



Birth Certificates and Other Vital Records Should Reflect Factual Information

I. Society has an important interest in maintaining accurate vital records, especially birth records.

As early as 1632, government officials began tracking vital statistics, specifically births, deaths, and marriages. Today, state and local vital records offices record over 11 million “vital events” annually in the U.S. These statistics include the date of birth, the individual’s sex, the location of birth, the parent’s identities, and the date of death. Why does the government maintain such detailed records of these events? Because this information is necessary to help the government fulfill one of its most basic duties: protecting the health and safety of its citizens.

For example, information obtained from vital records is used to help diagnose and solve problems that impact national health, including:

- tracking and diagnosing disparities in mortality rates based on age and sex;
- identifying factors that account for the significant differences in life expectancy between males and females;
- measuring and seeking solutions to socioeconomic inequalities in health based on sex and age; and
- studying infant death rates based on sex, location, birth weight, and other information collected from vital records.¹

See also Oklahoma Aid Ass’n v. Thomas, 125 Okla. 190 (1927) (“It is our opinion that the Legislature provided for the keeping of vital statistics in the exercise of its police power for the purpose of keeping an accurate record of births and deaths and of the diseases causing death, and so that the health authorities may be better enabled to combat diseases.”).

Information from vital records is also necessary for national security. It is used to:

- identify potential disease epidemics, such as the zika virus, that may disproportionately impact one sex over the other;
- expose covert bioterrorist attacks, such as determining whether a sudden increase in certain symptoms in a population is due to random chance or should be further investigated; and
- identify criminals and terrorists, where vital records can be used to uncover fraudulently obtained drivers licenses or passports.²

¹ National Research Council (US) Committee on National Statistics, *VITAL STATISTICS: SUMMARY OF A WORKSHOP*, National Academies Press (US), 2009, available at <https://www.ncbi.nlm.nih.gov/books/NBK219874/>.

² *Id.*

These are just a few of the important state and national interest served by the government having accurate vital records for its citizens, including information on sex.

II. Given their importance, vital records should not be altered based upon a person's subjective feelings or experiences.

Imagine that a zika-like virus or chemical pollutant that caused higher mortality rates for men. In order for government officials to identify localities that are being impacted and direct their aid accordingly, the government would need accurate vital records to know the sex of individuals in the vicinity who had recently died. A sudden uptick in male deaths in a certain region would provide evidence that the virus or pollutant is present in that area.

Allowing individuals to alter their vital records, including birth certificates, based upon subjective feelings or experiences undermines the government's interest in having accurate vital records. The purpose of vital records is not to affirm a person's inner feelings or beliefs regarding their age, sex, or location of birth. As numerous courts have recognized, the purpose of vital records is to maintain an accurate database of factual information regarding births, deaths, and other vital events in a given jurisdiction. *Sea v. U.S. Citizenship & Immigration Servs.*, 2015 WL 5092509, at *4 (D. Minn. Aug. 28, 2015) ("The public does have an interest in having accurate records on vital statistics...."); *Ampadu v. U.S. Citizenship & Immigration Servs.*, Dist. Dir., 944 F. Supp. 2d 648, 655 (C.D. Ill. 2013) (acknowledging "the public's interest in having accurate records on vital statistics"); *Boiko v. Holder*, 2013 WL 709047, at *2 (D. Colo. Feb. 26, 2013) ("[T]he government, and the public at large, would appear to benefit from having the most accurate vital statistics records possible."); *J.R. v. Utah*, 261 F. Supp. 2d 1268, 1294 (D. Utah 2002) ("The State also has a significant interest in the accuracy of the records it keeps, particularly vital records like birth certificates.").

Factual information should not be subject to arbitrary revision. For example, imagine a gentlemen in his 70s who undergoes extensive cosmetic surgery. He removes wrinkles and excess skin, dyes his hair, and takes other steps to obtain the appearance of a 40-year old man. The state would not allow him to retroactively change his date of birth by thirty years in order to conform to how he now looks or feels. The same would be true of a person who was born in New Mexico, but was raised and lived their entire life in Iowa. While that person may personally identify as an Iowan, it does not change the fact that he was born in New Mexico.

These individuals could make passionate pleas that their birth certificates should be changed to allow them to fully live as a younger person or as a true Iowan. But that is not the purpose served by vital records. Birth records are not reflections of what we want to be or what we feel we are. They are a recording of factual information at a specific moment in time—i.e., the moment of birth.

The same is true of a person's sex. Sex is binary (male or female), fixed, and objectively verifiable. One's sex is genetically established at conception, ascertained at or (via sonogram or genetic testing) before birth, and may be verified by objective factors such as chromosomes, gonads, hormones, and genitalia. See, e.g., Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* at 1, <http://www.apa.org/>

[topics/lgbt/transgender.pdf](#). (“Sex is assigned at birth, refers to one’s biological status as either male or female, and is associated primarily with physical attributes such as chromosomes, hormone prevalence, and external and internal anatomy.”).

Just as a person’s date of birth or location of birth is unchangeable, so too is a person’s sex. While cosmetic surgery may alter some of the outward indications of sex, nothing changes the chromosomes, naturally occurring hormones, or other indicia of sex. And because having accurate information regarding a person’s sex helps the government fulfill its duty of protecting the health and safety of its citizens, it is imperative that vital records accurately reflect a person’s sex—not their gender identity.

III. Maintaining accurate birth records is not discriminatory.

Some argue that it is necessary for individuals to be allowed to alter their vital records in order to avoid discrimination based upon their gender identity—such as when an individual’s outward appearance as a female does not align with the male sex listed on a birth certificate. But there are several flaws with this argument.

First, facts are not and can never be discriminatory. Birth certificates, death certificates, and other vital records are intended to document facts. Efforts to attribute any further purposes to them (such as affirming a person’s internal sense of age, sex, or locality of birth) are irrelevant to the government’s vital interest in having accurate factual information.

Second, similar arguments could be made by the person who wants to change their date of birth to be younger or alter the location of their birth. But we do not allow individuals to arbitrarily change facts on their vital records out of unfounded fears that they may be treated differently as a result of those facts.

Finally, America is more tolerant and accepting of individuals who identify as transgender than ever before. They are not being denied access to employment, housing, or goods and services. Treating them with the dignity and respect that all persons are entitled to receive does not mean that we erase certain factual information, especially when that information helps the government better protect all citizens’ health and safety.

IV. Maintaining accurate birth records does not violate federal or state law.

There is no federal law that requires states to amend vital records, including birth certificates, to reflect a person’s gender identity rather than his or her biological sex. Some mistakenly claim that the Patient Protection and Affordable Care Act requires states (which are covered entities) to treat a person consistent with his or her gender identity. However, this section of the ACA was struck down by a federal court in December 2016 and is currently subject to a **nationwide injunction** against its enforcement. As the U.S. Department of Health and Human Services acknowledges, “[p]ursuant to court order, [the Office of Civil Rights] is enjoined from enforcing the Section 1557 regulation’s prohibitions against discrimination on the basis of gender identity ... on a nationwide basis.” Section 1557: Frequently Asked Questions, available at <https://www.hhs.gov/civil-rights/for-individuals/section-1557/1557faqs/index.html>.

Even in states or localities that ban discrimination based on gender identity (a policy which itself creates problems related to bodily privacy, safety, and competitive fairness in sports), government officials are not required to allow vital records to be amended to reflect a person's gender identity. As discussed above, maintaining accurate factual information regarding a person's birth is not discrimination.

For example, since 1967, the United States has protected individuals over the age of 40 against discrimination in employment based upon their age. Yet no court has ever ruled that a person must be permitted to alter the date of birth on their birth certificate in order to prevent them from being discriminated based on their age. We don't change facts; instead, we ensure that no one is subject to invidious discrimination based on those facts.

V. The proposed revisions to ARM 37.8.311 are an effort to erase "sex" and its biological basis from state law.

Under Montana law, a birth certificate is required to include the sex of the individual. *See, e.g.*, Mont. Code Ann. § 50-15-304 (requiring a substitute birth certificate for an adopted individual to include "the true date and place of birth and the sex of the adopted person"); Admin. Rules of Montana 37.8.301 (requiring an affidavit indicating the "sex, hour, date, and place of birth" for a child who is born somewhere other than a health care facility).

Factual information regarding a person's sex is among the vital statistics that Montana law requires to be maintained. Yet the Montana Department of Health and Human Services' proposed revisions to ARM 37.8.311 attempt to erase "sex" and replace it with the vague, undefined term "gender." In three instances, it deletes the word "sex" and replaces it with "gender."

As referenced above, sex is a person's biological status as male or female, based upon immutable attributes. In contrast, "gender refers to the socially constructed roles, behaviors, activities, and attributes that a given society considers appropriate for boys and men or girls and women." Am. Psychological Ass'n, *Answers to Your Questions About Transgender People, Gender Identity and Gender Expression* at 1, <http://www.apa.org/topics/lgbt/transgender.pdf>.

Montana's vital records should not be based upon "socially constructed roles." Rather, they should be based upon facts, including the factual information regarding a person's biological sex at birth.

Conclusion

For hundreds of years, our society has deemed it important to collect accurate factual information regarding certain vital statistics of its citizenry. Among these facts are locations of birth, dates of birth and death, and sex. The current effort to rewrite our laws to replace sex with gender identity does not change the government's need for accurate information. We can show tolerance and respect for those identify as a different gender while still maintaining factual data that helps our government identify and solve health and safety threats.