No. 20-1553

IN THE

Supreme Court of the United States

REIYN KEOHANE,

Petitioner,

—v.—

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

LANCE ERIC NEFF
Counsel of Record
FLORIDA DEPARTMENT
OF CORRECTIONS
501 South Calhoun Street
Tallahassee, Florida 32399-2500
(850) 717-3588
lance.neff@fdc.floridalegal.com

KIRKLAND E. REID
THE FINLEY FIRM, P.C.
200 13th Street
Columbus, Georgia 31901
(706) 322-6226

Attorneys for Respondent

QUESTION PRESENTED

Whether the Court should deny petitioner's attempt to have the court of appeals' decision vacated under *Munsingwear* even though the case is not moot, even though petitioner is not presently receiving all of the relief she sought throughout this case, and even though petitioner already has received all the appellate review to which she is entitled.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

Faced with a decision not to her liking**,** Petitioner Reiyn Keohane ("Keohane") asks this Court to vacate that decision as purportedly moot. But the case is not moot, and Keohane did not petition the Court on the merits of the Eleventh Circuit's decision. For the reasons briefly stated below, the Court should summarily reject Keohane's gambit and deny the petition.

Keohane, a transgender inmate who is biologically male, insisted throughout the history of this extensively litigated case that the Florida Department of Corrections ("FDC") was deliberately indifferent to her medical needs by not allowing her to wear make-up and do all the things female inmates are allowed to do in female prisons.[1] Female prisoners are allowed to wear make-up outside their housing unit. Keohane is not. Pet. App. 154a. Keohane could have challenged this limitation in this Court as violative of the Eighth Amendment, as she challenged any FDC limitation on her social transitioning requests throughout the history of this case. *See, e.g., Keohane v. Jones*, 328 F. Supp. 3d 1288, 1295 (N.D. Fla. 2018). She chose not to, arguing instead that the case is somehow moot. But when FDC continues to limit her social transitioning requests, there can be no credible claim that the case is moot.

Moreover, Keohane insisted at trial and on appeal that her social transitioning requests were constitutionally mandated. FDC has never accepted this contention and does not do so today. The

[1] This response will adhere to the case's history of referring to Keohane as "her" and "she."

Eleventh Circuit agreed with FDC and reversed the district court's determination to the contrary. Pet. App. 38a. Thus, there has always been a "case or controversy" sufficient for Keohane to petition this Court on the merits. For whatever reason, Keohane chose to pursue vacatur only.

Finally, Keohane sought *en banc* review from the Eleventh Circuit. Pet. App. 87a. This effort was denied, just as her subsequent effort to have the Eleventh Circuit recall its mandate was denied. Pet. App. 129a. Keohane therefore has received all the appellate review to which she is entitled. Nothing in her petition to this Court justifies vacatur. The petition should be denied.[2]

REASONS TO DENY THE PETITION

I. Keohane's Effort to Vacate the Eleventh Circuit's Opinion is Meritless

Keohane's insistence this Court must vacate the Eleventh Circuit's opinion pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), is wrong. This is so because the case is not moot and Keohane has received all the appellate review to which she is entitled.

---

[2] FDC relies on the Eleventh Circuit's opinion as accurately setting out the facts. Pet. App. 1a-9a. FDC notes, however, that Keohane improperly argues and takes issue with the Eleventh Circuit's opinion by calling it "demonstrably incorrect" on the core issue of medical necessity. Pet. at 6 n.2. Assuming, for the sake of argument only, that Keohane's characterization of the Eleventh Circuit's opinion was correct, such a characterization would only underscore why the case is not moot and why Keohane should have petitioned this Court on the merits.

As stated in FDC's opposition to Keohane's attempt to have the Eleventh Circuit recall its mandate, allowing her access to female canteen items, *i.e.*, make-up (to be worn in her housing unit only) and female grooming standards, is a reflection of FDC's own medical judgment and security considerations. Pet. App. 160a-161a. *See Jones v. N. Carolina Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring) (noting the healthy sense of realism on the part of the Court to understand that needed reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field, prison administrators themselves). FDC has never taken the position that such social transition requests are constitutionally mandated. Indeed, the district court's determination that such requests were constitutionally mandated formed the basis of FDC's appeal. The Eleventh Circuit agreed with FDC and reversed the district court's determination. Pet. App. 38a.

If Keohane wished to pursue her argument that such social transition requests were constitutionally mandated, such that the failure to accommodate those requests amounted to deliberate indifference in violation of the Eighth Amendment's prohibition on cruel and unusual punishment, she remained free to do so. Keohane, however, abandoned any effort to seek review from this Court on this central issue, opting instead to claim solely that the Eleventh Circuit's opinion should be vacated because it is purportedly moot. But because FDC has never said such requests are mandated by the Eighth Amendment, there is nothing moot about this case.

Crucially, FDC notes that even the present policy, Proc. No. 403.012, which Keohane says moots this

case and requires the extraordinary remedy of vacatur, *does not* provide Keohane the right to wear female make-up outside her housing unit. Keohane insisted at trial and on appeal that she should be allowed to wear make-up freely, with no such restriction imposed. *Compare Keohane v. Jones*, 328 F. Supp. 3d 1288, 1318 (N.D. Fla. 2018) ("Accordingly, Defendant is enjoined to permit Ms. Keohane access to the same undergarments, hair-length policy, and make-up items available for inmates housed in Defendant's female facilities so that she can socially transition to treat her gender dysphoria."), *with* Pet. App. 154a ("Make-up will be removed prior to departing the housing unit"). That she is still being denied this request plainly evidences there is an existing "case or controversy" and there is nothing moot about this case. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.") (quoting *Knox v. Service Employees*, 567 U.S. 298, 307-08 (2012)). This fact alone should compel this Court to deny Keohane's petition without further analysis.

Again, Keohane chose not to petition this Court on the constitutional merits; rather, she limited her petition to vacatur only. Given this omission (leaving aside the obviously live controversy concerning the location she may wear make-up), there is nothing equitable about vacating and wiping away such an extensively litigated case. *See, e.g., Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (noting that vacatur is "rooted in equity [and] turns on the conditions and circumstances of the particular case") (citation and internal quotation omitted).

Further underscoring the meritless nature of this petition is Keohane's own insistence that "there is a

real possibility that in the future she will be denied adequate care under the FDC's new policy." Pet. at 11. The Eleventh Circuit held that "adequate care" did not require all of Keohane's social transition requests. Pet. App. 38a. But, if Keohane believes that she will somehow be prejudiced if social transitioning requests are not constitutionally mandated, and could be denied in the future based on FDC's exercise of its medical judgment, then she should have made that argument on the merits to this Court and not requested vacatur. *See Chafin*, 568 U.S. at 172 ("But a case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.") (internal quotations and citation omitted).

Given that Keohane is not presently being provided everything she asked for, *i.e.*, she cannot wear make-up outside her housing unit, and given that she abandoned any opportunity to petition this Court to constitutionally mandate her social transition requests, there is no equitable, or any, basis for vacating the Eleventh Circuit's opinion. *See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) (noting petitioner's burden in establishing "equitable entitlement to the extraordinary remedy of vacatur").

To be clear, FDC submits that the obvious reason Keohane chose the vacatur path as a collateral attack on the Eleventh Circuit's judgment is because on the merits her petition is in no way worthy of certiorari. *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* § 19.4, at 968 n.33 (10th ed. 2013) (the "Court's behavior across a broad spectrum of cases since 1978 suggests that the Court denied certiorari in arguably moot cases unless the petition presents an issue (other than mootness) worthy of review").

Here, the case is not entirely moot and Keohane presented no other issue, much less a certworthy issue, to support issuance of the writ. The Eleventh Circuit's opinion is thorough and well-reasoned. It has none of the indicia that might lead this Court to grant a petition for writ of certiorari. Sup. Ct. R. 10. That Keohane is displeased with the Eleventh Circuit's opinion is no reason to vacate it. Indeed, if certiorari would have been denied for failure to satisfy the criteria of Rule 10, then vacatur would give Keohane a result in no way warranted. Accordingly, the petition should be denied.

II. The Eleventh Circuit Decided More than Social Transition Requests

Keohane asserts that FDC's interest is only in "preserving its *doctrinal* victory" in the court of appeals, Pet. at 10, and that this is irrelevant to her petition to vacate the opinion. But it was Keohane herself that sought *en banc* review on both the voluntary cessation doctrine and the standard of review in Eighth Amendment deliberate indifference cases. The Eleventh Circuit spent much effort, and many pages, discussing these issues in its order denying Keohane's request for *en banc* review. Pet. App. 87a. Keohane should not be allowed to so blithely ignore what she herself requested. That the result of the *en banc* request was not to her liking is, again, not a reason to vacate the opinion. The Eleventh Circuit's determinations on standard of review and voluntary cessation are important and resulted from Keohane's own request that the Eleventh Circuit decide them *en banc*. In such a scenario, there is no reason to vacate those determinations. *See U.S. Bancorp*, 513 U.S. at 26 ("Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are

not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.") (internal citation omitted).

Moreover, what Keohane's request for *en banc* review shows is that Keohane has received all the appellate review to which she is entitled. Appeals from the circuit courts of appeal are by certiorari; there is no appeal as of right to this Court. 28 U.S.C. § 1254(1). *Munsingwear* concerns "unreviewable" judgments; however, Keohane has had every opportunity to seek appellate review, including a request for *en banc* reconsideration and a motion to recall the mandate. Her efforts did not turn out to her liking, but that is no reason to invoke the equitable doctrine of vacatur as a last-ditch attempt to avoid determinations that she in part requested, particularly when her case does not warrant further consideration on the merits. Sup. Ct. R. 10. In short, there simply is no prejudice to Keohane to support the invocation of vacatur.

CONCLUSION

For at least the abovementioned reasons, FDC respectfully requests this Court deny Keohane's petition.

Respectfully submitted,

LANCE ERIC NEFF
Counsel of Record
FLORIDA DEPARTMENT OF CORRECTIONS
501 South Calhoun Street
Tallahassee, Florida 32399-2500
(850) 717-3588
lance.neff@fdc.floridalegal.com

KIRKLAND E. REID
THE FINLEY FIRM, P.C.
200 13th Street
Columbus, Georgia 31901
(706) 322-6226

Attorneys for Respondent