No. 18-1453

In the United States Court of Appeals for the Tenth Circuit

Dana Alix Zzyym,

Plaintiff – Appellee,

v.

Michael R. Pompeo, in his official capacity as Secretary of State, and

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

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, Civ. No. 1:15-cv-2362, Hon. R. Brooke Jackson

RESPONSE BRIEF OF APPELLEE
[Oral Argument Requested]

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GLOSSARY

APA – Administrative Procedure Act

CPA – Colorado Passport Agency

FAM – Foreign Affairs Manual

ICAO - International Civil Aviation Organization

OII-USA - Organisation Intersex International USA

VA – Veterans Affairs

WPATH - World Professional Association for Transgender Health

INTRODUCTION

For most Americans, the process for securing a U.S. passport is unremarkable: submit an application form accompanied by citizenship and identity documents, a photograph, and required fees. Indeed, over fifteen-million passport applications are processed and issued each year by the United States Department of State ("State Department"). Typically, if a passport application is denied, it is for established reasons—set by Congress, agency regulation, or practice prior to the early 20th century—and those reasons are explained to the applicant.

But this case is atypical. This case involves the State Department, for the first time in history, refusing to issue a vital travel and identity document based solely on an applicant's gender. (Br.App'x2,14[1] ("It is undisputed that in every other respect Dana is qualified to receive a passport.")

In 2014, in anticipation of traveling to Mexico City for a human-rights conference, Plaintiff-Appellee Dana Alix Zzyym ("Dana") submitted a complete application to passport officials in Colorado. The passport-application form, however,

[1] References to "Br.App'x" are to the "Appendix to the Brief" filed on March 5, 2019 by Appellants in connection with the Brief for Appellants. References to "Add." are to the "Addendum" filed on March 5, 2019 by Appellants in connection with the Brief for Appellants. References to "App'x" are to the three-volume Corrected Appendix for Appellants filed on March 7, 2019 by Appellants. References to "Supp.App'x" are to the "Supplemental Appendix" filed herewith on May 8, 2019 by Appellee. References to "AR" are to the administrative record—the full version of which appears in the district-court record at Document 64.

had presented Dana with an impossible task: submit a truthful passport application, *and* select either "M" for male or "F" for female. A U.S. citizen and Navy veteran, Dana was born intersex, with ambiguous external genitalia, and their[2] gender identity—the innate sense of being male, female, both or neither—is neither male nor female (that is, nonbinary).

In submitting a truthful application, Dana explained their gender since birth to passport officials; wrote "Intersex" on the sex field of the passport application instead of selecting "M" or "F"; submitted a certified birth certificate with "unknown" in the sex field; referenced the State Department's policy for placing a gender marker on passports different from underlying identity documents (the gender marker on Dana's driver's license at the time of the application was "F," but is now "X"); highlighted the agency's recognition of intersex people in its Foreign Affairs Manual ("FAM"); and even submitted multiple sworn medical statements from Veterans Affairs ("VA") physicians attesting to their gender as neither male nor female. Dana's application was denied.

After more than four years of litigation, three missed advocacy opportunities abroad for Dana, and two passport denials (one after remand), the State Department maintains that if Dana wishes to secure a U.S. passport, Dana must incorrectly select a

[2] As a nonbinary intersex person who is neither male nor female, Dana uses the singular "they," "them," and "their" third-person gender-neutral pronouns.

binary gender marker—"M" or "F"—on their passport application. As a result, Dana, a law-abiding veteran, cannot leave the country they defended because they refuse to be untruthful about who they are.

STATEMENT OF THE ISSUES

1. Did the State Department exceed its statutory authority under the Passport Act of 1926 in violation of the Administrative Procedure Act ("APA"), U.S.C. § 706(2)(C) by denying a U.S. passport to a nonbinary intersex citizen based solely on personal characteristics and absent any unlawful conduct on the part of the applicant?

2. Was the State Department's decisionmaking process for barring an applicant—who is neither male nor female, whose gender is supported by medical documentation, and who "in every other respect . . . [was] qualified to receive a passport" (*see* Br.App'x2)—from obtaining a U.S. passport with a gender marker other than "M" or "F" arbitrary and capricious in violation of the APA, 5 U.S.C. § 706(2)(A)?

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

The Passport Act, 22 U.S.C. § 211a, provides that the Secretary of State (the "Secretary") "may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person

shall grant, issue, or verify such passports." (Add.1) The Secretary, however, does not have "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Kent v. Dulles*, 357 U.S. 116, 128 (1958). The State Department has set forth regulations for adjudicating and issuing passports, including specific reasons for passport denials, restrictions, and revocations. (Add.15 (containing 22 C.F.R. § 51.60 *et seq.*))

The Immigration and Nationality Act makes it "unlawful for any citizen of the United States to depart from or enter . . . the United States unless he bears a valid United States passport." 8 U.S.C. § 1185(b). To obtain a U.S. passport, an applicant "shall subscribe to and submit a written application which shall contain a true recital of each and every matter of fact which may be required by law or by any rules authorized by law to be stated as a prerequisite to the issuance of any such passport." 22 U.S.C. § 213. The applicant is subject to criminal sanctions for "willfully and knowingly mak[ing] any false statement in an application for [a] passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another." 18 U.S.C. § 1542.

The policies that govern the State Department's operations regarding passports appear in the FAM at 7 FAM § 1300, which "applies to all passport-issuing offices, including U.S. passport agencies and passport processing centers . . . ." 7 FAM § 1312(a). Appendix M "provides policy and procedures that passport specialists . . . ***must*** follow in cases in which an applicant requests a gender on the passport

application different from the one reflected on some or all of the submitted citizenship and/or identity evidence." (7 FAM § 1310(a) App. M (emphasis added); *see also* App'x88–96[3] ("Gender Policy" or "Policy")) The Gender Policy recognizes that "[a]n individual's gender is an integral part of [the passport bearer's] identity" (7 FAM § 1310(c)), and, for those applicants seeking a gender marker different from what appears on documents submitted to the agency, medical certification from a licensed physician "is the **only** documentation of gender change required." (*Id.* § 1310(e)) Moreover, applicants born with intersex variations—that is, those who "do[] not fit typical definitions of male or female"—may submit the above-referenced medical certification; otherwise the gender listed on the applicant's "birth documentation will determine the gender to be listed in the passport." *Id.* §1360(a)–(c); App'x94.

In addition, State Department regulations specify that passport applicants may meet their burden of establishing their identity "by the submission of a previous passport, other state, local, or federal government officially issued identification with photograph, or other identifying evidence which may include an affidavit of an identifying witness." 22 C.F.R. § 51.23(b). A valid driver's license is an acceptable document to establish identity. *Id.*; *see also* 7 FAM § 1320. The Gender Policy

[3] The State Department altered the language of its Gender Policy on March 31, 2016—less than two weeks after the agency filed its Motion for Judgment on the Administrative Record on March 18, 2016 [Dist. Ct. Doc. 35]. (*Compare* App'x88–96; *with* AR 178–87)

recognizes that "state law and foreign laws vary as to whether a driver's license . . . may be issued reflecting a gender change" and, therefore, an applicant may establish his or her identity with "acceptable primary ID in the old gender . . . ." *Id.* 1320(a)(2)(c); App'x89.

II. STATEMENT OF THE FACTS

A. Dana Is Intersex and Nonbinary, Not Male or Female

1. Dana was born intersex, and endured masculinizing gender-assignment surgeries as a child

Dana is a U.S. citizen and Navy veteran, who currently resides in Colorado. Because Dana was born intersex, with ambiguous external sex characteristics, the sex field on Dana's birth certificate was initially left blank. (*See* App'x59,73; App'x18 ¶ 10) "Intersex" is an umbrella term used to describe a wide range of natural bodily variations. (App'x18 ¶ 11) Intersex people are born with sex characteristics that do not fit typical binary notions of bodies designated "male" or "female." (*See, e.g.*, App'x94) In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. (App'x18 ¶ 11) Some variations may not be visibly apparent at all. (*Id.*) Experts estimate that between 0.05% and 1.7% of the population is born with intersex traits. (*Id.*)

Moments after a child is born, the general practice in this country is for a physician to assess visually the newborn's genitalia and assign the newborn's sex as "male" or "female" on that basis. (*Id.* ¶ 12; *see also* App'x198 (demonstrating that,

according to the World Professional Association for Transgender Health ("WPATH"),[4] "[s]ex is assigned at birth as male or female, usually based on the appearance of the external genitalia")) Sex, however, is much more complex, and is determined by a number of factors, including chromosomes, gonads, hormones, genitalia, and gender identity. (App'x18 ¶ 12) A person's gender identity—the innate sense of being male, female, both, or neither—is the most important determinant of that person's sex. (*Id.*) Although there is not yet one definitive explanation for what determines gender identity, recent research points to the influence of biological factors, most notably the role of sex differentiation in the brain in gender-identity development. (*Id.*)

When a child is born with mixed or ambiguous markers of sex, doctors often assign a sex they guess is likely to match the child's gender identity. (*Id.* ¶ 13) It is impossible, however, to predict with certainty how an intersex infant's gender identity will develop. (*Id.*) As with any other person, an intersex person eventually may identify as female, male, both, or neither. (*Id.*)

Dana's parents and doctors decided that Dana would be raised as a boy, and that their intersex variance should be kept secret from them. (*Id.* ¶ 14) Dana was given

[4] The State Department relied upon the recommendations of WPATH in adopting a policy for transgender and intersex passport applicants in 2010. (*See* Appellants' Br. 4)

a stereotypical masculine name, and the sex field on their birth certificate was filled in with "Male." (*Id.*; *see also* App'x54)

By the age of five, Dana had been subjected to several irreversible, invasive, painful, and medically unnecessary "masculinizing" surgeries designed to make their body conform to male sex stereotypes. (App'x19 ¶ 15) The surgeries immediately failed and caused permanent scarring and damage. (*Id.*) None of the surgeries altered—or even fully disguised—Dana's intersex nature. (*Id.*)

2. As an adult, Dana came to understand that they are a nonbinary intersex person

In 1978, at the age of twenty, Dana enlisted as a Machinist Mate in the U.S. Navy. (*Id.* ¶ 17) During their six years with the Navy, Dana completed three tours of duty in Beirut and one tour throughout the Persian Gulf. (*Id.*) In 1984, Dana declined to re-enlist due to increased scrutiny over and interrogation regarding their perceived sexual orientation. (*Id.* ¶ 18)

By 1994, after years of experiencing shame, stigma, and physical and emotional pain, Dana came to realize that the male gender they had been arbitrarily assigned as an infant was not accurate. (App'x20 ¶ 19) Dana legally changed their name to "Dana Alix Zzyym" in 1995. (*See* App'x55)

In approximately 2008, Dana began researching the possible causes of the severe scarring and damage they had lived with since childhood. (App'x20 ¶ 20) In 2009, Dana was examined by a urologist at the VA hospital, who confirmed Dana's

intersex traits. (*Id.* ¶ 21) The VA urologist informed Dana that an orchiectomy and other surgical procedures might greatly reduce Dana's pain and allow Dana to gain sexual function. (*Id.*) After completing those procedures, Dana then experimented with living as a female, and even amended their Colorado driver's license to reflect "Female" in the sex field. (*Id.*; *see also* App'x56) Dana soon realized, however, that living as a woman was not right either. (App'x20 ¶ 21)

By 2011, Dana came to terms with being intersex, and has since identified as a nonbinary intersex person, neither male nor female. (*Id.* ¶ 22) Dana's medical records reflect that they are intersex, and doctors who have treated Dana—including multiple VA doctors—consistently report that Dana is intersex. (*Id.* ¶¶ 21–22; *see also* App'x71–74) Dana amended the gender marker on their birth certificate (which was originally left blank at birth) from the arbitrarily and inaccurately assigned "Male," to "Unknown" (App'x54), and now has a Colorado driver's license bearing an "X" gender marker. (Br.App'x40) Dana has become an advocate for intersex people, including through their work as Associate Director for Organisation Intersex International USA ("OII-USA"). (App'x21 ¶ 23)

B. Dana Applied for a U.S. Passport with an Accurate Gender Marker

In 2014, Dana was invited to represent OII-USA at the International Intersex Forum in Mexico City. (App'x64) To travel internationally to Mexico, however, Dana needed to obtain a U.S. passport. *See* 8 U.S.C. § 1185. U.S. citizens seeking a first-time

passport must complete the two-page Application for a U.S. Passport, Form DS-11 ("Application"). (*See* App'x51–52 (Dana's completed Application))

In September 2014, Dana visited the Colorado Passport Agency ("CPA") to obtain a passport. (App'x23 ¶ 34) Dana submitted a completed Application along with the required identity and citizenship documentation, photograph, and fee payment. (*Id.*; *see also* App'x51–54) In the "Sex" field of their completed Application, Dana truthfully and accurately stated "Intersex"—instead of checking the "M" or "F" box:


APPLICATION FOR A U.S. PASSPORT
Please Print Legibly Using Black Ink Only
OMB CONTROL NO. 1405-0004
OMB EXPIRATION DATE: 01-31-2017
ESTIMATED BURDEN: 85 MIN
Attention: Read WARNING on page 1 of instructions.
Please select the document(s) for which you are applying:
☐ U.S. Passport Book ☐ U.S. Passport Card ☒ Both
☐ 28 Page Book (Standard) ☐ 52 Page Book (Non-Standard)
172460355
1. Name Last
ZZYYm
First
DANA
Middle
ALIX
2. Date of Birth
1958
3. Sex
Intersex
4. Place of Birth
MICHIGAN
5. Social Security Number
6. Email Address
7. Primary Contact Phone Number

(App'x51) In a separate letter, Dana clarified that "I'm not male or female," and requested an "X" as the marker in the "Sex" field of their passport because such designation conforms to the International Civil Aviation Organization ("ICAO") standards for machine-readable travel documents. (*Id.* at 53; *see also* App'x23 ¶ 35) In support of their request, Dana also provided a letter from a VA doctor stating that Dana is intersex. (App'x59)

C. The State Department Denied Dana's Passport Application Based upon Its Binary-Only Gender-Marker Policy

In a letter dated September 24, 2014 (the "September 2014 Letter"), the State Department notified Dana that it "currently requires the sex field on United States passports to be listed as 'M' or 'F'" and that it was thus "unable to fulfill your request to list your sex as 'X.'" (App'x67) The September 2014 Letter presented Dana with three options: (1) receive a passport listing Dana as female, consistent with their driver's license at the time[5]; (2) receive a passport listing Dana as male, upon further submission of a signed statement from their doctor attesting to a "gender transition"; or (3) withdraw their application. (*Id.* at 67–68)

On December 19, 2014, Dana again visited the CPA's office to present further documentation in support of their passport application—including sworn statements by two additional VA doctors stating that Dana is intersex. (*See id.* at 69–74) Rejecting the options set forth in the September 2014 Letter, Dana reiterated their request for a passport that accurately reflected their gender through the use of a gender marker other than "M" or "F." (*Id.* at 69–70)

[5] Although the State Department has consistently offered to issue Dana "a passport in a sex consistent with the sex listed in your currently valid driver's license" (*see, e.g.*, App'x82), Dana's currently valid Colorado driver's license lists Dana's sex as "X." (*See* Br.App'x40) Counsel for the State Department represented at argument on May 29, 2018, that a person with an "X" on a driver's license would not be able to secure a passport with a gender marker other than "M" or "F." (Supp.App'x46)

In a letter dated December 29, 2014, the State Department denied Dana's passport application solely because it was "unable to accommodate" Dana's request for a passport with an accurate gender marker. (*Id.* at 76 ("[T]he Department of State requires the sex field on United States passports to be listed as 'M' or 'F.' Therefore, we cannot fulfill your request to list your sex as 'X.'"))

In a letter dated April 10, 2015 (the "April 2015 Letter"), the State Department confirmed that its denial of Dana's passport application was final, and denied Dana's request for a review hearing. (*Id.* at 80) The April 2015 Letter stated that

> [T]he Department of State's current policy requires that the applicant select "M" or "F" on the sex field on a U.S. passport application, and that the corresponding sex of "M" or "F" be identified on the issued passport. The Department does not recognize the use of "X" on a U.S. passport, and therefore Dana cannot select the sex as "X."

(*Id.*)

Aside from Dana's refusal to select an inaccurate and untruthful "M" or "F" gender marker, Defendants have not identified any other issues with or deficiencies in Dana's passport application. (App'x25 ¶ 41; Br.App'x14) And none of the above-described correspondence from the State Department offer any rationale for requiring a passport applicant to select "M" or "F," or for requiring an issued passport to identify its holder as "M" or "F."

Although the State Department has indicated that "Dana remains eligible at any time to submit a new passport application, provide sufficient supporting documentation, and receive a U.S. passport listing the sex supported by the

documentation" (App'x80), Dana cannot truthfully submit any such application claiming to be male or female. As a result, Dana continues to have no means of lawfully exiting the United States, and "has missed travel opportunities for four years throughout the course of this litigation" alone. (*See* Br.App'x42)

III. PROCEDURAL HISTORY

A. The District Court Holds That the Denial of Dana's Passport Application Violated the APA and Remands the Matter to the State Department

Dana commenced this action against the State Department on October 25, 2015, alleging that the denial of Dana's passport application based on the agency's binary-only gender policy violated the APA, 5 U.S.C. § 706(2), and Dana's constitutional rights to due process and equal protection. (App'x26–34 ¶¶ 48–90) On November 26, 2016, the district court issued an order ("*Zzyym I*") holding that the denial of Dana's application was arbitrary and capricious under the APA and that the administrative record did not demonstrate that the Defendants' "decisionmaking process that resulted in the [binary-only gender] policy in question was rational." (Br.App'x12) Accordingly, the district court remanded the matter to the State Department for reconsideration, and declined to reach the constitutional claims. *Id.*

B. The State Department Adheres to Its Binary-Only Gender Policy, and the District Court Again Holds That the Agency Is in Violation of the APA

On March 6, 2017, while this matter was on remand to the State Department, the Intersex Campaign for Equality (formerly OII-USA) asked Dana to represent the

organization at an intersex conference in Amsterdam. (AR 67–69) In order to travel to this conference, Dana asked the State Department to issue either a full-validity or temporary passport bearing an "X" or other nonbinary gender identifier in the sex field. (*Id.*) The agency refused to issue an accurate passport but said it would soon complete its judicially mandated review of the binary-only gender policy. (AR 75–76)

On May 1, 2017, the State Department denied Dana's passport application a second time (App'x81–82), and set forth five justifications it claimed supported the decision to "maintain its existing" gender policy ("Justifications Memo"): (1) accuracy and reliability, (2) utility of sex to identify persons ineligible for passports, (3) utility for law enforcement, (4) lack of medical consensus, and (5) feasibility. (*Id.* at 83–87)

In an order issued September 19, 2018, the district court considered each of the State Department's justifications and determined that the administrative record did not reflect a rational decision-making process. (Br.App'x22–27) The district court found that the first three justifications "boil down to the same argument": that the binary-only gender policy "ensure[s] accuracy and reliability in cross-checking gender data with other identity systems." (*Id.* at 22) The district court found this argument was undermined by evidence that (1) the State Department in some circumstances allows the gender designation on an individual's passport to differ from the gender designation on some or all of that individual's other identifying documents, and (2) the gender field is not used or reliable in some law-enforcement databases. (*Id.* at 22–23) Additionally, the district court noted that the State Department had failed to add

any substantive arguments or evidence to support this point since *Zzyym I*, and the only new evidence in the record on this point at the time—that at least four U.S. states and territories had begun issuing identification cards with a third gender option—"cuts against the Department."[6] (*Id.*)

As to the fourth justification that "there is no generally accepted medical consensus on how to define a third sex" (*id.* at 21), the district court concluded this was not rational because the State Department's own regulations rely upon a medical authority that recognizes a nonbinary gender. (*Id.* at 25 (citing 7 FAM § 1310(b) App. M)) Finally, the district court rejected the fifth justification—that "[t]he policy is necessary because changing it would be inconvenient" (*id.* at 21)—as "guesswork" unsupported by any evidence of the time, cost, or coordination necessary to update its information systems to accommodate a third gender option. (*Id.* at 27)

After concluding that the binary-only gender policy was arbitrary and capricious, the district court independently considered the scope of the State Department's authority under the Passport Act, and the limits on that authority. (*Id.* at 28–29) In light of Supreme Court precedent, the district court determined that the

[6] As of the date of this brief, twelve states and the District of Columbia authorize gender markers other than "M" or "F" in at least one form of identification document or ID. Nine states and the District of Columbia authorize an "X" gender marker on driver's licenses or identification cards, and seven states authorize (or have approved) a gender-neutral category on birth certificates. An additional eight states currently have legislation pending to authorize "X" gender markers on government identification documents.

State Department exceeded its statutory authority by refusing to grant Dana a passport for reasons that were related to Dana's basic identity, and unrelated to any unlawful conduct by Dana. (*Id.* at 30)

Having concluded that the binary-only gender policy was arbitrary and capricious under the APA *and* in excess of the State Department's statutory authority, the district court enjoined the agency from relying on the gender policy to withhold a passport from Dana. (*Id.* at 32) Final judgment was entered on September 19, 2018. (*Id.* at 33–34) The agency appealed the district court's findings to this Court.

On December 3, 2018, the State Department filed a Motion to Stay the Court's Injunction Pending Appeal with the district court. (Br.App'x35) Dana opposed the stay, and, on February 21, 2019, the district court denied the State Department's motion on the grounds that the harm to the agency of implementing the district court's order would be outweighed by the ongoing harm to Dana if they are forced to continue to miss travel opportunities pending the resolution of this appeal. (*Id.* at 37–41) The district court further found that the likelihood of success on the merits of the appeal did not favor the State Department. (*Id.* at 42)

The State Department subsequently filed a Motion for Stay of the District Court's Injunction Pending Appeal in this Court on February 28, 2019. (Doc. 10110132686) Following briefing, this Court denied the Motion to Stay without prejudice on the grounds that the State Department had not shown it would suffer

irreparable harm absent a stay because the district court's injunction will have no effect until Dana files a new passport application. (Doc. 10110149105)

SUMMARY OF ARGUMENT

When Congress delegated authority to the Secretary of State to grant and issue passports under the Passport Act, it did not bestow upon the Executive discretion to deny and indefinitely withhold a passport for any reason whatsoever—and certainly not solely because of personal characteristics. In correctly concluding that the State Department exceeded the scope of its statutory authority in violation of the APA, the district court reviewed long-standing Supreme Court precedent outlining the parameters of the State Department's authority under the Passport Act. Unlike those cases affirming passport denials, however, the grounds for refusal here do not relate to Dana's citizenship or allegiance, nor to a criminal or unlawful purpose. This case does not implicate geographic-area restrictions affecting all travelers, and Dana's planned advocacy at three international intersex conferences does not raise national-security or foreign-policy concerns. Instead, the State Department refused to issue a passport to Dana because Dana is neither male nor female—a basis which has not been expressly or implicitly endorsed by Congress. In any event, the State Department waived any argument that it acted within its statutory authority by failing to address this issue on appeal.

Separately, the district court also rightly held that the State Department's actions were arbitrary and capricious. The agency failed to engage in a reasoned

decisionmaking process, including by giving purported justifications unsupported by the administrative record, deviating from policy without awareness or explanation, and failing to consider relevant factors or important aspects of the problem. And, in a futile effort to cure APA record deficiencies, the State Department also attempts to improperly inject extra-record evidence and post-hoc rationalizations on appeal through heavy reliance on two self-serving declarations, first introduced nineteen months after the agency denied Dana's passport application.

ARGUMENT

The APA embodies core concepts of administrative law: an agency must act within the bounds of its authority and provide a reasoned explanation for its actions. Otherwise, a "reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ." 5 U.S.C. § 706(2). Far from rubber-stamp approval, the APA "require[s] the reviewing court to engage in a 'substantial inquiry.' An agency's decision is entitled to a presumption of regularity, 'but that presumption is not to shield [the agency's] action from a thorough, probing, in-depth review.'" *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1574 (10th Cir. 1994) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971)).

"Federal administrative agencies are required to engage in 'reasoned decision making.'" *See Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374–75 (1998). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* at 374. Here, the State Department failed on both counts. First, the Secretary exceeded his authority under the Passport Act because Congress has not delegated to the Executive the authority to deny a passport to a nonbinary intersex citizen based solely on personal characteristics. And, second, the agency failed to demonstrate its policy barring individuals who are neither male nor female from securing an accurate passport was the product of reasoned decisionmaking. The State Department's justifications are inadequate, and its policy produces absurd results: Dana cannot legally depart the United States simply because they refuse to be untruthful about their gender on a passport application.

I. THE STATE DEPARTMENT EXCEEDED ITS AUTHORITY UNDER THE PASSPORT ACT WHEN IT DENIED DANA'S PASSPORT APPLICATION BASED SOLELY ON GENDER

A. The State Department Exceeded Its Statutory Authority by Denying Dana's Passport Application Based Solely on Gender

The State Department acted outside its lawful authority when the agency denied a passport to Dana based solely on personal characteristics. The Passport Act provides that "[t]he Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United

States." 22 U.S.C. § 211a. Congress did not, however, give the Secretary of State[7] "unbridled discretion to grant or withhold a passport from a citizen for any substantive reason he may choose." *Kent*, 357 U.S. at 128; *see also Lynd v. Rusk*, 389 F.2d 940, 944 (D.C. Cir. 1967) ("[T]he language of the Passport Act of 1926 is broader than the authority it confers."). The State Department acted *ultra vires* because Congress has never authorized the Secretary to withhold a vital travel and identity document from a citizen based on the passport applicant's gender.

Contrary to the State Department's conclusory assertion that district court "conflat[ed]" the two distinct APA claims (*see* Appellants' Br. 29), the district court fully and thoroughly analyzed whether the State Department exceeded its authority under the Passport Act. (Br.App'x28–30) In light of Supreme Court precedent, the district court concluded that the Passport Act "does not include the authority to deny an applicant on grounds pertinent to basic identity, unrelated to any good cause as described in *Kent* and *Haig* [*v. Agee*, 453 U.S. 280 (1981)]." (Br.App'x29) Specifically, under *Kent* and *Haig*, the potentially valid grounds for denying a passport application are ones "related to national security, foreign policy, citizenship, allegiance, or criminal or unlawful conduct." (*Id.*) The State Department did not deny Dana's application on any of those grounds, however, but because Dana refused "to untruthfully claim to be

[7] A subsequent executive order conferred on the Secretary the President's authority under the Passport Act to prescribe rules governing the granting and issuing of passports. (*See* Add.1)

either male or female." (*Id.*; *see also id.* at 2, 14 ("It is undisputed that in every other respect Dana is qualified to receive a passport.")) Denying a citizen a passport bearing an accurate gender marker for that reason alone is beyond the State Department's delegated authority.

A trilogy of Supreme Court cases directly supports the district court's conclusion that the State Department exceeded its statutory authority. In *Kent*, the petitioners were denied passports because they were suspected Communists and refused to provide affidavits concerning their Communist Party membership. 357 U.S. at 117–20. Noting that courts should "construe narrowly all delegated powers that curtail or dilute" the right to travel, the Court held that the Passport Act must be interpreted in light of administrative practices at the time the statute was enacted. *Id.* at 128–29. The Court further concluded that the grounds cited for denying passport applications prior to passage of the Passport Act fell into two categories: "citizenship or allegiance on the one hand" and "criminal or unlawful conduct on the other." *Id.* at 128. Because political beliefs or associations did not fit within either of those categories, the Court held that the State Department exceeded its authority in denying the petitioners' applications. *Id.* at 129–30.

The Court subsequently addressed the scope of the Passport Act in *Zemel v. Rusk*, 381 U.S. 1 (1965). There, the Court considered whether the State Department could refuse to validate passports for travel to Cuba. *Id.* at 3. The Court reaffirmed its holding from *Kent* that the Passport Act "must take its content from history: it

authorizes only those passport refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id.* at 17–18 (citation omitted). The Court then upheld the passport denials because Congress had implicitly authorized area restrictions for passports. *Id.* at 11–12. The Court distinguished *Kent* because, in *Zemel*, the State Department "has refused to validate appellant's passport *not because of any characteristic peculiar to appellant*, but rather because of the foreign policy considerations affecting all citizens." *Id.* at 13 (emphasis added).

Most recently, in *Haig*, the Court added an applicant's egregious conduct to the list of grounds on which the State Department may deny a passport. 453 U.S. at 308–10. The passport holder in *Haig* (Philip Agee) was a former CIA operative living abroad who started a campaign to expose fellow CIA operatives. *Id.* at 283–84. Pursuant to an express regulatory provision, the State Department revoked Agee's passport because his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." *Id.* at 286. The Court upheld the revocation, finding that conduct raising serious national-security and foreign-policy concerns warranted the denial of a passport prior to enactment of the Passport Act and that the openly asserted regulation had been implicitly approved by Congress. *Id.* at 294, 301.

Together, *Kent* and its progeny dictate that the State Department may lawfully deny (or revoke) passports based only on (1) allegiance or citizenship, (2) unlawful or criminal conduct, (3) specific geographic travel restrictions applicable to all citizens,

and (4) conduct damaging to national security or foreign policy. *See, e.g.*, 22 C.F.R. § 51.60 *et seq.* The State Department lacks the statutory authority to deny or revoke passports for reasons unrelated to these four grounds.[8]

The State Department provides no evidence that Congress granted the Secretary the alleged right to deny a nonbinary intersex applicant who is neither male nor female an accurate gender marker on a passport, and such a denial is outside the four permissible categories. Like the applicant in *Kent*, Dana did not seek to acquire a passport for an unlawful or criminal purpose. *See* 357 U.S. at 130 ("They do not seek to escape the law nor to violate it."). Instead, Dana sought to attend and advocate for nondiscriminatory treatment of intersex persons at international conferences in Mexico City, Amsterdam, and New Zealand. (App'x21 ¶ 24; Supp.App'x25 ¶ 16; Doc. 010110137392, at 20) The State Department does not question Dana's citizenship or allegiance, nor does it assert that Dana's conduct as an advocate for intersex people is likely to seriously impair the national security or foreign policy of the United States.

[8] To the extent the State Department relies on *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015), to justify its denial of Dana's passport application (*see* Appellants' Br. 2–3), that reliance is misplaced. *Zivotofsky* concerned the constitutionality of a statute that allowed citizens born in Jerusalem to have Israel as their place of birth listed on their passport, contrary to the State Department's longstanding policy of not recognizing any country as having sovereignty over Jerusalem. 135 S. Ct. at 2081–82. The Supreme Court struck down the statute as infringing upon the President's exclusive power to recognize foreign states. *Id.* at 2096. In doing so, the Supreme Court recognized and did not take issue with the principle underlying *Zemel*, *Rusk*, and *Haig* that "Congress must authorize the grounds on which passports may be approved or denied." *Id.*

Moreover, this case does not challenge any across-the-board restrictions on travel to designated countries applicable to all travelers.

The State Department cannot establish a sufficiently substantial and consistent practice that compels the conclusion that Congress has knowingly authorized the State Department to refuse to issue a passport based solely on gender. Implicit authorization of a grounds for denying passports requires "an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it." *Zemel*, 381 U.S. at 12. Only a "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent." *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). And, "only the clearest of such evidence will permit this Court to consider Congressional silence to be a substitute for explicit and affirmative legislative action in limiting the free exercise of important rights." *Woodward v. Rogers*, 344 F. Supp. 974, 985 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973).

Unlike *Haig*, where the Supreme Court identified three specific examples of the State Department openly denying passports in situations involving substantial likelihood of serious damage to national security or foreign policy of the United States, the agency here cites no instances where it has openly asserted—much less enforced—the purported power to deny a passport to an applicant who is neither male nor female. Thus, "there [is] in reality [no] definite policy in which Congress could have acquiesced" providing the Secretary with authority to deny passports to

citizens based only upon personal characteristics. *Haig*, 453 U.S. at 303; *see also* Gregory Limoncelli, *Clarifying the Authority Delegated to the Secretary of State for the Control of Passports:* Haig v. Agee, 24 B.C.L. Rev. 435 (1983), *available at* http://lawdigitalcommons.bc.edu/bclr/vol24/iss2/4.

The passport application itself—which includes binary-only gender options alongside numerous other data points—cannot constitute a practice sufficiently substantial to put Congress on notice that the State Department would deny a passport to Dana or someone else in their position. *See Kent*, 357 U.S. at 129. The seemingly innocuous administrative form that has never before been challenged in this context is insufficient to meet the standard for implicit authority set by *Kent*, *Zemel*, and *Haig*. In fact, at the time litigation commenced, the Gender Policy did "not explicitly state that the Department cannot issue a passport containing an alternative gender marking" and never "contemplate[d] the existence of a gender other than male or female." (Br.App'x7–8) Because the Passport Act does not grant the State Department authority to deny Dana's application on the ground that they truthfully listed "Intersex" rather than "M" or "F" on the passport application, the district court's order should be affirmed.

B. In Any Event, the State Department Has Waived Any Argument That It Acted within Its Statutory Authority under the Passport Act

The Federal Rules of Appellate Procedure require an appellant's opening brief to set forth the "appellant's contentions and the reasons for them, with citations to

the authorities and parts of the record on which the appellant relies . . . ." Fed. R. App. P. 28(a)(8)(A); *see also* 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3974.1 (4th ed.). "It is well-settled that '[a]rguments inadequately briefed in the opening brief are waived.'" *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998)); *see also, e.g.*, *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007); *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004) (quoting *Murrell v. Shalala*, 43 F.3d 1388, 1930 n.2 (10th Cir. 1994)).

Although the district court conducted an in-depth analysis regarding the scope of the Secretary's authority under the Passport Act before finding that the Secretary exceeded his statutory authority by withholding a passport from Dana in violation of the APA, the State Department does not brief, develop, or otherwise engage in any substantive argument that it acted in accordance with duly delegated powers by Congress under the Passport Act.[9] Therefore, the issue is waived by the State Department and the district court's judgment should be affirmed. *See, e.g.*, *Clark v.*

[9] Indeed, the State Department presents only one issue for this Court's consideration: "Whether the State Department's longstanding requirement that a passport identify the bearer's sex as either male or female is arbitrary and capricious." (Appellants' Br. 2; *see also infra*, Argument, Part II) At best, the agency gave the statutory-authority issue perfunctory treatment in two sentences, conclusorily and erroneously claiming that the district court "conflat[ed] two separate inquiries" and that "reversing the district court's arbitrary-and-capricious holding also disposes of its ruling that the Department had exceeded its statutory authority . . . ." (Appellants' Br. 29)

Colbert, 895 F.3d 1258, 1265 (10th Cir. 2018) ("By offering an incomplete challenge to the district court's analysis, [the appellant] has effectively abandoned his appeal of its ruling."); *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("An issue or argument insufficiently raised in the opening brief is deemed waived."); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002) (deeming an argument consisting of a conclusory statement and unhelpful citations to be waived for failure to brief); *cf. United States v. Harrell*, 642 F.3d 907, 918 (10th Cir. 2011) ("[A]rguments raised for the first time in a reply brief are generally deemed waived.").

II. THE STATE DEPARTMENT'S ACTIONS ARE ARBITRARY AND CAPRICIOUS

In addition to holding that the agency exceeded its authority under the Passport Act, the district court separately determined the State Department's decisionmaking process for the binary-only gender policy was arbitrary and capricious. A court reviewing agency action under the "'arbitrary and capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d at 1574 (citation omitted). Agency action should be set aside "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the*

U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983). "In addition to requiring a reasoned basis for agency action, the 'arbitrary or capricious' standard requires an agency's action to be supported by the facts in the record." *Olenhouse*, 42 F.3d at 1575.

In conducting its APA review, the district court focused on the administrative record before the agency at the time of the decision. Contrary to the State Department's assertion that the district court "subjected [the agency] to exacting scrutiny" (Appellants' Br. 17), the district court properly applied the *State Farm-Olenhouse* review standard to conclude that the binary-only policy was "not the product of reasoned decision making." (Br.App'x7) Importantly, a court must intervene "if the court becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied,* 403 U.S. 923 (1971). With rampant danger signals throughout the administrative record, the State Department's decision to deny Dana's passport application was arbitrary and capricious in violation of the APA.

A. The State Department Failed to Provide a Reasoned Basis for Denying Dana's Passport Application

1. Compelling a passport applicant to select an incorrect gender cannot be reconciled with the agency's goal of accuracy

Understandably, the State Department seeks to "ensure that the information contained in the U.S. passport is *accurate and verifiable*, and thus to ensure the integrity

of the U.S. passport of identity and citizenship." (App'x84 (emphasis added)) Yet, the binary-only gender policy as applied to Dana—a person who is neither male nor female—undermines the agency's interest in accuracy. Specifically, the State Department's action forces Dana to arbitrarily designate an inaccurate binary gender on their passport application despite the agency having acknowledged that "there are individuals whose gender identity is neither male or female" (App'x86), and that some people are "born with [intersex traits] that [do] not fit typical definitions of male or female." (7 FAM § 1350 App. M; App'x94)

The process for securing a U.S. passport illuminates the agency's lack of reasoned decisionmaking in rejecting Dana's application. In order to obtain a passport from the State Department, a first-time applicant must submit—among other things (*see supra*, Statement of the Case, Part II.B)—"a written application which shall contain a true recital of each and every matter of fact," which "shall be duly verified" by oath. 22 U.S.C. § 213. An applicant born in the United States "generally must submit a birth certificate." 22 C.F.R. § 51.40. And an applicant must also establish identity "by submission of a previous passport, other state, local or federal government officially issued identification or photograph, or other identifying evidence which may include an affidavit of any identifying witness." *Id.* § 51.23.

For individuals whose gender is not accurately reflected on evidence submitted to the agency, the State Department's FAM dictates that such evidence submitted to the agency is not dispositive as a matter of identity. The applicant may "request[] a

gender on the passport application different from the one reflected on some or all of the submitted citizenship and/or identity evidence." (7 FAM § 1310(a) App. M; App'x88) For such passport applications, medical certification by a licensed physician is to be "the *only* documentation of gender change" required (*id.* § 1310(e)), and, if all other criteria are met,[10] "a full validity U.S. passport will be issued reflecting a new gender." (*Id.* § 1320(b)(1); App'x90)

Dana requested an accurate passport reflecting their nonbinary gender identity by writing "Intersex" on the application and requesting a gender marker other than "M" or "F." (App'x51) In support of their request, and in adherence to the FAM, Dana provided medical certification from multiple licensed VA physicians, confirming that Dana is intersex and neither male nor female. Dana also submitted their amended birth certificate that lists their sex as "unknown." (App'x54) Nevertheless, the State Department rejected Dana's application, insisting that Dana arbitrarily select either "M" or "F" to obtain a passport when, for them, neither would be accurate.[11] "This agency action cannot be reconciled." *Olenhouse*, 42 F.3d at 1582.

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[10] But for their inability to select "M" or "F" on their passport application, "[i]t is undisputed that in every other respect Dana is qualified to receive a passport." (Br.App'x14)

[11] Further, Dana could be exposed to criminal penalties for dishonesty if they arbitrarily select "M" or "F" on the application as the State Department suggests. Every "passport applicant must truthfully answer all questions" on the form and a "person providing false information as part of a passport application . . . is subject to prosecution under applicable Federal criminal statutes." 22 C.F.R. § 51.20(b); *see also,*

(footnote continued)

As the district court correctly concluded, "requiring an intersex person to misrepresent their sex on this identity document is a perplexing way to serve the Department's goal of accuracy and integrity." (Br.App'x25) There is no reasoned basis for compelling Dana to be untruthful about their gender in order to obtain a passport. *Clark Cnty., Nev. v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008) (finding that an agency's "determinations do not satisfy the [] reasoned decisionmaking requirement" where there is a "lack of any coherent explanation"). "[T]he reason" that the State Department "gave for [the agency's] action . . . makes no sense." *New England Coal. on Nuclear Pollution v. Nuclear Regulatory Comm'n,* 727 F.2d 1127, 1130–31 (D.C. Cir. 1984) (Scalia, J.).

2. The State Department's database-matching justification is not the product of reasoned decisionmaking

The State Department uses gender as a "vital data point" for "performing the adjudication of passports" (App'x85), and it claims to "rel[y] on the databases of other federal agencies and from federal and state law enforcement authorities" in the adjudication of passports. (*See* Appellants' Br. 8 (citing App'x85)) The database-matching justification, however, is not the product of reasoned decisionmaking because the agency need not jettison its regulations or established procedures for *verifying* identity in order to issue Dana an accurate passport. Further, the agency's

(footnote continued from previous page)
e.g., 18 U.S.C. § 1542 (imposing criminal sanctions for willfully and knowingly making any false statement in an application for passport).

assertions about comparing gender biodata between independent computer systems for law enforcement purposes are not "supported by the facts in the record." *Olenhouse*, 42 F.3d at 1575.

The introduction of a third gender option does not impede the agency's goal of "identify[ing] persons ineligible for a passport." (App'x85) An applicant like Dana must still follow existing regulations to establish citizenship, 22 C.F.R. § 51.40–51.42, and identity, *id.* § 51.23. In addition, the Gender Policy sets forth existing procedures for the agency to verify identity when an applicant "requests a gender on the passport application different from . . . some or all" underlying documents, such as birth certificates, driver's licenses, or state IDs. (7 FAM § 1310(a) App. M; App'x88) Importantly, Dana does not suggest the agency should dispense with these existing protocols, including use of the sex field to compare evidence submitted to the agency with government systems to identify "[i]ndividuals who may not be entitled to passports[.]" (App'x85 (citing applicants subject to "felony arrest warrants," "criminal court orders," and "requests for extradition")) The State Department may apply its existing policy and protocols and, as with any other individual whose gender is not accurately reflected on their government identification, verify identity and eligibility based on the totality of the evidence.

The agency's "matching" justification is also unsupported by—and even contrary to—the administrative record. Gender-marker discrepancies *already* exist between the State Department's systems and other third-party databases. The Gender

Policy expressly acknowledges that state law varies as to whether underlying government identity documents are corrected with a gender change, thus accounting for mismatches in the gender field. (7 FAM § 1320(a)(2) App. M; App'x89) The State Department does not explain why it would be precluded from employing the existing process for binary transgender or intersex applicants, whose documents may not match.

The State Department's database matching concept also makes little sense when the agency told Dana they could select either binary gender, which may or may not correspond to underlying databases. As the district court observed, "the Department undermined its purported rationale when it informed Dana that Dana could receive a male passport if Dana provided a physician's letter attesting to that gender, even though Dana's Colorado driver's license listed Dana's gender as female." (Br.App'x22) "By allowing this means of gender designation on the passport, the Department made it apparent that it did not actually rely on other jurisdiction's gender data to verify passport applicants' identities to the extent it argued." (*Id.*)

Even assuming other government systems utilize only "M" or "F" gender markers (which is no longer true for some state databases), adding an "X" gender maker to an agency system does not interfere with State Department systems *receiving* information from other government databases to compare the gender field to the information collected from the passport applicant. (*See, e.g.*, App'x47 ("[A] field left blank in the system is assumed to reflect the particular datum is unknown or

unrecorded" and "not every law enforcement record from which the data is input to this system designates an individual's sex.")) Any mismatch is flagged—whether an M/F or X/M/F disparity—ensuring that the underlying application receives more scrutiny. In other words, a disparity in the gender field may in fact aid the State Department in identifying individuals who are not entitled to passport applications. (*See* App'x42 (demonstrating that the sex field is only one of several data points "such as name, date of birth, and place of birth" used during the adjudication process))

The State Department further speculates that introducing a third gender marker "could introduce verification difficulties," may "complicate" data sharing, and "likely cause" operational issues for third-party government bodies, as well as public and private institutions. (App'x85) Setting aside the fact that these third-party entities are not participants in this litigation, the State Department's assertion—without evidence in the administrative record—relies upon sweeping assumptions about technical specifications of third-party computer systems. Such threadbare conjectures not supported by the record and the "mere possibility fall[] short of the appropriate [APA] standard." *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1152 (10th Cir. 2016).

3. The State Department ignores international standards allowing an "X" gender marker on passports

Reasoned decisionmaking under the APA also requires an agency to explain departures from past practice and consider viable alternatives. *State Farm*, 463 U.S. at

43, 51. Yet, the State Department eschewed its responsibility to provide Dana with a considered adjudicatory process to obtain a valid and accurate passport, where the international standards that form the basis for agency policy recognize three gender options: "M," "F," or "X."

The content, design, and format of U.S. passports adhere to standards set forth by the ICAO. ICAO requires all member states, including the United States, to issue "passports in accordance with Doc 9303" (Supp.App'x56)—a document developed by ICAO's Technical Assistance Group, comprised of government officials who specialize in the issuance and border inspection of passports.

When ICAO added sex as a required data element in 1976, "the Department added a field labeled 'SEX (M-F)'" to be "[i]n conformity with" the "international standard." (AR 88) "At the time there was no consideration given to permitting the use of a third sex marker, inasmuch as ICAO's specifications did not permit one." (*Id.*) In 1999, ICAO added a third designation ("X") for the sex field, and several countries now use this gender marker on passports "to designate a sex other than male or female." (Supp.App'x57 (recognizing that "Australia, Bangladesh, Denmark, Malta and New Zealand fall into this category"))

When Dana submitted their passport application, Dana requested an "X" gender marker specifically because the designation conformed to ICAO standards. (*See, e.g.*, App'x53) But, despite having earlier adopted ICAO standards, the State Department departed from its past practice in declining to offer an "X" marker, and

"does not explain its departure from adherence to this standard." (Br.App'x24) In other words, the State Department added sex as a field in U.S. passports because ICAO required it, and limited that field to "M" or "F" because those were the only two ICAO-approved options at the time. Now that "X" has been added as an available option for gender on passports, however, the State Department departs *sub silentio* from a viable solution approved by the same security experts who apparently prompted the United States to include sex on passports in the first place.

In *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Auto Insurance Co.*, the Supreme Court highlighted a similar inadequacy when the National Highway Traffic Safety Administration failed to consider whether airbag technology could effectively meet the agency's desired safety standards. 463 U.S. at 46–57. In finding the agency's decision to be arbitrary and capricious, the Court did not focus on whether airbags were a desirable safety improvement, but instead focused solely on the fact that the agency "apparently gave no consideration whatever" to the viability of an airbag-only requirement. *Id.* at 46. The Supreme Court faulted the agency for failing to examine the "relevant data," including "a technological alternative within the ambit of the existing standard." *Id.* at 43, 51.

Here, the State Department failed to consider an existing nonbinary gender option sanctioned by ICAO. The administrative record is devoid of any evidence that the agency sought to examine the policies of the countries that offer "X" on their passports, to evaluate whether those jurisdictions encountered any unique security

concerns, to consult with stakeholders in other federal agencies, or even to gauge the benefits and burdens associated with adopting a new gender option on U.S. passports.[12] Contrary to the agency's contentions, the district court did not "displac[e] the State Department's judgment about the appropriate content of a passport with its own" (Appellants' Br. 1); rather, the district court examined the administrative record to see whether—in the context of a specific request by a nonbinary intersex passport applicant—the agency had genuinely considered the issue. It did not. "[T]he failure of an agency to consider obvious alternatives has led uniformly to reversal." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 & n.46 (D.C. Cir. 1987).

4. The State Department did not examine all relevant factors in its decisionmaking

The State Department's actions are also arbitrary and capricious because it failed to consider several other important aspects of the problem. *See United States v. Burlington N.R.R. Co.*, 200 F.3d 679, 689 (10th Cir. 1999). Here, at least two other relevant factors warranted consideration: the issuance of identity documents reflecting a nonbinary gender marker by several U.S. states, and the agency's recognition of foreign passports bearing the "X" gender marker. The State Department failed to examine these issues.

[12] As explained below (*see infra*, Argument, Part III.C.1), the State Department's "burdens" relate to a system upgrade, introduced via extra-record evidence after the entry of final judgment.

Before denying Dana's passport application a second time, the State Department learned that several states had begun to authorize identity documents reflecting a gender marker other than male or female. (*See, e.g.,* App'x84 ("The Department is aware that in a handful of individual cases in recent months, a few vital records have issued amended birth certificates in a third sex, and that a very small number of state courts have issued court orders recognizing a sex change to a sex other than male or female.")) This was not "'new' evidence outside the administrative record." (*See* Appellants' Br. 22) Legal recognition of nonbinary gender had already commenced in the United States—and several other jurisdictions were poised to (and did) follow.

During oral argument for *Zzyym I*, the district court raised the then-hypothetical question about how the agency might respond, and counsel for the State Department admitted that he was "not sure how the State Department would handle that situation." (*See* Supp.App'x18, Hr'g Tr. 16:9-13, July 20, 2016[13] ("THE COURT: "If [Dana] goes back and gets a driver's license that says "intersex," does that make all well, right? Well and right with the world." MR. PARKER: "Your Honor, I'm not sure how the State Department would handle that situation . . . .")) As foreshadowed by the district court, an "X" gender marker on driver's licenses soon followed, and

[13] The full transcript for the July 20, 2016, hearing appears in the district-court record at Document 51.

Dana now has a Colorado driver's license with an "X" marker. (*See supra* notes 5–6) The impending changes were noted by the State Department, but relegated to a footnote in the administrative record when it again denied Dana's passport application on May 1, 2017.[14] (Supp.App'x53, at n. 1 (expressly referencing Oregon and California); *see also* AR 192–218)

"An agency does . . . have an obligation to deal with newly acquired evidence in some reasonable fashion." *Zen Magnets*, 841 F.3d at 1150. "In general, where there is a known and significant change or trend in the data underlying the agency decision, the agency must either take that change or trend into account, or explain why it relied solely on data pre-dating that change or trend." *Id.* 1149.

The trend here was apparent. Despite knowing that courts were issuing nonbinary gender change orders, vital records offices were issuing amended birth certificates for people who are neither male nor female, *and* having notice that some U.S. states would soon "issue identification cards with a third gender option" (Br.App'x23), the State Department "[i]gnore[d] the reality that some American

[14] The district court even inquired whether remanding the case, yet again, to consider these questions would be beneficial to the agency. The State Department declined the invitation. (Supp.App'x41–43,46 (Hr'g Tr. 22:1-19, 23:22-24:7, May 29, 2018)) Counsel also signaled remand would be a useless exercise. (Supp.App'x46 (Hr'g Tr. 27:16-20, May 29, 2018) (MR: PARKER: "I don't think it's clear that a person in Oregon could receive a passport with—identifying the gender as X. In fact, I think that it's clear at this point that the state department only issues passports with an M or F gender marker."))

passport applicants will have gender verification that exclusively list a gender that is neither female nor male"—just as Dana now has. (*Id.* at 23, 40)

The State Department also failed to consider the fact that the federal government permits foreign nationals who have the gender marker "X" listed on their passports to freely enter and exit the United States. Notwithstanding the forced binary-only marker on visa applications, foreign-issued "X" passports are recognized, inspected, and processed at the point of entry by U.S. border officials. (*See* Supp.App'x56–57) Curiously, however, the agency has denied a U.S. citizen, simply because of their gender, the same freedom to travel abroad. These factors should have been addressed through a reasoned decisionmaking process.

B. The State Department Ignored Its Own Policy Without Explanation

As the district court stated, "[a]gency action is arbitrary and capricious if it is not the product of reasoned decision making." (Br.App'x20) Ignoring agency regulations, policies, and procedures is exactly the type of arbitrary and capricious decisionmaking that runs afoul of the APA. An agency cannot change its policies, without first "supply[ing] a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." *Greater Bos. Television Corp.*, 444 F.2d at 852; *see also Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1327 (10th Cir. 2007). To satisfy the "reasoned analysis" standard, an agency first must "display awareness that it is changing position." *FCC v. Fox Television Stations, Inc.*, 556

U.S. 502, 515 (2009). Once the agency has identified a conflicting past practice, it must suitably justify any deviation. *Greater Bos. Television Corp.*, 444 F.2d at 852 ("[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.").

1. The State Department departs from its deference to medical standards without awareness or providing good reasons for changing course

The State Department ignores its long and abiding deference to medical standards of care for transgender and gender nonconforming individuals. Avowedly, "the Department lacks the medical expertise to assess whether an individual has had 'appropriate' clinical treatment to warrant the issue of an identity document in the new sex." (App'x86) It is, thus, unremarkable that the agency expressly adopted "new policy and procedures" based on the "standards and recommendations" of "the WPATH, recognized as the authority in its field by the American Medical Association (AMA)." (7 FAM § 1310(b) App. M; App'x88; *see also* AR 89, 120, 122) The WPATH Standards of Care are "flexible clinical guidelines" for health professionals (App'x104), and recognize that "[t]reatment is individualized." (App'x107) "Therefore, since 2010, the Department has relied on the signed certification of a licensed physician that the applicant has had appropriate treatment . . . [and] the Department does not take a position on what treatment is 'appropriate' for transition[.]" (App'x86)

The WPATH Standards of Care are reflected in the Gender Policy, whereby the agency uses medical certification in order "to conclude that the individual has transitioned to the new sex, and therefore the Department may issue a passport in the new sex." (*Id.*; *see also* 7 FAM § 1310(e) App. M; App'x88 ("Medical certification . . . is the **only** documentation of gender change required.")) On its face, this Gender Policy should apply equally to individuals like Dana, who are now intersex, notwithstanding identification documents indicating M or F. Thus, the State Department was required to either adhere to its Gender Policy, and the WPATH Standards of Care it adopted, or acknowledge departure from its stated rules and provide a reasoned basis for a change in its Policy. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016); *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The State Department did neither, therefore its action was arbitrary and capricious.

Here, the State Department fails to demonstrate "an awareness" that it has taken a position contrary to WPATH Standards of Care, as incorporated by the FAM. *See Fox*, 556 U.S. at 515. Despite conceding that "there are individuals whose gender identity is neither male nor female" (App'x86), the State Department claims a supposed lack of "medical consensus" precludes nonbinary people from securing a passport with an accurate gender marker. This ignores that the WPATH Standards of Care used for binary transgender people unequivocally applies to individuals who "transcend a male/female binary." (App'x111) In fact, those Standards of Care "recognize[] that there is a spectrum of gender identities, and that choices of identity

limited to Male or Female may be inadequate to reflect all gender identities: *an option of X or Other (as examples) may be advisable*." (Supp.App'x37 (emphasis added))

The State Department's assertion that "there is no consensus in the medical community" regarding appropriate treatment "when a person's gender identity is something other than male or female" (App'x87), is also directly refuted by the WPATH Standards of Care. (Supp.App'x37) Yet, for nonbinary passport applicants, the State Department ignores its historical deference to WPATH clinical guidelines without explanation and, further, deviates from its practice of relying upon "certification [from] a licensed physician that the individual's treatment is appropriate" in order to conclude that "alignment is achieved."[15] (App'x86) In other words, while simultaneously professing its "lack of medical expertise" and claiming that it takes "no position" on appropriate treatment, the State Department has carved out an exception to its Gender Policy to assert that medical certification by Dana's VA physicians "reflects only the views of the individual doctor who signed them, and are not founded in a common medical understanding[.]" (App'x87) The State Department either ignores or lacks awareness that it has deviated from recognizing WPATH Standards of Care as "the best available science and expert professional consensus." (App'x103)

[15] Although the agency is entitled to change course by providing a reasoned explanation for the change, the State Department cannot "depart *sub silentio* or simply disregard rules that are still on the books." *Fox*, 556 U.S. at 515.

2. The agency does not explain why it ignores existing policy for passport applicants who are intersex

The State Department's actions are arbitrary and capricious because the agency ignores definitive, on-point Gender Policy procedures—without any explanation, rationale, or even acknowledgment that such procedures exist. *See Encino Motorcars*, 136 S. Ct. at 2126. Specifically, the agency disregards its own procedures applicable to intersex persons who seek an accurate gender maker on their passports.

Within the Gender Policy, the State Department reserves a section for people like Dana who were "born with [intersex traits] that [do] not fit typical definitions of male or female." (7 FAM § 1350 App. M; App'x94) As with transgender applicants, a gender designation on government documents submitted as proof of identity and/or citizenship for individuals who are intersex is not dispositive of what gender appears on a passport. The Gender Policy mandates reliance only upon the gender from the applicant's medical certification (*id.* § 1350(b)), *otherwise* the designation on "birth documentation will determine the gender to be listed in the passport." (*Id.* § 1350(c)) Even if the State Department sought to tie Dana's gender designation on a passport to an underlying government identity document, the policy requires the agency to use Dana's birth certificate—not Dana's driver's license.

Here, the State Department ignores both Dana's medical certification by Veteran Affairs' physicians attesting that Dana is intersex and Dana's birth certificate, which lists "Unknown" in the sex field. (App'x54; *see also* AR 167 ("Of course, we will

continue to accept an amended birth certificates noting gender change with the required physician certification statement."}) Regardless whether the agency uses section 1350(b) or 1350(c) to process Dana's application, the gender marker should be a designation *other than* "M" or "F." The State Department cannot jettison its own policy, as a matter of agency discretion, without explanation. The agency's unexplained deviation from the Gender Policy renders its actions arbitrary and capricious. *See Fox*, 556 U.S. at 515.

C. The State Department Cannot Cure APA Deficiencies with Post-Hoc Rationalizations

"[T]he grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record." *Olenhouse*, 42 F.3d at 1575. In considering whether the agency took a "hard look" at the problem, a court may only consider the agency's reasoning at the time of decisionmaking, excluding post-hoc rationalizations offered by counsel in briefs or argument. *Utahns*, 305 F.3d at 1165 (citing *Olenhouse*, 42 F.3d at 1565). Ultimately, a court "may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015).

1. The State Department cannot cure record deficiencies related to costs through extra-record evidence introduced after final judgment

Without any support in the administrative record, the State Department claims that "significant time and cost[s]" (Appellants' Br. 25–26) of upgrading agency

systems to support a gender marker other than "M" or "F" as another reason for retaining its binary-only gender policy. (App'x87) The State Department did not engage in "a level of effort (LOE) estimation on the time and cost" for removing technological barriers to allow a third option for gender on U.S. passports. (*Id.* at 86) Nor did the agency proffer an informal assessment regarding the financial expenditures or resources required to upgrade agency systems. Far from "consider[ing] all important aspects of the problem before it" (Br.App'x20), the State Department resorted to a broad and unsupported generalization that the cost and effort of implementing a viable solution is "anticipated to be considerable." (App'x87; *see also* Appellants' Br. 26 ("[T]he Department did not initially quantify these *obvious* costs . . . .") (emphasis added))

Here, the State Department cannot make up for an administrative record devoid of any support for its claim by providing a post-hoc cost-benefit rationale. (Br.App'x27 (noting "the Department's rational[e] here is the product of guesswork rather than actual analysis.")) The absence of quantifiable data, thoughtful deliberation, or "*even an attempt* at determining the time, cost, or coordination necessary," *id.* (emphasis added), in the administrative record means the agency omitted "an essential component of reasoned decisionmaking under the Administrative Procedure Act." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 733 (D.C.

Cir. 2016) (Kavanaugh, J., dissenting).[16] Thus, the district court correctly determined that the State Department's actions were arbitrary and capricious.

The State Department's "explanation of the burdens" associated with upgrading its systems to support a gender marker other than "M" or "F" on U.S. passports are outside the administrative record. (*See* Appellants' Br. 26 (citing App'x225–30)) Rather than engage in reasoned analysis of costs in the weeks or months leading up to the agency decision on May 1, 2017, the State Department first disclosed its estimated costs of "twenty-four months and $11 million," along with attendant "burdens," by declaration in support of its motion to stay pending appeal on December 13, 2018—nearly 19 months after final agency action. (App'x225–30) "But this manner of tactical litigation maneuvering—of creating a *post hoc* evidentiary record before the trial court that was clearly missing in the record before the administrative agency—has been soundly rejected by both this court and the Supreme Court." *Sierra Club v Bostick*, 539 Fed. Appx. 885, 900 (10th Cir. 2013).

2. The agency never invoked foreign policy or national security as a basis to deny Dana a passport

The State Department likewise never raised foreign policy or national security as a justification for precluding a third gender option on passports in its administrative

[16] Additionally, the State Department ignored the costs to nonbinary passport applicants caused by its refusal to upgrade its systems. *See Mingo Logan*, 829 F.3d at 733 (Kavanaugh, J., dissenting) ("By ignoring costs, EPA in essence discounted the costs to humans all the way to zero.").

record. (*Compare with* App'x84–87; *see also supra*, Statement of the Case, Part III.B (describing the five justifications in the agency's Justifications Memo)) Instead, in its Justifications Memo, the agency focused solely on reasons related to the process of verifying a passport applicant's gender through supporting application materials and the agency's computer systems.[17]

The State Department cannot interject reasons outside the administrative record. *See Citizens*, 401 U.S. at 420. Yet, contrary to this clearly established rule, the State Department devotes three pages of its opening brief, and at least a dozen other references, to purported "foreign policy interests" and "national security concerns." (*See, e.g.*, Appellants' Br. 26–29) And included in the State Department's Corrected Appendix and cited throughout its brief are declarations that surfaced for the first time during the stay proceedings—more than two months after the entry of final judgment. (*See* App'x219–24 (Risch Decl.); *id.* at 225–31 (Reynolds Decl.)) This "[a]ggressive use of extra-record materials . . . run directly counter to the admonitions of the Supreme Court." *Am. Mining Congress v. Thomas*, 772 F.2d 617, 626 (10th Cir. 1985).

[17] During the years of litigation in this case, the State Department has explained its reasoning for maintaining its binary-only gender policy at multiple junctures—including during initial proceedings before the district court (Dist. Ct. Doc. 35); during oral argument (Dist. Ct. Doc. 49); on remand (Dist. Ct. Docs. 55, 64) and in briefing following remand (Dist. Ct. Doc. 68). The agency never raised a single foreign policy or national security concern related to the issuance of a one-off passport to Dana.

Even if such post-hoc rationalizations were permitted, the declarations pertain solely to an illusory remedy—not to the merits of the binary-only gender policy itself. Indeed, the State Department (not the district court)[18] first introduced the so-called option for a "one-off" passport to Dana in lieu of upgrading its systems. (*See* App'x227 ("[Consular Affairs] has considered the possibility of printing a single ePassport with an 'X' sex marker as a 'one-off,' outside of the normal processes. It appears that it is possible to override and incorporate 'one-time' modifications to certain systems to change the sex marker in the issuance system's database, to an 'X.'")) Then, rebutting its own proposal, the State Department raised foreign-policy and national-security concerns because other countries would not have notice of a passport differing from published policy. (*See* Defs.' Mot. to Stay 7–10, Dec. 3, 2018 (Dist. Ct. Doc. 98))

The State Department provides no evidence to support these manufactured concerns, relying entirely on assertions in a declaration submitted with its motion to stay the district court's injunction. (*See* App'x220–23) These arguments are impermissible extra-record evidence and, therefore, not appropriately before this Court. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) ("[A] party

[18](*See* Appellants' Br. 26 (erroneously contending that the "district court . . . suggested that the Department could. . . issu[e] Zzyym a 'one-off' passport with a third designation"))

may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.").

CONCLUSION

For the foregoing reasons, Dana respectfully requests that the district court's final judgment dated September 19, 2018 be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Counsel request oral argument. Counsel believe that this Court's disposition of this case would be aided by oral presentation to this Court.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 12,440 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) and 10th Cir. R. 32 because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that (1) all required privacy redactions have been made; (2) any paper copies of this document submitted to the Court are exact copies of the version filed electronically; and (3) the electronic submission was scanned for viruses and found to be virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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