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IN THE
Indiana Supreme Court

No. 23A-PL-00899

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

RESPONSE TO PETITION TO TRANSFER

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

1. Whether, under the Administrative Rules and Procedures Act, the Bureau was required to conduct a rulemaking before declining to issue credentials describing plaintiffs' gender as "X."

2. Whether declining to issue credentials with an "X" gender designation violates the Equal Protection Clause.

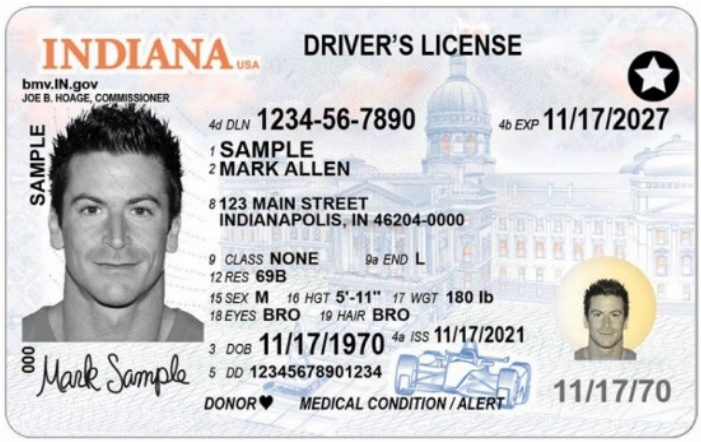
BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

I. Legal Background

The Indiana Bureau of Motor Vehicles is responsible for issuing driver's licenses, learner's permits, and other credentials. Ind. Code § 9-24-11-2. When the General Assembly created the Bureau in 1945, it directed the Bureau to collect information about drivers' "name, age, sex, and residence address" and to include such identifying information on credentials. 1945 Ind. Acts 1308, 1345, 1353. Those requirements changed little until, in 2007, the legislature adopted standards set by the federal REAL ID Act, a post-9/11 security measure. 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 34, 38. Now, the Bureau must include on credentials a person's "full

legal name," "date of birth," "address," "hair color," "eye color," "gender," "weight, "height," and other information. Ind. Code § 9-24-11-5(a).

In 2009, the Bureau adopted regulations implementing REAL ID standards. The regulations require an applicant to establish her identity by submitting an un-expired U.S. passport, certified birth certificate, or other approved document, and require an applicant to present additional documentation to establish any "change" to her "legal name, date or birth, or gender." 140 Ind. Admin. Code 7-1.1-3(b)(1). The regulations do not address how the Bureau would describe an applicant's gender on credentials. But during the first decade under the regulations, all-Bureau credentials described an applicants' gender—listed on credentials under the category "sex"—as "M" (male) or "F" (female). *See* Op. 15.



Id. Only in May 2019 did the Bureau announce that it would begin listing "a third gender option on credentials and customer records." App. IV 145. "The third option is 'Not Specified' and will be displayed as an 'X.'" *Id.*

In 2019, the Bureau also proposed an amendment to its regulation governing the documentation required to establish gender changes. App. IV 150, 152. The Bureau recalled its proposal in January 2020. App. IV 33–34. But the proposed rule prompted a state senator to request an opinion from Attorney General Curtis Hill on related issues, including whether the Bureau had authority to describe a person's gender as anything but male or female absent a legislative change. App. IV 22. The opinion advised that the statutory provision requiring the Bureau to list "gender" on credentials refers to the trait of being male or female, precluding the Bureau from offering other options. App. IV 23–24, 26.

A few months later, the Bureau emailed managers that "branches may not process any credential applications or transactions with a gender indicator of 'X.' Only genders Male or Female may be offered." App. IV 120 (59:12–25).

II. Prior Proceedings

In 2019, multiple "nonbinary" persons—persons whose "internal and inherent sense" does not fall "into the binary categories of man or woman"—applied for credentials listing their gender as "X." App. II 41–42, 47. The Bureau denied their applications on the ground that it lacked "authority" to issue the credentials, citing the Attorney General's opinion. App. II 48, 66. Several applicants unsuccessfully sought administrative review. Op. 2–3. And all applicants filed a declaratory-judgment action. Op. 3. As relevant here, they alleged that the Bureau violated the Administrative Rules and Procedures Act (ARPA) by not conducting a rulemaking before ceasing

to offer credentials with an "X" gender option and that declining to issue such credentials violates the Equal Protection Clause. App. II 53.

The trial court ruled for plaintiffs. It held that, while ARPA did not require the Bureau to conduct a rulemaking before starting to issue credentials with an "X," the Bureau had to conduct a rulemaking before reversing course. App. II 36. In the court's view, Indiana law allows applicants to "self-defin[e]" their gender on credentials and requires the Bureau to issue credentials that reflect applicants' "gender identity." App. II 30–31. The court also held that the Equal Protection Clause prohibits the Bureau from limiting applicants' options to "male/female designations." App. II 37.

The Court of Appeals reversed. It rejected plaintiffs' ARPA claim on the ground that the Bureau could not issue credentials with an "X," whether or not it conducted a rulemaking. Op. 9, 16. By statute, the Bureau must list an applicant's "gender" on credentials, and the statutes relevant here use "gender" synonymously with "sex"—a term that refers to the "division of being either female or male." Op. 16. The court also rejected plaintiffs' argument that the Bureau's actions unconstitutionally discriminated against "nonbinary" persons, explaining that rational-basis review applies and that the actions advanced "legitimate government interests." Op. 18, 20.

ARGUMENT

The principal issue in this case is whether the Bureau was required to conduct a rulemaking before adhering to its governing statutes. Plaintiffs do not contend there is any conflict between the Court of Appeals' answer to that question—"no"—and any other appellate decision. Nor do plaintiffs identify any conflict concerning

how to interpret the statutes that require Bureau-issued credentials to list persons' "gender." Instead, plaintiffs attempt to make this case about something it is not—whether the Court of Appeals can "defer . . . to the Attorney General." Pet. 8. But the court never deferred to the Attorney General. It simply interpreted the statutory term "gender," using dictionaries and traditional principles of statutory construction.

The Court of Appeals, moreover, correctly held that the term "gender" carries its traditional meaning of referring to the male and female divisions of the species (also called "sex") rather than a person's subjective sense of gender ("gender identity"). Plaintiffs do not grapple with the dictionaries, statutory history, and principles the Court of Appeals considered. Rather, plaintiffs plead for uncritical deference to a position that the Bureau took during a 14-month period but has since reconsidered. Whether or not deference to agencies is ever appropriate, no precedent requires deference to an abandoned position that conflicts with the statutory text.

Finally, the Court of Appeals correctly rejected plaintiffs' argument that they have a constitutional right to dictate the contents of state-issued credentials.

I. Plaintiffs' Deference Argument Is Wrong and Forfeited

The transfer petition's lead argument that the Court of Appeals "defer[red] . . . to the Attorney General," Pet. 8, is simply wrong. In ruling on plaintiffs' claim, the Court of Appeals began by using dictionaries, statutory history, and principles of construction to determine that the statutory term "gender" refers to a person's sex rather than to gender identity. *See* Op. 10–14. Using traditional tools of statutory interpretation to discern a statute's meaning is not deference by any stretch.

The Court of Appeals then stated that an agency's views should receive "weight." Op. 14–15. Contrary to plaintiffs' suggestion, however, the court never deferred to a brief or opinion from agency "lawyer[s]." Pet. 11. Rather, the court invoked the Bureau's longstanding practice using the term "sex" on credentials to refer to what the statute calls gender. Op. 15; *cf. Warner v. State*, 406 N.E.2d 971, 975 (Ind. Ct. App. 1980) (reproducing a Bureau record from 1978 that uses the term "sex"). And even then, the court made clear that the Bureau's practice was only an "additional" consideration. Op. 14. What was of "paramount" importance is that the General Assembly used the terms "sex" and "gender" interchangeably. *Id.*

At bottom what plaintiffs object to is not deference to executive officials. They urge deference to the Bureau. Pet. 13. Rather, the thrust of plaintiffs' argument is that the Bureau should have been required to concede in litigation that plaintiffs' reading of the statute is correct because the Bureau once agreed with their position and changed its position only after the Attorney General issued an advisory opinion on the meaning of "gender." Pet. 11, 13. But plaintiffs waived any argument that the Attorney General overstepped by discharging his statutory duty of answering a state senator's questions or that it was improper for the Bureau to change its position in response to the opinion. Plaintiffs did not raise those arguments in the trial court or in their briefs to the Court of Appeals. Plaintiffs cannot raise those arguments for the first time now. *See Noblesville, Ind. Bd. of Zoning Appeals v. FMG Indianapolis, LLC*, 217 N.E.3d 510, 516 (Ind. 2023); *Morgan v. State*, 755 N.E.2d 1070, 1077 (Ind. 2001).

Nor did anything improper occur. As required by statute, Ind. Code § 4-6-2-5, the Attorney General issued an advisory opinion in response to a question from a state senator on the meaning of "gender," App. IV 22. But that opinion did not "make decisions properly charged to BMV." Pet. 12. As plaintiffs concede, Pet. 13, Attorney General opinions are just that—non-binding advice. State officials need not follow them. Yet neither is it a problem for state officials to do so. *See Zoercher v. Ind. Associated Tele. Corp.*, 7 N.E.2d 282, 286 (Ind. 1937); *Wayne Cnty. Dep't of Pub. Welfare v. Scott's Estate*, 55 N.E.2d 337, 338–39 (Ind. Ct. App. 1944). Indiana law requires the Attorney General to issue opinions at state officials' request precisely so that they can have the benefit of his legal analysis. *See* Ind. Code § 4-6-2-5. If the legislature did not want state officials to follow advisory opinions they find persuasive, it would not have required the Attorney General to issue advisory opinions at their request.

The record, moreover, is clear that the Bureau itself decided to change its policy and deny plaintiffs credentials describing their gender as "Not Specified." The Bureau's Chief Administrative Officer ordered staff to stop issuing credentials listing genders other than male or female. App. IV 120 (59:12–25). The Bureau itself sent plaintiffs letters saying that it lacked statutory authority to issue credentials with genders other than male or female. App. II 48, 66. And the Bureau itself took the position in administrative proceedings that it lacked authority to issue the credentials plaintiffs sought. App. II 163–64. It was thus necessary and proper for the Court of Appeals to consider the bounds of the Bureau's statutory authority.

II. Plaintiffs' ARPA Claim Lacks Merit Regardless

A. The Bureau was not required to conduct a rulemaking before adhering to a statutory command

As the Court of Appeals perceived—and plaintiffs do not dispute—if the Bureau's governing statutes do not allow it to issue credentials describing holders' genders as "Not Specified," then plaintiffs cannot obtain an order under ARPA requiring the Bureau to issue such credentials. Op. 9, 16. Where an agency adopts a rule without following ARPA's procedures, the resulting rule "does not have the effect of law." Ind. Code § 4-22-2-44. But an agency still must follow its governing statutes. An agency has "no power" to do otherwise. *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000). So a critical question here is what the statutory command to list "gender" on credentials requires the Bureau to do. Ind. Code § 9-24-11-5(a).

The term "gender" can be defined in two ways. It can refer to (1) "[e]ither of [the] two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs"—also known as "sex"—or (2) grammatical, social, or cultural constructs, such as someone's "identity as female or male or as neither." *The American Heritage Dictionary* (online ed.); *accord The American Heritage College Dictionary* 577 (4th ed. 2002); *Merriam-Webster's Dictionary* (online ed.); *Merriam-Webster's College Dictionary* 484 (10th ed. 2000). But simply because two definitions of "gender" exist does not imply that plaintiffs can pick either. *Contra* Pet. 15. Context matters. *See Lake Imaging, LLC v. Franciscan All., Inc.*, 182 N.E.3d 203, 207–08 (Ind. 2022). And here context shows that "gender" refers to sex, the "two divisions, designated male and female, by which most organisms are classified."

Critically, from 1945 to 2007, the General Assembly used the term "sex" in referring to the information that the Bureau records on credentials. *See* 2007 Ind. Legis. Serv. Pub. L. No. 184-2007, Sec. 34; 1945 Ind. Acts 1308, 1345. During that period, the term "sex" undoubtedly referred to the trait of being male or female, as determined by "biology and reproductive function." *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 812 (11th Cir. 2022) (en banc) (collecting definitions). Even today, the "ordinary meaning" of "sex" refers to "male and female biological traits." *West v. Radtke*, 48 F.4th 836, 850 n.4 (7th Cir. 2022); *accord Merriam-Webster's Dictionary* (online ed.) (defining "sex" as "the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures," the "characteristics . . . that distinguish males and females, and "the state of being male or female").[1]

In 2007, the legislature updated the statutory language to reflect the terminology of the federal REAL ID Act, which uses the term "gender." Op. 13. But there is no evidence the legislature intended for credentials to describe changeable, subjective experiences of gender rather than sex, a stable and objectively verifiable trait. Even while updating Indiana Code § 9-24-11-5(a)(6)'s terminology, the legislature retained related provisions that use "sex" to refer to identifying information on credentials.

[1] In a footnote, plaintiffs state "sex" is "not limited to a male/female binary." Pet. 17 n.2. But courts must look to a term's "ordinary meaning." Ind. Code § 1-1-4-1. The existence of intersex conditions—extremely rare genetic "disorder[s]" that prevent "normal sex chromosome structure," Ind. Code § 25-1-22-5(b)—does not suggest that the term "sex" ordinarily refers to those conditions, *see* § 25-1-22-12 (defining "sex"). Plaintiffs, moreover, are not intersex or asking for "intersex" to be a gender option.

Op. 14. For example, it reenacted a provision requiring traffic citations to list the driver's "sex," along with other identifying information that the Bureau records on credentials (*e.g.*, age, birth date, height, weight). Ind. Code § 9-30-3-6(b). That shows the legislature used "gender" to refer to sex, the state of being male or female.

Plaintiffs do not attempt to refute the appellate court's analysis of the context in which the term "gender" appears. Instead, they argue that the court never should have interpreted the statute because agencies get "first"—and apparently last—"crack at interpretation." Pet. 16. But to the extent that an agency's construction of a statute receives any weight, *see Ind. Off. of Consumer Couns. v. Duke Energy Ind., LLC*, 183 N.E.3d 266, 268 (Ind. 2022) ("no deference" is owed to agencies on "legal question[s]"), no weight can be given to an agency interpretation that "would be inconsistent with the statute itself," *LTV Steel*, 730 N.E.2d at 1257.

Plaintiffs, moreover, do not explain why deference would be due the Bureau's position during the 14-month period in which it issued "X" credentials, rather than its current position of declining to issue "X" credentials or its unbroken practice of using the term "sex" on credentials. Plaintiffs appear to assume that 140 Indiana Administrative Code 7-1.1-3(d)(3) supplies the answer. *See* Pet. 18. But that regulation—adopted approximately a decade before the Bureau started issuing credentials with an "X"—"lays out what must be submitted to support an amendment for a change of gender." App. II 164. It is silent on what "gender" means and whether the Bureau must offer any options besides male and female. As the Bureau itself explained when it proposed an amendment to the regulation in 2019—around the same

time it first began processing "X" credentials—the regulation "addresses process." App. IV 156. "[G]ender marker types are not within the scope of this rule." *Id.*

Plaintiffs' other extra-statutory sources do not aid them either. Plaintiffs mention that various agencies and a national association that promulgates technical standards said that it would be technologically feasible to accommodate an "'X' gender marker." Pet. 13–14, 18. But none of those bodies are "charged with the duty of enforcing the statute" relevant here, *LTV Steel*, 730 N.E.2d at 1257, and technological feasibility does not determine a statute's meaning. Its text does. *George v. Nat'l Collegiate Athletic Ass'n*, 945 N.E.2d 150, 154 (Ind. 2011). Plaintiffs also cite a federal regulation on federal identification standards. Pet. 13. As the Court of Appeals observed, Op. 13, that regulation says the federal REAL ID Act does not adopt any definition of "gender," 73 Fed. Reg. 5272, 5301 (Jan. 29, 2008). Most REAL ID States, like Indiana, offer just male or female as gender options. *See* Reply 17.

Lastly, plaintiffs argue that recording gender identity on credentials better promotes accuracy and consistency. Pet. 10. The legislature could think otherwise. The General Assembly could rationally conclude that recording a stable, objectively verifiable biological characteristic aids identification more than recording an unverifiable "internal and inherent sense," App. II 42, that can and does change. Op. 19; *see* Sutter Health, *The Gender Binary and Non-Binary Individuals*, https://www.sutterhealth.org/health/sexual-health-relationships/non-binary (nonbinary gender expression "may fluctuate"). That is especially true considering that state law requires birth certificates to reflect "sex," as opposed to gender identity, which means

that recording sex fosters consistent state records. *See* Ind. Code § 16-37-2-9(a)(2), 16-37-2-2; *see also* Op. 19; *In re K.G.*, 200 N.E.3d 475, 478–49 (Ind. Ct. App. 2022) (holding courts have no "authority" to order birth certificates changed), *transfer denied*. Plaintiffs identify no reason to read "gender" as meaning gender identity.

B. The challenged agency action is not a "rule" subject to ARPA

Even if the statute were not dispositive, plaintiffs' ARPA claim would still fail because the Bureau's internal directive instructing staff to stop issuing credentials with an "X" is not a rule. Under ARPA, a policy constitutes a rule only if it has "the effect of law." Ind. Code § 4-22-2-3(b). A policy with the effect of law is one that "prescribes binding standards of conduct for persons subject to agency authority," requiring "citizens to alter their behavior." *Ward v. Carter*, 90 N.E.3d 660, 665 (Ind. 2018). "[I]nternal policies and procedures that bind [agency] personnel" are not rules. *Id.* at 666.

The action challenged here is an internal policy exempt from ARPA. The Bureau's decision to stop issuing "X" credentials does not prescribe binding standards of conduct for citizens or even require them to present different documentation. The Bureau "will take" the same "paperwork" from citizens that it took previously. App. IV 136 (31:1–7). The Bureau simply will process paperwork differently. That distinguishes this case from *Villegas v. Silverman*, 832 N.E.2d 598 (Ind. Ct. App. 2005), in which the challenged policy required citizens to present different documents.

Indeed, plaintiffs' insistence that the Bureau had to conduct a rulemaking in 2020 before ceasing to issue credentials with an "X" is self-defeating. The Bureau did

not conduct a rulemaking before announcing that it would start issuing such credentials in 2019. Thus, if plaintiffs are correct that any policy change regarding gender markers requires a rulemaking, the Bureau should never have issued credentials bearing an "X." Either way, plaintiffs cannot obtain the credentials they seek.

III. The Appellate Court Correctly Rejected the Equal-Protection Claim

A. Rational-basis review applies

Plaintiffs challenge the Court of Appeals' rejection of their equal-protection claim as well, arguing the court erred by applying rational-basis review "without first deciding" whether the Bureau's policy of not issuing credentials with an "X" was "based on sex or gender." Pet. 19. But plaintiffs overlook that their complaint did not allege sex discrimination or allege that it is unconstitutional to list gender on credentials. Rather, the complaint alleged that the Bureau declined to give plaintiffs amended credentials "solely" because plaintiffs identify as "nonbinary." App. II 54; *see id.* ("But for Plaintiffs' nonbinary gender, their IDs would be amended."). And plaintiffs present no argument that nonbinary persons constitute a protected class.

Plaintiffs contend that "discrimination based on gender identity" "necessarily entails discrimination based on sex." Pet. 20. But neither the U.S. Supreme Court nor this Court has so held. The U.S. Supreme Court's equal-protection cases have never treated alleged discrimination based on sexual orientation, gender identity, or nonbinary status as sex discrimination, including in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Rather, the U.S. Supreme Court has said, sex-based classifications distinguish "between men and women." *United States v. Virginia*, 518 U.S. 515, 532–33

(1996); *see* Opening Br. 38–39 (collecting examples). To equate gender identity (a changeable inner sense) with sex (a fixed biological trait) for equal-protection purposes would sidestep the high bar for recognizing new protected classes.

Another problem with plaintiffs' argument is that neither Indiana law nor the Bureau "discriminate[s] based on gender identity." The Indiana Code requires credentials to record sex. But the choice to describe persons based on sex rather than gender identity does not "facially discriminate" based on nonbinary status. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022) (en banc). "[B]oth sexes" include nonbinary persons, so any sex-based line is not a line based on nonbinary status. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Plaintiffs may believe including sex rather than gender identity on credentials impacts nonbinary persons differently than persons whose gender identity and sex align. But plaintiffs cannot sustain a disparate-impact claim without showing an invidious intent to harm a protected class. *See Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 272–74 (1979). Plaintiffs have not done so. As the Court of Appeals observed, "legitimate" reasons underlie the choice to have Bureau-issued credentials record sex. Op. 19–20.

Bostock v. Clayton County, 590 U.S. 644 (2020), does not support plaintiffs. That decision "only" held that "an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual 'because of such individual's sex'" in violation of Title VII. *Id.* at 681. It did not address the Equal Protection Clause, nonbinary status, or even hold all alleged workplace discrimination against "transgender" persons violates Title VII. *See id.*

And "[a]s many jurists have explained, Title VII's definition of discrimination" does "not neatly map" onto "other anti-discrimination mandates." *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880, at *2 (6th Cir. July 17, 2024).

There is, moreover, a critical difference between this case and the federal anti-discrimination cases plaintiffs invoke. In each of plaintiffs' cases, someone was treated differently—the person was fired or forced to use distant bathrooms. But neither Indiana law nor the Bureau treats nonbinary persons differently than other applicants. It does not give them lesser driving privileges, require them to present different documentation, or offer them different number of gender options. All applicants are treated the same regardless of sex or gender identity. That evenhanded application is dispositive here. The "gravamen of an equal protection claim is differential governmental treatment." *Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017).

Besides, the Equal Protection Clause does not give plaintiffs a right to demand that the State describe them as they wish. As federal courts have consistently held, the "Equal Protection Clause does not apply to government speech." *Fields v. Speaker of Pa. House of Representatives*, 936 F.3d 142, 160–61 (3d Cir. 2019). So the State is entitled to describe plaintiffs as it thinks most appropriate in state records and on state-issued credentials. For Bureau-issued credentials are "government speech." App. II 26; *see Comm'r of Ind. Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200, 1209 (Ind. 2015) (even personalized license plates "are government speech").

B. Plaintiffs misapprehend rational-basis review

Finally, plaintiffs argue that the Court of Appeals should not have considered what they deem "post hoc rationalizations." Pet. 14. That misunderstands what rational-basis review requires. On rational-basis review, a court is required to consider "'every conceivable basis which might support'" the challenged governmental action. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). "[I]t does not matter what the actual policy reason was, so long as a legitimate reason can be conceived." *City of Indianapolis v. Armour*, 946 N.E.2d 553, 561 (Ind. 2011), *aff'd*, 566 U.S. 673 (2012). The Court of Appeals thus appropriately considered all rationales that might support the Bureau's actions and the statute that lies behind them.

CONCLUSION

The petition to transfer should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2024, I electronically filed the foregoing document using the Indiana E-filing System (IEFS). I also certify that on September 5, 2024, the foregoing document was served upon the following persons using the IEFS:

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