2017-1460

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEE FULCHER, GIULIANO SILVA, AND
THE TRANSGENDER AMERICAN VETERANS ASSOCIATION,
Petitioners,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Review Pursuant to 38 U.S.C. § 502

BRIEF FOR RESPONDENT

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel states that he is unaware of any other appeal in or from this action that was previously before this Court or any other appellate court under the same or similar title. Respondent's counsel also states that he is unaware of any case pending in this or any other court that may directly affect or be directly affected by this Court's decision in this case.

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BRIEF FOR RESPONDENT

INTRODUCTION

Petitioners invoke this Court's jurisdiction under 38 U.S.C. § 502 to review "the denial" of their petition for rulemaking, Pet. Br. 1, which asked the Department of Veterans Affairs (VA) to amend its regulations to provide gender alteration surgery to veterans enrolled in VA's health care system. But their petition for review suffers from a fatal defect: VA has neither denied their petition for rulemaking nor taken any other final action with respect to such rulemaking. Absent such a denial, this Court lacks jurisdiction over that claim.

Although petitioners concede that VA "never directly responded to the petition," Pet. Br. 1, they nevertheless ask this Court to construe a letter from VA to individual members of Congress as a denial of their rulemaking petition. But that letter, sent to third parties, did not even mention petitioners' request for rulemaking. Moreover, the letter made clear that VA "will continue to explore a regulatory change that would allow VA to perform gender alteration surgery" as part of the medical benefits package to veterans. Appx1-47. That letter, therefore, cannot reasonably be construed as a denial of petitioners' rulemaking request such that this Court has jurisdiction to review that denial.

Petitioners' alternative claim that VA has unreasonably delayed acting on their rulemaking request lacks merit. Regardless of whether this Court analyzes that claim under mandamus or APA standards, petitioners fail to satisfy the high standard necessary to establish that VA unreasonably delayed in acting on their rulemaking petition, particularly given that the rulemaking petition has only been pending for 18 months and VA has taken active steps in considering whether to change the rule excluding gender alterations from the medical benefits package. But even if petitioners could satisfy that standard, they are mistaken as to the appropriate remedy, which would be to order VA to respond to the petition, not to grant the petition.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 38 U.S.C. § 502, alleging that VA denied their rulemaking petition on November 10, 2016. Pet. Br. 1; *see also Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011) (holding that section 502 vests this Court with jurisdiction "to review the Secretary's denial of a request for rulemaking made pursuant to § 553(e)"). But, as explained below, VA has not denied their petition such that this Court has jurisdiction under section 502 to review that purported denial.

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction under 38 U.S.C. § 502 to review a "denial" of rulemaking when VA has not denied the rulemaking petition.

2. Even if this Court construes VA's letter to individual members of Congress as final agency action denying the petition for rulemaking, whether the proper remedy is to remand the petition to the agency for an adequate response.

3. Whether this Court should reject petitioners' alternative claim that VA has unreasonably delayed acting on petitioners' rulemaking request.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

I. Nature Of The Case

In May 2016, petitioners Dee Fulcher, Giuliano Silva, and the Transgender American Veterans Association filed a petition for rulemaking, asking VA to

amend its regulations to provide gender alteration surgery to veterans enrolled in VA's health care system. Although VA has not denied their request, petitioners nevertheless ask this Court to exercise its jurisdiction under 38 U.S.C. § 502 to review "the denial of a petition for rulemaking." Pet. Br. 1. In the alternative, petitioners claim that the agency has unreasonably delayed acting on their rulemaking request.

II. Statement Of Facts And Course Of Proceedings Below

A. VA's Health Care System

Pursuant to 38 U.S.C. § 1710(a), the Secretary "shall furnish hospital care and medical services which the Secretary determines to be needed" to specified categories of veterans, *see id.* § 1710(a)(1) and (a)(2), and "may" furnish such care to all other veterans "to the extent resources and facilities are available," *id.* § 1710(a)(3). Congress gave the Secretary broad discretion to "determin[e]" the "needed" hospital care and medical services that VA will provide to veterans enrolled in the health care system. *Id.* § 1710(a)(1)-(3); *see also E. Paralyzed Veterans Ass'n v. Sec'y of Veterans Affairs*, 257 F.3d 1352, 1362 (Fed. Cir. 2001).

Following passage of the Veterans Health Care Eligibility Reform Act of 1996 (the 1996 Act), VA promulgated a "medical benefits package" in 1999 to clearly establish the parameters of the care and services that VA will provide to

veterans enrolled in its health care system. *See* 38 C.F.R. § 17.38. At the time, VA explained how it intended to determine care and services that are "needed":

> The Secretary has authority to provide healthcare as determined to be medically needed. In our view, medically needed constitutes care that is determined by appropriate healthcare professionals to be needed to promote, preserve, or restore the health of the individual and to be in accord with generally accepted standards of medical practice.

Enrollment – Provision of Hospital and Outpatient Care to Veterans, 64 Fed. Reg. 54,207, 54,210 (Oct. 6, 1999); *see also* 38 C.F.R. § 17.38(b) ("Care referred to in the 'medical benefits package' will be provided to individuals only if it is determined by appropriate healthcare professionals that the care is needed to promote, preserve, or restore the health of the individual and is in accord with generally accepted standards of medical practice.").[1] As a result, section 17.38(a)(1) lists the "basic care" services and procedures included in the medical benefits package, and subsection (a)(2) lists the "preventative care" services and procedures included in the package. Finally, section 17.38(c) lists six services or

[1] Veterans may also receive certain types of VA care not included in the medical benefits package if authorized by statute or another regulation (*e.g.*, humanitarian emergency care for which the individual will be billed, compensation and pension examinations, dental care, domiciliary care, nursing home care, readjustment counseling, care as part of a VA-approved research project, seeing-eye or guide dogs, sexual trauma counseling and treatment, and special registry examinations). Appx305-315.

procedures that are excluded from the medical benefits package, including "[g]ender alterations." 38 C.F.R. § 17.38(c)(4).

Although Congress gave the Secretary broad discretion to determine the care and services included in the medical benefits package, VA's provision of health care is nevertheless subject to certain Congressionally-imposed limitations. First, the 1996 Act clarified that the Secretary may provide health care to enrollees only to the extent and in the amount appropriated in advance for such programs. 38 U.S.C. § 1710(a)(4); *see* H.R. REP. NO. 104-690, at 6 (1996) ("Finally, the Act would explicitly recognize that the extent of the Secretary's obligations under law are limited by the funds made available in advance by appropriations acts.").

The 1996 Act also directs the Secretary to establish and operate a "system of annual patient enrollment" that enrolls veterans according to eight Congressionally-established priority groups. 38 U.S.C. § 1705(a); *see* H.R. REP. NO. 104-690, at 12 (1996). Further, the 1996 Act directs the Secretary to manage the enrollment of veterans in accordance with priorities, and in the order, specified in the law. For example, the first priority for enrollment are "[v]eterans with service-connected disabilities rated 50 percent or greater and veterans who were awarded the medal of honor[.]" 38 U.S.C. § 1705(a)(1). Congress also required the Secretary to establish an enrollment system that "ensure[s] that the provision of care to enrollees is timely and acceptable in quality." 38 U.S.C. § 1705(b)(1). The

legislative history of the 1996 Act makes clear Congress's intent was not only to ensure that all enrollees receive timely, quality health care, but also to tether VA's provision of health care to the availability of appropriations and to limit the enrollment pool:

> Section 4 would first add a new section 1705 applicable to managing delivery of care under new section 1710(a)(1) to: (1) require the VA to administer care-delivery through an annual patient enrollment, with a veteran's ability to enroll to be governed by the availability of appropriations and by reference to a system of listed priorities; (2) require that the size of the enrollment pool be governed by the requirement that provision of care to enrollees be timely and acceptable in quality; (3) require that the VA promote cost-effective delivery of care in the most clinically appropriate setting; and (4) require the VA to maintain its capacity to provide for the specialized treatment needs of disabled veterans.

H.R. REP. NO. 104-690, at 12 (1996).

In addition, 38 U.S.C. § 1706(a) directs VA to "design, establish and manage health care programs in such a manner as to promote cost-effective delivery of health care services in the most clinically appropriate setting." In doing so, the Secretary is required to "ensure that the Department . . . maintains its capacity to provide for the specialized treatment and rehabilitative needs of disabled veterans . . . within distinct programs or facilities of the Department[.]" 38 U.S.C. § 1706(b).

VA currently provides health care to approximately 8.9 million veterans at more than 1,200 VA Medical Centers and Veterans Health Administration (VHA) outpatient clinics.[2]

B. Petitioners' Rulemaking Request And VA's Preliminary Actions

On May 9, 2016, petitioners filed a petition for rulemaking to request that VA remove the regulatory exclusion for gender alterations in section 17.38(c)(4) and promulgate a new regulation "expressly including medically necessary sex reassignment surgery for transgender veterans in [the] medical benefits package." Appx71-298.

In the Spring 2016 version of the Semiannual Unified Agenda of Regulatory and Deregulatory Actions (Unified Agenda), VA announced that it was considering issuing a notice of proposed rulemaking (NPRM) to remove the exclusion of gender alterations from the medical benefits package.[3] VA drafted an

[2] *See* https://www.va.gov/health/findcare.asp (last visited November 27, 2017).

[3] The listing is available online only at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201604&RIN=2900-AP69 (last visited November 27, 2017). The Unified Agenda is a non-binding, informational document that "communicates agency actions under development or review during the 12 months following publication." Office of Information and Regulatory Affairs, Memorandum: Spring 2017 Call for the Unified Agenda of Federal Regulatory and Deregulatory Actions (2017), *available at* https://www.whitehouse.gov/the-press-office/2017/03/06/memorandum-spring-2017-data-call-unified-agenda-federal-regulatory-and (last visited November 27, 2017).

NPRM, Appx305-315, but did not publish the draft NPRM in the Federal Register or otherwise make it publicly available.

In June 2016, VA initiated an economic impact analysis to consider the impact of the draft proposed rule. Appx321-329. The directors of VA's Lesbian, Gay, Bisexual and Transgender (LGBT) Health Program determined that "[t]he costs estimated during the budget pilot from the publication of the rule through the first 3 years to be just over $17.9 million." Appx329.

On June 22, 2016, VA received a letter signed by 30 members of the United States House of Representatives and Senate expressing disapproval of VA's consideration of a proposed rule. Appx316-319. Among other issues, the letter expressed concern that VA has struggled within its budgetary constraints to provide the care already included in the medical benefits package. *Id.* The letter requested that VA cease consideration of the rulemaking. *Id.*

On September 12, 2016, VA received two letters from members of the United States Senate urging VA to publish a proposed rule and to provide gender alteration surgery to veterans through its medical benefits package. Appx331-336.

On November 10, 2016, then-Under Secretary for the VHA, David Shulkin, responded to individual members of Congress by sending a separate letter to each member. *E.g.*, Appx1. At the beginning of each letter, Dr. Shulkin told each recipient that he was writing "in response to your . . . letter" "asking for an update

on the Notice of Proposed Rulemaking (NPRM)." *E.g.*, *id.* Dr. Shulkin clarified that "VA has not published a NPRM to remove the exclusion of gender alterations from VA's medical benefits package, but rather announced it was considering issuance of such a NPRM in the Unified Agenda of Federal Regulatory and Deregulatory Actions." *Id.* Dr. Shulkin explained:

> VA has been and will continue to explore a regulatory change that would allow VA to perform gender alteration surgery and a change in the medical benefits package, when appropriated funding is available. Therefore, this regulation will be withdrawn from the Fall 2016 Unified Agenda. While VA has begun considering factors impacting this rulemaking process, it is not imminent.

Id.

On January 6, 2017, petitioners filed a petition for review. Appx300-304.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction over the petition for review insofar as it seeks review of a denial of petitioners' rulemaking request because VA has not denied the rulemaking petition. Although VA has taken concrete steps in consideration of a possible rulemaking, it has neither completed its formal decision-making process nor provided petitioners with a response, as the APA requires before an agency will be deemed to have made a final, judicially-reviewable decision. *See* Pet. Br. 1 (acknowledging that VA has "never directly responded to the petition"). Without final agency action denying the petition, this Court lacks jurisdiction under 38

U.S.C. § 502. At such time as the agency issues a final decision on the petition, this Court may review that decision with the benefit of a reasoned explanation from the agency and a complete administrative record.

If this Court, however, nevertheless determines that it has jurisdiction—despite the absence of any "direct[] respon[se] to the petition" for rulemaking, Pet. Br. 1—then remand would be required to allow VA to provide a reasoned, formal response to the petition. VA's November 2016 letter to individual members of Congress to "update" them on the draft NPRM did not mention, much less deny, petitioners' specific request for rulemaking. Because the letter was never intended to be a final decision responding to petitioners' request, any explanation contained therein would not provide a reasoned basis to support a denial of petitioners' rulemaking petition. At a minimum, Supreme Court precedent would require a remand so that VA may provide a reasoned explanation.

This Court should reject petitioners' alternative claim that VA unreasonably delayed acting on their rulemaking request, which was filed only 18 months ago. Petitioners have failed to establish that VA's 18-month delay is so egregious as to warrant an order compelling VA to act on their petition. Even assuming that petitioners could demonstrate such a right to relief, the proper remedy would be limited to an order directing the Secretary to respond to the rulemaking request, not to grant it.

ARGUMENT

I. Standard And Scope Of Review

This Court has exclusive jurisdiction to review "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 . . . refers." 38 U.S.C. § 502. This Court thus has jurisdiction to review certain rulemaking actions, such as the promulgation or amendment of a rule, *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 (Fed. Cir. 2000), as well as to "review the Secretary's denial of a request for rulemaking made pursuant to [5 U.S.C.] § 553(e)." *Preminger*, 632 F.3d at 1351-52; *see also* 5 U.S.C. § 553(e) (providing for "the right to petition for the issuance, amendment, or repeal of a rule").

This Court reviews petitions under section 502 in accordance with the standards set forth in the APA. 38 U.S.C. § 502 ("Such review shall be in accordance with chapter 7 of title 5 . . . ."); *Nyeholt v. Sec'y of Veterans Affairs*, 298 F.3d 1350, 1355 (Fed. Cir. 2002). This standard permits this Court to review whether the Secretary's decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Preminger*, 632 F.3d at 1353. Although "[r]eview under the 'arbitrary and capricious' tag line . . . encompasses a range of levels of deference to the agency[,]" "an agency's refusal to institute rulemaking proceedings is at the high end of the range." *Am. Horse Protection Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (citations omitted). Under

section 502 and in accordance with the APA, this Court may review only final agency action. 38 U.S.C. § 502; 5 U.S.C. § 704; *see also Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (discussing standard for final agency action).

II. This Court Lacks Jurisdiction To Review A "Denial" Of A Rulemaking Petition Where The Petition Has Not Been Denied

This Court has exclusive jurisdiction to review "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 . . . refers." 38 U.S.C. § 502. In *Preminger*, this Court held that its jurisdiction under section 502 extends to review of "the Secretary's denial of a request for rulemaking made pursuant to [5 U.S.C.] § 553(e)." 632 F.3d at 1352. As this Court explained, 5 U.S.C. § 553(e) "refers" to a petition for rulemaking. *Id.* at 1351 (quoting 38 U.S.C. § 502). This Court held that it has jurisdiction not only in "a case in which the petitioner is somehow denied 'the right to petition,'" *id.* at 1351 (quoting 5 U.S.C. § 553(e)), but also in a case that seeks review of "the Secretary's denial" of the petition itself, *id.* at 1352.

Because VA has *not* denied petitioners' rulemaking request, or taken any other final agency action with respect to that request, however, this Court lacks jurisdiction under 38 U.S.C. § 502 (and this Court's decision in *Preminger*) to review the agency's purported denial of rulemaking. Indeed, nothing in the record remotely resembles a denial of petitioners' request for rulemaking.[4]

[4] The regulatory exclusion in 38 C.F.R. § 17.38(c)(4) became effective over 18 years ago, and therefore the time for seeking direct review of the regulation has

Ordinarily, when an agency denies a petition for rulemaking, the APA requires the agency to give "[p]rompt notice" of the denial and a brief statement of the grounds for the denial. 5 U.S.C. § 555(e) ("Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding . . . the notice shall be accompanied by a brief statement of the grounds for the denial."); *see Nat. Resources Def. Council, Inc. v. SEC*, 389 F. Supp. 689, 702 (D.D.C. 1974). Moreover, the APA contemplates that the notice will be provided directly to the petitioning party. *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535, 540 (S.D.N.Y. 2009) ("At a minimum, the right to petition for rulemaking entitles a petitioning party to a response to the merits of the petition.") (quoting Richard J. Pierce, Jr., ADMINISTRATIVE LAW TREATISE § 6.10 (4th ed. 2002)); *cf. WWHT, Inc. v. FCC*, 656 F.2d 807, 814 (D.C. Cir. 1981) (FCC regulations provide that a "petition for rule making will be denied and the petitioner will be notified of the Commission's action with the grounds therefor.").

VA has taken no action that satisfies these requirements. Petitioners concede, in fact, that VA has "never directly responded to the petition." Pet. Br. 1.

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long passed. *See* Fed. Cir. R. 47.12(a) (actions for judicial review under 38 U.S.C. § 502 of a VA rule or regulation "must be filed with the clerk of court within 60 days after issuance[.]"); 64 Fed. Reg. at 54,207 (effective Nov. 5, 1999).

This Court therefore lacks jurisdiction over petitioners' challenge to the alleged denial of rulemaking.

Petitioners counter that the absence of a formal denial is "immaterial," Pet. Br. 23, but this argument is predicated on the supposition that VA's decision-making process is nonetheless complete. Nothing in the record supports this conclusion.[5] Moreover, adopting petitioners' characterization of the APA's response requirement as a mere formality would effectively eviscerate the protections Supreme Court precedent affords agencies in completing their administrative processes by inviting premature judicial intervention. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (premature judicial intervention "inappropriately interfere[s] with further administrative action" by hindering an agency's efforts to complete the decision-making process); *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) ("Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise . . . [and] also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary." (citations omitted)). Indeed, petitioners provide no reason for the

[5] To the extent petitioners allege, in the alternative, that the agency failed to act on their petition for rulemaking (*i.e.*, that the agency unreasonably delayed), that claim lacks merit for the reasons discussed *infra* pp. 36-42.

Court to casually disregard the APA's requirement of a final denial communicated to petitioners as a predicate for judicial review.

Petitioners ask this Court to construe VA's November 2016 letter to update individual members of Congress on the draft NPRM as a "denial of [their] petition for rulemaking." Pet. Br. 1; *Preminger*, 632 F.3d at 1352. But that letter is not addressed to petitioners and does not even mention their specific rulemaking petition, the purported denial of which is the alleged basis for this Court's jurisdiction. *See* 38 U.S.C. § 502 (granting exclusive jurisdiction to this Court to review "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 . . . refers"); 5 U.S.C. § 553(e) (right to petition for rulemaking). The letter was sent "in response to [the various] letter[s]" from individual members of Congress, not in response to the rulemaking petition. Appx1.

Even if the letter had referred to the specific rulemaking petition at issue, it could not possibly be considered final agency action denying the petition. As petitioners acknowledge (Pet. Br. 22), "two conditions must be satisfied for agency action to be 'final'" and therefore subject to judicial review. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Id.* (citations omitted). Second, "the action must be one by which 'rights or obligations have been determined,' or from which 'legal

consequences will flow[.]'" *Id.* (quoting *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). Neither *Bennett* condition is satisfied by the letter.

First, the plain language of VA's letter disclosed that VA's consideration of a regulatory change to permit VA to provide gender alteration surgery remained ongoing. Appx1 ("VA has been and will continue to explore a regulatory change that would allow VA to perform gender alteration surgery and a change in the medical benefits package, when appropriated funding is available."); *id.* (noting that "VA has begun considering factors impacting this rulemaking process"). VA was not merely leaving open the possibility of future regulatory action as petitioners contend, Pet. Br. 23-24, but was informing individual members of Congress that its consideration of the issue remained ongoing ("VA . . . will continue to explore a regulatory change"), even if a proposed rule was not "imminent." Appx1.

At most, VA's letter described preliminary, non-final actions taken in consideration of rulemaking regarding gender alteration surgery. That VA initially listed the draft NPRM on the spring Unified Agenda, and then withdrew it in the fall, underscores that the agency was actively considering whether to even publish a draft NPRM on this issue. Such preliminary agency action, taken to explore possible rulemaking, is not final agency action that can operate as a denial of a

petition for rulemaking. *See Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 427 (D.C. Cir. 2004) ("we have long recognized that the term [agency action] is not so all-encompassing as to authorize us to exercise 'judicial review [over] everything done by an administrative agency.'" (quoting *Hearst Radio, Inc. v. FCC*, 167 F.2d 225, 227 (D.C. Cir. 1948)); *see, e.g.*, *Standard Oil*, 449 U.S. at 241 (agency's filing of complaint, which included the agency's statement that it had "reason to believe" there was a violation of section 5 of the Federal Trade Commission Act, was not final agency action reviewable under the APA because it was "not a definitive statement of position" but instead "represents a threshold determination[.]"); *Clark v. Busey*, 959 F.2d 808, 812-13 (9th Cir. 1992) (the agency's publication of a summary of the rulemaking petition in the Federal Register was a "preliminary" action that "did not amount to a denial of [petitioner's] rulemaking petition."). Indeed, petitioners concede that any "denial" must be final agency action to be reviewable. Pet. Br. 22; *see also* 38 U.S.C. § 502; 5 U.S.C. § 704. A holding to the contrary would discourage agencies from engaging in such preliminary, exploratory activities, rendering the rulemaking process inflexible and less transparent. In light of these standards, VA's November 2016 letter does not reflect anything more than preliminary action that is "tentative or interlocutory in nature," and therefore is not final under *Bennett*, 520 U.S. at 178.

Second, VA's November 2016 letter did not constitute an action from which "rights or obligations have been determined" or from which "legal consequences will flow." *Bennett*, 520 U.S. at 177-78. Section 17.38(c)(4), promulgated in 1999, remains in effect until replaced or amended through a new rulemaking. By its own terms, the November 2016 letter merely advised members of Congress that VA was withdrawing the draft NPRM from the Unified Agenda, but that consideration of a regulatory change remained ongoing. Appx1. The letter did not announce the outcome of the agency's decision-making process on the petition, alter the applicable legal regime, or result in any legal consequences. *See Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("if the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."); *Indep. Equip. Dealers Ass'n*, 372 F.3d at 428 (agency letter did not satisfy the second part of the *Bennett* test because "[i]t left the world just as it found it[.]").

Other courts have declined to review similarly non-final agency correspondence. In *Families for Freedom v. Napolitano*, the Department of Homeland Security informed a third party (the American Bar Association) by letter that it supported the plaintiffs' petition for rulemaking. 628 F. Supp. 2d 535, 538 (S.D.N.Y. 2009). The agency subsequently sent a letter to petitioners that neither granted nor denied the petition. *Id.* The district court held that the agency's letters

did not constitute final agency action under the APA because "DHS has not yet responded to plaintiffs' petition within the meaning of the APA[.]" *Id.* at 538, 541; *see also La. State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016) (agency's report to Congress was "tentative and interlocutory . . . as it necessarily contemplates future agency action."). Likewise here, because VA has only sent a letter to third parties referencing the same issues raised in the petition (but not even the petition itself), VA cannot reasonably be found to have finally decided the petition.

The cases upon which petitioners rely are inapposite or distinguishable. In *National Parks Conservation Association v. United States Department of Interior*, the Department of the Interior and Environmental Protection Agency sent letters to the petitioners stating that the agencies were "fully and finally respond[ing] to all of the referenced petitions." 794 F. Supp. 2d 39, 45 (D.D.C. 2011). Plaintiffs argued that the agency letters, which denied their petition, were non-final because they did not "foreclose taking the course of action proposed by Plaintiffs in the future." *Id.* The court disagreed because (1) the agencies "made clear that they [we]re denying Plaintiffs' petitions at this time," and (2) leaving open the possibility of future action does not necessarily render an otherwise definitive denial non-final. *Id.* at 46. In contrast, VA did not send the letter to petitioners or reach a "definitive decision" to deny the petition "at this time." Pet. Br. 25. The

letter to members of Congress explained that VA's consideration of the regulatory change remained ongoing. Appx1.

Petitioners also rely upon *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89 (D.D.C. 2010), but it is similarly unhelpful. In *WildEarth*, the Fish and Wildlife Service sent a formal response to plaintiff denying a request to repeal a prior rule, clearly indicating "that [Fish and Wildlife Service] was not repealing the 1991 Rule and that it was [Fish and Wildlife Services'] 'final decision' on the APA Petition." *Id*. at 104. Plaintiff argued that the response was not a procedurally adequate denial because it did not use the word "denial" or a variation thereof. *Id.* The court rejected this overly formal approach to the APA, but did not dispense with the APA's formal response requirement, as petitioners suggest. Pet. Br. 23; *WildEarth*, 741 F. Supp. 2d at 104 (noting that plaintiff "understood the response to be a denial" and "does not claim that [Fish and Wildlife Service] did not provide a brief statement of the grounds for denial as required under 5 U.S.C. § 555(e)."). Unlike the plaintiff in *WildEarth*, VA does not contend that its November 2016 letter is non-final because of an overly formal reading of the APA. Instead, the APA requires VA to provide a response *to petitioners* that explains the basis for the agency's final decision, which it has not yet reached. 5 U.S.C. § 555(e).

Petitioners note that courts routinely review agency correspondence under the APA. Pet. Br. 25. But agency correspondence like VA's November 2016

letter—which was sent to third parties, rather than petitioners, which did not even refer to the petition at issue, and which indicated that VA's consideration of the issue remained ongoing—is not the same type of correspondence that courts have found reviewable under the APA. *Families for Freedom*, 628 F. Supp. 2d at 538, 541. Petitioners concede that in the cases they cite, "the correspondence was directed to the petitioning party or expressly referred to the petition (or both)," but contend that these distinctions are "not meaningful" because the November 2016 letter was sent from a high-ranking VA official and "reflect[s] an authoritative statement of the VA's position." Pet. Br. 26. Petitioners provide no support for this argument, however, which would sidestep the requirements of the APA and open up countless correspondence from agencies, especially those sent to Congress, to premature judicial review. Thus, petitioners provide no reasoned basis for this Court to overlook the meaningful differences between VA's letter to individual members of Congress and the correspondence deemed ripe for review in *Am. Horse Protection Ass'n*, 812 F.2d at 3, and *Henley v. FDA*, 873 F. Supp. 776, 780, 782-83 (E.D.N.Y. 1995), cited by petitioners. Pet. Br. 25-26.

Finally, petitioners argue that the finality of VA's action is demonstrated by VA's subsequent "reissue" of VHA Directive 2013-003, which they contend "reiterate[d] the categorical exclusion of sex reassignment surgery from the medical benefits package and declar[ed], again, that this would be the agency's

policy at least through February 28, 2018." Pet. Br. 25. The record demonstrates that VA did not reissue the directive, however, but simply "revised" it on January 19, 2017 to add the contact information for the VA's LGBT Health Program, which had not been included when VA first issued the directive on February 8, 2013. Appx58. There are no other changes in the revised directive. VA's effort to ensure that veterans have contact information for VA's LGBT Health Program does not lend support to the notion that VA has taken any final action on petitioners' rulemaking request. Indeed, to the extent the revised directive is relevant, VA's decision to leave the directive's original February 28, 2018 expiration date in place, as opposed to extending it, is further evidence that VA's decision-making process is not yet complete.

III. If This Court Nevertheless Concludes That It Has Jurisdiction, It Must Remand To VA To Provide A Reasoned Explanation In Response To The Rulemaking Request

As explained above, the record demonstrates that VA has not taken any final agency action to deny petitioners' rulemaking request. However, if this Court disagrees and concludes that VA's November 2016 letter constitutes a denial of the petition for rulemaking such that it has jurisdiction under 38 U.S.C. § 502, then remand would be the only proper course. Because VA's letter did not respond to, or even reference, petitioners' rulemaking request, that letter would not provide a sufficiently reasoned explanation to support "denial" of petitioners' rulemaking

request. Thus, remand would be required to allow VA to adequately respond to petitioners' rulemaking request.

A. This Court's "highly deferential," "narrow" review of a denial of a petition for rulemaking is "limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on" and that "those facts have some basis in the record." *Preminger*, 632 F.3d at 1353 (alterations and quotation marks omitted). This Court "examine[s] the petition for rulemaking, comments pro and con[,] and the agency's explanation of its decision to reject the petition." *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1374-75 (Fed. Cir. 2016). "In other words, a court looks to see whether the agency employed reasoned decisionmaking in rejecting the petition." *Preminger*, 632 F.3d at 1354.

Even under this Court's narrow review, the November 2016 letter to individual members of Congress fails to adequately explain any denial of petitioners' rulemaking request. The letter did not mention the petition for rulemaking, nor did it provide "reasoned decisionmaking [for] rejecting the petition." *Preminger*, 632 F.3d at 1354; *see also Am. Horse Protection Ass'n*, 812 F.2d at 4 ("[T]wo conclusory sentences . . . are insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking."). Therefore, even if this Court were to construe the letter as a

denial of the rulemaking petition, there is no reasoned explanation for this Court to review. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency.").

B. Remand is the proper remedy when an agency fails to provide a reasoned explanation for its decision. *See, e.g., Am. Horse Protection Ass'n*, 812 F.2d at 7 ("This remedy is particularly appropriate when the agency has failed to provide an adequate explanation of its denial [of a rulemaking petition]."); *see also Deloach v. Shinseki*, 704 F.3d 1370, 1380-81 (Fed. Cir. 2013) (noting that when the Board of Veterans' Appeals "fail[s] to provide adequate reasons and bases" for its decision as required by statute, remand is the proper remedy). "Without an adequate statement, it is impossible to understand the precise basis for the [agency's] decision and conduct informed appellate review." *Deloach*, 704 F.3d at 1381. Therefore, courts have held that when an agency fails to adequately explain or support the denial of a rulemaking petition, the reviewing court should remand to the agency "to adequately address the petition." *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 747 (D.C. Cir. 2017) (remanding to agency where record was insufficient to support decision); *see also, e.g.*, *Am. Horse Protection Ass'n*, 812 F.2d at 4, 7 (holding that agency failed to provide reasoned explanation for denial

of rulemaking petition and remanding to give the Secretary "a reasonable opportunity to explain his decision or to institute a new rulemaking").

Remand in these circumstances would be a straightforward application of the "ordinary remand rule," which the Supreme Court has repeatedly applied. *See, e.g.*, *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (per curiam) (summarily reversing Ninth Circuit for failure to follow "ordinary remand rule"); *INS v. Ventura*, 537 U.S. 12, 18 (2002) (per curiam) (same). The ordinary remand rule provides that when an agency "has not yet considered" a particular issue within its discretion, "'the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16); *see also Negusie v. Holder*, 555 U.S. 511, 524 (2009) (remanding to agency for "initial determination" of statutory-interpretation question); *Byron v. Shinseki*, 670 F.3d 1202, 1205 (Fed. Cir. 2012) (explaining that remand is "'the proper course'" "when an agency has not made an initial determination") (quoting *Thomas*, 547 U.S. at 186). The Supreme Court has made clear that the ordinary remand rule also applies when an agency has made a determination that cannot survive APA review. *See, e.g., Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 547-58 (2007) ("[W]e note that if the EPA's action was arbitrary and capricious, as the Ninth Circuit held, the proper course would have been to remand to the Agency for clarification of its reasons.")

(citing *Thomas*, 547 U.S. at 186); *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (concluding that if agency decision is not sustainable on the basis of the administrative record, then the matter should be "remanded to [the agency] for further consideration.").

In the context of petitioners' specific rulemaking request, it is particularly important for VA to adequately address the request in the first instance, given the "broad discretion" of the Secretary "to determine the precise hospital or medical services to be supplied." *E. Paralyzed Veterans Ass'n*, 257 F.3d at 1362. Remand would permit the Secretary to decide whether and how to exercise his discretion with respect to gender alteration surgery, and to explain his decision to petitioners. *See Ventura*, 537 U.S. at 16.

C. This case does not present the "rare circumstances" that would justify an exception to the ordinary remand rule. *Ventura*, 537 U.S. at 16. In *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001) (*SKF*), this Court explained that a court may have discretion not to remand "if the agency's request is frivolous or in bad faith," but further clarified that "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.* at 1029.[6] VA's remand request,

[6] In *SKF*, this Court discussed the bad-faith exception in the context of particular situations where an agency requests a remand, such as when the agency wishes "to reconsider its previous position" or "believes that its original decision is incorrect on the merits and wishes to change the result." 254 F.3d at 1029. This Court acknowledged that "there may be remand situations that do not fall neatly

which is presented only as an alternative to dismissal for lack of jurisdiction, reflects its good-faith effort to adequately address the rulemaking petition and to provide a reasoned explanation that would facilitate this Court's review. Moreover, petitioners cannot possibly dispute that there are substantial and legitimate concerns that would justify remand to VA, particularly given their extensive arguments that VA's purported denial is "unreasoned," "insufficient," and "unsupported by the record." Pet. Br. 31-39.

Petitioners suggest that this Court "should simply direct the VA to initiate rulemaking." Pet. Br. 29. As petitioners acknowledge, however, "such a remedy is appropriate only 'in the rarest and most compelling of circumstances.'" *Flyers Rights Educ. Fund*, 864 F.3d at 747 (quoting *Am. Horse Protection Ass'n*, 812 F.2d at 7); *see also WWHT*, 656 F.2d at 818. In support of this extreme remedy, petitioners first argue that remand would be futile because "the VA has unambiguously decided–as announced in public correspondence to Congress–not to initiate a rulemaking." Pet. Br. 29. As an initial matter, petitioners misread

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into" the categories it described, and this case is one such situation. *Id.* Here, the Government argues that the petition should be dismissed for lack of jurisdiction, and seeks a remand in the alternative to adequately address petitioners' rulemaking request *in the first instance*, making this case more analogous to *Thomas* and *Ventura*, in which the Supreme Court held that the failure to remand constituted reversible error. Moreover, as discussed above, remand is the only proper remedy when an agency fails to adequately explain its decision. *See, e.g.*, *Flyers Rights Educ. Fund*, 864 F.3d at 747; *Am. Horse Protection Ass'n*, 812 F.2d at 4, 7; *Deloach*, 704 F.3d at 1380-81.

VA's November 2016 letter, which states that consideration of these issues is ongoing. *See supra* pp. 9-10. In any event, this argument fails to appreciate the purpose of a remand, which is to allow the agency to provide a reasoned explanation of its decision in order to facilitate judicial review. *See Ventura*, 537 U.S. at 17.

Petitioners next argue that the court should order VA to initiate rulemaking because "a significant factual predicate of a prior decision on the subject . . . has been removed." Pet. Br. 30 (quoting *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1241 (D.D.C. 1986)). This exception is reserved for "extremely rare circumstances," and petitioners cite only one district-court decision in which it has been applied. *Public Citizen*, 654 F. Supp. at 1241. The D.C. Circuit has made clear that this already-rare exception will seldom apply when "the agency has failed to provide an adequate explanation of its denial." *Am. Horse Protection Ass'n*, 812 F.2d at 7. If the decision involves issues that "lie within the institutional competence of the Secretary," the D.C. Circuit explained, an agency "*must* be given a reasonable opportunity to explain [its] decision or to institute a new rulemaking proceeding," even if a "significant factual predicate" has been removed. *Id.* (emphasis added). Where, as here, the Secretary has "broad discretion" "to determine the precise hospital or medical services to be supplied," *E. Paralyzed Veterans Ass'n*, 257 F.3d at 1362, the issues raised by the rulemaking

petition are clearly "within the institutional competence of the Secretary," who must be given an opportunity to adequately consider the issue in the first instance, *Am. Horse Protection Ass'n*, 812 F.2d at 7.

Moreover, this case is nothing like *Public Citizen*. In that case, the district court held that "extremely rare circumstances" warranted an order directing the Department of Health and Human Services to promulgate a rule banning the interstate sales of certified raw milk. *Public Citizen*, 653 F. Supp. at 1241. The record showed that the agency's original decision not to ban the sale of certified raw milk was based on the need for further study regarding the product's safety. *Id.* at 1232, 1241. The agency pledged that if the product were found to be unsafe, "'appropriate action [would] be taken.'" *Id.* at 1232. The administrative record detailed evidence the agency collected over 13 years, including hearings on the product's safety, which ultimately led the Secretary to concede that the product was unsafe. *Id.* at 1241. The district court held that in light of the undisputed facts in the record, the agency's denial of a rulemaking petition to ban the sale of certified raw milk was arbitrary and capricious. *Id.* Based on this comprehensive administrative record, the court then concluded that "[i]t [was] unlikely that the issues involved or the proposed rule could become any more focused," and that a remand "would serve no purpose." *Id.* at 1240-41.

Here, by contrast, the circumstances are not so rare or compelling. Petitioners focus on the question of medical necessity, but the record on that issue is sparse, and pales in comparison to *Public Citizen*'s 13-year administrative record. The record here contains only: (1) a statement from VA in a draft NPRM concerning the reason for the initial promulgation of section 17.38(c)(4), which VA cautioned had "not [been] specifically explained in the preambles to the original proposed and final rules[,]" Appx307; and (2) interlocutory statements concerning VA's evolving view on the medical consensus regarding gender alteration surgery. *See, e.g.*, Appx1, Appx308. Thus, VA's statements do not establish to the degree found in *Public Citizen* that "a significant factual predicate" for the promulgation of section 17.38(c)(4) "has been removed." Pet. Br. 30 (citing *WWHT*, 656 F.2d at 818). In any event, there is no basis to assume that this factual question is the sole factor in determining how VA will exercise its "broad discretion" "to determine the precise hospital or medical services to be supplied." *E. Paralyzed Veterans Ass'n*, 257 F.3d at 1362. If this Court determines it has jurisdiction, remand would be the only proper remedy.

D. Because remand would be the proper course, it would be entirely improper for this Court to prematurely address the constitutional questions raised in petitioners' brief. Pet. Br. 40-55. As the D.C. Circuit has explained, when an agency fails to provide a reasoned explanation for denying a petitioner's request, it

is "inappropriate for [a] court to consider the constitutionality of [its] denial[] without affording the agency an opportunity to more fully address [the] request[]." *Amerijet Int'l, Inc. v. Pistole*, 753 F.3d 1343, 1353 (D.C. Cir. 2014). In *Amerijet*, the D.C. Circuit held that "the usual remedy of a remand" was "the proper course" because the Transportation Security Administration (TSA) failed to adequately explain its denial of petitioner's requests for alternate security procedures. *Id.* (quotation marks omitted). The D.C. Circuit further concluded that, given the absence of a "meaningful basis upon which to evaluate TSA's denials," it would be "inappropriate" to consider petitioner's equal-protection claim, which was "premised on" those denials. *Id.* The court explained that "[t]here is no way to weigh the viability of [petitioner's] equal protection claim without a clear understanding of the agency's position with respect to the disputed denials." *Id.* Moreover, the court continued, "with our remand of this case, the possibility remains that TSA may reconsider its prior denials or offer adequate explanations for the agency's actions, either of which may moot [petitioner's] equal protection claim." *Id.* Therefore, the court concluded, the equal-protection claim was "unripe for review." *Id.*

In this case, it would be particularly "inappropriate for this court to consider the constitutionality" of a denial that *was never made* and therefore was not adequately explained. *Amerijet*, 753 F.3d at 1353. Even if this Court construed

VA's letter to individual members of Congress as a denial of petitioners' rulemaking request, the absence of a reasoned explanation would foreclose review: "There is no way to weigh the viability of [petitioner's] equal protection claim without a clear understanding of the agency's position." *Id.*; *see also El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 186 (3d Cir. 2010) (equal protection claim under the Fifth Amendment "would inevitably involve scrutiny of the merits of the [agency's] decision."). Here, as in *Amerijet*, there is simply no "meaningful basis" for review of petitioners' equal-protection claim. 753 F.3d at 1353. Indeed, petitioners' opening brief underscores the difficulty of assessing their claims on the current record. *See* Pet. Br. 50-51. The claim is not fit for review. *Amerijet*, 753 F.3d at 1353.

Remand would be especially required in the present situation, where VA has not "directly responded to the petition" for rulemaking, Pet. Br. 1, and argues that it has not issued a denial at all. In *Amerijet*, by contrast, the agency had expressly denied petitioner's requests. 753 F.3d at 1348 (describing denials). VA must have an opportunity to adequately address, in the first instance, petitioners' rulemaking request, which includes a claim that "[a] denial of [their rulemaking] petition . . . would . . . violate the Equal Protection component of the Fifth Amendment." Appx101-08; *see also Ventura*, 537 U.S. at 17; *cf. Coronado v. Holder*, 759 F.3d 977, 986-87 (9th Cir. 2014) (applying ordinary remand rule to permit agency to

address constitutional due-process claims in the first instance); *Montes-Lopez v. Gonzales*, 486 F.3d 1163, 1165 (9th Cir. 2007) (similar).

In these circumstances, it would be entirely improper to address the constitutional questions in this case "without affording the agency an opportunity to more fully address [petitioners'] request[]." *Amerijet*, 753 F.3d at 1353. On remand, "the possibility remains that [the agency] may reconsider its [purported] denial[] or offer adequate explanations for the agency's actions," which may moot or significantly reshape petitioners' equal-protection claim. *Id.*

Resolution of the constitutional questions also would run afoul of the long-settled "policy of the courts to decide cases on non-constitutional grounds when that is available, rather than reach out for the constitutional issue." *Stockton East Water Dist. v. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (citing *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009)). Because remand would be the proper course, it is unnecessary to reach the novel constitutional questions in this case. *See, e.g., Guilavogui v. Gonzales*, 228 F. App'x 33, 35 (2d Cir. 2007) (summary order) ("Because the agency's legal and factual errors require remand, we need not reach [petitioner's] constitutional claim."); *Nguyen v. Holder*, 315 F. App'x 617, 619 (9th Cir. 2009) (mem.) (remanding to allow for agency reconsideration in light of intervening case law and concluding that, "[i]n light of our disposition, we need not reach [petitioner's] equal protection claim.").

That policy has particular force here, where petitioners press this Court to adopt a significant expansion of the law in this Circuit. For example, petitioners assert (Pet. Br. 42-46) that VA's regulation constitutes sex discrimination, but there are strong arguments to the contrary. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 1997) (rejecting argument that "discrimination against a transsexual based on the person's status as a transsexual" is sex discrimination under Title VII); Memorandum of the Attorney General, Oct. 4, 2017[7] (providing several reasons as to why Title VII's prohibition on sex discrimination should not be construed to encompass discrimination based on transgender status). And petitioners assume (Pet. Br. 46) that the regulation is *per se* a discriminatory classification against transgender individuals simply because it excludes procedures that are disproportionately (if not exclusively) used by transgender individuals, but Supreme Court precedent strongly suggests to the contrary. *See Geduldig v. Aiello*, 417 U.S. 484, 494-96 & n.20 (1974) (exclusion of insurance benefits for pregnancy-related disabilities is not discrimination on the basis of sex under the Equal Protection Clause). Petitioners further argue (Pet Br. 46-49) that transgender status is a suspect classification that triggers heightened scrutiny, but the Supreme Court has not recognized transgender status as a suspect

[7] *Available at* https://assets.documentcloud.org/documents/4067383/Attachment-2.pdf (last visited November 27, 2017).

classification. Indeed, the Supreme Court has not recognized a new suspect classification in decades. Finally, petitioners contend (Pet. Br. 49-53) that VA could not assert any valid reason that would justify a denial of petitioners' request to include gender alteration surgery in the medical benefits package. But there are myriad rational reasons why VA could conclude that gender alteration surgery should remain excluded, such as budgetary constraints and medical uncertainty. Whatever the outcome on remand, VA's "informed discussion and analysis" would "help [this] [C]ourt later determine" the answers to these questions, *Ventura*, 537 U.S. at 17, if it needs to address them at all, *see Amerijet*, 753 F.3d at 1353. Even in petitioners' view, the quality of any explanation provided by VA in denying a rulemaking petition would be critical to determining the constitutionality of the agency's action. *See, e.g.*, Pet. Br. 51 ("Nor is the explanation in the VA's letter sufficient."). Therefore, this Court need not—and should not—address the constitutional questions posed by petitioners' brief.

IV. VA Has Not Unreasonably Delayed Its Decision

Petitioners acknowledge that this Court may "conclude[] that the November 2016 letter did not finally deny the petition," and thus argue in the alternative that VA's "[y]ear-[l]ong" delay in addressing the petition is unreasonable. Pet. Br. 26 (citing 5 U.S.C. §§ 555(b), 706(1)). Petitioners fail to satisfy the high burden necessary to demonstrate that VA has unreasonably delayed in acting on their

petition. Even if they could, however, the proper remedy would be an order directing VA to respond to the petition, not to grant it.[8]

Whether brought as a petition for mandamus or as an APA claim, a petitioner bringing an unreasonable-delay claim faces a high burden. Relief will not be granted unless the agency's delay is "so egregious as to warrant" an order compelling the agency to act. *TRAC*, 750 F.2d at 79. That standard is "hardly ironclad," but the D.C. Circuit has set forth several factors that may provide useful guidance to this Court. *See id.* at 80.[9] These factors include the passage of time, as

[8] Although this Court's jurisdiction under 38 U.S.C. § 502 (providing that review is in accordance with the APA) is generally limited to review of final agency action, this Court may, in certain circumstances, have jurisdiction to review a claim that VA has failed to act, or has unreasonably delayed in acting, to protect its prospective jurisdiction under section 502. *See In re Paralyzed Veterans of Am.*, 392 F. App'x 858, 859-60 (Fed. Cir. 2010); *Military Order of Purple Heart v. Sec'y of Veterans Affairs*, No. 2010-7062, 2010 WL 1568485, *1 (Fed. Cir. Apr. 16, 2010) (*MOPH*); *see also Telecommunications Research Action Ctr. v. FCC*, 750 F.2d 70, 77-79 (D.C. Cir. 1984) (*TRAC*) (discussing jurisdiction of court of appeals to review unreasonable-delay claim).

[9] In previously considering mandamus requests, this Court has affirmed the Veterans Court's application of an "arbitrary refusal to act" standard on numerous, albeit non-precedential, occasions. *See, e.g.*, *Williams v. McDonald*, 614 F. App'x 499, 501 (Fed. Cir. 2015) (unpublished) (citing *Costanza v. West*, 12 Vet. App. 133, 134 (1999) ("The petitioner, who carries the burden in this matter, has not adequately demonstrated a clear and indisputable right to the writ. He has not demonstrated that the delay he complains of is so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system.")); *Bucholtz v. Snyder*, No. 2016-2485, 2017 WL 563158, at *2 (Fed. Cir. Feb. 13, 2017); *Adeyi v. McDonald*, 606 F. App'x 1002, 1005 (Fed. Cir. 2015); *Bryan v. McDonald*, 615 F. App'x 681, 684 (Fed. Cir. 2015). Given that Congress created the Veterans Court to fulfill one

evaluated under a "rule of reason"; any Congressional timetable for action; the agency's good faith; the agency's competing priorities; and the nature and extent of the interests prejudiced by delay, including the impact upon human health and welfare. *Id.* As applied in this case, these factors demonstrate that this Court's intervention is not required.

First, the passage of time is far from "egregious." *TRAC*, 750 F.2d at 79. Petitioners filed the present petition for review on January 9, 2017—a mere 9 months after filing their rulemaking request on May 9, 2016. To date, only 18 months have passed since the filing of the petition for rulemaking. In contrast, "[t]he cases in which courts have afforded relief have involved delays of years." *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1125 (9th Cir. 2001); *see In re City of Va. Beach*, 42 F.3d 881, 885-86 (4th Cir. 1994) (denying writ where, although not "happy" about anticipated four and a half year delay in agency's action, the court found "rational explanation[]" for delay); *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 114-15, 120 (D.D.C. 2005) (finding two to four year delay did not warrant a writ, and collecting similar cases); *Biodiversity Legal Foundation v. Norton*, 285

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purpose—oversight of the veterans benefits system—the Veterans Court's mandamus standard is well suited to address the specific needs of veterans and the burdens on VA. *See Sanders v. Shinseki*, 556 U.S. 396, 412 (2009) (holding that the Veterans Court is better suited to exercise informed judgment on issues related to the veterans benefits system). For the reasons discussed above, any delay in this case is far from an arbitrary refusal to act.

F. Supp. 2d 1, 22 (D.D.C. 2003) (agency's four year delay was not unreasonable, even where species was in a "precarious position" and the parties agreed as to the "pressing need to revise critical habitat").

Second, there is no allegation here that VA has failed to comply with a statutory or regulatory deadline, and no such deadline to act on petitioners' rulemaking petition exists. *Compare MOPH*, 2010 WL 1568485 at *2 ("[W]e cannot order relief . . . because the final regulations are not required to be issued until 90 days after the issuance of the proposed regulations . . . ."), *with In re Paralyzed Veterans of Am.*, 392 F. App'x at 860 (granting mandamus where "Congress clearly imposed on the Secretary a date-certain deadline to issue a final regulation" and Secretary failed to issue regulation by that date).

Third, petitioners make no allegation calling into question the well-established presumption that Government officials act in good faith and "conscientiously in the discharge of their duties." *See, e.g., Croman Corp. v. United States*, 724 F.3d 1357, 1364 (Fed. Cir. 2013). Rather, as demonstrated in the record, VA has worked diligently and in good faith to consider issues relating to petitioners' rulemaking request. *See, e.g.*, Appx305-315; Appx320-330. Any perceived delay in resolving that request is largely attributable to VA's efforts to determine whether the Secretary will exercise his discretion to include gender alteration surgery in the medical benefits package and not due to inattention by

VA. Thus, VA's unchallenged good faith weighs in the agency's favor. *See W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1176 (D.C. Cir. 2000); *Nat. Resources Def. Council, Inc. v. N.Y. Dep't of Envtl. Conservation*, 700 F. Supp. 173, 181-82 (S.D.N.Y. 1988).

Fourth, the agency has devoted substantial time and resources to consider issues relating to the rulemaking petition. As petitioners note, VA "draft[ed] a proposed rulemaking and conduct[ed] an impact analysis within a few months of receiving the petition." Pet. Br. 27. Petitioners argue that these significant steps weigh in *favor* of mandamus, but the opposite is true. These steps reflect the agency's serious consideration of these issues; there is no need for judicial intervention in that process, particularly at this early stage. As the D.C. Circuit has explained, an "agency is in a unique—and authoritative—position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). Accordingly, it is the "exceptionally rare case[]" where a court will compel an agency to move forward on a specific project. *Id.* Particularly considering that only 18 months have elapsed since petitioners made their rulemaking request, during which time VA has worked to address the issues raised therein, this is not one of those rare cases.

Finally, petitioners note that the subject of their petition involves their health and welfare. Pet. Br. 28-29. The D.C. Circuit has held, however, that "this factor alone can hardly be considered dispositive when, as in this case, virtually the entire docket of the agency involves issues of this type." *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987). Moreover, although VA does not dispute that obtaining medical care involves an individual's health and welfare, it is equally true that VA provides numerous medical benefits to transgender veterans suffering from gender dysphoria as part of the medical benefits package, including "hormone therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex reassignment surgery." Appx53, Appx57. Veterans enrolled in the medical benefits package may also obtain gender alteration surgery outside of the VA health-care system. *See* Appx61. Thus, this is not the type of "extraordinary situation" where the "drastic remedy" of mandamus is warranted.

Even assuming, for the sake of argument, that petitioners had demonstrated unreasonable delay such that they are entitled to relief, they would not be entitled to an order that "direct[s] the VA to initiate rulemaking." Pet. Br. 29. As petitioners acknowledge, "[t]he ordinary remedy for an agency's unreasonable delay in responding to a petition for rulemaking is for the Court to direct a response"—not to grant the petition. Pet. Br. 29; *see also Norton v. S. Utah*

Wilderness All., 542 U.S. 55, 65 (2004) (reviewing APA claim under 5 U.S.C. § 706(1) and emphasizing that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."). That is true regardless of whether courts grant relief in the mandamus context or under the APA. *See, e.g.*, 5 U.S.C. § 706(1) (authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed"); *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 420 (D.C. Cir. 2004) (awarding mandamus and "direct[ing] [the agency] to issue a judicially reviewable response to the . . . petition").

Petitioners' efforts to craft an exception to this rule are misguided. They rely on the district court's decision in *Public Citizen*, but that case involved review of an agency's denial of a rulemaking petition, not an unreasonable-delay claim. *See* 653 F. Supp. at 1235. In any event, as discussed above, the remedy the court directed in *Public Citizen* is reserved for "extremely rare circumstances" that do not exist in this case. *See supra* pp. 29-31.

CONCLUSION

For these reasons, this Court should dismiss for lack of jurisdiction petitioners' challenge to the purported denial of their rulemaking request or, in the alternative, remand to VA. This Court should likewise deny petitioners' request to compel VA to engage in rulemaking.

Respectfully submitted,

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November 28, 2017

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 28th day of November, 2017, a copy of the foregoing "BRIEF FOR RESPONDENT" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent's counsel certifies that this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 10,198 words.

/s/Eric P. Bruskin
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