

March 20, 2020

Submitted via www.reginfo.gov/public/do/PRAMain

Department of State

RE: OMB Control No. 1405-0020 or Docket No. FR-2025-02697 or Public Notice 12667, Public Comment Opposing Proposed Information Collection: U.S. Passport Renewal Application for Eligible Individuals (Form DS-82)

I write to express my strong opposition to all three proposed changes to form DS-82: 1) the requirement that the applicant affirm that they are not required to register as a sex offender; 2) the replacement of the word “gender” with “sex;” and 3) the requirement that the applicant disclose their sex assigned at birth as either male “M” or female “F.” Many other comments have already made good arguments in opposition to these changes, and I support them by reference here; however, I will focus this comment on the policy deleting X markers as an option.

I am a public interest attorney who has provided direct legal services to countless transgender clients over the last several years. I have helped clients obtain court orders recognizing their correct name and update their documents to reflect their correct gender. In this role, I have also borne witness to the truly senseless inefficiency, unnecessary problems, impossible hurdles, humiliation, and even increased danger that inaccurate or inconsistent documents can cause anyone in a bureaucratic world, especially transgender, intersex, and nonbinary people.

I have also struggled through many of these same hurdles myself as a transgender, nonbinary person, and I currently possess a valid United States passport with an X marker. By stripping the X marker option from the DS-82 passport renewal form, I—and other transgender, intersex, or nonbinary people like me—will be arbitrarily stripped of accurate passports correctly reflecting our sex. This change will not only decrease the accuracy of passports and the efficiency in issuing them, it is also blatantly unlawful.

1. The Proposed Change Is Arbitrary and Capricious Under the Administrative Procedure Act

First, the exclusion of X markers on passports is arbitrary and capricious under the Administrative Procedure Act. The Department of State first introduced X markers as an option on passports on April 11, 2022,¹ after having lost a lawsuit finding the exclusion of X markers arbitrary and capricious in the first place.² The plaintiff in that suit, Dana Zzyym, was a nonbinary, intersex person, and the Department of State was enjoined to begin issuing passports with X markers, rather than continuing to force those like the plaintiff to either choose an

¹ U.S. Dep’t of State, *Press Statement: X Gender Marker Available on U.S. Passports Starting April 11* (Mar. 31, 2022), <https://2021-2025.state.gov/x-gender-marker-available-on-u-s-passports-starting-april-11/#:~:text=The%20Department%20of%20State%20has,regardless%20of%20their%20gender%20identity>.

² *Zzyym v. Mullen*, 958 F.3d 1014 (10th Cir. 2020).

inaccurate binary sex designation, or be denied a passport and the right to travel as a United States citizen.

Now, less than three years after beginning to offer X markers on passport forms, the Department is choosing to disobey the ruling of this case and reverse its policy with no factual or logical explanation as to why it makes more sense now than it did then to force Dana Zzyym into a biologically incorrect sex category. The Department has failed to cite any issues caused by existing passports bearing X markers, any burden in issuing them, or literally any other reason for its policy change. Nor has it given any reason why it would be a problem to issue future passports containing X markers while current passports already containing X markers (such as my own) continue to be in use without incident. The only sources cited in regards to this change are the standards set by the International Civil Aviation Organization—which support recognition of passports with X markers, in contrast to the Department’s proposal—and Executive Order 14168³—which asserts only general transphobic animus and inexplicably denies the biological and medical reality of intersex and transgender people. Indeed, changing the forms to delete X markers as an option and require submission of additional evidence will create unnecessary delay and inefficiency in renewal processing, as well as unnecessary chaos, confusion, and inefficiency in passport use at airports and other venues, as intersex and nonbinary people will be forced to provide inaccurate identifying information about their biological realities that will lead to increased error and harassment.

2. The Proposed Change Violates the First and Fourteenth Amendments of the Constitution

Moreover, the refusal to provide X markers as an option on passports violates the constitutional rights of transgender, intersex, and nonbinary people in multiple ways. First, it violates the Equal Protection Clause of the Fourteenth Amendment. This is a policy that classifies on its face by sex, as it wholly excludes from recognition and denies the existence of an entire sex (intersex people) by explicitly recognizing only male and female sexes. As such, it is subject to intermediate scrutiny, which it wholly fails: the Department has asserted no important government interest at all in its proposal, and while it references Executive Order 14168, which asserts the important government interest of protecting women’s rights, the elimination of X markers on passports and the insistence that gender markers reflect sex assigned at birth is not only not substantially related to achieving that interest, it is wholly unrelated. There is simply no evidence that X markers or recognition of transgender people affects women’s safety or equal access to education, employment, or anything other right. However, denial of accurate passports to transgender, intersex, and nonbinary people violates their right to travel under the substantive due process clause of the Fourteenth Amendment, and the imposition of inaccurate gender markers on their passports compels speech in violation of the First Amendment.

For these reasons and more, I urge the Department to reconsider its proposed changes to this form.

For more information, please contact:
Jensen Rode

³ Executive Order 14168, <https://www.federalregister.gov/documents/2025/01/30/2025-02090/defending-women-from-gender-ideology-extremism-and-restoring-biological-truth-to-the-federal>.