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IN THE INDIANA SUPREME COURT

Case No. _____

INDIANA BUREAU OF MOTOR VEHICLES, et al., Appelants	Court of Appeals Case No. 23A-PL-00899
	Appeal from the Monroe Circuit Court VI
v.	Trial Court Case No. 53C06-2106-PL-1347
FITZ SIMMONS, et al., Appellees	The Honorable Holly M. Harvey, Judge

APPELLEE SIMMONS' REPLY BRIEF IN SUPPORT OF PETITION TO TRANSFER

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ARGUMENT

1. The limits of the Attorney General's authority are properly before this court.

Simmons challenges the Court substituting the Attorney General's views for the agency's, an issue that could not be forfeited because it first arose in the Court's decision. Simmons challenges neither the Attorney General's authority to issue advisory opinions nor an agency's ability to adopt one as its own.

The BMV didn't analyze the Attorney General's March 2020 Opinion ("opinion") and change its prior interpretation of law and regulation. Instead, the BMV believed the opinion was "binding," a "directive" to stop issuing nonbinary IDs and was "the only document" used to change its policy. App. Vol. IV 134-136. The Court's statutory construction analysis thus incorrectly deferred to the opinion instead of the agency's actual statutory construction.

2. Indiana law permits nonbinary IDs.

The Court reasoned that the BMV cannot issue nonbinary IDs because "gender" and "sex" are synonyms and "sex" only refers to "being either female or male." Decision at 48. This conclusion is not supported by any tool of statutory construction.

The plain and ordinary meaning of "gender" includes more than male or female. Dictionaries cited by both parties and the Court offer three possible definitions: gender identity, behavioral/cultural traits, and/or sex. Decision at 24; Brief of Appellee at p. 22-24; 26; Brief of Appellant 25; 28. Assuming "sex" is selected, definitions say male or

female are common, but not exclusive sexes. *Id.* The Court cherry-picked portions of definitions, contrary to principles of statutory construction.

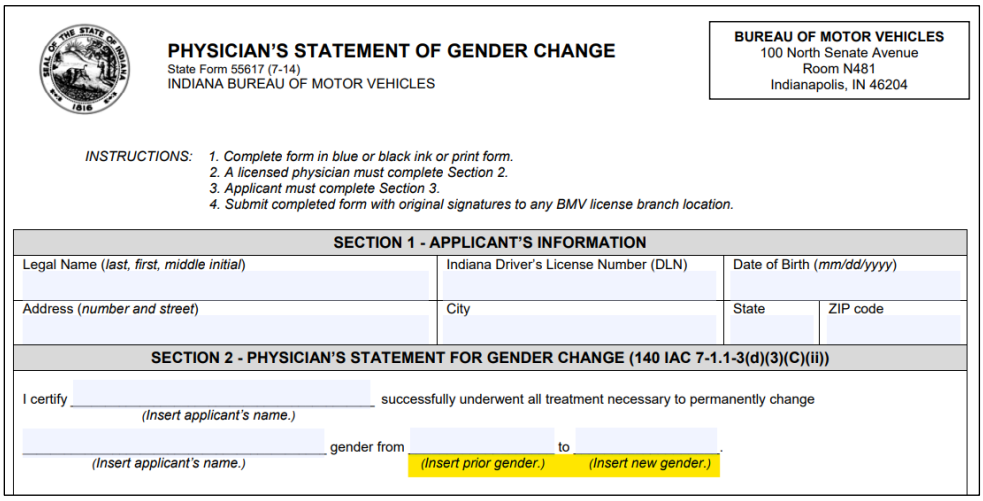
There is no other support for "sex" being limited to male or female. The Court correctly assessed whether the legislature limited the BMV's authority to only male or female IDs, but reached the wrong conclusion because no limit exists. "There is danger in seeking legislative intent where none has been expressed" because it is "more than likely that the legislature didn't express itself on the subject because it wasn't thinking about the problem." *Crown Point v. Lake Cty.,* 510 N.E.2d 684, 689-90 (Ind. 1987)(internal citation omitted). Legislators may think many things, but all that matters is what they codified. *See Miller v. Walker,* 647 N.E.2d 1000, 1003 (Ind. Ct. App. 1994) (rejecting affidavits from individual legislators to show intent).

None of the reasons proffered for limiting gender to male or female were codified. The legislature deferred to the BMV to decide what gender to record and how to verify changes. Courts can't substitute language which it *thinks* the legislature intended. *E.g. Ott v. Johnson,* 319 N.E.2d 622l (1974); *In re A.B.*, 582 N.E.2d 913, 915 (Ind. Ct. App. 1991). When the legislature changed "sex" to "gender" it could have defined "gender" but did not.

Contrary to the Court's decision, no part of Title 9 limits "gender" or "sex" to male or female. "Sex" appears in two parts of Title 9, but neither provision defines "sex" or otherwise indicates that "sex" is only male or female. I.C. § 9-30-3-6; I.C. § 9-30-6-16.

More importantly, neither section applies to the BMV. Appellee's Petition for Rehearing at 6.

Confusingly, the Court ignored BMV regulations, which are entitled to fair weight. *Alberici Constructors, Inc. v. Ohio Farmers Ins. Co.*, 866 N.E.2d 740, 743 (Ind. 2007). To change a gender marker, applicants must submit an amended birth certificate or a physician's statement. 140 I.A.C. 7- 1.1-3(d)(3). Both the regulatory language and required evidence permit nonbinary 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); App. Vol. IV pp. 133-135; App. Vol. III p. 184. Under BMV rules, whether male, female, or nonbinary, the gender on this document appears on the ID. App. Vol. IV at 112-13.

2.1. Because the statute and regulations permit nonbinary IDs, the BMV was required to conduct rulemaking.

The trial court correctly held that when the BMV reinterpreted "gender," banning nonbinary IDs, it created a new policy requiring formal rulemaking. App. Vol. II p. 36. Previously, any person could walk into a BMV office and obtain a gender marker change using documentation indicating "nonbinary" gender; now, they cannot.

The Administrative Rules and Procedures Act requires formal rulemaking when an agency 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). The BMV's reinterpretation meets that standard.

3. The Equal Protection Clause requires the BMV to issue nonbinary IDs.

The BMV argued that the "Government Speech" doctrine shields it from Equal Protection claims. This argument was not raised in the trial court and is waived. Brief of Appellee at 36 (citing cases). Regardless, it does not preclude Simmons' claims. *Id.*

Intermediate scrutiny applies because a decision excluding nonbinary persons from a benefit available to other people is a decision based on gender. Appellee's Petition to Transfer at 20 (citing cases).

Even if rational basis applies, the Court's conclusion that the BMV policy was constitutional because gender markers are "subjective" and "innumerable" contradicts the record and otherwise doesn't provide a rational basis. Decision at 40-41. The nonbinary gender markers at issue are objective because they require external verification, and they are not "innumerable." All plaintiffs wanted the same nonbinary

ID, and the record is void of the BMV being concerned about "innumerable" genders. The BMV's use of "not specified" doesn't undermine this. "Not specified" is the industry's standard phrase for a nonbinary gender marker. App. Vol. IV p. 118. It's "interchangeable" with nonbinary and means a "person is not identifying as a male or female." *Id.* at p. 108. There is no record support for the BMV's assertion that "not specified" means anything else.

The classification also fails rational basis. Courts nationwide agree that refusing to correct gender markers undermines government interests in accuracy and therefore has no rational basis. Brief of Appellee at 46 (citing cases).

CONCLUSION

The Court should grant transfer and affirm the trial court.

Respectfully submitted,

/s/ Megan Stuart

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 1,000 words.

/s/ Megan Stuart
Megan Stuart (35144-53)

CERTIFICATE OF SERVICE

Undersigned counsel certifies that, on September 13, 2024, the foregoing was filed electronically using the IEFS under Rule 68(C). I also certify that on September 13, 2024, the foregoing document was served upon the following persons using the IEFS:

James Barta, Solicitor General
Jenna Lorence, Deputy Solicitor General
Katelyn Doering, Deputy Attorney General

/s/ Megan Stuart
Megan Stuart (35144-53)