No. 20-1958

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

AMANDA JANE WOLFE, PETER BOERSCHINGER,

Claimants-Appellees,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,

Respondent-Appellant.

Appeal from the United States Court of Appeals for Veterans Claims,
Case No. 18-6091

BRIEF OF *AMICI CURIAE* LAW PROFESSORS IN SUPPORT OF CLAIMANTS-APPELLEES

MICHAEL B. MILLER
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
Telephone: 212.468.8009
mbmiller@mofo.com

Counsel for Amici Curiae *Law Professors*

JULY 20, 2021

CERTIFICATE OF INTEREST

Counsel for *amici curiae* law professors certify under Federal Circuit Rule 47.4 that the following information is accurate and complete to the best of their knowledge:

1. **Represented Entities.** Provide the full names of all entities represented by undersigned counsel in this case.

None

2. **Real Party in Interest.** Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

A complete list of *amici* is set forth in the appendix.

3. **Parent Corporations and Stockholders.** Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None

4. **Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

None

5. **Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case.

None

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

None

Dated: July 20, 2021

/s/ Michael B. Miller
Michael B. Miller

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INTERESTS OF *AMICI CURIAE*

Amici curiae are law professors and legal scholars from across the country with expertise in appellate jurisdiction, appellate procedure, and federal courts. *Amici* have an interest in the proper interpretation and application of courts' authority to grant writs of mandamus in extraordinary circumstances. *Amici* are concerned that the Appellant takes too narrow a view of federal courts' authority to consider petitions for mandamus to address important legal questions. Accordingly, *amici* respectfully submit this brief in support of Appellees.[1] The complete list of *amici* is set forth in the appendix hereto.

INTRODUCTION

The United States Court of Appeals for Veterans Claims (Veterans Court) had the authority to consider Ms. Wolfe's petition for a writ of mandamus and the discretion to conclude that mandamus was appropriate in this case. The All Writs Act provides that all federal courts established by Congress, including the Veterans Court, may issue all writs that are appropriate in aid of their jurisdiction, and there is nothing in the statute that establishes the jurisdiction of the Veterans Court to

[1] All parties have consented to the filing of this brief pursuant to Fed. R. App. P. 29(a). No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici* or their counsel—contributed money that was intended to fund preparing or submitting the brief.

review decisions of the Board of Veterans' Appeals (Board) to suggest that Congress intended to limit in any way the mandamus jurisdiction of the Veterans Court.

Whether the Veterans Court had authority to grant the petition in this case turns principally on whether the requested writ was in aid of the Veterans Court's prospective jurisdiction over a potential future Board decision in Ms. Wolfe's case.[2] There need not yet have been a Board decision over which the Veterans Court would have appellate jurisdiction for a writ of mandamus to issue. To bring Ms. Wolfe's petition within the Veterans Court's prospective jurisdiction, this Court's mandamus jurisprudence requires only that Ms. Wolfe have made some progress on the path toward a Board decision and an appeal to the Veterans Court—she need only have taken "the first preliminary step that might lead to appellate jurisdiction . . . in the future." *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1380 (Fed. Cir. 2021). Ms. Wolfe took this "preliminary step" and triggered the Veterans Court's prospective jurisdiction when she filed a claim for reimbursement to the Department of Veterans Affairs (VA), the VA denied her claim, and she filed a Notice of Disagreement.

[2] As Appellees note, mandamus may also be available to protect a prior exercise of jurisdiction. *See* Claimants-Appellees' Resp. Br. at 40-41.

Of course, the extraordinary remedy of mandamus may not always—or even frequently—be appropriate even in cases where a court has jurisdiction to entertain a mandamus petition. But it is well settled that mandamus can be appropriate to address important legal questions and that, once a court has jurisdiction over a petition for mandamus, the decision whether to grant or deny the petition is within the discretion of the court to which the petition is made. Ms. Wolfe's petition regarding the validity of a VA regulation affecting potentially hundreds of thousands of claimants is precisely the type of fundamental and recurring legal question that is appropriate to address through mandamus, and her petition was within the Veterans Court's discretion to grant even before Ms. Wolfe exhausted every other available avenue to obtain the requested relief.[3]

ARGUMENT

I. The Veterans Court had authority to issue a writ of mandamus in aid of its prospective jurisdiction where Ms. Wolfe initiated a proceeding before the VA and appellate jurisdiction would potentially exist in the future.

Judicial intervention is available in extraordinary circumstances by petition for mandamus. *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 380 (2004); *Mylan*, 989

[3] This amicus brief focuses on the Veterans Court's jurisdiction over Ms. Wolfe's claim and why the writ to invalidate the VA regulation was in aid of the Veterans Court's jurisdiction and proper in this case. *Amici* support, but this brief does not specifically address, the Veterans Court's decision to certify the Wolfe class and grant additional forms of relief that are only available on a class basis.

F.3d at 1379. The All Writs Act, which "unquestionably applies in the Veterans Court," *Monk v. Shulkin*, 855 F.3d 1312, 1318 (Fed. Cir. 2017), provides that "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a).

The reach of the Veterans Court's mandamus authority thus turns on the scope of the court's jurisdiction. The Veterans Court has exclusive jurisdiction to review decisions of the Board, including the authority to "decide all relevant questions of law, interpret . . . statutory[] and regulatory provisions, and . . . hold unlawful and set aside . . . regulations issued or adopted by the Secretary . . . found to be . . . in violation of a statutory right." 38 U.S.C. §§ 7261(a), 7252(a). Section 7252—the statute that establishes the jurisdiction of the Veterans Court—is silent with respect to mandamus, and there is no reason to believe that Congress intended § 7252 to divest the Veterans Court of mandamus jurisdiction. *Cf. Mylan*, 989 F.3d at 1380 (finding "no reason . . . to think [the appeal bar in 35 U.S.C.] § 314(d) also divests [the court] of mandamus jurisdiction"). And in practice, the Veterans Court routinely considers petitions in aid of its jurisdiction over Board decisions. *See Young v. Shinseki*, 25 Vet. App. 201, 215 (2012) (Lance, J., dissenting) (noting that the Veterans Court rules on more than one hundred petitions each year, even though it rarely grants a petition for extraordinary relief); *see also* U.S. Ct. of

Appeals for Veterans Claims, Fiscal Year 2020 Annual Report, http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf (identifying disposition of 309 petitions during the fiscal year).

Although the All Writs Act "does not expand a court's jurisdiction," *Mylan*, 989 F.3d at 1379 (quoting *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998)), the Supreme Court has "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,'" and the Veterans Court's authority to issue writs in aid of its jurisdiction over Board decisions is not limited to circumstances in which it has already acquired jurisdiction by appeal. *Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 426 U.S. 394, 402 (1976). Indeed, it is "well settled that 'the authority of the appellate court is not confined to the issuance of writs in aid of jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.'" *Mylan*, 989 F.3d at 1379-80 (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966)); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 255 (1957) ("Since the Court of Appeals could at some stage of the antitrust proceedings entertain appeals in these cases, it has power in proper circumstances, as here, to issue writs of mandamus reaching them."). "In other words, [the All Writs Act] empowers a federal court to issue writs of mandamus necessary to protect its prospective jurisdiction." *Mylan*, 989 F.3d at 1380.

The Supreme Court's seminal decision in *La Buy* established appellate courts' power to protect their jurisdiction and to correct systemic error. 352 U.S. at 254-60. There, the Supreme Court approved the Seventh Circuit's writ against a persistent practice in the Northern District of Illinois of routinely referring cases to special masters. After spending years individually admonishing trial judges for overusing special masters, the Seventh Circuit relied on the All Writs Act to vacate those referrals. *Id.* at 258. The Supreme Court squarely rejected the argument that appellate courts lack the power issue writs of mandamus "except in those cases where the review of the case on appeal after final judgment would be frustrated." *Id.* at 254. Rather, the power exists as long as appellate jurisdiction would exist "at some stage" of the proceedings. *Id.* at 255. In *La Buy*, the Seventh Circuit's exercise of authority was appropriate to protect its future jurisdiction over those cases, to uniformly protect the rights of parties, and to conserve judicial resources associated with more appeals and new trials. *Id.* at 259-60; *see also* Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. Rev. 1237, 1258-65 (2007) (describing the Supreme Court's *La Buy* decision as the foundation of the contemporary approach to appellate mandamus and tracing the use of mandamus thereafter). With respect to class actions, this Court has endorsed the use of the All Writs Act to enable courts "to serve as lawgiver and error corrector simultaneously, while also reducing the delays associated with individual appeals."

Monk, 855 F.3d at 1321 (quoting Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. Mich. J. L. Reform 483, 522 n.231 (2007)).

Like other appellate courts, the Veterans Court's prospective jurisdiction—and its authority to issue writs of mandamus pursuant to 28 U.S.C. § 1651(a)—is triggered as soon as "a party [takes] the first preliminary step that might lead to appellate jurisdiction in [the] court in the future." *Mylan*, 989 F.3d at 1380 (quoting *In re Tennant*, 359 F.3d 523, 529 (D.C. Cir. 2004) (Roberts, J.)). Initiating a proceeding before an agency is sufficient to bring a proceeding within a court's appellate jurisdiction. *Compare Mylan*, 989 F.3d at 1380 (holding that this Court had prospective jurisdiction once a petitioner seeks inter partes review (IPR) of a patent because the Federal Circuit has jurisdiction over any permissible appeal from a final decision of the Patent Trial and Appeal Board in an IPR) *with In re Donohoe*, 311 F. App'x 357, 358-59 (Fed. Cir. 2008) (holding that this court did not have authority under the All Writs Act where petitioner did not even initiate a proceeding at the Merit Systems Protection Board before seeking relief from the Federal Circuit); *see also Tennant*, 359 F.3d at 529 ("Once there has been a proceeding of *some* kind instituted before an agency or court that might lead to an

appeal, it makes sense to speak of the matter as being 'within [our] appellate jurisdiction' – however prospective or potential that jurisdiction might be.").

In this case, Ms. Wolfe took "the first preliminary step that might lead to appellate jurisdiction" in the Veterans Court when she filed a claim for reimbursement, the VA denied her claim, and she filed a Notice of Disagreement with that denial. *Mylan*, 989 F.3d at 1380; *see Martin v. O'Rourke*, 891 F.3d 1338, 1341 (Fed. Cir. 2018) (citing 38 U.S.C. § 7105(a)) ("A veteran begins the process of seeking benefits by filing a claim with a VA regional office. If the veteran receives an unfavorable 'rating decision' from the regional office (e.g., a denial of a claim for disability benefits), he or she begins the appeal process by filing a Notice of Disagreement."). The VA issued its Statement of the Case in March 2019, and Ms. Wolfe subsequently filed her substantive appeal with the Board of Veterans' Appeals.

The Veterans Court's authority to issue a writ of mandamus in a case such as this is well settled. The All Writs Act grants the Veterans Court authority to issue writs in aid of its jurisdiction over Board decisions, including writs in aid of the Veterans Court's *prospective* jurisdiction over such decisions. Ms. Wolfe triggered the Veterans Court's prospective jurisdiction when she filed a Notice of Disagreement with the VA, if not earlier. Her Notice of Disagreement set the administrative machinery into motion and opened an avenue for appellate

jurisdiction, no matter how "prospective or potential that jurisdiction might be." And the Veterans Court can consider any petition for a writ of mandamus in aid of that jurisdiction. Accordingly, the Veterans Court had jurisdiction to consider Ms. Wolfe's request for mandamus.

II. The Veterans Court had discretion to determine that mandamus was appropriate to provide guidance on an important legal question, especially because exhaustion of other avenues to resolve the question would be futile.

Even where the Veterans Court has authority to grant mandamus, the court must consider whether mandamus is appropriate in a particular case. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25-26 (1943) ("the question presented on this record is . . . whether in the light of all the circumstances the case was an appropriate one for the exercise of that power"). Importantly, once the Veterans Court has jurisdiction over a case, the decision whether to grant mandamus is "in the sound discretion of the court." *Id.* at 25; *Mote v. Wilkie*, 976 F.3d 1337, 1346 (Fed. Cir. 2020) ("'Because the issuance of the writ is a matter vested in the discretion of the court to which the petition is made, and because this [c]ourt is not presented with an original writ of mandamus,' we need not analyze each traditional mandamus requirement." (quoting *Martin*, 891 F.3d at 1343 n.5).

The Veterans Court acted within its discretion when it concluded that mandamus was appropriate in this case. The Supreme Court and federal courts of appeals, including this Court, have long considered mandamus to be appropriate to

address unanswered legal questions that are of great public importance and likely to recur. Mandamus may be appropriate in such cases even without the conditions that the Supreme Court in *Cheney* identified as relevant to evaluating petitions for mandamus, although applying the *Cheney* framework further supports the Veterans Court's use of mandamus. And while Appellant argues that Ms. Wolfe has other means to obtain the requested relief, exhaustion of administrative remedies would be futile and is not a bar to mandamus. Thus mandamus is appropriate in this case and the Veterans Court acted within its discretion when it granted Ms. Wolfe's petition.

A. Mandamus is appropriate to resolve the kind of important legal question presented in Ms. Wolfe's petition.

This Court has repeatedly found mandamus to be appropriate to address unanswered legal questions that are of great public importance and likely to recur. *See In re Google LLC*, 949 F.3d 1338, 1343 (Fed Cir. 2020). In *Google*, the district court had concluded that the presence of Google's cache servers – but not any of its employees – within the Eastern District of Texas was sufficient to make venue proper in a patent-infringement suit in that district. *Id.* at 1340-41. This Court granted Google's petition for mandamus and ordered the district court to dismiss or transfer the case due to improper venue, noting that this Court had not addressed this "fundamental and recurring issue of patent law." *Id.* at 1343, 1347. The Court emphasized that "[t]he Supreme Court has confirmed that the

requirements for mandamus are satisfied when the district court's decision involves 'basic' and 'undecided' legal questions." *Id.* at 1341 (quoting *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964)).

Applying this Supreme Court precedent, this Court in *Google* concluded that mandamus was appropriate to address a "fundamental and recurring issue of patent law." *Id.* at 1343. The decision to grant Google's petition for mandamus is consistent with the practice and precedent of this Court and other federal courts of appeals. *See, e.g.*, *In re BigCommerce, Inc.*, 890 F.3d 978, 981 (Fed. Cir. 2018) (granting petition for mandamus to address "basic" venue question that had not previously been addressed and "will inevitably be repeated," therefore presenting "sufficiently exceptional circumstances" to warrant "immediate consideration via mandamus" even though the petitioner had the availability of seeking reconsideration); *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018) (granting petition for mandamus to address basic and undecided venue issues that "are likely to be repeated and present sufficiently exceptional circumstances as to be amenable to resolution via mandamus"); *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) (granting petition for mandamus even though "the law was unclear," concluding that mandamus would "further supervisory or instructional goals on an unsettled and important issue, an appropriate basis upon which to grant the mandamus petition" (citations omitted)); *In re Micron Tech., Inc.*, 875 F.3d

1091, 1095-96 (Fed. Cir. 2017) (granting petition for mandamus to "consider[] the fundamental legal issues presented in this case and many others," finding "this case to present special circumstances justifying mandamus review of certain basic, unsettled, recurring legal issues"); *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1292 (Fed. Cir. 2016) (concluding that mandamus review was appropriate to address "an issue of first impression" where "[i]mmediate resolution of [the] issue will avoid further inconsistent development of [the] doctrine" regarding patent-agent privilege); *In re Deutsche Bank Tr. Co. Americas*, 605 F.3d 1373, 1375 (Fed. Cir. 2010) (granting petition for mandamus to address "an important issue of first impression in which courts have disagreed"); *United States v. Pleau*, 680 F.3d 1, 4 (1st Cir. 2012) (noting that advisory mandamus is available in rare cases where the standard for supervisory mandamus is not met, where there is an unsettled issue of law "of substantial public importance," where the issue is "likely to recur," and where "deferral of review would potentially impair the opportunity for effective review or relief later on"); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc) (issuing writ of mandamus regarding venue-transfer order and noting that such writs "are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case"); *In re Atl. Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002) (granting petition for mandamus to address "a systemically important issue as to which this court has not yet spoken"

and "is capable of significant repetition," noting that where "advisory mandamus is appropriate, irreparable harm need not be shown").

As several commentators and judges argue, mandamus "should primarily be employed to address questions likely of significant repetition prior to effective review, so that [the court's] opinion would assist other jurists, parties, or lawyers." Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 Ind. L. Rev. 343, 359 (2012) (quoting *United States v. Horn*, 29 F.3d 754, 770 (1st Cir. 1994)). This is particularly important in cases, like this, involving mass adjudication—where the risk of systemic and persistent error can frustrate parties' rights, aggravate administrative delays, and waste precious judicial resources. *See* Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 Colum. L. Rev. 1992, 2010-12 (2012) (observing that, without uniform remedies, large public benefits programs can waste resources in "duplicative litigation, requiring frequent remands to address common factual errors, and hampering the efficient development and enforcement of law."). In such cases, the sheer volume of repeated errors requiring re-adjudication between an appellate court and the tribunals they review can overwhelm any prospects for a meaningful remedy. *See, e.g., Am. Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957, 961 (5th Cir. 1982) ("Litigation in scores of cases is not adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy.").

For example, after unions, shippers and businesses sued the Interstate Commerce Commission (ICC) for illegally processing thousands of licenses, the Fifth Circuit ordered the ICC to revamp its regulations for all shippers to stave off "the potential for massive future litigation." *Id.* The court underscored the importance of providing uniform relief to a mass adjudication system through a writ of mandamus: "The volume of matters the ICC is handling is so great," the court observed, "that applicants, opponents, and the public, as well as the Commission, should know with certainty the terms of our opinion and enforcing mandate." *Id.*

In light of this long line of authority, the Veterans Court was plainly justified in granting Ms. Wolfe's petition for mandamus. Among other requests, Ms. Wolfe's petition presented a basic legal question—whether the VA's revised regulation regarding reimbursement of deductible and coinsurance expenses is valid in light of the Veterans Court's interpretation of 38 U.S.C. § 1725 in *Staab v. McDonald*, 28 Vet. App. 50 (2016)—that "will inevitably be repeated" (*BigCommerce*, 890 F.3d at 981). In fact, the Veterans Court found that over 600,000 veterans were affected by the VA's past actions concerning the matters in this case. *See Wolfe v. Wilkie*, 32 Vet. App. 1, 21 (2019). The Veterans Court acted within its discretion to grant mandamus to, in addition to providing other

requested relief, address this basic, unsettled, and recurring legal issue that is of such importance to so many of our nation's veterans.[4]

B. The Appellant's arguments against mandamus are unavailing.

In arguing against the Veterans Court's use of mandamus in this case, the Appellant emphasizes the Supreme Court's decision in *Cheney*, which identified three conditions that must be satisfied before a court may issue a writ: "First, the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires . . . Second, the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable. Third, even if the first two prerequisites have been met, 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 380-81 (internal citations omitted); *see also Mylan*, 989 F.3d at 1382. Correctly understood, however, *Cheney* does not foreclose mandamus review here. *See Cheney*, 542 U.S. at 381 ("These hurdles, however demanding, are not insuperable.")

[4] This amicus brief does not address the substantive merits of the VA's revised regulation. According to the Veterans Court, the legal issue is not in fact "unsettled" but, rather, is clearly settled *against* the VA. *See, e.g.*, *Wolfe*, 32 Vet. App. at 12 ("It's difficult to conceive how an agency could believe that adopting a regulation that mimics the result a Federal court held to be unlawful is somehow appropriate when the statute at issue has not changed."). But even if one views the substantive legal issues most sympathetically to the VA in this case, it presents at the very least an "undecided" question for which a writ of mandamus is proper.

As an initial matter, this Court's case law indicates that the *Cheney* framework is not the exclusive route to mandamus review. *See* Steinman, *supra* at 1263-65 (describing alternative tests for mandamus in the federal courts of appeals). Consider this Court's recent decision in *Cray*. After describing the three *Cheney* factors, it stated: "*Similarly*, mandamus may be appropriate . . . to decide issues important to proper judicial administration. *Additionally*, the Supreme Court has approved the use of mandamus to decide a 'basic and undecided' legal question when the trial court abused its discretion by applying incorrect law." *Cray*, 871 F.3d at 1358-59 (emphasis added) (quoting *Schlagenhauf*, 379 U.S. at 110 (brackets, citations, and quotation marks omitted)). That is, the need for appellate courts to provide guidance on the kind of basic legal questions at the heart of this case is an "[a]dditional[]" justification for mandamus review, independent of the *Cheney* factors. *Cray*, 871 F.3d at 1358-59; *see also Google*, 949 F.3d at 1341 ("The Supreme Court has confirmed that the requirements for mandamus are satisfied when the district court's decision involves 'basic' and 'undecided' legal questions." (quoting *Schlagenhauf*, 379 U.S. at 110)).

In any event, a proper understanding of *Cheney*'s three factors supports the Veterans Court's use of mandamus in this case. First, Ms. Wolfe has "no other adequate means to attain the relief [s]he desires." *Cheney*, 542 U.S. at 380-81 (quoting *Kerr*, 426 U.S. at 403). The relief desired here is the immediate

correction of the VA's regulation based on its inconsistency with the governing statute. Although the Appellant argues that the administrative appeals process was an "alternative" that foreclosed mandamus review, *see* Brief for Respondent-Appellant at 35-44, the Veterans Court properly concluded that such an alternative simply was not "adequate" under these circumstances. An appeal from a final decision may be adequate in some situations, but that is not necessarily the case where the delay would impose substantial burdens on the party seeking review. *See Google*, 949 F.3d at 1342-43 (noting that "there may be circumstances in which [an appeal] is inadequate" and concluding that "the substantial expense to the parties that would result from an erroneous district court decision confirms the inadequacy of appeal in this case"). Although the Board eventually ruled in favor of Ms. Wolfe two months after the Veterans Court's decision in this case, the Board's actions to follow the Veterans Court's decision reveal nothing about the time that might have passed and the financial hardship that Ms. Wolfe and other class members might have incurred absent the Veterans Court's decision. Ultimately, the "adequa[cy]" of any alternative paths to review must take into account the functions that mandamus is meant to perform. As discussed above, this may include the need to resolve important legal issues that are likely to recur and to affect large numbers of litigants. *See, e.g.*, *Am. Trucking Ass'ns*, 669 F.2d at

961 ("Litigation in scores of cases is no adequate remedy for an agency's failure to carry out its statutory duties. Therefore, there is no adequate alternative remedy.").

Ms. Wolfe's mandamus petition also satisfies *Cheney*'s "clear and indisputable" requirement. 542 U.S. at 381. Importantly, this requirement assesses the petitioner's right to mandamus in light of the legal guidance provided by the reviewing court in considering the petitioner's substantive arguments. Consider, for example, the Supreme Court's decision in *Mallard v. U.S. District Court for the Southern District of Iowa*, 490 U.S. 296 (1989). There, the petitioner's right to the writ turned on the Court's resolution of a circuit split regarding whether 28 U.S.C. § 1915(d) authorized district courts to compel attorneys to represent indigent prisoners. *Id.* at 298. The district court's ruling in that case was—at the time—permissible under the law of its own circuit and others as well. *Id.* at 300, 300 n.2. Ex ante, then, one would be hard-pressed to say that the district court's decision in *Mallard* was "clear[ly]" or "indisputabl[y]" incorrect. But it *was* clearly and indisputably incorrect once the Supreme Court clarified the proper interpretation of § 1915(d). *See id.* at 309 ("*[A]s we decide today*, § 1915(d) does not authorize coercive appointments of counsel." (emphasis added)). So too here. As the Veterans Court explained, the challenged regulation "is not based on a permissible construction" of the governing statute in light of the

Veterans Court's decision in *Staab*; accordingly, the "right to the writ is clear and indisputable." *Wolfe*, 32 Vet. App. at 39.[5]

That leaves the third *Cheney* factor: whether "the writ is appropriate under the circumstances." 542 U.S. at 381. As shown above, the need to resolve basic and undecided questions has long been recognized as a situation making a writ of mandamus "appropriate." *See supra* Part II.A. The propriety of mandamus is further shown by the importance of the issue—not only for Ms. Wolfe but for other members of the class as well. *See, e.g.*, *Queen's Univ. at Kingston*, 820 F.3d at 1291 ("Mandamus may thus be appropriate in certain cases to further supervisory or instructional goals where issues are unsettled and important." (citation omitted)). Moreover, as described in the next Section, it would be futile to insist that Ms. Wolfe continue to litigate this issue to a final decision. *See infra* Part II.C. With no potential benefit coming from further proceedings below, denying mandamus review would serve no purpose other than causing unnecessary delay and expense. The Veterans Court was entirely within its discretion in concluding

[5] This approach dovetails well with the notion, described above Part II.A, that "the requirements for mandamus are satisfied when the district court's decision involves 'basic' and 'undecided' legal questions." *Google*, 949 F.3d at 1341 (quoting *Schlagenhauf*, 379 U.S. at 110). This law-clarifying function would be thwarted if the decision being reviewed must be clearly and indisputably incorrect under the case law *preexisting* consideration of the mandamus petition. The very point of mandamus review to resolve basic legal questions is to provide clarification that has not yet been provided.

that mandamus review was "appropriate under the circumstances." *See generally* Wright, Miller & Cooper, Federal Practice & Procedure § 3934.1 (3d ed.) (describing factors that courts have considered in deciding whether mandamus review is appropriate).

C. Mandamus is especially appropriate where exhaustion of administrative remedies would be futile.

Appellant argues that mandamus was inappropriate because Ms. Wolfe had adequate alternative means to obtain her desired relief. But because the Veterans Court had prospective jurisdiction over Ms. Wolfe's claim, whether she had adequate alternative avenues to obtain her desired relief is a question left to the discretion of the Veterans Court, which concluded those alternative avenues would be futile. Although "it is bedrock law that 'extraordinary writs cannot be used as substitutes for appeals,'" Brief for Respondent-Appellant at 35 (citing *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 349, 383 (1953)), it is also the case that the availability of an appeal at some later point in time does not automatically foreclose the possibility of mandamus. Indeed, as discussed above in Section I, the Veterans Court's authority under the All Writs Act exists *because of* the jurisdiction it would have over a hypothetical appeal in the future.

In its discretion, the Veterans Court concluded that Ms. Wolfe lacked other adequate means to obtain the requested relief because pursuit of the available administrative appeals process would be "futile" and amount to "a useless act."

The Veterans Court's conclusion finds support in the well-developed rules regarding the circumstances in which courts do not require exhaustion of administrative remedies.

The doctrine of exhaustion of administrative remedies is well settled and provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp*., 303 U.S. 41, 50-51 (1938). But the rule of exhaustion of administrative remedies need not always be satisfied. "[I]n the absence of an explicit statutory directive, the general rule [of exhaustion] is ultimately a matter of judicial discretion . . . ." *Am. Maritime Ass'n v. United States*, 766 F.2d 545, 567 n.30 (D.C. Cir. 1985); *Weishan Hongda Aquatic Food Co. v. United States*, 917 F.3d 1353 (Fed. Cir. 2019) (holding that where Congress does not require exhaustion, the choice to impose an exhaustion requirement lies in the discretion of the court).

In this case, an exception to the exhaustion of administrative remedies in favor of a writ of mandamus is justified because exhaustion is not statutorily prescribed and further agency proceedings would be futile. When resort to further agency proceedings would be futile, exhaustion may be avoided. *See Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021) (applying the futility exception to petitioners who were denied social security benefits by administrative law judges because the

administrative proceedings were powerless to provide the requested relief and "[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested"); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 400 (1988) (finding it "futile" for Medicare Providers to attempt to persuade a fiscal intermediary to award reimbursement except as provided for by the Secretary of Health and Human Services' regulations because, "under the statutory scheme, the fiscal intermediary is confined to the mere application of the Secretary's regulations, that the intermediary is without power to award reimbursement except as the regulations provide, and that any attempt to persuade the intermediary to do otherwise would be futile"); *Houghton v. Shafer*, 392 U.S. 639, 640 (1968) (finding that, in view of Attorney General's submission that the challenged rules of a prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act"); *Ramon-Sepulveda v. INS*, 824 F.2d 749, 751 (9th Cir. 1987) (finding it "futile and unreasonable to require petitioner to exhaust administrative remedies" where petitioner sought a writ of mandamus requesting that court order the Immigration and Naturalization Service to immediately terminate new deportation proceedings because they violated the court's prior mandate).

Were Ms. Wolfe to pursue an appeal before the Board, the result is foreclosed, and the proceeding itself unnecessary because the VA concedes that the

Board is powerless to invalidate VA's regulations. Brief for Respondent-Appellant at 38. Thus, as the Veterans Court rightfully noted, "disputing the regulation's validity within the administrative appeals process amounts to 'a useless act' and would be futile because the Board doesn't have jurisdiction to invalidate the regulation." *Wolfe*, 32 Vet. App. at 39.

CONCLUSION

For the foregoing reasons, the Veterans Court's order should be affirmed.

Respectfully submitted,

/s/ Michael B. Miller

MICHAEL B. MILLER
MORRISON & FOERSTER LLP
250 West 55th Street
New York, New York 10019
Telephone: 212.468.8009
mbmiller@mofo.com

Counsel for Amici Curiae *Law Professors*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 32(b) because it contains 5,496 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b)(2), as determined by the word-counting feature of Microsoft Word.

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Dated: July 20, 2021

/s/ Michael B. Miller
Michael B. Miller

APPENDIX

List of *Amici Curiae* Law Professors
(Institutional affiliation listed for identification purposes only)

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

Heather Elliott
Alumni, Class of '36 Professor of Law
University of Alabama School of Law

Richard D. Freer
Charles Howard Candler Professor of Law
Emory University School of Law

Paul R. Gugliuzza
Professor of Law
Temple University Beasley School of Law

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law
and Civil Liberties
New York University School of Law

Andrew S. Pollis
Professor of Law
Case Western Reserve University School of Law

Cassandra Burke Robertson
John Deaver Drinko—BakerHostetler Professor of Law
Director, Center for Professional Ethics
Case Western Reserve University School of Law

Adam Steinman
University Research Professor of Law
University of Alabama School of Law

Howard M. Wasserman

Professor of Law
FIU College of Law

Adam Zimmerman
Professor of Law & Gerald Rosen Fellow
Loyola Law School, Los Angeles