

7 THE COURT: I mean, she made the decision that
8 driving a car in Colorado was a big enough deal that she would
9 check the box, but the passport is different.

10 MR. CASTILLO: No, Your Honor. Dana still contests
11 and would, you know, perhaps at some point in the future
12 challenge that fact. The fact that we started with a federal
13 -- the fact that the state is discriminating against our
14 client does not mean that it then becomes okay for the federal
15 government to discriminate.

16 THE COURT: Right. I don't disagree with you. But
17 the fact remains that for whatever reason she checked the box
18 in that instance.

19 MR. CASTILLO: And the particular instance, again,
20 under protest, and, again, although it's not on the record,
21 had secured and went through a process individually without
22 representation of counsel to attempt to get them to have a
23 gender marker that is consistent with her gender identity, and
24 that is what we're seeking here today.

25 THE COURT: So she's not willing to check the box

1 under protest.

2 MR. CASTILLO: Well, it would be inconsistent with
3 who they are. It's not a matter of willingness. It's a
4 matter of being -- you know, the state government not
5 representing who they are as a person, as an American citizen,
6 and the fact that -- it would be analogous to a fact of the
7 state department requiring some American to bear a gender
8 marker that's not them. For me, I have a passport with a male
9 gender marker. It would be like the Government says, no, you
10 can't have a passport unless you bear -- even though my gender
11 identity is male -- and bear a female gender marker on your
12 passport. It's inconsistent with their core, with their inner
13 sense of who they are.

14 THE COURT: And if sometime this afternoon your inner
15 core told you you'd rather be a female, you could get your
16 passport changed to that under their policy.

17 MR. CASTILLO: Well, under the WPATH standards of
18 care -- again, that prescribes the standard -- medical
19 standards of care for transgender individuals -- it's not
20 something that could be changed. It's insistent,
21 inconsistent, persistent expression of a person's inner core,
22 and with -- the standards of care do allow for the individual
23 to express themselves in facets of life and social behavior
24 and in the legal documents in order to alleviate the distress,
25 because of this insistent, persistent, and consistent

1 expression of their gender identity.

2 So with respect, Your Honor, it's not something that
3 somebody decides from one day to the next with regard to --
4 without being seen in many cases by a doctor who confirms
5 that.

6 THE COURT: Right. You said that earlier, and I
7 should have added that. If you change your mind this
8 afternoon and went to a doctor and convinced a doctor that you
9 really identified as female, you could do that, and you could
10 get a new passport.

11 MR. CASTILLO: If, in fact, the physician attests
12 that a person's gender identity must -- is supportive of who
13 they are as a person, because they -- you know, they exhibit
14 some of the same distress as a result of, you know, bearing,
15 for example, legal documents in a situation that's different
16 from who they are, or in social situations, you know, not
17 respecting the person's name or pronouns. Those sorts of
18 things cause significant distress to people who are
19 transgender, and as a result, a medical physician can treat
20 that. And one of the treatment protocols is to provide the
21 basis for individuals to be able to change identity documents
22 that is consistent with who they are.

23 The case that we submitted by supplement, the Arroyo
24 case, was a recent decision by the District Court of Puerto
25 Rico that involved transgender people's attempt to change the

1 gender marker on the birth certificate. Puerto Rico was one
2 of the few remaining states -- I think there's three left --
3 that bar individuals from changing the birth certificate. And
4 the district court ruled that it was against fundamental
5 liberty, due process, both informational privacy and
6 decisional privacy, to bar transgender individuals from not
7 only updating the birth certificate consistent with their
8 gender identity, but also barring them from having any sort of
9 footnote or evidence that it had changed from a prior gender
10 identity, because of the fact that it would be consistent with
11 an individual's lived experience, and it causes them great
12 harm and distress as a result of the government prohibiting
13 them.

14 In the same way, again, the Court -- although
15 physicians in this record provided the documentation with
16 regard to U.S. Department of Veteran Affairs physicians
17 stating under penalty of perjury that Dana is intersex,
18 identifies as intersex, again, with respect to a choice of a
19 gender marker, the International Aviation -- the International
20 Civil Aviation Organization provides a gender-neutral option.
21 And so it doesn't require the state department to make the
22 determination whether or not Dana is intersex or an individual
23 who is nonbinary.

24 It's just that we're not going to display it. It's
25 unspecified. And many countries around the world have done

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1 that, as we talked about before. And it's just the
2 Government's insistence that it is not going to defer to the
3 medical professionals that it itself defers to with respect to
4 transgender people, but accept people who are gender
5 nonconforming, we're not going to defer to the WPATH standards
6 of care.

7 All of these decisions with regard to the
8 justifications don't even meet rational basis scrutiny, but
9 with respect --

10 THE COURT: Would they have to modify the form, the
11 passport form?

12 MR. CASTILLO: They may modify the form.

13 THE COURT: Would they have to modify the form?

14 MR. CASTILLO: Correct. To allow, for example -- and
15 I keep bringing up X not to say that that's their only choice,
16 but because of the fact that it is an internationally-accepted
17 gender marker by the international organization that includes
18 gender markers for passports. That is an easy option for them
19 and does not require for them to conduct any medical
20 evaluation whatsoever. In fact, Canada --

21 THE COURT: You're not answering my question. The
22 form says M, F, two little boxes. I don't have my passport in
23 front of me, but I assume that's what it is.

24 MR. CASTILLO: Yes.

25 THE COURT: Would they have to modify the passport

1 form and have a third choice?

2 MR. CASTILLO: Yes, Your Honor, that's an option.

3 THE COURT: So she can't just put an X -- and when I
4 say she, I'm not identifying her as female. It's just --

5 MR. CASTILLO: I understand, Your Honor.

6 THE COURT: Dana can't just put an X in between.

7 There has to be a change of the form.

8 MR. CASTILLO: Dana wrote intersex on top of the
9 field and didn't check a form, and so that wasn't sufficient
10 for the state department. But, yeah, they -- that's an
11 acceptable response with respect to if they decide to include
12 the X gender marker as a gender-neutral option for people who
13 don't identify as male or female.

14 THE COURT: With the transgender people they don't
15 have to change the form.

16 MR. CASTILLO: That is correct, Your Honor.

17 THE COURT: I've wondered how much the hassle and
18 cost of changing the form is really driving that.

19 MR. CASTILLO: Well, with respect to the
20 justifications that were proffered, they admitted that they
21 did not undertake any sort of level of effort estimation as to
22 the cost or feasibility, but rather just come to some sort of,
23 you know, conclusory statements that it may be more difficult,
24 but there was no -- nothing in the administrative record with
25 regard to the actual cost of, you know, printing new forms.

1 But even so, with respect to the rational basis level
2 of review, cost and feasibility alone is still insufficient
3 when you're targeting a class of individuals for disfavored
4 treatment and you're talking about important rights such as
5 the right to international travel and the right to define and
6 express one's identity, much less gender discrimination. So
7 we're talking about nothing in the record with respect to
8 cost. Just supposition about that it may be inconvenient, and
9 they have not provided the level of effort estimation. But
10 even if they were, that would not be sufficient under, you
11 know, cases such as *Romer* and *Heller* to infringe on Dana's
12 fundamental rights.

13 And we urge this Court to apply the high-level
14 review. It is discrimination based on sex. The passport
15 classifies that gender change policy literally because of sex,
16 checking male or female, and it also discriminates on the
17 basis of sex because it amounts to the Government imposing
18 gender stereotypes that are overbroad and archaic stereotypes
19 about the nature of sex as being binary.

20 Intersex people, as they well know and is included in
21 their Foreign Affairs Manual, do not fit typical definitions
22 of male or female. Many Courts around the country say sex is
23 not a cut-and-dry matter, but with respect to transgender
24 Americans, they respect their sex based on the gender identity
25 marker that their physicians have testified to. And so it is

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1 -- the Supreme Court in the last term has said the
2 classification must serve an important interest today. For
3 interpreting the equal protection guarantee, the Supreme Court
4 recognized that new insights and societal understandings can
5 reveal unjustified equality that once passed unnoticed. Thank
6 you, Your Honor.

7 THE COURT: Thank you, Mr. Castillo.

8 All right, Mr. Parker.

9 MR. PARKER: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. PARKER: And may it please the Court. I'd like
12 to quickly address a couple of the arguments that Mr. Castillo
13 has made. To begin with, on May 1st, 2017, the Department of
14 State issued a thorough and well-reasoned decision explaining
15 why it requires passport applicants to check either male or
16 female and to receive a passport that identifies their sex as
17 either male or female.

18 This Court is sitting in this APA review as an
19 appellate court reviewing the state department's decision, and
20 conducting that review based on the administrative record that
21 was before the agency. Many of the arguments that
22 Mr. Castillo made involve factual developments that have
23 occurred since the state department made its decision on
24 May 1st, 2017. So I'd like to review with the Court the facts
25 that existed at the time that the state department made --

Sarah K. Mitchell, RPR, CRR

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1 THE COURT: Oh, you're telling me now, Mr. Parker,
2 that if I send it back again they would change their mind this
3 time because there are new developments?

4 MR. PARKER: Your Honor, I certainly am not telling
5 the Court that.

6 THE COURT: I didn't think so. I sent it back with
7 the hope that maybe they would take a good hard look at this,
8 which you say they did, but now you say that there have been
9 new developments, but I can't consider those.

10 MR. PARKER: Well, Your Honor, I think what I am
11 trying to tell the Court is many of plaintiff's arguments
12 involve new developments.

13 THE COURT: Well, then I'm asking you, Mr. Parker,
14 given these new developments, if there are significant ones,
15 would your client change its position based on these new
16 developments? Because I'd love to have that happen.

17 MR. PARKER: Your Honor, the department is certainly
18 monitoring developments in this area as they relate to its
19 passport policy.

20 THE COURT: What you're doing is -- and it may be
21 very intentionally so -- is forcing this Court to make a
22 constitutional decision. And so when you get up and say,
23 Well, there have been new developments but they don't count.
24 You tell me that the new developments might count, and maybe
25 we can do some business.

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1 MR. PARKER: Well --

2 THE COURT: But if you can't tell me that, you're
3 putting me up against a wall. You've painted me into a
4 corner, and you are just wanting a constitutional decision so
5 you can take it up to the Tenth Circuit. That, to me, seems
6 silly.

7 MR. PARKER: Your Honor, we certainly are not trying
8 to put the Court in a difficult situation. The decision that
9 is before the Court was made in May, on May 1st, 2017, and the
10 administrative record for that is also from that time. And so
11 I think the point that I was trying to make is that when the
12 state department made its decision, as it noted in its
13 decision document, there were 57 jurisdictions that issued
14 identification documents; passports, birth certificates. And
15 as far as the state department was aware, not a single one of
16 those jurisdictions issued identification documents that
17 identified a sex other than male or female.

18 THE COURT: Now there are four. There are four
19 states. There's the Civil Aviation. There's the country of
20 Canada. I mean, what does it take for the state department to
21 finally say, well, maybe we better get with the program?

22 MR. PARKER: Your Honor, I think that that's a policy
23 matter that the state department continues to consider as it
24 reviews the relevant factual developments that the Court has
25 touched on here.

1 THE COURT: If I give you 30 days, will they give me
2 a different decision? Or is it going to take another year?

3 MR. PARKER: Your Honor, I certainly can't forecast
4 for the Court what the department's position would be if this
5 case were remanded, but I can say that the department has
6 issued a thorough and well-reasoned decision that provides
7 five different justifications for the department's decision.

8 THE COURT: Right. Let me ask you another question.
9 This case was named Zzyym vs. Tillerson. Now it's Zzyym vs.
10 Pompeo.

11 MR. PARKER: Correct, Your Honor.

12 THE COURT: Have people at the Tillerson or Pompeo
13 level even heard about this? Have they weighed in on this?
14 It strikes me as unlikely that someone like Rex Tillerson
15 would think this is such a big deal to make a constitutional
16 case out of, especially given what the state department
17 recognizes for transgender people. Or is this some lower
18 level that's the one that's representing the state department?

19 MR. PARKER: Your Honor, I can tell you when this
20 case was remanded to the state department, the state
21 department considered its policy very carefully at high levels
22 in the department and came to its decision and wrote a
23 thorough --

24 THE COURT: So in other words, you can't answer my
25 question.

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1 MR. PARKER: Your Honor, I can't answer specifically
2 whether Secretary Tillerson considered this policy. But I can
3 tell you that the state department had the appropriate
4 officials look at this policy, that they amassed significant
5 documents, they considered -- as the Court is aware, there's a
6 1,300-page administrative record of the documents that the
7 agency considered, and it issued a thorough and well-reasoned
8 decision.

9 THE COURT: How can you justify treating transgender
10 people as liberally as you do and then putting people like
11 Dana in a different category? How do you justify that?

12 MR. PARKER: Your Honor, I think that there are some
13 fundamental differences between the way that the state
14 department treats transgender individuals with regard to
15 passport applications and the situation of intersex
16 individuals like Dana.

17 THE COURT: Yeah, what are they?

18 MR. PARKER: And I think -- and let me first begin
19 with the fact that the state department relies on an
20 individual's documented sex. And so Dana submitted with their
21 passport application --

22 THE COURT: What are they relying on when somebody
23 from Oregon applies?

24 MR. PARKER: Well, Your Honor, the hypothetical
25 you're positing is someone from Oregon would apply with a

1 driver's license with X on it --

2 THE COURT: That's right.

3 MR. PARKER: That situation is still, I think, being
4 resolved by the state department. But that's certainly not
5 the situation --

6 THE COURT: What do you mean it's being resolved by
7 the state department? He just told me that they base their
8 decision on the documents that they get.

9 MR. PARKER: So --

10 THE COURT: I'm telling you they just got a document
11 from somebody in Oregon who wants to go to Cancun. What do
12 they do?

13 MR. PARKER: Your Honor, I think as Mr. Castillo
14 pointed out, in the majority of states that offer an X, the X
15 simply means unspecified, and the department is not aware of
16 any jurisdiction that has been issuing -- excuse me -- birth
17 certificates that identify an individual's sex as an X. And
18 so if an individual were to present a birth certificate that
19 identified -- in our hypothetical -- an individual as male,
20 and a driver's license that identified them as X, I assume
21 they could receive a passport that identified them as male
22 consistent with their documented sex.

23 In this case, Dana submitted, with their passport
24 application --

25 THE COURT: Their documented sex is X in Oregon --

1 MR. PARKER: Well, Your Honor --

2 THE COURT: -- California, DC, Washington. Their
3 documented sex is X. What does the state department do with
4 those people? Or does the whole West Coast of the United
5 States have to stay home?

6 MR. PARKER: Your Honor, as Mr. Castillo pointed out
7 in his argument, that X is not an indication of a new gender.
8 It is simply a marker, as he said, that is gender neutral.

9 THE COURT: Okay. If she writes on her -- Dana
10 writes on her application unspecified, is that good enough?
11 Does she get a passport now?

12 MR. PARKER: Your Honor, she could not receive a
13 passport for unspecified.

14 THE COURT: But the Oregon person could. Now, how is
15 that equal protection?

16 MR. PARKER: Your Honor, I don't think it's clear
17 that a person in Oregon could receive a passport with --
18 identifying the gender as X. In fact, I think that it's clear
19 at this point that the state department only issues passports
20 with an M or F gender marker.

21 THE COURT: So the Oregon person, the California
22 person, the DC person, the state of Washington person who has
23 an X is out of luck?

24 MR. PARKER: No, Your Honor. I'm not saying that. I
25 think that they -- that person could receive a passport either

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1 in M or F depending on the documentation that they submit.
2 What I am saying, though, is that person could not receive a
3 passport with an X, and that's for the very reasons that the
4 state department set forth in its decision document.

5 THE COURT: Okay. So what's the good reason for
6 that?

7 MR. PARKER: So, Your Honor, the state department
8 uses passports in a number of different ways. One, when an
9 individual applies for a passport, they check that individual
10 against a number of federal databases to determine whether
11 they're eligible for a passport.

12 THE COURT: You've conceded that Dana is eligible for
13 everything except checking the box. There's not a thing about
14 Dana that's offensive to the state department, correct?

15 MR. PARKER: That's correct, Your Honor.

16 THE COURT: All right. So they don't have to check
17 anything for her. She has to check something. They don't
18 have to. She's passed all those other tests.

19 MR. PARKER: Your Honor, but the state department
20 doesn't issue passports on an ad hoc one-off basis. The
21 department is committed to being consistent in the way that
22 they issue passports across all the passport offices. And, in
23 fact, in the state department decision document, they talk
24 about how the computer system they've created for the issuance
25 of passports only accepts an M or F.

1 THE COURT: Okay. Now we're getting down to what
2 appears to be the real reason. It's a computer system. It's
3 the printer. It's the hassle and the cost of modifying to
4 accommodate the Danas of the world. Isn't that really the
5 reason?

6 MR. PARKER: Your Honor, I would say that's one of
7 five reasons. I do think that that is a significant reason,
8 but along with that --

9 THE COURT: The other reasons are legal reasons.
10 It's, you know, you disagree about what constitutional test to
11 apply and so forth. The on-the-ground everyday reason is the
12 practical reason, isn't it?

13 MR. PARKER: Well, Your Honor, I would disagree with
14 that statement, because I think that it is a practical reason
15 that the state department has given that when an individual
16 uses their passport, that individual is then -- that they use
17 the passport information including the sex, to link that
18 individual up with federal, state, and local law enforcement
19 databases, and as far as the department is aware, those
20 databases only identify sex as male or female.

21 And so one of the --

22 THE COURT: So what about the transgender person who
23 comes in and gets a passport marked F. The state department
24 wants to match that up with local databases, and lo and
25 behold, what they find is all the local databases are saying

1 M.

2 MR. PARKER: That's correct, Your Honor.

3 THE COURT: What happens then?

4 MR. PARKER: So in a situation like that, there are
5 certainly multiple points of data that the department can use
6 to match up an individual. But there's a significant
7 difference between someone moving between two possible options
8 within a system and the idea of inserting a new variable into
9 the system that doesn't exist currently in the state
10 department system, it doesn't exist in other federal
11 government agency systems, it doesn't exist in state systems,
12 and it doesn't exist in local systems.

13 THE COURT: There was a time when transgender didn't
14 exist in their system too, wasn't there? Probably some old
15 codger like me, if I applied for a passport when I was -- or
16 my parents did when I was five years old, transgender wasn't
17 even a thought then. Everything has a first time.

18 MR. PARKER: Your Honor, I would agree with you that
19 the state department's policy with regard to transgender
20 individuals has evolved, but I think there is still a
21 fundamental difference between allowing an individual to move
22 from, for example, using the Court's hypothetical from
23 earlier, male to female or female to male, within a system
24 that uses those two variables and inserting a third variable.

25 THE COURT: Right. Because you can use the same

1 form. It's sort of easy.

2 MR. PARKER: Well, I would say it's more than a form,
3 Your Honor, because there's a system that allows for the state
4 department to link documents with other federal agencies,
5 state and local agencies, and so it's really a matter of
6 compatibility. It's the ability of the state department to
7 link up their documents with other law enforcement and other
8 documents within the federal government and beyond that is, I
9 think, beyond checking a box on a form. It has to do with the
10 ability to use the data. The bottom line with the passport is
11 that it's a government document. It's used for government
12 purposes. It's used to allow the government to determine
13 whether to allow an individual to cross the borders of the
14 United States.

15 THE COURT: Well, now, Dana was in the Navy. These
16 Navy doctors, these VA doctors have said she's intersex. But
17 the government was happy to have her in the Navy, right?

18 MR. PARKER: Certainly, Your Honor.

19 THE COURT: Were they -- did they send her overseas?

20 MR. PARKER: Your Honor, I'm not aware of that fact.

21 THE COURT: Well, she served honorably in the Navy,
22 did she not?

23 MR. PARKER: I believe so, Your Honor.

24 THE COURT: So they're happy to have her service in
25 the Navy, in the military, but she can't get a passport --

1 MR. PARKER: Your Honor --

2 THE COURT: -- because she won't check a form.

3 MR. PARKER: I think the department, and it's clear
4 from the record, is also happy to issue plaintiff a passport
5 that conforms with the documentary evidence that plaintiff
6 submitted with plaintiff's passport application.

7 THE COURT: No. No, they won't. Because she
8 submitted these two doctors' affidavits, government doctors
9 paid by the taxpayer just like I am and you are, government
10 doctors who said she's intersex. They won't accept that.

11 MR. PARKER: Your Honor, plaintiff also submitted a
12 driver's license from Colorado that identifies plaintiff as
13 female, and the department --

14 THE COURT: If she relinquishes her driver's license,
15 will you then give her a passport?

16 MR. PARKER: Your Honor, I think for the same reasons
17 that are set forth in the department's decision letter, I
18 believe the answer would be no.

19 THE COURT: What if she decides to go to the state of
20 Oregon and get a driver's license? Now can she get a
21 passport?

22 MR. PARKER: Your Honor, plaintiff, I believe, could
23 receive a passport, but not a passport that identifies
24 plaintiff's sex as X. The department has set forth clearly
25 the very practical reasons -- and I would say that they're not

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1 legal reasons -- the practical reasons that it requires an M
2 or an F on a passport.

3 THE COURT: Okay. Tell me what the practical reasons
4 are.

5 MR. PARKER: The practical -- there are -- I'll list
6 them out, Your Honor. The first is that still, and at the
7 time the department made its decision, the majority -- I would
8 say the time the department made its decision, all of the
9 jurisdictions that issued identification documents issued them
10 in M or F.

11 THE COURT: Okay. That's not a good reason anymore.
12 What's the next reason?

13 MR. PARKER: The next reason is that the state
14 department when it issues a passport uses the passport
15 application form and the information provided on that form to
16 interface with other federal government agencies to determine
17 whether an individual is eligible for a passport. There are a
18 host of reasons why an individual may not be eligible.

19 THE COURT: Such as?

20 MR. PARKER: Such as they have a warrant for their
21 arrest or a foreign country is trying to ex --

22 THE COURT: That isn't the case here.

23 MR. PARKER: Certainly that isn't the case in this
24 particular --

25 THE COURT: But they were able to figure out that

1 wasn't the case despite her intersex status.

2 MR. PARKER: Your Honor, the state department's
3 decision is not directed only at the plaintiff here. It's a
4 decision for the department as a whole regarding its
5 male/female policy. And so the department's justification
6 that it works with other agencies like the law enforcement
7 agencies, Treasury, Social Security Administration, it works
8 with all these agencies to see if an individual is eligible
9 for a passport, and as far as --

10 THE COURT: Social Security Administration, they can
11 check the social security number. Local law enforcement, they
12 can check address, name, criminal history.

13 MR. PARKER: So --

14 THE COURT: Gender is only one of -- as you've even
15 said in your brief -- and, frankly, your brief is quite
16 candid, and I applaud you that for -- there are multiple
17 identifiers for a person. I identify as male, but believe me,
18 there are a lot of other identifiers, if you want to look into
19 my background.

20 MR. PARKER: Your Honor is absolutely correct that --

21 THE COURT: My name is sort of female. That throws a
22 lot of people off.

23 MR. PARKER: Your Honor is absolutely correct that
24 there are multiple pieces of data that the federal government
25 and local and state governments use to identify individuals

1 and to link up records, including name, social security
2 number, birth date, place of birth. There are a host of
3 different fields that can be used. But the way that a match
4 occurs is that they try to match as many fields as possible.
5 And so the more fields that the government has available, the
6 stronger the matches can be, and the more matches can be
7 created.

8 Now, it can be that sometimes there are certain
9 fields that don't match. For example, with the example that
10 Your Honor gave, if the name didn't match in one of your
11 records, that would leave it to the other fields. But if your
12 birth place and your social security number and your sex
13 match, the agencies may still be able to make a match, because
14 they have the other fields of data.

15 The same thing occurs with sex. The department
16 obviously doesn't match individuals based solely on their sex,
17 but it does use that data point to help to either strengthen
18 the match or to make the match, and it's important because
19 sometimes they don't have information like place of birth, or
20 a name is spelled differently, or people use different names,
21 or they don't have the social security number. Each piece of
22 data that the department uses plays a role in allowing it to
23 match.

24 THE COURT: Okay. Let me throw out an idea here.
25 You want to match the states, and a year ago the states didn't

1 have what the four have now. What would you think of the idea
2 of the federal government being the leader, not the states?
3 The federal government could set an example. But what is
4 going to happen, the state department is going to wait until
5 how many states, a dozen, 15, 20? When is there enough that
6 the feds will say, Well, I guess we need to change our policy
7 to match?

8 MR. PARKER: Your Honor, I'm not sure -- well, let me
9 say this. I think the state department is committed to being
10 a leader and an example for our country, but I think that
11 these practical concerns are important to the department.
12 They go really to the heart of what a passport is used for,
13 and even if states are to change their driver's license
14 identifications to allow people to mark unspecified, that
15 doesn't alleviate the practical concerns that the state
16 department has identified here.

17 And as I said, I think the Department is monitoring
18 these developments as they relate to this policy, but these
19 practical concerns are real. That as the department -- when
20 an individual comes to the border, and as they try to link
21 that person up with the other records that are necessary to
22 allow -- to decide whether, one, to issue them a passport or,
23 two, to allow them to cross our borders, they really do need
24 to be able to link up with these other agencies.

25 THE COURT: Well, no one is accusing the state

1 department of bad faith. I certainly am not. Stubbornness,
2 maybe. But bad faith, no. There are people at the state
3 department, good people, that feel they have good and
4 sufficient reasons for this. And maybe in May of 2017,
5 without four states leading the way, it was a little too much
6 to handle. But like I said at the beginning, what that does
7 is puts the Court in the position of having to make a
8 constitutional decision. That's what Courts are for.

9 MR. PARKER: And, Your Honor, if it would be helpful,
10 I'm happy to address the constitutional issues, but I guess
11 the department's position here is that the decision that it's
12 made and the justifications that are provided and the
13 practical considerations that we've discussed today clearly
14 meet really any level of constitutional scrutiny. The
15 government's argument is that this should be subject to
16 rational basis --

17 THE COURT: You say clearly. Is it really that
18 clear? Is it that obvious that Mr. Castillo is full of beans?

19 MR. PARKER: Well, Your Honor, I have a great deal of
20 respect for Mr. Castillo, and I've enjoyed working with him on
21 this case immensely, but I do disagree with his arguments. I
22 think the state department has come to a decision that is
23 based on practical considerations, and that when the Court
24 looks at the equal protection claim here, the Tenth Circuit
25 has adopted a two-step approach, and the first step is to

1 determine whether there is intentional discrimination, whether
2 the discrimination at issue is an intended consequence of the
3 policy.

4 THE COURT: Well, it's intentional. You very
5 intentionally are excluding people who won't check M or F.
6 That's not an accident.

7 MR. PARKER: Your Honor, I think the intended
8 consequence of the policy here is that the passport be a
9 document that can be used to link up and access other records.
10 I don't think there's anything in the record that would
11 support an argument that the state department made this
12 decision for the sole purpose of discriminating against
13 intersex individuals, or even as a -- I don't believe that the
14 record supports that had any kind of purpose.

15 I think the purpose of this policy really is that it
16 was driven by practical considerations that are set forth, and
17 so I don't think that there is intentional discrimination
18 against individuals here.

19 THE COURT: Well, there may not be intentional
20 discrimination. Those are fighting words. But it's very
21 intentional that Dana is being discriminated against. Again,
22 I'm not saying in bad faith. But there's no accident to it.
23 The state department knows exactly what it's doing, and it
24 knows what the consequence is for someone like Dana who is
25 intersex and stubborn enough that she won't check a box.

1 MR. PARKER: Your Honor, I guess I wouldn't say that
2 that's an intended consequence. That would be the difference,
3 is that the state department didn't make this decision
4 thinking we're going to treat individuals like Dana
5 differently and that's the reason we're making this decision.
6 I think the state department looked at the practical
7 implications of adding an X to a passport and saw that it
8 would really hinder the use of passports and their purpose at
9 the border and when they're issued.

10 THE COURT: Well, but the state of Oregon and the
11 state of California aren't that concerned about it, the state
12 of Washington. The District of Columbia, the center of our
13 government, they aren't that concerned about it. In fact, the
14 District of Columbia is a federal enclave.

15 MR. PARKER: I would submit, though, that states have
16 much different considerations than the state department for
17 the use of identity documents. Driver's licenses, for
18 example, are certainly used for much different purposes than
19 passports, and that there's a difference between the way that
20 the state department uses these documents and the way the
21 states use these documents .

22 And I would agree that the states have looked at this
23 issue. They've considered the facts, the factors that are
24 relevant to them and the way that they use driver's licenses.
25 But I don't think that that means that the same factors apply

1 or weigh in the same way that the state department looked at
2 those documents.

3 And so I think that when the Court examines the state
4 department's decision document, its memo, it's clear that
5 there's not intentional discrimination against intersex
6 individuals. That it really -- this policy is driven by a
7 need to be able to use passports for their purpose, and
8 because of that, that really is the end of the equal
9 protection analysis. If there is not intentional
10 discrimination, there's not a violation of the equal
11 protection clause, and the Tenth Circuit has been very clear
12 that that finding of intentional discrimination is really the
13 preliminary step in equal protection analysis.

14 THE COURT: So that brings me back to the transgender
15 people. Why don't these same practical problems exist there?
16 I mean, surely you've thought about that. You knew that would
17 be a question. If it's really important to match, a
18 transgender person doesn't match, right?

19 MR. PARKER: Well, Your Honor, I think --

20 THE COURT: Maybe some do and some don't. But once
21 you've become a transgender person, and a doctor attests to
22 that, your client, the state department, is fine with -- if
23 they check female. Even though all the documents, all of the
24 Bruce Jenner documents through the Olympic years and beyond
25 were male. He was one of the more visible males in the world

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1 at one point. Now she's female, and that's okay. There's no
2 match, but they get around it because there are other markers.

3 MR. PARKER: So, Your Honor, I think Your Honor is
4 correct, that when a transgender individual submits a note
5 from a doctor saying that the individual has gone through the
6 clinically-appropriate process for transitioning their gender
7 from male to female or from female to male, the state
8 department will issue a passport in the new gender.

9 THE COURT: And I say good for the state department.
10 That's an enlightened view, it seems to me, but it doesn't
11 match anymore.

12 MR. PARKER: And Your Honor is exactly correct, that
13 for a period of time, that individual may not match on the sex
14 field. Now, the other --

15 THE COURT: Well, Bruce Jenner is not going to match
16 for the rest of time unless he goes back and has all those --
17 gives back his medal and all the rest of it.

18 MR. PARKER: Well, Your Honor, I think that
19 Ms. Jenner could receive potentially a driver's license in
20 California that identifies her as female, and could go through
21 steps to change other documentation. But I think the point
22 here is that, yes, at a point in time there's not a match in
23 the sex field that the state department uses, and that was, I
24 would imagine, a significant factor that the state department
25 considered.

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1 THE COURT: That's a hard one to distinguish, isn't
2 it?

3 MR. PARKER: Well, it was only one factor. So, Your
4 Honor, the mismatch is one factor here. You know, there's the
5 mismatch factor, but there's also the idea -- and the
6 department tried to explain this in the briefing -- that there
7 is a fundamental difference between allowing someone to move
8 from one variable to another that's in a system and inserting
9 a third variable into what has been a binary system, and I
10 think that is -- is fundamentally different.

11 THE COURT: Let me ask you a slightly different
12 question, because as Mr. Castillo pointed out, the state
13 department recognizes the existence of intersex people. They
14 recognize that people can be like Dana. And I haven't heard
15 the state department argue in this case, two years ago or now,
16 that she's just a liar. She believes that she is neither male
17 nor female, but to get a passport she would have to do
18 something fundamentally false for her. How is -- how do you
19 justify making her do that?

20 MR. PARKER: Your Honor, the passport form and the
21 passport itself is not a matter of self-expression. What the
22 department is asking for is for the applicant's documented
23 sex. And so in this instance, the state department offered to
24 provide plaintiff with a passport consistent with the Colorado
25 driver's license that plaintiff submitted as proof of

1 identification.

2 THE COURT: Right. But the government's own doctors
3 have documented her as intersex. Why won't the state
4 department accept that? Is their own doctor -- the
5 government's own VA doctor -- two of them -- less reliable
6 than the state of Colorado driver's license bureau?

7 MR. PARKER: Your Honor, I think that it's important
8 to remember that there are a number of factors that the
9 department considered here, and one is, as was touched on by
10 Mr. Castillo, the fact that for transgender individuals, there
11 is an established pathway for transitioning from female to
12 male, but as plaintiff acknowledged in plaintiff's complaint,
13 the term intersex is an umbrella term that encompasses a wide
14 variety of different conditions.

15 And you could have a situation where a plaintiff
16 identifies as intersex or gender queer, or there are a whole
17 bunch of different terminologies that are used, and it's
18 really unclear whether -- how one would identify this term
19 intersex. In fact, plaintiff's own doctors -- and, in fact,
20 there are three doctors that submitted notes -- each
21 identified plaintiff's situation differently.

22 One said that plaintiff was born intersex. Another
23 said that plaintiff had transitioned to intersex. Another
24 said that plaintiff had had surgery to transition them
25 physically to female. And so even within the notes provided

1 by the plaintiff's doctor it's unclear --

2 THE COURT: The latter thing isn't inconsistent with
3 the first two. The latter thing is just a fact, right? A lot
4 of these people, their parents are concerned, freaked out,
5 whatever, and they decide before the child is old enough to
6 know better to try to surgically make the person one or the
7 other. That's just a fact. That happened to her.

8 MR. PARKER: Certainly, Your Honor. And I think the
9 state department's point here is simply that the -- a doctor's
10 note saying that an individual has transitioned is
11 transgender. I think there's a general understanding of what
12 that means. I think a doctor's note saying that someone is
13 intersex or gender neutral, it's actually not quite clear what
14 that means or what it means to transition, and this is a
15 different situation. That it's a situation that is not as
16 well understood, certainly, as transgender individuals, and
17 that that's certainly a factor as the department looks at how
18 it would accept documentation.

19 But I think that when you step back and look at the
20 department's decision document, it sets out these practical
21 concerns. That it has to be able to link these passports,
22 that it has computer systems that it has set up that are used
23 across the world to issue passports and to check passports.
24 It has other agencies that rely on passports and that link to
25 them, both federal, state, and local. And that all of these

1 practical considerations, when taken in conjunction with this
2 uncertainty about what it means -- would mean to be marked as
3 either -- neither male or female -- when combined, certainly
4 support the department's decision.

5 And the department did not say that this was an easy
6 decision. I think the department has a great deal of respect
7 for the plaintiff here, and as shown in the department's
8 policy towards intersex individuals and its acknowledgment
9 that some individuals don't identify as male or female, has a
10 great deal of respect for intersex individuals.

11 But the practical realities for the department is
12 that the passport has to be used for the purposes that it is
13 issued. To allow the department to determine, one, whether
14 individuals should be issued a passport; and, two, whether
15 they should be allowed to come into the country. And the
16 insertion of a third variable into that process would
17 significantly undermine the way that the department uses a
18 passport. And I think that while the passport -- the state
19 department is very sympathetic to the plaintiff here, and to
20 others in that situation, the practical ramifications of
21 adding a third variable are such that it is unable to change
22 its policy at this time.

23 And I think the department is certainly aware of
24 changing facts and is monitoring those facts as they're
25 relevant, but as it stands, at this point, based on the

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1 identification that was before the department, it's made a
2 decision that it needs to maintain this male/female binary for
3 very practical reasons, and that those reasons withstand any
4 level of constitutional scrutiny.

5 If Your Honor doesn't have any further questions,
6 I'll sit down.

7 THE COURT: I guess I haven't been too shy about
8 asking questions.

9 MR. PARKER: I'm happy to answer any additional
10 questions.

11 THE COURT: I know. Thank you.

12 MR. PARKER: Thank you.

13 THE COURT: Mr. Castillo, anything further from you?

14 MR. CASTILLO: Briefly, Your Honor. I just want to
15 make a few points because we've been talking about the
16 practical justifications that the state department has set
17 forth. But the justifications in and of themselves have no
18 footings in reality when you compare it to the policy with
19 respect to transgender individuals. When you compare it to
20 what was in the administrative record was already the state
21 department's awareness -- the administrative record at 189 --
22 they footnoted the fact they had awareness that Oregon and
23 District of -- that there are other jurisdictions considering
24 this policy.

25 THE COURT: Well, do you think that the Court can

1 consider these four states now? They weren't in front of the
2 state department at the time.

3 MR. CASTILLO: With respect to the constitutional
4 standard of review, and the fact that the Supreme Court just
5 last year said that they must provide an interest today with
6 respect to, you know, changing times, I think that the Court
7 may consider it. But, you know, it's not necessary because of
8 the fact they had a demonstrated awareness that at least two
9 jurisdictions were in the process, which leads me to the other
10 practical consideration of introduction of a third variable
11 that Mr. Parker had said.

12 With respect to matching data systems with respect to
13 the states, those states are now going -- if they didn't
14 already -- have data systems that have the third X variable in
15 those states, which have to talk to and communicate with and
16 share information. But as Your Honor pointed out, there are
17 many points of data from social security numbers, which are
18 requested on the application, to name, date of birth, place of
19 birth.

20 And they even have a regular process that they use on
21 an individual basis with any person who they believe they
22 don't have enough information with respect to identity, they
23 can seek additional primary and secondary documents, and in
24 some cases, they may not even be documents in addition to
25 identification documents under the regulation, which are

1 merely a federal or state ID with a photograph. That's what
2 the regulation requires with respect to demonstrating a
3 person's identity.

4 But they also have secondary documents, and even the
5 attestation of an individual person as additional reasons for
6 support. So they have a way if they feel that there's not
7 enough data points that have been matched. But we believe
8 that, you know, the record here, the record reflecting that
9 the Department of Veterans Affairs physicians have attested to
10 the fact that Dana is neither male or female.

11 THE COURT: Right. When is the last time the state
12 department changed the form?

13 MR. CASTILLO: I don't know, Your Honor. That's a
14 question for Mr. Parker.

15 THE COURT: Oh, I thought maybe you knew that.

16 MR. CASTILLO: Well, I know they've changed the
17 Foreign Affairs Manual several times over with respect to the
18 gender change policy. They, in fact -- the prior version
19 during the course of this litigation accepted primary
20 documents in the old -- what they say in the old gender. Now
21 they've since changed that since the litigation has commenced
22 to say in the original gender. So this is sort of a moving
23 target here with respect to excluding our client when they are
24 simply seeking to travel internationally.

25 And so from a practical standpoint, our client has

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1 been, you know, with this litigation for three and a half
2 years, has already missed opportunities to travel to Mexico
3 City with work, to Amsterdam with work. Next year there's
4 another world intersex convention with work. But you need not
5 business opportunities to travel. A person, an American
6 citizen has the freedom of movement to move in and out of our
7 borders, and it just makes no sense that we would allow
8 foreign nationals with an X marker on their passport to enter
9 and exit our country, but we don't let American citizens who
10 have served our country honorably do the same. Thank you,
11 Your Honor.

12 THE COURT: All right. Thank you. All right. Have
13 you both been heard? Thank you.

14 MR. CASTILLO: Thank you.

15 THE COURT: We'll take it under advisement. Thank
16 you for your arguments. Well done.

17 MR. PARKER: Thank you, Your Honor.

18 THE COURTROOM DEPUTY: All rise. Court is in recess.

19 (The proceedings were concluded at 10:10 a.m.)
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