

The Identity Project (IDP) submits these comments in response to Department of State Public Notice 12665, “30-Day Notice of Proposed Information Collection: Application for a U.S. Passport, Form DS-11” (90 *Federal Register* 9652, February 14, 2025); Public Notice 12667, “30-Day Notice of Proposed Information Collection: U.S. Passport Renewal Application for Eligible Individuals, Form DS-82” (90 *Federal Register* 9800, February 18, 2025); and Public Notice 12668, “30-Day Notice of Proposed Information Collection: Application for a U.S. Passport for Eligible Individuals: Correction, Name Change to Passport Issued 1 Year Ago or Less, and Limited Passport Replacement, Form DS-5504” (90 *Federal Register* 9800-9801, February 18, 2025).

These three notices propose identical changes to currently identical portions of each of these three forms. According to the supporting statement submitted to the Office of Management and Budget (OMB) by the Department of State (DOS) for all three of these forms, “OMB-approved changes to the three collections will require simultaneous systems development and testing. Therefore, it is necessary to receive OMB approval of the DS-11, DS-82, and DS-5504 together.” To avoid repetition, we are submitting these consolidated comments with respect to all three of these notices. These comments apply equally to each of these three notices and the proposed changes to each of these three forms.

According to these notices, DOS is seeking approval by OMB, pursuant to the Paperwork Reduction Act (PRA), to modify these forms to collect additional information from applicants for issuance or renewal of U.S. passports and passport cards, and to require attestation by each applicant, under penalty of perjury, as to (1) the applicant’s “biological sex at birth” and (2) that the applicant is not required to register as a sex offender in accordance with 34 U.S.C. 21501 *et seq.* and 22 U.S.C. 212b.

As discussed below, submission of these proposed changes to OMB is premature, as the DOS has not provided notice and a 60-day comment period concerning these proposed changes, as required by the PRA. For this reason alone, OMB may not, consistent with the PRA, approve this information collection.

These proposals are incorrectly categorized by the DOS as proposals for a new or revised information collection. In fact, these are proposals for approval of revised forms that are already unlawfully in use, without OMB approval and in violation of the PRA. The online interactive fillable versions of these forms on the DOS website at <<https://pptform.state.gov/>> have already been modified as though these modifications had already been approved by OMB, when they have not. This ongoing use of the as-yet-unapproved forms is in flagrant violation of the PRA, and must be discontinued immediately.

Even if the DOS had provided the required notice and opportunity for public comment, the additional information proposed to be collected is irrelevant to the purposes of these forms or to any lawful function of the DOS. Requiring attestation under penalty of perjury of answers to factual, medical, and legal questions to which passport applicants may not even be qualified to give answers, and which are irrelevant and unnecessary to adjudicating eligibility for a U.S. passport, would serve only as a trap for applicants who guess incorrectly as to the answers to these questions, or to provide a pretext for denial or delay in issuance of passports on the basis of issues irrelevant to the Constitutional, statutory, and regulatory criteria for U.S. citizenship and issuance of passports, and invite the DOS to waste its time and resources, and those of applicants, in attempted fact-finding and adjudication of these irrelevant issues.

If OMB does not disapprove the proposed information collections as premature, it should disapprove them as proposing the collection of information not relevant to any lawful agency function.

I. ABOUT THE IDENTITY PROJECT.

The Identity Project (IDP) is an independent not-for-profit civil liberties and human rights project, founded in 2006, which provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental

rights. IDP has conducted extensive research on passport application forms¹, including through Freedom Of Information Act (FOIA) requests², and has filed comments with the DOS and OMB concerning previous changes to passport application forms and related information collection requests.³

II. THE REQUEST FOR OMB APPROVAL OF THIS INFORMATION COLLECTION IS PREMATURE, SINCE THERE WAS NO 60-DAY NOTICE AND COMMENT PERIOD.

The PRA requires that, before submitting a request for approval of a new or revised information collection to OMB (at which time it must provide another 30-day notice and comment period), an agency must provide a 60-day notice and comment period, and must consider those public comments.

The DOS claims that a 60-day notice and comment period was provided, at least for two of the three forms at issue, by notices published at 89 *Federal Register* 93389-93390 (November 26, 2024), and than, “There were no comments submitted in response to the 60-day Notice.”

But that is disingenuous. No comments were submitted in response to that notice, because that notice was *not* a notice of these proposed forms. That notice was a notice of intent to request approval for continued use of the previous versions of these forms. The 60-day *Federal Register* notice gave no notice of intent to make the substantive changes now being proposed with respect to the collection of information and affidavits regarding “biological sex at birth”. On information and belief, these changes were not even contemplated by the DOS when the 60-day notice was promulgated in November 2024.

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1. See *e.g.* “State Dept. proposes ‘Biographical Questionnaire’ for passport applicants”, March 18, 2011, <<https://papersplease.org/wp/2011/03/18/state-dept-proposes-biographical-questionnaire-for-passport-applicants/>>.
 2. See *e.g.* “100,000 passport applicants have gotten the long form”, August 27, 2024, <<https://papersplease.org/wp/2024/08/27/100000-passport-applicants-have-gotten-the-long-form/>>. Others of our FOIA requests to the DOS for records related to passport application forms, which if available would inform these comments, remain answered after more than thirteen years. See, “FOIA follies at the State Department”, February 16, 2024, <<https://papersplease.org/wp/2024/02/16/foia-follies-at-the-state-department/>>.
 3. See *e.g.* Comments of the Identity Project, *et al.*, “60-Day Notice of Proposed Information Collection: DS-5513, Biographical Questionnaire for U.S. Passport, 1405-XXXX”, April 24, 2011, <<https://papersplease.org/wp/wp-content/uploads/2011/04/idp-passport-ds-5513-comments.pdf>>.

There was *no* notice of these proposed changes, and *no* opportunity for public comment on them, until the promulgation of the 30-day notices on February 14-18, 2025.

A 60-day notice-and-comment period on a materially different form, already in use, does not satisfy the requirement of the PRA for a 60-day notice and comment period on the *proposed* form.

Pursuant to the PRA, the current notice and comment period must be extended to at least 60 days, or a new 60-day notice and comment period must be provided, and the DOS must consider the public comments, before this proposal can properly even be submitted to, much less approved by, OMB.

III. THE ADDITIONAL INFORMATION PROPOSED TO BE COLLECTED IS IRRELEVANT TO CITIZENSHIP, IDENTITY, OR ANY LAWFUL FUNCTION OF THE DOS.

OMB may approve a collection of information only if it is necessary for a lawful agency function.

The purpose of each of these forms is to collect the information needed by the DOS to determine whether the applicant is a U.S. citizen entitled to a U.S. passport. The additional information proposed to be collected is not relevant, much less necessary, for that purpose.

“Biological sex at birth” has, and can Constitutionally have, no relevance to U.S. citizenship.

The Constitutional criteria of birthright citizenship, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States”, could not be more explicitly and unambiguously non-gendered: “persons”. Sex or gender, by any definition, are *per se* irrelevant to the determination of whether an individual applicant for a passport is a U.S. citizen.

Neither Congress, nor an agency such as the DOS, nor the President, has the authority to make laws, promulgate regulations, or issue Executive Orders contrary to the Constitution, such as purporting to add additional criteria of U.S. citizenship to those spelled out in the Constitution.

“Decline to state” in response to a question about sex or gender cannot lawfully be a basis for a determination of non-citizenship or denial of an application for a U.S. passport.

Because neither current gender identity nor sex as assigned at birth can necessarily or with certainty be ascertained by inspection, even by a strip search, they are of little or no more use in establishing identity than in establishing citizenship, and certainly not necessary for that purpose.

The notice and supporting statement from the DOS do not indicate any other purpose of these forms or any other lawful agency function for which it would be *necessary* to collect statements, affidavits, or evidence with respect to sex or gender – again, regardless of how these terms are defined.

The DOS has demonstrated in recent years that it does not need to adjudicate sex or gender or indicate anything about either on passports. Since 2021, the DOS has, without difficulty, been processing applications and issuing passports without any information as to “biological sex at birth” and without any information about gender other than the applicant’s indication of the gender marker (“F”, “M”, or “X”) they prefer to have on their passport. If an applicant for a passport is unable or unwilling to specify or provide evidence with respect to sex or gender, either at birth or at the time of the application, the DOS has demonstrated the capability to issue a gender-neutral “X” passport to any such individual.

“Biological sex” is a medical question, to which passport applicants may not even be qualified to express an opinion, much less able to provide a certain answer under penalty of perjury. Intersex individuals may not even know what “biological sex” was assigned to them at birth, or may have been told that medical professionals were uncertain, disagreed with each other, or agreed that they were neither definitively male nor definitively female. It is simply impossible, years after the fact, for the DOS or anyone else to make a binary retroactive binary “factual” determination of “biological sex at birth”.

The best analogy is the assignment of racial identifiers, which used to be required and included on birth certificates and passports, but rightfully no longer are in the U.S. If sex or gender is no more relevant to citizenship than race (whatever “race” means, which is no more clear-cut than “sex”), why would it be unnecessary to collect information or evidence of race on passport applications, but necessary to collect information, affidavits, or evidence with respect to any concept of sex or gender? It’s not.

Similarly, whether an individual is required to register as a sex offender in accordance with 34 U.S.C. 21501 *et seq.* and 22 U.S.C. 212b is a complex legal question which most passport applicants are not qualified to answer and which is the subject of extensive case law and ongoing litigation.

The statute prohibits the DOS from issuing a passport without a special marker to an individual who is required to register as a sex offender. But the applicant's subjective opinion or guess as to whether a court would find them to be required to register is irrelevant, and the statute imposes no obligation on a passport applicant to express such an opinion, one way or the other, much less to do so under penalty of perjury. It is the responsibility of the DOS to determine, based on dispositive government records, which type of passport – with or without a special marker – to issue to each applicant.

Because the passport application form must be attested to under penalty of perjury, an erroneous guess, even if sincere and made in good faith, as to what the DOS might consider to be their “biological sex and birth” or whether they are required to register as a sex offender could subject the applicant to severe criminal penalties. The grave risk of perjury prosecution would compel respondents to err on the side of not submitting the proposed form, and not applying for a passport at all – effectively confining themselves, or allowing themselves to be confined by well-founded fear, to the territory of the U.S.

The invidious real intent of these new requirements for certification under penalty of perjury of binary answers to ambiguous, complex, technical, medical and legal questions appears to be to intimidate applicants for whom the answers are uncertain or non-binary into not applying for passports, or to provide a pretext for delay, denial, or further questioning and/or collection of evidence regarding intimate personal medical and sexual histories that are irrelevant to any lawful agency function.

IV. CONCLUSIONS AND RECOMMENDATIONS

The proposed collection of additional information is unnecessary for determining eligibility for a U.S. passport or performing any lawful agency function. Neither sex nor gender, by any definition, can Constitutionally be a factor in determining U.S. citizenship. The proposal should be withdrawn.

If the proposal is not withdrawn, a proper 60-day notice and comment period must be provided, and the comments considered, before it is submitted to OMB, or OMB must reject the proposal.

If, following a proper 60-day notice and comment period, this proposal is submitted to OMB, OMB must, pursuant to the PRA, disapprove the proposed information collection as not necessary or even relevant to the performance of any lawful function of the DOS.

Respectfully submitted,

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