No. _______

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

PETITION FOR WRIT OF CERTIORARI

Daniel B. Tilley
Counsel of Record
ACLU FOUNDATION OF FLORIDA
4343 W. Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
dtilley@aclufl.org

Ardith Bronson
DLA PIPER LLP (US)
200 South Biscayne Blvd.
Suite 2500
Miami, FL 33131

Leslie Cooper
James D. Esseks
ACLU FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004

David D. Cole
ACLU FOUNDATION
915 15th St. NW
Washington, DC 20005

Attorneys for Petitioner

QUESTION PRESENTED

Petitioner Reiyn Keohane is a Florida prisoner who challenged the denial of medically necessary care for gender dysphoria under then-applicable Florida Department of Corrections (FDC) policies. Following a trial, she obtained an injunction from the district court mandating the care. The FDC prevailed on appeal but then unilaterally applied a new, unchallenged policy to Ms. Keohane and granted her the relief she had requested, rendering Ms. Keohane's challenge to the prior policies moot. Ms. Keohane sought vacatur on the ground that the FDC, as prevailing party, had unilaterally rendered her case moot, but the court of appeals denied the motion without explanation.

The question presented is whether, pursuant to *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the court of appeals' judgment should be vacated where the FDC, after prevailing in the court of appeals, unilaterally rendered the case moot, thereby depriving Petitioner of an opportunity to seek this Court's review of the merits of the court of appeals' judgment.

PARTIES TO THE PROCEEDING

Petitioner is Reiyn Keohane, a prisoner in the custody of the Florida Department of Corrections.

Respondent is the Secretary of the Florida Department of Corrections.

STATEMENT OF RELATED PROCEEDINGS

U.S. Court of Appeals for the Eleventh Circuit:

Keohane v. Fla. Dep't of Corr. Sec'y, No. 18-14096 (11th Cir. Mar. 11, 2020) (reversing district-court opinion)

Keohane v. Fla. Dep't of Corr. Sec'y, No. 18-14096 (11th Cir. Dec. 3, 2020) (denying rehearing *en banc*)

Keohane v. Fla. Dep't of Corr. Sec'y, No. 18-14096 (11th Cir. Apr. 5, 2021) (denying motion to recall mandate and vacate prior opinion)

U.S. District Court for the Northern District of Florida:

Keohane v. Jones, No. 4:16-cv-511 (N.D. Fla. Aug. 22, 2018) (order on the merits)

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
STATEMENT OF RELATED PROCEEDINGS ii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 2
JURISDICTION... 2
CONSTITUTIONAL AND OTHER ISSUES INVOLVED 2
STATEMENT OF THE CASE.................................... 3
REASONS FOR GRANTING THE PETITION......... 6
I. THE FDC RENDERED MS. KEOHANE'S CASE MOOT WHEN, AFTER THE COURT OF APPEALS RULED IN ITS FAVOR, IT VOLUNTARILY AND FOR THE FIRST TIME APPLIED ITS NEW POLICY TO HER AND ALLOWED HER TO RECEIVE HORMONE THERAPY AND TO ACCESS FEMALE CLOTHING AND GROOMING STANDARDS 9
II. BECAUSE THE CASE IS MOOT, THE DECISION BELOW SHOULD BE VACATED UNDER *MUNSINGWEAR*......... 11
CONCLUSION.. 13

APPENDIX

Appendix A, Court of appeals opinion,
Mar. 11, 2020 .... 1a

Appendix B, Court of appeals order denying en banc review, Dec. 3, 2020 .... 87a

Appendix C, Court of appeals mandate,
Dec. 11, 2021 .... 128a

Appendix D, Court of appeals order denying motion to recall mandate and vacate prior opinion,
Apr. 5, 2021 .... 129a

Appendix E, District court order vacating judgement,
Dec. 17, 2020 .... 130a

Appendix F, Motion to recall mandate and vacate prior opinion (with attachments: (1) Declaration of Reiyn Keohane; (2) FDC Procedure Number 403.012), Mar. 9, 2021 .... 132a

Appendix G, FDC Response to motion to recall mandate and vacate prior opinion,
Mar. 26, 2021 .... 159a

Appendix H, Reply in support of motion to recall mandate and vacate prior opinion,
Mar. 29, 2021 .... 164a

TABLE OF AUTHORITIES

CASES

Alabama State Conf. of Nat'l Ass'n for Advancement of Colored People v. Alabama, 806 F. App'x 975 (11th Cir. 2020)... 12, 13

Arizonans for Off. Eng. v. Arizona, 520 U.S. 43 (1997)... 7, 9

Azar v. Garza, 138 S. Ct. 1790 (2018).................................... 6, 7, 9

Brewer v. Swinson, 837 F.2d 802 (8th Cir. 1988) 8, 11

Burke v. Barnes, 479 U.S. 361 (1987).. 7

Camreta v. Greene, 563 U.S. 692 (2011).. 7, 13

Clarke v. United States, 915 F.2d 699 (D.C. Cir. 1990)................................ 7

Duke Power Co. v. Greenwood Cty., 299 U.S. 259 (1936).. 7

Great W. Sugar Co. v. Nelson, 442 U.S. 92 (1979)... 7

Hand v. Desantis, 946 F.3d 1272 (11th Cir. 2020) 11

IAL Aircraft Holding, Inc. v. FAA, 216 F.3d 1304 (11th Cir. 2000) 8

In re United States, 927 F.2d 626 (D.C. Cir. 1991)................................ 7

Karcher v. May, 484 U.S. 72 (1987)... 7

Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990)... 10

Trump v. Hawaii,
138 S. Ct. 377 (2017)... 7

Trump v. Int'l Refugee Assistance,
138 S. Ct. 353 (2017)... 7

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994).................................... 7, 8, 9, 11

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950)...*passim*

United States v. Schaffer,
240 F.3d 35 (D.C. Cir. 2001)............................ 8, 11

OTHER AUTHORITIES

Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.10 at 435 (1984) 8

PETITION FOR A WRIT OF CERTIORARI

This lawsuit involves an action under 42 U.S.C. § 1983 alleging violations of Reiyn Keohane's Eighth Amendment rights. In 2016, Ms. Keohane, a transgender woman imprisoned by the Florida Department of Corrections (FDC), challenged then-applicable FDC policies that denied her access to medically necessary treatment for gender dysphoria. The challenged policies barred the initiation of hormone therapy and denied transgender women access to female clothing and grooming standards essential to socially transitioning in accordance with treatment for gender dysphoria. Ms. Keohane prevailed at the district court, which issued an injunction against enforcement of the challenged policies, and directed the FDC to provide her with hormone therapy and access to female clothing and grooming standards. A divided panel of the Eleventh Circuit reversed and vacated the district court's order. Ms. Keohane's request for *en banc* review was subsequently denied.

After prevailing in the court of appeals, the FDC unilaterally and for the first time applied a distinct policy to Ms. Keohane, pursuant to which FDC doctors determined that she should be granted hormone therapy and access to female clothing and grooming standards. This change in policy rendered her challenge to the prior policies moot. As a result of the FDC's unilateral actions, there is no longer a live controversy between the parties with respect to the policies originally applied to Ms. Keohane. Ms. Keohane therefore sought vacatur of the court of appeals' decision, because the FDC had unilaterally deprived her of an opportunity to seek this Court's review of the merits of the court of appeals' judgment.

The court of appeals denied that request without explanation. This Court should accordingly grant certiorari, vacate the court of appeals' decision under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and remand.

OPINIONS BELOW

The court of appeals' opinion reversing the district court (Pet. App. 1a) is reported at 952 F.3d 1257. The court of appeals' decision denying *en banc* review (Pet. App. 87a) is reported at 981 F.3d 994. The court of appeals' decision denying Petitioner's motion for vacatur (Pet. App. 129a) is unreported.

The district court's opinion following trial is reported at 328 F.Supp.3d 1288.

JURISDICTION

The opinion reversing the district court was entered on March 11, 2020. The court of appeals denied *en banc* review on December 3, 2020. The court of appeals denied Petitioner's motion for vacatur on April 5, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND OTHER ISSUES INVOLVED

The Eighth Amendment provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

Reiyn Keohane brought suit in the U.S. District Court for the Northern District of Florida, alleging that the Florida Department of Corrections (FDC) violated her Eighth Amendment rights. *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1291–93 (N.D. Fla. 2018). She challenged FDC policies that (1) banned all treatment for gender dysphoria that individuals were not already receiving prior to entering into custody (the "freeze-frame" policy), including hormone therapy, and (2) prohibited prisoners with gender dysphoria from accessing the clothing and grooming standards appropriate to their gender identity, preventing them from socially transitioning in accordance with accepted standards of care for the treatment of gender dysphoria. *Id.* at 1296–97.

Pursuant to these policies, the FDC denied Ms. Keohane hormone therapy and access to female clothing and grooming standards for two years. Ms. Keohane filed a complaint challenging these policies and requesting that the district court issue an injunction directing the FDC to provide her hormone therapy and access to female clothing and grooming standards. *Id.* at 1291–93. After her complaint was filed, the FDC agreed to provide hormone therapy but continued to deny her access to female clothing and grooming standards. *See id.* at 1292–93.

After a bench trial, the district court granted the injunction that Ms. Keohane requested. *Id.* at 1318–19. The court held that the FDC's initial refusal to provide hormone therapy and its continued refusal to permit social transition under the policies applied to Ms. Keohane constituted deliberate indifference to a serious medical need in violation of the Eighth

Amendment. *Id.* at 1302–18.[1] It ordered the FDC to continue providing hormone therapy and to permit Ms. Keohane to access female clothing and grooming standards. *Id.* at 1318–19.

The FDC appealed, and on March 11, 2020, the Eleventh Circuit reversed and vacated the district court's order. *Keohane v. Fla. Dep't of Corrections Sec'y*, 952 F.3d 1257 (11th Cir. 2020). The court of appeals found that Ms. Keohane's challenge to the FDC's freeze-frame policy and its initial failure to provide hormone therapy was moot. The court of appeals also held that the FDC's policy denying her access to female clothing and grooming standards did not violate the Eighth Amendment. Ms. Keohane petitioned for rehearing *en banc*, which was denied on December 3, 2020. *Keohane v. Fla. Dep't of Corrections Sec'y*, 981 F.3d 994 (11th Cir. 2020). The mandate issued on December 11, 2020. Pet. App. 128a. The district court vacated the injunction on December 17, 2020. Pet. App. 130a.

After the court of appeals reversed the district court's order, the FDC unilaterally applied its new policy regarding the treatment of transgender prisoners to Ms. Keohane for the first time. Pet. App. 141a–144a. The new policy, adopted by the FDC in 2017, removed the freeze-frame policy; established two "teams" (the Gender Dysphoria Review Team and Multidisciplinary Services Team) to decide on and

---

[1] The FDC had begun providing Ms. Keohane hormone therapy after she filed suit, but the district court held that the hormone-therapy issue was not moot because the FDC had not met its burden of showing that the challenged conduct could not reasonably be expected to recur. *Keohane v. Jones*, 328 F. Supp. 3d at 1297–1300.

implement, on a case-by-case basis, the proper treatment of transgender prisoners; and permits prisoners to access female clothing and grooming standards if recommended by those teams. Pet. App. 144a–158a. However, Ms. Keohane had been told she would not be evaluated under the new policy while her litigation was pending. Pet. App. 141a–142a ¶ 3.

But once the FDC prevailed in the court of appeals, it abandoned its reliance on the policies challenged in this litigation and instead applied its new system to Ms. Keohane for the first time. After the court of appeals' decision, the Multidisciplinary Services Team informed Ms. Keohane that the treatment she had been denied under the FDC's prior policies but was receiving pursuant to the district court's injunction would continue to be provided even though the court of appeals reversed the district court's order. Pet. App. 142a–144a ¶¶ 4–8.

Thus, the FDC is now voluntarily providing Ms. Keohane with hormone therapy and access to female clothing and grooming standards, pursuant to its new policy. Pet. App. 142a-144a ¶¶ 4–8. She has a written pass from the FDC indicating that she is allowed to maintain long hair, wear female clothing, and order female canteen items. Pet. App. 142a-144a ¶ 5. And she continues to be provided hormones daily by nursing staff. Pet. App. 144a ¶ 8.

Once the FDC unilaterally abandoned the policies this litigation challenged, and granted Ms. Keohane appropriate treatment under the new policy, this litigation became moot. Ms. Keohane therefore asked the Eleventh Circuit to recall the mandate and vacate its prior decision as moot. Pet. App. 132a. In response, the FDC opposed vacatur, arguing that it

would like to leave in place doctrinal determinations made by the court of appeals that it believes will benefit it in future potential litigation. Pet. App. 159a. On April 5, 2021, the court appeals denied without comment the motion to vacate. Pet. App. 129a.

REASONS FOR GRANTING THE PETITION

The FDC's voluntary decision to apply its new policy to Ms. Keohane and provide her the relief she requested *after it prevailed in the court of appeals* has rendered Ms. Keohane's case moot. She is therefore prevented from asking this Court to grant *certiorari* to review the adverse ruling of the court of appeals. In this circumstance, where a prevailing party has unilaterally rendered a dispute moot, the proper disposition is to vacate the opinion that cannot be appealed. For this reason, Ms. Keohane requests that this Court grant *certiorari*, vacate the court of appeals' opinion, and remand.[2]

---

[2] A finding of cert-worthiness is not a prerequisite to vacatur in these circumstances. *See, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018) (per curiam) (vacating judgment on an issue of first impression in the court of appeals without discussing whether *certiorari* would have been warranted); Stephen M. Shapiro et al., Supreme Court Practice § 5.13, at 357–58, 968 n.33 (10th ed. 2013). Petitioner notes, however, that the court of appeals' decision is demonstrably incorrect: when the majority opinion states that the FDC's retained expert said the care wasn't "medically necessary," the majority fails to note that the expert was not applying the *Eighth Amendment's* standard, but his own idiosyncratic definition, in which "medically necessary" refers only to physical-health needs and not mental-health needs. The Eighth Amendment makes no such distinction. *See* Petition for Rehearing *En Banc*, No. 18-14096 (11th Cir. Apr. 15, 2020).

When an appeal becomes moot "while on its way" to this Court, this Court's "established practice" is to "vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 & n.2 (1950); *see also, e.g.*, *Azar v. Garza*, 138 S. Ct. 1790, 1792 (2018) (per curiam); *Trump v. Hawaii*, 138 S. Ct. 377 (2017) (mem.); *Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353 (2017) (mem.); *Karcher v. May*, 484 U.S. 72, 82 (1987); *Burke v. Barnes*, 479 U.S. 361, 365 (1987); *Duke Power Co. v. Greenwood Cty.*, 299 U.S. 259, 267 (1936) (per curiam). This Court has followed that approach in "countless cases," *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam), and it is the "normal" procedure in the event of mootness through no fault of the losing party, *Camreta v. Greene*, 563 U.S. 692, 713 (2011).

The rule providing for vacatur serves important purposes: "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance" or the "unilateral action of the party who prevailed below," "ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). "Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997) (citation omitted).

It is generally appropriate for the court of appeals itself to vacate its judgment when it learns of events that rendered the case moot during the time available to seek *certiorari*. *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991); *see also Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (quoting Wright, Miller & Cooper, *Federal Practice*

and Procedure § 3533.10 at 435 (1984)). Thus, vacatur is appropriate when an appeal becomes moot after an appellate panel has issued a published opinion, but before the appeal can be litigated to completion. *See United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam); *Brewer v. Swinson*, 837 F.2d 802, 806 (8th Cir. 1988) (recalling the mandate and vacating its own judgment when the case became moot after the court issued its mandate but before the time available to seek *certiorari* review expired); *see also IAL Aircraft Holding, Inc. v. FAA*, 216 F.3d 1304, 1306 n.2 (11th Cir. 2000) ("Even after a case becomes moot . . . , courts of appeals always have jurisdiction to determine mootness and recall their mandates."). Here, however, the court of appeals rejected a motion to vacate its opinion—without even offering an explanation. Pet. App. 129a.

Vacatur under *Munsingwear* is appropriate when the party seeking vacatur is not responsible for causing the case to become moot and vacating the lower court decision serves the doctrine's equitable purposes. *See, e.g.*, *U.S. Bancorp Mort'g Co.*, 513 U.S. at 24–25. As explained further below, this case easily meets both requirements. The dispute became moot through unilateral actions of the FDC and not through any action of Ms. Keohane. And principles of equity favor vacating the court of appeals' opinion because that opinion has preclusive effects on Ms. Keohane, but the FDC has deprived Ms. Keohane of any chance to seek Supreme Court review of it. Accordingly, the Court should grant *certiorari*, vacate the decision below, and remand for vacatur under *Munsingwear*.

I. THE FDC RENDERED MS. KEOHANE'S CASE MOOT WHEN, AFTER THE COURT OF APPEALS RULED IN ITS FAVOR, IT VOLUNTARILY AND FOR THE FIRST TIME APPLIED ITS NEW POLICY TO HER AND ALLOWED HER TO RECEIVE HORMONE THERAPY AND TO ACCESS FEMALE CLOTHING AND GROOMING STANDARDS.

Although vacatur is fundamentally an "equitable remedy," *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25, it is "clear[ly]" appropriate "when mootness occurs through . . . the 'unilateral action of the party who prevailed in the lower court,'" *Garza*, 138 S. Ct. at 1792 (quoting *Arizonans for Off. Eng.*, 520 U.S. at 71-72). As this Court has remarked, "'[i]t would certainly be a strange doctrine that would permit a [party] to obtain a favorable judgment, take voluntary action that moots the dispute, and then retain the benefit of the judgment.'" *Id.* (quoting *Arizonans for Off. Eng.*, 520 U.S. at 75).

That is precisely what would happen absent vacatur in this case. After it prevailed in the court of appeals, the FDC unilaterally decided to apply its new policy to Ms. Keohane and provide the treatment she had been denied under the FDC's prior policies but was receiving pursuant to the district court's injunction. Pet. App. 141a–144a. The court of appeals' ruling in the FDC's favor was entered on March 11, 2020. Pet. App. 1a. In May 2020, the Multidisciplinary Services Team informed Ms. Keohane that she would nonetheless continue to receive hormone therapy and access to female clothing and grooming standards, under the new policy that the FDC had previously refused to apply to her. Pet.

App. 142a ¶ 4. In June 2020, Ms. Keohane was provided a written pass indicating that she is permitted to access female clothing, grooming standards, and canteen items. Pet. App. 142a–143a ¶ 5. The FDC has continued to provide her with hormone therapy and access to female clothing and grooming standards under the new policy. Pet. App. 142a–144a ¶¶ 4–8. Because the FDC abandoned its reliance on the old policy after it prevailed, there is no longer any actual dispute between the parties.

When Ms. Keohane moved for vacatur in the court of appeals, the FDC maintained that the case was not moot, but gave no reasons for why it believed it was not moot. Instead, it merely asserted an interest in preserving its *doctrinal* victory in the court. Pet. App. 159a–163a. But that abstract interest does not create a live case or controversy. The case remains live only if Ms. Keohane has "a 'specific live grievance' against the application of the [FDC policy] to [her], and not just an "'abstract disagreemen[t]'" over the constitutionality of such application," *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 479 (1990). She does not.[3]

Under these circumstances, the dispute between the parties is moot.

[3] The FDC did not contend that the voluntary-cessation exception to mootness applies. The fact that the FDC itself did not even raise the possibility underscores that it has no intention of reverting to the prior policy challenged here. Pet. App. 160a (FDC response to motion to vacate) ("As FDC told the Court at oral argument, it was not rolling back the treatment offered to Keohane and it was adopting a new policy relating to the treatment of gender dysphoria.").

II. BECAUSE THE CASE IS MOOT, THE DECISION BELOW SHOULD BE VACATED UNDER *MUNSINGWEAR*.

Once it learned that the case was moot, the court of appeals should have vacated its prior decision. *See, e.g.*, *Schaffer*, 240 F.3d 35; *Brewer*, 837 F.2d 802. Because it erroneously refused to do so, Ms. Keohane has no alternative but to seek that remedy here.

Munsingwear requires vacatur. Ms. Keohane "ought not in fairness be forced to acquiesce in the judgment" by the "unilateral action of the party who prevailed below." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 25. The court of appeals' opinion was a final adjudication of the merits of Ms. Keohane's challenge to the now abandoned policies, and, thus, in the Eleventh Circuit, has res judicata effect on the parties. *Cf. Hand v. Desantis*, 946 F.3d 1272, 1275 n.5 (11th Cir. 2020) (denying motion to vacate prior stay order because it lacks "a final adjudication of the merits of the appeal and therefore it has no res judicata effect") (quotations omitted).

Moreover, Ms. Keohane has an ongoing interest in the issues resolved by the court of appeals because her treatment going forward remains dependent on the judgment of the GDRT and the MDST, the two entities the FDC has created to address the needs of transgender prisoners. While those teams have for the time being granted Ms. Keohane access to hormone therapy and female clothing and grooming standards, their decisions are subject to regular reevaluation and revision, Pet. App. 147a–148a, so there is a real possibility that in the future she will be denied adequate care under the FDC's new policy. The FDC

said as much in its response to the motion for vacatur, explaining that the new policy:

> makes plain that medical and mental health treatment and services are individualized and provided based on identified medical needs. These individual needs can change over time, and FDC's Procedure allows the treating health care professional to exercise his or her medical judgment in accommodating these fluctuating needs

Pet. App. 160a.

The new policy creating the GDRT and MDST, however, is not the subject of this lawsuit. Thus, while this case, challenging the now-abandoned policies, is moot, Ms. Keohane may well be in an adverse position with the FDC in the future under the new policy. She should not be prejudiced by the court of appeals' decision on the abandoned policies simply because the FDC unilaterally rendered that dispute moot after prevailing in the court of appeals. It is inequitable to leave the court of appeals' decision in place—with its res judicata effect on Ms. Keohane—when she is unable to seek review in this Court.[4]

---

[4] 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. *See, e.g.*, *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) (in dissent, maintaining that a prior opinion should have been vacated because (1) "not vacating the panel opinion would spawn immense legal consequences for [non-party] Florida, [non-party] Georgia, and [Defendant] Alabama"; (2) Alabama had been prevented from obtaining en banc review or filing a petition for

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.

Respectfully submitted,

Ardith Bronson
DLA Piper LLP (US)
200 South Biscayne Blvd.
Suite 2500
Miami, FL 33131

Leslie Cooper
James D. Esseks
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004

Daniel B. Tilley
Counsel of Record
ACLU FOUNDATION OF FLORIDA
4343 W. Flagler St., Suite 400
Miami, FL 33134
(786) 363-2714
DTilley@aclufl.org

David D. Cole
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th St. NW
Washington, DC 20005

Date: May 3, 2021

---

writ of *certiorari*; and (3) "the constitutional ruling in this case—abrogation of state sovereign immunity—is certainly a legally consequential decision"); *id.* (describing *Camreta*, 563 U.S. 692, as "noting that vacatur of the Ninth Circuit's constitutional rulings was warranted because a 'constitutional ruling in a qualified immunity case is a legally consequential decision'"). To the extent that this Court's precedents support consideration of the impact of the decision on non-parties, that factor also weighs heavily in favor of vacatur, because the decision below is a constitutional decision with potential consequence for all transgender prisoners in the Eleventh Circuit.

APPENDIX

APPENDIX A

UNITED STATE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

———

REIYN KEOHANE
Plaintiff-Appellee,
v.
FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,
Defendant-Appellant.

———

18-14096

———

On appeal from the United States District Court for the Northern District of Florida in No. 4:16-cv-00511-MW-CAS

[Date Issued: March 11, 2020]

OPINION

NEWSOM, Circuit Judge:

This appeal requires us to decide whether the Florida Department of Corrections violated the Eighth Amendment's prohibition on cruel and unusual punishment in its treatment of a transgender inmate's gender dysphoria. Specifically, we must determine whether the FDC acted with deliberate indifference to Reiyn Keohane's serious medical need when it (1) enforced a since- repealed policy that

strictly limited transgender inmates to the particular medical treatments they were receiving when taken into custody, (2) delayed providing hormone therapy to Keohane for two years pursuant to that policy, and (3) refused Keohane's "social transitioning" requests—in particular, to wear long hair, makeup, and female undergarments. We must also determine whether the FDC's post-suit decisions to rescind what the parties have called its "freeze-frame" policy and to prescribe Keohane hormone therapy moot this appeal with respect to the first two issues.

Keohane brought this action under 42 U.S.C. § 1983 alleging violations of her Eighth Amendment rights and seeking (as relevant here) declaratory and injunctive relief. The district court entered a three-part order (1) declaring the FDC's former freeze-frame policy unconstitutional and permanently enjoining the FDC from "reenacting and enforcing" it, (2) requiring the FDC to continue to provide Keohane with hormone therapy "so long as it is not medically contraindicated," and (3) directing the FDC to permit Keohane "to socially transition by allowing her access to female clothing and grooming standards." *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1319 (N.D. Fla. 2018).

We hold that Keohane's challenges to the prior freeze-frame policy and the FDC's initial denial of hormone therapy are moot in light of the FDC's subsequent repeal and replacement of the policy and its provision of hormone treatment. We reject on the merits Keohane's claim that the FDC violated the Eighth Amendment by refusing to accommodate her social-transitioning requests.

I

A

Reiyn Keohane is an FDC inmate currently serving a 15-year sentence for attempted murder. Keohane was born male, but she began to identify as female sometime during her preadolescent years. Beginning at age 14—and up until the time she was incarcerated at 19—Keohane wore women's clothing, makeup, and hairstyles. At 16, she was formally diagnosed with gender dysphoria—which, in general terms, "refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013). About six weeks before her arrest, Keohane began hormone therapy under the care of a pediatric endocrinologist.

Following her arrest, Keohane was initially housed at the Lee County Jail, where she says her request to continue hormone therapy was immediately denied. When, several months later, in July 2014, Keohane was transferred to an FDC prison in south Florida, she asked to resume her hormone-therapy treatment because, as she explained to prison officials in a written grievance, "[w]ithout it [she] consider[ed] self-harm and suicide every single day." She made similar requests (accompanied by similar threats of self-harm) during the ensuing two years, all of which were either disregarded or rejected.[1] Keohane alleges—and the FDC doesn't dispute—that

[1] It is undisputed that, throughout the course of her incarceration, Keohane has consistently been provided mental-health counseling for her gender dysphoria.

her hormone-therapy requests were denied pursuant to a policy specifying that "[i]nmates who have undergone treatment for [gender dysphoria] will be maintained only at the level of change that existed at the time they were received by the Department." Under this "freeze-frame" policy, the care of inmates suffering from gender dysphoria was determined not by their current, individualized medical needs, but rather by the treatment they were (or weren't) receiving at the time of their incarceration.

In December 2014, Keohane's grievances began to include requests relating to "social transitioning"—that is, the ability to live consistently with one's gender identity, including by dressing and grooming accordingly. In particular, Keohane expressed a desire to wear female undergarments and makeup, and to grow out her hair in a long, feminine style—as the district court described it, "to possess and wear the same bras, panties, hairstyles, and makeup items permitted in [the FDC's] female facilities." The FDC refused Keohane's social-transitioning requests on the grounds that they violated prison policy—which required male inmates to wear "[u]nder shorts" and to "have their hair cut short to medium uniform length at all times with no part of the ear or collar covered," Fla. Admin. Code r. 33- 602.101(2), (4)—and that they posed a security risk. Specifically, the FDC was concerned that an inmate wearing makeup and female undergarments would inevitably become a target in an all-male prison, thereby endangering not only the inmate but also the prison employees who would have to step in to protect her. Additionally, the FDC concluded that there are clear advantages to maintaining uniformity in a prison setting, including the ability to more readily detect contraband.

During this protracted request-denial cycle, Keohane made multiple attempts to self-harm. In October 2014, Keohane tried to hang herself. In January 2015, she tried to castrate herself. And in April 2017, she tried to kill herself twice more.

B

Having exhausted her efforts to obtain relief within the prison system, Keohane filed a single-count complaint in the United States District Court for the Northern District of Florida alleging that the FDC's denial of her hormone-therapy and social-transitioning requests violated the Eighth Amendment. As relevant here, Keohane sought three forms of relief: (1) a declaration that the FDC was acting with deliberate indifference to her gender dysphoria, a serious medical need; (2) a permanent injunction ordering the FDC to provide her with hormone therapy and social-transitioning accommodations, including "access to female clothing and grooming standards"; and (3) a permanent injunction prohibiting the FDC from enforcing its freeze-frame policy.

Not long after Keohane filed suit, the FDC altered its behavior in two material respects. First, just two weeks after the complaint was filed, the FDC referred Keohane to an outside endocrinologist who immediately prescribed her hormone therapy. Second, about six weeks after that, the FDC formally repealed its freeze-frame policy and replaced it with a policy that calls for individualized assessment and treatment of inmates who claim to be suffering from gender dysphoria and related conditions. With the lone exception of a sports bra to help with her hormone-related breast enlargement, however, the

FDC has continued to refuse Keohane's social-transitioning requests.

Keohane's case proceeded to a bench trial. Helpfully, the parties agreed— and still do—both that Keohane's gender dysphoria constitutes a "serious medical need" for deliberate-indifference purposes and that hormone therapy is medically necessary to treat that need. Most notably, Keohane's FDC treatment team— which comprised her psychologist, her mental-health counselor, and a psychiatric physician assistant—supported the determination that hormone therapy is medically necessary. And since initially acceding to Keohane's request for hormone therapy in September 2016, the FDC has consistently provided it and has repeatedly represented (both at trial and on appeal) that it will continue to do so "as long as [her] treatment team believes the hormones are medically necessary to treat her gender dysphoria." Br. of Appellant at 7–8 (citing testimony).

The parties and medical professionals disagreed, however—and still do— about the medical necessity of Keohane's social-transitioning-related requests to dress and groom herself as a woman. For his part, Keohane's retained medical expert testified (1) that allowing an individual to present consistently with her gender identity is one "of the medically necessary components for the treatment of gender dysphoria," (2) that it would be "medically and logically inconsistent" and "potentially harmful" to provide Keohane hormone therapy while denying her the ability to socially transition, and (3) that forcing one to live in conformity with a gender with which she doesn't identify "would likely" cause her to engage in self- harm.

By contrast, the members of Keohane's treatment team, who had supported the provision of hormone therapy, denied that social transitioning is medically necessary to treat Keohane's gender dysphoria—as did a staff psychiatrist with the FDC's medical vendor Wexford, the FDC's chief clinical officer, and the FDC's retained expert. According to the treatment team, Keohane's current regimen—hormone therapy and mental-health counseling, together with other accommodations, including the use of female pronouns ("she," "her," etc.), safer housing accommodations, and private shower facilities—is sufficient to treat her gender dysphoria. The treatment team also explained that requiring Keohane to comply with the FDC's clothing and grooming policies does not place her at a substantial risk of self-harm or severe psychological pain. The FDC's retained expert acknowledged that the sorts of social-transitioning-related accommodations that Keohane sought may be "psychologically pleasing" to her, but he too rejected the suggestion that they are medically necessary. Finally, FDC witnesses testified—as FDC personnel had explained from the beginning—that granting Keohane's social-transitioning requests would pose unacceptable security risks. Notably, though, despite the FDC's steadfast refusal to accommodate Keohane's social-transitioning requests, it has repeatedly stated—since this suit was filed, anyway—that "if [those] requests are deemed medically necessary, they will be fulfilled," and that it will take additional security measures as needed. Br. of Appellant at 9.

Following trial, the district court issued an opinion in Keohane's favor. The court rejected the FDC's contention that Keohane's claims relating to

the former freeze-frame policy and its initial refusal to provide hormone therapy were moot— concluding, in particular, that the FDC's "voluntary cessation" of the challenged conduct was insufficient to render those claims nonjusticiable. On the merits, the district court held (1) that the FDC's former freeze-frame policy was an unconstitutional "blanket ban on medically necessary care," (2) that the FDC's earlier denial of hormone therapy—which the district court thought resulted from "bigotry and ignorance"—evinced "deliberate indifference to [Keohane's] serious medical need in violation of the Eighth Amendment," and (3) that allowing Keohane to clothe and groom herself as a woman is medically necessary to treat her gender dysphoria and that the FDC's ongoing denial of her social-transitioning requests likewise violates the Eighth Amendment. To effectuate its judgment, the court entered a three-part order (1) declaring the FDC's former freeze-frame policy unconstitutional and "permanently enjoin[ing]" the FDC from "reenacting and enforcing" it, (2) requiring the FDC to continue to "provide Ms. Keohane with hormone therapy so long as it is not medically contraindicated," and (3) directing the FDC to "permit Ms. Keohane to socially transition by allowing her access to female clothing and grooming standards."[2]

---

[2] We review the district court's mootness determination, including its voluntary-cessation analysis, de novo, and any related findings of fact for clear error. *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1282 (11th Cir. 2004). On the merits, "[a]lthough we review the district court's entry of a permanent injunction for an abuse of discretion, the district court's underlying legal conclusion—that there was an Eighth Amendment violation warranting equitable relief—is reviewed *de novo*." *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010). "Subsidiary issues of fact are reviewed for clear error." *Id.* For

*   *   *

The FDC's appeal presents the following issues for our consideration: (1) Did the FDC's former freeze-frame policy manifest deliberate indifference to Keohane's serious medical need and thereby violate the Eighth Amendment's prohibition against cruel and unusual punishment, and relatedly, is Keohane's challenge to that policy—and requested injunction against its enforcement—now moot in light of its repeal and replacement? (2) Did the FDC's refusal to provide Keohane with hormone therapy during the first two years of her incarceration violate the Eighth Amendment, and again, is Keohane's challenge to that refusal— and requested injunction—now moot in light of the FDC's decision to allow the treatment? And (3) does the FDC's ongoing refusal to provide Keohane with social-transitioning accommodations—including the ability to wear long hair, makeup, and female undergarments—violate the Eighth Amendment?[3]

(much) more on these standards of review as they apply to the merits of Keohane's Eighth Amendment claim, *see infra* at 27–28, 28 n.8.

[3] We can dispense at the outset with the FDC's contention that the district court's injunction violates the Prison Litigation Reform Act. The PLRA requires injunctive relief to be "narrowly drawn," to "extend[] no further than necessary to correct the violation of the [f]ederal right," and to be "the least intrusive means necessary to correct the violation of the [f]ederal right." 18 U.S.C. § 3626(a)(1)(A). The FDC asserts that the district court ran afoul of the PLRA by decreeing what the FDC calls a "blanket policy" allowing transgender female inmates in male facilities access to the privileges afforded to inmates in female prisons. In short, we just don't see it. By its terms, the district court's order directs the FDC to provide a particular course of treatment to Keohane *specifically*. *See, e.g.*, *Keohane*, 328 F. Supp. 3d at 1318–19 ("Defendant must provide Ms. Keohane with hormone therapy

II

The Eighth Amendment prohibits the "inflict[ion]" of "cruel and unusual punishments." U.S. Const. amend VIII. Under the Amendment, the "[f]ederal and state governments . . . have a constitutional obligation to provide minimally adequate medical care to those whom they are punishing by incarceration." *Harris v. Thigpen*, 941 F.2d 1495, 1504 (11th Cir. 1991). As particularly relevant here, the Supreme Court has held that prison officials violate the bar on cruel and unusual punishments when they display "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

A deliberate-indifference claim entails both an objective and a subjective component. *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). First, the inmate must establish "an objectively serious medical need"—that is, "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention"—that, "if left unattended, poses a substantial risk of serious harm." *Id.* (alteration adopted) (quotation omitted). Second, the inmate must prove that prison officials acted with deliberate indifference to that need by showing (1) that they had "subjective knowledge of a risk of serious harm" and (2) that they "disregard[ed]" that risk (3) by conduct that was "more than mere negligence." *Id.*

…."; "To treat Ms. Keohane's gender dysphoria, Defendant must permit Ms. Keohane to socially transition ….").

Here, as already noted, there's no debate about the objective component. The FDC admits—and the parties thus agree—that Keohane's gender dysphoria constitutes a "serious medical need." Rather, the dispute hinges on the subjective component. Specifically, the parties disagree—at least in part—over whether the particular types of treatment that Keohane has requested are medically necessary, such that any course of care that doesn't include them would be constitutionally inadequate.

A prisoner bringing a deliberate-indifference claim has a steep hill to climb. We have held, for instance, that the Constitution doesn't require that the medical care provided to prisoners be "perfect, the best obtainable, or even very good." *Harris*, 941 F.2d at 1510 (quotation omitted). Rather, "[m]edical treatment violates the [E]ighth [A]mendment only when it is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Id.* at 1505 (quotation omitted). We have also emphasized—as have our sister circuits—that "a simple difference in medical opinion between the prison's medical staff and the inmate as to the latter's diagnosis or course of treatment [fails to] support a claim of cruel and unusual punishment." *Id.*; *accord, e.g.*, *Lamb v. Norwood*, 899 F.3d 1159, 1162 (10th Cir. 2018) ("We have consistently held that prison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants."); *Kosilek v. Spencer*, 774 F.3d 63, 82 (1st Cir. 2014) (en banc) ("[The Eighth Amendment] does not impose upon prison administrators a duty to provide care that is ideal, or of the prisoner's choosing.").

Against that backdrop, we consider whether the FDC violated the Eighth Amendment (1) by adopting and previously enforcing the since-repealed freeze-frame policy, (2) by initially declining to provide Keohane with hormone therapy, and (3) by continuing to refuse Keohane's social-transitioning-related requests to dress and groom herself according to female standards.

A

First, the former freeze-frame policy. Keohane contends that it constituted "deliberate indifference to [a] serious medical need[]," *Estelle*, 429 U.S. at 104, in that it amounted to a per se rejection of any treatment that an inmate hadn't received prior to her incarceration, without regard to (or any exception for) medical necessity. The district court agreed and permanently enjoined the FDC from "reenacting and enforcing" its former policy. Were we free to reach the merits, we would almost certainly agree, as well. As already explained, the FDC has repeatedly conceded that Keohane's gender dysphoria constitutes a "serious medical need." It seems to us that responding to an inmate's acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of "deliberate indifference"—anti-medicine, if you will. *Cf*. Webster's Second New International Dictionary 1527 (1944) (defining "medicine" as "[t]he science and art dealing with the prevention, cure, or alleviation of disease"). Unsurprisingly to us, other courts considering similar policies erecting blanket bans on gender-dysphoria treatments—without exception for medical necessity—have held that they evince deliberate indifference to prisoners' medical needs in violation of

the Eighth Amendment. *See, e.g.*, *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011); *see also Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 247 (D. Mass. 2012).

We conclude, though, that we are not free to reach the merits. Because the FDC has formally rescinded its freeze-frame policy and replaced it with a new one that properly attends to inmates' individualized medical needs, we hold that Keohane's challenge to the old policy is moot. There is, quite simply, no longer any freeze-frame policy to challenge—nothing to enjoin, as the district court purported to do.

Mootness arises when an issue presented in a case is "no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). In particular, we have held that a case must be dismissed as moot "[i]f events that occur subsequent to the filing of a lawsuit . . . deprive the court of the ability to give the plaintiff . . . meaningful relief." *Al Najjar v. Ashcroft*, 273 F.3d 1330, 1336 (11th Cir. 2001). "[D]ismissal is required because mootness is jurisdictional," in that a moot case no longer presents a live "Case[]" or "Controvers[y]" within the meaning of Article III of the Constitution. *Id.* at 1335–36.

Here, because the FDC repealed its freeze-frame policy following the onset of litigation—approximately two months after Keohane filed suit—we must determine whether the "voluntary cessation" exception to the mootness doctrine applies. Pursuant to that exception, a defendant's "voluntary cessation of allegedly illegal conduct does not moot a case."

United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968). For reasons we will explain, we hold that the exception does not apply here, and that Keohane's challenge to the since- rescinded freeze-frame policy is moot.

The basis for the voluntary-cessation exception is the commonsense concern that a defendant might willingly change its behavior in the hope of avoiding a lawsuit but then, having done so, "return to [its] old ways." *Id.* (quotation omitted). So when a defendant contends that a plaintiff's claim has become moot as a result of the defendant's own independent decision to cease some disputed action, it usually "bears the . . . burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Doe v. Wooten*, 747 F. 3d 1317, 1322 (11th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). Importantly here, though, we have explained that "governmental entities and officials have . . . considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs*, 868 F.3d 1248, 1256 (11th Cir. 2017) (en banc) (quoting *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328–29 (11th Cir. 2004)). The reason, we have said, is that government actors are more likely than private defendants "to honor a professed commitment to changed ways." *Troiano v. Supervisor of Elections*, 382 F.3d 1276, 1283 (11th Cir. 2004) (quotation omitted); *see also, e.g.*, *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011) ("Hence, 'the Supreme Court has held almost uniformly that voluntary cessation by a government defendant moots

the claim.'" (alterations adopted) (quoting *Beta Upsilon Chi Upsilon Chapter v. Machen*, 586 F.3d 908, 917 (11th Cir. 2009))).

That is especially true when, as here, a government defendant has formally rescinded a challenged statute, ordinance, rule, or policy. As the en banc Court emphasized in *Flanigan's*, "the repeal of a challenged statute"—or other similar pronouncement—is ordinarily "one of those events that makes it absolutely clear that the allegedly wrongful behavior . . . could not reasonably be expected to recur." 868 F.3d at 1256 (quoting *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1265– 66 (11th Cir. 2010)).[4] "As a result, once the repeal of [a policy] has caused our jurisdiction to be questioned, the plaintiff bears the burden of presenting affirmative evidence that [her] challenge is no longer moot." *Id.* (alterations adopted) (quotation omitted). "The key inquiry" is whether the plaintiff has shown a "reasonable expectation"—or, as we phrased it elsewhere, a

---

[4] Notably, in so stating, the *Flanigan's* Court was merely reiterating the conclusions of an earlier en banc decision, which itself was merely repeating the conclusions of earlier circuit decisions. *See, e.g.*, *Flanigan's*, 868 F.3d at 1259 ("This Court and the Supreme Court have repeatedly held that the repeal or amendment of an allegedly unconstitutional statute moots legal challenges to the legitimacy of the repealed legislation. A superseding statute or regulation moots a case . . . to the extent that it removes challenged features of the prior law. If the repeal is such that the allegedly unconstitutional portions of the [challenged] ordinance no longer exist, the appeal is rendered moot because any decision we would render would clearly constitute an impermissible advisory opinion." (citations and internal quotation marks omitted) (quoting *Tanner Advert. Grp., L.L.C. v. Fayette Cty., Ga.*, 451 F.3d 777, 789–90 (11th Cir. 2006) (en banc))).

"substantial likelihood"—that the government defendant "will reverse course and reenact" the repealed rule. *Id.*; *Beta Upsilon Chi Upsilon Chapter*, 586 F.3d at 917 (quotation omitted).

In *Flanigan's*, we explained that, in determining whether a plaintiff has shouldered its burden, a reviewing court should look to "three broad factors"— although we hastened to add that "these factors should not be viewed as exclusive nor should any single factor be viewed as dispositive," and that, in any event, "a mootness finding should follow when the totality of [the] circumstances persuades the court that there is no reasonable expectation that the government entity will reenact" the challenged policy. 868 F.3d at 1257. "First, we ask whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction." *Id.* In this connection, "we will examine the timing of the repeal, the procedures used in enacting it, and any explanations independent of this litigation which may have motivated it." *Id.* "Second, we ask whether the government's decision to terminate the challenged conduct was 'unambiguous'"— which, in turn, entails an inquiry into whether the government's policy shift is fairly viewed as being "permanent and complete." *Id.* (quotation omitted). Finally, "we ask whether the government has consistently maintained its commitment to the new policy." *Id.*; *accord, e.g.*, *Doe*, 747 F.3d at 1322–23 (articulating the same three factors).

Applying these factors here, we come to the same conclusion that we reached in *Flanigan's*: "[T]here is no substantial evidence indicating a reasonable likelihood that" the defendant—here, the FDC—"will reenact the challenged provision"—here,

the freeze-frame policy—"which it has now repealed." 868 F.3d at 1260. With respect to the first factor, the district court concluded that the FDC's decision to rescind its freeze-frame policy "was an attempt to manipulate jurisdiction—certainly *not* the result of substantial deliberation." *Keohane*, 328 F. Supp. 3d at 1300. To echo a sentiment expressed in *Flanigan's*, "[w]e are not unsympathetic to this argument." 868 F.3d at 1260. We don't doubt for a minute that the FDC's about-face just two months after Keohane filed suit was motivated, at least in part, by a desire to rid itself of this litigation. Even so, as we took care to clarify in *Flanigan's*, the timing of a government defendant's decision to repeal a challenged policy shouldn't be overemphasized. *Id.* at 1259 ("[T]he timing of repealing legislation should not be dispositive of our inquiry into whether there is a reasonable expectation of reenactment."); *id.* ("[T]he timing of repealing legislation should not control the mootness inquiry.").[5] Moreover—and contrary to the dissent's suggestion—the fact that "the FDC still hasn't admitted that its practices violated the Constitution," *see* Dissenting Op. at 51, has little, if anything, to do with the substantial-deliberation factor, or with the voluntary-cessation analysis at all, for that matter, *see Flanigan's*, 868 F.3d at 1262 (noting that "even at en banc oral argument" the government defendant there had "declined to concede that [its ordinance] was unconstitutional" but clarifying that "[w]hether the [government] defended the [o]rdinance and/or continue[d] to believe it was constitutional" had little bearing on the mootness

---

[5] The dissent fails to heed the en banc Court's warning against overstating timing considerations. *See, e.g.*, Dissenting Op. at 44, 45, 48, 50, 56.

analysis). Finally, and in any event, even if we were to give Keohane the substantial-deliberation factor, it is but one among several, and here the remaining considerations tip the scale decisively in the other direction.

What we said in *Flanigan's* about the second factor applies here too: The FDC's formal repeal of the freeze-frame policy "is plainly an unambiguous termination." *Id.* at 1261. Just like the government defendant there, the FDC "has not merely declined to enforce the [freeze-frame policy] against" Keohane in particular—so as, in effect, to give her a personalized exemption. *Id.* Rather, "it has removed the challenged portion" of the policy "in its entirety." *Id.* Indeed, the FDC has gone a step farther by replacing the old freeze-frame policy with a new protocol that provides for individualized evaluation. And as the FDC explained at oral argument, it would have to do some serious hoop-jumping to rescind the current, individual-assessment policy and reenact the former freeze-frame policy even if it wanted to do so. *See* Oral Argument at 4:23 (explaining the protracted administrative process that accompanies a formal policy change). Moreover—and again, just as in *Flanigan's*—the FDC has repeatedly "assured this Court . . . that it has no intention of reenacting" the freeze-frame policy. 868 F.3d at 1261–62; *see also* Br. of Appellant at 48–49; Oral Argument at 4:15, 4:55, 5:10, 5:15. "We have previously relied on such representations," and there is no evidence or history that would cause us to doubt them here. *Flanigan's*, 868 F.3d at 1262.[6]

[6] *Cf. Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994) ("Every lawyer is an officer of the court. And . . . he always

Finally, as to the third factor, we conclude that the FDC has "consistently maintained" and applied its new individualized-assessment policy. *Id.* at 1257. There is certainly no "pattern" of broken promises here of the sort that has concerned us in the past. *See, e.g.*, *Doe*, 747 F.3d at 1324. To the contrary, the FDC rescinded the freeze-frame policy in October 2016, immediately replaced it with a new policy that provides for personalized evaluation, and (so far as we can tell) hasn't looked back. In an effort to turn the consistent-application factor to her advantage, Keohane has asserted (and the dissent repeats, *see* Dissenting Op. at 51) that one inmate was denied hormone-therapy treatment pursuant to the freeze-frame policy even after its formal repeal. Tellingly, though, not even the district court found that lone instance probative, saying that it would be "hard pressed to find that evidence of one mistake in applying old policies—or, perhaps, one rogue doctor acting contrary to protocol—[was] sufficient" to demonstrate inconsistency. *Keohane*, 328 F. Supp. 3d at 1299.

At the end of the day, we're less concerned with the subjective question whether the initial reason for the government's decision was sincere than with the objective question whether there is any "substantial evidence indicating a reasonable likelihood that the [FDC] will reenact the challenged [freeze-frame policy] which it has now repealed" and replaced. *Flanigan's*, 868 F.3d at 1260. Evidence that the FDC realized and corrected its mistake a little late in the

---

has a duty of candor to the tribunal."); Model Rules of Prof'l Conduct r. 3.3 (Am. Bar Ass'n 1983) ("Candor Toward the Tribunal").

game in no way suggests that it would revert back to its old ways absent the injunction. All of the evidence, in fact, is squarely to the contrary. *Cf. Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late."). Accordingly, we hold that Keohane's challenge to the FDC's former freeze-frame policy is moot.

B

Second, hormone therapy. Keohane contends that the FDC's initial refusal to provide her with hormone-therapy treatment violated the Eighth Amendment. The district court agreed and entered an injunction (separate from the one prohibiting the reenactment of the freeze-frame policy) requiring the FDC to "provide Ms. Keohane with hormone therapy so long as it is not medically contraindicated." *Keohane*, 328 F. Supp. 3d at 1318.

On the merits, the question might be a close one. The record seems to indicate that the FDC knew that denying Keohane hormone therapy threatened a serious risk of self-harm—the grievances that she filed with prison officials expressly and repeatedly linked the two. And given the circumstances, it's possible that the FDC disregarded that risk "by conduct that [was] more than mere negligence." *Brown*, 387 F.3d at 1351.

Once again, though, we find that we cannot reach the merits because we conclude that Keohane's hormone-therapy-related challenge is moot. Approximately two weeks after Keohane filed suit—and even before it formally repealed the freeze-frame policy—the FDC referred her to an endocrinologist

who prescribed her hormone therapy, and she has been receiving hormone-therapy treatment ever since. Accordingly, the FDC contends that there is no longer any live controversy concerning Keohane's entitlement to hormone therapy.

As before, the mootness inquiry hinges on the application of the voluntary- cessation exception. And as already explained, under that exception "governmental entities and officials have . . . considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *Flanigan's*, 868 F.3d at 1256 (quoting *Coral Springs*, 371 F.3d at 1328–29). And even though here we consider the FDC's freestanding determination to provide Keohane hormone therapy—independent of its later repeal of the freeze-frame policy, which the district court enjoined separately—the governing principles remain basically the same. As we summarized in *Flanigan's*, "even where the intervening governmental action does not rise to the level of a full legislative repeal . . . 'a challenge to a government policy that has been unambiguously terminated will be moot in the absence of some reasonable basis to believe that the policy will be reinstated if the suit is terminated.'" *Id.* at 1256 (emphasis added) (quoting *Troiano*, 382 F.3d at 1285).

We find no "reasonable basis" to believe that, following a dismissal, the FDC would revert to refusing hormone therapy to Keohane. As with its repeal of the freeze-frame policy, we recognize that the timing of the FDC's decision to provide Keohane with hormone treatment—here, a mere two weeks after she filed suit—may well suggest a desire to eliminate potential liability. It seems scarcely debatable that the FDC hoped that by acceding to Keohane's request it

could avoid litigation. But again, we have clarified that timing considerations shouldn't be overemphasized in the voluntary-cessation analysis and, in any event, that alleged jurisdiction-manipulation is only one among several non-exhaustive factors that inform the inquiry. *See id.* at 1257–59. The remaining factors demonstrate that Keohane's hormone-therapy challenge, like her freeze-frame challenge, is indeed moot. Most notably, we are satisfied both (1) that the FDC's "decision to terminate the challenged conduct"—here, its reversal of its initial denial of hormone therapy—was "unambiguous" in the sense that it was "both permanent and complete," and (2) that the FDC "has consistently maintained its commitment" to Keohane's new course of treatment. *Id.* at 1257 (quotation omitted). The FDC has given us concrete assurances—in both word and deed—that it will continue to provide Keohane's hormone therapy. Not only has the FDC rescinded the freeze- frame policy pursuant to which it refused Keohane's early requests for hormone treatment, but its own doctors have concluded—and testified under oath—that Keohane's hormone therapy *is* medically necessary. And consistent with that view, since initially granting Keohane's request in September 2016, the FDC has faithfully provided her with hormone-therapy treatment and has repeatedly represented to us that it will continue to do so.[7]

The decision on which the district court principally relied in rejecting the FDC's mootness argument, *Doe v. Wooten*, actually provides a useful contrast here. There, an inmate filed suit alleging that

[7] *See supra* n.6.

two prison officials had acted with deliberate indifference to his serious need for protection after he assisted the Bureau of Prisons in an investigation of one of its own employees. 747 F.3d at 1321. Specifically, the officials promised the inmate that they would protect him and transfer him to a lower-security prison in exchange for his cooperation. *Id.* at 1320. Although he was briefly moved to a lower-security facility as promised, he was then, over the course of several years, repeatedly transferred to other high- security prisons where he was exposed as an informant and severely assaulted. *Id.* at 1320–21. After years of litigation and more questionable transfers, the BOP suddenly changed course and moved the inmate to a lower-security facility just days before the trial was set to begin—and then contended that the inmate's challenge was moot. *Id.* at 1321. We held that the BOP had failed to establish the unlikelihood of a recurrence for four basic reasons: (1) the BOP's ultimate transfer of the inmate to a lower-security prison so soon before trial strongly suggested that its motivation was solely to manipulate jurisdiction; (2) the BOP had a "pattern" of breaking its transfer-related promises; (3) the "mere fact" that the BOP was (at that moment, anyway) giving the inmate what he wanted wasn't enough to overcome its history of recurring misbehavior, and (4) the BOP "never said" that it wouldn't transfer the inmate back to a high-security prison. *Id.* at 1323–25.

As already noted, the *Doe* Court's first reason—that the timing indicated a desire to dispose of a lawsuit—may well apply here, too. But the other reasons are inapplicable—or more accurately, belied—in this case. There is no "pattern" of broken promises here; since acceding to Keohane's hormone-

therapy request in September 2016, the FDC has consistently provided her the treatment. And more than the "mere fact" that Keohane is currently being given hormone therapy, we have reasonable assurance that the FDC won't revert back to its previous posture; whereas in *Doe* the BOP had "never said" that it wouldn't backslide, the FDC has repeatedly represented that it will continue to provide Keohane with hormone therapy so long as her team "believes the hormones are medically necessary to treat her gender dysphoria." Br. of Appellant at 7–8.

In short, we conclude that there is no "reasonable basis" to believe that, if Keohane's hormone-therapy claim is dismissed, the FDC will reverse course and refuse to provide the treatment. Accordingly, we hold that Keohane's hormone-therapy-related claim is moot.

C

Lastly, social transitioning. Keohane asserts that the FDC is continuing to violate the Eighth Amendment by denying her requested social-transitioning- related accommodations—specifically, to grow out her hair, use makeup, and wear female undergarments. Unlike Keohane's arguments concerning the freeze-frame policy and hormone therapy, her social-transitioning claim unquestionably presents a live controversy, inasmuch as the FDC (for the most part, anyway) continues, to this day, to refuse her requests. Accordingly, we proceed to consider Keohane's social-transitioning-based challenge on the merits. In so doing, we review de novo the district court's ultimate determination "that there was an Eighth Amendment violation warranting equitable relief," and we review for clear

error any "[s]ubsidiary issues of fact." *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010).[8]

---

[8] We pause here to respond briefly (or perhaps not so briefly) to the dissent's extended critique of the standards of review that we apply. The dissent accuses us—vigorously and repeatedly— of ignoring the observation in *Thomas* that "[a] prison official's deliberate indifference is a question of fact which we review for clear error." 614 F.3d at 1312. We've done no such thing. As we trust the text demonstrates, we haven't endeavored to re-find any historical facts—*e.g.*, what happened, who knew what, how did they respond? *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways …."); *Goebert v. Lee County*, 510 F.3d 1312, 1327 (11th Cir. 2007) ("Disregard of the risk is also a question of fact that can be shown by standard methods."). Instead, we've simply done what *Thomas* commands us to do, and what the dissent itself recognizes we must do—apply "de novo review. . .to the district court's ultimate conclusion whether the objective and subjective elements of a deliberate- indifference claim state an Eighth Amendment violation." Dissenting Op. at 60.

The dissent seems to think that the clear-error standard's application in a deliberate- indifference case somehow supersedes and supplants the foundational rule that we, as an appellate court, must review de novo a district court's ultimate determination whether an Eighth Amendment violation has occurred. On the dissent's understanding, the de novo standard's sole office is to ensure that the district court puts "checkmarks" in the right boxes, and then doesn't make a truly boneheaded, asinine mistake:

> [I]f the district court, despite checkmarks in both the objective and subjective boxes, still concluded that there was no Eighth Amendment violation, we would lend no deference to this error. We would review it de novo, and would no doubt reverse. And if the district court, despite holding that one of the elements was not met, still concluded that there was an Eighth Amendment violation, we would do the same. We would review this error de novo, and no doubt reverse.

> *That* is the ultimate conclusion that we review de novo.

Id. at 61–62. *This* mindless, mechanical box-checking assessment cannot possibly be what we've meant when we have repeatedly held that de novo review applies to the district court's determination whether "there was an Eighth Amendment violation warranting equitable relief." *Thomas*, 614 F.3d at 1303.

Contrary to the dissent's suggestion, meaningful appellate review of a district court's ultimate constitutional holding follows straightaway from Supreme Court precedent prescribing de novo review of other application-of-law-to-fact questions—including those arising under the Eighth Amendment. *See United States v. Bajakajian*, 524 U.S. 321, 336–37 & n.10 (1998) (excessiveness of a fine); *see also, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435–36 (2001) (punitive-damages award); *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (probable cause and reasonable suspicion). District courts are undoubtedly better situated than appellate courts to make findings of historical fact, and their determinations with respect to those facts are accordingly entitled to deference. But what the Eighth Amendment means—and requires in a given case—is an issue squarely within the core competency of appellate courts. And to be clear, it's no answer to say, as the dissent does—citing Justice Scalia's solo *dissent* in *Ornelas*—that some issues underlying a deliberate-indifference claim may be "fact-specific and not easy to generalize." Dissenting Op. at 70 n.13. The Supreme Court recognized as much regarding the "mixed questions" in *Ornelas*, *Bajakajian*, and *Cooper*—and yet applied de novo review anyway. Just so here. *See generally Kosilek v. Spencer*, 774 F.3d 63, 68–69, 84–85 (1st Cir. 2014) (en banc) (rejecting the very same arguments being offered by the dissent in this case and holding that de novo, rather than clear-error, review governed a district court's ultimate determination that the Eighth Amendment required prison authorities to accommodate a transgender inmate's medical-treatment requests).

Now, having said all that, we hasten to add that nothing here rides on the applicable standard of review. Even if the deferential clear-error standard *did* apply (as the dissent suggests) in such a way as to render essentially meaningless the

Recall that a deliberate-indifference claim entails both an objective and a subjective component. As we have explained, the objective component is clearly satisfied here—all agree that Keohane's gender dysphoria constitutes a "serious medical need" within the meaning of Eighth Amendment precedent. *Brown*, 387 F.3d at 1351. The dispute here centers on the subjective component, which requires the plaintiff to show that prison officials (1) had actual "knowledge of a risk of serious harm" and (2) "disregard[ed]" that risk (3) by conduct that was "more than mere negligence." *Id.*

Although the parties vigorously debate whether the actual-knowledge prong is satisfied here, we needn't resolve that issue, because even assuming that FDC officials knew that Keohane was at risk of serious harm—thus satisfying the subjective prong's first factor—there is no basis for concluding that by denying her social-transitioning requests they disregarded that risk "by conduct that [was] more than mere negligence" and thereby violated the Eighth Amendment. That is so for two reasons.

First, as already explained, unlike with respect to hormone therapy, the testifying medical professionals were—and remain—divided over whether social transitioning is medically necessary to

---

de novo review that applies to the district court's ultimate determination whether an Eighth Amendment violation has occurred, we would have little trouble formulating the required "firm conviction that a mistake ha[d] been committed." *Silva v. Pro Transp., Inc.*, 898 F.3d 1335, 1339 (11th Cir. 2018) (quotation omitted). For reasons explained in text, the district court's determination—that the FDC "disregard[ed]" a risk of serious harm "by conduct that [was] more than mere negligence," *Brown*, 387 F.3d at 1351—was not just erroneous, but clearly so.

Keohane's gender-dysphoria treatment. Keohane's retained expert testified that it is. By contrast, the members of Keohane's medical-treatment team, Wexford's staff psychiatrist, the FDC's chief clinical officer, and the FDC's retained expert all testified that it isn't. The closest any of those witnesses got—not nearly close enough, it seems to us—was the FDC's expert's acknowledgment that social-transitioning, while not strictly medically necessary, would be "psychologically pleasing" to Keohane. *Cf. Harris*, 941 F.2d at 1511 n.24 ("[N]othing in the Eighth Amendment . . . requires that [inmates] be housed in a manner [that is] most pleasing to them." (quotation omitted)).[9] Keohane's medical-treatment team further concluded that requiring Keohane to comply with the FDC's policies regarding hair and grooming standards doesn't put her at a substantial risk of self-harm or severe psychological pain.

At worst, then, this is a situation where medical professionals disagree as to the proper course of treatment for Keohane's gender dysphoria, and it's well established that "a simple difference in medical

---

[9] We needn't dwell on the point, but we emphatically reject the dissent's suggestion that the Eighth Amendment requires the government—which is to say taxpayers—to fund any medical treatment that is "psychologically pleasing" to an incarcerated inmate. *See* Dissenting Op. at 82–85. Necessity, not pleasure, is the constitutional standard—and no amount of massaging can make those two things the same. And to be clear, it hardly renders the dissent's would-be standard more "sensible" to note that "gender dysphoria is . . . a psychological illness." *Id.* at 82. By the very same logic, the dissent would presumably conclude that the Eighth Amendment requires the provision of any treatment that is "*physically* pleasing"—not necessary, but pleasing—to address an inmate's *physical* illness. The possibilities are endless.

opinion between the prison's medical staff and the inmate as to the latter's diagnosis or course of treatment [cannot] support a claim of cruel and unusual punishment." *Id.* at 1505; *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989); *accord, e.g.*, *Lamb*, 899 F.3d at 1163 (holding that "disagreement alone" does not constitute deliberate indifference); *Kosilek*, 774 F.3d at 90 ("The law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of our court to second guess medical judgments or to require that the DOC adopt the more compassionate of two adequate options." (quotation omitted)).[10] Put simply, when the medical community can't agree on

---

[10] To be clear, because the district court awarded only prospective injunctive relief—as relevant here, in the form of an order directing the FDC to begin providing Keohane social-transitioning accommodations—the deliberate-indifference question must "be determined in light of the prison authorities' current attitudes and conduct," *i.e.*, "their attitudes and conduct at the time suit is brought *and persisting thereafter*." *Farmer*, 511 U.S. at 845 (emphasis added) (quoting *Helling v. McKinney*, 509 U.S. 25, 36 (1993)). It is irrelevant, therefore, that there was once a time— years ago now—when the FDC was refusing Keohane both hormone therapy and social- transitioning accommodations. As matters stood at the time the parties' witnesses testified before and during trial, and at the time the district court issued its injunction, Keohane was—and as things stand today, still is—receiving both mental-health counseling and hormone therapy, and is enjoying the use of female pronouns, safer housing accommodations, and private shower facilities. *See Kosilek*, 774 F.3d at 91 ("The subjective element of an Eighth Amendment claim for injunctive relief requires not only that [the plaintiff] show that the treatment she received was constitutionally inadequate, but also that the DOC was—*and continues to be*—deliberately indifferent to her serious risk of harm." (emphasis added)).

the appropriate course of care, there is simply no legal basis for concluding that the treatment provided is "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Harris*, 941 F.2d at 1505 (quotation omitted). Here, therefore, implementing the course of treatment recommended by Keohane's FDC medical team, and seconded by a number of other medical professionals, isn't "so unconscionable as to fall below society's minimum standards of decency"—and thus violative of the Eighth Amendment—merely because it conflicts with the opinion of Keohane's retained expert. *Kosilek*, 774 F.3d at 96.[11]

[11] The several decisions concluding that prison officials acted with deliberate indifference to a transgender inmate's serious medical need are distinguishable in three important ways. *First*, in each of those cases there appeared to be general (and consistent) consensus among the inmate's medical providers that a particular treatment was medically necessary. *See, e.g., Soneeya*, 851 F. Supp. 2d at 250 (inmate's providers consistently recommended feminization). As explained in text, that's not the case with respect to Keohane's social-transitioning requests; indeed, the district court's own finding—that before Keohane filed suit her treatment team couldn't reach a consensus about the medical necessity of her social-transitioning requests—actually undermines its deliberate-indifference conclusion. *Second*, in those cases the prison officials denied treatment based on a blanket policy without exception for medical necessity. *See, e.g.*, *id.* at 249–50. Here, while that was once the case, the FDC has since rescinded its freeze-frame policy and has clarified that it will make exceptions for social-transitioning-related requests if deemed medically necessary. *Third*, in those cases it was clear that the current course of treatment was insufficient because the gender-dysphoria symptoms persisted or even worsened. *See, e.g.*, *id.* at 250; *see also Hicklin*, 2018 WL 806764, at *11–13. Here, to the contrary, the evidence indicates that Keohane's symptoms improved after she was prescribed hormone therapy, which she continues to receive.

Second, the FDC denied Keohane's social-transitioning-related requests, at least in part, on the ground that they presented serious security concerns— including, most obviously, that an inmate dressed and groomed as a female would inevitably become a target for abuse in an all-male prison. "When evaluating medical care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight." *Id.* at 83; *see also Helling v. McKinney*, 509 U.S. 25, 37 (1993) ("The inquiry into [the subjective] factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration."); *Evans v. Dugger*, 908 F.2d 801, 806 (11th Cir. 1990) ("[P]rison officials operate[] under a mandate to provide for [physical and medical] needs while simultaneously assuring the safety and security of [inmates]."). As the Supreme Court has long recognized, "[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Accordingly, even an outright "denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prisoner safety and institutional security." *Kosilek*, 774 F.3d at 83.[12] That

[12] To the extent that the dissent suggests that "denying treatment for non-medical reasons"— including for reasons of institutional security—always and everywhere "arises to subjective deliberate indifference," Dissenting Op. at 72, we disagree. The lone case that the dissent cites for that proposition—*McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999)—had nothing to do with prison security. And we think it inconceivable that the Eighth Amendment could be read to

is all the more true where, as here, the inmate has not been refused care entirely, but has instead been given a meaningful course of treatment that includes many (if not all) of the components that she originally sought.[13]

The First Circuit's en banc decision in *Kosilek v. Spencer* is especially instructive here. There, as here, a transgender inmate who was suffering from gender dysphoria—and who had attempted both to castrate herself and to commit suicide—alleged that the treatment she was receiving in prison violated the Eighth Amendment. 774 F.3d at 68–69. There, as here, the inmate was getting some, but not all, of the treatment she wanted; in particular, while the prison was providing her with mental-health counseling, hormone therapy, and gender-appropriate clothing, it had persistently refused her requests for sex-

---

disable prison administrators from refusing an inmate's treatment request on the ground that it would threaten safety and security.

[13] The district court declined even to address the security issue—calling it a "red herring"—on the ground that the FDC had entered into a pretrial stipulation that it would accommodate Keohane's social-transitioning requests if they were deemed medically necessary. On appeal, Keohane likewise asserts that the stipulation "begins and ends the discussion of security in this case." The point, seemingly, is that if the FDC has promised to meet Keohane's social- transitioning demands if necessary, prison security must not be as serious an issue as the FDC contends. What this argument ignores is that the FDC's stipulation expressly clarified that even if it did become necessary to accommodate Keohane's requests, "additional security measures [would be] taken" as needed. So, far from admitting that Keohane's social-transitioning requests present no meaningful security concerns, the FDC has simply said that if it became necessary to do so, it would address the newly presented security issues in new and different ways.

reassignment surgery. *Id.* at 69–70. There, as here, the testifying medical professionals disagreed about whether a constitutionally adequate course of treatment required the prison to grant the inmate's remaining request. *Id.* at 74–79. There, as here, prison officials had raised security-related concerns about accommodating the inmate's demand. *Id.* at 79–81. And finally, there, as here, the district court had "issued an extensive opinion" concluding (1) that the inmate's gender dysphoria constituted a "serious medical need," (2) that "the only adequate way to treat" her condition was by granting all of her requests—including, there, for sex-reassignment surgery—and (3) that the prison officials' "stated security concerns were merely pretextual." *Id.* at 81.

The First Circuit framed the question before it in terms that apply equally here: "[W]e are faced with the question whether the [prison's] choice of a particular medical treatment is constitutionally inadequate, such that the district court acts within its power to issue an injunction requiring provision of an alternative treatment—a treatment which would give rise to new concerns related to safety and prison security." *Id.* at 68. Notwithstanding the "extensive[ness]" of the district court's determinations, the First Circuit reversed. In so doing, the en banc court emphasized that "[t]he law is clear that where two alternative courses of medical treatment exist, and both alleviate negative effects within the boundaries of modern medicine, it is not the place of [a reviewing] court to second guess medical judgments or to require that [prison officials] adopt the more compassionate of two adequate options." *Id.* at 90 (quotation omitted). The First Circuit also stressed the "wide-ranging deference" to

which prison administrators are entitled when making safety and security assessments. *Id.* at 83, 92 (quotation omitted). Concluding, the court held (1) that prison authorities "ha[d] chosen to provide a form of care that offer[ed] direct treatment" for the inmate's gender dysphoria and (2) that they had "done so in light of the fact that provision of" the inmate's preferred treatment "would create new and additional security concerns— concerns that do not presently arise from its current treatment regimen." *Id.* at 96.

Kosilek is closely (if not quite exactly) on point here. The FDC has given Keohane some, but not all, of what she wants—although it has denied her social-transitioning requests (at least as they pertain to clothing and grooming), it has provided mental-health counseling, hormone therapy, the use of female pronouns, safer housing accommodations, and private shower facilities. And like the prison officials in *Kosilek*, the FDC has struck that balance both because Keohane's treatment team has determined that her current regimen is sufficient to treat her gender dysphoria and because it has rationally concluded that her social- transitioning requests—to dress and groom herself as a woman—would present significant security concerns in an all-male prison.[14]

---

[14] Rather than *Kosilek*, the dissent embraces the Ninth Circuit's recent decision in *Edmo v. Corizon*, Inc., 935 F.3d 757, 767 (9th Cir. 2019), which held that a state prisoner suffering from gender dysphoria was constitutionally entitled to state-funded sex-reassignment surgery. *See* Dissenting Op. at 90 ("The Ninth Circuit got it right ...."). In ruling the way it did, though, the Ninth Circuit emphasized that the state there had "not so much as allude[d] to" any of the sorts of security concerns that the FDC has raised here. *Edmo*, 935 F.3d at 794 ("Our approach mirrors the First Circuit's [in *Kosilek*], but the important factual differences between cases yield different outcomes. Notably, the

Bottom line: In light of the disagreement among the testifying professionals about the medical necessity of social transitioning to Keohane's treatment and the "wide-ranging deference" that we pay to prison administrators' determinations about institutional safety and security, *Bell*, 441 U.S. at 547, we simply cannot say that the FDC consciously disregarded a risk of serious harm by conduct that was "more than mere negligence" and thereby violated the Eighth Amendment, *Brown*, 387 F.3d at 1351. Rather, it seems to us that the FDC chose a meaningful course of treatment to address Keohane's gender-dysphoria symptoms—treatment that, while perhaps different from (and less than) what Keohane preferred, is sufficient to clear the low deliberate-indifference bar. For better or worse, prisoners aren't constitutionally entitled to their preferred treatment plan or to medical care that is great, "or even very good." *Harris*, 941 F.2d at 1510; *see also Lamb*, 899 F.3d at 1162 ("[P]rison officials do not act with deliberate indifference when they provide medical treatment even if it is subpar or different from what the inmate wants."). So long as the care provided isn't "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness," then the Eighth Amendment is satisfied. *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986); *Harris*, 941 F.2d at 1505. We are confident that the care here passes constitutional muster.[15]

---

security concerns in *Kosilek*, which the First Circuit afforded 'wide- ranging deference,' are completely absent here. The State does not so much as allude to them." (citation omitted)).

[15] A brief word about the dissent's repeated refrain (echoing the district court) that Keohane's treatment team was "incompetent." *See* Dissenting Op. at 79–81, 84, 90; *see also*

*   *   *

One final word: This is a case that stirs emotions. And understandably so— the question whether and to what extent Florida prison officials must accommodate Keohane's gender dysphoria is a sensitive one, on both sides of the "*v*." Our dissenting colleague's opinion is passionate and heartfelt, as is evident from its rhetoric. He accuses us, among other things, of "usurp[ing]" (and alternatively "commandeer[ing]" and "annexing") the district court's role (Dissenting Op. at 41, 53, 86), "rearrang[ing] the record" to suit our own desires (*id.* at 41), strategically "ignoring" bad facts while focusing on those we "like[] better" (*id.* at 53), "pluck[ing]" favorable tidbits from cases (*id.* at 54), and—the coup de grâce— "shak[ing] the magic 8-ball until it gives us" a result we want (*id.* at 92). Needless to say—and

---

Keohane, 328 F. Supp. 3d at 1307, 1316. The nub of the dissent's critique seems to be that "no member of Keohane's treatment team had ever treated" someone in Keohane's precise situation—*i.e.*, "a pre-transition patient with gender dysphoria"—and that the team members hadn't been trained specifically in the "World Professional Association for Transgender Health" standards. Dissenting Op. at 79. Respectfully, the dissent sets the constitutional bar entirely too high. To repeat what we've just said—because it bears repeating—the medical care provided to prisoners needn't be "perfect, the best obtainable, or even very good." *Harris*, 941 F.2d at 1510 (quotation omitted). In the same vein, we have held that "[m]inimally adequate care usually requires minimally competent physicians." *Id.* at 1509. Keohane's treatment might not have been "perfect," but it wasn't conscience-shocking either, and her treatment-team members might not have had specialties (or particularized experience) in caring for "pre-transition patient[s] with gender dysphoria," but they were (at the very least) "minimally competent."

with all due respect—we don't think that we've done any of those things.

Make no mistake, we too have sympathy for Ms. Keohane, and we too regret her predicament. But our first obligation—our oath—is to get the law right. *See* 28 U.S.C. § 453. And our best understanding of the law is that—for better or worse—it simply does not entitle Ms. Keohane to additional relief. Our dissenting colleague, of course, sees things differently. But let us pause briefly to consider the implications of his position:

- First, on his view, the Constitution should be read to require prison officials to provide every convicted inmate—at taxpayer expense—with any treatment that is "psychologically pleasing." *See* Dissenting Op. at 82–85. That cannot possibly be the law.
- Second, on his view, the Constitution should be read to require prison officials to provide every convicted inmate—again, at taxpayer expense— with doctors who have particularized experience (perhaps even a specialty) in dealing with his or her precise condition, no matter how rare. *See* Dissenting Op. at 79–81. Again—inconceivable.
- Finally, on his view, the Constitution should be read to prohibit prison authorities from making a prophylactic judgment that housing a transitioning *woman*—wearing long hair, female undergarments, and makeup—in a *men's* prison simply poses too grave a threat to institutional security. *See* Dissenting Op. at 74–79. We just don't think so.

This is a difficult case—no doubt. While we respect our dissenting colleague's fervor, we find ourselves constrained to disagree with his conclusions, which, we think, would precipitate sweeping changes in the law of prison administration.

III

For the foregoing reasons, we hold that Keohane's challenges to the FDC's former freeze-frame policy and its initial failure to provide her with hormone therapy are moot, and we reject on the merits her claim that the FDC violated the Eighth Amendment by refusing to accommodate her social-transitioning-related requests.

We **VACATE** the district court's order, **DISMISS AS MOOT** in part, and **REVERSE** in part.

WILSON, Circuit Judge, dissenting:

The majority has usurped the role of the district court. In a painstaking, 61- page order, the district judge made detailed factual findings, concluding from them that Keohane's claims were not moot and that the FDC was liable for deliberate indifference. We must review those findings with great deference, disregarding them only if clearly erroneous. But the majority does not apply ordinary clear- error review, as we might in a sentencing case or an employment dispute. Instead, the majority steps into the district court's shoes to reweigh the facts, reassess credibility determinations, and rearrange the record to reach a different result. *See Mach. Rental Inc. v. Herpel (In re Multiponics, Inc.)*, 622 F.2d 709, 723 (5th Cir. 1980) ("Merely because a reviewing Court on the same evidence may have reached a different result will not justify setting a finding aside.").[1]

That is not our role. The clearly erroneous standard is weighty for a reason: It reflects the "unchallenged superiority of the district court's factfinding ability" and its capacity "to judge . . . the credibility of the witnesses." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). We cannot simply supplant the district court's findings with our own. And yet that is what the majority does here.

Since the district court's findings have substantial footing in the record, I would accept them. And given those findings, none of Keohane's claims are moot, and the FDC was deliberately indifferent to

[1] In *Bonner v. City of Prichard*, we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

her gender dysphoria when it failed to provide her with social-transitioning treatment.

One brief note before we begin: The majority cites language from my dissent to suggest that I have let the emotions surrounding this issue sway my opinion. The majority quotes me correctly; I have strong words about its analysis. But make no mistake—any fervor in the text below stems not from the facts of this case, but from the majority's misapplication of our precedent.

I.

First, mootness. Federal courts decide only "live" controversies. *See Troiano v. Supervisor of Elections in Palm Beach Cty., Fla.*, 382 F.3d 1276, 1281– 82 (11th Cir. 2004). A case is no longer live, and is thus moot, when a court can no longer grant "meaningful relief" to the challenging party. *Id.* at 1282. This can happen when allegedly unlawful conduct ceases, but a party's "voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000). This is because the defendant might simply return to its "old ways." *Troiano*, 382 F.3d at 1283. A defendant "claiming that its voluntary compliance moots a case" thus bears the "formidable" and "heavy" burden of "showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Doe v. Wooten*, 747 F.3d 1317, 1322 (11th Cir. 2014); *see also Harrell v. Fla. Bar*, 608 F.3d 1241, 1268 (11th Cir. 2010).

That analysis is a little different for the government, though. Government actors are more likely to "honor a professed commitment to changed

ways" and get "more leeway than private parties in the presumption that they are unlikely to resume illegal activities." *See Doe*, 747 F.3d at 1322; *Troiano*, 382 F.3d at 1283. As a result, this court has held that when the government "unambiguously terminat[es]" challenged conduct, we presume that the conduct will not begin again. *Doe*, 747 F.3d at 1322. It has also held that the "government actor is entitled to this presumption only *after* it has shown unambiguous termination of the complained of activity." *Id.*

Our case law, however, has shifted slightly from this framing. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1257 (11th Cir. 2017) (en banc), *cert. denied sub nom. Davenport v. City of Sandy Springs, Ga.*, 584 U.S. ___, 138 S. Ct. 1326 (2018). We used to ask first whether the government had "unambiguously terminated" its conduct before we would apply the presumption against recurrence; if it did, the burden would shift to the plaintiff to prove that there was a reasonable basis to believe that the challenged conduct would renew. *See Doe*, 747 F.3d at 1322. Now we ask only "whether the evidence leads us to a reasonable expectation that the [government] will reverse course and reenact the allegedly offensive [conduct]" should the court dismiss the case. *See Flanigan's*, 868 F.3d at 1256.[2] As before,

---

[2] There was good reason to do away with the unambiguous-termination two-step. Our prior unambiguous-termination analysis ran confusingly parallel to other standards for deciding mootness after the government's voluntary cessation. *Compare Doe*, 747 F.3d at 1322–23 (holding that the unambiguous-termination test is the proper standard for deciding whether a case is moot after the government's voluntary cessation), *with Troiano*, 382 F.3d at 1283–84 (holding that whether "there is a substantial likelihood that the offending policy will be reinstated if the suit is terminated" is the proper standard for deciding

we rely on three broad and non-exclusive factors to help us answer this question. *See id.* at 1257.

"First, we ask whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction." *Id.* The "timing" of the cessation is highly relevant to this inquiry. *See id.* So are the government's reasons for its delayed action and change of heart. *See id.* at 1260; *Doe*, 747 F.3d at 1323. A "defendant's cessation before receiving notice of a legal challenge weighs in favor of mootness, while cessation that occurs 'late in the game' will make a court more skeptical of voluntary changes that have been made." *Harrell*, 608 F.3d at 1266 (citation omitted) (internal quotation mark omitted). Similarly, a "well-reasoned justification for the cessation" is critical evidence "that the ceasing party intends to hold steady in its revised (and presumably unobjectionable) course." *Id.* In contrast, the government's inconsistent and unsupported position changes tend to show a lack of substantial deliberation. *See Doe*, 747 F.3d at 1325–26.

---

whether a case is moot after the government's voluntary cessation). The unambiguous-termination analysis was also redundant in two ways. For one, the first of the three factors for determining whether the government unambiguously terminated its conduct was, paradoxically, whether the government unambiguously terminated its conduct. *See Doe*, 747 F.3d at 1322–23. For another, the three factors that went into the unambiguous-termination analysis were the same factors that went into the later reasonable-basis-for-recurrence analysis, making the second step effectively redundant. *See id.* By streamlining the test to focus on the broad factors we've typically relied on, our en banc court eliminated this redundancy while reaffirming that the government must still unambiguously terminate its conduct to survive the voluntary-cessation analysis. *See Flanigan's*, 868 F.3d at 1257.

"Second, we ask whether the government's decision to terminate the challenged conduct was unambiguous." *Flanigan's*, 868 F.3d at 1257 (internal quotation mark omitted). The question here is "whether the actions that have been taken to allegedly moot the case reflect a rejection of the challenged conduct that is both permanent and complete." *Id.* As with the first prong, the "timing and content of the decision" are highly relevant to whether the government has decidedly abandoned prior conduct. *See Harrell*, 608 F.3d at 1266. So is the government's refusal to admit that its prior position was wrong. *See, e.g.*, *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1187 (11th Cir. 2007) (holding that a case was not moot despite voluntary cessation in part because the government had not admitted that its conduct was wrong); *ACLU v. Fla. Bar*, 999 F.2d 1486, 1494–95 (11th Cir. 1993) (same when the government had not admitted that a prior rule was wrong).[3] As are the

---

[3] The majority says that the government's current beliefs about the constitutionality of its action have "little, if anything" to do with the voluntary-cessation analysis. Majority Op. at 19–20. That is an overstatement. To be sure, *Flanigan's* concluded that the government's current beliefs there provided "only weak evidence, if any" that its termination was unambiguous. 868 F.3d at 1262. Yet we did not blink this consideration out of existence (and overrule years of precedent in the process). *See Sheely*, 505 F.3d at 1187; *ACLU*, 999 F.2d at 1494–95. Rather, we noted that this evidence in *Flanigan's* paled alongside strong evidence of unambiguous termination, including a public repeal and a unanimous and public adoption of a resolution supporting the repeal. *See* 868 F.3d at 1262. As I explain below, we have none of those safeguards here. *See infra* at 52–56. We have long known that a party is more likely to pursue a practice it believes is lawful than one it thinks is not. *See Sheely*, 505 F.3d at 1187; *ACLU*, 999 F.2d at 1494–95. So the FDC's current beliefs hold weight in the unambiguous-termination analysis.

government's assurances that it will steer clear of prior conduct. *See Flanigan's*, 868 F.3d at 1261–62. But this point is key: The government's promises are not a trump card. They can prove hollow under the weight of other evidence. *See Sheely*, 505 F.3d at 1184 (noting that a party's assertion "that it has no intention of reinstating the challenged practice" does not suffice to moot a case and is merely "one of the factors" to consider).

"Third, we ask whether the government has consistently maintained its commitment to the new policy or legislative scheme." *Flanigan's*, 868 F.3d at 1257. We are also "more likely to find a reasonable expectation of recurrence when the challenged behavior constituted a continuing practice or was otherwise deliberate." *Doe*, 747 F.3d at 1323.

Although these factors lend helpful guidance, they are not the be-all and end-all. When considering government cessation, including "a full legislative repeal of a challenged law—or an amendment to remove portions thereof—these factors should not be viewed as exclusive nor should any single factor be viewed as dispositive." *Flanigan's*, 868 F.3d at 1257. "Rather, the entirety of the relevant circumstances should be considered and a mootness finding should follow when the totality of those circumstances persuades the court that there is no reasonable expectation that the government entity will reenact the challenged [policy]." *Id.* In other words, though the formal repeal of a policy or practice often goes a long way toward showing that the government won't turn heel, it is not always determinative; other facts can call the repeal into doubt. *See Doe*, 747 F.3d at 1323 (noting that the cessation "analysis may vary depending on the facts" of each case).

Finally, although we consider the voluntary-cessation analysis de novo, we review the factual findings that play into this analysis for clear error. *Troiano*, 382 F.3d at 1282. The FDC, as the appellant, must prove that these findings are clearly erroneous. *See Thelma C. Raley, Inc. v. Kleppe*, 867 F.2d 1326, 1328 (11th Cir. 1989). Under clear-error review, we must defer to the district court's factual findings and credibility determinations, as that court "had the advantage of observing the witnesses and evaluating their credibility firsthand." *Hiram Walker & Sons, Inc. v. Kirk Line*, 30 F.3d 1370, 1376 (11th Cir. 1994). The district court's findings bind us "unless, in view of the entire record, we are left with a definite and firm conviction that a mistake has been committed." *Pelphrey v. Cobb Cty., Ga.*, 547 F.3d 1263, 1268 (11th Cir. 2008). A "mistake," however, is not merely a difference in judgment. *See Multiponics*, 622 F.2d at 723. As an appellate court, we cannot set aside a finding just because we would "have reached a different result." *Id.*

A.

The district court held that the FDC failed to show under the factors that "the allegedly wrongful behavior could not reasonably be expected to recur." *Doe*, 747 F.3d at 1322. Its analysis rested on a collection of careful factual findings. Since these findings have substantial support in the record, I accept them. And given their persuasive weight, I conclude that there is a reasonable basis to believe that the FDC will return to its old ways.

First up is substantial deliberation or jurisdictional manipulation. The district court held that the FDC retreated from the challenged conduct—

both its freeze-frame policy and its refusal to treat Keohane with hormone therapy—only to manipulate jurisdiction. Many findings compel this result.

One is timing. As the majority concedes, the timing of the FDC's termination muddies the waters around its cessation, and the timing on this point is key. *See Flanigan's*, 868 F.3d at 1257. For more than two years, the FDC refused to treat Keohane with hormone therapy under the freeze-frame policy. But less than a month after Keohane filed this lawsuit, the FDC gave her hormone therapy. And within about two months, it repealed the freeze-frame policy.

The district court reasonably found these fourth-quarter concessions suspect—they suggest that the FDC only changed its ways to silence litigation. *See Doe*, 747 F.3d at 1325. Its murky motives "create[] ambiguity" about the FDC's commitment to its changes and about whether the FDC will reoffend in the future. *See Rich v. Sec'y, Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013).

Dubious timing was not all the district court relied on. Alongside a suspicious sequence of events, the court also doubted the FDC's deliberation because the FDC took inconsistent positions throughout the case and could not explain its prolonged delay or sudden change of heart. *See Doe*, 747 F.3d at 1325–26; *Harrell*, 608 F.3d at 1266.

To start, the district court found that the FDC had flip-flopped about its policy and practices throughout the litigation—a finding that no one disputes. Then, after the FDC reluctantly changed its ways, the court found that the FDC could not explain why it had done so. The FDC provided no minutes, no memoranda, and no testimony to show that it had

thoughtfully considered its policy shifts. *See Harrell*, 608 F.3d at 1267 (holding that the government's retreat from challenged conduct did not moot a case in part because the government failed "to disclose any basis for its decision," making it unclear whether the decision was "well-reasoned and therefore likely to endure" (internal quotation mark omitted)). The FDC's only explanation for its turnaround was that its general counsel had found some "case law" on the subject. Yet the FDC provided no support for this justification. It did not identify what case law called for the changes, who at the FDC compelled the changes, or what procedures went into making the changes. In short, the only evidence the FDC gave to show that it had engaged in substantial deliberation was its word that it had engaged in substantial deliberation.

For these reasons, the district court *found* that the FDC's justification for its policy shifts was incredible and pretextual. The court also *found* that the FDC had taken inconsistent positions and had been hasty in its decision-making. These findings led the district court to conclude that the FDC shifted its policy and practice for one purpose: to manipulate jurisdiction. The majority does not claim that any of these findings leave it with a "definite and firm conviction" that the district court made a "mistake." *Pelphrey*, 547 F.3d at 1268. Nor could it—they have substantial record support. *See supra* at 48–50. Given these detailed findings, there is only one conclusion: The FDC shied away from its former ways not to make amends, but to manipulate jurisdiction.

Second is whether the FDC unambiguously terminated its freeze-frame policy and practice of denying Keohane hormone therapy. As before, the

"timing and content" of the FDC's reversal is crucial. *See Harrell*, 608 F.3d at 1266. The district court found the FDC's timing suspect, its reasons dodgy, and its process a mystery. *See supra* at 48–50; *Harrell*, 608 F.3d at 1266; *Doe*, 747 F.3d at 1325–26. It also found its obstinance telling. Because even after the FDC turned heel, it still refused to admit the error in its ways. *See Sheely*, 505 F.3d at 1187. It continued to argue that hormone therapy is not constitutionally required for treating Keohane's gender dysphoria—words that contradict its actions and the "case law" that spurred the FDC into motion. In fact, the FDC still hasn't admitted that its practices violated the Constitution, and it refused to do so at oral argument. See Oral Argument at 1:40; *Sheely*, 505 F.3d at 1187.

The record supports these findings. The majority does not claim them clearly erroneous. So I am hard pressed to see how anyone could conclude, given these findings of fact, that the FDC's termination was unambiguous. Properly confined to the district court's findings, I conclude, as that court did, that the FDC's termination was hazy at best.[4]

Third, then, is inconsistency. The district court found that, even after the FDC repealed the freeze-frame policy, the FDC withheld hormone therapy from at least one other inmate under the freeze-frame policy.[5] The court also found that, even after the FDC

---

[4] In this step, the majority analyzes the repeal of the policy and the government's promise not to revert to it old ways. Since those issues are relevant to my analysis of *Doe* and *Flanigan's*, *see infra* at 52–56, I will discuss them there to avoid repetition.

[5] The majority claims that the district court did not find this "lone [inconsistent application] probative" to the mootness analysis. Majority Op. at 21–22. But the majority is incorrect. The district court relied on this evidence to conclude that the FDC failed to

began giving Keohane hormone therapy, the FDC delayed in providing her hormone therapy. This delay caused her to attempt suicide twice in three days. The record also shows that the delays would have been more frequent had she not vigilantly pursued her treatment.

Like canaries in a coal mine, these deviations warn that the FDC is not as dedicated to its new positions as the majority would have us believe. And these instances were not mere anomalies. They were new applications of the FDC's prior practices—practices that were not mere blips, but were "continuing" and "otherwise deliberate." *See Doe*, 747 F.3d at 1323. For these reasons, the district court held that this factor cut against the FDC. The majority, as before, does not question the evidence that the court relied on. Nor does it hold that the court clearly erred in finding that the FDC delayed in providing hormone therapy and applied the freeze-frame policy after its repeal. Given these uncontested facts, I agree with the district court that the last factor cuts against mootness.

---

establish an unambiguous termination. *See Keohane v. Jones*, 328 F. Supp. 3d 1288, 1300 (N.D. Fla. 2018) ("Given [a host of other reasons] and at least one instance of inconsistent application of the new policy, this Court finds Defendant has failed to establish an 'unambiguous termination' …." (emphasis added)). True, the district court said that it would be "hard pressed to find that evidence of one mistake . . . is sufficient" standing alone to find against the government. *Id.* at 1299. But it noted that this evidence doesn't stand alone; "this drop of evidence only adds to the tidal wave of other circumstances crashing down on [the FDC's] mootness argument." *Id.* So contrary to the cropped picture the majority presents, the full frame shows that the district court *did* rely on this information, as should we.

B.

If we were conducting a typical mootness review, the district court's unchallenged findings would lead us to the same conclusion that the district court reached. But rather than lend due weight to the district court's findings, the majority commandeers the district court's role, ignoring that court's conclusions while focusing us on the facts it likes better. To do so, it places a heavy emphasis on the repeal of the policy, and it takes solace in the FDC's oral-argument assurance that it will stay on the straight and narrow. The majority then strictly stacks this case up against the facts of *Doe* and *Flanigan's*, concluding that there is no reasonable expectation of recurrence. That analysis is wrong for four reasons.

First, the repeal of the freeze-frame policy does not deliver a de facto win for the government. A repeal, to be sure, is "often" determinative of unambiguous termination, *see Doe*, 747 F.3d at 1322, but the key word is "often." When the weight of the other facts suggests that the government's moves were ambiguous, inconsistent, and made to manipulate jurisdiction, there is reason to fear that the government will veer from its new course. Relying on a sea of red flags, the district court found that this was exactly the case—that the government's reasons for its repeal didn't add up, and that it was thus unclear whether its old ways were gone for good. The majority again does not hold that any of the court's findings are clearly erroneous.[6] And given these

[6] In fact, the FDC even concedes that the district court's findings are *not* clearly erroneous. *See* Oral Argument at 13:40–14:50 (conceding in response to a question about the clearly erroneous standard that we should "just give the judge those factual

findings, the only reasonable conclusion under the factors is that Keohane's claims are not moot. *See id.* at 1322–23.

Second, though the majority contends that this case is a clone of *Flanigan's*, it clouds key parts of the picture. The City Council in *Flanigan's* "twice voted on the relevant remedial measures," "put forth persuasive explanations that [were] not dependent upon [the] litigation," and unanimously repealed the policy in "open session during regularly scheduled meetings." 868 F.3d at 1260. The City also had a "long history of non-enforcement," which, "coupled with the recent repeal, indicate[d] the commitment to [its] new legislative scheme." *Id.* at 1263 n.10.

We have none of that. We have no idea how many times the FDC considered these policy shifts—it didn't tell us. We have no persuasive explanation for its about-face—it gave us none, and it met behind closed doors. *See Harrell*, 608 F.3d at 1267. And we have no history of looking the other way— the FDC, until this litigation, enforced these policies to their fullest extent. Simply put, *Flanigan's* was a case in which the government publicly replaced—with good reasoning—a rule that it never enforced. Ours is a case in which the government privately replaced—with no reasoning—a rule that it enforced daily. Apples to oranges; *Flanigan's* to *Keohane*.

Third, although the majority says that our facts differ from the facts it plucks from *Doe*, this case is closer to *Doe* than the majority admits. For instance, the majority claims that, in *Doe*, the government had

---

findings" and move on to the legal merits of the deliberate-indifference analysis).

a "pattern" of breaking its promises to the plaintiff, but here there is no history of broken promises. Though we may not have explicit broken promises, we have a substantial comparator: The FDC has consistently defended its old policies and inconsistently applied its new ones. Its inconsistencies and contradictions raise the same flags as broken promises—they cast doubt on the FDC's shaky commitment to its newfound path.

Finally, the majority draws a line through this case, *Doe*, and *Flanigan's*, because here (like *Flanigan's* and unlike *Doe*) the government has assured us that it will not revert to its old ways. But those assurances do not deserve the weight the majority gives them. For one thing, the district court *found* that the FDC never made this assurance about the freeze-frame policy, *see Keohane*, 328 F. Supp. 3d at 1300, and taking the FDC's lawyer's word at the final hour over the district court's finding again ignores clear-error review. Equally important, the City Council in *Flanigan's* backed up its oral-argument statements with actual statements: It passed a resolution "expressly disavowing any intent to reenact the Ordinance or any similar regulation." 868 F.3d at 1262 (alterations accepted) (internal quotation mark omitted). This, coupled with the City's "alternative reasons for the repeal" and "history of non-enforcement," assured us that the City would keep its promise. *See id.* at 1263. The FDC, in contrast, has offered no security to guarantee its claims. And contrary to the majority's view, there is "evidence or history that would cause us to doubt them here": a record teeming with temperamental positioning, clandestine decision-making, all-too-

convenient timing, and an adamant refusal to admit the error of its ways. *See id.*[7]

*   *   *

The majority quips that wisdom "often never comes, and so one ought not to reject it merely because it comes late." But the district court didn't find that wisdom had come late; it found that wisdom had never come at all. It concluded that the FDC's reversals were born of desperation, not deliberation. And its holding stood on a host of findings: that the timing of the FDC's concessions was suspect; that the FDC had no explanation for its delay; that the FDC's positions throughout the litigation were inconsistent; that the FDC's decision-making was a black box; that the FDC's prior practices were not accidental, but deliberate and historical; that the FDC refused to promise that it would not re-enact the freeze- frame policy; that the FDC still was adamant that its practices were valid, even after it claimed to change its ways; that the FDC delayed in providing Keohane's hormone therapy, even after it agreed that she needs it; and that, on at least one occasion, the FDC applied the repealed freeze-frame policy to bar hormone therapy for a patient with gender dysphoria.

---

[7] The majority also emphasizes the supposed hoops the FDC would need to jump through to bring back the policy, but a review of the oral-argument recording reveals that all it would take is a run-of-the-mill internal review. *See* Oral Argument at 4:23. Apparently, this doesn't take awfully long, given that the FDC changed the freeze-frame policy in just two-months' time. So the protection that these procedural hurdles offer is slight, if any at all.

As the majority does not hold that any of these findings are clearly erroneous, they bind us. *See Pelphrey*, 547 F.3d at 1268. And these findings show that the FDC has not apologetically turned over a new leaf, but has acted to manipulate jurisdiction. I would affirm the district court's holding that these claims are not moot.[8]

II.

Next, the merits of the social-transitioning claim. The Eighth Amendment bars a prison official from being deliberately indifferent to a serious medical need. *See Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). A deliberate- indifference claim thus has two components: an objectively serious medical need, and subjective deliberate indifference to that need. *See id.* We review de novo the district court's ultimate conclusion that there was an Eighth Amendment violation warranting equitable relief, and we review issues of fact supporting this conclusion for clear error. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1349 (11th Cir. 2009).

An objectively serious medical need is "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003). We review the legal conclusion

---

[8] As for the merits of these claims, I agree with the majority that the FDC was deliberately indifferent to Keohane's serious medical need when it subjected her to the freeze-frame policy. I would also affirm that the failure to provide hormone therapy, despite Keohane's undisputed need for the therapy, arises to deliberate indifference. Because the majority does not dispute these conclusions, I will not analyze them further.

that a medical need is objectively serious de novo. *See Thomas v. Bryant*, 614 F.3d 1288, 1307 (11th Cir. 2010).[9] Because both sides and the majority agree that gender dysphoria is an objectively serious medical need, only the subjective element is in dispute.

To establish subjective deliberate indifference, a plaintiff must show "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence." *Brown*, 387 F.3d at 1351. Unlike the objectively-serious-need element, the subjective-deliberate-indifference element presents a question of fact that we review for clear error. *Thomas*, 614 F.3d at 1312.

The district court found that the FDC was deliberately indifferent to Keohane's gender dysphoria when it refused to let her wear female undergarments or use female grooming products. This finding has substantial support in the record. So I'd let it stand. And since both the subjective and objective elements of an Eighth Amendment violation are met, I would affirm.

The majority reaches a different result, however, and it uses the wrong standard of review to get there. Reviewing the subjective-deliberate-indifference finding de novo during its review of the "ultimate" Eighth Amendment violation, it concludes that the district court was wrong to find that the last two subparts of the deliberate-indifference element

---

[9] We review any underlying fact issues—like what the medical need is—for clear error. *See Thomas*, 614 F.3d at 1307.

were met.[10] I explain below why this analysis is incorrect and why we must affirm the district court's conclusion that the FDC was deliberately indifferent to Keohane's gender dysphoria.

A.

The majority's first mistake comes in articulating our standards of review. While listing the standards, the majority agrees that we apply clear-error review to questions of fact supporting the district court's conclusion that a defendant violated the Eighth Amendment. *See* Majority Op. at 28. It also accepts that subjective deliberate indifference is a question of fact that we review for clear error. *See id.* at 28 n.8. And yet, despite these directives, the majority refuses to apply clear-error review to the district court's finding of subjective deliberate indifference. Instead, it insists that it retains de novo review over this factual finding, citing the unremarkable rule that the "ultimate determination" whether "there was an Eighth Amendment violation warranting equitable relief" is a legal conclusion that we review de novo. *Id.* at 27–28. In other words, the majority has somehow read *Thomas* to hold that, even though the underlying finding of deliberate indifference is a question of fact reviewed for clear error, we (really) review that finding again de novo when we consider the "ultimate" Eighth Amendment violation.

[10] The majority rightly assumes that the FDC knew that Keohane's gender dysphoria put her at substantial risk of self-harm, which satisfies the first subpart. *See* Majority Op. at 30.

That is simply wrong. We have long reviewed a finding of subjective deliberate indifference for clear error. *See, e.g.*, *Thomas*, 614 F.3d at 1312. We can reverse a subjective-deliberate-indifference finding only if left with a firm and definite conviction that the district court made a mistake. *See Pelphrey*, 547 F.3d at 1268. Our de novo review extends only to questions of law (i.e., the objectively- serious-need element) and to the district court's ultimate conclusion whether the objective and subjective elements of a deliberate-indifference claim state an Eighth Amendment violation. Precedent makes this clear.

Take *Thomas*—the case from which the majority derives its de-facto-de- novo rule. There we explained that we review de novo the district court's ultimate determination that there was an Eighth Amendment violation. *See Thomas*, 614 F.3d at 1303. We also explained that we review for clear error questions of fact supporting this conclusion. *Id.* Against this backdrop, we analyzed the two elements of a deliberate-indifference claim. We first reviewed the objectively- serious-need prong de novo, concluding as a matter of law that the prisoner's medical needs were sufficiently serious under the Eighth Amendment. *See id.* at 1307–13. Then we analyzed the subjective-deliberate-indifference finding. Citing Supreme Court and Eleventh Circuit precedent, we held—unequivocally—that the subjective-deliberate-indifference element raises a "question of fact which we review for clear error." *Id.* at 1312 (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994); *Goebert v. Lee Cty.*, 510 F.3d 1312, 1327 (11th Cir. 2007)). And then we did just that: We reviewed the district court's finding of subjective deliberate indifference for clear error, holding that we could not

reverse on the subjective- deliberate-indifference prong, because the finding was not "clearly erroneous." *Id.* at 1313–16. Finally, we summed up by "[c]oncluding that [the plaintiff] satisfied both the objective and subjective prongs of his Eighth Amendment" claim, leading us to affirm the district court's ultimate conclusion that there was an Eighth Amendment violation. *Id.* at 1317.

That is precisely how this analysis should go. We review the objectively- serious-need element de novo, as it is a question of law. *Id.* at 1307. We review the subjective-deliberate-indifference finding for clear error, as it is a question of fact. *Id.* at 1312. And then we review the district court's "ultimate" application of these elements de novo. *Id.* at 1303. So if the district court, despite checkmarks in both the objective and subjective boxes, still concluded that there was no Eighth Amendment violation, we would lend no deference to this error. We would review it de novo, and would no doubt reverse. And if the district court, despite holding that one of the elements was not met, still concluded that there was an Eighth Amendment violation, we would do the same. We would review this error de novo, and no doubt reverse. *That* is the ultimate conclusion that we review de novo. *See id.*[11]

But that is not how the majority analyzed this case. If you look closely through its opinion, you won't

---

[11] Indeed, I'm curious how the majority thinks these standards work otherwise. What is the point of initial clear-error review for a finding of subjective deliberate indifference if we review that finding again de novo when we review the ultimate Eighth Amendment violation? The majority doesn't tell us. It simply recites these two standards, with no attempt to make sense of how they work together, and chooses the one endowing it with a greater level of review.

see a single attempt to analyze whether the district court's subjective-deliberate-indifference finding was clearly erroneous. To be sure, the majority pays lip service to this standard at the end of footnote eight. But that perfunctory paragraph is no more than a fail-safe to cover itself should its de novo rule prove too much. Even a skim through its opinion shows that the majority has not applied clear-error review to the district court's finding of subjective deliberate indifference; it has swapped the deference we typically apply with overarching de novo review. This switch allows it to reweigh the deliberate- indifference evidence as it sees fit, disregarding the ample evidence the district court relied on to make its factual findings. *Contra id.* at 1312.

B.

To justify its new standard, the majority pens a footnote treatise that reads the clear-error rule out of *Thomas*. *See* Majority Op. at 28–29 n.8. It first opines that *Thomas*'s clear-error rule applies only to "historical facts" supporting the district court's finding of subjective deliberate indifference—i.e., the who, what, when, and where facts—not the determinative facts. It then concludes that *Thomas* compels it to review the subjective-deliberate-indifference finding de novo during its review of the ultimate Eighth Amendment violation. And it supports these claims with out-of-context Supreme Court precedent, asserting that its ultimate factual review "follows straightaway" from the Court's application of de novo review in cases predating *Thomas*. For three reasons, these arguments fall short.

First—as the majority well knows—it does not matter what we think the prior panel should have held under then-existing Supreme Court precedent: All that matters is what the prior panel held. *See In re Lambrix*, 776 F.3d 789, 794 (11th Cir. 2015) ("[A] prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." (emphasis omitted)). In *Thomas*, we held— with the benefit of all the Supreme Court precedents the majority cites—that subjective deliberate indifference is a "question of fact which we review for clear error." 614 F.3d at 1312. There were no qualifiers—we did not say that clear-error review applies to only the "historical" subparts of the district court's deliberate-indifference finding. Nor did we double back to review the subjective- deliberate-indifference finding de novo at the end; we did just the opposite, affirming the subjective-deliberate-indifference finding because it was not clearly erroneous. *See id.* at 1313–17. The majority cannot reexamine the legal landscape the prior panel considered to conclude that the prior panel was wrong—such second-guessing would "undermine the values of stability and predictability in the law that the prior panel precedent rule promotes." *Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001). For this reason, we have "categorically reject[ed] any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time." *Id.* If the majority has a problem with *Thomas*'s clear-error rule, the proper place for its concerns is in a concurrence urging our court to consider the issue en banc. What it cannot do is what it does here:

overrule a co-equal panel and take the en banc court's role for itself.[12]

Second, *Thomas* foreclosed the majority's academic notion that clear-error review extends only to historical facts. As said before, *Thomas*'s holding had no reservations: "A prison official's deliberate indifference is a question of fact which we review for clear error." 614 F.3d at 1312. The majority does not explain how this rule statement applies only to historical facts. Nor could it do so—*Thomas* itself applied the rule beyond historical facts. Just pages after *Thomas* set out the ultimate-de-novo-review rule that the majority clings to, the panel applied clear-error review to all three subparts of the subjective-deliberate-indifference element. It first held that the record supported the district court's finding that prison officials were subjectively aware of a risk of harm to the prisoner. *See id.* at 1313. Then it took on the second and third prongs, holding that the "record also supports the district court's finding that the Secretary of the DOC and the Warden of FSP

[12] At any rate, the Supreme Court cases the majority cites did not arise in the context of deliberate indifference. *See* Majority Op. at 28–29 n.8 (citing cases in the excessive-fine, punitive-damages, and probable-cause contexts). Crafting a standard of review is a context- specific inquiry, so we have no clue whether the Supreme Court would apply clear-error or de novo review to a deliberate-indifference finding. Thankfully, we need not read any tea leaves— *Thomas* already concluded that clear error is the right standard of review in our circuit. But the majority's reliance on off-point Supreme Court precedent shows that its analysis is "less an application of existing precedent than a prediction of what the Supreme Court will hold [should] it choose[] to address this issue in the future." *United States v. Greer*, 440 F.3d 1267, 1275 (11th Cir. 2006). This, we have held, the majority cannot do. *See Lambrix*, 776 F.3d at 794.

recklessly disregarded the risk of psychological harm to inmates like McKinney." *Id.* at 1315. If this application weren't clear enough, the panel erased any doubt when it held that "the DOC's refusal to modify its non-spontaneous use-of-force policy provides support for the district court's finding of more than mere or even gross negligence on the part of the DOC." *Id.* And the panel confirmed that clear-error review applies to the entire deliberate-indifference element, holding that "an examination of his entire record demonstrates that the district court did not commit clear error in finding the defendants' deliberate indifference." *Id.* at 1317. These findings are not historical facts; they are the determinative facts that make up a finding of subjective deliberate indifference. *See Brown*, 387 F.3d at 1351. So *Thomas*'s application proves that clear-error review extends beyond the who, what, where, and when—it extends to the entire deliberate-indifference element.

Thomas isn't the outlier in our precedent—it's the norm. We have held time and again that subjective deliberate indifference is a factual finding. *See, e.g.*, *Greason v. Kemp*, 891 F.2d 829, 840 (11th Cir. 1990) (holding at summary judgment that the "evidence could support a finding that the conduct reflected a deliberate indifference to [the prisoner's] [E]ighth [A]mendment right to adequate mental health care," and holding that whether "the conduct *actually* constituted deliberate indifference . . . is a factual question" (emphasis added in underline)); *McElligott v. Foley*, 182 F.3d 1248, 1256 (11th Cir. 1999) (holding at summary judgment that there "was sufficient evidence to permit a jury to infer that the defendants in this case knew of a substantial risk of harm to [the prisoner]" and "to draw the conclusion that [the

defendants] were not merely negligent" in providing subpar care (emphasis added)). We review factual findings like these for clear error. *See, e.g.*, *United States v. Williams*, 340 F.3d 1231, 1234 (11th Cir. 2003). We don't dissect them with artificial labels, defying prior precedent.

In fact, the type of review the majority presses here echoes the sole instance where we *do* dissect facts with artificial labels—our de novo review of "constitutional facts" in First Amendment cases. In those cases, the constitutional facts are determinative; they answer "why" a government actor suppressed certain speech and whether its motives were unconstitutional. *See Am. Civil Liberties Union of Fla., Inc. v. Miami-Dade Cty. Sch. Bd.*, 557 F.3d 1177, 1206 (11th Cir. 2009). We review those facts de novo and accompanying historical facts for clear error. *See id.* But this an exceedingly narrow exception—one unique to First Amendment cases. *See Flanigan's Enters., Inc. of Ga. v. Fulton Cty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010). We have never imported this plenary factual review to an Eighth Amendment case. *Cf. Thomas*, 614 F.3d at 1312. And yet, despite *Thomas*, the majority does so now.

Third, the majority's super-de-novo-review rule proves unjustifiable when we consider how we review subjective deliberate indifference after a jury trial (rather than after a bench trial). For when a jury finds that a defendant was deliberately indifferent, we don't retrace this finding de novo; we review the jury's finding for sufficient evidence. *See Carswell v. Bay Cty.*, 854 F.2d 454, 457 (11th Cir. 1988) (affirming a jury's finding of deliberate indifference because there was sufficient evidence to reach that conclusion). Why would we review subjective deliberate indifference for

sufficient evidence after a jury trial, but de novo after a bench trial? The answer is simple: We don't. We have never suggested in these cases that we somehow revisit the factual finding of subjective deliberate indifference de novo when reviewing the "ultimate" Eighth Amendment violation. And the majority does not point us to a single Eleventh Circuit case that does so.

Turning to the second paragraph in its footnote, the majority claims that there is no way that the purportedly "mindless, mechanical box-checking" that I described above marks the extent of our de novo review over the ultimate Eighth Amendment violation. *See supra* at 61–62. This is a mountain made out of a molehill—of course our de novo review has less teeth here than in most constitutional cases. For one, the defendants here have conceded that the objectively-serious-need element—one we review de novo—is met, leaving us little to review on that side of the coin. For another, our precedent has set up a clear, two-part test for establishing an Eighth Amendment violation, and one of those parts is a fact question, leaving little to ultimately review de novo. *See Thomas*, 614 F.3d at 1312. In other cases, like an Equal Protection challenge or a Due Process case, our ultimate review of the constitutional violation driving the preliminary injunction is far more searching—the questions there are almost entirely legal. But a finding of subjective deliberate indifference is different; it is heavily fact-intensive. *See Greason*, 891 F.2d at 837. Though we are just as equipped as the district court to decide the legal question of whether a medical need is objectively serious, the district court is far better situated to analyze the subjective, state-of-mind question of a prison official's deliberate

indifference. *See Salve Regina*, 499 U.S. at 233 (noting that deference is warranted when the district court is better positioned decide the issue, as it is when applying a fact-dependent legal standard). So our "ultimate" de novo review, in the deliberate-indifference context, is understandably more limited.

As its parting word, the majority notes that the First Circuit, sitting en banc, rejected clear-error review for subjective deliberate indifference, ultimately applying the de novo review the majority applies here. *See Kosilek v. Spencer*, 774 F.3d 63, 84 (1st Cir. 2014) (en banc). But that's because the First Circuit concluded that deliberate indifference is a "[s]ubsidiary legal question," not a fact question. *Id.* That is, word for word, the opposite of what we held in *Thomas*. *See* 614 F.3d at 1312. The First Circuit also justified its de novo review of the deliberate-indifference finding by citing our statement in *Thomas* that the "ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is reviewed de novo." 774 F.3d at 84. But, as explained above, *Thomas*'s ultimate-de-novo-review rule only extends to the district court's application of the objective and subjective elements; it does not empower us to rereview the subjective-deliberate-indifference-finding de novo. *See supra* at 60– 62, 65–69. Finally, the *Kosilek* court was sitting en banc; was not bound by prior precedent; and, so far as *Kosilek* explains, did not have precedent squarely holding that deliberate indifference is a question of fact reviewed for clear error. We, in contrast, are not sitting en banc; are bound by prior precedent; and do have precedent squarely on point. *See Thomas*, 614

F.3d at 1312. So *Kosilek* holds no weight in this analysis.[13]

* * *

In the end, "our first obligation—our oath" is to follow the law. Majority Op. at 39 (citing 28 U.S.C. § 453). In the Eleventh Circuit, that means following prior precedent. *Thomas* holds that subjective deliberate indifference is a question of fact that we review for clear error. We cannot refuse to apply this holding simply because we disagree. Nor can we reanalyze the issue for ourselves to overrule the prior panel. If the majority has concerns about our precedent, it should voice those concerns separately for our en banc court. And it may have the chance to do just that, as its disregard for our precedent has no

---

[13] Another important fact: The First Circuit decided *Kosilek* with a bare 3-2 majority, and the two dissenting judges strenuously dissented from the majority's de novo review of the subjective-deliberate-indifference finding. Since we are not sitting en banc, I need not explain—as the *Kosilek* dissenters did—why a court might conclude that subjective deliberate indifference is a finding best reviewed for clear error. But there are indeed reasons why a court might do so. *See* 774 F.3d at 98–100 (Thompson, J., dissenting). As Justice Scalia noted in *Ornelas v. United States*, "[l]aw clarification requires generalization, and some issues lend themselves to generalization much more than others." 517 U.S. 690, 703 (1996) (Scalia, J., dissenting). When the issues are fact-specific and not easy to generalize, "probing appellate scrutiny will not contribute to the clarity of legal doctrine" and deference to the district court is warranted. *Salve Regina*, 499 U.S. at 233. A subjective-deliberate-indifference inquiry is fact-specific, motive- based, and not due for easy generalization. One could thus say that deference to the district court is warranted, as an appellate court cannot "hope to match the district judge's expertise in these areas." *Kosilek*, 774 F.3d at 100. But we need not say that—we have already made that determination. *See Thomas*, 614 F.3d at 1312.

doubt transformed this routine deliberate-indifference case into one justifying en banc review.

C.

Having minted a new standard of review, the majority applies it to reverse the district court at the last deliberate-indifference step: Whether the FDC "disregarded" a substantial risk of harm by "more than mere negligence." The district court found that the FDC had for two reasons. First, the FDC denied social transitioning because it blindly deferred to the FDC's clothing policy, effectively enacting a blanket ban on social transitioning without case-specific medical or security judgment. Second, the FDC denied Keohane access to medical personnel competent enough to realize that she needs to transition to avoid severe self-harm. Reviewing de novo, the majority replaces these findings with its own. It concludes that the FDC denied treatment because medical professionals disagreed with Keohane about her need to transition and because the FDC concluded that the security risks of the treatment were too great.

To reach that conclusion, though, our precedent compels the majority to hold that the district court's findings were clearly erroneous. *See Pelphrey*, 547 F.3d at 1268. The majority doesn't do so (and its cursory footnote is no substitute for true clear-error review). *See* Majority Op. at 29 n.8. In reality, the majority takes the issue up anew, concluding that it "simply cannot say that the FDC consciously disregarded a risk of serious harm by conduct that was more than mere negligence." Majority Op. at 37 (internal quotation mark omitted).

As I explain below, that is the wrong approach. Because both of the district court's findings hold

substantial footing in the record, we must affirm. *See Pelphrey*, 547 F.3d at 1268.

1.

I'll start with the blanket-ban finding. The denial of medical care based on blind deference to a blanket rule, rather than on an individualized medical determination, violates the Eighth Amendment. *See Kosilek*, 774 F.3d at 91; *Roe v. Elyea*, 631 F.3d 843, 862 (7th Cir. 2011); *Colwell v. Bannister*, 763 F.3d 1060, 1068 (9th Cir. 2014); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 247 (D. Mass. 2012); *Brooks v. Berg*, 270 F. Supp. 2d 302, 310 (N.D.N.Y. 2003) (vacated in part on other grounds). So does denying treatment for non-medical reasons. *McElligott*, 182 F.3d at 1255. The district court found that the FDC refused to consider Keohane's need for social transitioning because treatment team members blindly deferred to prison policy, without evaluating her specific circumstances. That conduct arises to subjective deliberate indifference. *See Kosilek*, 774 F.3d at 91; *McElligott*, 182 F.3d at 1255. And the record supports this finding.

For starters, one member of Keohane's treatment team admitted that she "never assessed whether Ms. Keohane has a mental-health need for longer hair or access to female undergarments because . . . [the FDC's] policies prohibit these things." She also admitted that she doesn't think the FDC would even permit a medical pass for social transitioning, and so she focused Keohane's therapy "on coping *without* access to this particular treatment." The FDC's regional medical director further testified that she did not consider any medical exceptions to the FDC's clothing policy. And another member of Keohane's treatment team even conceded

that the team discussed whether Keohane needed access to female clothing, but ultimately concluded that "it is out of our hands, that we understand, but there's nothing we can do."

Perhaps more concerning, these blanket denials didn't start from the bottom; they came from the top. The district court found that the FDC's final decisionmaker—its chief medical officer—would have refused an exception even if treatment team members had recommended it, solidifying the FDC's blanket ban on social transitioning. Indeed, the officer testified that it would be a "hard sell" for him to grant a medical exception for social transitioning, regardless of the inmate's particular needs. The district court also found that the officer made this decision without considering Keohane's specific circumstances, as he "has never decided this issue, nor has he been presented with any medical request for any exceptions to security policies to allow for social transitioning."[14]

Given the testimony from treatment team members and the chief medical officer's steadfast and unreasoned refusal to consider social-transitioning treatment, the record supports the district court's finding that the FDC categorically denied Keohane

---

[14] Alongside this, the district court found that the chief medical officer's prejudgment was also born of "ignorance of gender dysphoria and bigotry toward transgender individuals in general," further leading the court to conclude that the medical officer's refusal to provide treatment was categorical and not based on medical need. The record supports this finding as well. *See Keohane*, 328 F. Supp. 3d at 1306 & n.11 (noting that the medical officer "thinks treating gender dysphoria by encouraging the transition of gender roles 'goes against nature'" and that the officer admits that his religion plays into his views on transgender people in general).

treatment under a blanket policy, without considering her individual circumstances. As all agree, "responding to an inmate's acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of 'deliberate indifference'—anti-medicine, if you will." Majority Op. at 14. Since this finding is not clearly erroneous, we must affirm it, even if we would have found differently. *See Multiponics*, 622 F.2d at 723.

And yet the majority does find differently: It crowns security king. Citing out-of-circuit precedent, the majority holds that the FDC can shrug off Keohane's medical need if it decides that the security risks of the treatment outweigh its necessity. *See Kosilek*, 774 F.3d at 92. We need not get into the limits of this rule today,[15] because that's not what happened here. More specifically, that's not what the district court *found* happened here. The district court did not conclude that the FDC denied treatment because it considered Keohane's need for social transitioning and decided that the security risks outweighed her need. The court found that the FDC did not consider necessity or security *at all* when denying treatment, because prison officials blindly deferred to the FDC's clothing policy. Said differently, prison officials denied treatment <u>because of the policy</u>, not because of their

[15] Although there must be some limits—I would be deeply troubled if the majority thought that a prison can withhold truly life-saving treatment for security's sake. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.").

views on her need for the treatment or the security risks it presents.

That situation fails even under *Kosilek*, the case from which the majority draws its security exception. *Kosilek* held that so "long as prison administrators make judgments balancing security and health concerns that are 'within the realm of reason and made in good faith,' their decisions do not amount to a violation of the Eighth Amendment." *Id.* A fair enough rule—prison administrators can of course balance a prisoner's need for treatment with security concerns and fairly conclude that the risks outweigh the need. But the prison must "balance" the competing interests—something that the district court found the FDC did not do. In the district court's view, the FDC did not balance Keohane's medical needs with prison security and decide that security carried the day. Prison officials denied treatment solely because they thought prison policy forbade social transitioning— the strength of Keohane's medical need had nothing to do with it. A prison cannot balance security over medical necessity if it never factored medical necessity into the analysis. So the district court's finding that the FDC failed to consider Keohane's medical need when denying her treatment precludes the FDC from claiming that security won the day, leaving it liable for its deliberate indifference. *See id.* at 91; *Roe*, 631 F.3d at 862; *Colwell*, 763 F.3d at 1068; *McElligott*, 182 F.3d at 1255; *Soneeya*, 851 F. Supp. 2d at 247.

Worse, the FDC didn't just fail to consider Keohane's medical need; it failed to consider security too. Prison officials did not evaluate the security risks of social transitioning and deem them too great—they assumed that FDC policy would always forbid the

treatment, and that was the end of it. Based on this belief, treatment team members "couldn't even fathom requesting an exception to [the policy] even if the inability to socially transition drives a patient to suicide." Nor did they elevate the issue to the chief medical officer—the one who has the final say on granting medical exceptions to security policy. So far as her treatment team was concerned, "Keohane *simply can't transition* because [the FDC] does not permit inmates housed in its male facilities access to the clothing and grooming standards it applies to female inmates." A weighing of security risks had no role in the matter.

Adding insult to injury, treatment team members were *wrong* that security policy always forbids social transitioning. Contrary to their view, the FDC's security representative testified that medical staff—not security staff—has the ultimate say in granting a medical exception to prison security policy. The representative even listed examples of how the FDC could accommodate social transitioning, despite potential security risks. The FDC's chief medical officer affirmed this procedure, testifying that medical (not security) makes the final call when it comes to medical exceptions. And the FDC confirmed this procedure yet again here, stipulating that it would accommodate social transitioning "if having longer hair or female undergarments or makeup were deemed to be medically necessary for an inmate with gender dysphoria."[16]

---

[16] This policy makes sense. When "society takes from prisoners the means to provide for their own needs," prisons must provide the "necessary medical care." *Plata*, 563 U.S. at 510. If necessary medical care creates security concerns, the prison must make accommodations. The FDC does just that: If medical officials say

In sum, then, medical staff, not security policy, has the final say on whether security risks outweigh medical need. Yet, in a catch-22, medical staff denied social transitioning here because they thought that security policy barred social transitioning. And while the staff pointed fingers, *no one* evaluated whether the security risks of social transitioning outweighed Keohane's specific medical need.

Which brings us to what distinguishes this case from *Kosilek*. There, unlike here, the record showed that prison officials *extensively* considered the inmate's medical need and whether the requested treatment would create security concerns, ultimately concluding that the need was too little and the concerns were too great. *See Kosilek*, 774 F.3d at 73–75, 79–84 (chronicling the prison's in-depth security balancing); *id.* at 95 ("[T]he [prison] testified consistently that it believed the postoperative security concerns surrounding Kosilek's treatment were significant and problematic."). The record here shows, by contrast, that Keohane's medical need and the security risks of her treatment played zero part in the FDC's decision to withhold social transitioning. That decision was driven by blind deference to FDC policy, without regard for medical need, no matter how dire the straits.

---

something is medically necessary, security officials make it work. But security officials never considered how to make social transitioning work here, because the treatment team never tried to seek an exception. Even though the FDC's own policy makes clear that security bends the knee to medicine, Keohane's treatment team washed its hands of the matter the moment it concluded that FDC policy forbids social transitioning. That arises to deliberate indifference. *See Kosilek*, 774 F.3d at 91.

In the end, the district court said it well: "What's clear from the treatment team's testimony is that everybody knows Ms. Keohane has harmed herself and attempted suicide, but still, *nobody* has requested *any* exceptions to [the FDC's] male grooming and clothing policies to treat her gender dysphoria." They failed to do so not because they balanced security risks with individual medical need, but because they (erroneously) thought that prison policy forbade social transitioning, regardless of the circumstances. That situation does not fall within *Kosilek*'s security exception. It is a categorical, blanket ban on social transitioning and a level of disregard that rises above mere negligence. *See id.* at 91; *Colwell*, 763 F.3d at 1068; *McElligott*, 182 F.3d at 1255. Since this finding is well supported by the record, we must affirm. *See Pelphrey*, 547 F.3d at 1268.

2.

Next is the incompetent-personnel finding. A prison official disregards a substantial risk of harm by more than mere negligence when the official provides physicians who are incompetent to adequately treat a prisoner's serious medical need. *See Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985). The record shows that Keohane's treatment team was not qualified to treat her illness and thus provided subpar care. As the district court found, no member of Keohane's treatment team had ever treated a pre-transition patient with gender dysphoria. In fact, most of her team members had never treated a patient with gender dysphoria, period. Team members were not trained in the World Professional Association for Transgender Health (WPATH) standards—standards that the district court (and many others) have found

authoritative for treating gender dysphoria in prison. *See also Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019) (collecting cases). Keohane's treatment team leader conceded that she was not qualified to decide whether Keohane needed social transitioning. And the FDC's chief medical officer admitted that he "doesn't know one way or the other if social transitioning is helpful in treating gender dysphoria," even though that treatment is standard for treating the illness.

To this adds that the FDC's staff psychiatrist—a psychiatrist the FDC brought in post-litigation to say that Keohane doesn't need social transitioning—admitted that he lacked knowledge about the proper standard of care for gender dysphoria, that he had only read the parts of Keohane's record relevant to her psychiatric need (Keohane has never taken psychiatric medication while in FDC custody), and that he had never before "evaluated anyone in prison to determine a medical need for access to clothing or grooming standards to treat gender dysphoria." This led the district court to fairly conclude that his views deserved little, if any weight.

Prison officials have a tough job, but the Constitution requires that they be prepared to treat the inmates they take into their custody. *See Ancata*, 769 F.2d at 704. The record here shows that the FDC was ill-equipped to treat Keohane's gender dysphoria, which ultimately led it to withhold necessary social-transitioning treatment. The district court was therefore within its bounds to find that the FDC's incompetence arose to disregard by more than mere negligence. And the majority's paragraph-long footnote replacing this detailed finding with its own only confirms that the majority is not reviewing for

clear error, as it must under our precedent. See *Thomas*, 614 F.3d at 1312.

3.

Despite the district court's findings, the majority colors this case one of disagreement, not disregard. The argument is this: The FDC did not disregard a substantial risk of harm by more than mere negligence, because "members of Keohane's medical-treatment team, Wexford's staff psychiatrist, the FDC's chief clinical officer, and the FDC's retained expert" merely disagreed with Keohane and genuinely believed that hormone therapy sufficed to treat her gender dysphoria. The majority also taps *Kosilek* again for help, claiming that there, as here, medical officials disagreed over the right course of treatment.

This analysis is off for a few reasons. Chief among them, and as I said before, the district court *found* that the treatment team's position on Keohane's need for social transitioning played zero role in its decision to withhold treatment. Without ruling that this finding was clearly erroneous, we cannot hold that the district court's ruling was incorrect. *See Pelphrey*, 547 F.3d at 1268.

At any rate, the majority couldn't hold that the court's findings were clearly erroneous even if it applied the right standard. This is because there is no genuine dispute or difference in medical opinion in this record. Both experts agreed at trial that Keohane should have this treatment. Team members recognized that Keohane remained in pain despite hormone therapy and knew that social conditioning could help her pain. And the district court found that the few officials who said social transitioning was unnecessary were incompetent and incredible.

Starting with the experts, Keohane's trial expert testified that social transitioning was medically necessary to treat Keohane's severe gender dysphoria. The FDC's trial expert also testified that medically necessary treatment can be treatment that is "psychologically pleasing to the patient" (sensible enough— gender dysphoria is, of course, a psychological illness). The expert then agreed that letting Keohane wear female underwear and grow out her hair would be "psychologically pleasing" to her. He also noted that Keohane could be vulnerable to "acute decompensation" and would have "a suicidal ideation and crisis" if she were denied access to social transitioning. Given that the experts agreed that this treatment would be deeply helpful for Keohane's mental state (and that she would be at great risk of self-harm without it), the court fairly found that "[e]xperts on both sides agreed at trial that [the FDC] should allow Ms. Keohane access to female clothing and grooming standards to treat her gender dysphoria."[17]

---

[17] The majority thinks that I believe an inmate is always entitled to medical care that is "psychologically pleasing." I believe no such thing. My view—and what the law requires—is that a prison must provide an inmate with medical care that is psychologically pleasing if that care is medically necessary. *See Plata*, 563 U.S. at 510. Here, the FDC's expert opined that care that is "psychologically pleasing" can be medically necessary for a patient with gender dysphoria. Given this testimony, the expert's accompanying testimony, and other medical testimony in the case, the district court found that there was no genuine dispute: Social transitioning is medically necessary to treat the psychological harm flowing from Keohane's severe gender dysphoria. So, to be clear, it does not matter if care is pleasing to an inmate; all that matters is whether the care is medically necessary. For a psychological illness like gender dysphoria,

Along with this, treatment team members knew that Keohane remained in serious pain despite receiving hormone therapy. They knew that she still suffered from suicidal ideation and severe psychological harm. They also knew the cause of this pain: Keohane's inability to express herself as a woman. Keohane told them so in grievance after grievance. She told them again at trial. And her words weren't her only symptoms. She also tried to kill herself twice after a string of forced haircuts—first by hanging herself with a sheet from her bunk, and then by tying a pants leg around a door handle, tying the other leg around her neck, and sitting down on the floor to cut off the blood flow.

And that's not all treatment officials knew. They also knew that social transitioning is an effective way to treat gender dysphoria. According to one team member, "[i]t allows you to express yourself in the gender that you feel yourself to be . . . [and i]t helps with self-esteem, it helps with expression, [and] it helps with . . . emotions." Team members also knew that an individual may need both hormone therapy *and* social transitioning to adequately treat the disease.

To be sure, there were a few prison officials who testified that they don't think Keohane needs social transitioning. Putting aside the fact that this is not why they denied her treatment, *see supra* at 72–79, the district court also found them incompetent and their views incredible. Some of these officials think that a treatment is not medically necessary unless it is a matter of life or death—a frighteningly incorrect

---

then, it makes perfect sense that medically necessary treatment might be treatment that eases the inmate's psychological pain.

view of medical necessity. *See Keohane*, 328 F. Supp. 3d at 1310; *Gayton v. McCoy*, 593 F.3d 610, 620 (7th Cir. 2010) ("A medical condition need not be life-threatening to be serious; rather, it could be a condition that would result in further significant injury or unnecessary and wanton infliction of pain if not treated."). These witnesses also lack experience with WPATH standards and gender dysphoria in general. *See supra* at 79–81. And the court gave "little if any weight" to the FDC's staff-psychiatrist-turned-armchair-quarterback, because he was not an expert, was not a treating physician, had spoken with Keohane for less than an hour, had not reviewed Keohane's history of self-harm, and had reviewed only the psychiatric section of her chart (even though she has never taken psychiatric medicine while in FDC custody). So even if medical disagreement could have played into the FDC's social-transitioning ban (it did not), there is still no credible medical testimony in this record saying that Keohane does not need social transitioning. As the reviewing court, we must respect these credibility determinations, not remake them. *See Salve Regina*, 499 U.S. at 233.

Which again brings us to why *Kosilek* does not apply. There, unlike here, the record showed that medical officials were genuinely and fervently divided on the appropriateness of gender-reassignment surgery. Several prison doctors concluded, without reservation, that gender-reassignment surgery was not medically necessary. One doctor even testified that surgery was the wrong treatment for the prisoner. *Kosilek*, 774 F.3d at 72. There was also a decreased risk of self-harm, as the prisoner had not tried to harm herself throughout her twenty-year incarceration. *Id.* at 69.

We have just the opposite. Keohane's self-destructive tendencies have only ramped up in recent years. *See supra* at 52, 83. Keohane's expert says social transitioning is medically necessary. The FDC's expert testified that social transitioning would be "psychologically pleasing" for Keohane, which, in the expert's view, can be a medically necessary treatment for a psychological illness like gender dysphoria. And everyone on Keohane's treatment team failed to factor Keohane's need for the treatment into their decisions (either because of unyielding deference to prison policy or a warped view of medical necessity and Keohane's medical situation).

Given all this, the district court was within its bounds to find that the FDC denied treatment not because of a genuine belief that social transitioning was unnecessary, but because of blind deference and medical incompetence. The majority does not explain how these findings lack record support. Nor could it, as it is ill-suited to make the credibility determinations that were key to this case. *See Salve Regina*, 499 U.S. at 233. Yet it beats on anyway, annexing the district court's role to reweigh the evidence, remake the credibility determinations, and thus refind de novo that there was no disregard by more than mere negligence. *Contra Pelphrey*, 547 F.3d at 1268.

4.

To wrap up, the majority tries to distinguish several cases holding that the failure to provide social-transitioning treatment arises to deliberate indifference. In footnote 11, it gives three reasons for why these cases do not apply. Each reason falls flat.

First, the majority says that, in those cases, medical providers all agreed that a certain medical treatment for gender dysphoria was medically necessary, while here they don't. That is both wrong and irrelevant. It is wrong because medical providers in those cases did *not* all agree that a given type of treatment was necessary. *See, e.g.*, *Hicklin v. Precynthe*, 2018 WL 806764, at *12 (E.D. Mo. Feb. 9, 2018) (noting that the regional medical director in that case stated that permanent hair removal was not medically necessary). And it is irrelevant because, again, the views of Keohane's treatment team had no role in its decision- making. Team members blindly deferred to prison policy, which caused them to deny care. As shown in the cases that the majority tries to distinguish, that level of neglect arises to deliberate indifference. *See, e.g.*, *Kosilek*, 774 F.3d at 91; *Soneeya*, 851 F. Supp. 2d at 247.

Second, the majority claims that prison officials in those cases denied care under a blanket ban, but here the FDC has rescinded the freeze-frame policy and has conceded that it will grant exceptions if social transitioning is medically necessary. This is a misdirection. The FDC's freeze-frame policy has nothing to do with its general security policy requiring all inmates to dress as their biological sex. And the district court found that the treatment team here denied treatment under a blanket ban. *See supra* at 72–79. Given the treatment team's unwavering deference to FDC policy and the chief medical officer's staunch refusal to provide social transitioning in any circumstance, the court was right to treat Keohane's case as a blanket-ban case. *See, e.g.*, *Soneeya*, 851 F. Supp. 2d at 247.

Third, the majority says that it was clear in those cases that the patient's health was declining, but here the evidence shows that Keohane's symptoms improved after she received hormone therapy. That distinction is hollow for two reasons.

One, it can be true that Keohane's treatment team knew that hormone therapy was helping and *also* knew that she still suffered from significant distress due to her lack of social transitioning. These facts are not mutually exclusive— although Tylenol dulls the pain of a gunshot wound, the patient still needs stitches. *See Ancata*, 769 F.2d at 704 ("Although the plaintiff has been provided with aspirin, this may not constitute adequate medical care. If, 'deliberate indifference caused an easier and less efficacious treatment' to be provided, the defendants have violated the plaintiff's Eighth Amendment rights by failing to provide adequate medical care."); *Soneeya*, 851 F. Supp. 2d at 246–50 (holding that a blanket ban on laser hair removal and surgery arose to deliberate indifference even though the transgender plaintiff was receiving some treatment, including psychotherapy and hormones).[18] So it does not matter if Keohane's treatment team believed that hormone therapy was helping. That evidence does not detract from the evidence showing that the FDC *also* knew

[18] See also *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) ("By analogy, imagine that prison officials prescribe a painkiller to an inmate who has suffered a serious injury from a fall, but that the inmate's symptoms, despite the medication, persist to the point that he now, by all objective measure, requires evaluation for surgery. Would prison officials then be free to deny him consideration for surgery, immunized from constitutional suit by the fact they were giving him a painkiller? We think not.").

that Keohane was still suffering from her inability to transition and yet did nothing more to treat her pain.

Two, the district court found that the FDC knew that Keohane was suffering greatly *because* of its refusal to provide social transitioning. *See Keohane*, 328 F. Supp. 3d at 1314–15; *supra* at 83. The court also discredited testimony from treatment team officials claiming that they thought hormone therapy was enough to treat her pain. *See supra* at 83–84. So the majority is again disregarding the district court's finding (without engaging in meaningful clear-error review) and placing greater weight on facts it prefers. *Contra Pelphrey*, 547 F.3d at 1268.

Despite the majority's framing, this case is very similar to cases across the country holding that the categorical refusal to adequately treat gender dysphoria amounts to deliberate indifference. *See, e.g.*, *Hicklin*, 2018 WL 806764, at *11 ("Ms. Hicklin has presented compelling evidence that Defendants' refusal to provide her with hormone therapy after her diagnosis is based on the Policy rather than on a medical judgment concerning Ms. Hicklin's specific circumstances."); *Soneeya*, 851 F. Supp. 2d at 248 ("The DOC cannot, therefore, claim that Ms. Soneeya is receiving adequate treatment for her serious medical needs because it has not performed an individual medical evaluation aimed solely at determining the appropriate treatment for her GID under community standards of care.").

In fact, a recent Ninth Circuit opinion highlights the ways the majority has gone wrong. *See Edmo*, 935 F.3d 757. Our sister circuit there affirmed a district court's holding that the failure to provide gender-reconstruction surgery arose to deliberate

indifference, and it did so on a similar posture. There, as here, the state argued that theirs was simply a case of dueling medical opinions. And there, as here, the district court found that this was not so, crediting the prisoner's experts' view that surgery was medically necessary, and discrediting the state's experts because they lacked necessary experience.

On appeal, the Ninth Circuit took the district court's credibility findings as true, recognizing that, absent clear error, "it is not our role to reevaluate them." *Id.* at 787. Given the district court's findings, the appellate court agreed that surgery was medically necessary. *Id.* at 790. Then—again lending deference to the district court's findings—the appellate court affirmed that the state was deliberately indifferent to the prisoner's serious medical need because the state knew that the prisoner had engaged in substantial self-harm due to her gender dysphoria and yet continued to provide ineffective treatment. *Id.* at 793. Finally, the court rejected the argument that, since the state had provided at least some treatment for gender dysphoria, it was not deliberately indifferent to the prisoner's medical needs. In doing so, the appellate court recognized that the "provision of some medical treatment, even extensive treatment over a period of years, does not immunize officials from the Eighth Amendment's requirements." *Id.* Because the state did not provide medically necessary care—there, gender-reconstruction surgery—it was liable for deliberate indifference, even if it provided other care.

The Ninth Circuit got it right, and its analysis leads us to the right result here. The district court found that FDC officials deferred to a blanket policy and were incompetent to treat Keohane's gender dysphoria. It also found that, for both those reasons,

they denied her access to social transitioning—a treatment that the district court found as medically necessary to treat Keohane's gender dysphoria. That amounts to deliberate indifference. *See Kosilek*, 774 F.3d at 91; *McElligott*, 182 F.3d at 1255. And none of these findings are clearly erroneous, because they rest on a wealth of evidence, and because they necessarily rely on the district court's credibility determinations—determinations that we are not equipped to make. *See Salve Regina*, 499 U.S. at 233. As a result, I would affirm.[19]

* * *

Our role on appeal is not to reweigh the evidence or recreate factual findings. That is for good reason: We did not attend the hearing; we did not hear the testimony; we did not see the record develop. We must therefore defer to the district court's findings, accepting them as true unless the record leaves us with a firm and definite conviction that the court made a mistake. It does not matter if, after reviewing the record, we would have found differently. *See Multiponics*, 622 F.2d at 723 ("Merely because a reviewing Court on the same evidence may have reached a different result will not justify setting a

---

[19] The majority says that our case is more like *Kosilek*, and less like *Edmo*, because the security concerns present in *Kosilek* were not present in *Edmo*. *See* Majority Op. at 37 n.14. Yet that is exactly what makes this case closer to *Edmo* than *Kosilek*: The FDC did not consider security concerns here; it blindly deferred to prison policy without considering whether security concerns outweighed Keohane's specific medical need. As the Ninth Circuit recognized, the government in *Kosilek* considered "significant security concerns that would arise if the prisoner underwent [gender-reconstruction surgery]." *Edmo*, 935 F.3d at 794. Here, as in *Edmo*, the FDC did no such thing.

finding aside."). All that matters is that the record supports the district court's findings of fact. *See id.*

The majority ignores this standard of review today, turning our court into a district court in the process. It does not explain how the district court's findings on deliberate indifference lack support; it simply believes that its own findings are better. That is not the law. Because this record supports the district court's findings, we should affirm them, not shake the magic 8-ball until it gives us a different result. And on those findings, the FDC is liable for deliberate indifference to Keohane's gender dysphoria. I dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-14096

D.C. Docket No. 4:16-cv-00511-MW-CAS

REIYN KEOHANE,
Plaintiff - Appellee,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,
Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

[Date Filed: December 3, 2020]

Before WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, JORDAN, ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA, and BRASHER, Circuit Judges.

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this appeal should be reheard by the Court sitting en banc, and a majority of the judges in active service on this Court having

voted against granting rehearing en banc, it is ORDERED that this appeal will not be reheard en banc.

WILLIAM PRYOR, Chief Judge, joined by BRANCH, Circuit Judge, statement respecting the denial of rehearing en banc:

I voted with the majority not to rehear this appeal en banc. I write separately to explain why my dissenting colleague is wrong to assert that a grant of en banc review is somehow objectively "demand[ed]" or is "an obligation," Dissenting Op. at 23, 45–46, in this appeal or any other. No statute, precedent, rule, or internal operating procedure imposes such an obligation. The decision to grant en banc review is always discretionary and disfavored.

No source of law *obligates* us to hear *any* appeal en banc. To be sure, a statute grants us the authority to hear appeals en banc. *See* 28 U.S.C. § 46(c). And a rule elucidates some procedural aspects of en banc review. *See* Fed. R. App. P. 35. We have added details of our own. *See* 11th Cir. R. 35-1–35-10; Fed. R. App. P. 35, IOP 1–9. But none of those rules requires us to hear any appeals en banc.

Precedent points in the same direction. The Supreme Court long ago explained that the statute permitting en banc review "vests in the court[s of appeals] the power to order hearings *en banc*." *W. Pac. R.R. Case*, 345 U.S. 247, 250 (1953). But "[i]t goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*." *Id.* Ten years later, the Supreme Court reaffirmed this view: "the rights of the litigant go no further than the right to know the administrative machinery that will be

followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Shenker v. Balt. & Ohio R.R. Co.*, 374 U.S. 1, 5 (1963). And more recently, the Supreme Court acknowledged yet again that "[r]ehearing [e]n banc is a *discretionary* procedure employed only to address questions of exceptional importance or to maintain uniformity among Circuit decisions." *Missouri v. Jenkins*, 495 U.S. 33, 46 n.14 (1990) (emphasis added); *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* § 61, at 496 (2016) ("The decision to grant a petition for hearing or rehearing en banc, or to initiate en banc review on the court's own motion, is discretionary."); 16AA Charles A. Wright et al., *Federal Practice and Procedure* § 3981.1, at 496 (5th ed. 2020) ("Consideration en banc rests in the discretion of the court of appeals."). The Supreme Court has described this process as "essentially a policy decision of judicial administration." *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 627 (1974).

The grant of en banc review is and should be rare. The Federal Rules of Appellate Procedure say so: "An en banc hearing or rehearing is not favored . . . ." Fed. R. App. P. 35(a). Practical considerations confirm why: "[T]he institutional cost of rehearing cases *en banc* is extraordinary. . . . It is an enormous distraction to break into [our regular] schedule and tie up the *entire* court to hear one case *en banc*." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1243 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc). After all, a panel of three judges has already spent considerable resources deciding the appeal once. For that reason, we and our sister circuits have said again and again that the "heavy artillery" of en banc review should be used rarely. *United States v.*

Hogan, 986 F.2d 1364, 1369 (11th Cir. 1993); *see, e.g.*, *Mitts v. Bagley*, 626 F.3d 366, 369–71 (6th Cir. 2010) (Sutton, J., concurring in denial of rehearing en banc); *Kane County v. United States*, 950 F.3d 1323, 1324 (10th Cir. 2020) (Phillips, J., concurring in denial of rehearing en banc); *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1339–42 (D.C. Cir. 1981) (en banc) (Robinson, J., dissenting).

Because en banc review is both discretionary and disfavored, reasonable minds can differ about whether it is appropriate in a particular case. Indeed, the problem of deciding whether to grant en banc review is evergreen; a judge wrestling with the decision decades ago remarked that sometimes "one judge's case of 'exceptional importance' is another judge's 'routine or run-of-the-mill' case." *Bartlett*, 824 F.2d at 1242 (Edwards, J., concurring in denial of rehearing en banc). Judges can reasonably disagree about the best way to allocate our judicial resources. And, of course, I never take any colleague's disagreement personally. *Cf.* Dissenting Op. at 24 n.1. For the same reason, disagreements about whether to grant rehearing do not warrant attacks on the integrity of judges or their commitment to the rule of law nor, good grief, on the legitimacy of this Court. *See id.* at 23–24 & n.1, 28–29, 41–42, 45.

NEWSOM, Circuit Judge, joined by LUCK, Circuit Judge, concurring in the denial of rehearing en banc:

I offer the following pre-buttal to Judge Rosenbaum's dissent from the denial of rehearing en banc.

Before jumping into the merits, let me say this by way of introduction: More often than not, any writing's persuasive value is inversely proportional to

its use of hyperbole and invective. And so it is with today's dissental—which, rather than characterizing, I'll let speak for itself.[1] Among other things, the dissental accuses me—as the author of the panel opinion—of "inaccurately purport[ing]" (and alternatively "claiming") "to apply the governing prior precedent" in *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010), "reimagin[ing]" *Thomas*'s holding, construing *Thomas* "as [I] pleased," "pretending" that *Thomas* sanctioned a standard of appellate review that it "demonstrably did not," "distort[ing] beyond recognition" this Court's prior-panel-precedent rule and "remold[ing]" it into an "unrecognizable and dangerous form," and now, in this opinion, of engaging in "distraction tactics." Rosenbaum Dissenting Op. at 23, 24, 26, 28, 30, 32, 42, 43, 44.

And there's so much more where that came from. The dissental saves its most biting criticism—and its most soaring rhetoric—for the seven judges who voted against rehearing. All of us, the dissental not so subtly implies, cast our votes simply because we "agree[d] . . . with the ultimate outcome" of the panel opinion. *Id.* at 24. In declining to rehear the case, the dissental charges, we have blessed a "rogue interpretation of the prior-precedent rule," sanctioned a "critical threat to the stability and predictability of the law," and thereby unleashed "potentially devastating consequences." *Id.* at 23, 45.

---

[1] For the most part, I'll use the term "dissental" to refer to Judge Rosenbaum's dissent from the denial of rehearing en banc, thereby distinguishing it from Judge Wilson's panel-stage dissent. See Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 Yale L.J. Online 601 (2012).

Strong words. Not a one of them true. Allow me to turn down the volume and provide a little perspective.

I

I begin with a brief factual summary.

Reiyn Keohane is a Florida inmate currently serving a 15-year sentence for attempted murder. Keohane was born anatomically male, but she began to identify as female sometime during her preadolescent years. Beginning at age 14—and up until the time she was incarcerated at 19—Keohane wore women's clothing, makeup, and hairstyles. At 16, she was formally diagnosed with gender dysphoria. About six weeks before the arrest that eventually landed her in prison, Keohane began hormone therapy under the care of a pediatric endocrinologist. *See Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1262 (11th Cir. 2020).

Upon her incarceration in a Florida prison, Keohane requested (as relevant here) two forms of treatment. First, she sought to continue hormone therapy. That request was initially denied for reasons that have no real bearing on my colleague's dissental and that I therefore won't belabor. *See id.* at 1262–63. In short, though, not long after Keohane filed suit, the Florida Department of Corrections reversed course and referred Keohane to an outside endocrinologist, who immediately prescribed her hormone therapy. *See id.* at 1263. The panel majority held that the FDC's decision to grant Keohane's hormone-therapy request mooted her challenge to the initial denial of that treatment. *See id.* at 1270–72. The dissental doesn't take issue with the panel's mootness determination, so for present purposes we can leave

the hormone-therapy requests to the side. *See* Rosenbaum Dissenting Op. at 30 n.3.

Second, and separately, Keohane requested the ability to engage in "social transitioning"—in particular, she asked to wear female undergarments and makeup, and to grow out her hair in a long, feminine style. *Keohane*, 952 F.3d at 1263. The FDC refused Keohane's social-transitioning requests on the grounds that they violated prison policy—which required male inmates to wear "[u]nder shorts" and to "have their hair cut short to medium uniform length at all times with no part of the ear or collar covered," Fla. Admin. Code r. 33-602.101(2), (4)—and that they posed a security risk. *Keohane*, 952 F.3d at 1263. Most notably, the FDC expressed concern that an inmate wearing makeup and female undergarments would inevitably become a target in an all-male prison, thereby endangering not only the inmate but also the prison employees who would have to step in to protect her. *Id.* The FDC also (and relatedly) determined that there were clear advantages to maintaining uniformity in a prison setting, including the ability to more readily detect contraband. *Id.*

As relevant to the concerns raised in the dissental, the district court held that by refusing Keohane's social-transitioning requests, Florida prison authorities were "deliberately indifferent" to Keohane's serious medical needs in violation of the Eighth Amendment. *Id.* at 1264–65. Accordingly, the court entered an injunction ordering prison officials to "permit Ms. Keohane to socially transition by allowing her access to female clothing and grooming standards." *Id.* at 1265. On appeal, the panel held (again, as relevant here) that the FDC did not violate the Eighth Amendment by refusing to accommodate

Keohane's social-transitioning-related requests, and we therefore vacated the district court's injunction. *See id*. at 1272–80. In so doing, we reviewed de novo the district court's ultimate determination that there was an Eighth Amendment violation, and we reviewed subsidiary issues of fact for clear error. *See id*. at 1272 & n.8 (citing *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010)).

II

Next, a bit of necessary legal background: A deliberate-indifference claim entails two components, the latter of which entails three sub-components. *See Hoffer v. Sec'y, Fla. Dep't of Corr*., 973 F.3d 1263, 1270 (11th Cir. 2020). First, the inmate must establish "an objectively serious medical need"—that is, "one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention"—that, "if left unattended, poses a substantial risk of serious harm." *Id.* (quotation marks omitted). Second, the inmate must prove that prison officials acted with deliberate indifference to that need by showing (1) that they had "subjective knowledge of a risk of serious harm" and (2) that they "disregarded" that risk (3) by conduct that was "more than gross negligence." *Id.*

Here, there's no debate about the first component—everyone agrees that Keohane's gender dysphoria constitutes a serious medical need. Rather, the parties' dispute (and the dissental's concern) hinges on the application of—and in particular our review of—the second component.

III

Today's dissental is predicated on an assertion that the panel only "purport[ed] to follow," but instead strategically "reimagine[d]," this Court's earlier decision in *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010), when we held that the de novo—rather than the clear-error—standard of review applied to the district court's determination that prison officials violated the Eighth Amendment in refusing Keohane's social-transitioning requests. *See* Rosenbaum Dissenting Op. at 26, 29, 43. And because the panel turned its back on *Thomas*, the dissental asserts, it violated this Court's prior-panel-precedent rule, pursuant to which "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

With respect, the panel didn't "reimagine" *Thomas*—let alone reimagine it "as [we] pleased." Rosenbaum Dissenting Op. at 26, 32. To the contrary, and the dissental's shade-throwing notwithstanding, the panel *followed Thomas*—or, to be more precise, it followed the breadcrumbs left in *Thomas*'s various (and sometimes conflicting) passages. Because the panel followed (rather than "flout[ed]," *see id.* at 23) *Thomas*, it didn't violate the prior-panel-precedent rule. And because the panel didn't violate the prior-panel-precedent rule, the basis for the dissental evaporates.

In an effort to paint a picture of lawless, result-oriented judging, the dissental gives the misleading impression that *Thomas* is pellucidly clear—that it just says, over and over and over, that the entirety of

an Eighth Amendment claim, from stem to stern, is subject only to clear-error review, and that the panel, in the face of all that clarity, willfully bulled ahead with de novo review instead. As is so often the case, the reality is more complicated.

It is true, as the dissental says, that *Thomas* states that "[a] prison official's deliberate indifference is a question of fact which we review for clear error." 614 F.3d at 1312; *see also id.* at 1302 ("Subsidiary issues of fact are reviewed for clear error."). In our opinion, the panel candidly admitted as much. *See Keohane*, 952 F.3d at 1272 n.8. But *Thomas* also holds—and I'll just quote it directly—that an appellate court must review the ultimate determination "that there was an Eighth Amendment violation warranting equitable relief . . . *de novo*." *Thomas*, 614 F.3d at 1303.

For better or worse, then, it fell to the panel to try to synthesize those competing directives. And for what it's worth—and totally unsurprisingly, I'm sure—I think the panel got it exactly right. Let me explain.

A

Despite all the adverbs that the dissental uses to describe the *Thomas* opinion—it says, in turn, that *Thomas* "expressly," "demonstrably," "unmistakably," "unambiguously," and "repeatedly" prescribed across-the-board clear-error review—everyone recognizes that some synthesis of *Thomas*'s mixed messages is necessary. I recognize it. Judge Wilson's panel dissent recognized it. And, yes, even Judge Rosenbaum's dissental ultimately recognizes it. Here, it seems to me, are the contenders:

1. *The Panel Opinion.* In tackling the case, the panel took seriously *Thomas*'s dual directives (1) that an appellate court must review de novo the district court's ultimate determination "that there was an Eighth Amendment violation warranting equitable relief" and (2) that "[s]ubsidiary issues of fact are reviewed for clear error." 614 F.3d at 1302. Accordingly, we held (1) that the clear-error standard governs what we (echoing the Supreme Court) called "historical facts—*e.g.*, what happened, who knew what, how did they respond?"—but (2) that "what the Eighth Amendment means—and requires in a given case—is an issue squarely within the core competency of appellate courts" and is thus subject to de novo review. *Keohane*, 952 F.3d at 1272–73 n.8. The panel opinion therefore gives meaningful roles to both the de novo and clear-error standards, both of which *Thomas* prescribes.

2. *The Dissental's Proposal.* Today's dissental suggests (without quite saying) that, perhaps, de novo review applies *only* to the first, objective component of a deliberate-indifference claim: "*Thomas*'s precise statements applying clear-error review to all components of the subjective inquiry . . . are entirely harmonious with *Thomas*'s statement that de novo review applies to the overarching question of deliberate-indifference. The overarching standard of review is necessarily de novo *because it incorporates within it de novo review of the objective inquiry of the deliberate-indifference analysis*." Rosenbaum Dissenting Op. at 33 (emphasis added); *see also id.* at 34 n.5 ("[De novo review] extends to the ultimate conclusion because the ultimate conclusion necessarily *includes within it a determination based*

on de novo review (the objective inquiry)." (emphasis added)).

With respect, that can't be correct. The *Thomas* opinion prescribes de novo review in *two* separate places—with respect to *two* different issues. In one place, it states that the constituent determination whether the deprivations suffered by the inmate "are objectively 'sufficiently serious' to satisfy the objective prong" of the deliberate-indifference standard "is a question of law" subject to de novo review. *Thomas*, 614 F.3d at 1307. In another, it states, separately, that the district court's ultimate determination "that there was an Eighth Amendment violation warranting equitable relief"—*i.e.*, the *entirety* of that determination—"is reviewed *de novo*." *Id.* at 1302. So de novo review unquestionably applies to more than just the first prong of the deliberate-indifference standard—it applies, somehow or another, to the whole enchilada.

3. ***The Panel Dissent.*** Which brings me to the panel dissent's reading of *Thomas*. It seemed to appreciate that de novo review applies to the entirety of the deliberate-indifference claim—to the ultimate determination that the Eighth Amendment was violated—but it left the de novo standard only a vanishingly small role:

> [I]f the district court, despite checkmarks in both the objective and subjective boxes, still concluded that there was no Eighth Amendment violation, we would lend no deference to this error. We would review it de novo, and would no doubt reverse. And if the district court, despite holding that one of

> the elements was not met, still concluded that there was an Eighth Amendment violation, we would do the same. We would review this error de novo, and no doubt reverse. *That* is the ultimate conclusion that we review de novo.

Keohane, 952 F.3d at 1288 (Wilson, J., dissenting).

With respect, that can't be right, either. As the panel majority explained in our opinion, it is inconceivable that "the de novo standard's sole office is to ensure that the district court puts 'checkmarks' in the right boxes, and then doesn't make a truly boneheaded, asinine mistake." *Id.* at 1273 n.8.[2]

B

Among the available alternatives, it won't surprise you to learn that I think the panel's synthesis of *Thomas*'s mixed messages is clearly correct. I say so for reasons that I have already explained and that neither of my dissenting colleagues has even engaged, let alone rebutted.

---

[2] The dissental suggests that the panel "g[ave] itself permission to reimagine what *Thomas* held because it conclude[d] that what *Thomas* expressly said 'cannot possibly be what we've meant.'" Rosenbaum Dissenting Op. at 26 (quoting *Keohane*, 952 F.3d at 1273 n.8). No. What the panel said in the passage that the dissental snatch-quotes is that *the panel dissent's "checkmark" interpretation* of de novo review "cannot possibly be what we've meant when we have repeatedly held that de novo review applies to the district court's determination whether 'there was an Eighth Amendment violation warranting equitable relief.'" *Keohane*, 952 F.3d at 1273 n.8 (quoting *Thomas*, 614 F.3d at 1303).

1

First, the panel's interpretation gives meaningful roles to both the de novo and clear-error standards—both of which, again, *Thomas* expressly prescribes. By contrast, neither of my dissenting colleagues has any viable explanation of what role de novo review should play in Eighth Amendment deliberate-indifference cases. As between the courts of appeals and the district courts, who decides what the Eighth Amendment ultimately means and requires in a given case? On their theories, the district courts do—at which point the appellate courts' hands are pretty much tied. What an odd state of affairs. In what other circumstance do the courts of appeals effectively cede to district courts the job of determining the meaning and proper application of the Constitution?[3]

2

Second, "meaningful appellate review of a district court's ultimate constitutional holding follows straightaway from Supreme Court precedent prescribing de novo review of other application-of-law-to-fact questions—including those arising under the Eighth Amendment." *Keohane*, 952 F.3d at 1273 n.8. In *United States v. Bajakajian*, 524 U.S. 321 (1998), for instance, the Supreme Court rejected the contention that an appellate court should defer to a

---

[3] I note that while a holding that clear-error review applies to the entirety of the deliberate-indifference analysis—and effectively binds us to the district courts' determinations—might serve Keohane well in this particular case, it would be cold comfort to the multitude of prisoners who appeal from district court orders *rejecting* deliberate-indifference claims. And of course, the *vast* majority of deliberate-indifference cases that appellate courts see arise on appeal by inmates who have lost below.

district court's determination whether a fine is excessive for Eighth Amendment purposes. As the Supreme Court explained there, while the district court's factual findings in conducting the excessiveness inquiry "must be accepted unless clearly erroneous," "whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case"—and thus calls for "*de novo* review." *Id*. at 336–37 & n.10.

Similarly, in *Ornelas v. United States*, the Supreme Court held "that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal." 517 U.S. 690, 699 (1996). The Court acknowledged—precisely as our opinion did—"that a reviewing court should take care both to review findings of *historical fact* only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id*. (emphasis added); *see Keohane*, 952 F.3d at 1273 n.8. But it insisted that the ultimate determination—the application of the constitutional standard to those facts—demands de novo review. Significantly, the Court gave three reasons to support its holding, all of which apply equally here: (1) the constitutional standards at issue involve "fluid concepts that take their substantive content from the particular contexts in which the standards are being assessed"; (2) the applicable "legal rules . . . acquire content only through application," and "[i]ndependent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles"; and (3) "*de novo* review tends to unify precedent" and "stabilize the law." *Ornelas*, 517 U.S. at 696–98.

Finally, applying *Bajakajian* and *Ornelas*—and repeating the same considerations—the Supreme Court held in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, "that courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards" under the Fourteenth Amendment. 532 U.S. 424, 436 (2001).

Except to say that they aren't deliberate-indifference cases, neither of my dissenting colleagues has offered any explanation why the rationale of *Bajakajian*, *Ornelas*, and *Cooper Industries* doesn't apply here. District courts are undoubtedly better situated than appellate courts to make findings of what the panel (echoing the Supreme Court in *Ornelas*) called "historical facts," and their determinations with respect to those facts are accordingly entitled to deference. But what the Eighth Amendment means—and requires in a given case—is, as I have said, an issue squarely within the core competency of appellate courts. And to be clear, it's no answer to say, as the panel dissent did—citing Justice Scalia's solo *dissent* in *Ornelas*—that some issues underlying a deliberate-indifference claim may be "fact-specific and not easy to generalize." *Keohane*, 952 F.3d at 1291 n.13 (Wilson, J., dissenting). The Supreme Court recognized as much regarding the "mixed questions" in *Bajakajian*, *Ornelas*, and *Cooper Industries*—and yet applied de novo review anyway. Just so here.

3

Finally, the panel's synthesis of *Thomas*'s standard-of-review conundrum squares precisely with the First Circuit's en banc decision in the factually

similar *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014). The court there rejected the very arguments that my dissenting colleagues have made and held that de novo, rather than clear-error, review governed a district court's determination that the Eighth Amendment required prison authorities to accommodate a transgender inmate's medical-treatment requests. In *Kosilek*, an inmate alleged that the Massachusetts Department of Correction's refusal to provide sex-reassignment surgery to treat the inmate's gender-identity disorder constituted deliberate indifference. *Id.* at 68–69.

Sitting en banc, the First Circuit explained that "[t]he test for establishing an Eighth Amendment claim of inadequate medical care encompasses a multitude of questions that present elements both factual and legal"—and, therefore, that "[r]eview of such 'mixed questions' is of a variable exactitude," such that "the more law-based a question, the less deferentially we assess the district court's conclusion." *Id.* at 84. Citing our opinion in *Thomas*, the *Kosilek* court held that "[t]he ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is reviewed *de novo*." *Id.* In so holding, the court rejected the dissenting judges' argument that "the ultimate constitutional question is inextricably tied up with the factual details that emerged at trial," which, according to them, "counsels against pure de novo review." *Id.* at 99 (Thompson, J., dissenting). While acknowledging—again, just as the panel did here—that appellate courts "award[] deference to the district court's resolution of questions of pure fact and issues of credibility," the *Kosilek* majority stood by its conclusion that the ultimate Eighth Amendment question is reviewed de novo. *Id.*

at 84–85. Notably, the court buttressed its holding with citations to decisions from several other circuits reaching the same conclusion. *See, e.g.*, *Hallett v. Morgan,* 296 F.3d 732, 744 (9th Cir. 2002) ("The district court's factual findings regarding conditions at the Prison are reviewed for clear error. However, its conclusion that the facts do not demonstrate an Eighth Amendment violation is a question of law that we review de novo."); *Hickey v. Reeder,* 12 F.3d 754, 756 (8th Cir. 1993) ("Whether conduct, if done with the required culpability, is sufficiently harmful to establish an Eighth Amendment violation is an objective or legal determination which we decide de novo."); *Alberti v. Klevenhagen,* 790 F.2d 1220, 1225 (5th Cir. 1986) ("[O]nce the facts are established, the issue of whether these facts constitute aviolation of constitutional rights is a question of law that may be assayed anew upon appeal.").

* * *

So in short, the panel here didn't "reimagine" this Court's earlier decision in *Thomas* but, rather, synthesized *Thomas*'s mixed messages in accordance with Supreme Court and other circuits' precedents.

IV

I'll conclude where I began. For all its rhetorical flourish, today's dissent from denial simply doesn't make a compelling argument that this case warranted en banc reconsideration. The panel was faced with the vexing question of how the de novo and clear-error standards of review map onto the various elements and sub-elements of an Eighth Amendment deliberate-indifference claim—a question made all the more vexing by *Thomas*'s (let's just say) imprecise discussion of that issue. Faced with all that

ambiguity, the panel did its level best—both to apply *Thomas* and to faithfully and correctly decide the case before it. I, for one, think the panel got it exactly right. But even if I'm wrong about that—and reasonable minds can disagree—the worst that can be said of the panel opinion is that it "misappli[ed the] correct precedent to the facts of the case." 11th Cir. R. 35-3. In this Circuit, that is not a ground for en banc rehearing. *Id.*

While the dissental's spicy rhetoric doesn't enhance its argument—but rather pretty severely diminishes it, to my mind—it does, I fear, corrode the collegiality that has historically characterized this great Court. Here's hoping for better—and more charitable—days ahead.

ROSENBAUM, Circuit Judge, joined by WILSON, MARTIN, and JILL PRYOR, Circuit Judges, dissenting from the denial of rehearing en banc:

This is not an easy dissent to write—not because the legal issue involved in the merits of this case is complex or difficult (it's not), but because our denial of rehearing en banc here is not—or at least should not be—normal. We are denying en banc rehearing in a case that objectively qualifies for it under the Federal Rules of Appellate Procedure and that indeed demands it to preserve the sanctity of the prior-precedent rule and the important policies of stability and predictability that that rule serves.

Our failure to hold en banc review in a case where the panel opinion contradicts our holdings in opinions earlier panels issued yet claims nonetheless to comply with the prior-precedent rule introduces uncertainty and confusion into the law of our Circuit. And worse, it undermines the prior-precedent rule,

"the foundation of our federal judicial system." *Smith v. GTE Corp.*, 236 F.3d 1292 (11th Cir. 2001) (quoting *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983)). We as a Court must reckon with these potentially devastating consequences of our actions if we continue to allow opinions that flout the prior-precedent rule while claiming they comply with it to issue unchecked.

A case like this one, where the opinion distorts beyond recognition the prior-precedent rule—a fundamental mechanism by which this Court ensures the predictability and stability of the law—is exactly the kind of case for which the en banc tool was designed. For that reason, whether any individual judge agrees or disagrees with the ultimate outcome of *Keohane* should be irrelevant to the question of whether this case warrants en banc review. Too much is at stake.

I am sure each of us believes that we are applying the appropriate standards in determining whether to vote for en banc rehearing.[1] But an

---

[1] I am truly sorry that Chief Judge Pryor and Judge Newsom seem to have taken my concerns personally. I do not believe this dissent to be personal. I have great respect for all my colleagues, and I value this Court's collegiality. But I also have great respect for the rule of law and the need for our Court to maintain its legitimacy. And I don't agree that defending these things or pointing out what I think is wrong with *Keohane* and explaining why I view it as such a big problem makes me "[un]collegial[]" and "[un]charitable," *see* Newsom Op. at 22, or is an "attack[on] . . . the integrity of judges or their commitment to the rule of law . . . [or] the legitimacy of this Court," W. Pryor Op. at 5. Nor do the labels and characterizations the W. Pryor and Newsom Opinions feel a need to impose provide a good enough reason to remain silent in the face of the threat *Keohane* represents to our judicial norms. I am aware of no other way to oppose what I see

objective analysis suggests we are not. So we need to recalibrate. I urge our Court—and each of us individually—to carefully and objectively reexamine this vote and to truly reflect on the dangers of condoning panel opinions that contradict our prior precedent while nonetheless claiming to follow the prior-precedent rule.

I divide my discussion into three substantive sections. In Section I, I review the law governing the limited circumstances in which en banc review is appropriate. In Section II, I show that this case warrants en banc rehearing. And in Section III, I explain why we must insist on strict adherence to the prior-precedent rule by every panel.

But first, a word of caution: this dissent is not about what the substantive law that governs Keohane's case should or should not be. And to avoid any possible misunderstanding on that, I begin by stating expressly that I take no position on that in this dissent. Even assuming without deciding that *Keohane* arrived at the objectively legally correct rule for the appropriate standard of review in Eighth Amendment deliberate-indifference claims, the problem here is that on the way to doing so, it issued a new rule that is contrary to our binding precedent while nonetheless attributing that new rule to that same precedent. The proper procedure for overruling binding precedent in this Circuit requires the Court sitting en banc to set it aside; a panel is not free to overrule binding precedent on its own. To be clear, then, this dissent is solely about the importance to the

---

as the failure of our Court to require the *Keohane* panel to comply with the prior-precedent rule, other than by writing a dissent that candidly discusses that problem and its significance.

stability and predictability of the law of ensuring every panel strictly follows our prior-precedent rule.

I.

Rule 35, Fed. R. App. P., anticipates that en banc rehearing will be ordered only when it is "necessary to secure or maintain uniformity of the court's decisions" or the case "involves a question of exceptional importance." Fed. R. App. P. 35(a). This is one of those cases.[2] First, this case objectively warrants en banc review under Rule 35(a) because the panel majority opinion here, *Keohane v. Florida Department of Corrections*, 952 F.3d 1257 (11th Cir. 2020), creates confusion and inconsistency in our Eighth Amendment Circuit jurisprudence. But second and more urgent is what the *Keohane* panel's interpretation and application of the prior-precedent rule and our refusal to take this case en banc do to that rule. In trying unsuccessfully to avoid running afoul of our prior-precedent rule and raising a conflict with our earlier precedent known as *Thomas v. Bryant*, 614 F.3d 1288, 1312 (11th Cir. 2010), the *Keohane* majority opinion remolds the prior-precedent

---

[2] Chief Judge Pryor notes that "[t]he grant of en banc review is and should be rare." W. Pryor Op. at 4. Of course, as I recognize above, that's true, when we consider the total number of cases we review every year. But that's also an oversimplification of what happened here. By my count, in the most recent nearly two-year period (since January 1, 2019), we have voted for en banc rehearing in twelve cases. During that same period, we have voted against en banc review only seven times when a member in active service on this Court has requested an en banc poll. So once a member of this Court in active service has sought an en banc poll, we have granted en banc rehearing at a rate of 63%—a majority of the time. Presumably, that is because we exercise extreme discretion in requesting an en banc poll in the first place.

rule into an unrecognizable and dangerous form: it gives itself permission to reimagine what *Thomas* held because it concludes that what *Thomas* expressly said "cannot possibly be what we've meant," *Keohane*, 952 F.3d at 1272.

Our "firmly established" prior-precedent rule strictly requires later panels to follow the precedent of earlier panels unless and until the prior precedent is overruled or undermined to the point of abrogation by the Supreme Court or this Court sitting en banc. *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc); *see also Smith*, 236 F.3d at 1303 n.11. We have described ourselves as "emphatic" in our strict adherence to this rule, *see Steele*, 147 F.3d at 1318 (quoting *Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir. 1997)), and have said that this Court "take[s] [the prior-precedent] rule seriously," *Atl. Sounding Co.*, *Inc. v. Townsend*, 496 F.3d 1282, 1286 (11th Cir. 2007) (Ed Carnes, J., concurring).

We have gone so far as to hold that under that rule, a later panel cannot overrule a prior one's holding "even though convinced it is wrong." *Steele*, 147 F.3d at 1317-18. Indeed, we have held that the prior-precedent rule binds later panels even when the prior panel's decision failed to mention controlling Supreme Court precedent and reached a holding in conflict with that precedent. *Smith*, 236 F.3d at 1302-03. So strong is the prior-precedent rule that under it, a later panel is bound by the earlier panel's "reasoning and result," even when the prior panel does not explicitly state its rule. *See id.* at 1304.

No exceptions to the prior-precedent rule exist. *See id.* at 1302. That is so, we have explained, because if an exception applied, "it could end up nullifying the

well-established prior panel precedent rule that is an *essential* part of the governing law of this Circuit." *Id.* (emphasis added). Not only that but the prior-precedent rule "helps keep the precedential peace among the judges of this Court, and it allows us to move on once an issue has been decided." *Townsend*, 496 F.3d at 1286 (Ed Carnes, J., concurring). Without it, as Judge Ed Carnes has cautioned, "every sitting of this court would be a series of do-overs, the judicial equivalent of the movie 'Groundhog Day.'" *Id.*

The Newsom Opinion takes issue with my discussion, describing it as full of "hyperbole and invective" because of my concerns that continued disregard of our prior-precedent rule jeopardizes the rule of law. *See* Newsom Op. at 6. But those concerns are not overblown. Indeed, our own Court has emphasized that the prior-precedent rule "serves as the foundation of our federal judicial system[, as] [a]dherence to it results in stability and predictability." *Smith*, 236 F.3d at 1303 (quoting *Jaffree v. Wallace*, 705 F.2d 1526, 1533 (11th Cir. 1983)). For these reasons, if we continue to allow panels to skirt the prior-precedent rule, we certainly ask for trouble.

Under our prior-precedent rule, if a panel vehemently disagrees with a prior precedent, its only option is to apply it, anyway, and call for en banc rehearing. It may not, under any circumstances, create its own conflicting rule and inaccurately purport to apply the governing prior precedent. And if it does, en banc review is in order—either to correct the panel opinion and make it comply with binding precedent, or to overrule the prior precedent. But in any case, changing prior precedent is not something that a panel may do.

II.

Yet that's precisely what the *Keohane* panel did: while insisting it was following *Thomas*, it instead created a new rule diametrically opposed to *Thomas*'s holding. To show that this is necessarily the case, I must first briefly review the relevant facts of Keohane's case (Section A) and the law governing claims of deliberate indifference to prisoners' medical claims (Section B). Then in Section C I point out how the *Keohane* panel opinion is at war with *Thomas*, the precedent it purports to follow.

A.

Reiyn Keohane was assigned male at birth, but she has identified as female since she was about eight years old. ECF No. 171 at 1. She was formally diagnosed with gender dysphoria when she was sixteen. *Id.* at 2. At that time, Keohane began a hormone-therapy regimen. *Id.*

After her arrest, she was cut off from her treatment, including hormone therapy and the ability to dress and groom as a woman. *Id.* at 2. She complained, but the prison did not respond. *Id.* Keohane's untreated dysphoria caused her such extreme anxiety that she attempted to kill herself and castrate herself while in custody. *Id.*

These facts and others led Keohane to sue the Florida Department of Corrections (the "FDC") under 42 U.S.C. § 1983, alleging violations of her Eighth Amendment rights and seeking declaratory and injunctive relief. As the panel opinion explained, after a bench trial, the district court entered a 61-page order awarding Keohane relief. As relevant to the

concerns I raise in this dissent,[3] the district court directed the FDC to permit Keohane "to socially transition by allowing her access to female clothing and grooming standards." 952 F.3d at 1262 (quoting district court order).

The panel opinion reversed. Claiming to follow *Thomas*, the *Keohane* panel applied the de novo standard of review to certain components of the district court's findings for which the *Thomas* Court had instructed a clear-error standard governs. In so doing, the panel simultaneously injected conflict into our Eighth Amendment deliberate-indifference jurisprudence and stretched interpretation of our prior-precedent rule beyond recognition.

B.

The Eighth Amendment prohibits the government from inflicting "cruel and unusual punishments" on inmates. *Wilson v. Seiter*, 501 U.S. 294, 296–97 (1991). That prohibition encompasses "deprivations . . . not specifically part of [a] sentence but . . . suffered during imprisonment." *Id.* at 297. An inmate who suffers "deliberate indifference" to her "serious medical needs" may state a claim for a violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004). Under our precedent, a deliberate-indifference claim has two components: an objectively serious medical need and subjective

---

[3] Appellant's motion for rehearing also seeks rehearing on whether the Majority Opinion correctly applied our mootness exception for voluntary cessation. For purposes of this dissent from the denial of rehearing en banc, I express no views about the propriety of that holding.

deliberate indifference by the official to that need. *Brown*, 387 F.3d at 1351.

Thomas holds that the objective inquiry (whether a serious medical need exists) includes both questions of fact subject to clear-error review and a question of law subject to de novo review. *Thomas*, 614 F.3d at 1307, 1308. I am not concerned with that aspect of *Keohane* because the panel opinion had no occasion to comment on or apply the *Thomas* standard of review to the objective inquiry, since "all agree[d] that Keohane's gender dysphoria" satisfies that requirement. 952 F.3d at 1273. Instead, I focus on the subjective component of Keohane's deliberate-indifference claim.

Before *Keohane*, we had described the subjective inquiry (whether the defendant was subjectively deliberately indifferent to the plaintiff's serious medical need) to require the plaintiff "to prove three ***facts***: (1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence" (the "subjective-inquiry components"). *Brown*, 387 F.3d at 1351 (emphasis added). Of course, in characterizing as "facts" the three things that the plaintiff must prove to satisfy the subjective inquiry, we suggested that the district court's resolutions of the three subjective-inquiry components were findings of fact.

Then, as Judge Wilson plainly showed in his dissent in *Keohane*, 952 F.3d at 1289-92 (Wilson, J., dissenting), we said precisely that a few years later in *Thomas*. There, several inmates sued FDC employees, alleging that their use of chemical agents on certain mentally ill inmates violated the Eighth Amendment. 614 F.3d at 1293. After a five-day bench trial, the

district court determined that the FDC's non-spontaneous disciplinary use of chemical agents on inmates who, at the time, were unable to conform their behavior to prison standards because of their mental illnesses, violated the Eighth Amendment. *Id.* at 1294. The FDC employees appealed this conclusion (among other district-court actions not relevant here). *Id.*

In analyzing the appeal, we noted that we review de novo the "legal conclusion—that there was an Eighth Amendment violation[,]"—but that "[s]ubsidiary issues of fact are reviewed for clear error." *Id.* at 1303. Had we stopped there and both said nothing more about the standard of review and not applied the standard of review in a way that demonstrated what we meant by this division of the standard of review, perhaps the *Keohane* panel would have been free to construe those two propositions as it pleased, without running afoul of the prior-precedent rule.[4]

But that was not the end of our discussion and application of the standard of review. Rather, later in *Thomas*, our statements concerning the appropriate standard of review, as well as our application of that standard of review, unmistakably show that the phrase "legal conclusion . . . that there was an Eighth Amendment violation" refers to "[t]he ultimate legal conclusion" of whether the defendants violated the Eighth Amendment, *Kosilek v. Spencer*, 774 F.3d 63

[4] That, too, is questionable (though less so than *Keohane*'s characterization of *Thomas*), in light of our prior description in *Brown*, 387 F.3d at 1351, that a plaintiff had to prove three "facts" to establish all three aspects of the subjective part of a deliberate-indifference claim.

(1st Cir. 2014). And the phrase "[s]ubsidiary issues of fact" refers to the issues of fact that one of the objective-inquiry components and all the subjective-inquiry components of the deliberate-indifference analysis constitute.

Contrary to the Newsom Opinion's characterization of *Thomas*, there is nothing "conflicting" or "competing," *see* Newsom Op. at 11, 12, about *Thomas*'s direction. Nor does *Thomas* send "mixed messages." *Id.* at 12. *Thomas*'s precise statements applying clear-error review to all components of the subjective inquiry—outlined in detail below—are entirely harmonious with *Thomas*'s statement that de novo review applies to the overarching question of deliberate-indifference. The overarching standard of review is necessarily de novo because it incorporates within it de novo review of the objective inquiry of the deliberate-indifference analysis.[5]

---

[5] The Newsom Opinion attempts to alter the focus from my reason for seeking en banc review—*Keohane*'s failure to follow *Thomas* and abide by the prior-precedent rule—by arguing that daylight exists between Judge Wilson and me concerning *Thomas*'s holding on the applicable standard of review. *See* Newsom Op. at 13-15. It doesn't. I fully agree with Judge Wilson that *Thomas* applies the clear-error standard to all aspects of the subjective-inquiry prong of the deliberate-indifference test. *See* *Keohane*, 952 F.3d at 1287-90 (Wilson, J., dissenting). I likewise understand *Thomas*'s statement that we review "the district court's . . . conclusion [] that there was an Eighth Amendment violation warranting equitable relief [] . . . de novo," *Thomas*, 614 F.3d at 1303, to refer in context to the notion that "[o]ur de novo review extends only to questions of law (i.e., the objectively-serious-need element) and to the district court's ultimate conclusion whether the objective and subjective elements of a deliberate indifference claim state an Eighth Amendment violation." *Keohane*, 952 F.3d at 1287 (Wilson, J., dissenting). As

And nothing in *Thomas* supports the *Keohane* majority opinion's suggestion that, by "[s]ubsidiary issues of fact," *Thomas* meant only what the *Keohane* majority opinion deemed "historical facts." *See Keohane*, 952 F.3d at 1272 n.8. Tellingly, the *Keohane* majority opinion cited nothing in *Thomas* for its contention. Nor did *Thomas* ever use the term "historical facts." On the contrary, as Judge Wilson's *Keohane* dissent and this dissent demonstrate in detail, *see infra* at 35-38, *Thomas* unambiguously applied the clearly erroneous standard of review to each of the three components of the subjective inquiry. The *Keohane* majority opinion was not free to stray from the clear-error standard of review that *Thomas*

I have noted, it extends to the ultimate conclusion because the ultimate conclusion necessarily includes within it a determination based on de novo review (the objective inquiry). And we're not the only ones to understand *Thomas*'s clear analysis this way. Indeed, in *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), the First Circuit cited *Thomas* for the proposition that "[t]he ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is reviewed *de novo*," while quoting from *Thomas* in the supporting parenthetical only the following: "Whether the record demonstrates that [the prisoner] was sprayed with chemical agents . . . and that he suffered psychological injuries from such sprayings are questions of fact. Whether these deprivations are objectively 'sufficiently serious' to satisfy the ***objective*** prong, ***is a question of law*** . . . ." *Kosilek*, 774 F.3d at 84 (quoting *Thomas*, 614 F.3d at 1307) (quotation marks omitted) (alterations by the *Kosilek* Court) (emphasis added). Tellingly, *Kosilek* never refers to the subjective inquiry to provide an example of presenting any legal questions to show why *Thomas* refers to the overarching question of deliberate-indifference liability as subject to de novo review. Nor does *Kosilek* cite *Thomas* for the proposition that any components of the subjective inquiry are subject to de novo review.

held governs the components of the subjective inquiry. Yet that is what it did.

C.

I begin with what *Thomas* had to say about how the standard of review applies to the evaluation of a district court's determination on the subjective inquiry of an Eighth Amendment deliberate-indifference claim—that is, whether the defendant (1) subjectively knew of a risk of serious harm; (2) nonetheless disregarded that risk; and (3) did so by conduct that is more than mere negligence. *Thomas*, 614 F.3d at 1312. *Thomas* explained that this inquiry requires us to determine whether "the evidence . . . demonstrate[s] that with knowledge of the infirm conditions, the official knowingly or recklessly declined to take actions that would have improved the conditions." *Id.* (internal quotation marks and alterations omitted). This summary of what the subjective inquiry requires encompassed all three prongs of the subjective inquiry: "knowledge of the infirm conditions" means the defendant "subjectively knew of a risk of serious harm"; "declined to take actions that would have improved the conditions" means the defendant "disregarded the risk"; and "knowingly or recklessly" did so means the defendant "did so by conduct that is more than mere negligence."

Immediately after we summarized what the three components of the subjective inquiry require, we unambiguously stated that "[a] prison official's deliberate indifference is a ***question of fact which we review for clear error***." *Id.* (emphasis added). Based on the placement and content of the remark, it is clear that with this statement, we were referring to the entirety of the three-part subjective inquiry. Not

only did this quotation appear immediately following our summary of all the elements of the subjective component of an Eighth Amendment violation, but significantly, by definition, "[a] prison official" can engage in "deliberate indifference" only if all three subjective-inquiry components are satisfied.

We need not review *Thomas* any further than this to know that we unambiguously held in *Thomas* that the district court's rulings on the entire subjective inquiry—including its rulings on all three of the subjective inquiry's components—are subject to the clearly erroneous standard of review.

But there's more. In addressing each of the three parts of the subjective inquiry in *Thomas*, we again said and demonstrated that each component is to be reviewed for clear error.

With respect to the first question—whether the defendant subjectively knew of a risk of serious harm—we relied in *Thomas* on *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), citing to *Farmer*'s proposition that "[w]hether a prison official had the requisite knowledge of a substantial risk is a ***question of fact*** subject to demonstration in the usual ways . . . ."[6] *See Thomas*, 614 F.3d at 1313 (quoting *Farmer*, 511 U.S. at 842) (alteration omitted) (emphasis added).

---

[6] Though in *Thomas* we omitted the phrase "question of fact" from the *Farmer* quotation, we did so only to avoid repetition of the phrase "question of fact," which appears in the sentence immediately preceding the *Farmer* quotation. As I've noted above, that sentence states that the entire subjective inquiry is a question of fact we review for clear error. *See Thomas*, 614 F.3d at 1312.

As to the second and third parts of the test—whether the defendant disregarded this risk by more than mere negligence—we concluded that "[t]he record . . . ***<u>supports the district court's finding</u>*** that the Secretary of the [FDC] and the Warden . . . recklessly disregarded the risk of psychological harm to inmates like [the *Thomas* plaintiff]." *Id.* at 1315 (emphasis added). We then described the evidence in the record that underpinned the district court's finding. *Id.* For example, we opined that "the [FDC]'s refusal to modify its non-spontaneous use-of-force policy provides ***<u>support for the district court's finding</u>*** of more than mere or even gross negligence on the part of the [FDC]." *Id.* (emphasis added). The repeated references to evidence in the record and uses of the words "support for the district court's finding" further unmistakably demonstrate that we viewed the district court's "findings" as factual findings, and we reviewed them for clear error.

But you need not take my word for it. *Thomas* says as much. Thomas began its analysis by invoking the clear error-test and by summarizing its conclusion that the defendant failed to meet that standard: "[O]ur review of the district court's voluminous uncontested ***<u>factual findings</u>*** as they relate to the defendants' deliberate indifference ***<u>does not leave us with the definite and firm conviction that a mistake has been committed</u>***. Accordingly, the defendants have failed to satisfy their burden of ***<u>demonstrating the district court's clear error</u>***." *Thomas*, 614 F.3d at 1313 (emphasis added).

That was no mistake. *Thomas* also ended its discussion of the second and third components of the subjective inquiry by summing up that it could not "conclude that the district court was ***<u>clearly</u>***

erroneous in ***finding*** that the record demonstrates that FDC officials turned a blind eye to [the plaintiff's] mental health needs and the obvious danger that the use of chemical agents presented to his psychological well-being." *Id.* at 1316 (internal quotation marks omitted and emphasis added). In our very next sentence, we explained that "[t]urning a blind eye to such obvious danger provides ample ***support for the [district court's] finding*** of the requisite recklessness." *Id.* (emphasis added). Finally, we held that "an examination of [the] entire record demonstrates that the district court did not commit ***clear error*** in ***finding*** the defendants' deliberate indifference." *Id.* at 1317 (emphasis added).

In short, our discussion in *Thomas* of the subjective inquiry of the deliberate-indifference claim repeatedly shows that we characterized and treated each of the three components as factual ones, governed by the clearly erroneous standard of review on appeal.

Whether each of us personally agrees or disagrees that a clear-error standard of review is a good idea for each of the components of the subjective inquiry, *see* Newsom Op. at 16 n.3, is irrelevant. It is beyond dispute that *Thomas* held that clear-error review governs.

In contrast, the *Keohane* majority opinion reviewed de novo the district court's findings on the second and third parts of the subjective inquiry.[7] *See*

[7] The *Keohane* majority opinion concluded that it did not need to evaluate whether the district court correctly determined that the prison officials had actual knowledge of a risk of serious harm because, in any case, Keohane did not establish the second and third parts of the subjective inquiry. 952 F.3d at 1274. For that

Keohane, 952 F.3d at 1274-78. In fact, except in a footnote dismissing the notion that clear-error review applies to each of the three components of the district court's factual findings on the subjective inquiry, the majority opinion never once employed the term "clear error" in conducting its analysis. *See id.* And even in that footnote, the *Keohane* panel opined only that even assuming the clear-error standard of review governs review of the district court's findings on each of the three subparts of the subjective inquiry, "we would have little trouble formulating the required firm conviction that a mistake had been committed." *Id.* at 1272 n.8 (citation and internal quotation marks omitted). The majority opinion said so, though, without any corresponding analysis other than a throwaway reference to its legal-error analysis in the text. *See id.*

Perhaps most disturbingly, though, despite the *Keohane* majority opinion's use of the de novo standard of review to review the second and third subparts of the district court's subjective inquiry on Keohane's deliberate-indifference claim, the *Keohane* majority opinion asserted that it followed *Thomas*. But in support of this proposition, the *Keohane* majority opinion relied solely on *Thomas*'s statements that we review de novo whether "there was an Eighth Amendment violation" and that "[s]ubsidiary issues of fact are reviewed for clear error." *See Keohane*, 952 F.3d at 1265 n.2. Likewise, that is the sole "breadcrumb[]" from *Thomas* that the Newsom Opinion cites in justifying *Keohane*'s application of de

---

reason, the *Keohane* majority opinion did not expressly review the first part of the district court's ruling on the subjective inquiry.

novo review to all components of the subjective inquiry. *See* Newsom Op. at 11-12.

But as I have already discussed, that one "breadcrumb[]" is part of a trail that leads inescapably to the conclusion that *Thomas* holds that the clear-error standard governs the subjective inquiry.

Yet that one statement deprived of its proper context is the only thing that *Keohane* and the Newsom Opinion point to from *Thomas* to justify *Keohane*'s conclusion that *Thomas* required de novo review of the subjective inquiry. Indeed, neither *Keohane* nor the Newsom Opinion responds to *any* of the numerous quotations Judge Wilson's dissent and I have cited from *Thomas* that show that *Thomas* held that clear-error review governs the subjective inquiry. *Keohane* and the Newsom Opinion just ignore them. But ignoring *Thomas*'s words does not make *Thomas*'s holding go away.

Rather than explaining how *Keohane*'s holding can possibly be consistent with *Thomas*'s numerous quotations, the Newsom Opinion takes a different tack: it appears to attempt to distract the reader from its inability to demonstrate that *Keohane* does not violate *Thomas*. Indeed, careful readers can't help but notice that the Newsom Opinion spends nearly all its pages trying to change the subject.

For example, it defends at length the correctness of the outcome of *Keohane* and the new rule that the *Keohane* panel imposed contrary to *Thomas*'s rule. *See, e.g.*, Newsom Op. at 8-9 (arguing the facts of Keohane's case—including defending the FDC's decision not to allow Keohane to dress and groom herself as a woman—that have no bearing on whether *Keohane* followed *Thomas*), 16 (opining that,

as a matter of law, it makes better sense for appellate courts to "decide[] what the Eighth Amendment ultimately means and requires in a given case" because anything else would be "an odd state of affairs."[8]), 16-19 (contending that *United States v. Bajakajian*, 524 U.S. 321 (1998), *Ornelas v. United States*, 517 U.S. 690 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)—none of which *Thomas* cites, by the way—support the new *Keohane* rule), 19-21 (discussing *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014), to support the notion that de novo review is the correct legal answer to the standard of review that should govern the components of the subjective inquiry[9]).

The Newsom Opinion also tries to divert attention from its failure to show how it is consistent with *Thomas* by grading my writing and that of the *Thomas* panel. *See*, *e.g.*, Newsom Op. at 3, 4, 12, 21, 22.

---

[8] Most respectfully, I disagree that district courts are somehow not equipped to make capable rulings on the application of the subjective-inquiry components of the Eighth Amendment deliberate-indifference standard in any given case. And even if a district court erred, it would not be the last word on the matter, since a party could always appeal to the circuit court. Clearly erroneous review does not mean no review.

[9] *Kosilek*'s sole citation of *Thomas* for the proposition that "[t]he ultimate legal conclusion of whether prison administrators have violated the Eighth Amendment is reviewed *de novo*." *Kosilek*, 774 F.3d at 84, also does not show that *Thomas* applied de novo review to the components of the *subjective* inquiry. In fact, as I have explained in note 5, *supra*, it demonstrates the opposite. So to be clear, *Kosilek* did not purport to read *Thomas* to hold that the components of the subjective inquiry are subject to de novo review.

These distraction tactics miss the point. Whether de novo review of the components of the subjective inquiry is or is not a better answer than *Thomas*'s clear-error review is not the issue here. And whether I use too many adverbs in my writing or whether the Newsom Opinion likes how *Thomas* is written is similarly irrelevant to the issue before the Court.

The only question here is whether *Keohane* is faithful to *Thomas*. The Newsom Opinion's failure to show how the numerous quoted statements from *Thomas* can possibly be consistent with *Keohane*'s new rule applying the de novo standard of review to the subjective inquiry answers that question with a resounding "no."[10]

The *Keohane* majority opinion reached another conclusion only because it viewed *Thomas*'s plain language to require a "mindless, mechanical box-checking assessment." *Id.* So the *Keohane* majority opinion reasoned that what *Thomas* unambiguously said "cannot possibly be what we've meant[.]" *Id.* That language from *Keohane*, in and of itself, gives up the game and implicitly concedes that the *Keohane* majority opinion did not follow *Thomas*.

III.

Under our prior-precedent rule, it was not up to the *Keohane* panel to reimagine the meaning of

[10] The W. Pryor Opinion's silence on this issue likewise speaks volumes: the W. Pryor Opinion doesn't even try to show that *Keohane* is consistent with *Thomas* or that it didn't violate the prior-precedent rule. Nor does it defend *Keohane*'s interpretation of the prior-precedent rule, which allows a later panel to reinvent the holding of a prior panel.

Thomas's unmistakable language holding that the clearly erroneous standard of review applies to the second and third components of the subjective inquiry. The *Keohane* panel was bound by *Thomas*, whether it agreed with it or not and whether it found *Thomas*'s standard of review to be consistent with "meaningful appellate review" or not. *Id.* If the *Keohane* panel had a problem with the standard of review that *Thomas* requires, as Judge Wilson pointed out in his *Keohane* dissent, 952 F.3d at 1292 (Wilson, J., dissenting), its only option under the prior-precedent rule was to apply the *Thomas* standards and call for en banc review. There was no option to recast *Thomas* as having held that de novo review applies when *Thomas* in fact and unmistakably held that clearly erroneous review governs.

Because the *Keohane* panel's holding on the applicable standards of review conflicts directly with the *Thomas* panel's, the *Keohane* panel introduced conflict in our precedent. Under our earliest-precedent rule, "[w]hen we have conflicting [precedents], we follow our oldest precedent." *CSX Transp., Inc. v. Gen. Mills, Inc.*, 846 F.3d 1333, 1338 (11th Cir. 2017) (citation and internal quotation marks omitted). So the earliest-precedent rule requires later panels and district courts to follow *Thomas*. But because *Keohane* claims to be consistent with *Thomas*, *Keohane* purports to render the earliest-precedent rule inapplicable. To do that, though, it violates the prior-precedent rule by failing to abide by *Thomas*'s true holding imposing the clearly erroneous standard of review and by instead pretending that *Thomas* sanctioned the de novo standard of review when it demonstrably did not.

Ultimately, our refusal to hear *Keohane* en banc creates a mess with respect to the current state of the law concerning the correct standards of review governing the components of the subjective inquiry on an Eighth Amendment deliberate-indifference claim: should district courts and later panels follow *Thomas*, as our prior-precedent rule requires, or should they follow *Keohane*, which holds the opposite of *Thomas* while claiming to have followed it?

But the real problem is that our refusal to hear *Keohane* en banc sows uncertainty as to the meaning and strength of our prior-precedent rule. This may be no big deal to the W. Pryor Opinion (though that opinion never tells us why). But as I have noted, *see supra* at Section I, for good reason, we as a Court have historically viewed anything that erodes the prior-precedent rule as a critical threat to the stability and predictability of the law. *See Smith*, 236 F.3d at 1303; *see also Steele*, 147 F.3d at 1317-18. *Keohane*'s rogue interpretation of the prior-precedent rule certainly qualifies as such a threat.

If we are willing to accept *Keohane* as compliant with our prior-precedent rule, then our prior precedent means only what the last panel to have reconstrued what the deciding panel held says it means—no matter how inconsistent the most recent panel's interpretation may be with what the deciding panel actually held. As a result, the practical effect is that no later panel will be bound by anything an earlier panel said.

For these reasons, regardless of what any individual judge on this Court believes the correct standard of review here to be, a bigger issue is at stake: the rule of law imposes an obligation to rehear

Keohane en banc and reaffirm our "emphatic[ally]" strict adherence to the prior-precedent rule. *See Steele*, 147 F.3d at 1318 (citation omitted). Then, if a majority of judges on the Court thinks *Thomas* got it wrong, the Court can say so and change our precedent. But a panel cannot and should not be allowed to do that. And a panel certainly should not be permitted to do so by reinterpreting our prior-precedent rule to the point where it allows precisely what it has always prohibited: a later panel to issue a holding that directly conflicts with an earlier panel's precedent.

By any recognized measure, *Keohane* demands en banc review. We must do better in the future.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-14096

District Court Docket No.
4:16-cv-00511-MW-CAS

REIYN KEOHANE, Plaintiff-Appellee,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY, Defendant-Appellant,

TRUNG VAN LE,
In his official capacity as Chief Health Officer of the Desoto Annex, et al., Defendants.

Appeal from the United States District Court for the Northern District of Florida

---

[Date Issued: March 11, 2020;
Issued as Mandate December 11, 2020]

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 18-14096-HH

REIYN KEOHANE,
Plaintiff - Appellee,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,
Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Florida

[Date Filed: April 5, 2021]

BEFORE: WILSON and NEWSOM, Circuit Judges, and COOGLER,* District Judge.

BY THE COURT:

Appellant's "Motion to Recall Mandate and Vacate Prior Opinion" is DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. 18-14096

Case No.: 4:16-cv-511-MW/CAS

REIYN KEOHANE,
Plaintiff,

versus

JULIE JONES, in her official capacity as Secretary of the Florida Department of Corrections,
Defendant.

[Date Filed: December 17, 2020]

ORDER VACATING JUDGMENT

Pursuant to the Mandate issued in this case by the United States Court of Appeals for the Eleventh Circuit, ECF No. 192, the Clerk shall annotate the docket to reflect that this Court's Order on the Merits, ECF No. 171, is **VACATED**, and the Clerk's Judgment, ECF No. 172, is **VACATED in its entirety**. The Clerk shall enter a new judgment stating, "Plaintiff's claims against Defendant are

dismissed with prejudice." The Clerk shall close the file.[1]

SO ORDERED on December 17, 2020.

s/Mark E. Walker
Chief United States District Judge

[1] Pursuant to this Court's order extending the deadline to file a bill of costs and motion to determine entitlement to fees, ECF No. 178, this Court will entertain a motion for entitlement to fees, if any, even though the file is closed.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 18-14096-H

D.C. Docket No. 4:16-cv-00511-MW-CAS

REIYN KEOHANE,
Plaintiff-Appellee,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Florida

[Date Filed: March 9, 2021]

MOTION TO RECALL MANDATE AND VACATE PRIOR OPINION

INTRODUCTION

Because the case has become moot as a result of recent actions taken by the Florida Department of Corrections (the "FDC"), Reiyn Keohane respectfully moves this Court to recall the mandate and vacate its previous decision, *Keohane v. Fla. Dep't of Corrections Secretary*, 952 F.3d 1257 (11th Cir. 2020), *en banc review denied*, 981 F.3d 994 (11th Cir. 2020).

This lawsuit involves an action under 42 U.S.C. § 1983 alleging violations of Ms. Keohane's Eighth Amendment rights. ECF 1.[1] Specifically, Ms. Keohane challenged the FDC's policies denying her access to medically necessary treatment for gender dysphoria, including a policy barring the initiation of hormone therapy and a policy prohibiting prisoners from socially transitioning by denying them access to female clothing and grooming standards. *Id.* She prevailed on her claims at the district court, which issued an injunction directing the FDC to provide Ms. Keohane with hormone therapy and access to female clothing and grooming standards. ECF 171 at 61. A panel of this Court reversed, vacating the district court's order, and Ms. Keohane's request for *en banc* review was denied. The FDC has voluntarily continued to provide Ms. Keohane hormone therapy, has permitted her to access female clothing and grooming standards, and has assured her that she would continue to receive such treatment,[2] thereby rendering the present case moot. As a result of the FDC's unilateral actions, there is no longer a live controversy between the parties, resulting in Ms. Keohane being unable to pursue her right to seek *certiorari* from the Supreme Court to review this Court's decision. Due to the actions of the FDC, and through no action of Ms. Keohane, Ms. Keohane has been left with an unreviewable adverse decision. For this reason, the Court should vacate its opinion under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

[1] "ECF" is a reference to the trial-court docket.

[2] *See* Declaration of Reiyn Keohane ("Keohane Decl."), attached hereto as Exhibit A.

BACKGROUND

Ms. Keohane brought an action in the U.S. District Court for the Northern District of Florida on grounds that her Eighth Amendment rights were violated by the FDC. ECF 1. The FDC implemented a policy that banned all treatment for gender dysphoria that inmates were not already receiving prior to entering into custody (the "freeze-frame" policy), including hormone therapy. *Id.* The FDC also prohibited prisoners with gender dysphoria from accessing female clothing and grooming standards, preventing them from socially transitioning in accordance with accepted standards of care for the treatment of gender dysphoria. *Id.*

After being denied hormone therapy and access to female clothing and grooming standards by the FDC for two years, Ms. Keohane filed a complaint challenging these policies and requesting that the district court issue an injunction directing the FDC to provide Ms. Keohane hormone therapy and access to female clothing and grooming standards. *Id.* at 30. After her complaint was filed, the FDC agreed to provide hormone therapy to Ms. Keohane but maintained its refusal to permit her to access female clothing and grooming standards. *See* ECF 171. After a bench trial, the district court issued the order in Ms. Keohane's favor. *Id.* The court held that the FDC's initial refusal to provide hormone therapy and its continued refusal to permit social transition constituted deliberate indifference to a serious medical need in violation of the Eighth Amendment. *Id.*[3] It issued an injunction directing the FDC to

---

[3] The court held that the hormone-therapy issue was not moot because the FDC voluntarily ceased application of the freeze-

continue providing hormone therapy and to permit Ms. Keohane to access female clothing and grooming standards. *Id.* at 61.

The FDC appealed, and on March 11, 2020, this Court reversed and vacated the district court's order. *Keohane,* 952 F.3d 1257. The Court found that Ms. Keohane's challenge to the FDC's freeze-frame policy and its initial failure to provide hormone therapy was moot. The Court also rejected Ms. Keohane's claim that the FDC's refusal to provide access to female clothing and grooming standards, which prevented her from socially transitioning, violated the Eighth Amendment. Ms. Keohane petitioned for rehearing *en banc*, which was denied on December 3, 2020. *Keohane,* 981 F.3d 994. The mandate issued on December 11, 2020. The district court vacated the injunction on December 17, 2020. ECF 194. Ms. Keohane's deadline for filing a petition for *certiorari* to the Supreme Court is May 3, 2021.[4]

After this Court vacated the district court's order, the FDC continued to voluntarily provide Ms. Keohane with hormone therapy and access to female clothing and grooming standards and assured her that such treatment would continue. *See* Keohane Decl. ¶¶ 4-8. On June 23, 2020, she was provided a written pass from the FDC indicating that she is allowed to maintain long hair, wear female undergarments, and

---

frame policy to Ms. Keohane after she filed her complaint without meeting its burden of showing that the challenged conduct could not reasonably be expected to recur. *Id.* at 14-21.

[4] *See* Supreme Court order dated March 19, 2020, extending the deadline for cert petitions to 150 days due to the COVID-19 pandemic. https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

order female canteen items. *Id.* ¶ 5. She continues to be provided hormones daily by nursing staff. *Id.* ¶ 8. Additionally, as recently as February 18, 2021, a prison doctor assured Ms. Keohane that her current treatment would continue. *Id.* ¶ 7.[5]

The FDC's voluntary decision to provide Ms. Keohane with her requested relief after it was no longer under court-order to do so has rendered Ms. Keohane's case moot and, thus, prevents her from asking the Supreme Court to grant *certiorari* to review the adverse ruling of this Court. For this reason, Ms. Keohane requests that this Court recall the mandate and vacate its prior opinion.

ARGUMENT

Federal courts require that cases have a live case or controversy throughout every stage of the litigation process. *IAL Aircraft Holding, Inc. v. FAA*, 216 F.3d 1304, 1305 (11th Cir. 2000). As such, an actual dispute must remain live at all stages of review, not only at the time the complaint is filed. *Id.*; *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) ("[A] dispute must be extant at all stages of review, not merely at the time the complaint is filed. A case that becomes moot at any point during the proceedings is "no longer a 'Case' or 'Controversy' for

---

[5] In 2017, the FDC adopted new guidelines—most recently updated, Ms. Keohane believes, in 2019—for the treatment of gender dysphoria, which no longer included a freeze-frame policy, and permitted prisoners to access female clothing and grooming standards if recommended by the Gender Dysphoria Review Team. *See* FDC Procedure Number 403.012, attached hereto as Exhibit B. Ms. Keohane, however, had been told she would not be evaluated under the new guidelines while her litigation was pending. *See* Keohane Decl. ¶ 3.

purposes of Article III . . . .") (citations and internal quotations omitted). If the case no longer has a "live" controversy, it will be dismissed as moot. *IAL Aircraft*, 216 F.3d at 1305. When a case becomes moot after an appellate court issues its decision, it is generally appropriate for an appellate court to vacate the lower court's, or its own, decision under *Munsingwear*, 340 U.S. at 39-40.

In *Munsingwear*, the Supreme Court recognized the "duty" of federal appellate courts to vacate decisions when the issue has become moot during its journey to the Supreme Court. *Id.* at 40. The underlying reason is that this procedure "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." *Id.* Following this procedure ensures the rights of all parties are preserved. *Id.*

Generally, it is appropriate for the court of appeals to vacate its judgment when it learns of events that mooted the case during the time available to seek *certiorari* review. *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991); *see also Clarke v. United States*, 915 F.2d 699, 706 (D.C. Cir. 1990) (quoting Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.10 at 435 (1984)). Thus, vacatur is appropriate when an appeal becomes moot after an appellate panel has issued a published opinion, but before the appeal can be litigated to completion. *See United States v. Schaffer*, 240 F.3d 35, 38 (D.C. Cir. 2001) (en banc) (per curiam); *Brewer v. Swinson*, 837 F.2d 802, 806 (8th Cir. 1988) (Eighth Circuit recalled the mandate and vacated its own judgment when the case became moot after the court issued its mandate but before the time available to seek *certiorari* review

expired); *see also IAL Aircraft*, 216 F.3d at 1306 n.2 ("Even after a case becomes moot . . . , courts of appeals always have jurisdiction to determine mootness and recall their mandates.").

Vacatur under *Munsingwear* is appropriate when the party seeking vacatur is not responsible for causing the mootness, and vacating the lower court decision serves the doctrine's equitable purposes. *See, e.g.*, *U.S. Bancorp Mort'g Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24-25 (1994). The present matter easily meets these requirements. The case became moot through actions taken by the FDC and not by Ms. Keohane. And principles of equity favor vacating the Court's prior opinions because this Court's decision has preclusive effects on Ms. Keohane, but Ms. Keohane's ability to seek Supreme Court review of this adverse ruling has been taken away because the case is now moot.

I. The FDC rendered Ms. Keohane's case moot when, after this Court ruled in its favor, it voluntarily made the decision to allow her to continue receiving hormone therapy and access female clothing and grooming standards.

When the FDC filed its appeal in this Court, it asked the Court to reverse the district court's decision directing it to continue providing hormone therapy and to permit Ms. Keohane to access female clothing and grooming standards. This Court ruled in the FDC's favor, vacating the district court's order on March 11, 2020.

Although no longer under court order to provide Ms. Keohane with hormone therapy or access to female clothing and grooming standards, the FDC has

voluntarily continued to do so. Keohane was provided a written pass indicating that she is permitted to access female undergarments, grooming standards, and canteen items in June 2020. Keohane Decl. ¶ 5. After this Court denied Ms. Keohane's petition for *en banc* review and issued the mandate, and the district court vacated its injunction (all of which occurred in December 2020), the FDC has continued to provide her with hormone therapy and access to female clothing and grooming standards (including access to female canteen items). *Id.* ¶¶ 6-8. The FDC assured her as recently as February 18, 2021, that such treatment would continue. *Id.* ¶ 7. As a result of this action by the FDC, there is no longer any actual dispute between the parties.

The FDC's decision to provide Ms. Keohane with the relief she seeks in this litigation after this Court ruled that it was not required to do so was made of its own volition. The FDC's actions rendered the case moot, preventing Ms. Keohane from seeking review from the Supreme Court. Under these circumstances, the appropriate course of action is to vacate the Court's decisions. *See, e.g.*, *Schaffer*, 240 F.3d 35; *Brewer*, 837 F.2d 802.

II. Vacating this Court's opinion is consistent with the equitable principles underpinning *Munsingwear*.

The Court should vacate its opinion because it serves the equitable principles underpinning *Munsingwear*. The equitable remedy of vacating prior opinions in cases that become moot is driven by the principle that a "party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to

acquiesce in the judgment." *Democratic Exec. Comm. of Florida v. Nat.'l Republican Senatorial Comm.*, 950 F.3d 790, 793 (11th Cir. 2020) (citing *U.S. Bancorp Mort'g Co.*, 513 U.S. at 25).

This Court's opinion was a final adjudication of the merits of Ms. Keohane's claims and, thus, has res judicata effect on the parties. *See Hand v. Desantis*, 946 F.3d 1272, 1275 n.5 (11th Cir. 2020) (denying motion to vacate prior stay order because it lacks "a final adjudication of the merits of the appeal and therefore it has no res judicata effect") (quoting *F.T.C. v. Food Town Stores, Inc.*, 547 F.2d 247, 249 (4th Cir. 1977) (quotations omitted)). While Ms. Keohane has been given no indication that the FDC will resume its practice of denying her hormone therapy or access to female clothing and grooming standards—indeed, the FDC's new guidelines permit such treatment if approved by the Gender Dysphoria Review Team—in the event the FDC's policy should change in the future, her ability to challenge it would be negatively affected by this Court's decision. It would be inequitable to leave this Court's decision in place—with its res judicata effect on Ms. Keohane—when she is unable to seek review by the Supreme Court because the case is moot.

By vacating this Court's opinion, the Court would be comporting with the equitable principles of *Munsingwear*.

CONCLUSION

The FDC's voluntary actions in providing Ms. Keohane with the relief she is seeking in this litigation, even after this Court ruled that it is not required to do so, moots Ms. Keohane's claims and deprives her of the chance to obtain further appellate

review. Accordingly, Ms. Keohane respectfully requests that this Court recall the mandate and vacate its prior decision as moot.

Counsel for Ms. Keohane has conferred with counsel for the FDC, which opposes the requested relief.

[Counsel signature blocks and certificates of service/compliance omitted]

EXHIBIT A

Declaration of Reiyn Keohane

1. I, Reiyn Keohane, am the Plaintiff-Appellant in this case. I am over the age of 18 and am competent to testify regarding the contents of this Declaration, which I make based upon my personal knowledge.

2. Just before my trial in July 2017, I was informed by my counsel that the Florida Department of Corrections had issued new guidelines for the treatment of prisoners with gender dysphoria and that they would permit social transition for prisoners with gender dysphoria if deemed appropriate by the Gender Dysphoria Review Team ("GDRT").

3. When I was transferred to the Wakulla Annex in 2018, I was told by psychologist Dr. Sean Lloyd that the evaluation process for treatment for gender dysphoria had been updated. He also told me that I would not be reevaluated for treatment for gender dysphoria because of the ongoing litigation. He said my current care related to social transition (being able to access female clothing and grooming standards,

specifically having long hair, wearing female undergarments, and accessing female canteen items) was ordered by the court, so I would not be evaluated under the new policy that applied to other inmates with gender dysphoria.

4. In May 2020, shortly after I arrived at Florida State Prison in Raiford, I was seen by the Multi-Disciplinary Services Team to go over my service plan. Dr. Emanuelidis, psychological director and evaluator at Florida State Prison, assured me that there would be no change in my gender dysphoria treatment, which continued to include hormone therapy and access to female clothing and grooming standards (including access to female canteen items).

5. In June 2020, the DOC, for the first time, gave me something in writing indicating approval for hair growth and grooming, women's undergarments, and female canteen items.[1] Dr. Emanuelidis gave me an accommodation pass on or about June 23, 2020. The form is entitled "Florida Department of Corrections Accommodation(s) Pass." On the top right corner, in handwriting, it says E-1301, which was my cell number at the time I received the pass. Under the title it says "**INMATE KEOHANE, REIYN DCY55036**". Underneath that, it says "1. Hair length," with two boxes indicating "yes" or "no," with "yes" checked, and

[1] On a previous occasion, at Jefferson CI (I think around April or May 2017), the DOC had given me a pass to wear a sports bra, and the DOC made clear that it was for physical support and not to treat my gender dysphoria.

underneath that, "In accordance with female hair standards as stated in 33-602.101." Under that, it says "2. Alternate canteen items," with two boxes indicating "yes" or "no," with "yes" checked. Under that, it says "3. Under garments," with two boxes marked "male" and "female," with "female" checked. Under that, it bears the date "6/23/20." Under that, it states "**INMATES FOUND ALTERING OR COPYING THIS PASS MAY BE SUBJECT TO DISCIPLINARY ACTIONS IN ACCORDANCE WITH RULES 33-601.301-.314, FAC."** Under that, it says "page 1 of 1" and the footer of the document states, "This form is not to be amended, revised or altered without approval of the Chief of Health Services Administration." I dictated the content of the form to my counsel by phone. I keep the form in my personal property.

6. When I arrived back at Wakulla Annex in February 2021 I did not have any female clothing with me because I was on suicide watch, so Lieutenant Watkins (who represents security on the Multi-Disciplinary Services Team) and a female corrections officer (whose name I believe is Huntley) called down to laundry to ensure that I was able to obtain female undergarments.

7. On February 18, 2021, I met with the Multi-Disciplinary Services Team at Wakulla. Dr. Olroyd, who goes by Dr. O, said that my gender-dysphoria treatment (including hormone therapy and access to female clothing and grooming standards, which includes access to

female canteen items) would continue as I am currently receiving it.

8. I continue to be provided my hormone pills every day by nursing staff.

EXHIBIT B

Florida Department of Corrections
Mark S. Inch, Secretary

PROCEDURE NUMBER:
403.012

PROCEDURE TITLE:
IDENTIFICATION AND MANAGEMENT OF INMATES DIAGNOSED WITH GENDER DYSPHORIA

RESPONSIBLE AUTHORITY:
OFFICE OF HEALTH SERVICES

EFFECTIVE DATE:
NOVEMBER 13, 2019

INITIAL ISSUE DATE:
JULY 13, 2017

SUPERSEDES:
NONE

RELEVANT DC FORMS:
DC4-643A, DC4-643E, DC4-643F, DC4-643G, DC4-711L, DC4-711M, AND DC6-1009

ACA/CAC STANDARDS:
4-4281-5 AND 4-4371

STATE/FEDERAL STATUTES:
28 C.F.R §115.5-501; 42 U.S.C. §15601-15609

FLORIDA ADMINISTRATIVE CODE:
CHAPTER 33-603.101

PURPOSE: To provide guidelines for a medical appraisal, mental health screening, evaluation and treatment of inmates meeting criteria for a diagnosis of Gender Dysphoria.

DEFINITIONS:

(1) **Clinical Group Therapy**, where used herein, refers to a cognitive behavioral or psychodynamic process by which a group of individuals is led by a Psychologist or Behavioral Health Specialist to guide interpersonal and intrapersonal growth through an examination of the patients' thoughts, feelings, experiences, and skills.

(2) **Gender Dysphoria**, where used herein, previously known as Gender Identify Disorder, refers to discomfort or distress experienced by an individual because of a perceived discrepancy between the individual's gender identity and the inmate's gender assigned at birth.

(3) **Gender Dysphoria Review Team (GDRT)**, where used herein, refers to a team composed of the Chief of Medical Services, Chief of Mental Health Services, Chief of Security Operations, Chief of Classification Management, and the Prison Rape Elimination Act (PREA) Coordinator. The team members may designate or send a representative when circumstances exist, which, prevents their attendance.

(4) **Gender-Affirming Hormonal Therapy**, where used herein, refers to prescribed

medication to facilitate biological change(s) during transitioning

(5) **Individual Psychotherapy,** where used herein, refers to a collaborative treatment based on the therapeutic relationship between the patient and Mental Health Clinician, including, but not limited to, cognitive behavioral, dialectical behavioral, psychodynamic, and interpersonal modalities.

(6) **Intersex**, where used herein, refers to a person whose sexual/reproductive anatomy or chromosomal pattern does not seem to fit the typical biological definition of male or female.

(7) **Multidisciplinary Services Team (MDST)**, where used herein, refers to staff representing different professions and disciplines, which has the responsibility for ensuring access to necessary assessment, treatment, continuity of care and services to inmates in accordance with their identified mental health needs, and which collaboratively develops, implements, reviews, and revises an individualized service plan, as needed.

(8) **Psychoeducational Group Intervention,** where used herein, refers to a didactic form of group therapeutic services designed to teach patients about their disorder and help them learn how to manage the related symptoms, behaviors and consequences. This may include workbook and/or homework activity.

(9) **Transgender**, where used herein, refers to a general term used for inmate whose gender identity does not conform to the typical expectations associated with the gender they

were assigned at birth. A male-to-female transgender inmate refers to a biological male who identifies as, or desires to be, a member of the female gender; a female-to-male transgender inmate refers to a biological female who identifies as, or desires to be, a member of the male gender. A transgender inmate may or may not qualify for a diagnosis of Gender Dysphoria depending on her/his level of distress or impairment.

(10) **Transitioning**, where used herein, refers to the process during which transgender inmates may change their physical, social, and legal characteristics to the gender with which they identify. Transition may also be regarded as an ongoing process of physical change and psychological adaptation.

GENERAL GUIDELINES:

These standards and responsibilities apply to both Department staff and Comprehensive Health Care Contractor (CHCC) staff.

(1) **GENDER DYSPHORIA REVIEW TEAM ROLE AND RESPONSIBILITY:**

(a) The GDRT has the authority and responsibility to review recommenddations for the treatment and management of inmates diagnosed with Gender Dysphoria to ensure individualization in the decision-making process.

(b) The GDRT will convene at least quarterly to address issues in the

treatment and management of inmates diagnosed with Gender Dysphoria. The GDRT may request any information it determines necessary to assist in its decision-making process.

(c) The GDRT may consult with the warden and any other staff at the facility where an inmate diagnosed with Gender Dysphoria resides when making decisions regarding their management and plans of care.

(d) The GDRT may access an outside consultant to evaluate known or potential Gender Dysphoria inmates and provide recommendations for treatment and transitioning. Recommendations from an outside consultant may be considered, but are not binding on the GDRT.

(e) Specific facilities will be identified by the Department to provide ongoing treatment and accommodations for Gender Dysphoria.

SPECIFIC PROCEDURES:

(1) **SCREENING AND IDENTIFICATION**:

(a) Mental health staff is responsible for the diagnosis of Gender Dysphoria. All initial diagnoses of Gender Dysphoria will be provisional until a comprehensive assessment can be completed by a psychologist credentialed to diagnose and treat Gender Dysphoria and the results are reviewed by the GDRT. The

provisional diagnosis must be a consensus of the MDST or, if not available, a clinician credentialed to diagnose and treat Gender Dysphoria.

(b) The MDST or, if not available, a clinician credentialed to diagnose and treat Gender Dysphoria will enter the provisional diagnosis into the Offender Based Information System (OBIS) within three business days and will notify the Regional Mental Health Director by e-mail of the provisional diagnosis, while initiating the transfer process as outlined in "Mental Health Transfers," Procedure 404.003.

(c) Within three business days of receipt of the request for the Gender Dysphoria evaluation, the Central Office Mental Health Transfer Coordinator will review and log the request into an excel spreadsheet for tracking purposes. The request will be forwarded by e-mail to Population Management and Reception/Youthful Offender Services, which will notify the Central Office Mental Health Transfer Coordinator of its approval for transfer.

(d) The inmate, along with the current medical and mental health record, will be transferred to an institution designated by the GDRT for completion of the "Psychological Evaluation for Gender Dysphoria," DC4-643E.

(2) **ASSESSMENT OF GENDER DYSPHORIA**:

(a) Upon the inmate's arrival at an institution designated by the GDRT, the Psychological Services Director will place a mental health hold on the inmate pending completion of the evaluation and further disposition by the GDRT.

(b) An appointment for the inmate will be scheduled by the evaluating psychologist, who must be credentialed in the diagnosis and treatment of Gender Dysphoria. The psychologist will:

1. explain the limits of confidentiality and the potential consequences of a Gender Dysphoria diagnosis;

2. explain the potential treatment and permissible accommodations; and

3. obtain a new "Consent to Mental Health Evaluation or Treatment," DC4-663.

(c) The DC4-643E will be completed within 90 calendar days of an inmate's arrival to the designated site.

(d) Upon Completion, form DC4-643E will be sent to the CHCC Regional Mental Health Director for review. Within seven business days, the CHCC Regional Mental Health Director will forward the completed evaluation to the GDRT for review and final disposition.

(3) **TREATMENT FOR GENDER DYSPHORIA**:

(a) Inmates diagnosed with gender dysphoria shall have access to necessary mental health treatment at each of the designated Gender Dysphoria facilities. Treatment will include, but not be limited to, clinical group therapy once weekly, psychoeducational group interventions twice weekly, and individual psychotherapy at least every 30 days.

(b) Inmates with a provisional diagnosis of Gender Dysphoria who refuse the evaluation for Gender Dysphoria will be assigned to a facility designated by the GDRT and will be offered treatment that will include, but not be limited to, individual psychotherapy at least weekly.

(c) While receiving any treatments for Gender Dysphoria inmates must remain at a mental health designation of S-2 or higher.

(d) Treatment interventions will focus on the ambivalence and/or dysphoria regarding gender identity, social transitioning, assisting with adjustment to incarceration, and community reentry. Gender-affirming hormonal medication will be prescribed as clinically indicated.

(4) **GENDER AFFIRMING HORMONAL THERAPY**:

(a) All gender-affirming hormonal therapy will be provided on a single dosage basis.

(b) An inmate who is receiving hormonal medication at the time of intake will be continued on hormonal medications provided the following conditions are met:

1. the hormones represent an established treatment that has been prescribed under the supervision of a qualified clinician;

2. the inmate cooperates with health care staff in obtaining written records or other necessary confirmation of her/his previous treatment; and

3. health care staff determine the hormones are medically necessary and not contraindicated for any reason.

(c) An inmate who is not receiving hormonal medication at the time of intake may be started on hormonal medications while incarcerated provided the following conditions are met:

1. the inmate cooperates with health care staff in efforts to obtain written records or other necessary confirmation of previous treatment, if present; and

2. the GDRT determines that the hormones are medically necessary and not contraindicated for any reason.

(d) Gender-affirming hormonal therapy shall not be implemented unless the appropriate consent form, either "Transgender Hormone Therapy – Testosterone Informed Consent," DC4-711M, or "Transgender Hormone Therapy – Estrogen and Antiandrogens Informed Consent," DC4-711L, is signed by the inmate, the psychologist, and the medical practitioner. The medical practitioner and psychologist shall allow the inmate to read the appropriate consent form, as well as discuss the content of the form with the inmate to ensure that she/he understands this content thoroughly. A signed copy of the informed consent shall be given to the inmate. The original shall be placed in the health record on the left side under the subdivider entitled Consents/ Refusals.

(e) Gender-affirming hormonal treatment shall be managed by a CHCC Physician and/or outside consultant. Any Transgender or Gender Dysphoric inmates on hormone therapy will be placed in the Miscellaneous – Chronic Illness Clinic (HSB 15.03.05 Appendix 3) for treatment and monitoring by the institutional CHO/Medical Director

(f) The CHO/Medical Director shall write and submit a consult for a follow-up appointment as requested by the consultant, but no longer than 180 days from the last consult until the hormonal

levels are within normal range for a transgendered individual.

(g) If an inmate chooses to discontinue hormonal medications while incarcerated and then wishes to restart hormonal medications, the GDRT shall evaluate the request and consider the medical necessity of the treatment option.

(5) **ACCOMMODATIONS FOR INMATES WITH A DIAGNOSIS OF GENDER DYSPHORIA**:

(a) To assist in transitioning, facilities designated by the Department will:

1. provide alternate canteen and quarterly order menus in addition to the menus available to other inmates at the facility;

2. allow inmates to wear make-up inside the housing unit. Make-up will be removed prior to departing the housing unit;

3. allow inmates to grow and style their hair in accordance with the female hair standards as stated in Rule 33-602.101, F.A.C.; and

4. issue opposite gender inmate uniform and under garments. Inmates will be issued the approved type, but may purchase other types of under garments independently from either the alternate canteen or quarterly

menu. These items can be worn outside of the housing unit.

(b) The name of the inmate as it appears on the on the indictment page of the commitment package shall be used, unless there is a subsequent court order for a name change. If so, a new indictment page of the commitment package must be issued or the court order must specifically state "change all records."

(c) Inmates may use preferred titles of Ms., Miss, Mrs., or Mr. in correspondence; however, the name at the time of commitment and DC number must be used.

(d) Facilities shall encourage staff to use gender-neutral forms of address (e.g., Inmate Smith or Smith) for gender dysphoria inmates who request it.

(e) All other requested accommodations must be presented to the GDRT for review and final determination.

(6) **GENDER DYSPHORIA REVIEW TEAM DISPOSITIONS:**

(a) Following review of the completed DC4-643E, the GDRT will document its disposition on the "Gender Dysphoria Review Team Dispositions," DC4-643F and the "Accommodation(s) Pass," DC4-643G. Property and apparel shall be consistent with the inmate's DC4-643F

as approved by the GDRT. These forms will be routed and filed as follows:

1. the Mental Health Quality Assurance Manager in Central Office will e-mail the completed DC4-643F and DC4-643G to the CHCC State Mental Health Director, CHCC Regional Mental Health Director, Psychological Services Director, and the Health Services Administrator (HSA);

2. the original forms will be mailed to the HSA at the institution who will be responsible for reviewing with treating mental health and medical staff;

3. the HSA will ensure these forms are filed in the Mental Health Evaluation Reports section of the health record next to the DC4-643E; and

4. a copy of the DC4-643G will be provided to the inmate by the Health Services Administrator at the institution. A replacement DC4-643G will be provided to an inmate upon request due to loss or excessive damage. Inmates found to have altered their DC4-643G may be subject to discipline in accordance with Rules 33-601.301-.314, F.A.C.

(b) The PREA coordinator will notify the Warden at the facility currently housing

the inmate through e-mail advising her/him of the final disposition(s). The notice will include the DC4-643F and the "Transgender/Intersex Housing Determination," DC6-1009. The Warden will be responsible for notifying the appropriate staff/departments within the facility regarding any applicable dispositions for accommodations or actions to be taken.

(c) For inmates requiring transfer subsequent to the completion of the DC4-643F, an automated e-mail notification will be generated to the sending and receiving facilities to notify the Warden(s) of the upcoming transfer. The sending facility will be responsible for ensuring all applicable forms/dispositions are included in the inmate's records. The receiving facility will be responsible for ensuring any accommodations/dispositions are met upon the inmate's arrival.

(d) For those inmates receiving a formal diagnosis of Gender Dysphoria, further facility and housing assignments shall be made on a case by case basis with inmates being placed at one of the designated treatment facilities for Gender Dysphoria. The health and safety of the inmate, as well as all treatment, management, and security concerns will be examined. The inmate's own views regarding safety shall be given careful consideration.

(e) Issues relating to an inmate's Gender Dysphoria diagnosis that emerge after completion of the DC4-643F will be addressed through the institutional MDST. At institutions where there is no available MDST, issues will be addressed by a mental health clinician credentialed to provide a Gender Dysphoria evaluation. If it is determined additional review by the GDRT is required, the MDST or the credentialed mental health clinician may refer the issue(s) to the GDRT for further consideration.

(6) **RELEASE PLANNING**: Pre-release continuity of care planning for necessary medical and mental health treatment and services shall be provided in accordance with "Pre-release Planning for Continuity of Health Care," HSB 15.03.29; and "Mental Health Re-Entry Aftercare Planning Services," HSB 15.05.21, respectively.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Appeal No. 18-14096-H

REIYN KEOHANE,
Plaintiff/Appellee,

versus

FLORIDA DEPARTMENT OF CORRECTIONS,
Defendant/Appellant.

Appeal from the United States District Court
for the Northern District of Florida
No. 4:16-cv-511-MW-CAS

[Date Filed: March 26, 2021]

FLORIDA DEPARTMENT OF CORRECTIONS' RESPONSE IN OPPOSITION TO MOTION TO RECALL MANDATE

Appellant Florida Department of Corrections ("FDC") respectfully requests that the Court deny appellee Reiyn Keohane's motion to recall mandate and vacate prior opinion (the "Motion"). Despite Keohane's assertions, this case is not moot and the Court's prior decision and subsequent denial of Keohane's petition for rehearing en banc determined

far more than her "social transitioning" requests. Accordingly, the Motion should be denied.

Keohane Fails to Satisfy the Standards for Recalling the Mandate

Eleventh Circuit Rule 41-1(b) states, as follows: "A mandate once issued *shall not* be recalled except to prevent injustice." (emphasis added). Not surprisingly, this rule goes unmentioned in Keohane's Motion. This rule comports with the Supreme Court's decision in *Calderon v. Thompson*, 523 U.S. 538 (1998), which instructed that the power to recall the mandate can be exercised "only in extraordinary circumstances" and is a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* at 550.

Here, FDC fails to see the grave injustice being suffered by Keohane that would require the mandate to be recalled. As FDC told the Court at oral argument, it was not rolling back the treatment offered to Keohane and it was adopting a new policy relating to the treatment of gender dysphoria. *See* Exhibit B to Motion. This policy, Proc. No. 403.012, makes plain that medical and mental health treatment and services are individualized and provided based on identified medical needs. These individual needs can change over time, and FDC's Procedure allows the treating health care professional to exercise his or her medical judgment in accommodating these fluctuating needs.

That Keohane presently is being allowed access to female canteen items, i.e., make-up (to be worn in cell only), and female grooming standards is a reflection of FDC's own medical judgment and security considerations. What is critical to FDC's

opposition to Keohane's Motion is this: FDC has not adopted the position that the Eighth Amendment *requires* such treatment, as was the basis for the district court's Order. (doc. 171 at 61). As FDC stressed in its arguments to this Court, the district court's Order established the WPATH Standards of Care as the *constitutional minimum* in any deliberate indifference analysis involving transgender issues. This determination was rightly rejected by this Court. And this determination should not be vacated, as requested by Keohane, particularly after such extensive litigation.

Because FDC is not taking, and never has taken, the position that Keohane's social transition requests are constitutionally mandated, there is nothing moot about this case and a "case or controversy" still exists for certiorari purposes. Keohane's reliance on *Munsingwear* is therefore misplaced. Indeed, Keohane seems to be attempting to punish FDC for exercising its medical judgment in her favor. But the ability to exercise its own medical judgment, as opposed to that judgment being decreed by WPATH, which has no referential authority in state statutory practice act standards, or by the district court's Order, is precisely what FDC asked this Court to uphold. If Keohane still wishes to attempt to constitutionalize the WPATH Standards of Care, she is free to seek review in the Supreme Court.

Again, no "injustice" has befallen Keohane to justify the extreme remedy of recalling the mandate and vacating the Court's opinion. Further, her reliance on *IAL Aircraft Holding, Inc. v. FAA*, 216 F.3d 1304 (11th Cir. 2000) misses the mark. There, this Court recalled the mandate after issuance because the Court *lacked jurisdiction* when the decision and

mandate were issued. *Id*. at 1306-07. Such a lack of jurisdiction does not exist here.

The Court's Opinion Determined More than "Social Transition" Requests

Though unmentioned in Keohane's Motion, the Court's decision, *Keohane v. Fla. Dep't of Corrections Secretary,* 952 F.3d 1257 (11th Cir. 2020), and its denial of Keohane's petition for en banc review, 981 F.3d 994 (11th Cir. 2020), determined far more than Keohane's social transition requests. The Court made important determinations on both the voluntary cessation doctrine and the applicable standard of review in Eighth Amendment deliberate indifference cases.

Indeed, Keohane herself expressly sought en banc review based on her contention that the panel got the standard of review wrong. After the Court's lengthy discussion of *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010) in both the original decision and in the decision denying en banc review, it determined that "what the Eighth Amendment means – and requires in a given case – is an issue squarely within the core competency of appellate courts." *Keohane*, 952 F.3d at 1272-73 n.8. Thus, the Court held that de novo review was the appropriate standard for such legal determinations. FDC believes the Court got it right, and does not wish to have this important determination vacated based on Keohane's mistaken belief that this case is moot. The Court's guidance is critically important to future cases and should not be vacated, particularly after Keohane herself invited the Court's detailed analysis and ultimate determination.

The same holds true for the Court's determination that the voluntary cessation exception to the mootness doctrine did not apply because there was no evidence that FDC would roll back Keohane's treatment when the case resolved. *Keohane,* 952 F.3d at 1267-70. Keohane's present Motion underscores that the Court got this determination right. More importantly, FDC believes the Court's guidance and analysis of the voluntary cessation doctrine as applied to governmental agencies is instructive and should not be vacated based on Keohane's belief that her case is moot.

In short, the Court's analysis of the applicable standard of review in Eighth Amendment deliberate indifference cases and its decision on the voluntary cessation doctrine are hardly moot. Keohane did not mention these aspects of the Court's decision; rather, her Motion seems to seek a partial recall of the mandate. FDC submits that the Court should decline this invitation and deny the Motion.

CONCLUSION

For at least the foregoing reasons, Keohane's Motion should be denied.

[Counsel signature blocks and certificates of service/compliance omitted]

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 18-14096-H

D.C. Docket No. 4:16-cv-00511-MW-CAS

REIYN KEOHANE,
Plaintiff-Appellee,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Florida

---

[Date Filed: March 29, 2021]

PLAINTIFF-APPELLEE'S REPLY IN SUPPORT OF HER MOTION TO RECALL MANDATE AND VACATE PRIOR OPINION

In support of her Motion to Recall Mandate and Vacate Prior Opinion (Mar. 9, 2021) ("Motion"), Plaintiff-Appellee Reiyn Keohane files this reply to the Florida Department of Corrections' ("FDC") "Response in Opposition to Motion to Recall Mandate" (Mar. 26, 2021) ("Response"). The FDC's Response

fails to refute the fact that the Court's decision has been rendered moot and that vacatur is appropriate under *Munsingwear*.[1]

I. A party's interest in doctrinal victory does not save that party from mootness and vacatur under *Munsingswear*.

In its Response, the FDC opposes vacatur on the basis that it would like to leave in place doctrinal determinations made by this Court that it believes wil benefit it in future potential litigation. *See* Response at 3[2] (the Court "made important determinations on both the voluntary cessation doctrine and the applicable standard of review in Eighth Amendment deliberate indifference cases"); *id.* at 4 (the Court's guidance "is critically important to future cases"); *id.* (this "guidance and analysis of the voluntary cessation doctrine as applied to governmental agencies is instructive and should not be vacated"); *id.* at 2 (FDC "has not adopted the position that the Eighth Amendment *requires* [Ms. Keohane's sought] treatment") (emphasis in original). Ms. Keohane does not doubt the FDC's genuine *institutional* interest in preserving an appellate opinion that it believes will serve its interests in the future, but that has nothing to do with the question whether the case is moot. If a victorious party's "belie[f] [that] the Court got it right," Response at 4—or that the opinion in the party's favor was "critically important" or "instructive," *id.*—was enough to save the case from mootness and vacatur under *Munsingwear*, this would swallow those doctrines because a victorious party

[1] *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

[2] [footnote omitted]

always has an interest in its view of the law being reflected in a court's written opinion.[3]

"Granting *Munsingwear*-style relief always requires appellate courts to consider whether vacatur is appropriate when the requirements of Article III are no longer met because one party is no longer able to obtain relief on the merits." *Democratic Exec. Comm. of Fla. v. Nat'l Republican Senatorial Comm.*, 950 F.3d 790, 794 (11th Cir. 2020). "The equitable remedy of vacating prior opinions in cases that become moot is driven by the principle that a 'party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment.'" *Id.* (citing *U.S. Bancorp Mort'g Co. v. Bonner Mall P'ship*, 513 U.S. 18, 25 (1994)). Here, Ms. Keohane is "no longer able to obtain relief on the merits," *id.*, because FDC voluntarily provided her with the relief she is seeking in this litigation, *see* Motion at 9, even though this Court said that the FDC did not need to provide it. Ms. Keohane cannot appeal this Court's decision to the Supreme Court because there is nothing the Supreme Court can provide her that was denied to her by this Court. The FDC appears to point to a purported interest Ms. Keohane has in the proper interpretation of *Thomas v. Bryant*, 614 F.3d 1288 (11th Cir. 2010). Response at 3-4. But while the implications of that opinion were addressed in Ms. Keohane's petition for rehearing en banc and have been vigorously debated by members of this Court, that debate is of no personal consequence to Ms. Keohane except to any extent that the resolution of

[3] Tellingly, *Munsingwear* is given only a fleeting single reference in the FDC's response.

that debate in her favor would yield the continued provision of care she sought in this litigation. That specific medical care is now secure, thankfully, due to the voluntary actions taken by the FDC. As a result, Ms. Keohane has nothing to obtain from the Supreme Court. Because she cannot obtain relief from the Supreme Court, she is stuck with an adverse legal ruling that would have res judicata effect in the event the FDC's policy should change in the future. Motion at 13-14. Because the FDC's doctrinal interest in having a court decision say things that may help the FDC in future legal disputes is insufficient to save a case from mootness, the appellate decision is moot and should be vacated under *Munsingwear*.[4]

II. The FDC misstates the relevance of the WPATH standards to Plaintiff's claim.

Although substantive issues should have no role in this discussion given that the case is moot, because the FDC appears to assert what amounts to a substantial misunderstanding of the relevance of the WPATH standards in this case, Ms. Keohane will address the matter briefly.

The FDC appears to complain about its purported inability "to exercise its own medical judgment, as opposed to that judgment being decreed by WPATH." Response at 2. The WPATH standards do not "decree[]" care for *any* person. *See, e.g.*, Brief of

[4] And, to respond to the FDC on the standard to recall mandates, Response at 1-3 (citing Eleventh Circuit Rule 41-1(b) ("A mandate once issued shall not be recalled except to prevent injustice.")), it would be an injustice to leave a decision in place when a party is unable to appeal because of mootness. And inherent in vacating the opinion is that the mandate must also give way.

Amici Curiae Medical, Mental Health, and Other Health Care Organizations in Support of Appellee [(including WPATH)] (11th Cir. Feb. 12, 2019) at 3 ("Treatment *may* include the following: [listing examples]") (emphasis added); *id.* at 12 ("The recommended treatment for transgender adults with gender dysphoria includes assessment, counseling, and, *as appropriate*, [listing examples]. However, each patient requires an individualized treatment plan that accounts for the patient's specific needs.") (emphasis added; footnote omitted). The WPATH standards merely articulate what care *may* be appropriate. When the Seventh Circuit held almost a decade ago that a Wisconsin state law barring hormone therapy and gender-affirming surgery as possible treatments for prisoners with gender identity disorder facially violated the Eighth Amendment, *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011), it did not do so on the belief that such treatments were *required* for all transgender inmates with clinically significant distress. Rather, the question is one of individual medical need. Nothing in the WPATH standards prevents a qualified provider from making their own judgment as to someone's individual medical needs. And, indeed, now that the FDC has replaced its blanket ban on social transition with a policy explicitly permitting it for certain transgender inmates with gender dysphoria, *see* Motion Exhibit B, it surely believes its providers are doing just that. Red-herring arguments about "constitutionaliz[ing]" the standards, Response at 3, have no meaning because the standards themselves do not mandate hormone therapy, social transition, or surgical care for *any* person.

CONCLUSION

For these reasons, Plaintiff-Appellee respectfully requests that this Court recall the mandate and vacate its prior decision as moot.

[Counsel signature blocks and certificates of service/compliance omitted]