

March 17, 2025

*Submitted via* [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain)

Form number: DS-11

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

OMB Control Number: 1405-0005

Amanda E. Smith

Managing Director for Passport Support Operations

Bureau of Consular Affairs

Passport Services

Department of State

Re: [FR Doc. 2025-02648 Filed 2-13-25]; OMB Control Number 1405-004; 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 to comment upon, and oppose, the Department of State's notice of proposed rulemaking regarding passport sex designations. This comment will focus specifically on the Proposed Rule's requirement of binary sex designations based on "biological sex at birth" on U.S. Passports holders.

Before we go into the relevant legal issues, we would like to introduce ourselves. We are law students at Loyola University New Orleans College of Law. This Spring we are taking immigration and citizenship law, which has given us the opportunity to produce this, our first ever comment on a proposed rulemaking.

We believe that U.S. citizens have the right to move freely with their passport with the correct sex designation, the one they identify with. This comment is based on our studies throughout law school, as well as our personal convictions.

On February 14, 2025, the Department of State issued a proposed amendment regarding the information collection for Form DS-11, Application for a U.S. Passport, as published in the Federal Register (FR Doc. 2025-02648 Filed 2-13-25; 8:45 AM), under OMB Control Number 1405-0004.<sup>1</sup> The proposal changes the term "gender" with "sex" and requests applicants to select

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<sup>1</sup> Proposed Rule: Application for a U.S. Passport (Form DS-11), 90 Fed. Reg. 9652 (proposed February 13, 2025)(to be codified at 22 C.F.R. 51.20-8).

their “biological sex at birth,” only providing the options of male (“M”) or female (“F”).<sup>2</sup> Additional revisions include general format changes, plain language updates, and a statement, affirming the applicant is not required to register as a sex-offender, in accordance with International Megan’s Law (34 U.S.C. 21501 et seq., and 22 U.S.C. 212b).<sup>3</sup>

Together, these proposed changes violate constitutional protections of more than 1.6 million transgender Americans<sup>4</sup>, more than 1.2 million non-binary Americans<sup>5</sup>, and possibly as many as 5.6 million intersex Americans.<sup>6</sup>

### **The Proposed Change Violates Constitutional Protections**

The Fifth Amendment provides that “[n]o person shall ... be deprived of life, liberty or property, without due process of law.”<sup>7</sup> The Supreme Court holds that the Due Process Clause of the Fifth Amendment includes a guarantee of equal protection by the federal government, including the Department of State, equivalent to the laws of States under the Equal Protection Clause of the Fourteenth Amendments. As written, the new regulations are a violation of the equality guarantee of the Due Process clause because they discriminate against persons based on sex on those who are transgender or intersex by denying them their rights of correct sex designation on their identification documents. Conversely, people who are male or female can correctly designate their sex on such documentation.

The standard of review for any government gender classification is 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). For sex discrimination to be valid, the government must provide an exceedingly persuasive interest or justification that does not rely on archaic or overbroad stereotypes about the sexes. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (striking down the exclusion of women from public higher education). Additionally, the government must also provide that the discrimination is substantially related to that interest. *Sessions v. Morales-Santana*, 582 U.S. at

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See 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> (last accessed Mar. 14, 2025).

<sup>5</sup> Bianca D.M. Wilson et al., *Nonbinary LGBTQ Adults in the United States*, Williams Institute, UCLA School of Law 2 (June 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf> (last accessed Mar. 14, 2025).

<sup>6</sup> 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> (last accessed Mar. 14, 2025).

<sup>7</sup> U.S. Const. Amend V.

48. If it can't, then the policy is invalid. Passports are widely used for other verification identification such as obtaining a driver's license, proof of age, proof of citizenship, and educational registrations. Refusal to comply with the proposed changes would render applicants without the ability to travel or identify themselves safely. Such changes could also increase confusion and processing times. Passports are also widely used for employment purposes as they are one of the more widely used methods of verification that one is authorized to work in the United States as a citizen, national or permanent resident of the United States. Requiring U.S. citizens, nationals, or permanent residents to report a sex that is inaccurate or misrepresents their actual sex or gender creates problems for the I-9 employment verification system.

Even if a court would find that restricting the "sex" categories to male and female is not sex discrimination, at a minimum the government would have to satisfy rational basis scrutiny which requires a law be rationally related to a legitimate government interest.<sup>8</sup> The proposed rule cannot survive even rational basis review because the interest that is asserted reflects inaccurate and unscientific understandings of "sex," rests on stereotypes about sex that are overbroad and archaic that render it illegitimate. Further, the proposed rule is arbitrary and irrational because any asserted interest is not furthered by the discrimination.

The proposed policy defines "female" as someone "belonging, at conception, to the sex that produces the small reproductive cell" and "male" as someone "belonging, at conception, to the sex that produces the large reproductive cell," then proceeds to restrict sex designations on passports to those definitions, i.e., a sex classification. Transgender, intersex, and non-binary people who appear physically differently than their sex "at birth" will be targeted exclusively on the basis of their sex designation, with no material purpose apart from what may be interpreted to be animus towards transgender, intersex, and nonbinary people, similarly not a legitimate governmental interest. See *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).

In *Obergefell v. Hodges*, 135 S.Ct. 2589 (2015), the Court held that the Fourteenth Amendment's Due Process Clause extends to certain personal choices that an individual makes with dignity and autonomy. Some of the choices that an individual can make are intimate choices defining their personal identity and beliefs. In this case, by the government removing the option of individuals to designate their gender on their passports, it would violate the Fourteenth Amendment's Due process Clause. Removing the option of an "X" on their passport, it is not allowing individuals to make an intimate choice to define their personal identity on a legal document such as passport.

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<sup>8</sup> 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).

Individuals would be oppressed, humiliated and marginalized by the government for not being able to make their own choices with dignity and autonomy.

The proposed rule poses a direct, increased threat of injury to the transgender community. The number of transgender people who were murdered in the U.S. nearly doubled between 2017 and 2021.<sup>9</sup> Already, transgender people are over four times more likely than cisgender people to experience violence including rape, sexual assault, and aggravated or simple assault, and higher rates of property discrimination.<sup>10</sup> Forced exposure of individuals' private information will likely proliferate the already heightened violence they experience on a daily basis.

Passports are necessary for, inter alia, international travel. Failure to comply with the new sex change will restrict Applicant's ability to move freely unless they accept the wrong designation. Doing so will place individuals whose physical appearance does not match the designation on their passports in imminent danger at the hands of those who loathe transgender, intersex, and non-binary people.

Further, individuals will suffer emotional and psychological harm of being forced to "come out" each time their sex designation and physical appearance is questioned. Forcing individuals to feel the need to prove their identity can lead to erosion of their identity and gender dysphoria.

#### **The Proposed Rule Will Have Adverse Economic Effects on Those Personally Restricted and U.S. Businesses**

The proposed changes will also result in significant loss of employment and educational opportunities for career advancement abroad, due to one's inability or difficulty to travel with correct sex designations. It could also negatively impact an individual's domestic employment and educational opportunities. One's passport is used for various identification and status verifications such as the Form I-9, Employment Eligibility Verification, required to verify an employee's citizenship and eligibility of employment.

Sex and physical appearance inconsistencies amongst driver's licenses, passports, and birth certificates can lead to individuals being accused of engaging in fraudulent activities, such as attempting to hide their true identity for purposes of immigration benefits. These accusations can cause severe emotional distress as well as legal challenges. Further, in some cases, it could lead to criminal charges and permanent bans from entering the United States.

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<sup>9</sup> C Mandler, *Murders of trans people nearly doubled over past 4 years, and Black trans women are most at risk, report finds.*, CBS News <https://www.cbsnews.com/news/transgender-community-murder-rates-everytown-for-gun-safety-report/> (last accessed Mar. 14, 2025).

<sup>10</sup> Andrew Flores, et. al., *Transgender people over four times more likely than cisgender people to be victims of violent crime.*, Williams Institute, UCLA School of Law 1 (2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/> (last accessed Mar. 14, 2025).

The proposed changes may also discourage transgender, intersex, and non-binary people from entering the U.S. due to a heightened likelihood of harassment, discrimination, and violence. Heightened risks of misgendering, discrimination, and legal challenges present significant barriers. These barriers will result in reduced immigration and talent pools, decreases in tax revenues, and decrease in tourism to the United States, which will have compounding effects on the United States economy. Orlando, Florida's economy in 2023 saw an estimated \$3.1 million in tourism spending from the LGBTQ+ community alone.<sup>11</sup>

### **Conclusion**

For the above-mentioned reasons, we are concerned this proposed rule denies the equality guarantee of the due process clause of the Fifth Amendment to intersex, transgender and other persons on account of their sex or sexual identity. These persons are entitled and deserving of protection, and must not be restricted and targeted on account of their sex or sexual identity. We urge its rejection in favor of retaining the prior, more inclusive designations. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "M Isabel Medina", followed by a long horizontal line 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 rulemaking 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.

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<sup>11</sup> Capo Jr., Julio, *How LGBTQ+ Tourism Helped Put Florida on the Map*, Time, <https://time.com/7018332/florida-lgbtq-tourism/> (September 6, 2024).