

Comments to the Department of State
on
Notice of Proposed Information Collection: U.S. Passport Renewal Application for Eligible
Individuals
90 Fed. Reg. 9800
March 20, 2025

By notice published February 18, 2025, the United States Department of State (“the Department”) published a 30-day notice of Proposed Information Collection on Applications for Passports,¹ Passport Renewal Application for Eligible Individuals,² and Corrections to Name Change to Passport Issued 1 Year Ago or Less, and Limited Passport Replacement³ (collectively, “the proposed changes”). The proposed changes were made pursuant to Executive Order “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” (“Executive Order”).⁴ The Executive Order has been challenged on various grounds, including violations of the constitutional right to privacy, free speech, and equal protection.⁵

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation.⁶ EPIC regularly promotes privacy rights for individuals and marginalized communities, including the LGBTQ+ community.

¹ 90 Fed. Reg. 9652 (Feb. 14, 2025), <https://www.federalregister.gov/documents/2025/02/14/2025-02648/30-day-notice-of-proposed-information-collection-application-for-a-us-passport>.

² 90 Fed. Reg. 9800 (Feb. 18, 2025), <https://www.federalregister.gov/documents/2025/02/18/2025-02697/30-day-notice-of-proposed-information-collection-us-passport-renewal-application-for-eligible>.

³ 90 Fed. Reg. 9800 (Feb. 18, 2025), <https://www.federalregister.gov/documents/2025/02/18/2025-02696/30-day-notice-of-proposed-information-collection-application-for-a-us-passport-for-eligible>.

⁴ Executive Order 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025), <https://www.federalregister.gov/documents/2025/01/30/2025-02090/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal>.

⁵ Complaint, *Orr v. Trump*, 1-25-cv-10313-JEK (D. Mass. Feb. 7, 2025).

⁶ EPIC, *About Us* (2024), <https://epic.org/about/>.

EPIC has submitted FOIA requests,⁷ submitted comments on regulations⁸ and filed complaints⁹ regarding unlawful practices relating to the LGBTQ+ community.

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Fight for the Future is an organization composed of artists, engineers, activists, and technologists who harness the power of the Internet to channel outrage into action, defending our most basic rights in the digital age. Fight for the Future fights to ensure that technology is a force for empowerment, free expression, and liberation rather than tyranny, corruption, and structural inequality.

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Scott Skinner-Thompson is an associate professor at Colorado Law School, where he researches constitutional law, civil rights, and privacy law, with a particular focus on LGBTQ and HIV issues.¹¹

The Department must not—and, by law, may not—implement the proposed changes. If implemented as written, the proposed changes will violate the rights of transgender, nonbinary, and intersex (collectively, “gender-diverse”) individuals, including the right to informational privacy and the right to travel freely and safely. The changes to these forms are material and substantial, and the Department’s Notice of Proposed Information Collection is severely lacking both procedurally and in guidance.

To the extent that the Department is nevertheless compelled to implement the Executive Order, the undersigned organizations urge the Department to provide guidance and implement safeguards regarding these material changes to passport policy. First, the Department should outline exactly what data can be used as proof of sex assigned at birth for the purpose of passport gender markers and how that highly sensitive data will be used and stored. Second, the Department must recognize and adopt the gender markers on an applicant’s valid legal documents, including

⁷ EPIC, *FOIA Request to HHS regarding HHS’ efforts to establish or reinterpret the legal definition of sex and/or gender* (Oct. 24, 2018), <https://epic.org/wp-content/uploads/2024/03/EPIC-18-10-24-HHS-FOIA-20181024-Request-.pdf>.

⁸ EPIC, *Comments to United Kingdom Department for Education on Guidance Regarding Gender Questioning Children* (Mar. 12, 2024), <https://epic.org/documents/comments-of-epic-to-the-uk-department-for-education-on-gender-questioning-children/>; EPIC, *Comments to Department of Health and Human Service on System of Records Notice, System No. 09-90-2101 HIV Prevention Medication Distribution Records* (Feb. 22, 2023), <https://epic.org/documents/comments-of-epic-chlp-prep4all-and-patient-privacy-rights-to-hhs-on-hiv-prep-database-sorn/>.

⁹ EPIC, *In the Matter of Grindr, LLC* (Oct. 4, 2023), <https://epic.org/wp-content/uploads/2023/10/EPIC-FTC-Grindr-Complaint.pdf>.

¹⁰ Waldman is the current chair of EPIC’s board of directors.

¹¹ Skinner-Thompson is an EPIC advisory board member.

those that have been lawfully amended, including birth certificates, driver's licenses, and/or state identification cards compliant with the REAL ID Act. Finally, the Department cannot adopt artificial intelligence tools such as large language models or facial analysis tools to process passport applications due to the significant and persistent accuracy, reliability, and cybersecurity issues present in these systems.

I. Background

a. Passports are integral identity documents.

Passports are one of the most commonly accepted forms of legal identification both within the United States and abroad. Passports are necessary for travel abroad and reentry into the United States¹² and are frequently used for domestic air travel. Since the United States does not have a national identity card, the passport is the most widely accepted form of identity verification abroad.¹³ After the planned implementation of the REAL ID Act on May 7, 2025, many state identification documents will no longer be valid for travel purposes or for visiting federal facilities, so the passport may be an individual's only compliant identity document.¹⁴

Beyond travel, passports are also widely used by employers. Passports are frequently used to complete I-9 employment eligibility forms, which are required for all new hires in the United States.¹⁵ All federal government employees and contractors are required to use E-Verify, a Department of Homeland Security website that allows agencies and contractors to determine identity and employment eligibility.¹⁶ In particular, passport use is critical for naturalized citizens who may have fewer documents that establish citizenship compared to a non-naturalized citizen.¹⁷

b. Inconsistent identity documents radically harm gender-diverse individuals.

Removing the ability to update gender markers on passports directly contradicts the widespread ability to update legal documentation that reflects an individual's gender identity at the state level. Only four states do not allow individuals to update gender markers on driver's licenses.¹⁸ Over 40 states and territories allow individuals to amend the gender marker on their birth certificates.¹⁹ As of 2025, 22 states and the District of Columbia allow individuals to use the X gender marker (denoting "unspecified or another gender identity") on driver's licenses. The

¹² 8 U.S.C. § 1185(b).

¹³ See, e.g., Travel Documents for non-EU nationals, Your Europe (Last updated Mar. 3, 2025), https://europa.eu/youreurope/citizens/travel/entry-exit/non-eu-nationals/index_en.htm.

¹⁴ See, e.g., Acceptable Identification at the TSA Checkpoint, Transportation Security Administration (last visited Mar. 11, 2025), <https://www.tsa.gov/travel/security-screening/identification>.

¹⁵ U.S. Citizenship and Immigration Services: Form I-9, Employment Eligibility Verification Employee Information Sheet, <https://www.uscis.gov/sites/default/files/document/fact-sheets/FormI9EmployeeInfoSheet.pdf>.

¹⁶ [everify.gov](https://www.e-verify.gov), *1.1.1 Executive Order 12989*, <https://www.e-verify.gov/supplemental-guide-for-federal-contractors-10-e-verify-federal-contractor-rule-overview-11/111>.

¹⁷ For example, the I-9 does not allow a naturalization certificate as proof of citizenship. U.S. Citizenship and Immigration Services: Form I-9, Employment Eligibility Verification Employee Information Sheet, <https://www.uscis.gov/sites/default/files/document/fact-sheets/FormI9EmployeeInfoSheet.pdf>.

¹⁸ Movement Advancement Project, Equality Maps: Identity Document Laws and Policies, (last accessed Mar. 11, 2025), https://www.mapresearch.org/equality-maps/identity_document_laws.

¹⁹ *Id.*

District of Columbia and 16 states allow for birth certificates to be amended to include an X gender marker.²⁰ The federal government’s policy from 2010 to 2025 permitted individuals to apply to change the sex designation on their passport.²¹ From 2021 to 2025, individuals could also use an “X” designation on valid U.S. passports.²²

One of the most important aspects of transitioning is obtaining legal documentation affirming the individual’s gender identity. Changing documentation to reflect an individual’s gender protects individuals from forced outing, reduces the risk of fraud accusations, and affirms the individual’s lived experiences. The proposed changes violate gender-diverse individuals’ constitutional right to privacy and free speech, among others, and would put millions of Americans at risk for increased contact with law enforcement, discrimination, harassment, and physical violence by forcing individuals to live with inconsistent legal documents.

i. Inconsistent gender markers violate individuals’ rights to information privacy.

Americans have a right to informational privacy in their transgender or otherwise gender-diverse status, and inconsistent legal documentation forcibly out individuals in violation of this right. A person’s gender-diverse status is an incredibly intimate piece of information, which discloses highly sensitive personal history as well as medical information. Americans have a right to privacy.²³ Compelled disclosure of personal matters implicates the fundamental right to privacy where the disclosure may: (1) invite stigma or harassment; (2) invite bodily harm;²⁴ or (3) reveal personal details of an intimate nature, such as information implicating one’s sexual, medical, or mental health, including one’s transgender status.²⁵ Disclosure of one’s gender identity implicates all three considerations.

The proposed changes require individuals to disclose their sex assigned at conception, as opposed to their lived gender identity, every single time they provide their identity documents for verification. This outs gender-diverse individuals to employers, law enforcement officials, government agencies, and countless other third parties.

When state actions lead to the “[i]nvoluntary disclosure of one’s transgender status”—either by prohibiting amending identity documents altogether, or conditioning amendments on

²⁰ *Id.*

²¹ See Chaput Decl., Exs. S (Ernesto Lodono, “Transgender Americans Challenge Trump’s Passport Policy in Court,” N.Y. Times (Feb. 7, 2025), <https://www.nytimes.com/2025/02/07/us/transgender-americans-lawsuit-trump-passports.html> (last accessed Feb. 11, 2025); (Lisa Mottet, “Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People,” 19 Mich. J. Gender & L. 373, 383 (2013), <https://repository.law.umich.edu/mjgl/vol19/iss2/4>), (U.S. Department of State, 8 Foreign Affairs Manual 403.3, Gender Change (May 31, 2019), archived version at <https://web.archive.org/web/20190531235228/https://fam.state.gov/FAM/08FAM/08FAM040303.html>).

²² *Id.*

²³ See *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977).

²⁴ *Kallstrom v. Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998).

²⁵ *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (recognizing a privacy right in maintaining the confidentiality of one’s transgender identity); *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (medical, mental health); *Livsey v. Salt Lake Cnty.*, 275 F.3d 952, 956 (10th Cir. 2001) (sexual, medical).

medical intervention—“the core of Due Process protections” is implicated.²⁶ Indeed, many courts have held that requiring individuals to have sex designations inconsistent with their gender identity on identification documents infringes their fundamental right to informational privacy by compelling disclosure of their transgender status.²⁷

Furthermore, courts have consistently rejected governments’ proffered interests in disallowing gender marker changes.²⁸ Some courts have even found that forcing people to carry inconsistent identity documents “may facilitate, rather than prevent, fraud.”²⁹ The proposed changes proffer no justification that might outweigh this plain constitutional defect.

ii. Inconsistent identity documents heighten risks of invasive scrutiny and mistreatment, including accusations of criminal fraud.

A passport with a gender marker that does not match a person’s perceived gender presentation or otherwise does not match the individual’s identification documents can increase the rate at which an individual is selected for invasive scrutiny at airports and elsewhere. Transgender people are already routinely faced with humiliating and invasive questioning, scrutiny, and mistreatment due to their lack of conformity with mainstream ideals of gender. For example, a 2019 report found that transgender individuals often felt pressured to expose their genitals during pat downs so TSA officers would allow them to pass through the security checkpoints at airports.³⁰ Individuals can be investigated for identification issues due to TSA’s body scanners flagging a person’s body not matching gendered expectations, and the proposed changes would create another opportunity for individuals to be investigated based on non-conformity with gender expectations. Transgender individuals have also been subject to increased questioning, scrutiny, and mistreatment due to their identity documents in numerous areas integral

²⁶ H.R. by & through *Roe v. Cunico*, 745 F. Supp. 3d 842, 851 (D. Ariz. 2024) (finding that the state requirement that individuals demonstrate completion of a “sex change operation” as a condition for changing their birth certificate gender marker violated the Due Process Clause’s right to privacy and the Equal Protection Clause).

²⁷ See, e.g., *Powell*, 175 F.3d at 111; *Ray v. McCloud*, 507 F. Supp. 3d 925, 931-32 (S.D. Ohio, 2020) (“forced disclosure of an individual’s transgender status could subject them to risk of bodily harm[,]” and harassment, and that this “highly personal” information is “protected by the due process clause’s informational right to privacy”); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (denying sex marker changes on driver’s licenses “forces [transgender people] to disclose their transgender status in violation of their constitutional right to informational privacy” and recognizing that “there are few areas which more closely intimate facts of a personal nature than one’s transgender status” (cleaned up)); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (where “disclosure of this [highly intimate] information may fall into the hands of persons harboring negative feelings, [denial of a license with an accurate sex marker] creates a very real threat to Plaintiffs’ personal security and bodily integrity” (cleaned up)).

²⁸ *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (prohibition on gender marker changes was “not justified by any legitimate government interest,” “[did] not further public safety,” “chill[ed] speech, and restrain[ed] engagement in the democratic process”); *Ray*, 507 F. Supp. 3d at 938-940 (rejecting state’s arguments that policy was “substantially related to vital statistic preservation” and necessary to prevent fraud).

²⁹ *Fowler v. Stitt*, 104 F.4th 770, 16 (10th Cir. 2024).

³⁰ Lucas Waldron & Brenda Medina, *When Transgender Travelers Walk Into Scanners, Invasive Searches Sometimes Wait on the Other Side*, ProPublica (Aug. 26, 2019), <https://www.propublica.org/article/tsa-transgender-travelers-scanners-invasive-searches-often-wait-on-the-other-side>.

to everyday life and civic duty, such as when trying to gain employment,³¹ at polling locations during elections,³² and when attempting to access personal bank accounts.³³

An individual may also be accused of criminally falsifying identity documents or otherwise engaging in fraud for presenting identification documents that do not match their perceived gender presentation or other identification documents. In fact, a Texas legislator recently proposed a bill that would outright criminalize transgender existence, categorizing representing oneself as a gender other than their “sex assigned at birth” as a false representation that constitutes felony fraud.³⁴ Implementing the proposed changes as written would create one such instance where a gender-diverse individual seeking to acquire legal documentation consistent with their lived gender identity would be criminalized.

c. The proposed changes must not be implemented.

The Department’s proposed changes infringe on the rights described above without identifying a single governmental objective that the Department seeks to achieve. The proposed changes would prevent individuals from acquiring a passport consistent with the appropriate gender marks and create a layer of inconsistency for individuals who already have amended gender markers on other legal documents. People with an “X” gender marker on a driver’s license or amended birth certificate would have no recourse and no ability to acquire a passport consistent with other valid legal documents.

The Department must not—and by law, may not—implement the proposed changes. To the extent that the Department is nevertheless compelled to implement the Executive Order, the Department should recognize and adopt the gender markers on an applicant’s valid legal documents, including those that have been lawfully amended, such as birth certificates, driver’s licenses, and/or state identification cards compliant with the REAL ID Act.

II. The Proposed Changes Violate the Paperwork Reduction Act, the Administrative Procedure Act, and the U.S. Constitution

a. The Department used improper procedure to implement substantial, material policy changes.

Under the Paperwork Reduction Act, when a federal agency seeks to collect information from the public (often through government forms), it is obligated to provide notice and otherwise

³¹ Subhauna Hussain, *Uber blockers transgender driver from signing up: ‘They didn’t believe me’*, The Detroit News (Dec. 10, 2021), <https://www.detroitnews.com/story/business/2021/12/10/uber-blocks-transgender-drivers-signing-up-they-didnt-believe-me/6463222001/>.

³² See, e.g., Bruce Henderson, *Transgender voter sues NC, Mecklenberg election officials for questioning identity*, Charlotte Observer (Feb. 12, 2020), <https://www.charlotteobserver.com/news/politics-government/election/article240227061.html>.

³³ Corin Faife, *Bank Security Measures Are Making Life Difficult for Trans Customers*, Vice News (Aug. 29, 2016), <https://www.vice.com/en/article/how-banks-make-it-difficult-for-trans-customers/>.

³⁴ Erin Reed, *New Texas Bill Outright Criminalizes Being Trans as Felony Fraud*, Erin in the Morning (Mar. 05, 2025), <https://www.erininthemorning.com/p/new-texas-bill-outright-criminalizes>.

consult with members of the public and affected agencies concerning each proposed collection of information.³⁵ Agencies must establish an internal process to review each proposed collection of information, publish notice in the Federal Register, and provide for a 60-day public comment period.³⁶ After the 60-day period ends and the agency considers the comments, the agency must submit an Information Collection Review to the Office of Information and Regulatory Affairs (“OIRA”), publish a second Federal Register notice, and begin a second public comment period of 30 days.³⁷

The Paperwork Reduction Act contains some mechanisms that could provide for a shorter or adjusted procedure. OIRA can approve a generic clearance for conducting more than one information collection using similar methods, such as customer service feedback.³⁸ Agencies can use common forms to share information collection between one or more agencies.³⁹ Under the Paperwork Reduction Act, certain types of changes do not require approval by the Office of Management and Budget (“OMB”), such as *de minimis* changes, which are usually changes of a cosmetic nature such as changes to colors and visual layouts. Agencies may also perform non-substantive changes, such as wording changes or certain adaptations for forms to be used on the web, which must be reviewed by the OMB but do not require that the public be notified.⁴⁰ Finally, an agency can request emergency review if an unanticipated event has occurred, or harm might result if normal clearance procedures are followed.

In the current 30-day information collections for these three forms, the State Department gives no reason as to why these information collections are not following the standard Paperwork Reduction Act requirements. These information collections do not attempt to assert that they are employing one of the above abbreviated flexibilities. These proposed changes are clearly not *de minimis* or non-substantive, and the significant, substantive burden and harm of these changes is detailed below. Confusingly, in publishing the sections of the information collection for each of these forms, the State Department incorrectly refers to a prior 60-day notice and comment period that did not occur. This referenced 60-day notice and comment period could not have occurred because these form changes are a result of the Executive Order issued on January 20, 2025, which was less than 60 days before the Notice of Proposed Information Collection on February 18.

b. The proposed information collection is neither necessary nor proportionate for the proper function of the department.

Despite the onerous harms the implementation of the proposed changes would generate, the Department’s only justification for these substantial changes to its longstanding gender marker policy is a short reference to the Executive Order. The Executive Order puts forward a nonsensical and scientifically false definition of sex and cites a specious objective of defending women’s

³⁵ Paperwork Reduction Act of 1980, 44 U.S.C. §3501 et seq.

³⁶ See The Paperwork Reduction Act and Federal Collections of Information: A Brief Overview, <https://crsreports.congress.gov/product/pdf/IF/IF11837>, Updated April 17, 2024.

³⁷ *Id.*

³⁸ Memorandum for the Heads of Executive Departments and Agencies and Independent Regulatory Agencies, *Flexibilities under the Paperwork Reduction Act for Compliance with Information Collection Requirements*, Office of Management and Budget, July 22, 2016, https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/pr_a_flexibilities_memo_7_22_16_final.pdf.

³⁹ *Id.*

⁴⁰ *Id.*

rights, depicting transgender people as intruders seeking to gain access to intimate single-sex spaces. These provisions—and the numerous other recent actions by the President targeting transgender Americans—confirm the Department’s impermissible animus in engaging in this policy change. The policy is not narrowly tailored to advancing a compelling government interest, substantially related to an important government interest, or even rationally related to achieving any legitimate government interest. For these reasons, the policy violates the U.S. Constitution.

The Department’s passport policy and proposed changes have already been challenged on several Constitutional grounds,⁴¹ and the Department should pause the implementation of the proposed changes until the litigation has been settled and amend the policy as necessary.

c. The Department vastly underestimates the time, effort, and cost of implementing the proposed changes.

The Paperwork Reduction Act requires agencies to evaluate the paperwork burden associated with each new collection, meaning the time, effort, and financial resources expended to provide information to the agency.⁴² It does not appear that the Department has done so properly here.

On the DS-11 (Application for a U.S. Passport), the State Department appears to have copied the same burden estimates from the information collection in November 2024, including estimated number of respondents, average time per response, and total estimated burden time (in both cases, the Department estimated 12.5 million form respondents who take 85 minutes average per response).⁴³ However, the agency’s stated time of 85 minutes per response grossly underestimates the burden the form imposes on transgender, intersex, and nonbinary applicants.

The State Department’s public facing website warns about some of the burdens that transgender, intersex, and nonbinary applicants will now face, but the State Department has not included them in the ICR burden analysis.⁴⁴ The website states that if you submit a passport application indicating “a sex marker that is different from your sex marker at birth, you may experience delays getting your passport” and “may receive a letter or email requesting more information.”⁴⁵ Internal guidance distributed by the Secretary of State on February 8, 2025, further explains that if citizenship and identity evidence submitted with the application does not sufficiently establish the applicant’s “biological sex at birth,” the office should suspend the application and send an Information Request Letter.⁴⁶ As a result, affected applicants have already reported long delay times for these applications. Some applicants have received requests for original birth certificates and must spend additional time and money seeking to obtain those documents—a particularly burdensome challenge when the only birth certificate available is an amended birth certificate, causing additional delays and paperwork confusion.

⁴¹ Complaint, *Orr v. Trump*, 1-25-cv-10313-JEK (D. Mass. Feb. 7, 2025).

⁴² *Id.* at 4.

⁴³ Federal Register, 60-Day Notice of Proposed Information Collection: Application for a U.S. Passport (Nov. 26, 2024), <https://www.federalregister.gov/documents/2024/11/26/2024-27703/60-day-notice-of-proposed-information-collection-application-for-a-us-passport>.

⁴⁴ Sex Marker in Passports, Travel.State.Gov, U.S. Dep’t of State: Bureau of Consular Affairs (Last accessed Mar. 17, 2025), <https://travel.state.gov/content/travel/en/passports/passport-help/sex-marker.html>

⁴⁵ *Id.*

⁴⁶ Message Reference Number 25 STATE 11610, Adjudicating X markers and Binary Sex Markers in U.S. Passports and Consular Reports of Birth Abroad (Feb 8, 2025).

Approximately two million individuals in the United States are transgender;⁴⁷ individuals born with intersex traits are estimated to be between 170,000 and 5.7 million, or 0.05% and 1.7% of the population;⁴⁸ and according to one survey more than 1.2 million Americans identify as nonbinary.⁴⁹ It is imperative to factor in the heavy additional burden placed on these specific applicants, as they are the population most affected by this form change.

Gender-diverse individuals also spend substantial funds on updating legal documents, including seeking legal counsel to assess their options. The passport applications themselves are expensive. For example, an application for a first-time passport costs \$165.⁵⁰ In the aggregate, this could lead to tens of millions of dollars in costs.

The State Department also fundamentally underestimates how much it will cost to implement the proposed changes. Because of the lack of scientific evidence behind the Executive Order's phrasing of "sex assigned at conception" and the lack of guidance as to what constitutes proof of sex assigned at conception, the State Department may need to investigate ALL respondents for compliance with the proposed changes. Some transgender individuals have legally amended their birth certificates to reflect their gender identity. Some non-transgender individuals who are naturalized citizens may no longer have access to their original birth certificates or may not have a gender marker on their birth certificates. If the State Department relies on birth certificates, it will need to create rigorous and time intensive processes to determine whether a birth certificate accurately reflects the "sex assigned at conception" of any respondent, not just those who may be gender-diverse. However, there is a lack of other standardized documentation that would prove a person's sex under the Executive Order's definition that could be used as an adequate substitute for birth certificates. This would dramatically increase the time needed for the Department to implement and comply with the proposed changes.

d. The proposed changes exceed the scope of the International Civil Aviation Organization's standards for security in international travel.

The International Civil Aviation Organization ("ICAO"), a UN specialized agency that sets international travel standards for the 193 participating nations (including the United States), has determined that "sex at birth" is not a necessary data point for identity verification in travel documents.⁵¹ The ICAO standardizes what information must be included in a machine readable travel document ("MRTD") such as a U.S. passport. The ICAO provides guidance to nations for issuance and verification of MRTDs to ensure that: (1) the claimed identity is genuine, (2) the

⁴⁷ Jody Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Institute, UCLA School of Law 1 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

⁴⁸ United Nations Free & Equal, "Intersex People," Office of the United Nations High Commissioner for Human Rights 1 (2024), <https://www.unfe.org/sites/default/files/download/Intersex%20factsheet%202024%20EN%20-%20CLEARED.pdf>.

⁴⁹ Bianca D.M. Wilson, et al., *Nonbinary LGBTQ Adults in the United States*, Williams Institute, UCLA School of Law 2 (June 2021), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf>.

⁵⁰ Passport Fees, Department of State—Bureau of Consular Affairs (Last visited Mar. 11, 2025), <https://travel.state.gov/content/travel/en/passports/how-apply/fees.html>.

⁵¹ *About ICAO*, ICAO (last visited Mar. 13, 2025), <https://www.icao.int/about-icao/Pages/default.aspx>.

presenter links to the identity, and (3) the presenter uses the claimed identity.⁵² It explains different types of evidence for identity and labels “core identity attributes” as name at birth, date of birth, place of birth, parents’ names, biometrics, and birth registration or national identification numbers.⁵³ It further construes “identity-related information” to include passport numbers, visa number, address, phone numbers, email address, relationships and association, driver’s license number, firearms license number, electoral roll (voter registration), utilities records, bank records, other names, school/church records, tax records, marriage/death records, health records, employment records, social media, and IP address.

Notably, sex at birth is not included in types of evidence that build confidence in establishing a person’s identity. The guidance explains that a birth registration document—like a birth certificate—is an anchor for identification because it provides details for identity, including parents, date and place of birth, a birth registration number, and a name.⁵⁴ The guidance strongly recommends using “name at birth” and explicitly provides for name changes, which “allows records to be checked against both current and previous names associated with the identity, and enables the authority to link subsequent information and events back to a unique anchor.”⁵⁵ Again, the focus on *name* at birth, which is tied to a birth registration number, is appropriate for identification because it allows for name changes, but the official guidance does not once indicate that “sex at birth” is evidence to establish or verify identity. In “protocols for acceptance of documentation,” the guidance further provides for name changes, requiring that nations only accept evidence of “use in the community” documents that are less than one year old and documented evidence of any name change.⁵⁶ It also provides guidance for how to properly record individuals’ life event details such as marriage, divorce, adoption, or name change.⁵⁷ It lists “name change records” as a foundational document to establish the existence of identity.⁵⁸ The explicit requirements for passports set out by the ICAO include many data points to establish and verify a person’s identity, none of which include assigned sex at birth.

The ICAO provides specifications for what must be included in machine readable travel documents and how officials should analyze such documents. During passport verification, data elements contained in the machine readable zone of the passport (first and last name, date of birth, sex, and nationality) are compared with the elements on the data page or the chip of the passport to authenticate an individual.⁵⁹ The ICAO requires that a passport include sex and provides the specifications for that inclusion:

⁵² *ICAO Trip Guide on Evidence of Identity*, ICAO Security and Facilitation (May 2018) at 3, 8, <https://www.icao.int/Security/FAL/TRIP/PublishingImages/Pages/Publications/ICAO%20Guide%20on%20Evidence%20of%20Identity.pdf>.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 10.

⁵⁶ *Id.* at 17.

⁵⁷ *Id.* at 10.

⁵⁸ *Id.* at 25, Table 1.

⁵⁹ *Machine Readable Travel Documents, Eighth Edition Part 2: Specification for the Security of the Design, Manufacture and Issuance of MRTDs*, ICAO Doc 9303 (2021), at C.40, https://www.icao.int/publications/Documents/9303_p2_cons_en.pdf.

Sex of the holder, to be specified by use of the single initial commonly used in the language of the State or organization where the document is issued and, if translation into English, French or Spanish is necessary, followed by an oblique and the capital letter F for female, M for male, or X for unspecified.⁶⁰

In other words: the entity that establishes worldwide criteria for verifying passports allows for an X designation for gender. None of the requirements by ICAO for issuance or verification of a passport include a person's assigned sex at birth. The only data elements included that are related to a person's information at the time of their birth is name, date of birth, and place of birth. The ICAO allows for name changes over an individual's life when tied to their birth registration number. In the U.S., this allows cisgender and gender-diverse individuals alike to change their name with life events, provide documentation to the relevant authorities, and receive updated documents consistent with their name changes. This similarly allows an individual to provide documentation of a new gender, including ICAO-accepted evidence of identity and name change, and a signed original medical certification for gender change on office letterhead from a licensed physician who has treated the individual for gender-related care.⁶¹ A gender-diverse person must submit these documents to receive an updated passport consistent with their gender identity, and much like a name change, this documentation chain verifies the person's identity. These practices are consistent with the authentication and protection purposes of the ICAO.

The Department's proposed changes disregard these ICAO-accepted standards and exceed the scope of what is necessary for air travel. The State Department previously had requirements in place that met the ICAO's standards for an individual's identity verification. The Department's proposed changes will collect and use information in excess of what the ICAO requires, and this data collection and use is wholly unrelated to fraud or crime prevention and does not make air travel safer. For example, if a trans man provides the necessary documentation to show his name change, gender change, and the official medical certification of his gender change to receive an updated U.S. passport, the ICAO considers this updated passport valid for air travel. It is wholly unnecessary to include a person's sex assigned at birth. If an individual has previously gone through the steps and documentation to change their gender and update their passport, the only relevant data element about their gender is their current sex designation. A valid passport does not list both the current sex designation and assigned sex at birth, so collecting this information and forcing a change to the passport are wholly unnecessary.

The Department's proposed changes contradict the previous ICAO-accepted practices for gender change, which will lead to confusion and inconsistency. For example, if a gender-diverse individual had previously amended their birth certificate to update the gender designation to be consistent with their gender identity, the Department's proposed changes are unworkable. The ICAO requires that the person provide documentation of their birth registration, in this case a birth certificate, which as amended would reflect their new gender. However, the proposed changes

⁶⁰ *Machine Readable Travel Documents, Eighth Edition Part 4: Specification for Machine Readable Passports (MRPs) and other TD3 Size MRTDs*, ICAO Doc 9303 (2021), at 14, https://www.icao.int/publications/Documents/9303_p4_cons_en.pdf.

⁶¹ U.S. Department of State, 8 Foreign Affairs Manual 403.3, Gender Change (May 31, 2019), archived version at <https://web.archive.org/web/20190531235228/https://fam.state.gov/FAM/08FAM/08FAM040303.html>.

would prevent this individual from listing any gender other than their sex assigned at birth on their passport. This person would be unable to verify their identity if their sex assigned at birth does not match their updated birth certificate, suggesting that any person who has updated the sex designation on their birth certificate is unable to receive a passport.

Take another example of this confusion. If a gender-diverse person has updated their other forms of identification, such as a driver's license, they too may be unable to receive a passport if they cannot verify their identity. Their application would necessarily include inconsistent name and gender markers by including their updated driver's license with the new gender marker but their assigned sex at birth. This would similarly exclude gender-diverse people who have updated their name and gender in their documents from receiving a passport. If the Department does not reverse its proposed changes, the Department must provide guidance for individuals that have previously changed their gender markers and names as to how they can still obtain valid U.S. passports, as denying them a passport on the basis of their gender is a violation of the U.S. Constitution and the Paperwork Reduction Act.

Lastly, if the Department nevertheless proceeds with the unlawful collection of information about sex assigned at birth, the Department should at least outline its plan for how it will securely collect, use, retain, and delete the information collected. For example, the Department must establish strict purpose, use, and access limitations, as mandated by the Privacy Act of 1974, 5 U.S.C. § 552a and the Fair Information Practices. This means that the Department would only be allowed to use such information for the limited purpose of verifying a person's identity on a passport application and the data should be deleted as soon as that purpose has been fulfilled. The Department should present clear guidance as to what constitutes permissible proof of one's sex assigned at birth. For example, if someone was born intersex, what evidence must they present to the Department to prove this: testimony from the applicant's birthing parent, the delivery doctor's sworn affidavit describing the newborn's anatomy, an ultrasound, or something else? If an individual is unlawfully compelled to disclose highly sensitive information related to their sex as a newborn, the Department must at least have data collection, use, retention, and deletion practices consistent with the sensitivity of such information.

e. The proposed changes irreparably harm millions of Americans and create intolerable burdens for every person in America who applies for a first-time, renewed, or corrected passport.

The Department failed to consider the burden to individuals applying for a new passport, passport renewal, or corrections to passports issued within the last year.

First, gender-diverse individuals forced to travel with identification documents, including passports, that are not consistent with their lived gender identity experience accusations of criminal fraud and strong emotional distress.⁶² One of the plaintiffs challenging this passport policy has already been accused of presenting false identity documents by TSA because his passport had a female gender marker while his driver's license had been updated to contain a male gender marker that matches his gender presentation.⁶³ Another plaintiff was subjected to a strip search by TSA

⁶² Memorandum of Law, *Orr v. Trump*, 1-25-cv-10313-JEK at 8 (D. Mass. Feb. 7, 2025).

⁶³ *Id.*

because her identification documents did not match her gender presentation.⁶⁴ The plaintiffs all reasonably fear traveling and being subjected to additional screening due to the inability to acquire consistent legal documents that reflect their lived gender identity. There are various categories of individuals who are affected by these proposed changes and who would experience the harms described, including i) individuals with identification documents fully consistent with their lived identity (such as valid passports issued prior to the Executive Order and amended driver's licenses) who may have such documents invalidated by the proposed changes; ii) individuals who have consistent identification documents but an inconsistent passport; and iii) individuals who have no identification documents that matched their lived gender identity. Any deviation from the norm is liable to flag gender-diverse individuals under this unworkable set of proposed changes. This would reduce the amount of travel gender-diverse individuals will engage in due to this fear rooted in real, troubling practices.

Second, gathering the necessary documentation will be a burden for all individuals who respond to this form. Depending on how the Department intends to operationalize its definition of sex assigned at birth, individuals would have to dredge up documentation that may no longer exist, or, in fact, may never have existed in the first place. This burden does not only apply to gender-diverse individuals, but every single person who applies for a new passport, applies to renew their passport, or applies to correct a recently issued passport. The Department would have no way of distinguishing which individuals applying are gender-diverse, so the burden would fall to the applicant to provide the appropriate documentation. Naturalized citizens may have a hard time acquiring their original birth certificates which could be located in a country halfway across the world. Individuals may have a hard time identifying and reaching out to the medical facilities and/or practitioners who delivered them. Individuals may not have access to ultrasounds or other documentation that may "prove" their sex assigned at birth. If the Department is allowed to proceed with the proposed changes despite their unlawfulness, the Department must at least keep this burden in mind when operationalizing its definition of sex assigned at conception.

Finally, the proposed changes are a burden because the passport policy opens individuals to increased government surveillance due to inconsistent legal documentation. This is especially salient as the Department of Homeland Security no longer blocks the surveillance of individuals solely based on sexual orientation and gender identity.⁶⁵ The databases are also accessible to law enforcement, which puts gender-diverse people at risk for criminal charges like fraud or more in an increasingly political and tense climate for these communities. There is no way to implement these changes without triggering this onerous burden.

f. The Department must not use AI tools to implement the proposed changes.

Artificial intelligence tools, including large language models and facial analysis tools, should not be used to by the Department during passport application processing. AI systems are

⁶⁴ *Id.*

⁶⁵ Ellen M. Gilmer, *DHS Scraps Ban on Surveillance Based on Sexual Orientation (1)*, BLOOMBERG GOVERNMENT (Feb. 18, 2025), <https://news.bgov.com/bloomberg-government-news/trumps-dhs-loosens-sexual-orientation-based-surveillance-policy>; Erin Reed, *DHS Now Allows for Surveillance based on Sexual Orientation or Gender Identity*, ERIN IN THE MORNING (Mar. 2, 2025), <https://www.erininthemorning.com/p/dhs-now-allows-for-surveillance-based>.

frequently inaccurate and unreliable, even more so for gender-diverse individuals. Even if these systems worked as promised, granting or denying a passport application should not be left to opaque, unaccountable decision making tools that risk denying individuals due process of law. Large language models, facial analysis software, and other similar systems will not make the Department's work more efficient or more accurate—but they will create security vulnerabilities which place highly sensitive data at risk.

Facial analysis software would not be a suitable alternative to birth certificates for assessing sex assigned at birth because it often fails at accurately ascribing gender to individuals.⁶⁶ Large language models often produce outputs with no basis in reality (“hallucinations”) or otherwise produce false and misleading data.⁶⁷ These tools lack adequate safeguards and assurances of accuracy to be used for something as critical as reviewing passport applications.

AI tools also create cybersecurity vulnerabilities that would put highly sensitive data at risk. The process for applying for a passport is highly sensitive, implicating biometric data such as facial images, dates of birth, social security numbers, and other highly sensitive personal data that is hard to anonymize or otherwise obscure.⁶⁸ Passport data and its related databases are already highly sought-after targets for malicious cyberattacks.⁶⁹

Finally, using AI systems to streamline the passport application process risks denying individuals procedural due process. The use of these tools can erode procedural due process protections because the basis or logic of outputs they produce cannot be adequately explained nor can the State Department adequately account for the decisions being made. This, in turn, can impermissibly limit an individual's ability to challenge adverse outcomes affecting their eligibility for a passport.

III. Conclusion

The proposed changes do nothing to further a legitimate government interest and instead would violate the rights of gender-diverse individuals and increase the burden on all individuals who apply for a first time, renewed, or corrected passport. These unclear and invasive requirements to prove sex assigned at birth do not align with international expert standards on travel documentation, mandated government procedure for substantive changes, or common decency. The Department should not implement the changes.

⁶⁶ Morgan Klaus Scheuerman et al., How Computers See Gender: An Evaluation of Gender Classification in Commercial Facial Analysis and Image Labeling Services, 3 Proceedings of the ACM on Human-Computer Interaction 144 (Nov. 7, 2019), <https://dl.acm.org/doi/10.1145/3359246>.

⁶⁷ EPIC, Generating Harms: Generative AI's Impact & Paths Forward, 1-9 (2023), <https://epic.org/gai>.

⁶⁸ See EPIC, Comment on the CFPB's Proposed Rule on the Small Business Advisory Review Panel for Consumer Reporting 14–15 (Oct. 30, 2023), <https://epic.org/wp-content/uploads/2023/10/EPIC-CFPB-FCRA-SBREFA-Comment.pdf> (citing Luc Rocher et al., Estimating the Success of Re-identifications in Incomplete Datasets Using Generative Models, 10 Nature Commc'ns 1, 2 (2019)).

⁶⁹ See Vanessa Wojtusiak, United States Passport Numbers Compromised in Equifax Cyberattack, News8 (May 11, 2018), <https://www.wtnh.com/news/united-states-passport-numbers-compromised-in-equifax-cyberattack/>; Security Gaps Found in Massive Visa Database, ABC News (Mar. 31, 2016), <https://abcnews.go.com/US/exclusive-security-gaps-found-massive-visa-database/story?id=38041051>.

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