

# COMMENTS

## COMPELLING AGENCY ACTION: A NOVEL REGULATORY AVENUE FOR CORRECTING THE BIRTH CERTIFICATES OF TRANSGENDER CITIZENS

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Introduction .....	962
I. The Importance of Allowing Transgender Citizens to Have Accurate Gender Markers on Identity and Citizenship Documentation.....	966
A. Transgender Individuals and Gender Transition.....	966
B. The Relevance of Accurate Birth Documentation .....	968
II. The Limitations to Federal Regulation of U.S. Birth Certificates .....	969
A. The Vital Statistics Jurisdictions .....	969
B. The Model State Vital Statistics Act and Regulations .....	970
III. The Inconsistent Gender Marker Amendment Policies of the Federal Government and the States.....	972
A. DHS .....	972
B. SSA .....	973
C. States .....	974
D. State Department.....	974
E. The Equal Protection Violation Resulting from Differential Treatment Between Transgender U.S. Citizens Born in the United States and Abroad .....	976

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IV. The CDC's Failure to Enact Minimum Standards for U.S. Birth Certificates Constitutes Agency Inaction .....	977
A. Section 7211 of the Intelligence Reform and Terrorism Prevention Act of 2004 .....	977
B. HHS's Delegation of Authority to the CDC and the CDC's Agency Inaction .....	978
V. The Mechanism for a Reviewing Court to Compel the CDC to Create Minimum Standards for U.S. Birth Certificates .....	980
A. The Requirements for Judicial Review of Agency Action and Relevant Precedents.....	980
B. A Litigation Strategy to Persuade a Reviewing Court to Compel the CDC to Act.....	984
VI. A Proposed Regulation for the CDC to Include in its Minimum Standards for U.S. Birth Certificates .....	986
Conclusion .....	988

## INTRODUCTION

Approximately 1.4 million adults in the United States are transgender<sup>1</sup> and have the unique<sup>2</sup> reality of identifying with a gender that does not align with the biological sex designated on their<sup>3</sup> original birth certificates.<sup>4</sup> An unfortunate aspect of this reality is that transgender individuals often face

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1. ALFRED R. FLORES ET AL., WILLIAMS INST. ON SEXUAL ORIENTATION & GENDER IDENTITY LAW & PUB. POLICY, HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (June 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

2. See Jaclyn M. White Hughto et al., *Barriers to Gender Transition-Related Healthcare: Identifying Underserved Transgender Adults in Massachusetts*, 2 TRANSGENDER HEALTH 107, 107 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5627670/pdf/trgh.2017.0014.pdf> (stating that approximately 0.6% of adults in the United States identify as transgender).

3. This Comment uses third-person personal and possessive pronouns (“they” and “their”) to refer to individuals and groups of people in a gender-neutral manner, reflecting the modern and topical use of this grammatical construct. See 2015 Word of the Year is Singular “They”, AM. DIALECT SOC’Y (Jan. 8, 2016), <https://www.americandialect.org/2015-word-of-the-year-is-singular-they> (noting that the American Dialect Society recognizes the word “they” as a “gender-neutral singular pronoun for a known person, particularly as a nonbinary identifier”).

4. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 733–34 (2008) (defining “transgender” as “a population of people . . . who live their lives identifying as and expressing a different gender than the one assigned to them at birth”); see also NICHOLAS M. TEICH, TRANSGENDER 101: A SIMPLE GUIDE TO A COMPLEX ISSUE 4 (2012) (explaining that “[m]ost transpeople feel that their gender differs from the sex they were labeled at birth”).

discrimination, physical violence, and verbal harassment that negatively impacts virtually every facet of their lives.<sup>5</sup> Laws that prevent transgender U.S. citizens<sup>6</sup> from having birth certificates that reflect their gender identity are examples of the many institutions that promote and compound these hardships.<sup>7</sup>

Since the states inconsistently regulate the registration and maintenance of birth certificates, they have various, non-uniform laws and policies that control an individual's ability to change the gender marker on their birth certificate.<sup>8</sup> Many states do not allow transgender individuals to obtain ac-

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5. See SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 4 (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [hereinafter THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY]. Based on a survey that collected data from 27,715 adult transgender people from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases abroad, the survey illuminated that transgender individuals endure “disturbing patterns of mistreatment and discrimination” and “harassment and violence at alarmingly high rates.” *Id.* The survey found that 77% of respondents who were out as transgender or viewed by others as transgender between kindergarten and twelfth grade reported encountering mistreatment like verbal harassment, harsher discipline, or physical or sexual assault. *Id.* at 11. 46% of individuals suffered verbal harassment within the past year, and 9% of respondents experienced a physical attack within the past year because they are transgender. *Id.* at 15. Further, 15% of respondents faced verbal harassment, physical violence, or sexual assault—or a combination of them—in the past year at their place of employment because of their gender identity or expression. *Id.* at 12.

6. A U.S. citizen at birth includes a person born or naturalized in the United States. U.S. CONST. amend. XIV, § 1; 8 U.S.C. § 1401(a) (2012). However, a person born outside of the United States can be deemed a citizen at birth if the person meets certain criteria. For example, a U.S. citizen at birth can include a person born outside of the United States to U.S. citizen parents with at least one parent who has resided in the United States prior to the child’s birth. See 8 U.S.C. § 1401(c).

7. See Lisa A. Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 379, 391 (2013) (claiming that people use their birth certificates as identity documents and policies that allow transgender individuals to obtain identity documents with accurate gender markers can help curb discrimination in the areas of education, employment, and housing); see also Kristin Wenstrom, Comment, “*What the Birth Certificate Shows*”: An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies, 17 L. & SEXUALITY 131, 135 (2008) (highlighting that transgender individuals are often subjected to discrimination when their gender identity is “incongruent” to their identity documentation).

8. See Amy Rappole, Comment, *Trans People and Legal Recognition: What the U.S. Federal Government Can Learn from Foreign Nations*, 30 MD. J. INT'L L. 191, 196 (2015) (acknowledging that states vary with respect to their policies for changes to the gender marker on U.S. birth

curate gender designations on their birth certificates unless they undergo gender-affirming surgery; in fact, a few states completely bar a modification to the gender marker on the birth certificate.<sup>9</sup> These obstacles prevent transgender people from acquiring birth certificates—which serve as citizenship evidence and identification documentation—that accurately reflect their gender identity.<sup>10</sup>

While a transgender U.S. citizen born within the United States must follow state law to change the gender marker on a birth certificate, a transgender U.S. citizen born abroad who wants to change the gender marker on the Consular Report of Birth Abroad of a Citizen of the United States of America (Consular Report of Birth Abroad)<sup>11</sup> adheres to the policies of the U.S. Department of State (State Department).<sup>12</sup> The State Department permits an individual to amend the gender marker on a Consular

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certificates); *About the National Vital Statistics System*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/nchs/nvss/about\\_nvss.htm](https://www.cdc.gov/nchs/nvss/about_nvss.htm) (last visited Nov. 6, 2018) (indicating that the legal authority for registering vital events, including births, lies with the fifty-seven vital statistics jurisdictions—the fifty states, the District of Columbia, New York City, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands).

9. See *Identity Document Laws and Policies Birth Certificates*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/identity\\_document\\_laws](http://www.lgbtmap.org/equality-maps/identity_document_laws) (last visited Oct. 27, 2018) (declaring that “22% of [the] LGBT population lives in states [that] require proof of sex reassignment surgery in order to change gender marker” and “6% of [the] LGBT population lives in states that do not allow for amending the gender marker on the birth certificate”).

10. See Scott Skinner-Thompson, *Why Trans People Have a Constitutional Right to Change Their Birth Certificates*, SLATE (Apr. 27, 2017), [http://www.slate.com/blogs/outward/2017/04/27/transgender\\_people\\_have\\_a\\_constitutional\\_right\\_to\\_change\\_their\\_birth\\_certificate.html](http://www.slate.com/blogs/outward/2017/04/27/transgender_people_have_a_constitutional_right_to_change_their_birth_certificate.html) (iterating that state laws that limit gender marker amendment to identification documentation, such as birth certificates, “act as gatekeepers—burdening transgender people’s ability to participate in and enjoy public life”); see also *Citizenship Evidence*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/passports/requirements/citizenship-evidence.html> (last visited July 10, 2018) (attesting that a U.S. birth certificate is a primary form of evidence of U.S. citizenship).

11. See U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL §§ 1441.1(a), (f) (2017), <https://fam.state.gov/fam/07fam/07fam1440.html#M1440> (defining a Consular Report of Birth Abroad as “a formal document certifying the acquisition of U.S. citizenship at birth by a person born abroad to a U.S. citizen parent(s)” that relies on “[the] certification of, or attestation to, facts of birth by a legally authorized local official in the place where the birth occurred” to provide proof of a person’s U.S. citizenship).

12. *Understanding the Passport Gender Change Policy*, NAT’L CTR. FOR TRANSGENDER EQUAL., [https://www.transequality.org/sites/default/files/docs/kyr/passports\\_2014.pdf](https://www.transequality.org/sites/default/files/docs/kyr/passports_2014.pdf) (last updated Mar. 2014).

Report of Birth Abroad or a passport and does not require the individual to undergo gender-affirming surgery to change the gender marker.<sup>13</sup>

For a U.S. citizen born abroad, the Consular Report of Birth Abroad is “functionally equivalent” to a U.S.-born citizen’s birth certificate,<sup>14</sup> yet the federal and state governments treat gender marker amendment to these documents differently. This difference in treatment discriminates against transgender U.S. citizens born within the United States simply because they were born within the country’s borders rather than abroad. Consequently, state laws that either (1) completely prevent U.S.-born individuals from changing the gender markers on their birth certificates or (2) laws that have a surgical requirement before allowing gender marker amendment violate the Equal Protection Clause of the Fourteenth Amendment on the basis of national origin.<sup>15</sup>

Although the states have historically regulated birth certificates, the federal government, through the Centers for Disease Control and Prevention (CDC), has the ability to promulgate binding minimum standards for U.S. birth certificates.<sup>16</sup> Under the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Congress originally granted the Secretary of the U.S. Department of Health and Human Services (HHS) the authority to establish minimum standards for U.S. birth certificates for use by federal agencies and mandated that the Secretary act within one year of IRTPA’s enactment.<sup>17</sup> That deadline was December 17, 2005.<sup>18</sup> However, on December 15, 2005, the Secretary of HHS delegated the authority to establish

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13. *See id.* (noting that the policies for changing the gender marker on a passport are the same as the policies for updating a person’s gender marker on the Consular Report of Birth Abroad); *see also* U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1310(d) app. M (2016), <https://fam.state.gov/fam/07fam/07fam1300apM.html#M1350> (“Sex reassignment surgery is not a prerequisite for passport issuance based on gender change.”).

14. Mottet, *supra* note 7, at 383.

15. *See Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (stating that nationality is an inherently suspect classification); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007) (expressing that laws that discriminate against individuals on the basis of suspect classifications violate the Equal Protection Clause unless the law is narrowly tailored or necessary to achieving a compelling government interest); *Federal Protections Against National Origin Discrimination*, U.S. DEP’T OF JUST. (Oct. 2000), <https://www.justice.gov/crt/federal-protections-against-national-origin-discrimination-1> (declaring that national origin includes a person’s birthplace).

16. Intelligence Reform and Terrorism Prevention Act of 2004 Delegation of Authority, 70 Fed. Reg. 75,821, 75,821 (Dec. 21, 2005).

17. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7211, 118 Stat. 3638, 3826.

18. *See id.*

these minimum standards for U.S. birth certificates to the Director of the CDC.<sup>19</sup> More than twelve years after the delegation of this authority, the Director of the CDC has yet to establish these minimum standards for U.S. birth certificates.

Part I of this Comment defines transgender and why transgender individuals need accurate birth certificates that reflect their gender identity. Part II explores the interaction between the traditional power of the states to regulate birth certificates and the federal government's attempt to influence the states through the provisions of the Model State Vital Statistics Act and Model State Vital Statistics Regulations (collectively, Model State Vital Statistics Act and Regulations). Part III outlines the inconsistent policies of federal agencies and the states. Part III also discusses how transgender U.S. citizens born in certain states within the United States and transgender U.S. citizens born abroad are subject to different standards for amending the gender markers on their birth documentation and how this differential treatment violates the Equal Protection Clause of the Fourteenth Amendment. Part IV describes the IRTPA, the IRTPA's mandate that HHS establish minimum standards for birth certificates, HHS's failure to establish these standards prior to delegating the authority to the CDC, and the CDC's failure to develop these minimum standards. Part V recommends an administrative law litigation strategy for transgender U.S. citizens who desire, but are unable, to change the gender marker on their birth certificates. Part V also explains that these individuals should petition a reviewing court for a writ of mandamus to compel the Director of the CDC to establish minimum standards because the Director unlawfully withheld or unreasonably delayed agency action. Part VI recommends a regulation that the Director of the CDC should include in the minimum standards for U.S. birth certificates.

## I. THE IMPORTANCE OF ALLOWING TRANSGENDER CITIZENS TO HAVE ACCURATE GENDER MARKERS ON IDENTITY AND CITIZENSHIP DOCUMENTATION

### A. *Transgender Individuals and Gender Transition*

A transgender person identifies with a gender that differs from their assigned sex at birth—the gender that appears on their birth certificate.<sup>20</sup> A person's sex is a biological determination based on the appearance of a per-

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19. Intelligence Reform and Terrorism Prevention Act of 2004 Delegation of Authority, 70 Fed. Reg. at 75,821.

20. Hughto et al., *supra* note 2, at 107.

son's genitalia prior to birth, through the use of an ultrasound, or at birth, by visual inspection.<sup>21</sup> For an individual with ambiguous external genitalia, a physician or the child's parents assign the sex at birth, which is generally based on factors such as internal genitalia or sex chromosomes.<sup>22</sup> In contrast, a person's gender identity is a person's internal sense of being male, female, or other.<sup>23</sup> People express their gender identity through their physical appearance, clothing and accessory choices, and behavior.<sup>24</sup> However, a person's gender expression does not always conform with that person's gender identity.<sup>25</sup> While most individuals have a biological sex that aligns with their gender identity and expression,<sup>26</sup> a transgender person's gender identity differs from their birth sex.<sup>27</sup>

When a transgender person transitions, that person modifies their gender expression to align with their gender identity rather than their assigned birth sex.<sup>28</sup> A person's gender transition is unique to that person and may or may not include changing one's gender expression through one's clothing; using a new preferred pronoun; updating one's name and identity documentation; or undergoing medical treatment including hormone therapy, electrolysis, counseling, or surgery.<sup>29</sup>

Because a person's gender transition is specific to each person, not all transgender individuals undergo surgical intervention.<sup>30</sup> In fact, most transgender individuals do not undergo gender-affirming surgery<sup>31</sup> for rea-

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21. *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, AM. PSYCHOL. ASS'N 5, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Feb. 9, 2018).

22. *Id.* at 5–6.

23. *Id.* at 4.

24. *Id.* at 3.

25. *Id.* at 3–4.

26. See *id.* at 1. The term “cisgender” refers to a person whose gender identity and gender expression align with the sex on that person's birth certificate.

27. *Id.* at 1, 5–6.

28. *Frequently Asked Questions about Transgender People*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>.

29. *Id.*; *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, OFF. OF PERSONNEL MGMT., <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance> (last visited Feb. 9, 2018).

30. See DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW 145 (2011) (elucidating that a “common misperception” exists that the majority of transgender individuals undergo surgery).

31. See THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, *supra* note 5, at 100 (indicating that only 25% of the 27,715 transgender survey respondents underwent surgical

sons including restrictive insurance coverage, provider discrimination, lack of education, medical contraindications, low income, age, and lack of desire to undergo certain procedures.<sup>32</sup> Despite this reality, numerous laws and policies require transgender individuals to undergo gender-affirming surgical procedures to obtain identification and citizenship documentation that accurately reflects their gender identity.

#### *B. The Relevance of Accurate Birth Documentation*

While birth certificates serve as primary evidence of a person's citizenship status, people also frequently use their birth certificates as a form of identity documentation.<sup>33</sup> Individuals utilize their birth certificates to acquire employment, receive government pension or insurance benefits, and obtain a passport, driver's license, and Social Security number.<sup>34</sup> Consequently, preventing transgender people from having accurate gender markers on identity documentation causes agencies to have outdated, incorrect, or conflicting gender information for this segment of the population.<sup>35</sup>

Further, having accurate gender markers on documentation such as birth certificates helps preclude potential discrimination and injury<sup>36</sup> like that experienced by Stacie Ray.<sup>37</sup> Ray—a transgender plaintiff in a lawsuit against the Ohio Department of Health—experienced workplace harassment and humiliation as a result of Ohio's policy that prevents gender

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procedures as part of their transition).

32. *Id.* at 10, 100–03; Hughto et al., *supra* note 2, at 107–16.

33. See DEPT OF HEALTH & HUMAN SERVS. OFFICE OF INSPECTOR GEN., BIRTH CERTIFICATE FRAUD 6 (Sept. 2000) [hereinafter BIRTH CERTIFICATE FRAUD] (“Birth certificates are widely recognized as proof of age, place of birth, and identity.”); *Citizenship Evidence*, *supra* note 10 (attesting that a U.S. birth certificate provides evidence of a person’s U.S. citizenship).

34. Spade, *supra* note 4, at 766; BIRTH CERTIFICATE FRAUD, *supra* note 33, at 2.

35. SPADE, *supra* note 30, at 78–79.

36. See THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY, *supra* note 5, at 4, 82 (conveying that based on the National Center for Transgender Equality’s survey of 27,715 transgender individuals, after showing an identification with a name or gender that did not match the respondent’s gender presentation, 25% of respondents experienced verbal harassment, 16% of respondents were refused benefits or services, 9% of respondents were told to leave an establishment, and 2% of respondents were assaulted).

37. See Julie Moreau, *Four Transgender People Sue Ohio Over State’s Birth Certificate Policy*, NBC NEWS (Apr. 3, 2018), <https://www.nbcnews.com/feature/nbc-out/four-transgender-people-sue-ohio-over-state-s-birth-certificate-n862411>; Julie Carr Smyth, *4 Transgender People Sue for Changes to Birth Certificates*, ASSOCIATED PRESS (Mar. 29, 2018), <https://www.apnews.com/a8b67734fb7e4e0e917fc6d22b1dea4a>;

marker amendment on birth certificates.<sup>38</sup> Upon learning from a member of human resources that Ray's birth certificate did not align with her gender identity, a coworker threatened Ray with physical violence.<sup>39</sup> Additionally, when Ray, a truck driver, sought a background check at the Transportation Security Administration (TSA) in order to obtain a hazmat materials endorsement necessary for a promotion, a TSA employee denied her request for a background check.<sup>40</sup> The TSA employee went on to publicly humiliate her after seeing that Ray's driver's license and birth certificate had incongruent gender markers.<sup>41</sup> These alarming experiences highlight the vital importance of what may seem like mere paperwork. By allowing transgender individuals to obtain identification and citizenship documents that accurately reflect their gender identity, they will have more control over whether to expose their gender history rather than being outed by the inaccurate documentation.<sup>42</sup> Given the importance of such documentation, transgender individuals need to be able to obtain documentation that accurately reflects their gender identity.<sup>43</sup>

## II. THE LIMITATIONS TO FEDERAL REGULATION OF U.S. BIRTH CERTIFICATES

### A. *The Vital Statistics Jurisdictions*

HHS houses the CDC, which in turn houses the National Center for Health Statistics (NCHS).<sup>44</sup> The NCHS collects vital statistics information

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38. Moreau, *supra* note 37; Smyth, *supra* note 37.

39. *Id.*

40. *Id.*

41. *Id.*

42. See Anna James Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J.L. & GENDER 491, 496–97 (2016) (“Having [identification] that reflects and substantiates one’s gender identity gives trans people agency over when and whether to disclose their gender history.”).

43. See *Recent Administrative Policy: Administrative Law—Identity Records—Social Security Administration Eliminates Surgical Requirement for Changing Trans Individuals’ Gender Markers—Soc. Sec. Admin., Program Operations Manual System, RM 10212.200* Changing Numident Data for Reasons Other than Name Change (2013), 127 HARV. L. REV. 1863, 1864 (2014) (iterating that having gender-affirming identity documents is imperative).

44. *Organizational Chart*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 27, 2018), <https://www.cdc.gov/about/pdf/organization/cdc-photo-org-chart.pdf>; *HHS Organizational Chart*, DEP’T HEALTH & HUMAN SERVS. (Mar. 8, 2017), <https://www.hhs.gov/about/agencies/orgchart/index.html>.

from the National Vital Statistics System (NVSS), an entity that compiles data from the fifty-seven vital statistics jurisdictions, which include the fifty states, the District of Columbia, New York City, and the five United States territories—Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.<sup>45</sup> These fifty-seven jurisdictions have the legal authority to register vital events including births, deaths, fetal deaths, marriages, and divorces.<sup>46</sup> The NCHS uses the vital statistics for social welfare, public health, demographic, and administrative purposes in areas such as business and government.<sup>47</sup>

As the states hold legal responsibility for registering and maintaining vital records, including birth certificates, the states develop and implement their own laws and regulations to create state vital statistics.<sup>48</sup> Although each state enacts its own laws and regulations, the federal government has created—and has continued to revise—model laws and regulations that serve as guidelines for states.<sup>49</sup> The federal government's guidelines aim to develop uniformity among the states' registration procedures and to ensure accurate data for use by the federal government.<sup>50</sup>

#### *B. The Model State Vital Statistics Act and Regulations*

In 1907, the U.S. Census Bureau developed the first Model State Vital Statistics Act, which included a set of recommendations, standards, and model forms for states to use for birth and death registration.<sup>51</sup> The Bureau was responsible for constructing and revising these recommended standards so that the federal government could obtain comparable vital statistics data from state and local offices.<sup>52</sup> The task of providing recommended standards is currently held by NCHS.<sup>53</sup> In 1973, NCHS first issued the Model

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45. *About the National Vital Statistics System*, *supra* note 8.

46. *Id.*

47. *Physicians' Handbook on Medical Certification of Death*, NAT'L CTR. FOR HEALTH STATISTICS 1, 55 (2003), <https://www.spokanecounty.org/DocumentCenter/View/1354>.

48. See DEP'T OF HEALTH & HUMAN SERVS., MODEL STATE VITAL STATISTICS ACT AND STATISTICS REGULATIONS 1992 REVISION iii (Apr. 1995), <https://www.cdc.gov/nchs/data/misc/mvsact92aacc.pdf>; DEP'T OF HEALTH & HUMAN SERVS., U.S. VITAL STATISTICS SYSTEM MAJOR ACTIVITIES AND DEVELOPMENTS, 1950–95 5 (Feb. 1997), <https://www.cdc.gov/nchs/data/misc/usvss.pdf>.

49. U.S. VITAL STATISTICS SYSTEM MAJOR ACTIVITIES AND DEVELOPMENTS, 1950–95, *supra* note 48, at 5.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

State Vital Statistics Regulations.<sup>54</sup> To further the goal of uniformity among the states in how they maintain and record vital statistics, NCHS advised that states consider both the act and regulations when amending relevant state laws and regulations.<sup>55</sup>

The 1977 revision of both the Model State Vital Statistics Act and Regulations replaced the 1959 Model State Vital Statistics Act revision and the 1973 Model State Vital Statistics Regulations revision.<sup>56</sup> Unlike prior versions of the Model Act and Regulations, the 1977 revision was the first version that addressed gender marker amendment on a birth certificate.<sup>57</sup> Section 21(e) of the 1977 revision states that:

[u]pon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed in Regulation 10.8(e) to reflect such changes.<sup>58</sup>

Subsequently, the 1992 revision replaced the 1977 revision, and the CDC, the Public Health Service (PHS), and the Association for Vital Records and Health Statistics approved and recommended it as a guide for states.<sup>59</sup> Section 21(d) of the 1992 revision, like the relevant provision in the 1977 revision, reiterated that an individual must obtain a court order stating that the person underwent a surgical procedure before changing the gender marker on that person's U.S. birth certificate.<sup>60</sup>

In 2011, a working group that included individuals from the NCHS set forth a proposed revision to the Model Act and Regulations.<sup>61</sup> Under

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54. *Id.* at 6.

55. *Id.*

56. *Id.*; DEPT OF HEALTH, EDUC., & WELFARE, MODEL STATE VITAL STATISTICS ACT AND MODEL STATE VITAL STATISTICS REGULATIONS 1977 REVISION (May 1978), <https://www.cdc.gov/nchs/data/misc/mvsact77acc.pdf>.

57. Mottet, *supra* note 7, at 380.

58. MODEL STATE VITAL STATISTICS ACT AND MODEL STATE VITAL STATISTICS REGULATIONS 1977 REVISION, *supra* note 56, at 17.

59. MODEL STATE VITAL STATISTICS ACT AND STATISTICS REGULATIONS 1992 REVISION, *supra* note 48, at iii.

60. See *id.* at 10 ("Upon receipt of a certified copy of an order of (a court of competent jurisdiction) indicating the sex of an individual born in this State has been changed by surgical procedure and whether such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by regulation.").

61. NAT'L CTR. FOR HEALTH STATISTICS, MODEL STATE VITAL STATISTICS ACT AND MODEL STATE VITAL STATISTICS REGULATIONS 2011 REVISION 1–3 (Sept. 2011), [https://naphsis-my.sharepoint.com/personal/cldmn\\_naphsis\\_onmicrosoft\\_com/Documents/Shared%20with%20Everyone/FinalMODELLAWSeptember72011.pdf?shrid=a1ac-a39e-a04e-0000-25b3-faaa8af3a876](https://naphsis-my.sharepoint.com/personal/cldmn_naphsis_onmicrosoft_com/Documents/Shared%20with%20Everyone/FinalMODELLAWSeptember72011.pdf?shrid=a1ac-a39e-a04e-0000-25b3-faaa8af3a876).

§ 24(a)(4) of the 2011 proposed revision, an individual does not have to undergo a variety of gender-affirming surgery for that person to change their birth certificate's gender marker, but instead must obtain a court order stating that the person has undergone treatment to permanently transition from one sex to another.<sup>62</sup> However, HHS has not approved this 2011 revision—only the National Association for Public Health Statistics and Information Systems has endorsed this revision by resolution.<sup>63</sup> Therefore, the 1992 revision of the Model Act and Regulations was the last revision approved and recommended by the CDC.<sup>64</sup> Ultimately, even if approved by these federal agencies, the Model Act and Regulations serve only as non-binding guidelines for states to follow.

### III. THE INCONSISTENT GENDER MARKER AMENDMENT POLICIES OF THE FEDERAL GOVERNMENT AND THE STATES

#### A. DHS

The U.S. Department of Homeland Security (DHS) promulgated a final rule, in accordance with the REAL ID Act of 2005, that established minimum standards for state-issued driver's licenses and identification cards that federal agencies would accept for official purposes.<sup>65</sup> Part of the minimum standards developed by DHS require the surface of the licenses and ID cards to include the individual's gender.<sup>66</sup> The gender designation on both driver's licenses and identification cards are to be determined by the state issuing these pieces of documentation.<sup>67</sup>

In contrast, the U.S. Citizenship and Immigration Services (USCIS), a sub-agency of DHS, does not defer to individual state policy, but rather allows an applicant seeking to change their gender marker on USCIS documents to submit a letter from a licensed health care professional attesting to the applicant's gender designation.<sup>68</sup> Alternatively, an applicant may pro-

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62. *Id.* at 42–43.

63. *Id.* at 1.

64. MODEL STATE VITAL STATISTICS ACT AND REGULATIONS 1992 REVISION, *supra* note 48.

65. See Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5272 (Jan. 29, 2008) (to be codified at 6 C.F.R. pt. 37).

66. 6 C.F.R. § 37.17(c).

67. *Id.*

68. *Know Your Rights: Immigration Documents*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://www.transequality.org/know-your-rights/immigration-documents> (last visited Nov.

duce either a court order recognizing the sex or gender change or government-issued document demonstrating the correct designation.<sup>69</sup> In both cases, gender-affirming surgery or a particular type of medical treatment is not required.<sup>70</sup> USCIS does limit the gender or sex marker to male or female, even if the applicant does not identify as either.<sup>71</sup> The policy differences between DHS and USCIS illustrate the lack of uniformity of gender amendment policies in the federal government.

#### B. SSA

Although an individual's Social Security card does not include gender, the U.S. Social Security Administration (SSA) maintains records that include an individual's gender.<sup>72</sup> The SSA created a new policy on changing the gender information in a person's Social Security record on June 14, 2013.<sup>73</sup> The SSA's policy permits the amendment of an individual's gender information if the person requesting the change provides any of the following: a U.S. passport reflecting the new gender; an amended birth certificate stating the new gender; a court order directing legal recognition of the change of the person's gender; or medical certification from a licensed physician stating that the individual has undergone appropriate clinical treatment for gender transition.<sup>74</sup> With respect to "appropriate clinical treatment for gender transition," the medical certification does not need to provide details of the treatment or require a specific type of treatment.<sup>75</sup> Further, the individual can only choose between male and female genders, even if the individual identifies as non-binary.<sup>76</sup> Thus, the policies of the

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8, 2017); *10.22 Change of Gender Designation on Documents Issued by USCIS*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 10, 2012), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/Chapter10-22.html> (explaining that a licensed health care professional encompasses licensed counselors, nurse practitioners, physicians, physician assistants, psychologists, social workers, and therapists).

69. *Know Your Rights: Immigration Documents*, *supra* note 68.

70. *Id.; Revision of Adjudicator's Field Manual Subchapter 10.22 - Change of Gender Designation on Documents Issued by U.S. Citizenship and Immigration Services*, U.S. CITIZENSHIP & IMMIGR. SERVS. 2 (Jan. 19, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoanda/2017/2017-1-19ChangeGenderDesignation-PM-602-0141.pdf>; *10.22 Change of Gender Designation on Documents Issued by USCIS*, *supra* note 68.

71. *Revision of Adjudicator's Field Manual Subchapter 10.22*, *supra* note 70, at 2.

72. *Know Your Rights: Social Security*, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/know-your-rights/social-security> (last visited Oct. 28, 2018).

73. *Recent Administrative Policy*, *supra* note 43, at 1863.

74. *Know Your Rights: Social Security*, *supra* note 72.

75. *Id.*

76. *RM 10212.200 Changing Numident Data for Reasons other than Name Change*, SOC.

SSA and the USCIS are similar.

### C. States

Within the state vital statistics jurisdictions, the gender marker amendment laws and policies for birth certificates vary widely. Three states do not permit individuals to amend their gender markers on their birth certificates.<sup>77</sup> Twenty-one states require individuals to undergo gender-affirming surgery to change the gender markers on their birth certificates.<sup>78</sup> Seventeen states, the District of Columbia, and New York City do not require gender-affirming surgery for individuals to change the gender markers on their birth certificates.<sup>79</sup> Of those seventeen states, California, Nevada, Oregon, and Washington allow individuals to change the gender markers on their birth certificates by submitting affidavits attesting to the correct gender identity.<sup>80</sup> Nine states have unclear or unknown policies on the surgical or clinical requirements necessary for an individual to change the gender marker on a birth certificate.<sup>81</sup> These non-uniform approaches to gender marker amendment on birth certificates demonstrate the significant policy inconsistencies from state to state.

### D. State Department

The State Department allows a person to change the gender marker on a U.S. passport.<sup>82</sup> To change the gender marker, an individual must provide a medical certification that attests that the person has undergone or is

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SECURITY ADMIN. (Sept. 30, 2013), <https://secure.ssa.gov/poms.nsf/lnx/0110212200>.

77. See ID Documents Center, NAT'L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/documents> (search “Name Change, Driver's License & Birth Certificate Policies” by state or territory) (last visited July 2, 2018) (Kansas, Ohio, and Tennessee).

78. See *id.* (Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, Nebraska, New Jersey, New Mexico North Carolina, North Dakota, West Virginia, Wisconsin, and Virginia).

79. See *id.* (California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Maryland, Massachusetts, Minnesota, Montana, Nevada, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington).

80. *Id.*

81. See *id.*; *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <https://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last visited Feb. 25, 2018) (Indiana, Mississippi, New Hampshire, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming).

82. *Gender Designation Change*, U.S. DEP'T OF STATE, <https://travel.state.gov/content/passports/en/passports/information/gender.html> (last visited July 27, 2018).

undergoing “appropriate clinical treatment for gender transition.”<sup>83</sup> The medical certification must be a signed statement from a licensed Medical Doctor (M.D.) or Doctor of Osteopathy (D.O.) on that physician’s office letterhead.<sup>84</sup> However, “appropriate clinical treatment” does not demand gender-affirming surgery.<sup>85</sup> Even if the applicant has a court order reflecting that the applicant has had a legal gender change, or has updated domestic documents (such as a driver’s license or birth certificate), the applicant still must provide the medical certification.<sup>86</sup> Moreover, an applicant is limited to selecting either the male or female gender, even if the individual does not identify as either.<sup>87</sup> The policies of the State Department conflict with those of the SSA, USCIS, and several states because the State Department requires a medical attestation regardless of whether the individual seeking the gender marker change has a court order reflecting that change.

The State Department’s policies for amending the gender marker on a U.S. passport are the same as its policies for amending the gender marker on a Consular Report of Birth Abroad.<sup>88</sup> The Consular Report of Birth Abroad proves U.S. citizenship of a person born abroad to at least one U.S. citizen parent and can be used throughout the person’s life.<sup>89</sup> The Bureau of Consular Affairs, a bureau within the State Department, is responsible for issuing passports and other documentation to nationals; as such, U.S. embassies and consulates issue the Consular Report of Birth Abroad.<sup>90</sup> The Vital Records Section of Passport Services, a subsection of the Bureau of Consular Affairs, is responsible for correcting, amending, or replacing an individual’s Consular Report of Birth Abroad.<sup>91</sup> The Bureau of Consular Affairs, whose parent agency is the State Department, executes the amendment to the gender marker of a Consular Report of Birth Abroad.<sup>92</sup>

Although the State Department does not consider a Consular Report of

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Understanding the Passport Gender Change Policy*, *supra* note 12.

89. U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL §§ 1441.1(a), (g) (2017), <https://fam.state.gov/fam/07fam/07fam1440.html#M1440>.

90. *Id.* §§ 1441.1(a), (c), (h); *Mission*, U.S. DEP’T OF STATE—BUREAU OF CONSULAR AFF., <https://travel.state.gov/content/travel/en/about-us.html> (last visited July 10, 2018).

91. U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL §§ 1441.5(a), (d) (2017), <https://fam.state.gov/fam/07fam/07fam1440.html#M1440>.

92. *Bureau of Consular Affairs*, U.S. DEP’T OF STATE, <https://www.usa.gov/federal-agencies/bureau-of-consular-affairs> (last visited July 10, 2018).

Birth Abroad to be a birth certificate because consular offices do not perform a vital statistics function like that of vital statistics offices within the United States,<sup>93</sup> the Consular Report of Birth Abroad should be treated as equivalent to a U.S. birth certificate. The Consular Report of Birth Abroad should be considered equivalent to a birth certificate because the Consular Report of Birth Abroad proves an individual's U.S. citizenship, derives from records of a person's birth, and seemingly meets the definition of "birth certificate" under the IRTPA.<sup>94</sup>

*E. The Equal Protection Violation Resulting from Differential Treatment Between Transgender U.S. Citizens Born in the United States and Abroad*

A U.S. citizen born abroad can change the gender marker on their Consular Report of Birth Abroad without undergoing gender-affirming surgery. However, a U.S. citizen born in a state that completely bars gender marker amendment or that requires applicants to undergo gender-affirming surgery does not have the same opportunity to amend their birth documentation merely because of their national origin.<sup>95</sup> This Comment contends that states with these restrictive laws discriminate against transgender U.S. citizens born within the United States on the basis of national origin, which is a suspect classification.<sup>96</sup> Because the aforementioned state laws discriminate against a suspect classification, they are in violation of the Equal Protection Clause of the Fourteenth Amendment, which states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>97</sup>

Consequently, these state laws are subject to strict scrutiny by a reviewing court.<sup>98</sup> The standard for strict scrutiny is whether a law is narrowly

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93. U.S. DEP'T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1441.1(f) (2017), <https://fam.state.gov/fam/07fam/07fam1440.html#M1440>.

94. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7211, 118 Stat. 3638, 3825–26 (defining "birth certificate"); *Birth Abroad of a U.S. Citizen*, U.S. CUSTOMS & BORDER PROT., [https://help.cbp.gov/app/answers/detail/a\\_id/10433/~/birth-abroad-of-a-u-s-citizen](https://help.cbp.gov/app/answers/detail/a_id/10433/~/birth-abroad-of-a-u-s-citizen) (last visited Jan. 4, 2018) (acknowledging that a Consular Report of Birth Abroad of a United States citizen proves U.S. citizenship); *Citizenship Evidence*, *supra* note 10 (explaining that a U.S. birth certificate and a Consular Report of Birth Abroad are both primary forms of evidence of U.S. citizenship).

95. See *Federal Protections Against National Origin Discrimination*, *supra* note 15 (conveying that a person's national origin is "a person's birthplace, ancestry, culture or language").

96. See *Graham v. Richardson*, 403 U.S. 365, 371–72 (1971) (highlighting that classifications based on alienage, nationality, and race are inherently suspect).

97. U.S. CONST. amend. XIV, § 1.

98. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (indicating that a classification based on

tailored to meet a compelling governmental interest.<sup>99</sup> In order for these laws to pass strict scrutiny, states must successfully argue that their laws are narrowly tailored to meet a compelling governmental interest.<sup>100</sup> States have strained to make this argument as well as failed to provide such a basis for their restrictive laws.<sup>101</sup>

Given the need to remedy this Equal Protection violation and address the inconsistencies of gender marker amendment within federal agencies and the states, this Comment proposes using an administrative law avenue to rectify these issues.

#### IV. THE CDC'S FAILURE TO ENACT MINIMUM STANDARDS FOR U.S. BIRTH CERTIFICATES CONSTITUTES AGENCY INACTION

##### A. *Section 7211 of the Intelligence Reform and Terrorism Prevention Act of 2004*

After the September 11, 2001 terrorist attacks, President George W. Bush and Congress established the National Commission on Terrorist Attacks Upon the United States.<sup>102</sup> This body investigated the September 11 terrorist attacks, with attention to facts related to intelligence and law enforcement agencies, diplomacy, immigration and border control, asset flow to terrorist organizations, commercial aviation, and congressional oversight and resource allocation.<sup>103</sup> The resulting 9/11 Commission Report outlined the findings of the investigation.<sup>104</sup> Among the Report's many rec-

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national origin is “given the most exacting scrutiny”); Fallon, *supra* note 15, at 1268–69 (stating that strict scrutiny is the standard that determines whether a law that discriminates against individuals on the basis of a suspect classification violates the Equal Protection Clause).

99. Fallon, *supra* note 15, at 1268–69.

100. *Id.*

101. See Memorandum in Support of Defendants' Motion to Dismiss at 3, Ray v. Dir., Ohio Dep't of Health, No. 2:18-cv-00272-MHW-CMV (S.D. Ohio July 6, 2018) (“Birth certificates serve an important purpose and Ohio has a substantial interest in ensuring their accuracy, including an accurate record of a person's sex as reported at birth.”). But see Defendant's Answer to First Amended Complaint at 7, F.V. v. Barron, 286 F.Supp.3d 1131 (D. Idaho 2018) (No. 1:17-cv-00170) (“Defendants admit that they are aware of no compelling, substantial, or rational basis justifying a prohibition against changing the sex designation on the birth certificate of a transgender person who has undergone clinically appropriate treatment to permanently change his or her sex.”).

102. THE 9/11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE U.S. xv (2004), <https://www.9-11commission.gov/report/911Report.pdf>.

103. *Id.*

104. *Id.* at xv–xvi.

ommendations, the Commission advised that, to prevent identification fraud, the federal government should develop standards for issuing birth certificates and driver's licenses because these documents provide individuals with the ability to access "vulnerable facilities" such as gates for boarding aircrafts in the United States.<sup>105</sup> When the U.S. House of Representatives included a provision to create federal minimum standards for birth certificates in the IRTPA, it cited the 9/11 Commission Report.<sup>106</sup>

The IRTPA defines birth certificate as "a certificate of birth . . . for an individual (regardless of where born) who is a citizen or national of the United States at birth . . . whose birth is registered in the United States [regardless of where born] . . . that . . . is issued by a Federal, State, or local government agency or authorized custodian of record and produced from birth records maintained by such agency or custodian of record . . .".<sup>107</sup> Pursuant to § 7211 of the IRTPA, the Secretary of HHS was given one year to craft new minimum standards "for proof and verification of identity as a condition of issuance of a birth certificate."<sup>108</sup> While President George W. Bush signed the IRTPA on December 17, 2004,<sup>109</sup> HHS did not establish minimum standards for U.S. birth certificates prior to the deadline specified in the legislation.<sup>110</sup>

#### *B. HHS's Delegation of Authority to the CDC and the CDC's Agency Inaction*

Although the Secretary of HHS should have established minimum standards on or by December 17, 2005 to comply with the IRTPA's one-year timeline, the Secretary instead delegated most of the Secretary's authorities to set minimum standards for U.S. birth certificates to the Director of the CDC on December 15, 2005.<sup>111</sup> Since the CDC's NCHS is respon-

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105. *Id.* at 390.

106. 150 CONG. REC. H10994-04, H11,007 (daily ed. Dec. 7, 2004) (statement of Rep. Menendez) (stating that the Intelligence Reform and Terrorism Prevention Act of 2004 "establish[es] tough Federal minimum standards for birth certificates and driver's licenses just as the 9/11 Commission report recommended").

107. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 7211, 118 Stat. 3638, 3825.

108. *Id.* at 3826.

109. Statement by President George W. Bush Upon Signing S. 2845, Pub. L. No. 108-458, 2004 U.S.C.C.A.N. (118 Stat.) S51, S53.

110. MINIMUM STANDARDS FOR BIRTH CERTIFICATES [§ 7211], HOMELAND SECURITY ACT SUMMARY § 6:232 n.4, Westlaw (2018 ed.) (advising that "[n]o regulations, proposed or final, establishing minimum standards have been issued to date.") [hereinafter HOMELAND SECURITY ACT SUMMARY].

111. See Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-

sible for evaluating the quality of state vital statistics and developing appropriate model laws, the Secretary of HHS likely delegated this authority to the Director of the CDC because of the CDC's expertise in the area of vital statistics.<sup>112</sup> However, more than twelve years have passed since the Secretary of HHS delegated this authority to the CDC Director, and the Director has yet to promulgate minimum standards for U.S. birth certificates.<sup>113</sup>

As the Director of the CDC's failure to establish minimum standards for U.S. birth certificates is an example of agency inaction, it also provides an opportunity to compel the federal government to create regulations that help transgender individuals obtain accurate gender markers on their birth certificates. Though transgender individuals and advocates have previously pursued state and federal litigation to fight state laws and policies that hinder transgender individuals from obtaining accurate birth certificates, this litigation did not have a sweeping effect across all states.<sup>114</sup> By convincing a court to compel agency action, transgender petitioners could potentially create widespread change that would impact the vital records laws and policies of the fifty-seven vital statistics jurisdictions.

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458, 118 Stat. at 3826; Intelligence Reform and Terrorism Prevention Act of 2004 Delegation of Authority, 70 Fed. Reg. 75,821, 75,821 (Dec. 21, 2005).

112. *Physicians' Handbook on Medical Certification of Death*, *supra* note 47, at 57. The head of an agency can delegate authority it receives by law "to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency" and "to authorize the publication of advertisements, notices, or proposals" to subordinate officials within the agency. 5 U.S.C. § 302(b)(1)–(2) (2012); *see also* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 441 (2015) (expressing that the heads of agencies delegate authority to subordinates within their agency because of expertise, time, or resource constraints).

113. *See* HOMELAND SECURITY ACT SUMMARY, *supra* note 110.

114. *See* Victory! Court Orders Idaho to Issue Accurate Birth Certificates to Transgender People, LAMBDA LEGAL (Mar. 5, 2018), [https://www.lambdalegal.org/news/id\\_20180305\\_court-orders-accurate-birth-certificates](https://www.lambdalegal.org/news/id_20180305_court-orders-accurate-birth-certificates) (describing how Lambda Legal filed a federal lawsuit challenging Idaho's state policy that prevents transgender individuals from changing the gender markers on their birth certificates and a federal judge held that Idaho's birth certificate policy was unconstitutional because it discriminated against transgender individuals); Tim Cwiek, *Trans Birth-Certificate Lawsuit Filed in New Jersey*, PHILA. GAY NEWS (Nov. 23, 2016), <http://www.epgn.com/news/local/11337-trans-birth-certificate-lawsuit-filed-in-new-jersey> (noting that attorneys filed a federal lawsuit in New Jersey challenging state law that requires transgender individuals to undergo gender-affirming surgery to amend the gender markers on their birth certificates); *Kansas Woman Sues State for Denying Her an Accurate Birth Certificate*, TRANSGENDER L. CTR. (Feb. 24, 2016), <https://transgenderlawcenter.org/archives/12543> (explaining how the Transgender Law Center along with other law firms filed a lawsuit in state court challenging Kansas's policy of preventing transgender individuals from correcting the gender markers on their birth certificates).

## V. THE MECHANISM FOR A REVIEWING COURT TO COMPEL THE CDC TO CREATE MINIMUM STANDARDS FOR U.S. BIRTH CERTIFICATES

### A. *The Requirements for Judicial Review of Agency Action and Relevant Precedents*

Within the context of the Administrative Procedure Act (APA), agency action includes affirmative action as well as a failure to act (inaction).<sup>115</sup> In *Norton v. Southern Utah Wilderness Alliance*,<sup>116</sup> the Supreme Court clarified that the term “failure to act” includes the failure to take any of the five discrete agency actions enumerated in 5 U.S.C. § 551(13)—an agency rule, order, license, sanction, or relief.<sup>117</sup> The APA states that when an agency’s action is unlawfully withheld or unreasonably delayed, the reviewing court “shall” compel the agency to act.<sup>118</sup>

Although judicial review of agency action is limited if such review is barred by statute or if the agency’s action under that statute is discretionary, individuals harmed by an agency’s withholding of action or unreasonable delay of action are entitled to seek judicial review of the agency’s inaction.<sup>119</sup> Under the APA, individuals who are injured because of an agency’s failure to act can petition a reviewing court to issue a writ of mandamus to compel the agency to act in accordance with its congressional mandate.<sup>120</sup> Although a court’s issuance of a writ of mandamus is considered an “extraordinary remedy,” a reviewing district court should issue the writ of mandamus when the agency fails to perform a non-discretionary, legally required action.<sup>121</sup> In *Norton*, the Southern Utah Wilderness Alliance

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115. 5 U.S.C. § 551(13) (2012) (specifying that “agency action” also includes “failure to act”).

116. 539 U.S. 55 (2004).

117. *See id.* at 62–63.

118. 5 U.S.C. § 706(1).

119. *Id.* § 701(a)(1)–(2) (allowing judicial review of agency action unless “statutes preclude judicial review” or “agency action is committed to agency discretion by law”); *Id.* § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

120. *See id.* §§ 702, 706(1).

121. *Norton*, 539 U.S. at 64 (citing U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5, 108 (1947)); *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000); *see* 28 U.S.C. § 1361 (2012) (“The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”); *id.* § 1651(a) (Under the All Writs Act, “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”).

(SUWA) and other organizations filed a lawsuit for declaratory and injunctive relief against the Bureau of Land Management (BLM), the Director of the BLM, and the Secretary of the U.S. Department of Interior (DOI).<sup>122</sup> SUWA claimed that the BLM failed to protect Utah's public lands from damage by off-road vehicles (ORVs) as required under the Federal Land Policy Management Act of 1976 (FLPMA) and the National Environmental Policy Act of 1969 (NEPA).<sup>123</sup> SUWA argued that under § 706(1) of the APA, the BLM, Director of the BLM, and the Secretary of the DOI should be compelled to act because the agency's inaction was unlawfully withheld or unreasonably delayed.<sup>124</sup> The Supreme Court held that the SUWA's claims against the BLM and the DOI Secretary were not actionable claims under § 706(1) of the APA—the DOI Secretary's and the BLM Director's mandates under the FLPMA and the NEPA were flexible and discretionary and were not required mandates that they had to meet in a specific statutory time period.<sup>125</sup>

In contrast, the Director of the CDC's failure to establish minimum standards for U.S. birth certificates would meet the necessary requirements for judicial review of that inaction. The Director of the CDC's failure to promulgate minimum standards for U.S. birth certificates qualifies as a failure to act because Congress set a specific statutory time frame for those minimum standards to be created, and because the provision in the IRTPA was not flexible and discretionary.<sup>126</sup> The Secretary of HHS delegated its authority to establish minimum standards for birth certificates to the Director of the CDC on December 15, 2005.<sup>127</sup> Despite the IRTPA's mandate that minimum standards be established no later than December 17, 2005, the Director of the CDC still has failed to develop these standards.<sup>128</sup> Judi-

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122. *Norton*, 539 U.S. at 60. The Bureau of Land Management (BLM) is an agency within the U.S. Department of Interior (DOI). *Id.* at 58.

123. *Id.* at 60–61. The Southern Utah Wilderness Alliance's (SUWA's) three claims were that the BLM: (1) violated its nonimpairment obligation under the Federal Land Policy Management Act of 1976 (FLPMA) by permitting degradation in certain wilderness area studies; (2) failed to implement provisions regarding off-road vehicle (ORV) use in its land use plans; and (3) failed to take a “hard look” regarding whether it should undergo additional environmental analyses for areas with increased ORV use in violation of the National Environmental Policy Act of 1969 (NEPA). *Id.*

124. *Id.*

125. *Id.* at 67–72.

126. *See id.*; *see also* 5 U.S.C. § 551(13) (2012) (defining “agency action”).

127. Intelligence Reform and Terrorism Prevention Act of 2004 Delegation of Authority, 70 Fed. Reg. 75,821, 75,821 (Dec. 21, 2005).

128. *See* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3826.

cial review is thus appropriate because the action has been unlawfully withheld or unreasonably delayed for more than twelve years.<sup>129</sup>

In assessing whether a reviewing court should issue a writ of mandamus to compel delayed agency action, the D.C. Circuit developed a set of elements (*TRAC* factors) in *Telecommunications Research and Action Center v. FCC*<sup>130</sup> to consider:

- (1) the time agencies take to make decisions must be governed by a “rule of reason;”
- (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”<sup>131</sup>

Courts have applied the *TRAC* factors when an agency has failed to meet a statutorily mandated deadline for agency action. In *In re United Mine Workers of America International Union*,<sup>132</sup> the United Mine Workers of America (UMWA) petitioned the D.C. Circuit to issue a writ of mandamus to compel the Mine Safety and Health Administration (MSHA) of the DOI to establish regulations to control gas emissions in diesel engines that underground coal mines use per the requirements in the Mine Safety and Health Act of 1977 (Mine Safety and Health Act).<sup>133</sup> Although MSHA had issued a notice of proposed rulemaking and received comments regarding an update to the air quality standards for hazardous substances, like the aforementioned gas emissions, MSHA never issued the final rule.<sup>134</sup> The UMWA’s petition focused on the second *TRAC* factor (a statutory timetable)<sup>135</sup> and argued that MSHA failed to meet a provision in the Mine Safety and Health Act that required the Secretary of Labor to issue final regulations or to explain her decision not to establish them either (1) within ninety days of the certification of the record of a hearing, if held, or (2) at the end

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129. See 5 U.S.C. § 706(1).

130. 750 F.2d 70 (D.C. Cir. 1984).

131. *Id.* at 80 (internal citations omitted).

132. 190 F.3d 545 (D.C. Cir. 1999).

133. *Id.* at 546.

134. *Id.*

135. See *Telecomm. Research & Action Ctr.*, 750 F.2d at 80 (establishing the second *TRAC* factor, that if Congress provides a timetable for agency action, the statute “may supply content for this rule of reason”).

of the public comment period, if no hearing was held.<sup>136</sup> Although the last hearings on the rulemaking took place on March 27, 1991, the agency failed to take action on certain proposed regulations for eight years.<sup>137</sup> The D.C. Circuit held that the agency's failure to meet the deadline was not excused by the fact that Congress had required the agency to engage in other rulemaking since the passage of the Mine Safety and Health Act.<sup>138</sup> While the D.C. Circuit determined that the Secretary of Labor failed to meet the congressionally mandated ninety-day deadline, the court examined the remaining *TRAC* factors to determine if mandamus was appropriate.<sup>139</sup> Although the court found that the agency's delay in final rulemaking would not cause a substantial health risk<sup>140</sup> and the agency's other priorities were appropriate,<sup>141</sup> the court did find that "the delay here has been substantial" and that the failure of the Secretary of Labor to meet the statutory deadline to issue a final rule meant that the agency was using outdated exposure standards that were twenty-seven years old.<sup>142</sup> Prior to rendering its decision, the D.C. Circuit ordered MSHA to file a definite schedule with the court to determine when MSHA could complete the rulemaking for the diesel emission gases.<sup>143</sup> The agency provided the court with a two-year schedule to complete the rulemaking regarding diesel emission gases.<sup>144</sup> While the court found that the schedule was not unreasonable, it did not find that the schedule would remedy the agency's ongoing violation of the Mine Safety and Health Act.<sup>145</sup> However, rather than issuing a writ of mandamus, the court decided to retain jurisdiction over the case and required that the MSHA provide the court with status updates according to a schedule that aligned with the one proposed by MSHA.<sup>146</sup>

However, in *In re Bluewater Network*,<sup>147</sup> Bluewater Network and Ocean Advocates successfully argued that the Coast Guard failed to establish regulations that it was required to promulgate under § 4110 of the Oil Pollution

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136. *In re United Mine Workers of America Int'l Union*, 190 F.3d at 550.

137. *Id.*

138. *Id.* at 551.

139. *Id.*

140. See *Telecomm. Research & Action Ctr.*, 750 F.2d at 80 (third *TRAC* factor).

141. See *id.* (fourth *TRAC* factor).

142. *In re United Mine Workers of America Int'l Union*, 190 F.3d at 553; see *Telecomm. Research & Action Ctr.*, 750 F.2d at 70, 80 (fifth *TRAC* factor).

143. *In re United Mine Workers of America Int'l Union*, 190 F.3d at 554.

144. *Id.*

145. *Id.* at 554–56.

146. *Id.* at 555–56.

147. 234 F.3d 1305 (D.C. Cir. 2000).

Act of 1990 (Oil Pollution Act).<sup>148</sup> The statute required the Coast Guard to promulgate regulations by August 18, 1991—one year after Congress enacted the statute.<sup>149</sup> Although three months before this deadline the Coast Guard set forth a notice of proposed rulemaking regarding §§ 4110(a)–(b) and adopted a temporary rule in March 1997, it did not establish permanent § 4110(a) regulations and delayed promulgating use and installation requirements under § 4110(b).<sup>150</sup> The D.C. Circuit ruled that the U.S. Coast Guard must engage in rulemaking under § 4110 of the Oil Pollution Act.<sup>151</sup> The D.C. Circuit granted mandamus because “a nine-year delay is unreasonable given a clear one-year time line,” the delayed regulations related to environmental issues, and the Coast Guard failed to show that rulemaking would interfere with its other higher priorities.<sup>152</sup>

While the D.C. Circuit’s *TRAC* factors are generally part of the reviewing court’s decision in determining whether agency action was unreasonably delayed, not all courts have used this test. In *Forest Guardians v. Babbitt*,<sup>153</sup> the Tenth Circuit held that when Congress imposes a mandatory, date-specific statutory deadline on an agency to engage in agency action, a reviewing court must compel the agency to follow through with that required action.<sup>154</sup> The Tenth Circuit determined that if Congress did not impose a deadline, a reviewing court can only compel the agency to act if the action is unreasonably delayed.<sup>155</sup> The Tenth Circuit “decline[d] to apply” the *TRAC* factors “where Congress has established a specific, non-discretionary time within which the agency must act.”<sup>156</sup> Thus, *Forest Guardians* demonstrates that the Tenth Circuit does not rely on the *TRAC* factors in reviewing agency inaction when Congress has created a specific statutory timeline for the agency to act.<sup>157</sup>

#### B. A Litigation Strategy to Persuade a Reviewing Court to Compel the CDC to Act

Since the D.C. Circuit and the Tenth Circuit differ on how to approach

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148. *Id.* at 1307.

149. *Id.*

150. *Id.* at 1308–09, 1313.

151. *Id.* at 1316.

152. *Id.* Since the Coast Guard did not contest Bluewater Network and Ocean Advocates’s arguments regarding the *TRAC* factors, the D.C. Circuit did not analyze these arguments.

153. 174 F.3d 1178 (10th Cir. 1999).

154. *Id.* at 1190.

155. *Id.*

156. *Id.* at 1191.

157. *Id.*

judicial review of agency inaction, forum selection is imperative when litigants are deciding where to file a lawsuit.<sup>158</sup> Section 7211 of the IRTPA provides a specific one-year timeline for establishing minimum standards for U.S. birth certificates.<sup>159</sup> Given the Director of the CDC's failure to perform a non-discretionary action within a statutorily-mandated timeline, a reviewing court within the Tenth Circuit would likely follow the precedent of *Forest Guardians* and compel the Director of the CDC to establish these minimum standards. Due to this favorable precedent in the Tenth Circuit, the proposed lawsuit should be filed by litigants in the district courts within that jurisdiction.

In addition to filing the proposed lawsuit within the Tenth Circuit's jurisdiction, the individuals who should bring this petition for mandamus should be transgender U.S. citizens who were born and reside in states within the Tenth Circuit that require gender-affirming surgery or do not allow for gender marker amendment. With these considerations, transgender individuals should bring the proposed mandamus action in one of three states within the Tenth Circuit: Colorado, Kansas, or New Mexico.<sup>160</sup> Colorado and New Mexico require proof of gender-affirming surgery,<sup>161</sup> while Kansas does not allow an individual to change the gender marker on a birth certificate by agency policy.<sup>162</sup> Since the litigants will file a petition requesting the reviewing court to issue a writ of mandamus to compel agency action, federal jurisdiction is appropriate because the proposed lawsuits arise from federal legislation.<sup>163</sup>

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158. See Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 94 (2011) (arguing that strategy regarding forum selection is important in cases centering on review of an agency action).

159. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3826.

160. 28 U.S.C. § 1361 (2012) ("The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."); *id.* § 41 (outlining the composition of the circuit courts).

161. COLO. REV. STAT. § 25-2-115 (2017) (mandating that a copy of "an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure" to amend the birth certificate); N.M. STAT. ANN. § 24-14-25 (West 2010) (requiring a signed statement that certifies that the sex of an individual born in this state has been changed by surgical procedure to amend the birth certificate).

162. KAN. ADMIN. REGS. § 28-17-20 (2018) (instructing that the "registrant's sex may be amended if the amendment is substantiated with the registrant's affidavit, or a parent's affidavit if the registrant is under the age of 18, that the sex was incorrectly recorded and with medical records substantiating the registrant's sex at the time of birth").

163. See 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of

As part of the authority delegated by the Secretary of HHS, the Director of the CDC is tasked with establishing the requirements for verification and proof of identity necessary for the issuance of U.S. birth certificates.<sup>164</sup> While a transgender U.S. citizen born abroad and residing in Colorado, New Mexico, or Kansas can amend the gender marker on a Consular Report of Birth Abroad without undergoing gender-affirming surgery, a transgender U.S. citizen born and residing in these three states either cannot amend the gender marker on the birth certificate or must undergo gender-affirming surgery to amend it.<sup>165</sup> By establishing identity and verification requirements for the issuance of birth certificates, the Director of the CDC can remedy the Equal Protection violation that discriminates against transgender U.S. citizens born within the United States.

## VI. A PROPOSED REGULATION FOR THE CDC TO INCLUDE IN ITS MINIMUM STANDARDS FOR U.S. BIRTH CERTIFICATES

Since the fifty-seven vital statistics jurisdictions have their own laws that govern how they maintain and amend birth certificates, a federal regulation that provides minimum standards for U.S. birth certificates will have a substantial direct effect on state law.<sup>166</sup> An agency's regulation has federalism implications when its policy has a substantial and direct effect on the states, on the relationship between the states and the federal government, or on the distribution of power among the different levels of government.<sup>167</sup> If the agency's regulation has federalism implications, imposes compliance costs on state and local governments, and is not required by statute, the regulation must meet one of two criteria: (1) the federal government pays the state and local governments' direct costs to comply with the regulation, or (2) the agency must consult with state and local officials in the early stages of crafting the regulation.<sup>168</sup> However, if an agency's regulation preempts state law, the agency still must consult with state and local officials

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all civil actions arising under the Constitution, laws, or treaties of the United States.”).

164. Intelligence Reform and Terrorism Prevention Act of 2004 Delegation of Authority, 70 Fed. Reg. 75, 821, 75, 821 (Dec. 21, 2005); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3825, 3826.

165. See COLO. REV. STAT. § 25-2-115; KAN. ADMIN. REGS. § 28-17-20; N.M. STAT. ANN. § 24-14-25; U.S. DEP’T OF STATE, 7 FOREIGN AFFAIRS MANUAL § 1310(d) app. M (2016), <https://fam.state.gov/fam/07fam/07fam1300apM.html#M1350>.

166. See *About the National Vital Statistics System*, *supra* note 8 (explaining how the fifty-seven vital statistics jurisdictions establish their own laws regarding birth certificates).

167. Exec. Order No. 13,132, 64 Fed. Reg. 43,255, 43,255 (Aug. 4, 1999).

168. *Id.* at 43,257–58.

in the early stages of generating the proposed regulation.<sup>169</sup> Despite the federalism implications of proposing minimum standards for birth certificates, the mandate to establish these regulations is required by statute. Therefore, the Director of the CDC's regulation only requires that the CDC consult with state and local officials prior to formulating the proposed regulation.<sup>170</sup>

While not subject to federalism implications, the CDC's determination of minimum standards for birth certificates should consider the policies of the Secretary of DHS, the Commissioner of the SSA, state vital statistics offices, and other relevant federal agencies as stated in the IRTPA.<sup>171</sup> As discussed previously, states adhere to their own, state-specific laws and regulations, and DHS also looks to how the states regulate gender amendment laws when it establishes minimum standards for driver's licenses and identification cards.<sup>172</sup> However, the USCIS does not rely on a state's laws and regulations when determining the different ways transgender individuals can change the gender markers on their immigration documents.<sup>173</sup> Further, the SSA and the State Department do not adhere to state-specific standards for gender marker amendment on Social Security records, U.S. passports, and U.S. Consular Reports of Birth Abroad.<sup>174</sup> Thus, the Director of the CDC should coordinate an approach to crafting minimum standards that consults the policies of this web of entities.

The Director of the CDC should propose a regulation as part of the minimum standards for birth certificates that weaves the policies of the states and various federal agencies. The regulation should permit any individual to change the gender marker on their birth certificate. With only three states that currently do not permit an individual to change the gender marker on a U.S. birth certificate, this requirement creates greater uniformity with the remaining state laws and policies. At a minimum, male and female gender markers should be available for gender marker options. States may also permit individuals to change gender markers on birth certificates to non-binary markers.<sup>175</sup>

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169. *Id.* at 43,258.

170. *See id.* at 43,257–58.

171. Intelligence Reform and Terrorism Prevention Act of 2004 Delegation of Authority, 70 Fed. Reg. 75,821 (Dec. 15, 2005); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3825, 3826.

172. *See* 6 C.F.R. § 37.17 (2012).

173. *See* 10.22 Change of Gender Designation on Documents Issued by USCIS, *supra* note 68.

174. *See How Do I Change My Gender on Social Security's Records?*, SOC. SECURITY ADMIN. (May 18, 2018), <https://faq.ssa.gov/en-us/Topic/article/KA-01453>; *Know Your Rights: Social Security*, *supra* note 72; *Gender Designation Change*, *supra* note 82.

175. *See, e.g.*, California, ID Documents Center, *supra* note 77 (stating that the gender

Moreover, states should accept various certifications from an individual seeking to change a gender marker: a court order from a court of competent jurisdiction; a certification from a licensed health care provider; or an application with accompanying affidavits to the state's vital records office attesting under penalty of perjury that the request to change the applicant's gender marker aligns with the applicant's gender identity. These policies would combine those of the State Department, the USCIS, the SSA, and several states, allowing for transgender individuals to have a greater opportunity to have accurate gender markers on their birth certificates.<sup>176</sup> Further, the regulation will not require an individual to undergo gender-affirming surgery or a specific type of clinical treatment. This lack of a requirement for gender-affirming surgery aligns with the policies of the State Department, the USCIS, the SSA, and a significant number of states.<sup>177</sup> Importantly, such a policy is endorsed by the American Medical Association, which considers surgical prerequisites for gender marker amendment to be "inconsistent with current medical standards."<sup>178</sup>

This proposed regulation integrates the policies of both the states and U.S. federal agencies and establishes clear and uniform requirements for proof and verification of gender identity. By allowing transgender citizens multiple documentation options for gender marker amendment, the proposed regulation removes the existing barriers to having accurate gender marker designations on birth certificates.

## CONCLUSION

Transgender U.S. citizens born in certain states are faced with laws that prevent them from obtaining accurate gender markers on their birth certifi-

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marker options available for a birth certificate in California are male, female, and non-binary); Washington, ID Documents Center, *supra* note 77 (identifying that the gender marker designations available for a birth certificate in Washington are M, F, and X).

176. See *supra* notes 68–70, 74–80 and accompanying text.

177. See *id.*

178. *AMA Calls for Modernizing Birth Certificate Policies*, AM. MED. ASS'N (June 10, 2014), <http://news.cision.com/american-medical-association/r/ama-calls-for-modernizing-birth-certificate-policies,c9598921>. See *Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients H-65.967*, AM. MED. ASS'N (2014), <https://policysearch.ama-assn.org/policyfinder/detail/transgender?uri=%2FAMADoc%2FHOD.xml-0-5096.xml> (declaring that within the policy of the American Medical Association (AMA), the AMA "supports elimination of any requirement that individuals undergo gender affirmation surgery in order to change their sex designation on birth certificates and supports modernizing state vital statistics statutes to ensure accurate gender markers on birth certificates").

cates, through outright preclusion and prohibitive surgical requirements. However, transgender U.S. citizens born abroad can change the gender marker on their Consular Report of Birth Abroad without undergoing gender-affirming surgery. While both the U.S. birth certificate and the Consular Report of Birth Abroad are documents that attest to the facts of a person's birth and provide evidence of a person's citizenship, transgender U.S. citizens within U.S. borders are subject to different requirements than transgender citizens born abroad. This disparate treatment violates the Equal Protection Clause of the Fourteenth Amendment on the basis of national origin because two transgender U.S. citizens living in the same state may be required to undergo wholly-different procedures to change their gender designation on their birth documentation simply because they were born in different parts of the world.

To redress the Equal Protection violation, transgender U.S. citizens born in the United States can petition a court to compel the Director of the CDC to establish minimum standards for U.S. birth certificates to create fairness among state laws. Although Congress, per the IRTPA, originally granted the authority to establish minimum standards for U.S. birth certificates to HHS, HHS delegated this authority to the CDC. Thus, the CDC has a mandatory statutory duty to create these minimum standards, including establishing requirements for proof and verification of identity. Yet, the Director of the CDC has failed to set these minimum standards. By creating requirements for proof and verification of identity as a condition of issuance of a birth certificate, the Director of the CDC can address the Equal Protection violation discussed in this Comment. This Comment's proposed regulation not only integrates the policies of federal agencies and the vital statistics jurisdictions, but it would also mitigate a substantial obstacle for transgender U.S. citizens seeking citizenship and identification documentation that matches their gender identity.