

No. 18-1453

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

DANA ALIX ZZYYM,

Plaintiff - Appellee,

v.

MICHAEL R. POMPEO,

in his official capacity as Secretary of State, and

STEVEN J. MULLEN,

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

Defendants - Appellants.

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

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

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

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**Not admitted in the Tenth Circuit*

CORPORATE DISCLOSURE STATEMENT

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

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AUTHORITY TO FILE

Amici file this brief with the consent of both parties.

STATEMENT OF AMICUS CURIAE

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

BACKGROUND

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

s/ Mark Silverstein
Mark Silverstein

CERTIFICATE OF SERVICE

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

s/ Mark Silverstein _____
Mark Silverstein