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Comments of Lambda Legal Regarding OAR 735-062-0013, Proposed Rule Addressing Physical Description, including Sex, on Driver License, Driver Permit or Identification Card

Dear Coordinator Kunze,

Lambda Legal Defense and Education Fund (“Lambda Legal”) is pleased to respond to the Oregon Department of Transportation’s request for comments regarding OAR 735-062-0013, a rule proposed to address physical description, including sex, on state-issued driver licenses, driver permits or identification cards. We applaud your office’s consideration of adding a third “sex descriptor” (hereafter referenced as “gender marker”) of “X” to indicate that the identification-holder’s sex is not specified. The proposed revision will allow identification documents to more accurately reflect the gender identity of all Oregonians you serve. Accurate documents in turn promote health, wellbeing and safety.

Lambda Legal is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV. In the course of our work we raise awareness and advance reform on behalf of gender-nonconforming¹ people, including but not limited to people with nonbinary genders -- that is, people who are neither male nor female. In the context of this work, we are concerned about the practice of providing identification documents that require binary-only gender markers (“F” or “M”), because such documents fail to serve individuals who do not fit within either of those two categories. Saddled with identification that does not reflect who they are, people with nonbinary genders may be targeted for discrimination, harassment and violence. Their identification frequently cues incursions into their privacy when they are perceived not to “match” the gender markers on their identification, and they endure insults and psychological

¹ Gender-nonconforming: Behaving in a way that does not match social stereotypes about female or male gender, usually through dress or physical appearance. See Lambda Legal, *Glossary of LGBTQ Terms*, <http://www.lambdalegal.org/know-your-rights/article/youth-glossary-lgbtq-terms>

trauma that could largely be averted if they had an option to use a gender marker that does not contradict who they are.²

We respectfully offer these comments regarding (I) the identities of people with nonbinary gender identities (including but not limited to gender-fluid and many intersex people); (II) the harmful effects of issuing identity documents with binary-only gender markers; (III) the inadequacy of the proffered justifications for binary-only gender markers; and (IV) the successful approaches of other jurisdictions that have abandoned binary-only gender markers for systems that are more accurate and serve people of all gender identities.

I. Binary gender markers fail to accurately reflect the identities of nonbinary people, including many intersex and gender-fluid individuals.

The inclusion of a third option of “X” to reflect an unspecified sex, rather than male or female, as proposed in OAR 735-062-0013, will allow Oregon’s state-issued identification documents to properly reflect the identities of nonbinary individuals, whose identities do not fit neatly within either of the two boxes most commonly offered in the United States.³ Below we describe groups

² In the U.S. context, see Jamie M. Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force (2011), available at http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (“Forty percent (40%) of those who presented ID (when it was required in the ordinary course of life) that did not match their gender identity/expression reported being harassed and 3% reported being attacked or assaulted. Fifteen percent (15%) reported being asked to leave the setting in which they had presented incongruent identification.”); Jamie M. Grant, *et al.*, *National Transgender Discrimination Survey Report on Health and Health Care*, National Center for Transgender Equality and National Gay and Lesbian Task Force (2010), available at http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf (“[A]ttributes that correlate with an increased rate of attempted suicide” include “those who have only some of their identity documents in their preferred gender (46%).”). In foreign and international contexts, see Yuvraj Joshi, *“All Five Fingers Are Not the Same”*: *Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka*, Human Rights Watch (2016), available at <https://www.hrw.org/report/2016/08/14/all-five-fingers-are-not-same/discrimination-grounds-gender-identity-and-sexual> (“Transgender people in Sri Lanka are rarely able to obtain a national identity card and other official documents that reflect their preferred name and gender, exposing them to constant and humiliating scrutiny about their gender identity—including from police at checkpoints, staff at public hospitals, employers, airport staff, and bank tellers.”); Neela Ghoshal and Kyle Knight, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, Human Rights Watch (2016), available at <https://www.hrw.org/world-report/2016/rights-in-transition> (“Absent legal recognition in the gender with which they identify, and associated rights and protections, every juncture of daily life when documents are requested or appearance is scrutinized becomes fraught with potential for violence and humiliation, driving many transgender people into the shadows.”).

³ 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. Law & Gender 491, 517 (2017) (“Where a third gender classification is optional—not mandated by genital status, tripartite gender systems by their very nature provide better recognition and protection of non-binary people than binary systems do.”).

particularly in need of the proposed change, including (A) many intersex people and (B) other people who are gender-fluid or otherwise nonbinary in their gender identities.

A. Intersex people

“Intersex” is an umbrella term used to describe a wide range of natural variations of sex characteristics that do not fit typical notions of bodies or chromosomes designated “male” or “female.” In some cases, intersex traits are visible at birth, while in others they are not apparent until puberty. Some variations may not be visibly apparent at all. Experts estimate that at least 1 in every 2000 people have intersex traits.⁴

Moments after a child is born, the general practice in this country is for a physician to assess visually the newborn’s genitalia and assign the newborn’s sex as “male” or “female” on that basis. A person’s sex, however, is more complex than genital appearance at birth, and is determined by a number of factors, including chromosomes, gonads, hormones, genitalia and gender identity.

A person’s gender identity, meaning the innate sense of being male, female, both, or neither, is the most important determinant of that person’s sex. Although there is not yet one definitive explanation for what determines gender identity, recent research points to the influence of biological factors, most notably the role of sex differentiation in the brain in gender identity development.⁵

When a child is born with mixed or ambiguous markers of sex, doctors often assign a sex they guess is likely to match the child’s gender identity. However, it is impossible to predict with certainty how an intersex infant’s gender identity will develop. As with any other person, an intersex person eventually may identify as female, male or -- less commonly but with some regularity -- as both or neither.

For people with intersex traits who do not identify as male or female, a binary-only system lacks an accurate gender marker option. Furthermore, when the government mandates that gender must be male or female only, it perpetuates a system in which many intersex people and other people with nonbinary genders are physically and psychologically harmed. Lambda Legal’s client Dana Zzyym has experienced an array of these damaging impacts.

⁴ See Intersex Society of North America, *How common is intersex?* (2008), <http://www.isna.org/faq/frequency>; See also World Health Organization, *Genomic resource center: Gender and genetics, Genetic components of sex and gender*, <http://www.who.int/genomics/gender/en/index1.html>; See also American Psychological Association, *Answers To Your Questions About Transgender People, Gender Identity, and Gender Expression* (2011), <https://www.apa.org/topics/lgbt/transgender.pdf>;

⁵ *Id.* See, e.g., Blaise Vanderhorst, *Whither Lies The Self: Intersex and Transgender Individuals and a Proposal for Brain-Based Sex*, 9 Harv. L. & Pol’y Rev. 241, 259-60 (2015) (discussing several such studies); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vermont L. Rev. 943, 984 n. 38 (2015) (same).

Dana Zzyym's Experience

Dana Zzyym, the plaintiff in Lambda Legal's case *Zzyym v. Kerry*, 2016 WL 7324157 (D. Colo, Nov. 22, 2016) was born intersex, with ambiguous external sex characteristics.⁶

Although the sex field on Dana's birth certificate was initially left blank, by age five, Dana had been subjected to several irreversible, invasive, painful, and medically unnecessary surgeries designed to make Dana's body conform to binary-only sex stereotypes. As is common, the surgeries failed and caused permanent scarring and damage. None of the surgeries Dana underwent altered (or even fully disguised) Dana's intersex nature.

Surgeries to change the bodies of intersex infants and children commonly result in sterilization, loss of sexual function and urological difficulties – in addition to psychological trauma.⁷ The attendant examinations and bodily inspections of intersex children commonly instill a deeply damaging sense of something being wrong or bad about their bodies and themselves.⁸ A 2016 joint statement issued by a group of U.N. and regional human rights experts called for an end to

⁶ *Zzyym v. Kerry*, 2016 WL 7324157 (D. Colo, Nov. 22, 2016), available at

http://www.lambdalegal.org/sites/default/files/zzyym_co_20151026_complaint_1.pdf

⁷ See, e.g., Open Society Foundations, *License to be Yourself; Forced Sterilization*, 5-6 (2014), <https://www.opensocietyfoundations.org/sites/default/files/lgr-forced-sterilization-20151120.pdf>; Anne Tamar-Mattis, *Sterilization and Minors with Intersex Conditions in California Law*, *The Circuit*. Paper 40. (2012), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1039&context=clrcircuit>; Charlotte Greenfeld, *Should We 'Fix' Intersex Children?* *The Atlantic* (July 8, 2014), <https://www.theatlantic.com/health/archive/2014/07/should-we-fix-intersex-children/373536/> (“A long and gut-wrenching list of damaging side effects—painful scarring, reduced sexual sensitivity, torn genital tissue, removal of natural hormones and possible sterilization—combined with the chance of assigning children a gender they don't feel comfortable with has left many calling for the surgeries to be heavily restricted.”); World Health Organization, *Eliminating forced, coercive and otherwise involuntary sterilization; an interagency statement* (2014) (p. 7 “Intersex persons may be involuntarily subjected to so-called sex-normalizing or other procedures as infants or during childhood, which, in some cases, may result in the termination of all or some of their reproductive capacity. Children who are born with atypical sex characteristics are often subjected to “cosmetic” and other non-medically indicated surgeries performed on their reproductive organs, without their informed consent or that of their parents, and without taking into consideration the views of the children involved; 64; 147, para 57; 148; 149. As a result, such children are being subjected to irreversible interventions that have lifelong consequence for their physical and mental health (64; 150, para 20; 151). p. 2 “Such practices have also been recognized as human rights violations by international human rights bodies and national courts.”); Catherine L. Minto, et al., *The effect of clitoral surgery on sexual outcome in individuals who have intersex conditions with ambiguous genitalia: a cross-sectional study*, 361 *The Lancet* 1252, 1256 (2003) (“[I]ndividuals who have had clitoral surgery are more likely than those who have not to report a complete failure to achieve orgasm and higher rates of non-sensuality—in particular, a lack of enjoyment in being caressed and in caressing their partner's body.”).

⁸ See, e.g., Lih-Mei Liao and Margaret Simmonds, *A values-driven and evidence-based health care psychology for diverse sex development*, 5 *Psych. & Sexuality* 83, 86 (2014) (“Genital surgery also places children at risk of potential negative psychological effects of repeat intimate examinations, because surgeons are compelled to monitor and evidence the results.”).

human rights violations against intersex children and adults and specifically to prohibit harmful medical practices on intersex children, including unnecessary surgery.⁹

Dana Zzyym eventually came to realize that they had been forced into an incorrect gender category. By 2011, Dana came to terms with being intersex, and their intersex identity is documented by their doctors at the Veterans Administration. Dana identifies as neither male nor female, and in 2012 successfully amended the gender marker on their birth certificate that was originally left blank (and later inappropriately switched to “Male”) to “Unknown.”

In September 2014, Dana submitted a U.S. passport application. In the “sex” field on the application, Dana noted “Intersex”—instead of “M” or “F”—and clarified by separate letter, “I’m not male or female.” Dana requested “X” as the marker in the sex field of the passport because that designation conforms to the International Civil Aviation Organization (ICAO) standards for machine-readable travel documents. After the State Department denied Dana’s Application, Lambda Legal filed a complaint, and on November 22, 2016, a U.S. District Court ruled that there is “no evidence that the [State] Department followed a rational decision-making process in deciding to implement its binary-only gender passport policy.”¹⁰

B. Other people with nonbinary genders

As explained in the 2015 U.S. Transgender Survey, “nonbinary” is a term “used by some to describe people whose gender is not exclusively male or female, including those who identify as no gender [agender], as a gender other than male or female, or as more than one gender.”¹¹

Oregon has previously issued identification with a nonbinary gender classification, pursuant to a petition brought by Jamie Shupe in Multnomah County Circuit Court.¹² Jamie was assigned male at birth, at one point underwent “hormone treatments to transition to a woman,”¹³ and ultimately determined that neither binary gender marker fit their identity.¹⁴ When Jamie petitioned the court for a nonbinary status, they came prepared with “letters from two doctors attesting that Jamie is neither male nor female.”¹⁵ The court granted the petition,¹⁶ and other Oregon residents have

⁹ United Nations Committee against Torture, et al., *End violence and harmful medical practices on intersex children and adults*, UN and regional experts urge (Oct. 26, 2016), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>.

¹⁰ Order at 6, available at http://www.lambdalegal.org/sites/default/files/zzyym_co_20161122_order.pdf

¹¹ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality at 40. See also genderspectrum, <https://www.genderspectrum.org/glossary/non-binary/>

¹² Christopher Mele, “Oregon Court Allows a Person to Choose Neither Sex,” *New York Times* (June 13, 2016), https://www.nytimes.com/2016/06/14/us/oregon-nonbinary-transgender-sex-gender.html?_r=1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

followed suit and obtained similar grants to reflect nonbinary gender identity.¹⁷ Following the decision, The Guardian covered the court decision and its impact, quoting Jamie as saying, “I’m not a male. I’m not a female,” and the decision thus “gives me a place to exist”.¹⁸

II. Issuing identity documents with binary-only gender markers can harm nonbinary people, as well as transgender people.

Documents with the X gender marker have the potential to eliminate a key cause of harms that are now routine for nonbinary and transgender people. Presenting an identification document that does not accurately reflect one’s sex and is inconsistent with one’s gender identity can trigger invasions of privacy, prejudice, stigma, violence, and discrimination and harassment in a wide variety of settings, including in employment, education, public accommodations, health care, housing, and interactions with the government, including with law enforcement.¹⁹ For example, transgender people, disproportionately targeted for hate crimes in the United States and abroad, are put further at risk when their identification documents disclose their transgender status against their will.²⁰ The World Professional Association for Transgender Health (WPATH)—an international 700-member multidisciplinary professional association that promotes evidence-based care, education, research, advocacy, public policy, and respect in transgender health—has issued a statement on identity recognition that

[u]rges governments to eliminate unnecessary barriers, and to institute simple and accessible administrative procedures for transgender people to obtain legal recognition of gender, consonant with each individual’s identity, when gender markers on identity documents are considered necessary.²¹

Yet according to the 2015 U.S. Transgender Survey, “67% of respondents did not have an ID or record with the gender they preferred.”²² Moreover, 88% “of non-binary individuals who

¹⁷ Everton Bailey, “Oregon Residents Who Identify as Neither Man Nor Woman Granted Non-Binary Gender Status,” The Oregonian (April 2, 2017), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2017/04/oregon_residents_who_identify.html.

¹⁸ Lauren Dake, *Jamie Shupe becomes first legally non-binary person in the US*, The Guardian (June 16, 2016), <https://www.theguardian.com/world/2016/jun/16/jamie-shupe-first-non-binary-person-oregon>; See also Mary Emily O’Hara, *Californian Becomes Second US Citizen Granted ‘Non-Binary’ Gender Status* (Sept. 26, 2016) <http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611>

¹⁹ Amended Complaint for Declaratory and Injunctive Relief, *Arroyo v. Rosselló*, D.P.R. 3:17-cv-01457, (Apr. 10, 2017), http://www.lambdalegal.org/sites/default/files/legal-docs/downloads/gonzalez_pr_20170406_complaint.pdf

²⁰ *Id.*

²¹ World Professional Association for Transgender Health, *2015 WPATH Statement on Identity Recognition*, January 19, 2015, available at https://amo_hub_content.s3.amazonaws.com/Association140/files/WPATH%20Statement%20on%20Legal%20Recognition%20of%20Gender%20Identity%201-19-15.pdf

²² James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality at 82.

indicated that none of their IDs or records had the gender they preferred reported that it was because the available gender options (male or female) did not fit their gender identity, in contrast to 4% of transgender men and women.”²³ The lack of identity documents that properly reflect individuals’ gender identities frequently causes harm.

Presenting identification with a gender marker that does not match one’s gender identity or gender expression contributes to harm during interactions with law enforcement, concerns about criminalization of identity, and overall difficulty in navigating public spaces -- and therefore can result in damaging psychological impact. As Professor Dean Spade has explained, “Not having appropriate identification creates difficulties and dangers when dealing with employers or the police and other state agents, trying to travel, attempting to cash checks, or entering age-restricted venues: the person’s [gender-nonconforming] identity is exposed every time ID is shown.”²⁴

A. Interactions with Law Enforcement

Gender-nonconforming people report that they are frequently at-risk when interacting with law enforcement. According to the 2015 U.S. Transgender Survey, 71% of nonbinary respondents who had encounters with law enforcement reported “having never or only sometimes [being] treated with respect.”²⁵ Similar harms occur in encounters with airport security. Forty-three percent of 2015 U.S. Transgender Survey respondents who had gone through airport security in the year prior to taking the survey “experienced at least one issue related to their gender identity or expression, such as Transportation Security Administration (TSA) officers using the wrong pronoun or title to refer to them, searching their bodies or belongings because of a gender-related item, or detaining them.”²⁶ Importantly, 11% of respondents reported that TSA officers questioned the name or gender on their ID.²⁷ Most significantly for the proposal at hand, “[r]espondents who said that none of their IDs reflect the name and/or gender they prefer (51%) were also more likely to report negative experiences in airport security related to their gender identity.”²⁸

B. Concerns About Charges of Fraud or Criminal Misrepresentation

As Lambda Legal’s client in the *Zzyym* case illustrates, when applications for identity documents require accuracy under penalty of potential charges of fraud or criminal misrepresentation, and

²³ *Id.* at 89.

²⁴ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law*, 12 (2015).

²⁵ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality at 186.

²⁶ *Id.* at 222.

²⁷ *Id.*

²⁸ *Id.*

simultaneously offer binary-only gender options, people with nonbinary gender identities are left with a “Catch-22” dilemma that poses the disturbing potential for serious legal consequences. Human Rights Watch has documented the use of laws abroad to criminalize transgender or intersex people on “personation” charges “based on the assumption that a transgender person taking measures to assume a gender identity that is different from the sex assigned at birth has the malicious intent of cheating others.”²⁹ Transgender and nonbinary people are at risk of being whipsawed by conflicting provisions governing gender markers on their identification. For example, Lambda Legal is currently litigating cases on behalf of transgender people categorically barred by U.S. law in a minority of jurisdictions from changing the “birth sex” listed on their birth certificates, regardless of what other measures they have taken or other identification and recognition they have procured.³⁰ Allowing an X gender marker will help lower the risks of unnecessary gender marker conflicts among individuals’ identification documents.

C. Public Perception of an Individual’s Gender

Transgender and gender-nonconforming people face an array of obstacles when their identity documents fail to reflect who they are. “Having access to identity documents is important because of the very reason they are taken for granted: They are an integral part of daily life in most cultures. Identity documents are needed for many activities of daily life—working, voting, traveling, accessing government institutions, and proving that one is who one claims to be. Yet for many transgender people, accessing this basic proof of identity is out of reach, pushing them further into the margins of society. Historically, many obstacles have been placed in the way of obtaining accurate ID. For many transgender people, these financial, medical, and legal barriers are impossible requirements to satisfy.”³¹

Unfortunately, gender-nonconforming people are often subject to mistreatment in public spaces as a result of showing an identification document with a gender marker that does not match their gender expression or perceptions of their gender. Among respondents to the 2015 U.S. Transgender Survey, “[N]early one-third (32%) of individuals who have shown IDs with a name

²⁹ Human Rights Watch, “All Five Fingers Are Not the Same” Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka” (Aug. 14, 2016),

³⁰ Lambda Legal, “Lambda Legal Sues Puerto Rico for Anti-Transgender Birth Certificate Policy” (Apr. 6, 2017), http://www.lambdalegal.org/blog/20170406_lambda-legal-sues-puerto-rico-anti-trans-birth-certificate-policy; Lambda Legal, “Lambda Legal Sues Over Idaho's Anti-Trans Birth Certificate Policy” (Apr. 18, 2017), http://www.lambdalegal.org/blog/20170417_lambda-legal-sues-idaho-over-anti-trans-birth-certificate-policy

³¹ Andrew Cray and Jack Harrison, “ID Accurately Reflecting One’s Gender Identity Is a Human Right” (Dec. 18, 2012) <https://www.americanprogress.org/issues/lgbt/reports/2012/12/18/48367/id-accurately-reflecting-ones-gender-identity-is-a-human-right/>

or gender that did not match their presentation reported negative experiences, such as being harassed, denied services, and/or attacked.”³²

The Office of the United Nations High Commissioner for Human Rights has called for specific action by states to “prohibit discrimination on the basis of intersex traits, characteristics or status, including in education, health care, employment, sports, and access to public services [while addressing] such discrimination through relevant anti-discrimination initiatives.”³³ The 2015 U.S. Transgender Survey states that “[t]he freedom to participate in public life without fear of discrimination, harassment, and violence has been shown to have wide-ranging impacts on health, economic stability, and other key aspects of life.”³⁴

In an age of increasing voter identification requirements, access to accurate identification documents is particularly important so that transgender, gender-nonconforming, and intersex people can exercise their fundamental right to vote. For example, in 2012, Jody Herman, Peter J. Cooper public policy fellow at the Williams Institute at the University of Los Angeles School of Law, estimated that as many as 25,000 transgender voters in states with strict photo ID voter requirements could be disenfranchised, not just because of bias but also because they simply may not have appeared to be the person on their identification.³⁵

This array of needs demonstrates how important it is to have access to identification that matches one’s gender identity.

D. Psychological Impact

Presenting identification with a gender marker that does not reflect an individual’s gender identity commonly causes negative psychological impact. As a California Senate Committee report has noted, the state’s failure to “recognize nonbinary individuals, who self-identify as neither male nor female . . . causes them emotional distress and violates their right to be free from discrimination on the basis of their gender identity and expression.”³⁶ As one person who responded to the 2015 U.S. Transgender Survey said, “As a non-binary person, not being able to

³² James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality at 93.

³³ Office of the United Nations High Commissioner for Human Rights, *Fact Sheet: Intersex*, http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/UNFE_FactSheet_Intersex_EN.pdf

³⁴ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality at 197

³⁵ *Id.*

³⁶ S. Comm. on Transp. and Hous. Analysis, SB 179 (Cal. 2017-18) available at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB179

change my gender on any of my identification documents is really disheartening, dysphoria inducing, and kind of dehumanizing. I'm not allowed to be me."³⁷

III. There is no good reason to require binary-only gender markers on state identity documents.

The public response to Oregon's proposal has been notably positive.³⁸ Aside from logistical updates of forms and computer systems, questions concerning such policy changes tend to focus on whether they pose any security threats. Such fears have no basis in logic or evidence and do not justify denying Oregon residents identity documents that accurately reflect who they are. Simply put, accuracy is a core element of identity documents, so if gender is to be noted on identity documents, then providing options that allow the documents to accurately reflect gender cannot detract from their utility.

A. Nonbinary Gender Markers Comply with Federal and International Law

The REAL ID Act of 2005 established national standards for state driver licenses and identification cards. For a federal agency to accept a state-issued identification, it must include the person's gender, among other identifying information.³⁹ Federal regulations clarify that the determination of gender rests with states.⁴⁰ Accordingly, OAR 735-062-0013 is consistent with federal law, and Oregon driver licenses and identification cards would continue to be accepted at airports, in federal buildings, and other federal agencies.

Although the federal government does not yet offer a gender designation other than male or female on U.S. passports and official records, it recognizes and accepts nonbinary gender markers. For example, the U.S. government accepts passports issued by other nations that list an individual's gender as "X."⁴¹ Additionally, regulations implementing the Affordable Care Act's nondiscrimination provision proscribe discrimination based on gender identity and define gender

³⁷ James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality at 85.

³⁸ *See, e.g., id.*; Gordon Friedman, "Ore. DMV Says It Can't Issue License to Nonbinary Person," *Statesman Journal* (June 21, 2016), <http://www.statesmanjournal.com/story/news/politics/2016/06/21/ore-dmv-says-cant-issue-license-nonbinary-person/86183112/>; Mary Emily O'Hara, "'Nonbinary' Is Now a Legal Gender, Oregon Court Rules," *The Daily Dot* (June 10, 2016), <https://www.dailydot.com/irl/oregon-court-rules-non-binary-gender-legal/>; Dirk VanderHart, "After a First-Ever 'Non-Binary' Gender Ruling, the Oregon DMV May Change Its ID Rules," *The Portland Mercury* (June 15, 2016), <http://www.portlandmercury.com/blogtown/2016/06/15/18233344/after-a-first-ever-non-binary-gender-ruling-the-oregon-dmv-may-change-its-id-rules>.

³⁹ Improved Security for Drivers' Licenses and Personal Identification Cards, Pub. L. 109-13 § 202(b)(3).

⁴⁰ 6 C.F.R. § 37.17(c) (identification must include "gender, as determined by the State").

⁴¹ Corinne Segal, "The Complications of ID for Non-binary People — And How It Could Change Soon," *PBS News Hour* (Aug. 21, 2016), <http://www.pbs.org/newshour/updates/ids-nonbinary-people/>.

as “male, female, neither, or a combination of male and female.”⁴² Accordingly, the federal government has acknowledged genders other than male and female and has presumably anticipated the possibility that states will enact policies like OAR 735-062-0013.

The proposed policy change is also consistent with international standards for identity documents. The United Nations International Civil Aviation Organization (ICAO), which creates global standards for machine-readable travel documents, permits gender designations of “male,” “female,” and “X” for unspecified.⁴³

There is growing international recognition that a state’s failure to provide people with a simple and accessible procedure to change their gender marker on official documents violates their rights.⁴⁴ For instance:

- In 2011, the U.N. High Commissioner for Human Rights recommended that member states should “[f]acilitate legal recognition of the preferred gender of transgender persons and establish arrangements to permit relevant identity documents to be reissued reflecting preferred gender and name, without infringements of other human rights.”⁴⁵
- In 2015, the U.N. Committee against Torture recommended “necessary legislative, administrative and other measures to guarantee respect for the autonomy and physical and psychological integrity of transgender and intersex persons, including by removing abusive preconditions for the legal recognition of the gender identity of transgender persons.”⁴⁶
- A joint statement in 2015 by 12 U.N. agencies called on governments to ensure “legal recognition of the gender identity of transgender people without abusive requirements” such as forced sterilization, treatment, or divorce.⁴⁷

Enacting OAR 735-062-0013 presents an opportunity to protect the fundamental rights of all Oregonians, including those who are gender nonconforming.

⁴² 45 C.F.R. § 92.4.

⁴³ 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. Law & Gender 491, 512–21 (2017)

⁴⁴ United Nations Committee against Torture, *Concluding observations on the fifth periodic report of China with respect to the Hong Kong Special Administrative Region*, December 2015, tbinternet.ohchr.org/Treaties/CAT/.../CAT_C_CHN-HKG_CO_5_22478_E.docx.

⁴⁵ Office of the United Nations High Commissioner for Human Rights, *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity: Report of the United Nations High Commissioner for Human Rights*, November 2011, available at http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf.

⁴⁶ United Nations Committee against Torture, *Concluding observations on the fifth periodic report of China with respect to the Hong Kong Special Administrative Region*, December 2015, tbinternet.ohchr.org/Treaties/CAT/.../CAT_C_CHN-HKG_CO_5_22478_E.docx.

⁴⁷ International Labor Organization, et al., *Ending Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People*, September 2015, http://www.ohchr.org/Documents/Issues/Discrimination/Joint_LGBTI_Statement_ENG.PDF.

B. Nonbinary Gender Markers and Public Safety

There is no evidence to support arguments that making nonbinary gender markers available will negatively affect public safety.⁴⁸ To the contrary, numerous foreign countries and U.S. municipalities have moved beyond binary gender designations without reporting attendant upticks in fraud or crime. Additionally, the fact that enacting OAR 735-062-0013 would mean that some residents will obtain state identification that lists their gender as “X” while other identity documents and records list their gender as “male” or “female” does not detract from the many reasons to provide nonbinary gender markers. Oregon already permits residents to change the name and gender listed on their driver license or state identification card, whether or not they also amend their birth certificate, passport, arrest record, etc.⁴⁹ There is no indication that people helped by these policies (most frequently cisgender⁵⁰ people who change their names when married) have used their new identity documents to break the law with impunity, evade debts, or otherwise harm the community.

C. Nonbinary Gender Markers Promote Accuracy

Some critics have argued that the gender designation on driver licenses must correspond to the holder’s anatomy and/or chromosomes.⁵¹ This proposition ignores the fact that a person’s gender is determined primarily based on their gender identity as well as the practical reality of how identity documents are used. Bartenders do not examine customers’ genitals before serving them alcoholic beverages, and police officers do not perform DNA testing before issuing tickets

⁴⁸ See *Zzyym, supra* note 6, at 10–11 (expressing concern that nonbinary gender markers might hamper government officials’ ability to verify an individual’s identity and background); see also Associated Press, “California Lawmakers Wanted Third-Gender Option on IDs,” Fox News (Jan. 26, 2017), <http://www.foxnews.com/politics/2017/01/26/california-lawmakers-want-third-gender-option-on-ids.html>; Frank Camp, “California Legislators Propose Non-Binary Option on State Documents, Bringing Up National Security Concerns,” Daily Wire (Jan. 27, 2017), <http://www.dailywire.com/news/12891/california-legislators-propose-non-binary-option-frank-camp#>; “SB 179: Stop ‘3rd Gender’ Identity Fraud,” Save California, <https://www.savecalifornia.com/oppose-nonexistent-3rd-gender.html>.

⁴⁹ “Changing Your Name,” Oregon DMV, <https://www.oregon.gov/ODOT/DMV/pages/dv/chgname.aspx>; “Changing Your Sex Designation on Your DL or ID,” Oregon DMV, https://www.oregon.gov/ODOT/DMV/Pages/driverid/chg_gender_designation.aspx.

⁵⁰ Cisgender refers to people whose gender identity is the same as their assigned or presumed sex at birth. See <http://www.lambdalegal.org/protected-and-served/glossary#Cisgender>

⁵¹ Greg Burt, “Bill to Make Gender a Personal Choice,” California Family Council (April 3, 2017), <http://www.californiafamily.org/2017/bill-to-make-gender-a-personal-choice-in-hearing-tomorrow/>; Camp, *supra* note 50; Susan Wright, “California Lawmakers Propose Alternate Gender Reality,” The Resurgent (Jan. 31, 2017), <http://theresurgent.com/california-lawmakers-propose-alternate-reality-gender-classifications-for-official-documents/>.

to speeding drivers. Furthermore, forcing a person whose gender is nonbinary to use an identity document identifying them as male or female subverts rather than promotes accuracy.

IV. **A growing number of countries as well as American municipalities provide identity documents with gender designations other than “male” and “female.”**

The Oregon DMV’s proposed rule change is well-founded and part of an emerging national and global trend. Over the past decade, nations across the globe have begun issuing passports and other official documents with gender options beyond “male” and “female.” Meanwhile, within the United States, numerous municipalities have expanded the options for gender markers, or have removed those designations from their identification cards.⁵² Additionally, California legislators recently introduced a bill⁵³ to create a nonbinary option for driver licenses and other state identity documents. Oregon can draw on these models in providing accurate identity documents for nonbinary transgender, gender-nonconforming, and intersex people.

A. International Examples

The international human rights Yogyakarta Principles formalized in 2007 set forth a nation’s obligation under international law to prevent discrimination based on gender identity and, recognizing that each person’s gender identity is “one of the most basic aspects of self-determination, dignity, and freedom,” the Yogyakarta Principles advise that governments must take all necessary measures to ensure that state-issued identity documents “reflect the person’s profound self-defined gender identity.”⁵⁴

Consistent with these principles, at least eight countries have modified their passports or national identification cards to recognize more than two genders.⁵⁵ In these countries — Australia,⁵⁶

⁵² Vicky Gan, *How Municipal ID Cards Make Cities More Inclusive*, City Lab (Jun. 4, 2015), <http://www.citylab.com/politics/2015/06/how-municipal-id-cards-make-cities-more-inclusive/394826/>

⁵³ SB 179 (Cal. 2017-18),

https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB179

⁵⁴ International Commission of Jurists & International Service for Human Rights, *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, at 6–7 (2007), http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf.

⁵⁵ 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. Law & Gender 491, 512–21 (2017); Aron Macarow, “These Eleven Countries Are Way Ahead of the US on Trans Issues,” ATTN (Feb. 9, 2015), <http://www.attn.com/stories/868/transgender-passport-status>; Olivia Niland, “Tired of Passport Discrimination, Some Intersex People are Fighting Back,” Mashable (Nov. 7, 2015), <http://mashable.com/2015/11/07/intersex-passports/#8.NmhxvXmZqb>; Mary Emily O’Hara, “Why Can’t the Nation’s First Legally Nonbinary Person Get an ID?,” The Daily Dot (July 23, 2016), <https://www.dailydot.com/irl/jamie-shupe-dana-zzyym-passport-state-department-gender/>; Valentine

Bangladesh,⁵⁷ Germany,⁵⁸ India,⁵⁹ Malta,⁶⁰ Nepal,⁶¹ New Zealand,⁶² and Pakistan⁶³ — citizens choose a gender designation of “male,” “female,” or a third option such as “X” or “other.” In addition, Thailand has recognized a “third gender” in its federal constitution,⁶⁴ and corresponding identity documents may follow.

Decisions from high courts throughout South Asia have set forth underlying rights and reasoning for a third gender category. As Human Right Watch has reported,⁶⁵

In 2007, Nepal’s Supreme Court recognized a third gender category for people who identify as neither male nor female. The court made clear that the ability to obtain documents bearing a third gender marker should be based on “self-feeling,” and not the opinions of medical professionals or courts.⁶⁶

Pasquesoone, “7 Countries Giving Transgender People Fundamental Rights the U.S. Still Won’t,” *Mic* (Apr. 9, 2014), <https://mic.com/articles/87149/7-countries-giving-transgender-people-fundamental-rights-the-u-s-still-won-t#.KWa7TdMLX>; Jacob Scobey-Thal, “Third Gender: A Short History,” *Foreign Policy* (June 30, 2014), <http://foreignpolicy.com/2014/06/30/third-gender-a-short-history/>.

⁵⁶ “Australian Passports to Have Third Gender Option,” *The Guardian* (Sept. 15, 2011), <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option>.

⁵⁷ Tahmima Anam, “Transgender Rights, Bangladesh Style,” *N.Y. Times* (July 2, 2015), https://www.nytimes.com/2015/07/03/opinion/tahmima-anam-transgender-rights-bangladesh-labannya-hijra.html?_r=1.

⁵⁸ “Germany Allows ‘Indeterminate’ Gender at Birth,” *BBC News* (Nov. 1, 2013), <http://www.bbc.com/news/world-europe-24767225>.

⁵⁹ “From Railways to Insurance, the Third Gender is Now Official in India,” *International Business Times* (Nov. 28, 2016), <http://www.ibtimes.co.in/railways-insurance-third-gender-now-official-india-705882>.

⁶⁰ “‘X’ Gender Option to be Added to Passports and ID Cards,” *Times of Malta* (Feb. 24, 2107), <http://www.timesofmalta.com/articles/view/20170224/local/x-gender-option-to-be-added-to-passports-and-id-cards.640544>.

⁶¹ Kyle Knight, “Third-Gender Passports May Be the Future of Trans Travel,” *Advocate* (Oct.26, 2015), <http://www.advocate.com/commentary/2015/10/26/third-gender-passports-may-be-future-trans-travel>.

⁶² Simon Collins, “X Marks the Spot on Passport for Transgender Travellers,” *New Zealand Herald* (Dec. 5, 2012), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10852012.

⁶³ Pasquesoone, *supra* note 57; Ananya Bhattacharya, “Some of the World’s Least Progressive Countries Recognize Transgender Citizens. The US Does Not,” *Quartz* (Jan. 12, 2017), <https://qz.com/882300/some-of-the-worlds-least-progressive-countries-recognize-transgender-as-a-gender-the-us-does-not/>.

⁶⁴ Amy Sawitta Lefevre, “Thailand to Recognize ‘Third Gender’ in New Constitution,” *Reuters* (Jan. 15, 2015), <http://www.reuters.com/article/us-thailand-politics-idUSKBN0KO0SC20150115>.

⁶⁵ Human Rights Watch, “All Five Fingers Are Not the Same” *Discrimination on Grounds of Gender Identity and Sexual Orientation in Sri Lanka* (Aug. 14, 2016), <https://www.hrw.org/report/2016/08/14/all-five-fingers-are-not-same/discrimination-grounds-gender-identity-and-sexual>

⁶⁶ *Pant v. Nepal*, Writ No. 917 of the Year 2064 BS (2007 AD), translated in *Nat’l Jud. Acad. L.J.*, 2008, at 262

In 2013, India's Supreme Court recognized transgender people constitute a third gender, declaring that this "is not a social or medical issue but a human rights issue."⁶⁷ The court stated that undertaking medical procedures should not be a requirement for legal recognition of gender identity.⁶⁸ In 2015, the Delhi High Court reinforced that, "Everyone has a fundamental right to be recognized in their gender" and that "gender identity and sexual orientation are fundamental to the right of self-determination, dignity and freedom."⁶⁹

Similarly, in 2009, the Supreme Court in Pakistan called for a third gender category to be recognized, and in Bangladesh, the cabinet issued a 2013 decree recognizing *hijras* as their own legal gender.

Other nations currently considering similar policy changes include the United Kingdom,⁷⁰ Norway,⁷¹ Thailand⁷² and Canada.⁷³ Indeed, one Canadian province has already adopted the "X" symbol as a third option for gender markers on driver licenses.⁷⁴

Geographically and ideologically diverse, these countries manifest a commitment to treating people of all gender identities with equal dignity and respect. One way in which they have acted on that commitment is by taking steps to ensure that state-issued identity documents more accurately reflect each person's gender identity.

⁶⁷ *Nat'l Legal Servs. of India v. Union of India et al.* (2014) 5 SCC 438, available at <https://globalfreedomofexpression.columbia.edu/cases/national-legal-services-authority-v-union-of-india/>

⁶⁸ *Id.*

⁶⁹ *Shivani Bhat vs State Of Nct Of Delhi & Ors*, WP.Crl.2133/2015, Del. HC, available at <https://indiankanoon.org/doc/10525112/>

⁷⁰ Jack Sommers, "British Passports Should Have Gender Neutral 'X' Option for Trans People, Stonewall Says," *Huffington Post* (April 5, 2017), http://www.huffingtonpost.co.uk/entry/passports-gender-neutral-x_uk_58e4d00ce4b0f4a923b3b399

⁷¹ Charlotte England, "Norway Could Introduce a Third Gender Option on Passports for People Who Identify as Neither Male nor Female," *The Independent* (Feb. 8, 2017), <http://www.independent.co.uk/news/world/europe/norway-third-gender-passport-option-identify-male-female-han-hun-labour-party-youth-wing-a7568271.html>.

⁷² Madison Park and Kiki Dhitavat, Thailand's new constitution could soon recognize third gender, *CNN* (Jan 16, 2015), <http://www.cnn.com/2015/01/16/world/third-gender-thailand/>

⁷³ Drake Baer, "Why Canada Should Make IDs Gender Neutral — And America Should, Too," *New York Magazine* (July 7, 2016), <http://nymag.com/scienceofus/2016/07/canada-us-gender-neutral-id.html>; Jordan Press, "Settlement in Human Rights Complaint Sets Stage for Gender-Neutral IDs," *City News* (Jan. 27, 2017), <http://www.citynews.ca/2017/01/27/settlement-in-human-rights-complaint-sets-stage-for-gender-neutral-ids-activist/>; Levon Sevunts, "Canada Could Adopt Gender-Neutral Passports, Says LGBTQ2 Expert," *Radio Canada International* (July 5, 2016), <http://www.rcinet.ca/en/2016/07/05/canada-could-adopt-gender-neutral-passports-says-lgbtq2-expert/>.

⁷⁴ "New 'X' Gender Option Now Available on Ontario Driver's Licenses," *Ontario Ministry of Transportation* (March 20, 2017), <https://news.ontario.ca/mto/en/2017/03/new-x-gender-option-now-available-on-ontario-drivers-licences.html>.

B. Local Governments

More than a dozen U.S. cities, towns, and counties issue municipal identification cards, many of which allow gender designations beyond the M/F binary.⁷⁵ In several localities, including Detroit, New York City, and various New Jersey towns such as Newark⁷⁶ and Plainedge⁷⁷, residents have options of “male,” “female,” or “not designated.”⁷⁸ Several cities in California have eliminated gender markers on municipal identity documents.⁷⁹ As the Center for Popular Democracy has observed, these policies render identity documents more accurate, inclusive and affirming for individuals who do not identify as male or female.⁸⁰

To date, U.S. states have issued nonbinary identity documents as individual exceptions to their standard policies, typically following a court order.⁸¹ In January 2017, however, California legislators introduced a bill that would create a nonbinary gender option for driver licenses and other official state documents.⁸² As the bill’s sponsors explained, this advance would help

⁷⁵ Vicky Gan, “How Municipal ID Cards Make Cities More Inclusive,” *The Atlantic* (June 4, 2015), <http://www.citylab.com/politics/2015/06/how-municipal-id-cards-make-cities-more-inclusive/394826/>.

⁷⁶ “Newark ID Application,” City of Newark, <http://www.ci.newark.nj.us/newarkid/>.

⁷⁷ “Plainfield Municipal ID Application,” City of Plainfield, <http://plainfieldnj.gov/docs2016/PMIDP%20Application.pdf>.

⁷⁸ City of Detroit, Detroit ID FAQs, <http://www.detroitmi.gov/How-Do-I/Find/Detroit-ID-FAQs>; New York City, IDNYC Application, <http://www1.nyc.gov/assets/idnyc/downloads/2017-pdfs/English%20Application.pdf>; City of Elizabeth, Elizabeth ID Application, <http://elizabethnj.org/sites/default/files/pdf/EMIDApplicationNEW.pdf>; Hartford City ID, FAQs, <http://www.hartford.gov/hartfordcityid/hartford-city-faqs>; City of Perth Amboy, Application, http://ci.perthamboy.nj.us/agendas/nc/id_application_2016.pdf; Borough of Roselle, Ordinance No. 2524-15 § III(b), <http://ecode360.com/documents/RO0497/source/LF864371.pdf>.

⁷⁹ Oakland, City ID Prepaid Master Card, <http://www.oaklandcityid.com/>; City of Richmond, Ordinance No. 16-11 N.S. § 2.64.010, <http://www.ci.richmond.ca.us/DocumentCenter/Home/View/8791>; City and County of San Francisco, City Identification Card Application Form, <http://sfgov.org/countyclerk/sites/default/files/Documents/CIDC-A-English.pdf>.

⁸⁰ Center for Popular Democracy, *Who We Are: Municipal ID Cards as a Local Strategy to Promote Belonging and Shared Community Identity*, at 14 (2013), <https://populardemocracy.org/sites/default/files/municipal%20id%20report.pdf>.

⁸¹ “CA Court Issues Nonbinary Gender Change to Transgender Law Center Client,” *Transgender Law Center* (Feb. 10, 2017), <https://transgenderlawcenter.org/archives/13570>; Mary Emily O’Hara, “Nation’s First Known Intersex Birth Certificate Issued in NYC,” *NBC News* (Dec. 29, 2016), <http://www.nbcnews.com/feature/nbc-out/nation-s-first-known-intersex-birth-certificate-issued-nyc-n701186>.

⁸² The Gender Recognition Act of 2017, California Legislative Information (April 17, 2017), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179; Melanie Mason, “California Democrats Propose Adding Third, Nonbinary Gender Option for Driver’s Licenses and Other Official Documents,” *Los Angeles Times* (Jan. 26, 2017), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-democrats-propose-adding-1485465341-htmllstory.html>

alleviate the “significant hardships” faced by “non-binary people who are trying to live their everyday lives.”⁸³

V. Recommendation

For the foregoing reasons, we recommend that the Oregon Department of Transportation adopt OAR 735-062-0013 and allow individuals to simply self-select when choosing the descriptor “X.” Doing so will benefit Oregonians by ensuring increased accuracy in state-issued identity documents while also promoting health and safety.

Please do not hesitate to contact me for additional information or support from Lambda Legal as you consider this issue.

Sincerely,

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

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⁸³ Ja’Nel Johnson, “Bill Would Allow Third Gender on Birth Certificates, Driver’s Licenses,” KPBS (April 6, 2017), <http://www.kpbs.org/news/2017/apr/06/bill-would-allow-third-gender-birth-certificates-d/>.