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Form number: DS-11

Title of Information Collection: Application for a U.S. Passport

OMB Control Number: 1405-0004

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Department of State

Re: [FR Doc. 2025-02648 Filed 2-13-25]; OMB Control Number 1405-0004; Comments in Opposition to Proposed Changes to Form DS-11 Requiring Biological Sex at Birth on the Passport's Biographical Data Page

Dear Ms. Smith:

We are writing in response to the Department of State's proposed rule to the Application for a U.S. Passport (Form DS-11), as published in the Federal Register on February 14, 2025 (FR Doc. 2025-02648 Filed 2-13-25; 8:45 am). We express our strong opposition to the proposed rule to require applicants to indicate their "biological sex at birth" as only either male ("M") or female ("F") on the passport's biographical data page and to replace the word "gender" with "sex". This change does not reflect a scientifically accurate understanding of human biology, disregards the existence of intersex and transgender persons, compromises the passport's effectiveness as a reliable identification tool, poses risks to national security by misrepresenting identity data, and raises significant constitutional concerns, in particular the protections afforded to persons by the Due Process Clause including the equality guarantee by the Fifth Amendment to the U.S. Constitution.

For the reasons detailed below, we urge the Department to withdraw this proposed rule and restore the prior, more inclusive, and scientifically accurate approach to U.S. passports. The Department should revert to the former framework and eliminate the language that requires "biological sex at birth," and reinstate the "X" or other analogous marker for persons that do not fit the binary sex categories of male or female and for persons whose gender identities likewise do not fit the binary sex categories of male or female on Form DS-11. Further, the Department should retain the term "gender" rather than "sex" on Form DS-11.

DETAILED COMMENTS in Opposition to the Proposed Changes to Form DS-11 Requiring Biological Sex at Birth on the Passport's Biographical Data Page, [FR Doc. 2025-02648 Filed 2-13-25]; OMB Control Number 1405-0004

On February 14, 2025, the Department of State issued a proposed rule amending the "Application for a U.S. Passport" (Form DS-11), as published in the Federal Register (FR Doc. 2025-02648 Filed 2-13-25; 8:45 am), under OMB Control Number 1405-0004.¹ The primary change requires applicants to designate their "biological sex at birth" only as either male ("M") or female ("F") on the passport's biographical data page. The proposed rule also replaces the category of "gender" with "sex."²

Taken together, these proposed changes impose a scientifically inaccurate and exclusionary framework on passport identity documentation, conflicting with biology, national security, and constitutional protections, in particular due process and its equality guarantee under the Fifth Amendment of the U.S. Constitution.³ We submit these comments to express strong opposition to the proposed rule, particularly the shift to "biological sex at birth," and the elimination of the "X" gender marker for persons that do not fit the binary sex categories of male or female or for persons whose gender identities likewise do not align with either of the binary sex categories of male or female. As explained below, the proposed rule's impact on intersex and transgender persons, as well as its broader implications for equality and accuracy in federal identification raise grave concerns.⁴ We urge the Department to rescind this proposal in its entirety and restore the prior, more inclusive approach that focuses on a person's current sex, allows for persons to choose a third option, not just male or female on the form, and retains the term "gender" as the designation category on the passport's biographical data page.⁵

The Proposed Change to 'Biological Sex at Birth' on Form DS-11 Is Scientifically Inaccurate and Distorts Human Biology

The requirement to designate "biological sex at birth" as male or female on Form DS-11 misrepresents biological science and disregards the existence of intersex persons. The requirement to input "biological sex at birth" as a binary choice—male or female—presumes a rigid dimorphism that does not accurately reflect the established scientific understanding of

¹ *Proposed Rule: Application for a U.S. Passport (Form DS-11)*, 90 Fed. Reg. 9652 (Feb. 14, 2025) (to be codified at 22 C.F.R. pt. 51) (reflecting FR Doc. 2025-02648 and OMB Control Number 1405-0004 as cited in the document). Additional revisions include plain language updates, general format adjustments, and a new applicant statement affirming non-registration as a sex offender, in accordance with International Megan's Law, 34 U.S.C. § 21501 et seq., and 22 U.S.C. § 212b.

² *Id.*

³ U.S. Const. amend. V.; See Anne Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* 30-32 (2000), <https://files.libcom.org/files/Fausto-Sterling%20-%20Sexing%20the%20Body.pdf>

⁴ See Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Hum. Biology 151, 161 (2000); Lambda Legal, *Changing Birth Certificate Sex Designations: State-by-State Guidelines*, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last visited Mar. 12, 2025) (discussing transgender identity documentation issues).

⁵ See U.S. Dep't of State, *Gender Designation on Passports*, <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> (describing the prior policy allowing self-selected gender markers, including "X," until reversed by E.O. 14168).

human biology.⁶ Biological sex is not solely determined by a single factor such as chromosomes (i.e., XX or XY) or external genitalia at birth, as the proposed rule implies.⁷ Rather, it encompasses a spectrum of characteristics, including gonadal tissue, hormone levels, and genetic makeup, and secondary sex characteristics such as body mass distribution, hair growth, breast development, and muscle mass, which do not always fit neatly into "male" or "female" categories.⁸ Intersex persons—estimated to comprise 1.7% of the population, depending on the criteria used—are born with variations in sex characteristics that do not fit typical definitions of male or female.⁹ These variations may include conditions such as Androgen Insensitivity Syndrome (AIS), Congenital Adrenal Hyperplasia (CAH), or Klinefelter Syndrome (XXY), among others. These conditions can cause differences in chromosomes, hormone production, and/or secondary sex characteristics. For such individuals, the assignment of "biological sex at birth" as male or female is often an arbitrary medical or parental decision rather than an accurate reflection of their biological reality.¹⁰

Thus, the proposed rule's decision to limit passport sex designation to "M" (male) or "F" (female) based on "biological sex at birth" disregards the scientific complexity of an individual's sex. For example, an intersex person with ambiguous genitalia at birth might be assigned "female" due to surgical intervention, despite having XY chromosomes and internal testes.¹¹ Conversely, an person assigned "male" at birth might later discover a condition like Complete Androgen Insensitivity Syndrome, rendering their phenotype female despite an XY karyotype.¹² Requiring such people to select a binary sex on Form DS-11 that aligns with an initial assignment at birth rather than their lived experience or full biological profile upon adult development, creates a document that is incongruent with science and potentially misleading for identification purposes.¹³

Furthermore, forcing transgender people to use their assigned sex at birth ignores the biological reality of transgender people who have medically transitioned. Medical transition refers to the process of undergoing medical treatment to align one's sex with their gender. This process typically involves the potential suppression of endogenous hormones, the addition of exogenous hormones, surgery to remove or add breast tissue, surgery to modify external or

⁶ See Claire Ainsworth, *Sex Redefined: The Idea of 2 Sexes Is Overly Simplistic*, Sci. Am. (Oct. 22, 2018), <https://www.scientificamerican.com/article/sex-redefined-the-idea-of-2-sexes-is-overly-simplistic/> (arguing that biological sex involves multiple traits beyond chromosomes or genitalia).

⁷ See Eric Vilain, *The Spectrum of Sex Development: Eric Vilain and the Intersex Controversy*, Sci. Am. (May 11, 2016), <https://www.scientificamerican.com/article/the-spectrum-of-sex-development-eric-vilain-and-the-intersex-controversy/> (noting that sex determination is a complex interplay of genetic and developmental factors).

⁸ See *id.*

⁹ See Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex Res. 174 (2002), <https://doi.org/10.1080/00224490209552139>; see also Intersex Soc'y of N. Am., *What Is Intersex?*, https://isna.org/faq/what_is_intersex/ (last visited Mar. 12, 2025) (describing sex as a spectrum encompassing chromosomes, gonads, hormones, and genitalia).

¹⁰ See *id.*; see also InterACT, *What Is Intersex?*, <https://interactadvocates.org/faq/> (last visited Mar. 12, 2025) (listing AIS, CAH, and Klinefelter Syndrome as examples of intersex conditions).

¹¹ See *Orr v. Trump*, No. 1:25-cv-10313, at 6-7 (D. Mass. Feb. 7, 2025) Compl. (describing "sex" as encompassing multiple physiologic attributes beyond chromosomes or genitalia).

¹² See InterACT, *supra* note 10 (explaining how CAIS results in a female phenotype despite XY chromosomes).

¹³ See Amanda Montañez, *Visualizing Sex as a Spectrum*, Sci. Am. Blog Network (Oct. 1, 2017), <https://blogs.scientificamerican.com/sa-visual/visualizing-sex-as-a-spectrum/> (arguing that rigid sex designations misalign with biological reality and identification needs).

internal reproductive organs, and other various procedures affecting sex characteristics.¹⁴ Transgender people may go through any number of these procedures. The biggest aspect of biological sex that cannot currently be modified or changed is chromosomes, which as stated above, are not binary. A transgender person may have gone through procedures to change almost every aspect of their biological sex. For example, a transgender woman who has gone through all available procedures takes testosterone blockers that decrease her natural levels of testosterone to equal a cisgender woman's levels. She also takes estrogen hormone therapy to increase her levels of estrogen to equal a cisgender woman's levels. The combination of these hormone treatments will affect her secondary sex characteristics – she will develop breasts and undergo fat redistribution in her hips and abdomen. She will lose muscle mass and strength. The hair on her body will decrease in thickness and growth rate. She may even experience small changes in height and shoe size. She will have gotten facial feminization surgery which minimizes the appearance of her Adam's apple. Gender reassignment surgery (vaginoplasty) will have removed her external genitalia and given her a fully functional vulva and vagina.

Except for her XY chromosomes and lack of functional internal female reproductive organs, all of her sex characteristics match a cisgender woman's sex characteristics – and many cisgender women also lack functional internal reproductive organs, and this lack of function does not disqualify them from biological womanhood. In terms of chromosomes, many or most people have never gotten genetically tested and are not aware of their chromosomal makeup – chromosomes play a minimal role in identifying sex in day-to-day life. Because biological sex is based on a combination of all sex characteristics, for all intents and purposes, this transgender woman's sex is female.¹⁵ The proposed rule change denies this woman's biological reality and assumes that her biology is both the same as it was before medical transition and the same as a cisgender man's – a complete and total falsehood.

The Proposed Rule Disregards Previous Rulings Enjoining the State Department from Adhering to a Binary-Only Gender Marker Policy

The proposed rule's changes to Form DS-11 have already faced legal challenges. The prior version of the Form DS-11 was the result of federal court decisions that required the Department of State to issue U.S. passports with "X" markers. In *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020), the United States Court of Appeals for the Tenth Circuit analyzed five reasons given by the State Department explaining their denial of Dana Alix Zzyym's passport marked "X". The case began when the Department of State denied a passport application submitted by Dana Zzyym which marked "I" as their gender, reflecting the fact that they are intersex. Dana was applying for that passport because they were the Associate Director for the United States affiliate of the Intersex Campaign for Equality and had been invited to attend the International Intersex Forum in Mexico to represent and vote on behalf of their organization. Lambda Legal filed suit in the District Court of Colorado on behalf of Dana, who identifies as non-binary. *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248 (D. Colo. 2018). After six years of litigation, Dana became the first United States citizen to be issued an "X" marker on their

¹⁴ Overview of gender-affirming treatments and procedures | Gender Affirming Health Program, <https://transcare.ucsf.edu/guidelines/overview> (last visited Mar 16, 2025).

¹⁵ Matilda Carter, *Trans Women Are (or Are Becoming) Female: Disputing the Endogeneity Constraint*, 37 HYPATIA 384 (2022).

passport.¹⁶ Prior to that historic event, the Honorable R. Brooke Jackson of the United States District Court for the District of Colorado, stated that:

[T]he administrative record does not show that the decision making process that resulted in the [use of the binary-only gender] policy in question was rational. The withholding of the passport from Dana Zzyym is in excess of statutory authority. Recognizing the unreasonable delays Dana has faced in the issuance of a passport with an intersex marker, the Court enjoins the [State] Department from relying upon its binary-only gender marker policy to withhold the requested passport from Dana.

Zzyym v. Pompeo, 341 F. Supp. 3d at 1261).

In its ruling on appeal, the Tenth Circuit outlined many reasons for the justifications for the use of a binary-only gender marker policy asserted by the State Department were unsupported by record evidence. The State Department asserted that use of the binary sex policy ensured accuracy and reliability of U.S. passports, and the court held that:

The State Department lacks record support for its asserted interest in accuracy and reliability. The State Department mirror[s] how every U.S. jurisdiction [is] treating gender...but these jurisdiction shoehorn[s] everyone into a binary sex classification ill-suited for intersex applicants. The State Department thus relie[s] on information that didn't accurately describe intersex applicants.

Zzyym v. Pompeo, 958 F.3d, at 1025.

Ultimately, the court remanded the case with “instructions to vacate the State Department’s decision and reconsider Zzyym’s application for an intersex passport.” *See id.*, at 1034-35. The State Department did not appeal this ruling, and as referenced above, issued a passport with the X marker for Dana. At the time it did so, the United States “joined at least a dozen other countries that issue passports with sex/gender markers other than “F” (female) or “M” (male), including Australia, Austria, Bangladesh, Canada, Denmark, Germany, Iceland, India, Malta, Nepal, New Zealand and Pakistan.”¹⁷

Litigation based on the harms caused by the Department’s preemptive implementation of these changes was filed by the American Civil Liberties Union. *Orr v. Trump*, No. 1:25-cv-10313, at 6-7 (D. Mass. Feb. 7, 2025). The complaint in that matter, as discussed below, gives multiple examples of the real tangible harm caused to transgender and non-binary persons who are either applying for renewals of their previously issued U.S. passports or applying newly for a U.S. passport. While a ruling has not been issued in *Orr v. Trump*, the complaint outlines the myriad legal challenges that implementation of the proposed rule changes will invite.

Additionally, recently a court granted a temporary restraining order holding, in part, that transgender persons who are discriminated against on the basis of transgender identity, and

¹⁶ See Andrew Jones, *A Transgender and Non-Binary Review of the Law*, State Bar of Texas: Emerging Issues: The New Face of Constitutional Law Litigation, May 2023, at 2.

¹⁷ See Jones, *supra* note 15, at 3.

therefore on the basis of sex, would likely prevail on constitutional claims based on discrimination in the case. *PFLAG, Inc. v. Trump*, No. 25-337-BAH, 2025 U.S. Dist. LEXIS 26702, *62 (D. Md. Feb. 14, 2025).

The Proposed Rule Violates the Equality Guarantee Provided by The Due Process Clause of The Fifth Amendment

The proposed rule violates the equality guarantee of the due process clause of the Fifth Amendment because it discriminates against transgender, intersex and nonbinary persons on the basis of sex by denying them the right to report their sex or gender accurately, whereas persons who are male or female are able to report their sex or gender accurately. When the government facially discriminates on the basis of sex, it must satisfy intermediate scrutiny. *Sessions v. Morales-Santana*, 582 U.S. 47, 52 (2017) (striking down differential treatment of U.S. citizen fathers and U.S. citizen biological mothers as to their children's acquisition of U.S. citizenship on the grounds that the preference for biological mothers was not justified by real differences). See also *Bostock v. Clayton Cnty*, 590 U.S. (2020) (interpreting "sex" in Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-(a)(1) to include discrimination on the basis of sexual orientation and sexual identity) and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (recognizing the rights of same-sex persons to marry). For sex discrimination to be upheld, the government must be advancing an important, exceedingly persuasive interest or justification. *Sessions v. Morales-Santana*, 582 U.S., at 52 (2017); see *United States v. Virginia*, 518 U.S. 515, 533 (1996) (striking down the exclusion of women from public higher education and requiring that justifications for sex or gender discrimination must be genuine, not hypothesized or invented); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1981) (striking down exclusion of men from a nursing program). Further, the government has to establish that the interest is substantially related to discrimination on the basis of sex or gender. *Sessions v. Morales-Santana*, 582 U.S. at 48 As the Court stated in *Morales-Santana*, "if a statutory objective is to exclude or protect members of one gender' in reliance on 'fixed notions concerning [that gender's] roles and abilities, the objective itself is illegitimate.'" *Id.*, at 62 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). The proposed order would fail under this analysis because the government's only identified interest, to defend or protect women, as identified in the E.O. 14168, "Defending Women From Gender Ideology Extremisms and Restoring Biological Truth to the Federal Government," lacks any, let alone a substantial relationship to the proposed rule's changes to U.S. passport identifying information, which discriminate against transgender women and men, and intersex or other nonbinary persons, by not allowing them to designate their sex accurately.

Instead, the proposed rule risks adversely impacting the important and even compelling interests that the United States has in ensuring that U.S. passport holders are identified accurately, instead of on the basis of information that may or may not have been accurately ascertained at birth. Passports serve several purposes: they are the primary way that U.S. citizens are protected by their citizenship when traveling overseas; and they enable the U.S. government to correctly identify persons who are entitled to secure a U.S. passport and travel in and out of the country on a regular basis, something that is important to national security interests. Passports also have become a critical form of identification for U.S. citizens, permanent residents and nationals within the United States. All of these interests are frustrated and compromised

when transgender and intersex persons are forced to identify their sex or gender "at birth" and when they are deprived of the ability to choose "X" as an alternative gender marker. The proposed rule cannot pass muster under intermediate scrutiny because the asserted interest is simply not furthered at all by the discrimination and other important and compelling interests that the Department of State has in the issuance of U.S. passports are thwarted by the proposed rule's changes. Thus, the proposed rule will not pass even rational basis scrutiny, discussed more fully below, because there appears to be no relation between any asserted or possible interest advanced by the State Department.

In *Bostock v. Clayton County*, 590 U.S. 644 (2020), the United States Supreme Court interpreted Title VII in the Civil Rights Act of 1964's bar on discrimination on the basis of sex in employment to encompass gender identity and sexual orientation. *Bostock*, 590 U.S. at 655. Similarly, lower courts have treated gender or sex discrimination as encompassing discrimination on the basis of gender identity. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 602 (4th Cir. 2020). More recently, a court granted a preliminary injunction to a challenge to the implementation of an executive order banning federal funding to institutions providing gender affirming care to persons affected by gender dysphoria. *PFLAG, Inc. v. Trump*, 2025 U.S. Dist. LEXIS 26702 (D. Md. Feb. 14, 2025). The PFLAG court reaffirmed the principle that transgender persons are a quasi-suspect class and that facial discrimination against the class is subject to intermediate scrutiny. against the class is subject to intermediate scrutiny. As discussed above, the court granted the injunction reasoning that there was a likelihood that the plaintiffs would succeed on their constitutional claim. As in the PFLAG case, a constitutional challenge to the proposed rule's changes is likely to be successful as well because the changes flout established legal norms.

The equality guarantee of due process in the Fifth Amendment ensures that persons are treated equally by the federal government in the eyes of the law. Transgender persons, estimated to constitute 1% of Americans, are entitled to be free from discrimination on account of their gender identity. As will be further established below, the proposed rule would only further subjugate these persons by refusing to recognize or report an accurate gender or gender marker on their passports, despite other U.S. citizens, permanent residents and nationals to easily choose an accurate gender marker.

Further, the proposed rule would fail even under rational basis scrutiny, the minimal guarantee to all persons under the Fifth Amendment because the proposed rule is solely based on animus towards a politically disfavored group. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that one law only being enforced against one community and not another is animus); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (holding that animus cannot be the basis for discrimination even if the group is not a suspect or quasi-suspect class); and *U.S. Dep't of Agri. v. Moreno*, 413 U.S. 528, 534 (1972) (holding that animus towards a group cannot be the government's legitimate interest for rational basis). Laws that discriminate against a class that have not been held to be a suspect or semi-suspect class are analyzed under rational basis review, which is the lowest form of scrutiny. For the law to be upheld, the party challenging the law must establish that the discrimination is rationally related to a legitimate governmental interest. Under *Obergefell*, and other cases, the Court has previously held that animus is not a legitimate governmental interest. *Obergefell v. Hodges*, 576 U.S. 644, 679 (2015); *Lawrence v.*

Texas, 539 U.S. 558, 578 (2003) (holding that one law only being enforced against one community and not another is animus); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (holding that animus cannot be the basis for discrimination even if the group is not a suspect or quasi-suspect class); and *U.S. Dep't of Agri. v. Moreno*, 413 U.S. 528, 534 (1972) (holding that animus towards a group cannot be the government's legitimate interest for rational basis).

As discussed above, the proposed rule does not rest on any strong governmental interest other than the supposed protection of women. The protection of women is not an important or even legitimate interest for the government to pursue if it is doing so in a way that burdens or excludes one gender “in reliance on ‘fixed notions concerning [that gender’s] roles and ability.’” *Sessions v. Morales-Santana*, 582 U.S., at 62 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)). For the government to do so renders the objective itself “illegitimate.” *Id.* At page cite citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982).

The function and language of the proposed rule, when considered with the Executive Order it seeks to implement, makes clear that its primary motivation is animus against transgender and intersex people. *See* Exec. Order No. 14168, “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” January 20, 2025. The proposed rule is violative of the equality guarantee in the due process clause of the Fifth Amendment and it should be withdrawn.

The Proposed Rule Violates the Due Process Rights of Transgender and Intersex Persons

The Fifth Amendment prohibits the government from depriving individuals of “life, liberty, or property, without due process of law.” Generally, the United States Supreme Court has interpreted the substantive due process guarantee to require that the federal government regulate in a rational, not arbitrary, manner. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955) (due process requires laws to have reasonable relation to a proper legislative purpose and not be arbitrary). The proposed rule, if adopted, would infringe on substantive due process because the rule rests on biologically inaccurate information and commits the United States Department of State to perpetuating and misrepresenting a person’s actual current sex. Rational basis review requires that government actions be rationally related to a legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (stating that under rational basis review, a law must be “rationally related to a legitimate state interest”). “Restoring biological truth,” as stated in the proposed revisions of DS-11, may be a legitimate governmental interest but the proposed rule does not further that interest because the changes announced by the proposed rule are not biologically accurate. Rather, the rule adopts changes that reflect an ideological assertion without reason or scientific basis. Medical and psychological communities recognize gender identity as a complex spectrum that is not confined by biological sex at birth.¹⁸ The government may assert a legitimate interest in ensuring biological accuracy, but that interest is not served by the proposed rule. Rather, the proposed rule rejects biological or gender accuracy as an interest,

¹⁸ *See* Am. Psych. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 832-864 (2015), <https://www.apa.org/practice/guidelines/transgender.pdf> (affirming that gender identity exists on a spectrum and is not solely determined by biological sex at birth).

since it is not reflective of biological accuracy. By ignoring scientific consensus, this proposed rule lacks a rational basis.¹⁹

The proposed rule fails to add any asserted interest in biological accuracy because it does not account for the lived experiences and medical transitions of transgender persons, nor does it adjust for intersex persons whose biology may not fit a binary gender model at birth. For example, a transgender man who has gone through hormone therapy and surgery to better align his physical body with his male identity would still be required to list “female” on his U.S. passport if that was his assigned sex at his birth, ultimately misrepresenting his current biological and social reality. This leaves the person disconnected from their true self. Similarly, intersex persons, who may have ambiguous or non-binary biological characteristics, are forced into an inaccurate binary designation, weakening any claim of “biological truth.” The rule does not improve U.S. passport security protocols or administrative efficiency—purported interests often cited in identity documentation policies—because it creates inconsistencies between an individual’s legal identity and their U.S. passport, potentially leading to confusion and increased scrutiny when at nation’s borders. Instead of advancing any legitimate governmental purpose, the rule imposes a rigid, antiquated framework that causes harm by denying people the ability to present their true identity, thus failing a rational basis review altogether.

Further, the proposed rule violates substantive due process by wholly undermining a fundamental right to personal dignity, autonomy, and identity as to matters of gender and sex. Substantive due process protects certain implied fundamental rights, which are deeply rooted in our nation’s history and tradition and implicit in our concept of ordered liberties—namely, personal decisions regarding identity and personal autonomy. *See Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (holding that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy,” which extends to identity-related decisions); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (explaining that substantive due process protects rights “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty”). Moreover, the United States Supreme Court has recognized that the right to define one’s own identity is a basic aspect of liberty, encompassing decisions about relationships, family, and personal expression. *See Obergefell v. Hodges*, 576 U.S. 644, 663 (2015) (holding that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy,” which extends to identity-related decisions and which is not confined to history and tradition); *see also Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (affirming that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”). Requiring U.S. passport applicants to designate their “biological sex at birth” as either male or female, when their actual sex misaligns or is different from the sex assigned at birth, infringes on the rights of human beings who are transgender, nonbinary, and intersex since their gender identities do not align with a binary gender classification.

Fundamental rights are reviewed under strict scrutiny, which requires the government to demonstrate that the challenged regulation is narrowly tailored to serve a compelling state interest. *See Reno v. Flores*, 507 U.S. 292, 302 (1993) (explaining that strict scrutiny applies to

¹⁹ See Am. Med. Ass’n, Policy H-185.950, *Removing Financial Barriers to Care for Transgender Patients* (2008, reaffirmed 2016), <https://www.ama-assn.org> (recognizing that affirming gender identity aligns with medical and scientific understanding, not arbitrary binary designations).

laws infringing on fundamental rights, requiring the government to show a compelling interest and narrow tailoring). A compelling state interest must be more than a generalized desire to maintain tradition or administrative convenience; it must involve a pressing need, such as national security or public safety, that justifies overriding fundamental rights. “Narrow tailoring” means the policy must be the least restrictive means to achieve that interest, avoiding unnecessary burdens on the protected right. Here, the proposed rule fails strict scrutiny. The government might claim a compelling interest in “ensuring biological truth” or ensuring accuracy or uniformity in U.S. passport data, but these interests are not advanced in any way by the proposed rule. Instead, they are thwarted by the proposed rule, which reflect ideological assertions or administrative preferences, not urgent governmental needs. Thus, the proposed rule is not narrowly tailored. It imposes a blanket binary requirement without exceptions or accommodations for transgender, nonbinary, or intersex persons, despite less restrictive alternatives like the previously implemented “X” gender marker option, which the Department of State introduced in 2022 without undermining U.S. passport functionality. Because the proposed rule is neither justified by a compelling interest nor narrowly tailored, it does not pass strict scrutiny and would violate substantive due process if adopted.

The recent case, *PFLAG, Inc. v. Trump*, backs up why this rule fails to hold substantial weight. See *PFLAG, Inc. v. Trump*, No. 25-337-BAH, 2025 U.S. Dist. LEXIS 38036, at *66-71 (D. Md. Mar. 4, 2025) (holding that Executive Order 14168, which cut funding for gender-affirming care, constituted discrimination based on transgender status and violated equal protection principles). The court stated that Executive Order 14168—the same one behind the DS-11 proposed change—overstepped by cutting funding for gender-affirming care, calling it discrimination based on transgender status, which they ruled is sex discrimination under *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020) (ruling that discrimination based on transgender status or sexual orientation constitutes sex discrimination under Title VII), and *Kadel v. Folwell*, 100 F.4th 122, 164 (4th Cir. 2024) (extending *Bostock*’s reasoning to hold that denying transgender individuals coverage for gender-affirming care under state health plans violates the Equal Protection Clause). *Id.* at *68-69. The court pointed out that it’s about comparing sex at birth to someone’s identity, which is exactly how the proposed rule forces a “biological sex” label that doesn’t match how individuals currently identify. This instance shows how the proposed rule has no rational basis—it pushes an idea about sex that science doesn’t support and mirrors how the funding cuts were more about bias than reason in *PFLAG*, which distorts due process.

Additionally, *PFLAG* fails strict scrutiny because it cannot justify itself any better than the funding ban did. *Id.* at *68-71 (reasoning that the government failed to provide a compelling interest for the funding ban and that it was not narrowly tailored, as it disproportionately harmed transgender individuals without a legitimate basis). In the case, the court threw out the idea that there was a substantial reason—like protecting children—to blanket-ban care for transgender people. They reasoned that it treated them differently from others getting similar treatments, and there were less harsh ways to handle it. *Id.* at *69-70. The proposed rule shows similarity: it singles out transgender and nonbinary individuals by locking them into a sex-at-birth label with no solid proof that it’s necessary for safety or anything notable. The government seems to be forcing its view on identity without a worthwhile reason or a fair substitute. *PFLAG* states how

this governmental move does not hold water constitutionally; this reasoning pinpoints why the proposed rule fails strict scrutiny as well. *Id.*

Forcing people to conform to gender designations that do not reflect their physical and lived experience is coercive and is not a neutral act; it denies their humanity and squeezes them into a box that they do not agree with and that is not accurate. It would be a mistake to simply view a U.S. passport as a travel document—it is a reflection of one’s identity in the eyes of the state and the world. The proposed rule mandating a binary sex marker would strip people of the ability to have their identity truthfully represented, violating their fundamental right of self-determination. This violation particularly targets transgender persons who have legally and medically transitioned as well as nonbinary and intersex persons whose identities outrightly defy binary classification. The harm is not hypothetical—mismatched identity documents like U.S. passports can lead to harassment, discrimination, or real and physical danger when traveling, as people may face pushback or disbelief from officials who question their appearance or documentation, as will be further developed below. For example, a transgender woman forced to list “male” on her U.S. passport may be subjected to invasive questioning or denial of entry in countries hostile to gender nonconformity. The government would blatantly refuse to recognize her true identity. This policy does not only merely inconvenience but also fundamentally undermines the dignity and autonomy that substantive due process protects. This would compel people to either misrepresent themselves or forego international travel altogether, which would be a significant restriction on their liberty.

The Proposed Rule Would Effectively Out Trans People and Place Them at Risk of Violence and Harassment

Transgender people already face violence and harassment at far higher rates than their cisgender counterparts. When transgender people are forced to use an ID with a gender or sex marker that does not match their appearance, they are immediately placed in danger. When a transgender person ‘passes’ (is recognized by strangers as the gender they identify as), they are generally able to navigate the world with more safety than those who do not.²⁰ One study found a significant portion of trans people had been harassed at a public location - of respondents who said that staff or employees at a place of public accommodation they visited thought or knew that they were transgender, nearly one-third (31%) experienced at least one type of negative experience, including being denied equal treatment or service (14%), verbally harassed (24%), and/or physically attacked (2%) in the past year.²¹

When the public recognizes a transgender person as being trans, they are often met with violence, potentially even fatal violence²² - see the 1993 case of Brandon Teena, a transgender man who was murdered after he was outed as transgender. In fact, 50% of transgender persons reported having experienced being denied equal treatment and/or being verbally or physically harassed due to being transgender, with one in ten having experienced physical attacks because

²⁰ Brynn Tannehill, *Not Passing or Blending Is Dangerous for Many Trans People*, Slate (June 19, 2018), <https://slate.com/human-interest/2018/06/not-passing-or-blending-is-dangerous-for-many-trans-people.html>

²¹ Nat’l Ctr. for Transgender Equal., 2015 U.S. Transgender Survey

²² Human Rights Campaign, *An Epidemic of Violence 2024*, HRC (2024) <https://reports.hrc.org/an-epidemic-of-violence-2024>

of their trans identity.²³ These rates of violence go even further – since 2013, almost 400 transgender persons have been murdered in the U.S.²⁴, including the February 2025 murder of Sam Nordquist, a transgender man who was kept and tortured for months.²⁵

Hate crimes due to gender identity are on the rise - in 2022, rates increased by a shocking 32.9% compared to 2021²⁶. In 2023, rates increased by 16% to a total of 542 incidents.²⁷ These statistics also vastly underestimate the actual number of hate crimes against transgender people. Many jurisdictions do not collect gender identity-based hate crime data, and many jurisdictions do not report their data to the FBI. Only 50% of the LGBT population lives in a state that requires hate crime data collection for gender identity, meaning many hate crimes against transgender people go unreported.²⁸ Still, even the under-reported rates of hate crime incidents have risen in a significant manner. The proposed rule will contribute to this rise in hate crimes.

Forcing a trans person to reveal their birth sex when presenting their passport effectively outs them as transgender every time they show their ID. Trans people are already victims of harassment and violence when interacting with TSA.²⁹ 43% of trans people report negative experiences at airport security related to being transgender, such as having their name or gender questioned, unnecessary pat-downs, and/or being detained.³⁰ The proposed rule increases the risk for every trans person who goes through the airport, because the sex listed on the passport will not match the person's appearance, indicating to employees that the person is transgender.

Furthermore, the proposed rule would out a transgender person in other scenarios, like in housing or work applications that require multiple forms of identification, a practice which is an increasingly common requirement. As explained below, most employees use passports for I-9 employment purposes, meaning a transgender employee would be forced to out themselves to their employer. In each instance, the trans person runs the risk of encountering someone who would deny them services, harass them, or attack them for being transgender.

²³ Sandy E James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey* (Nat'l Ctr. for Transgender Equal. 2022).

²⁴ Human Rights Campaign, *HRCF's 2024 Epidemic of Violence Report: Fatal Violence Against Transgender and Gender Non-Conforming People Continues with Black Trans Women Comprising Nearly Half of the Deaths*, HRC (2024), <https://www.hrc.org/press-releases/hrcs-2024-epidemic-of-violence-report-fatal-violence-against-transgender-and-gender-non-conforming-people-continues-with-black-trans-women-comprising-nearly-half-of-the-deaths>

²⁵ Sopan Deb, *Person Killed in New York Was Tortured for More Than a Month, Police Say*, The New York Times, Feb. 15, 2025, <https://www.nytimes.com/2025/02/15/nyregion/ny-arrests-sam-nordquist-murder.html>

²⁶ Human Rights Campaign, *FBI's Annual Crime Report: Amid State of Emergency, Anti-LGBTQ+ Hate Crimes Hit Staggering Record Highs*, HRC (Oct. 2024), <https://www.hrc.org/press-releases/fbis-annual-crime-report-amid-state-of-emergency-anti-lgbtq-hate-crimes-hit-staggering-record-highs>

²⁷ Human Rights Campaign, *New FBI Data: Anti-LGBTQ+ Hate Crimes Continue to Spike Even as Overall Crime Rate Declines*, HRC (Oct. 2024), <https://www.hrc.org/press-releases/new-fbi-data-anti-lgbtq-hate-crimes-continue-to-spike-even-as-overall-crime-rate-declines#:~:text=The%20FBI's%20report%20noted%20that,with%20469%20the%20year%20before>

²⁸ Movement Advancement Project, *Equality Maps: Hate Crime Laws*, LGBT MAP, https://www.lgbtmap.org/equality-maps/hate_crime_laws (last visited Mar. 15, 2025).

²⁹ See CNN Travel Staff, *Traveling While Transgender: Complications and Tips*, CNN (Feb. 2023) <https://www.cnn.com/travel/article/transgender-travel-complications-tips/index.html>

³⁰ See Nat'l Ctr. for Transgender Equal., *supra* note 22.

The more scenarios in which the trans person is forcibly outed by their incorrect passport, the more the risk of discrimination and violence grows. A staggering 50% of Americans believe changing one's gender is morally wrong.³¹ This reality means that as a trans person navigates the world, one out of every two people they meet believe their identity is morally wrong - a belief that could potentially lead to discrimination, harassment, and violence. One in ten trans people who have held a job have lost their job due to being transgender.³² Almost half of respondents in a 2011 survey reported having adverse employment action taken against them for being trans.³³ Under the proposed rule, every time a trans person shows their passport to their employer, they are faced with the risk of losing their job or facing adverse employment actions. All in all, the proposed rule will out trans people every time they show their passport, and will lead to increased harassment, violence, and discrimination against them.

The Proposed Rule Creates Inconsistencies with Other Identity Documents and Poses National Security Risks by Complicating Identity Verification and Increasing Vulnerabilities at Borders.

By enforcing passports to reflect sex assigned at birth, the proposed rule creates inconsistencies with other identification documents, posing national security risks by complicating identity verification and increasing vulnerabilities at borders.

The proposed rule requires passports to reflect a binary male or female designation based on the sex assigned at birth, eliminating the "X" marker for those whose sex was neither male or female at birth or who do not identify as male or female. *See* Compl., *Orr v. Trump*, 1:25-cv-10313, (D. Mass. Feb.07.2025) at 2. This policy creates inconsistencies with state issued identification documents, where most states allow gender markers to reflect the sex they live as. *Id.*

The complaint filed in *Orr v. Trump*, Compl., *Orr v. Trump*, 1:25-cv-10313, (D. Mass. Feb.07.2025) identifies actual people who are adversely impacted by the kind of policy the proposed rule applies. Zaya Perysian, a transgender woman, had her passport changed to male despite her state ID's identifying her as female. Compl. at 27-29. Unless Zaya is issued a correction, she will effectively have an unusable passport and will be unable to leave the country safely or comfortably for ten years. *Id.* The current passport Zaya possess does not reflect who she truly is and if she were to present the current passport with a male sex designation, it could cause a multitude of issues with TSA agents such as invasive scrutiny at domestic checkpoints. *Id.*

Another instance of similar harassment experienced by people directly impacted by the proposed rule due to mismatches involves Drew Hall, a nonbinary New Yorker who sought a passport matching their feminine driver's license. Compl. at 33. Drew travels internationally frequently and mailed their passport to the State Department's national processing center

³¹ See Megan Brennan, *Slim Majority of Adults Say Changing Gender Is Morally Wrong*, Gallup (June 17, 2024) <https://news.gallup.com/poll/645704/slim-majority-adults-say-changing-gender-morally-wrong.aspx>

³² See Sandy E James et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey*.

³³ See Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Ctr. for Transgender Equal. & Nat'l Gay and Lesbian Task Force (2011), <https://www.thetaskforce.org/resources/injustice-every-turn-report-national-transgender-discrimination-survey/>

requesting an updated female sex designation. However, Drew does not know whether the agency will return a passport that accurately reflects their identity. As of now, Drew does not have access to their passport and is unable to travel internationally. Compl. at 34. This burdensome ordeal mirrors Zaya's, as both face hardships from a policy that disrupts identification and international travel. These examples reveal a system that undermines security by complicating the identification verification process and generates disorder that results in intensified scrutiny that jeopardizes both security and effectiveness.

Moreover, the proposed rule's adoption of a birth assigned binary is a national security flaw. By mandating passports to adhere to an antiquated standard that is irrelevant to lived experience and biological accuracy, the proposed rule frustrates the identity verification framework our borders rely on. While some states align gender markers with how people express themselves in the world, the proposed rule produces a disjointed mess where a passport might declare one gender, their state ID another, and their appearance something else entirely.

The proposed rule's binary framework also conflicts with the United States' obligations as a member state of the International Civil Aviation Organization (ICAO).³⁴ The ICAO, a specialized United Nations agency, establishes international standards for aviation safety and security to ensure global consistency.³⁵ ICAO Document 9303 recommends "M" (male), "F" (female), or "X" (unspecified) as sex field options in travel documents, a flexible approach adopted by many member states.³⁶ However, the proposed DS-11 rule excludes the "X" option, going beyond what these norms allow.³⁷ As an ICAO member, the U.S. is expected to follow such standards unless it formally opts out, yet no exception appears here.³⁸ The availability of "X" in numerous countries' passport systems, such as Australia, Canada, Germany, and India, reflects an acknowledgment of biological and social realities that the U.S. proposal dismisses.³⁹ By rejecting this option, the proposed rule not only diverges from global best practices but also imposes a standard that is less scientifically accurate and precise than other countries.⁴⁰

Further, in nations hostile to transgender or nonbinary gender persons, the mismatch becomes a spotlight, exposing travelers to harassment or worse, imprisonment.⁴¹

³⁴ See Int'l Civil Aviation Org., *Machine Readable Travel Documents*, Doc. 9303, pt. 3, at 11 (7th ed. 2015), https://www.icao.int/publications/Documents/9303_p3_cons_en.pdf (specifying "M," "F," or "X" as acceptable sex designations); see also *Member States*, Int'l Civil Aviation Org., <https://www.icao.int/about-icao/Pages/member-states.aspx> (last visited Mar. 15, 2025).

³⁵ *Convention on Int'l Civil Aviation*, Dec. 7, 1944, art. 44, 61 Stat. 1180, 15 U.N.T.S. 295, https://www.icao.int/publications/Documents/7300_9ed.pdf

³⁶ See *Machine Readable Travel Documents*, *supra* note 18, at 11.

³⁷ See *id.*

³⁸ See *id.*

³⁹ See Human Rights Watch, *I Want to Be Like Nature Made Me* 23-24 (July 25, 2017), <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us> (noting countries like Australia and Germany offer "X" passport options).

⁴⁰ United Nations Off. of the High Comm'r for Hum. Rts., *Background Note on Human Rights Violations Against Intersex People* (2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/LGBT/BackgroundNoteHumanRightsViolationsAgainstIntersexPeople.pdf> (highlighting global recognition of intersex variations in identity documentation).

⁴¹ U.S. DEPARTMENT OF STATE, <https://travel.state.gov/content/travel/en/international-travel/before-you-go/travelers-with-special-considerations/lgb.html>

The State Department's proposed rule to allow for designation only of sex as male or female based on birth assigned sex does not fortify our borders – it compromises them, endangering the lives and health of U.S. citizens and other U.S. passport holders and generating disorder, not stability, resulting in intensified scrutiny that jeopardizes both security and effectiveness.

The Proposed Rule Ignores the Role That U.S. Passports Play in the Internal Affairs of The Country

The proposed rule ignores the role that U.S. passports have come to play in the internal affairs of the United States, including employment and the interstate travel of U.S. citizens and permanent residents, areas beyond the purview of the agency that has promulgated this rule, the Department of State. The proposed rule poses a major issue for United States citizens or permanent legal residents' stability in identification in our society and imposes unnecessary, yet substantial, burdens on both the people affected and the various governmental agencies tasked with approving identifying documents for employment. Federal law requires that employees fill out an I-9 form to verify that they are authorized to work in the United States. One of the most accessible ways for U.S. citizens and permanent residents to verify their citizenship or status that enables them to work in the United States is to present their employers with a valid passport. Although the United States accepts other forms of identification for I-9 purposes, most employees use their passport because it is one of the most common forms of identification allowed.

Removing the gender marker "X" from valid passports and only allowing gender markers to identify either "M" or "F" on the basis of the sex assigned at birth on a birth certificate leaves millions of transgender and intersex Americans and permanent residents with U.S. passports that, while still technically valid, identify a gender marker that will not match other identification, such as state-issued driver licenses – or most problematic – the physical way in which they may present to the employer.⁴² This policy change would impact the employability of U.S. citizen and permanent resident workers in a way unanticipated by the proposed rule and far beyond the purview of the Department of State, which is primarily focused on international affairs and international travel. The proposed rule would make it difficult for U.S. citizen or permanent resident workers to use their passport for I-9 purposes (verification of eligibility or authorization to be employed in the United States), since their passport, if this rule is approved, would no longer be an accurate descriptor of their sex.

Further, a mismatch in identification documents or physical appearance will create additional unnecessary problems for both the federal government and the people affected. Transgender persons may face additional challenges in securing a U.S. passport because some states allow a current sex-designation (not one limited to what was assigned at birth) that will not match with the proposed rule's designation. Some states still allow an "X" gender marker on state-issued identification that will not match the passport designations under the terms of the proposed rule, since the passport is only able to show "M" and "F" under the gender marker.

⁴² See Williams Inst., *Transgender People*, UCLA Sch. of L., <https://williamsinstitute.law.ucla.edu/subpopulations/transgender-people/> (last visited Mar. 17, 2025).

Transgender U.S. citizens will be forced to go through lengthy and costly measures to change their passport markers, made even more burdensome because of state requirements for legally changing one's gender designation vary significantly depending on the state.

The passport application may also be denied if the proposed photograph doesn't align with the Department of State's view of what a "M" or a "F" should look like, even if the individual has successfully lawfully changed their sex from their sex assigned at birth. The proposed rule negates state laws and processes that have recognized and facilitated an individual person's change of sex under the law because of an inaccurately assigned or represented sex in the birth certificate issued at birth.

Further, the proposed rule should not be approved because it is inconsistent with historical and traditional understandings of how sex identity is determined or presented in the United States, which has been a matter of state process and state law. States have played the predominant role in providing mechanisms that allow persons to accurately record their sex for legal purposes, not an agency like the United States Department of State, whose focus primarily is not to determine what US citizens' sex is or is not but to provide a verified identification travel documents that enable US citizens and other US passport holders to engage in international travel, and increasingly, for use within the United States, including for purposes other than travel, like employment.

The Proposed Change from "Gender" to "Sex" Undermines Effective Identification

The proposed rule's change from "gender" to "sex" on U.S. passports risks misidentifying people and reducing the document's reliability as an identification tool.⁴³ This change introduces practical and ethical challenges for intersex and transgender applicants.⁴⁴ For transgender persons, this shift heightens the risk of being forcibly outed, as the sex listed on their passport may not match their appearance, exposing them to the risk of harassment and violence every time they present their passport.⁴⁵ To fully understand these challenges, it is crucial to recognize that "sex" and "gender" carry distinct meanings: "sex" typically refers to biological characteristics—chromosomes, hormones, and anatomy—while "gender" is understood as a social construct encompassing identity and expression of that identity.⁴⁶ However, the courts and general public often treat these terms interchangeably. Regardless of this debate, the shift from "gender" to "sex" in the proposed rule has tangible consequences.⁴⁷ The use of "gender" as a term on the previous form allowed for flexibility, reflecting an individual's identity as it aligns with their lived experience—a consideration particularly relevant for intersex and transgender persons whose gender identity may not match their assigned sex at birth.⁴⁸ For transgender persons, this flexibility can be a matter of safety, as studies show that many people who identify

⁴³ See Tiffany Jones, *Intersex Studies: A Systematic Review of International Health Literature*, SAGE Open, Jan.-Mar. 2018, at 7, <https://journals.sagepub.com/doi/full/10.1177/2158244017745577>

⁴⁴ National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 12, 86 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁴⁵ See *id.*

⁴⁶ See *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, *supra* note 25, at 832

⁴⁷ See *id.*

⁴⁸ See Intersex Soc'y of N. Am., *supra* note 9 (distinguishing gender identity from assigned sex for intersex persons).

as transgender face negative experiences in public settings such as denial of services, verbal harassment, or physical attacks.⁴⁹

In contrast, by shifting to "sex" and anchoring it to the moment of birth, the Department ignores the dynamic nature of biological sex as understood in modern science, where factors like hormone therapy or surgical interventions (common among intersex and transgender persons) can alter sex characteristics over time.⁵⁰ Forcing a static, rigid, and binary designation risks misrepresenting these people, potentially leading to confusion or discrimination during identity verification processes at borders or elsewhere.⁵¹

Retaining a third marker—such as an "X" option for unspecified sex—is justified not because of the specific use of "gender" over "sex," but because it reflects the biological and social reality.⁵² This inclusion ensures accuracy and fairness, aligning with international standards like those of the International Civil Aviation Organization (ICAO).⁵³ Without this option, transgender persons face increased scrutiny at borders, contributing to a documented rise in hate crimes. The Department's obligation to provide reliable identification hinges on acknowledging this complexity, not oversimplifying it.⁵⁴

We urge the Department to reconsider this change given scientific evidence demonstrating that biological sex exists on a continuum rather than as a strict binary.⁵⁵ The current proposal, as it stands, misrepresents human biology in a manner that is neither practical nor scientifically defensible, ultimately undermining the credibility of the U.S. passport as a reliable identification document.⁵⁶

In conclusion, the proposed rule change would reinstate a binary-only gender marker policy which, as outlined herein, will cause untold harm for transgender, non-binary, and intersex people. In fact, the State Department has already implemented the proposed change before this notice and comment period has been completed. That attempt to implement the proposed change has been preliminarily enjoined. The Secretary of State has ordered the State Department to suspend the processing of passport applications that seek to change the sex designation on a person's passport or that selected a gender-neutral sex designation, causing confusion and harm to U.S. citizens, permanent residents and other persons eligible for U.S. passports whose sex or gender does not comport with sex at birth.

For the above-mentioned reasons, the Department should withdraw the proposed rule and retain the prior, more inclusive and scientifically accurate framework.

⁴⁹ See *id.*, see also Nat'l Ctr. for Transgender Equal., *supra* note 46, at 86.

⁵⁰ See Ctr. for Am. Progress, *Key Issues Facing People with Intersex Traits* (Oct. 25, 2021), <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/> (describing discrimination risks due to mismatched identity documents).

⁵¹ See Montañez, *supra* note 13 (visualizing sex as a continuum based on scientific evidence).

⁵² See *id.*

⁵³ See Int'l Civil Aviation Org., *supra* note 18, at 11 (supporting "X" as an option for accurate identification).

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See Human Rights Watch, *supra* note 23, at 45 (arguing that binary-only policies undermine passport reliability for intersex persons).

Thank you for the opportunity to submit comments on the proposed rule.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Isabel Medina", with a long horizontal flourish extending to the right.

Submitted by M. Isabel Medina

For Identification Purposes Only: Victor H. Schiro Distinguished Professor of Law
Loyola University New Orleans College of Law

These comments, protected activity under the Administrative Procedures Act and the First Amendment, have been drafted by law students, expressing their personal views in a learning exercise to better understand the federal rule making process and experience the process of submitting comments in rule-making under the supervision of Professor Medina while studying related issues in a law school course. Neither the comments, Professor Medina nor the students speak for or on behalf of Loyola University New Orleans College of Law.