

[ORAL ARGUMENT REQUESTED]

No. 18-1453

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

DANA ALIX ZZYVM,

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
of 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)

CORRECTED APPENDIX FOR APPELLANTS v.1

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**U.S. District Court - District of Colorado
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:15-cv-02362-RBJ**

Zzyym v. Kerry et al
Assigned to: Judge R. Brooke Jackson
Demand: \$0
Case in other court: USCA, 18-01453
Cause: 05:0706 - Judicial Review of Agency Action

Date Filed: 10/25/2015
Date Terminated: 09/19/2018
Jury Demand: None
Nature of Suit: 899 APA
Review/Appeal
Jurisdiction: U.S. Government
Defendant

Plaintiff

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V.

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Sherman Portell
*in his official capacity as the Director
of the Colorado Passport Agency for
the United States Department of State*

represented by **Benjamin Thomas Takemoto**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew Charles Skurnik
(See above for address)
ATTORNEY TO BE NOTICED

Ryan Bradley Parker
(See above for address)
TERMINATED: 06/08/2018

Date Filed	#	Docket Text
10/25/2015	<u>1</u>	COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF against John Forbes Kerry, Sherman Portell (Filing fee \$ 400,Receipt Number 1082-4666560)Attorney Paul David Castillo added to party Dana Alix Zzyym (pty:pla), filed by Dana Alix Zzyym. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Civil Cover Sheet)(Castillo, Paul) (Entered: 10/25/2015)
10/26/2015	<u>2</u>	NOTICE of Entry of Appearance by Hayley Jill Gorenberg on behalf of Dana Alix ZzyymAttorney Hayley Jill Gorenberg added to party Dana Alix Zzyym (pty:pla) (Gorenberg, Hayley) (Entered: 10/26/2015)
10/26/2015	<u>3</u>	NOTICE of Entry of Appearance by Trina Kissel Taylor on behalf of Dana Alix ZzyymAttorney Trina Kissel Taylor added to party Dana Alix Zzyym (pty:pla) (Taylor, Trina) (Entered: 10/26/2015)
10/26/2015	<u>4</u>	SUMMONS REQUEST as to John F. Kerry and Sherman D. Portell by Plaintiff Dana Alix Zzyym. (Attachments: # <u>1</u> Summons to John F. Kerry, # <u>2</u> Summons to John F. Kerry, # <u>3</u> Summons to Sherman D. Portell, # <u>4</u> Summons to Sherman D. Portell, # <u>5</u> Summons to Sherman D. Portell)(Taylor, Trina) (Entered: 10/26/2015)
10/26/2015	<u>5</u>	NOTICE of Entry of Appearance by M. Dru Levasseur on behalf of Dana Alix ZzyymAttorney M. Dru Levasseur added to party Dana Alix Zzyym(pty:pla) (Levasseur, M.) (Entered: 10/26/2015)
10/26/2015	<u>6</u>	NOTICE of Entry of Appearance by Emily Elizabeth Chow on behalf of Dana Alix ZzyymAttorney Emily Elizabeth Chow added to party Dana Alix Zzyym (pty:pla) (Chow, Emily) (Entered: 10/26/2015)
10/26/2015	<u>7</u>	NOTICE of Entry of Appearance by Demoya Renee Gordon on behalf of Dana Alix ZzyymAttorney Demoya Renee Gordon added to party Dana Alix Zzyym (pty:pla) (Gordon, Demoya) (Entered: 10/26/2015)
10/26/2015	<u>8</u>	NOTICE of Entry of Appearance by Michael Allen Ponto on behalf of Dana Alix ZzyymAttorney Michael Allen Ponto added to party Dana Alix Zzyym (pty:pla) (Ponto, Michael) (Entered: 10/26/2015)
10/26/2015	9	

		Case assigned to Judge Wiley Y. Daniel Text Only Entry (dbera,) (Entered: 10/27/2015)
10/27/2015	10	Magistrate Judge Consent Form issued pursuant to Local Rule (dbera,) (Entered: 10/27/2015)
10/27/2015	11	SUMMONS issued by Clerk. Magistrate Judge Consent form issued pursuant to Local Rule (Attachments: # 1 Summons, # 2 Summons, # 3 Summons, # 4 Summons, # 5 Summons, # 6 Magistrate Judge Consent Form) (dbera,) (Entered: 10/27/2015)
10/27/2015	12	ORDER Directing Preparation of Joint Case Management Plan by Judge Wiley Y. Daniel on 10/27/2015. (Attachments: # 1 Case Management form) (evana,) (Entered: 10/27/2015)
10/27/2015	13	NOTICE of Entry of Appearance by Camilla Bronwen Taylor on behalf of Dana Alix ZzyymAttorney Camilla Bronwen Taylor added to party Dana Alix Zzyym(pty:pla) (Taylor, Camilla) (Entered: 10/27/2015)
11/19/2015	14	SUMMONS Returned Executed upon defendant(s) John Forbes Kerry served on 10/27/2015, answer due 12/28/2015. (Taylor, Trina) (Entered: 11/19/2015)
11/19/2015	15	SUMMONS Returned Executed upon defendant(s) Sherman Portell served on 10/27/2015, answer due 12/28/2015. (Taylor, Trina) (Entered: 11/19/2015)
11/23/2015	16	NOTICE of Entry of Appearance by Jessica Marie Kunevicius on behalf of All Plaintiffs Attorney Jessica Marie Kunevicius added to party Dana Alix Zzyym (pty:pla) (Kunevicius, Jessica) (Entered: 11/23/2015)
12/02/2015	17	NOTICE of Entry of Appearance by Kristin Ann Petri on behalf of Dana Alix ZzyymAttorney Kristin Ann Petri added to party Dana Alix Zzyym(pty:pla) (Petri, Kristin) (Entered: 12/02/2015)
12/10/2015	18	CERTIFICATE of Mailing/Service <i>Via Certified Mail</i> by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Exhibit Proofs of Service with certified mail receipts)(Taylor, Trina) (Entered: 12/10/2015)
12/21/2015	19	Unopposed MOTION for Extension of Time to File Answer or Otherwise Respond to <i>Plaintiff's Complaint and for the Parties to File Their Joint Case Management Plan</i> by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Proposed Order (PDF Only))(Parker, Ryan) (Entered: 12/21/2015)
12/21/2015	20	ORDER Granting 19 Defendants Unopposed Motion for Extensions of Time for Defendants to File a Responsive Pleading and for the Parties to File their Joint Case Management Plan ECF No. 19 . Therefore, the parties shall file their Joint Case Management Plan by January 15, 2016, and Defendants responsive pleading shall be due by March 11, 2016, by Judge Wiley Y. Daniel on 12/21/2015.(evana,) (Entered: 12/21/2015)
01/15/2016	21	Proposed Joint Case Management Plan by Defendants Sherman Portell, John Forbes Kerry. (Parker, Ryan) (Entered: 01/15/2016)
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		JOINT CASE MANAGEMENT PLAN ORDER Plaintiffs Brief due by 4/15/2016, Defendants Brief due by 5/6/2016, Plaintiffs Reply Brief due by 5/27/2016, by Judge Wiley Y. Daniel on 1/21/2016. (evana,) (Entered: 01/22/2016)
01/22/2016	22	NOTICE of Entry of Appearance by Thomas George Hackney on behalf of Dana Alix ZzyymAttorney Thomas George Hackney added to party Dana Alix Zzyym(pty:pla) (Hackney, Thomas) (Entered: 01/22/2016)
01/22/2016	23	MOTION to Withdraw as Attorney by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Proposed Order (PDF Only) Granting Motion to Withdraw as Counsel)(Taylor, Trina) (Entered: 01/22/2016)
01/22/2016	25	ORDER Granting 23 Motion to Withdraw as Attorney. Attorney Trina Kissel Taylor terminated, by Judge Wiley Y. Daniel on 1/22/2016.(evana,) (Entered: 01/22/2016)
01/25/2016	26	Unopposed MOTION for Extension of Time to <i>Produce the Administrative Record</i> by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Proposed Order (PDF Only))(Parker, Ryan) (Entered: 01/25/2016)
01/26/2016	27	ORDER granting 26 Motion for Extension of Time to Produce the Administrative Record to Plaintiff by Judge Wiley Y. Daniel on 1/26/16. Text Only Entry(wydlc2,) (Entered: 01/26/2016)
02/29/2016	28	Unopposed MOTION for Order to <i>Present Supplemental Materials to the Court</i> by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Proposed Order (PDF Only))(Castillo, Paul) (Entered: 02/29/2016)
03/01/2016	29	MINUTE ORDER Granting 28 Plaintiff's Unopposed Motion for Order to Present Supplemental Materials to the Court. by Judge Wiley Y. Daniel on 3/1/2016.(cmira) (Entered: 03/01/2016)
03/09/2016	30	Unopposed MOTION for Extension of Time to <i>File Dispositive Motion and the Administrative Record</i> by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Proposed Order (PDF Only))(Parker, Ryan) (Entered: 03/09/2016)
03/11/2016	31	ORDER granting 30 Motion for Extension of Time as follows: Deadline for Defendants Dispositive Motion and to File the Administrative Record: March 18, 2016; Deadline for Plaintiffs Opposition to Defendants Motion and CrossMotion/Opening Brief (If Any): April 22, 2016; Deadline for Defendants Reply Brief and Opposition to Plaintiffs CrossMotion/Opening Brief (If Any): May 13, 2016; Deadline for Plaintiffs Reply Brief (If Any): June 3, 2016. by Judge Wiley Y. Daniel on 3/11/16. Text Only Entry(wydlc2,) (Entered: 03/11/2016)
03/11/2016	32	Utility Resetting Deadlines: Pursuant to the 31 Order, Motions due by 3/18/2016. SS Defendants Brief due by 4/22/2016. SS Plaintiffs Brief due by 5/13/2016. SS Plaintiffs Reply Brief due by 6/3/2016. Text Only Entry (evana,) (Entered: 03/11/2016)
03/11/2016	33	

		Utility Confirming Setting Deadlines: Corrected to show Administrative Deadlines. Adm Defendants Brief due by 4/22/2016. Adm Plaintiffs Brief due by 5/13/2016. Adm Plaintiff Reply Brief due by 6/3/2016. Text Only Entry (evana,) (Entered: 03/14/2016)
03/18/2016	34	ADMINISTRATIVE RECORD by Defendants John Forbes Kerry, Sherman Portell. (Parker, Ryan) (Modified on 3/18/2016 edited the text to show the Record as filed)(evana,). (Entered: 03/18/2016)
03/18/2016	35	MOTION for Judgment <i>on the Administrative Record on Counts One and Two and Motion to Dismiss Counts Three, Four, and Five</i> by Defendants John Forbes Kerry, Sherman Portell. (Parker, Ryan) (Entered: 03/18/2016)
03/21/2016	36	NOTICE OF NONCOMPLIANCE WITH COURT RULES/PROCEDURES: re: 35 MOTION for Judgment on the Administrative Record on Counts One and Two and Motion to Dismiss Counts Three, Four, and Five :Ryan B. Parker has failed to comply with D.C.COLO.LCivR5.1(a) and 4.3(d) of the Electronic Case Filing Procedures (Civil Cases), which mandate the correct form for an attorneys signature block. Failure in the future to follow these procedures may lead to mandatory CM/ECF training, or action by the court. (Text Only Entry) (evana,) (Entered: 03/21/2016)
04/22/2016	37	BRIEF in Opposition to 35 MOTION for Judgment <i>on the Administrative Record on Counts One and Two and Motion to Dismiss Counts Three, Four, and Five and Plaintiff Zzyym's Opening Brief in Support of Declaratory, Injunctive, and Other Relief</i> filed by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Exhibit 1)(Castillo, Paul) (Entered: 04/22/2016)
04/29/2016	38	Unopposed MOTION for Extension of Time to File Response/Reply as to 35 MOTION for Judgment <i>on the Administrative Record on Counts One and Two and Motion to Dismiss Counts Three, Four, and Five</i> by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Proposed Order (PDF Only))(Parker, Ryan) (Entered: 04/29/2016)
05/02/2016	39	ORDER granting 38 Motion for Extension of Time to File Reply. The deadline for Defendants Reply Brief and Opposition to Plaintiffs CrossMotion/Opening Brief is May 25, 2016. The deadline for Plaintiffs Reply Brief is June 15, 2016 by Judge Wiley Y. Daniel on 5/2/16. Text Only Entry(wydlc2,) (Entered: 05/02/2016)
05/02/2016	40	Utility Resetting Deadlines: Adm Plaintiffs Cross Motion/Opening Brief due by 5/25/2016. Adm Plaintiff Reply Brief due by 6/15/2016, pursuant to the 5/2/2016 39 Order. Text Only Entry (evana,) (Entered: 05/20/2016)
05/25/2016	41	REPLY to Response to 35 MOTION for Judgment <i>on the Administrative Record on Counts One and Two and Motion to Dismiss Counts Three, Four, and Five and Opposition to Plaintiff's Request for Judgment</i> filed by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Affidavit of Bennett S. Fellows)(Parker, Ryan) (Entered: 05/25/2016)
05/26/2016	42	CASE REASSIGNED. Your AP case is at issue. Pursuant to D.C.COLO.LCivR 40.1 this case is assigned to Judge Richard P. Matsch. All

		future pleadings should be designated as 15-cv-02362-RPM. (Text Only Entry) (evana,) (Entered: 05/26/2016)
05/26/2016	43	MEMORANDUM RETURNING CASE for reassignment by Judge Richard P. Matsch. (ktera) (Entered: 05/26/2016)
05/26/2016	44	CASE REASSIGNED pursuant to 43 Memorandum Returning Case. This case is reassigned to Judge R. Brooke Jackson. All future pleadings should be designated as 15-cv-02362-RBJ. (Text Only Entry) (ktera) (Entered: 05/26/2016)
06/15/2016	45	REPLY <i>Brief in Support of Declaratory, Injunctive, and Other Relief (Oral Argument Requested)</i> by Plaintiff Dana Alix Zzyym. (Castillo, Paul) (Entered: 06/15/2016)
06/16/2016	46	MINUTE ORDER re: 45 Reply filed by Dana Alix Zzyym. The Court requests that counsel jointly contact Chambers at Jackson_chambers@cod.uscourts.gov or (303) 844-4694 within 14 days to schedule an Oral Argument. By Judge R. Brooke Jackson on 6/16/16. Text Only Entry (rbjsec.) (Entered: 06/16/2016)
06/24/2016	47	MINUTE ORDER: Oral Argument is scheduled for July 20, 2016 at 9:30 a.m. in Courtroom A 902 before Judge R. Brooke Jackson. By Judge R. Brooke Jackson on 6/24/16. Text Only Entry (rbjsec.) (Entered: 06/24/2016)
07/15/2016	48	NOTICE of Entry of Appearance by Brian Leo Lynch on behalf of Dana Alix ZzyymAttorney Brian Leo Lynch added to party Dana Alix Zzyym(pty:pla) (Lynch, Brian) (Entered: 07/15/2016)
07/20/2016	49	COURTROOM MINUTES/MINUTE ENTRY for proceedings held before Judge R. Brooke Jackson: Oral Argument Hearing held on 7/20/2016. ORDERED: Case is considered submitted and is TAKEN UNDER ADVISEMENT. Court Reporter: Kara Spitler. (jdyne,) (Entered: 07/20/2016)
07/20/2016	50	AMENDED COURTROOM MINUTES/MINUTE ENTRY for proceedings held before Judge R. Brooke Jackson: Amended re 49 COURTROOM MINUTES/MINUTE ENTRY to reflect time in court, as indicated. Court Reporter: Kara Spitler. (jdyne,) Modified on 7/20/2016 (jdyne,). (Entered: 07/20/2016)
07/27/2016	51	TRANSCRIPT of Hearing on Pending Motions held on 7-20-16 before Judge Jackson. Pages: 1-57. NOTICE - REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov.
 Transcript may only be viewed at the court public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (kspit,) (Entered: 07/27/2016)
09/22/2016	52	NOTICE by Plaintiff Dana Alix Zzyym (Castillo, Paul) (Entered: 09/22/2016)

10/14/2016	53	MOTION to Withdraw as Attorney by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Proposed Order (PDF Only) On Motion to Withdraw as Counsel for Plaintiff Dana Alix Zzyym)(Hackney, Thomas) (Entered: 10/14/2016)
10/17/2016	54	ORDER granting 53 Motion to Withdraw as Attorney. Attorney Thomas George Hackney is withdrawn. By Judge R. Brooke Jackson on 10/17/16. Text Only Entry(rbjsec.) (Entered: 10/17/2016)
11/22/2016	55	ORDER: case remanded for reconsideration. by Judge R. Brooke Jackson on 11/22/16.(jdyne,) Modified on 11/22/2016 designate as a Memorandum and Opinion (jdyne,). (Entered: 11/22/2016)
11/28/2016	56	Civil Case administratively closed pursuant to the ORDER filed in this case on 11/22/16. Text Only Entry (jdyne,) (Entered: 11/28/2016)
06/26/2017	57	Unopposed MOTION to Reopen Case by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Exhibit A, # 2 Proposed Order (PDF Only))(Castillo, Paul) (Entered: 06/26/2017)
06/27/2017	58	ORDER granting 57 Unopposed Motion to Reopen Case. By Judge R. Brooke Jackson on 6/27/17. Text Only Entry (rbjsec.) (Entered: 06/27/2017)
07/03/2017	59	Unopposed MOTION for Leave to <i>File Supplemental Complaint for Declaratory, Injunctive and Other Relief</i> by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Exhibit A - Proposed Supplemental Complaint)(Castillo, Paul) (Entered: 07/03/2017)
07/06/2017	60	ORDER granting 59 Unopposed MOTION for Leave to File Supplemental Complaint for Declaratory, Injunctive and Other Relief. The Court requests that the Clerk of Court's Office docket the Supplemental Complaint at ECF No. 59-1. By Judge R. Brooke Jackson on 7/6/17. Text Only Entry (rbjsec.) (Entered: 07/06/2017)
07/06/2017	61	SUPPLEMENT Complaint filed by Plaintiff Dana Alix Zzyym pursuant to 60 Order. (dkals,) (Entered: 07/06/2017)
07/19/2017	62	Proposed Scheduling Order by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Proposed Order (PDF Only))(Parker, Ryan) (Entered: 07/19/2017)
09/01/2017	63	BRIEFING SCHEDULE: Adm Plaintiffs Brief due by 10/10/2017. Adm Defendants Brief due by 11/14/2017. Adm Plaintiff Reply Brief due by 12/15/2017. by Judge R. Brooke Jackson on 9/1/17. (jdyne,) (Entered: 09/01/2017)
09/11/2017	64	ADMINISTRATIVE RECORD by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 AR Part 1, # 2 AR Part 2, # 3 AR Part 3, # 4 AR Part 4, # 5 AR Part 5, # 6 AR Part 6, # 7 AR Part 7, # 8 AR Part 8, # 9 AR Part 9, # 10 AR Part 10, # 11 AR Part 11, # 12 AR Part 12, # 13 AR Part 13, # 14 AR Part 14, # 15 AR Part 15, # 16 AR Part 16, # 17 AR Part 17, # 18 AR Part 18, # 19 AR Part 19, # 20 AR Part 20, # 21 AR Part 21, # 22 AR Part 22, # 23 AR Part 23, # 24 AR Part 24, # 25 AR Part 25, # 26 AR Part 26, # 27 AR Part

		27, # 28 AR Part 28, # 29 AR Part 29, # 30 AR Part 30, # 31 AR Part 31, # 32 AR Part 32, # 33 AR Part 33, # 34 AR Part 34, # 35 AR Part 35, # 36 AR Part 36, # 37 AR Part 37, # 38 AR Part 38, # 39 AR Part 39, # 40 AR Part 40, # 41 AR Part 41, # 42 AR Part 42, # 43 AR Part 43, # 44 AR Part 44)(Parker, Ryan) Modified on 9/12/2017 to correct text (dkals,). (Entered: 09/11/2017)
10/10/2017	65	PLAINTIFF'S OPENING BRIEF re 64 Administrative Record,,, by Plaintiff Dana Alix Zzyym. (Castillo, Paul) (Entered: 10/10/2017)
11/07/2017	66	Unopposed MOTION for Extension of Time to <i>File Response Brief</i> by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Proposed Order (PDF Only))(Parker, Ryan) (Entered: 11/07/2017)
11/08/2017	67	ORDER granting 66 Unopposed MOTION for Extension of Time to File Response Brief. The response brief is now due by December 1, 2017, and the reply brief due January 8, 2018. By Judge R. Brooke Jackson on 11/8/17. Text Only Entry (rbjsec.) (Entered: 11/08/2017)
12/01/2017	68	DEFENDANT'S RESPONSE BRIEF re 64 Administrative Record,,, by Defendants John Forbes Kerry, Sherman Portell. (Parker, Ryan) (Entered: 12/01/2017)
12/19/2017	69	NOTICE of Change of Address/Contact Information by M. Dru Levasseur (Levasseur, M.) (Entered: 12/19/2017)
01/08/2018	70	BRIEF <i>Following The Department's Reconsideration of its Gender Policy</i> by Plaintiff Dana Alix Zzyym. (Lynch, Brian) (Entered: 01/08/2018)
01/09/2018	71	MINUTE ORDER re: 65 Administrative Record - Plaintiffs Opening Brief filed by Dana Alix Zzyym. The Court directs that the parties jointly contact Chambers at (303) 844-4694 or Jackson_chambers@cod.uscourts.gov to schedule an Oral Argument. By Judge R. Brooke Jackson on 1/9/18. Text Only Entry (rbjsec.) (Entered: 01/09/2018)
01/19/2018	72	MINUTE ORDER: An Oral Argument is set for May 29, 2018 at 9:00 a.m. in Courtroom A 902 before Judge R. Brooke Jackson. By Judge R. Brooke Jackson on 1/19/18. Text Only Entry (rbjsec.) (Entered: 01/19/2018)
04/20/2018	73	MOTION to Withdraw as Attorney <i>Gorenberg, Hayley</i> by Plaintiff Dana Alix Zzyym. (Gorenberg, Hayley) (Entered: 04/20/2018)
04/23/2018	74	ORDER granting 73 Motion to Withdraw as Attorney. Attorney Hayley Jill Gorenberg is withdrawn. By Judge R. Brooke Jackson on 4/23/18. Text Only Entry (rbjsec.) (Entered: 04/23/2018)
05/16/2018	75	NOTICE OF DISABILITY OF ATTORNEY <i>KUNEVICIUS</i> by Plaintiff Dana Alix Zzyym (Castillo, Paul) (Entered: 05/16/2018)
05/16/2018	76	Unopposed MOTION for Leave to <i>Cite Supplemental Authority in Support of</i> 65 Administrative Record - Plaintiffs Opening Brief by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Exhibit 1 - Arroyo Gonzalez v. Rossello Nevares) (Castillo, Paul) (Entered: 05/16/2018)
05/17/2018	77	

		ORDER granting 76 Unopposed MOTION for Leave to Cite Supplemental Authority in Support of 65 Administrative Record - Plaintiffs Opening Brief. By Judge R. Brooke Jackson on 5/17/18. (rbjsec) (Entered: 05/17/2018)
05/29/2018	78	COURTROOM MINUTES/MINUTE ENTRY for proceedings held before Judge R. Brooke Jackson: Oral Argument Hearing held on 5/29/2018. Court Reporter: Sarah Mitchell. (jdyne,) (Entered: 05/29/2018)
06/07/2018	79	NOTICE of Entry of Appearance by Defendants John Forbes Kerry, Sherman Portell (Takemoto, Benjamin) (Entered: 06/07/2018)
06/07/2018	80	MOTION to Withdraw as Attorney for Defendants by Defendants John Forbes Kerry, Sherman Portell. (Parker, Ryan) (Entered: 06/07/2018)
06/08/2018	81	ORDER granting 80 Motion to Withdraw as Attorney. Attorney Ryan Bradley Parker is withdrawn. By Judge R. Brooke Jackson on 6/8/18. Text Only Entry (rbjsec.) (Entered: 06/08/2018)
06/13/2018	82	NOTICE of Entry of Appearance by Ann Elizabeth Prouty on behalf of Dana Alix ZzyymAttorney Ann Elizabeth Prouty added to party Dana Alix Zzyym (pty:pla) (Prouty, Ann) (Entered: 06/13/2018)
06/25/2018	83	MOTION to Withdraw as Attorney by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Proposed Order (PDF Only))(Lynch, Brian) (Entered: 06/25/2018)
06/26/2018	84	ORDER granting 83 Motion to Withdraw as Attorney. Attorney Brian Leo Lynch is withdrawn. By Judge R. Brooke Jackson on 6/26/18. Text Only Entry (rbjsec.) (Entered: 06/26/2018)
06/29/2018	85	TRANSCRIPT of Oral Argument held on May 29, 2018 before Judge Jackson. Pages: 1-50. NOTICE - REDACTION OF TRANSCRIPTS: Within seven calendar days of this filing, each party shall inform the Court, by filing a Notice of Intent to Redact, of the party's intent to redact personal identifiers from the electronic transcript of the court proceeding. If a Notice of Intent to Redact is not filed within the allotted time, this transcript will be made electronically available after 90 days. Please see the Notice of Electronic Availability of Transcripts document at www.cod.uscourts.gov. Transcript may only be viewed at the court public terminal or purchased through the Court Reporter/Transcriber prior to the 90 day deadline for electronic posting on PACER. (smitc,) (Entered: 06/29/2018)
08/17/2018	86	MOTION to Withdraw by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Proposed Order (PDF Only))(Gordon, Demoya) (Entered: 08/17/2018)
08/20/2018	87	ORDER granting 86 MOTION to Withdraw by Plaintiff Dana Alix Zzyym. Attorney Demoya Gordon is withdrawn. By Judge R. Brooke Jackson on 8/20/18. Text Only Entry (rbjsec.) (Entered: 08/20/2018)
09/19/2018	88	ORDER by Judge R. Brooke Jackson on 9/19/18. (jdyne,) (Entered: 09/19/2018)
09/19/2018	89	

		FINAL JUDGMENT: the defendants are enjoined from relying upon its binary-only gender marker policy to withhold the requested passport from the plaintiff. by Clerk on 9/19/18. (jdyne,) (Entered: 09/19/2018)
10/01/2018	90	NOTICE of Change of Address/Contact Information by Benjamin Thomas Takemoto (Takemoto, Benjamin) (Entered: 10/01/2018)
10/04/2018	91	ADVISORY NOTICE OF NONCOMPLIANCE WITH COURT RULES/PROCEDURES:re: 90 Notice of Change of Address/Contact Information filed by attorney Benjamin Thomas Takemoto. DO NOT REFILE THE DOCUMENT. Action to take - counsel must submit a change of contact request through the Attorney Services Portal Account pursuant to D.C.COLO.LAttyR 5(c) and 3.5 of the Electronic Case Filing Procedures (Civil cases).(Text Only Entry) (dkals,) (Entered: 10/04/2018)
11/19/2018	92	NOTICE of Entry of Appearance by Matthew Charles Skurnik on behalf of John Forbes Kerry, Sherman Portell Attorney Matthew Charles Skurnik added to party John Forbes Kerry(pty:dft), Attorney Matthew Charles Skurnik added to party Sherman Portell(pty:dft) (Skurnik, Matthew) (Entered: 11/19/2018)
11/19/2018	93	NOTICE OF APPEAL as to 89 Judgment by Defendants John Forbes Kerry, Sherman Portell (Skurnik, Matthew) (Entered: 11/19/2018)
11/20/2018	94	MOTION to Withdraw as Attorney <i>Michael A. Ponto</i> by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Proposed Order (PDF Only))(Ponto, Michael) (Entered: 11/20/2018)
11/21/2018	95	LETTER Transmitting Notice of Appeal to all counsel advising of the transmittal of the 93 Notice of Appeal filed by Sherman Portell, John Forbes Kerry to the U.S. Court of Appeals. (Attachments: # 1 Preliminary Record) (dkals,) (Entered: 11/21/2018)
11/21/2018	96	ORDER granting 94 Motion to Withdraw as Attorney. Attorney Michael Allen Ponto terminated by Judge R. Brooke Jackson on 11/21/18. Text Only Entry (jdyne,) (Entered: 11/21/2018)
11/21/2018	97	USCA Case Number 18-1453 for 93 Notice of Appeal filed by Sherman Portell, John Forbes Kerry. (dkals,) (Entered: 11/21/2018)
12/03/2018	98	MOTION to Stay re 89 Judgment by Defendants John Forbes Kerry, Sherman Portell. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Skurnik, Matthew) (Entered: 12/03/2018)
12/11/2018	99	TRANSCRIPT ORDER FORM re 93 Notice of Appeal by Defendants John Forbes Kerry, Sherman Portell (Takemoto, Benjamin) (Entered: 12/11/2018)
12/11/2018	100	LETTER TO USCA and all counsel certifying the record is complete as to 93 Notice of Appeal filed by Sherman Portell, John Forbes Kerry. A transcript order form was filed stating that a transcript is not necessary. (Appeal No. 18-1453) Text Only Entry (dkals,) (Entered: 12/11/2018)
12/20/2018	101	BRIEF in Opposition to 98 MOTION to Stay re 89 Judgment filed by Plaintiff Dana Alix Zzyym. (Attachments: # 1 Exhibit A, # 2 Exhibit A-1)(Castillo, Paul) (Entered: 12/20/2018)

12/26/2018	102	Unopposed MOTION to Stay <i>the Deadline for Defendants' Reply in Support of Their Motion to Stay the Court's Injunction Pending Appeal</i> by Defendants John Forbes Kerry, Sherman Portell. (Takemoto, Benjamin) (Entered: 12/26/2018)
01/02/2019	103	ORDER granting 102 Unopposed MOTION to Stay the Deadline for Defendants' Reply in Support of Their Motion to Stay the Court's Injunction Pending Appeal (Government Shutdown). By Judge R. Brooke Jackson on 1/2/19. Text Only Entry (rbjsec.) (Entered: 01/02/2019)
01/28/2019	104	NOTICE to the Court of Restoration of Appropriations by Defendants John Forbes Kerry, Sherman Portell (Takemoto, Benjamin) (Entered: 01/28/2019)
02/04/2019	105	REPLY to Response to 98 MOTION to Stay re 89 Judgment filed by Defendants John Forbes Kerry, Sherman Portell. (Takemoto, Benjamin) (Entered: 02/04/2019)
02/21/2019	106	ORDER denying 98 Motion to Stay by Judge R. Brooke Jackson on 2/21/19. (jdyne,) (Entered: 02/21/2019)

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Billable Pages:	10	Cost:	1.00

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:15-cv-2362

DANA ALIX ZZYYM,

Plaintiff,

v.

JOHN F. KERRY, in his official capacity as the Secretary of State; and,

SHERMAN D. PORTELL, in his official capacity as the Director of the Colorado Passport Agency for the United States Department of State,

Defendants.

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiff Dana Alix Zzyym (“Dana” or “Plaintiff”), by and through the undersigned attorneys, files this Complaint for Declaratory, Injunctive, and Other Relief against Defendant John F. Kerry in his official capacity as the Secretary of State of the United States (“Defendant Kerry” or “Secretary”) and Defendant Sherman D. Portell in his official capacity as the Director of the Colorado Passport Agency for the United States Department of State (“Defendant Portell”) (jointly, “Defendants” or “State Department”). In support thereof, Plaintiff alleges as follows:

INTRODUCTION

1. This is an action to hold unlawful and set aside certain agency actions by the State Department that, in effect, deprive Dana, a United States citizen and U.S. Navy veteran who was born intersex, a U.S. passport for international travel because Dana’s gender identity is neither male nor female. By denying Dana a U.S. passport with a gender marker that respects Dana’s

identity, Defendants lock Dana within the confines of our nation's borders with no legal means to depart the United States.

2. The State Department's denial of Dana's passport application solely because Dana cannot accurately identify as either male or female was arbitrary and capricious, not in accordance with law, in excess of statutory jurisdiction and authority and violates constitutional guarantees of equality and liberty. Specifically, the Constitution prohibits the State Department from discriminating against Dana based on sex or because Dana is a member of a class of people who identify as neither male nor female; and prohibits the State Department from infringing upon Dana's fundamental rights and liberty interests, including the freedom to travel and right to define and express one's own identity, all without adequate justification.

3. Therefore, Plaintiff seeks injunctive relief and a judicial declaration that the State Department has exceeded its authority under the Administrative Procedure Act ("APA"), 5 U.S.C. §706(2) and the Fifth Amendment to the U.S. Constitution.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal question). This Court has jurisdiction to review final agency action pursuant to the APA, 5 U.S.C. § 702 ("[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Plaintiff has exhausted all administrative remedies.

5. Venue is properly vested in the District of Colorado pursuant to 28 U.S.C. § 1391(e) because Defendants are officers or employees of an agency of the United States acting in their official capacities and because this judicial district is where Defendant Portell performs his

official duties, where a substantial part of the events or omissions giving rise to the claim occurred, and where Plaintiff resides and no real property is involved in the action.

6. This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of, *inter alia*, the APA, 5 U.S.C. § 706, and because the State Department actions are contrary to the Fifth Amendment to the U.S. Constitution. The Court may also compel an officer or employee of the State Department to perform a nondiscretionary duty under 28 U.S.C. § 1361 (mandamus relief).

PARTIES

7. Plaintiff Dana Alix Zzyym is a United States citizen born in Michigan, who currently resides in Fort Collins, Colorado.

8. Defendant John F. Kerry is the duly appointed and confirmed Secretary of State for the United States. In this capacity, Defendant Kerry has the authority to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States, and by such other employees of the Department of State who are citizens of the United States as he may designate. 22 U.S.C. § 211(a). Defendant Kerry is the head of the U.S. Department of State and responsible for setting and overseeing implementation of the policies and procedures employed by the agency and all its various subdivisions, including the Bureau of Consular Affairs. Defendant Kerry is sued in his official capacity.

9. Defendant Sherman D. Portell is the Director of the Regional Passport Agency located in Aurora, Colorado. In this capacity, Defendant Portell is responsible for the Colorado

Passport Agency (“CPA”), which is within the Bureau of Consular Affairs and one of 26 regional passport agencies and centers open to the public that, among other things, reviews passport applications and issues U.S. passports to traveling Americans. Defendant Portell is sued in his official capacity

STATEMENT OF FACTS

I. DANA, WHO WAS BORN INTERSEX, IS NEITHER MALE NOR FEMALE

10. Plaintiff Dana Zzyym was born in 1958. Because Dana was born intersex, with ambiguous external sex characteristics, the sex field on Dana’s birth certificate was initially left blank.

11. “Intersex” is an umbrella term used to describe a wide range of natural bodily variations. Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated “male” or “female.” In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some variations may not be visibly apparent at all. Experts estimate that between 0.05% and 1.7% of the population is born with intersex traits.

12. Moments after a child is born, the general practice in this country is for a physician to assess visually the newborn’s genitalia and assign the newborn’s sex as “male” or “female” on that basis. Sex, however, is much more complex, and is determined by a number of factors, including chromosomes, gonads, hormones, genitalia and gender identity. A person’s gender identity, meaning the innate sense of being male, female, both, or neither, is the most important determinant of that person’s sex. Although there is not yet one definitive explanation for what determines gender identity, recent research points to the influence of biological factors, most notably the role of sex differentiation in the brain in gender identity development.

13. When a child is born with mixed or ambiguous markers of sex, doctors often assign a sex they guess is likely to match the child's gender identity. However, it is impossible to predict with certainty how an intersex infant's gender identity will develop. As with any other person, an intersex person eventually may identify as female, male or, less commonly but with some regularity, as both or neither.

14. Sometime after Dana's birth, Dana's parents and doctors decided Dana would be raised as a boy. Dana's intersex variance was kept secret from Dana. Dana was given the name "Brian Orin Whitney," and the sex field on Dana's birth certificate was filled in with "Male."

15. Similar to many other intersex children, by age five, Dana had been subjected to several irreversible, invasive, painful, and medically unnecessary surgeries designed to make Dana's body conform to binary sex stereotypes. The surgeries immediately failed and caused permanent scarring and damage. None of the surgeries Dana underwent altered, or even fully disguised, Dana's intersex nature.

16. Like many intersex adults subjected to such surgeries as children, Dana experienced shame and stigma, as well as physical and emotional pain caused by attempts to erase Dana's intersex traits. Dana eventually came to realize that Dana had been forced into an incorrect gender category.

17. In 1978, at the age of twenty, Dana enlisted as a Machinist Mate in the U.S. Navy. During Dana's six years with the Navy, Dana completed three tours of duty in Beirut and one tour throughout the Persian Gulf.

18. In 1984, Dana declined to re-enlist in the Navy due to increased scrutiny over and interrogation regarding Dana's perceived sexual orientation. In 1991, Dana began working as a

custodian at Colorado State University (“CSU”) in Fort Collins.

19. In 1994, Dana, came to understand the male gender Dana had been arbitrarily and inaccurately assigned as an infant was not accurate. Dana completed a legal name change in 1995, from Brian Orin Whitney to Dana Alix Zzyym.¹

20. In approximately 2008, on a suspicion of having been born intersex and receiving “masculinizing” gender-assignment surgeries, Dana began researching possible causes of the severe scarring and damage Dana has lived with since childhood.

21. In 2009, Dana was examined by a urologist at the Veteran’s Affairs (“VA”) hospital, who confirmed Dana’s intersex traits. The urologist also informed Dana that an orchiectomy and other surgical intervention might greatly reduce the pain Dana had experienced for several years and allow Dana to gain sexual function. But because the VA would not pay for what it considered to be “transgender” procedures, given Dana’s early history of being labeled male, Dana ultimately found a surgeon outside of the VA to complete the procedure. Around the same time, Dana began experimenting with living as female. However, Dana soon came to understand that living as a woman was not right either.

22. By 2011, Dana came to terms with being intersex; Dana identifies neither as male nor female. Dana’s medical records—provided to Defendants in connection with Dana’s application for a U.S. passport—reflect that Dana is intersex, and the doctors who have treated Dana for the last six years consistently report that Dana is intersex. In 2012, Dana successfully

¹ As an intersex person who does not identify as either male or female, Dana uses the singular “they,” “them,” and “their” third-person gender-neutral pronouns. See ‘They,’ the Singular Pronoun, Gets Popular, The Wall Street Journal, April 10, 2015 at <http://www.wsj.com/articles/can-they-be-accepted-as-a-singular-pronoun-1428686651>; Writing Around Gender, The New York Times, Feb. 6, 2015 at <http://www.nytimes.com/times-insider/2015/02/06/writing-around-gender>.

amended the gender marker on Dana's certificate of live birth that was originally left blank, and later inappropriately switched to "Male," to "Unknown."

23. Dana currently serves as the Associate Director for the United States affiliate of the Organisation Intersex International ("OII-USA") (a/k/a Intersex Campaign for Equality).

24. Dana was invited to attend the International Intersex Forum on October 27-31, 2014, in Mexico City, Mexico to represent and vote on behalf of OII-USA. However, to travel internationally, Dana needed to obtain a U.S. passport.

II. THE STATE DEPARTMENT POLICIES REGARDING GENDER MARKERS ON U.S. PASSPORTS

25. A U.S. passport is a travel document issued under the authority of State Department attesting to the identity and nationality of the bearer. To travel internationally, a U.S. citizen must carry a U.S. passport. 8 U.S.C. § 1185.

26. Before a U.S. passport can be issued, the applicant "shall subscribe to and submit a written application which shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport." 22 U.S.C. § 213.

27. A U.S. citizen seeking a first-time passport must complete the two-page Application for a U.S. Passport, Form DS-11 (09-2013) ("Application"), available at <http://www.state.gov/documents/organization/212239.pdf>. The Application contains twenty-one numbered fields, including a field for "Sex" with two boxes—an "M" box and an "F" box—as shown in the excerpt below:

APPLICATION FOR A U.S. PASSPORT
Please Print Legibly Using Black Ink Only

OMB CONTROL NO. 1425-0004
OMB EXPIRATION DATE: 01-31-2017
ESTIMATED BURDEN: 95 MIN

Attention: Read WARNING on page 1 of instructions
Please select the document(s) for which you are applying:

U.S. Passport Book U.S. Passport Card Both
The U.S. passport card is not valid for international air travel. For more information see page 1 of instructions.

28 Page Book (Standard) 52 Page Book (Non-Standard)
Note: The 52 page option is for those who frequently travel abroad during the passport validity period, and is recommended for applicants who have previously required the addition of visa pages.

1. Name Last: _____
First: _____ Middle: _____
End. # _____ Exp. _____
 D O Dep DOTS

2. Date of Birth (mm/dd/yyyy) _____
3. Sex: M F
4. Place of Birth (City & State if in the U.S., or City & Country as it is presently known) _____

5. Social Security Number _____
6. Email Address (e.g., my_email@domain.com) _____
7. Primary Contact Phone Number _____

8. Mailing Address: Line 1: Street/RFD#, P.O. Box, or URB. _____

28. The State Department requires each applicant to select either “M” for male or “F” for female on the Application.

29. In addition to submitting a completed Application, proof of identity, a recent color photograph, and fees, a first-time applicant born in the United States must also submit a certified birth certificate, which “must include your full name, date and place of birth, [and] sex”

30. An applicant is subject to civil and criminal sanctions for “willfully and knowingly mak[ing] any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another.” 18 U.S.C. § 1542

31. The State Department Foreign Affairs Manual (“FAM”) recognizes people born with intersex traits “do[] not fit typical definitions of male or female.” See 7 FAM 1350 Appendix M, available at <http://www.state.gov/documents/organization/143160.pdf> (last visited October 25, 2015).

32. The State Department’s current policies prohibit applicants who identify as

neither male nor female from accurately listing their gender.

33. Defendants will not issue a U.S. passport to an applicant who is unable to select “M” or “F” but has otherwise complied with the application instructions.

III. THE STATE DEPARTMENT DENIES DANA’S PASSPORT APPLICATION

34. In September 2014, Dana visited the CPA to obtain a U.S. passport in order to attend the International Intersex Forum in Mexico City. Dana submitted a completed Application, with the requisite identity and citizenship documentation, photograph, and fee payment.

35. In the sex field on the Application, Dana accurately listed “Intersex”—instead of “M” or “F”—and, by separate letter, clarified that, “I’m not male or female.” Dana requested “X” as the marker in the sex field of the passport because such designation conforms to the International Civil Aviation Organization (ICAO) standards for machine-readable travel documents. *See* ICAO Document 9303, *Machine Readable Travel Documents*, at IV-14 (7th ed. 2015) (“Sex of the holder, to be specified by . . . the capital letter F for female, M for male, or X for unspecified.”), available at <http://www.icao.int/Security/mrtd/Pages/Document9303.aspx>.²

36. In a letter dated September 24, 2014 (“September 2014 Letter”), the State Department, through its customer service department, informed Dana that the “Department of State currently requires the sex field on United States passports to be listed as ‘M’ or ‘F’” and that it was “unable to fulfill your request to list your sex as ‘X.’” The September 2014 Letter provided Dana with three alternative options: (a) receive a passport listing Dana as female, (b) receive a passport listing Dana as male, or (c) withdraw Dana’s application. Defendant offered

² ICAO Document 9303 was still in its 6th edition when Dana applied for a passport. It has since been updated, but the relevant provision remains the same.

no rationale for requiring that an applicant select “M” or “F” on the Application or for requiring an issued passport to identify its holder as “M” or “F.”

37. On December 19, 2014, Dana appeared at the CPA’s office to present additional documentation in support of Dana’s intersex classification and use of the “X” marker on the passport. Dana again reiterated that Dana only wished to be issued a passport that accurately reflected Dana’s gender by the use of a third gender marker.

38. In a letter dated December 29, 2014 (“Notification of Denial”), Defendant Portell denied Dana’s passport application, stating that because “the Department of State requires the sex field on United States passports to be listed as ‘M’ or ‘F,’” it was unable to accommodate Dana’s request for the use of the “X” marker in the sex field. Again, the Notification of Denial provided no rationale for requiring that an applicant select “M” or “F” on the Application or for requiring an issued passport to identify its holder as “M” or “F.”

39. In a letter dated February 26, 2015 (“Request for Reconsideration or Hearing”), Dana requested that the State Department reconsider its decision to deprive Dana of a passport for international travel or, alternatively, to provide Dana with a review hearing pursuant to 22 C.F.R. § 51.70(a). Plaintiff’s Request for Reconsideration or Hearing expressly noted that the agency’s Notification of Denial “did not set forth any explanation, specific reason, or legal basis” for such assertion and that the State Department “must articulate the reasoning behind its conclusion that Dana is not entitled to a U.S. passport with an accurate sex marker[.]”

40. In a letter dated April 10, 2015 (“April 2015 Letter”), the State Department confirmed that its denial of Dana’s passport application due to Dana’s inability to select an “M” or “F” marker was final, and denied the request for a review hearing. Reiterating its refusal to

recognize the use of “X” on a U.S. passport, the State Department Director for Legal Affairs, Jonathan Rolbin, asserted that its “current policy requires that the applicant select ‘M’ or ‘F’ on the sex field on a U.S. passport application, and that the corresponding sex of ‘M’ or ‘F’ be identified on the issued passport.” Again, no rationale was provided for requiring that an applicant select “M” or “F” on the Application or for requiring an issued passport to identify its holder as “M” or “F.” A true and correct copy of Defendant’s April 10, 2015, letter is attached hereto as Exhibit A.

41. Aside from Dana’s inability to select an “M” or “F” marker, Defendants did not identify any other issues or deficiencies in connection with Dana’s passport application. None of the provisions in 22 C.F.R. § 51.60 apply. *See* 22 C.F.R. § 51.60 (setting forth reasons for mandatory and discretionary denials and restrictions of passports).

42. The grounds for refusal asserted by the State Department do not relate to Dana’s citizenship or allegiance, nor to criminal or unlawful conduct.

43. Dana does not seek to acquire a passport for an unlawful or improper purpose.

44. According to Director Rolbin, “Dana remains eligible at any time to submit a new passport application, provide sufficient supporting documentation, and receive a U.S. passport listing the sex [either male or female] supported by the documentation.” *See* Ex. A.

45. For all of the reasons described above, Dana cannot truthfully submit an application claiming to be either male or female. Therefore, resubmission of a passport application to the State Department is futile.

46. Defendants denied Plaintiff a passport on the basis of personal characteristics rather than area restrictions affecting all citizens. Other United States citizens are permitted and

currently do travel to Mexico with valid U.S. passports listing an accurate gender marker.

47. By denying Plaintiff a passport, Defendants have wholly deprived Plaintiff access to any and all means of lawfully exiting the United States.

CLAIMS FOR RELIEF

**COUNT I:
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT (5 U.S.C. § 706(2)(A))**

(The State Department’s Conduct Is Arbitrary And Capricious)

48. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

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

50. The State Department failed to provide a reasoned explanation of both its decision to refuse the Plaintiff a passport and its male-or-female, binary-only gender marker policy (together, “Policy”). Not only did the State Department fail to provide sufficient written notice to Plaintiff supported by the legal and factual basis for its decision to withhold a U.S. passport from Dana, it further failed to articulate any rational connection between the facts found and the course of action taken.

51. The State Department gave insufficient consideration, if any, to the viability of possible alternatives for passport applicants who are neither male nor female, such as Plaintiff, including the use of the “X” as the marker in the sex field on the passport.

52. The State Department’s decision to deny Plaintiff a passport based upon its Policy is wholly inconsistent with its practice to allow foreign nationals who have a passport with “X” as a sex marker, and otherwise qualify to be admitted, secure entry into the United States.

53. The State Department’s refusal to issue Plaintiff a passport with a gender marker other than “M” (male) or “F” (female) constitutes a clear error of judgment because it runs counter to the evidence before the agency, and is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. Any conclusion the State Department may have made regarding the viability of utilizing a gender marker other than “M” (male) or “F” (female) on U.S. passports for individuals, such as Plaintiff who do not fit into a binary sex classification, is flawed because it does not reflect the State Department bringing expertise to bear on the question.

54. The State Department has acted by regulatory fiat to effectively prohibit or severely restrict international travel of people who do not fit into a binary sex classification based upon constitutionally protected personal characteristics. The State Department has thus stigmatized and denigrated individuals, including Plaintiff, who are neither female nor male.

55. Plaintiff has suffered a legal wrong and has been adversely affected and aggrieved by the State Department’s arbitrary and capricious conduct, and the agency action must therefore be set aside and permanently enjoined.

**COUNT II:
VIOLATION OF THE ADMINISTRATIVE
PROCEDURE ACT (5 U.S.C. § 706(2)(C))**

(The State Department’s Conduct Exceeds The Authority Delegated By Congress)

56. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

57. The APA empowers the Court to “hold unlawful and set aside agency action, findings, and conclusions” that are “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2)(C).

58. Pursuant to the Passport Act of 1926, 22 U.S.C. § 211a, Defendant Kerry has the power to grant and issue passports, and cause passports to be granted by those acting under him. Any exercise of delegated powers to curtail or diminish personal freedoms, such as the freedom to travel or the freedom to define and express one’s identity, must be construed narrowly.

59. The State Department engages in an unlawful practice of imposing an inaccurate gender marker on a United States passport for people such as Plaintiff who identify as neither male nor female.

60. The Passport Act of 1926, 22 U.S.C. § 211a, does not expressly or implicitly authorize Defendants to refuse to issue a passport unless and until the applicant accepts either a male or female gender marker inconsistent with that person’s gender identity.

61. The final agency action by the State Department against Plaintiff in denying a passport on the ground that Dana cannot identify as either “M” (male) or “F” (female) is unlawful and *ultra vires*.

62. No provision of law purports to authorize such authority by the State Department to impinge on Plaintiff's personal freedoms, nor could any law do so constitutionally.

63. Plaintiff has suffered a legal wrong and has been adversely affected and aggrieved by the State Department's exceeding its authority delegated by Congress, and its agency action must therefore be set aside and permanently enjoined.

**COUNT III:
DEPRIVATION OF DUE PROCESS
U.S. Const. Amend. V**

(The State Department's Conduct Violates Plaintiff's Fundamental Right To International Travel, And Fundamental Liberty To Make Personal Choices Central To Individual Dignity And Autonomy, Including the Right To Define and Express One's Own Identity And Beliefs)

65. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

66. The APA empowers the Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In addition, this Court has authority under 28 U.S.C. § 1331 and its traditional powers of equity to declare invalid and enjoin agency action that violates the Constitution.

67. Where a Complaint contends that agency action offends the Constitution, and for that reason should be set aside, the Court affords no deference to the agency but instead reviews the constitutional issues independently.

68. The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend.

V. The Due Process Clause has a substantive component that provides heightened protection against government interference with fundamental rights and liberty interests.

69. The right to international travel and freedom of movement without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fifth Amendment.

70. Defendants' refusal to issue a U.S. passport to Plaintiff with a gender marker other than "M" (male) or "F" (female) impermissibly infringes upon Plaintiff's fundamental right to movement, including Plaintiff's fundamental right to travel abroad.

71. The Fifth Amendment's Due Process Clause also protects each person's fundamental liberty to individual dignity and autonomy, including the right to define and express one's own identity, to define one's own concept of existence, and make intimate decisions concerning marriage, procreation, and family life, all without undue government interference.

72. A person's gender identity constitutes a core aspect of individual self-definition. Defendant's Policy as applied to Plaintiff impermissibly interferes with the most intimate choices a person may make in a lifetime, including Plaintiff's right to existence and self-expression as a person who identifies neither as male nor female. It would disparage Plaintiff's choice to live openly and authentically and diminish Plaintiff's personhood to deny Plaintiff this right.

73. When government deprives an individual of a fundamental right or substantially infringes upon a fundamental liberty interest, such government action may be sustained only upon a showing that it is, at the very least, substantially related to an important government interest, if not narrowly tailored to serve a compelling government interest. Here, Defendants' Policy lacks adequate tailoring and fails to serve even a legitimate governmental interest.

74. Defendants' Policy violates Plaintiff's fundamental right to travel and impermissibly infringes upon Plaintiff's fundamental liberty interests in personal decision-making central to individual dignity and autonomy, in violation of the Fifth Amendment to the United States Constitution, and will continue to do so if Plaintiff is not afforded the relief requested. Defendants' actions must therefore be set aside and permanently enjoined.

**COUNT IV:
DEPRIVATION OF EQUAL PROTECTION
U.S. Const. Amend. V**

**(The State Department's Conduct Discriminates Against Plaintiff
Based on Sex, Status As A Person Whose Gender Identity Is Neither Male Nor
Female, And Exercise Of A Fundamental Right)**

75. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

76. The APA empowers the Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In addition, this Court has authority under 28 U.S.C. § 1331 and its traditional powers of equity to declare invalid and enjoin agency action that violates the Constitution.

77. Where a Complaint contends that agency action offends the Constitution, and for that reason should be set aside, the Court affords no deference to the agency but instead reviews the constitutional issues independently.

78. The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee of equal

protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amendment.

79. People such as Plaintiff, who do not identify as either male or female, are similarly situated to people who identify as exclusively male or female in all of the characteristics relevant to issuance of a passport by the State Department. Plaintiff, like other citizens or non-citizen nationals, may seek to travel abroad for job and business opportunities; for cultural, political and social activities; or for all the reasons any other person may have.

80. **Discrimination Based On Sex.** Defendant's Policy discriminates against Plaintiff on the basis of sex, both facially and as applied, by barring Plaintiff from obtaining an accurate U.S. passport with a gender marker other than "M" (male) or "F" (female). For example, if Plaintiff were male, Defendants would have issued Plaintiff a passport.

81. Discrimination against an individual who is neither male nor female as such, just like discrimination against a woman as such, is discrimination based on sex. In denying a passport to Plaintiff, the State Department relied upon sex-based considerations. Because of the State Department's rigid sex-based classification, Plaintiff, a person who is neither male nor female, is precluded from obtaining a passport with a marker that properly indicates Plaintiff's sex. If Plaintiff were intersex and also identified as either male or female, Plaintiff would qualify for and be issued a passport for international travel by the State Department.

82. Defendants' Policy is also impermissibly premised on assumptions, expectations, stereotypes, or norms about the nature of sex as a binary characteristic, either male or female.

83. The State Department excluded Dana from obtaining a passport because Plaintiff failed to conform to the sex-based stereotype that individuals are all clearly male or female. That

is, the State Department relies on an inaccurate assumption that sex is binary and that individuals cannot fall along (or outside of) a sex continuum, i.e., the false belief that all people are either exclusively men/male or exclusively women/female.

84. All sex-based classifications must be supported by an exceedingly persuasive justification and be substantially related to the achievement of that underlying objective.

85. The exclusion of individuals who are neither male nor female, such as Plaintiff, from passports unless they falsely describe themselves as exclusively male or female, cannot survive the heightened scrutiny required for sex-based classifications. Indeed, the Policy is not even tailored to further any legitimate interest at all.

86. **Discrimination Based On Status As Neither Male Nor Female.** On its face, Defendants' Policy denies passports to the class of United States citizens whose sex is neither male nor female. Thus, in addition to being discrimination based on sex, Defendants' Policy also targets people who do not fit in a male or female sex classification as a group.

87. The United States Supreme Court has not yet determined the level of scrutiny applicable for laws that classify persons for adverse treatment based on their status as people who cannot identify as male or female or their status as intersex. At the very least, such classifications must be rationally related to a legitimate government interest. Here, Defendants' Policy lacks even a rational relationship to a legitimate interest.

88. **Discrimination With Respect To Fundamental Rights And Liberty Interests Secured By The Due Process Clause.** Defendants discriminate against Plaintiff with respect to Plaintiff's access to the fundamental right to international travel and liberty interests in

individual dignity and autonomy, including Plaintiff's right to define and express identity, self-definition and privacy.

89. Differential treatment with respect to exercise of fundamental rights and liberty interests subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand.

90. Defendant's Policy deprives Plaintiff of equal protection and equal liberty and dignity without due process, in violation of the Fifth Amendment to the United States Constitution, and will continue to do so if Plaintiff is not afforded the relief requested. Defendants' actions must therefore be set aside and permanently enjoined.

**COUNT V:
WRIT OF MANDAMUS**

91. Plaintiff incorporates by reference all of the preceding paragraphs of this Complaint as though fully set forth herein.

92. Plaintiff's claims—as set forth in paragraphs 51 through 90 above—are clear and certain.

93. Pursuant to 22 U.S.C. § 211a, the Defendant Kerry has the power to grant and issue passports, and to cause passports to be granted by those acting under him. Moreover, Defendants' duty to adjudicate Plaintiff's passport application and issue Plaintiff a U.S. passport is nondiscretionary, ministerial, and free from doubt.

94. Plaintiff has exhausted any administrative remedies that may exist, and no other adequate remedy is available to Plaintiff.

95. Pursuant to 28 U.S.C. § 1361, Plaintiff is entitled to mandamus relief compelling Defendant process Plaintiff's application for a U.S. passport that accurately reflects Plaintiff's sex.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Issue a declaratory judgment that Defendants' denial of Plaintiff's application for a U.S. passport based on Plaintiff's inability to accurately select "M" or "F" (a) constitutes agency action that is arbitrary and capricious in violation of the Administrative Procedure Act, (b) constitutes agency action that exceeds statutory jurisdiction and authority in violation of the Administrative Procedure Act, and (c) violates Plaintiff's constitutional rights;

B. Permanently restrain or enjoin Defendants from relying upon its male-or-female, binary-only gender marker policy to withhold the requested passport from Dana or any other individual;

C. Issue a writ of mandamus compelling Defendants to process Plaintiff's passport application on an individualized, nondiscriminatory basis in a manner consistent with the applicable burden of proof;

D. Award attorney's fees, costs, and expenses of all litigation in accordance with law, including the Equal Access to Justice Act, 28 U.S.C. § 2412; and

E. Grant all such other and further relief as the Court may deem just and proper.

Dated: October 25, 2015

Respectfully submitted,

Attorneys for Plaintiff Dana Alix Zzyym

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United States Department of State

Washington, D.C. 20520

April 10, 2015

Mr. Paul D. Castillo
Lambda Legal
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Dallas, Texas 75219-6722

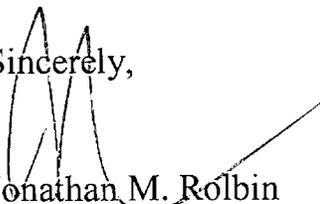
Dear Mr. Castillo:

Our office received your February 26, 2015 letter concerning Dana Alix Zzyym's passport application number 172460355. You requested that the Department of State reconsider its decision to deny Dana Zzyym's passport application, or alternatively, provide a hearing regarding the denial of the application.

The denial was the final decision of the Department on Dana Zzyym's passport application and the request for a designation of "intersex." This action does not meet the requirements for a review hearing specified at 22 C.F.R. § 51.70. As noted in our previous communications with Dana, and consistent with several other federal agencies, the Department of State's current policy requires that the applicant select "M" or "F" on the sex field on a U.S. passport application, and that the corresponding sex of "M" or "F" be identified on the issued passport. The Department does not recognize the use of "X" on a U.S. passport, and therefore Dana cannot select the sex as "X." While the denial of passport application number 172460355 is final, Dana remains eligible at any time to submit a new passport application, provide sufficient supporting documentation, and receive a U.S. passport listing the sex supported by the documentation.

Thank you for your inquiry.

Sincerely,


Jonathan M. Rolbin
Director

for Legal Affairs and Law Enforcement Liaison
Passport Services

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 DANA ALIX ZZYIM

(b) County of Residence of First Listed Plaintiff Larimer County, CO
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 See Attachment for Attorneys from Lambda Legal Defense and Education Fund, Inc., Faegre Baker Daniels LLP, and the Law Office of Jessica Kunevicius, LLC

DEFENDANTS
 U.S. Dept. of State, JOHN KERRY, Secretary of State
 U.S. Dept. of State, SHERMAN D. PORTELL, Director of Colorado Passport Agency

County of Residence of First Listed Defendant _____
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
 (For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities Employment <input type="checkbox"/> 446 Amer. w/Disabilities Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
		IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 5 U.S.C. 706; U.S. Const., amend. V

VI. CAUSE OF ACTION

Brief description of cause: AP Docket
 Challenge of unlawful final agency action related to denial of passport and "policy" as arbitrary and capricious and exceeding authority under 22 U.S.C. 211a; violation of equal protection and due process under Fifth Amendment to the U.S. Constitution.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ 0.00

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

DATE: 10/25/2015

SIGNATURE OF ATTORNEY OF RECORD: s/Paul D. Castillo

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows.

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment noting, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.

Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example:

U.S. Civil Statute: 47 USC 553

Brief Description:

Unauthorized reception of cable service

Or:

"AP Docket"

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Date and Attorney Signature. Date and sign the civil cover sheet.

App'x 39

**CIVIL COVER SHEET
ATTORNEY LIST ATTACHMENT**

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

DANA ALIX ZZYYM,

Plaintiff,

v.

JOHN F. KERRY, ET AL.,

Defendants.

DECLARATION OF BENNETT S. FELLOWS

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

1. I am Division Chief of the Office of Adjudication Policy in the Office of Adjudication of the U.S. Department of State, Bureau of Consular Affairs, Passport Services Directorate. I submit this declaration in connection with the response of the Defendants to Plaintiff Zzyym's "Opening Brief in Support of Declaratory, Injunctive, and Other Relief and Opposition to Defendants' Motion for Judgement on the Administrative Record and Motion to Dismiss" (ECF No. 37). The statements made herein are based on my personal knowledge and on information provided to me in the course of my official duties with the Department of State (the "Department"). I have served in the Passport Directorate for ten years, and have been in my current position in the Office of Adjudication for four years. From 2006 to 2009, I adjudicated passport applications in the National Passport Center in Portsmouth, New Hampshire, where

I later supervised the adjudication of passports from 2009 to 2010. The mission of the Office of Adjudication includes providing the highest level of quality in adjudicating passport applications and identifying fraud while maintaining efficiency. The Office of Adjudication Policy develops and implements the Department's policies and procedures for adjudicating passports.

2. The Secretary of State has authority under 22 U.S.C. § 211a (the Passport Act of 1926) and Executive Order 11295 (August 5, 1966), to grant and issue U.S. passports, and to authorize U.S. diplomatic and consular officers and such other U.S. citizen employees of the Department as he may designate to issue U.S. passports. The Secretary has authorized the adjudication of U.S. passports by Specialists serving in U.S. passport centers and agencies domestically and by Foreign Service Officers serving in U.S. Embassies and Consulates abroad.

3. Under its regulatory authority, 22 C.F.R. § 51.20(a), the Department has prescribed certain forms to be completed by individuals applying for a U.S. passport, including Form DS-11, the form used by Plaintiff in this case. Applicants are required to complete the application, and information that the Department deems material to its adjudication of the applicant's claim of identity and citizenship must be provided.

4. Prior to 1976, applicants for U.S. passports were not required to provide their sex in passport applications, and U.S. passports did not list the sex of the bearer on the data page. Since October 1976, the Department has required all applicants for U.S. passports to specify their sex as either "M" for Male or "F" for Female on passport application

forms, and has imprinted every U.S. passport with a sex marker consistent with the holder's passport application.

5. An applicant's sex is one of the key data such as name, date of birth, and place of birth that the Department deems material to its adjudication of the applicant's claim of identity and citizenship. Not only must such data be provided by every applicant, it must also be supported by documentation generated by third parties, such as birth certificates, driver's licenses, social security cards, third-party affidavits, and/or other documentation consistent with the information submitted by the applicant.

6. An application without one of the two checkboxes for "Sex" checked, either for "M" or for "F," is not considered to be complete. If an applicant fails to indicate their sex, or lists it incorrectly, the passport adjudicator takes appropriate corrective measures, either to add or correct the sex indicated on the application where it is clear from the documentation submitted by the applicant, or to obtain additional information from the applicant, in either case in accordance with the Department's policies. Writing a word above the "M" and "F" checkboxes on the application form does not constitute submitting the data required by the form.

7. Depending on the circumstances, an applicant's failure to complete certain items on their application form may not result in suspension of processing or denial of the application. For example, the Department may not suspend the processing of a passport application if the applicant fails to provide an e-mail address or additional telephone number, fails to specify their occupation, school, or employer, or fails to provide marital

information, unless there are discrepancies in the information submitted by the applicant or other problems with the application that may lead the Department to require the item.

8. The Department also requires all applicants for U.S. visas to select one of these two sex markers in order to submit an electronic visa application. Based on the sex identified in the corresponding visa application, every U.S. visa added to a foreign passport by the Department includes either an “M” or an “F” in the sex field; this is the case even if the applicant’s foreign passport has a third gender marker such as “X.”

9. In the present case, Plaintiff failed to complete Form DS-11 because Plaintiff failed to complete the “sex” field by selecting one of the two checkboxes provided. [AR-00002.] Under the Department’s policy, the sex field can be completed only by checking one of these two boxes, and not by writing a word in the surrounding space. Thus, Plaintiff’s writing of the word “Intersex” above the checkboxes while leaving the checkboxes unmarked did not constitute proper “completing” of the application under applicable regulations.

10. In correspondence to Plaintiff dated September 24 and December 29, 2014, the Department advised Plaintiff that the Department requires the sex field on passports to be listed as either “M” or “F” and, therefore, could not fulfill Plaintiff’s request to have sex listed as “X” on a U.S. passport. [AR-00018 & 00036.] Writing “Intersex,” or any other word, instead of selecting a checkbox to indicate sex is not an option on the application form because only the binary options “M” and “F” appear on the data pages and in the contactless chips used in U.S. passports. The correspondence explained why such an

incomplete application form, accompanied by a request to receive a passport with a third sex marker beyond the parameters of the application form or U.S. passports, could not be processed and had therefore been rejected.

11. A U.S. passport is the world's premier identity credential, and every passport issued by the Department is based upon the submission of documentation supporting a finding of valid identity and citizenship. A U.S. passport is proof of identity and a vital travel document for Americans going abroad.

12. In addition to their primary use to facilitate identity checks in connection with international travel, U.S. passports serve an important secondary purpose in verification of identity (and citizenship) for a wide variety of uses by diverse entities in the public and private sectors. A U.S. passport is a uniquely reliable, and thus widely accepted, proof of identity for such purposes as issuing birth records, drivers' licenses, and vehicle registrations, as well as for applications for employment, government benefits, educational admissions, medical treatment, and banking and credit account applications, among many others.

13. The Department's longstanding policy of allowing only two sex markers – "M" and "F" – on U.S. passports serves several significant purposes related to the passport's central role as a primary proof of identity and citizenship for most U.S. citizens. This data collected by the Department on passport application forms is used to verify the identity and citizenship of persons applying for U.S. passports in connection with the adjudication of their applications. Sex is a key component of the "biometric identity"

that the Department uses to verify the identity of the applicant and distinguish individuals.

14. Each U.S. passport book and U.S. passport card specifies the sex of the holder as “M” for male or “F” for female, and includes a recent photo that clearly shows facial features. Both the sex and the photo image of the holder are among the passport data that are stored in a contactless chip embedded in U.S. passport books¹ and cards. Other components of biometric identity that are required to be provided on passport application forms, such as height, weight, eye color, and hair color, are not printed or otherwise stored in U.S. passports, but all components of biometric identity included on original passport application forms are kept permanently in the Department’s passport records for future use in verifying an applicant’s identity and citizenship.

15. In verifying an applicant’s identity, among other things, the Department matches the applicant’s stated sex against numerous other documents and information sources – including birth records, drivers’ licenses, court orders and law enforcement records – and a number of governmental and private data bases. Fifty-seven U.S. jurisdictions issue certificates of birth and identity documents, including each of the fifty states, Guam, Puerto Rico, United States Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, New York City, and the District of Columbia. To the best of my knowledge, none of these entities currently authorize the use of an “X,” or any marker other than “M” for male or “F” for female, to specify the sex of the subject of the

¹ Temporary passports include a sex field on the data page but do not contain contactless chips.

birth. Although some jurisdictions allow the sex field to be left blank or filled with the word “unknown,” these are not used to indicate a sex other than male or female. Similarly, none of the 57 jurisdictions that issue drivers’ licenses presently issue licenses with any sex designation other than “M” or “F.” It should be noted that none of the other U.S. federal agencies that issue citizenship documents or personal identification cards, such as U.S. Citizenship and Immigration Services in the Department of Homeland Security or the Department of Defense, recognize the use of any third marker, including the “X” for Intersex requested by Plaintiff. Indeed, of the numerous kinds of documents and databases that the Department uses to verify the identity of a passport applicant, I am aware of none that utilize any other sex designations.

16. The rigorous process of verifying a passport applicant’s identity and citizenship is necessary to prevent identity theft and passport fraud and to ensure the accuracy and reliability of United States Passports. When an individual applies for a United States passport or crosses the border of the United States using a United States passport, the Department employs a computerized system to ensure document integrity, effective fraud prevention, and cooperation with courts and law enforcement agencies. Sex is one of the items of personally identifiable information input into this system by the Department and other agencies to identify individuals. Although not every law enforcement record from which data is input to this system designates an individual’s sex, a field left blank in the system is assumed to reflect that the particular datum is unknown or unrecorded, and not to indicate “intersex” or other possible alternative categorization. Where sex is recorded

in the system, the entries are uniformly “male” or “female,” and such entries assist in making connections between passport applicants and passport holders, on the one hand, and information in law enforcement databases relating to those individuals, on the other. To the best of my knowledge, none of the law enforcement entities that provide data to the Department’s system use an “X” or any other indicator (including a blank) to signify an option for sex other than male or female.

17. In addition, because only a few countries recognize a third sex marker in their issuance of passports and visas under the precatory specification of the International Civil Aviation Organization (ICAO) permitting the letter “X” to indicate a sex of “unspecified,” the Department’s introduction of a third gender marker in the sex field of U.S. passports could lead to inconvenience and uncertainty if U.S. citizens face difficulty entering tourist and business destinations abroad in countries that do not yet recognize a third gender marker.

18. The Department does have rules that address changes in gender. In cases in which a passport applicant claims that the sex indicated on their birth document is incorrect, adjudicators must follow the procedures in 7 FAM 1360 Appendix M, “Gender Change” (Appendix M). Appendix M provides guidance and requirements for issuing a passport listing a sex other than the one indicated on the applicant’s birth document when the applicant has changed gender from male to female or vice versa, or is in the process of a gender transition. Appendix M sets forth a limited exception to the rule that the sex identified on an applicant’s passport application and printed on their passport must match

the sex reflected on the applicant's birth documents and other evidence of identity and citizenship. The Department's policy ensures that a passport reflecting a sex designation different than that reflected on the applicant's birth document is based on sound, objective, medical evidence, which is sufficiently reliable to maintain the passport's integrity as a proof of identity.

19. Department policy does not accept an amended birth certificate as evidence of a new gender sufficient to issue a passport reflecting a change in sex designation. 7 FAM 1320, Appendix M, subsection (c)(6). [AR-00024.] The Department has no control over, and limited knowledge of, the degree of proof that various jurisdictions may require in order to issue an amended birth certificate with a new sex designation. Because a jurisdiction may issue an amended birth certificate based upon an individual's self-identification, or on the basis of evidence that the Department would not accept as sufficient, the Department cannot accept an amended birth certificate as sufficient evidence to issue a passport in a new gender.

20. To satisfy the requirements of Appendix M, the applicant must provide a signed medical certification under penalty of perjury, from a licensed physician who has treated the applicant or reviewed and evaluated the applicant's medical history, that the applicant "has had appropriate clinical treatment for gender transition to the new gender of either male or female." [AR-00023.] The required medical certification provides an objective, reliable basis which assists the Department in adjudicating the claim of identity and in

determining whether issuance of a passport in the new gender is appropriate. In any event, the passport must still identify a sex of "M" for Male or "F" for Female.

21. I am not aware of any instance, other than Plaintiff's application at issue here, in which an individual has applied to be issued a passport with a sex marker other than "M" or "F".

22. It is my understanding that, in the absence of fraud, an individual such as Plaintiff who identifies as "intersex" in other contexts would be not be referred by the Department for prosecution under Federal criminal statutes for making a "false statement" merely due to their compliance with the Department's requirement that all applicants designate an "M" for Male or an "F" for Female in the sex field of their passport application so as to make it possible for the Department to verify their identity and citizenship. Compliance with one of the two options made available by the Department's policy would not be treated as subject to a criminal referral or as a false statement on the passport application form.

I declare under penalty of perjury that the foregoing statements are true and correct.

Dated: May 25, 2016



Bennett S. Fellows

00006368-1618

WC

Thur @ 2 pm

APPLICATION FOR A U.S. PASSPORT

Please Print Legibly Using Black Ink Only

OMB CONTROL NO. 1465-0048
OMB EXPIRATION DATE: 01-31-2017
ESTIMATED BURDEN: 85 MIN

Attention: Read WARNING on page 1 of instructions.

Please select the document(s) for which you are applying:

- U.S. Passport Book
 - U.S. Passport Card
 - Both
- The U.S. passport card is not valid for international air travel. For more information see page 1 of instructions.
- 28 Page Book (Standard)
 - 52 Page Book (Non-Standard)

Note: The 52 page option is for those who frequently travel abroad during the passport validity period, and is recommended for applicants who have previously required the addition of visa pages.



172460355

1. Name Last

ZZYym

D O Dep DOTS

First

DANA

Middle

ALIX

2. Date of Birth (mm/dd/yyyy)

1958

3. Sex

Female

4. Place of Birth (City & State if in the U.S., or City & Country as it is presently known.)

(MICHIGAN)

5. Social Security Number

6. Email Address (e.g., my_email@domain.com)

7. Primary Contact Phone Number

8. Mailing Address: Line 1: Street, P.O. Box, or R.F.D.

Address Line 2: Clearly label Apartment, Company, Suite, Unit, Building, Floor, In Care Of or Attention if applicable. (e.g., In Care Of - Jane Doe, Apt # 100)

City

FORT COLLINS

State

CO

Zip Code

80521

Country, if outside the United States

9. List all other names you have used. (Examples: Birth Name, Maiden, Previous Marriage, Legal Name Change. Attach additional pages if needed.)

BRIAN DRIN WHITNEY



STOP! CONTINUE TO PAGE 2

DO NOT SIGN APPLICATION UNTIL REQUESTED TO DO SO BY AUTHORIZED AGENT

Identifying Documents - Applicant or Mother/Father/Parent on Second Signature Line (if identifying minor)

Driver's License State Issued ID Card Passport Military Other

Name Dana Alix Zzyym

Issue Date (mm/dd/yyyy) 06 25 2010 Exp. Date (mm/dd/yyyy) 2015 State of Issuance CO

ID No. Country of Issuance

Identifying Documents - Applicant or Mother/Father/Parent on Third Signature Line (if identifying minor)

Driver's License State Issued ID Card Passport Military Other

Name

Issue Date (mm/dd/yyyy) Exp. Date (mm/dd/yyyy) State of Issuance

ID No. Country of Issuance

I declare under penalty of perjury all of the following: 1) I am a citizen or non-citizen national of the United States and have not, since acquiring U.S. citizenship or nationality, performed any of the acts listed under "Acts or Conditions" on page four of the instructions of this application (unless explanatory statement is attached); 2) the statements made on the application are true and correct; 3) I have not knowingly and willfully made false statements or included false documents in support of this application; 4) the photograph attached to this application is a genuine, current photograph of me; and 5) I have read and understood the warning on page one of the instructions to the application form.



Dana Alix Zzyym
Applicant's Legal Signature - age 16 and older

Mother/Father/Parent/Legal Guardian's Signature (if identifying minor)

Mother/Father/Parent/Legal Guardian's Signature (if identifying minor)

Name of courier company (if applicable)

Facility ID Number

Facility Name/Location

Agent ID Number

Signature of person authorized to accept applications

Date

For Issuing Office Only -> Bk 110 Card 30 EF 60 Postage Execution 25 Other



* DS 11 C 09 2013 1 *

DS-11 09-2013

Page 1 of 2

00006368-1619

Name of Applicant (Last, First, & Middle) **Zzyym DANA ALIX** Date of Birth (mm/dd/yyyy) **1958**

10. Parental Information
 Mother/Father/Parent - First & Middle Name _____ Last Name (at Parent's Birth) _____

 Date of Birth (mm/dd/yyyy) _____ Place of Birth _____ Sex Male Female U.S. Citizen? Yes No
 Mother/Father/Parent - First & Middle Name _____ Last Name (at Parent's Birth) _____

 Date of Birth (mm/dd/yyyy) _____ Place of Birth _____ Sex Male Female U.S. Citizen? Yes No

11. Have you ever been married? Yes No (If yes, complete the remaining items in #11.)
 Full Name of Current Spouse or Most Recent Spouse _____ Date of Birth (mm/dd/yyyy) _____ Place of Birth _____

 U.S. Citizen? Yes No Date of Marriage (mm/dd/yyyy) **02/06/2004** Have you ever been widowed or divorced? Yes No Widow/Divorce Date (mm/dd/yyyy) **01/08/2008**

12. Additional Contact Phone Number _____ 13. Occupation (If age 16 or older) **DISABLED** 14. Employer or School (If applicable) _____
 Home Cell Work

15. Height **5'9"** 16. Hair Color **Grey** 17. Eye Color **Blue** 18. Travel Plans
 Departure Date (mm/dd/yyyy) **10/24/2014** Return Date (mm/dd/yyyy) **11/03/2014** Countries to be Visited **MEXICO**

19. Permanent Address - If P.O. Box is listed under Mailing Address, or if residence is different from Mailing Address.
 Street/RFD # or URB (No P.O. Box) _____ Apartment/Unit _____

 City _____ State _____ Zip Code _____

20. Emergency Contact - Provide the information of a person not traveling with you to be contacted in the event of an emergency.
 Name _____ Address, Street/RFD # or P.O. Box _____ Apartment/Unit _____

 City _____ State _____ Zip Code _____ Phone Number _____ Relationship _____

21. Have you ever applied for or been issued a U.S. Passport Book or Passport Card? Yes No (If yes, complete the remaining items in #21)
 Name as printed on your most recent passport book _____ Most recent passport book number _____ Most recent passport book issue date (mm/dd/yyyy) _____

 Status of your most recent passport book: Submitting with application Stolen Lost In my possession (if expired)
 Name as printed on your most recent passport card _____ Most recent passport card number _____ Most recent passport card issue date (mm/dd/yyyy) _____

 Status of your most recent passport card: Submitting with application Stolen Lost In my possession (if expired)

PLEASE DO NOT WRITE BELOW THIS LINE - FOR ISSUING OFFICE ONLY

Name as it appears on citizenship evidence **Brian Orin Whitney**
 Birth Certificate **SR** CR City Filed: **3-3-58** Issued: **NIC notated on BC**
 Nat. / Citiz. Cert. USCIS - USDC Date/Place Acquired: _____ AR
 Report of Birth Filed/Place: _____
 Passport C/R SR Per PIERS #/DOI: _____
 Other **Old NIC # FA4C4063 - Larimer City Cit. CO -**
 Attached To **Dana Alix Zzyym**
Dana Alix Zzyym
 P/C of ID DS-3053 DS-64 DS-5520 DS-6513 Citiz W/S
 P/C of Citiz DS-10 DS-86 DS-71 IRL CIS Ver

* DS 11 C 09 2013 2 *

2 September 2014

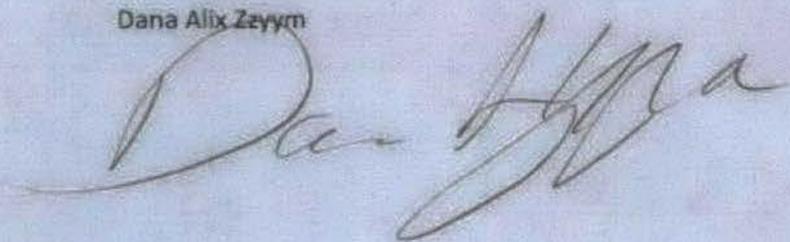
To: The US Passport Office

My name is Dana Alix Zzyym. I am an intersex person. Both my biological sex and my gender is Intersex.

The International Civil Aviation Organization, the UN organization that controls passports worldwide allows for a third sex marker on passports an "X". As an intersex person, I'm not male or female. I want the third sex marker on my passport the "X".

Sincerely,

Dana Alix Zzyym

A handwritten signature in dark ink, appearing to read "Dana Alix Zzyym". The signature is written in a cursive, flowing style with some loops and flourishes.

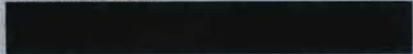
STATE OF MICHIGAN

00006368-1621
IMPORTANT INFORMATION

This certificate is a valuable and legal document. Please keep it in a safe place.

Errors or omissions should be reported to the State Vital Records Office within 30 days of issue by calling (517)335-8666

DANA ZZYIM



STATE OF MICHIGAN



STATE OF MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH

LF 64

CF _____

CERTIFICATE OF LIVE BIRTH
Attended

121- 1334217

State File Number

1. CHILD'S NAME (First, Middle, Last, Suffix) Brian Orin Whitney			
2. SEX UnKnown	3a. PLURALITY - Single, Twin, Triplet, etc. (Specify) Single	3b. IF NOT SINGLE BIRTH - First, Second, Third, etc. (Specify)	4a. DATE OF BIRTH (Month, Day, Year) [Redacted] 1958
5a. CHILD'S BIRTHPLACE (Hospital or Address if other) [Redacted]		5b. COUNTY [Redacted]	
6a. MOTHER'S CURRENT LEGAL NAME (First, Middle, Last) [Redacted]		6b. MOTHER'S FULL NAME BEFORE FIRST MARRIED (First, Middle, Last) [Redacted]	
7a. STATE OF BIRTH - Name - Country if not USA Michigan	7b. DATE OF BIRTH OR AGE [Redacted]	7c. COUNTY OF RESIDENCE [Redacted]	7d. STATE OF RESIDENCE Michigan
8a. FATHER'S CURRENT LEGAL NAME (First, Middle, Last) [Redacted]		8b. STATE OF BIRTH - Name - Country if not USA Michigan	8c. DATE OF BIRTH OR AGE [Redacted]
9a. REGISTRAR'S SIGNATURE [Signature] Fred G. Catrell		9b. DATE FILED BY LOCAL REGISTRAR - (Month, Day, Year) March 3, 1958	

New Name: Dana Alix Zzyim, Established By: Larimer County, Colorado County Court, January 12, 1995.

I hereby certify that the above is a true and correct representation of the birth facts on file with the State of Michigan, issued from the Michigan Centralized Birth Certification System.

Certified by: *Glenn Copeland*
Glenn Copeland
State Registrar

Date Issued: **November 1, 2013**
AFS: 2605850



20182341



VOID WITHOUT WATERMARK OR IF ALTERED OR ERASED

COUNTY COURT, LARIMER COUNTY, COLORADO

CASE NO. F9404088

PUBLIC NOTICE

IN THE MATTER OF THE PETITION OF: BRIAN ORIN WHITNEY FOR A CHANGE OF NAME TO:
DANA ALIX ZZYYM

PUBLIC NOTICE is hereby given that on the 12 day of Jan 1995,
by an order of the County Court of Larimer County, Colorado, the name of
BRIAN ORIN WHITNEY, was changed to
DANA ALIX ZZYYM, and in accordance with
such Order this Notice is given.

WILLIAM R. PERMER
Clerk of the County Court of
Larimer County, Colorado

By Linda Neuse
Deputy



FOR BILLING PURPOSES:

Name BRIAN O. WHITNEY

Address [REDACTED]

City, State, ZIP FORT COLLINS CO. 80526

00006368-1620

Colorado Driver License



[Redacted] Expires: [Redacted]-2015
 Class: R Issued: 06-25-2010
 End: M ✓ DOB: [Redacted]-1958
 Rest: V Previous Type: A
 Ht: 5'10" Wt: 260 Eyes: BLU Sex: F
 Voter: Y

Dana Alix Zzyym

DANA ALIX ZZYYM

[Redacted]
FT COLLINS, CO 80525



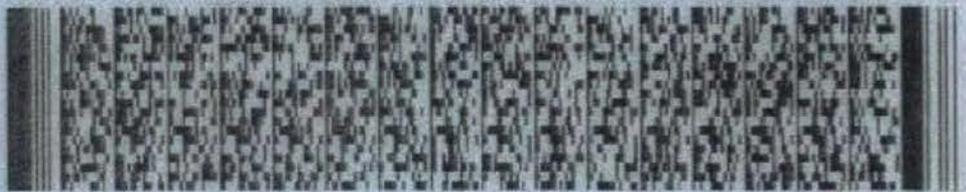
Class R: Any motor vehicle with a GVWR of less than 26,001 lbs. as a single unit or in combination, designed to carry 15 or fewer passengers, including the driver, and does not carry hazardous material.

Restrictions:
V - Corrective Lenses



FT Collins Co 80525

Endorsements:
M - Motorcycle



00006368-1622



00006368-1623

VA  U.S. Department of Veterans Affairs

Card Expires: 05/27/2024

Plan ID (B08401) 

Member: **DANA A ZZYYM**



VA HEALTHCARE ENROLLEE
SERVICE CONNECTED



Department of Veterans Affairs
P.O. Box 5005
Bay Pines, FL 33744

OCT 15, 2013

DANA ALIX ZZYIM



To whom it may concern:

Dana Zzyim was born with ambiguous genitalia which would classify her as intersex.

Sincerely,

LAURA ANN HARPER MD

00006368-1633

2 September 2014

To: The US Passport Office

My name is Dana Alix Zzyym. I am an Intersex person. Both my biological sex and my gender is Intersex.

The International Civil Aviation Organization, the UN organization that controls passports worldwide allows for a third sex marker on passports an "X". As an Intersex person, I'm not male or female. I want the third sex marker on my passport the "X".

Sincerely,

Dana Alix Zzyym

A handwritten signature in black ink, appearing to read "Dana Alix Zzyym", written in a cursive style.

00006368-1630



Office of United States Senator Michael F. Bennet

RELEASE OF INFORMATION FORM

Before an inquiry can be made on your behalf and subject to the provisions of the Privacy Act of 1974 (Title 5, Sec. 552A of the U.S. Code), the Office of United States Senator Michael Bennet must first receive, in writing, your permission. Please provide the information below (please print) and mail, email, or fax this form and other necessary documents to your Constituent Advocate.

Printed Name: DANA ALIX ZZYHON

Signature: [Handwritten Signature] Date: 9/4/14

(not typed) Your signature on this form authorizes us to obtain information on your behalf.

Please complete the following section as we must have this information to effectively assist you:

Address: <u>[Redacted]</u>	City: <u>FORT COLLINS</u>	Zip: <u>80521</u>
Preferred Phone#: <u>[Redacted]</u>	Email: <u>[Redacted]</u>	
Social Security #: <u>[Redacted]</u>	Date of Birth: <u>[Redacted]</u>	<u>58</u>

Please include the information that pertains to your issue:

Housing Loan #: <u>PASSPORT</u>	Name of Bank: _____
IRS Case #: _____	Specific years in question: _____
Social Security Case #: _____	New Enrollment? YES NO Date: _____
Immigration File#: _____	DHS/DOS office: _____
Military Rank: _____ Branch: _____	Years of Service: _____ Last Post/Base/Port: _____
Retirement/Separation Date: _____	Disabled? YES NO Percentage? _____

Have you retained an attorney? YES NO Name: no yet

Have you contacted another congressional office? If so, whom? no

Please describe problem and attach supporting documents:

Return to Constituent Advocate:

[Aaron.torres@bennet.senate.gov](mailto: Aaron.torres@bennet.senate.gov)
FAX: 303-455-8854

1127 Sherman St, Suite 150, Denver, CO 80201
Call for Assistance: 303-837-3806

00006368-1631



U.S. Department of State

CONSULAR OFFICES OF THE UNITED STATES OF AMERICA

AUTHORIZATION FOR THE RELEASE OF INFORMATION UNDER THE PRIVACY ACT

In accordance with the Privacy Act (PL 93-579) passed by Congress in 1974, a U.S. Consular Office cannot release any information regarding you to anyone without your written consent except as set forth in the Act. Please complete the authorization below, specifying whom a U.S. Consular Office may contact and to whom to release information with regard to your case. Please return the completed authorization to a U.S. Consular Office. Local language translations are acceptable to facilitate completion of the form in English.

The U.S. Government, by providing the Authorization for the Release of Information Under the Privacy Act Form, cannot under any circumstances compel an individual to complete and submit the form. PLEASE CAREFULLY CONSIDER TO WHOM, AND WHAT INFORMATION IS BEING DISCLOSED.

IMPORTANT: You are not obliged to grant anyone access to information regarding you but failure to provide the information requested on this form may make it more difficult, or impossible, for the Department of State or the U.S. Consular Office to assist you.

Your Full Name (Last, First, MI)

Zzyym DANA A

Place of Birth (City, State/Province, Country)

Born At: [Redacted] Michigan

Date of Birth (mm-dd-yyyy)

On: [Redacted] 1953

SECTION A

I hereby authorize the U.S. Consular Office of the United States of America and the U.S. Department of State to release information regarding me to the following individuals:

Name (Last, First)	Telephone Number	Address	Relationship

00006368-1632

IN THE EVENT OTHER PERSONS REQUEST INFORMATION REGARDING MY CASE, INFORMATION CAN BE RELEASED TO THE FOLLOWING:

- | YES | NO | |
|-------------------------------------|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> | Family (Other than Those Listed Under Section A) |
| <input type="checkbox"/> | <input type="checkbox"/> | Friends (Other than Those Listed Under Section A) |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Individual Members of Congress and Staff |
| <input type="checkbox"/> | <input type="checkbox"/> | Members of the Media |
| <input type="checkbox"/> | <input type="checkbox"/> | The General Public |
| <input type="checkbox"/> | <input type="checkbox"/> | Employer |

Please review the form before signing. Information will only be released under Section A if requested and if we have your signed authorization.



Signature of the Applicant
(Please Sign in Black or Blue Ink)

Fort Collins, Colorado

City, Country

DANA A Zzym

Print Your Name

09/04/2014

Date (mm-dd-yyyy)

PRIVACY ACT STATEMENT

This information is needed to assist you in your present need for consular services. The primary purpose for soliciting this information is to establish your citizenship, identity, and entitlement to welfare protection services offered by the U.S. Government.

The U.S. Department of State is committed to ensuring that any personal information received is safeguarded against unauthorized disclosure. The data you provide is subject to the provisions of the Privacy Act (5 U.S.C. 552a). This means that the U.S. Department of State will not disclose the information you provide unless you have given us written authorization to do so, or unless the disclosure is otherwise permitted under the provisions of the Act or in accordance with our routine uses published in Title 22 of the Code of Federal Regulations. The information solicited on this form may be made available as a routine use to other government agencies for law enforcement and administrative purposes. For further information on routine uses, please visit <http://www.state.gov/documents/organization/102787.pdf>.

00006368-1627



Organisation Intersex International USA
 United States affiliate of the world's largest organization of intersex people.
 3060 Kansas Street, Oakland, CA 94602
 +1 415 374-1255
 info@oii-usa.org
 oii-usa.org

September 5, 2014.

Dear Ms. Serenil:

I am writing on behalf of Dana Zzyym, our Rocky Mountain Regional Rep, and Dana's ability to attend the 4th International Intersex Forum, October 27-31, 2014, in Mexico City. Intersex people are born with sex anatomy (chromosomes, gonads, and/or genitalia) that is not typically male or female, and the Intersex Forum (hosted by ILGA: <http://ilga.org>), is an international gathering of intersex human rights activists. At this year's Forum, held in conjunction with the ILGA World Conference, organizations will be voting on representatives including, for the first time, an Intersex Secretariat, who will serve as a liaison and representative on intersex issues to ILGA staff and members (<http://ilga.org/ilga-xxvii-world-conference-second-mailing/>). I cannot attend this year, nor can our Associate Director, and thus we would like Dana to attend and vote for OII-USA, which requires obtaining a passport.

Dana is not male or female but intersex, as reflected in their birth certificate designation of "sex unknown" (note: Dana uses "their" rather than "him" or "her"). Dana is also a veteran, and the Veteran's Administration (which acknowledges intersex people in VHA DIRECTIVE 2011-024, http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2416), has also issued medical records confirming Dana's intersex status.

Dana is thus seeking an "X" sex designator, which is available through the ICAO, the agency that governs passports. ICAO Doc 9303 specifies in Part I, Section IV, p. IV-16, that the category of "sex" on passports may be "female", "male", or "unspecified" (http://www.icao.int/publications/Documents/9303_p1_v1_cons_en.pdf). The ICAO's 2012 paper, "Technical Advisory Group on Machine Readable Travel Documents", which advises nations on how to comply with its regulations, elaborates in Part IV, Technical Specifications for Machine Readable Passports, Section VIII, 8.6, that Field No. 11, "Sex", is to be "specified by use of the single initial commonly used in the language of the state. If English/French or Spanish necessary use F/M/X" (http://www.icao.int/Meetings/TAG-MRTD/Documents/Tag-Mrtd-21/Tag-Mrtd21_WP10.pdf).

Australia made the X available to citizens providing documentation of being neither male nor female in 2011, as traveling with an incorrect sex designation often results in discrimination and/or harassment. U.N. Human Rights Commissioner Navi Pillay stated, "I... urge other states around the world to review their own laws, policies and practices to ensure that discrimination against transgender and intersex individuals is addressed in a systematic and effective way." (<http://news.smh.com.au/breaking-news-world/un-welcomes-aust-passport-changes-20110916-1kee2.html>).

All members of the ICAO, including the U.S., are able to submit applications with "Sex" listed as X, as it is one of the three available passport sex designators, but Dana's passport officials are unaware of this. We thus kindly ask that you contact them and request that they expedite Dana's passport application, with their sex listed as "X" as Dana is not male or female, in order for Dana to be accurately identified.

Thank you for your assistance, and please do not hesitate to contact me with any questions.

Respectfully,

Hida Vioria
 Director, OII-USA

00006368-1628

<http://oii-usa.org>
hida@oii-usa.org

00006368-1629

Dana Zzyym

Hermaphrodite/Intersex, Advocate & Activist
Public Speaker/Panelist, Personal Story
National/International Issues
Intersex & Genderqueer Recognition Project Member
Oii-USA Member

P [REDACTED]
E [REDACTED]



00006368-1634



United States Department of State

Colorado Passport Agency
3151 South Vaughn Way, Suite 600
Aurora, Colorado 80014

September 24, 2014

Dana Alix Zzyym

[REDACTED]
Fort Collins, CO 80521

RE: 172460355

Dear Dana Zzyym:

Thank you for your recent passport application.

The Department of State currently requires the sex field on United States passports to be listed as "M" or "F." Therefore, we are unable to fulfill your request to list your sex as "X." If you wish to receive a passport listing you as female as shown on your driver's license, 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.

If you wish to withdraw your application, please let us know.

We appreciate your assistance in this matter so that we may continue processing your passport application. If we do not receive the requested information **within ninety (90) days from the date of this letter**; or the information you submit is insufficient to establish your entitlement to a U.S. passport in accordance with the relevant provisions of Part 51, Title 22 of the Code of Federal Regulations, your application will be denied and your evidence returned to you. By law, the passport execution and application fees are non-refundable. Any special return postage will be returned or refunded.

If you have any questions regarding this letter or your passport application, contact the National Passport Information Center (NPIC), toll-free, at 1-877-487-2778 (TTY/TDD: 1-888-874-7793). For general passport information, to check the status of your passport application, or to enroll in our Smart Traveler Enrollment Program (STEP), please visit us online at travel.state.gov.

PLEASE RETURN A COPY OF THIS LETTER WITH YOUR REPLY.

Sincerely,

Customer Service Department

00006368-1635

In order to issue you a full validity passport book reflecting a gender different from the one on some or all of your citizenship and/or identity evidence, please send us a signed original statement on office letterhead from your attending medical physician. Statements from medical physicians can be from licensed medical doctors (M.D.) and osteopathic doctors (D.O.); the physicians may specialize in various medical fields, including, but not limited to: internal medicine, endocrinology, gynecology, urology, surgery, psychiatry, pediatrics, and family practice. The statement must include the following information:

- a) Physician's full name;
- b) Medical license or certificate number;
- c) Issuing state of medical license/certificate;
- d) Address and telephone number of the physician;
- e) Language stating that he/she has treated you or has reviewed and evaluated your medical history and that he/she has a doctor/patient relationship with you;
- f) Language stating that you have had appropriate clinical treatment for transition to the new gender (the new gender, male or female, must be stated); and
- g) The statement must clearly state the following: "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."

If your gender transition process is ongoing, a two-year limited validity passport book reflecting the new gender will be issued upon submission of the letter stated above with language from your attending physician that you are in the process of gender transition.

The two-year passport may be replaced for the remaining validity period without additional fees (except for expedited service), if you apply within two (2) years of issuance using a DS-5504 Application for a U.S. Passport (Name Change, Data Correction and Limited Passport Book Replacement) and provide a new statement from your attending physician attesting that you have had appropriate clinical treatment for transition to the new gender.

12/18/14

Dear Passport Appeal Officer:

I was recently notified in a letter from the Colorado Passport Agency that my passport application was denied because "the Department of State currently requires the sex field on United States passports to be listed as "M" or "F". I was provided two choices, male or female, for obtaining a United States passport, but neither of these applies because I am, intersex, both biologically and in terms of my Gender (as per Supreme Court Justice Ruth Bader Ginsberg). In addition to being intersex, I am a United States Navy veteran, and served six years of active duty in Beirut.

Delivered with this appeal are two signed, sworn documents which verify that my sex is intersex, from my current doctors, both of whom work for the VA MEDICAL CENTER in Cheyenne, WY. I am thus providing the required documentation for obtaining a "passport book reflecting a gender different from the one on some or all of [my] citizenship and/or identity evidence" – as the gender listed on my Colorado state driver's license is "female"—but the gender I wish to have reflected is not male, but intersex.

As I stated in my letter delivered with the original passport application, the International Civil Aviation Organization, which controls passports worldwide, allows for an "X" gender marker in the sex field of passports, representing "indeterminate sex" or "sex unknown". Intersex Australian citizens are legally utilizing an X sex marker on their passports (upon their request), representing "Intersex/Indeterminate/Unspecified". In fact, the Department of State recently recognized the "X"/intersex individuals legally identified by an "X" gender marker, by providing a Visa for entry to an intersex Australian (Morgan Carpenter) with an "X" in the sex field of his passport. I would thus like, for international consistency and bureaucratic ease, to likewise have my intersex status represented by an "X" sex marker on my passport.

The U.N. Declaration of Human Rights states:

Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. **Article 6.** Everyone has the right to recognition everywhere as a person before the law. **Article 13. (2)** Everyone has the right to leave any country, including his own, and to return to his country.

In addition, the Organization of American States (OAS) aims: 1. To... urge the states within the parameters of the legal institutions of their domestic systems to eliminate, where they exist, barriers faced by lesbians, gays, and bisexual, transsexual, and intersex (LGBTI) persons in equal access to political participation and in other areas of public life, and to avoid interferences in their private life.. 4. In addition, to encourage states, within their institutional capacities, to produce data on homophobic and transphobic violence, with a view to fostering public policies that protect the human rights of lesbians, gays, and bisexual, transsexual, and intersex people.

00006368-1642

In the United States, the authority of the Secretary of State to issue passports was made exclusive by the Act of Congress, August 18, 1856. ... The decisions in *Crandal v. Nevada*¹, *Edwards v. California*³, and *Williams v. Fears*⁴, although concerned with interstate travel, reflect a philosophy of basic rights readily applicable to travel abroad... the decision gave the first legal recognition... to the right to travel outside the United States as a civil liberty... of increasing importance to the ordinary citizen. (William & Mary Law Review, Vol. issue 2, Passport Denial and the Freedom to Travel, Roger M. Johnson).

The U.S. Department of Veterans Affairs recognizes intersex citizens in VHA DIRECTIVE 2011-024, http://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2416). It likewise behooves the Department of State to recognize the existence of intersex American citizens. Denying me my passport because I will not incorrectly identify my sex as male or female denies me the right to legal recognition and the right to leave and return to my country that is granted to male and female U.S. citizens.

Discrimination against marginalized communities is facilitated and reflected by a lack of equal legal rights and recognition. This is why in 2011, in response to Australia's X passport legislation, the U.N. High Commissioner of Human Rights stated, "I... urge other states around the world to review their own laws, policies and practices to ensure that discrimination against transgender and intersex individuals is addressed in a systematic and effective way." (<http://news.smh.com.au/breaking-news-world/un-welcomes-aust-passport-changes-20110916-1kee2.html>). As the article in the link discusses, England is considering abolishing sex markers altogether in identification documents.

I urge you to join other Commonwealth nations in enacting policies that are inclusive of intersex citizens. A small technicality such as updating sex marker fields in passport forms and documents should not prevent U.S. citizens, particularly those who have served their country, from obtaining accurate legal recognition and equal rights under the eyes of the law.

Thank you,


Dana Zzyym

Intersex Person/IGM survivor

Fort Collins CO. 80521



DEPARTMENT OF VETERANS AFFAIRS
Medical Center
2360 East Pershing Boulevard
Cheyenne WY 82001

December 16, 2014

To Whom it May Concern,

Re: Dana Zzym, DOB [REDACTED]/58

I have been veteran's mental health provider since 6/23/08. I have had a 6 year doctor/patient relationship with her. She has had the appropriate clinical treatment for transition to intersex.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct.

Terri Orcutt M.D.
Terri Orcutt M.D.

Colorado medical license number CO 38367

Fort Collins VA Outpatient Clinic

2509 Research Blvd

Fort Collins, CO 80526

00006368-1640

**DEPARTMENT OF
VETERANS AFFAIRS**

**Cheyenne VAMC
2360 E. Pershing Blvd
Mail Stop: 136
Cheyenne, WY 82001**

**DATE: 12/5/2014
In Reply Refer To: 136
SSN: [REDACTED]**

DANA ALIXZZYYM
[REDACTED]

FORT COLLINS, CO 80521

RE: ROI PlusRequest for DANA ALIX ZZYYM

Dear MS ZZYYM:

This individually identifiable information is privileged its confidentiality should be maintained along with appropriate securitysafeguards to protect against individual harm (identity theft), embarrassment, or inconvenience.

Sincerely,

[Handwritten Signature]

**BOOKS, LARRY
Chief, HIMS**

Prepared by: GILBERT R MADRID - Release of Information

Press Notes

Printed On Dec 05, 2014

Sincerely,

Cheyenne VAMC - (307) 778-7550, Ext. 7555
 Fort Collins CBOC - (970) 224-1550
 Greeley CBOC - (970) 313-0027
 Tricare/ChampVA/Sharing - (307) 778-7513

PATIENT NAME AND ADDRESS (Mechanical imprinting, if available)

ZZYIM, DANA ALIX

████████████████████
FORT COLLINS, COLORADO 80521

VISTA Electronic Medical Documentation

Printed at CHEYENNE VAMC

Interim Electronic Accounting of Disclosure for: ZZYIM,DANA ALIX

Page 1

Patient: ZZYIM,DANA ALIX
[REDACTED]
FORT COLLINS, CO 80521

Requestor: DANA ALIX ZZYIM
[REDACTED]
FORT COLLINS, CO 80521

Current Status: OPEN

Entered On: Dec 05, 2014

Closed On:

Assigned Clerk: GILBERT R. MADRID

Request Comments:
DR JOHNSON WROTE LETTER -GRM

Released info:
ProgressNotes: [REDACTED] December 04, 2014

00006368-1643



United States Department of State
Colorado Passport Agency
44132 Mercure Circle
PO Box 1045
Sterling, Virginia 20166-1045

December 29, 2014

Dana Alix Zzyym

[REDACTED]
Fort Collins, CO 80521

RE: 172460355

Dear Dana Zzyym:

Thank you for your passport application. Because your application did not meet our requirements, our office sent you a letter on September 24, 2014, requesting additional information. A copy of that letter is enclosed. You appeared at our office on December 19, 2014, to present additional documentation and to discuss our letter.

As explained in our letter of September 24, and as you discussed with our staff on December 19, the Department of State requires the sex field on United States passports to be listed as "M" or "F." Therefore, we cannot fulfill your request to list your sex as "X."

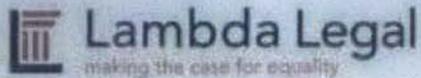
You indicated both in your letter dated December 18 and in person on December 19 that you did not wish a passport to be issued to you unless it could be issued showing the sex as "X." Because we are unable to accommodate your request, your passport application is denied. The original documents you submitted with your application are enclosed. By law, the passport execution and application fees are non-refundable.

If you still wish to obtain a passport book and/or card, you will need to re-apply on a new application, provide all required information, and pay the appropriate fees.

If you have any questions regarding this letter you may contact the National Passport Information Center (NPIC), toll-free, at 1-877-487-2778 (TTY/TDD: 1-888-874-7793).

Sincerely,

Sherman D. Portell
Director



PAUL D. CASTILLO STAFF ATTORNEY
EMAIL: PCASTILLO@LAMBDALEGAL.ORG

February 26, 2015

Via overnight mail and email to portellsd@state.gov

Mr. Sherman D. Portell, Director
United States Department of State
Colorado Passport Agency
44132 Mercure Cir.
P.O. Box 1045
Sterling, VA 20166-1045

**RE: Dana Alix Zzyym, Passport Applicant – Request for Reconsideration or Hearing
U.S. Department of State, File No. 172460355**

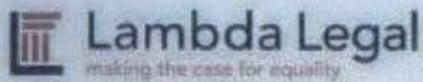
Dear Mr. Portell:

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) and the Law Office of Jessica Kunevicius, LLC jointly represent Dana Alix Zzyym, an intersex American citizen and veteran who applied for a passport through the Colorado Passport Agency. We write to request that the United States Department of State (“DOS”) reconsider its decision to deny Dana a passport that accurately designates Dana’s sex as ‘X.’ Alternatively, we request a hearing pursuant to 22 CFR § 51.70(a) for final decision by the Deputy Assistant Secretary for Passport Services.

In Dana’s case, as is true for numerous other intersex people, a passport with the designation of male or female is inaccurate, inappropriate, and dangerous to Dana’s security and well-being. Many Americans do not and cannot identify as male or female because their sex chromosomes, gonads, and/or internal or external sexual anatomy do not fit clearly into binary categories. Dana was identified as intersex at birth, which is reflected on Dana’s birth certificate. However, for others, an inability to identify as male or female becomes evident later in life. In any event, a passport that mischaracterizes the holder as male or female can subject the holder to discrimination in numerous contexts and prevents the holder from traveling safely. Accordingly, we request the use of ‘X’ on Dana’s passport in accordance with international travel standards for designating people who are neither male nor female.

In early September 2014, Dana visited the Colorado Passport Agency in Aurora, Colorado to obtain a U.S. passport. Dana submitted an Application for a U.S. Passport, Form DS-11 (09-2013) (“Form”) with the requisite identity and citizenship documentation, photograph, and fee payment. Dana accurately listed “intersex” in the sex field on the Form and, by separate letter, clarified that “[a]s an intersex person, I’m not male or female.” Dana requested ‘X’ as the marker in the sex field on Dana’s passport, noting that such designation conforms to

00007293-0141



Mr. Sherman D. Portell
February 26, 2015
Page 2

the International Civil Aviation Organization (ICAO) standards for machine-readable travel documents. See ICAO Doc 9303, Part 1, Volume 1 Sixth Ed. (2006).

By letter dated September 24, 2014 ("September 24 Letter"), CPA acknowledged receipt of Dana's application, but asserted that DOS "currently requires the sex field on U.S. passports to be listed as 'M' or 'F.'" Although Dana clearly and unequivocally informed DOS that Dana is neither male nor female, but intersex, DOS directed Dana to select either a male or female sex designation if Dana wanted to receive a passport for international travel. Alternatively, DOS invited Dana to withdraw Dana's passport application.

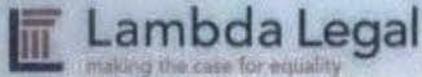
Dana timely responded to DOS's September 24 Letter, reiterating that neither male nor female applies "because I am intersex." Indeed, as part of the original application, Dana had previously submitted a certified Michigan Certificate of Live Birth showing "unknown" in the sex field. Nevertheless, Dana provided CPA with additional documentation, including sworn statements from licensed physicians at the U.S. Department of Veterans Affairs attesting to the fact that Dana is intersex. Despite submitting supplemental information and complying with the relevant provisions of Part 51, Title 22 of the Code of Federal Regulations ("Passport Regulations"), DOS denied Dana a U.S. passport by letter dated December 29, 2014 ("Notification of Denial"). See Enclosed Application Materials and DOS Responses.

The Notification of Denial did not set forth any explanation, specific reason, or legal basis for the assertion that DOS "requires the sex field on United States passports to be listed as 'M' or 'F.'" (emphasis added). Nor did the Notification of Denial set forth the procedures for review available under 22 CFR § 51.70 through 51.74. At minimum, DOS must articulate the reasoning behind its conclusion that Dana is not entitled to a U.S. passport for international travel with an accurate sex marker, 'X'. In the absence of statute, regulation, or other referenced authority "requiring" use of the 'M'/'F' sex binary in DOS's issuance of U.S. passports, the Foreign Affairs Manual specifically allows for Dana's request insofar as the applicant's "birth documentation will determine the gender to be listed on the passport." 7 FAM 1350, Appendix M §(c), Intersex Conditions. Given that Dana's birth certificate lists "unknown" as Dana's sex, 'X' would be the only accurate and appropriate designation for the sex field on Dana's passport.

In light of the foregoing, we respectfully request that DOS reconsider its decision to deprive Dana of a passport for international travel or, alternatively, provide Dana a hearing in accordance with Subpart F of the Passport Regulations for final decision by the Deputy Assistant Secretary for Passport Services. If such a hearing is granted, our client waives the requirement that the hearing occur within 60 days after DOS receives this request and recommends a mutually convenient time and place to be determined by the parties through counsel.

00007293-0142

Mr. Sherman D. Portell
February 26, 2015
Page 3



Please submit your response to this letter at your earliest convenience. Also, do not hesitate to contact us if we can be of further assistance in providing additional information in support of our client's request.

Very truly yours,

LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.

Paul D. Castillo
Staff Attorney

Encl.

cc: Director, Colorado Passport Agency
United States Department of State
3151 South Vaughn Way, Suite 600
Aurora, Colorado 80014

00061409-1023

United States Department of State

Washington, D.C. 20520



April 10, 2015

Mr. Paul D. Castillo
Lambda Legal
3500 Oak Lawn Avenue
Suite 500
Dallas, Texas 75219-6722

Dear Mr. Castillo:

Our office received your February 26, 2015 letter concerning Dana Alix Zzyym's passport application number 172460355. You requested that the Department of State reconsider its decision to deny Dana Zzyym's passport application, or alternatively, provide a hearing regarding the denial of the application.

The denial was the final decision of the Department on Dana Zzyym's passport application and the request for a designation of "intersex." This action does not meet the requirements for a review hearing specified at 22 C.F.R. § 51.70. As noted in our previous communications with Dana, and consistent with several other federal agencies, the Department of State's current policy requires that the applicant select "M" or "F" on the sex field on a U.S. passport application, and that the corresponding sex of "M" or "F" be identified on the issued passport. The Department does not recognize the use of "X" on a U.S. passport, and therefore Dana cannot select the sex as "X." While the denial of passport application number 172460355 is final, Dana remains eligible at any time to submit a new passport application, provide sufficient supporting documentation, and receive a U.S. passport listing the sex supported by the documentation.

Thank you for your inquiry.

Sincerely,

Jonathan M. Rolbin
Director
for Legal Affairs and Law Enforcement Liaison
Passport Services



United States Department of State

Washington, D.C. 20520

May 1, 2017

Dana Alix Zzyym

[REDACTED]
Fort Collins, CO 80521-5118

RE: 172460355

Dear Dana Alix Zzyym:

In response to the November 22, 2016 order of the District Court in *Zzyym v. Tillerson, et al.*, D. Col. No. 1:15-cv-2362-RBJ (Doc. 55), the Department of State has reconsidered its previous decision to deny your passport application, in which you requested a passport issued in a sex other than male or female. Consistent with the court order, we reviewed our policies and practices and reconsidered your previous application, supporting evidence, and all additional information. However, upon reconsideration the Department cannot fulfill your request for such a passport, and therefore your application is denied.

On your September 2, 2016 passport application, you did not indicate your sex as male or female. Rather, you wrote the word "Intersex" in the sex field and requested by supplemental letter that the Department issue you a passport book and card in a sex other than male or female. Among other documents supporting your application, you provided:

- (i) an amended birth certificate issued to you by the State of Michigan on November 1, 2013, listing your sex as "Unknown";
- (ii) a driver's license issued to you by the State of Colorado on June 25, 2010, listing your sex as female; and
- (iii) a copy of a medical certification dated October 15, 2013, in which Laura Ann Harper, M.D., certified that you were "born with ambiguous genitalia" which would classify you as "intersex."

With a subsequent December 18, 2014 response letter, you provided signed originals of two additional supporting documents from your physicians:

- (iv) a medical certification dated December 4, 2014, in which Amanda Johnson, M.D., certified that you were "born intersex," have had "surgery for transition to female genitalia," and that your "treatment for transition has been appropriate"; and

- (v) a medical certification dated December 16, 2014, in which Terri Orcutt, M.D., certified that you have “had the appropriate clinical treatment for transition to intersex.”

After the December 29, 2014 denial of your passport application by the Colorado Passport Agency, your counsel, Lambda Legal Defense and Education Fund, Inc., and the Law Office of Jessica Kunevisius, LLC, submitted a request for reconsideration or hearing on your behalf dated February 26, 2015, which enclosed additional copies of several of the aforementioned documents, and a copy of an additional supporting document from a physician:

- (vi) a medical certification dated October 23, 2013, in which Elzbieta J. Chobot-Sochet, M.D., certified that you were “born with [ambiguous] genitalia” which would classify you as “intersex.”

Subsequently, the Department learned that you applied for and were issued the following:

- (vii) a driver’s license issued to you by the State of Colorado on February 24, 2015, valid through [REDACTED], 2020, listing your sex as female.

As indicated on the passport application form, the Department recognizes and issues passports in two sexes, male and female. While the Department does accept a medical certification of an applicant’s transition from one of these two sexes to the other, the Department is unaware of generally accepted medical standards for diagnosing and evaluating a transition to any sex other than male or female. Thus, the Department does not accept a medical certification that specifies transition to a sex other than male or female as evidence for the issuance of a passport.

Additionally, the Department does not accept an amended birth certificate as evidence of a change in sex. Consistent with this policy, an amended birth certificate listing sex as “unknown” does not satisfy the Department’s requirements for issuance of a passport reflecting a sex that differs from the sex established by the applicant’s other evidence of identity and citizenship.

Because we are unable to accommodate your request for a passport in a sex other than male or female, your passport application is denied. If you wish to obtain a passport in a sex consistent with the sex listed in your currently valid driver’s license, you will need to submit a new application, provide all required evidence and information, and pay the appropriate fees.

Sincerely,

Bureau of Consular Affairs
Passport Services Directorate

cc: Paul D. Castillo, Lambda Legal Defense and Education Fund



United States Department of State

Washington, D.C. 20520

UNCLASSIFIED
MEMORANDUM

May 1, 2017

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

THROUGH: CA/PPT/I – Florence G. Fultz

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

SUBJECT: Sex Designation Policy for U.S. Passports

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

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

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

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

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-2-

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

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

The reasons for maintaining this policy are described below.

Accuracy and Reliability of Passport as an Identity Document

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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mean to align one's physical, hormonal, or social gender expression with such a new sex. This is partly due to the lack of consensus of what it means, biologically, for an individual to have a sex other than male or female. Rather, there are a number of genetic, hormonal and physiological conditions in which an individual is not easily classified as male or female (often referred to as disorders of sexual development, or DSDs). These DSDs are highly distinct from one another, both as to their biological cause and as to their presentation (*i.e.*, whether the individual appears to be, and/or identifies as, male, female or neither).² In other words, there is no single, biological set of traits described by the terms "intersex" or "non-binary."

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

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

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

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

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

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

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7 FAM 1300 APPENDIX M GENDER CHANGE

*(CT:CON-551; 12-12-2014)
(Office of Origin: CA/OCS/L)*

7 FAM 1310 APPENDIX M SUMMARY

(CT:CON-541; 11-13-2014)

- a. This appendix provides policy and procedures that passport specialists and consular officers must follow in cases in which an applicant requests a gender on the passport application different from the one reflected on some or all of the submitted citizenship and/or identity evidence, including a prior passport.
- b. This policy explains the need for medical certification from a licensed physician who has treated the applicant or reviewed and evaluated the medical history of the applicant regarding the change in gender, as well as the need for accurate identification and a photograph reflecting the applicant's current appearance. It is based on standards and recommendations of the World Professional Association for Transgender Health (WPATH), recognized as the authority in this field by the American Medical Association (AMA).
- c. A passport is defined by INA 1101(a)(30) (Immigration and Nationality Act) (8 U.S.C. 1101(a)(30)) as "any travel document issued by competent authority showing the bearer's origin, identity, and nationality if any, which is valid for the entry of the bearer into a foreign country." An individual's gender is an integral part of that person's identity.
- d. Sexual reassignment surgery is not a prerequisite for passport issuance based on gender change.
- e. Medical certification of gender transition from a licensed physician as described in 7 FAM 1320 Appendix M is the **only** documentation of gender change required. Other medical records are not to be requested.
- f. A Form DS-11 "Application for U.S. Passport" must be used initially as personal appearance for execution is required. A change in gender is a change in the identity of the applicant, and the identification in the new name and gender must be presented.

UNCLASSIFIED (U)U.S. Department of State Foreign Affairs Manual Volume 7
Consular Affairs**7 FAM 1320 APPENDIX M DOCUMENTS TO BE SUBMITTED WITH FORM DS-11 PASSPORT APPLICATION***(CT:CON-541; 11-13-2014)*

a. Requirements for all elements of the Form DS-11 passport application aside from gender still apply, including:

- (1) **Evidence of U.S. citizenship/nationality.** The applicant must submit acceptable evidence of U.S. citizenship or nationality. (See 7 FAM 1100 "Acquisition and Retention of U.S. Citizenship and Nationality.") The applicant is not required to obtain an amended birth record/amended Consular Report of Birth (CRBA), or to request that the U.S. Citizenship and Immigration Services (USCIS) issue a replacement Certificate of Naturalization/Citizenship reflecting the change of gender. State law in the United States and the laws of other countries vary on whether an amended birth certificate may be issued reflecting a gender change.
- (2) **Evidence of identity.** As with all applications, the applicant must be asked to submit acceptable evidence of identity (in the new gender and name, if available. (See 7 FAM 1320 "Identity of the Passport Applicant".) However, state law and foreign law vary as to whether a driver's license or other State government form of ID document may be issued reflecting a gender change. So, the applicant may document her/his identity by submitting any of the following ID documents:
 - (a) Acceptable, for passport purposes, primary ID in the new gender (e.g., state issued driver's license, Certificate of Naturalization/Citizenship);
 - (b) Secondary ID documents (two or more) in the new gender. The U.S. Department of State Bureau of Consular Affairs Internet page provides information and examples of secondary evidence of identification.
 - (c) Acceptable primary ID in the old gender.

NOTE: Some form of photographic identification must be presented; You cannot use the doctor's certification as the only evidence to identify an applicant.

- (3) **Photograph.** A recent photograph that reflects a good likeness of the applicant, and satisfactorily identifies the applicant must be submitted. The photograph must agree with the submitted identification evidence and reflect the applicant's current and true appearance (see also 7 FAM 1300 Appendix E "Passport Photographs");
- (4) **Passport Fee.** All necessary passport fees must be submitted (see 7 FAM 1300 Appendix G "Passport Fees");
- (5) **Name Change.** If the applicant's name has been changed, either by court

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order or through exclusive use for five years, he/she must present satisfactory evidence of the legal name change. Adjudication of the name change must be handled in accordance with requirements contained in 7 FAM 1300 Appendix C "Names to Be Used in Passports".

b. Medical Certification Accepted for Gender Change/Transition That Must be Submitted with the Passport Application.

- (1) A full validity U.S. passport will be issued reflecting a new gender upon presentation of a signed original certification or statement, **on office letterhead**, from a licensed physician who has treated the applicant for his/her gender-related care or reviewed and evaluated the gender-related medical history of the applicant.

NOTE: Such licensed physicians include Medical Doctors (M.D.) and Doctors of Osteopathy (D.O.). (Not to be confused with Doctors of Optometry (O.D.), whose certifications are **not** acceptable. The physicians may specialize in various medical fields, including, but not limited to, internists, endocrinologists, gynecologists, urologists, surgeons, psychiatrists, pediatricians, and family practitioners.

Certifications from persons who are not licensed physicians are **not** acceptable. They include, but are not limited to psychologists, physician assistants, nurse practitioners, health practitioners, licensed vocational nurse; registered nurse, chiropractors, or pharmacists, are not acceptable.

The certification or statement **must** include the following information (See 7 FAM 1300 Appendix M Exhibit 1):

- (a) Licensed physician's full name;
- (b) Medical license or certificate number;
- (i) Licensed physicians in foreign countries must have a comparable foreign license or certificate registration number.
- (ii) For all foreign licensed physician gender change requests, passport agencies/centers must scan copies of the application and attach all submitted documents to Passport Services' Adjudication Policy Division (CA/PPT/S/A/AP) at "CA-PPT-Adjudication-Suggestion-Box". CA/PPT/S/A/AP works with the Overseas Citizens Services' Office of Legal Affairs (CA/OCS/L) to verify the bona fides of the foreign-based licensed physician with the applicable post abroad. CA/PPT/S/A/AP will advise the passport agency/center of the outcome of post's verification as soon as possible.
- (iii) Posts must verify their own foreign-based licensed physicians or, if the statement is from a physician in another country, contact the post which covers that country for verification.

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- (d) Address and telephone number of the licensed physician;
 - (e) Language stating that he/she has treated the applicant or has reviewed and evaluated the medical history of the applicant and that he/she has a doctor/patient relationship with the applicant;
 - (f) Language stating the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female; and
 - (g) Language stating "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."
- (2) For individuals who have just begun and may be in the initial stages of the gender transition process, a two year limited validity passport reflecting the new gender will be issued upon presentation of the following:
- (a) Information listed in paragraph 1(a)-(e) above;
 - (b) Language stating the applicant is in the process of gender transition to the new gender of either male or female; and
 - (c) Language stating "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."
- (3) Faxed, e-mailed, or scanned photocopies of medical certifications are not acceptable.

c. Adjudication Actions.

- (1) The passport specialist or consular officer will annotate the application "**gender change**" (in the "For Issuing Office Only" block of the Form DS-11) to record the reason for issuing the full validity passport in the new gender. Attach the medical certification to the application.

NOTE: Passport specialists and consular officers must not ask for additional specific clinical details regarding the gender change from the applicant.

- (2) The passport specialist or consular officer will annotate the application "**gender transition**" (in the "For Issuing Office Only" block of the Form DS-11) to record the reason for issuing the limited validity passport in the new gender. Attach the medical certification to the application when limited passports are issued in these cases:
- (a) Use endorsement code 46 for U.S. and Overseas Photodigitized Passports (OPDP) issuance. Annotate the application "gender transition" to record the reason for the limited validity book in the new gender. (See 7 FAM 1300 Appendix B "Endorsement Codes" for appropriate code.)
 - (b) Use endorsement code 109 in Emergency Photodigitized Passports (EPDPs) for urgent overseas cases where the applicant must travel immediately. Limit the EPDP to three months. (See 7 FAM 1300 Appendix B for appropriate code.)

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- (3) An applicant will receive a passport for the remaining full validity period without further fee (except for expedited service), if:
- He/she applies for the new passport within two years of issuance using Form DS-5504, Application for a U.S. Passport (Name Change, Data Correction, and Limited Passport Book Replacement); and
 - Meets the requirements of 7 FAM 1320 Appendix M paragraph a and 7 FAM 1320 Appendix M paragraph b(1).
 - You must use endorsement code 3 (see 7 FAM 1300 Appendix B for appropriate code) in all gender change replacement books.

Example (for an adult):

- The issuance date of the limited passport is "July 31, 2010."
- The issuance date in the new full validity passport will be automatically assigned by TDIS.
- However, the issuance date placed in the endorsement code must be that of the original, limited passport "July 31, 2010."
- The expiration date listed in the endorsement must be ten years from the issuance date of the original, limited validity passport book, minus one day - "July 30, 2020".

- (4) If the applicant has not submitted the requested medical certification, use the appropriate letter (or similar language for overseas posts) available in Information Request Letter (IRL) 700 in corresponding with the passport applicant. (See 7 FAM 1300 Appendix T "Information Request Letters and Information Notices.")
- (5) If, after two years, the applicant applies for a new passport and gender transition has not been completed, the applicant must submit a new physician's statement following the same information and licensure requirements in 7 FAM 1320 Appendix M, paragraph b (1) above, reflecting that the applicant still is in the process of gender transition. The application must be made on a Form DS-11, with appropriate identity, citizenship and passport fees submitted. Another two-year limited validity passport will be issued.
- (6) If an applicant is renewing his/her passport, but is applying for the renewal in a new gender, the applicant must use Form DS-11, and submit medical certification, including all elements previously indicated in 7 FAM 1320 Appendix M paragraph b. An amended birth certificate in the new gender is not acceptable evidence to issue the passport in the new gender.
- (7) If an applicant who already has been issued a passport in a new gender requests issuance of a passport in the birth gender, a certification under penalty of perjury from a licensed physician who has treated the applicant

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or reviewed and evaluated the medical history of applicant for transition back to the birth gender, is required. The statement must include all the elements previously stated in 7 FAM 1320 Appendix M paragraph b(1). The same procedures for adjudication and issuance of full validity (gender change) or limited validity (gender transition) passports apply if the applicant is returning to the birth gender (see also 7 FAM 1320 Appendix M paragraph c.)

7 FAM 1330 APPENDIX M CONVERSATIONS WITH PASSPORT APPLICANTS SEEKING TO DOCUMENT GENDER TRANSITION

(CT:CON-334; 06-10-2010)

- a. As with all passport applicants, you must be sensitive and respectful at all times.
- b. Refer to the applicant by the pronoun appropriate to his/her new gender.
- c. Ask only appropriate questions regarding information necessary to determine citizenship and identity of the applicant.

7 FAM 1340 APPENDIX M AMENDING GENDER IN REPORTS OF BIRTH

(CT:CON-551; 12-12-2014)

The Form FS-240, Consular Report of Birth Abroad of Citizen of the United States of America, can be amended by the Vital Records Section of Passport Services (CA/PPT/S/TO/RS/VR) to reflect the change in gender. The same documentary requirements specified in this Appendix for passport services are the same for amending gender on a Form FS-240. (See 7 FAM 1440, Consular Report of Birth Abroad of a Citizen/Non-Citizen National of the United States of America.) See Bureau of Consular Affairs Internet Information on amending an FS-240. Inquirers are directed to contact Passport Services' Vital Records Section, using the below dual addresses, both physical and P.O. box address, and the nine-digit zip code.

ARCHIVE COPY

U.S. Department of State
 Record Services Division
 CA/PPT/S/TO/RS
 44132 Mercure Cir
 PO Box 1213
 Sterling, VA 20166-1213
 Telephone (public): 202-485-8300

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Fax: 202-485-8302

7 FAM 1350 APPENDIX M INTERSEX CONDITIONS (DISORDERS OF SEX DEVELOPMENT)

(CT:CON-541; 11-13-2014)

- a. "Intersex" is a condition in which a person is born with a reproductive or sexual anatomy and/or chromosomal pattern that does not fit typical definitions of male or female.
- b. Birth documentation is often not updated to reflect corrected gender. The applicant, or his/her applying parents in the case of a minor child, must provide a statement from a licensed physician who has treated the applicant for his/her gender-related care or reviewed and evaluated the gender-related medical history of the applicant. The statement must include all the information required in 7 FAM 1320 Appendix M paragraph b(1), adjusting the language to reflect the intersex condition and specify the gender correction to either male or female. In the case of a minor child, the applying parent also must submit a signed statement confirming the gender correction to either male or female. These statements must be attached to the passport application.
- c. Unless the applicant, or his/her applying parent, provides the statements described above, the gender listed on his/her birth documentation will determine the gender to be listed in the passport.

7 FAM 1360 APPENDIX M GENDER ERRORS IN ORIGINAL BIRTH CERTIFICATE

(CT:CON-541; 11-13-2014)

- a. If an applicant advises that the gender on his/her birth document mistakenly lists the wrong gender due to typographical error, and there is sufficient time before the listed departure date, refer the applicant to the appropriate issuing vital records office to have the error corrected.
- b. If the departure date is imminent, you may issue a limited one year validity passport, listing the applicant's requested gender, using endorsement code 46 (see 7 FAM 1300 Appendix B.) A corrected certified copy of the amended birth document will be required before issuance of a full validity passport in the requested gender.

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7 FAM 1370 APPENDIX M QUESTIONS

(CT:CON-464; 06-17-2013)

- a. Passport agencies and centers must contact CA-PPT-Adjudication-Suggestion-Box@state.gov for specific guidance.
- b. U.S. embassies and consulates must contact Ask-OCS-L@state.gov for specific guidance.

7 FAM 1380 APPENDIX M AND 1390 APPENDIX M UNASSIGNED

**7 FAM 1300 Appendix M Exhibit 1
Model Letter for Licensed Physician Certifying to
the Applicant's Gender Change**

(CT:CON-548; 11-08-2014)

**Licensed Physician's Letterhead
(Physician's Address and Telephone Number)**

I, (physician's full name), (physician's medical license or certificate number), (issuing U.S. State/Foreign Country of medical license/certificate), am the physician of (name of patient), with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose medical history I have reviewed and evaluated).

(Name of patient) has had appropriate clinical treatment for gender transition to the new gender (specify new gender male or female).

(Name of patient) is in the process of gender transition to the new gender (specify new gender male or female). **(NOTE TO PHYSICIAN ONLY: Use this sentence only when the patient has just begun or is in the early stages of his or her gender transition.)**

I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

Signature of Physician

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Typed Name of Physician

Date

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

s/ Lewis S. Yelin
Counsel for Appellants-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2019, I electronically filed the foregoing corrected appendix 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/ Lewis S. Yelin
Counsel for Appellants-Defendants