No. 24-____

In the United States Court of Appeals for the Federal Circuit

IN RE TRANSGENDER AMERICAN VETERANS ASSOCIATION, Petitioner.

PETITION FOR WRIT OF MANDAMUS TO THE DEPARTMENT OF VETERANS AFFAIRS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

Transgender and gender non-conforming veterans (collectively, "transgender veterans") serve this country at nearly twice the rate of their cisgender counterparts. Yet for nearly eight years, the U.S. Department of Veterans Affairs ("VA") has ignored their request for essential health care commensurate with that it provides to other veterans. Specifically, VA categorically excludes gender-confirmation surgery from its medical benefits package, even though this treatment is often lifesaving care and VA provides the same procedures when not used to treat gender dysphoria.

On May 9, 2016, the Transgender American Veterans Association ("TAVA"), along with two veterans that were denied gender-confirmation surgery by VA—against the recommendations of VA's own doctors—submitted a formal petition for rulemaking on gender-confirmation surgery under the Administrative Procedure Act. App'x 1-38. The petition requested that VA amend its regulations, including 38 C.F.R. § 17.38(c)(4) and implementing directives, that exclude medically necessary gender-confirmation surgery for transgender veterans from the medical benefits package. TAVA's proposed rule would ensure that transgender veterans receive the medically necessary care they earned through their service. It would also mean that those veterans do not have to seek this care through private doctors, which is often prohibitively expensive. And since these veterans often rely on VA doctors for their other health care, including and especially their other transition-related care, VA

provision of gender-confirmation surgery would allow continuity of care with the doctors who know their medical history best.

VA has publicly stated that it intends to provide gender-confirmation surgery to its veteran patients, prepared multiple proposed rules for cost-benefit analysis, and received public comment on the rulemaking petition. Yet it has taken no formal action granting or denying TAVA's petition in nearly eight years since it was filed. Nor, despite its vague public statements, has VA made this essential care available. Such informal statements do not satisfy VA's obligation to respond to TAVA's rulemaking petition. Transgender veterans deserve the gender-confirmation surgery that VA has promised. At the very least, VA has a legal duty to TAVA and its members to grant or deny their rulemaking petition. Transgender veterans should not have to wait any longer.

Left with no other options, TAVA now seeks a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). TAVA asks this Court to compel a formal response from VA to its May 2016 rulemaking petition, which has been unreasonably delayed, *see* 5 U.S.C. § 706(1), and to require VA to conclude this matter within a "reasonable time." *See id.* § 555(b).

FACTS & PROCEEDINGS

A. Factual Background

Transgender people are a disproportionally high percentage of the veteran community. Over 20% of transgender people in the United States have served in the military, or approximately more than 134,000 veterans. *See* App'x 93-94. Like other veterans, transgender veterans frequently rely on VA health care, including for treatment of gender dysphoria, the medical diagnosis for the distress caused by incongruence between gender identity and sex assigned at birth. Transgender veterans are more likely than cisgender veterans to rely on VA health care, because they are more likely to be uninsured and to face cost barriers to care. *See id.* 96-98. At least 10,000 transgender veterans currently receive transition-related care through VA. *See id.* 107.

However, VA does not meet the medical needs of transgender veterans in the same way it does for other veterans. VA categorically excludes gender-confirmation surgery from its medical benefits package, 38 C.F.R. § 17.38(c)(4), App'x at 39-77, even though this surgery is essential care for many people who have gender dysphoria. As a result, transgender veterans for whom gender-confirmation surgery is medically necessary cannot receive it from VA, even while they receive other care—including transition-related care—from VA doctors at VA facilities.

VA's failure to provide gender-confirmation surgery puts transgender veterans at increased risk of physical harm, psychological distress, and suicide. Major medical associations have long recognized that gender-confirmation surgery is effective, and often critical, treatment for gender dysphoria. *See id.* 11-13; *see also id.* 436-439 (Resolution 122 of the American Medical Association), 440-474 (Report of the APA Task Force), 475-509 (guidelines from the Endocrine Society). Gender-confirmation surgery is associated with significantly lowered psychological distress and suicidal ideation. *See id.* 13, 108-115 (2021 study finding lower risk of suicidal ideation and attempt after transgender patients receive gender-confirmation surgery), 402-403 (declaration of Dr. Marci Bowers), 416-421 (declaration of Dr. Randi Ettner), 515 (APA guidelines).

For instance, the American Medical Association has concluded that "[a]n established body of medical research demonstrates the effectiveness and medical necessity of . . . sex reassignment surgery" for people with gender dysphoria. *Id.* 436. The American Psychiatric Association has concurred that "medical research demonstrates the effectiveness and necessity of mental health care, hormone therapy and sex reassignment surgery for many individuals diagnosed with" gender dysphoria. *Id.* 448. Additionally, the Endocrine Society has explained that "[f]or many transgender adults, genital gender-affirming surgery may be the necessary step toward achieving their ultimate goal of living successfully in their desired gender

role" and that "[t]he mental health of the individual seems to be improved by participating in a treatment program that defines a pathway of gender-affirming treatment that includes . . . surgery." *Id.* 499.

Access to this care can represent the difference between life and death. Veterans experience suicide at a rate 57.3% higher than civilians, *see id.* 122, and higher rates of depression as well. *See id.* 159-160. Suicide-related events are over 20 times more common for veterans with gender dysphoria who rely on VA care than for veterans who rely on VA care generally. *Id.* 170.

VA's categorical exclusion forces transgender veterans to forego the necessary care, increasing these mental health risks. To obtain care, they must pay out-of-pocket at a non-VA facility. Forcing them to seek gender-affirming care at multiple facilities and from different providers disrupts continuity of care for transgender veterans, to the detriment of their health and well-being. *See, e.g.*, *id.* 176-177; *id.* 584-585 ¶ 6 (describing how VA denied TAVA President Eshler a referral letter to receive gender-confirmation surgery elsewhere). Maintaining continuity of care would also decrease costs for VA, in part because it mitigates the risk of more serious—and more expensive—medical interventions. *Id.* 553-563.

VA's refusal to provide gender-confirmation surgery is particularly arbitrary given that it recognizes that gender dysphoria requires medical attention. In fact, VA covers "all medically necessary gender-affirming care to transgender Veterans *with*

the exception of gender-affirming surgical interventions." App'x 181 (emphasis added). VA even provides gender-confirmation surgery to treat conditions *other* than gender dysphoria. *See id.* 15-17; *see also, e.g.*, 38 C.F.R. § 17.38(a)(1)(x) (providing plastic surgery to veterans "required as a result of disease or trauma"); App'x 40 (clarifying that VA provides to "intersex Veterans . . . surgery to correct inborn conditions related to reproductive or sexual autonomy"). VA's refusal to cover this medical care for transgender veterans is discordant with its stated "commit[ment] to addressing health disparities, including disparities among our transgender . . . veterans." *Id.* 55. In fact, VA's categorical exclusion of gender-confirmation surgery has caused transgender veterans to lose access to the VA care to which they are presently entitled. *See, e.g.*, *id.* 581-582 ¶¶ 13-14 (describing how VA denied post-operative care to a TAVA member, Ray Gibson, who received this surgery elsewhere).

Without access to medically necessary care, some transgender veterans lose their lives. Natalie Kastner, a TAVA member diagnosed with gender dysphoria and denied gender-confirmation surgery at the VA, was nearly one of those veterans. *Id.* 576-577 ¶ 6. Desperate and unable to access gender-confirmation surgery via the VA or alternative means, she removed her right testicle at home on March 5, 2022, without anesthesia or formal medical training. *Id*. In doing so, she accidentally severed an artery. *Id.* Ms. Kastner managed to drive herself to the local emergency

room, where she received life-saving care. *Id.* 577 ¶ 7. Though Ms. Kastner survived this harrowing incident, she continues to struggle with gender dysphoria daily while anxiously awaiting the VA's response to TAVA's petition. *Id.* 578-579 ¶¶ 14-15, 17-18.

Some transgender veterans are racing against time to access gender-confirmation surgery. Another TAVA member, Ray Gibson, is a Black transgender male veteran of the U.S. Air Force. *Id.* 580 ¶¶ 2-3. At 66 years old, Mr. Gibson fears that he is nearly too old to safely access phalloplasty. *Id.* ¶ 4; *id.* 583 ¶ 19. As he has aged, recovery from surgeries has become harder. VA is his only health care provider, and he lives on a fixed income. *Id.* 581 ¶¶ 13, 10. He is unable to pay out-of-pocket for gender-confirmation surgery. *Id.* ¶ 11; *id.* 582 ¶ 17. If VA continues to delay its decision, he may be unable to avoid suffering gender dysphoria for the rest of his life. *Id.* ¶ 18; *id.* 583 ¶ 19.

B. Procedural History

Given the importance of this issue to its members, on May 9, 2016, TAVA and two individual veterans filed the rulemaking petition that is the subject of this action. *Id.* 1-38. VA promptly acknowledged receipt. *Id.* 249. In the media and in response to inquiries from Members of Congress, the agency stated that it would explore a regulatory change to allow VA to provide gender-confirmation surgery in its medical benefits package. *Id.* 249-250. In 2016, VA drafted a proposed rule, entitled

"Removing Exclusion of Gender Alterations from the Medical Benefits Package," performed an impact analysis for the draft proposed rule, and issued a memorandum from the Veterans Health Administration's Chief Financial Officer regarding the impact analysis. *See id.* 254. But on November 10, 2016, then-Under Secretary David J. Shulkin of VA wrote 47 Members of Congress that VA would not include a Notice of Proposed Rulemaking ("NPRM") in the Fall 2016 Unified Agenda. *See id.* 228-234 ("Shulkin Letter").

VA changed direction under the next Administration. In 2017, it re-issued VHA directive 2013-003, declaring that "[s]ex reassignment surgery cannot be performed or funded by VA." *Id.* 78-90. That remains VA's position. *Id.* 52-77.

In response, TAVA and two individual veterans filed suit requesting that this Court set aside VA's constructive denial of the rulemaking petition as stated in the Shulkin Letter or, in the alternative, compel VA to act on the grounds of unreasonable delay. *See Fulcher v. Sec'y of Veterans Affs.*, No. 2017-1460 (Fed. Cir. filed June 21, 2017); App'x 184-236, 237-308. VA argued that it had neither denied the rulemaking petition nor engaged in unreasonable delay. *Id.* 320-330, 343-349. This Court held oral argument in May 2018. *Id.* 363. In July, VA sought comment on the rulemaking petition in the Federal Register, although without publishing an NPRM or proposed rule, *id.* 364-365, and TAVA and the other plaintiffs voluntarily dismissed the case before this Court issued a decision. *Id.* 371-372.

Since the start of the Biden Administration, VA has returned to its 2016 posture, making repeated public promises that it will provide gender-confirmation surgery. Secretary McDonough first made public assurances that VA will provide gender-confirmation surgery in 2021, soon after he was confirmed by the Senate. *See id.* 373-376, 377-378. More recently, in June 2023, VA Press Secretary Terrence Hayes said that VA is "moving ahead methodically" to provide gender-confirmation surgery "because we want this important change in policy to be implemented in a manner that has been thoroughly considered" and "meets VA's rigorous standards for quality health care." *Id.* 379-383. But Hayes declined to say which steps VA has taken thus far and which steps are left. *See id.* Secretary McDonough made a similar statement—again without details—at a VA town hall in November 2023. *See id.* 388.

VA has also submitted five proposed rules for gender-confirmation surgery to the Office of Information & Regulatory Affairs ("OIRA"), including as recently as fall 2023, each of which has specified an intended publication date for an NPRM. One of those rules went through full OIRA review. *See id.* 397; *id.* 393 (indicating intended NPRM date of July 2022); *id.* 394 (same); *id.* 395 (indicating intended NPRM date of December 2022); *id.* 396 (indicating intended NPRM date of October 2023); *id.* 398 (indicating intended NPRM date of November 2023). Yet VA has not adhered to *any* of these intended publication dates, even though it has a proposed rule drafted for OIRA review. Each of these submissions also contains the following

language, confirming that VA understands that it has both the legal authority under 38 U.S.C. § 1710 and the obligation to provide gender-confirmation surgery:

> The Department of Veterans Affairs (VA) is proposing to revise its medical regulations by removing the exclusion on gender alterations from the medical benefits package. VA is proposing these changes so that transgender and gender diverse veterans may receive medically necessary health care, including surgical interventions for gender transition. This proposed change would be consistent with medical industry standards and would ensure that VA provides a full continuum of care to transgender and gender diverse veterans.

Id. 393-398. Despite these public comments and representations in the Unified Agenda, VA has neither published an NPRM nor a proposed rule in the Federal Register.

Seven and one-half years since submitting its rulemaking petition, and after more than two and one-half years of public promises by current VA leadership unmatched by any concrete agency action, TAVA sent a demand letter to VA's Acting General Counsel on November 20, 2023, International Transgender Day of Remembrance. TAVA stated that if VA failed to grant its 2016 rulemaking petition and initiate the rulemaking process within 30 days, the organization would file suit. *See id.* 543-547. VA replied by letter on December 22, 2023, repeating the same noncommittal representations it has made for years—even recycling the exact language it has previously used in its public statements. *Compare id.* 548 *with id.* 373-376, 379-383. VA's reply did not, however, grant or deny TAVA's petition, let

alone identify any concrete steps it had taken or specify any timeline by which it would act. *See id.* 548.

It has been over two years since Secretary McDonough publicly committed to initiating the rulemaking process on this matter and *nearly eight years* since TAVA filed its rulemaking petition. Having tried and failed to secure this relief short of litigation, TAVA now has no choice but to seek this Court's intervention.

JURISDICTION

The United States Court of Appeals for the Federal Circuit has exclusive jurisdiction to review VA rules and regulations, including the VA Secretary's responses to petitions for rulemaking. 38 U.S.C. § 502.

STANDING

TAVA submitted a petition for rulemaking on May 9, 2016, which VA has neither granted nor denied. TAVA has associational standing on behalf of its members, including its members denied medically necessary gender-confirmation surgery by VA, because TAVA has members who have standing to sue in their own right, the interests TAVA seeks to protect are germane to its purpose, and neither the claim asserted nor relief requested requires participation of individual TAVA members in this suit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Inst. Nat'l Des Appellations D'Origine v. Vintners Int'l Co., Inc.*, 958 F.2d 1574, 1579 (Fed. Cir. 1992); *E. Paralyzed Veterans Ass'n, Inc. v. Sec'y of*

Veterans Affs., 257 F.3d 1352, 1356 (Fed. Cir. 2001) (holding veterans group has associational standing under *Hunt* standard to challenge VA regulation). Indeed, in every year since the rulemaking petition was filed, continuing through 2023, VA has denied gender-confirmation surgery to multiple TAVA members. App'x 587 ¶ 15.

TAVA also has organizational standing because the petition is germane to TAVA's purpose, which is to ensure that all transgender veterans receive full services and dignified treatment from VA. VA's delay in deciding TAVA's rulemaking petition has forced TAVA to divert scarce resources to address the VA's failure to act. *Id.* 586 ¶ 11. This diversion of resources is an injury-in-fact. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also Warth v. Seldin*, 422 U.S. 490, 511 (1975).

ARGUMENT

This Court should issue a writ of mandamus ordering VA to respond to TAVA's 2016 rulemaking petition on the grounds of unreasonable delay. Forty years ago, the D.C. Circuit established a multifactor test for agency delay. *Telecomms. Rsch. & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"). This and other courts of appeals have adopted the standard in the years since then. As applied here, the six *TRAC* factors confirm that VA's delay in responding to TAVA's rulemaking petition has been unreasonable and warrants mandamus.

On the first and arguably most important factor (and, by extension, the second factor), no "rule of reason" governs VA's nearly eight-year delay, especially given that VA has already prepared multiple NPRMs. The third and fifth *TRAC* factors further confirm that mandamus is warranted, as VA's failure to respond to TAVA's rulemaking petition has directly impacted "human health and welfare" and prejudiced the interests of transgender veterans who rely on VA to provide medically necessary care. Gender-confirmation surgery is essential care, and its provision is especially urgent given the increased risks of suicide and self-harm faced by transgender and veteran populations.

VA cannot argue that responding to the rulemaking petition will delay actions of a higher or competing priority, given both the negligible cost of publishing an already-drafted proposed rule and VA's own recognition in its submissions to OIRA that any costs imposed by the rule TAVA requests are not economically significant. This analysis should also inform the Court's analysis of the traditional mandamus requirements, *see Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004), as VA's failure to respond leaves TAVA with no other means to attain adequate relief, TAVA's right to a response from VA is clear and indisputable, and a writ of mandamus is appropriate in these high-stakes circumstances.

This Court should grant this petition for writ of mandamus and compel VA to grant or deny TAVA's rulemaking petition from nearly eight years ago.

I. The TRAC factors are the appropriate standard for this Court to evaluate mandamus petitions based on unreasonable delay.

This Court should use the *TRAC* factors to evaluate whether VA has engaged in unreasonable delay in failing to respond to TAVA's 2016 rulemaking petition. As the D.C. Circuit laid out, these factors establish a framework for evaluating claims of unreasonable agency delay under the All Writs Act:

> (1) the time agencies take to make decisions must be governed by a "rule of reason";
> (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;
> (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;
> (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;
> (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and
> (6) 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 (cleaned up).

The *TRAC* factors are the appropriate standard in this matter. Every circuit to have considered the question employs the *TRAC* factors for mandamus claims based on unreasonable delay. The D.C. Circuit has repeatedly explained that it "analyzes unreasonable delay claims under the now-familiar criteria set forth in *TRAC*[,]" *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000), including when it "exercise[es] our equitable powers under the All Writs Act . . . for assessing claims of agency delay[.]" *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 549

(D.C. Cir. 1999); *see also, e.g.*, *In re Core Commc'ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (analyzing All Writs Act mandamus claim based on unreasonable delay under *TRAC* factors); *In re Ctr. for Biological Diversity*, 53 F.4th 665, 670 (D.C. Cir. 2022) (same).

The First and the Ninth Circuits have followed suit. *See Towns of Wellesley, Concord & Norwood, Mass. v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (applying *TRAC* factors to analyze mandamus claim based on unreasonable delay); *In re A Cmty. Voice*, 878 F.3d 779, 783-84 (9th Cir. 2017) (explaining that the Ninth Circuit "applies the six factor balancing test set out by the D.C. Circuit in *TRAC*" in "deciding whether to grant a mandamus petition on the grounds of unreasonable delay" (citing *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997))); *In re Nat. Res. Def. Council, Inc.*, 956 F.3d 1134, 1138 (9th Cir. 2020) (same) ("*NRDC*").

In particular, the *TRAC* factors are the proper standard for evaluating whether an agency has engaged in unreasonable delay in responding to a rulemaking petition. *See NRDC*, 956 F.3d at 1138; *A Cmty. Voice*, 878 F.3d at 786 (finding agency's eight-year delay—only a few months more than that in this case—in responding to rulemaking petition to be unreasonable, and granting writ of mandamus).

This Court has indicated that the *TRAC* factors are the proper standard to review mandamus claims based on unreasonable delay and claims under 5 U.S.C.

§ 706(1). In 2018, this Court held that the *TRAC* factors govern evaluation of unreasonable delay claims in the context of individual veterans' benefits decisions. *Martin v. O'Rourke*, 891 F.3d 1338, 1348 (Fed. Cir. 2018). There, the Court relied on several of the above-listed decisions, *see, e.g.*, *id.* at 1345 (citing *Towns*, 829 F.2d at 277), including those pertaining to agency failures to respond to a rulemaking petition. *See, e.g.*, *id.* (citing *A Cmty. Voice*, 878 F.3d at 783-84).[1] And in 2010, this Court relied on *TRAC* to confirm that it has the authority under the All Writs Act to review mandamus claims based on agency action unlawfully withheld under 5 U.S.C. § 706(1)—which also prohibits unreasonable agency delay. *In re Paralyzed Veterans of Am.*, 392 F. App'x 858, 859-60 (Fed. Cir. 2010).

This Court should follow other circuit courts and its own reasoning by adopting the *TRAC* factors as the standard for evaluating mandamus claims based on unreasonable delay under 5 U.S.C. § 706(1) and 5 U.S.C. § 555(b).

II. VA's delay has been unreasonable under the *TRAC* factors.

VA has failed to act on TAVA's rulemaking petition for nearly eight years. VA is obligated by law "to conclude a matter presented to it" within "a reasonable time . . . ." 5 U.S.C. § 555(b); *see also id.* § 706(1) (authorizing courts to "compel

[1] The Court also clarified that the "three traditional requirements" for mandamus still "must be demonstrated for mandamus to issue." *Id.* at 1343 n.5 (citing *Cheney*, 542 U.S. at 391). The *TRAC* factors are relevant to each of these requirements, as described *infra*.

agency action . . . unreasonably delayed"). Although "[t]here is no *per se* rule as to how long is too long to wait for agency action," *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004), the well-established *TRAC* factors provide guidance to courts to determine how long an agency can reasonably wait to act. *In re Barr Labs., Inc.*, 930 F.2d 72, 74-75 (D.C. Cir. 1991). Considering these factors, VA has unjustifiably failed to either grant or deny the petitioners' rulemaking request. All of the *TRAC* factors strongly support issuance of mandamus.

A. No "rule of reason" justifies VA's failure to respond.

The first *TRAC* factor weighs heavily in favor of mandamus because the length of VA's delay is beyond a rule of reason. Under the first factor, "the time agencies take to make decisions must be governed by a rule of reason." *TRAC*, 750 F.2d at 80 (cleaned up). The length of agency delay is "the most important factor" in multiple circuits. *Martin*, 891 F.3d at 1345 (citing *A Cmty. Voice*, 878 F.3d at 786); *see also Core Commc'ns*, 531 F.3d at 855 (time is "[t]he first and most important factor" (quoting *TRAC*, 750 F.2d at 80)); *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (first factor is the "ultimate issue."); *NRDC*, 956 F.3d at 1139 ("The most important *TRAC* factor is the first factor, the rule of reason . . . .") (cleaned up).

Even though there is no "hard and fast rule with respect to the point in time at which a delay becomes unreasonable," *Martin*, 891 F.3d at 1346, courts agree that

"a reasonable time for agency action is typically counted in weeks or months, not years." *Am. Rivers*, 372 F.3d at 419 (citing *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987)). Here, VA received and prepared all the necessary materials to respond to the rulemaking petition years ago. Yet VA has still not decided the petition, nor has it published an NPRM or a proposed rule in the Federal Register.

The D.C. Circuit, as well as courts across the country, have found similar delays to be unreasonable. *See, e.g.*, *Am. Rivers*, 372 F.3d at 419 (finding "six-year-plus delay nothing less than egregious"); *Core Commc'ns,* 531 F.3d at 857 (same for seven-year delay); *NRDC*, 956 F.3d at 1139 (same for ten- and twelve-year delays). These decisions include agency failures to respond to rulemaking petitions. *See In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (finding six-year delay in responding to rulemaking petition unreasonable because "[t]here is a point when the court must let the agency know, in no uncertain terms, that enough is enough, and we believe that point has been reached") (cleaned up). Courts have even found shorter delays in responding to such petitions to be unreasonable. *See Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (five-year delay unreasonable); *MCI Telecomms. Corp. v. FCC*, 627 F.2d 322, 324-25 (D.C. Cir. 1980) (three-year delay unreasonable); *Pub. Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1157-59 (D.C. Cir. 1983) (per curiam) (same); *Fams. for*

Freedom v. Napolitano, 628 F. Supp. 2d 535, 536 (S.D.N.Y. 2009) (holding nearly two-and-one-half years-delay in responding to rulemaking petition unreasonable and ordering response).

VA's repeated public promises that it is taking steps to change the rule, *see supra* Facts & Proceedings, are no justification for the delay. Courts considering comparable delays have found inaction egregious even when an agency "publicly and privately . . . appears to have done some work." *A Cmty. Voice*, 878 F.3d at 783. The Secretary has failed to offer a meaningful reason for why a decision cannot be made on the existing administrative record.

On a similar note, the second *TRAC* factor does not cut against mandamus. Under the second factor, courts consider whether Congress has indicated a time frame for when an agency is expected to act. *See Martin*, 891 F.3d at 1345 ("'[A] timetable or other indication of the speed with which [Congress] expects the agency to proceed' may 'supply content' for the rule of reason." (quoting *TRAC*, 750 F.2d 70 at 80)). When there is no specific statutory timetable for agency action, courts will apply the APA's "reasonable time" standard and grant mandamus when the agency's delay is unreasonable. *See NRDC*, 956 F.3d at 1140 (citing 5 U.S.C. § 555(b)). Accordingly, the lack of a rule of reason for VA's delay here also counsels in favor of mandamus under this factor.

B. The third and fifth TRAC factors strongly support issuance of mandamus given the health and welfare interests at stake.

As other circuits have noted, the same analysis often applies to both the third and fifth *TRAC* factors. *See, e.g.*, *Barr Labs.*, 930 F.2d at 75 (noting the third factor "overlaps with the fifth"); *Martin*, 891 F.3d at 1346 (same); *A Cmty. Voice*, 878 F.3d at 787 (referring to analysis under third factor when concluding that "the fifth factor thus favors issuance of the writ").

Application of the third *TRAC* factor strongly favors mandamus, as VA's unreasonable delay impacts "human health and welfare" for tens of thousands of veterans. *Cf. Martin*, 891 F.3d at 1346 ("Veterans' disability claims always involve human health and welfare." (citing *TRAC*, 750 F.2d at 80)). The Veterans Health Care Eligibility Reform Act of 1996, Pub. L. 104-262, which established the current framework for veteran eligibility for medical benefits under VA's health care system, was passed to ensure the medical needs of all American veterans would be met through the provision of quality health care. Medical necessity is the standard for whether veterans are eligible for care, and all veterans who enroll in VA health care are eligible to receive the care their VA doctor determines they need. *See* 38 C.F.R. § 17.36(b); 38 U.S.C. § 1710. As of May 2014, there were an estimated 129,700 transgender veterans of the U.S. Military, as well as 4,600 retired transgender members of the U.S. Reserves and National Guard. *See* App'x 94 fig.4.

VA's approach to gender dysphoria is inconsistent with the way it identifies medically necessary treatment for other conditions for which veterans seek VA treatment. As it stands, VA prohibits coverage for "gender alterations" and does not allow for medically necessary sex reassignment surgery to treat gender dysphoria. But the *Diagnostic and Statistical Manual of Mental Disorders*—on which VA ratings for disability relating to mental disorder rely, *see* 38 C.F.R. § 4.130—dedicates an entire chapter to the diagnosis of gender dysphoria. *See* App'x 564-575.

As TAVA made clear in its original petition, gender-confirmation surgery is critical and often lifesaving care for those who live with gender dysphoria. *See* App'x 25, 403 (Bowers declaration), 416-421 (Ettner declaration); *see also supra* Facts & Proceedings. Additional evidence and guidance from major medical organizations since TAVA submitted its petition further confirms the importance of gender-confirmation surgery as effective treatment of gender dysphoria. *See supra* Facts & Proceedings; App'x 108-115. Thorough treatment of gender dysphoria is particularly essential because veterans are already at a unique risk of suicide compared to their civilian counterparts. *See supra* Facts & Proceedings. As the original petition shows, gender-confirmation surgery is therefore a critical bulwark against exacerbation of that risk. *See* App'x 23 & n.30, 402-403 (Bowers declaration), 414-415 (Ettner declaration); *see also supra* Facts & Proceedings.

Application of the fifth *TRAC* factor, which examines the nature of the interests prejudiced by delay, aligns with much of the analysis under the third *TRAC* factor, since they "are often considered together and require the Court to consider Plaintiff's interests, health, and welfare." *Rezaei v. Garland,* No. CV 23-1645 (CKK), 2023 WL 5275121, at *3 (D.D.C. Aug. 16, 2023). This delay prejudices the interests of transgender veterans who served this country by denying them the medically necessary health care that they have earned and that VA has a statutory obligation to provide. Further delay exacerbates these significant harms.

C. Responding to the rulemaking petition will not interfere with agency activities of a higher or competing priority.

Under the fourth *TRAC* factor, courts consider the effect of expediting delayed action on agency activities of a higher or competing priority. *TRAC*, 750 F.2d at 80. Here, VA has no colorable argument that responding to the rulemaking petition will unduly burden or divert its resources, whether financial or administrative.

An agency's concerns about cost, complexity, or limited resources do not excuse unreasonable delay. *See Cobell v. Norton*, 240 F.3d 1081, 1097 (D.C. Cir. 2001) ("[N]either 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."); *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."); *In re*

Pub. Emps. for Env't Resp., 957 F.3d 267, 275 (D.C. Cir. 2020) (recognizing "that agencies have legitimate resource-based concerns," but finding "agencies' competing obligations cannot justify their nineteen-year holdup").

Resource-based arguments are particularly unpersuasive here. The record shows that responding to the rulemaking petition would impose negligible financial and administrative costs on VA. Petitioners ask only that VA formally respond to the rulemaking petition. VA has already drafted multiple proposed rules, *see* App'x 393-398; conducted a thorough financial impact analysis, *see id.* 553-563, 326; gone through OIRA cost-benefit analysis, *see id.* 399, 401; and published and received comment on the rulemaking petition. *See id.* 364-365. All that remains to be done is formal resolution of the petition.

Moreover, VA provision of gender-confirmation surgery is not financially burdensome. In its submissions to OIRA, VA has repeatedly classified its proposed rule as "non-major" under 5 U.S.C. § 801, *see* App'x 393-394, 396, 398, as it is "[un]likely to result in an annual effect on the economy of $100 million or more . . . ." *See id.* 551. VA has also repeatedly characterized the proposed rule's priority status as "other significant," *see id.* 394-396, 398, which means a "rulemaking that is not 'economically significant' but is considered significant by the agency." *See id.* 551; *cf. id.* 397 (clarifying that the rule which went through full OIRA review is not economically significant under definitions provided). It is thus

undisputed that TAVA's proposed rulemaking will not unduly burden or divert VA's financial resources.

In fact, according to VA's own economic impact analysis, the projected cost of providing gender-confirmation surgery at VA hospitals is minimal—and VA might even realize cost savings. *Id.* 553-563. Already, VA "must pay for post-operative care and complications from transition surgeries provided outside" VA. *Id.* 560. "By ensuring that the entire transition process is handled within the VHA system, [VA] ha[s] better continuity of care and better control of pricing." *Id.* Furthermore, "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.*

By VA's own admissions, responding to the rulemaking petition and promulgating the rule requested therein will have little to no financial impact, nor will it impact agency activities of a higher or competing priority. Under the fourth *TRAC* factor, Petitioner unequivocally prevails.[2]

[2] Under the sixth factor, a "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 (cleaned up). VA's repeated assurances that it plans to act are thus immaterial to the reasonableness of its nearly eight-year delay.

III. TAVA satisfies the *Cheney* conditions for mandamus to issue.

The *TRAC* analysis overlaps with each of the traditional requirements for mandamus: namely, that (1) "the party seeking issuance of the writ must have no other adequate means to attain the relief he desires," (2) the party "must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable," and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney*, 542 U.S. at 391 (cleaned up). This Court has never had occasion to clarify the relationship between the *TRAC* and *Cheney* standards for issuance of a writ of mandamus to redress unreasonable agency delay. *Cf. Martin*, 891 F.3d at 1343 n.5 (remanding to court of original jurisdiction over writ of mandamus "to consider the traditional mandamus requirements as informed by the *TRAC* analysis"). Nor is undersigned counsel aware of any other court of appeals that has done so. But it is plain that TAVA satisfies both the *TRAC* and *Cheney* standards. Mandamus should issue.

A. TAVA has no other means to attain adequate relief.

This request for mandamus is Petitioner's only means to obtain relief. TAVA has repeatedly tried to prompt VA to act, including through previous litigation, *see* App'x 184-372, and attempts at pre-suit resolution. *See id.* 543-548. In response to TAVA's recent demand letter, VA recited the same language it has used previously to describe its vague plans to act on the petition and declined to adjudicate TAVA's

rulemaking petition. *See supra* Facts & Proceedings. This most recent VA statement is not final agency action, such that it would be subject to judicial review. *See, e.g.*, *Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (holding letter stating that agency is "actively working to develop the kind of information that would enable it to" grant rulemaking petition "do[es] not represent final agency action . . . on petitioners' request for rulemaking"). "An agency cannot avoid its obligation to 'fully and promptly consider' a petition for rulemaking—and shield itself from future judicial review—merely by issuing a noncommittal response." *Whale & Dolphin Conservation v. Nat'l Marine Fisheries Serv.*, 573 F. Supp. 3d 175, 180 (D.D.C. 2021) (finding unreasonable delay lawsuit not mooted by agency letter that fails to provide definitive answer as to whether agency was granting or denying rulemaking petition).

TAVA has no choice but to seek a writ of mandamus from this Court in order to receive the response it is due. There is no other avenue for judicial review. Veterans who have served this country and suffer from gender dysphoria rely on VA health care and need a resolution on the question of whether and when VA will act.

The *TRAC* factors are relevant to this prong of the *Cheney* test, since TAVA cannot directly challenge an agency's decision if none exists. This Court has recognized this logic before, noting that "[a] veteran who is claiming the VA has failed to render a timely decision [on his benefits] cannot seek relief through direct

appeal" and "must [instead] petition for a writ of mandamus before the Veterans Court to obtain that relief." *Proceviat v. McDonough*, No. 2021-1810, 2021 WL 4227718, at *3 (Fed. Cir. Sept. 16, 2021) (cleaned up). There, this Court applied the *TRAC* factors and issued mandamus. *Id.*; *cf. Am. Rivers*, 372 F.3d at 419 ("[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart our jurisdiction by withholding a reviewable decision." (citing *TRAC*, 750 F.2d at 76)).

Here, if VA denied the rulemaking petition, TAVA could challenge the decision under 5 U.S.C. § 706(2); if VA promulgated a rule with which TAVA disagreed, it could challenge it under the same provision. But in the absence of any action that TAVA can challenge by other means, mandamus is the only solution. Accordingly, the analysis of the *TRAC* factors above demonstrating unreasonable delay also proves that TAVA has no other means to attain adequate relief.

B. TAVA's right to issuance of the writ is clear and indisputable.

Under the APA, "each agency shall proceed to conclude a matter presented" to it "within a reasonable time." 5 U.S.C. § 555(b); *see also id.* § 706(1) (empowering courts to "compel agency action unlawfully withheld or unreasonably delayed"). "This has been interpreted to mean that an agency has a duty to fully respond to matters that are presented to it under its internal processes." *A Cmty. Voice*, 878 F.3d at 784 (citing 5 U.S.C. § 555(b)); *see also Am. Rivers*, 372 F.3d at

418-19 (holding that, under 5 U.S.C. § 706(1), federal agency must respond to rulemaking petition); KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 4.10 (7th ed. 2024) ("At a minimum, the right to petition for rulemaking entitles a petitioning party to a response to the merits of the petition."); *Nat'l Parks Conservation Ass'n v. U.S. Dep't of Interior*, 794 F. Supp. 2d 39, 44 (D.D.C. 2011) ("[A]n agency 'is required to at least definitively respond to . . . [a] petition—that is, to either deny or grant the petition.'" (quoting *Fams. for Freedom*, 628 F. Supp. 2d. at 540, and citing 5 U.S.C. §§ 555(b), 706(1))); *Env't Integrity Proj. v. EPA*, 160 F. Supp. 3d 50, 54 (D.D.C. 2015) ("[T]he APA is the source of an agency's duty to respond to a petition for rulemaking . . . within a reasonable time . . . ."). VA has a duty to respond to the rulemaking petition TAVA submitted.

The *TRAC* factor analysis is also relevant to this prong of the *Cheney* test. *Cf. Oil, Chem. & Atomic Workers Union v. Occupational Safety & Health Admin.*, 145 F.3d 120, 124 (3d Cir. 1998) (applying several *TRAC* factors to determine whether "[t]he legal duty [was] 'clear and indisputable'"). TAVA has a clear and indisputable right to a formal response to its rulemaking petition absent a reasonable explanation from VA for its delay.

Other circuits' application of *TRAC* factors to the "clear duty" requirement for mandamus is instructive. There, as here, the critical question is whether petitioners

have a right to the relief requested. The D.C. Circuit has repeatedly applied the *TRAC* factors in assessing whether the agency's duty to petitioners was violated through unreasonable delay. For instance, in *Am. Hosp. Ass'n v. Burwell*, the court explained that, "where plaintiffs allege that agency delay is unreasonable despite the absence of a specific statutory deadline, the entire *TRAC* factor analysis may go to the threshold jurisdictional question: does the agency's delay violate a clear duty?" 812 F.3d 183, 189-90 (D.C. Cir. 2016); *see also, e.g.*, *Bluewater Network*, 234 F.3d at 1315 (explaining that "[i]n the case of agency inaction, we not only must satisfy ourselves that there indeed exists such a duty [to act], but that the agency has 'unreasonably delayed' the contemplated action" and "[t]his court analyzes unreasonable delay claims under the now-familiar criteria set forth in *TRAC* "); *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 836 (D.C. Cir. 2012) (same); *Am. Rivers*, 372 F.3d at 418 (same). These principles extend to claims under the All Writs Act. *See Core Commc'ns*, 531 F.3d at 855 (citing *Bluewater Network*, 234 F.3d at 1315, to explain that *TRAC* factors govern unreasonable delay analysis after agency's duty to act has been established). The Fourth and Ninth Circuits have taken similar approaches, *see e.g.*, *In re City of Virginia Beach*, 42 F.3d 881, 884-86 (4th Cir. 1994), including on agency failure to respond to rulemaking petitions. *See, e.g.*, *A Cmty. Voice*, 878 F.3d at 784-85.

This Court should look to the above analysis of the *TRAC* factors in determining whether TAVA's right to a formal response from VA to its May 2016 rulemaking petition is clear and indisputable. Just as the *TRAC* factors establish when an agency violated its clear duty for purposes of the Mandamus Act, so too do they establish whether a petitioner has a clear and indisputable right to a writ of mandamus under *Cheney*. Application of these factors demonstrates that Petitioner has such a clear and indisputable right.

C. Issuance of the writ is appropriate under the circumstances.

Over the course of nearly eight years, thousands of transgender veterans have been left in limbo, unable to access vital medical care, and confused by the contradictions between the Secretary's public statements and VA's lack of official action. This delay is egregious, and this confusion requires correction in the form of mandamus.

Every day that the VA further delays its response to TAVA's petition, TAVA members' mental and physical health suffers. For example, without access to an orchiectomy at the VA, Ms. Kastner is left with no choice but to take a testosterone blocker that manages her gender dysphoria—yet simultaneously risks exacerbating her Type 2 diabetes. App'x 578 ¶ 16. Other TAVA members are approaching an age at which they fear gender-confirmation surgery may no longer be a safe medical

procedure. *See*, *e.g.*, *id.* 583 ¶ 19. For such veterans, the VA's response may come too late.

The *TRAC* factors analysis once more confirms that this Court should exercise its equitable power to issue mandamus, given the unreasonable and egregious nature of this nearly eight-year delay. As the D.C. Circuit has explained, "[o]n the equities, the central question is whether the agency's delay is so egregious as to warrant mandamus" under the All Writs Act, and "[t]he hexagonal *TRAC* factors guide this inquiry . . . ." *Ctr. for Biological Diversity*, 53 F.4th at 670 (cleaned up); *see also id.* at 671 (granting writ of mandamus); *United Mine Workers*, 190 F.3d at 549 (noting the *TRAC* factors apply in the "exercis[e of] our equitable powers under the All Writs Act"). The *TRAC* assessment of reasonableness bears directly on this Court's determination of the appropriate remedy.

CONCLUSION

Transgender veterans have kept their promise to serve the United States. In return, the Government must honor its commitment to them by providing services and care necessary for their health and survival. VA has failed to meet its obligation under the Administrative Procedure Act to respond to TAVA's rulemaking petition within a reasonable time. The health and welfare of TAVA's members are at stake, and VA has already completed the necessary steps to respond to the petition. TAVA has no other adequate means to obtain relief. Petitioner respectfully requests that the

Court issue a writ of mandamus and compel VA to respond to the petition for rulemaking within thirty days.

January 25, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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