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IN THE  
**Indiana Supreme Court**

No. \_\_\_\_\_

IN RE: THE CHANGE OF GENDER  
OF O.J.G.S.,  
A Minor,  
  
S.G.S.,  
  
Appellant.

Court of Appeals Case No.  
21A-MI-02096,

Appeal from the  
Allen Circuit Court,

Trial Court Case No.  
02C01-2003-000156

The Honorable  
Wendy W. Davis,  
Judge.

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**INTERVENOR STATE OF INDIANA'S RESPONSE TO  
APPELLANT'S PETITION TO TRANSFER**

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**QUESTION PRESENTED**

Whether, and if so under what circumstances, courts may order changes to a birth certificate to reflect a person's gender identity rather than biological sex.

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## INTRODUCTION

By statute, the Indiana Department of Health must issue birth certificates recording the biological sex of persons born in Indiana. Recently, some courts have ordered that birth certificates instead record gender identity, even for very young children. The Court of Appeals is starkly divided over whether courts may issue such orders, and if so, what standards they should use. This Court should grant the petition to transfer but ultimately hold that courts lack authority to order that a person's birth certificate record gender identity rather than biological sex at birth.

## BACKGROUND

### I. The System for Recording and Correcting Birth Certificates

The Indiana General Assembly has charged the Indiana Department of Health (IDOH) with maintaining a system of vital statistics, administered by the State Registrar. Ind. Code §§ 16-37-1-1, -2. The Registrar must “[k]eep the files and records pertaining to vital statistics,” such as births and deaths. *Id.* § 16-37-1-2(1).

When a child is born, a “person in attendance” must file a “certificate of birth” with the local health officer using the electronic Indiana Birth Registration System. Ind. Code § 16-37-2-2. Alternatively, the officer must “prepare a certificate of birth from information secured from any person who has knowledge of the birth.” *Id.* The local health officer “make[s] a permanent record”—maintained in the state birth registration system—of information from the birth certificate, including the child’s “sex.” *Id.* § 16-37-2-9(a).



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In practice, the birth mother completes the Indiana Birth Worksheet, a questionnaire prepared by IDOH to collect vital statistics, demographic information, and medical history about the child and parents. *Birth Registration*, Ind. Dep't of Health, <https://www.in.gov/health/vital-records/vital-record-registration/birth-registration/> (last visited Aug. 3, 2022). The worksheet, which includes the “sex” of the child, is used to generate the child’s birth certificate.

If a birth certificate contains a misspelling or obvious inaccuracy as to (for example) spelling, date of birth, or parents’ birthplace, IDOH will correct it upon a showing of the inaccuracy. *Correct/Amend a Birth Certificate*, Ind. Dep't of Health, [https://www.in.gov/health/vital-records/corrections-and-amendments/correctamend-a-birth-certificate/#:~:text=To%20correct%20or%20amend%20a,\(317\)%20233%2D2700](https://www.in.gov/health/vital-records/corrections-and-amendments/correctamend-a-birth-certificate/#:~:text=To%20correct%20or%20amend%20a,(317)%20233%2D2700) (last visited Aug. 3, 2022).

In addition, for paternity designations, IDOH “may make additions to or corrections in a certificate of birth” upon “receipt of adequate documentary evidence, including the results of a DNA test . . . or a paternity affidavit.” Ind. Code § 16-37-2-10(b). But “[t]he state department may make an addition to a birth certificate based on the results of a DNA test only if: (1) a father is not named on the birth certificate; and (2) a citation to this subsection as the authority for the addition is noted on the birth certificate.” *Id.* § 16-37-2-10(c).

In the case of “a child of unknown parentage,” “[t]he local health officer shall prepare a certificate of birth.” *Id.* § 16-37-2-12. If the child later “is identified or if a regular certificate of birth is found or obtained, the local health officer shall correct

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the health officer's records and file a corrected certificate of birth with the state department." *Id.* Where a child is born out of wedlock and the biological parents later marry, "[u]pon receiving the proof of marriage and executed paternity affidavit, the state department shall make the corrections to the child's certificate of birth." *Id.* § 16-37-2-16. And in cases of adoption, IDOH "shall establish a new certificate of birth for an individual born in Indiana upon a receipt of an official report that the individual has been adopted." *Id.* § 31-19-13-1(a).

Name changes, however, first go through the courts. The General Assembly has empowered "the circuit courts, superior courts, and probate courts" to "change the names of natural persons on application by petition." Ind. Code § 34-28-2-1. When the petitioner is "a parent or guardian who wishes to change the name of a minor child, the petition must be verified, and it must state in detail the reason the change is requested." *Id.* § 34-28-2-2(b). In addition, "the written consent of a parent [or guardian] . . . must be filed with the petition," *id.*, and the petitioner must publish notice of the petition, stating that "any person has the right to appear at the hearing and to file objections," *id.* § 34-28-2-3(b). "In deciding on a petition to change the name of a minor child, the court shall be guided by the best interest of the child rule under IC 31-17-2-8," subject to a presumption in favor of a parent who objects to the proposed name change. *Id.* § 34-28-2-4(d). If it grants the petition, "the court shall send a copy of the final decree to the state department of health and to the local health department of the county." *Id.* § 34-28-2-5(b). Such a decree suffices for IDOH to change the name on a person's birth certificate.

## II. Procedure Used in this Case

Born male, O.J.G.S. “has been treated as a girl by her family, peers, and her doctors” since around age two. Pet. 5. O.J.G.S.’s birth certificate—and school and medical records—lists O.J.G.S.’s sex as male. *Id.* S.G., the mother of O.J.G.S., filed a petition in Allen County Circuit Court requesting changes to O.J.G.S.’s name and gender marker on O.J.G.S.’s birth certificate.

Styled a “Verified Petition for Change of Gender,” the petition seeks to “change the child’s gender marker to female” to “reflect the child’s gender identity and presentation.” App. Vol. II at 12–13. As authority, it cites Indiana Code § 16-37-2-10—which provides “[t]he state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence, including the results of a DNA test . . . or a paternity affidavit”—and *In re Petition for Change of Birth Certificate*, 22 N.E.3d 707 (Ind. Ct. App. 2014) (“*Birth Certificate*”). *Id.* The petition, which was not served on IDOH or any other potential respondent, asserted that it was “made in good faith and not for fraudulent purposes.” *Id.* at 13. After a hearing, the court denied the petition. *Id.* at 4–5.

S.G. appealed, and the case was consolidated with two others in *Matter of A.B.*, 164 N.E.3d 167 (Ind. Ct. App. 2021). The Court of Appeals, relying on Indiana Code section 16-37-2-10(b) and *Birth Certificate*, concluded that a parent could petition a court to change the “gender marker” on a minor child’s birth certificate and declared that “the appropriate standard is whether the change is in the child’s best interest.” *Id.* at 170–71. It remanded for the circuit court to make a best-interest determination.

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*Id.* at 171. Judge Pyle dissented because “[a] plain reading of the text [of Ind. Code § 16-37-2-10] reveals that this section has nothing to do with amending a birth certificate to reflect a parent’s desire to change a minor child’s gender to reflect their gender identity and presentation.” *Id.* at 172. In his view, the court “improperly expand[ed] judicial authority into an area where none presently exists.” *Id.* at 173.

On remand, the circuit court denied the petition because it “c[ould not] make a finding it is in the best interest of the child to approve the Petition.” App. Vol. II at 11.

S.G. appealed this second denial, and the Court of Appeals affirmed. In the lead opinion, Judge Altice explained that he, “like Judge Pyle, believe[s] that I.C. § 16-37-2-10 . . . simply does not grant courts of this state the authority to order a change of a gender marker on a birth certificate.” *In re O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022). “Starting with *In re Birth Certificate* in 2014, this court essentially amended the statute in order to permit individuals—first adults and then parents on behalf of their minor children—to petition for gender marker changes.” *Id.* at 330.

Judge Bailey, concurring in result, “agree[d] . . . that Indiana Code Section 16-37-2-10 does not provide trial courts with the authority to order the registrar of the division of vital statistics within the Indiana Department of Health to change the gender marker on a birth certificate of a child.” *Id.* at 330. Despite that lack of authority, Judge Bailey would permit a change for an adult, but not a child. *Id.* at 331.

Judge Mathias dissented, arguing that courts can “provide[] equitable relief” in “the absence of a statute prohibiting that action.” *Id.* at 334. In his view, “equity jurisprudence provides the remedy to consider [S.G.]’s request on [O.J.G.S.]’s behalf.” *Id.* at 340. Judge Mathias would defer to parents’ wishes absent “clear and convincing evidence” that denying a change would serve the child’s best interests. *Id.* at 336.

### **SUMMARY OF ARGUMENT**

Indiana courts need to know whether they have authority to change the sex recorded on a birth certificate to align with a person’s asserted gender identity, and if so, what standard applies. This Court should grant transfer and resolve the confusion with a clear rule grounded in law.

The law affords but a single answer: courts lack authority to grant petitions for a change of “gender marker.” No statute provides (1) a cause of action for changing the sex recorded on a birth certificate, (2) judicial authority to change the recorded sex in any circumstance, or (3) a standard for evaluating petitions to change that information. Indiana law otherwise provides a right to petition IDOH to make “additions to or corrections in a certificate of birth” regarding a “paternity” record, and it provides a cause of action to petition for name changes. But it provides no procedure or standard by which a court or IDOH may change the sex recorded on a birth certificate to reflect a different gender identity.

A court’s general equitable powers do not provide such authority, either. The “inherent equity power” of the judiciary is limited by historical practice, which does not include judicial alteration of birth certificates to reflect gender identity. And by

expressly placing authority to manage and change birth certificates in IDOH, the General Assembly limited any equitable authority of the courts to do so.

## ARGUMENT

### I. Transfer Is Warranted Because Court of Appeals Decisions Conflict over Whether (and If So, When) Courts May Change “Gender Markers” on Birth Certificates

The Court of Appeals first permitted a change to a birth certificate’s recorded sex to reflect a different gender identity in *In re Petition for Change of Birth Certificate*, where a female adult who had undergone gender reassignment surgery “filed a petition to change his legal gender so that he could correct the gender markers on his birth certificate.” 22 N.E.3d 707, 707 (Ind. Ct. App. 2014) (“*Birth Certificate*”). Relying on Indiana Code § 16-37-2-10 and “inherent equity power,” the court declared that Indiana courts could grant such petitions where “the petition is made in good faith and not for a fraudulent or unlawful purpose.” *Id.* at 709–10. The court, however, ignored Indiana law requiring that a birth certificate record an individual’s “sex,” not gender identity. Ind. Code § 16-37-2-9(a). And it neither cited authority for, nor explained, its “good faith” standard. Another panel of the Court of Appeals nonetheless followed suit in *Matter of R.E.*, 142 N.E.3d 1045, 1052 (Ind. Ct. App. 2020).

In the consolidated first appeal in this case, the Court of Appeals applied *Birth Certificate* to a new context—a parent’s petition to change the “gender marker” on a minor child’s birth certificate. *Matter of A.B.*, 164 N.E.3d 167 (Ind. Ct. App. 2021). “Considering the broad language of Indiana Code section 16-37-2-10(b)” —as interpreted in *Birth Certificate*—“and the wide authority of parents to make decisions

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about their children's lives," the court concluded that a parent may petition a court to change the sex recorded on a minor child's birth certificate. *Id.* at 170. The court further held that the statutory standard for requesting a *name* change—the best interest of the child—applies to petitions requesting a “gender marker” change for a child, while the “good faith” standard used in *Birth Certificate* applies to adult petitions. *Id.* at 170–71.

Judge Pyle dissented because the “General Assembly has not provided Indiana trial courts with any statutory authority to grant petitions to change a minor child's gender to reflect their gender identity and presentation.” *Id.* at 171 (Pyle, J., dissenting). In his view, *Birth Certificate*, *R.E.*, and *A.B.* all “improperly expand judicial authority into an area where none presently exists.” *Id.* at 173.

Soon thereafter, the Court of Appeals affirmed the denial of a mother's petition for a child's name and gender-marker change in *In re H.S.*, 175 N.E.3d 1184 (Ind. Ct. App. 2021). In the lead opinion, Judge Bailey asserted that, while “[t]he generic statutory provision [Ind. Code § 16-37-2-10] has served as a vehicle with enough flexibility to permit its ready application to the gender marker choice of a competent adult,” it “has reached a point of inelasticity where the issue concerns children.” *Id.* at 1188. He concluded that “any application to a child must be accompanied by a best interests analysis.” *Id.*

Judge Pyle concurred in the result for the same reason as his *A.B.* dissent: the lack of “statutory authority.” *Id.* at 1188. Judge Crone dissented, arguing that the trial court erred in its “best interests” analysis. *Id.* at 1189.

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Amidst these existing doctrinal tensions, the decision in this case created outright conflict. Judge Altice concluded that Indiana Code § 16-37-2-10 “has been improperly interpreted by this court on a number of occasions,” and it “simply does not grant courts of this state the authority to order a change of a gender marker on a birth certificate.” *In re O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022). The error arose from “[f]ocusing on only the first clause of subsection (b) and essentially ignoring the rest of the statute.” *Id.* at 327. Allowing “gender marker” changes for adults and children goes “far beyond the plain language and clear intent” of the statute. *Id.* at 330.

Judge Bailey concurred in result because “Indiana Code Section 16-37-2-10 does not provide trial courts with the authority to order” this change, and “an equitable action cannot accomplish the desired objective where . . . there is absolutely no statutory framework.” *Id.* at 330–31. Judge Mathias dissented, arguing that courts have equitable authority to order a change of sex recorded on birth certificates for adults and children alike. *Id.* at 335.

Thus, the Court of Appeals is fractured in multiple directions as to whether and when courts may order IDOH to change the sex recorded on a birth certificate, including two judgments in the same case reaching different conclusions. This Court should grant transfer to resolve the conflict.



## **II. Courts Lack Authority in Law and Equity to Change the Sex Recorded on Birth Certificates**

### **A. The General Assembly requires recording a person's "sex," not gender identity**

State law forecloses changes to birth certificates to reflect gender identity instead of sex. The General Assembly has provided, by statute, that a birth certificate must record a person's "sex." Ind. Code § 16-37-2-9. Sex is a function of anatomy and biology, as reflected in a person's genitalia, reproductive organs, and chromosomes. *Sex*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/sex> (last visited Aug. 3, 2022). "Gender identity," on the other hand, is a function of subjective understanding, sometimes accompanied by aspects of individual presentation, hormone therapy, and surgery. *Gender Identity*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gender%20identity> (last visited Aug. 3, 2022); *see also* Br. of Amicus Curiae Drs. Fortenberry and Meininger 4 ("[G]ender identity . . . refers to a person's internal sense of being male or female."). While popular culture often elides the two concepts, they have distinct meanings, and no basis exists for inferring that the Indiana Code treats them as synonymous. The statutory requirement that a birth certificate record "sex" precludes a petition asking to record gender identity instead.

### **B. Section 16-37-2-10, relied on by Petitioner, merely empowers IDOH to change the father's name on a birth certificate**

Petitioner does not address Section 16-37-2-9. Petitioner instead claims that Indiana Code § 16-37-2-10(b) gives courts authority "to order that a child's gender

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marker be changed.” Pet. 2. The plain text of that statute, however, forecloses such authority.

First, the statute addresses changes or additions to a birth certificate only with respect to paternity. Section 16-37-2-10(b) provides in full: “The state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence, including the results of a DNA test under subsection (c) or a paternity affidavit under section 2.1 of this chapter.” That text “has nothing to do with amending a birth certificate to reflect a parent’s desire to change a minor child’s gender to reflect their gender identity and presentation.” *Matter of A.B.*, 164 N.E.3d 167, 172 (Ind. Ct. App. 2021) (Pyle, J., dissenting). It merely contemplates changes to a birth certificate’s record of paternity, as established by “a DNA test . . . or a paternity affidavit.” Ind. Code § 16-37-2-10(b). Those two examples demonstrate that other “evidence” justifying a change to a birth certificate must likewise relate to paternity. *Loparex, LLC v. MPI Release Technologies, LLC*, 964 N.E.2d 806, 821 (Ind. 2012) (under *eiusdem generis*, a statute’s general language “encompass[es] only those activities of a like kind or class” to those specifically mentioned).

The statutory context confirms that Section 16-37-2-10 is a paternity statute, as it refers to an individual’s “DNA” and “paternity” in subsections 10(a) and 10(b). Subsection 10(c) next permits a change “based on the results of a DNA test only if . . . a father is not named on the birth certificate.” Ind. Code § 16-37-2-10(c)(1). Nowhere does this statute refer to sex—or to any other information—on a birth certificate. If

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anything, a DNA test can only provide evidence of a person's *biological* sex, not gender identity.

Second, changing the sex recorded on a birth certificate to gender identity does not constitute an "addition" or a "correction." Doing so would not add to the certificate—it would replace "male" with "female," or vice-versa. And it would not constitute a "correction," as such requests do not assert that the birth certificate mis-recorded the biological sex of the child at birth, as determined by the child's anatomy, reproductive organs, or even chromosomes. The claim, rather, is that the person's gender identity—their internal sense of self—does not align with that sex. So, changing "sex" to reflect gender identity would be a substantive change with entirely different information, not an error correction.

Third, the General Assembly has enacted *other* statutes providing mechanisms for individuals to change *other* legal information, but not sex. For example, the legislature has empowered "the circuit courts, superior courts, and probate courts in Indiana [to] change the names of natural persons on application by petition," Ind. Code § 34-28-2-1, including minor children upon application by the parents, *id.* § 34-28-2-2(c). In another statute, if a woman in divorce proceedings wishes to restore her maiden name or a previous married name, the legislature has provided "[t]he court shall grant the name change upon entering the decree of dissolution [of marriage]." *id.* § 31-15-2-18(b). The General Assembly has not created a procedure for changing sex to gender identity on a birth certificate.

**C. Courts cannot invoke “equity” to order changes to the recorded sex on birth certificates to align with asserted gender identity**

Invoking “inherent equity power” to change a birth certificate to record gender identity rather than sex at birth is unjustified. *See In re Petition for Change of Birth Certificate*, 22 N.E.3d 707, 709 (Ind. Ct. App. 2014); *Matter of A.B.*, 164 N.E.3d 167, 172 (Ind. Ct. App. 2021). No tradition supports such a claim of judicial authority, and the legislature’s detailed scheme for controlling vital records precludes it.

**1. Changing a birth certificate to reflect an individual’s gender identity is not within an equity court’s traditional powers**

History and tradition define the bounds of a court’s equitable authority. *Nealis v. Dicks*, 72 Ind. 374, 379 (1880) (courts of equity could “provide substantially the same remedy” available “under the old chancery practice” but not “enlarge” those powers); *McConnell v. Hampton*, 73 N.E. 1092, 1092 (Ind. 1905) (a “case must be brought within some of the recognized foundations of equitable jurisdiction”); *see Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 536 (2021) (“equitable relief . . . [is] permissible only when supported by tradition”).

To state the obvious, courts have not traditionally exercised an equitable power to change a birth certificate’s recordation of sex to reflect a person’s gender identity. Dodging the question of history and tradition, the court in *Birth Certificate* merely observed that “[t]he vast majority of states, including Indiana, have allowed it in practice for some time.” 22 N.E.3d at 709. But the cited authorities point only to the practice of state legislatures and agencies allowing changes to birth certificates, not to the historical practice of courts of equity. *See Dean Spade, Documenting Gender*,

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59 Hastings L.J. 731, 768 (2008) (most states “specifically authorize gender reclassification by statute or administrative ruling,” while others “have no written rule . . . , but in practice do provide sex designation upon application”); *In re Heilig*, 816 A.2d 68, 83–84 (Md. 2003) (similar). And *Birth Certificate* cited only a single Indiana case that “observ[ed] that [the] trial court granted [a] petition to change gender on birth certificate.” 22 N.E.3d at 709. That cited case, for its part, explained that “[t]he question of whether the trial court properly amended Davis’s birth certificate to show a change of gender [wa]s not properly before [it].” *In re Davis*, 1 N.E.3d 184, 186 n.1 (Ind. Ct. App. 2013). No “old chancery practice” or deeply rooted tradition permits a court to change the sex recorded on a birth certificate to reflect a different gender identity. *Nealis*, 72 Ind. at 376.

Nor do equitable maxims supply authority here. Although, as Judge Mathias observed in dissent, “[e]quity will not suffer a wrong to be without a remedy,” *Ritter v. Ritter*, 38 N.E.2d 997, 1000 (Ind. 1942), “[a]bsent a wrong, intervention by equity is inappropriate,” *Savoree v. Indus. Contracting & Erecting, Inc.*, 789 N.E.2d 1013, 1020 (Ind. Ct. App. 2003). Here, Section 16-37-2-9 contemplates that a birth certificate will reflect a person’s “sex,” not gender identity, and no one disputes that the birth certificate accurately records O.J.G.S.’s sex at birth. Accordingly, no wrong exists.

Even apart from the statutory text, whether any wrong has occurred is highly debatable. Reasonable people may disagree over whether a birth certificate should record a person’s biological sex or gender identity. Recording a person’s biological sex

may be useful for demographic statistical purposes or for ensuring medical records made from a birth certificate reflect a person's biology (which may be important for treatment decisions).

In short, answering the value-laden policy question of whether a "wrong" has occurred is for the General Assembly. As Judge Altice put it, "the mechanism for such a change, no matter how vital to certain members of our society, must be crafted by the General Assembly." *In re O.J.G.S.*, 187 N.E.3d 324, 325 (Ind. Ct. App. 2022).

**2. The statutory scheme forecloses judicial authority to change a birth certificate**

Furthermore, the regulatory scheme prescribing the information to be recorded on birth certificates and providing for IDOH to collect and maintain vital records tacitly limits the power of the judiciary to order "equitable" changes to vital records.

First, again, the legislature has provided that a birth certificate must record a person's "sex," not gender identity. Ind. Code § 16-37-2-9.

Second, the General Assembly delegated to IDOH the authority and responsibility to operate the State's birth registration system. *Id.* § 16-37-1-3.1(a). IDOH's responsibilities include, among others, "provid[ing] a system of vital statistics for Indiana to be administered by a division of the state department," *Id.* § 16-37-1-1(a), "adopt[ing] rules concerning the application for, the supporting documents for, and the acceptance of delayed certificates of birth," *id.* § 16-37-2-6, and "issu[ing] a certificate of birth registration without charge to the applicant for a delayed certificate of birth if the state department finds the application is properly executed," *id.* § 16-37-2-7.

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In so doing, the legislature has prescribed the substantive changes IDOH may make, including in cases of adoption or paternity corrections. Ind. Code § 31-19-13-1(a) (adoption); *id.* § 16-37-2-10(b) (paternity). IDOH will also honor a court order under Section 34-28-2-5 to change a name on a birth certificate. By enacting statutes governing issuance and maintenance of birth certificates and the information they bear, the General Assembly implicitly foreclosed resort to equity as a catch-all source of authority to change birth certificates. Because “equity follows the law,” *State ex rel. Root v. Circuit Court of Allen County*, 289 N.E.2d 503, 506 (Ind. 1972), courts cannot, in the name of equity, create a separate, parallel, and potentially more expansive power to change vital records.

**CONCLUSION**

The Court should grant transfer and hold that the judiciary has no statutory or inherent equitable power to order a change to the sex recorded on a birth certificate to reflect a different gender identity.

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**CERTIFICATE OF WORD COUNT**

I verify that this brief contains no more than 4,200 words.

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**CERTIFICATE OF FILING AND SERVICE**

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