

March 2, 2021

President Joseph R. Biden
The White House
1600 Pennsylvania Ave NW
Washington, DC 20500

Via Email

Dear President Biden,



National Political
Advocacy Department
915 15th St. NW, 6th FL
Washington, D.C. 20005
aclu.org

Deborah N. Archer
President

Anthony Romero
Executive Director

Ronald Newman
*National Political
Director*

We applaud you for making long-sought commitments to ensure equity for all Americans, including transgender and intersex Americans, and for taking the first steps to fulfill them through landmark Day One actions on equity and nondiscrimination, and on bringing an end to the unconstitutional transgender military ban. We write to urge you to build on those actions, and fulfill a specific campaign promise, by issuing an executive order directing federal agencies to ensure all people can obtain accurate identification documents. As your campaign platform rightly recognized, federal identification documents that display an inaccurate gender marker are a key systemic barrier and source of discrimination—a problem that is widespread throughout several agencies and requires a whole-of-government approach.

Current policies are intrusive, discriminatory, and face legal challenges

Federal agencies issue well over a dozen major types of identification documents to millions of people each year. These documents range from US passports and permanent resident cards to DHS “Trusted Traveler” cards and Merchant Marine credentials to travel documents for visitors and refugees to birth certificates for US citizens born abroad. Americans rely on these documents every day to travel, apply for jobs or essential services, or enter public spaces, as do many visitors to our nation. While only a few of these documents are required by law or international standards to display a gender marker, most still do. Many transgender and intersex people are unable to obtain identification that accurately reflects their gender, putting them at risk of harassment, discrimination, and even violence.¹

¹ James SE et al., *Report of the 2015 U.S. Transgender Survey*, 85-90. (National Center for Transgender Equality 2016) (only 12% had the correct gender on all their identification; only 30% had correct name on all identification; 32% of those who had had to use inaccurate identification had faced harassment, discrimination, or even violence as a result); Scheim AI et al., Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study, 5 LANCET PUB. H. e196-e203 (2020) (accuracy of ID associated with mental health outcomes).

Currently, transgender and intersex people must produce medical documentation to obtain accurate identification and different agencies have variations of what that documentation must look like. This intrusive and burdensome requirement may require out-of-pocket medical visits solely for this purpose, and force individuals to carry inaccurate identification for long periods of time. By requiring either an “F” or “M” designation, non-binary individuals are unable to obtain accurate identification, and must sign statements about themselves that are not true to obtain one at all. This has recently led federal courts to declare these policies arbitrary and unconstitutional. In May 2020, a federal appeals court held that the State Department’s requirement that an individual select an “M” or “F” designation on their passport was arbitrary and capricious.² And in November 2020, a federal court held that requiring medical documentation to obtain a passport with a correct gender marker violated the Constitution’s Equal Protection Clause.³ These cases are ongoing. Based in part on similar rulings,⁴ and in part on the recommendations of groups like the American Medical Association,⁵ nearly twenty states have moved to ensure individuals can simply select an M, F, or X marker on IDs.

A whole-of-government approach is needed to ensure accuracy, fairness, and privacy

To date, there has been little coordination and no government-wide guidance in this area. The Paperwork Reduction Act and the Privacy Act require agencies to regularly evaluate the ways they display and disseminate personally identifiable information, to ensure it is only done when necessary and in a manner that is accurate and fair.⁶ But agencies and the Office of Management and Budget have neglected the impacts of gender marker requirements when conducting these reviews. Current policies were developed on an ad-hoc basis by each agency over many years, and procedures vary widely and are often unclear. Most importantly, these policies are outdated, burdensome, inequitable, and facing legal challenges, and a whole-of-government approach is needed to ensure they are reviewed and revised.

We urge you to solve this problem through an executive order, building on the PRA, Privacy Act, and Executive Orders 13985 and 13985 of January 20, 2021. Executive Order 13985 calls for a “whole-of-government equity agenda” and directs each agency to “assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits” for underserved communities—including LGBTQ+ people—and then act to remove

² *Zzyym v. Pompeo*, 958 F.3d 1014 (10th Cir. 2020). The State Department has been ordered to reconsider this decision by May 2021. No. 1:15-cv-02362, Doc. 116 (D. Colo. Dec. 28, 2020).

³ *Morris v. Pompeo*, No. 2:2019cv00569 (D. Nev. Nov. 23, 2020). The Department has until February 19, 2021 to appeal.

⁴ *Corbitt v. Taylor*, No. 2:18CV91-MHT, 2021 WL 142282 (M.D. Ala. Jan. 15, 2021); *Ray v. McCloud*, No. 2:18-CV-272, 2020 WL 8172750 (S.D. Ohio Dec. 16, 2020); *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp.3d 327, 333 (D.P.R. 2018); *F.V. v. Barron*, 286 F. Supp.3d 1131, 1142–1144 (2018), *clarified sub nom.*, *F.V. v. Jeppesen*, 477 F. Supp. 3d 1144 (D. Idaho 2020); *Love v. Johnson*, 146 F.Supp.3d 848, 850 (E.D. Mich. 2015).

⁵ Am. Med. Ass’n, *Conforming Sex and Gender Designation on Government IDs and Other Documents* H-65.967 (2019) (“Our AMA supports policies that allow for a sex designation or change of designation on all government IDs to reflect an individual’s gender identity, as reported by the individual and without need for verification by a medical professional...includ[ing] an undesignated or nonbinary gender option”).

⁶ 5 U.S.C. § 552a(e); 44 U.S.C. §§ 3506-3508.

those barriers.⁷ Executive Order 13988 makes it the policy of the federal government that “[e]very person should be treated with respect and dignity and should be able to live without fear, no matter who they are,” and “to prevent and combat discrimination on the basis of gender identity or sexual orientation.” It requires agencies to review and reconsider all existing policies that are or may be inconsistent with that policy.⁸

Because gender marker policies are spread throughout government, however—and because agencies have often not considered the equity, privacy, or nondiscrimination concerns involved—a clear directive is needed to ensure appropriate reviews and a consistent approach. A new executive order should specifically direct agencies to review their forms, policies, and procedures for all identification documents and systems of records regarding individuals that display a gender marker. Wherever these documents display gender markers, individuals should be permitted to self-select the appropriate designation, including an undesignated or neutral option (such as “X”). An executive order would ensure all agencies appropriately address this issue through upcoming PRA and privacy reviews, if not sooner.

We urge you to swiftly take this simple but essential step to ensure equity, prevent discrimination, and relieve unnecessary administrative burdens across the federal government.

Thank you for your consideration. If you have any questions or need further detail, please feel free to contact Campaign Strategist Arli Christian (achristian@aclu.org) and senior legislative representative Ian Thompson (ithompson@aclu.org).

Sincerely,

A handwritten signature in black ink, appearing to read 'Ronald Newman', written in a cursive style.

Ronald Newman
National Political Director

Cc:

Secretary Anthony Blinken, Department of State
Secretary Alejandro Mayorkas, Department of Homeland Security

⁷ Executive Order 13985 of January 20, 2021 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government), §1.

⁸ Executive Order 13988 of January 20, 2021 (Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation), §1.