

Agency Response to Public Comments on LSA #25-321

The Bureau of Motor Vehicles received comments on the proposed rules of LSA Document #25-321 via written submissions and the public hearing held on July 22, 2025. The following is a summary of the comments made by members of the public and the agency's response to those comments:

Comment: Many of the comments argue that the Regulatory Analysis filed by the BMV misrepresents the Court's ruling in *Indiana Bureau of Motor Vehicles v. Simmons*, 233 N.E.3d 1016 (Ind. App. 2024) in that the Court did not mandate that gender markers must reflect assigned at birth; rather, the Court only addressed the "X" gender marker and not whether "M" or "F" must align with birth sex.

Response: The commenters are correct in that the Court in *Simmons* specifically only addressed the "X" gender marker; however, in doing so, the Indiana Court of Appeals concluded that "until the legislature otherwise directs, . . . 'sex' is the definition of 'gender' and . . . under Title 9 generally and under [Ind. Code §] 9-24-11-5(a)(6) specifically, . . . refer[s] to the division of being either female or male." *Indiana Bureau of Motor Vehicles v. Simmons*, 233 N.E.3d 1016, 1027 (Ind. App. 2024) (as modified by *Indiana Bureau of Motor Vehicles v. Simmons*, 236 N.E.3d 1159 (Ind. App. 2024)).

Comment: Many comments argue that gender expression is protected free speech "based on the *Spence v. Washington* [418 U.S. 405 (1974)] test" and that the proposed rule "violates the compelled speech doctrine established in *West Virginia State Bd. Of Education v. Barnette*, [319 U.S. 624 (1943)]."

Response: *Spence* and *Barnette* are distinguishable and not applicable to gender markers on government issued credentials. First, *Spence* involved the display of a U.S. flag hanging upside down with a peace symbol made of tape affixed to the flag. The U.S. Supreme Court ruled the flag display was symbolic speech – that is, conduct intended to convey a specific message with a great likelihood the message would be understood by observers – and is a protected form of expression under the First Amendment. Gender markers on government issued credentials are factual government identifiers and not symbolic speech or expressive conduct initiated by the individual.

Next, *Barnette* involved a school mandate that all teachers and students salute the American flag and recite the Pledge of Allegiance. The U.S. Supreme Court held that the freedom of speech includes the right not to speak, and that symbolic acts of expression – like refusing a salute – are protected under the First Amendment. While the ruling in *Barnette* prohibits compelled ideological expression, gender markers on government issued credentials are neutral regulatory requirements and not an ideological statement. Thus, *Spence* and *Barnette* are factually distinguishable and not applicable to the proposed rule.

Lastly, in *Commissioner of Indiana Bureau of Motor Vehicles v. Vawter*, 45 N.E.3d 1200 (Ind. 2015), the Indiana Supreme Court ruled that personalized license plates are considered government speech and not private expression protected by the First Amendment. Like personalized license plates, government-issued credentials are forms of government speech and not forums for personal expression protected by the First Amendment. Thus, while *Spence* and *Barnette* are factually distinguishable and not applicable to the proposed rule, the *Vawter* opinion provides support that government-issued credentials – like personalized license plates – are forms of government speech, which the government may define and limit without violating the First Amendment.

Comment: The proposed rule is discriminatory, serves no rational government interest, and impedes equal access to government services as the rule will effectively bar all transgender, gender diverse, or intersex

Hoosiers from obtaining credentials which accurately reflect their identity.

Response: The *Simmons* Court ruled that the BMV's binary-only credential policy did not violate the Equal Protection Clause because the BMV's policy was neither irrational nor arbitrary in light of the governmental interests of accurately, consistently, and efficiently identifying licensees; promoting consistency with other statutes; and maintaining administrative efficiency.

While the *Simmons* Court essentially determined that "sex" is synonymous to "gender" and refers to the division of being female or male, it is important to note that the Court's conflation of "sex" with "gender" is only for the purposes of "Title 9 generally and under [Ind. Code §] 9-24-11-5(a)(6) specifically." *Simmons* at 1027. Including biological or binary sex on a credential is not a denial of gender diversity, but a reflection of practical realities that coexist with personal identity because biological sex and gender identity serve different but equally important functions. The proposed rule is not aimed at discriminating against gender-diverse Hoosiers or denying gender diversity; rather, it is aimed at ensuring the effective and efficient functioning of government systems and processes and maintaining compliance with state and federal laws and regulations.

Comment: Many comments were received requesting that the BMV continue to offer non-binary "X" designations on credentials contending that the *Simmons* opinion does not require the BMV to eliminate non-binary gender designations; rather, *Simmons* merely upholds the BMV's discretion.

Response: As discussed in the response to the first comment above, the *Simmons* Court did not uphold the BMV's discretion to offer a non-binary "X" gender marker. Rather, the *Simmons* Court concluded that "until the legislature otherwise directs, . . . 'sex' is the definition of 'gender' and . . . under Title 9 generally and under [Ind. Code §] 9-24-11-5(a)(6) specifically, . . . refer[s] to the division of being either female or male." *Simmons* at 1027.

Comment: In opposing the BMV's proposed rule, some commenters questioned why gender is included on credentials, recommending that gender no longer be included on credentials.

Response: The REAL ID Act sets forth the minimum document requirements and issuance standards established by the Department of Homeland Security for federal recognition of state identification. Among these is the information state driver's licenses and identification cards must contain, which includes "[t]he person's gender." REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, Title II, § 202(b)(3) (codified in 49 U.S.C. § 30301 note). Thus, federal law requires a person's gender to be included on a REAL ID compliant credential.