



EQUALITYUTAH

September 13, 2021

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UTAH STATE LEGISLATURE
350 North State, Suite 350
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VIA ELECTRONIC MAIL

RE: Invitation to Comment – Purposes of sex/gender designations on government documents

Dear Mr. Andrews:

We sincerely appreciate your invitation to submit comments to the legislature in light of the recent Utah Supreme Court decision in *In re Sex Change of Childers-Gray and Rice* last spring.

Your invitation sought the answers to four questions:

- (1) What purposes are served by recording an individual's biological sex¹ on a birth certificate? On a driver's license? On other government documents?
- (2) Could any of those purposes be accomplished by other means? If so, how?
- (3) What purposes are served by recording an individual's gender identification on government documents?
- (4) Could any of those purposes be accomplished by other means? If so, how?

These questions seem to be framed around designation of sex/gender based on observable physical or biological characteristics – however defined – as opposed to how an individual may self-identify. This letter is intended to respond accordingly. We also

¹ Given what modern biology understands about human sexual dimorphism, the term “biological sex” is extremely problematic. Biological sex can be defined in many ways – chromosomes, physical features, neurological attributes, hormonal makeup, etc. – not all of which match in many individuals. Thus, for our purposes and to avoid confusion, only the legal definition of “sex” is relevant. See Claire Ainsworth, *Sex Redefined: The Idea of 2 Sexes is Overly Simplistic*, SCIENTIFIC AMERICAN, October 22, 2018. (Available at: <https://www.scientificamerican.com/article/sex-redefined-the-idea-of-2-sexes-is-overly-simplistic1/>)

note that Utah driver's licenses and birth certificates currently label this attribute as "sex" - not "gender." However, parts of the Utah Code uses the terms "sex" and "gender" interchangeably.² Delving into the differences between the two terms is neither necessary nor practical for the scope of this legal analysis.

A. General purposes of government identification.

The most common reasons cited for government-issued identification are: (1) protecting national security (identifying terrorist suspects, verifying the status of foreign nationals, etc.), (2) preventing crime (identity theft, fraud, etc.), (3) investigating crime, and (4) administering government services (licensing, permitting, welfare programs, voter identification, etc.).

As a practical reality, gender is typically more relevant to social interactions than to interactions between individuals and the government. However, gender is currently so intertwined in society and the law, that any move to abolish it would require sweeping changes across innumerable entities at all levels of government. The Utah Supreme Court observed that "[a] person's sex designation can govern various interactions with the government and with the public. Government agencies use sex designation —to validate a [] person's identity when being used to access social benefits, services, or other forms of identification"³ and ultimately concluded that sex/gender designations have "legal significance."⁴

Real ID Act

The federal government has required gender identification on certain government documents. For example, in July 2004, the 9/11 Commission issued a 585-page report recommending reforms the United States Intelligence community and the implementation of other security measures to prevent future terrorist attacks against the United States. On page 390 of the report, under the section "Immigration Law and Enforcement," the Commission stated: "Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. Fraud in identification document is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists."⁵

In response, the United States Congress passed the Real ID Act⁶ setting forth minimum requirements for federal government recognition of state ID's such as driver's licenses. Compliant identification is required for accessing federal facilities, boarding federally regulated commercial aircrafts, entering nuclear power plants, and any other purposes

² See Utah Code Ann. § 57-21-2(22) (stating "[s]ex means gender")

³ Childers-Gray, at ¶ 97.

⁴ Childers-Gray, at ¶ 35.

⁵ Full report available at: <http://www.9-11commission.gov/report/911Report.pdf>

⁶ Codified at 6 CFR § 37.1 et seq.

that the Secretary of Homeland Security shall determine.⁷ The Act lists gender, as determined by individual states, as one of the required pieces of information on the surface of a driver's license or identification card.⁸

The state of Utah has already incurred significant expense to comply with the Real ID Act. Including gender on state-issued documents in compliance with the Act prevents significant hardship to *all* Utahns as no legal alternative currently exists. If sex/gender was absent from birth certificates, obtaining federal identification in the form of passports, social security cards, etc. would be impossible for individuals born within Utah's borders. Thus, compliance with federal regulations appears to be a compelling purpose for including sex or gender on state-issued identification.

B. Recording biological sex on government documents.

The Utah Supreme Court noted in its opinion in *Childers-Gray* that "'biological sex' itself is ambiguous and may mean more than the sex designated by examination at birth."⁹ Any legislation proposing rules based on "biological sex" would need to seek first to define that term which, scientifically speaking, is more than just external genitalia. This lack of specificity, combines with medical advances and changing social perspectives, could leave any such rule subject to frequent changes and subject the state to perpetual litigation.

The stated objectives in issuing government identification are better served by gender identification as opposed to designations of sex according to external genitalia. Aside from failing to account for individuals born intersex, government identification based on external genitalia amounts to a gross invasion of privacy. There is no legitimate public interest in knowing an individual's external genitalia in order to cash a check, buy an alcoholic beverage, or engage in any number of other daily interactions where ID is required. From a government perspective, information concerning an individual's private parts is perhaps relevant only to matters of personal health.

Most other identification documents initially rely on sex/gender as recorded on birth certificates. As courts in Utah and across the country have found, the consequences of incongruity between a birth certificate and other forms of government identification can range from inconvenience to discrimination, harassment, and even grave physical violence, particularly for transgender, intersex, and non-binary individuals. State and federal courts have also held that preventing individuals from obtaining congruity among government documents violates those individuals' constitutional right to due

⁷ *Id.*

⁸ 6 CFR § 37.17(c)

⁹ *In Re Sex Change of Childers-Gray and Rice*, 2021 UT 13, at ¶ 86 ("It is worth noting that while the dictionary definitions of 'sex' provided by the dissent have some focus on physiological differences between males and females, many definitions focus also on 'psychological,' 'behavior[al],' or 'character' differences, which are not necessarily tied exclusively to physiology or observable characteristics at birth. At the very least, 'biological sex' itself is ambiguous and may mean more than the sex designated by examination at birth."); *see also* ¶¶ 87 - 93.

process, equal protection¹⁰ and privacy.¹¹ In Utah, there is precedent that protecting a transgender individuals' right to privacy outweighs the vital public policy of open court records.¹² Thus, any scheme to mandate the inclusion of individual's "biological sex" on birth certificates or other government records while listing gender identity differently or separately on other government-issued ID would likely subject the state to constitutional liability.

Some have argued that identification of biological sex based on external genitalia is the only way to police transwomen's access to "spaces traditionally reserved for cisgender girls and women – sex-segregated sports leagues, school locker rooms, and shelters designed as safe spaces for victims of sex abuse."¹³ The elimination of sex/gender identifications on government records might create incentives for invasive genital inspections. While legislative bodies across the country are currently debating policy on this very topic, courts have generally rejected such arguments as unmeritorious.¹⁴ Laws restricting access to restrooms, locker rooms, sports leagues, etc. that are based on narrow definitions "biological sex" are consistently being struck down as unconstitutional.

C. Recording gender identity on government documents.

Because gender identity typically goes hand-in-hand with gender expression,¹⁵ recording an individual's gender identity on government documents facilitates the goals of government identification listed above. The Utah Supreme Court observed that the policies underlying sex changes on government documents are "to promote clarity and avoid confusion."¹⁶ Elsewhere in its opinion, the Court continued, "condoning such confusion by refusing a valid petition for a name or sex change would obviate the very purpose of legal identification."¹⁷ Recording an individual gender identity furthers these legitimate public interests, while respecting individual rights.

As for alternate methods to achieve these purposes, photographs on documents such as driver's licenses could replace gender designations. But photographs are not sufficient to comply with the Real ID Act and, by their nature, are likely to increase ambiguity and reduce clarity.

¹⁰ See *Ray v. McCloud*, 507 F. Supp. 3d 925 (SD Ohio 2020).

¹¹ See, e.g. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *K.L. v. State of Alaska, Department of Administration, Division of Motor Vehicles*, Case No. 3AN-11-05431 CI (Alaska Sup. Ct., Anchorage, Mar. 12, 2012).

¹² See, e.g., *Doe v. Utah Rental LLC et al.*, Case No. 200400900 (2020) (allowing a transgender litigant to proceed by pseudonym).

¹³ *Childers-Gray*, n. 44.

¹⁴ *Id.*

¹⁵ "The way in which a person expresses their gender identity, typically through their appearance, dress, and behavior." *Gender Expression*, OXFORD ENGLISH DICTIONARY.

¹⁶ *Childers-Gray*, at ¶96.

¹⁷ *Childers-Gray*, at n. 19.

Critics may argue that a newborn infant cannot communicate its gender identity, and therefore there is no accurate method to record it on a birth certificate. While this is true, from a practical standpoint, transgender, intersex, and non-binary persons make up a very small minority of the population. For the great majority of the population, their gender identity will be synonymous with their assigned sex at birth. For those individuals, Utah's current laws provide an appropriate avenue to make those corrections.

D. Considerations regarding religious liberties.

Just as there are significant social implications for gender identity and expression, there are religious implications for many individuals. Some religions hold that gender is an essential characteristic of individual identity and any attempt to remove or diminish long established sex/gender designations could conceivably generate litigation claims against the state.

Conclusion

Utah's current laws and procedures fulfill the legitimate government objectives for identifying sex/gender while also respecting individual constitutional rights and liberties.

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Paul Burke

Equality Utah