No. 2017-1460

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 from the United States Department of Veterans Affairs

REPLY BRIEF FOR PETITIONERS

LYNLY S. EGYES
SHAWN THOMAS MEERKAMPER
TRANSGENDER LAW CENTER
P.O. Box 70976
Oakland, CA 94612
(510) 587-9696

SASHA J. BUCHERT
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1875 I Street NW
Washington, DC 20006
(202) 999-8083

ALAN SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294

TARA L. BORELLI
M. DRU LEVASSEUR
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree St. NE, Ste. 640
Atlanta, GA 30308-1210
(404) 897-1880

PAUL R.Q. WOLFSON
MICHAEL POSADA
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6390

December 28, 2017 *Attorneys for Petitioners*

CERTIFICATE OF INTEREST

Counsel for Petitioners, Dee Fulcher, Giuliano Silva, and the Transgender American Veterans Association, certifies the following:

1. The full name of every party or amicus represented in this appeal is:

Dee Fulcher, Giuliano Silva, and the Transgender American Veterans Association

2. The names of the real parties in interest represented in this appeal are:

Not applicable.

3. The names of all parent corporations and any publicly held companies that own 10 percent of the party represented are:

None.

4. The names of all law firms and the partners or associates that are expected to appear in this appeal for Petitioners are:

All counsel have filed appearances in this case.

5. The following law firms and counsel formerly appeared in the district court in prior phases of the case:

None.

6. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

None.

/s/ Alan Schoenfeld
ALAN SCHOENFELD

December 28, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

DOCKETED CASES

STATUTES AND REGULATIONS

INTRODUCTION

There is no dispute in this case about what steps the Department of Veterans Affairs (the "VA" or the "Department") has taken to respond to the petition for rulemaking. The record is short, simple, and clear: The VA took all necessary steps to evaluate the proposed rulemaking, assess the economic impact, and prepare a draft rule repealing 38 C.F.R. § 17.38 (the "Regulation"), which prohibits the VA from providing sex reassignment surgery to transgender veterans. Instead of moving forward, however, the VA informed Members of Congress that it has no intention to open a rulemaking. For all practical purposes, a petition for rulemaking that may mean the difference between life and death for transgender veterans has been denied, or has been shunted off to an unidentified point in the future that may never occur.

According to the VA's argument in this case, a federal agency may shelve a petition for rulemaking and allow it to gather dust indefinitely, but that action is not subject to judicial review because the agency's decision is not a "denial" and is not "final." The judicial-review provisions of the Administrative Procedure Act ("APA"), however, may not be so easily evaded. When an agency decides—as the VA decided in this case—that it is not appropriate to move forward with a petition for rulemaking for the foreseeable future, and when that agency informs Members

of Congress of that decision, the APA's judicial-review requirement that the agency take "final agency action" has been satisfied.

The VA argues that its correspondence with Members of Congress preserves the possibility that it may someday—when appropriated funding is available—renew its consideration of repealing the Regulation. But idle speculation is not enough to shield the VA's action from judicial review. Those circumstances may never occur, and there is no evidence to suggest that the VA is trying to bring them about. Indeed, although the VA states (Br. 2) that it "has taken active steps in considering whether to change the rule excluding gender alterations from the medical benefits package," the VA does not suggest that it has done *anything* on the petition for rulemaking in the thirteen months since it informed Members of Congress that it was shelving the issues raised by the petition.

Whether this case is viewed as seeking relief from the agency's denial of a petition for rulemaking or from its unreasonable delay in acting on that petition, the VA's action (or inaction) violates the APA. The appropriate remedy in these circumstances is to direct the agency to open the rulemaking. Petitioners are not at this point seeking to compel the VA to issue any particular rule, but only to have the agency request public comment so that it can consider all relevant facts. At a minimum, this Court should direct the VA to provide a fully reasoned response to the petition for rulemaking within 90 days of the issuance of the Court's mandate,

so that the VA does not further delay action on an issue critical to the health of thousands of transgender veterans.

ARGUMENT

I. THE VA HAS DENIED THE PETITION FOR RULEMAKING IN A FINAL AGENCY ACTION REVIEWABLE BY THIS COURT

The VA argues that it has not *denied* the petition for rulemaking; rather, it has simply taken no action yet on that petition. That argument cannot be squared with the record. The VA's November 10, 2016 letter to Members of Congress demonstrates that the VA has decided not to move forward with the petition for rulemaking. The fact that the VA did not memorialize its reasoning in a letter specifically addressed to *Petitioners* cannot be dispositive; otherwise, an agency could routinely avoid judicial review of its decisions to deny rulemaking by informing outside observers of its decision in written correspondence while declining to direct such correspondence to the petitioner herself. Here, the letter to Members of Congress demonstrates that the VA has completed its work on the petition, and its denial of the petition has grave consequences for transgender veterans. That denial is final agency action ripe for judicial review.

A. The VA Denied The Petition For Rulemaking

According to the VA, it cannot have denied the petition for rulemaking because even though it informed Members of Congress that it has no present intention of taking any action on the issues raised by that petition, it never provided

"prompt notice" of the denial, as required by 5 U.S.C. § 555(e); it did not inform Petitioners directly of its decision not to take action; and its letter to Members of Congress did not make explicit reference to the petition for rulemaking. Those arguments are without merit. "The label an agency attaches to its action is not determinative." *Continental Air Lines, Inc. v. Civil Aeronautics Board*, 522 F.2d 107, 124 (D.C. Cir. 1974). The VA may not have adhered to certain formalities in denying the petition for rulemaking, such as responding promptly. But that can hardly mean that an action failing to observe those requirements is categorically disqualified from being a denial of the petition. If anything, the VA's inattention to those formalities is evidence of its disregard of the requirements of the APA. Indeed, if the VA's position were correct, it would enable agencies to avoid judicial review of their decisions to deny petitions for rulemaking by acting in a dilatory and evasive manner, burying requests for rulemaking while never formally denying them.[1]

Although the VA argues that a denial must respond directly to Petitioners, neither the text of the APA nor case law construing it imposes that requirement. The statute says no such thing, *see* 5 U.S.C. § 555(e), and the cases the VA cites similarly fail to support that supposed requirement. *Families for Freedom v. Napolitano*, 628

[1] If its lack of promptness were to discount the letter as a denial, then the VA's tardiness in responding to Petitioners—despite its ability to do so—demonstrates unreasonable delay. *See infra* pp. 14-22.

F. Supp. 2d 535, 539 (S.D.N.Y. 2009), addresses only whether the agency "[i]s … required to respond to a petition for rulemaking"—not whether the response must be directed to the petitioners themselves. And *WWHT, Inc. v. Federal Communications Commission*, 656 F.2d 807, 814 (D.C. Cir. 1981), concerns an agency's regulations requiring that the "petitioner will be notified" of the denial of a petition—confirming that the APA itself imposes no such requirement. In this case, the VA stated precisely what it is doing with respect to the subject matter of the requested rulemaking, but informed Congress rather than Petitioners. The substance of the letter, not the recipient, is what matters under the APA.

Nor does the APA impose a requirement that the denial make specific reference to the petition. *See WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 104 (D.D.C. 2010) ("Plaintiff fails to identify any legal support for its claim that [the agency] must expressly indicate it was denying Plaintiff's request."); *cf. Ciba-Geigy Corp. v. U.S. Environmental Protection Agency*, 801 F.2d 430, 438 n.9 (D.C. Cir. 1986) (rejecting proposition that an agency may not undertake a final action "without following formal procedures" and holding that the "relatively informal nature of the agency ruling" was not grounds to postpone review).

The thrust of the VA's argument is that the Secretary's letter to Congress has nothing to do with the petition for rulemaking and ought not be considered as part of the decisionmaking process or in determining whether the petition was denied.

See, e.g., VA Br. 16 ("The letter was sent 'in response to [the various] letter[s]' from individual members of Congress, not in response to the rulemaking petition."). That position is belied, however, by the Secretary's inclusion of the letter to Members of Congress in the certified record before this Court. In identifying the letter to Petitioners and to this Court, the Secretary explicitly stated that it constitutes the "record relating to the agency's consideration of [P]etitioners' May 9, 2016 petition for rulemaking." Dkt. 20; *see also University of Colorado Health at Memorial Hospital v. Burwell*, 151 F. Supp. 3d 1, 12 (D.D.C. 2015) ("Agencies bear the responsibility of compiling the administrative record, which must include all of the information that the agency considered 'either directly or indirectly.'"), *adhered to on reconsideration*, 164 F. Supp. 3d 56 (D.D.C. 2016).

Nor is the VA's November 10 letter devoid of any reason for denying the petition. To the contrary, the VA informed Members of Congress that it would not take any further action on the issue of sex reassignment surgery absent identified appropriated funds. Appx1. Thus, the VA *has* offered a reason for its denial of the petition—flawed though that reason may be; the VA has explicitly identified the fiscal impact of a possible repeal of the Regulation as the basis for its action. As explained in Petitioners' opening brief, that argument is refuted by the administrative record in this case, which shows that the VA estimated the fiscal impact to be *de minimis*. Appx329. The VA appears to recognize that

inconsistency, for it does not even attempt to defend its denial of the petition on fiscal grounds.

B. The VA's Denial Of The Petition Is Final Agency Action

The VA further argues (Br. 16-22) that its decision to abandon work on the petition for the time being was not final agency action subject to judicial review. That argument, too, is misguided.

The APA's limitation on judicial review to final agency action "highlights the importance of avoiding disruption of the administrative decisionmaking process." *CSI Aviation Services, Inc. v. U.S. Department of Transportation*, 637 F.3d 408, 411 (D.C. Cir. 2011). "[I]t does not," however, "foreclose" judicial review in proper circumstances, *id.*, and it certainly does not allow agencies to shelter their decisionmaking from judicial review by indefinitely delaying a formal pronouncement of their actions. The finality inquiry is "pragmatic" and "flexible," designed to ensure that courts do not waste judicial resources by ruling prematurely on abstract controversies or intrude on an agency's decisionmaking process. *See Ciba-Geigy Corp.*, 801 F.2d at 435-436; *see also U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016); *Friedman v. Federal Aviation Administration*, 841 F.3d 537, 543 (D.C. Cir. 2016). As the Supreme Court has explained, the "generous review provisions" of the APA "must be given a hospitable interpretation" to ensure that agency action does not escape judicial

review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (internal quotations omitted); *Ciba-Geigy Corp.*, 801 F.2d at 435 n.7 ("final agency action" does not "convey[] some settled, inflexible meaning that precludes pragmatic or functional considerations").

The VA's November 10 letter constitutes final agency action. First, the November 10 letter demonstrates that the VA has concluded its decisionmaking process. *See Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (final agency action must "mark the 'consummation' of the agency's decisionmaking process"). As the record indicates, by that date, the agency had completed all the preliminary steps necessary for rulemaking: It had drafted a Notice of Proposed Rulemaking ("NPRM"), Appx305-315, and it had conducted an economic impact analysis, Appx320-330. All that was left to do was issue the rulemaking. At the last minute, however, the VA abruptly changed course and announced in its November 10 letter that the draft NPRM had been removed from the regulatory agenda and that any rulemaking was "not imminent." Appx1. That official communication by an authoritative VA official left nothing more to decide; rulemaking would not take place then or at any point in the foreseeable future. *See Ciba-Geigy Corp.*, 801 F.2d at 436-437 (agency action was final in part because it was announced by an EPA official with authority to speak for the agency); *see also Safari Club*

International v. Jewell, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (communication reflecting the "considered determination" of agency views was final).

The VA's denial of the petition for rulemaking also satisfies the second *Bennett* factor—that "legal consequences" flow from the decision. 520 U.S. at 178. As a consequence of the November 10 letter and the decision it reflects, transgender veterans will continue to be denied access to necessary sex reassignment surgery as part of their medical benefits package, the Regulation will remain in place, and the VA will have no obligation to provide such care. That state of affairs undoubtedly produces an "impact … sufficiently direct and immediate" on Petitioners. *Abbott Laboratories*, 387 U.S. at 152. More than merely "actual" and "concrete," *Bennett*, 520 U.S. at 167, the injury to Petitioners may be life-threatening.[2]

---

[2] As Petitioners explained in their opening brief, the finality of the VA's consideration of this issue is further underscored by the January 2017 reissuance of VHA Directive 2013-003, extending the categorical exclusion for sex reassignment surgery as official agency policy at least through February 28, 2018. *See* Pet. Br. 25; *see also Ciba-Geigy Corp.*, 801 F.2d at 436 n.7 (stating that courts may consider "whether final agency action has resulted from a series of agency pronouncements rather than a single edict" and finding no "principled reason" for not considering "the cumulative effect of the agency's actions"). The VA protests that the directive was only "revised"—not "reissued"—but the semantics are immaterial: In January 2017, after Petitioners filed their petition and the VA told Congress that no rulemaking was forthcoming, the VA reiterated that it would categorically exclude sex reassignment surgery from the medical benefits package for at least another 13 months. Tellingly, the VA does not suggest that it has any intention of changing that position when the Directive expires two months from now.

Where, as here, an agency has definitively determined not to act on a rulemaking petition and that determination inflicts a concrete injury on the petitioners, the agency action is final. No further action by the agency is contemplated, and judicial review in this instance does not risk premature intrusion on the agency's decisionmaking process. Nor does it risk wasting judicial resources on an interlocutory matter. *Cf. Berry v. U.S. Department of Labor*, 832 F.3d 627, 634 (6th Cir. 2016) ("The concerns animating the finality analysis are simply not present" when an agency makes a "discrete, after-the-fact decision … [that] its initial decision should remain in place in light of new evidence.").

Moreover, the "possibility" that the VA "may revise [its decision] … is a common characteristic of agency action, and does not make an otherwise definitive decision nonfinal." *Hawkes Co.*, 136 S. Ct. at 1814; *see also Safari Club International*, 842 F.3d at 1289; *Fox Television Stations, Inc. v. Federal Communications Commission*, 280 F.3d 1027, 1037-1038 ("[T]he Commission argues that the *1998 Report* is not final because the agency intends to continue considering the ownership rules. That, however, does not mean the determination is not 'final' as a matter of law."), *opinion modified in part on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). Indeed, in *National Parks Conservation Association v. U.S. Department of Interior*, the court characterized an agency action as final notwithstanding a far more concrete prospect of regulatory activity

than the VA left open in its November 10 letter. 794 F. Supp. 2d 39, 44 (D.D.C. 2011) (agency "defer[red] action on the petition *until EPA makes its final … determination*" (emphasis added)).

Under the circumstances here—where the agency has recognized the need for regulatory change and taken all steps prefatory to rulemaking but then changed course at the last minute without any concrete prospect of resuming the regulatory process—this Court ought not countenance the agency's effort to avoid judicial review indefinitely simply by leaving open the possibility of reconsideration at some undetermined time. *Compare Friedman*, 841 F.3d at 543, 545 (agency may not "hold[] out a vague prospect of reconsideration" as a means to "thwart judicial review"), *with Louisiana State v. U.S. Army Corps of Engineers*, 834 F.3d 574, 584 (5th Cir. 2016) (agency report transmitted to Congress that "*necessarily* contemplates future agency action" is non-final (emphasis added)).

To demonstrate the supposedly interlocutory nature of the agency action, the VA relies on *Federal Trade Commission v. Standard Oil Co.*, 449 U.S. 232 (1980) and *Clark v. Busey*, 959 F.2d 808 (9th Cir. 1992), neither of which helps the agency. In *Standard Oil Co.*, the Supreme Court held that the filing of a complaint was not a final agency action. In reaching that conclusion, the Court stressed that the complaint served only to announce the commencement of adjudicatory proceedings, and that after the completion of those proceedings, the oil company

would then have ample opportunities to challenge the complaint and its charges. 449 U.S. at 241-242. But in this case, far from announcing the beginning of regulatory proceedings, the VA's letter states definitively that such proceedings are not "imminent." Appx1.

In *Clark v. Busey*, Clark sued to force the Federal Aviation Administration to substitute a summary he had submitted as part of his rulemaking petition in place of the allegedly inadequate summary that the agency had published. 959 F.2d at 813. The Ninth Circuit held that the agency's refusal to publish Clark's summary was not a denial of Clark's rulemaking petition. *Id.* It was instead an "intermediate … agency action[] leading up to the final challenged result,"—*i.e.*, the disposition of the petition for rulemaking. *Id.* at 811. Here, Petitioners do not challenge an "intermediate action" taken on the road to rulemaking. They are challenging the agency's decision to stop the rulemaking process altogether. That is the end of the road.

The VA further maintains that the second *Bennett* factor is not met because the effect of the letter was to leave the regulatory landscape unchanged. That argument misapprehends the second *Bennett* factor. By the VA's logic, a denial of a petition to promulgate a new rule—or to repeal a rule—would *never* be final agency action subject to judicial review. That is, of course, incorrect, *see, e.g.*,

Preminger v. Secretary of Veterans Affairs, 632 F.3d 1345, 1352 (Fed. Cir. 2011), and the VA unsurprisingly does not cite a single case supporting that proposition.

The VA instead cites *National Association of Home Builders v. Norton*, but that case involved a challenge to "recommended" protocols that imposed no restrictions or prohibitions on the petitioners' ability to develop land. 415 F.3d 8, 11-12 (D.C. Cir. 2005). Here, the consequence of the agency's denial of the petition is to leave in place a potentially life-threatening restriction—which, as discussed above (*see supra* note 2), the agency reissued after the petition was filed and after the VA communicated the denial to Members of Congress.

Independent Equipment Dealers Association v. Environmental Protection Agency is likewise unhelpful to the VA. In that case, the EPA provided the petitioners with a "workaday advice letter" that, as the D.C. Circuit explained, "was purely informational in nature; it imposed no obligations and denied no relief." 372 F.3d 420, 427 (D.C. Cir. 2004) (quotation marks omitted).

Here, by contrast, Petitioners have been denied relief. Eighteen months ago, Petitioners asked the VA to revisit and rescind its categorical exclusion of life-saving sex reassignment surgery from the veterans' medical benefits package. Six months later—more than a year ago—the Secretary told Members of Congress that he had no intention of proceeding with a rulemaking that was all but issued. Nothing has happened in the interim, and yet the VA now contends that its

November 10, 2016 letter was neither a denial of the petition nor a final statement of the agency's position. That is simply not credible, and not a conclusion the APA or the finality case law requires this Court to reach. The VA has finally denied the petition for rulemaking, and judicial review is now proper.

II. THE VA HAS UNREASONABLY DELAYED AGENCY ACTION

Even if the VA's decision to defer rulemaking was not subject to review as final agency action, it still violates § 706(1) of the APA because the VA has "unreasonably delayed" agency action to which Petitioners are entitled. The APA requires an agency to proceed on a matter before it "within a reasonable time." 5 U.S.C. § 555(b). The VA claims that its review of the proposed rulemaking remains ongoing and that the current delay is reasonable. But the VA has failed to offer a reasonable justification for its failure to act on the petition, and that failure is especially unacceptable given that the record shows that the agency was fully prepared to engage in rulemaking over a year ago. Nor does the VA suggest that any action on the petition is forthcoming. The VA has simply stopped working on the petition. In light of the high stakes for Petitioners and other transgender veterans, the lack of adequate justification for the lengthy and ongoing delay is unlawful.

A. The VA's Denial Is Unreasonable Under The *TRAC* Factors

The parties agree that this Court should evaluate Petitioners' unreasonable delay claim under the standard articulated in *Telecommunications Research &*

Action Center v. Federal Communications Commission ("*TRAC*"), 750 F.2d 70, 80 (D.C. Cir. 1984); *see* Pet. Br. 27; VA Br. 37. Under *TRAC*, courts should consider several factors in determining the reasonableness of agency delay: (1) the length of time elapsed, which is governed by a "rule of reason"; (2) whether the statute authorizing the agency action, if any, provides a timetable for decisionmaking; (3) whether the delay affects human health and welfare, as opposed to economic interests; (4) the effect that compelling agency action will have on other priorities; and (5) the nature and extent of the interests prejudiced by the delay.[3] Those factors weigh in favor of compelling the VA to act.

With respect to the first and second factors, the VA appears to suggest that it is entitled to years to act on the petition because there is no statutorily prescribed timetable for a decision. VA Br. 38-39. But courts have been clear that "[t]here is 'no *per se* rule'" regarding when an agency's delay becomes excessive. *In re American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (citation omitted). Rather, "the ultimate issue, as in all such cases, will be whether the time the [agency] is taking to act upon the [petition] satisfies the 'rule of

[3] The VA's suggestion (Br. 37 n.9, 40-42) that a heightened mandamus standard applies is puzzling. Petitioners brought suit under the APA, and as to the claims Petitioners advance before this Court, there is no dispute between the parties that *TRAC* provides the relevant decisionmaking framework. The cases the Department cites—each of which concerns the processing of individual veterans' medical benefits claims—are inapposite.

reason.' That issue cannot be decided in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful, but will depend in large part … upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003).

This case is unlike those the VA cites, in which complex scientific questions must be carefully explored or parties must compete over the allocation of limited agency resources. For example, in *In re California Power Exchange Corp.*, the petitioners sought a writ of mandamus to address a four-month delay for a request for "retroactive refunds from wholesale electricity sellers." 245 F.3d 1110, 1124 (9th Cir. 2001). And in *In re City of Virginia Beach*, the court excused a delay in an agency's response to a city's application for a water pipeline because of the complicated legal framework guiding the adjudication of the application, which required coordination with additional federal agencies. 42 F.3d 881, 886 (4th Cir. 1994). Likewise, in the remaining cases cited by the VA, agencies were petitioned to take more extensive actions that involved multiple parties, a significant expenditure of agency resources, or intensive scientific questions. *See* VA Br. 38-39; *Liberty Fund, Inc. v. Chao*, 394 F. Supp. 2d 105, 109 (D.D.C. 2005) (addressing a request for a writ compelling the Department of Labor to expedite processing of

immigrant labor certification applications); *Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1, 6 (D.D.C. 2003) (addressing the delay in responding to a petition to revise a critical habitat designation for an endangered bird).

Here, the petition requests only that the VA engage in a rulemaking to review an outdated and discriminatory regulation that harms transgender veterans. The issues have already been thoroughly and exhaustively studied, a draft rulemaking notice has been produced, and there is nothing left for the agency to do in order to open the rulemaking.

The third and fourth factors similarly counsel in favor of compelling agency action. The VA has not pointed to any competing priorities that would be affected merely by opening a rulemaking. And, as courts have noted, an agency's vague claims about a lack of resources or about the difficulty of a decision do not automatically justify an extensive delay. *See Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) ("Yet neither a lack of sufficient funds nor administrative complexity, in and of themselves, justify extensive delay, nor can the government claim that it has become subject to unreasonable expectations."). Ultimately, the VA remains bound to respond to the petition in a "reasonable" amount of time, and if a "reasonable" time under the APA is to have any meaning, it must be defined by the actual circumstances of the delay, rather than vague, unsupported claims posited by an agency. *Cf. Sierra Club v. Gorsuch*, 715 F.2d 653, 659 (D.C. Cir.

1983) ("Judicial review of decisions not to regulate must not be frustrated by *blind* acceptance of an agency's claim that a decision is still under study." (emphasis in original)).[4]

As for the health and welfare factor, the record makes clear that there are severe consequences for continued delay, as transgender veterans are denied important and medically necessary procedures. *See* Appx127; Appx133; Appx144-145; *see also* Appx327 ("On more than one occasion we have learned of veterans who sought transition-related surgeries outside of the U.S. and then returned home, sitting on the surgical site for an extended airline trip. These

---

[4] Nor is there anything to the VA's half-hearted assertions about cost. Undertaking the rulemaking—the only remedy sought here—does not impose any material cost. To the extent the VA seeks to justify its inaction in removing the exclusion based on the supposed cost, that concern is both legally irrelevant and demonstrably unsupported by the record. In addition to drafting an NPRM, in June 2016, the VA conducted an economic impact analysis for the proposed rulemaking package. Appx320-330. As the VA notes in its own brief, the impact analysis indicated that the estimated expenses of a pilot program during the first three years would only cost approximately $18 million. VA Br. 9; Appx329. However, while recognizing these costs, the VA's economic impact analysis also noted that the VA "must pay for post-operative care and complications from transition surgeries performed outside the system" and that "[b]y ensuring that the entire transition process is handled within the VHA system, [the VA] ha[s] better continuity of care and better control of pricing." Appx327. The impact analysis also stated that "transition-related surgery has been proven effective at mitigating serious health conditions including suicidality, substance abuse and dysphoria that, left untreated, impose treatment costs on the VHA." *Id*. The VA can hardly justify its refusal to undertake rulemaking based on concerns about cost when it has recognized the significant countervailing cost savings that would be realized by removing the exclusion.

veterans then presented to VHA emergency rooms seeking assistance. Outcomes are poorer than when there has been planned post-surgical care."). In such cases, this factor weighs strongly in favor of compelling an agency to act. *See In re A Community Voice*, No. 16-72816, 2017 WL 6601875, at *6 (9th Cir. Dec. 27, 2017) (noting a "clear threat to human welfare" where the agency itself acknowledged that lead poisoning was a danger to children, where current standards were insufficient, and where children exposed to lead poisoning were prejudiced by the ongoing agency delay).

The VA leans heavily on *Families for Freedom v. Napolitano* to argue that the November 10, 2016 letter is not a denial, but it ignores the second part of the opinion in which the court held that the Department of Homeland Security ("DHS") had unreasonably delayed acting on a petition, citing, in part, the plaintiffs' allegations that "detainees in DHS custody are dying as a result of the substandard conditions under which they are held" and that this claim "clearly implicate[d] concerns of human health and welfare, making DHS's delay in responding to the petition that much more egregious." 628 F. Supp. 2d at 541. As in *Families for Freedom*, Petitioners in this case have made a record establishing immediate harm to themselves and other transgender veterans, making the VA's delay in responding equally egregious.

Finally, the VA asserts that Petitioners have not argued that the agency acted in bad faith in failing to respond to the petition. But as *TRAC* itself makes clear, "the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed." *TRAC*, 750 F.2d at 80 (citation and internal quotation marks omitted). Thus, this consideration does not weigh in favor of the VA, and Petitioners need not allege bad faith to demonstrate that the delay is unreasonable.

B. The Agency's Proffered Reasons For The Delay Are Inadequate

The VA's proffered justifications warrant further consideration by this Court—not because they explain the agency's delay, but because they underscore its unreasonableness.

The VA contends that it has "devoted substantial time and resources to consider issues relating to the rulemaking petition" since it was filed. VA Br. 38-40. But any work by the VA on the rulemaking petition stopped more than a year ago, when the VA was on the verge of opening a rulemaking. In light of the effort the VA expended in evaluating and drafting the proposed rulemaking, the VA's decision to call an abrupt halt without adequate justification is unreasonable—or at a minimum, requires an explanation from the agency. But the VA offers no justification for suddenly putting down its pens, with no indication that it will ever pick them up again. The VA offers only an off-hand line in its brief that "[a]ny

perceived delay in resolving that request is largely attributable to VA's efforts to determine whether the Secretary will exercise his discretion to include [sex reassignment] surgery in the medical benefits package." VA Br. 39. The VA gives no explanation of what those "efforts to determine whether the Secretary will exercise his discretion" might consist of, or why it has taken the agency more than a year to decide whether it will start work again. Indeed, if the only reason for the current delay is to enable the Secretary to decide whether to "exercise his discretion," that counsels in *favor* of compelling agency action.

The VA cannot rely on unsupported claims of ongoing activity without proving that such activity is actually ongoing. *See Flyers Rights Education Fund, Inc. v. Federal Aviation Administration*, 864 F.3d 738, 746 (D.C. Cir. 2017) ("Whatever deference we generally accord to administrative agencies, 'we will not defer to a declaration of fact that is 'capable of exact proof' but is unsupported by any evidence.'" (citation omitted)). The VA points to nothing in the record suggesting that it intends or needs to engage in additional study of the issue as a precursor to opening a rulemaking. As just noted, the agency has already engaged in extensive study. The record leaves no room for doubt about the VA's efforts, as indicated by the statement in the draft rulemaking package that the agency "deliberated on all the information," including the statements made by multiple medical professionals about the necessity in some cases of sex reassignment

surgery. Appx309-310. Furthermore, the VA conducted a detailed analysis of the severe human costs of the Regulation and the fiscal feasibility of replacing it. Appx320-330.

Petitioners are not asking the agency at this point to reach a definitive decision whether it will repeal the Regulation; they are merely asking the agency to engage in notice-and-comment rulemaking so that it can obtain the views of interested parties and can reach a fully informed decision on that question.

III. THE REMEDY IS RULEMAKING

As to remedy, the VA argues that if this Court concludes that it did in fact deny the petition for rulemaking, then the Court should not direct the VA to open a rulemaking but should instead merely remand the case to the VA to permit it to provide a "reasoned explanation for its decision." VA Br. 25. The VA's suggestion would result in more unwarranted delay in a matter of life and death to some transgender veterans. Moreover, the premise of the VA's argument—that it has thus far provided no reason for its denial—is incorrect. The VA *has* articulated its reason for denying the petition—and that reason cannot survive scrutiny.

In its November 10, 2016 letter, the VA set forth its reason for stopping work on the rulemaking—that it would defer any further action until such time "when appropriated funding is available." Appx1. The VA invoked the potential fiscal impact of providing sex reassignment surgery in deciding to stop work on the

rulemaking, and its denial can be justified only on that ground. *See, e.g.*, *Association of Civilian Technicians v. Federal Labor Relations Authority*, 269 F.3d 1112, 1116-1117 (D.C. Cir. 2001) ("Agency decisions must generally be affirmed on the grounds stated in them."). But as explained in Petitioners' opening brief, the VA had already concluded that the fiscal impact of providing sex reassignment surgery would be minimal. Pet. Br. 32, 39-40. Because the agency's proffered justification for its decision is refuted by the record, its decision to deny rulemaking was arbitrary and capricious. *See, e.g.*, *Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 682 (D.D.C. 1997) (holding that an agency decision based on "factual errors contradicted by overwhelming record evidence" is "arbitrary and capricious and therefore must be set aside").

The VA argues (Br. 23-27) that remand is appropriate to allow it to address the constitutional dimensions of its denial in the first instance, but it is unclear why an explanation offered after remand would necessarily entail a discussion of the *constitutionality* of the agency's decision. The VA does not have any particular expertise in assessing the constitutionality of a denial of a petition for rulemaking regarding sex reassignment surgery. *See, e.g.*, *Petruska v. Gannon University*, 462 F.3d 294, 308 (3d Cir. 2006) ("[A]s a general rule, an administrative agency is not competent to determine constitutional issues."); *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994) ("[A]ny examination of the constitutionality of the [agency's]

revocation power should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional competence.'").[5]

Finally, although the ordinary remedy may be a remand, this is not the "ordinary" case. The record in this case demonstrates that the agency has already completed the work required to engage in the rulemaking. *Cf. Flyers Rights Education Fund*, 864 F.3d at 747 ("[R]emand is the presumptive remedy *when the agency record is insufficient 'to permit [the court] to engage in meaningful review.'*" (emphasis added) (citation omitted)). There is nothing left for the VA to

---

[5] Although the VA suggests there are "strong arguments" (Br. 35) that such a denial is not discriminatory, it cites only a conclusory memorandum from the Attorney General and two cases from 1974 and 1997, both contradicted by numerous recent decisions that have concluded that discrimination against transgender individuals violates constitutional equal-protection principles and federal civil rights statutes. *See Whitaker v. Kenosha Unified School District No. 1 Board of Education*, 858 F.3d 1034, 1049 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1320-1321 (11th Cir. 2011); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572-575 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). In addition, four federal courts have recently held that transgender servicemembers are likely to succeed in the merits of their claims that a hastily announced policy prohibiting transgender individuals from serving in the military violates constitutional equal-protection principles. *See* Civil Minutes Order, *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx) (C.D. Cal. Dec. 22, 2017); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *8 (W.D. Wash. Dec. 11, 2017), *appeal docketed*, No. 17-36009 (9th Cir. Dec. 16, 2017); *Stone v. Trump*, __ F. Supp. 3d __, 2017 WL 5589122, at *15 (D. Md. Nov. 21, 2017), *appeal docketed*, No. 17-2398 (4th Cir. Dec. 6, 2017); *Doe 1 v. Trump*, __ F. Supp. 3d __, 2017 WL 4873042, at *27-29 (D.D.C. Oct. 30, 2017), *appeal docketed*, No. 17-5267 (D.C. Cir. Nov. 30, 2017).

do, except apparently to make an "effort[] to determine whether the Secretary will exercise his discretion to include [sex reassignment] surgery in the medical benefits package." VA Br. 39. If the Secretary need only exercise his discretion, then he should do so, especially when the stakes are so high. As the D.C. Circuit has noted, compelling an agency to engage in rulemaking is appropriate when the denial presents "grave health and safety problems for the intended beneficiaries of the statutory scheme." *National Customs Brokers & Forwarders Ass'n of America, Inc. v. United States*, 883 F.2d 93, 103 (D.C. Cir. 1989) (R.B. Ginsburg, J.).

Here, there are immediate consequences for failing to provide sex reassignment surgery. Transgender veterans who need but cannot receive medically necessary surgeries are more likely to suffer from depression or commit suicide. *See* Appx94; Appx308-309 ("According to the American Medical Association House of Delegates, Resolution 122:A-08, gender dysphoria is a serious condition that, left untreated, can lead to serious medical problems, including 'clinically significant psychological distress, dysfunction, debilitating depression and, for some people without access to appropriate medical care and treatment, suicidality and death.'"). As the VA's own draft NPRM and economic impact analysis make clear, there are significant health and welfare consequences in failing to provide a complete range of care—including sex reassignment surgery—to servicemembers with gender dysphoria. Appx305; Appx327.

Because "[t]here is no longer any question of fact," *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1241 (D.D.C. 1986), regarding the necessity of these procedures, and because the VA has taken all necessary steps to respond to the petition, this Court should compel the VA to initiate rulemaking to review and repeal the petition.

In the event this Court elects to remand the petition, it should order the VA to respond to the petition expeditiously—and certainly in no longer than 90 days. *Cf. In re People's Mojahedin Organization of Iran*, 680 F.3d 832, 838 (D.C. Cir. 2012) (ordering the Secretary of State to either grant or deny a petition before the agency within four months); *Families for Freedom*, 628 F. Supp. 2d at 541 (ordering DHS to grant or deny the petition at issue within 30 days of entry of judgment). Given the VA's delay in acting on the petition and the consequences from failing to take action, this Court should not permit the agency to let this petition languish any longer.

CONCLUSION

The Court should direct the Department to undertake a rulemaking to amend or repeal the Regulation.

Respectfully submitted,

/s/ Alan Schoenfeld

LYNLY S. EGYES
SHAWN THOMAS MEERKAMPER
TRANSGENDER LAW CENTER
P.O. Box 70976
Oakland, CA 94612
(510) 587-9696

SASHA J. BUCHERT
LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.
1875 I Street NW
Washington, DC 20006
(202) 999-8083

ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294

TARA L. BORELLI
M. DRU LEVASSEUR
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree St. NE, Ste. 640
Atlanta, GA 30308-1210
(404) 897-1880

PAUL R.Q. WOLFSON
MICHAEL POSADA
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6390

December 28, 2017

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of December, 2017, I filed the foregoing Reply Brief for Petitioners with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ Alan Schoenfeld
ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Circuit Rule 32(a).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 6,587 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Alan Schoenfeld
ALAN SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 937-7294

December 28, 2017