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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Respondent's brief in opposition does not dispute that after prevailing in the court of appeals, Respondent abandoned the policies Petitioner challenged in this litigation—which prohibited her from growing her hair out, purchasing and wearing female undergarments, and purchasing and wearing makeup. Nor does it dispute that at that point it applied its new policy, not challenged here, to Ms. Keohane for the first time. As a result, Ms. Keohane is now permitted to maintain long hair, purchase and wear female undergarments, and purchase and wear makeup. Petitioner has received all the relief her lawsuit sought, and the case is therefore moot. Because Respondent's abandonment of the challenged policy and application of a new one prevents Ms. Keohane from pursuing further review of the Eleventh Circuit's decision, that decision should be vacated under *United States v. Munsingwear*, 340 U.S. 36 (1950).

Respondent maintains that the case is not moot because, under its new policy, Petitioner cannot wear makeup outside of her housing unit. But Petitioner's case did not challenge the new policy, which was adopted *after* her trial, and was not applied to her until *after* the court of appeals ruled. And Petitioner never sought a right to "wear make-up outside [her] housing unit." BIO 1. Because Respondent voluntarily took action to moot this dispute, thereby preventing Petitioner from seeking further appellate review, this Court should grant certiorari and vacate under *Munsingwear*.

ARGUMENT

I. THIS CASE HAS BEEN RENDERED MOOT BY THE FDC'S GRANTING MS. KEOHANE ALL THAT SHE SOUGHT IN THIS LITIGATION—THE ABILITY TO GROW OUT HER HAIR, PURCHASE AND WEAR FEMALE UNDERGARMENTS, AND PURCHASE AND WEAR MAKEUP.

Respondent Florida Department of Corrections Secretary ("FDC") argues that the case is not moot because Ms. Keohane is not now allowed to "do all the things female inmates are allowed to do in female prisons." BIO 1. But the FDC's premise is false. Ms. Keohane did not seek the right to "do all the things female inmates are allowed to do in female prisons."

Rather, Ms. Keohane's complaint sought "a permanent injunction directing the [FDC] to provide to Plaintiff hormone therapy, access to female clothing and grooming standards, and all other treatment for Gender Dysphoria deemed medically necessary by a qualified professional in the treatment of the condition." ECF 1 at 30. Petitioner's proposed post-trial order describes her medical need to socially transition as "involv[ing] living in accordance with one's gender identity and includes dressing and grooming accordingly." ECF 151 at 35. And the district court's order specified that "Defendant must permit Ms. Keohane to socially transition by allowing her access to female clothing and grooming standards consistent with Defendant's security policies governing female inmates' hair length, possession and purchase of makeup, and possession of female undergarments including bras, sports bras, and panties." ECF 171 at 60. Petitioner did not cross-

appeal from this order on the grounds that it did not allow her to "do all the things female inmates are allowed to do in female prisons," but she instead merely sought the order's affirmance. All that she sought on appeal were these three forms of relief.

In short, beyond hormone therapy, Petitioner sought to defend three forms of relief concerning social transition: (1) the ability to grow out her hair; (2) the ability to purchase and wear female undergarments; and (3) the ability to purchase and wear makeup. Those three items are how Ms. Keohane has framed her requests throughout the case. *E.g.*, ECF 151 (Plaintiff's Proposed Trial Order) at 18 ("To this day, however, the [FDC] still refuses to permit Plaintiff to socially transition. Specifically, the [FDC] refuses to allow Plaintiff access to female underpants or female grooming standards (the female hair-length standard and permission to purchase and wear makeup.") (footnote omitted). Under Respondent's new policy, applied for the first time to Ms. Keohane after the court of appeals' decision, she has obtained all the relief she sought on appeal. Pet. App. at 141a–144a (Declaration of Reiyn Keohane).

Thus, Respondent's brief in opposition rests on a false premise. Petitioner never sought the right to "do all the things female inmates are allowed to do in female prisons." BIO 1. There are innumerable ways in which Petitioner's specific experience differs from that of individuals housed in a women's prison, but those have never been the subject of this case. Ms. Keohane never claimed a right to every aspect of clothing and grooming applicable in a women's prison. Instead, she sought three specific forms of relief: (1) the ability to grow out her hair; (2) the ability to purchase and wear female undergarments; and (3) the

ability to purchase and wear makeup. Under the new policy, she has been granted precisely the relief she sought to defend on appeal.

FDC contends that its new policy provides that "make-up will be removed prior to departing the housing unit," and that "Keohane insisted at trial and on appeal that she should be allowed to wear make-up freely, with no such restriction imposed." BIO 4. But Ms. Keohane did not challenge any such rule. Indeed, she could not possibly have challenged "such [a] restriction," because it did not even exist at the time of trial; the policy she challenged barred her from purchasing and wearing makeup altogether. The policy that FDC now applies to Ms. Keohane made its first appearance in the record in Petitioner's motion to vacate the court of appeals' decision as moot, because Respondent did not apply the new policy to Ms. Keohane until after the court of appeals ruled in its favor. Pet. App. at 141a–144a (Declaration of Reiyn Keohane).

Accordingly, because FDC has rendered Ms. Keohane's challenge moot through its own actions, and thereby deprived her of an opportunity to seek further review of the court of appeals' decision, the decision below should be vacated under *Munsingwear*.

II. FDC'S OTHER ARGUMENTS LACK MERIT.

FDC's other arguments fare no better. Respondent states that "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." BIO 6.[1] But it was not until *after* en banc review was denied that the district court's injunction was lifted and Ms. Keohane received assurance from her Multi-Disciplinary Services Team "that [her] gender-dysphoria treatment (including hormone therapy and access to female clothing and grooming standards, which includes access to female canteen items) would continue as [she] [is] currently receiving it," Pet. App. 143a–144a ¶ 7, despite the injunction being lifted, Pet. App. 130a. It was only at that point, therefore, that the case became moot.

Moreover, FDC's focus on the purported importance of this decision—and impliedly the importance of keeping it in place—only highlights the point made in Ms. Keohane's initial petition. "Some have interpreted this Court's standard for vacatur of a lower court's order under *Munsingwear* to also include consideration of the impact on *non*-parties." Pet. at 12–13 n.4 (citing *Alabama State Conf. of Nat'l Ass'n for Advancement of Colored People v. Alabama*, 806 F. App'x 975, 976 (11th Cir. 2020) (Branch, J., concurring in part and dissenting in part) (maintaining that a prior opinion should have been vacated in part because "not vacating the panel opinion would spawn immense legal consequences for [non-party] Florida, [non-party] Georgia, and [Defendant] Alabama"). This Court recently granted certiorari, vacated, and remanded in that very case under *Munsingwear*. *Alabama v. AL Conf. of NAACP*, No. 20-1047, --- S. Ct. ----, ----, 2021 WL 1951778, at *1 (U.S. May 17, 2021). If indeed the impact of a legally

[1] In fact, the en banc court actually focused solely on the standard of review. Pet. App. 87a–127a.

consequential decision on non-parties is an important consideration in vacating under *Munsingwear*, that weighs heavily in favor of vacatur here because the court of appeals' decision is a constitutional decision with potential consequence for all transgender prisoners in the Eleventh Circuit.

Finally, Respondent contends that *Munsingwear* vacatur is inappropriate because Petitioner "has received all the appellate review to which she is entitled" given that "there is no appeal as of right to this Court." BIO 7. If that were true, vacatur at the Supreme Court level could *never* exist following court of appeals review, because there are virtually *no* cases with appeal as of right to this Court. And this Court's own precedent makes clear that Respondent's view is not the law. *E.g.*, *Camreta v. Greene*, 563 U.S. 692, 713–14 (2011) ("Mootness has frustrated his ability to challenge *the Court of Appeals' ruling* . . . . We therefore vacate the part of the Ninth Circuit's opinion that addressed that issue . . . .") (emphasis added).

CONCLUSION

The petition for writ of *certiorari* should be granted, the decision denying vacatur should be vacated, and the matter should be remanded to the court of appeals with instructions to vacate its judgment on the merits.

[signatures on following page]

Respectfully submitted,

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