

[ORAL ARGUMENT REQUESTED]

No. 18-1453

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

DANA ALIX ZZYVM,

Plaintiff-Appellee,

v.

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

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

Defendants-Appellants.

On Appeal from the United States District Court for the District of Colorado
District Court Case No. 15-cv-2362 (Judge R. Brooke Jackson)

REPLY BRIEF FOR APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
ICAO	International Civil Aviation Organization
WPATH	World Professional Association for Transgender Health

INTRODUCTION

Zzyym's response confirms that the district court's judgment cannot stand. Like the court below, Zzyym insists that the State Department's longstanding policy of identifying bearers of its passports as either male or female—consistent with the practice of the vast majority of other countries—is irrational. In defending this remarkable position, Zzyym does not dispute that as a general matter, the Department's policy ensures that U.S. passports and their underlying data remain reliable in multiple respects. Nor does Zzyym deny that adopting a third sex designation would require either a two-year, multimillion-dollar overhaul of the Department's information systems or the creation of a one-off passport that could harm U.S. foreign policy and national security. Instead, Zzyym quibbles that the Department's justifications are undercut by non-existent contradictions. But that sort of second-guessing is wholly inappropriate under the deferential review mandated by the Administrative Procedure Act (APA), much less in an area involving foreign-affairs and national-security concerns. At bottom, Zzyym offers no justification for displacing the United States' judgment about the content of its diplomatic communications with Zzyym's own.

Zzyym's additional argument that the Department lacked statutory authority to adopt its sex-designation policy—based on limitations that formed no part of the decision below—adds nothing to the equation. Zzyym argues that there are four grounds, and four grounds only, on which the Department may deny a passport application: (1) allegiance or citizenship; (2) unlawful or criminal conduct; (3)

geographic travel restrictions; and (4) harm to national security or foreign policy interests. That standard is plainly incorrect and would lead to absurd results. The Supreme Court decisions which Zzyym invokes announced these grounds on which passport applications *may* properly be denied; they did not purport to provide the exclusive circumstances in which the Department may do so. They certainly do not call into question the Department's authority to deny a passport to a person who fails to answer a question on a passport application concerning, for example, the applicant's address or date of birth.

ARGUMENT

I. The State Department Gave a Reasoned Explanation for the Sex-Designation Policy

Zzyym's arguments fail to show that the Department's decision to maintain its longstanding sex-designation policy was arbitrary or capricious.

A. To start, Zzyym does not dispute that, in general, the sex-designation policy helps the Department verify the identity and eligibility of passport applicants, which is all that is required under the APA. Instead, Zzyym contends that this policy is insufficiently tailored to achieving these objectives. But the APA does not mandate that agency policies—especially ones implicating sensitive considerations of foreign affairs and national security—survive exacting scrutiny, and the inconsistencies Zzyym alleges can be readily explained.

For example, Zzyym argues that the sex-designation policy cannot further the Department's interest in the accuracy and verifiability of passports because, according to Zzyym, the policy would "designate an inaccurate binary gender" on Zzyym's passport and expose Zzyym "to criminal penalties for dishonesty." Br. 29, 30 n.11; *see* Br. 28-31. But Zzyym never denies that a sex designation of "F" would match the sex designation on the driver's license Zzyym submitted with the passport application here, *see* App'x 56, and it is wholly implausible that anyone would be prosecuted for complying with the State Department's requirements for passport applications.

More fundamentally, Zzyym's argument (Br. 31) that a male or female designation would be "untruthful" here reduces to a larger disagreement with the State Department's reasonable policy—consistent with the practice of the vast majority of other nations—of not including a third sex designation in its diplomatic communications. As the Department has explained, such a designation would be an unreliable component of identity, particularly given the lack of a medical consensus on what it means for an individual to have a sex other than male or female. Opening Br. 18-21. Thus, even if Zzyym had provided identification documents containing a third sex designation, that would not address the Department's own concerns about using such a designation as a component of identity. *See also* Opening Br. 25 (explaining that even if a third sex designation matches the bearer's underlying identification documents, it will cause matching issues for the many agencies who use only male or female sex

fields). And contrary to Zzyym’s suggestion (*see* Br. 19-20), this policy does not turn on the basis of sex or even intersex status. All individuals seeking a passport—whether male or female, transgender or not, intersex or not—must comply with the Department’s binary sex-designation policy. What Zzyym actually objects to is that the policy at most may have a disparate *impact* on intersex persons, as such individuals may be less willing than others to accept a binary sex designation on their passports. *But see* Dkt. No. 1, at 5 (Compl. ¶ 13) (“As with any other person, an intersex person eventually may identify as female, male or, less commonly but with some regularity, as both or neither.”). Disparate impact alone, however, cannot constitute sex discrimination even under heightened scrutiny in an equal-protection challenge, much less under the highly deferential review governing the arbitrary-and-capricious claim here. *See, e.g., Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 272-74 (1979).

Zzyym further contends that the State Department does “not actually rely” on sex-designation data from other jurisdictions’ identification documents to verify identity, because the Department offered to provide Zzyym a passport with a male sex designation. Br. 33; *see* App’x 56. But the Department offered a passport with a male sex designation only if Zzyym satisfied the requirements of the Department’s transgender policy, which allows an applicant to obtain a passport with a sex designation opposite to the one provided on the applicant’s identification documents if the applicant provides a medical certification that he or she has had appropriate clinical

treatment for transition to the designated gender. App'x 91. As the State Department explained, that limited exception in no way calls into question whether the Department relies on other jurisdictions' sex designations in most cases. Opening Br. 19. It indisputably does, and that is all arbitrary-and-capricious review requires.

Somewhat at odds with Zzyym's earlier argument that the Department does not actually rely on sex-designation data, Zzyym next asserts that the sex-designation policy is unnecessary to further the State Department's interest in verifying a person's identity. Echoing the district court, Zzyym maintains that the Department can consider the "totality of the evidence," and verify an applicant's identity using other characteristics known to the Department. Br. 32; *see* Br. 33-34; *see also* Br. App'x 23 (concluding that it is irrational for the Department to require a male or female sex designation because sex is only one of many characteristics used to identify an applicant); *cf. Bowen v. Roy*, 476 U.S. 693 (1986) (addressing free-exercise challenge involving requirement that applicants seeking certain welfare benefits provide their social security number). But it is not for litigants or courts to substitute their judgment for that of the Department as to whether its sex-designation policy assists the agency's effort to verify identity. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And in any event, the Department reasonably concluded that each identity question on the passport application, including the sex-designation question, enhances the Department's ability to verify the applicant's identity using government databases on

which the Department relies. App’x 84. That explanation is plainly sufficient under arbitrary-and-capricious review. *See Market Synergy Grp., Inc. v. DOL*, 885 F.3d 676, 683 (10th Cir. 2018) (key inquiry is whether it was reasonable for the agency to act for the justifications it gave, even if another decision was possible).

The Department’s policy is also consistent with the vast majority of jurisdictions issuing identity documents in this country. Indeed, at the time of Zzyym’s passport application, all government jurisdictions issuing identity documents on which the Department relies used only male or female sex designations. App’x 84. Thus, permitting an individual to designate a third sex would not further the Department’s interest in verifying the applicant’s identity. And even assuming that permitting a third sex designation would further that interest, that benefit would have to be balanced against the harms that would follow from adopting a third sex designation, such as increased problems of data sharing with other agencies and the cost of system-wide modification. App’x 85-86, 87. That balance is a discretionary call for the Department to make. *See Western Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1276 (10th Cir. 2013) (concluding that an agency does not act arbitrarily and capriciously when it selects a “range of alternatives” based on a “balance [of] competing objectives”).

Zzyym further insists that because the Department did not identify specific instances of difficulties arising from the use of a third sex designation, it cannot rely on the agency’s inference that such difficulties would likely arise. Br. 34. But there is no

such evidence precisely because the Department has not adopted a third sex designation. Zzyym gives no reason to doubt the rationality of the Department's reasonable prediction. "The APA imposes no general obligation on agencies to produce empirical evidence," and "agencies can, of course, adopt prophylactic rules to prevent potential problems before they arise." *Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 519 (D.C. Cir. 2009) (Kavanaugh, J.); *see also FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978) ("In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required."). The Department "need not suffer the flood before building the levee," *Stilwell*, 569 F.3d at 519, especially by modifying diplomatic communications on which a wide array of public and private institutions rely.

B. Zzyym fares no better in arguing that the State Department's decision was arbitrary and capricious because it failed to consider relevant factors.

1. Zzyym urges that the Department failed to consider the passport standards promulgated by the International Civil Aviation Organization (ICAO), which according to Zzyym, "requires all member states, including the United States, to issue" passports in accordance with its standards. Br. 35. Zzyym notes that ICAO's standards added an "X" designation in 1999 and argues that the Department failed to "explain its departure from adherence" to the ICAO standard. Br. 35-36 (quoting Br. App'x 24, (Dist. Ct. Op.)). But as an initial matter, the Department *did* address the ICAO standard

in deciding to retain the sex-designation policy. *See* Supp. App’x 56-57 (discussing addition of “X” sex-designation).

More fundamentally, Zzyym’s argument rests on two mistaken premises. First, the Department’s policy *does* adhere to ICAO standards. As the Department has explained, ICAO has adopted “a technical specification *permitting, but not requiring*, the use of ‘X’ as an allowable designation of a passport holder’s sex.” Supp. App’x 57 (emphasis added). Indeed, as Zzyym implicitly concedes, the vast majority of countries continue to issue travel documents with “M” and “F” as the only sex-designation options. *See* Br. 35 (“[S]everal countries now use this gender marker on passports.”). Like those countries, the Department adheres to ICAO’s standards. Second, ICAO standards are not requirements dictating the contents of various sovereigns’ diplomatic communications. ICAO “does not have the authority to rule on whether a particular travel document will be acceptable in the United States or in other countries”; instead, ICAO “sets standards for the format of machine-readable travel documents. Conformity with ICAO standards . . . simply means that the document is readable by machines that conform to the ICAO standard.” 8 FAM 101.1-1(c), <https://go.usa.gov/xEP3Y>. Because ICAO issues only recommended standards related to the machine-readability of travel documents, ICAO’s adoption of a specification allowing countries to offer an “X” sex-designation has no bearing on the rationality of the Department’s policy.

2. Next, Zzyym faults the State Department for allegedly failing to consider a “trend” among states permitting sex designations other than male or female. Br. 37-40. But again, the Department *did* consider the “few vital records” in “a handful of individual cases” and a “very small number of state courts” that had permitted a third sex designation. App’x 84. It further observed that two states were considering administrative or legislative changes that would permit such a designation. Supp. App’x 53 n.1. And in any event, those few examples can hardly be called a “trend.” The Department relies on identity documents from fifty-seven jurisdictions, which at the time of the Department’s decision used only male or female sex designations. The Department considered the actions taken or contemplated by a few jurisdictions and reasonably concluded that it made sense to retain its longstanding sex-designation policy. Zzyym’s repeated reliance on developments that post-date the agency action challenged here (*see, e.g.*, Br. 11 n.5, 15 n.6, 39) is inconsistent with Zzyym’s recognition elsewhere (Br. 48) that review under the APA is limited to the administrative record. And more fundamentally, the fact that a handful of states have now chosen to include a third sex designation on their own administrative documents in no way compels the United States to do the same in its diplomatic communications with other sovereigns.

3. Zzyym contends that the State Department also failed to consider the fact that it permits foreign nationals with “X” sex designations in their passports to enter the United States. Br. 40. But the fact that the Department does not call into question

the passports of *other* nations has no apparent relevance to whether it should alter its *own* diplomatic communications. Moreover, as Zzyym concedes (*id.*), the Department requires foreign nationals with such passports “to select a sex of ‘F’ for female or ‘M’ for male on their U.S. visa application submitted to the Department” (Supp. App’x 57)—a practice fully consistent with the sex-designation policy.

C. Zzyym further argues that the binary sex-designation policy is arbitrary and capricious because it allegedly “conflict[s]” with the Department’s other policies and past practices. Br. 41. These allegations do not withstand scrutiny.

1. Zzyym first alleges that, because the Department relied in part on recommendations from the World Professional Association for Transgender Health (WPATH) in adopting its transgender policy in 2010,¹ it must also follow WPATH standards applicable to intersex individuals. Br. 41-42. Apparently, Zzyym believes that the WPATH standards require the Department to issue passports with “X” sex-designations to intersex individuals. But the WPATH standards contain no such mandate. To the contrary, the passage quoted in Zzyym’s brief states only that “an

¹ Under that policy, an applicant who has undergone gender transition may obtain a passport designating the sex associated with the completed transition if the applicant provides a medical certification from a treating physician stating that “the applicant has had appropriate clinical treatment for gender transition to the new gender of either male or female.” App’x 91.

option of X or Other (as examples) *may be advisable.*” Br. 43 (quoting Supp. App’x 37) (emphasis altered).

In any event, nothing requires the United States to adopt WPATH recommendations in its dealings with other sovereigns. As the Department explained, there is no medical consensus on what it means for an individual to have a sex other than male or female, making medical certifications concerning intersex passport applicants less reliable than those for transgender applicants. App’x 86-87. Zzyym mistakenly claims that a WPATH “Statement on Legal Recognition of Gender Identity” “refute[s]” the Department’s determination. Br. 43 (citing Supp. App’x 37). But the WPATH statement (*see* Supp. App’x 37) nowhere addresses whether there is a medical consensus, nor do the WPATH standards identify any medical consensus on the biological basis for identifying an individual’s sex as something other than male or female (*see* App’x 171-74).

2. Zzyym also asserts that if the Department would not issue a passport with an “X” sex-designation based on a medical certification from Zzyym’s doctors, then its own policies would require it to accept the sex designation on Zzyym’s amended birth certificate, which lists Zzyym’s sex as “[u]nknown.” Br. 44 (citing App’x 54). But Zzyym’s *original* birth certificate contained a male sex designation (*see* Br. 7-8; App’x 19), and the Department does not accept *amended* birth certificates as proof of sex “[i]n light of the wide variation in the evidence required to obtain such” documents (Supp. App’x

54). Accordingly, the Department’s decision not to rely on Zzyym’s amended birth certificate is fully consistent with its policies.

Invoking a document in the Administrative Record, Zzyym nevertheless suggests that the Department will rely on amended birth certificates to establish a change in sex. Br. 44-45 (quoting AR 167).² But while the document accurately reflects that the Department will “accept an amended birth certificate noting gender change *with* the required physician’s certification,” AR 167 (emphasis added)—for example as evidence of an applicant’s date and place of birth—it plainly states that the Department “cannot accept alternative documents such as amended birth certificates or court orders” as proof of a transition “in lieu of a licensed physician certification.” *Id.*

D. Finally, Zzyym contends that the opening brief inappropriately relied on extra-record material in two respects. First, Zzyym maintains that, to make up for a lack of evidence in the record on the issue, the Department invoked a declaration filed in support of the stay motion explaining that modifications to the Department’s passport systems would require approximately \$11 million and take about twenty-four months. Br. 46-47; *see* App’x 229. But the Department supplied the \$11-million estimate only because the district court mistakenly believed that considerations of cost could not be relevant to the Department’s decision unless those costs were quantified.

² The Administrative Record appears in the district court record at Docket Number 64.

As the opening brief explained (at 26), the Department was under no obligation to quantify its determination that the system modifications would be burdensome. *See Hillsdale Emtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1176 (10th Cir. 2012) (agency's "conclusion that [the] impact was unlikely to be significant, and its decision not to quantify this impact, was not arbitrary and capricious"). The Administrative Record contains a detailed explanation of various systems that would need to be modified as well as the significant interagency coordination required to accomplish such a change. App'x 87. That is all that is required.

Second, Zzyym contends that the Department improperly relied on a declaration describing the national-security and foreign-relations harms that would follow from the issuance of a unique, "one-off" passport with a sex designation of "X." Br. 49-50. Notably, Zzyym does not—and cannot—dispute the Department's analysis of the injuries associated with this approach. *See, e.g., Olivares v. TSA*, 819 F.3d 454, 462 (D.C. Cir. 2016) ("[C]ourts do not second-guess expert agency judgments on potential risks to national security. Rather, we defer to the informed judgment of agency officials whose obligation it is to assess risks to national security."). And unless Zzyym is willing to forgo the option of a one-off passport, it is entirely appropriate for this Court to consider the significant harms that would follow from one of the two options the district court identified for complying with its injunction.

When the Department reconsidered its denial of Zzyym’s passport application in 2017, it explained that, “[a]t present, the Department’s systems are incapable of printing a passport that does not include an ‘M’ or ‘F’ in both the printed and machine-readable areas of the passport.” App’x 87. After the district court entered its injunction, the Department determined that it could override its systems and produce a one-off passport with an “X” sex-designation that is not integrated into the Department’s passport systems. App’x 227. Upon making that determination, the government complied with its obligation to correct its prior statement to the district court by explaining that it has two ways to satisfy the injunction: either by modifying the Department’s entire passport system or by issuing a one-off passport. *See* Dkt. No. 98, at 6-7. Having informed the court of the possibility of issuing a unique passport, the Department had to explain the significant national-security and foreign-relations harms that would follow from that action, and it submitted a declaration to that effect. *See* App’x 219-24.

Despite finding this explanation of national-security and foreign-relations harm to be “reasonable and almost self-evident,” the district court nevertheless required the Department either to issue a one-off passport or to modify its systems. Br. App’x 41; *see id.* (“While this may be a difficult choice for the Department, it is not an impossible choice.”). If Zzyym is unwilling to give up the possibility of a one-off passport, this Court should not disregard a declaration considered by the district court in determining

the scope of its relief, especially when Zzyym does not—and cannot—contest the national-security and foreign-affairs harms associated with that course of action.

II. The Sex-Designation Policy Falls Within the Department’s Statutory Authority

Zzyym also insists that Congress never authorized the Department to require that passports identify the bearer’s sex as either male or female. That claim is meritless.

The Passport Act provides that “[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States.” 22 U.S.C. § 211a; *see* 31 Fed. Reg. 10,603 (Aug. 9, 1966) (delegating authority to the Secretary of State). The Supreme Court has repeatedly recognized that the statute’s “permissive language,” *Haig v. Agee*, 453 U.S. 280, 294 (1981), gives the Executive Branch “broad rule-making authority” concerning passports, *Zemel v. Rusk*, 381 U.S. 1, 12 (1965); *see Agee*, 453 U.S. at 293-95 (discussing Executive Branch’s inherent authority to issue passports before the enactment of passport legislation). Under that statutory authority, the Department has promulgated detailed regulations governing passports and their contents. *See* 22 C.F.R. §§ 51.1-51.74. One regulation requires “[a]n application for a passport” to be “completed using the forms the Department prescribes.” *Id.* § 51.20(a). And for more than forty years, “Department policy has required every passport applicant to indicate their sex as ‘M’ for male or ‘F’ for female in their application,” and has issued passport documents including only those two sex designations. AR 88. That sex-designation policy is an

application of the Executive Branch’s statutory authority to adopt rules of general applicability governing the application for and contents of passports.

Zzyym nevertheless contends that “[a] trilogy of Supreme Court cases”—*Agee*, *Zemel*, and *Kent v. Dulles*, 357 U.S. 116 (1958)—sharply circumscribe the Department’s authority to deny passport applications, even on the basis of generally applicable rules. Br. 21. That contention lacks merit.

At the outset, Zzyym mistakenly asserts that the Department forfeited any argument that its passport decision was within its statutory authority by failing to address the district court’s “in-depth analysis” of the issue. Br. 25-27. But the district court’s two-paragraph discussion simply concluded that (1) under *Kent* and *Agee*, the Department may not deny “a passport application without good reason”; and (2) it had “already held that the Department has acted arbitrarily and capriciously” in denying Zzyym’s application. Br. App’x 29-30. Thus, as the opening brief explained (at 29), the district court’s statutory-authority ruling was predicated on its arbitrary-and-capricious determination, and therefore failed for the same reasons.

On the merits, the rule Zzyym distills from the three cases is untethered to their reasoning and would lead to absurd results. In *Kent*, the Supreme Court held that the State Department acted in excess of its statutory authority by denying the plaintiff’s passport on the basis of his membership in the Communist Party. 357 U.S. at 117-18, 118 n.2, 129-30. In *Zemel*, by contrast, the Court upheld the Department’s refusal to

validate passports for travel to Cuba, because the “broad rule-making authority” the Passport Act confers on the Executive permits the Department to impose geographic travel restrictions based on foreign policy judgments. 381 U.S. at 7-9, 12. And in *Agee*, the Court upheld the Department’s revocation of a passport based on the Secretary’s determination that the bearer’s activities abroad were “causing or are likely to cause damage to the national security or the foreign policy of the United States.” 453 U.S. at 311. In interpreting the “broad and permissive language” of the Passport Act, the Court repeatedly emphasized the Executive’s wide discretion in issuing passports, which predated the enactment of any passport legislation. *Id.* at 294; *see, e.g., id.* at 292-99.

According to *Zzyym*, however, these three cases “dictate that the State Department may lawfully deny (or revoke) passports based *only* on (1) allegiance or citizenship, (2) unlawful or criminal conduct, (3) specific geographic travel restrictions applicable to all citizens, and (4) conduct damaging to national security or foreign policy.” Br. 22-23 (emphasis added). But *Zzyym* is entirely mistaken in inferring that “[t]he State Department lacks the statutory authority to deny or revoke passports for reasons unrelated to these four grounds.” Br. 23. The Court’s decisions do not identify *exclusive* factors for denying a passport, and the highly restrictive standard *Zzyym* urges is absurd. On *Zzyym*’s view of the law, an applicant could chose to withhold any information required by a passport application—such as date of birth; place of birth; or other names the applicant has used—and the Department would be powerless to deny

the application. *See* 22 C.F.R. § 51.20(b) (applicant must answer all questions on application form). The same would be true for an applicant who was committed to a mental institution, was declared incompetent, or was a minor with an objecting custodial parent. *See id.* § 51.60(b)(3), (4), (7) (allowing Department to deny applications on these grounds).

Zzyym also insists that there is no evidence that “Congress has knowingly authorized” the Department to adopt the sex-designation policy (Br. 24), even though “[i]t is beyond dispute that the Secretary has the power to deny a passport for reasons not specified in the statutes.” *Agee*, 453 U.S. at 290. The point of a broad grant of rule-making authority is that Congress need not knowingly authorize every rule adopted, and there is no evidence that Congress authorized any of the other questions asked in relation to an applicant’s identity.

Zzyym’s argument is particularly odd because the Department has explicitly required passport applicants to designate their sex as either male or female for more than forty years. “Particularly in light of the broad rule-making authority granted in the [Passport] Act,” a “consistent administrative construction of that statute must be followed by the courts unless there are compelling indications that it is wrong.” *Agee*, 453 U.S. at 291 (quotation marks omitted). If Congress had concerns with the sex-designation question, or any other question in the passport application, it could have addressed them legislatively. But when Congress amended the Passport Act in 1994,

almost two decades after the Department adopted the explicit sex-designation policy, it did not do so. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 127(a), 108 Stat. 382, 394 (1994); *see also Agee*, 453 U.S. at 300 (congressional acquiescence in light of Department’s consistent interpretation for twelve years before enactment of passport legislation); *Zemel*, 381 U.S. at 12 (same, in light of twenty-six year interpretation). And the Department has maintained that policy for more than forty years.

Whether or not the Department has been forced to assert the “power to deny a passport to an applicant who is neither male nor female” (Br. 24) has no bearing on the analysis. That is clear as a matter of common sense. And it is also clear as a matter of Supreme Court precedent, which confirms that “if there were no occasions—or few—to call the Secretary’s authority into play, the absence of frequent instances of enforcement is wholly irrelevant.” *Agee*, 453 U.S. at 302. After all, “[t]he exercise of a power emerges only in relation to a factual situation, and the continued validity of the power is not diluted simply because there is no need to use it.” *Id.* The same is true here. Consistent with the practice of the vast majority of other countries, the Department has for decades “openly asserted,” *id.* at 303, the authority to require applicants to designate their sex as either male or female. That the Department had not until recently been given a reason to consider a request to issue a passport with a third

sex designation is no reason to question the fact that Congress has acquiesced in the Department's sex-designation policy.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,726 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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