

Case No. 18-1453

---

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

DANA ALIX ZZYIM,

*Plaintiff-Appellee,*

v.

MICHAEL R. POMPEO, *et al.*,

*Defendants-Appellants.*

---

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

---

**Brief of Amici Curiae States of California, Colorado, Maine, Minnesota,  
Nevada, New Jersey, Oregon, Vermont and Washington in Support of  
Appellee**

---

ELLEN F. ROSENBLUM  
Attorney General of Oregon  
JONATHAN SCHILDT  
Assistant Attorney General  
1162 Court St. NE, Salem OR 97301  
(503) 378-4402  
jonathan.n.schildt@doj.state.or.us

XAVIER BECERRA  
Attorney General of California  
GABRIEL MARTINEZ  
Deputy Attorney General  
1515 Clay Street, 20<sup>th</sup> Floor  
Oakland, CA 94612  
(510) 879-0270  
Gabriel.Martinez@doj.ca.gov

PHILIP J. WEISER  
Attorney General of Colorado  
ERIC R. OLSON  
Solicitor General  
ROBERT DODD  
First Assistant Attorney General  
1300 Broadway, 10th Floor Denver,  
Colorado 80203  
(720) 508-6548  
Eric.Olson@coag.gov

*Additional Counsel on signature page*

**TABLE OF CONTENTS**

	<b>PAGE</b>
INTEREST OF AMICI CURIAE.....	1
ARGUMENT.....	2
I. The <i>amici</i> States, along with a growing number of states and local jurisdictions, provide identifying documents with a non-binary gender designation. ....	2
A. The <i>amici</i> States have added non-binary gender designations to identification documents with little administrative difficulty and without disrupting state operations. ....	6
B. In practice, state agencies, law enforcement departments, and private businesses across the country regularly interact with non-binary individuals and process their state identification documents accordingly. ....	9
II. The failure to recognize a non-binary gender classification on United States passports harms the interests of the <i>amici</i> States and their residents.....	15
A. The State Department’s refusal to recognize a non-binary gender creates the matching problems that it asserts it wants to avoid. ....	15
B. The State Department’s passport policy frustrates the <i>amici</i> State’s compelling interest in ensuring that their citizens have identifying documents that accurately reflect their gender. ....	17
CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE.....	21
CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS .....	22
CERTIFICATE OF SERVICE.....	23

**TABLE OF AUTHORITIES**

**PAGE**

**Statutes**

Cal. Gov’t. Code § 12525.5 (also referred to as AB 953) .....11  
 Cal. Health & Safety Code § 103425 et seq. (2018) .....4  
 Cal. Veh. Code § 12800(a)(2) (2019).....3  
 House Bill 1165 (Haw.).....4  
 House Bill 3534 (Ill.).....4  
 House Bill 421 (Md.).....4  
 House Bill 446 (N.H.).....4  
 House Bill 5505 (Conn.).....4  
 House Bill No. 2673, 79<sup>th</sup> Leg. (Ore. 2017) .....4  
 N.J. Stat. § 26:8-40.12 (2019).....4  
 N.M. Stat. § 24-14-25 (2019) .....4  
 S.B. 179 § 2(c) (Cal. 2017).....5  
 Senate Bill 1454 (Ariz.).....4  
 Senate Bill 2192 (Mass.).....4  
 Senate Bill 2203 (Mass.).....4  
 Senate Bill 429 (Haw.).....4  
 Senate Bill S56 (N.Y.) .....4

**Rules**

Cal. Code Regs. tit. 11, § 999.226 .....11  
 1 Colo. Code Regs. § 204-32:1 (2019).....3  
 5 Colo. Code Regs. § 1006-1:5 (2019).....4  
 Or. Admin. R. 735-062-0013 (2017).....3, 9  
 Wash. Admin. Code § 246-490-075 (2018) .....4

**Other Authorities**

*2016 AAMVA DL/ID Card Design Standard*, AMERICAN ASSOCIATION OF  
 MOTOR VEHICLE ADMINISTRATORS, [https://www.aamva.org/dl-id-card-  
 design-standard/](https://www.aamva.org/dl-id-card-design-standard/) (2016).....7  
*Application for Municipal ID Program*, [https://chicityclerk.s3.  
 amazonaws.com/s3fs-public/Chicago%20CityKey%20Final%  
 20Application%20Eng.pdf](https://chicityclerk.s3.amazonaws.com/s3fs-public/Chicago%20CityKey%20Final%20Application%20Eng.pdf).....4  
 Dan Carden, *Indiana Driver's Licenses now Offer 'X' Gender Option for  
 Non-binary Hoosiers*, NWI TIMES [https://www.nwitimes.com/  
 news/local/govt-and-politics/indiana-driver-s-licenses-now-offer-x-](https://www.nwitimes.com/news/local/govt-and-politics/indiana-driver-s-licenses-now-offer-x-)

gender-option-for/article\_7009d913-f93a-53b8-9d6f-dae15d734bbf.html (published March 11, 2019).....3

*Denver Jail Transgender Policy a National Model*, DENVER POST, <https://www.denverpost.com/2015/06/27/denver-jail-transgender-policy-a-national-model/amp/> (updated June 6, 2016) .....11

*Deschutes County Adult Jail Transgender Inmate Policy*, available at <https://sheriff.deschutes.org/CD-6-10-Transgender-Inmates.pdf>.....10

*FAQ: Non-binary Sex Identifier on Driver Licenses and Identification Cards*, COLO. DEP’T OF REV., <https://www.colorado.gov/pacific/dmv/faq-non-binary-sex-identifier-driver-licenses-and-identification-cards>..... 8, 9, 18

*Gender Designation Form*, MAINE BUREAU OF MOTOR VEHICLES, <https://www.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf>.....3

Ida Mojada, *California Rolls Out IDs With New Gender Option*, SF WEEKLY, <http://www.sfweekly.com/news/california-rolls-out-ids-with-new-gender-option/> (published Jan. 10, 2019) .....6

Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).....18

Kate Sosin, *Major Airlines Have Utterly Ignored Non-Binary IDs in Booking*, INTO, <https://www.intomore.com/impact/major-airlines-have-utterly-ignored-non-binary-ids-in-booking> (published November 8, 2018).....14

Lauren Feiner, *Apple, Amazon, Facebook and More than 50 other Companies Sign Letter Against Trump Administration's Proposed Gender Definition Changes*, CNBC, <https://www.cnbc.com/2018/11/01/companies-sign-letter-against-trumps-proposed-gender-definition-change.html>, (updated November 2, 2018).....13

*Machine Readable Travel Documents*, ICAO Document 9303, Part IV at 14 (7th ed. 2015), available at [https://www.icao.int/publications/Documents/9303\\_p4\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf).....8

*Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards*, DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES, <https://dmv.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and> (published June 23, 2017) .....3

*Mayor de Blasio, Speaker Johnson Announce Landmark Proposal to Make Birth Certificates More Inclusive to All Gender Identities*, <https://www1.nyc.gov/site/doh/about/press/pr2018/gender-identity.page> (published June 4, 2018) .....4

Michael Buckner, *Arkansas Issuing 'Gender Neutral' IDs to People, Policy in Effect Since 2010*, THV11 (CBS), <https://www.thv11.com/article/news/local/arkansas-issuing-gender-neutral-ids-to-people-policy-in-effect-since-2010/91-605215747> .....3

*Minnesota Offers Non-Binary Gender Option on REAL IDs*, KSTP (ABC) <https://kstp.com/news/minnesota-offers-non-binary-gender-options-real-id/5093121/> (published October 2, 2018).....8

*Multnomah County Sheriff's Office Transgender Booking Policy*, available at <https://s3-us-west-2.amazonaws.com/oregonknowledgebankmedia/other/Multnomah-sheriff-special-order-14-32.pdf>.....10

*Nevada Implements Gender-Neutral IDs; Nonbinary Gender X is now an option*, NEVADA DEPARTMENT OF MOTOR VEHICLES, <http://www.dmvnv.com/news/19001-gender-x-available.htm> (published April 22, 2019) .....3

*New License/ID Will Allow Third Gender Option Starting this Summer*, VERMONT DEPARTMENT OF MOTOR VEHICLES, <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer> (published March 13, 2019).....3

Paul Walsh, *Minnesota now offers 'X' for gender option on driver's licenses*, STAR TRIBUNE, <http://www.startribune.com/minnesota-now-offers-x-for-gender-option-on-driver-s-licenses/494909961/> (published October 3, 2018).....3

*Oregon Rule Advisory Committee on Non-Binary Licensing and Identification Meeting Minutes* (Oct. 17, 2016) .....9

San Francisco Police Department General Order § 5.22.....10

U.S. Census Bureau data available at <https://www.census.gov/quickfacts/fact/table/US/PST045218> .....5

*Updates on the Stop Data Collection System by the Cal. DOJ Justice Information Services Division to RIPA Board* (April 8, 2019), <https://oag.ca.gov/ab953/board> .....11

Zach Wichter, *U.S Airlines to Offer New Gender Options for Non-Binary Passengers*, N.Y. TIMES, <https://www.nytimes.com/2019/02/15/business/airline-travel-gender-choices.html> (published February 15, 2019).....13

## INTEREST OF AMICI CURIAE

The *amici* States submit this brief to help the Court understand the practical implications of non-binary gender identifiers on government-issued identification. Colorado resident Dana Zzyym applied for a passport that would reflect an undisputed fact—that Zzyym was born intersex and is neither male nor female. The U.S. Department of State (“State Department” or “Department”) denied the application for the sole reason that Zzyym did not designate “M” or “F” in the field asking for the applicant’s gender and instead identified as “intersex.” Although the Department stated that it would provide a passport listing Zzyym’s gender as “M” or “F,” the Department refused to provide a passport with an “X,” the marker recognized internationally for individuals whose gender is neither male nor female.

Zzyym challenged the State Department’s decision under the Administrative Procedure Act, and the district court concluded that the Department’s gender policy was arbitrary and capricious. In doing so, the district court rejected the State Department’s assertion, which it again advances on appeal, that it cannot include non-binary gender identifiers on passports because that would put the Department at odds with state and local jurisdictions. In fact, multiple states issue driver’s licenses and identifying documents recognizing a non-binary gender designation.

The *amici* States, including Zzyym’s home state of Colorado, recognize non-binary gender designations on driver’s licenses, identification cards, birth certificates, or a combination of those forms of identification. In the *amici* States, and in a growing number of states and local jurisdictions across the country, thousands of non-binary individuals now hold state driver’s licenses and other identification documents with a gender designation of “X.” They use those documents every day in interacting with state agencies, law enforcement, and all manner of private businesses. For the *amici* States, providing identification documents with non-binary gender designations has proved neither complex nor disruptive, while advancing the *amici* States’ interests to ensure the public safety and well-being of their residents. Further, the *amici* States have a compelling interest in ensuring that their residents, including Dana Zzyym, can obtain a passport that accurately reflects their gender.

## ARGUMENT

### **I. The *amici* States, along with a growing number of states and local jurisdictions, provide identifying documents with a non-binary gender designation.**

The *amici* States are among an increasing number of states that recognize non-binary gender designations on driver’s licenses, birth certificates, or both. The jurisdictions that recognize a non-binary gender designation on these identification documents include large and small states, and reflect a geographic cross-section of the country.

For driver’s licenses and equivalent identification cards, Arkansas, California, Colorado, Indiana, Maine, Minnesota, Nevada, Oregon, Vermont and the District of Columbia recognize a non-binary gender designation.<sup>1</sup> For birth certificates, California, Colorado, New Jersey, New Mexico, Oregon, and

---

<sup>1</sup> **Arkansas:** Michael Buckner, *Arkansas Issuing 'Gender Neutral' IDs to People, Policy in Effect Since 2010*, THV11 (CBS), <https://www.thv11.com/article/news/local/arkansas-issuing-gender-neutral-ids-to-people-policy-in-effect-since-2010/91-605215747> (updated October 18, 2018); **California:** Cal. Veh. Code § 12800(a)(2) (2019); **Colorado:** 1 Colo. Code Regs. § 204-32:1 (2019); **Indiana:** Dan Carden, *Indiana Driver's Licenses now Offer 'X' Gender Option for Non-binary Hoosiers*, NWI TIMES [https://www.nwitimes.com/news/local/govt-and-politics/indiana-driver-s-licenses-now-offer-x-gender-option-for/article\\_7009d913-f93a-53b8-9d6f-dae15d734bbf.html](https://www.nwitimes.com/news/local/govt-and-politics/indiana-driver-s-licenses-now-offer-x-gender-option-for/article_7009d913-f93a-53b8-9d6f-dae15d734bbf.html) (published March 11, 2019); **Maine:** *Gender Designation Form*, MAINE BUREAU OF MOTOR VEHICLES, <https://www.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf> (last visited April 24, 2019); **Minnesota:** Paul Walsh, *Minnesota now offers 'X' for gender option on driver's licenses*, STAR TRIBUNE, <http://www.startribune.com/minnesota-now-offers-x-for-gender-option-on-driver-s-licenses/494909961/> (published October 3, 2018); **Nevada:** *Nevada Implements Gender-Neutral IDs; Nonbinary Gender X is now an option*, NEVADA DEPARTMENT OF MOTOR VEHICLES, <http://www.dmvnv.com/news/19001-gender-x-available.htm> (published April 22, 2019); **Oregon:** Or. Admin. R. 735-062-0013 (2017); **Vermont:** *New License/ID Will Allow Third Gender Option Starting this Summer*, VERMONT DEPARTMENT OF MOTOR VEHICLES, <https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer> (published March 13, 2019); **District of Columbia:** *Mayor Bowser Announces Addition of Gender Neutral Identifier to Drivers Licenses and Identification Cards*, DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES, <https://dmv.dc.gov/release/mayor-bowser-announces-addition-gender-neutral-identifier-drivers-licenses-and> (published June 23, 2017).



Washington recognize a non-binary gender designation.<sup>2</sup> Municipalities, too, issue identification documents with a non-binary gender designations.<sup>3</sup> And the list of jurisdictions providing non-binary gender recognition continues to expand: legislation allowing for non-binary recognition on driver's licenses and/or birth certificates is currently pending in at least eight other states.<sup>4</sup> As of

---

<sup>2</sup> **California:** Cal. Health & Safety Code § 103425 et seq. (2018); **Colorado:** 5 Colo. Code Regs. § 1006-1:5 (2019); **New Jersey:** N.J. Stat. § 26:8-40.12 (2019); **New Mexico:** N.M. Stat. § 24-14-25 (2019) (Senate Bill 20, signed March 28, 2019); **Oregon:** House Bill No. 2673, 79<sup>th</sup> Leg. (Ore. 2017) (interpreted by Oregon Health Authority to be M, F, and X, at <https://www.oregon.gov/oha/PH/BIRTHDEATHCERTIFICATES/Pages/rules.aspx>); **Washington:** Wash. Admin. Code § 246-490-075 (2018).

<sup>3</sup> **City of Chicago:** *Application for Municipal ID Program*, <https://chicityclerk.s3.amazonaws.com/s3fs-public/Chicago%20CityKey%20—Final%20Application%20Eng.pdf>; **New York City:** *Mayor de Blasio, Speaker Johnson Announce Landmark Proposal to Make Birth Certificates More Inclusive to All Gender Identities*, <https://www1.nyc.gov/site/doh/about/press/pr2018/gender-identity.page> (published June 4, 2018).

<sup>4</sup> **Arizona:** Senate Bill 1454, <https://www.azleg.gov/legtext/54leg/1R/bills/SB1454P.pdf>; **Connecticut:** House Bill 5505, [https://www.cga.ct.gov/asp/CGABillStatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=HB5505](https://www.cga.ct.gov/asp/CGABillStatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB5505); **Hawaii:** Senate Bill 429, House Bill 1165, [https://www.capitol.hawaii.gov/measure\\_indiv.aspx?billtype=SB&billnumber=429](https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=429); **Illinois:** House Bill 3534, <http://www.ilga.gov/legislation/billstatus.asp?DocNum=3534&GAID=15&GA=101&DocTypeID=HB&LegID=120195&SessionID=108>; **Massachusetts:** Senate Bills 2192 and 2203, <https://malegislature.gov/Bills/191/S2203>; **Maryland:** House Bill 421, <http://mgaleg.maryland.gov/webmga/frmMain.aspx?id=HB0421&stab=01&pid=billpage&tab=subject3&ys=2019RS>); **New Hampshire:** House Bill 446, [http://gencourt.state.nh.us/bill\\_status/bill\\_docket.aspx?lsr=0762&sy=2019&txtsessionyear=2019&txtbillnumber=HB446&sortoption=&q=1](http://gencourt.state.nh.us/bill_status/bill_docket.aspx?lsr=0762&sy=2019&txtsessionyear=2019&txtbillnumber=HB446&sortoption=&q=1)); **New York:** Senate Bill S56, <https://www.nysenate.gov/legislation/bills/2019/s56>.

now, roughly 90 million people—over one quarter of the United States population—live in a jurisdiction that issues identification containing a non-binary gender designation.<sup>5</sup>

The available data reflect that thousands of citizens in the *amici* States now have identification documents with a non-binary designation. In Oregon, for example, over 3,500 state residents already have selected the “X” gender designation on driver’s licenses or state identifications since that designation first became available in July 2017. In just the first few months of the designation being available in California, more than 1,300 residents have obtained driver’s licenses or identification cards with non-binary gender markers.

And the numbers are likely to grow, both within the *amici* States and across the country. In California, for example, the state legislature has estimated that up to 1.7 percent of the population is intersex, which would translate to over half a million California residents.<sup>6</sup> While over a thousand residents obtained driver’s licenses or identification cards with non-binary

---

<sup>5</sup> Derived from U.S. Census Bureau data available at <https://www.census.gov/quickfacts/fact/table/US/PST045218>.

<sup>6</sup> S.B. 179 § 2(c) (Cal. 2017). While intersex individuals will not necessarily identify as non-binary, this data point helps illustrate that there are a significant number of people who are not typically male or female.

gender markers in the first few months of the designation availability, the California Department of Motor Vehicles estimates that tens of thousands more residents are likely to apply for a change in gender or non-binary designation in the months to come.<sup>7</sup> And given that recognition of non-binary gender markers on identification documents is part of a broad national movement spreading across the country, non-binary residents in several states will likely soon join residents in the *amici* States whose identification documents accurately reflect their gender.

Indeed, as explained below, the experience of the *amici* States shows that adding an “X” designation to driver’s licenses and other identifying documents has proven neither complex nor disruptive. And because several states have taken that step, private and public entities alike now regularly encounter and rely on government-issued identifications that have non-binary gender designations.

**A. The *amici* States have added non-binary gender designations to identification documents with little administrative difficulty and without disrupting state operations.**

States have taken different paths to make non-binary markers available on official government documents: Some have acted through legislation, others

---

<sup>7</sup> Ida Mojadad, *California Rolls Out IDs With New Gender Option*, SF WEEKLY, <http://www.sfweekly.com/news/california-rolls-out-ids-with-new-gender-option/> (published Jan. 10, 2019).

by rulemaking, and others by administrative decision. But the shared experience of the *amici* States is that the implementation of a non-binary gender marker has not resulted in disruption for agencies issuing identification documents or for government and private actors who rely on them.

The ease in implementation for the *amici* States stems, in part, from the existence of standards, both national and international, that recognize non-binary gender markers on identification documents. On the national level, the American Association of Motor Vehicle Administrators (AAMVA) develops standards for driver’s licenses and identification cards—including designations for gender—“to improve the security of [those identifications] issued by AAMVA’s members and to improve the level of interoperability among cards issued by all jurisdictions” in North America.<sup>8</sup> In 2016, AAMVA adopted a standard of permitting an unspecified gender designation on state identification documents. In doing so, the AAMVA followed the standards for the content and design of passports set by the International Civil Aviation Organization (ICAO). The ICAO allows for use of an “X” gender marker in addition to “M”

---

<sup>8</sup> 2016 AAMVA DL/ID Card Design Standard, AMERICAN ASSOCIATION OF MOTOR VEHICLE ADMINISTRATORS, <https://www.aamva.org/dl-id-card-design-standard/> (2016).

and “F”—a gender marker that several countries besides the United States recognize.<sup>9</sup>

For the *amici* States, adding non-binary gender designation in accord with national and international standards has required negligible administrative effort—the kind that accompanies routine changes to government documents.<sup>10</sup>

Colorado, for example, added a non-binary designation to driver’s licenses and other identifications by using an existing option within its system.<sup>11</sup>

Accordingly, for Colorado, there were “no development or programming costs associated with this rule.”<sup>12</sup>

---

<sup>9</sup> See *Machine Readable Travel Documents*, ICAO Document 9303, Part IV at 14 (7th ed. 2015), available at [https://www.icao.int/publications/Documents/9303\\_p4\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf). See also A.R. 0593-97 (identifying countries that legally recognize non-binary gender as Australia, Germany, India, Nepal and Pakistan), and A.R. 0606 (United Nations Office of the High Commissioner for Human Rights Fact Sheet noting laws in Australia and Malta designed to protect intersex individuals).

<sup>10</sup> See *Minnesota Offers Non-Binary Gender Option on REAL IDs*, KSTP (ABC) <https://kstp.com/news/minnesota-offers-non-binary-gender-options-real-id/5093121/> (published October 2, 2018) (noting Minnesota made the change to non-binary IDs when planning for a new driver’s license system).

<sup>11</sup> *FAQ: Non-binary Sex Identifier on Driver Licenses and Identification Cards*, COLO. DEP’T OF REV., <https://www.colorado.gov/pacific/dmv/faq-non-binary-sex-identifier-driver-licenses-and-identification-cards> (last visited April 24, 2019).

<sup>12</sup> *Id.*

Various state agencies—including law enforcement—have supported reform efforts designed to establish the legal recognition of a non-binary gender designation. Oregon, for example, instituted its non-binary designation through rulemaking, after consultation with the Oregon State Police, Oregon Judicial Department, Oregon Secretary of State, and other state agencies.<sup>13</sup> Those agencies supported adding a non-binary gender designation and none raised concerns that doing so would be detrimental to public safety or state operations.<sup>14</sup> The rulemaking process in Colorado was much the same: the Colorado Department of Motor Vehicles “consulted with law enforcement agencies” on the rule change, and those agencies “did not indicate a concern this rule [would] impact the investigative process.”<sup>15</sup>

**B. In practice, state agencies, law enforcement departments, and private businesses across the country regularly interact with non-binary individuals and process their state identification documents accordingly.**

Presenting identification is a central part of life. Individuals must present identification at banks, hotels, courthouses, grocery stores, restaurants, and myriad other places. Consequently, in the *amici* States and other states that

---

<sup>13</sup> Or. Admin. R. 735-062-0013 (2017), *Rule Advisory Committee on Non-Binary Licensing and Identification Meeting Minutes* (Oct. 17, 2016).

<sup>14</sup> *Id.*

<sup>15</sup> COLO. DEP’T OF REV., *supra* note 11.

recognize non-binary gender markers numerous state agencies, law enforcement departments, and public and private institutions now regularly process identification documents with non-binary gender designations.

Law enforcement officers in the *amici* States, for example, regularly rely on state identifications that reflect a person’s non-binary gender. In Oregon, use of a non-binary gender on identification makes it easier for law enforcement officers to implement policies that ensure respectful treatment of non-binary inmates being booked in county jails.<sup>16</sup> Those policies require officers to assess non-binary status by, among other things, looking to the listed gender—“M,” “F,” or “X”—on the person’s identification. The same is true for some local jurisdictions in California, where officers book suspects according to the sex listed on their identification, which now includes the “X” designation.<sup>17</sup> In Denver County, jail officer training, implemented to comply with federal Prison Rape Elimination Act (PREA) standards, addresses, among other at-risk groups,

---

<sup>16</sup> *Deschutes County Adult Jail Transgender Inmate Policy*, available at <https://sheriff.deschutes.org/CD-6-10-Transgender-Inmates.pdf>; *Multnomah County Sheriff’s Office Transgender Booking Policy*, available at <https://s3-us-west-2.amazonaws.com/oregonknowledgebankmedia/other/Multnomah-sheriff-special-order-14-32.pdf>.

<sup>17</sup> San Francisco Police Department General Order § 5.22.

intersex individuals whose characteristics do not conform with conventional definitions of male or female.<sup>18</sup>

Law enforcement recognition of a non-binary gender designation extends to data collection practices. For example, in California law-enforcement agencies collect and record a non-binary designation when processing certain contacts with individuals. Under a 2015 law, state and local law enforcement agencies must collect demographic data for all detentions and searches.<sup>19</sup> And the form for recording a person’s gender includes a non-binary “gender nonconforming” marker.<sup>20</sup> Those law-enforcement agencies currently subject to data collection requirements—including the California Highway Patrol, as well as the city and county police departments in Los Angeles, San Francisco, and San Diego—have submitted data for nearly two million detentions and searches during the first six months of data collection.<sup>21</sup>

---

<sup>18</sup> *Denver Jail Transgender Policy a National Model*, DENVER POST, <https://www.denverpost.com/2015/06/27/denver-jail-transgender-policy-a-national-model/amp/> (updated June 6, 2016).

<sup>19</sup> Cal. Gov’t. Code § 12525.5 (also referred to as AB 953).

<sup>20</sup> Cal. Code Regs. tit. 11, § 999.226.

<sup>21</sup> Video recording: *Updates on the Stop Data Collection System by the Cal. DOJ Justice Information Services Division to RIPA Board* (April 8, 2019), <https://oag.ca.gov/ab953/board>.



Beyond state and local law enforcement agencies, processing identifications with non-binary gender designations is now the regular business of other public and private institutions. Indeed, providing non-binary designations on identifying documents not only serves the interest of those who carry them, it serves the interests of those who rely on them. Universities in the *amici* States, for example, offer gender-inclusive university housing and other services for students whose gender is non-binary—a fact that is now immediately apparent from a simple glance at the student’s state identification or driver’s license.<sup>22</sup> Recognition of non-binary status on identification documents likewise helps businesses across the country serve their transgender, non-binary, and intersex customers and employees. More than 50 companies—including California-based companies Apple, Facebook, and Google, and

---

<sup>22</sup> See **University of Oregon:** <https://dos.uoregon.edu/gender-inclusive-housing>; <https://dos.uoregon.edu/name-and-gender-marker-change>; **Portland State University:** <https://www.pdx.edu/housing/all-gender-housing>; **Oregon State University:** <https://uhds.oregonstate.edu/roommate-matching-and-gender-identity>; **UC Berkeley:** <https://chancellor.berkeley.edu/task-forces/sb-179-committee>; **UC San Francisco:** <https://lgbt.ucsf.edu/gender-recognition-act>; **UC Riverside:** <https://chancellor.ucr.edu/chancellors-task-force-california-gender-recognition-act>; **Colorado School of Mines:** <https://www.mines.edu/residence-life/residence-halls/gender-inclusive-housing/>; **Colorado State University:** <https://housing.colostate.edu/halls/communities/open-housing>; **Princeton University:** <https://hres.princeton.edu/undergraduates/explore/other-housing-cases>; **Rutgers University:** <http://socialjustice.rutgers.edu/housing-options/gender-neutral-housing/>.

Oregon-based Nike and Intel—recently issued a statement that they “stand with the millions of people in America who identify as transgender, gender non-binary, or intersex, and call for all such people to be treated with the respect and dignity everyone deserves.”<sup>23</sup>

Perhaps most relevant to the facts here, airlines now include a non-binary gender designation on tickets for the millions of travelers in the United States. Following passport standards set by the ICAO, two prominent airline trade groups, Airlines for America and the International Air Transport Association, recently adopted a standard that allows non-binary passengers to select a sex of “unspecified” or “undisclosed” when booking tickets.<sup>24</sup> United States airline carriers have followed suit. Four of the nation’s five biggest airlines—American, Delta, Southwest and Alaska—plan to implement the trade groups’

---

<sup>23</sup> See Lauren Feiner, *Apple, Amazon, Facebook and More than 50 other Companies Sign Letter Against Trump Administration's Proposed Gender Definition Changes*, CNBC, <https://www.cnbc.com/2018/11/01/companies-sign-letter-against-trumps-proposed-gender-definition-change.html>, (updated November 2, 2018) (describing letter from more than 50 companies—including JP Morgan Chase, Marriott, Dow Chemical, American Airlines, and Coca-Cola—in response to a federal agency that was considering limiting the definition of gender to birth genitalia).

<sup>24</sup> Zach Wichter, *U.S Airlines to Offer New Gender Options for Non-Binary Passengers*, N.Y. TIMES, <https://www.nytimes.com/2019/02/15/business/airline-travel-gender-choices.html> (published February 15, 2019).

standard and will add a non-binary gender designation.<sup>25</sup> The fifth, United Airlines, already offers non-binary gender options when booking airline tickets.<sup>26</sup> And non-binary gender designations used in ticketing for air passengers are compatible with airport security checks; the systems that verify identification documents accept a non-binary designation.<sup>27</sup>

In short, the use of non-binary gender designations on identification documents is increasingly commonplace for both public and private institutions. For the *amici* States in particular, recognition of non-binary gender is not merely an exception, it is the rule. And while that practice continues to expand to more and more jurisdictions, it is already the standard for national and international identification documents and for industries that serve millions of Americans throughout the United States.

---

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Kate Sosin, *Major Airlines Have Utterly Ignored Non-Binary IDs in Booking*, INTO, <https://www.intomore.com/impact/major-airlines-have-utterly-ignored-non-binary-ids-in-booking> (published November 8, 2018) (noting that TSA explicitly accepts “X” gender markers in its system).

**II. The failure to recognize a non-binary gender classification on United States passports harms the interests of the *amici* States and their residents.**

The State Department acknowledges “that there are individuals whose gender identity is neither male nor female.” A.R. 00085. Yet the State Department’s policy denies those individuals a passport that reflects their non-binary status. The State Department’s central justification for doing so—that a non-binary gender designation on a passport would be mismatched to state documents and will burden public and private institutions that rely on passports—does not withstand scrutiny. And the Department’s policy harms the interests of the *amici* States and their residents.

**A. The State Department’s refusal to recognize a non-binary gender creates the matching problems that it asserts it wants to avoid.**

In refusing to recognize non-binary gender designation on passports, the State Department contends that it seeks to avoid “matching issues” between federal and state identifying documents that include gender designations. Opening Br. at 25. The Department first asserts that it relies on state identifications to establish the identity of passport applicants, and those identifications recognize only two genders. And the Department maintains that a non-binary gender designation on passports will render passports unusable to establish identity for government agencies and private actors that only recognize two genders. But, as the experience of the *amici* States shows, the

Department's policy cannot be justified by the purported rationales that it identifies.

As the district court explained, the State Department's assertion that state identification documents recognize only two genders "ignores the reality" that state and local governments recognize a non-binary gender designation on identifying documents. Opening Br. App. at 23. The Department offers no substantive response on appeal, other than to note that, at the time of its most recent denial of Zzyym's request, it knew only that state policy changes were imminent. A.R. 00189, n. 1. But the national trend towards recognizing non-binary gender markers on state identifications was already well underway when the Department most recently denied Zzyym's request for a passport. The reality, then and now, is that "American passport applicants will have gender verification documents that exclusively list a gender that is neither female nor male." Opening Br. App. at 23. And for the thousands of non-binary individuals in the *amici* States that hold state identifications with a non-binary designation, the Department's gender policy creates the kind of matching problems it purports to avoid.

The State Department's related contention—that government and private actors will not be able to rely on passports with non-binary gender identifications—likewise cannot be squared with the on-the-ground reality.

Opening Br. at 23. To be sure, agencies in the *amici* States rely on passports as proof of identity and proof of citizenship for a wide range of functions—issuing “birth records, driver’s licenses, identification cards, and vehicle registrations.” A.R. 00084; Opening Br. at 23–24. But those agencies, including law enforcement agencies, are prepared for and encounter non-binary gender designations on state identifying documents. Recognition of the same designation on passports would accommodate, rather than “compromise,” those state systems. Opening Br. at 24.

The same is true for “other public and private institutions” (Opening Br. at 23); those institutions accept non-binary gender designations when using state identification documents to establish identity. But as it now stands, state identification documents in the *amici* States accurately reflect a person’s non-binary gender but passports do not. If the State Department’s policy is meant to “assist” public and private actors “in carrying out their functions” (Opening Br. at 10), then the Department should recognize a non-binary gender designation on passports.

**B. The State Department’s passport policy frustrates the *amici* State’s compelling interest in ensuring that their citizens have identifying documents that accurately reflect their gender.**

In providing state identification documents with a non-binary designation, the *amici* States recognize the significant interests of non-binary residents in carrying government-issued documents that accurately reflect who

they are. As noted, non-binary individuals must produce identification to engage in the basic aspects of everyday life, from banking to traveling to entering a courthouse. And individuals who present identifications that do not accurately reflect their gender regularly face harassment and even physical violence.<sup>28</sup>

The *amici* States have taken a small, but important step, to ensure the health and safety of their non-binary residents by providing them with identification documents that reflect their non-binary gender. As the executive director of the Colorado Department of Revenue explained when implementing the change, “It is important Coloradans have a correct sex identifier on their driver licenses and identification cards that reflects their true lived experience. This policy is better for all of Colorado.”<sup>29</sup> The State Department’s continuing failure to recognize the non-binary gender of residents in the *amici* States, including Dana Zzyym, harms those residents and frustrates the states’ efforts to provide identification that accurately reflect their non-binary gender. While

---

<sup>28</sup> See Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), at 138 [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf) (“Study participants confirmed anecdotal evidence that gender incongruent identification exposes people to a range of hostile outcomes, from denial of benefits and employment to violence.”).

<sup>29</sup> COLO. DEP’T OF REV., *supra* note 11.

the *amici* States appreciate that the State Department seeks to maintain consistency between state and federal identification documents and to ensure that state actors can rely on gender data in federal documents, the State Department can do so only by issuing a passport that accurately reflects the non-binary gender of non-binary individuals like Dana Zzyym.

### CONCLUSION

The *amici* States have come to recognize the significant harm that results when their residents do not have state identification documents that accurately reflect their gender. To remedy that harm, the *amici* States—with the participation and support of law enforcement, state agencies, and private businesses—have made a simple addition to identification documents, one that recognizes the existence of non-binary individuals. The experience of the *amici* States shows that the federal government’s refusal to do the same in providing Dana Zzyym a passport is not the result of thoughtful and reasoned decision-making. This court should affirm the district court’s judgment.

Respectfully submitted,



ELLEN F. ROSENBLUM  
Attorney General of Oregon

PHILIP J. WEISER  
Attorney General of Colorado

*s/ Jonathan Schildt*

---

JONATHAN SCHILDT  
Assistant Attorney General

*s/ Eric R. Olson*

---

ERIC R. OLSON  
Solicitor General

XAVIER BECERRA  
Attorney General of  
California

*s/ Gabriel Martinez*

---

GABRIEL MARTINEZ  
Deputy Attorney General

ROBERT W. FERGUSON  
Attorney General of Washington  
PO Box 40100  
Olympia, Washington 98504-0100

THOMAS J. DONOVAN, JR.  
Attorney General of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, Vermont 05609-1001

KEITH ELLISON  
Attorney General of Minnesota  
75 Rev. Dr. Martin Luther King Jr.  
Blvd.  
St. Paul, MN 55155

GURBIR SINGH GREWAL  
Attorney General of New Jersey  
124 Halsey Street  
Newark, NJ 07101

AARON M. FREY  
Attorney General of Maine  
6 State House Station  
Augusta, ME 04333-0006

AARON D. FORD  
Attorney General of Nevada  
100 North Carson Street  
Carson City, NV 89701

### **CERTIFICATE OF COMPLIANCE**

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief contains 3728 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Time New Roman.

Dated: May 15, 2019

*s/ Eric R. Olson*

---

**CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY  
REDACTIONS**

I hereby certify that a copy of the foregoing **AMICUS BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk. The brief has been scanned for viruses with CrowdStrike Falcon software, Version 4.26.8904.0, last updated May 9, 2019 and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

Dated: May 15, 2019

*s/ Eric R. Olson*

---

**CERTIFICATE OF SERVICE**

I hereby certify that on May 15, 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.

*s/ David Reuter*

---