IN THE INDIANA COURT OF APPEALS

Case No. 23A-PL-00899

INDIANA BUREAU OF MOTOR VEHICLES, et al., Appelants v. FITZ SIMMONS, et al., Appellees	Appeal from the Monroe Circuit Court VI Trial Court Case No. 53C06-2106-PL-1347 The Honorable Holly M. Harvey, Judge

BRIEF OF APPELLEES

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STATEMENT OF THE ISSUES

State law requires that "gender" appear on Bureau of Motor Vehicles (BMV)-issued IDs. Since 2009, the BMV has maintained regulations governing what proof is required to change the gender marker on an ID, and under those regulations it issued IDs recognizing nonbinary persons' gender (using an "X"). But – without changing its regulation – BMV began refusing to recognize a nonbinary persons' gender. Appellees, a group of nonbinary Hoosiers, sued for declaratory relief and sought judicial review of administrative decisions denying them IDs with nonbinary gender markers. The trial court granted the relief they sought. This appeal presents these questions:

1. Does the BMV's statute requiring gender markers on IDs permit nonbinary designations?
2. After determining that statute and regulation allows persons to change their gender marker to nonbinary, can the BMV change its policy to limit gender to a male/female binary without amending its regulation?
3. Does the BMV's policy of refusing to issue IDs with nonbinary gender markers violate the Equal Protection and Due Process rights of nonbinary persons?
4. Was the administrative decision denying individual applications for IDs with a nonbinary gender marker arbitrary, capricious, and not in accordance with law?

STATEMENT OF THE CASE

In 2021, thirteen nonbinary Hoosiers (collectively, Simmons) filed a complaint for declaratory and injunctive relief against the BMV and the BMV Commissioner in his individual capacity. It alleged that the BMV's policy of refusing to issue licenses and identification cards (IDs) with nonbinary gender markers was void for failing to comply with the Indiana Administrative Rules and Procedures Act and violated the parties' First and Fourteenth Amendments rights. Appellant's App. Vol. II pp. 53-57[1]. Simmons asked that the BMV, its officers, and agents be permanently enjoined from enforcing the binary-only policy. Simmons also asked that the BMV be ordered to process applications for nonbinary IDs and issue IDs bearing an "X" gender marker in accordance with its existing regulations. *Id.* at 57.

On February 2, 2022, the trial court dismissed Simmons' First Amendment claim but otherwise allowed the case to proceed. App. Vol. II pp. 19-27. In granting summary judgment for Simmons, the trial court found that nonbinary gender markers may be issued under existing law and that the BMV's adoption of a policy prohibiting nonbinary designations ("binary-only policy") was a rule, as defined by the Administrative Rules and Procedures Act. *Id.* at 34 and 36. Because this policy was a rule that did not go through formal rulemaking, it was void. *Id.*

[1] All references to the Appendix in this brief are to the Appendices submitted by the BMV.

The trial court also found for Simmons on their Constitutional claims. The trial court concluded that gender is a quasi-suspect class, which triggers intermediate scrutiny under the Equal Protection clause and the BMV's stated interest in the accuracy of its credentials and its different treating of persons seeking a nonbinary gender was neither an important objective nor a rational basis for refusing to issue IDs with nonbinary gender markers. *Id*. at 36. Therefore, the trial court held that the BMV violated Simmons' Fourteenth Amendment right to Equal Protection. *Id.* at 31 and 39. The trial court further determined that the BMV's binary-only policy violated Simmons' fundamental liberty interest in protecting their private medical information. *Id.* at 38-39.

As a result of the rulemaking and constitutional violations, the court enjoined the BMV from enforcing its policy of refusing nonbinary gender designation on BMV credentials. *Id.*

In the same litigation, six of the Appellees (collectively, Applicants) also petitioned for judicial review of the administrative law judge's February 21, 2021, order upholding the denial of their individual applications for IDs with nonbinary gender markers.[2] App. Vol. II pp. 51-53. These Applicants alleged that the individual denials were arbitrary and capricious, contrary to law for violating the Administrative Orders and Procedures Act and violated their constitutional rights. They requested the agency

[2] One member of this group was later dismissed from the case. App. Vol. p. 40.

action be set aside and the action be remanded to the BMV to approve the Applicant's individual applications. *Id.*; *Id.* at 57.

The BMV sought to dismiss judicial review, alleging these Applicants waived their claims for failing to timely file their petition. *Id.* at 90-114. The trial court found that, although Applicants failed to exhaust their administrative remedies because they didn't object to the ALJ's recommended order, they were excused from exhausting administrative remedies because doing so would have been futile. *Id.* at 21-22. After the trial court denied the BMV's Motion to Dismiss in this regard, the BMV asked that the judicial review and declaratory actions be bifurcated. *Id.* at 12. The trial court denied this request but ordered the parties to file their judicial review briefs before the close of discovery and ruled on the Petition for Judicial Review separately from the Motions for Summary Judgment. *Id.* at 12; 28-39.

In granting the Petition for Judicial Review, the trial court found the individual denials arbitrary and not in accordance with law because the BMV failed to follow its existing gender change regulations. App. Vol. II p. 30. The trial court also found the BMV's interpretation of the term "gender" to equate with biological sex to be outside the agency's expertise and arbitrary because it did not follow the rules of statutory construction. *Id.* at 31. The trial court incorporated its rulemaking and constitutional analysis from the Summary Judgment order to further find the agency's actions invalid. *Id.* Finally, the trial court incorporated its Order on Motion to Dismiss and held that

exhaustion of administrative remedies was not required because that would have been futile. *Id.* at 30. As a result of these findings, the trial court remanded the case to the BMV to issue the Applicants' IDs with nonbinary gender markers. *Id.* at 31-32.

The trial court ruled on the petition for judicial review and on summary judgment on December 29, 2022. It denied the BMV's Motion to Correct its Summary Judgment Order and corrected a technical error in the Order on the Petition for Judicial Review on March 26, 2023. *Id.* at 40. The BMV filed its notice of appeal on April 25, 2023.

STATEMENT OF THE FACTS

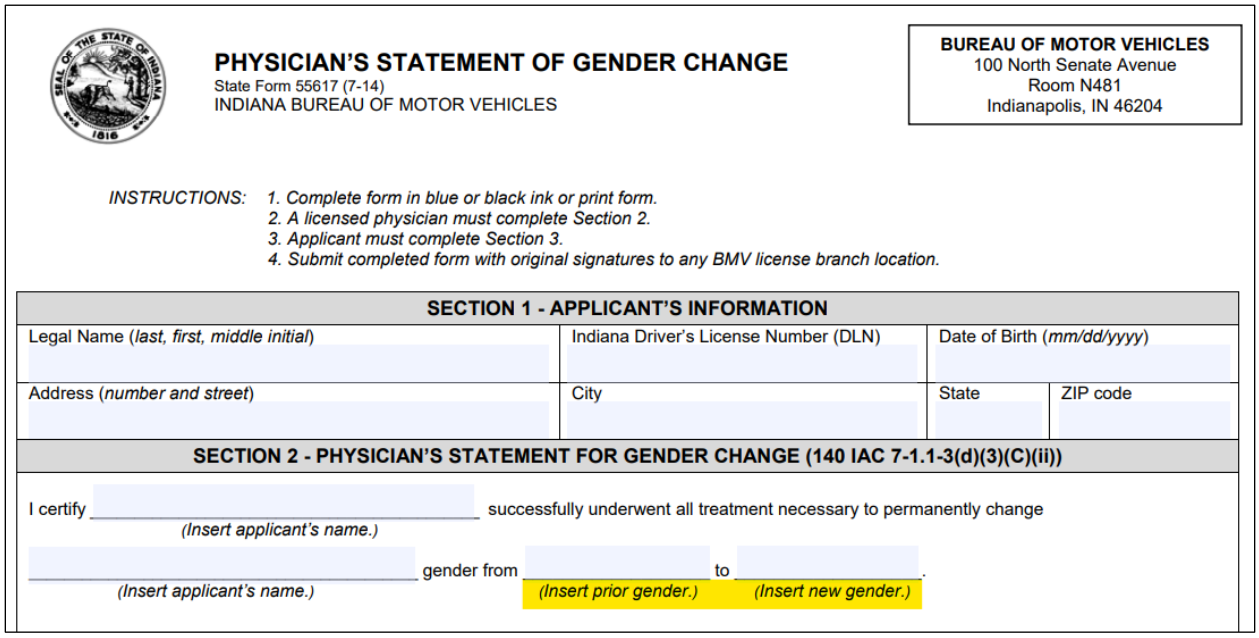
Appellees (collectively, Simmons) are Hoosiers who hold valid identification cards issued by the Indiana Bureau of Motor Vehicles. App. Vol. II p. 41. Simmons' gender is nonbinary, a term used by some people who experience their gender as not falling within the binary categories of man and woman. *Id.* at 42. Nonbinary genders "have been recognized throughout the world for as long as gender has been a conscious identity of humans." *Id*. at 187. Nonbinary genders are recognized by all major medical and mental health associations. *Id*.

Gender Markers on BMV IDs

The BMV is authorized to issue and amend IDs consistent with statutory requirements. Ind. Code § 9-24-9-2(b); I.C. § 9-24-16-2(b). One of the statutory requirements is that "gender," which is not defined in the code, appear on BMV-issued

IDs. I.C. § 9-24-11-5. To carry out its functions to collect and verify information that appear on IDs, the BMV promulgated regulations 140 Ind. Admin. Code 7-1.1-1 through 7-1.1-3.

These regulations allow an ID holder to amend the gender designation on their ID by providing proof of their gender change by submitting an amended birth certificate or physician's statement. 140 I.A.C. 7-1.1-3(d)(3). The state-issued physician's form recites the regulatory language that provides blank spaces for a physician to choose the appropriate gender:



PHYSICIAN'S STATEMENT OF GENDER CHANGE
State Form 55617 (7-14)
INDIANA BUREAU OF MOTOR VEHICLES

BUREAU OF MOTOR VEHICLES
100 North Senate Avenue
Room N481
Indianapolis, IN 46204

INSTRUCTIONS: *1. Complete form in blue or black ink or print form.*
2. A licensed physician must complete Section 2.
3. Applicant must complete Section 3.
4. Submit completed form with original signatures to any BMV license branch location.

SECTION 1 - APPLICANT'S INFORMATION

Legal Name (*last, first, middle initial*)	Indiana Driver's License Number (DLN)	Date of Birth (*mm/dd/yyyy*)	
Address (*number and street*)	City	State	ZIP code

SECTION 2 - PHYSICIAN'S STATEMENT FOR GENDER CHANGE (140 IAC 7-1.1-3(d)(3)(C)(ii))

I certify _____ successfully underwent all treatment necessary to permanently change
(Insert applicant's name.)

_____ gender from _____ to _____.
(Insert applicant's name.) *(Insert prior gender.)* *(Insert new gender.)*

Physician's Statement of Gender Change, State Form 55617-17, available at https://forms.in.gov/Download.aspx?id=11817 (emphasis added). The Indiana Department of Health also issues birth certificates with nonbinary gender markers.

App. Vol. III p. 184. When an applicant provides this proof, the BMV uses the information to update its records and an amended IDs. App. Vol. IV pp. 109-111.

BMV issues IDs with Nonbinary Gender Markers

In late 2018, the BMV decided to begin the system changes needed to offer IDs with nonbinary gender markers based on its regulations then in effect (and still in effect, unamended) if the applicant provided documentation and complied with the regulatory amendment process. App. Vol. IV p. 111. Under BMV regulations, there was no difference between amendments to male, female, or nonbinary because they all required the same documentation and the same application. *Id.* at 112-13. In accordance with national standards, the BMV had nonbinary gender markers displayed as an "X." *Id.* at 111; *Id.* at 145.

The BMV wanted to issue IDs with nonbinary gender markers due in part to the increasingly common use of nonbinary gender markers on federal documents, birth certificates, and IDs from other states. Offering IDs with nonbinary gender markers was intended to maintain consistency, accuracy, and customer service for nonbinary ID holders. *Id.* at 117. Providing an "X" option was compatible with the systems the BMV interacts with, including Court Technology, Secretary of State, Indiana State Police, and Selective Service. *Id.* at 113-114; *Id.* at 141-142. "X" designations also complied with national and international standards established by the Association of American Motor

Vehicle Administrators and the International Civil Avionics Organization. *Id.* at 145. After verifying that "X" credentials could be implemented in all those systems, the BMV issued an internal memorandum that its internal system would allow "a customer's gender to be changed from "M" or "F" to "X" effective May 3, 2019. *Id.* at 113-115; *Id.* at 146.

Based on the availability of IDs with nonbinary gender markers, at various times beginning in or around February 2019, Simmons followed agency regulations to apply for an amended ID with an "X" gender marker by submitting an amended birth certificate and/or physician's statement as proof of gender change and paying the applicable fee. App. Vol. III p.184-185; App. Vol. IV p. 44; App. Vol. II p. 154; *Id.* at 47.

BMV stops issuing IDs with nonbinary gender markers without rulemaking procedures.

Instead of issuing IDs with nonbinary gender markers, the BMV notified some Applicants for nonbinary IDs that it intended to issue amended IDs after the conclusion of rulemaking activity that sought to prescribe a new state form for gender amendment applications. App. Vol. II p. 61-62; see App. Vol. IV p. 149-153.

The proposed rule did not restrict the availability of gender marker amendments or the "X" designation, but instead changed which state agency would issue the form required for gender marker changes. App. Vol. IV p. 149-153. Under the proposed rule, the Health Department, not the BMV, would be the agency responsible for the

physician form referenced in 140 I.A.C. 7-1.1-3(d)(3). *Id.* No changes to the content of the form were proposed. *Id.* And the proposed rule did not alter the range of gender marker options available on IDs. As then-BMV Commissioner Peter Lacy explained, the proposed rule "specifically addresses process; gender marker types are not within the scope [of the rule]" and "as with the current process, the rule is applicable to all Hoosiers and applies to any gender amendments." *Id.* at 156; *Id.* at 132.

But the proposed rule was withdrawn, leaving the current regulations in place. App. Vol. IV p. 22. After the rule was withdrawn, then-Attorney General Curtis Hill issued an advisory opinion about gender markers on BMV IDs. Hill cited to Webster's 1993 dictionary and federal Title VII case law contending that under its plain meaning, "gender" was synonymous with "sex" and "sex" is the biological male or female. *Id.* at 86. Hill maintained the BMV lacked statutory authority to define "gender", and because "gender" meant "biological sex" the BMV could not issue IDs with nonbinary gender markers absent legislative action. App. II pp. 84-87.

Without any change in BMV regulations, in July 2020 the BMV adopted Hill's Advisory Opinion and determined it lacked regulatory or statutory authority to issue credentials bearing a nonbinary gender marker. App. Vol. IV p. 148. As a result, the BMV issued a directive that prohibited its employees from processing any transactions that involved a nonbinary gender marker and directed that "[u]nder this policy, only genders male or female may be offered to customers." *Id.* at 147. The BMV also

communicated the general unavailability of "X" credentials to the public and notified individuals their applications were denied. App. Vol. II p. 66; *Id.* at 154.

Applicants seek administrative review

Five Applicants requested agency review of their individual denials, and their cases were consolidated. Appellants' App. Vol. II p. 154-155. The sole issue before the administrative law judge was a question of law: did the BMV lack authority to deny Applicants' applications to change the gender marker on their credentials to nonbinary? *Id.* at 159. On February 21, 2021, the administrative law judge issued a recommended order granting summary judgment for the BMV and upheld the denials. *Id.* at p. 164. This order advised that a party may seek reconsideration of the order by the BMV within 18 days, and if no reconsideration was sought the order would become final. *Id.* at p. *165.*

SUMMARY OF ARGUMENT

This case is about the unremarkable proposition that the BMV must act in accordance with the plain language of its governing statute and regulations and treat nonbinary Hoosiers like it does all other ID-holders.

The central question before the administrative law judge, trial court and this Court is whether "gender" in I.C. § 9-24-11-5 allows for IDs with nonbinary gender markers. Because the plain meaning of the undefined statutory term "gender" is not limited to the

binary options of male and female, the answer is yes. Because the answer is yes, the BMV's reinterpretation of the statutory term "gender" to prohibit IDs with nonbinary gender markers was unlawful because it unduly limited the statutory language to Simmons' detriment.

Additionally, because the regulation does not prohibit BMV from recognizing nonbinary gender and BMV in fact issued IDs with a nonbinary marker under that very regulation, BMV could not change its policy without formally amending the regulation. Although Simmons would argue that such an amendment is itself unlawful, BMV's failure to change the regulation before changing its application is itself sufficient to support judgment for them under I.C. 4-22-2, the Administrative Rules and Procedures Act.

Moreover, the BMV's refusal to issue IDs with nonbinary gender markers violates Simmons' constitutional guarantees to equal protection and infringes on their fundamental rights to liberty and autonomy.

Finally, denying individual applications for IDs with nonbinary gender markers was arbitrary and capricious and contrary to law in violation of the I.C. 4-21.5-5, the Administrative Orders and Procedures Act. Judicial review of those administrative orders denying gender marker changes was timely because the agency did not issue a final order.

ARGUMENT

Simmons agrees with BMV that all issues in this appeal should be reviewed de novo because they are questions of law.

1.0 Indiana law permits IDs with nonbinary gender markers.

Indiana law permits the issuance of IDs with nonbinary gender markers, which was BMV's practice under existing regulations before it implemented the change at issue in this appeal. State law requires that "gender" appear on BMV IDs. I.C. § 9-24-11-5. Though the term "gender" appears throughout Title 9, it is not defined. *See generally* I.C. § 9-24 *et seq*. Because gender is undefined, its plain, ordinary meaning must be used. I.C. § 1-1-4-1(1); *see E.g., Prewitt v. State*, 878 N.E.2d 184 (Ind. 2007). Courts often resort to dictionaries like Merriam-Webster when evaluating a word's plain, ordinary, or usual meaning. *Rainbow Realty Grp., Inc. v. Carter,* 131 N.E.3d 168, 176 (Ind. 2019).

Dictionaries show that the plain and ordinary meaning of the term "gender" includes genders other than male and female. Dictionaries cited by both parties offer three possible definitions of gender (other than for grammatical purposes)—gender identity, behavioral/cultural traits, and sex. *"Gender," American Heritage Dictionary* (5th ed. 2011); "Gender," *Merriam-Webster Dictionary (online ed.),* https://www.merriam-webster.com/dictionary/gender (last visited Sept. 18, 2023); *see also* "Gender," *Dictionary.com,* https://www.dictionary.com/browse/gender (last visited Sept. 18, 2023).

All these definitions include nonbinary genders. Gender means "a person's internal sense of being male, female, some combination of male and female, or neither male nor female". *E.g., American Heritage Dictionary* (5th ed. 2011); *Merriam-Webster Dictionary* (online ed.), https://www.merriam-webster.com/dictionary/gender%20identity (last visited Sept. 18, 2023). Similarly, sex is not limited to the binary options of male or female. Definitions of sex say that male and female are two common, but not exclusive, sexes. *E.g., "Sex,"* Merriam-Webster Dictionary (online ed.), https://www.merriam-webster.com/dictionary/sex (last visited Sept. 18, 2023); *"Sex," American Heritage Dictionary* (5th ed. 2011).

BMV previously demonstrated that it shared this understanding of gender to include nonbinary genders. The agency's belief that the statute and regulations provide for a nonbinary credential is demonstrated by the failure of its regulation to limit gender to male or female. *E.g.,* App. Vol. IV. pp. 133-134 ("Q Do you also agree that the current regulation does not limit gender options to male or female? A Yeah, we -- specifically to 7-1.1-3, it does not limit); *Id.* at 119 (same).

Understanding gender to include nonbinary gender in the BMV context is also consistent with the State's use of nonbinary gender in other contexts. For instance, nonbinary is one designation available on Indiana birth certificates. App. Vol. III p. 184. A local health officer must make a permanent record of sex on a birth certificate but there is no limit as to what sexes can be recorded, and there is no implication in the

statutory language that those options are bound by a male-female binary. I.C. § 16-37-2-9(a)(2); App. Vol. III p. 184. Nor does I.C. § 16-37-2-10(b), which governs birth certificate amendments, contain any limits about what sex or gender may appear on a certificate.[3]

Scientific and medical organizations similarly understand gender to include nonbinary genders. Nonbinary gender identities are recognized by all major medical and mental health associations as well as by the internationally recognized authority on transgender health care. App. Vol. II p. 187. It would be absurd to assume the legislature intended to legislate away an undisputed scientific fact. *E.g., Peoples Nat'l Bank & Tr. Co. v. Pora*, 212 Ind. 468, 474 (Ind. 1937) (courts should not impute total ignorance to the general assembly). And it would be unjust (and unconstitutional, as discussed below) to interpret a statutory term to exclude a group of people based on their gender. *Helms v. Am. Sec. Co.*, 216 Ind. 1, 5, 22 N.E.2d 822, 824 (1939) (. . . "statutes should be construed in the most beneficial way the language will permit to prevent absurdity, hardship, or injustice. . .") (internal citations omitted).

[3] Though not at issue in this case, the BMV cites a conflict among court of appeals panels to support the position that birth certificates may not be amended. Br. p. 31. This argument is incorrect. Two cases hold there is no *statutory authority* for courts to issue gender marker change orders. Five hold the opposite. In contrast, there is unanimity in this Court that a trial court has inherent, equitable powers to order a gender marker change on a birth certificate. *In re Change of Birth Certificate,* 22 N.E.3d 707 at 709 (Ind. Ct. App. 2014); *In re Change of Gender Identification of A.B.*, 164 N.E.3d 167 (Ind. Ct. App. 2021); *In re O.J.G.S.*, 187 N.E.3d 324 (Ind. Ct. App. 2022) (Mathias, J., dissent), *trans. denied.*

In addition to these Hoosier and scientific foundations, the federal Real ID Act, which mandates gender appear on IDs, also contemplates genders other than male and female. In explaining why it chose to allow states to define gender, the Department of Homeland Security used the phrase "another gender" rather "the other gender" or "male or female." Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272, 5301 (Jan. 29, 2008). Twenty-two states, all of which comply with Real ID, offer IDs with nonbinary gender markers, showing that gender does not "refer to the biological characteristics of being male or female." Movement Advancement Project, *Identity Document Laws and Policies*, *available at* https://www.lgbtmap.org/equality-maps/identity_documents; *c.f.* Br. p. 26.

1.1 The BMV's position ignores plain meaning.

The BMV's position ignores the plain and ordinary meaning of "gender" and instead follows the Attorney General's advisory opinion that the statue does not permit IDs with nonbinary gender markers. App. Vol. II p. 64. This conclusion is based on a flawed syllogism that has no support in usage or law. The BMV reasons that it cannot issue IDs with nonbinary gender markers because "gender" and "sex" are synonyms, "sex" means only "biological sex," and "biological sex" includes only the binary options of male and female. Each of the three steps is wrong.

The first step, that "gender" and "sex" are synonyms, misunderstands basic grammatical concepts. Synonyms are two or more words that have the same or similar meaning. *Merriam-Webster Dictionary* (online ed.), *available at* https://www.merriam-webster.com/dictionary/synonyms. "Sex" is listed as one definition of "gender," but that does not make the terms synonymous. Instead, it illustrates that "gender" is polysemous, i.e., it has more than one meaning.

Second, sex and "biological sex" are not equivalent. No statute makes a definitional connection between "sex" and "biological sex." Nor is there any other evidence that when the legislature chose to use the word "gender" it really meant "biological sex." Moreover, the phrase "biological sex" is not defined by the dictionary or any medical organization. And the phrase does not appear in any Indiana court decision and did not appear in any Indiana statute until 2022. Had the General Assembly intended to use the phrase or mean "biological sex," it would have done so. It did not.

There is also no support for the proposition that "sex" means "biological sex." The plain and ordinary meaning of "sex" includes identity and behavior, in addition to biological, reproductive, or other physical traits. *E.g.*, *American Heritage Dictionary* (5th ed. 2011); *Merriam-Webster Dictionary* (online ed.). As noted above, even where State law has required the use of "sex" in other official State contexts, such as the issuance of birth certificates, it has allowed the use of male, female, *and* nonbinary gender. App. Vol. III p. 184.

As to the third step, there is no support for the proposition that "biological sex" is strictly limited to binary options of male and female or that the General Assembly's understanding is so limited. To the contrary, the General Assembly has indicated that it understands that "sex" is not limited the male/female binary, as evidenced by the enumerated list of intersex conditions in I.C. § 25-1-22-5(b). Intersex conditions, which are natural variations, most obviously refute—and extend beyond—the idea of an inherent or immutable binary.

The cases cited by the BMV do not change the analysis, because they don't show that "gender" and "biological sex" are limited to male and female. Br. p. 26 (citations omitted). That "sex" is *one* possible definition of "gender," or that some courts use "gender" and "sex" interchangeably, does not establish that "gender" is exclusively *limited* to "biological sex." None of the cases cited by the BMV mention the phrase "biological sex," and the fact that they note physical or reproductive differences between men and women does not limit "gender" or "sex" to biological, reproductive, or other physical traits discussed in certain cases. *E.g., Sessions v. Morales-Santana,* 582 U.S. 47 (2017).

The BMV's application of the statute to preclude IDs with nonbinary gender markers is inconsistent with the statute itself and entitled to no weight. *See, e.g., Indiana Dep't of Environmental Management v. AMAX, Inc*., 529 N.E.2d 1209 (Ind. Ct. App. 1988) (an agency's incorrect interpretation of a statute is entitled to no weight). "Gender" and

"biological sex" are different terms with different meanings, and that difference is dispositive. *Southlake Indiana, LLC v. Lake County Assessor*, 174 N.E.3d 177 (2021) (reversing the Tax Court's substitution of "burden or production" for the statutory term "burden of proof" because they were different terms with different meanings).

1.2 Existing BMV regulations provide for IDs with nonbinary gender markers.

The BMV's regulations on amending gender markers and the agency's prior application of those regulations reinforces the conclusion that the statute contemplates nonbinary gender markers on IDs. In 2009, the BMV promulgated regulations to create a process to amend the gender marker on BMV-issued IDs. 140 I.A.C. 7- 1.1-3(d)(3).[4] To amend a gender marker, an applicant must submit an amended birth certificate or a physician's letter documenting the change. *Id.* Both the regulatory language and required forms of proof permit nonbinary genders. App. Vol. IV pp. 133-135.

The state-issued form for a gender change has blank spaces, allowing a physician to choose the appropriate gender based on their professional expertise. *Id.* at. 139. The BMV argues that that the regulation requires documentation of a change from one

[4] The BMV argues for the first time on appeal that the statute does not permit any gender marker changes. But this argument was not raised below and has thus been waived. *E.g., Ealy v. State*, 685 N.E.2d 1047, 1050 (Ind. 1997)(issues not raised at the trial court are waived on appeal). Outside of this case, the Attorney General has taken the opposition position. App. Vol. II p. 88 ("Individuals wishing to change their binary designation on a driver's license or identification card may continue to utilize the process currently provided by the BMV rules.")

gender to "the other." Br. p. 30. But the regulation says no such thing. The regulation permits changes from a prior gender to a new gender. 140 I.A.C. 7- 1.1-3(d)(3)(C); App. Vol. IV p. 139 (physician's statement). Nothing limits the change from one to another or "the other."

For well over a year, the BMV issued IDs with the "X" nonbinary gender marker, illustrating that the regulatory language then and now in effect allowed it, if the applicant complied with the regulatory amendment process. *Id.* at 111. The BMV reasoned that the statute and regulation did not distinguish between amendments to male, female, or nonbinary. *Id.* at 112-113.

The BMV's former application of this regulation treated gender like most of the other items contained on the ID. Most of the information listed on an ID is obtained from external documentation, such from as a passport, birth certificate, court order, or an immigration document (although height and weight are self-reported). *Id.* at 109-110; *Leone v. Comm'r, Ind*. BMV, 933 N.E.2d 1244 (Ind. 2010). Under BMV regulations, the process is the same for gender. One's legal gender is the gender listed on an individual's birth certificate or physician's statement. 140 I.A.C. 7-1.1-3(d)(3). The BMV regulations rely on physician certifications because a doctor is "the most logical choice in certifying and affirming an individual's gender." App. Vol. IV p. 119.

Beginning in 2019 when the Attorney General issued its Opinion 2020-3, the BMV took a different approach to nonbinary gender markers than it takes for most of the

other information on the ID. It now ignores an updated birth certificate or physician's statement and instead asks the person to pick either male or female. *Id.* at 121-22. Proof of gender is the only piece of information the agency demands its staff ignore in favor of a different, non-verified option. *Id.* at 123; *Id.* at 136. The BMV's brief expresses concern that nonbinary IDs permit someone to self-define their gender, but ironically it is BMV's own current policy of refusing to issue nonbinary that not only allows but requires self-definition. Br. p. 29.

The BMV argues that limiting gender to male and female makes an ID more reliable, but as the trial court found, the opposite is true. Br. p. 27. The BMV began offering the "X" credential in part to maintain and improve consistency and accuracy for nonbinary Hoosiers. App. Vol. IV pp. 117-118. The BMV believes its interests in accuracy and consistency are best served when the designation on an ID and other documents match. *Id.* at 121-123. But through its ban on nonbinary gender markers, BMV undermines those interests and forces people to hold inaccurate and inconsistent documents, thereby removing one piece of identification that can be used for identity verification and fraud prevention. *Id.* at 117-18.

The BMV makes the fallacious argument that IDs with nonbinary gender markers are akin to "allowing applicants with blue eyes to demand driver's license describing them as 'brown'" Br. p. 29. But height, weight, eye and hair color are not verified by the agency though either external documents or visual means. App. Vol. IV p. 109-110.

Nevertheless, the BMV insists that "gender" should be interpreted to mean "sex" so that an ID can reflect information "objectively verified through visual observations or chromosomal tests." Br. p. 28. The BMV did not raise any arguments about visual observations or chromosomal tests below, and it is hard to see how that supports their argument now.

The BMV's argument about verification is further undermined by its own regulatory requirement that gender is verified through a birth certificate or physician statement, not an invasive visual observation or chromosomal test. Neither the statute nor regulation require a BMV employee or anyone else to inspect a person's genitals before getting an ID with any gender marker. *C.f.* I.C. § 9-24-11-5; 140 I.A.C. 7- 1.1-3(d)(3). Nor do they require an applicant to provide the results of a chromosomal test. *Id.* If the BMV believes medical inspections and genetic testing are necessary before issuing an ID, they are free to promulgate a rule saying so. But given the variety of intersex conditions that result in chromosomal variance and ambiguous external sex characteristics, the results of those inspections and tests would not be binary. *E.g., Hecox v. Little*, 2023 U.S. App. LEXIS 21541, at *29 (9th Cir. Aug. 17, 2023).

2.0 Because current regulations permit nonbinary IDs, the BMV was required to conduct rulemaking to preclude IDs with nonbinary gender markers.

The trial court correctly held that when the BMV adopted a new interpretation of the statutory word "gender" and thereby created a policy prohibiting IDs from bearing an

"X" gender marker, the agency was required to go through formal rulemaking procedures. App. Vol. II p. 36.[5] Formal rulemaking was required, because the agency "effectively changed the policy of the BMV when the underlying regulation remained unchanged. *Id.* (citing I.C. § 4-22-2-3(b)).

The trial court's decision is well-supported. The Administrative Rules and Procedures Act (ARPA) requires an agency to engage in formal rulemaking any time it applies a policy or action generally and prospectively, as though it has the effect of law, and affects the substantive rights of a class of persons subject to the agency's authority. I.C. § 4-22-2-3(b). An agency's interpretation of a statute must be promulgated before it is valid and enforceable. *Miller Brewing Co. v. Bartholomew County Bev. Co.*, 674 N.E.2d 193 (Ind. Ct. App. 1996).

The Attorney General's advisory opinion on which the BMV relies supports Simmons' position. "Any process created to effect a gender change needs to be promulgated under ARPA" because it is "intended to be generally applicable and have the effect of law." App. Vol. II p. 88 (citing *Ward v. Carter,* 90 N.E.3d at 665). The advisory opinion is correct on that point: the BMV's binary-only policy prospectively

[5] BMV's failure to go through rulemaking is an adequate basis to rule for Simmons in this appeal. But if BMV did revise its regulations, Simmons would still object to any failure to issue "X" IDs as violating the statute and the constitutional rights of nonbinary persons. As shown in this brief, Simmons would prevail on those arguments, even if the regulations were amended.

and categorically alters gender marker amendment application requirements that impact only applicants, not internal agency workings, by affecting nonbinary applicants' ability to get accurate IDs. *Villegas v. Silverman*, 832 N.E.2d 598, 609 (Ind. Ct. App. 2005).

The Court has previously struck down the BMV's identification requirements, where the agency failed to follow ARPA rulemaking procedures. This case is virtually indistinguishable from *Villegas*, where the BMV's adoption of identification requirements for immigrants that were more restrictive than those provided for under its regulations were void for failure to promulgate a formal rule under ARPA. *Villegas v. Silverman*, 832 N.E.2d at 609. The BMV's binary-only gender marker policy should meet the same fate.

The BMV began implementing nonbinary IDs under its regulations then (and still) in effect. Appellants' App. Vol. IV p. 111. But in July 2020, the BMV announced that it would limit available designations to male or female without making a new rule, despite there being no such limitation in its regulations, and despite the applicant providing documentation that their gender is nonbinary as the regulation requires. *Id.* at 148; *Id.* at 166-167. This rule affects the substantive rights of Hoosiers by making it impossible for nonbinary Hoosiers to hold accurate IDs. *Id.* at 136.

Instead of relying on the ascertainable standards for gender marker changes found in its regulations, the BMV disregarded the statute and regulations, both of which carry

the force of law, to informally adopt a new standard based on an advisory opinion that has no precedential effect. *See, E.g., Illinois-Indiana Cable Television Assn. v. Public Service Com.*, 427 N.E.2d 1100 (Ind. Ct. App. 1981) ("it is clear that the official opinions of the Attorney General are of no precedential effect and are not judicially binding").

The BMV considers the binary-only ID policy to be enforceable prospectively, making it impossible for a nonbinary Hoosier to get an ID with an "X" gender marker even if they otherwise comply with agency regulations. *App. Vol. IV pp.* 118-119; 136. Nevertheless, the BMV argues the binary-only policy did not have the effect of law because it bound only the agency and no one else. Br. p. 33. This argument finds no support in the case cited, *Ward v. Carter*, or in the record. In *Ward*, or in the record. In *Ward*, the agency's internal determination of which drugs it would use to carry out a death penalty sentence was deemed to not be a rule subject to ARPA because the person would be put to death no matter the drug cocktail the agency decided to use. This case is different.

Under the BMV's current regulations, ID holders could and, as the agency assured, would get credentials bearing "X" designations. App. Vol. IV pp. 140; 113. The binary-only ID policy is dispositive to whether Simmons will or will not get accurate IDs. Like the identification policy struck down in *Villegas*, the BMV's binary-only policy is one that prospectively impacts a group of people's ability to obtain a credential to which they were previously entitled; it is a rule subject to ARPA. *Villegas v. Silverman*, 832

N.E.2d at 609.

The BMV argues that individual denials do not constitute a rule and thus the rulemaking provisions of ARPA do not apply. Br. p. 33. No party made this argument in the administrative hearing or trial court, nor is it responsive to the trial court's decision. It is waived. *Ealy v. State*, 685 N.E.2d 1047, 1050 (Ind. 1997)(issues not raised at the trial court are waived on appeal).

The BMV applied a uniform principle when denying individual amendment applications. The BMV can't avoid rulemaking procedures simply because it recites a policy in an individual denial letter. The agency also communicated it to the public via a public letter from then-commissioner Peter Lacy. App. Vol. IV p. 40-41. It also communicated the policy change to its employees via an internal communication. *Id.* at 147.

Contrary to the BMV's claims, no legislative action is needed for the agency to issue nonbinary IDs. Agencies have powers given to them by statutes, but statutes need not enumerate every power. *E.g., Charles A. Beard Teachers Ass'n v. Bd. of Sch. Trs. of the Charles A. Beard Mem'l Sch. Corp*., 668 N.E.2d 1222, 1225 (Ind. 1996) (citation omitted). Here the statute requires the BMV to issue IDs with gender markers and places no express limit on that power. This Court should reject an interpretation that imposes a more restrictive meaning than the legislature chose. *E.g., Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 376 (Ind. 2017) (internal citations omitted).

Similarly, no regulatory action is required to issue nonbinary IDs, because the agency's existing regulations provide for them. 140 I.A.C. 7-1.1-3(d)(3). The agency should comply with its existing regulations and amend Simmons' IDs to record the gender verified to the agency. App. Vol. II p. 45-46.

The BMV's current gender amendment regulation was created in 2009 through the rulemaking process. Rulemaking is likewise required to change that process. Because the statute and regulations permit IDs with nonbinary gender markers and because the General Assembly has not amended the statute to prohibit or alter the existing rule, the BMV's restriction on what gender options are available on IDs is improper under ARPA.

3.0 The Equal Protection Clause requires the BMV to issue IDs with nonbinary gender markers.

The BMV's binary-only policy violates Simmons' Equal Protection rights because it classifies Simmons because of sex, a quasi-suspect class, and the agency's paper-thin justification of its classification falls far short of the "exceedingly persuasive" standard required to be constitutionally valid. The policy likewise fails rational basis review. To avoid intermediate scrutiny, the BMV raises for the first time on appeal the argument that the "Government Speech" doctrine precludes Simmons' Equal Protection claims. That argument should be rejected because it was waived below and, in any event, does not preclude Simmons' claims.

3.1 The BMV's binary-only policy is subject to intermediate scrutiny.

One's status as transgender or nonbinary is a classification based on sex. And any classification on those bases implicates intermediate (or heightened) scrutiny under the Equal Protection Clause. *See Glenn v. Brumby*, 663 F.3d 1312, 1315-18 (11th Cir. 2011) (collecting cases and recognizing that discrimination based on gender non-conformity is sex discrimination). The trial court correctly recognized that for Equal Protection claims based on gender, courts must apply intermediate scrutiny and states must have an exceedingly persuasive justification for the challenged policy. App. Vol. II p. 25 (citing *Hayden v. Greensburg Cmty. Sch. Corp.*, 743 F.3d 569, 576-78 (7th Cir. 2014) & *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

The BMV concedes "that discrimination based on 'sex' . . . triggers heightened scrutiny." Appellants' Br. at 38-39. To avoid heightened scrutiny, the BMV argues that the case is about "nonbinary status rather than their sex." Appellants' Br. at 40. But the Supreme Court has held that discrimination based on gender identity *is* discrimination based on sex. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1741 (2020).

The BMV points to inapposite case law and wrongly concludes that, as a matter of law, nonbinary status is not "gender" for purposes of the Equal Protection Clause. Appellants' Br. at 39. Not so. The issue in *Virginia*, for example, was whether the Equal Protection Clause "preclude[d] Virginia from reserving *exclusively to men*" education at the Virginia Military Institute. 518 U.S. at 519. The fact that the Court discussed the sex-

based exclusion of women—the controversy at bar—in no way "foreclose[s] equating nonbinary status with sex." *See* Appellants' Br. at 39; *see also Nguyen v. I.N.S.*, 533 U.S. 53, 60-61 (2001) (applying heightened scrutiny to a statute under which "the children of fathers born abroad and out of wedlock to a noncitizen mother" were treated differently from those born of a citizen mother); *Michael M. v. Super. Ct.*, 450 U.S. 464, 466 (1981) (analyzing a "statutory rape" law that "makes men alone criminally liable for the act of sexual intercourse"); *Reed v. Reed*, 404 U.S. 71, 72-73 (1971) (reviewing a probate statute that preferred males over females and finding that it failed even rational basis scrutiny); *C.T. v. State*, 939 N.E.2d 626, 627 (Ind. Ct. App. 2010) (discussing a law that prevented women, but not men, from exposing their chests in public). None of those cases present the issue here: the government's disparate treatment of nonbinary individuals relative to all other individuals.

The BMV cites *Geduldig v. Aviello*, 417 U.S. 484, 497 n.20 (1974) for the proposition 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.'" Appellants' Br. at 40. But *d*iscrimination lies in how groups are created, not just the makeup of the group. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1742 (2020)(it is discriminatory to fire both men and women for failing to fulfill sex stereotypes or for being transgender). *Geduling* does not change this outcome. There, the Supreme Court found that a government-funded insurance program that excluded reimbursements related to pregnancy was not

not discriminatory because it did discriminate about who was eligible for the program or exclude anyone from benefit eligibility because of gender. *Geduldig*, 417 U.S. at 489, 494, 497 n.20[6]. Simmons does not allege disparate treatment because of a compensable physical condition, as in *Geduldig*, but discrimination because of their sex. *See* App. Vol. II pp. 41-43. Unlike *Geduldig*, Simmons is excluded from having an accurate ID because of their sex.

The Supreme Court has long recognized that discrimination based on sex goes beyond one's physical attributes and includes stereotypes based on sex. Sex stereotyping assumes or insists people match stereotypes associated with their gender or sex assigned at birth, which is entirely independent of whether the someone is male, female, or nonbinary. *E.g. Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989)("an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."); *accord Hayden*, 743 F.3d 577 (rejecting "differential grooming standards for males and females"). In the context of gender non-conformity, the Supreme Court is clear that when someone is fired for being transgender, the person is fired for traits or actions the employer would not have questioned in members of a different sex. *Bostock v. Clayton County* 140 S. Ct. 1731, 1737

[6] And the decision in *Geduldig* has since been abrogated by statute, which Congress amended because the prior statute was discriminatory. *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 683-84 (1983).

(2020). Sex plays a necessary and undistinguishable role in the decision because transgender status is "*inextricably bound up with sex*" *Id.* at 1737 (emphasis added). Courts in our Circuit agree. *E.g., B.E. v. Vigo Cty. Sch. Corp.*, 608 F.Supp.3d 725, 729 (S.D. Ind. 2022) (it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" because "homosexuality and transgender status are inextricably bound up with sex."); *A.M. v. Indianapolis Pub. Schs.*, 617 F.Supp.3d 950, 959, 964-65 (S.D. Ind. 2022)("singling out of transgender females is unequivocally discrimination on the basis of sex, regardless of the policy argument as to why that choice was made.").

Other jurisdictions are in accord. The Fourth Circuit has explained that "discrimination against transgender people constitute[s] sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 592-93, 608 (4th Cir. 2020) (holding that a school board's sex-based classifications for restrooms, as applied to a transgender student, implicated a "quasi-suspect" class, and the policy was therefore "subject to a form of heightened scrutiny"). The District of Oregon recently held a school district's treatment of a nonbinary student is subject to heightened scrutiny because "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes …[which is] discrimination on the basis of gender-based behavioral

norms." *L.O.K. v. Greater Albany Pub. Sch. Dist. 8J*, No. 6:20-cv-00529-AA, 2022 WL 2341855, at *9 (D. Or. June 28, 2022) (quotes omitted).

The BMV argues the "challenged policy does not facially discriminate against nonbinary applicants." Br. at 40. That is patently false because discrimination based on gender non-conformity is sex discrimination. *See Glenn*, 663 F.3d at1315-18 (collecting cases). *Adams ex rel. Kasper v. School Board of St. Johns County.*, 57 F.4th 791 (11th Cir. 2022), offers no support for the BMV's argument. *See* Appellants' Br. at 40. There, the Eleventh Circuit accepted that under Supreme Court precedent, "transgender status necessarily entails discrimination based on sex," and subject to intermediate scrutiny. *Adams*, 57 F.4th at 801. The Supreme Court in *Administrator of Massachusetts v. Feeney*, also relied upon by the BMV, reiterates that "gender-based" classifications are subject to heightened scrutiny, and it only considered a statute that distinguished "between veterans and nonveterans, not between men and women" (i.e., "gender"). 442 U.S. 256, 273, 275 (1979). *Village of Arlington Heights v. Metropolitan Housing Development Corp.* merely dealt with racial discrimination, not sex discrimination, explaining, "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the decision, judicial deference is no longer justified." *Arlington Heights,* 429 U.S. at 265-66 (1977).

The BMV's decision to treat nonbinary transgender individuals differently than other transgender individuals inescapably is discrimination based on sex and subject to

intermediate scrutiny. The record demonstrates that the BMV's interest in pursuing the discriminatory policy is to reinforce "the traditional two options" for selecting gender. App. Vol. IV p. 38. This justification is based on a broad generalization that there are only two genders, which fails heightened scrutiny. *See Virginia*, 518 U.S. at 533 (stating that the state's justification "must not rely on overbroad generalizations.").

As the trial court properly observed, a nonbinary applicant who has the documentation to support a gender marker change "is treated differently from a person who has those same documents which reflect a change in gender identification and are allowed to change their gender designation." App. Vol. II p. 37. And The BMV's proffered reason for that disparate treatment "to ensure that the person is who they say they are and that the information is accurate." is neither an important government interest nor a rational basis for refusing to issue IDs with nonbinary gender markers. App. Vol. II pp. 34, 37.

3.2 The BMV does not have an important governmental interest for refusing to issue IDs with nonbinary gender markers.

Under heightened scrutiny, states have the burden to show its proffered justification is exceedingly persuasive, which requires a showing that the "classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017) (applying heightened

scrutiny to differential treatment of transgender students), *abrogated in nonrelevant part by Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *see also Sessions v. Morales-Santana*, 582 U.S. 47, 57-59 (2017) (applying heightened scrutiny to citizenship statute that distinguished based on sex of parent); *Boyden v. Conlin*, 341 F.Supp.3d 979, 982 (W.D. Wis. 2018) (applying heightened scrutiny to health insurance exclusion for transition related care).

The state's proffered "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 539-40. The classification must also substantially serve an important governmental interest when challenged because "new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged," *Morales-Santana*, 582 U.S. at 59 (quoting *Obergefell v. Hodges*, 576 U.S. 644, 647 (2015)). A challenged classification violates Equal Protection when the state fails to produce persuasive evidence to meet its burden. *Virginia*, 518 U.S. at 533-34.

The BMV's asserted interests in the accuracy and consistency of identity documents, in fraud prevention, and in adhering to an advisory opinion's interpretation of its statutory authority cannot satisfy heightened scrutiny's "demanding" burden. *U.S. v. Virginia*, 518 U.S. at 533. First, the binary ID policy is not substantially related to furthering an interest in accuracy, consistency, and fraud prevention. Regardless of their importance, the binary-only policy has no relationship to achieving those interests

as the BMV admits. App. Vol. IV pp. 121-122. It undermines those interests by forcing Simmons to hold inaccurate and inconsistent documents, thereby removing one piece of information that can be used for identity verification and fraud prevention. *Id*. Indeed, the BMV began offering the "X" credential in part to maintain and improve consistency and accuracy for nonbinary Hoosiers. *Id.* at 117.

Second, adherence to a non-binding advisory opinion is not an important governmental interest. The BMV is not bound by an advisory opinion from the attorney general's office. *E.g., Illinois-Indiana Cable Television Asso.*, 427 N.E.2d at 1111. The agency is unable to provide any other example of eschewing duly promulgated regulations in favor of an attorney general's advisory opinion. App. Vol. IV pp. 133-134. The BMV also admits that the advisory opinion, even though it gave the same opinion for the state health department, did not impact the health department's practice. *Id.* at 164; 21-26.

To the extent the BMV's adoption of the advisory opinion was based on its adoption of a definition of "sex" and "gender" or on its view that male and female are "traditional" options (App. Vol. IV p. 133), justifications based on a broad generalization that there are only two genders fails heightened scrutiny. *U.S. v. Virginia*, 518 U.S. at 533 (generalizations about sex fail heightened scrutiny).

The BMV's failure to produce any evidence to justify its policy of singling out nonbinary ID holders for differential treatment because of their gender warrants judgment for Simmons on their equal protection claim.

3.3 The BMV does not have a rational basis for refusing to issue IDs with nonbinary gender markers.

Although Simmons' equal protection claim is most appropriately evaluated under heightened scrutiny, the BMV's binary-only policy fails even rational basis review. Under rational basis, the challenged action is unconstitutional if it is arbitrary, irrational, and/or unreasonable. *Allegheny Pittsburgh Coal Co. v. Cty. Comm'r*, 488 U.S. 336, 344-45 (1989); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985); *see also Fields v. Smith*, 712 F.Supp.2d 830, 868 (E.D. Wis. 2010) (permanently enjoining Wisconsin statute prohibiting transition related medical care under rational basis because no conceivable facts could provide a rational tie between the law and prison safety and security), *aff'd on other grounds*, 653 F.3d 550 (7th Cir. 2011).

The BMV's justification of the accuracy of IDs did not pass rational basis review, because it bore "no rational relation to the BMV's stated accuracy interests." App. Vol. II p. 37. If the BMV has the stated goal of "being as accurate as possible" in issuing driver's licenses, "[n]onbinary individuals are forced to make a designation that is inconsistent with the supporting credential documentation." App. Vol. II p. 37. To the extent the BMV wishes to "follow[] national standards when developing its policies,"

the record demonstrates that "the State can modify its database to accommodate the nonbinary [gender] designation"; the state "Department of Health accepts nonbinary gender designations for birth certificates"; and the AAMVA, the BMV's "guiding agency," already accommodates nonbinary gender markers. App. Vol. II p. 37.

There is no legitimate justification for the BMV to ignore its regulations or documented information in favor of forcing Simmons to hold inaccurate and inconsistent documents. Decisions by courts across the country support this. *See Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (finding that the "forced disclosure of a transgender person's most private information is not justified by any legitimate government interest"); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018) ("[T]here is no rational basis for denying transgender individuals birth certificates that reflect their gender identity . . . ."); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (The state's refusal to correct the gender markers on transgender plaintiffs' drivers licenses "[bore] little, if any, connection to Defendant's purported interests" in maintaining accurate identity documents.); *K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *6-8 (Alaska Sup. Ct. Mar. 12, 2012) (holding a state's refusal to correct a transgender woman's driver's license not only failed to "further[] . . . the state's interest in accurate document[s] and identification" but, in fact, created a risk of "inaccurate and inconsistent identification documents.").

The BMV admits that its binary-only policy does not make identity documents more accurate or more consistent. App. Vol. IV pp. 97. Implementing an "X" option is also compatible with all the BMV's systems and cost the agency nothing. *Id.* The BMV articulates no cogent explanation or rationale as to why the nonbinary gender would be treated differently than the male or female genders. *Id.*

The circumstances surrounding the binary-only policy's creation show that it intentionally targeted nonbinary Hoosiers, requiring a more searching review even under rational basis. *United States v. Windsor*, 570 U.S. 744, 768 (2013) (rational basis review becomes more searching where the challenged action uses unusual means to target and disfavor a particular group of people). The policy was enacted outside of typical processes and under admittedly unprecedented circumstances. It came only 18 months after deciding an "X" option was available, after months of the agency's efforts to implement an "X" option to comport with the standards established by its "governing body," the AAMVA and its international counterpart the ICAO, and contrary to vendor representations that it posed no technical issues and no economic impact. App. Vol. IV p. 97. The binary-only policy came hastily, after months of agency representations to Simmons that their IDs were forthcoming, in disregard of agency regulations, and in response to a legally irrelevant and poorly reasoned advisory opinion. Because the binary-only policy solely targets and disadvantages nonbinary ID holders without any factual or rational justification, the policy is unsupported under any level of scrutiny.

3.3 The BMV's argument about "Government Speech" was waived and in any event does not bar Simmons' claims.

In an attempted end-run around the Fourteenth Amendment, the BMV argues for the first time on appeal that the "Government Speech" doctrine precludes Simmons' Equal Protection claim. The Court should reject that argument for at least two reasons. First, the argument was not raised in the trial court and is therefore waived. Second, as a matter of law, the "Government Speech" doctrine, as it relates to the First Amendment, does not preclude Simmons' Equal Protection claims arising under the Fourteenth Amendment.

As a preliminary matter, the Court should not entertain the BMV's new argument that the "government speech" doctrine precludes Simmons' Equal Protection claims, because that argument was not raised below. App. Vol. II pp. 92, 101-08, App. Vol. III pp. 157-61 (Briefing on Motion to Dismiss); App. Vol. IV pp. 72-80, 196-202 (Briefing on Summary Judgment). While the BMV argued in its motion to dismiss that driver's licenses are "government speech and *First Amendment* scrutiny thus does not apply," (App. Vol. II pp. 108-09; App. Vol. III pp. 165-68), Simmons' First Amendment claims were dismissed, (App. Vol. II p. 26), and the BMV did not raise the "Government Speech" argument in its later summary judgment briefing on Simmons' surviving Equal Protection claim, (App. Vol. IV pp. 196-202). It is well settled that a party may not present an argument or issue to an appellate court unless the party raised that

argument or issue to the trial court. *E.g., Pitman v. Pitman,* 717 N.E.2d 627, 633 (Ind. Ct. App. 1999) (citations omitted).

Even if the claim was not waived, the "Government Speech" doctrine does not bar Simmons' claims. The BMV has conflated the law governing "government speech" in the context of the First Amendment with the individual rights protected by the Equal Protection Clause. Appellants' Br. at 36-38. The trial court readily understood that distinction in its analysis. *See* App. Vol. II p. 25 (refusing to dismiss Simmons' Equal Protection claim and stating, "the position not to accept nonbinary designations treats binary individuals differently from other transgender individuals seeking a binary gender marker change," then separately analyzing "government speech" under the First Amendment). The BMV's erroneous conclusion that only "speech," and not "conduct," is at issue here is not supported by the law or the facts, and the Court should disregard it. *See* Br. at 36-38.

The "government speech" doctrine—"a relatively new, still-evolving doctrine," "at an adolescent stage of imprecision," *O'Brien v. Village of Lincolnshire,* 354 F. Supp. 3d 911, 918 (N.D. Ill. 2018)—merely counsels "that when the government speaks, it is entitled to say what it wishes." *Id.* at 918 (quotation and citation omitted);*see also Choose Life Ill., v White*, 547 F.3d 853, 859 (7th Cir. 2008). But that analysis assumes that "the government is the speaker," and the government is nevertheless "[s]ubject to other constitutional limitations." *Choose Life Ill.*, 547 F.3d at 859.

Plainly, the BMV's decision to "speak" via its state-issued driver's license is entirely irrelevant to whether the BMV's policies impede other constitutional rights. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 481-82 (2009) (Stevens, J., concurring) ("[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses."); *O'Brien*, 354 F. Supp. 3d at 920-21 (finding that the government's actions were "exempt from first Amendment scrutiny as government speech," then separately analyzing whether that same "speech" violated the Equal Protection Clause).

The cases on which the BMV relies make that distinction even more clear. *See* Appellants' Br. at 36-37. In *Lehnhausen v. Lake Shore Auto Parts Co.*, the classification at issue was between individuals and corporations regarding a state constitutional amendment addressing taxation. 410 U.S. 356, 357 (1973). The Court stressed the fact that "taxation" was at issue, and not a "specific federal right." *Id.* at 359. It was only against that background that the Court afforded the state "wide discretion" in dealing with "proper domestic concerns" that did *not* concern a "violat[ion of] the guaranties of the Federal Constitution." *Id. Moore v. Bryant* is further afield. *See* 853 F.3d 245, 250 (5th Cir. 2017). That case is about standing; a Black man failed to allege an injury-in-fact caused by exposure to the Mississippi state flag, which depicted a confederate battle flag. *Id.* at 248, 250, 253. Though recognizing that the Equal Protection Clause is not

directed at "differential governmental messaging," the Court emphasized in that case, that the plaintiff had no standing only because there was no "*corresponding denial of equal treatment*." *Id.* at 250 (emphasis added).

The consequences of the gender marker on Simmons' driver's licenses in this case is a far cry from a display of confederate symbolism by Mississippi, *see Moore*, 853 F.3d at 247; the distinction between corporations and individuals by Illinois, *see Lehnhausen*, 410 U.S. at 357-58; the "classifying [of] businesses for taxation" by Virginia, *see Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941); a Utah city's decision not to erect a religious monument, *see Summum*, 555 U.S. at 464, 467-68; or the Pennsylvania legislature's policy concerning its own in-session prayers, *see Fields v. Speaker of Pa. House of Reps.*, 936 F.3d 142, 149, 160-61 (3d Cir. 2019).

Here, Simmons applied for an ID with a nonbinary gender marker, as listed on their birth certificate or attested to by their respective physicians. App. Vol. II p. 41 ¶ 1. But because the BMV won't issue IDs with nonbinary gender markers, Simmons is forced to falsely identify their gender to hold a state ID at all. App. Vol. IV pp. 121-22. The BMV's binary-only gender marker policy is impermissible sex-based discrimination because but for Simmons' nonbinary gender, their IDs would be amended." App. Vol. IV p. 127. Assuming *arguendo* that the gender marker on a state ID is "government speech," such speech would still be subject to the protections of the Equal Protection Clause. *See Summum*, 555 U.S. at 481.

Moreover, as the BMV itself recognizes, it is only "*[w]ithout more*" that [c]lassification is not discrimination." Appellants' Br. at 36 (emphasis added). And the BMV concedes that Simmons' issue here is "how [the] BMV *describes them* on driver's licenses." *Id.* at 37 (emphasis added). The BMV attempts to re-frame the issue, however, as whether nonbinary applicants are being "refuse[d]" licenses or are afforded "fewer driving privileges." *Id.* But that is irrelevant to Simmons' claim. *See* App. Vol. II p. 25. As the trial court stated, "the position not to accept nonbinary designations treats binary individuals differently from other transgender individuals seeking a binary gender marker change." App. Vol. II at p. 37-38 (the BMV "treat[s] nonbinary individuals differently than male or female gendered individuals" by "forc[ing them] to make a designation that is inconsistent with the supporting credential documentation.").

In the BMV's view, the government is entitled to label individual nonbinary applicants whatever they want, even if they treat binary applicants differently, with no regard to the negative repercussions *to those individuals*. As the trial court recognized in its statement of the undisputed facts, however, the identity displayed on a driver's license may impact one's "legal interests," such as the "ability to board an airplane or access federal buildings." App. Vol. II p. 33. The BMV's speech/conduct distinction is of no moment, and the Court should disregard it.

4.0 The BMV's refusal to issue IDs with nonbinary gender markers violates Simmons' fundamental right to informational privacy

The Fourteenth Amendment, enforceable against the BMV under 42 U.S.C. § 1983, provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. The binary-only policy violates a fundamental liberty right of Simmons, i.e. their informational privacy right to avoid the disclosure of highly personal and sensitive information. *Obergefell v. Hodges*, 576 U.S. 644 (2015) (implicit at liberty are interests "central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."); *Nixon v. Adm'r of Gen. Servs*., 433 U.S. 425, 457, 465 (1977). Even when fundamental rights are not at issue, the due process clause protects against irrational and arbitrary government action. *Pence v. Rosenquist*, 573 F.2d 395 (7th Cir. 1978). The binary-only policy violates Simmons' due process protections on each score.

The right to protect private medical information, especially information that could potentially embarrass or put an individual at risk of physical harm, such as one's sex assigned at birth or transgender status, is a deeply rooted and historically recognized right. *Powell v. Schriver*, 175 F.3d 107, 111-112 (2d Cir. 1999) (finding a constitutional right to privacy for "[t]he private and intimate nature of transsexualism [sic], for person who wish to preserve privacy in the matter, is really beyond debate") (collecting cases); *Love v. Johnson*, 146 F. Supp. 3d 848, 853-56 (E.D. Mich. 2015) (noting that the Sixth

Circuit recognizes an informational privacy right where the release of personal information could lead to bodily harm or where the information was of a sexual, personal, and humiliating nature and finding that forcing "Plaintiffs to disclose their transgender status . . . directly implicates their fundamental right of privacy"). This Court should affirm that right here.

Here, the private medical information being protected is Simmons' sex assigned at birth. Because the BMV refuses to record a nonbinary applicant's accurate gender, they must choose either male or female. Nonbinary applicants will likely understand this direction to require that they select their sex assigned at birth. In certain instances, this disclosure will reveal that an applicant is transgender, someone whose gender is different than their sex assigned at birth. As other courts have held, one's status as transgender is private medical information that could potentially embarrass or put an individual at risk of physical harm. *Powell*, 175 F.3d at 111-12; *Love*, 146 F. Supp. 3d at 853-856: *see also In re Name Change of A.L.*, 81 N.E.3d 283, 291 (2017)(disproportionate rates of discrimination, harassment, and violence experienced by transgender people create significant risk of substantial harm if their transgender status was disclosed to the public). Compelled disclosure of such information violates the due process clause.

The BMV argues that the trial court's application of the right to informational privacy in this case was too abstract and general and must therefore be "defined more precise[ly]." Br. at 47. The BMV, of course, takes it upon itself to do this, re-defining the

right at issue as the "right to list one's gender on a state-issued driver's license as 'X' rather than male or female." *Id.* With this strawman-of-a-right in place, the BMV then proceeds to knock it down, claiming that such a right is not deeply rooted or historically recognized, and is therefore not a right recognized by the Constitution.

The Court, however, should reject the BMV's attempt to re-define the right at issue. The trial court's application of the right to informational privacy in this case was tethered to a well-established interest in protecting private medical information. *See* App. Vol. II p. 38 ("The gender designation on an identification credential may misidentify a nonbinary person's gender and reveal private medical information which Plaintiff has a substantial liberty interest in protecting."); *see also Denius v. Dunlap*, 209 F.3d 944, 955-58 (7th Cir. 2000) (interpreting *Whalen v. Roe*, 429 U.S. 589, 601 (1977) to recognize a right to privacy of highly personal information including medical and sexual information).

Affirming the right to protect disclosure of private medical information also does not lead to absurd results. *See* Appellants' Br. at 47-48 (suggesting the trial court's holding leads to a slippery slope of possible claims that all sorts of information should be kept private). This Court should ignore the BMV's obvious scare tactic, which is based on hypothetical facts and issues not at issue.

The BMV's specious, slippery slope argument also fails because it rests on the false premise that the trial court's application of the right to informational privacy is too

vague and general and not tethered to specific circumstances. The trial court explicitly tethered the right to informational privacy in this case to the right to protect private medical information. *See* App. Vol. II p. 38. As such, the right at issue has a principled basis and it does not open the door to a flood of claims that other types of personal information should be protected from disclosure.

The BMV also misunderstands what information the applicants are trying to protect from disclosure. *See* Appellants' Br. at 48 ("It makes no sense to issue credentials that trumpet plaintiffs' nonbinary identities if those identities constitute sensitive, private information."). The applicants are not trying to protect an accurate designation of their gender from disclosure; rather, they are trying to prevent the disclosure of the sex that they were assigned at birth, which may not be the sex they currently possess. The BMV's argument here, therefore, rests on a fundamental misunderstanding of the information the applicants seek to protect from disclosure.

Finally, the BMV claims that the binary-only policy is rationally related to furthering the State's interests in accurate identification of individuals. *See* Br. at 48. But, as discussed in section 3.2 above, nothing could be further from the truth. As the trial court found, the BMV's binary-only policy forces nonbinary applicants to *inaccurately* designate their gender as either male or female, even though they cannot accurately be described as either/or. *See* App. Vol. II pp. 38-39; *Brookview Props., LLC v. Plainfield Plan Comm'n*, 15 N.E. 3d 48, 65 (Ind. Ct. App. 2014); *Stewart v. Ft. Wayne Cmty. Schs.*, 564

N.E.2d 274, 279-80 (Ind. 1990) (substantive due process prohibits state action that exacts a deprivation of liberty "[w]here the basis for such state action is so lacking as to make it 'arbitrary and capricious").

Cisgender individuals and transgender individuals whose gender is binary, either male or female, can all get IDs issued or amended to reflect their accurate gender. The BMV admits there is no factual reason to treat nonbinary gender differently from male or female. App. Vol. IV pp. 124 and 126. While all other ID holders can comply with the statutory requirement to list gender on their ID, it is impossible for Simmons to hold an ID that bears their accurate gender. This is the quintessence of arbitrary state action prohibited by the due process clause. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001) ("[P]urported justifications for the ordinance made no sense in light of how the city treated other groups similarly situated in relevant respects."); *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (no rational basis where law was "riddled with exceptions" for similarly situated groups).

5.0 The trial court correctly granted judicial review because refusing to issue IDs with nonbinary gender markers is arbitrary, capricious, in excess of authority or expertise, and otherwise contrary to law.

5.1 Applicants' request for judicial review was timely.

The trial court got it right when it held the Applicants were not required to exhaust administrative remedies, as requiring exhaustion would have been futile. App. Vol. II

pp. 21-24. A party is not required to exhaust administrative remedies "when the remedy is inadequate or would be futile, or when some equitable consideration precludes application of the rule." *Indiana Michigan Power Co. v. Runge*, 717 N.E.2d 216, 226 (Ind. Ct. App. 1999). It is clear in this case that the BMV felt obligated under its non-rule policy to deny all requests for "X" gender markers on IDs. The agency did so, the ALJ affirmed that decision, and no additional administrative review would have led to a different result.

Additionally, there is another reason why judicial review is appropriate here. The Administrative Orders and Procedures Act (AOPA) requires an agency's "ultimate authority" to *issue* and *serve* a "final order". I.C. § 4-21.5-3-29(b);(f). The issuance and service of a final order starts the 30-day clock for filing for judicial review. I.C. § 4-21.5-5-5. While the ALJ in this case issued an order, she was not the BMV's ultimate authority, and the recommended order did not meet the statutory criteria for "final orders". App. Vol. II p. 52; 82.

The recommended order could not be a "final order" because it was not issued by the proper entity. Only ultimate authorities may issue final orders. I.C. § 4-21.5-3-28; I.C. § 4-21.5-3-29. Because the BMV has not expressly designated the Office of Administrative Law and Proceedings (OALP) as its ultimate authority, it not the administrative law judge, is the ultimate authority. *See* 140 I.A.C. 1-1 *et seq; see also*

I.C. § 4-15-10.5-12(b); OALP Jurisdiction, https://www.in.gov/oalp/oalp-resources/oalp-jurisdiction/; App. Vol. II p. 146.

The recommended order is also not a "final order" because it did not contain any of the information required in "final orders". "Final orders" must identify differences between the "final order" and the nonfinal order and include findings of fact or expressly incorporate the ALJ's findings I.C. § 4-21.5-3-28. The recommended order had none of this information. *Compare* App. Vol. IV pp. 43-55 *with* Final Order, Case BMV-0521-001080, *available at https://www.in.gov/bmv/resources/files/T.F.-09.28.2021.pdf*. Nor did it say it was final or contain any information about the timeline for filing judicial review. *Id.*

The ALJ's recommended order advised that a party may seek reconsideration within 18 days and if no reconsideration was sought the order would become final. App. Vol. II p. 165. Despite AOPA's requirements for final orders, the BMV asserts that 140 I.A.C. 1-1-11 absolves it from having to issue or serve a final order, because the recommended order became final after 18 days. But an agency may not use a regulation to avoid its statutory duties under AOPA. I.C. § 4-21.5-3-3. Once an ultimate authority issues a final order, judicial review must be sought within 30 days. I.C. § 4-21.5-5-5. *Hunter v. State*, cited by the BMV, is inapposite because there the agency issued a final order. 67 N.E.3d 1085 (Ind. Ct. App. 2016)

The Applicants were not required to object to the recommended order. The objection requirements in I.C. § 4-21.5-3-29 and 4-21.5-5-5 allow an agency "to correct its own errors, to afford the parties and the courts the benefit of [the agency's] experience and expertise, and to compile a [factual] record which is adequate for judicial review." *Austin Lakes Joint Venture v. Avon Utils.*, 648 N.E.2d 641, 644 (Ind. 1995) (citation omitted). No objection is required, however, when none of these purposes would be served. *E.g., Ind.-Kentucky Elec. Corp. v. Comm'r, Ind. Dep't of Envtl. Mgmt*., 820 N.E.2d 771, 779 (Ind. Ct. App. 2005) (judicial review of ALJ order granting summary judgment when no objection was filed).

Here, the issue before the ALJ was whether the BMV's denials of the Applicant's applications to amend their credentials was proper. App. Vol. IV p. 49. Because this issue was purely legal, no evidentiary hearing was held, and the case was resolved by summary judgment. *Id.* Failing to object also does not alter the BMV's duty to issue a "final order." "Final orders" must be issued within 60 days of a recommended order, regardless of if an objection is made. I.C. § 4-21.5-3-29(f).

Because the BMV is the ultimate authority and did not issue a "final order," Petitioner's claim for judicial review is not untimely. No "final order" was issued, and the BMV represented that it would not take further action. App. Vol. II p. 52. Because the petition was filed within thirty days of that representation in lieu of a "final order," judicial review was timely filed.

5.2 The BMV's denial of applications for IDs with nonbinary gender markers is arbitrary and exceeded its statutory authority.

Applicants did what the BMV's own regulations required, but they did not get the result that the regulations said they would. Simmons did not waltz into a BMV branch and demand that it update their ID to accommodate a fleeting preference or legally inaccurate information. Rather, they all provided one or both forms of the proof the agency requires by its regulations of applicants to show that their legal gender is nonbinary. App. Vol. II p. 28. With that proof, they were entitled to have their legal gender on their IDs, as the agency does for men and women requesting the same change. *Id.* at 30-31.

Denying IDs with nonbinary gender designations based on "biological sex" is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because it contravenes BMV regulations. A decision is arbitrary and capricious when it is "patently unreasonable" and it "lacks any basis which might lead a reasonable person to the same conclusion." *A.B. v. State*, 949 N.E.2d 1204 (Ind. 2011). These denials are quintessentially arbitrary—there is no rational reason to disregard the proof the agency requires (and accepts from others) or for the agency to force petitioners to hold IDs that bear gender markers that they, the State Department of Health, and their doctors agree are inaccurate. That the BMV bases its capricious position on a non-precedential and

poorly reasoned advisory opinion of the Attorney General does not justify the policy change.

It is undisputed that the BMV refused to amend the Applicants' IDs despite their compliance with the BMV regulation governing gender marker changes. App. Vol. II p. 33. The BMV's denials of their nonbinary IDs is arbitrary and invalid, because the denials are contrary to the agency's existing regulations that carry the force of law. *E.g., FSSA v. Methodist Hosp.*, 669 N.E.2d 186 (Ind. Ct. App. 1996) (agency decision is arbitrary when based on criteria not listed in regulations).

Contrary to the plain meaning of the word gender, the BMV denied the Applicants' applications by adopting the theory that the term "gender" means "sex," which is limited to the binary options of male and female. This rationale—several steps removed from the statutory text—is, as the trial court found, arbitrary and capricious.

Because the plain and ordinary meaning of "gender" includes genders other than male and female, the BMV's interpretation of "gender" that excludes nonbinary genders is contrary to the statutory language and necessarily unreasonable. *NIPSCO Industrial Group v. Northern Indiana Public Service Co.*,100 N.E.3d 234, 241 (Ind. 2018) (agency order reversed because the agency's interpretation of the undefined statutory term 'designate' was unsupported by term's plain and ordinary meaning); *C.f. Moriarity v. Ind. Dep't of Nat. Res.,* 113 N.E.3d 614, 619-612 (Ind. 2019) (agency action upheld because agency's

interpretation of undefined statutory term 'stream' was consistent with the term's dictionary definition).

The BMV's denials are also contrary to law because the BMV has no authority or technical expertise to define gender. An agency action is invalid where it adds to the law or seeks to extend its powers beyond those conferred by statute. *E.g., Lee Alan Bryant Health Care Facilities, Inc. v. Hamilton*, 788 N.E.2d 495, 500 (Ind. Ct. App. 2003). As relevant here, the BMV's authority is limited to collecting information and issuing and amending IDs. It has authority to decide how it will collect information, including gender, but that authority does not empower the agency to define gender.

Even if the BMV had authority to define gender, its definition should reflect scientific and medical consensus because it has no technical expertise in gender. Agencies have expertise in their field if the public relies on its authority to govern in that area. *E.g., Ind. Alcohol & Tobacco Comm'n v. Spirited Sales, LLC*, 79 N.E.3d 371, 375 (Ind. 2017). The BMV has expertise in driving and licensing fields— for example, who is qualified to have driving privileges, conditions under which privileges will be suspended, and similar topics. The public relies on the BMV for what a person must do to transfer a car title, get a license, or renew a vehicle registration.

Hoosiers do not rely on the BMV to define medical facts about the person doing the aforementioned activities. *C.f. Flat Rock Wind, LLC v. Rush Cty. Area Bd. of Zoning Appeals*, 70 N.E.3d 848, 858 (Ind. Ct. App. 2017) (zoning administration has expertise in

zoning matters). For example, the BMV does not purport to decide who has a medical condition that might impair the ability to drive, instead the agency defers to physicians for that determination. *E.g.,* 140 I.A.C. 7-3-6.5. The same is true with gender. Because the BMV has no statutory authority or expertise to define gender, its attempt to do so is contrary to law and must be reversed.

The BMV's judicial review argument is flawed in another regard: it is based on facts outside the agency record a waived argument. The phrase "not specified" does not appear in the court's judicial review decision or anywhere in the certified agency record. *See generally* App. Vol. II p. 28-32; App. Vol. II p. 146-248 and Vol. III p. 2-153. Judicial review courts cannot consider discovery responses from other litigation because judicial review of agency decisions must be based solely on the certified agency record. I.C. § 4-21.5-5-11; *e.g Bucko Const. Co., Inc. v. Indiana Dep't of Transp.,* 850 N.E.2d 1008, 1017 (Ind. Ct. App. 2006) ("review of an agency's decision must be confined to the record that was before the agency . . . ."(internal citations omitted)).

Like many raised by the BMV in this appeal, this argument has been waived. For the first time in its appellate brief, the BMV equates nonbinary gender markers displayed as an "X" as meaning one's gender is "not specified." Br. p. 20, 23, 28, 29, 31. This argument was waived because it was not made in the administrative hearing or in the trial court. *E.g* I.C. § 4-21.5-5-10; *Roman Marblene Co., Inc. v. Baker,* 88 N.E.3d 1090, 1098 (Ind. Ct. App. 2017) *trans. denied* (judicial review is limited to issues was raised before

the administrative agency); *Ealy v. State*, 685 N.E.2d 1047, 1050 (Ind. 1997)(issues not raised at the trial court are waived on appeal). Even if it were appropriately raised, it is irrelevant. "Not specified" is the Motor Vehicle Standard used when someone's gender is nonbinary. App. Vol. IV p. 118. The phrase is "interchangeable" with nonbinary and means a "person is not identifying as a male or female and does not want to be associated with one of those indicators." *Id.* at p. 108. There is no support in the record for the BMV's assertion that "not specified" means someone refuses to provide a gender. Br. p. 29; *c.f. e.g.,* App. Vol IV p. 140 (explaining what documents are necessary to obtain an X gender marker).

The trial court's decision is not, as the BMV argues, based on the premise that applicants may "self-define" gender. Br. p. 28. The trial court used that term in one sentence as a way of expressing how the regulation works. This is not essential to the trial court's holding. Instead, the trial court adopted the plain and ordinary meaning found in the dictionary to reject the BMV's argument that "gender" means "biological sex." App. II at 30.

The relief granted by the trial court, requiring that the BMV change Applicants' gender markers to "X", is permissible and reasonable. The BMV objects to the trial court remanding the judicial review claims back to agency to issue IDs with nonbinary gender markers, because the agency claims it does not have statutory authority to issue

such IDs. Br. p. 35. But the trial court rejected this claim when it found that the statutory term "gender" included nonbinary IDs. App. Vol. II p. 31.

CONCLUSION

For the reasons stated in this brief, this Court should affirm the trial court's judgment in all respects.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief has less than 14,000 words.

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that, on September 25, 2023, the foregoing was filed electronically using the IEFS under Rule 68(C). I also certify that on September 25, 2023, the foregoing document was served upon the following persons using the IEFS:

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