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IN THE
COURT OF APPEALS OF INDIANA

No. 23A-PL-00899

INDIANA BUREAU OF MOTOR VEHICLES and JOE B. HOAGE, in his official capacity as Commissioner of the Indiana Bureau of Motor Vehicles, Appellants, v. FITZ SIMMONS, et al., Appellees.	Appeal from the Monroe County Circuit Court VI, Trial Court Case No. 53C06-2106-PL-001347, The Honorable Holly M. Harvey, Judge.

REPLY BRIEF OF APPELLANTS

THEODORE E. ROKITA
Attorney General of Indiana
Attorney No. 18857-49

JAMES A. BARTA
Deputy Solicitor General
Attorney No. 31589-49

MELINDA R. HOLMES
Attorney No. 36851-79
KATELYN E. DOERING
Attorney No. 37523-32
Deputy Attorneys General

Office of the Attorney General
IGC-South, Fifth Floor
Indianapolis, Indiana 46204
Tel: (317) 232-0709
Fax: (317) 232-7979
Email: James.Barta@atg.in.gov

Counsel for Appellants

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SUMMARY OF THE ARGUMENT

I. The petition for judicial review should be dismissed. Petitions must be filed within 30 days of the "notice of agency action," which includes both orders and failure to issue orders. Petitioners did not petition for review within 30 days of receiving notice the Bureau would treat the recommended order as its order absent objection. And while petitioners say the Bureau should have issued an additional order, they did not seek review within 30 days after receiving notice of that putative failure.

Regardless, the statute does not entitle petitioners to credentials describing their "gender" as "X" ("Not Specified"). By statute, credentials must reflect applicants' "gender." And Title 9's interchangeable use of "gender" and "sex" shows that both terms refer to the biological state of being male or female. That understanding is consistent with federal law as well, which permits Indiana to define gender as sex.

The Bureau's adherence to the statute was reasonable. No regulation requires the Bureau to issue "X" credentials. And issuing licenses that reflect the stable, objectively verifiable characteristic of sex—as opposed to one of many subjective, fluid identities—promotes reliable identification and administrative efficiency too.

II. The Bureau was not required to conduct a rulemaking before declining to issue "X" credentials to plaintiffs. Its denials of plaintiffs' applications operated retrospectively on individuals and did not require plaintiffs to alter their conduct. Plaintiffs' contrary argument simply ignores the statutory definition of a "rule." Regardless, any procedural defect does not entitle plaintiffs to credentials the Bureau cannot lawfully issue.

III. The Equal Protection Clause permits the Bureau to describe plaintiffs' sex rather than their gender identity on state-issued credentials. Indeed, the Clause does not restrict how governments may speak. Regardless, plaintiffs' allegations of nonbinary-status discrimination are subject to rational-basis review. The statute governing credentials does not classify based on either sex or nonbinary status. Nonbinary status is not a protected characteristic. And plaintiffs cannot circumvent the high bar for creating a new protected characteristic by conflating nonbinary status with sex. In any event, describing applicants' sex—a stable, objectively verifiable trait—on credentials promotes an important state interest in reliable identification.

IV. Plaintiffs have no fundamental right to state-issued credentials listing their preferred gender identities. Nor can they redefine the interest asserted as a generic right to "informational privacy"—a right that does not exist regardless.

ARGUMENT

I. The Trial Court Erred in Granting the Petition for Judicial Review

The trial court erred in granting the petition for judicial review. The petition was untimely, filed long after the 30-day deadline to petition for review expired. The Bureau's actions are consistent with the plain statutory language as well. As context shows, the statutory requirement to list "gender" refers to a biological characteristic—not a person's subjective identification as nonbinary.

A. Petitioners waived any right to seek judicial review

Petitioners discuss exhaustion principles at length. Response Br. 57–58. But the issue here is timeliness, not exhaustion. Opening Br. 23–24. Regarding timeliness, petitioners do not dispute that the administrative law judge issued a recommended order on February 24, 2021, that they received notice that order would constitute the Bureau's final order absent objection within 18 days, or that they waited until 119 days after receiving that notice to petition for judicial review. *See* Opening Br. 24. Nor do petitioners dispute that a timely petition for judicial review is a nonwaivable, jurisdictional requirement. *See id.* at 23–24. Instead, petitioners fault the Bureau for allegedly never issuing a "final order." Response Br. 58–60.

There are three problems with that argument. First, timeliness turns on whether a petition for review was filed within 30 days of the "notice of the agency action." Ind. Code § 4-21.5-5-5. Agency action includes "the whole or a part of an order" and "the failure to issue an order." *Id.* § 4-21.5-1-4. Petitioners received notice that, absent objection, the Bureau intended to treat the recommended order as its final order on March 15, 2021. App. II 165. That constituted "notice" of the Bureau's final disposition of petitioners' applications for amended credentials.

Petitioners suggest that Indiana Code §§ 4-21.5-3-28 and 4-21.5-3-29—neither of which addresses judicial review—required the Bureau to send another notice, with more information, after they failed to object. Response Br. 58–60. But § 4-21.5-3-29 presupposes the party seeking review of an administrative law judge's recommended order objects within 18 days, as required to "preserve an objection." Ind. Code § 4-

21.5-3-29(d). It does not directly address whether the Bureau must issue another order where the Bureau has already stated it intends to treat the recommended order as final absent objection and no objection is made. Similarly, § 4-21.5-3-28 contemplates that a party proceeds as "section[] 29" directs, including by timely objecting to a recommended order. *Id.* § 4-21.5-3-28(a). That is why it requires "identify[ing] any differences" between that order and the final order. *Id.* § 4-21.5-3-28(g)(1).

Petitioners, moreover, are mistaken that they did not receive the "information required" under § 4-21.5-3-28. The February 24, 2021 notice explained the procedures for seeking "administrative review," and made clear that there would be no "differences" in the final order absent objection. Ind. Code § 4-21.5-3-28(g)(1), (3); *see* App. II 165. Similarly, it identified the regulation that "incorporate[d] the findings of fact in the administrative law judge's order" into the final order. *Id.* § 4-21.5-3-28(g)(2). The only piece of information that the notice did not contain concerns "information about the timeline for filing *judicial* review." Response Br. 59 (emphasis added). But nothing in § 4-21.5-3-28 requires a final order to contain that information; it merely requires information about "*administrative* review . . . (if any is available)." Ind. Code § 4-21.5-3-28(g)(3) (emphasis added). The document did precisely that. App. II 165.

Second, whether or not the Bureau was required to issue a separate order after petitioners' failure to object, the petition for review still is not timely. An "agency action" that triggers the 30-day clock for seeking judicial review includes "the failure to issue an order." Ind. Code § 4-21.5-1-4(2). Under Indiana Code § 4-21.5-3-29(f), any additional order issued under Indiana Code § 4-21.5-3-29 should have issued within

60 days of the recommended order—here no later than May 14, 2021. When no order issued, petitioners had notice of a "failure to issue an order." But they did not seek judicial review within 30 days, as required by Indiana Code § 4-21.5-5-5. Nor did petitioners seek judicial review within 30 days of receiving an express notice from the Bureau on February 24, 2021, that it did not intend to issue another order absent objection. App. II 165; *see* 140 Ind. Admin. Code 1-1-11(a). So the petition for judicial review was untimely even under petitioners' own theory.

Petitioners respond that they petitioned for judicial review within 30 days of the Bureau "represent[ing] that it would not take further action." Response Br. 60 (citing App. II 52). What representation this refers to and when it occurred are vague. The cited appendix page refers to unspecified "communications with Plaintiffs' counsel" at an unspecified time. App II. 52. (Perhaps petitioners are referring to a June 2021 letter concerning an application from K.W., who is not a petitioner. App. II 82.) What is clear, however, is that petitioners did not seek review within 30 days of receiving *initial* notice the Bureau would not issue another order. Petitioners cannot use subsequent events to extend the original 30-day deadline. *See Hunter v. State Dep't of Transp.*, 67 N.E.3d 1085, 1091 (Ind. Ct. App. 2016).

Third, if there is no final order to review, judicial review is premature. The remedy for the failure to issue an order is a remand to the agency—not a decision on the merits. *Ind. State Bd. of Health Facility Adm'rs v. Werner*, 841 N.E.2d 1196, 1209–10 (Ind. Ct. App. 2006) ("[R]emand is the appropriate remedy for improper administrative agency action."), *trans. denied*; *Ind. Fam. & Soc. Servs. Admin. v. Culley*, 769

N.E.2d 680, 684–85 (Ind. Ct. App. 2002) ("[T]he reviewing court does not have power to compel agency action as part of the initial review function. It may only remand the cause for rehearing."). The petition should be dismissed as untimely.

B. The Indiana Code precludes the Bureau from issuing credentials describing a person's gender as "X"

Turning now to the merits, the Bureau correctly denied petitioners' applications for credentials describing their gender as "X." Opening Br. 25–28. By statute, the Bureau must collect information about applicants' "gender" and then issue credentials stating their "gender." Ind. Code §§ 9-24-9-2(a), 9-24-11-5(a)(6). There is no serious dispute here that "gender" can be defined in one of two ways—either as an "internal sense" of being a man, woman, both, or neither (petitioners' view) or as the biological state of being male or female (the Bureau's view). The dictionary cited by petitioners says "gender" may refer to (1) "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures"—the first definition of "sex" in the same dictionary—or (2) "a person's internal sense of being male, female, some combination of male and female, or neither male nor female." *Merriam-Webster's Dictionary* (online ed.). The question here is *which* meaning the statute adopts.

Context demonstrates "gender" as used in Title 9 refers to a binary, biological characteristic. *See Carter v. Carolina Tobacco Co.*, 873 N.E.2d 611, 626 (Ind. Ct. App. 2007). Since at least 1945—the year the Bureau was created—Title 9 has required the Bureau to collect information about applicants' "sex." 1945 Ind. Acts 1308–09,

1345. That term referred to the binary, biological characteristic of being male or female. During the mid-twentieth century, an "overwhelming majority of dictionaries" "define[d] 'sex' on the basis of biology and reproductive function." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc); *cf. Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738–39 (2020) (assuming "sex" in Title VII, enacted 1964, refers "only to biological distinctions between male and female").

In 2007, the legislature updated §§ 9-24-9-2(a) and 9-24-11-5(a)(6) to reflect the federal REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005), which uses the term "gender." *See* 49 U.S.C. § 30301 note; 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 34, 38. But neither the trial court nor plaintiffs identify any evidence that the legislature intended to revolutionize how driver's licenses describe persons. Even while updating §§ 9-24-9-2(a) and 9-24-11-5(a)(6) to read "gender," the legislature retained related statutory provisions in Title 9 that use "sex" to refer to information on driver's licenses. *See* Ind. Code §§ 9-24-11-5(a)(6), 9-30-3-6(b), 9-30-6-16; Opening Br. 26–27. That use reflects that jurists have long used "gender" to mean "sex," *i.e.*, being "male or female" "based on biology (chromosomes, genitalia)." *DeJohn v. Temple Univ.*, 537 F.3d 301, 318 n.20 (3d Cir. 2008); *see* Opening Br. 25–26.

Petitioners have no explanation as to why the General Assembly would use "sex" and "gender" interchangeably in Title 9 unless they meant the same thing. Instead, petitioners argue that "sex" does not always mean being biologically male or female. Response Br. 22, 26–27. Petitioners, however, cite *no source* suggesting that,

when the General Assembly first began using "sex" in 1945, the term ordinarily referred to modern concepts of gender identity. Only "recently" have people begun using—or perhaps more accurately, misusing—"sex" to mean gender identity. *DeJohn*, 537 F.3d at 318 n.20. And even today, the term's "ordinary meaning" continues to refer to "male and female biological traits." *West v. Radtke*, 48 F.4th 836, 850 n.4 (7th Cir. 2022). Dictionaries say that "sex" "esp[ecially]" refers to being "male or female . . . on the basis of . . . reproductive organs and structures." *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2003); *see The American Heritage College Dictionary* 577 (4th ed. 2002). That "ordinary meaning" controls. Ind. Code § 1-1-4-1; *see Lake Imaging, LLC v. Franciscan Alliance, Inc.*, 182 N.E.3d 203, 207 (Ind. 2022).

That some persons use "biological sex" for emphasis does not imply that "sex" ordinarily refers to non-biological constructs. *Contra* Response Br. 26. Petitioners do not explain how the term's ordinary meaning—being "male or female . . . based on reproductive organs and structures"—can mean anything but a binary, biological classification. Nor does § 25-1-22-5(b)'s acknowledgment of "intersex conditions" imply the ordinary meaning of "sex" encompasses more than two sexes. *Contra* Response Br. 27. As that provision reflects, intersex conditions are extremely rare conditions caused by genetic "disorder[s]" that prevent "normal sex chromosome structure." Ind. Code § 25-1-22-5(b); *see* Leonard Sax, *How Common Is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex Rsch. 174 (2002) (clinically recognized intersex conditions are prevalent in 0.018% of the population). The statute recognizes that "sex" ordinarily "means the biological state of being male or female, based on the individual's sex

organs, chromosomes, and endogenous hormone profiles." Ind. Code § 25-1-22-12. Thus, Title 9's equation of "gender" and "sex" shows both refer to a biological trait.

Petitioners counter that a federal regulation implementing the REAL ID Act requires the Bureau to treat "gender" as referring to gender identity. Response Br. 25. That is not what the regulation says. It states that the Department of Homeland Security "will leave the determination of gender up to the states." 73 Fed. Reg. 5272, 5301 (Jan. 29, 2008); *see* 6 C.F.R. § 37.17(c) (defining "gender" to mean "gender, as determined by the State"). And petitioners themselves admit that only a minority of States—22 of the 50—use their preferred definition of "gender." Response Br. 25. Petitioners, moreover, overlook that the REAL ID Act itself contemplates that "gender" refers to "sex." Opening Br. 27. The subchapter of federal code in which the REAL ID Act is codified uses "sex" and "gender" interchangeably in referring to state driver's licenses. *See* 49 U.S.C. § 30304 (requiring the "chief driver licensing official of each participating State" to submit a report listing the "sex" of each person denied a driver's license or whose license is suspended or revoked). No regulation can alter the statute's meaning. *See Decker v. Nw. Env't Def. Ctr.*, 568 U.S. 597, 609 (2013).

Not only is construing "sex" to mean "gender" consistent with context. It is consistent with the evident purpose behind collecting and listing identifying information about drivers too. Opening Br. 27–28. Recording a stable, objectively verifiable biological characteristic aids identification more than recording an unverifiable "internal and inherent sense" that can and does change. App. II 42. Petitioners offer

no plausible explanation as to why the General Assembly would conclude that recording subjective, unverifiable identities promote reliable identification more than objective, verifiable traits. They simply argue that they "experience their gender as not falling within the binary categories of man and woman." Response Br. 15, 30–31.

Ultimately, petitioners offer no statutory evidence that "gender" refers to gender identity rather than a binary, biological characteristic. They repeatedly argue that "gender" refers to gender identity because that is a definition of the term. *See* Response Br. 22–23, 25–27. But the question here is not whether petitioners' definition of "gender" is possible; it is which of the several possibilities "gender" bears. *See* *Lake Imaging*, 182 N.E.3d at 207. Petitioners' assertion that "all major medical . . . associations" recognize "[n]onbinary gender identities," Response Br. 24, is thus beside the point. The question here is not about how many or what gender identities exist. It is whether, as used in Title 9, "gender" refers to an internal sense of self or the biological state of being male or female. Context shows it refers to a binary, biological state.

C. The Bureau's adherence to statutory requirements was both consistent with the law and reasonable

Petitioners do not dispute that the Bureau acted reasonably in denying their applications for amended credentials listing their gender as "X" if, in fact, Indiana Code § 9-24-11-5(a) requires credentials to record the applicant's sex. *See* Opening Br. 28–29. Nor do they defend the trial court's notion that applicants may "self-define" their gender. *See* Response Br. 65. Petitioners merely argue that the statute "places

no express limit" on the Bureau's power, arguing that the Bureau's regulations and other considerations render the denials arbitrary. Response Br. 29, 35; *id.* at 28–30.

Contrary to petitioners' assertion, 140 Indiana Administrative Code 7-1.1-3(d)(3) does not require the Bureau to issue credentials with an "X." Opening Br. 30. The regulation "lays out what must be submitted to support an amendment for a change of gender," App. II 164, but it is silent on how many gender-marker *options* the Bureau must offer. Petitioners cite no language from the regulation that says the Bureau must offer anything but a "M" or "F" marker. Indeed, petitioners overlook text inconsistent with their view that the Bureau must offer credentials reflecting nonbinary identities. The regulation addresses changes "from" one gender "to" another gender, requiring an amended birth certificate or a certification that an applicant "underwent all *treatment* necessary to *permanently* change" gender. 140 Ind. Admin. Code 7-1.1-3(d)(3) (emphasis added). Many nonbinary persons, however, say that they do not experience a "permanent" sense of identity or require medical "treatment." *See* Sutter Health, *The Gender Binary and Non-Binary Individuals*, https://www.sutterhealth.org/health/sexual-health-relationships/non-binary. Rather, they believe their identity "fluctuate[s]" such that they "feel more masculine on some days and more feminine on other days." *Id.*; *see* Nat'l Ctr. for Transgender Equality, *Understanding Nonbinary People* (Jan. 12, 2023), https://transequality.org/issues/resources/understanding-nonbinary-people-how-to-be-respectful-and-supportive.

The Bureau's "former application of [its] regulation" does not help petitioners either. Response Br. 29. The Bureau did not begin permitting "a customer's gender to

be changed from 'M' or 'F' to 'X'" until May 3, 2019—approximately *ten years* after the regulation's adoption. App. IV 146; *see* App. IV 111 (24:8–22). And the Bureau then permitted branches to process credential applications with a "gender indicator of 'X'" only until "August 1, 2020." App. IV 120 (59:12–25). That history hardly shows that regulation always required "X" credentials. In fact, when the Bureau proposed amendments to the regulation in 2019—around the same time it began processing credentials with an "X"—it explained that the rule "addresses process." App. IV 156. "[G]ender marker types are not within the scope of this rule." *Id.*

Much of petitioners' argument rests on their view that allowing a "doctor" to determine gender is "the most logical choice" and the Bureau lacks "technical experience" to determine gender. Response Br. 28–30, 63–64. But petitioners' opinions about what makes the most sense do not demonstrate the Bureau acted arbitrarily. "[A]n action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action." *Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 380 (Ind. 2017) (quoting *Breitweiser v. Ind. Off. of Env't. Adjudication*, 810 N.E.2d 699, 702 (Ind. 2004)). And here the Bureau could reasonably conclude that both the statute and its own regulation do not allow for credentials listing a driver's gender as "X." That is a reasonable basis for the agency action.

Petitioners' argument, moreover, presumes that a person's "legal gender" can include nonbinary options. Response Br. 29. By statute, birth certificates must reflect "sex"—not gender identity. Ind. Code § 16-37-2-9(a)(2); *see id.* § 16-37-2-2. The provision that governs "birth certificate amendments" does not say otherwise. Response

Br. 24. The statute addresses using a "DNA test" or similar evidence to "make additions to or corrections in a certificate of birth" to reflect "paternity." Ind. Code § 16-37-2-10(b). It "has nothing to do" with gender-marker changes. *In re K.G.*, 200 N.E.3d 475, 478–49 (Ind. Ct. App. 2022), *trans. denied*, 209 N.E.3d 1179 (Ind. 2023). In a footnote, plaintiffs argue courts have "inherent, equitable powers to order a gender marker change." Response Br. 24 n.3. But their invocation of equity underscores that they are departing from what *the statute* permits or requires, which in turn suggests courts lack the equitable power that plaintiffs claim for them. *See State ex rel. Root v. Cir. Ct. of Allen Cnty.*, 289 N.E.2d 503, 506 (Ind. 1972) ("equity follows the law"). The Bureau could reasonably conclude it was required to follow the statute.

Besides, there are other logical reasons not to issue credentials with an "X." One is that "X" stands for "Not Specified," App. IV 118, 140, 145, 166, so listing it would defy the statutory command to list "gender." *See* Ind. Code § 9-24-11-5(a)(6). (Although plaintiffs say the meaning of "X" should not be considered, Response Br. 64–65, they themselves introduced it, App. II 46–47; App. IV 140, 166. That is invited error. *See Witte v. Mundy ex rel. Mundy*, 820 N.E.2d 128, 133–34 (Ind. 2005).) Another, related consideration is that observable, stable, and objective biological characteristics better promote reliable identification by law enforcement than self-defined ones susceptible to change. Objections that the Bureau does "not verify" all characteristics on a credential and that tests could be invasive, Response Br. 30–31, miss the point. Whether or not the Bureau verifies every characteristic, biological charac-

teristics are more reliably identifiable. And finally, the sheer number of gender identities—some estimates range from 68 to 102 distinct identities[1]—makes it logical to limit the choice to the most common ones, "M" and "F," for administrative reasons.

Adhering to the statutory definition of "gender"—sex—was reasonable.

II. The Bureau Was Not Required To Conduct a Rulemaking Before Discontinuing a Short-Lived Policy Adopted Without a Rulemaking

The Bureau was not required to conduct a rulemaking before denying plaintiffs' individual applications for amended credentials. An agency must follow rulemaking procedures only when promulgating a "rule," *i.e.*, an "agency statement of general applicability" that "has or is designed to have the effect of law" and "implements, interprets or prescribes" a "law or policy" or "the organization, procedure, or practice requirements of an agency." Ind. Code § 4-22-2-3(b). As the Bureau argued below, its denials of individual applications for amended credentials do not meet that definition. App. II 98–100; *contra* Response Br. 35 (arguing waiver). They operate "retrospectively" upon "individual[s]"—not prospectively on groups. *See Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984). And they do not "prescribe[] binding standards of conduct" or "require[] citizens to alter their behavior." *Ward v. Carter*, 90 N.E.3d 660, 665 (Ind. 2018).

Without citation, plaintiffs assert that the Bureau's decisions "applied a uniform principle" and the denials therefore constituted a rulemaking. Response Br. 35.

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[1] *See 68 Terms that Describe Gender Identity and Expression*, Healthline (updated Feb. 9, 2022), https://www.healthline.com/health/different-genders; *How Many Genders Are There? Gender Identity List*, SexualDiversity.org (updated May 22, 2023), https://www.sexualdiversity.org/edu/1111.php.

But whether the agency "applied a uniform principle" is not the statutory standard for a "rule." The standard is whether the agency statement is of "general," as opposed to individual, applicability and has the "effect of law." Ind. Code § 4-22-2-3(b); *see Ward*, 90 N.E.3d at 662. An agency decision "appl[ying]" a principle to an individual is not a statement of general applicability. *See Conquest v. State Emp.'s Appeals Comm'n*, 565 N.E.2d 1086, 1088 (Ind. Ct. App. 1991).

Plaintiffs also invoke a purported "communicat[ion]" from the Bureau "to the public" about "X" credentials. Response Br. 35 (citing App. IV 40–41). Leaving aside that this communication was a letter from the Bureau to plaintiffs' attorney—not the general public—any subsequent communication does not change that the denials themselves operated only on individuals. And plaintiffs are challenging the denials of their applications, asking for the Bureau to "approve Petitioners' applications." App. II 57.

Plaintiffs, moreover, do not explain how either the challenged individual denials or any subsequent communication "require[d]" them "to alter their behavior." *Ward*, 90 N.E.3d at 665. Plaintiffs merely complain that they "will not get" the credentials they want. Response Br. 34. In *Ward*, however, the Indiana Supreme Court rejected a similar argument from a death-row inmate who wanted—but did not receive—a particular lethal injection protocol, holding that a rule "prescribes binding standards of conduct" or "requires citizens to alter their behavior." 90 N.E.3d at 661–

62, 665. Plaintiffs' situation thus stands in sharp contrast to the applicants in *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005), who challenged a rule altering what "applicants" had "to present." *Id.* at 601, 609–10; *see* Opening Br. 33–34.

Plaintiffs ignore a contradiction in their argument as well. According to plaintiffs, the Bureau's decision in mid-2020, to "restrict[] . . . what gender options are available on IDs" required a rulemaking. Response Br. 36. But the Bureau did not conduct a rulemaking before starting to offer credentials with an option other than "M" or "F" in 2019. Opening Br. 34. Hence, under plaintiffs' theory, the decision to start issuing "X" credentials "does not have the effect of law," which means they cannot demand that it compels a particular action. Ind. Code § 4-22-2-44. And contrary to plaintiffs' assertion, Response Br. 36, 140 Indiana Administrative Code 7-1.1-3(d)(3) is silent on whether "X" must be a gender option. *See* pp. 19–20, *supra*.

In any event, plaintiffs cannot invoke putative procedural defects to obtain credentials that the Bureau cannot lawfully issue. Opening Br. 34–35. Whatever agencies' power to act where governing statutes are silent, Response Br. 35, agencies have "no power" to act contrary to them, *LTV Steel Co. v. Griffin*, 730 N.E.2d 1257, 1257 (Ind. 2000). The Bureau cannot issue credentials with an "X" or "Not Specified" when Title 9 requires credentials to reflect applicants' sex. *See* pp. 14–18, *supra*.

III. The Equal Protection Clause Does Not Require the Bureau To Adopt Whatever Gender Designations Driver's License Applicants Desire

A. The government speech at issue—state identifications on state credentials—does not implicate the Equal Protection Clause

The Equal Protection Clause does not require the Bureau to issue "X" credentials either. As a threshold matter, the Clause forbids differential "treatment—not [differential] state descriptions used for state recordkeeping and identification purposes." Opening Br. 36. Plaintiffs argue waiver. Response Br. 36, 48. But the Bureau made that precise argument below, explaining that government "classification[s] for identification purposes" do "not implicate the . . . Clause." App. IV 196–198. To support that point on appeal, the Bureau simply pointed out a contradiction between the trial court's summary-judgment order and its earlier ruling that Bureau credentials constitute the "government['s] speech." Opening Br. 36–37 (quoting App. II 26).

Plaintiffs attempt to downplay the contradiction by characterizing the "government speech doctrine" as "new" and "still-evolving." Response Br. 49. Whatever plaintiffs mean by that vague criticism, the principles relevant here are well established. The U.S. Supreme Court has squarely held that a government entity may "say what it wishes." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). And *every* federal court of appeals to have addressed the issue has held that plaintiffs cannot circumvent that holding by raising equal-protection claims. *See Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 160–61 (3d Cir. 2019) (collecting cases). The Seventh Circuit case plaintiffs cite (Response Br. 49) merely postulated that the "Establishment Clause" may limit government speech but did not reach the issue,

saying that "constraints on the government's choice of message are primarily electoral, not judicial." *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 859 (7th Cir. 2008).

Issues of government speech aside, plaintiffs do not dispute they must establish a "denial of equal treatment." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017); *see* Response Br. 51. Here, however, plaintiffs point to none. Plaintiffs have not been denied licenses, been afforded fewer driving privileges, or been required to present different documentation than other drivers. Opening Br. 37–38. The Bureau treats everyone who wants a driver's license the same: It issues everyone credentials that list their sex. Opening Br. 37; App. IV 147, 166. Those credentials may not reflect plaintiffs' "gender" identities, Response Br. 51, but do reflect their sex. The Bureau is entitled to identify plaintiffs in its records by one trait rather than another.

B. The Bureau's classification affecting nonbinary persons does not trigger heightened scrutiny

Heightened scrutiny does not apply regardless. Plaintiffs brought this case on the theory that the Bureau denied them "X" credentials "*solely* because their gender is nonbinary." App. II 54 (emphasis added); *see id.* ("But for Plaintiffs' nonbinary gender, their IDs would be amended."). Neither the U.S. Supreme Court nor Indiana courts have held that nonbinary status is a protected characteristic. And plaintiffs do not even attempt to meet the "high" bar for recognizing a new protected class. *See L.W. ex rel. Williams v. Skrmetti*, --- F.4th ---, 2023 WL 6321688, at *18 (6th Cir. Sept. 28, 2023); Opening Br. 41–42. Instead, like the trial court, plaintiffs seek to equate "nonbinary" status discrimination with "sex" discrimination. Response Br. 37.

1. Difficulties with plaintiffs' approach abound. First, for equal-protection purposes, the U.S. Supreme Court treats "sex" (or "gender") as an unchanging "biological" characteristic. *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see* Opening Br. 38–39. Plaintiffs cite no instance in which the Court has treated alleged discrimination based on sexual orientation, gender identity, or nonbinary status as sex discrimination. "If . . . [it] were correct that the only material question in a heightened review case" is whether talking about a concept requires "a reference to sex or gender, the Court would have said so in invalidating bans on same-sex marriage in *Obergefell v. Hodges*. But it did not." *L.W.*, 2023 WL 6321688, at *16 (citation omitted).

Second, the Supreme Court has explicitly told us what a sex classification is: one that elevates "members of either sex over members of the other." *Reed v. Reed*, 404 U.S. 71, 76 (1971); *see L.W.*, 2023 WL 6321688, at *13 (collecting examples). Lines that create groups containing "members of both sexes" are not sex classifications. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974); *see* Opening Br. 40. Plaintiffs, however, do not allege that the Bureau favors men or women. It treats both equally.

Indeed, it is difficult to discern what classification plaintiffs challenge. Plaintiffs say they are "excluded from having . . . accurate ID[s]." Response Br. 39. But the statute does not create a category called "accurate IDs"; it requires the Bureau to describe "gender," meaning a biological characteristic of applicants rather than an internal sense. Ind. Code § 9-24-11-5(a)(6); *see* pp. 14–18, *supra*. Saying that a credential must describe sex rather than gender identity does not categorize based on nonbinary status. Opening Br. 40. That is precisely the point made by *Adams ex rel.*

Kasper v. School Board of St. Johns County, 57 F.4th 791 (11th Cir. 2022) (en banc), which held that categorizing based on sex "does not facially discriminate on the basis of transgender status." *Id.* at 809; *contra* Response Br. 40–41. In short, plaintiffs have not identified a facial classification based on either sex or nonbinary status.

Third, the U.S. Supreme Court has rejected the notion that disparate impact on either men or women equals a sex classification. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). *A fortiori* plaintiffs cannot establish the Bureau discriminated based on sex when they are merely alleging a disparate impact based on nonbinary status—not "sex" as the Supreme Court understands it—and do not attempt to satisfy the stringent standards for a disparate-impact challenge. *See* Opening Br. 40–41.

Fourth, treating nonbinary-status discrimination as sex discrimination would "sidestep" the demanding requirements for creating a new protected class. *L.W.*, 2023 WL 6321688, at *16. "The Supreme Court 'has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so.'" *Id.* at *18 (quoting *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015)).

Fifth, as the Bureau explained, applying heightened scrutiny to police its understanding of sex (or gender) would be "difficult" to reconcile with "the purpose behind" heightened scrutiny. *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006); *see* Opening Br. 42. Plaintiffs ignore that problem too.

2. Plaintiffs primarily argue that the U.S. Supreme Court blessed treating nonbinary status discrimination as sex discrimination in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Response Br. 37–40. In *Bostock*, however, the Court "only" held that "an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex'" in violation of Title VII. 140 S. Ct. at 1753. It did not address nonbinary status, the Equal Protection Clause, or even hold that every instance of alleged workplace discrimination against "homosexual" and "transgender" persons violates Title VII. *See id.* (disclaiming that it was addressing "whether other policies and practices might or might not qualify as unlawful discrimination").

Extending *Bostock* would be error. "The Equal Protection Clause contains none of the text that the Court interpreted in *Bostock*." *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023); *see Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (it is "implausible on its face" that the Clause "should mean the same thing" as Title VI). Indeed, the Clause is narrower than Title VII. It excludes "disparate impact claims," *L.W.*, 2023 WL 6321688, at *16—no small matter in a case where plaintiffs do not identify an explicit classification based on nonbinary status but object to "negative repercussions" for nonbinary applicants. Response Br. 47, 52.

There is "marked difference in application of the anti-discrimination principle" as well. *L.W.*, 2023 WL 6321688, at *17. "In *Bostock*, the employers fired adult employees because their behavior did not match stereotypes of how adult men or women

dress or behave." *Id.*; *see Bostock*, 140 S. Ct. at 1753. Here, however, no stereotype is at play because everyone—even plaintiffs—belongs to either the male or female sex. As the Endocrine Society explains, "*[s]ex* is a biological concept" possessed even by persons whose "self-perception of their gender . . . differ[s]." Aditi Bhargava et al., *Considering Sex as a Biological Variable in Basic and Clinical Studies: An Endocrine Society Scientific Statement*, 42 Endocrine Revs. 219, 221, 226 (2021); *see* Response Br. 54 (describing transgender persons as "someone whose gender is different than their sex"). Such foundational "biological" traits cannot be derided as mere "stereotypes." *Nguyen*, 533 U.S. at 73; *see United States v. Virginia*, 518 U.S. 515, 533 (1996) ("Physical differences between men and women . . . are enduring").

Plaintiffs' reliance (Response Br. 37, 40–41) on *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), and select district-court cases is misplaced for the same reasons. In fact, the Eleventh Circuit recently clarified that *Brumby* covers only "gender stereotyping in the context of employment discrimination." *Eknes-Tucker*, 80 F.4th at 1229. It is not "stereotyping" to recognize there are "biological differences between males and females." *Id.* This Court should not embrace plaintiffs' ill-defined theory of heightened scrutiny.

C. Important state interests justify recording sex on licenses

Important state interests justify recording sex on driver's licenses regardless. Plaintiffs do not deny that it is important for state-issued credentials to promote accurate, reliable identification. *See* Opening Br. 44. They argue that refusing to issue

"X" credentials undermines accuracy because plaintiffs identify their gender as nonbinary. *See* Response Br. 44. But that argument erroneously assumes the State's intent is to record gender identity rather than sex. In any event, plaintiffs do not dispute that in the "vast majority of cases" a license holder's sex and gender identity will align as well. Opening Br. 44. That is sufficient. Heightened scrutiny does not require a State to achieve "its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70.

The analysis on rational-basis review is even easier. That standard only requires asking whether the legislature "could have thought" a policy "would serve legitimate state interests," not whether the policy does. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). Here, plaintiffs do not dispute that the legislature could think that recording sex on credentials promotes compliance with other statutory provisions that expressly require information about drivers' "sex." *See* Opening Br. 43. Nor do plaintiffs dispute that the legislature could think it more administratively feasible to provide two options for driver's licenses—"M" or "F"—than offer options for the scores of different gender identities people say they experience. *See id.* Plaintiffs simply repeat their argument that recording sex does not accurately reflect nonbinary persons' gender "experience," Response Br. 15; *see id.* at 45–46, which fails for the reasons above.

Alternatively, plaintiffs argue that some "more searching" form of review is required because of the circumstances under which the Bureau adopted a putative "policy" in 2021 of no longer issuing "X" credentials to "target" nonbinary persons.

Response Br. 47. On rational basis, however, review must be deferential—not searching. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313–15 (1993). The Bureau also explained precisely why it changed its approach to "X" credentials; it wished to comply with the law. *See* App. III 48, 85, 122, 144; App. IV 56–57. There is nothing unusual with an agency seeking to comply with its legal obligations. Plaintiffs' argument, moreover, overlooks that Title 9 itself requires credentials to contain information about drivers' sex. And plaintiffs nowhere argue that the statute itself should be subject to searching review. *See Dobbs*, 142 S. Ct. at 2225 ("arguments based on alleged legislative motives" are "disfavored"). The statute survives any level of review.

IV. There Is No Unenumerated Constitutional Right To Obtain a Driver's License Identifying the License Holder as Nonbinary

Substantive due process does not confer a right to "X" credentials. Under U.S. Supreme Court precedent, any unwritten right must be "careful[ly] descri[bed]," and "objectiv[e]" evidence must show the putative right to be so "deeply rooted in this Nation's history and tradition" such that "neither liberty nor justice would exist" without it. *Washington v. Glucksberg*, 521 U.S. 702, 703, 720–21 (1997). Plaintiffs, however, provide no objective, historical evidence of a right to obtain a driver's license—much less a right to receive one listing the driver's gender as "X." They ignore the Indiana Supreme Court's holdings that there is "no fundamental right to drive." *Mitchell v. State*, 659 N.E.2d 112, 116 (Ind. 1995); *see* Opening Br. 46.

Plaintiffs attempt to recharacterize the right asserted as the right to protect "private medical information." Response Br. 55. Like the trial court, however, they

ignore that the U.S. Supreme Court requires a "careful"—meaning a precise—"description" of the putative right. *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *see* Opening Br. 45–47. Similarly, plaintiffs fail to show that the Constitution "encompass[es] a general right to nondisclosure of private information" or even private medical information. *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994); *see* Opening Br. 47. Plaintiffs cite no evidence from this Nation's history and tradition that a right to protect private information existed.

The oldest source plaintiffs cite is *Whalen v. Roe*, 429 U.S. 589 (1977). But a decision originating from within the last 50 years does not provide objective, historical evidence of a "deeply rooted" right comparable to "rights . . . expressly set out in the Bill of Rights." *Dobbs*, 142 S. Ct. at 2247; *see id.* at 2248–56 (rejecting similar argument). And while "*Whalen* . . . assume[d]" the existence of a privacy interest, it did not hold a right to informational privacy exists. *NASA v. Nelson*, 562 U.S. 134, 147 (2011); *see id.* at 160, 164 (Scalia, J., concurring). *Whalen* rejected a constitutional challenge to New York's decision to record the "names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs," holding there was no "invasion of any right or liberty." *Whalen*, 429 U.S. at 591, 599, 603–04; *see* *Dillard v. O'Kelley*, 961 F.3d 1048, 1054 (8th Cir. 2020).

Plaintiffs have no answer to the absurdities created by the trial court's decision either. They identify *no legal principle* that would preclude persons from asserting that other information they deem sensitive, such as their weight, date of birth, address, or Social Security status, should be kept private. Plaintiffs merely assert those

"issues are not at issue." Response Br. 55. Similarly, plaintiffs do not defend the trial court's illogical suggestion that revealing plaintiffs' nonbinary status somehow protects sensitive information. *See* Opening Br. 48. Plaintiffs instead say they want to protect from disclosure "the sex that they were assigned at birth, which may not be the sex they currently possess." Response Br. 56. Setting aside that plaintiffs conflate sex and gender identity, the fact remains that issuing an "X" credential still reveals that plaintiffs' sex and gender identity do not match. And it is revealing "one's status" as nonconforming that plaintiffs say can "potentially embarrass." *Id.* at 53–54.

At bottom, plaintiffs ask the judiciary to make a policy decision that driver's licenses should list gender identity rather than sex. But substantive due process protects only historically rooted liberties, not our "own ardent views about the liberty that Americans should enjoy." *Dobbs*, 142 S. Ct. at 2247. And where, as here, no historically rooted right is implicated, only rational-basis review applies. *Id.* at 2283–84. Issuing driver's licenses that list sex survives rational-basis review for the reasons above. *See* pp. 31–32, *supra*.

CONCLUSION

The Court should reverse the grant of the petition for review and of judgment for plaintiffs, ordering the petition dismissed and judgment entered for the Bureau.

Respectfully submitted,

THEODORE E. ROKITA
Attorney General of Indiana
Attorney No. 18857-49

By: /s/ James A. Barta
JAMES A. BARTA
Deputy Solicitor General
Attorney No. 31589-49

MELINDA R. HOLMES
Attorney No. 36851-79
KATELYN E. DOERING
Attorney No. 37523-32
Deputy Attorneys General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington Street
Indianapolis, IN 46204
Phone: (317) 232-0709
Fax: (317) 232-7979
Email: James.Barta@atg.in.gov

Counsel for Appellants

CERTIFICATE OF WORD COUNT

I verify that this brief contains 6,998 words.

/s/ James A. Barta
James A. Barta
Deputy Solicitor General

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on October 20, 2023, the foregoing document was served upon the following persons using the IEFS:

Megan Stuart
Jessica Rose Meltzer
Indiana Legal Services
1200 Madison Avenue, Ste. 300
Indianapolis, IN 46225
Megan.Stuart@ilsi.net
Jessi.meltzer@ilsi.net

Brent Andrew Auberry
David Alexander Suess
Faegre Drinker Biddle & Reath LLP
300 North Meridian Street, Ste. 2500
Indianapolis, IN 46204
Brent.Auberry@faegredrinker.com
David.Suess@faegredrinker.com

/s/ James A. Barta
James A. Barta
Deputy Solicitor General

Office of the Attorney General
Indiana Government Center South, Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone: (317) 232-0709
Fax: (317) 232-7979
Email: James.Barta@atg.in.gov