

Case No. 18-1453

IN THE
United States Court of Appeals
FOR THE TENTH CIRCUIT

—◆◆◆—
DANA ALIX ZZYIM,

Plaintiff-Appellee,

—v.—

MICHAEL R. POMPEO, in his official capacity as the Secretary of State;
STEVEN J. MULLEN, in his official capacity as the 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 - DENVER
HONORABLE R. BROOKE JACKSON
D.C. NO. 1:15-CV-02362-RBJ

**BRIEF FOR *AMICI CURIAE* INTERACT: ADVOCATES
FOR INTERSEX YOUTH, ARLENE B. BARATZ, MD,
KATHARINE BARATZ DALKE, MD, GEORGIANN DAVIS, PhD,
JULIE A. GREENBERG, JD, ELIZABETH REIS, PhD, SUSAN E.
STRED, MD, CARL G. STREED JR., MD, SEAN SAIFA WALL, ILENE
WONG, MD AND THE NATIONAL CENTER FOR LESBIAN RIGHTS
IN SUPPORT OF PLAINTIFF-APPELLEE**

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May 15, 2019

ORAL ARGUMENT NOT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Civil Procedure, *amici curiae* state as follows:

Amicus interACT: Advocates for Intersex Youth is a nonprofit organization. It has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

Amicus curiae the National Center for Lesbian Rights is a nonprofit organization. It has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE

Amici file this brief in support of Plaintiff-Appellee Dana Alix Zzyym (“Dana”).¹

Lead *amicus* **interACT: Advocates for Intersex Youth** is a nonprofit organization that employs legal and policy advocacy to protect the rights of children born with variations in their sex characteristics, often called intersex. It is the first and only organization in the country exclusively dedicated to this purpose. Founded in 2006 as Advocates for Informed Choice, its mission initially focused on ending harmful, non-consensual medical interventions on intersex children. Since then, interACT has expanded its mission to include awareness-raising to end the shame and stigma faced by intersex youth and overseeing the largest cohort of intersex young people advocating on their own behalf, interACT Youth.

¹ *Amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

Arlene B. Baratz, MD is Coordinator of Medical and Research Affairs for the AIS-DSD Support Group and Chair of the Medical and Research Policy Committee for interACT.

Katharine Baratz Dalke, MD is an Assistant Professor of Psychiatry at Penn State College of Medicine, member of the Medical Advisory Group and former President of the Board of interACT, and an intersex woman.

Georgiann Davis, PhD is an Associate Professor of Sociology at the University of Nevada, Las Vegas and the Board President of interACT. As a medical sociologist, Davis has spent over ten years studying the ways in which intersex is experienced and contested in contemporary U.S. society. She is the author of the award-winning book *Contesting Intersex: The Dubious Diagnosis* (New York University Press, 2015).

Julie A. Greenberg, JD is an Emeritus Professor of Law at the Thomas Jefferson School of Law. Professor Greenberg is an internationally recognized expert on the legal issues affecting the intersex community. Her path-breaking work has been cited by numerous state, federal, and international courts. Her scholarship, including her

award-winning book, *Intersexuality and the Law: Why Sex Matters*, has been quoted in hundreds of books and articles.

Elizabeth Reis, PhD is a Professor at Macaulay Honors College, CUNY, author of *Bodies in Doubt: An American History of Intersex* (Johns Hopkins University Press, 2009), and a Board member of inter-ACT. She has examined hundreds of cases of “hermaphroditism” and intersex found in medical and popular literature.

Susan E. Stred, MD is a Professor Emerita of Pediatric Endocrinology at SUNY Upstate Medical Center. She is a Board-certified pediatric endocrinologist with three decades of experience caring for individuals with intersex conditions. She was selected by AIS-DSD Support Group, the nation’s largest support group for individuals with intersex conditions, as a medical ally and annual speaker.

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Sean Saifa Wall is the co-Founder of the Intersex Justice Project and an internationally recognized intersex activist.

Ilene Wong, MD FACS is a practicing urologist at MidLantic Urology, author of *None of the Above* (2015), and Board Member of interACT.

The National Center for Lesbian Rights (NCLR) is a national nonprofit legal organization dedicated to protecting and advancing the equality of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country.

This case raises issues central to *amici's* mission as advocates for intersex people. It will determine whether Americans born with intersex variations will be able to exercise their right to travel without being compelled to make potentially false statements about themselves under oath. More generally, this case is about whether our federal government must recognize the existence and fundamental dignity of intersex people, or whether it may continue to erase and discriminate against this marginalized and mistreated group of Americans. *Amici* urge this Court to affirm.

INTRODUCTION

The Department of State (“Department”) will not permit Dana Zzyym to obtain a passport—and thus, to travel internationally—unless they² self-identify as “male” or “female” on their passport application. The Department doesn’t appear to care which box Dana checks, as long as they check one. But it is undisputed that Dana is *not* “male” or “female.” Dana is intersex. Their doctors have uniformly said so; their lawful birth certificate specifies their sex as “Unknown”; and their lawful Colorado driver’s license lists their sex as “X,” rather than “M” or “F.” The District Court rightly found that the Department’s irrational and discriminatory policy violates the Administrative Procedure Act because it is unsupported by the record and because the Department failed to consider an important aspect of the issue.

As *amici* explain in this brief, “intersex” is an umbrella term for a variety of natural bodily variations in sex characteristics that cause a person’s body to transcend binary notions of “male” or “female.” Inter-

² This brief uses the singular, gender-neutral “they” to refer to Dana, consistent with Dana’s own preference. App’x 20. References to “App’x” are to the three-volume Corrected Appendix filed on March 7, 2019 by Appellants. References to “Br.App’x” refer to the Appendix filed on March 5, 2019 by Appellants in connection with their brief.

sex people have existed throughout history and across all cultures, and the law has afforded them recognition in various respects since Biblical times, if not earlier. Today, a growing number of nations and U.S. states—including Dana’s home state of Colorado—issue passports, driver’s licenses, birth certificates, and other forms of ID with the option to reflect a lived reality that is neither “male” nor “female.”

Unfortunately, intersex people are still subject to a wide range of indignities and discriminatory practices that erase their existence—and this case is a perfect example. For Dana, the Department’s policy literally compels them to lie on an official government form, a degrading, immoral, and potentially criminal act. The policy also imposes additional stigma on a group of people who already experience severe mistreatment and discrimination. The Department’s stated grounds for its policy do not address these important aspects of the issue at all. Indeed, as *amici* explain below, the Department’s policy flies in the face of well-settled medical science, millennia of Western history, and growing domestic and international consensus. The District Court’s judgment should be affirmed.

ARGUMENT

I. INTERSEX PEOPLE'S BODIES TRANSCEND THE MALE/FEMALE BINARY.

“Intersex” is an umbrella term describing a wide range of natural variations of physical traits—in external genitals, internal sex organs, chromosomes, and hormones—that do not fit typical binary notions of male and female bodies. Each year, as many as 2% of all babies are born with these variations.³

Intersex traits originate from variations in the embryonic sexual development process. A fertilized egg usually has two sex chromosomes: XX or XY. For the first few weeks of gestation, XX and XY embryos look the same, but they later develop in different ways depending on genetic and hormonal factors. In male-typical sexual development, the gonads become testes; the genital tubercle becomes a penis; and the labioscrotal folds fuse and form a scrotum. In female-typical sexual development, the gonads become ovaries; the genital tubercle becomes a clitoris; and the labioscrotal folds develop into the outer labia. Later, at

³ Anne Fausto-Sterling, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 51 (2000); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 *Am. J. Human Biol.* 151 (2000).

puberty, hormones secreted by the testes or ovaries cause expression of male-typical or female-typical secondary sex characteristics, such as breast development, body hair, musculature, and depth of voice.⁴

There are many ways in which this “typical” process can vary.⁵ Such variations may present at different ages. For example, atypical external genitalia may mean an intersex child is diagnosed at birth, but variations in internal organs or sex chromosomes may not become apparent until puberty or later.⁶ Dana, for example, did not learn with certainty that they were born intersex until approximately age 50. App’x 20.

⁴ I.A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 118 *Pediatrics* 488, 491 (2006); Bruce E. Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, in *INTERSEX IN THE AGE OF ETHICS* 119 (1999); *SRY gene*, National Institutes of Health, <https://ghr.nlm.nih.gov/gene/SRY> (last visited May 7, 2019).

⁵ Hughes, *supra* note 4, at 488; Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law*, 11 *Ann. Health L.* 195, 204 (2002); Carla Murphy et al., *Ambiguous Genitalia in the Newborn: An Overview and Teaching Tool*, 24 *J. Pediatric Adolescent Gynecology* 236, 236–37 (2011).

⁶ *Clinical Guidelines for the Management of Disorders of Sexual Development in Childhood 2–5* (2006), Consortium on the Management of Disorders of Sex Development, <https://goo.gl/bKQcES> (last visited May 7, 2019) (hereinafter “Clinical Guidelines”).

Intersex children are usually “assigned” a binary (male/female) sex at birth based on some combination of their genitalia, gonads and other internal organs, and chromosomes.^{7,8} This is a largely subjective process, and experts may disagree on the “correct” sex to assign to an intersex child.⁹ Often, children discovered to be intersex in infancy are subjected to harmful “normalizing” surgical procedures in an attempt to erase their intersex differences—a form of discrimination and mistreatment discussed in Part III, *infra*.

Some intersex people continue to identify with their originally assigned sex throughout their lives, but others do not.¹⁰ For most major intersex diagnoses, 5–29% do not identify with their originally assigned

⁷ Hughes, *supra* note 4, at 491.

⁸ The emphasis on which characteristic should prevail in determining a person’s sex has changed over time. For a history of intersex management, *see generally* Elizabeth Reis, *BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX* (2009).

⁹ *See, e.g.*, Tamar-Mattis, *infra* note 68, at 5 (“There is still controversy and uncertainty about gender assignment in [cases of partial AIS], and it can go either way, depending largely on the doctor’s judgment.”); David A. Diamond et al., *Gender Assignment for Newborns with 46XY Cloacal Exstrophy: A 6-Year Followup Survey of Pediatric Urologists*, 186 *J. Urol.* 1642, 1643 (2011) (reporting that only 79 percent of surveyed clinicians agreed on a male gender assignment in 46XY cloacal exstrophy).

¹⁰ *Understanding Intersex and Transgender Communities* at 1, interACT, <https://goo.gl/CY53ZZ>.

sex.¹¹ In other cases, the rate of sex assignment rejection can reach higher than 60%.¹² Dana is among these many people born intersex who do not identify with the sex that they were “arbitrarily and inaccurately assigned as an infant.” App’x 20.

The (now-defunct) Intersex Society of North America (“ISNA”) recognized approximately 20 different intersex diagnoses,¹³ including:

- a. ***Congenital Adrenal Hyperplasia (CAH)***: CAH can occur in babies with XX or XY chromosomes, but is only considered an intersex variation in XX babies. In CAH, a variant form of an enzyme leads to heightened production of androgenic hormones *in utero*. This can cause development to varying degrees of typically “male” physical characteristics. XX individuals with CAH may

¹¹ Julie A. Greenberg, INTERSEXUALITY AND THE LAW 20 (2012); Hughes et al., *supra* note 4, at 491; P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of gender dysphoria at 5% for Complete Androgen Insensitivity Syndrome, 10% for Congenital Adrenal Hyperplasia, 12.5% for Ovotesticular DSD, 20% for Partial Androgen Insensitivity Syndrome, and 29% for Mixed Gonadal Dysgenesis).

¹² P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of gender dysphoria at 57% for 17-beta-HSD3 deficiency and 63% for 5-alpha-RD2 deficiency).

¹³ Clinical Guidelines, *supra* note 6, at 5–7.

have female-typical internal organs and masculinized external genitalia, such as an enlarged clitoris and/or the lack of a vaginal opening. CAH can also cause development of male-typical secondary sex characteristics like body hair, deep voice, and prominent muscles. CAH occurs in about 1 in 14,500 births.¹⁴

- b. *5-Alpha Reductase (5-AR) Deficiency:*** People with 5-AR deficiency have an XY chromosomes and testes, but their bodies produce lower-than-typical levels of the hormone dihydrotestosterone (DHT), which impacts formation of the external genitalia. Many are born with external genitalia that appear typically female. In other cases, they are neither male- nor female-typical. Still other affected infants have genitalia that appear predominantly male, often with an unusually small penis (micropenis) and the urethral opening on the underside of the penis (hypo-

¹⁴ Walter L. Miller & Selma Feldman Witchel, *Prenatal Treatment of Congenital Adrenal Hyperplasia: Risks Outweigh Benefits*, 208 *Am. J. Obstetrics & Gynaecology* 354, 354 (2013); Phyllis W. Speiser, et al., *Congenital Adrenal Hyperplasia Due to Steroid 21-Hydroxylase Deficiency: An Endocrine Society Clinical Practice Guideline*, 95 *J. Clin. Endocrinology & Metabolism* 4133–60 (2010); Blackless et al., *supra* note 3, at 154–55; *Congenital Adrenal Hyperplasia (CAH)*, ISNA, <https://goo.gl/8Ki1FH>; Fausto-Sterling, *supra* note 3, at 51–53 & tbl. 3.2; Clinical Guidelines, *supra* note 6, at 6.

spadias). During puberty, people with 5-AR deficiency develop some typically male secondary sex characteristics, such as increased muscle mass and a deep voice, but do not develop much facial or body hair. Children with 5-AR deficiency are often raised as girls. However, about half have a male gender identity and live as male beginning in adolescence or early adulthood.¹⁵

c. ***Androgen Insensitivity Syndrome (AIS)***: People with AIS have XY chromosomes, but their cells have a reduced or absent response to testosterone or other androgens. As a result, they do not form typically male genitalia. In “complete” AIS, babies are usually born with a vaginal opening and clitoris indistinguishable from those seen in typical female babies. The diagnosis is ordinarily not suspected until puberty, when menstruation does not occur. Investigation then reveals that these individuals are XY, that they have undescended testicles, and that neither a uterus nor ovaries are present. However, because their bodies naturally convert the testosterone they produce into estrogen, they will usually develop female-typical secondary sex character-

¹⁵ Hermer, *supra* note 5, at 207.

istics at puberty so long as their gonads are not removed. In “partial” AIS, the body’s cells have some (albeit limited) response to androgens, and as a result, the external genitalia fall somewhere between typically male and typically female. While individuals with complete AIS often have a female gender identity, individuals with partial AIS are divided approximately evenly between female and male gender identity. AIS occurs in approximately 1 in 20,000 individuals.¹⁶

- d. ***Swyer Syndrome:*** In this variation, an XY child is born with “gonadal streaks” (minimally developed gonadal tissue) instead of testes or ovaries. Externally, a child with Swyer Syndrome usually appears female-typical; however, because streak gonads do not produce the sex hormones that bring about puberty, the child will not develop most secondary sex characteristics without hormone treatment.¹⁷

¹⁶ Blackless et al., *supra* note 3 at 153; Fausto-Sterling, *supra* note 3, at 52; Hughes, *supra* note 4, at 491; *Androgen Insensitivity Syndrome*, ISNA, <https://goo.gl/GJziJL>.

¹⁷ L. Michala, et al., *Swyer syndrome: presentation and outcomes*, 115 *BJOG: An Int’l J. of Obstetrics & Gynaecology* 737–41 (2008); Georgiann Davis, *CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS 2* (2015); Fausto-Sterling, *supra* note 3, at 52 & tbl. 3.1; Julie A. Greenberg, *De-*

- e. ***Kallman Syndrome:*** This variation occurs in both XX and XY children, characterized by delayed or absent puberty and an impaired sense of smell. It is a form of hypogonadotropic hypogonadism, or absence of certain hormones that direct sexual development. XY children with Kallman syndrome often have an unusually small penis (micropenis) and undescended testes. At puberty, most affected individuals do not develop typical secondary sex characteristics, such as facial hair and deepening of the voice in XY adolescents, or menstruation and breast development in XX adolescents.
- f. ***Klinefelter Syndrome:*** A child with Klinefelter syndrome has XXY chromosomes, as opposed to the typical patterns XX or XY. This occurs when one parent's sperm or egg has an extra X chromosome from atypical cell division. The testes and penis may be smaller than typical. Klinefelter syndrome has a preva-

fining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265, 284 (1999).

lence of about 1 in 500 children, and is not ordinarily diagnosed before puberty.¹⁸

g. *Turner Syndrome:* A child with Turner syndrome has the chromosome pattern X, instead of the typical XX or XY. This occurs when one parent's sperm or egg is lacking an X chromosome due to atypical cell division. Children with Turner syndrome may have underdeveloped ovaries; their external genitalia generally appear female-typical, but may be less developed. They generally will not develop menstrual periods or breasts without hormone treatment. Turner syndrome affects between 1 in 2,500 and 1 in 5,000 newborns.¹⁹

h. *Persistent Müllerian Duct Syndrome (PMDS):* Persons with PMDS have XY chromosomes and male-typical reproductive organs and external genitalia, but also have a uterus and Fallopi-

¹⁸ Blackless et al., *supra* note 3, at 152; Greenberg, *supra* note 17, at 283; Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 J. Am. Med. Ass'n 1920, 1922 (1986).

¹⁹ Kutluk Oktay, et al., *Fertility Preservation in Women with Turner Syndrome: A Comprehensive Review and Practical Guidelines*, 29 J. Pediatric & Adolescent Gynecology 409–16 (2016); Blackless et al., *supra* note 3, at 152; Greenberg, *supra* note 17, at 284.

an tubes. This condition occurs when the Müllerian ducts—internal structures that ordinarily break down in an XY fetus—remain and develop as they would in an XX fetus. PMDS is ordinarily not diagnosed at birth, and individuals with this variation often have a male gender identity.²⁰

- i. **Ovotestes:** Ovotestes are gonads that contain both ovarian and testicular tissue. People with ovotestes are predominantly XX, but some are XY or have different chromosomal patterns in different cells (*see* “Mosaicism,” *infra*). Some people with ovotestes have external genitalia that look typically male; others have external genitalia that look typically female; and still others have genitalia that do not look typically male or female.²¹
- j. **Mosaicism:** As a result of atypical cell division in early embryonic development, some people are born with a mosaic karyotype, meaning that their sex-chromosome pattern varies from cell to

²⁰ Greenberg, *supra* note 17, at 285.

²¹ Hughes, *supra* note 4, at 492; Fausto-Sterling, *supra* note 3, at 21.

cell. A person with mosaicism may have an XX chromosomal pattern in some cells, and an XY pattern in others.²²

II. INTERSEX PEOPLE HAVE BEEN RECOGNIZED BY LAW AND MEDICINE FOR MILLENNIA.

Intersex people have been recognized by law and medicine for millennia—long before the Department first adopted binary-only (“M”/“F”) sex markers for passports in 1976. Br.App’x 8.

For example, classical Jewish writings identify six sex categories—male, female, and four that would be recognized today as intersex. These variations are mentioned hundreds of times in the Jewish Mishnah, Talmud, and legal codes.²³ Intersex variations were also recognized in Greco-Roman culture. Pliny’s *Natural History* refers to “those who belong to both sexes, [whom] we call by the name of hermaphrodites ... [or] Androgyni.”²⁴ And the Roman emperor Justinian permitted

²² Wilson & Reiner, *supra* note 4, at 122; Clinical Guidelines, *supra* note 6, at 7; L. Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex. Res. 174, 175 (2002).

²³ *More Than Just Male and Female: The Six Genders in Classical Judaism*, Sojourn Blog (June 1, 2015), <https://goo.gl/5BsHzS>; Julia M. O’Brien, ed., 1 OXFORD ENCYCLOPEDIA OF THE BIBLE AND GENDER STUDIES 311–12 (2014).

²⁴ Pliny, NATURAL HISTORY 7:3 (John Bostock trans., 1855), <https://goo.gl/nHahlm>.

children with genitals that were not clearly male or female to choose their own sex category prior to marriage.²⁵

In medieval and Renaissance Europe, “hermaphrodites”²⁶ were often regarded as a third sex and recognized by law or custom.²⁷ Twelfth-century French theologian Peter Cantor noted that the Church “allow[ed] a hermaphrodite ... to use the [sex] organ by which (s)he is most aroused” and to “wed as a man ... [or] as a woman” accordingly.²⁸ De Bracton’s thirteenth-century treatise on English law classified people as “male, female, or hermaphrodite.”²⁹ And, in a treatise regarded as a founding document of English common law, 16th-century jurist Lord

²⁵ Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination “Because of ... [Perceived] Sex”*, 34 N.Y.U. Rev. L. & Soc. Change 55, 67 (2010).

²⁶ “Hermaphrodite” is now recognized as a pejorative term and is not recommended for use outside of historical reference.

²⁷ Sharon E. Preves, *Sexing the Intersexed: An Analysis of Sociocultural Responses to Intersexuality*, 27 Signs 523, 535 (2002); Cary Nederman & Jacqui True, *The Third Sex: The Idea of the Hermaphrodite in Twelfth-Century Europe*, 6 J. History of Sexuality 497, 503 (1996).

²⁸ Preves, *supra* note 27, at 536–37.

²⁹ Henry de Bracton, 2 ON THE LAWS AND CUSTOMS OF ENGLAND 31 (Thorne trans., 1968), <http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/31.htm>.

Coke wrote that “[e]very heire is either a male[, a] female[, or] a[] hermaphrodite.”³⁰

In the Victorian era, medical thought divided humans into five sex classifications. In addition to male and female, this included (a) “true hermaphrodites,” with both testicular and ovarian tissue (*see* “Ovotestes,” *supra*); (b) “male pseudo-hermaphrodites,” with testicular tissue and external genitalia that were not male-typical; and (c) “female pseudo-hermaphrodites,” with ovarian tissue and external genitalia that were not female-typical.³¹ Freud discussed “hermaphroditism” in his writings,³² as did pioneering sexologist Richard von Krafft-Ebing.³³

Intersex people continued to be recognized into the modern era. A widely-read 1955 paper on “human hermaphroditism” observed that there were six factors that define “sex”—chromosomes, gonads, hormones/secondary sex characteristics, internal reproductive structures,

³⁰ Sir Edward Coke, 1 *INSTITUTES OF THE LAWS OF ENGLAND* 8.a; Greenberg, *supra* note 17, at 277–78.

³¹ Geertje Mak, *DOUBTING SEX: INSCRIPTIONS, BODIES AND SELVES IN NINETEENTH-CENTURY HERMAPHRODITE CASE HISTORIES* (2012).

³² Sigmund Freud, *THREE CONTRIBUTIONS TO THE THEORY OF SEX* 7 (A.A. Brill trans., 1910); Reis, *supra* note 8, at 55-81.

³³ Richard von Krafft-Ebing, *PSYCHOPATHIA SEXUALIS* 304 (Charles Gilbert Chaddock trans., 1894); Reis, *supra* note 8, at 55-81.

external genitalia, and sex of rearing—and that these factors do not always align.³⁴ And by the 1960s, over a decade before the Department first adopted binary-only sex markers for passports, the causes of specific intersex variations such as congenital adrenal hyperplasia, androgen insensitivity syndrome, and Klinefelter syndrome were already understood and documented.³⁵

In the last few decades, intersex people have gained even greater legal recognition. Most relevant here, an ever-increasing number of nations have adopted a third, neutral sex category on passports and other official documents. These include Australia (“X”/“nonspecific” on passports),³⁶ Bangladesh (“hijra” on voter forms and IDs),³⁷ Canada (“X” on

³⁴ John Money, et al., *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, Bull. Johns Hopkins Hosp. Johns Hopkins Univ. 97 (4): 301–19 (Oct. 1955).

³⁵ Leon A. Peris, *Congenital Adrenal Hyperplasia Producing Female Hermaphroditism with Phallic Urethra*, 16 *Obstetrics & Gynecology* 156 (1960); GENETIC DIAGNOSIS OF ENDOCRINE DISORDERS 249 (Roy E. Weiss & Samuel Refetoff, eds. 2010) (describing Lawson Wilkins’ demonstration of androgen resistance in 1950); Harry F. Klinefelter, *Klinefelter’s syndrome: historical background and development*, 79 *So. Med. J.* 1089–93 (1986).

³⁶ *Australian Gov’t Guidelines on the Recognition of Sex and Gender* (July 2013), <https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf>.

passports and IDs),³⁸ Denmark (“X” on passports, birth certificates, and IDs),³⁹ Germany (“X” on passports and “indeterminate” on birth certificates),⁴⁰ India (“hijra” or “O” on passports, voter cards, and IDs),⁴¹ Malta (“X” or “decline to state” on passports),⁴² Nepal (“O” on passports and

³⁷ Shakil Bin Mushtaq, *Bangladesh Adds Third Gender Option to Voter Forms*, *The Diplomat* (Jan. 19, 2018), <https://thediplomat.com/2018/01/bangladesh-adds-third-gender-option-to-voter-forms/>.

³⁸ Niraj Choksi, *Canada Introduces ‘X’ as a Third Sex Category for Passport Holders*, *N.Y. Times* (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/world/americas/canada-passport-x.html>.

³⁹ Mitch Kellaway, *Denmark Passes Groundbreaking Gender ‘Self-Determination’ Law*, *Advocate* (Sept. 3, 2014), <http://www.advocate.com/politics/transgender/2014/09/03/denmark-passes-groundbreaking-gender-self-determination-law>.

⁴⁰ Bill Chappell, *Germany Offers Third Gender Option on Birth Certificates*, *NPR* (Nov. 1, 2013), <https://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-certificates>.

⁴¹ Rajesh Sampath, *India has Outlawed Homosexuality. But it’s Better to be Transgender There than in the U.S.*, *Washington Post* (Jan. 29, 2015), https://www.washingtonpost.com/posteverything/wp/2015/01/29/india-has-outlawed-homosexuality-but-its-better-to-be-transgender-there-than-in-the-u-s/?utm_term=.d63d70377d2e.

⁴² Yannick Pace, *Malta Introduces “X” Marker on Passports, ID Cards and Work Permits*, *Malta Today* (Sept. 5, 2017), http://www.maltatoday.com.mt/news/national/80228/malta_introduces_x_marker_on_passports_id_cards_and_work_permits.

citizenship cards),⁴³ the Netherlands (“X” on passports),⁴⁴ New Zealand (“X” on passports),⁴⁵ and Pakistan (“X” on passports).⁴⁶

Meanwhile, in the United States, a neutral sex category has been recognized at the state and/or municipal level in Dana’s home state of Colorado (“X” on driver’s licenses and IDs),⁴⁷ as well as Arkansas (“non-binary” on IDs),⁴⁸ California (“non-binary” on birth certificates and driver’s licenses),⁴⁹ the District of Columbia (“non-binary” on driver’s licens-

⁴³ Joana Plucinska, *Nepal Is the Latest Country to Acknowledge Transgender Citizens on Its Passports*, Time (Aug. 11, 2015), <http://time.com/3992104/nepal-passport-third-gender-transgender/>.

⁴⁴ *First Dutch Gender-Neutral Passport Issued*, BBC News (Oct. 19, 2018), <https://www.bbc.com/news/world-europe-45914813>.

⁴⁵ *Information About Changing Sex/Gender Identity*, <https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/>.

⁴⁶ Zeeshan Haider, *Pakistan Issues Landmark Transgender Passport; Fight for Rights Goes On*, Reuters (June 28, 2017), <https://www.reuters.com/article/us-pakistan-lgbt-passport/pakistan-issues-landmark-transgender-passport-fight-for-rights-goes-on-idUSKBN19J237>.

⁴⁷ *FAQ: Non-binary Sex Identifier on Driver Licenses and Identification Cards*, Colo. Dep’t of Revenue (Nov. 8, 2018), <https://www.colorado.gov/pacific/sites/default/files/CO%20nonbinary%20sex%20identifier%20FAQ%2011.08.18.pdf>.

⁴⁸ Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years*, Huffington Post (Oct. 17, 2018), https://www.huffingtonpost.com/entry/Arkansas-gender-neutral-state-id-option_us_5bc79f75e4b0d38b5874a669.

⁴⁹ S.B. 179, 2017 Leg., Reg. Sess. (Cal. 2017) (enacted).

es),⁵⁰ Indiana (“X” on driver’s licenses),⁵¹ Maine (“non-binary” on driver’s licenses and IDs),⁵² Minnesota (“X” on driver’s licenses),⁵³ Nevada (“X” on birth certificates and IDs),⁵⁴ New Jersey (“Undesignated”/“non-binary” on birth certificates),⁵⁵ New Mexico (“X” on birth certificates, effective June 15, 2019),⁵⁶ New York City (“X” on birth certificates and IDs),⁵⁷ Oregon (“X” on driver’s licenses and IDs),⁵⁸ Utah (“non-binary” on

⁵⁰ D.C. Code § 50-1401.01.

⁵¹ Kellie Hwang, *Indiana Becomes the 6th State to Offer a New Gender Option on Driver’s Licenses*, Indianapolis Star (Mar. 12, 2019), <https://www.indystar.com/story/news/2019/03/12/indiana-drivers-licenses-now-have-x-gender-option/3138447002/>.

⁵² Press Release, Maine Dep’t of the Sec’y of State, *Maine DMV to Offer Non-binary Gender Designation on Driver’s Licenses, ID Cards* (June 11, 2018), <https://www.maine.gov/sos/news/2018/genderdesignationdclid.html>.

⁵³ Paul Walsh, *Minnesota Now Offers ‘X’ for Gender Option on Driver’s Licenses*, Star Tribune (Oct. 3, 2018), <http://www.startribune.com/minnesota-now-offers-x-for-gender-option-on-driver-s-licenses/494909961/>.

⁵⁴ Kate Sosin & Nico Lang, *Gender ‘X’: Nevada to allow nonbinary people to self-identify on IDs*, NBC News (Apr. 22, 2019), <https://www.nbcnews.com/feature/nbc-out/gender-x-nevada-allow-nonbinary-people-self-identify-ids-n997051>.

⁵⁵ [N.J. Stat. Ann. § 26:8-40.12](#) (West 2018).

⁵⁶ SB 20, 54th Leg., Reg. Sess. (N.M. 2019).

⁵⁷ N.Y.C. Admin. Code § 17-167.1 (Oct. 9, 2018).

⁵⁸ [Or. Admin. R. 735-062-0013](#).

legal documents),⁵⁹ Vermont (“other” on driver’s licenses),⁶⁰ and Washington (“X” on birth certificates).⁶¹

III. INTERSEX PEOPLE EXPERIENCE SEVERE MISTREATMENT AND DISCRIMINATION.

Despite the longstanding recognition of intersex bodies, in modern times, people with intersex variations—including Dana—have been mistreated, discriminated against, and subjected to surgeries and forced genital examinations that many consider a form of torture. The Court must assess the challenged policy in light of this pervasive mistreatment.

Since the 1960s, intersex children have often faced nonconsensual surgical intervention, including the mutilation and removal of internal and external sex organs (*e.g.*, clitoral reductions and vaginoplasties).⁶²

⁵⁹ Nico Lang, *Utah Among Growing Number of States Issuing Gender-Neutral IDs*, NBC News (Mar. 18, 2019), <https://www.nbcnews.com/feature/nbc-out/utah-among-growing-number-states-issuing-gender-neutral-ids-n984326>.

⁶⁰ Press Release, Vt. Dep’t of Motor Vehicles, *New License/ID Will Allow Third Gender Option Starting This Summer* (March 13, 2019), <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer>.

⁶¹ Wash. Admin. Code § 246-490-075 (2018).

⁶² Jeremy Toler, *Medical and Surgical Intervention of Patients with Differences in Sex Development* at 1, Gay & Lesbian Med. Ass’n (Oct. 3, 2016); Katrina Karkazis, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY*,

Almost always, these surgeries are performed not for any valid medical reason, but for cosmetic purposes or to ease parents’ or doctors’ discomfort with the child’s difference.⁶³ These surgeries are commonly performed before the age of 2, when the child is too young to understand what is taking place, let alone provide informed consent.⁶⁴ Dana, for their part, was “subjected to several irreversible, invasive, painful, and medically unnecessary surgeries designed to make [their] body conform to binary sex stereotypes” by age five. App’x 19.

AND LIVED EXPERIENCE 57–58, 60–61 (2008); Martin Kaefer & Richard C. Rink, *Treatment of the Enlarged Clitoris*, *Frontiers in Pediatrics* (August 2017); Jennifer Yang, et al., *Nerve Sparing Ventral Clitoroplasty: Analysis of Clitoral Sensitivity and Viability*, *J. Urol.*, Vol. 178, 1598-1601 (October 2007); Sarah Creighton, et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction*, *J. Pediatric Urol.* (2012).

⁶³ Toler, *supra*, note 62, at 1; Tamar-Mattis, *infra* note 68, at 2–3, 9; Hermer, *supra* note 4, at 207.

⁶⁴ Karkazis, *supra*, note 62, at 57–58; Tamar-Mattis, *infra* note 68, at 2; Daniela Truffer, “It’s a Human Rights Issue!” in *VOICES: PERSONAL STORIES FROM THE PAGES OF NIB – NORMALIZING INTERSEX* 26–29 (James M. DuBois & Ana S. Iltis, eds., 2016) (describing a gonadectomy performed at 2 months of age); Lily C. Wang & Dix P. Poppas, *Surgical Outcomes and Complications of Reconstructive Surgery in the Female Congenital Adrenal Hyperplasia Patient: What Every Endocrinologist Should Know*, *J. Steroid Biochem. & Molecular Biol.* (2017); Natalie Nokoff, et al., *Prospective Assessment of Cosmesis Before and After Genital Surgery*, 13 *J. Pediatric Urol.* (2017): 28.e1-28.e6.

The consequences of these surgeries are dire and permanent. The child may be rendered sterile; may suffer a lifelong diminution or loss of sexual sensation and function; and may experience scarring and incontinence.⁶⁵ Dana’s surgeries, for example, “caused permanent” and “severe scarring and damage.” App’x 16-17, 20. The pain and suffering experienced by children subjected to these procedures is comparable to that of child rape or sexual abuse survivors.⁶⁶

For all the harm they entail, there is no persuasive evidence that these surgeries provide any benefit to the child when performed without

⁶⁵ Toler, *supra* note 62, at 1; Recommendations from interACT, *infra* note 68, at 2; Tamar-Mattis, *infra* note 68, at 3–5; Peter Lee et al., *Review of Recent Outcome Data of Disorders of Sex Development (DSD): Emphasis on Surgical and Sexual Outcomes*, 8 J. Pediatric Urol. 611 (Dec. 2012); Sarah Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 Lancet 124 (2001); “I Want To Be Like Nature Made Me”: *Medically Unnecessary Surgeries on Intersex Children in the U.S.* 58, Human Rights Watch & interACT (2017), <https://bit.ly/2Y1N6DZ>.

⁶⁶ *A Human Rights Investigation into the Medical “Normalization” of Intersex People* 17-18, S.F. Human Rights Comm’n (2005), <https://goo.gl/trBnGT>; Tamara Alexander, *The Medical Management of Intersexed Children: An Analogue for Childhood Sexual Abuse*, ISNA (1997), <https://goo.gl/fy9jae>; Karsten Schützmann, et al., *Psychological Distress, Self-Harming Behavior, and Suicidal Tendencies in Adults with Disorders of Sex Development*, Arch. Sex. Behav. (2007).

individual consent.⁶⁷ Even the purported goals of “normalization” or mitigating other parties’ social discomfort are not always achieved. Today, these surgeries are widely condemned by the intersex community, and have been decried by human rights groups including the United Nations, the World Health Organization, and Amnesty International.⁶⁸ Br.App’x 26. Fortunately, an increasing number of parents are choosing to forgo them and to leave the decision to the child once they have reached the age of consent. Yet *amici* continue to receive reports from

⁶⁷ Sarah Creighton et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development — Introduction*, 8 J. Pediatric Urol. 602 (2012); Hughes, *supra* note 4, at 493; S.F. Human Rights Comm’n, *supra* note 66, at 19; Toler, *supra* note 62, at 1; Tamar-Mattis, *infra* note 68, at 3.

⁶⁸ Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, UN Doc. A/HRC/22/53 (Feb. 1, 2013); Toler, *supra* note 62, at 1; *Eliminating forced, coercive and otherwise involuntary sterilization: An inter-agency statement*, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF & WHO (2014), <https://goo.gl/nzXm6f>; *Policy Statement on the Rights of Intersex Individuals*, Amnesty International (2013); *Recommendations from interACT: Advocates for Intersex Youth Regarding the List of Issues for the United States for the 59th Session of the Committee Against Torture* at 1, interACT (June 2016), https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_ICS_USA_24552_E.pdf; Anne Tamar-Mattis, *Report to the Inter-American Commission on Human Rights: Medical Treatment of People with Intersex Conditions as a Human Rights Violation*, Advocates for Informed Choice (March 2013) at 7-9, <https://goo.gl/Nf7Xt7>.

families across the United States that unnecessary genital surgery has been pressed upon their children.⁶⁹

The mistreatment of intersex people does not end with childhood surgery. They may be denied medical treatment in adulthood by physicians who are unfamiliar with or who stigmatize intersex variations.⁷⁰ Dana, for example, was denied surgical intervention that could “greatly reduce [their] pain ... and allow [them] to gain sexual function” for reasons wholly unrelated to medical need. App’x 20. Even when doctors are willing and able to treat them, some intersex people report trauma and fear of doctors.⁷¹ Intersex people also experience discrimination in education, public services, employment, and sports.⁷²

⁶⁹ Toler, *supra* note 62, at 1; Eric Lohman and Stephani Lohman, *RAISING ROSIE: OUR STORY OF PARENTING AN INTERSEX CHILD* (UBCPress 2018).

⁷⁰ Tamar-Mattis, *supra* note 68, at 2, 7; *Fact Sheet: Intersex* at 2, Free & Equal: United Nations for LGBT Equality (2015), https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf.

⁷¹ S.F. Human Rights Comm’n, *supra* note 66, at 23; Tamar-Mattis, *supra* note 68, at 12; Davis, *supra* note 17, at 109-10 (quoting an intersex adult: “I don’t like doctors. I don’t go to the doctor very often. I don’t trust doctors. That’s a very triggering environment for me.”).

⁷² *Fact Sheet: Intersex*, *supra* note 70, at 1.

IV. THE DEPARTMENT’S PASSPORT POLICY IS ARBITRARY AND CAPRICIOUS AS APPLIED TO INTERSEX PEOPLE.

The above facts confirm that the District Court was correct in finding the Department’s passport policy arbitrary and capricious—*i.e.*, in finding that the Department failed to “examin[e] the relevant data” and “articulate[] a rational connection between the facts found and the decision made.” *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994).

Some people born with intersex traits may be able to accurately and truthfully check a box self-identifying as “male” or “female,” but others such as Dana cannot. The policy requires these intersex persons to erase themselves in a degrading and even potentially criminal way if they wish to exercise their right to travel. *See* 18 U.S.C. § 1542 (“willfully and knowingly mak[ing] any false statement in an application for [a] passport” punishable by imprisonment up to 25 years). The policy also imposes further stigma on a population already subject to severe mistreatment and discrimination. The Department simply did not consider these key aspects of the policy—the definition of arbitrary and capricious policymaking. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency’s decision is arbi-

trary and capricious if the agency “entirely failed to consider an important aspect of the problem”).

Indeed, it appears that the Department may not even understand who intersex people are. The Department denied Dana’s passport application, pointing to the lack of “a signed original statement ... from [Dana’s] attending medical physician’ ... attest[ing] to Dana’s ‘*new gender*,’” and citing a section of the Foreign Affairs Manual titled “*Gender Change*. Br.App’x 15. Likewise, in its memorandum providing the rationale for its policy, the Department stated that it “lacks a sound basis on which to make a reliable determination that [an applicant] has *changed their sex* to match [an intersex] gender identity.” Br.App’x 21. Even on appeal, the Department continues to argue that it cannot fathom “what it would mean to’ *undergo gender transition* to ‘a sex other than male or female.” App.Br. 20-21. However misguided the Department’s policy is with respect to transgender, non-binary, and intersex people, by conflating these distinct identities, the Department misapprehends the factual reality of Dana’s life and body. The District Court correctly recognized that “intersex people are born as they are,” and

thus, that there is no need to show or define a “transition” to intersex. Br.App’x 25.

The Department’s stated reasons for its policy become self-refuting when one considers the reality of what makes a person intersex. For example, the Department asserts that the policy “is necessary to ensure that a passport can be used as a reliable proof of identity.” Br.App’x 21. But forcing intersex people like Dana to identify themselves as “male” or “female” when they do not identify themselves that way is a “perplexing way” of serving that stated interest. Br.App’x 25. To serve as “reliable proof of identity,” the sex marker on a passport must *accurately* describe the bearer. Allowing an intersex individual to choose an “X” marker—accurately indicating that they do not fit the male-female binary—would identify them much more “reliably” than an arbitrarily imposed “M” or “F” marker that may, as in Dana’s case, clash with their identity, medical records, and state-issued forms of ID.

In the same vein, the Department asserts that intersex people like Dana must be identified on their passports as either “male” or “female” because “there is no generally accepted medical consensus as to how to define a third sex.” Br.App’x 21. To the contrary, there is a medical con-

sensus that intersex bodily variations exist, and as discussed above, this has been settled fact for thousands of years. Br.App'x 13 (citing 7 FAM § 1360 App. M); see Points I-II, *supra*. There is also no medical dispute that Dana is intersex. Again, all of Dana's doctors agree that they are intersex, and the Department has never questioned their medical opinions in any way.

Finally, the Department argues that it is "necessary" to force intersex people to arbitrarily choose "M" or "F" because the Department "relies on third-party documentation issued by state, municipal, and foreign authorities" to verify the applicant's identity. However, as noted above, a substantial and growing number of foreign nations and U.S. States—including Dana's home state of Colorado—issue identity documents bearing "X" or other non-binary sex identifiers. *Supra* at 22-25. For intersex people such as Dana who live in those jurisdictions, and whose lawful state-issued ID identifies them as "X," the Department's policy requires an arbitrary *departure* from the information on the underlying identity documents. This undermines the Department's claimed interest in "ensur[ing] that the information contained in U.S. passports is accurate and verifiable." Br.App'x 21.

In sum, the actual impact of the Department’s passport policy is so clearly at odds with its stated rationales that there cannot possibly be “a rational connection between the facts” and “the choice [the Department] made.” *State Farm*, 463 U.S. at 52. But the policy is not merely arbitrary and capricious—it is also deeply damaging to a group of Americans who are victimized from childhood solely because of the bodies that they were born with. Dana, and our nation’s many other intersex citizens, deserve better from their government.

CONCLUSION

For the reasons above, the judgment should be affirmed.

Dated: New York, New York
May 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7) and Circuit Rule 32(b), that the attached brief is proportionally spaced; uses a typeface (Century Schoolbook) of 14 points; and contains 6,458 words (excluding portions exempted by Fed. R. App. P. 32(a)(7)(B)), as counted by Microsoft Office Word 2010, which was used to produce this brief.

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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.

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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.

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