

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

DANA ALIX ZZYYM,

Plaintiff-Appellee,

v.

MICHAEL R. POMPEO, in his official
capacity as Secretary of State,

and

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

Defendants-Appellants.

No. 18-1453

**RESPONSE TO MOTION FOR A STAY
OF THE DISTRICT COURT'S INJUNCTION PENDING APPEAL**

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INTRODUCTION

When Plaintiff-Appellee Dana Zzyym (“Dana”) applied for a passport from the U.S. Department of State (“Department”),¹ the application form presented Dana with an impossible task: select either the male (“M”) or female (“F”) gender marker and do so truthfully. Dana was born intersex, and Dana’s gender identity—the innate sense of being male, female, both, or neither—is neither male nor female. Despite the evidence presented, the Department denied Dana’s passport application, effectively barring Dana from leaving the country not because of any conduct, but because of who they² are and how they were born. After more than four years of litigation and two district court decisions, the Department’s cannot carry its burden that it is entitled to a stay pending appeal.

BACKGROUND

A. Statutory and Regulatory Background

The Passport Act of 1926 (“Passport Act”), 22 U.S.C. § 211a, provides that “[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States[.]” The Secretary of State, however, does not have “unbridled discretion to grant or

¹ Dana refers to both defendants, sued in their official capacities, jointly as the Department or the agency.

² Dana uses singular gender neutral “they,” “them,” and “their” pronouns.

withhold a passport from a citizen for any substantive reason he may choose.” *Kent v. Dulles*, 357 U.S. 116, 128 (1958). The Department has set forth regulations for adjudicating and issuing passports, including specific reasons for passport denials, restrictions, and revocations, *see* 22 C.F.R. § 51.60 *et seq.* None of these reasons were invoked by the Department as a basis to deny a passport to Dana.

The Immigration and Nationality Act makes it “unlawful for any citizen of the United States to depart from or enter . . . the United States unless he bears a valid U.S. passport.” 8 U.S.C. § 1185(b). To obtain a U.S. passport, an 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. The applicant is also subject to 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.” 18 U.S.C. § 1542.

The Department’s Foreign Affairs Manual (“FAM”), 7 FAM § 1300, “applies to all passport-issuing offices[,]” 7 FAM § 1312, and, as relevant here, Appendix M (“Gender Policy”), Administrative Record (AR)³ 178–187,⁴ “provides policy

³ The Administrative Record appears in the district court record at Docket Number 64.

and procedures passport specialists . . . must follow when an applicant indicates a gender on the ‘sex’ line on the passport application with information different from the one reflected on some or all of the submitted citizenship and/or identity evidence[.]” 7 FAM § 1310(a) App. M; AR 178. The Gender Policy recognizes that “[a]n individual’s gender is an integral part of [the passport bearer’s] identity,” *id.* § 1310(c), and, for those applicants seeking a gender marker different from what appears on documents submitted to the agency, medical certification from a licensed physician “is the **only** documentation of gender change required.” *Id.* § 1310(e). Moreover, applicants born with intersex variations, i.e., those who “do[] not fit typical definitions of male or female,” may submit the above-referenced medical certification; otherwise the gender listed on the applicant’s “birth documentation will determine the gender to be listed in the passport.” *Id.* at § 1360(a)-(c) App. M; AR 185.

(footnote continued from previous page)

⁴ During the course of this litigation, the Department altered the language of its Gender Policy on March 31, 2016—less than two weeks after the agency filed its Motion for Judgment on the Administrative Record on March 18, 2016 (Dkt. 35). *Compare* AR 169–177 (Ex. A) *with* AR 178–187 (Ex. B).

B. Factual Background

1. Dana was born intersex but arbitrarily designated “male” and raised as a boy.

It is impossible to predict with certainty how an intersex infant’s gender identity will develop.⁵ *Id.* at 5 (Compl. ¶ 13). Dana was born with ambiguous external sex characteristics, and the sex field on their birth certificate was initially left blank. Dkt. 1 at 4 (Compl. ¶ 10). Like many other intersex children, by age five, Dana was subjected to several irreversible, invasive, painful, and medically unnecessary surgeries designed to make their body conform to binary sex stereotypes. *Id.* (Compl. ¶ 15). The surgeries immediately failed, caused permanent scarring, and did not alter Dana’s intersex nature. *Id.* Yet, Dana’s mother wrote “Male” on Dana’s birth certificate by hand and raised Dana as a boy. *Id.*

2. As an adult, Dana discovers they were born intersex and amends the gender marker on their birth certificate from “Male” to “Unknown.”

In 2008, suspecting that they were born intersex and that they had received “masculinizing” gender-assignment surgeries, Dana began researching possible causes of the severe scarring and damage sustained during childhood. *Id.* (Compl. ¶ 20). In 2009, Dana was examined by a urologist at the Veteran’s Affairs (“VA”) hospital, who confirmed Dana’s intersex traits. *Id.* (Compl. ¶ 21). Around the same

⁵ 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. *Id.*

time, Dana began experimenting with living as female. *Id.* However, Dana soon came to understand that living as a woman was not right either. *Id.*

Since 2011, Dana has identified as intersex, and neither male nor female. *Id.* (Compl. ¶ 22). Dana’s medical records reflect—and their VA doctors have confirmed—that Dana is intersex. *Id.* In 2012, Dana amended the gender marker on their birth certificate from the arbitrarily assigned “Male,” to “Unknown.” *Id.*

3. The State Department denies Dana’s passport application.

Dana has become an advocate for intersex people, particularly infants, in order to stop harmful and medically unnecessary surgeries. AR 17, 29. To that end, Dana joined Organisation Intersex International USA (“OII-USA”), the U.S. affiliate of the world’s largest organization of intersex people. *Id.* at 15. In 2014, OII-USA invited Dana to represent and vote on behalf of the organization at the Fourth International Intersex Forum in Mexico City. *Id.* at 15, 28. To attend the conference, Dana needed to obtain a U.S. passport. *Id.* at 15.

Dana traveled to the Colorado Passport Agency (“CPA”) and submitted the Department’s Application for a U.S Passport (“Application”) on September 2, 2014. *Id.* at 2–3. In the “sex” field of the Application, Dana accurately wrote “Intersex”—instead of selecting “M” or “F”—and, by separate letter, clarified, “I’m not male or female.” *Id.* at 4, 11. Dana requested an “X” to be placed in the sex field because the “X” gender marker conforms to the standards of the

International Civil Aviation Organization (“ICAO”), a United Nations agency that sets forth passport specifications. *Id.* Dana submitted their birth certificate, a court-ordered name-change document, two photo identification cards from the VA, and a Colorado driver’s license, along with a photograph and payment of appropriate fees. *Id.* at 4–11. Dana also appended a letter from a VA doctor specifying that Dana was born intersex. *Id.* at 10.

In a letter dated September 24, 2014, the Department notified Dana that it “requires the sex field on United States passports to be listed as ‘M’ or ‘F’” and instructed Dana to select a binary gender marker (either male or female) or withdraw the Application. *Id.* at 18. On December 19, 2014, Dana returned to the CPA office to present medical certification from additional VA physicians attesting—under penalty of perjury—to Dana’s intersex classification. *Id.* at 29–35. On December 29, 2014, the Department denied Dana’s Application, stating “your application did not meet our requirements” and repeating that “the [Department] requires the sex field on United States passports to be listed as ‘M’ or ‘F’.” *Id.* at 36.

C. The Final Judgment Order Under Review

1. The district court holds that the denial of Dana’s passport application violated the APA and remands the matter to the Department.

Dana commenced this action against the Department on October 25, 2015, alleging that the denial of Dana’s passport application based on the Department’s binary-only gender policy violated the Administrative Procedure Act (APA), 5 U.S.C. § 706(2), and Dana’s constitutional rights to due process and equal protection. Dkt. 1 at 12–20 (Compl. ¶¶ 48–90). On November 26, 2016, the district court issued an order holding that the denial of Dana’s application was arbitrary and capricious under the APA and remanded the matter to the Department for reconsideration and declined to reach the constitutional claims. *Zzyym v. Kerry*, 220 F. Supp. 3d 1106, 1114 (D. Colo. 2016) (*Zzyym I*).

2. The Department adheres to its binary-only gender policy, and the district court again holds that the Department is in violation of the APA.

On March 6, 2017, while this matter was on remand to the Department, OII-USA (n/k/a Intersex Campaign for Equality) asked Dana to represent the organization at an intersex conference in Amsterdam. AR 67–69. In order to travel to this conference, Dana asked the Department to issue either a full-validity or temporary passport bearing an X or other third-gender marking in the sex field. *Id.* The Department refused but said it would soon complete its judicially mandated review of the binary-only gender policy. AR 75–76.

On May 1, 2017, the Department denied Dana’s passport application a second time, AR 79–80, and set forth five justifications it claimed supported the decision to “maintain its existing” gender policy, AR 82-86. In an order issued September 19, 2018, the district court determined that the agency’s justifications did not reflect a rational decision-making process and was, therefore, arbitrary and capricious. Dkt. 88 at 10–15 (*Zzyym II*). Separately, the court further held the Department’s decision to withhold a passport from Dana exceeded the agency’s statutory authority under the Passport Act and enjoined the Department from relying on the gender policy to withhold a passport from Dana. *Id.* at 20.

3. The district court denies the Department’s motion for a stay.

After the *Zzyym II* decision, on December 3, 2018, the Department filed a motion for a stay pending appeal with the district court. Dkt. 98. On February 21, 2019, the district court denied the motion. Dkt. 106 (Order) at 5–7.

STANDARD OF REVIEW

A stay pending appeal “is an ‘extraordinary and drastic remedy.’” *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015) (citation omitted). The movant must establish (1) “that he is likely to succeed on the merits,” (2) “that he is likely to suffer irreparable harm in the absence of preliminary relief,” (3) “that the balance of equities tips in his favor,” and (4) “that an injunction is in the public interest.”

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see also Nken v. Holder*, 556 U.S. 418, 425–26 (2009).

ARGUMENT

I. THE DEPARTMENT CANNOT DEMONSTRATE IRREPARABLE HARM

A. The Federal Government Is Subject To The Same Irreparable-Harm Standard As All Other Movants Seeking A Stay.

The Department argues that the cost of upgrading agency systems and associated time for implementation is so burdensome as to constitute irreparable harm. Mot. 19 (“[I]t would take approximately 24 months and \$11 million to make the required changes.”) As this Court recognized in *Port City Properties v. Union Pacific Railroad Co.*, however, economic loss usually does not, in and of itself, constitute irreparable harm. 518 F.3d 1186, 1190 (10th Cir. 2008). “The key word in this consideration is *irreparable*. Mere injuries, however, substantial in terms of money, time and energy necessarily expended in the absence of a stay are not enough.” *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

Here, the district court carefully analyzed law from other circuits to determine when, if ever, economic loss is sufficient to constitute irreparable harm—a key issue not addressed by *Port City*. Order 5. In the private sector, irreparable harm is a loss that “threatens the very existence of the movant’s business.” *Wis. Gas*, 758 F.2d at 674. In other words, economic loss must be “more than simply

irretrievable, it also must be serious in terms of its effect on the [movant].” *Coal. for Common Sense in Gov’t Procurement v. United States*, 576 F. Supp. 2d 162, 168 (D.D.C. 2008).

For a public movant, the threshold is similar: the economic loss must threaten the existence of the agency. *See, e.g., Steele v. United States*, 287 F. Supp. 3d 1, 5 (D.D.C. 2018) (holding no irreparable harm where loss of \$37.6 million would constitute 0.3% of the total yearly budget of the Internal Revenue Service); *Friends of Capital Crescent Trail v. Fed. Transit Authority*, 263 F. Supp. 3d 144, 150–51 (D.D.C. 2017) (holding movant failed to meet its burden even though Maryland was facing an irrecoverable loss of \$13 million per month). The district court correctly determined that “the reasoning in these cases is applicable to any entity” and, therefore, “economic loss is not irreparable harm unless the movant can show that such an economic loss would cause it harm as an entity, for example by impairing its ability to perform its core functions.” Order 5.

The Department suggests that it “would make no sense ... to incur those costs now,” but the agency does not identify a single case holding that it is entitled to special treatment. *See* Mot. 19. Instead, the Department urges this Court to create an exception for the federal government that economic loss is *per se* irreparable—an alarming proposition that would effectively eliminate irreparability as one of the two “most critical” *Nken* factors. 556 U.S. at 434.

The Department’s asserted economic loss is too small to approach “irreparable” because “[a] claim of substantial financial losses must be evaluated from the perspective of the organization’s total revenues in order to determine if the harm is of a magnitude that warrants injunctive relief.” *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 48 (D.D.C. 2014). While the district court acknowledged Dana’s argument that \$11 million dollars for a system upgrade “represents only .03 percent of [the Department’s 2019] budget” of \$37.8 billion, Order 5, the court instead credited the government’s own calculation of “4.7 percent of the budget that were allocated to consular systems and technology for systems development[.]” Order 6. Either way, the magnitude of the government’s alleged loss is not even close to the kind of monetary harm—somewhere above 25% of the movant’s budget—required to show irreparable harm.⁶ Moreover, the district court also correctly observed that “[t]he Department does not argue” that the money or time involved “would impair its ability to perform these technological tasks related to the Passport function.” *Id.*

⁶ Courts have found economic losses of 1–25% to fall short of showing irreparable harm. *See, e.g., ConverDyn*, 68 F. Supp. 3d at 48 (\$10 million or 10% of revenues); *Cardinal Health, Inc. v. Holder*, 846 F. Supp. 2d 203, 212 (D.D.C. 2012) (\$1 billion or 1% of revenues); *TGS Tech., Inc. v. U.S. Dep’t of Air Force*, 1992 WL 19058, at *4 (D.D.C. 1992) (“only” 20% of revenues); *Arrow Air, Inc. v. United States*, 649 F. Supp. 993, 1000–01 (D.D.C. 1986) (\$22 million or 25% of revenues).

Thus, the Department failed to show irreparable harm and this Court should deny it's motion.

B. The Department's National Security Concerns Are Entirely Speculative.

“To constitute irreparable harm, an injury must be certain, great, actual, and ‘not theoretical.’” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wis. Gas*, 758 F.2d at 674.). Irreparable injury cannot rest on a “possibility” of future harm; such injury must be “of such *imminence* that there is a clear and present need for equitable relief.” *Id.* Nevertheless, the Department claims an entirely speculative parade of horrors that might occur with the issuance of an accurate passport before the systems are ready—a solution that the agency itself raised. Order at 4. The Department even suggests that an accurate passport for Dana—one that now *matches* Dana's Colorado driver's license—might somehow impair the government's ability to “guard against fraud, illegal entry, and terrorism.” Mot. At 20.*Id.*

Vague and unsupported suppositions of what other countries might think about a validly issued U.S. passport do not suffice to show irreparable harm. *See RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1210 (10th Cir. 2009) (“Purely speculative harm will not suffice....”) Nor do the agency's threadbare recitals about “national security” and criminals who could exploit the introduction of passport bearing a gender marker other than “M” or “F”. The Supreme Court has rebuked such

unsubstantiated invocations, particularly where personal liberties are at stake. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1862 (2017) (explaining that “national-security concerns must not become a talisman used to ward off inconvenient claims.”).

The Department need only issue appropriate notice to alleviate its concern that foreign and domestic border officials will question the authenticity of Dana’s passport. Indeed, in cases considerably more complex than the adjudication of a single passport application, the government has demonstrated its ability to perform such administrative feats. *See, e.g., Trump v. Hawaii*, No. 16-1540, Pl.’s Application for Stay at 32 (“The government began implementing the Order...which entailed extensive, world-wide coordination among multiple agencies and issuance of guidance to provide clarity and minimize confusion.”).⁷ Regardless, the Department cannot demonstrate irreparable harm based on an alternative solution the agency voluntarily introduced to the equation.

II. THE EQUITIES WEIGH HEAVILY IN DANA’S FAVOR

Beyond the Department failing to show irreparable harm, the equities weigh firmly against granting a stay. In terms of the gravity of harm at stake for Dana, the Supreme Court regards “[l]oss of the ability to travel abroad ...[as] a harsh penalty.” *Vartelas v. Holder*, 566 U.S. 257, 268 (2012). The “[d]enial of a passport

⁷ Available at <https://www.scotusblog.com/wp-content/uploads/2017/09/17A275-Trump-v.-Hawaii-App.-Stay.pdf> (last visited March 11, 2019).

has the undoubted practical consequence of effectively limiting travel.” *Lynd v. Rusk*, 389 F.2d 940, 942 (D.C. Cir. 1967); *see also* 8 U.S.C. § 1185(b) (prohibiting travel without valid U.S. passport).

Dana has already suffered irreparable harm based on the Department’s actions—a sanction equivalent to nationwide house arrest. Indeed, “Dana has missed travel opportunities for four years,” including human-rights-advocacy missions to Mexico City (2014) and Amsterdam (2017). Order 8. Most recently, the Department’s motion here has prevented Dana from travelling to, New Zealand for the 2019 ILGA World Conference. Zzyym Decl. (Ex. C) ¶¶ 11, 13. If a stay were otherwise permitted through appeal, “Dana would continue to miss travel opportunities.” Order 8. Dana’s travel and related advocacy work could be stifled for months or even years—a very “harsh penalty” for their refusal to lie on the passport application. *See Vartelas*, 566 U.S. at 268; *cf. Kent* at 130 (“We must remember that we are dealing with citizens who have neither been accused of crimes nor found guilty. They are being denied their freedom of movement....”).

The Department attempts to downplay Dana’s inability to travel abroad by suggesting the agency will issue a passport with an incorrect “M” or “F” gender marker. Mot. 21. Aside from the indignity and attendant constitutional infirmities of carrying an inaccurate, second-class passport—even one with explanatory “endorsement” language on back pages as proposed by the agency in proceedings

below—Dana recently obtained a corrected Colorado driver’s license bearing a non-binary gender marker of “X.” Ex. C ¶¶ 3–7. The Department’s suggestion that Dana obtain a passport with a “female sex designation” to facilitate international travel is untenable and nonsensical. Such a passport would be incorrect and would not align with Dana’s current state-issued driver’s license nor any other government identity document Dana might carry. *See* Mot. 3, 7, 21. Ultimately, Dana’s free movement across borders plainly outweighs any economic and administrative inconvenience to the Department.

III. THE DEPARTMENT FAILS TO DEMONSTRATE IT WILL SUCCEED ON THE MERITS

A. The Department Fails to Demonstrate a Likelihood of Success on the Merits

The Department failed to make “a strong showing” that it is likely to succeed on the merits of its claim challenging the district court’s holding that it exceeded its authority under the Passport Act of 1926. *See Nken*, 556 U.S. at 434. Mot. 18. To merit a stay, the agency must demonstrate a likelihood of success on each count of the district court’s order that forms the basis for the injunction. *See Nken*, 556 U.S. at 433–34. Far from making “a strong showing,” the Department addresses

the court's holding that it exceeded its authority under the Passport Act in one summary and conclusive paragraph.⁸

Specifically, the Department wrongly suggests that the district court conflated its arbitrary and capricious review with review of an agency's authority (or lack thereof) under the Passport Act. Mot. 18 (citing Order 18). The district court examined two Supreme Court decisions analyzing the parameters of the Secretary's authority to grant or refuse passports. Order 17 (quoting and citing *Kent*, 357 U.S. at 128) The district court, finding Dana's situation to be like the plaintiff in *Kent*, determined that the Department exceeded its statutory authority for reasons related to Dana's basic identity, and unrelated to any unlawful conduct. *Id.* The district court did not abuse its discretion and the agency failed to demonstrate any showing that the agency is likely to succeed on the merits. *See* Mot. 18; *Nken*, 556 U.S. at 434. On this basis alone, the Court should deny the agency's motion.

⁸ Because the Department failed to substantively address the holding here and did not raise the issue whatsoever in the proceeding below, it waives any claim that it has a likelihood of succeeding on the merits of this independent and dispositive APA violation. *Tran v. Trustees of State Colleges in Colorado*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived.") (citation omitted). Thus, on this basis alone, the Court should deny the government's request for a stay.

B. The Department’s Binary-Only Gender Policy is Arbitrary and Capricious

The policy invoked to deny Dana a passport was not the product of rational decision making. While the “agency’s decision is entitled to the presumption of regularity,” it is not shielded from a “thorough, probing, in-depth review.”

Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994).

Meaningful review requires a court to “ascertain whether the agency examined the relevant information and articulated a rational connection between the facts found and the decisions made.” *Id.* Agency action must be set aside “if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

1. The Agency Failed to Explain Departures from the Foreign Affairs Manual

The Department’s deviation from the FAM, without explanation, renders its actions arbitrary and capricious. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action ... ordinarily demand[s] that it display awareness that it *is* changing

position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”).

For example, the Department’s repeated references to Dana’s Colorado driver’s license bearing a female gender designation⁹ is a red herring. The Gender Policy is written for precisely this scenario—rules “passports specialists ... *must follow* when applicant indicates sex different from some or all the submitted citizenship or identity evidence.” 7 FAM § 1310(a) App. M; AR 178 (emphasis added). A binary designation on such documents is not dispositive of what gender appears on a passport. Instead, the policy mandates reliance only upon the gender from the applicant’s medical certification, *id.* § 1310(a), *-otherwise* (as applied to intersex people) the designation on “birth documentation will determine the gender to be listed in the passport.” *Id.* § 1360(c). Yet, the Department ignores the medical certification by VA physicians attesting that Dana is intersex, and also ignores that Dana’s birth certificate lists “Unknown.” AR 10. *See, e.g., St. Lawrence Seaway Pilots Ass’n v. U.S. Coast Guard*, 85 F. Supp. 3d 197, 207 (D.D.C. 2015) (holding that an agency’s unsupported departure from prior practice was arbitrary and capricious).

⁹ As referenced in Section II, *supra*, Dana has since received a new driver’s license from Colorado denoting their gender as “X.”

The Department also departed from several other FAM provisions *sub silento*, including:

- Agency deference to “the World Professional Association for Transgender Health (WPATH), recognized as the authority in its field by the American Medical Association (AMA).” 7 FAM § 1310(c) App. M; AR 178; *but see* WPATH Statement on Legal Recognition of Gender Identity (Ex. D) (stating “choices limited to Male or Female may be inadequate... [and] an option of X or Other... may be advisable.”).
- Agency statement that ICAO “has set international specification for machine-readable passports” 7 FAM § 1310(c)(2), which “now specif[ies] that sex should be designated by [F, M, or X].” *But see Zzyym II* at 12 (“The Department does not explain its departure from adherence to this standard.”)
- Agency rules observing “[a]n individual’s gender is an integral part of [the passport bearer’s] identity,” 7 FAM § 1310(c) App. M; AR 178, and some people are “born with [intersex variances] that [do] not fit typical definitions of male or female.” *id* § 1360; AR 185.
- Agency revisions to the Gender Policy during the course of the litigation. *Compare* AR 169–177 (Ex. A) *with* AR 178–187 (Ex. B).

These unexplained deviations from the FAM demonstrate why the agency’s reliance on the Gender Policy to withhold an accurate passport from Dana is arbitrary and capricious.

2. The Agency’s Reasons Run Counter to the Evidence

The Department’s explanations are unsupported by, and even counter to, the evidence. *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 69 (D.D.C. 2016) (reversing an agency decision that “ignore[d] critical context” and

“cherry-pick[ed] ... evidence”). Without exhausting every example noted by the district court after it “looked deeper at the evidence in the administrative record:”

- **Accuracy:** The agency insistence that Dana select either M or F (despite potential criminal sanction for lying on a passport application) forces Dana to obtain a *less* accurate passport. “The Department’s uncertainty about how it would evaluate persons ‘transitioning’ to a third sex misses the ball – intersex people are born as they are.” *Zzyym II* at 14.
- **Law Enforcement Databases:** The agency data “matching” justifications are contradicted by record evidence that (1) the Department’s own policy creates a system where passport applicants may obtain a passport with a gender marker different from the one listed in government law enforcement databases, and (2) not every law enforcement record “designates individual sex” and a “field left blank is assumed to reflect that the particular datum is unknown or unrecorded.” *Zzyym II* at 11; *see, e.g., Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 103 (2d Cir. 2006) (stating that courts should not defer to agency action where evidence “directly contradicts the unsupported reasoning of the agency”);
- **“No Medical Consensus”:** An agency cannot “merely recite the terms ‘substantial uncertainty’ as a justification for its actions.” *State Farm*, 463 U.S. at 52. Moreover, the Department relies on WPATH standards that state “Male or Female may be inadequate” and X “may be advisable,” *supra*, and nothing in the record can “account for why the binary sex designation is preferable.” *Zzyym II* at 14; *see also Int’l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (explaining that an agency has an “obligation to explain its reasoning for rejecting” expert evidence contrary to its decision);
- **Costs:** The Department did not “even an attempt at determining, the time, cost, or coordination necessary” for adding a third gender marker. It was “the product of guesswork rather than actual analysis.” *Zzyym II* at 15. The cost and time estimate submitted after final judgment is extra-record evidence, and a court “may uphold agency action only on grounds that the agency invoked when it took the action.” *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015).

Any one of these errors would support a finding that the Department’s decision

was arbitrary and capricious within the meaning of the APA.

3. The Agency Failed to Consider that Several U.S. States Have Begun to Issue Identification Cards with a Third Gender Marker

The Department’s decision was arbitrary and capricious for another reason: it “failed to consider” several “important aspect[s] of the problem.” *State Farm*, 463 U.S. at 43. “An agency does ... have an obligation to deal with newly acquired evidence in some reasonable fashion.” *Zen Magnets, LLC v. Consumer Product Safety Comm’n*, 841 F.3d 1141, 1150 (10th Cir. 2016). Yet, despite the Department being “on notice” that some U.S. states would soon “issue identification cards with a third gender option,” the agency relegated the issue to a footnote without consideration of the problem. *Zzyym II* at 11 (citing AR 189 (Ex. E)). The Department, therefore, “[i]gnore[d] the reality that some American passport applicants will have gender verification that exclusively list a gender that is neither female nor male”—just as Dana now has. *Id.*; see, e.g., *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 & n.46 (D.C. Cir. 1987) (observing “that the failure of an agency to consider obvious alternatives has led uniformly to reversal”).

Additionally, the Department ignored the problem that some foreign nationals carrying passports with an X gender marker may freely enter and exit the United States, and the agency denies a U.S. citizen the same opportunity. See AR 372-73;

see also Prometheus Radio Project v. FCC, 373 F.3d 372, 420–21 (3d Cir. 2004) (vacating decision where the agency failed to consider or even acknowledge “the effect of its decision on minority television station ownership”).

Among the plethora of APA errors, the agency made “an irrational departure from [settled] policy,” *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996), failed to consider all “relevant factors,” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), and ignored “an important aspect of the problem,” *State Farm*, 463 U.S. at 43–44. Independently, any of these reasons is sufficient reason for the district court to conclude the Department’s actions were arbitrary and capricious. Together, they most certainly signal the agency cannot demonstrate a likelihood of success on the merits.

CONCLUSION

For all these reasons, this Court should affirm the district court’s denial of the Department’s motion for stay pending appeal.

Respectfully submitted,

March 11, 2019

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Exhibit A

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.

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 "Jul 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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Exhibit B

7 FAM 1300 APPENDIX M GENDER CHANGE

(CT:CON-653; 03-31-2016)

(Office of Origin: CA/OCS/L)

7 FAM 1310 APPENDIX M SUMMARY

(CT:CON-653; 03-31-2016)

- a. This appendix provides policy and procedures that passport specialists and consular officers ("you") must follow when an applicant indicates a gender on the "sex" line on the passport application with information 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 101(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. Sex 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 must not be requested.
- f. A Form DS-11 "Application for U.S. Passport" must be used the first time an applicant applies for a passport in reassigned gender, as personal appearance for execution is required, even if the applicant has a previous passport. A change in gender is a change in the identity of the applicant, and evidence of identity in the new name (if applicable) and gender must be presented. Subsequent applications in the same gender may be submitted on a Form DS-82 if the applicant is eligible (see 7 FAM 1345.4 regarding eligibility to apply on a Form DS-82 and 7 FAM 1334 Appendix M regarding resumption of the birth gender).

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appearance (see also 7 FAM 1300 Appendix E "Passport Photographs");

- d. **Passport Fee.** All necessary passport fees must be submitted (see 7 FAM 1300 Appendix G "Passport Fees"); and
- e. **Name Change.** If the applicant's name has been changed, either by court order or by customary usage, she/he must present satisfactory evidence of the material name change (see 7 FAM 1300 Appendix C "Names and Name Usage"). Both names must be cleared (see 7 FAM 1334).

7 FAM 1322 Appendix M Medical Certification for Gender Change/Transition

(CT:CON-653; 03-31-2016)

- a. 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 her/his gender-related care or reviewed and evaluated the gender-related medical history of the applicant.
- b. Licensed physicians include:
 - (1) A Doctor of Osteopathy (D.O.) (not to be confused with a Doctor of Optometry (O.D.), whose certification is not acceptable); or
 - (2) A Medical Doctor (M.D.). M.D.s may specialize in various medical fields including, but not limited to, internists, endocrinologists, gynecologists, urologists, surgeons, psychiatrists, pediatricians, and family practitioners.
- c. Medical certifications from persons who are not licensed physicians are **not** acceptable. They include, but are not limited to:
 - (1) Psychologists;
 - (2) Physician Assistants;
 - (3) Nurse practitioners;
 - (4) Health practitioners;
 - (5) Licensed vocational nurses;
 - (6) Registered nurses;
 - (7) Chiropractors; or
 - (8) Pharmacists.
- d. The medical certification **must** include the following information (see 7 FAM 1300 Appendix M Exhibit 1):
 - (1) Licensed physician's full name;
 - (2) Medical license or certificate number;

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- (a) Licensed physicians in foreign countries must have a comparable foreign license or certificate registration number.
 - (b) For all foreign licensed physician gender change requests, passport agencies/centers must scan copies of the Form DS-11 and attach all submitted documents to Passport Services' Adjudication Policy Division (CA/PPT/S/A/AP) at AskPPTAdjudication@state.gov. 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.
 - (c) 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.
- (3) Address and telephone number of the licensed physician;
 - (4) Language stating that she/he has treated the applicant or has reviewed and evaluated the medical history of the applicant and that she/he has a doctor/patient relationship with the applicant;
 - (5) Language stating the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female; and
 - (6) Language stating "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."
- e. 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) 706 in corresponding with the passport applicant. (See 7 FAM 1300 Appendix T "Information Request Letters and Information Notices.")
- f. For applicants who have just begun and may be in the initial stages of the gender transition process, a two year limited validity passport using endorsement 46 (see 7 FAM 1320 Appendix B) reflecting the new gender will be issued upon presentation of a medical certification described in paragraph a above that includes the following:
- (1) Information listed in paragraph 7 FAM 1300 Appendix M d(1)-(4) above;
 - (2) Language stating the applicant is in the process of gender transition to the new gender of either male or female; and
 - (3) Language stating "I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct."
- g. Faxed, e-mailed, or scanned photocopies of medical certifications are not acceptable for full validity U.S. passports. In emergency circumstances, you may issue a limited validity passport in the new gender using endorsement 46.

7 FAM 1330 APPENDIX M ADJUDICATING GENDER CHANGE OR TRANSITION

7 FAM 1331 Appendix M Adjudicating Gender Change Cases

(CT:CON-653; 03-31-2016)

a. You must annotate the reason for issuing the full validity passport in the new gender in the "For Issuing Office Only" block of the Form DS-11:

Name as it appears on citizenship evidence _____		
<input type="checkbox"/> Birth Certificate SR CR City Filed:	Issued:	
<input type="checkbox"/> Nat. / Citiz. Cert. USCIS USDC Date/Place Acquired:	A#	
<input type="checkbox"/> Report of Birth Filed/Place:		
<input type="checkbox"/> Passport C/R S/R Per PIERS #/DOI:		
<input checked="" type="checkbox"/> Other: Gender Change		
<input type="checkbox"/> Attached:		
<input type="checkbox"/> P/C of ID <input type="checkbox"/> DS-3053 <input type="checkbox"/> DS-64 <input type="checkbox"/> DS-5520 <input type="checkbox"/> DS-5513 <input type="checkbox"/> Citiz W/S <input type="checkbox"/> P/C of Citiz <input type="checkbox"/> DS-10 <input type="checkbox"/> DS-86 <input type="checkbox"/> DS-71 <input type="checkbox"/> IRL <input type="checkbox"/> CIS Ver		* DS 11 A 09 2013 2 *

b. You must annotate and attach the medical certification to the Form DS-11:

Name as it appears on citizenship evidence _____		
<input type="checkbox"/> Birth Certificate SR CR City Filed:	Issued:	
<input type="checkbox"/> Nat. / Citiz. Cert. USCIS USDC Date/Place Acquired:	A#	
<input type="checkbox"/> Report of Birth Filed/Place:		
<input type="checkbox"/> Passport C/R S/R Per PIERS #/DOI:		
<input checked="" type="checkbox"/> Attached: MD Ltr re: Gender Change		
<input type="checkbox"/> Other:		
<input type="checkbox"/> P/C of ID <input type="checkbox"/> DS-3053 <input type="checkbox"/> DS-64 <input type="checkbox"/> DS-5520 <input type="checkbox"/> DS-5513 <input type="checkbox"/> Citiz W/S <input type="checkbox"/> P/C of Citiz <input type="checkbox"/> DS-10 <input type="checkbox"/> DS-86 <input type="checkbox"/> DS-71 <input type="checkbox"/> IRL <input type="checkbox"/> CIS Ver		* DS 11 A 09 2013 2 *

NOTE: You must not ask for additional specific clinical details regarding the gender change from the applicant.

NOTE: If the applicant requests that the original medical certification be returned, you may attach a clear photocopy of the medical certification, clearly annotate that the original medical certification was seen and returned, and return the original medical certification to the applicant.

7 FAM 1332 Appendix M Adjudicating Gender Transition Cases

(CT:CON-653; 03-31-2016)

a. You must annotate the reason for issuing the limited validity passport in the new gender in the "For Issuing Office Only" block of the Form DS-11:

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, reflecting that the applicant still is in the process of gender transition. The applicant must also submit a new Form DS-11, with appropriate identity, citizenship, and passport fees submitted (see 7 FAM 1321 Appendix M). Another two-year limited validity passport will be issued.

7 FAM 1334 Appendix M Resumption of the Birth Gender

(CT:CON-653; 03-31-2016)

If an applicant who already has been issued a passport in a new gender requests issuance of a passport in the birth gender, a medical certification of the transition back to the birth gender is required (see 7 FAM 1322 Appendix M regarding medical certifications). 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 1331 Appendix M and 7 FAM 1332 Appendix M).

7 FAM 1340 APPENDIX M CONVERSATIONS WITH PASSPORT APPLICANTS SEEKING TO DOCUMENT GENDER CHANGE/TRANSITION

(CT:CON-653; 03-31-2016)

- 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 her/his new gender even if the transition is not complete.
- c. Ask only appropriate questions regarding information necessary to determine citizenship and identity of the applicant.

7 FAM 1350 APPENDIX M AMENDING GENDER IN CONSULAR REPORTS OF BIRTH ABROAD

(CT:CON-653; 03-31-2016)

- a. The Form FS-240, "Consular Report of Birth Abroad of Citizen of the United States of America," can be amended by Passport Services' Office of Technical Operations, Record Services division (CA/PPT/S/TO/RS) to reflect the change in gender. The documentary requirements specified in this Appendix for passport services are the same for amending gender on a Form FS-240. (See also 7

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Consular Affairs

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 a Form FS-240. Inquirers are directed to contact Passport Services' Record Services Division, using the below dual addresses, both physical and P.O. box address, and the nine-digit zip code.

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
Fax: 202-485-8302

- b. An amended Form FS-240 is acceptable evidence of a gender change for a subsequent passport application.

7 FAM 1360 APPENDIX M INTERSEX CONDITIONS (DISORDERS OF SEX DEVELOPMENT)

(CT:CON-653; 03-31-2016)

- 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. When the passport application indicates a sex different from the one reflected on the birth documentation, the applicant, or her/his applying parents in the case of a minor child, must provide medical certification that meets the requirements in 7 FAM 1322 Appendix M, 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(s) 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 her/his applying parent, provides the statements described above, the gender listed on her/his birth documentation will determine the gender to be listed in the passport.

7 FAM 1370 APPENDIX M GENDER ERRORS IN ORIGINAL BIRTH CERTIFICATE

7 FAM 1300 Appendix M Page 8 of 10
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(CT:CON-653; 03-31-2016)

- a. If an applicant advises that the gender on her/his 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 (IRL 875-33).
- 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.

7 FAM 1380 APPENDIX M QUESTIONS

(CT:CON-653; 03-31-2016)

- a. Passport agencies and centers must contact AskPPTAdjudication@state.gov for specific guidance.
- b. U.S. embassies and consulates must contact Ask-OCS-L@state.gov for specific guidance.

7 FAM 1390 APPENDIX M UNASSIGNED

7 FAM 1300 APPENDIX M EXHIBIT 1 MODEL LETTER FOR LICENSED PHYSICIAN CERTIFYING TO THE APPLICANT'S GENDER CHANGE/TRANSITION

(CT:CON-653; 03-31-2016)

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 change to the new gender (specify new gender male or female).

Or

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(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 foregoing is true and correct.

Signature of Physician

Typed Name of Physician

Date

Exhibit C

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

Civil Action No.: 1:15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

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

Defendants.

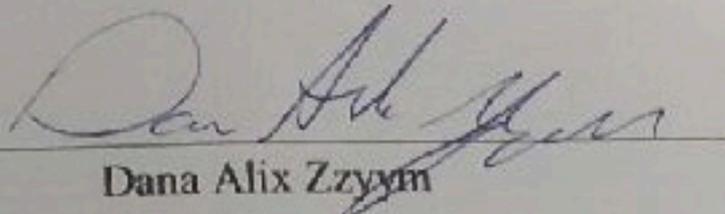
**DECLARATION OF
DANA ALIX ZZYYM**

I, Dana Alix Zzyym, do hereby state and declare as follows, pursuant to 28 U.S.C. § 1746:

1. I am the plaintiff in the above-captioned lawsuit. This declaration is based on my personal knowledge unless otherwise stated.
2. This declaration is submitted in support of Plaintiff Dana Alix Zzyym's Opposition to Defendants' Motion For Stay Of The Court's Injunction Pending Appeal.
3. On Friday, November 30, 2018, I appeared at a local office of The Colorado Department of Revenue—Division of Motor Vehicles (DMV) in order to correct the sex identifier on my Colorado driver's license.
4. After providing the DMV employee appropriate documentation, the sex identifier on my Colorado driver's license was corrected from "F" (female) to "X" (non-binary). I received a temporary driver's license card on the same day with "X" in the sex field.
5. On Monday, December 3, 2018, I returned to the same local office of the DMV in order to obtain Veteran designation on my Colorado driver's license based on my service in the United States Navy. I received an updated temporary driver's license card reflecting the Veteran designation.
6. On Monday, December 17, 2018, I received my permanent Colorado driver's license in the mail from the DMV.

7. A true and accurate copy of my new Colorado driver's license (with redactions of personally identifiable information and for privacy) is attached as **Exhibit 1**.
8. With reasonable notice, I am willing to appear before a passport official at the Colorado Passport Agency to present my Colorado driver's license for inspection in connection with my application for a full-validity United States passport that is the subject of the above-captioned lawsuit.
9. I am an intersex human rights activist and I use gender neutral "they", "them" and "their" pronouns.
10. I am the Associate Director of the Intersex Campaign for Equality (formerly the United States affiliate of the Organisation Intersex International).
11. Should I receive a valid and accurate U.S. passport, I plan to attend the ILGA World Conference located in Wellington, New Zealand.
12. ILGA, the International Lesbian, Gay, Bisexual, Trans and Intersex Association, is the world federation of national and local organizations dedicated to achieving equal rights for lesbian, gay, bisexual, trans and intersex people across the globe.
13. The conference dates are March 18-22, 2019. The registration deadline is March 1, 2019. Conference information is available at <https://www.ilga.org/world-conferences>.
14. It is my understanding that New Zealand is one of several countries that conforms to International Civil Aviation Organization (ICAO) standards, including allowing for "X" in the sex field.

I declare under penalty of perjury that the foregoing statements are true and correct.
Executed on December 19, 2018.



Dana Alix Zzyym
Plaintiff

Exhibit 1

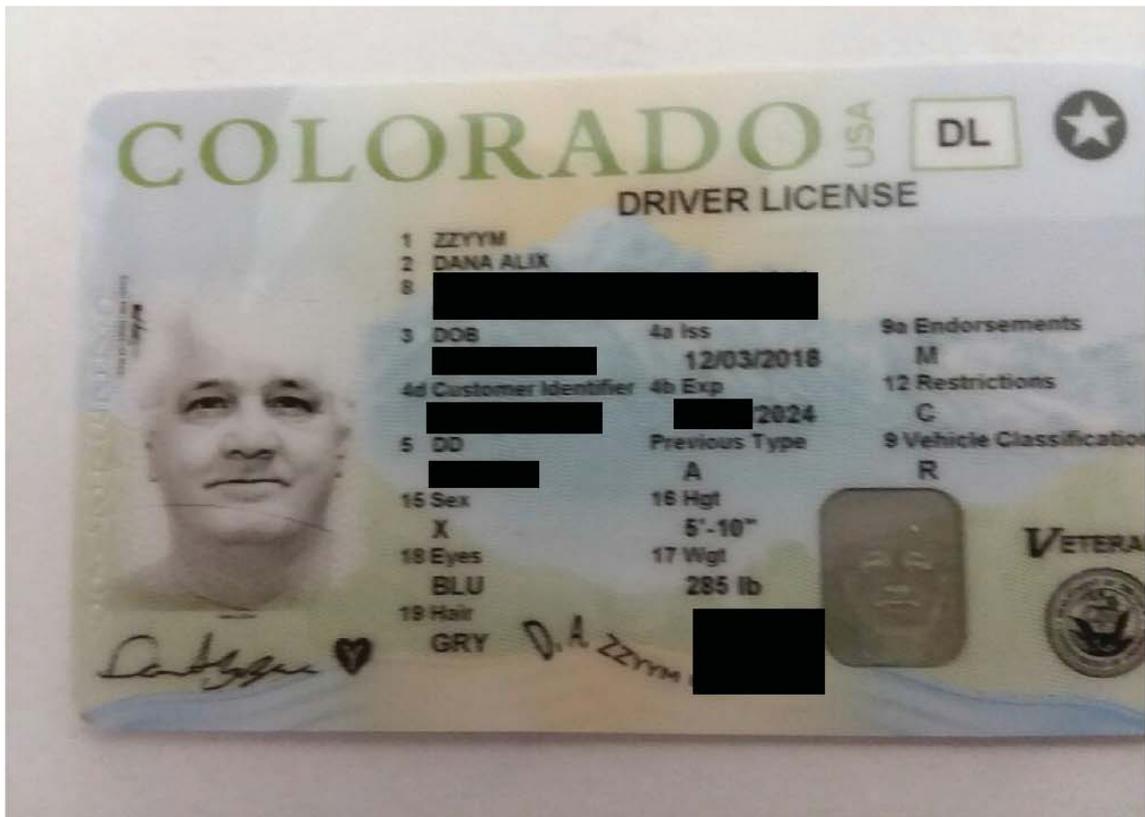
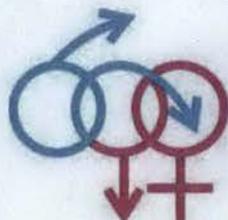


Exhibit D



WPATH WORLD PROFESSIONAL
ASSOCIATION for
TRANSGENDER HEALTH

Re: 2015 WPATH Statement on Identity Recognition

WPATH already opposes surgery or sterilization as requirements to change legal gender, per WPATH's Identity Recognition Statement, 2010. However, some governments erect many other legal barriers preventing trans people having congruent identity documents. Some of these barriers involve health professionals directly, e.g., examining people and filling out paperwork for court proceedings. These legal barriers are harmful to trans people's health because they make social transition more difficult, put congruent identity documents out of the reach of many, and even contribute to trans people's vulnerability to discrimination and violence. These laws are at odds with WPATH's perspectives expressed in SOC 7 and in our letters advising governments at those governments' request.

The statement, dated January 19, 2015, written by the WPATH Public Policy Committee and approved by the WPATH Board of Directors, is this Association's recommendation, grounded in our clinical experience as health and legal professionals.

Jamison Green, PhD
WPATH President

WPATH Statement on Legal Recognition of Gender Identity

January 19, 2015

The World Professional Association for Transgender Health (WPATH) recognizes the right of all people to legal identity recognition and to identity documents consonant with their gender identity. Further, for optimal physical and mental health, all persons must enjoy the right to freely express their gender identity, whether or not that identity conforms to the expectations of others. Legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely; transgender, transsexual, or gender-nonconforming status should not preclude individuals from enjoying the legal recognition all citizens expect and deserve. Barriers to legal recognition for transgender and transsexual individuals may harm physical and mental health. WPATH continues to oppose surgery or sterilization requirements to change legal sex or gender markers. No particular medical, surgical, or mental health treatment or diagnosis is an adequate marker for anyone's gender identity, so these should not be requirements for legal gender change. WPATH Standard of Care 7 recognizes that there is a spectrum of gender identities, and that choices of identity limited to Male or Female may be inadequate to reflect all gender identities: an option of X or Other (as examples) may be advisable. Marital status and parental status should not affect legal recognition of gender change, and appropriate legal gender recognition should be available to transgender youth. The right to legal recognition of gender extends to those incarcerated or institutionalized. Court hearings create financial and logistical barriers to legal gender change, and may also violate personal privacy rights or needs.

Therefore, the World Professional Association for Transgender Health urges governments to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual's identity, when gender markers on identity documents are considered necessary.

Exhibit E



May 1, 2017

Exhibit 38 – Male/Female Designation of Sex in U.S. Vital Records, such as Birth Certificates, Driver’s Licenses, and Identification Cards

In verifying a passport applicant’s identity, the Department matches the applicant’s stated biographical information, including sex, against numerous other documents and information sources – including birth records, driver’s licenses, court orders and law enforcement records – and a number of governmental and private data bases. The Department uses information derived from passport applications, databases, previous passports, government-issued identification, and other identifying evidence to adjudicate the identity and citizenship claims of an applicant. *See* 22 C.F.R. § 51.23. The rigorous process of adjudicating a passport applicant’s identity and citizenship is necessary to prevent identity theft and passport fraud, and to ensure the accuracy, integrity, and reliability of U.S. passports.

As the prevalence of birth certificates, driver’s licenses, and government-issued identification cards increased during in the twentieth century, these credentials evolved from documents possessed by a small percentage of the nation’s population, to documents that are now available to nearly all passport applicants, and which serve as primary proof of identity and/or evidence of citizenship. To the extent that such credentials include a holder’s sex, it is reflected as either male or female. To date, no applicant for a U.S. passport has submitted as evidence of their identity and citizenship an original (*i.e.*, un-amended) birth certificate, driver’s license, or non-driver identity card reflecting a sex other than male or female. Moreover, the Department is unaware of any vital record or motor vehicle authority in any domestic jurisdiction that has a policy providing for issuance of an original birth certificate, a driver’s license, or a non-driver identity card designating the sex of a person as “intersex,” “non-binary,” or any designation other than male or female.¹ Applicants generally submit birth certificates and government issued identification cards, such as driver’s licenses, to establish their identity and citizenship. The Department expects state and local governments to issue reliable documents, which the Department can use to adjudicate the citizenship and identity of passport applicants and to prevent identity theft and passport fraud. The Department cannot unilaterally adopt a new, third sex designation for use in U.S. passports that does not correspond to reliable, government-issued documentation, without compromising its established system for ensuring the integrity of U.S. passports as proof of identity and citizenship.

¹ A small number of jurisdictions are considering changes to their longstanding binary policy. In Oregon, the Department of Transportation, Driver and Motor Vehicle Services Division, filed a Notice of Proposed Rulemaking on March 15, 2017, to update that state’s DMV systems to permit an “X” to be used in the sex field of driver’s licenses and identification cards to indicate that sex is not specified or has been changed to “non-binary” by a court order. *See* Notice of Proposed Rulemaking Hearing, Mar. 15, 2017 (Exh. 39). In California, a bill has been introduced in the California Senate to eliminate the need for appropriate clinical treatment in order to change the sex listed on an amended birth certificate, driver’s license, or identification card, and to offer an option to list sex as “nonbinary” or “X” on such documents upon submission of an affidavit attesting that the requested change is to “conform the person’s legal gender to the person’s gender identity” *See* SB-179, introduced Jan. 24, 2017, as amended in the State Senate Apr. 17, 2017 (Exh. 40).

Birth Certificates

In addition to the 50 states, birth certificates are issued by the District of Columbia, New York City, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the United States Virgin Islands. According to a September 2000 report by the Office of Inspector General of the U.S. Department of Health and Human Services, within these domestic jurisdictions a total of 6,422 different entities issue birth certificates, including states, counties, cities, townships, and other governmental entities. The Department is not aware of any domestic jurisdiction that issues, as a policy, original, un-amended birth certificates designating a person's sex with a designation other than male or female. *See, e.g.,* Birth Certificate Application, New York City Department of Health, Office of Vital Records, Form VR 67 (Rev. Oct. 2014) (Exh. 41).²

The Department is aware that some individuals have obtained *amended* birth certificates listing their sex as something other than male or female. To date, two passport applicants have presented amended birth certificates in which the designation of their sex has been amended to read "unknown." The policy of the Department is to accept only un-amended birth certificates as evidence of the sex of the applicant. *See* 7 FAM 1320 Appendix M a NOTE (Exh. 36). Applicants who present an amended birth certificate in support of an application for a U.S. passport reflecting a *change of sex* must also submit medical certification that they have had appropriate treatment for transition to the requested sex, male or female. *See* 7 FAM 1322 Appendix M (Exh. 36). The reason for this policy is that the requirements for amending a birth certificate to reflect a change of sex vary significantly by jurisdiction. *See* "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People," 19 Mich. J. Gender & L. 373 (2013) (Exh. 42).³ In light of the wide variation in the evidence required to obtain such government-issued documents, the Department is unable to determine from an amended identity document alone whether the applicant can meet its standard for documenting a change of sex, and so cannot rely on such documents as evidence of a new sex.

² Some jurisdictions allow birth attendants to indicate initially that a child's sex is "unspecified," "unknown," or "undetermined" in cases where it cannot be immediately ascertained, with the expectation that the sex will be updated once a determination is made. Also, many vital records authorities expressly distinguish between birth certificate that is corrected due to "gender error," in which a hospital or local registrar enters incorrect information on a birth certificate, and a birth certificate that is amended due to "gender reassignment," pursuant to applicable state law.

³ A number of states have statutes that follow the requirement for a "surgical procedure" as set out in Section 21(d) of the Model State Vital Statistics Act (1992 Rev.) or impose a requirement for surgery using other language. Other states have explicitly repudiated surgical or hormonal requirements, authorizing a change based on "other treatment." Some states require a court order indicating that an individual's sex has been changed; others do not. Some states authorize amendment of a birth certificate based upon a medical certification that would not satisfy the Department's requirements under 7 FAM 1322 Appendix M. *See* "Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People," 19 Mich. J. Gender & L. 373 (2013) (Exh. 42), at 400-401 and 452-470 ("Appendix: Laws and Policies Regarding Gender Corrections for the 57 Jurisdictions that Administer Birth Certificates").

Driver's Licenses and Non-Driver ID Cards

The REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 302, establishes specific federal requirements for state-issued driver's licenses and identity cards to be accepted for certain federal purposes, including boarding a domestic flight. A REAL ID-compliant form of identification is required to include the gender (sex) of the holder. No state currently issues driver's licenses or identification cards in a sex other than male or female. *See* Resource Guide on Gender Designation on Driver's Licenses and Identification Cards, American Association of Motor Vehicle Administrators (AAMVA) (Sept. 2016) (Exh. 43).⁴

Social Security

Applicants are required by law to provide their Social Security number, if they have one, when applying for a U.S. passport or for renewal of a U.S. passport, and the Department verifies this information as part of the adjudication of the applicant's identity. The Social Security Administration requires every applicant for a Social Security number to designate his/her sex as either male or female in his/her application. *See* Form SS-5, Application for a Social Security Card, U.S. Social Security Administration (Aug. 2011) (Exh. 44). In order to change the sex entered in his/her social security record ("numident"), an individual must submit a medical certification that complies with applicable Social Security Administration requirements, which are identical to the Department's requirements for issuance of a passport reflecting a change of sex. *See* "RM 10212.200 - Changing Numident Data for Reasons other than Name Change," U.S. Social Security Administration Program Operations Manual System (POMS) (June 2013) (Exh. 45). Unlike a U.S. passport, a Social Security card issued by the Social Security Administration does not depict the sex of the holder as recorded in his/her numident.

⁴ *But see* footnote 1, *supra*.

CERTIFICATE OF COMPLIANCE

I hereby certify that no privacy redactions are required for this filing; that no paper copies are required to be submitted; and that the electronic copy of this filing was scanned for viruses using Symantec Endpoint Protection, updated March 11, 2019, and that no viruses were detected.

I hereby certify that this filing complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 5,198 words, excluding the parts of the filing exempted under Rule 32(f) according to the count of Microsoft Word 2016.

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

s/ Paul D. Castillo _____
Paul D. Castillo
Attorney for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, I electronically filed the forgoing Response to Motion for Stay of the District Court's Injunction Pending Appeal using the appellate CM/ECF system, which, pursuant to Circuit Rule 25.4, constitutes service on all parties registered for electronic filing.

s/ Paul D. Castillo
Paul D. Castillo
Attorney for Plaintiff-Appellee