
No. 18-1453

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

DANA ALIX ZZYYM,
Plaintiff-Appellee,

vs.

MICHAEL R. POMPEO, ET AL., 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 *AMICUS CURIAE* INTERSEX & GENDERQUEER RECOGNITION PROJECT
IN SUPPORT OF PLAINTIFF-APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Intersex & Genderqueer Recognition Project states that it is a non-stock entity under the fiscal sponsorship of the Social Good Fund; it has no parent corporation; and no publicly held corporation has an ownership interest in it.

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GLOSSARY

| | |
|-------------|---|
| AFAB | assigned female at birth |
| AMAB | assigned male at birth |
| cisgender | gender identity matches sex assigned at birth |
| Department | United States Department of State |
| DHS | United States Department of Homeland Security |
| ID | identification document |
| IDAHOT | International Day Against Homophobia and Transphobia |
| IGRP | Intersex & Genderqueer Recognition Project |
| intersex | born with variations in sex characteristics that do not fit typical definitions for male or female bodies |
| transgender | gender identity differs from sex assigned at birth |
| TSA | United States Transportation Security Administration |
| UUFSMA | Unitarian Universalist Fellowship of San Miguel de Allende |

Pursuant to Fed. R. App. P. 29(a)(2) and the consent of the parties, Intersex & Genderqueer Recognition Project (IGRP) respectfully submits this brief as *amicus curiae* in support of plaintiff-appellee Dana Alix Zzyym and affirmance of the judgment entered by the district court.

**IDENTITY, INTEREST, AUTHORITY, AND
INDEPENDENCE OF AMICUS CURIAE**

Identity. IGRP is the first, and leading, organization in the United States to address the rights of people to identify as nonbinary or gender-neutral on government-issued documents. IGRP is a non-profit legal organization engaged in litigation, education, and advocacy. IGRP’s membership and its advisory committee consist of intersex and transgender persons who have faced discrimination due to their nonbinary gender identities and perceived failure to conform to gender stereotypes.

Interest. IGRP has an interest in the Court’s consideration of this case, which directly affects its members’ rights to obtain a passport with an accurate gender marker. IGRP fully supports Zzyym’s challenge to the policy of the United States Department of State (Department) requiring that a United States passport identify the bearer’s sex as either male or female. In this brief, IGRP provides the Court with additional voices and examples of nonbinary people across the country, both those who are intersex and those who are not, so that the Court may better

understand the context and ramifications of the parties' dispute. In particular, IGRP submits the relevant stories of seven of its constituents.

Authority. All parties have consented to the filing of this brief.

Independence. No party's counsel authored this brief in whole or in part, and no party or person other than amicus, its members, or their counsel contributed money to fund its preparation and filing.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should affirm the decision of the district court, which correctly held that the Department's policy recognizing only male and female gender and refusing to issue a passport to Dana Zzyym on the basis that they are neither male nor female and refused to commit perjury by claiming to be either male or female is arbitrary and capricious. IGRP offers the unique perspective of nonbinary people who can explain the impact the Department's refusal to issue a passport with a gender-neutral marker has on nonbinary people in addition to Dana.

Charlie and **A.C.** have gender-neutral birth certificates from New York City. **Mel** has a gender-neutral driver's license from Utah and a gender-neutral birth certificate from Nevada. **Xin** and **Char** have gender-neutral driver's licenses, birth certificates, and court orders from California. **C.P.** will be able to get their gender-neutral driver's license in Maryland by the end of the year. **Violette** is a United States citizen born abroad who has a gender-neutral driver's license and

court order from Oregon and is obtaining a gender-neutral birth certificate from Ontario, Canada. Yet, under the Department's policy, none of these individuals can obtain a United States passport that accurately reflects their gender.

Through the personal stories of these people, IGRP seeks to provide the Court a broader view of nonbinary citizens and to help it understand the critical importance of having access to a passport reflecting an accurate gender marker. The challenges confronted by IGRP's constituents are neither isolated nor rare. Hundreds of thousands of people throughout the country face discrimination and hardship because of their nonbinary genders. By denying them access to a passport that accurately reflects their gender, the Department is denying them the right to participate in society and the recognition of who they really are.

ARGUMENT

I. Introduction to Gender Identity.

Gender identity refers to a person's inner sense of belonging to a particular gender; it is an innate, core component of human identity, with a strong biological basis.¹

¹ Blaise Vanderhorst, *Whither Lies the Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Legal Sex*, 9 HARV. L. & POL'Y REV. 241, 259–60 (2015) (reviewing scientific research); Milton Diamond, *Transsexuality Among Twins: Identity Concordance, Transition, Rearing, and Orientation*, 14 INT'L J. OF TRANSGENDERISM 24 (2013).

“Humans are socially conditioned to view sex and gender as binary attributes. From the moment we are born—or even before—we are definitively labeled ‘boy’ or ‘girl.’”² Individuals whose gender identity falls within these traditionally recognized confines of “male” and “female” are “binary.” Both cisgender people (those whose gender identity matches the sex they were assigned at birth) and transgender people (those whose gender identity does not match the sex assigned at birth) can have a binary gender of male or female.

But hundreds of thousands of Americans have a gender identity that is neither male nor female.³ “[S]cience points to a much more ambiguous reality ... The more we learn about sex and gender, the more these attributes appear to exist

² Amanda Montañez, *Beyond XX and XY: The Extraordinary Complexity of Sex Determination*, SCI. AM., Sept. 2017, 50–51, available at <https://www.scientificamerican.com/article/beyond-xx-and-xy-the-extraordinary-complexity-of-sex-determination/>.

All internet URLs cited in this brief were last visited on May 15, 2019.

³ ANDREW R. FLORES ET AL., WILLIAMS INSTITUTE (UCLA), HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>, at 3 (1.4 million, or 0.6% of U.S. adults identify as transgender); SANDY E. JAMES ET AL., NAT’L CTR FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>, at 45 & Fig. 4.2 (hereinafter TRANSGENDER SURVEY) (35% of adult transgender population identifies as nonbinary).

on a spectrum.”⁴ The terms “nonbinary” and “gender-neutral” recognize this reality. Indeed:

Determination of biological sex is staggeringly complex, involving not only anatomy but an intricate choreography of genetic and chemical factors that unfolds over time. Intersex individuals—those for whom sexual development follows an atypical trajectory—are characterized by a diverse range of conditions ... [T]he gender with which a person identifies does not always align with the sex they are assigned at birth, and they may not be wholly male or female.^[5]

Nonbinary individuals may or may not use the singular form of “they/them/their” or other gender-neutral pronouns. They may describe themselves using the term “nonbinary”; use more specific gender-neutral terms such as “agender,” “genderqueer,” “gender fluid,” “Two Spirit,” “bigender,” “pangender,” “gender nonconforming,” or “gender variant”; or not identify with any gender at all.⁶

“Intersex” means having been born with variations in sex characteristics that do not fit typical definitions for male or female bodies. Of the more than 490,000⁷

⁴ Montañez, *supra* n.2.

⁵ *Id.* (footnote omitted).

⁶ TRANSGENDER SURVEY, *supra* n.3, at 44 & Fig. 4.1.

⁷ *See id.* at 45 & Fig. 4.2 (35% of adult transgender population identifies as nonbinary); FLORES, *supra* n.3, at 3 (1.4 million transgender adults in U.S.).

adults in the U.S. with nonbinary gender identities, most were not born intersex.⁸ However, some were. Dana Zzyym is intersex. IGRP constituent Violette is intersex. The other six people whose personal stories are recounted below are not intersex, but they are nonbinary.

II. The Stories of IGRP's Constituents⁹

Dana Zzyym's story is not unusual. The denial of IDs with accurate gender markers has similarly impacted IGRP's constituents. All seven people whose stories are told here would obtain a United States passport with a nonbinary "X" gender marker but for the Department's unlawful policy; if permitted by the Department, Violette also would update their¹⁰ gender marker on their Certificate of United States Citizen Born Abroad.

⁸ TRANSGENDER SURVEY, *supra* n.3, at 44 & Fig. 4.1. *See also* Intersex Soc'y of N. Am., HOW COMMON IS INTERSEX?, <http://www.isna.org/faq/frequency> (citing studies: "[A]bout 1 in 1500 to 1 in 2000" children are "born [with] noticeably atypical in terms of genitalia," "[b]ut a lot more people than that are born with subtler forms of sex anatomy variations, some of which won't show up until later in life.").

⁹ The personal stories cited and quoted in this section are on file with amicus IGRP.

¹⁰ Though not all nonbinary people do, IGRP's constituent storytellers all use singular "they/them/their" pronouns. Singular "they" pronouns have been used since the 14th century. *They*, OXFORD ENGLISH DICTIONARY (3rd ed. 2005).

A. Mel Van De Graaff

Mel Van De Graaff is a 27-year-old nonbinary person living in Salt Lake City, Utah who was assigned female at birth (AFAB). They describe their experience vividly:¹¹

I can remember as early as age 4 feeling like there was something wrong with me. Everyone was telling me that I was supposed to graduate high school, have children, and raise them as a happy family in the church. Whenever I tried to voice my objections, I would be completely overruled. [People would say] “That’s not how it’s done” or “God made you for this reason.”

Kids picked on me at school. The girls didn’t see me as a girl and the boys didn’t see me as a boy. I didn’t have anywhere I fit in, and that led to me getting bullied. A lot.

I sometimes wondered if I was a boy, because I knew I wasn’t a girl. But that didn’t fit either. It was like going from wearing a shirt that’s too big to wearing pants that are too big. Neither fit. But I kept wearing these ill-fitting clothes.

When I was 15, I tried to take my life because I felt like I was an abomination. Everywhere around me, I heard messages that I was wrong because I didn’t do what girls were supposed to do and I wasn’t born a boy and should

¹¹ Mel’s story also has been reported by the press. See Taylor Stevens, *Disrupting the Binary: Members of Westminster’s Gender Queer Community Look To Live a Life Without Gender*, THE FORUM, Apr. 26, 2018, <https://www.wcforummedia.com/disrupting-the-binary-members-of-westminsters-gender-queer-community-look-to-live-a-life-without-gender/>.

stop trying to get away from the gifts God gave me from birth.

I turned 18, graduated high school, and moved out to go to college. I met several trans people, and their narratives explained so much of what I went through as a child. Being born in the wrong body, being socialized as something you're not. But I didn't feel trans, because I knew I wasn't a boy. So, I still didn't have a way to explain what was happening to me.

A year after I graduated, I found the term "nonbinary" and it felt like for the first time in my life I found a shirt AND pants that fit me. Suddenly, I had the narrative to explain what had happened to me....

[L]ater, I started HRT [hormone replacement therapy] so my body would be closer to my identity.

A little while after I started HRT, I saw that Sara Kelly Keenan got the nation's first intersex birth certificate. That article was so inspiring to me, because it showed that I didn't have to legally be male or female. I vowed that I would do whatever it took to get legal documentation that reflected my gender identity.

Utah is a very red state. I had asked around, and no one had heard of nonbinary gender markers at all, let alone in this state. So many people said it couldn't be done. But I knew I had to try. Even if the marker wasn't granted, if I tried and did my best to get it changed, then I could still live with myself with the hope that one day the law would change.

[Later, a Utah judge] granted the marker change [for my driver's license]. I was in a daze for the rest of the day. It had taken several months to get there, and I was finally there.

But that wasn't the end. Because I was born in Nevada, I had to ... get my birth certificate updated [there]. It took

a couple months of back and forth with their office of vital records, but they gave me a gender X certificate with my correct name. It wasn't until September [2018] that I received a license with an X [gender marker] on it. Utah's DMV had to update their systems so that an X could be put in the gender field. Overall, the process took ten months. It felt like a long time, but I know that many people have gone through a longer process.

Even with proper state documents, as a young person looking for a new job Mel still faces issues because their federal ID still doesn't reflect their gender identity. They can't use their passport for travel or for verification of eligibility to work because it doesn't match their gender on any of their other records:

My documents are a mess right now. My social security was changed to M, my passport says F, and my birth certificate and driver's license are X. I'm scared that I'll get accused of fraud since my documents don't match. I haven't been able to plan vacations abroad because my passport doesn't reflect who I am.

B. Xin Farrish and Char Crawford

Xin Farrish and Charlotte Crawford are a married couple living in San Francisco, California. Both Xin and Char are nonbinary. Xin is 37 years old, AFAB, and manages a café. Char is 35, assigned male at birth (AMAB), and works as a butcher at a grocery store.

In 2017 Xin and Char were invited by the Unitarian Universalist Fellowship of San Miguel de Allende (UUFSSMA) in Mexico to present on behalf of IGRP on the experiences of nonbinary people for International Day Against Homophobia

and Transphobia (IDAHOT). After arranging transportation, housing, and funding for the trip, the couple made plans to obtain passports. They had been watching Zzyym's case closely and were hoping the Department would change its policy, because Xin and Char are unwilling to commit perjury to obtain passports. The Department did not relent, and because the Department's rules prevent them from submitting truthful passport applications, Xin and Char were unable to make the trip. UUFSMA again extended invitations to the couple to present at IDAHOT in 2018 and 2019. They will not be able to fulfill the request because they cannot obtain accurate passports.

But the harm caused by the Department's policy doesn't stop there. In April 2019, Char writes:

My spouse Xin and I had intended to travel to Mexico this year to attend the wedding of my cousin.

The extended family of my cousin's fiancé are Mexican, and there were serious concerns about their ability to safely travel in the US due to our current political climate. So, it was an easy decision for my cousin to hold her wedding in Mexico to try to avoid those issues.

As a result of this, though, my spouse and I will be unable to attend this wedding. I won't be able to show up for my younger cousin. We grew up in a close-knit family. We shared birthdays and holidays, life milestones, and casual dinner get-togethers. Without an accurate passport, I won't be able to join my cousin to celebrate this incredibly important day of love and family.

My spouse and I currently have doctors' notes, signed court orders, birth certificates, and RealID California driver licenses which all accurately indicate our gender as "nonbinary" or "X". It is important that our passports correspond to these documents. It seems deeply unwise to try to cross international borders with mismatched documents.

Without an accurate passport, I won't be able to join my cousin [at their wedding in Mexico] to celebrate this incredibly important day of love and family.

C. C.P. Hoffman

C.P. "Charlie" Hoffman, is a 40-year-old, AMAB, nonbinary attorney and writer who lives in Silver Spring, Maryland. C.P. reports:

I am out as nonbinary at work, in my writing, with my friends, and with my family—in all aspects of my life except for legal documents like my passport that I am unable to change.

Being nonbinary is an important part of my life, a part that I am open and honest about to the world, and yet the State Department's policy bars me from claiming it when it comes time to actually travel the world.

C.P.'s family and coworkers recognize and are supportive of their nonbinary identity:

My eight year old daughter, [T.], calls me Charlie (since none of the gender-neutral terms for "parent" felt right for us) and lectures other people about the importance of not misgendering people and animals; my mom protested at the Indiana statehouse when the legislature considered a bill to bar gender-neutral markers on driver's licenses; my partner, Karen, a professor of environmental science, has started introducing herself with her pronouns as a

way of being inclusive of me and other nonbinary folks; my co-workers come to me when unsure how to write something in a gender-neutral way.

C.P. recently spoke before the Maryland General Assembly in support of state legislation to provide nonbinary persons like themselves accurate gender markers on their state ID or driver's license. The bills passed with veto-proof majorities.¹² C.P. plans to update their driver's license the day the "X" marker is available, and also is looking to have their Indiana birth certificate corrected.

As C.P explains:

While many people may take it for granted, we are asked for ID on a surprisingly-frequent basis—not just when we travel, but when we go out with friends, fill prescriptions, pick up packages, buy a bottle of wine, rent a car, enter many government or corporate offices, and, in many places, when we vote. Having ID that does not correspond to our gender identity puts nonbinary individuals such as myself at risk because we never know who will be looking at it or what assumptions about our gender they may have made before doing so.

For this reason, I have been actively involved in getting legislation passed in Maryland to allow nonbinary and other individuals to have an X gender marker...

C.P. also describes the daily impact of the Department's policy on them:

As someone who has traveled abroad extensively for work, education, and pleasure, having a passport that

¹² See *infra* n.34 & accompanying text.

recognizes me for the person I am is critically important...

While the situations in which we use our passports may be less frequent, the same safety considerations apply. Our passports are the first things we present when entering another country, and we are judged by how well we conform to the photographs and descriptions on them. It is not uncommon for transgender and nonbinary individuals to experience problems at the border because their appearance does not conform to preconceptions about what the gender listed on their passport should look like. But while binary transgender individuals can apply for a passport representative of their gender identity in order to minimize these situations, nonbinary individuals such as myself cannot. ...

I have had a passport since I was 17, but I haven't renewed my current passport since it expired last year, as I have struggled with the binary choice of genders with which I am currently presented, as well as serious concerns (especially as an attorney) about perjuring myself on the application if I stated either binary gender. Instead, I currently find myself without a passport, unable to share many of the important places in my life, such as Halifax, Nova Scotia, or Montreal, Quebec, with Karen, and she, likewise, has been unable to share places important to her with me.

Nonbinary individuals like myself want to be able to travel the world in safety and without having to lie about who we are. We merely ask this court to please help us do so.

D. A.C. Dumlao

A.C. is 28 years-old, AFAB, transgender, nonbinary, and Asian-American.

A.C. graduated from Vassar, works as a program manager, and resides in

Brooklyn, New York. They recently were able to get the originally assigned “F” gender marker on their New York City birth certificate corrected to an “X” marker.

A.C. has these concerns:

I regularly experience scrutiny in the world: I was assigned female at birth and am regularly assumed to be a cisgender woman. At the same time, my gender expression and presentation are androgynous, leaning towards masculine. Because of my short haircut and the “men’s” clothing I wear, people visually mistake me as male sometimes as well. When it comes to getting my ID checked, I have a lot of anxiety. This is somewhat alleviated by the fact that my current picture on my passport is a recent one: with a short haircut and looks like me in person, but I always feel anxious if they’re going to say anything about my gender marker.

I wonder and worry about what will happen if I need to use my birth certificate for proof of any application for an ID or otherwise moving forward, because it now has an X gender marker. It is a lie for me to select the F or Female gender marker when applying for IDs or using my ID at any security checkpoint. It does not feel good that my documents are mismatched.

E. Violette Skye Boys

Jonny Violette Skye Boys was born in Ontario, Canada and resides in Salem, Oregon. Violette is a 43-year-old AMAB homemaker who, like Dana Zzyym, was born intersex and is neither male nor female.

Since July 2017, Violette’s Oregon driver’s license has correctly identified them by an “X” gender marker. They also received a court order of their nonbinary gender from the Marion County (Oregon) Court in January 2018. As a

United States citizen born abroad, Violette also has applied for a nonbinary gender marker on their Ontario birth certificate.¹³ In addition to needing an accurate gender marker on their passport, Violette needs the Department to update their gender marker to “X” on their form FS-545 Certificate of United States Citizen Born Abroad. Violette explains:

I was born intersex in 1976, while my parents were in Canada as missionaries... We moved to Cincinnati when I was six years old... As an intersex person, my sex chromosomes don't match up with what has been simplified in medical science as “normal”; my chromosomes are XXY. My legal gender congruently is nonbinary.

My body has traits that are on the biological sex spectrum... [but] I was assigned “male” at birth, and treated that way medically my whole life.

As a result, Violette suffered dramatically:

At the age of 30 doctors decided my testosterone levels were too low and put me on a decade long regimen of testosterone therapy. It raised my cholesterol, made my blood thick, my legs ache, and I developed varicose veins.

After fighting to have my estrogen levels checked, doctors discovered that my body was converting testosterone into estrogen at an extremely high level. My GP told me to go off testosterone because it was giving

¹³ Ontario has issued nonbinary birth certificates since May 2018. Ariel Jao, *Gender ‘X’: Ontario Issues its First ‘Nonbinary’ Birth Certificate*, NBC NEWS (May 7, 2018), <https://www.nbcnews.com/feature/nbc-out/gender-x-ontario-issues-its-first-ever-non-binary-birth-n872676>.

me more health problems than it was worth. It turns out that for my variation of intersex, artificial testosterone, once stopped, terminates our bodies' ability to create any sex hormones. After a year of perimenopause symptoms my doctor put me on Estradiol and my body returned to a healthy functioning level...

As Violette explains, having accurate options for ID is critical for daily living:

As governments around the world adopt X markers for birth certificates, federal ID's, passports, marriage and death certificates, the US Department of State is currently lagging, while other advanced nations around the world are adopting policies and documentation to recognize "other genders" as well as intersex [folks] via an X marker. All major US airlines have agreed to offer new gender options when purchasing tickets because of the number of US states that are updating their ID's to adopt X markers, which meet the Real ID Act's stipulations.

Having documents that allow me to not be trapped with only two binary options based on antiquated science would allow me, as an intersex person who is not male or female, to live a fuller life. Having a passport that matches my legal gender and state ID would make it so that my wife and I could travel outside of the US. At present if I attempt to get a passport I would have to lie and check "female" or "male", which I refuse to do. I want to travel to Europe and South Africa to visit friends, but I can't, because my government is stuck in an old way of thinking about biological sex and gender.

F. Charlie Arrowood

Charlie is a Long Island native, a current resident of Roslyn Heights, New York, and a graduate of Tulane University and New York Law School. Charlie

was AFAB and has since obtained an “X” designation on their New York City birth certificate:

I was born in New York City in 1987 and assigned female at birth...

I knew there were things about my body and identity that were not female, but I also knew I definitely did not feel like a man, nor did I have any interest in “being” one, whatever that meant. I knew there was a disconnect between what I saw in my mind’s eye and what others saw.

Then I met a nonbinary person and realized just because I was not female did not mean I had to be male. While society is extremely binary, as evidenced by this very case, I always felt like neither “girl” nor “boy” clicked. I simply did not have the vocabulary or resources to name it or do anything about it...until I did.

Recognizing the difficulties they faced upon entering the legal profession were not unique to them, Charlie shifted gears and “began working at a nonprofit that helps transgender people change their documents and obtain health insurance coverage for their transition-related care.” As Director of Name & Gender Recognition with Transcend Legal, Charlie assists transgender youth and adults with legal name and gender changes.

Charlie has undergone surgery and hormone therapy, as many other nonbinary people have done, to more closely conform their body to their nonbinary identity, but still has a nonbinary gender identity:

My voice is now deeper, I have facial hair, and people think because I do not “look female,” that must mean I am male. But I was never transitioning “towards male,” just away from female...

This has come with its own set of problems, particularly when Charlie uses their previously issued passport, which has an “F” marker. As Charlie recounts:

Once when traveling, the TSA agent put “male” into the body scanner based on my appearance, and my chest pinged as an anomaly. A male TSA agent started patting me down, [then] shouted across the security screening area for a woman to come pat me down because I was female. I was brought into a separate screening room while security personnel went back and forth about what to do. The whole affair lasted maybe 15 minutes, but ten years later, it still plays like a day-long saga in my mind. It was traumatizing and the specter of it happening again loomed large every time I had to go anywhere. I registered for TSA Pre-Check so I could avoid body scanners in airports. But that does not help me when I am traveling internationally, which I currently cannot do if I want to avoid potentially complicated security encounters, especially when traveling with my wife and two small children.

For now, Charlie, like many others, remains trapped:

When a person applies for an identity document, they are required to attest that the information they are submitting is accurate. Not allowing people to apply for anything but M or F gives them no choice but to perjure themselves on official applications. Respondent can say what they want about how “legitimate” my nonbinary identity is, but the fact is I have a nonbinary body... If my passport says M or F, that is going to result in complications and a potential risk to my safety...

[H]aving documents that do not reflect who I am causes me distress every day. In my job assisting people with document changes, approximately 1/3 of my clients are nonbinary. The first thing they ask me is whether an X gender designation is available and on what documents. They share the same stories about their experiences, the same distress about having incorrect documentation, and all I can say is, “I sympathize.”

As a result of irrational policies like that of the Department, Charlie says:

My documents are a mess, thanks to bureaucracy. My driver’s license says male, my birth certificate says X, my passport and Social Security say female, and none of it matters...except to me.

III. The Department’s Policy Is Irrational

Under the Department’s male-or-female, binary-only gender marker policy, passport applicants with nonbinary gender identities must lie on their applications under penalty of perjury.¹⁴ The Department’s claim that this policy ensures passport integrity and data reliability for other agencies is wrong and illogical.

First, as discussed below in more detail, jurisdictions across the country already issue or soon will obtain nonbinary driver’s licenses, birth certificates, and other government-issued IDs.

¹⁴ See U.S. DEP’T OF STATE, APPLICATION FOR A U.S. PASSPORT (DS-11, OMB Control No. 1405-0004) (June 2016), *available at* <https://eforms.state.gov/Forms/ds11.pdf> (requiring selection of “M” or “F” sex, and a declaration that “under penalty of perjury ... the statements made on the application are true and correct [and] I have not knowingly and willfully made false statements ... in support of this application”).

Second, a third gender marker option (“X”) is consistent with the International Civil Aviation Organization’s standards and with the practice of the Department of Homeland Security (DHS) for air travel. Thus, commercial airlines also already use “X” gender markers when collecting Secure Flight data.¹⁵ This is the *same data* transmitted to and used by the United States Transportation Security Administration (TSA) (which is part of DHS) to determine which individuals pose security threats.¹⁶ TSA *encourages* this practice.¹⁷

Third, the Department already does not require a binary transgender person to obtain a gender marker for their passport that matches their other identity

¹⁵ See, e.g., Morgan Gstalter, *United Airlines Becomes First US Airline to Add Non-Binary Gender Booking Options*, THE HILL, March 23, 2019, <https://thehill.com/policy/transportation/aviation/435413-united-airlines-to-be-first-airline-offering-nonbinary-gender>.

¹⁶ See Security Screening, TRANSPORTATION SECURITY ADMINISTRATION, https://www.tsa.gov/travel/security-screening#quickset-security_screening_quicktabs_5 (“[T]he Secure Flight program collects ... gender ... to conduct effective matching” to “trusted traveler lists and watchlists.”); Secure Flight Q&A II, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/blog/2009/08/12/secure-flight-qa-ii> (hereinafter “Secure Flight”) (“information will be sent to Secure Flight to perform watch list matching”).

¹⁷ See, e.g., Transgender Passengers, TRANSPORTATION SECURITY ADMINISTRATION, <https://www.tsa.gov/transgender-passengers> (“When making a reservation, you are encouraged to use the same name, gender and birth date as indicated on your government-issued ID.”); Secure Flight, *supra* n.16, (“The gender provided when making the reservation should match the gender indicated on the passenger’s government-issued identification.”).

documents,¹⁸ showing that having passports be consistent with other agencies' gender records actually is not important to the Department.

As noted, many jurisdictions already have, or soon will, issue IDs with a non-binary gender designation. Arkansas,¹⁹ California,²⁰ Colorado,²¹ Indiana,²²

¹⁸ The Department requires only a medical certification based upon an individual physician's opinion that "[y]ou have had appropriate clinical treatment for transition from male to female or female or male." Change of Sex Marker, U.S. DEP'T OF STATE, <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/change-of-sex-marker.html>.

¹⁹ Kate Sosin & Nico Lang, *Arkansas—Yes, Arkansas—Quietly Begins Issuing Gender-Neutral IDs to Non-Binary People*, INTO, Oct. 16, 2018, <https://www.intomore.com/impact/arkansas-yes-arkansas-quietly-begins-issuing-gender-neutral-ids-to-non-binary-people> (“[T]he Arkansas Department of Finance and Administration ... confirmed ... that policy has been on the books ... [since] December 2010.”).

²⁰ CAL. HEALTH & SAFETY CODE § 103425, *et seq.* (2018); CAL. VEH. CODE § 12800(a)(2) (2018).

²¹ COLO. CODE REGS. § 204-32 (2018 & 2019).

²² Kelly Hwang, *Indiana Becomes the 6th State To Offer a New Gender Option on Driver's Licenses*, INDY STAR, Mar. 12, 2019, updated Mar. 20, 2019, <https://www.indystar.com/story/news/2019/03/12/indiana-drivers-licenses-now-have-x-gender-option/3138447002/>.

Maine,²³ Minnesota,²⁴ New Jersey,²⁵ New York City,²⁶ Oregon,²⁷ Utah,²⁸

Washington,²⁹ and Washington, D.C.³⁰ all provide for gender markers other than

²³ Kelley Bouchard, *Maine Begins Putting ‘Non-Binary’ on Driver’s Licenses for Those not ‘F’ or ‘M’*, PORTLAND PRESS HERALD, June 11, 2018, <https://www.pressherald.com/2018/06/11/maine-bmv-will-offer-non-binary-gender-licenses/>.

²⁴ *Third Gender Option Important for People Who Identify as “Non-Binary”*, ABC 6 NEWS, Oct. 8, 2018, <https://www.kaaltv.com/news/rochester-minnesota-drivers-license-gender-option-non-binary-x-transgender-latest/5100805/>.

²⁵ N.J. REV. STAT. § 26:8-40.12 (2018). *See also* N.J. DEP’T OF HEALTH, OFFICE OF VITAL STATISTICS & REGISTRY, REQUEST FORM AND ATTESTATION (REG-L2) TO AMEND SEX DESIGNATION TO REFLECT GENDER IDENTITY ON A BIRTH CERTIFICATE—ADULT (Feb. 2019), *available at* https://www.nj.gov/health/forms/reg-l2_1.pdf.

²⁶ City of New York, *Health Department Announces New Law Offering Third Gender Category on Birth Certificates Takes Effect Tuesday*, Dec. 31, 2018, <https://www1.nyc.gov/site/doh/about/press/pr2018/pr104-18.page>.

²⁷ OR. DEP’T OF TRANS., APPLICATION FOR DRIVING PRIVILEGES OR ID CARD (735-175) (May 2018), *available at* <https://www.oregon.gov/ODOT/Forms/DMV/173fill.pdf>; OR. HEALTH AUTH., APPLICATION TO CHANGE THE NAME AND/OR SEX ON A RECORD OF LIVE BIRTH TO SUPPORT GENDER IDENTITY (OHA 2673) (Jan. 2018), *available at* <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>.

²⁸ Taylor Stevens, *Utahn Becomes One of the First in the State to Receive Nonbinary ‘X’ Markers on Birth Certificate and Driver License*, SALT LAKE TRIB., Oct. 8, 2018, <https://www.sltrib.com/news/politics/2018/10/08/male-female-x-utahn/>.

²⁹ WASH. ADMIN. CODE § 246-490-075 (2018).

³⁰ Office of the Mayor, District of Columbia, *Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards*, June 23, 2017, <https://mayor.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and>.

“male” or “female” on IDs, driver’s licenses, or birth certificates. Today, the more than 68,500 nonbinary people residing in these jurisdictions can get state-issued IDs with accurate gender markers.³¹ Nevada and Vermont also are poised to add a nonbinary option for IDs and licenses shortly,³² and Nevada state already provided one of IGRP’s constituent story-tellers a nonbinary birth certificate. Most of these documents—the same types used for identity and citizenship purposes when applying for a passport³³—use an “X” marker to designate intersex or nonbinary gender.

³¹ FLORES, *supra* n.3, at 3–4 Tbl.1 (estimated 195,900 transgender individuals in previously listed states and D.C., not including New York City; New York State adds 78,600 more people); TRANSGENDER SURVEY, *supra* n.3, at 45 & Fig. 4.2 (35% of adult transgender population identifies as nonbinary).

³² Camalot Todd, *DMV Makes It Easier To Change Gender on Nevada Driver’s Licenses, IDs*, LAS VEGAS SUN, June 7, 2018, <https://lasvegassun.com/news/2018/jun/07/dmv-makes-it-easier-to-change-gender-on-drivers-li/>; Vt. Dep’t of Motor Vehicles, *New License/ID Will Allow Third Gender Option Starting This Summer*, Mar. 13, 2019, <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer>.

³³ *See* Photo Identification, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/passports/requirements/identification.html>; Children Under 16, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/passports/apply-renew-passport/under-16.html>.

Additionally, Maryland recently passed a bill with a veto-proof majority to provide a third gender marker on driver's licenses and state IDs.³⁴ Bills to provide nonbinary designations on state IDs, driver's licenses, and birth certificates are pending in Arizona,³⁵ Connecticut,³⁶ Illinois,³⁷ Massachusetts,³⁸ New Hampshire,³⁹ and New York.⁴⁰ In other states, like Rhode Island, advocates are working with agencies to add nonbinary gender options to identity documents without the need for legislation.⁴¹

As long as nonbinary individuals may obtain passports with only a male or female designation, those passports will not accurately reflect their identity. The Department's current policy does not enhance security or the integrity and reliability of identity documents; rather, it achieves the opposite result. This

³⁴ SB 196, 2019 Leg., 439th Sess. (Md.); HB 421, 2019 Leg., 439th Sess. (Md.).

³⁵ HB 2289, 54th Leg., 1st Reg. Sess. (Ariz. 2019); SB 1454, 54th Leg., 1st Reg. Sess. (Ariz. 2019).

³⁶ Substitute for HB 5505, 2019 Leg., Jan. Sess. (Conn.).

³⁷ HB 3534, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

³⁸ S. 2213, 191st Leg., Reg. Sess. (Mass. 2019); H. 3664, 191st Leg., Reg. Sess. (Mass. 2019).

³⁹ HB 446, Reg. Sess. (N.H. 2019); HB 669, Reg. Sess. (N.H. 2019).

⁴⁰ S. 56-A, Reg. Sess. (N.Y. 2019).

⁴¹ Samantha Allen, *How the Non-Binary Revolution Hit the West Coast*, DAILY BEAST, Feb. 8, 2018, <https://www.thedailybeast.com/how-the-non-binary-revolution-hit-the-west-coast>.

problem will continue to worsen as more Americans obtain other government-issued identity documents with “X” gender markers. The Department should be required to allow nonbinary people to obtain passports with an “X” gender marker.

CONCLUSION

Through its work and membership, IGRP knows all too well that Dana Zzyym isn’t the only one impacted by the Department’s arbitrary policy. Gender identity is neurologically hardwired,⁴² and nonbinary people can’t just pick one as the Department suggests.⁴³ The availability of nonbinary gender markers on state IDs and birth certificates has benefitted thousands of nonbinary people *and has harmed no one*.

IGRP respectfully requests that this Court uphold the ruling of the lower court that Department’s arbitrary and capricious denial of Dana Zzyym’s passport application for requesting an accurate gender marker violated the Administrative Procedure Act, so as to ensure that the Department may no longer apply its discriminatory binary-gender-only policy to prevent intersex and other gender nonbinary persons from applying for or receiving a passport.

⁴² Vanderhorst, *supra* n.1.

⁴³ App’x 67 (“If you wish to receive a passport listing you as female ... please return a signed statement indicating that to our office. If you wish to receive a passport listing you as male, please refer to the second page of this letter.”).

Dated: May 15, 2019.

Respectfully submitted,

s/ Benjamin N. Simler _____

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, a copy of this **BRIEF OF AMICUS CURIAE INTERSEX & GENDERQUEER RECOGNITION PROJECT IN SUPPORT OF PLAINTIFF-APPELLEE** was served electronically on all counsel of record through the Court's CM/ECF system.

s/ Benjamin N. Simler _____

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Pursuant to Fed. R. App. P. 29(a)(4)(G), 29(a)(5), and 32(g)(1), undersigned counsel states that this brief complies with the applicable type-volume limitations, because this brief, exclusive of the items listed in Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), contains 6,100 words, and was prepared using Microsoft Word 2016 in Times New Roman 14-point font, a proportionally spaced typeface.

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