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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.

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES

By statue, the Indiana Bureau of Motor Vehicles must list a person's "gender" ("sex" in older versions of the statute) on credentials. Ind. Code § 9-24-11-5(a). Plaintiffs, who do not identify as male or female but identify as "nonbinary," applied to the Bureau for amended credentials describing their genders as "X." "X" stands for "Not Specified." The Bureau denied their applications on the ground that it lacked the statutory authority to issue such credentials. The questions presented are:

1. Whether the Bureau's denials were consistent with its governing statutes and otherwise reasonable under the Administrative Orders and Procedures Act—and whether untimely petitions for review preclude review under that statute.

2. Whether the Bureau's denials are exempt from rulemaking procedures under the Administrative Rules and Procedures Act.

3. Whether the Bureau acted consistently with the Equal Protection Clause in declining to issue nonbinary persons credentials listing their gender as "X."

4. Whether the Bureau acted consistently with substantive due process in declining to issue nonbinary persons credentials listing their gender as "X."

STATEMENT OF THE CASE

The Bureau denied applications by plaintiffs Fitz Simmons, A.G., S.D., K.H., and S.R. (collectively, petitioners) for amended credentials on July 31, 2020. App. III 48, 85–86, 122, 144. Those plaintiffs sought administrative review. App. II 153. The administrative law judge issued a recommended order upholding the denials on February 24, 2021, which became final on March 15, 2021. App. II 164–65; *see* 140 Ind.

Admin. Code 1-1-11(a). The Bureau denied applications by plaintiffs B.C., C.O., J.L., J.T., K.O., K.W., S.O., and W.A. for amended credentials on June 3, 2021. App. II 49.

All plaintiffs filed a complaint against the Bureau and its commissioner (collectively, the Bureau) on June 23, 2021, alleging violations of the Administrative Rules and Procedures Act (ARPA), the Fourteenth Amendment's Equal Protection and Due Process Clauses, and the First Amendment. App. II 41–59. Petitioners Simmons, A.G., S.D., K.H., and S.R. also included in the complaint an untimely petition for judicial review in which they alleged that the Bureau acted arbitrarily, capriciously, and contrary to law in violation of the Administrative Orders and Procedures Act (AOPA). *Id.*

On February 2, 2022, the trial court dismissed the First Amendment claim but otherwise allowed the case to proceed. App. II 27. On December 29, 2022, the court granted the petition for judicial review, holding that the Bureau violated AOPA, ARPA, and the Fourteenth Amendment's Equal Protection and Due Process Clauses. App. II 28–32. The trial court also granted summary judgment to all plaintiffs, holding that the Bureau violated ARPA and the Fourteenth Amendment's Equal Protection and Due Process Clauses. App. II 33–39. It enjoined the Bureau enforcing its "policy of refusing nonbinary gender designations on BMV credentials." App. II 39. On March 26, 2023, the trial court granted in part and denied a motion to correct error. App. II 40. The Bureau filed a timely notice of appeal on April 25, 2023.

STATEMENT OF FACTS

I. Statutory Identification Requirements for Driver's Licenses

The Indiana Bureau of Motor Vehicles (BMV or the Bureau) is responsible for issuing driver's licenses to applicants who meet the statutory requirements "in a manner the bureau considers necessary and prudent." Ind. Code § 9-24-11-2; *see id.* § 9-24-11-1. By statute, the Bureau is required to collect certain information from applicants, *id.* § 9-24-9-2(a), list it on credentials, *id.* § 9-24-11-5(a), and maintain records of that information, *id.* § 9-14-12-2(3).

Before 2008, Indiana law required the Bureau to obtain information about an applicant's "name, date of birth, sex, Social Security number," and "address." 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 34. It also required Bureau-issued credentials to contain the holder's "name," "date of birth," address, and "a brief description" of the holder. 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 38. In 2007, the Indiana General Assembly amended Indiana's identification requirements to conform to the federal REAL ID Act, Pub. L. No. 109-13, 119 Stat. 302 (2005). 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 34, 38. Since 2007, Indiana law has required the Bureau to obtain the applicant's "full legal name," "date of birth," "gender," "height, weight, hair color," "eye color," "address," and Social Security status. Ind. Code § 9-24-9-2(a). It also has required Bureau-issued credentials to state the holder's "full legal name," "date of birth," "address," "hair color," "eye color," "gender," "weight, "height," and other information. *Id.* § 9-24-11-5(a).

When a license holder's "name" or "address" changes, a license holder is required to apply for an "amended driver's license . . . containing the correct information." Ind. Code § 9-24-13-4. The statute does not provide for changes to gender.

II. The Bureau's Implementation of the Identification Requirements

A. The Bureau adopts regulations addressing documentation requirements for credentials

In 2009, the Bureau adopted regulations implementing the identification requirements that the General Assembly adopted in 2007. Under the regulations, a driver's license applicant must establish identity by submitting an unexpired U.S. passport, certified birth certificate, or other approved document. 140 Ind. Admin. Code 7-1.1-3(b)(1). Where an applicant's "legal name, date of birth, or gender was changed," an applicant must submit additional documents to provide "proof of the change." *Id.* 7-1.1-3(b)(1)(K). Those additional documents may include "(i) a marriage certificate; (ii) a divorce decree; (iii) a court order approving a name change or a date of birth change; (iv) a certified amended birth certificate for a gender change; or (v) a physician's signed and dated statement that '(insert applicant's name) successfully underwent all treatment necessary to permanently change (insert applicant's name) gender from (insert prior gender) to (insert new gender).'" *Id.* Similar requirements apply when an applicant requests an amended driver's license. *Id.* 7-1.1-3(d).

B. Without adopting new regulations, the Bureau starts issuing nonbinary credentials and proposes a new rule on gender

For the first decade of the rule's existence, the Bureau identified applicants in its records and on credentials as either male (M) or female (F). Then, in March 2019,

the Bureau stated that it would "recognize a third gender option on credentials and customer records." App. IV 145. "The third option is 'Not Specified' and will be displayed as an 'X.'" *Id.* The Bureau began permitting "a customer's gender to be changed from 'M' or 'F' to 'X'" on May 3, 2019. App. IV 146; *see* App. IV 111 (24:8–22).

In October 2019, the Bureau proposed a rule altering the procedures for gender changes. The proposed rule provided that an "applicant applying to change the applicant's gender on the applicant's driver's license . . . must present: (i) a certified birth certificate containing the updated gender; or (ii) written notification from the Indiana state department of health communicating to the bureau that the Indiana state department of health has received from the applicant a fully and properly executed physician's statement of gender change submitted on a form prescribed by the Indiana state department of health." App. IV 150, 152. Attached to the proposed rule was a sample State Department of Health (ISDH) form for a physician's statement of gender change. App. IV 155. The form had options for "Male to Female," "Female to Male," "Male to X (non-binary)," or "Female to X (non-binary)." *Id.*

C. The Bureau withdraws its proposed rule on gender and stops issuing nonbinary credentials

In January 2020, the Bureau recalled its proposed rule addressing gender changes. App. IV 33–34. Shortly thereafter, Indiana Attorney General Curtis Hill released an official opinion addressing questions about the proposed rule. App. IV 22. The opinion explained that the Bureau lacked authority to recognize a "non-binary gender because that authority has not been granted to any agency by the Indiana General Assembly." App. IV 26. Under Indiana statutes governing driver's licenses

and birth certificates, the opinion observed, the term "gender" is interchangeable with "sex." App. IV 23. And "sex" refers to the binary characteristic of being "female or male especially on the basis of . . . reproductive organs and structures." App. IV 23–24 (citation omitted). "Therefore," the Bureau may not "define gender as being anything other than sex" or "create a third, non-binary gender marker." App. IV 25.

A few months later, the Bureau's Chief Administrative Officer sent an email to managers stating that, "[e]ffective August 1, 2020, branches may not process any credential applications or transactions with a gender indicator of 'X.' Only genders Male or Female may be offered to customers." App. IV 120 (59:12–25).

III. Plaintiffs Are Denied Credentials with "X" Designations and Challenge the Denials

In 2019, Fitz Simmons and twelve other Indiana residents (collectively, plaintiffs) applied to amend the gender markers on their credentials to "X." App. II 41, 47. According to plaintiffs, their "gender"—which they define as their "internal and inherent sense of being a woman, a man, or neither—does not fall into the binary categories of man or woman." App. II 42. They identify as "nonbinary." *Id.*

A. The Bureau denies plaintiffs' applications for amended credentials with "X" gender designations

The Bureau denied applications from plaintiffs Simmons, A.G., S.D., K.H., and S.R. (collectively, petitioners) on July 31, 2020, citing the Attorney General's opinion and stating that "the BMV does not have the statutory or regulatory authority to issue Indiana credentials bearing a nonbinary gender marker." App. II 48, 66. Petitioners sought administrative review. App. II 153.

After briefing, the administrative law judge ruled in the Bureau's favor. The administrative law judge determined that "BMV was entitled to rely on the published opinion of the Indiana Attorney General" in denying petitioners' applications and observed the Bureau had reasonably construed "gender" to be synonymous with "sex." App. II 163–64. The administrative law judge rejected petitioners' argument that the Bureau failed to follow 140 Indiana Administrative Code 7-1.1-3(d)(3)(C), observing "it does not require the BMV to use a nonbinary gender marker on driver's licenses." App. II 164. The order informed petitioners that they could request reconsideration and that, if they did not do so "within eighteen (18) days, this Recommended Order shall become the Final Order of the BMV." App. II 165 (citing 140 Ind. Admin. Code 1-1-11). Petitioners declined to request reconsideration, which meant the order became final on March 15, 2021. *See* 140 Ind. Admin. Code 1-1-11(a).

The Bureau denied the remaining applications in June 2021. App. II 49. It again cited the Attorney General's official opinion concluding that "the BMV does not have the statutory or regulatory authority to issue Indiana credentials bearing a nonbinary gender marker." App. II 49, 82. Although the denial letters notified the applicants that they could seek administrative review, App. II 82, none did.

B. Plaintiffs seek judicial review

On June 23, 2021, plaintiffs filed an action challenging the denials. App. II 41–59. Petitioners alleged that the Bureau's actions were arbitrary, contrary to law, and otherwise violative of the Administrative Orders and Procedures Act (AOPA), Ind.

Code § 4-21.5-5-14. App. II 51–53. All plaintiffs further alleged that the Bureau violated the Administrative Rules and Procedures Act (ARPA), Ind. Code § 4-22-2 *et seq.*, by failing to follow rulemaking procedures for adopting a "binary-only gender change rule." App. II 53. And they alleged that the Bureau violated the First Amendment and Fourteenth Amendment's Equal Protection and Due Process Clauses by not recognizing a "nonbinary gender." App. II 53–57.

The trial court dismissed the First Amendment claim but otherwise ruled for plaintiffs. In the court's view, the Bureau departed from the statutory requirement to issue credentials reflecting an applicant's "gender." App. II 30–31. "Gender," the court stated, "is a term" that refers to the concept of "gender identity" ("as opposed to a male/female binary biological classification") and includes "nonbinary" identities. App. II 31. The court also faulted the Bureau for not accepting whatever "gender" is listed on an applicant's "birth certificate or physician's statement," reasoning that 140 Indiana Administrative Code 7-1.1-3(d)(3) allows applicants to "self-defin[e]" their gender. App. II 30–31. The court rejected arguments that plaintiffs had waived any right to judicial review by failing to exhaust administrative remedies and filing untimely petitions for judicial review. App. II 30; *see* App. II 20–22.

The court further held that the Bureau violated ARPA "by adopting a policy in contravention from stated procedure" without conducting a rulemaking. App. II 35; *see* App. II 31. According to the court, when the Bureau started issuing credentials with an "X" in 2019, it did not need to conduct a rulemaking because it "did not change

the underlying administrative rule." App. II 36. But before the Bureau denied plaintiffs credentials with an "X" in 2020, the court stated, the Bureau needed to conduct a rulemaking because that action "effectively defined or redefined gender." *Id.*

Next, the court held that the Bureau's actions violated the Fourteenth Amendment. App. II 36–38; *see* App. II 31. Although the court did not hold that "nonbinary individuals" constitute a protected class, it applied intermediate scrutiny to plaintiffs' equal-protection claim. App. II 36. The court then reasoned the Bureau has no interest in requiring nonbinary persons to select from "male/female designations," deeming that practice to be "inconsistent with the supporting credential documentation," "national standards" for driver's licenses, and Indiana State Department of Health's practice. App. II 36–37. Further, the court stated that the Bureau's actions violated an unwritten right to "informational privacy" protected by substantive due process, reasoning that requiring a male or female designation on credentials "may misidentify a nonbinary person's gender and reveal private medical information." App. II 38.

Finally, the trial court rejected plaintiffs' First Amendment claim. App. II 27. Relying on an Indiana Supreme Court decision deeming personalized license plates government speech, the trial court held that a "driver's license is government speech" and outside the First Amendment's purview. App. II 26. A driver's license, the court observed, is a "government issued ID . . . historically used for government purposes, providing a unique means to identify the holder for administrative purposes." *Id.* It "carries with it the State's approval and licensure" and "is closely identified in the public mind with the state." *Id.* Additionally, the "BMV has a great deal of control

over the messages conveyed, as the BMV is mandated by statute to control those who obtain a license and the information gathered." *Id.*

As a remedy, the court "remand[ed]" petitioners' cases to the Bureau for it "to issue identifying credentials . . . consistent with [petitioners'] nonbinary designations." App. II 31–32. The court also declared "void" the Bureau's "policy [of] not accepting an application for nonbinary gender designation," and "enjoined" the Bureau "from enforcing [its] current policy of refusing nonbinary gender designations on BMV credentials" against anyone. App. II 39. The court denied a motion requesting that it limit the injunctive relief to the named plaintiffs. App. II 40.

SUMMARY OF THE ARGUMENT

The Bureau properly denied plaintiffs' applications for credentials describing their gender as "X," which stands for "Not Specified."

I. The petition for judicial review should have been denied. The petition is time-barred since it was filed more than 30 days after the final agency action. Regardless, the Bureau had a reasonable basis for denying petitioners' applications.

Under Indiana Code § 9-24-11-5(a), Bureau-issued credentials must list an applicant's "gender." As context demonstrates, "gender" refers to sex—the biological state of being male or female. It would violate the governing statute to designate an applicant's gender as "Not Specified" or nonbinary using an "X."

Complying with a statutory command was reasonable. The Bureau regulation that the trial court invoked cannot override the Bureau's governing statute and does not address the issuance of credentials with an "X" regardless. The Bureau's actions

are consistent with the form Indiana law requires for birth certificates as well. By statute, birth certificates must list a person's "sex."

II. The Administrative Rules and Procedures Act did not require the Bureau to conduct a rulemaking before denying plaintiffs' individual applications. A rule is 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 an agency's "organization, procedure, or practice requirements." Ind. Code § 4-22-2-3(b). The Bureau's denials of individual applications are not generally applicable orders and do not have the effect of law. Any policy governing how the Bureau describes gender on Bureau-issued credentials merely governs internal agency procedures.

Any procedural defects do not entitle plaintiffs to credentials listing their gender as "X" regardless. By statute, the Bureau must describe their gender as male or female. Plaintiffs cannot invoke a supposed procedural violation to demand relief that the Bureau cannot lawfully provide.

III. The Bureau's actions are consistent with the Equal Protection Clause. The Equal Protection Clause is concerned with differential treatment, not descriptions. It does not apply to the Bureau's descriptions of plaintiffs on state-issued credentials, which the trial court held constitute government speech.

There is no constitutional violation in any event. Plaintiffs allege that the Bureau discriminated against them "solely" because of their nonbinary status. But nonbinary status is not a protected or quasi-protected characteristic, which means rational-basis review applies.

Requiring Bureau-issued credentials to list a biological characteristic that can be objectively verified promotes an important state interest in identification.

IV. The Bureau's actions are consistent with substantive due process as well. There is no deeply rooted, historically recognized right to a driver's license—much less a right to demand that the license describe the holder's gender as "X."

STANDARD OF REVIEW

The trial court's rulings on the motion to dismiss, motions for summary judgment, and legal questions presented in the petition for judicial review are reviewed de novo. *See Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014); *Indiana Bureau of Motor Vehicles v. Watson*, 70 N.E.3d 380, 384 (Ind. Ct. App. 2017); *Bellows v. Bd. of Comm'rs of Cnty. of Elkhart*, 926 N.E.2d 96, 110–11 (Ind. Ct. App. 2010).

ARGUMENT

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

The trial court erred in granting the petition for judicial review and requiring the Bureau to issue credentials describing petitioners' gender as "X." Under Indiana law, any petition for judicial review must be filed within 30 days of the final agency action. In this case, however, petitioners waited more than 90 days to file theirs, waiving their right to judicial review and depriving the courts of jurisdiction.

Regardless, the Bureau "acted within its authority when it denied the Petitioners' applicants to change the gender marker on their credentials to a non-binary marker." App. II 159, 164. Under the Indiana Code, the Bureau must issue credentials reflecting an applicant's "gender." Ind. Code § 9-24-11-5(a). As statutory context

demonstrates, "gender" refers to sex—the biological state of being male or female. The Bureau thus properly declined to issue credentials describing gender as "X," which stands for "Not Specified" or (in plaintiffs' minds) some nonbinary gender.

The Bureau's adherence to statutory requirements is hardly arbitrary. It is always reasonable for an agency to follow statutory commands. No regulation requires a different result. The regulation that the trial court invoked is silent on whether the Bureau may issue nonbinary credentials. And while the trial court posited an inconsistency between the Bureau's refusal to issue nonbinary credentials and the legal requirements governing Indiana birth certificates, there is no inconsistency. Indiana law requires birth certificates to describe a person's sex—a binary, biological characteristic—not a nonbinary gender identity.

A. Petitioners waived any right to seek judicial review

Although the Bureau's actions are consistent with state law, this Court need not reach the issue. The Administrative Orders and Procedures Act (AOPA) provides the "exclusive means for judicial review of an agency action." Ind. Code § 4-21.5-5-1. Under the act, any petition for judicial review must be "filed within thirty (30) days after the date that notice of the agency action that is the subject of the petition for judicial review was served." *Id.* § 4-21.5-5-5. That requirement is mandatory and ju-

risdictional. *See id.* § 4-21.5-5-2(b); *Comm'r, Indiana Dep't of Env't Mgmt. v. Bethlehem Steel Corp.*, 703 N.E.2d 680, 682 (Ind. Ct. App. 1998); *Hoosier Env't Council v. Dep't of Nat. Res.*, 673 N.E.2d 811, 814 (Ind. Ct. App. 1996).[1]

In this case, however, petitioners missed the statutory deadline. The administrative law judge issued a recommended order denying petitioners' challenges to the Bureau's actions on February 24, 2021. App. II 164. The order informed petitioners that they could seek further administrative review and that, if they did not do so "within eighteen (18) days, this Recommended Order shall become the Final Order of the BMV." App. II 165 (citing 140 Ind. Admin. Code 1-1-11). Petitioners, however, declined to seek reconsideration of the order within eighteen days, which meant the order became final on March 15, 2021. *See* Ind. Code § 4-21.5-3-29(d)(2); 140 Ind. Admin. Code 1-1-11(a). Any petition for judicial review was thus due no later than April 14, 2021. But petitioners delayed filing until June 23, 2021, App. II 41, "waiv[ing] [their] right to seek judicial review," *Comm'r of Ind. Dep't of Env't Mgmt. v. Eagle Enclave Dev., LLC*, 120 N.E.3d 212, 217 (Ind. Ct. App. 2019).

The trial court identified no authority for excusing the waiver. Although the court stated that "exhausting administrative remedies would have been futile," App.

[1] Relying on *K.S. v. State*, 849 N.E.2d 538 (Ind. 2006)—a decision about the initiation of juvenile delinquency petitions—*Hunter v. State Dep't of Transp.*, 67 N.E.3d 1085, 1088–89 (Ind. Ct. App. 2016), held that the untimely filing of a petition for review is merely a procedural error. *Hunter*, however, failed to consider critical differences in statutory language. Unlike the statute in *K.S.*, AOPA prescribes an "exclusive means" of judicial review and bars review of untimely petitions. Ind. Code §§ 4-21.5-5-1, 4-21.5-5-2(b). *Hunter*, moreover, overlooked that the Indiana Supreme Court deems "jurisdiction[al]" other prerequisites to judicial review under AOPA. *M-Plan, Inc. v. Indiana Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 839 (Ind. 2004).

II 30; *see* App. II 21–22, futility is only an exception to the separate requirement of administrative exhaustion, *see M-Plan, Inc. v. Indiana Comprehensive Health Ins. Ass'n*, 809 N.E.2d 834, 839 (Ind. 2004). As this Court has held, where a person "fails to timely file a petition for judicial review," "there is no mechanism allowing the trial court to resurrect a waived right to judicial review." *Hunter v. State Dep't of Transp.*, 67 N.E.3d 1085, 1091 (Ind. Ct. App. 2016); *cf. Teaching Our Posterity Success, Inc. v. Indiana Dep't of Educ.*, 20 N.E.3d 149, 155 (Ind. 2014) (holding that the untimely filing of the administrative record required dismissal and that the deadline could not be retroactively extended). The petition for judicial review should be dismissed.

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

The petition for judicial review fails on the merits in any event. The Indiana Code requires the Bureau to collect information about applicants' "gender" and then issue credentials stating their "gender." Ind. Code §§ 9-24-9-2(a), 9-24-11-5(a). Although the term "gender" may refer to grammatical, social, or cultural constructs, such as someone's "identity as female or male or as neither," it may also refer to "[e]ither of [the] two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs"—*i.e.*, "sex." *The American Heritage Dictionary* (5th ed. 2022); *see, e.g.*, *The American Heritage College Dictionary* 577 (4th ed. 2002) (similar); *Merriam-Webster's Dictionary* (online ed.) (defining "gender" to include "sex"); *Merriam-Webster's College Dictionary* 484 (10th ed. 2000) (same).

Using the term "gender" to "mean[] sex—male or female—based on biology" is common in law. *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 n.20 (3d Cir. 2008); *see,*

e.g., *Black's Law Dictionary* 1583 (10th ed. 2014) (equating "sex" with "gender"). For example, both federal and state courts often use the term "gender" interchangeably with "sex" in contexts that leave no doubt the courts are referring to the biological divisions of male and female. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 58, 137 S. Ct. 1678, 1689 (2017) (using both "gender" and "sex" in discussing legislation distinguishing between "mothers" and "fathers"); *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (using "gender" and "sex" to discuss "enduring" "[p]hysical differences between men and women"); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (using "gender" in discussing differences between "the sexes" when it comes to the "consequences of sexual activity," such as pregnancy); *C.T. v. State*, 939 N.E.2d 626, 628 (Ind. Ct. App. 2010) (using "gender" and "sex" in discussing differences between male and female "anatomies" in the context of public nudity).

To determine whether "gender" refers to the biological characteristic of sex or a more nebulous psychological self-understanding, "it is necessary to consider . . . context." *Carter v. Carolina Tobacco Co.*, 873 N.E.2d 611, 626 (Ind. Ct. App. 2007) (quoting *United States v. Raynor*, 302 U.S. 540, 547–48 (1938)). And here context shows that "gender" refers to the biological characteristic of being male or female. Critically, Title 9 of the Indiana Code uses "gender" interchangeably with "sex." It requires citations for traffic violations to list a driver's "sex," along with other information that the Bureau is required to record on a driver's license (*e.g.*, age, date of birth, height, weight). Ind. Code § 9-30-3-6(b). Similarly, Title 9 requires certificates sent to the Bureau with the results of refused or failed alcohol tests to list the driver's

"[s]ex" and other identifying information appearing on a license. *Id.* § 9-30-6-16. Those provisions show that Title 9 treats "gender" and "sex" as synonymous.

In fact, there is no indication that Title 9 treats "gender" as referring to how someone self-identifies. Whereas Title 9 requires license holders to apply for updated credentials whenever their "name" or "address" changes, it makes no provision to changes to gender. Ind. Code § 9-24-13-4. The absence of any statutory procedure for changing "gender" suggests that Title 9 views gender as an immutable, biological characteristic rather than a self-identification that may change over time.

Statutory history points the same direction. For decades, Indiana law required the Bureau to obtain information about an applicant's "sex" and then describe a license holder accordingly. 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 34, 38. In 2007, the Indiana General Assembly updated the statute's terminology to match 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. The subchapter of federal code in which the REAL ID Act is codified, however, 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). So the 2007 update simply reinforces that "gender" in Indiana Code § 9-24-11-5(a) refers to sex.

Interpreting "gender" to mean "sex" furthers Title 9's purpose as well. A principal purpose of recording information required by Indiana Code § 9-24-11-5(a) is to

help identify drivers. Recording a driver's sex furthers that purpose because sex can be objectively verified through visual observation or chromosomal tests. By contrast, there is no objective means of verifying an "internal and inherent sense" that may be different from a driver's biological characteristics. App. II 42.

C. The trial court erred in deeming the Bureau's adherence to statutory requirements contrary to law and arbitrary

In pronouncing the Bureau's actions "contrary to law" and "arbitrary," App. II 30, the trial court erred. The court declared that the term "gender" in Indiana Code § 9-24-11-5(a) refers to "'gender identity' as opposed to a male/female binary classification typically associated with biological 'sex,'" invoking "the Merriam Webster definition of gender." App. II 31. Even the court's preferred dictionary, however, lists "sex" as a possible definition of "gender." *See Merriam-Webster's Dictionary* (online ed.); *Merriam-Webster's College Dictionary* 484 (10th ed. 2000). And other dictionaries agree. *See The American Heritage Dictionary* (5th ed. 2022); *The American Heritage College Dictionary* 577 (4th ed. 2002); *Black's Law Dictionary* 1583 (10th ed. 2014). Yet the court offered no reason for preferring one definition of "gender" over other possible definitions. It ignored critical context and statutory history demonstrating that "gender" refers to a biological characteristic rather than gender identity.

The trial court's reasoning demonstrates why no alternative reading of the statute is possible. According to the trial court, applicants may "self-defin[e]" their gender and demand credentials describing their gender as "X," *i.e.*, "Not Specified," App. II 30–31, 34; App. IV 145. But Indiana Code § 9-24-11-5(a) requires that driver's licenses describe a holder's "gender." Listing gender as "Not Specified" contravenes

the statute's command. Nothing in the statute suggests that applicants may refuse to provide their gender—or may "self-defin[e]" gender any more than they may self-define their legal name, date of birth, or eye color. Allowing applicants with blue eyes to demand driver's licenses describing them as "brown," or male applicants to demand driver's licenses describing them as something else, would defeat a principal statutory purpose—ensuring credentials have information that the State, law enforcement, and other actors can use to identify objectively a license holder.

Without any statutory basis for declaring the Bureau's actions unlawful, the trial court had no basis for declaring them arbitrary either. "[A]n action of an administrative agency is arbitrary and capricious only where there is no reasonable basis for the action." *Indiana Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 380 (Ind. 2017) (quoting *Breitweiser v. Indiana Office of Env't. Adjudication*, 810 N.E.2d 699, 702 (Ind. 2004)). Here, the Bureau had a reasonable basis for denying petitioners' requests for credentials with nonbinary gender markers appearing as "X" or "Not Specified." As the Bureau explained, Indiana Code § 9-24-11-5(a) requires the Bureau to list license holder's "gender"—that is, sex—on Bureau-issued credentials. App. II 66. The Bureau had no authority to do otherwise. *See Indiana Off. of Util. Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266, 268–69 (Ind. 2022); *Etzler v. Indiana Dep't of Revenue*, 43 N.E.3d 250, 256 (Ind. Ct. App. 2015).

The trial court posited that the Bureau departed from 140 Indiana Administrative Code 7-1.1-3(d)(3) in denying petitioners' applications. App. II 30. That is immaterial. To the extent that a statute and regulation conflict, the statute controls.

See Pierce v. State Dep't of Corr., 885 N.E.2d 77, 89 (Ind. Ct. App. 2008). There is, however, no conflict here. The cited regulation provides:

> To show proof of the applicant's gender change, the applicant must submit one (1) of the following documents:
>
> (i) A certified amended birth certificate
>
> (ii) A physician's signed and dated statement that "(insert name) successfully underwent all treatment necessary to permanently change (insert applicant's name) gender from (insert prior gender) to (insert new gender)."

140 Ind. Admin. Code 7-1.1-3(d)(3)(C). As the administrative law judge observed, the "rule lays out what must be submitted to support an amendment for a change of gender, [but] it does not require the BMV to use a nonbinary gender marker on driver's licenses." App. II 164. To the contrary, the regulation contemplates that gender is binary. It requires documentation of a change "from" one gender "to" the other.

Nor does the regulation's mention of "amended birth certificates" imply that applicants may "self-defin[e]" gender. App. II 30. The opposite is true. 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 trial court assumed that courts nonetheless may authorize a "nonbinary gender designation on an amended birth certificate." App. II 30–31. As this Court recently held, however, courts have no "authority to grant" such relief. *In re K.G.*, 200 N.E.3d 475, 478–49 (Ind. Ct. App. 2022), *transfer denied*, 209 N.E.3d 1179 (Ind. 2023); *see In re O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022) (opinion of Altice, J.) (holding courts do not have "the authority to order a change of a gender marker on a birth certificate"), *transfer denied*, 209 N.E.3d 1178 (Ind. 2023); *O.J.G.S.*,

187 N.E.3d at 330 (Bailey, J., concurring) (agreeing that courts do not have "authority to order . . . [a] change [to] the gender marker on a birth certificate"). And while a few decisions have held that Indiana Code § 16-37-2-10—a statute addressing paternity designations—permits changes to birth certificates, "a plain reading of the text . . . reveals that the statute has nothing to do with amending a birth certificate" to reflect changes to gender identity. *K.G.*, 200 N.E.3d at 478–49.

At bottom, the trial court's decision rests on the assumption that applicants may "self-defin[e]" gender. App. II 30. Neither the Indiana Code nor Bureau regulations, however, authorize self-definition. It would defeat the purpose of credentials to allow holders to define identifying characteristics however they wish. The Bureau reasonably declined to issue credentials listing gender as "X" or "Not Specified."

II. The Bureau Was Not Required To Conduct a Rulemaking Before Denying Plaintiffs' Applications for Amended Credentials

The trial court further erred in holding that the Bureau was required to conduct a rulemaking before denying plaintiffs' applications for credentials with "X" or nonbinary gender markers. When the Bureau denied plaintiffs' applications, it sent them letters informing them of the denials. The denials stated that, "[b]ased on . . . [the] Opinion of the Attorney General, the BMV hereby formally denies your application for your Indiana credential to bear a nonbinary gender marker." App. II 82; *see* App. II 66 ("Due to this Opinion, the BMV denies your application for your Indiana credential to bear a nonbinary gender marker."). The trial court reasoned that those letters constituted a rulemaking that did not follow the procedures required by the Administrative Rules and Procedures Act (ARPA). App. II 35–36; *see* App. II 31. But

those denials of individual applications for amended credentials do not constitute a rule—a statement of general applicability that applies prospectively to a class with the effect of law. Besides, whatever the letters' status, plaintiffs cannot invoke a putative procedural defect to obtain credentials the Bureau cannot legally issue.

A. The Bureau's denials of individual applications do not constitute a "rule" with the effect of law

ARPA sets forth procedural requirements for rulemaking. Ind. Code § 4-22-2-13(a). Under ARPA, a rule is 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." *Id.* § 4-22-2-3(b). The denials letters here do not meet that definition.

First, the denial letters are not prospective statements of "general applicability." As this Court has explained, a rule "operate[s] upon a class of individuals or situations" and "looks to the future." *Blinzinger v. Americana Healthcare Corp.*, 466 N.E.2d 1371, 1375 (Ind. Ct. App. 1984). By contrast, an "adjudication operates upon a particular individual or circumstance" and "operates retrospectively upon events which occurred in the past." *Id.*; *see Hamilton Se. Utilities, Inc. v. Indiana Util. Regul. Comm'n*, 135 N.E.3d 902, 913 (Ind. Ct. App. 2019).

In this case, the denial letters "operate[d] retrospectively" upon "individual[s]." Each denial letter states that the Bureau denies "*your* application" for "*your* Indiana credential to bear a nonbinary gender marker." App. II 62, 82 (emphasis added). It is thus "apparent from the face" of the letters that they "appl[y] only to" plaintiffs and to past events, rendering them adjudications rather than rulemakings. *Hamilton*, 135

N.E.3d at 913. The trial court identified no language in the denial letters supporting its characterization that those letters announce a new policy, effective "August 1, 2020," applicable to a "class" of persons. App. II 36.

Second, the denial letters do not create a new policy with "the effect of law." As the Indiana Supreme Court has explained, a policy "carries the effect of law when it prescribes binding standards of conduct for persons subject to agency authority." *Ward v. Carter*, 90 N.E.3d 660, 665 (Ind. 2018). Put another way, a rule "requires citizens to alter their behavior." *Id.* By contrast, "internal policies and procedures that bind [agency] personnel and no one else" do not constitute administrative rules and "are exempt from ARPA's rulemaking strictures." *Id.* at 666; *see Conquest v. State Employee's Appeals Comm'n*, 565 N.E.2d 1086, 1088 (Ind. Ct. App. 1991).

The denial letters here do not "prescribe[] binding standards of conduct" or require "citizens to alter their behavior." They announced the Bureau's decision that it will not issue plaintiffs credentials with nonbinary gender markers, but that announcement did not require plaintiffs to alter their conduct. Similarly, any general policy against issuing credentials with nonbinary gender markers requires only agency personnel to act differently. It does not alter the documentation requirements or require applicants to alter their primary conduct in any way. As the Bureau explained, if applicants "still want to pursue the 'X'" credential, it "will [still] take that paperwork." App. IV 136 (31:1–7). It simply will not issue credentials with an "X."

That distinguishes this case from *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005). In *Villegas*, this Court considered an announcement that the Bureau

would require "applicants for Indiana driver's licenses, permits, and indemnification cards . . . to present certain documentation providing their identity before obtaining such cards." *Id.* at 601. The Court deemed that announcement a rule because it "appl[ied] prospectively" to "all applicants" and would alter what documentation they must present to obtain identification cards. *Id.* at 609–10. Here, by contrast, the denial letters concern past applications from individual applicants and do not require those applicants to change their primary conduct.

The trial court's contrary assertion makes no sense. The trial court conceded that the Bureau's May 2019 decision to start issuing credentials with nonbinary gender markers did not constitute a rule. According to the trial court, that decision affected only the Bureau's "internal protocol" and "did not change the underlying administrative rule which dictated collection of . . . documentation." App. II 35. That observation applies with equal force here. If the Bureau's decision to start issuing credentials with nonbinary gender markers did not have the effect of law, then neither did its decision to stop issuing those credentials. The trial court erred in concluding that the Bureau violated ARPA's procedural requirements for rulemaking.

B. Any procedural defect does not entitle plaintiffs to credentials that the Bureau cannot lawfully issue

Any procedural defects do not entitle plaintiffs to credentials with nonbinary gender markers in any event. Where a rulemaking action "does not conform" to ARPA's procedural requirements, any resulting rule "does not have the effect of law." Ind. Code § 4-22-2-44. But that consequence does not mean the agency can then act beyond its statutory authority. To the contrary, "an administrative agency has only

those powers conferred on it by the legislature." *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). It has "no power" to act contrary to governing statutes. *Id.* That principle forecloses the relief granted here. As discussed above, the Bureau's governing statutes do not authorize it to issue credentials bearing "X" gender markers. *See* pp. 25–28, *supra*. The Bureau thus cannot issue plaintiff's credentials with "X" gender markers even if any generally applicable policy it adopted lacks the effect of law. The Indiana Code bars the relief plaintiffs seek.

The trial court's conclusion that the Bureau needed to conduct a rulemaking to stop issuing credentials with nonbinary gender markers is ironic. When the Bureau started issuing such credentials in early 2019, it did not conduct a rulemaking. It simply announced that it would start doing so. *See* App. IV 145–146. By the trial court's logic, that announcement should constitute an invalid rulemaking as well. But the trial court permitted plaintiffs to invoke the Bureau's brief foray into issuing credentials with nonbinary gender markers to demand that it continue to do so. That makes no sense. Either both actions violate ARPA or neither does.

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

The trial court further erred in holding that the Fourteenth Amendment's Equal Protection Clause requires the Bureau to issue driver's licenses with a nonbinary gender marker. App. II 31, 36–37. As even the trial court recognized, the Bureau's description of a person in its own records and on a state-issued credential is government speech. The Equal Protection Clause, however, does not apply to government speech about individuals. It is concerned only with disparate treatment.

Even if the Equal Protection Clause applied, it would not require the Bureau to issue nonbinary credentials. Plaintiffs here complain that recording their sex on driver's licenses adversely affects nonbinary persons. But nonbinary status is not a protected characteristic that triggers heightened scrutiny under the Equal Protection Clause. And accurately recording applicants' sex furthers important state interests in maintaining consistent state records and identifying license holders.

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

The Equal Protection Clause forbids States from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV § 1. As the Clause's focus on "protection" connotes, it is concerned with "difference[s] in treatment"—not with state descriptions used for state recordkeeping and identification purposes. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *see United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (explaining a court must "[f]ocus[] on the differential treatment"); *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) ("[T]he gravamen of an equal protection claim is differential governmental treatment, not differential governmental messaging."). Without more, "[c]lassification is not discrimination." *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941).

That principle takes on added force when it comes to government speech. As the U.S. Supreme Court has held, a "government entity has the right to speak for itself," "to say what it wishes," and "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (cleaned up). Government entities could not "function if [they] lacked this freedom." *Id.* at 468. "It is the

very business of government to favor and disfavor points of view." *Id.* (cleaned up). Federal appellate courts thus have consistently held that "the Equal Protection Clause does not apply to government speech." *Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 160–61 (3d Cir. 2019) (collecting cases).

That principle disposes of the equal-protection claim here. Plaintiffs object to how BMV describes them on driver's licenses. As the trial court held, however, "a driver's license is government speech." App. II 26. A driver's license is a state-issued credential "used for government purposes, providing a unique means to identify the holder for administrative purposes"; is "closely identified in the public mind with the [S]tate"; and is tightly controlled by the State, which determines by statute who may obtain a license and what information about them is displayed. *Id.*; *see Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1209 (Ind. 2015) (holding that even personalized license plates "are government speech"). As a result, the "Equal Protection Clause does not apply." *Fields*, 936 F.3d at 161.

The trial court's assertion that a "nonbinary" applicant "is treated differently" from other applicants, App. II 37, confuses speech with conduct. There is no allegation here that the Bureau refuses to issue licenses to nonbinary applicants or affords them fewer driving privileges. Rather, plaintiffs' complaint concerns how the Bureau identifies them in its records and on a driver's license. Plaintiffs have no more right to object to how the Bureau describes them on a driver's license than a fleeing suspect has a right to object to a police description of him over the radio. When it comes to the Bureau's descriptions of height, weight, or gender on state credentials used for

state identification and administrative purposes, the Bureau is "entitled to say what it wishes." *Summum*, 555 U.S. at 467–68 (cleaned up). The Equal Protection Clause does not require the Bureau to adopt applicants' preferred descriptions.

B. Classifications affecting nonbinary persons do not trigger heightened scrutiny under the Equal Protection Clause

Even if the Equal Protection Clause applies to how the Bureau describes a driver on a state-issued credential, only rational-basis review would apply. Plaintiffs have alleged that the Bureau treats them differently from other applicants "solely" because they identify as "nonbinary." App. II 54; *see id.* ("But for Plaintiffs' nonbinary gender, their IDs would be amended."). Neither the U.S. Supreme Court nor Indiana Supreme Court has recognized nonbinary status as a protected characteristic that triggers heightened scrutiny. The Bureau's policy therefore must be afforded a "strong presumption of validity" and "'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Heller v. Doe by Doe*, 509 U.S. 312, 319–20 (1993) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)).

1. The trial court erroneously equated nonbinary status with sex

Although the trial court identified no basis for treating nonbinary status as a protected characteristic, it applied "intermediate scrutiny" nonetheless. App. II 36. The court equated alleged discrimination based on nonbinary status with "gender" discrimination. *Id.* But that approach defies binding precedent. In the equal-protection context, the U.S. Supreme Court has held that discrimination based on "sex"

(sometimes loosely referred to as "gender") triggers heightened scrutiny. *Reed v. Reed*, 404 U.S. 71, 76 (1971). But the Court has also made clear that "sex" (or "gender") does not refer to a person's inner sense of being a man, a woman, or something else, but rather a binary, biological characteristic.

The U.S. Supreme Court's decisions consistently speak of sex as binary, explaining sex-based classifications distinguish "between men and women," *Virginia*, 518 U.S. at 533, or elevate "members of either sex over members of the other," *Reed*, 404 U.S. at 76. Its decisions consistently describe sex as biological as well, observing there are "basic biological differences . . . between men and women." *Nguyen v. INS*, 533 U.S. 53, 73 (2001); *see Virginia*, 518 U.S. at 533 ("[p]hysical differences between men and women . . . are enduring"); *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469–71 (1981) ("the sexes are not similarly situated in certain situations," such as "sexual intercourse" and "pregnan[cy]"). And this Court has embraced those descriptions. *See C.T. v. State*, 939 N.E.2d 626, 628–29 (Ind. Ct. App. 2010). Those decisions foreclose equating nonbinary status with sex.

Given the U.S. Supreme Court's understanding of sex as binary and biological, the trial court erred in applying heightened scrutiny. Plaintiffs here do not allege that the Bureau treats male applicants worse than female ones or has different processes for males and females. No one disputes that the Bureau requires all applicants—both male and female—to be identified as an "M" or "F" on their driver's licenses. *See* App. II 35. Similarly, it is common ground that all applicants requesting a change of the gender marker to select from "M" or "F" regardless of their sex. *See id.* According to

plaintiffs, BMV's policies affect them differently from other applicants "solely" because they identify as "nonbinary." App. II 54; *see id.* ("But for Plaintiffs' nonbinary gender, their IDs would be amended."). That allegation establishes their claim rests upon alleged discrimination based on nonbinary status, not sex.

That nonbinary applicants include members of both sexes reinforces that conclusion. The U.S. Supreme Court has held that a policy does not discriminate based on sex where the policy "divides" persons "into two groups" and at least one group "includes members of both sexes." *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974). Similarly, plaintiffs here cannot say the Bureau discriminates against them based on their sex because *both* binary *and* nonbinary applicants include "members of both sexes." *Id.* There is thus a "lack of identity"—no causal connection—between plaintiffs' sex and the alleged discrimination. *Id.* The Bureau will not issue a driver's license with an "X" regardless of an applicant's sex. At bottom, this case is about alleged discrimination based on applicants' nonbinary status rather than their sex.

2. Alleged discrimination based on nonbinary status triggers rational-basis review

Plaintiffs' alleged discrimination based on nonbinary status does not trigger heightened scrutiny. The Bureau's challenged policy does not facially discriminate against nonbinary applicants or apply *only* to them. Both the male and female categories that the Bureau recognizes "inherently contain" nonbinary persons, which means plaintiffs cannot show that the policy targets nonbinary persons. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (en banc) (citing *Geduldig*, 417 U.S. at 497 n.20). Plaintiffs have at most a disparate-impact

theory. Hence, for heightened scrutiny to apply, plaintiffs must show that the Bureau adopted its policy with an invidious intent to harm a protected class. *See Personnel Admin. of Mass. v. Feeney*, 442 U.S. 256, 272–74 (1979); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). They cannot do so.

For one thing, there is no evidence of invidious intent towards nonbinary persons. In denying plaintiffs' applications for nonbinary credentials, the Bureau explained that "the BMV does not have the statutory or regulatory authority to issue Indiana credentials bearing a nonbinary gender marker." App. II 66, 82. The Bureau's avowed purpose was to comply with state law. For another, nonbinary persons are not a suspect or quasi-suspect class. The U.S. Supreme Court has recognized only sex, *Craig v. Boren*, 429 U.S. 190, 197 (1976), and illegitimacy, *Mathews v. Lucas*, 427 U.S. 495, 505–06 (1976), as quasi-suspect classes. It has repeatedly declined to recognize others, including sexual orientation. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (sexual orientation); *Bowen v. Gilliard*, 483 U.S. 587, 601–02 (1987) (family units); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986) (close relatives); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441–42 (1985) (mental disability); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–13 (1976) (age).

Nonbinary persons, moreover, do not share similar attributes to persons in protected classes. Whereas race and sex are obvious, "immutable characteristic[s] determined solely by the accident of birth," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973), plaintiffs themselves describe their nonbinary identity as an "internal and inherent sense," App. II Compl. 42. Such a subjective, inner sense is not obvious and

may change. Plaintiffs also have not shown nonbinary persons have long been subjected to discriminatory treatment for no legitimate reason and to be without the "ability to attract" political support. *City of Cleburne*, 473 U.S. at 440–41, 445. In fact, the President has issued multiple orders to advance their rights. *See, e.g.*, Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021); Exec. Order No. 14,020, 86 Fed. Reg. 13,797 (Mar. 8, 2021); Exec. Order No. 14,021, 86 Fed. Reg. 13,803 (Mar. 8, 2021).

Applying heightened scrutiny to the Bureau's understanding of sex (or gender) is "difficult" to reconcile with "the purpose behind" heightened scrutiny as well. *Jana-Rock Constr., Inc. v. N.Y. Dep't of Econ. Dev.*, 438 F.3d 195, 210 (2d Cir. 2006). Heightened scrutiny exists to ensure a State does "not make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women." *Michael M.*, 450 U.S. at 469 (cleaned up). Its purpose is not to ensure that a State correctly identifies whether someone is a man or women in every instance or correctly describes someone's sex "in every particular." *Jana-Rock*, 438 F.3d at 210; *see Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 (D. Haw. 1986). The trial court, however, invokes heightened scrutiny precisely for that purpose.

C. Important interests justify recording sex on driver's licenses

Important state interests justify recording sex on driver's licenses in any event. On rational-basis review, a policy has a "strong presumption of validity." *Beach Comm'ncs*, 508 U.S. at 314. It must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"—a principle that applies with "added force" where, as here, a classification serves to "defin[e] the

class of persons subject to" a requirement. *Id.* at 313, 315. The Bureau's policy easily passes rational-basis review. The legislature could reasonably think that recording the objective, immutable characteristic of sex better advances state interests in promoting the accurate identification of license holders than recording a person's gender identity—a subjective self-perception that may change.

Other interests justify recording sex as well. As noted above, Indiana law requires traffic citations and reports about failed or refused alcohol tests to list a driver's "sex." Ind. Code §§ 9-30-3-6(b), 9-30-3-16. Similarly, federal law requires participating States to report the "sex" of persons refused driver's licenses. 49 U.S.C. § 30304(b)(A). The legislature could rationally conclude that recording sex on Bureau-issued credentials promotes compliance with those requirements. Similarly, the legislature could reasonably conclude that requiring the Bureau to list a driver's sex will ensure consistency in state records since state law requires birth certificates to list "sex" as well. Ind. Code § 16-37-2-9(a)(2). And finally the legislature could rationally conclude that maintaining information about sex—a stable, binary characteristic—better promotes administrative efficiency than maintaining information about the innumerable and changeable gender identities persons may espouse.

The trial court rejected arguments that the Bureau's policy rationally relates to any state interest, stating it was irrational to withhold credentials with nonbinary gender markers while recognizing "nonbinary individuals" exist. App. II 37. That misapprehends the State's objectives. The question is not whether some persons identify as nonbinary. It is whether a legislature could think recording sex on a driver's license

promotes a state interest in identification, compliance with other statutory requirements, and administrative convenience. A legislature could. Similarly misplaced is the court's objection that listing a nonbinary person's sex as male (M) or female (F) is inconsistent with the ISDH's practice and a private organization that helps to set standards for driver's licenses nationally. *Id.* As discussed above, the ISDH is required to list a person's sex on birth certificates—not gender identity. *See* pp. 30–31, *supra*. And while it may be rational to follow standards set by organizations absent a contrary state law, it is hardly irrational for the State to set different requirements.

Even if the Court were to apply heightened scrutiny, the policy survives. Heightened scrutiny requires a policy to be "substantially related to the achievement" of an "important governmental objective[]." *Nguyen*, 533 U.S. at 70. Here, the trial court never disputed that the State's interests in accurately identifying persons on state-issued credentials used for identification is important. It merely objected that requiring nonbinary persons to "make a designation that is inconsistent" with their internal sense of identity produces credentials that are inaccurate. App. II 37. But that objection assumes the State is attempting to record gender identity rather than the biological characteristic of sex. Moreover, even if the State's objective were to record gender identity, that would not change the result. The trial court did not dispute that male (M) and female (F) designations are accurate in the vast majority of cases. That is sufficient. Heightened scrutiny does not require a classification to be "capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70.

The trial court also did not dispute that complying with state and federal statutory requirements is important. It assumed that, in both state and federal statutes, "gender" refers to gender identity rather than sex. App. II 30; *see* App. II 37. As explained above, however, that assumption is wrong. *See* pp. 25–28, *supra*. And the trial court offered no other reason why the Bureau's policy would fail to promote an interest in complying with the law. Instead, the trial court posited a conflict between refusing to issue credentials with an "X" and what would "best serv[e]" the Bureau's customers and accord with standards set by a private organization. App. II 37. Heightened scrutiny, however, requires a court to examine whether a classification furthers the State's "proffered" objective—not whether the classification promotes other possible objectives, *Virginia*, 518 U.S. at 533. It is not the responsibility of courts but policymakers to decide which objectives the State should pursue.

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

The trial court went even further astray in holding that the Fourteenth Amendment protects an unwritten right to obtain state-issued credentials with nonbinary designations. To determine whether the Fourteenth Amendment confers an unwritten right, a court must "careful[ly] describ[e]" it and ask whether "objectiv[e]" evidence shows it 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) (citation omitted). That careful, objective analysis is essential to "guard against the natural human tendency to confuse what the

Amendment protects with our own ardent views about the liberty that Americans should enjoy." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2247 (2022).

In this case, plaintiffs seek to obtain state-issued credentials with nonbinary gender designations. But neither they nor the trial court have identified any deeply rooted, historically recognized right to obtain driver's licenses that describes the license holder's gender with an "X." As the Indiana Supreme Court has held, there is "no fundamental right to drive." *Mitchell v. State*, 659 N.E.2d 112, 116 (Ind. 1995); *see Leone v. Comm'r, Indiana Bureau of Motor Vehicles*, 933 N.E.2d 1244, 1257 (Ind. 2010); *Walker v. State*, 661 N.E.2d 869, 872 (Ind. Ct. App. 1996). And since there is no right to obtain a driver's license, there cannot be a fundamental right to determine how one's name, gender, or any other characteristic appears on a license. *See Leone*, 933 N.E.2d at 1257 (applying only rational-basis scrutiny to a policy requiring the name listed on a driver's license to match Social Security records).

The trial court theorized that the Bureau's refusal to issue credentials with a nonbinary designation "may misidentify a nonbinary person's gender and reveal private medical information," violating a "right to informational privacy." App. II 38. There are multiple problems with that theory. First, in describing a putative right, courts must "avoid[] sweeping abstractions and generalities." *Doe v. City of Lafayette*, 377 F.3d 757, 769 (7th Cir. 2004) (en banc). For example, the U.S. Supreme Court has rejected efforts to frame a "right to abortion" as a "right to autonomy" or "right of personal privacy." *Dobbs*, 142 S. Ct. at 2258, 2267. Similarly, it has rejected attempts to portray a "right to commit suicide" with a physician's assistance as a "right to die,"

explaining that the right must be defined "more precise[ly]." *Glucksberg*, 521 U.S. at 723. The question here thus is not whether there is a general right to informational privacy, but rather the more specific right to list one's gender on a state-issued driver's license as "X" rather than male or female. There is not.

Second, the "Constitution does not encompass a general right to nondisclosure of private information." *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (citation omitted); *see Nat'l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 159–66 (2011) (Scalia, J., concurring). U.S. Supreme Court precedent demands extensive, "objectiv[e]" historical evidence of unwritten rights. *Glucksberg*, 521 U.S. at 720–21. That evidence must be on par with the evidence for "rights . . . expressly set out in the Bill of Rights." *Dobbs*, 142 S. Ct. at 2247. But the trial court identified nothing comparable to the rich historical tradition supporting expressly enumerated rights. It cited only two decisions of recent vintage, which dealt with matters "very, very far afield" from how gender is listed on driver's licenses. *Id.* at 2268; *see Denius v. Dunlap*, 209 F.3d 944, 956, 958 (7th Cir. 2000) (addressing "medical records," medical communications, and "confidential financial information"); *In re Name Change of M.E.B.*, 126 N.E.3d 932 (Ind. Ct. App. 2019) (addressing whether sealing records for a name-change petition was proper under Administrative Rule 9).

Third, embracing the trial court's reasoning would produce absurdities. The trial court identified no principled reason that confines its "informational privacy" right to nonbinary persons or to gender identity. What principle prevents binary persons from asserting that their gender—or other potentially sensitive information,

such as their weight, date of birth, address, or Social Security status—should be kept private? The trial court did not say. Nor did the trial court offer a coherent reason for ordering the Bureau to issue credentials with an "X," which *reveal* plaintiffs' status as nonbinary persons. It makes no sense to issue credentials that trumpet plaintiffs' nonbinary identities if those identities constitute sensitive, private information.

Just as challenges to how the Bureau lists a license holder's name are subject to rational-basis review, *see Leone*, 933 N.E.2d at 1257, so are challenges to how the Bureau describes a license holder's gender. And as discussed above, listing a license holder's sex furthers important state interests in accurate identification and promoting compliance with state law. *See* pp. 42–45, *supra*. The trial court erred in concluding that the State has "no rational" basis for listing sex on credentials. App. II 38.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2023, I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on July 12, 2023, the foregoing document was served upon the following persons using the IEFS:

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