

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-02362-RBJ

DANA ALIX ZZYIM,

Plaintiff,

vs.

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

Defendants.

REPORTER'S TRANSCRIPT
HEARING ON PENDING MOTIONS

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

Proceeding Reported by Mechanical Stenography, Transcription
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APPEARANCES

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RYAN PARKER, United States Department of Justice, 20 Massachusetts Avenue, NW, Washington, DC 20001; MATTHEW HACKELL and ROBERT SATROM, United States Department of State, 600 19th Street, NW, Washington, DC 20522, for defendants.

P R O C E E D I N G S

(In open court at 9:34 a.m.)

THE COURT: Good morning.

MR. CASTILLO: Good morning, Your Honor.

THE COURT: Have a seat, please.

This is -- and I'm not sure how to pronounce the name.

MR. CASTILLO: Zzyym, Your Honor.

THE COURT: Zzyym?

MR. CASTILLO: Zzyym.

THE COURT: Dana Alix Zzyym vs. John Kerry, *et al.*

Appearances, for the plaintiff.

MR. CASTILLO: Paul Castillo for plaintiff petitioner, Dana Alix Zzyym; and I also have with me Emily Chow and Brian

1 Lynch with Faegre Baker Daniels, and also Jessica Kunevicius
2 with the law office of Jessica Kunevicius, and our client, Dana
3 Alix Zzyym.

4 THE COURT: All right. Welcome.

5 For the defendant.

6 MR. PARKER: Your Honor, Ryan Parker representing the
7 United States. With me at counsel table are Matthew Hackell
8 and Robert Satrom from the Department of State.

9 THE COURT: All right. So technically we're here this
10 morning on the defendants' motion. So, Mr. Parker, or your
11 colleagues, you may proceed.

12 MR. PARKER: Thank you, Your Honor.

13 Your Honor, before I start my argument, I'd like to
14 just take a moment to thank plaintiff's counsel for the
15 professional and cooperative way they've litigated this matter.
16 They're excellent attorneys and it's a pleasure working with
17 them.

18 May it please the Court, the Department of State
19 requires that U.S. passports identify the sex of the passport
20 holder as male or female, to verify identity --

21 (Discussion off the record.)

22 MR. PARKER: The State Department requires that U.S.
23 passports identify the sex of passport holders, with either an
24 "M" or an "F." And they do this to help verify the identity of
25 the passport holder, to prevent passport fraud, and to allow

1 the Department to link passport holders and applicants to
2 relevant law-enforcement information.

3 THE COURT: Yeah. Where are you getting those
4 reasons?

5 MR. PARKER: Excuse me, Your Honor?

6 THE COURT: Where do those reasons come from?

7 MR. PARKER: Those reasons are contained in the
8 agency's declaration in this case, and underlie the
9 Department's policy that is embodied in the passport
10 application form, which requires an applicant to check either
11 "M" or "F," and the State Department's regulations which
12 require applicants to fully complete the passport form before
13 receiving United States passport.

14 THE COURT: Right.

15 So we begin, before we get to the regulations, with
16 Congress. Now, there isn't any congressional statute, that
17 you've called to our attention at least, that says it's fine
18 for the State Department, passport people, to require an "M" or
19 "F" declaration, right?

20 MR. PARKER: Your Honor, I --

21 THE COURT: There's no statutory basis for it, true?

22 MR. PARKER: No, Your Honor. I would disagree with
23 that statement. The Passport Act of 1926 authorizes, and I'll
24 quote, Secretary of State may grant and issue passports under
25 such rules as the President may designate and prescribe for and

1 in behalf of the United States.

2 The President has issued an executive order, order
3 11295, authorizing the Secretary of State under the Passport
4 Act to, it says to designate and prescribe for and in behalf of
5 the United States rules governing the granting, issuing, and
6 verifying of passports.

7 THE COURT: Yeah, that's just a broad delegation.
8 There's nothing in that delegation specific to our issue.

9 MR. PARKER: Your Honor, I would disagree. I think
10 that that delegation empowers the Department of State to
11 promulgate regulations and to create passport application forms
12 that dictate the issuance of passports as the act empowers the
13 Department to do.

14 THE COURT: Any regulation they want?

15 Could they say, you can issue passports to men but not
16 women?

17 MR. PARKER: Certainly a regulation like that would be
18 subject to legal challenge. And I think that --

19 THE COURT: Subject to legal challenge. It would be
20 illegal.

21 MR. PARKER: Your Honor, certainly that's, that's the
22 case.

23 THE COURT: Well, what if they put a regulation out
24 that says, only straight individuals, not homosexual people.

25 Subject to legal challenge or clearly illegal?

1 MR. PARKER: Your Honor, I would say clearly illegal.

2 THE COURT: Right.

3 My point is, the delegation doesn't authorize the
4 passport people or the Secretary of State to willy-nilly impose
5 any regulation on the issue of passports. There has to be a
6 rational basis for it, true?

7 MR. PARKER: That is true, Your Honor.

8 THE COURT: What is the rational basis here and where
9 do you find it?

10 MR. PARKER: Your Honor, the rational basis here, for
11 denying plaintiff a passport, was that plaintiff requested a
12 passport that did not comply with the State Department's
13 requirement that --

14 THE COURT: That's *ipse dixit*, isn't it?

15 She didn't comply because we say she didn't comply.
16 She didn't comply because she didn't check "M" or "F" or he
17 didn't check "M" or "F," or let's say . . . I don't want to be
18 insulting to Ms. or Mr. or to the plaintiff.

19 The plaintiff didn't check "M" or "F," and therefore,
20 because we think that's important, she can't go out of the
21 United States? Now, what kind of a deal is that?

22 MR. PARKER: Your Honor, the State Department has
23 explained that there are important government interests that
24 underlie that requirement.

25 First, the Department relies on dependable

1 documentation for purposes of identification and to prevent
2 passport fraud, and the principal documents --

3 THE COURT: You're not contending that she's engaged
4 in -- I don't mean to insult her again, if I say "she." I look
5 at the word "Dana." That could be either.

6 How you do want me to say it?

7 THE PLAINTIFF: I don't mind pronouns "they," "them,"
8 and "theirs," Your Honor.

9 THE COURT: I'm sorry, I can't hear.

10 THE PLAINTIFF: They, them, or theirs, Your Honor.
11 I'm fine, whatever pronoun you need to use is fine by me.

12 THE COURT: They seems plural to me. It's awkward,
13 but if that's what you want, that's what I'll use.

14 THE PLAINTIFF: Thank you, Your Honor, I appreciate
15 that.

16 THE COURT: All right. So there's no suggestion at
17 all, is there, that they, Ms. Zzyym, is engaging in passport
18 fraud. There's no issue about their identity. The information
19 submitted in support of the passport contains plenty of
20 information about identity. There's no indication of passport
21 fraud.

22 What's the other basis?

23 MR. PARKER: Well, Your Honor, the State Department
24 does not make these types of decisions on an individual or an
25 ad hoc basis. The Department relies on dependable

1 documentation, primarily driver's licenses and original birth
2 certificates.

3 And as we explained in our papers, the Department is
4 not aware of one of any of the 57 jurisdictions that issue
5 either driver's licenses or original birth certificates that
6 identify a sex other than male or female.

7 THE COURT: Well, a lot of things are changing in our
8 world, aren't they? You're talking about a statute from 1926.
9 Things have changed a lot in the last 90 years. Things are
10 changing as we speak. We've all seen just in recent
11 jurisprudence the Supreme Court recognize the right of gay
12 people. We have this whole issue that's being discussed and
13 even litigated about transsexual people. And now we've got a
14 different category, intersex people.

15 The passport form wasn't created for the modern
16 reality of life, right?

17 MR. PARKER: Your Honor --

18 THE COURT: And somebody in the government is
19 insisting that, by golly, we're going to insist on "M" or "F"
20 and if you don't check one of those, you can't leave the United
21 States. She's not a criminal. Not a fraud artist. There's
22 nothing wrong with her, right?

23 Other than the fact that she won't check "M" or "F."

24 Put another way, if she would just check "M" or "F,"
25 you don't care which, either one, away she goes.

1 MR. PARKER: Your Honor, if I could clarify on that
2 point.

3 The passport form does not ask how the applicant
4 identifies. Essentially the passport form asks the applicant
5 to check "M" or "F," the sex that the applicant can support
6 with adequate documentation. And so in this case, the
7 plaintiff submitted a Colorado driver's license that identifies
8 the plaintiff as female.

9 THE COURT: Yes, she did. She did.

10 MR. PARKER: And the Department --

11 THE COURT: I use the word "she" there, because she
12 did do that. She said she checked "female."

13 She submitted other, or they submitted other
14 documentation that showed an intersex preference. Right?

15 MR. PARKER: That's correct, Your Honor.

16 THE COURT: Okay. Let's come at this a different way,
17 Mr. Parker.

18 There is no reason to deny this person a passport
19 other than that she didn't check either "M" or "F." True?

20 MR. PARKER: That's correct, Your Honor. Essentially
21 she did not, she requested a passport that was inconsistent
22 with the State Department's requirements.

23 THE COURT: Okay.

24 The answer is yes to my question.

25 MR. PARKER: Yes.

1 THE COURT: There's nothing -- there are cases out
2 there, for example, one of the Supreme Court cases concerning
3 the right to international travel talks about somebody who was
4 refused a passport because that person was way behind on child
5 support. You're familiar with the case.

6 MR. PARKER: Yes.

7 THE COURT: Now, that, in the view of the courts, was
8 a rational basis. Here was a person that wanted to go off,
9 spend a lot of money, have a nice trip to Mexico or some other
10 warm place, but wasn't paying child support. And they said, no
11 dice. There's a rational basis there.

12 But here, there's no reason like that that she
13 shouldn't have a passport. There's no culpability or taint,
14 right?

15 MR. PARKER: Your Honor, the Department in its letter
16 to the plaintiff did not say that the plaintiff could not have
17 a passport.

18 THE COURT: Right.

19 MR. PARKER: The plaintiff said that if -- the State
20 Department said that if the plaintiff wanted a passport
21 identifying plaintiff as female, as shown on the identification
22 documents that plaintiff submitted, that the State Department
23 could issue that passport.

24 THE COURT: Right. If the plaintiff would knuckle
25 under and check "F," she gets a passport. If the plaintiff

1 were to knuckle under and check "M," she would also get a
2 passport. According to your papers.

3 MR. PARKER: Your Honor, let me just clarify. The
4 Department did tell plaintiff that if she wanted -- if
5 plaintiff wanted a passport that identified plaintiff as male,
6 plaintiff could request such a passport but would also have to
7 provide the necessary documentation to receive that.

8 And in this case, the plaintiff has not, did not check
9 either of the boxes, and the documentation that the plaintiff
10 provided, even if the State Department provided Xs on
11 passports, the documentation that the plaintiff provided, is
12 not compliant with the Department's federal --

13 THE COURT: So what if she isn't "M" or "F"? What if
14 anatomically she's some of each? They used to call those
15 people hermaphrodites. They don't, or at least a lot of people
16 anymore, intersex includes those people and other people that
17 identify as intersex.

18 Suppose this particular plaintiff or a hypothetical
19 plaintiff has some of both, hasn't had surgery, is just the way
20 they were born. They don't identify, no belief that they're
21 female, don't identify, no belief that they're male. Are they
22 stuck? They can't leave the country?

23 MR. PARKER: No, Your Honor. In fact, the State
24 Department recognizes that there are people who are intersex
25 and has in its foreign affairs manual a section that addresses

1 intersex applicants.

2 THE COURT: So how does the intersex applicant get a
3 passport? What does she have to do?

4 MR. PARKER: Well, Your Honor, as plaintiff has
5 alleged in plaintiff's own complaint, this, the group of people
6 that is affected by this requirement is, is not exclusively
7 intersex people and is not all intersex people. Plaintiff has
8 explained that many intersex people identify as either male or
9 female and some people who are not intersex choose not to
10 identify as male or female.

11 The group we're talking about is individuals for
12 whatever reason, whether they be intersex or not, do not want
13 to identify as male or female on the State Department's
14 passport application form.

15 THE COURT: Then they can't leave the country.

16 MR. PARKER: Your Honor, if they refuse to identify as
17 male or female, they cannot receive a United States passport.

18 THE COURT: They can't leave the country. They're
19 stuck here in the United States forever more.

20 MR. PARKER: But the Department has said that for
21 these individuals, if they will submit adequate documentation,
22 for example, plaintiff, plaintiff could have received a
23 passport that identified plaintiff as female.

24 THE COURT: What if she submits adequate documentation
25 that she's intersex?

1 MR. PARKER: Your Honor, that, under the State
2 Department's foreign affairs manual, that's not one of the
3 options. That's inconsistent with the State Department's
4 requirement.

5 THE COURT: Okay.

6 So take this hypothetical person. This person is born
7 with ambiguous genitalia. Just the way they came. Person
8 hasn't had surgery. You could say the person maybe isn't
9 totally male and isn't totally female, okay? There are people
10 like that.

11 MR. PARKER: Certainly, Your Honor.

12 THE COURT: Now, your State Department, our State
13 Department, tells these people they can't submit false
14 information on a passport application. That's a big no-no.
15 You can't do that. It's illegal. But this person doesn't
16 identify with and doesn't have genitalia, even, that correspond
17 with one or the other.

18 Is that person stuck in the United States now?

19 MR. PARKER: Your Honor, I think it's important to
20 take a step back and look at what a passport is. A passport is
21 a government document that the government can ask to be
22 returned at any time, that is used for government purposes.

23 It is not, for example, the plaintiff's document.
24 This is a document that the government uses for specific
25 purposes. And one of those purposes is that when a passport

1 holder crosses the borders of the United States, the State
2 Department uses a computerized system to link that person with
3 critical law-enforcement information. The information that is
4 input into this system from various law-enforcement agencies
5 only identifies individuals as male or female. And the sex
6 identifier that the government uses on the government document
7 is important for linking individuals to relevant
8 law-enforcement information.

9 THE COURT: What law-enforcement information?

10 MR. PARKER: Excuse me, Your Honor?

11 THE COURT: What law-enforcement information? If an
12 intersex person, like the hypothetical person, has a criminal
13 history, it's going to come out.

14 MR. PARKER: Your Honor, respectfully, the
15 Department's declaration explains that the sex of the passport
16 holder is one of the key elements for linking a passport holder
17 or passport applicant to law-enforcement information that is
18 entered into the system by federal law-enforcement agencies,
19 state and local law-enforcement agencies.

20 THE COURT: So to answer my question, this person with
21 the ambiguous genitalia, who is neither male or female, can't
22 leave the country because you have to have the passport to get
23 out legally, can't leave the country unless they lie. And by
24 lie, they check "F" or they check "M." Either one, as long as
25 they check one, government doesn't care which one. Check one,

1 fine. Don't check one, you're stuck.

2 MR. PARKER: Your Honor, I would have to disagree with
3 that characterization because what the government is asking is
4 for the applicant to check the box that they can support with
5 adequate documentation.

6 THE COURT: How about if they submit adequate
7 documentation from a doctor, an M.D., who says this person is
8 neither male nor female, this person is intersex, this person
9 was born this way. It would not be proper for this person to
10 check "male" or "female" because the person is neither one.
11 The person is somewhere in between.

12 They submit that from a doctor, then what? The
13 government says, well, that's not good enough, because you
14 don't check "M" or "F." But if you do check "M" or "F," you're
15 lying, but if you don't check "M" or "F," you don't leave the
16 country.

17 MR. PARKER: Your Honor, an applicant would need more
18 than a note from a doctor. They would also have to submit
19 identification documentation, such as a original birth
20 certificate or a driver's license.

21 THE COURT: Well, this person can do that. Maybe she
22 already has. I'm guessing she already has.

23 MR. PARKER: Your Honor, the plaintiff's submitted a
24 driver's license that identifies the plaintiff as female.

25 THE COURT: That was one document. What else did they

1 submit?

2 MR. PARKER: The plaintiff also submitted --

3 THE COURT: Birth certificate?

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

5 THE COURT: And what does it say?

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

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

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

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

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

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

1 the Supreme Court, make the law? Or do you want to consider
2 modifying your rules? To be reasonable.

3 MR. PARKER: Your Honor, I certainly am not in a
4 position today to talk to the State Department's policy making;
5 but I would agree with Your Honor, to the extent that you are
6 saying that, that appropriate remedy here may be a remand to
7 the agency, if the Court finds that the reasons put forth by
8 the agency are insufficient.

9 THE COURT: They're totally insufficient.

10 The question in my mind isn't whether the action was
11 arbitrary and capricious, the question in my mind is does it
12 make any sense to remand. If remand is just going to be an
13 opportunity for the government to shore up its alleged rational
14 basis, what's the point?

15 But if remand were to give the government an
16 opportunity to sit back and say, well, let's think about this
17 some more, maybe we can come up with a policy that works for
18 these people, then maybe it's a good idea.

19 You tell me. They're your client.

20 MR. PARKER: Your Honor, I would say that I'm not in a
21 position to forecast the State Department's policy position on
22 this matter.

23 THE COURT: Well, do you have a client sitting here,
24 somebody that can tell you?

25 MR. PARKER: I do have a client. My understanding is

1 that those type of policy decisions would have to be made
2 likely at the highest levels of the Department.

3 But I certainly would agree with Your Honor that if,
4 if you find the record to be insufficient or the reasons set
5 forth by the Department that the appropriate remedy under the
6 APA is a remand and an opportunity for the agency to reexamine
7 its decision.

8 THE COURT: Well, usually courts avoid constitutional
9 rulings if they can. That's kind of a last resort. I'm
10 saying, does it make sense to give the government a chance to
11 save face on this.

12 MR. PARKER: Your Honor, I think that that would be
13 the appropriate remedy under the APA.

14 THE COURT: Okay.

15 Now, you have more argument you want to make. I
16 haven't let you practically have five minutes. So why don't I
17 be quiet and let you make your argument.

18 MR. PARKER: I'm happy to answer any questions that
19 Your Honor has.

20 Let me just step back, in light of the questions that
21 you have had, and say this; that this policy, which first
22 appeared in 1976, was certainly not based on animus of any
23 kind; that this is a policy that states and local jurisdictions
24 that issue identification use. Frankly, it's consistent with
25 the rest rooms here in the courthouse, with the box that you

1 have to check when you check in for your airline flight. In a
2 host of different situations --

3 THE COURT: I agree with all that. I don't think the
4 regulations passed in '76 were done with animus in mind. They
5 were done, you know, what is it, 30 years, 40 years ago, when
6 things were different. A lot has happened. We didn't have
7 computers back then. We didn't have the Internet. We didn't
8 have cellphones. You might say we were better off. The world
9 was simpler. We didn't have all these issues about transgender
10 and intersex and to some extent, even gay and lesbian issues
11 that we have now. But even the United States Supreme Court has
12 adopted or adapted, I should say, to where we are now.

13 And maybe, maybe the people who write these passport
14 regulations have some adapting to do.

15 MR. PARKER: Certainly, Your Honor, I would concede
16 that this is an important policy issue that has come before the
17 government. And, but I would suggest, Your Honor, that the
18 appropriate place for that policy to be made is in Congress or
19 at the agency. That when you look at the reasons for the
20 denial here, they certainly were not arbitrary or capricious.
21 The people who process the passport application form were
22 simply following a regulation.

23 And as Your Honor can surely understand, the State
24 Department tries its best to be consistent and so they have
25 regulations that apply to all applicants. And so they, the

1 reason for the denial is clear, it was inconsistent with the
2 requirement.

3 Now, if we're talking about the reasons for the
4 requirement itself, I think that the State Department has put
5 forth compelling reasons for requiring an "M" or "F" on the
6 passport application form. The passport application is meant
7 to help the agency to verify the citizenship and identity of
8 the applicant and to prevent passport fraud, and although in
9 this situation we certainly are not claiming that the plaintiff
10 was trying to act in any sort of fraudulent way, that broad
11 policy that applies to all applicants is important. Because it
12 allows the State Department to rely on the most dependable
13 documents: original birth certificates and driver's licenses.
14 Other forms of documentation are often less reliable, less
15 verifiable, and less consistent.

16 And then more importantly, when people apply for
17 passports or cross the border, the State Department has to use
18 the information that they have available to them to link those
19 individuals to relevant law-enforcement information. And the
20 male or female designation is critical to that link because the
21 information that is input into the computerized system by
22 multiple federal agencies and local and state agencies only
23 uses the male and female designation.

24 THE COURT: What do you do with a transgender person?
25 The transgender person's original birth certificate says

1 "male." The transgender person hasn't had surgery, yet. Maybe
2 never. Hasn't done the hormone treatment, all of that. But
3 the transgender person is standing in the locker room or gym,
4 you would say male by appearance. But she considers himself
5 female. Caitlyn Jenner, as an example.

6 How does the State Department handle that one?

7 MR. PARKER: The Department has a policy that does
8 allow transgender individuals to submit documentation. It's a
9 notarized letter from a doctor saying that the individual has
10 gone through the clinical treatment necessary to transition
11 from, in your hypothetical, from male to female, and can
12 receive a passport that in some instances differs from some of
13 their identification documentation. And the State Department
14 has looked at that issue and has, I think, come forth with a
15 very progressive policy that recognizes that.

16 THE COURT: Has the State Department looked at the
17 intersex issue yet, to your knowledge?

18 MR. PARKER: Certainly, Your Honor, the Department has
19 looked at the issue as there is a section of the foreign
20 affairs manual that deals with intersex individuals.

21 But frankly, Your Honor, the change from a binary
22 system would be extremely disruptive for the Department,
23 because of the types of documents they rely on and the uses
24 they put the passport to. And so the section that identify,
25 addresses intersex individuals, still requires that they

1 identify for purposes of a government document and for
2 government use, either as male or female because it's binary.

3 THE COURT: What if this plaintiff checked both and
4 submitted documents explaining why? How is the State
5 Department going to deal with that one?

6 MR. PARKER: I think, Your Honor, to be completed, the
7 application form, you have to check one or the other.

8 THE COURT: Well, you can fix the form, right? That's
9 just a form. The government changes forms every day. They can
10 fix a form. They can have a form that has "M," "F," or a
11 third, "neither." Or "both." They could have that.

12 MR. PARKER: Your Honor, I certainly concede that the
13 Department could do that. But that would upend the process
14 that they have in place for verifying identity and for linking
15 individuals with law-enforcement information. It really comes
16 back to the traditional binary that we see throughout our
17 society. And I understand Your Honor's view that that binary
18 may be outdated, but the State Department as it looks at the
19 way that it uses the passport, the way that it uses it to
20 identify the individual and especially the way that it uses it
21 when individuals try to use passports to cross the borders of
22 the United States, that binary is still very important because
23 it's a key piece of identifying information.

24 And so I think that, you know, despite the fact that
25 that binary certainly is viewed differently today than it was

1 in 1976, it still serves a very important purpose to the
2 government. And I think the State Department has set forth in
3 its declaration what that purpose is.

4 THE COURT: Well, its declaration was a
5 rationalization for this case. It's not something that you
6 find in anything printed. It's just something that was created
7 for this case, right?

8 MR. PARKER: So the declaration certainly was created
9 for this case. But I think that it explains -- it's certainly
10 not a substitute for the administrative record. The
11 administrative record says we denied the passport application
12 because of the policy. But the folks who denied the passport
13 application weren't in a position to explain the policy.
14 That's certainly not their job. And so --

15 THE COURT: No, and they're -- and I don't mean this
16 pejoratively at all. They're bureaucrats, they have a job,
17 they're trained in how to do it. They look at the form, see if
18 it's filled out properly, see if the documentation is there,
19 and say yes or no.

20 MR. PARKER: That's certainly true.

21 THE COURT: And somebody above them, in a position
22 that's a higher-up position, has to decide what has to be in
23 the form. I get that.

24 MR. PARKER: That's correct, Your Honor.

25 And I would also just submit that the agency's

1 declaration is similar to the types of declarations that have
2 been accepted in the Tenth Circuit. In Lewis vs. Babbitt the
3 court upheld the district court that looked at an agency
4 declaration that it said was used to explain the administrative
5 record, rather than substitute for it. Our declaration is
6 certainly not a substitute for the administrative record, but
7 the declaration doesn't explain the rationale for the policy.

8 THE COURT: I agree with that.

9 MR. PARKER: And the government agrees as well. And
10 that's why we submitted that declaration. But the declaration
11 does set forth compelling reasons for the State Department's
12 use of this binary policy. And when you think about all of the
13 law-enforcement records that go into a computerized system,
14 records from the FBI or from state and local law-enforcement
15 agencies, it would be very difficult practically for the State
16 Department to get out in front of everyone else on moving from
17 a binary system, if that's the ultimate decision, because they
18 rely on records that are only binary, meaning driver's licenses
19 and birth certificates, and law-enforcement information that is
20 also only binary.

21 So while it may seem that the State Department is
22 outdated, the reasons for its policy, I think, are clear that
23 it relies on a host of other agencies and documents from other
24 places that all are based on a binary system. And so to upend
25 that binary system would cause serious disruption to important

1 government interests that the State Department has set forth.

2 Your Honor, I would simply submit that regardless of
3 whether Your Honor is looking for a rational basis or intends
4 to apply a heightened standard of review, the government has
5 set forth substantial and compelling reasons for its policy and
6 has shown that the decisions made at the passport office were
7 not arbitrary and capricious and were consistent with the grant
8 of authority that was given to the State Department through the
9 Passport Act.

10 I would just close with returning to a subject that we
11 already have discussed at length; but if Your Honor is not
12 convinced by the information that's been put forth by the State
13 Department, under the APA the appropriate remedy would be
14 remand to the agency so that they can review the decision and
15 come to whatever decision they think is proper. I'm not in a
16 position to tell Your Honor what that position would be. I
17 certainly don't know, myself; but I can tell you that the
18 agency, I can assure you that the agency will take a good-faith
19 look at it, if that's the way that the Court sees fit.

20 If Your Honor has --

21 THE COURT: Okay.

22 MR. PARKER: -- no further questions.

23 THE COURT: Oh, I've got lots of questions. I haven't
24 addressed them all. I have some for them, too, probably.

25 MR. PARKER: Thank you, Your Honor.

1 THE COURT: All right. Mr. Castillo.

2 My first question to you is why doesn't your client
3 just check the form and save herself and everybody else all
4 this brain damage.

5 MR. CASTILLO: Because it's inaccurate, Your Honor.
6 The passport form --

7 THE COURT: The government doesn't care if it's
8 inaccurate, apparently.

9 MR. CASTILLO: It's inconsistent, I would agree, with
10 their justifications that the passport is the world-premier
11 identity document and it wants to ensure accuracy when it's in
12 fact asking our client to lie on the passport application.

13 THE COURT: But the government doesn't consider that a
14 lie. The government puts full faith and credit in the driver's
15 license and says, okay, she's female, so check the "F," we're
16 out of here, no more litigation, no more nothing, she goes
17 wherever she wants, has a good life.

18 MR. CASTILLO: Well, that statement by counsel is
19 actually inconsistent with the State Department's own foreign
20 affairs manual that actually recognizes that state law and
21 foreign laws may vary as to whether driver's license or other
22 forms of identification such as a state driver's license is
23 consistent or inconsistent with a person who is applying for a
24 passport application; case in point with respect to individuals
25 who are transgender oftentimes are unable or have insufficient

1 financial resources to change either their birth documentation
2 or their state documentation, but yet, despite that
3 inconsistency, the State Department has a policy that allows a
4 transgender individual to apply on the passport form with the
5 gender marker that's different from their underlying documents.

6 THE COURT: So take Caitlyn Jenner, since she's the
7 famous transgender person who's in the news every day now. She
8 wants a passport. Let's say her old passport that was used
9 when she won the Olympic games has expired. She wants a
10 passport. She applies.

11 Now, I don't know if she's had surgery or not. Say
12 no. Say no. No surgery. But she identifies as a woman. She
13 came out as Caitlyn Jenner. She can get a passport.

14 MR. CASTILLO: That is correct, Your Honor.

15 THE COURT: Her birth certificate says "male." Her
16 old driver's license for sure says "male." I don't know what
17 her current driver's license says. But she says she's female.
18 She checks "F" and gets a passport.

19 MR. CASTILLO: Correct.

20 THE COURT: Even though the driver's license,
21 hypothetically, and certainly the birth certificate say "M."

22 MR. CASTILLO: Correct. And in fact, the specific
23 policy that we're referring to, appendix M, are procedures that
24 the State Department follows when the gender marker is
25 inconsistent with the underlying documents.

1 And as a result, a transgender individual is able to
2 secure a passport that's consistent with their gender identity;
3 and similarly, in that same section, the State Department
4 acknowledges the existence of intersex individual and
5 specifically states that intersex applicants do not fit typical
6 definitions of male or female.

7 Yet the State Department would rather have a catch 22
8 imposed on Dana because of the fact that Dana cannot submit
9 untruthful or inaccurate information subject to criminal
10 sanctions. The record does reflect, the administrative record
11 does reflect, Your Honor, that Dana did support not only
12 identification documents proving they are who they say they
13 are, but also have provided documents from certified physicians
14 with the U.S. Department of Veterans Affairs attesting to the
15 fact that Dana is intersex. Specifically on the record --

16 THE COURT: Well, you know, don't you, that if she
17 checked "F," she wouldn't be criminally prosecuted for false
18 information. There is no way that these people could prosecute
19 her now. They want her to check "F." They would give their
20 right arm if she would check "F" so that this headache would be
21 gone. They're not going to prosecute her.

22 If we're just talking about Dana --

23 MR. CASTILLO: Well, I think --

24 THE COURT: -- there's an easy solution, check the box
25 and go to Mexico.

1 MR. CASTILLO: First of all, irrespective of the
2 indignity it would impose on a person, you know, to tell them
3 that they should be somebody who they are not, the, the State
4 Department themselves cannot speak on behalf of the Department
5 of Justice prosecution and citizens of the United States --

6 THE COURT: Well, Mr. Parker can.

7 MR. CASTILLO: Citizens of the United States should
8 not have to evaluate whether or not they will be prosecuted in
9 order to estimate the risk in violating what is a criminal law.

10 THE COURT: Well, are you talking about citizens of
11 the United States, or are we talking about Dana?

12 Put another way, is this a cause case where your whole
13 objective is to get a constitutional ruling, or is this a case
14 for Dana?

15 MR. CASTILLO: In this case, this is an as-applied
16 challenge as to Dana's ability to secure a passport and to be
17 able to travel around the world as they had requested to do
18 back in 2014.

19 THE COURT: All right.

20 MR. CASTILLO: This case --

21 THE COURT: And Dana knows, and you know, that if she
22 would just hold her nose and check "F," she gets a passport and
23 no one is going to prosecute her, this is over.

24 MR. CASTILLO: Well, the fact is there's a criminal
25 statute on the books. The passport form warns individuals that

1 they're subject to criminal sanctions if they lie on the
2 passport application.

3 THE COURT: Well, we're two ships passing in the night
4 on this issue. There could be a million statutes on the books,
5 but they're not going to prosecute Dana if they do that.
6 They've waived any opportunity to do that. They've begged her
7 practically to check "F." That's not the issue. Her dignity
8 and all that is a different issue. If she really wanted a
9 passport without litigating this case all the way to the
10 Supreme Court, she could get it, tomorrow. Or today.

11 MR. CASTILLO: In fact, you know, you can't have a
12 U.S. Navy veteran make a selection about somebody who they are
13 not. It would be the same thing as if I were to apply for a
14 passport application and the government were to refuse to give
15 to me, as a male, a passport unless I marked "female" on the
16 form.

17 You know, the -- what the State Department is
18 requiring in this particular case is for an American citizen,
19 for Dana, to lie on a passport application about their gender.

20 The documents or the declaration that was submitted, I
21 have to note, is outside the administrative record. The -- all
22 the purported justifications that Mr. Parker stated before this
23 Court are not within the administrative record. In fact, there
24 was one single conclusory sentence --

25 THE COURT: Well, the administrative record isn't good

1 enough and they know that and that's why they did the
2 declaration. If we remand this case for them to reconsider and
3 come up with an appropriate administrative record, one of two
4 things will happen.

5 One is they'll change their policy, recognizing that
6 there's a decent chance that they may lose this case. And they
7 may not want that to happen. Or recognizing that maybe their
8 policy is irrational and it's time to update it.

9 The other thing that could happen is they just put all
10 the stuff in the declaration in the administrative record and
11 we're back here again, right?

12 MR. CASTILLO: That's right, Your Honor. And we agree
13 with Your Honor's concerns. In fact, while the APA does
14 provide relief in vacating the State Department's decision, in
15 this particular case, that's not enough because we would --

16 THE COURT: What if they just said, tell you what, she
17 puts her X on there, in her case, only her case, we'll give her
18 the passport; now go away.

19 Is that good enough for you?

20 MR. CASTILLO: To get Dana a passport.

21 THE COURT: To resolve this case. To end this case.

22 MR. CASTILLO: We are here on behalf of Dana Zzyym,
23 that is correct.

24 THE COURT: If they will do that, they'll say, we'll
25 settle this case on a confidential basis, we'll settle it and

1 just issue the passport and away she goes.

2 MR. CASTILLO: The -- it is important for this Court
3 to at least opine about the constitutional issues because of
4 the fact that the State Department would be free to return to
5 the same decisions. They've adequately briefed their
6 justifications, which again are outside the record --

7 THE COURT: If they grant the passport, you don't have
8 standing anymore.

9 MR. CASTILLO: I would concede, yes, Your Honor.
10 But they're refusing to consider any other viable
11 options.

12 The reason our client requested X or any other
13 potential solution that the Department still respecting Dana's
14 identity is that there's nothing, we concede and I think
15 opposing counsel concede, that the administrative record was
16 inadequate, it didn't provide reasons, and the Supreme Court
17 has indicated that agency action must be upheld on the basis
18 that the agency articulated itself at the time that the
19 decision was made.

20 THE COURT: What if they were to say, we'll issue the
21 passport to her, if she checks "M" and "F," to indicate that
22 she's part of each?

23 MR. CASTILLO: My client is neither male nor female.
24 It would still be inaccurate.

25 THE COURT: Well, I'm basically, if you look at the

1 Intersex of North America website, which I have done, they
2 indicate that intersex is a sociological designation, not a
3 physiological or biological designation. That's what that
4 organization says.

5 People are born, they would say, you're either male or
6 female. You've got ambiguous genitalia, but our world only
7 recognizes that you're male or female. She checks both boxes,
8 and they say that's good enough.

9 Would she do it or not?

10 MR. CASTILLO: With respect to checking both boxes,
11 Dana is neither male nor female, Your Honor.

12 THE COURT: Well, that doesn't answer my question.
13 Will she do it or not?

14 MR. CASTILLO: In this particular respect, we're
15 returning to the same problem where Dana is subject to placing
16 inaccurate information on the passport. Dana as intersex,
17 identifies as intersex, and has provided statements from not
18 one but two physicians that work for the United States
19 government, the U.S. Department of Veterans Affairs, who will
20 attest and certify, and it's in the record at 31 and 33, to the
21 fact that Dana's

22 So we're returning back to accuracy which furthers,
23 rather than detracts, the State Department's interest in
24 maintaining an accurate identity document.

25 With respect to, Your Honor, if I may, the State

1 Department --

2 THE COURT: So your answer is, no, she would not check
3 both boxes, even if that would resolve this case.

4 MR. CASTILLO: I think we would have to have a
5 conversation, but I think ultimately if the solution -- the
6 question is how would the --

7 THE COURT: It doesn't matter, really, does it,
8 whether you check "F," "M," or both boxes, she still considers
9 herself to be whatever she considers herself to be. She has a
10 right as a human being to consider herself as she wants. I
11 think.

12 MR. CASTILLO: That's right, Your Honor.

13 THE COURT: We're talking about a bureaucracy that
14 would respond like a Pavlov's dog. All she has to do is check
15 a form and they respond. It doesn't change who she is or what
16 she is or how she views herself; it's a form.

17 MR. CASTILLO: Well, the issuing passport is much more
18 than just a bureaucratic form. It's the government's --

19 THE COURT: No, the form is the application form.

20 MR. CASTILLO: That's correct.

21 THE COURT: A passport's a passport. I've got one.
22 You probably have one. Probably everybody in the room, except
23 Dana, has one. Because we were willing to check where they
24 wanted us to check.

25 MR. CASTILLO: That's correct. And we did it in an

1 accurate fashion as well.

2 The State Department's denial of the passport
3 application, as Your Honor had indicated, was not because of
4 misrepresentations on the application or fraud --

5 THE COURT: No, I get that. I understand that.

6 Are there any countries that issue passports with
7 "intersex" checked?

8 MR. CASTILLO: There are countries that utilize the
9 marker "X" as a designate; for example, intersex individuals in
10 Australia.

11 THE COURT: Australia issues passports that are marked
12 "X"?

13 MR. CASTILLO: That is correct.

14 THE COURT: And those people get a passport. The
15 application is marked "X." They issued a passport. What does
16 the passport say?

17 MR. CASTILLO: The X gender marker designation.

18 THE COURT: Are those people admitted in the United
19 States on the Australian passport?

20 MR. CASTILLO: They are, Your Honor, on a -- presuming
21 they comply with other visa requirements, the indication of an
22 X on a passport marker of a foreign individual does not
23 preclude *per se* entry into the United States.

24 THE COURT: So the United States will let them in, but
25 won't let them out.

1 MR. CASTILLO: They will not let a U.S. American
2 citizen out with an X, X marker.

3 THE COURT: But they'll let a noncitizen from
4 Australia in.

5 MR. CASTILLO: And this was pointed out to the State
6 Department as part of the process at the administrative record
7 at page 15. And again on page 28. During the dialogue where
8 we were pointing out that the International Civil Aviation
9 Organization, or the ICAO, which governs the requirements for
10 passports globally, allow for three gender markers: "M" for
11 "male," "F" for "female," and "X" for "unspecified."

12 THE COURT: Are you saying there's an international
13 form?

14 MR. CASTILLO: No, Your Honor, I'm saying that there's
15 an international -- there's an agency under the province of the
16 United Nations that specifically offers what the passport
17 requirements for travel documents around the globe would
18 require. The State Department is a part of and it acknowledges
19 the existence of this agency which provides the specifications
20 for passports and other travel documents.

21 Document 9303 is a specific document that's put forth
22 by the ICAO where it has sex, the sex of the holder may be or
23 must be, rather, M, F, or X. So in conformance with these
24 international standards, many countries have implemented such a
25 system --

1 THE COURT: Well, you mentioned Australia. Who else
2 has?

3 MR. CASTILLO: Australia, India, Malta, Nepal, New
4 Zealand, all of which offer markers other than male or female.
5 And there are many, there are others as well. But those are a
6 few examples of where countries, outside the United States,
7 have implemented, successfully implemented, gender markers
8 other than male or female.

9 And again, the United States government, provided they
10 meet all other requirements -- and there's even a frequently
11 asked question, as a foreign national, can I enter the country
12 if my passport has X.

13 And the government response was -- well, pick
14 whichever one you feel comfortable with. That's for the visa.
15 But when they enter the country, on their Australian passport,
16 for example, it still says X, and they are able to enter the
17 country. And return to Australia. Yet a U.S. citizen, who was
18 part of the military and served our country is unable to leave
19 because of the Department's insistence that they put inaccurate
20 information on the passport form.

21 And so they have failed to even consider that that may
22 be a viable option, even though that was put forth to them at
23 the time that Dana made the application. They refused to
24 consider. There was no discussion, and there is no discussion
25 in the administrative record about how they feel about that.

1 There is no discussion --

2 THE COURT: Has there been a case like this anywhere
3 else in the United States?

4 MR. CASTILLO: To my knowledge, this is the first
5 case, Your Honor.

6 THE COURT: Why did you pick on me?

7 MR. CASTILLO: Right place, right time, I guess.

8 THE COURT: Well, we'll see.

9 MR. CASTILLO: Yes, Your Honor.

10 So, you know, there are -- you know, that's not the
11 only option available to the State Department, you know. But
12 that is a viable option. And under the case law by the United
13 States Supreme Court and Motor Vehicle Manufacturers
14 Association vs. State Farm, in even an adjudication the agency
15 must articulate reasoned decision-making and they must consider
16 viable options.

17 Now, I anticipate that my opposing counsel is going to
18 come up and say, well, State Farm was a case about rule making,
19 but the Tenth Circuit in Olenhouse vs. community, vs. community
20 credit corporation, in 1994, adopted in an agency adjudication
21 the State Farm standard. In fact, there's no distinction about
22 arbitrary and capricious with respect to adjudication or policy
23 making. The standard is the same.

24 The government must display for this Court some sort
25 of reasoned decision-making.

1 THE COURT: Yeah, I know that.

2 Look, there are some things that I think oughtn't to
3 be in dispute here. The Supreme Court, the Ninth Circuit, and
4 probably other courts, have recognized that there is a right to
5 travel internationally. It's not as broad a right as the right
6 to travel within the states. But it's a right that is subject
7 to the due process clause and cannot be denied without a
8 rational basis.

9 The record before the Court does not articulate what I
10 or I think any judge would say is a rational basis for this
11 rule.

12 The real question here is what to do about it. There
13 are a lot of things to be done potentially about it.

14 One is the two sides can agree to settle this case. I
15 brought that up, just so you wouldn't overlook it. They would
16 agree to give her the passport. Checked X. They could do
17 that. That would resolve the case. You might not like it.
18 But for your client, that ends the case.

19 Or the Court could remand with the idea that they
20 shore up the administrative record but in the process consider
21 changing the bureaucratic rules that require "M" or "F" and not
22 "X." That's another thing that could happen.

23 Or the Court could make some constitutional ruling.
24 It's a violation of her due process as applied on these facts
25 to deny her a passport.

1 Any of those are possible. Or the Court could rule in
2 their favor, of course, that's a possibility, too.

3 What do you want? What's your choice?

4 If you had a choice. Which you don't, but if you did.

5 MR. CASTILLO: Your Honor, my client, Dana Zzyym,
6 would like a passport with a gender marker other than "F" or
7 "M," and "X" would be perfectly satisfactory.

8 THE COURT: And no matter how she gets it, that's what
9 she wants.

10 MR. CASTILLO: That is correct.

11 THE COURT: Okay.

12 MR. CASTILLO: And I did want to raise another issue
13 with the Court, you know. I do agree that under constitutional
14 law there is an international right to travel under substantive
15 due process. But we submit that that right is subject rather
16 to strict scrutiny as opposed to --

17 THE COURT: That's not what the courts have said so
18 far.

19 MR. CASTILLO: Well, the Supreme Court in Haig vs.
20 Agee, which is the last case involving a passport with respect
21 to an individual who was denied the right to travel, the court
22 applied a strict scrutiny standard. It was narrowly tailored
23 and it was also, there was a compelling interest in that case.
24 So that passport was denied --

25 THE COURT: Have you read the Ninth Circuit case on

1 this subject?

2 MR. CASTILLO: And the Ninth Circuit has not yet
3 issued a standard. In fact, the Ninth Circuit --

4 THE COURT: I think Kent and Haig can be construed to
5 stand for the proposition that it's not strict scrutiny when
6 you're talking about international travel, it's rational basis.

7 But why do you care?

8 MR. CASTILLO: That's correct, even if we applied
9 rational basis, you know, those, the justifications offered,
10 and I would agree with the Court, do not withstand any
11 rational-basis scrutiny.

12 THE COURT: Well, they don't on this record. Unless,
13 A, I include the declaration as a sort of a fix-it to the
14 record; and B, I would agree that the declaration provides a
15 compelling basis or a rational basis, neither of which is
16 likely to happen.

17 MR. CASTILLO: The State Department, if in fact it
18 insists on refusing a passport to our client, you know, is
19 free, as Your Honor had said, you know, to return to this Court
20 with the same record that has already been briefed. Their
21 justifications have already been briefed by both sides, and if
22 it's remanded with free rein to the State Department to come to
23 the same conclusion, our client continues to be precluded from
24 traveling internationally in the meanwhile.

25 THE COURT: Right.

1 MR. CASTILLO: And we're going to be before this Court
2 again. So I think it would be instructive if the State
3 Department continues to refuse, as Your Honor had said, I
4 think, you know, settlement discussion are particularly
5 important and should --

6 THE COURT: Have you had any?

7 MR. CASTILLO: I'm sorry?

8 THE COURT: Have you had any?

9 MR. CASTILLO: We explored the possibility, yes, Your
10 Honor.

11 THE COURT: Well, that's before the government found
12 out that they were in the wrong court, at least temporarily.

13 MR. CASTILLO: I think --

14 THE COURT: But you have to keep in mind that I'm just
15 a bump on the road here.

16 MR. CASTILLO: That is correct, Your Honor.

17 THE COURT: The Tenth Circuit may have an entirely
18 different view of things than I do. In fact, that's happened.
19 On occasion.

20 MR. CASTILLO: I agree, Your Honor.

21 And I don't think -- and Mr. Parker and I have worked
22 well together -- and I don't think that coming before the Court
23 today would preclude continued discussions about potential
24 settlement.

25 But should this Court -- should settlement be

1 unsuccessful -- and the State Department is free to come to the
2 same conclusion, without any sort of instruction from this
3 Court -- we are going to be back. And this Court has within
4 its power to give guidance about the fact that they've exceeded
5 their statutory authority; that it -- the purported
6 justifications by the State Department do not even meet even
7 the lowest level of scrutiny, rational basis; and it -- and
8 there are other viable options that are available to enable my
9 client to submit a passport application that is accurate and
10 truthful and obtain a passport without a "male" or "female"
11 declaration.

12 THE COURT: Thank you, sir.

13 MR. CASTILLO: Thank you.

14 THE COURT: Mr. Parker, would you like to make a
15 rebuttal?

16 MR. PARKER: Yes, Your Honor. Thank you.

17 THE COURT: Is your client willing to consider the
18 possibility of settlement? I suggested there are different
19 ways it could do it.

20 MR. PARKER: Your Honor, as Mr. Castillo mentioned, we
21 did discuss the possibility of settlement early on. And we
22 certainly are always willing to revisit settlement. I think
23 that in most cases, settlement is better than the imposition of
24 a ruling by the Court, and we certainly are willing to discuss
25 settlement.

1 THE COURT: Well, how long is that going to take
2 before you'll know?

3 MR. PARKER: It's difficult to forecast, Your Honor.
4 I would say that the State Department has a very strong
5 interest in uniformity and in treating everyone the same way in
6 passport application offices across the country.

7 And for that reason is reticent to make ad hoc
8 departures from its requirements.

9 THE COURT: I understand that. But it can. And it
10 also could change its rule, just like Australia and all those
11 other countries have done.

12 MR. PARKER: And I assure you --

13 THE COURT: And by the way, why do we let those people
14 in, but don't let her out?

15 MR. PARKER: I would like to address that, 'cause I
16 think there are a couple of additional facts that will help the
17 Court to understand.

18 There are a very limited number of countries that will
19 include an X on a passport. I don't think it's clear or in the
20 record what that X means, if it represents a third gender or it
21 simply specifies "unspecified." I know with regard to the
22 ICAO, which essentially from my understanding governs what is
23 necessary for passports to be scanned, the X designation does
24 not mean a third gender, it means "unspecified." It's not a
25 departure from the male, female binary.

1 THE COURT: Right, but they aren't requiring the State
2 Department to do that. They're happy if there's a X
3 designation and she can check that or Dana can check that and
4 go on about her business. They're not trying to change the
5 State Department's belief that everybody is male or female.

6 What they're trying to do is get the form changed.

7 MR. PARKER: And so let me answer the first question.
8 Then I'll respond to your comment.

9 Those who come into the United States with a passport
10 that identifies their sex as X and apply for a visa are still
11 required on the visa form to check "M" or "F." And it's for
12 the same reason that the State Department requires passport
13 applicants to check "M" or "F." It's because the binary system
14 of "male" and "female" is prevalent throughout our society and
15 especially in the records that are relied on by the State
16 Department.

17 And this is very much cause litigation. The plaintiff
18 is asking the Court to upset the traditional binary that
19 pervades our society.

20 THE COURT: Look, I recognize it as cause or
21 potentially cause litigation. These people came from Chicago
22 to litigate this case. I understand that.

23 I'm trying to look at it from a practical standpoint
24 and asking you and him, does this have to be a cause. It
25 really is about Dana. And about her desire to have a passport

1 so she can leave the United States and go to Mexico. Or
2 somewhere else. That's what it's about.

3 MR. PARKER: Certainly, Your Honor. The government
4 has the utmost respect for Dana and her right to identify as
5 the plaintiff sees fit.

6 What we're talking about here, though, is not how a
7 person identifies. We're talking very clearly about a
8 government document that is, even when it is issued to a
9 person, remains a government document and can be recalled at
10 any time. It's a government document that is used for
11 government purposes --

12 THE COURT: Have the countries that have submitted or
13 permitted, I should say, the X designation, Australia and the
14 others that he listed, Malta and Nepal and the list that he
15 had, have they experienced that it's wreaked havoc with their
16 law-enforcement agencies?

17 MR. PARKER: Your Honor, I don't have an answer to
18 that question. And I know that that information is not in the
19 record.

20 I know that there are a very limited number of
21 countries, I believe there are maybe only five across the
22 entire world, that issue designations other than "M" or "F,"
23 and I'm not confident that, I'm not aware of any of those
24 actually refer directly to intersex people. I think the X
25 traditional stands for unspecified.

1 In this instance, in this case, the Department has
2 explained to the Court in a declaration that it does have a
3 rational basis for this policy. And that rational basis is the
4 same rational basis that the architect who designed this
5 building and put only male and female bathrooms had for doing
6 so.

7 THE COURT: That may have to change, too, at some
8 point.

9 MR. PARKER: And I agree, Your Honor --

10 THE COURT: I don't have to deal with the bathroom
11 issue today.

12 MR. PARKER: No, you don't, thankfully.

13 I will say, Your Honor, I agree, that may have to
14 ultimately change; but I believe that is the type of policy
15 decision that is best left to Congress and to the executive and
16 that here, where the Court should be looking only to see
17 whether there is a rational basis, there clearly is a rational
18 basis for the reliance on the traditional binary that we've had
19 in our society.

20 And even if the Court finds that that binary is
21 outdated, the fact that all of the documents that the State
22 Department relies on still use that binary and that it is
23 critical to being able to link passport applicants and passport
24 holders to law-enforcement information, I think provides more
25 than a rational basis for the Department's policy.

1 I would just conclude, Your Honor, by saying that I
2 don't believe that it's appropriate for plaintiff or for the
3 Court even to speculate about what the agency might do on
4 remand. I can assure Your Honor that if the Court decides to
5 remand the case, the agency will put forth the good-faith
6 effort to look at this issue anew. I cannot certainly
7 guarantee Your Honor the outcome of that look, but I can say
8 that the agency will do what is necessary to re-evaluate.

9 THE COURT: How long would that take for this new
10 look?

11 MR. PARKER: I'm not sure, offhand, Your Honor. I
12 think it could be done in a relatively short time period.

13 THE COURT: Well, what if she wants to go to Mexico
14 next week, will they give her a temporary passport so she can
15 do that until they decide?

16 MR. PARKER: Your Honor, I'm not in a position to be
17 able to answer that accurately, to be frank. I believe the
18 answer is no. And it's for the same reason that I started this
19 argument with: the State Department has a great deal of respect
20 for, for the plaintiff here and for the plaintiff's right to
21 identify as the plaintiff sees fit; but it also has to apply
22 policies broadly across every single person who applies for a
23 passport application. And it has to be able to use those
24 passports when they're used to cross the border. So I think
25 the possibility of sort of an ad hoc solution, frankly, I think

1 is very small.

2 THE COURT: Well, he says he's got two affidavits from
3 doctors, government doctors, attesting to the fact that Dana is
4 neither male nor female.

5 Is that true, does he?

6 MR. PARKER: There are in the record two, two letters
7 from, from physicians at VA facilities that have treated the
8 plaintiff, yes.

9 THE COURT: So that's part of the government, the same
10 government.

11 MR. PARKER: That's correct, Your Honor. But those
12 letters are not --

13 THE COURT: You say that the government, meaning your
14 government, the State Department, has respect for her. And how
15 she wishes to think of herself. And she's got these two
16 government documents that say she is exactly what she claims to
17 be, and yet your bureaucracy can't adjust to that. Because
18 just that's not the way they've done it.

19 MR. PARKER: Well, I would say, Your Honor, that
20 there's much more to it than just the way that they have done
21 it.

22 THE COURT: The only rationale you've really given is
23 that it's critical to the use of information from
24 law-enforcement agencies.

25 MR. PARKER: Also, Your Honor --

1 THE COURT: There's a lot more important information
2 from law-enforcement agencies that is important besides male or
3 female.

4 A person's name, for example, and yet law-enforcement
5 records show that a lot of these people that have criminal
6 histories have aliases that sometimes take more than one page
7 to list.

8 MR. PARKER: That's certainly true, Your Honor. And
9 that's why name is only one of the pieces of information --

10 THE COURT: Name, date of birth, citizenship.

11 MR. PARKER: And sex, Your Honor. That's why sex is
12 important.

13 THE COURT: Sex. Gender.

14 Sex, gender.

15 But they often have on there national origin. They
16 ask you to identify what color you are. Some of them say
17 white. Black. Brown. None of us is white. My daughter, who
18 won't go out in the sun, is pretty pale. Most people aren't
19 black. Most people aren't brown. But some of the forms have
20 those things.

21 MR. PARKER: Certainly, Your Honor, it's absolutely
22 correct that there are multiple pieces of data that the State
23 Department uses to try to link individuals up with relevant
24 law-enforcement records. But one of those critical pieces of
25 data is the sex designation. And I think it's important to

1 realize that a --

2 THE COURT: Well, a critical piece of information
3 would be DNA. That's a critical piece. A critical piece of
4 information would be fingerprints.

5 Why is it so critical to know if the person is
6 intersex or male or female? They have the person's date of
7 birth, they have the birth certificate, they have the
8 fingerprint, they have the DNA information. Why do they care
9 if the person checks "M" or "F"?

10 MR. PARKER: Certainly in some records the government
11 will have some of those pieces of information, and in other
12 records, it will have other pieces. And the sex designation
13 plays a critical part, like the other things that the Court has
14 mentioned.

15 But certainly it is not irrational for the State
16 Department to rely on the same binary that all of the state and
17 local jurisdictions that, one, issue driver's licenses and
18 birth certificates; and, two, submit law-enforcement
19 information to the State Department's database. Those, those
20 reasons in and of themselves show that this is not an
21 irrational policy. It is a policy that is meant to allow the
22 government to use a government document; even when a passport
23 is issued, for example, to the plaintiff, it is not the
24 plaintiff's document. It remains a government document. And
25 it is used for government purposes. It is meant to allow the

1 government to identify the individual when they cross the
2 borders of the United States. And the government has set forth
3 a rational basis for why it needs an "M" or an "F" on those
4 passports.

5 THE COURT: You know, I'll bet you that if the State
6 Department rethought its policy and decided to accept the X
7 designation, the sun would still come up tomorrow. There
8 wouldn't be international chaos. International chaos results
9 from terrorism, not from whether Dana checks "M" or "F" on a
10 passport application, right?

11 MR. PARKER: Certainly, that is --

12 THE COURT: Bigger picture here is that people, human
13 beings, have certain rights as human beings, to look at
14 themselves the way they want. If they want to look at
15 themselves as male or female or in between or homosexual or
16 straight.

17 MR. PARKER: On that point, Your Honor, we are in
18 complete agreement. The State Department is not asking the
19 plaintiff to say how the plaintiff identifies. They're simply
20 asking the plaintiff to check a box, either "male" or "female,"
21 that the plaintiff can support with adequate documentation.
22 This is not a matter of self-expression. This is a government
23 form. The government needs to be able to verify the
24 information. That's why they need documentation.

25 THE COURT: But she can support an "X" with adequate

1 documentation. Your own government doctors say so. How much
2 better do you get than that?

3 MR. PARKER: Your Honor, but that doesn't remove us
4 from the problem of the binary. These are notes from --

5 THE COURT: Well, in fact, isn't that a point on their
6 side? The driver's license you say, all the states require "M"
7 or "F." Whether that's good or bad. Let's say it's a fact.
8 Okay. To get a driver's license, which everybody has to have
9 these days, just about everybody needs a driver's license to
10 get around, especially in Colorado, you got to check "M" or
11 "F." Okay. So she checked "M" -- or "F" in this particular
12 case. I don't know why, she chose "F," okay. She did. That's
13 not reliable. That's where she knuckled under and went along
14 to get what she needed. This time she's not willing to knuckle
15 under. That time she knuckled under and checked "F," how
16 reliable is that, versus your own doctors who say she's
17 neither.

18 MR. PARKER: Your Honor, again, so in this instance,
19 plaintiff checked "F" and has a driver's license that
20 identifies plaintiff as female.

21 THE COURT: And she would probably say in a sense she
22 misrepresented herself to the driver's license people.

23 MR. PARKER: That may or may not be true, Your Honor.
24 But if there are records there are attached to her driver's
25 license, criminal records or other citations that are relevant

1 that identify the plaintiff as female, it's important that she
2 be identified, consistent with a driver's license, or it's at
3 least helpful to be able to link her to relevant records. You
4 know, your driver's license potentially is linked to a whole
5 host of information about whether you have committed, you know,
6 certain crimes or violations of other sorts. If you were to
7 try to link a passport to a driver's license, the designation
8 of female would be an important link.

9 THE COURT: So if Dana were to go into the
10 motor-vehicle office in Jefferson County this afternoon and say
11 to the person there, I'd like to have you amend my driver's
12 license. Instead of "male" or "female," I want to say "X." Or
13 "neither."

14 And suppose the clerk in the motor-vehicles office
15 would say, hey, fine. Here it is.

16 Then the State Department would give her a passport
17 because some clerk in Jefferson County gave her a driver's
18 license marked that way?

19 MR. PARKER: Your Honor, according to the State
20 Department's regulation, the answer to that question is no.
21 The requirement is male or female --

22 THE COURT: So it isn't so critical what the driver's
23 license says, after all. To law enforcement.

24 MR. PARKER: Certainly it is critical in the vast
25 majority of cases to linking law-enforcement information. In

1 this hypothetical, first of all, I would say that the State
2 Department is not aware of one of the 57 jurisdictions that
3 would issue that type of driver's license.

4 If that were to occur, certainly that may be grounds
5 upon which the State Department may want to reconsider its
6 policy. Certainly this is an area that is developing, as Your
7 Honor --

8 THE COURT: The State Department is going to adjust to
9 what the bureaucrats in the states do, but not to her
10 constitutional rights.

11 MR. PARKER: Your Honor, the State Department relies
12 on state and local documents. They don't verify, independently
13 verify, many of these pieces of data, and so they rely on
14 states that issue birth certificates or driver's licenses. And
15 I think they're perfectly reasonable in doing so. And so if
16 states were to change their policy and were to issue driver's
17 licenses that identified the driver's sex as "X," maybe that
18 would be something that the State Department would need to take
19 into account as it's reexamining its policy.

20 I will say, Your Honor, as you have already alluded
21 to, this is a developing area. I think the State Department
22 has a very progressive policy with regard to transgender
23 individuals. I think the Department respects the plaintiff's
24 dignity. And respects the plaintiff. And is looking at this
25 issue. But the Department does not make ad hoc exceptions,

1 because they need a uniform application and they've set forth
2 the reasons for this binary system. And those reasons are
3 rational and frankly meet constitutional muster under any level
4 of scrutiny.

5 And I'll just also add that the decision to deny the
6 passport was clearly not arbitrary and capricious. It was
7 based on a consistently applied government requirement for
8 passports. There's nothing arbitrary or capricious about it.
9 And so if the Court looks at each of plaintiff's claims, the
10 government should be granted judgment on each. This was not
11 arbitrary and capricious. It was appropriate under the
12 Passport Act. There is a rational basis. In fact, there is a
13 compelling reason why the government has its requirement
14 requiring an "M" or an "F" on passports, and for those reasons,
15 the government submits that the Court should rule for the
16 government on each of plaintiff's claims here.

17 To the extent that the Court disagrees, which I
18 suspect may be the case, the Court should consider remanding,
19 which is the appropriate remedy under the APA so that the
20 government can reexamine this issue.

21 But I would submit that based on the pleadings before
22 the Court, based on the government's record, that the
23 government is entitled to judgment on each of these claims,
24 that it has met its burden, it has showed that this decision
25 was not arbitrary and capricious, did not violate the

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

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

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

13 Thank you very much for your arguments this morning.

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

15 REPORTER'S CERTIFICATE

16 I certify that the foregoing is a correct transcript
17 from the record of proceedings in the above-entitled matter.
18 Dated at Denver, Colorado, this 21st day of July, 2016.

19
20 s/Kara Spitler
21 Kara Spitler
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