

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:15-cv-02362-RBJ

DANA ALIX ZZYYM,

Plaintiff,

v.

REX W. TILLERSON, in his official capacity as the Secretary of State; and,
SHERMAN D. PORTELL, in his official capacity as the Director of the Colorado
Passport Agency for the United States Department of State,

Defendants.

**SUPPLEMENTAL COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER
RELIEF**

Plaintiff Dana Alix Zzyym (“Dana” or “Plaintiff”), by and through the undersigned attorneys, files this Supplemental Complaint for Declaratory, Injunctive and Other Relief against Defendants Rex W. Tillerson, in his official capacity as the Secretary of State of the United States, and Defendant Sherman D. Portell, in his official capacity as the Director of the Colorado Passport Agency for the United States Department of State (jointly, “Defendants” or “State Department”), pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, and alleges as follows:

INTRODUCTION

1. This is an action to hold unlawful and set aside certain agency actions by the State Department that, in effect, continue to deprive Dana, a United States citizen and U.S. Navy veteran who was born intersex, of a U.S. passport for international travel

because Dana's gender is neither male nor female. By continuing to deny Dana a U.S. passport with a gender marker that respects Dana's identity, Defendants lock Dana within the confines of our nation's borders with no legal means to depart the United States.

2. After reconsideration ordered by this Court, the State Department's denial of Dana's passport application solely because Dana cannot accurately identify as either male or female violates constitutional guarantees of equality and liberty. Specifically, the Constitution prohibits the State Department from discriminating against Dana based on sex or because Dana is a member of a class of people who are neither male nor female; and prohibits the State Department from infringing upon Dana's fundamental rights and liberty interests, including the freedom to travel and right to define and express one's own identity, all without adequate justification.

3. Therefore, Plaintiff seeks injunctive relief and a judicial declaration that the State Department has exceeded its authority under the Administrative Procedure Act ("APA"), 5 U.S.C. §706(2) and has violated the Fifth Amendment to the U.S. Constitution through agency actions which occurred after October 25, 2015.

JURISDICTION AND VENUE

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1331 (federal question). This Court has jurisdiction to review final agency action pursuant to the APA, 5 U.S.C. § 702 ("[a] person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."). Plaintiff has exhausted all administrative remedies.

5. Venue remains properly vested in the District of Colorado pursuant to 28

U.S.C. § 1391(e) because Defendants are officers or employees of an agency of the United States acting in their official capacities and because this judicial district is where Defendant Portell resides, where a substantial part of the events or omissions giving rise to the claim occurred, and where Plaintiff resides and no real property is involved in the action.

6. This Court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief), and 5 U.S.C. §§ 701-706, for violations of the APA, 5 U.S.C. § 706, and because the State Department actions are contrary to the Fifth Amendment to the U.S. Constitution.

PARTIES

7. With the exception of Defendant John F. Kerry, the Parties to this action remain the same as they were upon commencement of this action on October 25, 2015.

8. Defendant Rex W. Tillerson is the duly appointed and confirmed Secretary of State for the United States. In this capacity, Defendant Tillerson has the authority to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic and consular officers of the United States, and by such other employees of the Department of State who are citizens of the United States as he may designate. 22 U.S.C. § 211(a). Defendant Tillerson is the head of the U.S. Department of State and responsible for setting and overseeing implementation of the policies and procedures employed by the agency and all its various subdivisions, including the Bureau of Consular Affairs. Defendant Tillerson, who succeeded John F. Kerry in office as Secretary of State on February 1, 2017, “is automatically substituted as

a party” pursuant to Federal Rule of Civil Procedure 25(d). Defendant Tillerson is sued in his official capacity.

PROCEDURAL BACKGROUND

9. On October 25, 2015, Dana commenced this action by filing a Complaint for Declaratory, Injunctive and Other Relief (“Original Complaint”) [Dkt. No. 1]. In the Original Complaint, Dana alleged that the Department of State’s denial of Dana’s passport application submitted on September 2, 2014 and the underlying collection of rules pertaining to gender within the Foreign Affairs Manual the Department claims requires it to only issue passports marked “M” for male or “F” for female (“Decision and Binary-Only Gender Policy” or “Policy”) was arbitrary and capricious, exceeded the Department of State’s delegated authority, and deprived Dana of due process and equal protection. Dana also requested a writ of mandamus to compel Defendants to process Dana’s passport application on an individualized, nondiscriminatory basis in a manner consistent with the applicable burden of proof. *Id.*

10. On March 18, 2016, Defendants filed a motion seeking judgment on the administrative record on Plaintiff’s claims pursuant to the Administrative Procedure Act, and dismissal of the remainder of the Complaint. [Dkt. No. 35].

11. On April 22, 2016, Dana filed an Opening Brief in Support of Declaratory, Injunctive Relief and Opposition to Defendants’ Motion for Judgment on the Administrative Record and Motion to Dismiss. [Dkt. No. 37].

12. After full briefing by the parties, oral argument on Defendants’ Motion was heard on July 20, 2016. [Dkt. No. 51].

13. On November 22, 2016, the Court issued an Order holding that Defendants' denial of Dana's passport application was arbitrary and capricious 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." Accordingly, the Court remanded the matter to the Department of State for reconsideration. [Dkt. No. 55].

14. The Court declined at that time to reach the constitutional questions raised by the Original Complaint in its Order, indicating it would not do so "unless and until it needs to." [Dkt. No. 55].

SUPPLEMENTAL STATEMENT OF FACTS

15. Paragraphs 10 through 40 of the Original Complaint are adopted here pursuant to Fed. R. Civ. P. 10(b) and 10(c).

16. On March 6, 2017, Plaintiff requested that the agency render a decision about Dana's pending passport application or, in the alternative, provide Dana with a temporary passport bearing an "X" or other third-gender marking in the sex field so that Dana could travel to Amsterdam, the Netherlands in April 2017 to participate in the Fourth International Intersex Forum ("4IIF Amsterdam") as a representative of Intersex Campaign for Equality (a/k/a OII-USA).

17. On or about March 15, 2017, Defendants refused to issue Dana a temporary or limited-validity passport reflecting a sex other than male or female. Instead, the State Department offered to issue Dana a limited-validity passport with the inaccurate "F" (female) gender designation. Defendants further declined to render a determination on the reconsideration of the binary-only gender policy and Dana's passport application

before May 1, 2017.

18. By refusing to issue a full-validity or temporary passport bearing an “X” or other third-gender marking on the sex field prior April 20, 2017, Defendants actions caused Dana to miss 4IIF Amsterdam. This was the second time since Dana’s original passport application in September 2014 (when Dana sought to travel to Mexico City to represent OII-USA in the ILGA World Conference), e.g., Dkt. No. 1, ¶¶ 23-24, 34, that the State Department’s actions effectively barred Dana from international travel.

19. Defendants’ unlawful actions are memorialized in letters between the parties, through respective counsel, dated March 6, 2017, March 15, 2017, and March 29, 2017.

20. On May 1, 2017, Defendants, after reconsideration pursuant to Court Order, denied Dana’s application for a full-validity passport bearing a gender marker other than “M” (male) or “F” (female) (“May 1, 2017 Denial”). See Letter from the State Department to Dana dated May 1, 2017. [Dkt. No. 57-1].

21. The May 1, 2017 Denial does not address the issues or questions outlined in the Court’s Order, or explain the basis for or importance of the Defendants’ male-or-female, binary-only gender policy.

22. The May 1, 2017 Denial constitutes final agency action subject to judicial review under the Administrative Procedure Act (“APA”).

23. Aside from Dana’s inability to select an “M” or “F” marker, Defendants did not identify any other issues or deficiencies on reconsideration of Dana’s passport application. None of the provisions in 22 C.F.R. § 51.60 apply. See 22 C.F.R. § 51.60

(setting forth reasons for mandatory and discretionary denials and restrictions of passports).

24. The grounds for refusal asserted by the State Department in its May 1, 2017 Denial do not relate to Dana's citizenship or allegiance, nor to criminal or unlawful conduct.

25. Dana does not seek to acquire a passport for an unlawful or improper purpose.

26. Dana cannot truthfully submit an application claiming to be either male or female. Therefore, resubmission of a passport application to the State Department is futile.

27. Defendants denied Plaintiff a passport on the basis of personal characteristics rather than area restrictions affecting all citizens. Other United States citizens who, unlike Dana, can accurately and truthfully choose an "M" or "F" gender marker, are permitted to and currently do travel internationally with valid U.S. passports listing a gender marker consistent with the holder's identity.

28. Defendants' continued refusal to issue Dana a passport bearing an accurate gender marker wholly deprives Plaintiff of access to any and all means of lawfully exiting the United States.

29. Dana's work with OII-USA continues to be severely and detrimentally impacted by the inability to travel internationally. Not only has Dana missed conferences in Mexico City and Amsterdam because of Defendants' actions, but Dana is precluded from attending future conferences without a passport, including but not limited to the

ILGA-Europe Annual Conference in Warsaw, Poland scheduled for November 1-4, 2017.

30. Defendants' male-or-female, binary-only gender policy is irrational in light of jurisdictions within the United States that permit a gender other than "M" (male) or "F" (female) on driver's licenses, state IDs, birth certificates, and other identity documents. For example, Oregon and the District of Columbia authorize and have issued driver's licenses and state IDs bearing an "X" in the sex field.

CLAIMS FOR RELIEF

COUNT VI: DEPRIVATION OF DUE PROCESS U.S. Const. Amend. V

(The State Department's Conduct Violates Plaintiff's Fundamental Right To Travel, And Fundamental Liberty To Make Personal Choices Central To Individual Dignity And Autonomy, Including The Right To Define and Express One's Own Identity)

31. Plaintiff incorporates by reference all of the preceding paragraphs of this Supplemental Complaint as though fully set forth herein.

32. The APA empowers the Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In addition, this Court has authority under 28 U.S.C. §

1331 and its traditional powers of equity to declare invalid and enjoin agency action that violates the Constitution.

33. Where a Complaint contends that agency action offends the Constitution, and for that reason should be set aside, the Court affords no deference to the agency but instead reviews the constitutional issues independently.

34. The Fifth Amendment to the United States Constitution provides that no person shall “be deprived of life, liberty, or property, without due process of law[.]” U.S. Const. amend. V. The Due Process Clause has a substantive component that provides heightened protection against government interference with fundamental rights and liberty interests.

35. The right to travel, including international travel, and freedom of movement without undue government restriction is one of the fundamental liberty interests protected by the Due Process Clause of the Fifth Amendment.

36. The State Department’s Decision and Binary-Only Gender Policy impermissibly infringe upon Plaintiff’s fundamental right to movement, including Plaintiff’s fundamental right to travel abroad.

37. The Fifth Amendment’s Due Process Clause also protects each person’s fundamental liberty to individual dignity and autonomy, including the right to define and express one’s own identity, to define one’s own concept of existence, and to make

intimate decisions concerning marriage, procreation, and family life, all without undue government interference.

38. A person's gender identity constitutes a core aspect of individual self-definition. The State Department's Decision and Binary-Only Gender Policy impermissibly interferes with the most intimate choices a person may make in a lifetime, including Plaintiff's right to existence and self-expression as a person who is neither male nor female. It would disparage Plaintiff's choice to live openly and authentically and diminish Plaintiff's personhood to deny Plaintiff this right.

39. When government deprives an individual of a fundamental right or substantially infringes upon a fundamental liberty interest, such government action may be sustained only upon a showing that it is, at the very least, substantially related to an important government interest, if not narrowly tailored to serve a compelling government interest. Here, the State Department's Decision and Binary-Only Gender Policy lack adequate tailoring and fail to serve even a legitimate governmental interest.

40. The State Department's Decision and Binary-Only Gender Policy violate Plaintiff's fundamental right to travel and impermissibly infringe upon Plaintiff's fundamental liberty interests in personal decision-making central to individual dignity and autonomy, in violation of the Fifth Amendment to the United States Constitution, and will

continue to do so if Plaintiff is not afforded the relief requested. Defendants' actions must therefore be set aside and permanently enjoined.

**COUNT VII:
DEPRIVATION OF EQUAL PROTECTION
U.S. Const. Amend. V**

**(The State Department's Conduct Discriminates Against Plaintiff
Based On Sex, Status As A Person Whose Gender Is Neither Male Nor
Female, And Exercise Of A Fundamental Right)**

41. Plaintiff incorporates by reference all of the preceding paragraphs of this Supplemental Complaint as though fully set forth herein.

42. The APA empowers the Court to "hold unlawful and set aside agency action, findings, and conclusions" that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2)(B). In addition, this Court has authority under 28 U.S.C. § 1331 and its traditional powers of equity to declare invalid and to enjoin agency action that violates the Constitution.

43. Where a Complaint contends that agency action offends the Constitution, and for that reason should be set aside, the Court affords no deference to the agency but instead reviews the constitutional issues independently.

44. The Fifth Amendment to the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. The Due Process Clause of the Fifth Amendment includes a guarantee

of equal protection equivalent to that expressly provided for under the Equal Protection Clause of the Fourteenth Amendment.

45. People such as Plaintiff, who are neither male or female, are similarly situated to people who are either male or female in all of the characteristics relevant to issuance of a passport by the State Department. Plaintiff, like other citizens or non-citizen nationals, may seek to travel abroad for job and business opportunities; for cultural, political and social activities; or for all the reasons any other person may have.

46. **Discrimination Based On Sex.** Defendants' Decision and Binary-Only Gender Policy discriminate against Plaintiff on the basis of sex, both facially and as applied, by barring Plaintiff from obtaining an accurate U.S. passport with a gender marker other than "M" (male) or "F" (female). For example, if Plaintiff were male, Defendants would have issued Plaintiff a passport.

47. Discrimination against an individual who is neither male nor female as such, just like discrimination against a woman as such, is discrimination based on sex. In denying a passport to Plaintiff following reconsideration as conveyed on May 1, 2017, the State Department relied upon sex-based considerations. Because of the State Department's rigid sex-based classification, Plaintiff, a person who is neither male nor

female, is precluded from obtaining a passport with a marker that properly indicates Plaintiff's sex.

48. The State Department's Policy is also impermissibly premised on assumptions, expectations, stereotypes, or norms about the nature of sex as a binary characteristic, either male or female.

49. The State Department has excluded Dana from obtaining a passport, even following reconsideration, because Plaintiff failed to conform to the sex-based stereotype that every individual is either male or female. That is, the State Department relies on an inaccurate assumption that sex is binary and that individuals cannot fall along (or outside of) a sex continuum, i.e., the false belief that all people are either exclusively men/male or exclusively women/female.

50. All sex-based classifications must be supported by an exceedingly persuasive justification and be substantially related to the achievement of that underlying objective.

51. The exclusion of individuals who are neither male nor female, such as Plaintiff, from passports unless they falsely assert that they are either male or female, cannot survive the heightened scrutiny required for sex-based classifications. The Policy is not even tailored to further a legitimate governmental interest.

52. **Discrimination Based On Status As Neither Male Nor Female.** On its face, the State Department's Decision and Binary-Only Gender Policy deny passports to Dana and the class of United States citizens whose sex is neither male nor female. Thus,

in addition to constituting discrimination based on sex, Defendants' Policy also targets people who do not fit in a male or female sex classification as a group.

53. The United States Supreme Court has not yet determined the level of scrutiny applicable for laws that classify persons for adverse treatment based on their status as people who cannot identify as male or female or their status as intersex with nonbinary gender. At the very least, such classifications must be rationally related to a legitimate government interest. Here, the State Department's Decision and Binary-Only Gender Policy lack even a rational relationship to a legitimate governmental interest.

54. **Discrimination With Respect To Fundamental Rights And Liberty Interests Secured By The Due Process Clause.** Defendants discriminate against Plaintiff with respect to Plaintiff's access to the fundamental right to travel and freedom of movement without undue government restriction and fundamental liberty interests in individual dignity and autonomy, including Plaintiff's right to self-definition and privacy.

55. Differential treatment with respect to exercise of fundamental rights and liberty interests subjects Defendants' conduct to strict or at least heightened scrutiny, which Defendants' conduct cannot withstand.

56. The State Department's Decision and Binary-Only Gender Policy deprive Plaintiff of equal protection and equal liberty and dignity without due process, in violation of the Fifth Amendment to the United States Constitution, and will continue to do so if

Plaintiff is not afforded the relief requested. Defendants' actions must therefore be set aside and permanently enjoined.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Issue a declaratory judgment that Defendants' denial of Plaintiff's application for a U.S. passport based on Plaintiff's inability to accurately select "M" (for "male") or "F" (for "female") violates Plaintiff's constitutional rights;

B. Permanently restrain or enjoin the State Department from relying upon its male-or-female, binary-only gender policy to withhold the requested passport from Dana or any other individual;

C. Award attorney's fees, costs, and expenses of all litigation in accordance with law, including the Equal Access to Justice Act, 28 U.S.C. § 2412; and

D. Grant all such other and further relief as the Court may deem just and proper.

Respectfully submitted this 3rd day of July 2017.

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