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March 17, 2025

VIA ELECTRONIC SUBMISSION to www.regulations.gov

RE: 30-Day Notices of Proposed Information Collection

- **Application for a US Passport, DS-11, OMB Control Number 1405-0004**
- **U.S. Passport Renewal Application for Eligible Individuals, DS-82, OMB Control Number 1405-0020**
- **Application for a U.S. Passport: Correction, Name Change to Passport Issued 1 Year Ago or Less, and Limited Passport Replacement, OMB Control Number 1405-0160**

The Center for Constitutional Rights (“CCR”) is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the U.S. Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including policies that disproportionately impact lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQIA+) communities.

CCR writes today in our capacity as civil rights leaders to express our grave concern about the three above-referenced information collections related to U.S. passport applications, specifically the Application for a US Passport, DS-11, OMB Control Number 1405-0004; the U.S. Passport Renewal Application for Eligible Individuals, DS-82, OMB Control Number 1405-0020; and the Application for a U.S. Passport: Correction, Name Change to Passport Issued 1 Year Ago or Less, and Limited Passport Replacement, OMB Control Number 1405-0160. We strongly oppose all proposed policy, procedural, and technocratic changes that would revise application forms for U.S. passports to require applicants to select only either “male” or “female,” as determined by what is currently referred to by the U.S. federal government as their “biological sex at birth.”

Such substantive changes embody invidious discrimination and are procedurally deficient. Tethering transgender men and women, as well as nonbinary and intersex people, to their sex assigned at birth perpetuates violent gender stereotypes, personal bias, and mischaracterization of the relationship between biological sex and gender. The proposed changes are also hasty and improvident; they are not the culmination of adequate information gathering or research, but a reflexive return to an outdated and reductive approach.¹ The changes fail on efficiency and legality grounds by imposing new costs on the State Department, diminishing the usefulness of U.S. passports, and violating the Administrative Procedure Act and the U.S. Constitution. The proposed

¹ See Press Statement, Antony J. Blinken, U.S. Sec’y of State, 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/> (announcing the State Department’s commitment to making the X gender marker available in order to advance inclusion and serve all U.S. citizens).

collection of information also fails to satisfy the legal requirements of the Paperwork Reduction Act (PRA). We urge the Office of Information and Regulatory Affairs to disapprove of this reductive and defective information collection and respectfully call for the withdrawal of these agency proposals in their entirety.

I. THE PROPOSED FORM CHANGES VIOLATE THE REQUIREMENTS OF THE PAPERWORK REDUCTION ACT.

A. The Form Changes Attempt to Unilaterally Strip Transgender, Nonbinary, and Intersex People of Legal Recognition Without A Valid or Reasoned Basis

President Trump’s January 20, 2025 Executive Order (the “Executive Order”) asserts that sex is fixed at conception.² While the executive branch cannot unilaterally eliminate constitutional or statutory rights, we note with alarm that this policy nonetheless attempts to promulgate a government-wide policy of ignoring the existence of transgender, nonbinary, and intersex people. The addition of the X gender marker to passport forms during the previous presidential administration was the result of extensive consultation with partner countries, public health experts, and members of the LGBTQIA+ community.³ Now, the previously available forms have been replaced on the U.S. State Department’s website with older versions that do not include an “X” sex designation.⁴ Further, the currently available forms appear to have Information Collection Review (ICR) clearance that expired on December 31, 2023; no current ICR is listed on reginfo.gov.

B. A 30-Day Comment Period is Insufficient Procedure

By replacing valid passport forms with facially inaccurate versions and changing policy without a required notification in the Federal Register, the Department of State violated the Paperwork Reduction Act (PRA). The PRA requires federal agencies to provide a notice and comment period or otherwise consult with the public if they seek to collect information, including through agency forms.⁵ The PRA applies broadly to almost all executive agencies and agency information collections.⁶ Prior to any changes, agencies are statutorily mandated to establish an internal review process, publish a notice in the Federal Register, and provide a *60-day* public comment period, followed by the submission of an Information Collection Review to the Office of Information and Regulatory Affairs (OIRA), a second Federal Register notice, and a subsequent 30-day public comment period.⁷ While the PRA does afford agencies some flexibility,

² Exec. Order No. 14168, 90 Fed. Reg. 8615, 8615 (Jan. 20, 2025).

³ See Blinken, *supra* note 1.

⁴ Compare DS-11 Form, U.S. Dep’t of State (January 20, 2025), https://web.archive.org/web/20250120175305/https://eforms.state.gov/Forms/ds11_pdf.PDF with DS-11 Form, U.S. Dep’t of State (February 1, 2025), https://web.archive.org/web/20250201073950/https://eforms.state.gov/Forms/ds11_pdf.PDF.

⁵ Paperwork Reduction Act of 1980, 44 U.S.C. § 3501, *et seq.*

⁶ See Maeve P. Carey & Natalie R. Ortiz, Cong. Rsch. Serv., The Paperwork Reduction Act and Federal Collections of Information: A Brief Overview (Apr. 17, 2024), <https://crsreports.congress.gov/product/pdf/IF/IF11837>.

⁷ *Id.*

reflecting the balancing of public interest and agency burden, the opportunities to minimize or shorten the required process are narrowly circumscribed.⁸

De minimis and non-substantive changes, for example, are eligible for a less extensive review process.⁹ The revision of passport application forms under the current administration does not fall into either category. A *de minimis* change affects the “look and feel” of a collection while leaving the nature or type of information collected unchanged.¹⁰ A non-substantive change might include wording revisions or adaptations of forms for a digital interface, but the Office of Management and Budget (OMB) would still be required to review prior to implementation.¹¹ Seeking to invisibilize the gender identity of more than one million people living in the United States is a significant and substantive change that requires adequate process.

The “emergency” review process is also not applicable here, nor does it appear to have been pursued. OIRA can grant expedited review of collection *upon request* if the collection is “essential” to the agency’s mission, more rapid clearance is needed, and an agency is unable to comply with normal clearance procedures because: “(i) public harm is reasonably likely to result if normal clearance procedures are followed; (ii) an unanticipated event has occurred; or (iii) the use of normal clearance procedures is reasonably likely to prevent or disrupt the collection of information or is reasonably likely to cause a statutory or court-ordered deadline to be missed.”¹² Emergency clearance can also only be granted for a maximum of six months, attaching an expiration date to the collection.¹³ As discussed in greater detail below, the proposed changes impose significant burdens and harms on the public and do not serve a legitimate government interest. OIRA can also approve a generic clearance for conducting more than one information collection using similar methods, such as customer service feedback, and agencies can also use common forms to share information collection between one or more agencies.¹⁴ Again, these exceptions do not apply, and there has been no apparent attempt to pursue one of these flexibilities.

It is unclear why the 30-day information collection promulgated for these forms deviates significantly from requirements under the PRA. The publication of information collection for each of the aforementioned forms references a prior, unrelated 60-day notice and comment period. This attempt to shortcut statutory requirements could stem from the State Department’s misunderstanding of the required process or from a willful disregard. Ultimately, however, neither a lack of administrative acumen nor a disregard for administrative law justify invidious discrimination against the LGBTQIA+ community.

⁸ Howard Shelanski, Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget, 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 (July 22, 2016), https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/omb/inforeg/inforeg/pru_flexibilities_memo_7_22_16_final.pdf (summarizing the “administrative flexibilities” agencies can pursue when complying with the PRA).

⁹ *Id.* at 4–5.

¹⁰ *Id.* at 4.

¹¹ *Id.*

¹² 44 U.S.C. § 3507(j).

¹³ *Id.*

¹⁴ *Id.*

II. THE PROPOSED FORM CHANGES ARE CONTRARY TO THE GOALS OF THE PAPERWORK REDUCTION ACT

The Paperwork Reduction Act aims to minimize the federal paperwork burden for individuals, minimize the government’s cost of information collection, and maximize the usefulness of collected information.¹⁵ The proposed passport form changes fail to achieve any of these objectives.

A. The proposed form imposes a significant burden on transgender, intersex, and nonbinary people

It is clear that the State Department understands the PRA’s statutory requirement of evaluating the burden associated with a collection, but has still failed to adequately do so. The burden is meant to include the time, effort, and financial resources expended to provide information to an agency.¹⁶ The State Department seems simply to have copied previous burden estimates, grossly underestimating the time and money that form respondents will be forced to expend.¹⁷

Transgender, intersex, and nonbinary applicants constitute a significant portion of the U.S. population. Approximately 1.6 million people in the U.S. are transgender,¹⁸ while as many as 3.3 million people were born with intersex traits,¹⁹ and more than 1.2 million people identify as nonbinary.²⁰ While the State Department’s website acknowledges potential delays and requests for additional information for applicants whose indicated sex marker differs from their sex marker at birth, the ICR burden analysis does not disaggregate or analyze the disparate burden on this population.²¹ The gravity of this omission is heightened by evidence that federal agencies intend to create new barriers for transgender, intersex, and nonbinary people. The Secretary of State distributed internal guidance in February 2025 directing agency officials to suspend the applications of people whose citizenship and identity evidence “does not sufficiently establish” the applicant’s “biological sex at birth,” and to send an Information Request Letter.²²

¹⁵ Public L. No. 96-511, 94 Stat. 2812.

¹⁶ *Id.* at 2813.

¹⁷ The burden estimates for the DS-11, Application for a U.S. Passport, for example, appears to have been copied from a November 2024 information collection. See 60-Day Notice of Proposed Information Collection: Application for a U.S. Passport, 89 Fed. Reg. 93389 (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>.

¹⁸ Jody Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, Williams Inst. of UCLA Sch. of Law 1 (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

¹⁹ Stephanie Dutchen, *The Body, The Self*, Harv. Med. (Winter 2020), <https://magazine.hms.harvard.edu/articles/body-self>.

²⁰ Bianca D.M. Wilson et al., *Nonbinary LGBTQ Adults in the United States*, Williams Inst. of UCLA Sch. of Law 2 (June 2021), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf>.

²¹ The State Department’s website warns that people who submit passport applications indicating “a sex marker that is different from [their] sex marker at birth . . . may experience delays getting [their] passport.” See Sex Marker in Passports, U.S. Dep’t of State Bureau of Consular Affs., <https://travel.state.gov/content/travel/en/passports/passport-help/sex-marker.html> (last visited Mar. 17, 2025).

²² 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).

Further, the stated time of 85 minutes per response fails to account for the full implications of such an incoherent and unnavigable policy for transgender, intersex, and nonbinary applicants. Many will need to seek legal counsel to understand the ramifications of providing the federal government with inaccurate information that contradicts their legal sex designation on other documents, significantly increasing the burden of these agency proposals to members of the public.

B. The proposed form changes increase cost and decrease government efficiency

The Trump administration has publicly shared a commitment to curbing government spending that “fail[s] to align with American values or address the needs of the American people.”²³ While this aligns with the PRA’s existing goal of minimizing the cost of information collection, the proposed form changes fail to fulfill both the administration’s promise and the PRA’s purpose. The proposed changes will increase costs, necessitating that adjudicators inspect the sex designation history of every passport application to see if other records align with the administration’s narrow and incorrect understanding of the relationship between sex and gender. If adjudicators do identify a “discrepancy,” they are then required to suspend the application and send an Information Request Letter.²⁴ Still more investigative time is required upon receiving the required letter, including review of vital records.²⁵ To our knowledge, this weaponization of this bureaucratic process is unprecedented in its scope and attendant cost, and the consequences will ripple beyond targeted communities, slowing down passport processing times for everyone.

U.S. Supreme Court precedent makes clear that discriminating against transgender people is impermissible sex discrimination;²⁶ the fact that the form changes do so at significant expense to the federal government and American people only compounds the urgency of withdrawal.

C. The proposed form changes undermine the usefulness of U.S. passports

Further contravening the goals of the PRA, the proposed form changes undermine the utility of U.S. passports. Issuing passports that do not reflect an individual’s gender expression will cause unnecessary confusion, undue scrutiny, and increased expenditure of government time and taxpayer dollars on unnecessary document checks, airport pat-downs, and delays at border checkpoints. Again, while this burden will have a targeted impact on transgender, intersex, and nonbinary people, the consequences will be felt by a broad swath of the U.S. population, and serves no legitimate public policy goal.

III. THE PROPOSED FORM CHANGES ARE UNCONSTITUTIONAL AND ILLEGAL

The proposed form changes and the underlying discriminatory policy also violate the constitutional guarantee of equal protection, rights to travel and privacy, and protections against compelled speech as well as the Administrative Procedure Act (APA). This has already led to at

²³ Fact Sheet: President Donald J. Trump Continues the Reduction of the Federal Bureaucracy, The White House (Mar. 14, 2025), <https://www.whitehouse.gov/fact-sheets/2025/03/fact-sheet-president-donald-j-trump-continues-the-reduction-of-the-federal-bureaucracy/>.

²⁴ Message Reference Number 25 STATE 11610 (U.S. Sec’y of State internal guidance), *supra* note 22.

²⁵ *Id.*

²⁶ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (affirming that discrimination against LGBTQIA+ persons is an actionable form of sex discrimination).

least one pending legal challenge.²⁷ It is clear that the proposed passport policy cannot be justified under any level of judicial scrutiny, and it is irresponsible for OIRA and the State Department to burden courts with a blatantly unlawful policy and process.

A. The Proposed Changes Violate the Administrative Procedure Act

Agency actions that are arbitrary, capricious, an abuse of discretion, or contrary to constitutional rights, privileges or immunities are in violation of the APA.²⁸ The APA not only delineates agencies' procedural obligations, but also defines the standards of review for agency actions.²⁹ The lack of research, inadequate burden analysis, and deficient notice and comment period clearly meet the threshold for an arbitrary and capricious agency action. This is in stark contrast with the thorough process undertaken when the passport gender change policy was updated in 2022.³⁰

B. The Proposed Changes are Unconstitutional

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” The U.S. Supreme Court has held that the liberties protected by this Due Process Clause include fundamental rights to free movement and travel, including travel abroad.³¹ The Due Process Clause also guarantees equal protection under federal law, equivalent to that guaranteed by the Equal Protection Clause of the Fourteenth Amendment.³²

Passports are not only necessary for travel outside of the country and for reentry into the United States,³³ but are also used broadly as identification documents inside the United States, including to obtain drivers' licenses, for educational registration, and to enroll in government programs. The proposed passport policy contravenes the promise of equal protection while burdening transgender, intersex, and nonbinary peoples' rights to travel, and potentially jeopardizes property interests secured by valid passports. It also increases the risk of discrimination, harassment, and violence they face.³⁴

Separately, the First Amendment dictates that “Congress shall make no law . . . abridging the freedom of speech.” As articulated in the pending legal challenge against the new information collections related to U.S. passport applications, “[u]nder the First Amendment, the government cannot require a person to convey a controversial, ideologically-infused message with which they disagree.”³⁵ In order to obtain a passport, transgender, intersex, and nonbinary people are forced

²⁷ *Orr v. Trump*, Case No. 25-cv-10313-JEK, 2025 WL 449214 (D. Mass. Feb. 7, 2025).

²⁸ 5 U.S.C. § 706(2).

²⁹ 5 U.S.C. §§ 500, *et seq.*

³⁰ *See, e.g.,* S. Willson & K. Miller, *Cognitive Interview Evaluation of X Gender Marker Definitions for the U.S. Passport Application Form*, Nat'l Ctr. for Health Stats. - CCQDER (2022), <https://wwwn.cdc.gov/QBank/Report.aspx?1225>.

³¹ *See, e.g.,* *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964).

³² *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

³³ *See* 8 U.S.C. § 1185(b).

³⁴ *See, e.g.,* Movement Advancement Project, *Identity Documents & Transgender People* (Mar. 2025), <https://www.mapresearch.org/file/ID-info-transgender-nonbinary-communities.pdf>.

³⁵ Compl. at ¶ 231, *Orr v. Trump*, 2025 WL 449214 (D. Mass. Feb. 7, 2025) (No. 25-cv-10313-JEK).

to adhere to an ideology that erases their existence, violating the First Amendment’s prohibition on compelled speech.

The State Department’s blatantly unconstitutional efforts are justified only by reference to the animus-laden executive order “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government.”³⁶ The policy is not narrowly tailored to advancing a compelling government interest, it is not substantially related to an important government interest, and it cannot even be framed as rationally related to achieving any legitimate government interest.

CONCLUSION

For the aforementioned reasons, the Center for Constitutional Rights respectfully urges the withdrawal of these proposed information collection revisions related to U.S. passport applications. These changes are procedurally flawed, contrary to the goals of the Paperwork Reduction Act, and violate fundamental legal and constitutional principles. The significant harm that this policy would inflict upon transgender, intersex, and nonbinary individuals would only compound existing marginalization and cannot be ignored.

Sincerely,

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³⁶ See *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*, Exec. Order 14168, 90 Fed. Reg. 8615 (Jan. 20, 2025).