

No. 18-1453

**In the United States Court of Appeals
for the Tenth Circuit**

Dana Alix Zzyym,

Plaintiff – Appellee,

v.

Michael R. Pompeo, in his official capacity as Secretary of State, and
Steven J. Mullen, in his official capacity as Director of the Colorado Passport
Agency for the United States Department of State,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO, Civ. No. 1:15-cv-2362, Hon. R. Brooke
Jackson

**SUPPLEMENTAL APPENDIX FOR APPELLEE
[Oral Argument Requested]**

Paul D. Castillo
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, Texas 75219-6722
(214) 219-8585

Puneet Cheema
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
1776 K Street NW, Suite 722
Washington, District of Columbia 20006
(202) 804-6245

Emily E. Chow
Rory F. Collins
FAEGRE BAKER DANIELS LLP
90 South Seventh Street, Suite 2200
Minneapolis, Minnesota 55402
(612) 766-7000

Ann E. Prouty
FAEGRE BAKER DANIELS LLP
1700 Lincoln Street, Suite 3200
Denver, Colorado 80203-4532
(303) 607-3500

Counsel for Plaintiff – Appellee Dana Alix Zzyym [Additional Counsel Listed Below]

M. Dru Levasseur
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, New York 10005
(212) 809-8585

Camilla B. Taylor
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 West Adams Street, Suite 2600
Chicago, Illinois 60603
(312) 663-4413

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ADMAPP,APPEAL,TERMED

**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

Dana Alix Zzyym

represented by **Ann Elizabeth Prouty**
Faegre Baker Daniels LLP-Denver
1700 Lincoln Street
Wells Fargo Center
Suite 3200
Denver, CO 80203-4532
303-607-3746
Fax: 303-607-3600
Email: ann.prouty@faegrebd.com
ATTORNEY TO BE NOTICED

Brian Leo Lynch
United States Army Corps of Engineers
Engineer Research & Development
Center
PO Box 9005
2902 Newmark Drive
Champaign, IL 61826-9005
307-761-1567
Email: brianlynch307@gmail.com
TERMINATED: 06/26/2018

Camilla Bronwen Taylor
Lambda Legal Defense & Education
Fund-Chicago
105 West Adams
Suite 2600
Chicago, IL 60603
312-663-4413
Fax: 312-663-4307
Email: ctaylor@lambdalegal.org
ATTORNEY TO BE NOTICED

Demoya Renee Gordon

Lambda Legal Defense & Education
Fund-New York
120 Wall Street
19th floor
New York, NY 10005
212-809-8585
Fax: 212-809-0055
Email: dgordon@lambdalegal.org
TERMINATED: 08/20/2018

Emily Elizabeth Chow

Faegre Baker Daniels LLP-Minneapolis
90 South 7th Street
Wells Fargo Center
Suite 2200
Minneapolis, MN 55402-3901
612-766-8012
Fax: 612-766-1600
Email: emily.chow@faegrebd.com
ATTORNEY TO BE NOTICED

Hayley Jill Gorenberg

Lambda Legal Defense & Education
Fund-New York
120 Wall Street
19th floor
New York, NY 10005
212-809-8585 x 269
Fax: 212-809-0055
Email: hgorenberg@lambdalegal.org
TERMINATED: 04/23/2018

Jessica Marie Kunevicius

Jessica Kunevicius LLC, The Law
Office of
695 South Colorado Boulevard
Suite 480
Denver, CO 80246
303-459-2806
Fax: 303-722-7281
Email: jkunevicius@gmail.com
ATTORNEY TO BE NOTICED

Kristin Ann Petri

Jessica Kunevicius LLC, The Law
Office of
695 South Colorado Boulevard

Suite 480
Denver, CO 80246
303-459-2806
Fax: 303-722-2812
Email: petrikristin@gmail.com
ATTORNEY TO BE NOTICED

M. Dru Levasseur
Lambda Legal Defense & Education
Fund-Atlanta
730 Peachtree Street NE
Suite 640
Atlanta, GA 30308-1210
404-897-1880
Fax: 404-897-1884
Email: dlevasseur@lambdalegal.org
ATTORNEY TO BE NOTICED

Michael Allen Ponto
Faegre Baker Daniels LLP-Minneapolis
90 South 7th Street
Wells Fargo Center
Suite 2200
Minneapolis, MN 55402-3901
612-766-7000
Fax: 612-766-1600
Email: michael.ponto@faegrebd.com
TERMINATED: 11/21/2018

Thomas George Hackney
Faegre Baker Daniels LLP-Denver
1700 Lincoln Street
Wells Fargo Center
Suite 3200
Denver, CO 80203-4532
303-607-3500
Fax: 303-607-3600
Email: tom.hackney@faegrebd.com
TERMINATED: 10/17/2016

Trina Kissel Taylor
Colorado Department of Law,
Consumer Credit Unit
1300 Broadway
6th Floor
Denver, CO 80203
720-508-6113
Fax: 720-508-6033
Email: trina.taylor@coag.gov

TERMINATED: 01/22/2016

Paul David Castillo
Lambda Legal Defense & Education
Fund-Dallas
3500 Oak Lawn Avenue
Suite 500
Dallas, TX 75219
214-219-8585
Fax: 214-219-4455
Email: pcastillo@lambdalegal.org
ATTORNEY TO BE NOTICED

V.

Defendant

John Forbes Kerry
*in his official capacity as the Secretary
of State*

represented by **Benjamin Thomas Takemoto**
U.S. Attorney's Office-San Francisco
450 Golden Gate Avenue
Suite 7-5395
San Francisco, CA 94102
415-436-6636
Fax: 415-436-6632
Email: benjamin.takemoto@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Matthew Charles Skurnik
U.S. Department of Justice-DC-1100 L
Street
1100 L Street NW
Washington, DC 20005
202-616-8188
Email: matthew.skurnik@usdoj.gov
ATTORNEY TO BE NOTICED

Ryan Bradley Parker
U.S. Department of Justice-DC-#883
Federal Programs Branch
P.O. Box 883
20 Massachusetts Avenue, N.W.
Washington, DC 20044
202-514-4336
Fax: 202-616-8460
Email: ryan.parker@usdoj.gov
TERMINATED: 06/08/2018

Defendant

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)
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		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 Zzyym Attorney 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 KUNEVICIUS 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 <i>to the Court of Restoration of Appropriations</i> 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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Description:	Docket Report	Search Criteria:	1:15-cv-02362-RBJ
Billable Pages:	10	Cost:	1.00

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF COLORADO

3 Civil Action No. 15-cv-02362-RBJ

4 DANA ALIX ZZYIM,

5 Plaintiff,

6 vs.

7 JOHN F. KERRY, in his official capacity as Secretary of State;
8 and SHERMAN D. PORTELL, in his official capacity as Director of
9 the Colorado Passport Agency of the United States Department of
10 State,

11 Defendants.

12 REPORTER'S TRANSCRIPT
13 HEARING ON PENDING MOTIONS

14
15 Proceedings before the HONORABLE R. BROOKE
16 JACKSON, Judge, United States District Court for the District
17 of Colorado, commencing at 9:34 a.m., on the 20th day of July,
18 2016, in Courtroom A902, Alfred A. Arraj United States
19 Courthouse, Denver, Colorado.

20
21
22
23
24 Proceeding Reported by Mechanical Stenography, Transcription
25 Produced via Computer by Kara Spitler, RMR, CRR,
901 19th Street, Denver, CO, 80294, (303) 623-3080

[Page 16]

1 submit?

2 MR. PARKER: The plaintiff also submitted --

3 THE COURT: Birth certificate?

4 MR. PARKER: Well, an amended birth certificate.

5 THE COURT: And what does it say?

6 MR. PARKER: It says "unknown." It does not identify
7 the sex of the plaintiff.

8 THE COURT: Well, there you are. So she submitted the
9 birth certificate and the driver's license. If she goes back
10 and gets a driver's license that says "intersex," does that
11 make all well, right? Well and right with the world.

12 MR. PARKER: Your Honor, I'm not sure how the State
13 Department would handle that situation, but the Department is
14 not aware of any of the 57 jurisdictions that issue driver's
15 licenses or birth certificates that use any indicator other
16 than "M" or "F." The same indicators that the State Department
17 uses.

18 THE COURT: Well, maybe the Department needs to be
19 brought into the modern world. Because there's a right to
20 international travel. Subject to a rational-basis analysis.

21 Now. Do you want a ruling out of this court, a
22 published order that finds the policy unconstitutional, or do
23 you want to perhaps rethink the policy?

24 What does the government want here? Is this the case
25 that you want to make law on? Go to the Tenth Circuit, go to

1 plaintiff's constitutional rights. There is clearly a rational
2 basis for this policy. And if the Court has no further
3 questions, I'll submit.

4 THE COURT: No more questions. Case stands submitted.

5 You've both said that your clients are willing to
6 participate in an effort to get it resolved. If you want to
7 take advantage of that opportunity, I suggest you do it sooner
8 rather than later. I'll give you a little bit of time to
9 either get settled or let me know that you're seriously in
10 discussions. Otherwise you're going to get a decision, and
11 once that happens, you have to live with it, until the Tenth
12 Circuit says no.

13 Thank you very much for your arguments this morning.

14 (Recess at 10:56 a.m.)

15 REPORTER'S CERTIFICATE

16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.

18 Dated at Denver, Colorado, this 21st day of July, 2016.

19

20 s/Kara Spitler
21 Kara Spitler

22

23

24

25

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

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

DANA ALIX ZZYYM,

Plaintiff,

v.

REX W. TILLERSON, 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.

**SUPPLEMENTAL COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER
RELIEF**

Plaintiff Dana Alix Zzyym (“Dana” or “Plaintiff”), by and through the undersigned attorneys, files this Supplemental Complaint for Declaratory, Injunctive and Other Relief against Defendants Rex W. Tillerson, in his official capacity as the Secretary of State of the United States, and Defendant Sherman D. Portell, in his official capacity as the Director of the Colorado Passport Agency for the United States Department of State (jointly, “Defendants” or “State Department”), pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, and 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, continue to deprive Dana, a United States citizen and U.S. Navy veteran who was born intersex, of a U.S. passport for international travel

because Dana's gender is neither male nor female. By continuing to deny 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. After reconsideration ordered by this Court, the State Department's denial of Dana's passport application solely because Dana cannot accurately identify as either male or female 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 are 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 has violated the Fifth Amendment to the U.S. Constitution through agency actions which occurred after October 25, 2015.

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 remains 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 resides, 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 the APA, 5 U.S.C. § 706, and because the State Department actions are contrary to the Fifth Amendment to the U.S. Constitution.

PARTIES

7. With the exception of Defendant John F. Kerry, the Parties to this action remain the same as they were upon commencement of this action on October 25, 2015.

8. Defendant Rex W. Tillerson is the duly appointed and confirmed Secretary of State for the United States. In this capacity, Defendant Tillerson 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 Tillerson 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 Tillerson, who succeeded John F. Kerry in office as Secretary of State on February 1, 2017, “is automatically substituted as

a party” pursuant to Federal Rule of Civil Procedure 25(d). Defendant Tillerson is sued in his official capacity.

PROCEDURAL BACKGROUND

9. On October 25, 2015, Dana commenced this action by filing a Complaint for Declaratory, Injunctive and Other Relief (“Original Complaint”) [Dkt. No. 1]. In the Original Complaint, Dana alleged that the Department of State’s denial of Dana’s passport application submitted on September 2, 2014 and the underlying collection of rules pertaining to gender within the Foreign Affairs Manual the Department claims requires it to only issue passports marked “M” for male or “F” for female (“Decision and Binary-Only Gender Policy” or “Policy”) was arbitrary and capricious, exceeded the Department of State’s delegated authority, and deprived Dana of due process and equal protection. Dana also requested a writ of mandamus to compel Defendants to process Dana’s passport application on an individualized, nondiscriminatory basis in a manner consistent with the applicable burden of proof. *Id.*

10. On March 18, 2016, Defendants filed a motion seeking judgment on the administrative record on Plaintiff’s claims pursuant to the Administrative Procedure Act, and dismissal of the remainder of the Complaint. [Dkt. No. 35].

11. On April 22, 2016, Dana filed an Opening Brief in Support of Declaratory, Injunctive Relief and Opposition to Defendants’ Motion for Judgment on the Administrative Record and Motion to Dismiss. [Dkt. No. 37].

12. After full briefing by the parties, oral argument on Defendants’ Motion was heard on July 20, 2016. [Dkt. No. 51].

13. On November 22, 2016, the Court issued an Order holding that Defendants' denial of Dana's passport application was arbitrary and capricious and that the administrative record did not demonstrate that the Defendants' "decisionmaking process that resulted in the [binary-only gender] policy in question was rational." Accordingly, the Court remanded the matter to the Department of State for reconsideration. [Dkt. No. 55].

14. The Court declined at that time to reach the constitutional questions raised by the Original Complaint in its Order, indicating it would not do so "unless and until it needs to." [Dkt. No. 55].

SUPPLEMENTAL STATEMENT OF FACTS

15. Paragraphs 10 through 40 of the Original Complaint are adopted here pursuant to Fed. R. Civ. P. 10(b) and 10(c).

16. On March 6, 2017, Plaintiff requested that the agency render a decision about Dana's pending passport application or, in the alternative, provide Dana with a temporary passport bearing an "X" or other third-gender marking in the sex field so that Dana could travel to Amsterdam, the Netherlands in April 2017 to participate in the Fourth International Intersex Forum ("4IIF Amsterdam") as a representative of Intersex Campaign for Equality (a/k/a OII-USA).

17. On or about March 15, 2017, Defendants refused to issue Dana a temporary or limited-validity passport reflecting a sex other than male or female. Instead, the State Department offered to issue Dana a limited-validity passport with the inaccurate "F" (female) gender designation. Defendants further declined to render a determination on the reconsideration of the binary-only gender policy and Dana's passport application

before May 1, 2017.

18. By refusing to issue a full-validity or temporary passport bearing an “X” or other third-gender marking on the sex field prior April 20, 2017, Defendants actions caused Dana to miss 4IIF Amsterdam. This was the second time since Dana’s original passport application in September 2014 (when Dana sought to travel to Mexico City to represent OII-USA in the ILGA World Conference), e.g., Dkt. No. 1, ¶¶ 23-24, 34, that the State Department’s actions effectively barred Dana from international travel.

19. Defendants’ unlawful actions are memorialized in letters between the parties, through respective counsel, dated March 6, 2017, March 15, 2017, and March 29, 2017.

20. On May 1, 2017, Defendants, after reconsideration pursuant to Court Order, denied Dana’s application for a full-validity passport bearing a gender marker other than “M” (male) or “F” (female) (“May 1, 2017 Denial”). See Letter from the State Department to Dana dated May 1, 2017. [Dkt. No. 57-1].

21. The May 1, 2017 Denial does not address the issues or questions outlined in the Court’s Order, or explain the basis for or importance of the Defendants’ male-or-female, binary-only gender policy.

22. The May 1, 2017 Denial constitutes final agency action subject to judicial review under the Administrative Procedure Act (“APA”).

23. Aside from Dana’s inability to select an “M” or “F” marker, Defendants did not identify any other issues or deficiencies on reconsideration of 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).

24. The grounds for refusal asserted by the State Department in its May 1, 2017 Denial do not relate to Dana's citizenship or allegiance, nor to criminal or unlawful conduct.

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

26. 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.

27. Defendants denied Plaintiff a passport on the basis of personal characteristics rather than area restrictions affecting all citizens. Other United States citizens who, unlike Dana, can accurately and truthfully choose an "M" or "F" gender marker, are permitted to and currently do travel internationally with valid U.S. passports listing a gender marker consistent with the holder's identity.

28. Defendants' continued refusal to issue Dana a passport bearing an accurate gender marker wholly deprives Plaintiff of access to any and all means of lawfully exiting the United States.

29. Dana's work with OII-USA continues to be severely and detrimentally impacted by the inability to travel internationally. Not only has Dana missed conferences in Mexico City and Amsterdam because of Defendants' actions, but Dana is precluded from attending future conferences without a passport, including but not limited to the

ILGA-Europe Annual Conference in Warsaw, Poland scheduled for November 1-4, 2017.

30. Defendants' male-or-female, binary-only gender policy is irrational in light of jurisdictions within the United States that permit a gender other than "M" (male) or "F" (female) on driver's licenses, state IDs, birth certificates, and other identity documents. For example, Oregon and the District of Columbia authorize and have issued driver's licenses and state IDs bearing an "X" in the sex field.

CLAIMS FOR RELIEF

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

(The State Department's Conduct Violates Plaintiff's Fundamental Right To 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)

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

32. 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.

33. 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.

34. 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.

35. The right to travel, including 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.

36. The State Department’s Decision and Binary-Only Gender Policy impermissibly infringe upon Plaintiff’s fundamental right to movement, including Plaintiff’s fundamental right to travel abroad.

37. 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 to make

intimate decisions concerning marriage, procreation, and family life, all without undue government interference.

38. A person's gender identity constitutes a core aspect of individual self-definition. The State Department's Decision and Binary-Only Gender Policy 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 is neither male nor female. It would disparage Plaintiff's choice to live openly and authentically and diminish Plaintiff's personhood to deny Plaintiff this right.

39. 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, the State Department's Decision and Binary-Only Gender Policy lack adequate tailoring and fail to serve even a legitimate governmental interest.

40. The State Department's Decision and Binary-Only Gender Policy violate Plaintiff's fundamental right to travel and impermissibly infringe 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 VII:
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 Is Neither Male Nor
Female, And Exercise Of A Fundamental Right)**

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

42. 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 to enjoin agency action that violates the Constitution.

43. 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.

44. 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.

45. People such as Plaintiff, who are neither male or female, are similarly situated to people who are either 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.

46. **Discrimination Based On Sex.** Defendants' Decision and Binary-Only Gender Policy discriminate 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.

47. 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 following reconsideration as conveyed on May 1, 2017, 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.

48. The State Department's Policy is also impermissibly premised on assumptions, expectations, stereotypes, or norms about the nature of sex as a binary characteristic, either male or female.

49. The State Department has excluded Dana from obtaining a passport, even following reconsideration, because Plaintiff failed to conform to the sex-based stereotype that every individual is either 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.

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

51. The exclusion of individuals who are neither male nor female, such as Plaintiff, from passports unless they falsely assert that they are either male or female, cannot survive the heightened scrutiny required for sex-based classifications. The Policy is not even tailored to further a legitimate governmental interest.

52. **Discrimination Based On Status As Neither Male Nor Female.** On its face, the State Department's Decision and Binary-Only Gender Policy deny passports to Dana and the class of United States citizens whose sex is neither male nor female. Thus,

in addition to constituting discrimination based on sex, Defendants' Policy also targets people who do not fit in a male or female sex classification as a group.

53. 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 with nonbinary gender. At the very least, such classifications must be rationally related to a legitimate government interest. Here, the State Department's Decision and Binary-Only Gender Policy lack even a rational relationship to a legitimate governmental interest.

54. **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 travel and freedom of movement without undue government restriction and fundamental liberty interests in individual dignity and autonomy, including Plaintiff's right to self-definition and privacy.

55. 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.

56. The State Department's Decision and Binary-Only Gender Policy deprive 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.

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" (for "male") or "F" (for "female") violates Plaintiff's constitutional rights;

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

C. 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

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

Respectfully submitted this 3rd day of July 2017.

Michael A. Ponto
Emily E. Chow
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Phone: (612) 766-7000
Fax: (612) 766-1600
michael.ponto@faegrebd.com
emily.chow@faegrebd.com

s/ Paul D. Castillo
Paul D. Castillo
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Suite 500
Dallas, TX 75219-6722
Phone: (214) 219-8585
Fax: (214) 219-4455
pcastillo@lambdalegal.org

Attorneys for Plaintiff Dana Alix Zzyym

Brian Lynch
FAEGRE BAKER DANIELS LLP
3200 Wells Fargo Center
1700 Lincoln Street
Denver, CO 80203-4532
Phone: (303) 607-3500
Fax: (303) 607-3600
brian.lynch@faegrebd.com

Hayley Gorenberg
M. Dru Levasseur
Demoya R. Gordon
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 1005
Phone: (212) 809-8585
Fax: (212) 809-0055
hgorenberg@lambdalegal.org
dlevasseur@lambdalegal.org
dgordon@lambdalegal.org

Camilla B. Taylor
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 West Adams Street, Suite 2600
Chicago, IL 60603-6256
Phone: (312) 663-4413
Fax: (312) 663-4307
ctaylor@lambdalegal.org

Attorneys for Plaintiff Dana Alix Zzyym



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.

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF COLORADO

3
4 Civil Action No. 15-CV-02362-RBJ

5 DANA ALIX ZZYIM,

6 Plaintiff,

7 vs.

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

11 Defendants.

12

13 REPORTER'S TRANSCRIPT
14 Oral Argument

15

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

18

APPEARANCES

19

For the Plaintiff:

20 PAUL D. CASTILLO, Lambda Legal Defense & Education Fund, 3500
Oak Lawn Ave., Ste. 500, Dallas, TX 75219

21

ANN E. PROUTY and BRIAN L. LYNCH, Faegre Baker Daniels, LLP,
1700 Lincoln St., Ste. 3200, Denver, CO 80203

22

For the Defendants:

23 RYAN B. PARKER, U.S. Department of Justice, 20 Massachusetts
Ave., N. W., Washington, DC 20044

24

25

Sarah K. Mitchell, RPR, CRR, 901 19th Street, Room A252,
Denver, CO 80294, 303-335-2108

Proceedings reported by mechanical stenography;
transcription produced via computer.

[Page 22-27]

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

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

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

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

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

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

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

Sarah K. Mitchell, RPR, CRR

1 MR. PARKER: Well --

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

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

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

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

Sarah K. Mitchell, RPR, CRR

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

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

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

11 MR. PARKER: Correct, Your Honor.

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

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

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

Sarah K. Mitchell, RPR, CRR

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

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

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

17 THE COURT: Yeah, what are they?

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

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

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

Sarah K. Mitchell, RPR, CRR

1 driver's license with X on it --

2 THE COURT: That's right.

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

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

9 MR. PARKER: So --

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

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

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

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

Sarah K. Mitchell, RPR, CRR

1 MR. PARKER: Well, Your Honor --

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

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

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

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

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

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

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

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

Sarah K. Mitchell, RPR, CRR

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REPORTER'S CERTIFICATE

I, SARAH K. MITCHELL, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 28th day of June, 2018.

/s/ Sarah K. Mitchell

SARAH K. MITCHELL
Official Court Reporter
Registered Professional Reporter
Certified Realtime Reporter

Sarah K. Mitchell, RPR, CRR

**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.

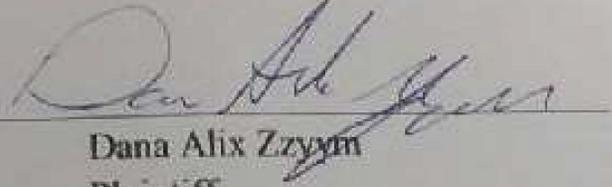
**DECLARATION OF
DANA ALIX ZZYYM**

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.

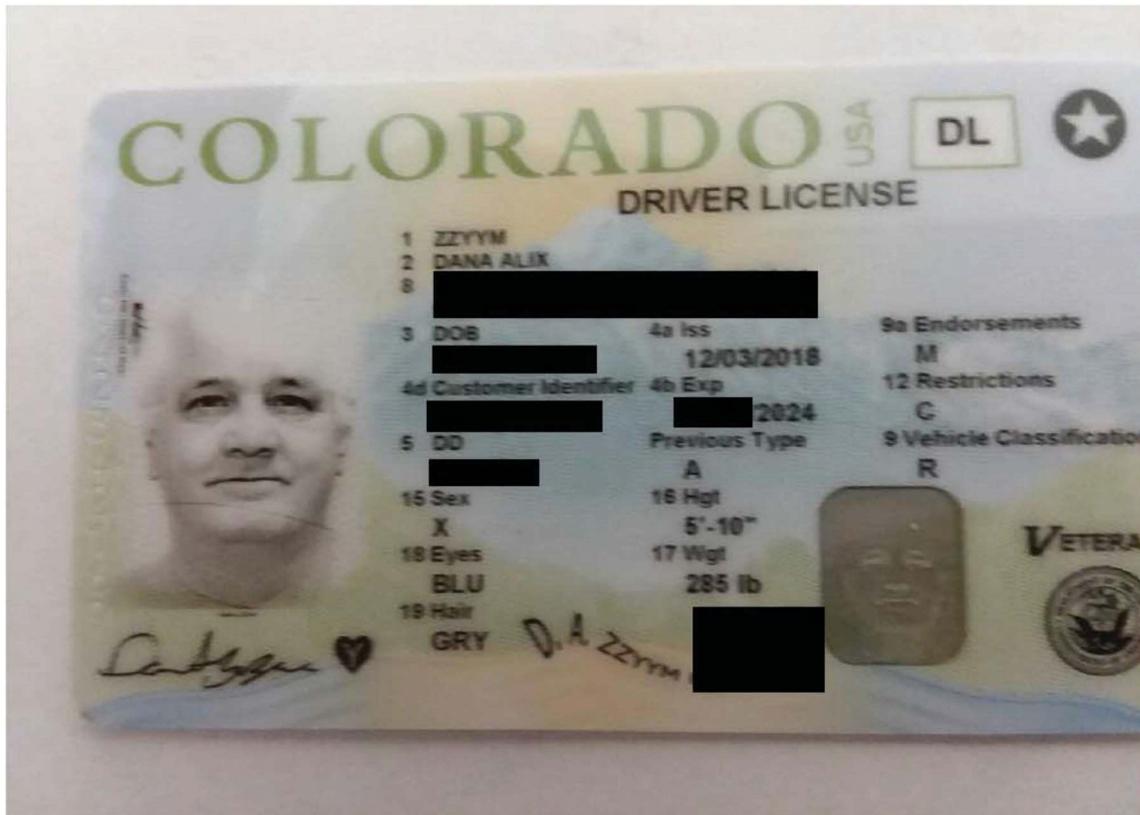
7. A true and accurate copy of my new Colorado driver's license (with redactions of personally identifiable information and for privacy) is attached as **Exhibit 1**.
8. With reasonable notice, I am willing to appear before a passport official at the Colorado Passport Agency to present my Colorado driver's 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 Zzym
Plaintiff

Exhibit 1





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*.



May 1, 2017

Exhibit 46 – Use of a Third Sex Marker by Contracting States as Permitted by ICAO

The International Civil Aviation Organization (ICAO) is a specialized agency of the United Nations created in 1947 by the Convention on International Civil Aviation (the “Chicago Convention”). ICAO was created for the purpose of reaching consensus on international civil aviation practices and policies in support of a safe, efficient, secure, economically sustainable, and environmentally responsible civil aviation sector. Under Article 37 of the Chicago Convention, Contracting States undertook to collaborate in securing the highest practicable degree of uniformity in those regulations, standards, procedure and organization required for efficient and orderly civil aviation operations. Under this and other mandates, ICAO has developed and maintained international standards in Annex 9 to the Chicago Convention, “Facilitation.”

ICAO’s work on machine readable travel documents (MRTDs) began in 1968 with the establishment of a panel of passport experts charged with developing recommendations for a standardized passport book or card that would be machine readable, in the interest of accelerating the clearance of passengers through passport controls. In November 1980, ICAO published its initial guidance and recommendations for machine-readable travel documents (MRTDs), “A Passport with Machine Readable Capability” (ICAO Document 9303, now known as the First Edition of ICAO Doc 9303) (Exh. 48), which became the basis for the introduction of such passports by Australia, Canada, and the United States. ICAO’s production of standardized technical specifications for travel documents, and for the data contained in such documents, was aimed at building the level of confidence in the reliability of travel documents and in the effectiveness of procedures for inspection of air travelers. *See* ICAO Doc 9303, “Machine Readable Travel Documents,” 7th Edition, Part 1, “Introduction” (2015) (Exh. 50), at 2 (§ 3.1).

The European Community adopted resolutions in 1981 and 1982 calling for its contracting states to follow the specifications of Doc 9303 in a uniform European passport by January 1, 1985. In 2005, the then-188 Member States of ICAO approved a “Standard” – Standard 3.10 – requiring all Member States to begin issuing only machine-readable passports in accordance with Doc 9303 no later than 2010. ICAO’s most recent specifications for passports are published in the Seventh Edition of Doc 9303, published in 2015. *See id.*; ICAO Doc 9303, “Machine Readable Travel Documents,” 7th Edition, Part 4, “Specifications for Machine Readable Passports (MRPs) and other TD3 Size MRTDs” (2015) (Exh. 51).

Doc 9303 specifies the size and format of MRTDs to be issued by ICAO Member States, as well as the arrangement and content of the data contained in such documents. ICAO’s issuance of uniform standards assists ICAO Member States in issuing MRTDs that are compatible with the computerized systems used by other ICAO Member States. Since the First Edition of Doc 9303, ICAO has required detailed biodata such as the bearer’s sex to be included on travel documents in order to reduce the risk of such documents being issued to the wrong identity or multiple documents being issued to one identity. *See* “A Review of the Requirement to Display the Holder’s Gender on Travel Documents,” ICAO Technical Advisory Group on

Machine Readable Travel Documents Information Paper TAG/MRTD/21-IP/4 (Nov. 20, 2012) (Exh. 52), at 6. ICAO also considered the requirement for a sex marker to be valuable in assisting border officials in verifying a traveler's identity by performing a quick visual check of the sex indicated on the passport compared to the traveler. *See id.*

Each edition of Doc 9303 has specified that MRTDs, including passports, include a data field identifying the sex of the holder in both the printed and machine-readable zones. In specifying the permissible characters to be used to designate a holder's sex in both zones, Doc 9303 initially recognized only two designations, one for the sex of female and one for the sex of male. By 1999, a third permissible sex designation, "unspecified," had been added to both zones, to accommodate a person who did not wish their sex to be identified or where a Member State did not want to show this data. *See* ICAO Doc 9303, "Machine Readable Travel Documents," Part 1 – Machine Readable Passports, 4th Edition (1999) (Exh. 49). In the printed zone, Doc 9303 now provides that sex is shown as a personal data element in Field 11 (Zone II), as a single initial commonly used by the issuing country and, if applicable, followed by an oblique (/) and the capital letter "F" for female, "M" for male, or "X" for unspecified. *See* ICAO Doc 9303, "Machine Readable Travel Documents," 7th Edition, Part 4, "Specifications for Machine Readable Passports (MRPs) and other TD3 Size MRTDs" (2015) (Exh. 51), at 6 (§ 3.2 Fig. 4), 7 (§ 3.2 Fig. 6), and 14 (§ 4.1.1.1). In the machine-readable zone, sex is indicated in position 21 in the lower machine-readable line by "F" for female, "M" for male, or "<" (referred to by ICAO as the "filler character") for "unspecified." *Id.* at 19 (§ 4.2.2.2).

In Doc 9303, ICAO encouraged international interoperability by adopting a technical specification permitting, but not requiring, the use of "X" as an allowable designation of a passport holder's sex, for cases in which the sex of the individual issued a travel document was unspecified. Most countries, including the United States, do not issue passports or visas with the "unspecified" designation. *See* "Gender and Sex Designations for Identification Purposes: A Discussion on Inclusive Documentation for a Less Assimilationist Society," 3 Wisc. J. Law, Gender & Society 131 (2015) (Exh. 53); "Third Gender: A Short History," *Foreign Policy* (June 30, 2014) (Exh. 54). A small number of countries, applying varying standards, permit their citizens to qualify for an "X" sex marker in their passport not to indicate that their sex is unspecified or undetermined, but instead to designate a sex other than male or female. Australia, Bangladesh, Denmark, Malta, and New Zealand fall into this category. Also, India and Nepal have issued passports using sex markers in the printed zone other than "F," "M," or "X" to indicate a sex other than male or female. To ensure machine-readability of such passports at foreign borders, in the machine-readable zone these countries use the filler character ("<") specified by ICAO for use when sex is unspecified or undetermined.

Because the U.S. does not issue visas or other travel documents with the "unspecified" designation, a holder of a foreign passport bearing an "X" in the printed zone and "<" in the machine-readable zone who wishes to travel to the United States is required to select a sex of "F" for female or "M" for male on their U.S. visa application submitted to the Department or, for nationals of visa waiver program countries who issue such passports, on their ESTA application submitted to U.S. Customs and Border Protection.

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/ Paul D. Castillo
Counsel for Plaintiff – Appellee

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2019, I electronically filed the foregoing Supplemental 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/ Paul D. Castillo
Counsel for Plaintiff – Appellee