2015

Petition for Writ of Certiorari, Kosilek v. O'Brien

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No.

IN THE

Supreme Court of the United States

MICHELLE KOSILEK,

Petitioner,

v.

CAROL HIGGINS O'BRIEN, Commissioner of the Massachusetts Department of Correction,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether appellate courts must parse "questions that present elements both factual and legal" into their factual and legal components, so that all factual findings can be reviewed for clear error, or whether, as the First Circuit ruled, they may review such questions as a whole along a "continuum" of deference, where the degree of deference given to the district court is of "variable exactitude."

2. Whether the Eighth Amendment prohibits prison officials from denying necessary medical treatment to a prisoner for non-medical reasons, such as security concerns.

PARTIES TO THE PROCEEDING

Petitioner is Michelle Kosilek, plaintiff-appellee below.

Respondent is the Commissioner of the Massachusetts Department of Correction, defendant-appellant below. The current Commissioner is Carol Higgins O'Brien. This suit originally named Michael T. Maloney, the Commissioner of the Massachusetts Department of Correction at the time the complaint was filed.

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Petitioner Michelle Kosilek respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The decision of the *en banc* court of appeals (Pet. App. 1a-109a) is reported at 774 F.3d 63. The three-judge panel decision of the court of appeals (Pet. App. 110a-219a) is reported at 740 F.3d 733. The district court's decision granting injunctive relief following a bench trial (Pet. App. 220a-344a) is reported at 889 F. Supp. 2d 190. An earlier decision of the district court following a previous bench trial (Pet. App. 345a-432a) is reported at 221 F. Supp. 156.

JURISDICTION

The *en banc* court of appeals entered judgment on December 16, 2014. Pet. App. 3a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Eighth Amendment to the U.S. Constitution, 42 U.S.C. § 1983, and Federal Rule of Civil Procedure 52 are reprinted in the Appendix, *infra*, at 433a-434a.

INTRODUCTION

This case involves the First Circuit's review of the district court's fact-driven determination, following a 28-day bench trial, that the Massachusetts Department of Correction ("DOC") violated the Eighth Amendment by refusing to provide petitioner Michelle Kosilek with necessary medical treatment that had been recommended by the DOC's own doctors. A panel of the First Circuit affirmed, but the court granted a petition for rehearing, and a 3-2 majority of the *en banc* court reversed. In so doing, the *en banc* court did not identify a single error of law, nor did it declare any of the district court's factual findings clearly erroneous.

The *en banc* majority was able to achieve this reversal only by invoking its "degree-of-deference continuum," a standard of review of its own design that is not found in the Federal Rules of Civil Procedure and that is inconsistent with this Court's precedents and the precedents of other circuits. Under its "continuum," the First Circuit applies a standard of review of "variable exactitude" to any issue that has both legal and factual components, rather than breaking such issues down and then applying *de novo* or clear error review to each legal or factual component, as appropriate.

The First Circuit's continuum approach allows it to conduct its review without ever expressly stating what standard of review is warranted—or what standard of review it is applying. And that is precisely what happened here: By invoking its continuum of deference, the *en banc* majority of the First Circuit gave itself free reign to disregard the district

court's factual findings and credibility determinations, to independently review and reweigh the evidence presented at trial, and to reach conclusions based on the evidence that were contrary to the findings made by the district court, without ever holding that the district court's findings were clearly erroneous. Because the First Circuit's continuum approach differs from that of other circuits and is untethered to this Court's precedents, *see infra* pp. 15-21—and because it impacts not only this case, but potentially *every* civil case in the First Circuit for which there is an evidentiary record, *see, e.g., S. Kingstown Sch. Comm. v. Joanna S.*, 773 F.3d 344, 349 (1st Cir. 2014) (invoking continuum in IDEA case); *Braunstein v. McCabe*, 571 F.3d 108, 124 (1st Cir. 2009) (invoking continuum in bankruptcy case)—this Court should grant certiorari to address it.

Additionally, the Court should grant certiorari to consider whether prison officials may, consistent with the Eighth Amendment, refuse to provide necessary medical treatment for non-medical reasons. The First Circuit held here that the DOC could constitutionally deny medical treatment to Ms. Kosilek based on security concerns. This conclusion is inconsistent with the Constitution, with this Court's precedents, and with the holdings of other circuits. The Eighth Amendment imposes on prison officials a duty *both* to provide adequate medical care *and* to protect prisoners from violence while incarcerated. *See Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Prison officials are not entitled to choose between these two constitutional obligations. Instead, to comply with the Eighth Amendment, they must find a way to ensure both safety and adequate medical care for all inmates.

STATEMENT

This petition culminates more than 20 years of litigation and two trials addressing whether DOC officials have violated Ms. Kosilek's rights under the Eighth Amendment by failing to provide adequate treatment for her severe gender identity disorder ("GID"), a condition that both parties agree is a "serious medical need." Pet. App. 43a.

Ms. Kosilek entered DOC custody in 1992. Pet. App. 346a. By that time, she had long self-identified as a woman who was trapped inside a man's body. *Id.* at 345a. Throughout her time in custody, Ms. Kosilek steadfastly continued to pursue expression of her female identity. She also sought medical treatment for her GID from prison officials. When they refused, she filed suit. *Id.* at 346a.

A. *Kosilek I*

During her first bench trial (*Kosilek I*), Ms. Kosilek sought treatment consistent with the Harry Benjamin Standards of Care (the "Standards of Care"). Pet. App. 347a. The Standards of Care establish a progressive "triadic treatment sequence," calling for (1) hormone therapy, (2) "real-life experience of living as a member of the opposite sex" for at least one year, and, for some suffering from GID, (3) sex reassignment surgery ("SRS"). *Id.* at 299a, 364a.

The district court found that the Standards of Care represent the "prudent professional standards," Pet. App. 428a, that are "regularly relied upon by experts" to treat GID, *id.* at 381a,[1] and that, by not fol-

[1] Other courts have reached the same conclusion. *See De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013) ("The Stand-

lowing these standards and instead providing only generalized counseling to Ms. Kosilek, the DOC had failed to meet Ms. Kosilek's serious medical need. *Id.* at 418a. The court declined to impose an injunction, however, finding that, until that time, the DOC Commissioner did not have actual knowledge that Ms. Kosilek faced a substantial risk of serious harm. *Id.* at 352a-353a. But, because the court's opinion "put [the Commissioner] on notice" of this risk, *id.*, the court also made clear that it expected DOC officials to provide adequate care to Ms. Kosilek going forward. *Id.* at 427a. If they did not, the court warned, Ms. Kosilek likely would be entitled to injunctive relief. *Id.* at 355a.

B. The DOC's Post-*Kosilek I* Conduct

After *Kosilek I*, the DOC revised its GID-treatment policy, but it still refused to provide prisoners suffering from GID with treatments recommended by the DOC's medical provider, the University of Massachusetts Correctional Health Program ("UMass"), unless the treatments were approved by the DOC Director of Health Services and the Commissioner. Pet. App. 268a-269a. This made GID the only medi-

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ards of Care . . . are the generally accepted protocols for the treatment of GID."); *Sundstrom v. Frank*, No. 06-C-112, 2007 WL 3046240, at *6 (E.D. Wis. Oct. 15, 2007) ("[T]he Standards of Care . . . are accepted worldwide, and represent the consensus of professionals regarding the psychiatric, medical and surgical management of GID."); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 764 (N.Y. Sup. Ct. 2013) ("The course of treatment for Gender Identity Disorder generally followed in the medical community is governed by the 'Standards of Care' . . . .").

cal condition for which treatment decisions were not left to medical professionals. *Id.* at 269a.

UMass hired GID specialist Dr. David Seil to evaluate Ms. Kosilek. Dr. Seil diagnosed Ms. Kosilek with severe GID and, pursuant to the Standards of Care, recommended estrogen therapy, electrolysis for facial hair removal, and access to female clothing and makeup. Pet. App. 269a-270a. He also recommended a reevaluation after one year, once Ms. Kosilek completed the second step of the triadic sequence, to determine whether she also required SRS. *Id.* at 270a. The DOC responded to this evaluation by terminating Dr. Seil. *Id.* at 271a.[2]

The DOC nonetheless implemented certain of Dr. Seil's recommendations, including hormone therapy and providing female clothing, but only after receiving a written report from the Superintendent of MCI Norfolk indicating that he did not foresee any security problems with these treatments. Pet. App. 272a-273a. Ms. Kosilek's increasing feminization resulted in no security incidents. *Id.* at 273a & n.9.

But progress slowed in 2004, when Kathleen Dennehy was named the new DOC Commissioner. Pet. App. 273a. As the district court found, "Dennehy began taking a series of actions intended to delay, and ultimately deny," Ms. Kosilek's prescribed medical care, including cancelling Ms. Kosilek's scheduled electrolysis treatment without justification. *Id.* at 273a-274a.

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[2] The DOC also terminated its initial litigation expert in 2000 after he recommended that Ms. Kosilek's treatment follow the Standards of Care. Pet. App. 271a.

Meanwhile, UMass sought a new GID specialist to evaluate Ms. Kosilek for SRS.[3] It chose the Fenway Community Health Center of Massachusetts—"the foremost referral center in New England" for individuals with GID. Pet. App. 274a. But, in what the district court found to be an "unprecedented" move, the DOC independently retained Cynthia Osborne, a licensed social worker in the Johns Hopkins University Department of Psychiatry, to peer review Fenway Health's medical recommendation. *Id.* at 274a-276a.

At this point, the district court's findings of fact and the First Circuit's account of the facts diverge significantly. The district court found that Osborne was hired by the DOC because of her known beliefs that (1) SRS was rarely medically necessary and (2) an inmate, by virtue of incarceration, could *never* have the real-life experience that is a prerequisite to SRS under the Standards of Care. Pet. App. 276a-277a. The district court also found that the entire Johns Hopkins psychiatry department, including Osborne, was "substantially influenced" by the department chair, Dr. Paul McHugh, who "was well-known for his strongly held view that sex reassignment surgery is 'religiously abhorrent.'" *Id.* at 276a. On this evidence, the district court found that "Osborne's known positions and foreseeable advice that Kosilek should not be provided [SRS] were precisely the reasons that Dennehy decided to hire her," and that Dennehy's contrary testimony was "not credible." *Id.* at 277a.

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[3] UMass had sole responsibility for selecting and retaining medical specialists for the DOC. Pet. App. 274a.

According to the *en banc* majority, in contrast, the DOC retained Osborne for her "substantial expertise" in GID, Pet. App. 10a, and because the DOC believed she might "do more objective evaluations," *id.* at 9a.

Meanwhile, after evaluating Ms. Kosilek, Fenway Health's GID experts submitted a written report recommending that Ms. Kosilek undergo SRS and stating that, absent SRS, she would likely attempt to harm herself again. Pet. App. 275a-276a.[4] The DOC thus faced the situation it had hoped to avoid through its policies and strategic employment (and termination) of specialists: a recommendation *from its own doctors* that Ms. Kosilek receive SRS.

In light of this recommendation, the DOC was required by its own policies to conduct a security evaluation to determine the impact of providing SRS to Ms. Kosilek. Pet. App. 283a. The district court found that Dennehy met with key personnel to discuss the security evaluation for the first time on May 19, 2005. *Id.* But several days earlier, on May 16, 2005, Dennehy gave interviews to the media in which she indicated that the DOC already had identified significant security concerns that would result if Ms. Kosilek received SRS. *Id.* According to the district court, at the time of the interviews, Dennehy had not yet requested or received the required written security assessment, or met with key personnel to obtain their views, and, thus, she could not have

[4] Ms. Kosilek had previously attempted castration and suicide (twice) as a result of GID. Pet. App 346a.

had any basis to tell the media that SRS would present security risks. *Id.* at 281a-283a.[5]

The *en banc* majority, however, reached a different factual conclusion, by crediting different record evidence. According to the majority, the DOC began discussing security concerns in January 2005, and, starting in April, "worked to *formalize* its security concerns into a report." Pet. App. 16a (emphasis added). Accordingly, the majority determined that the statements Dennehy made during the May 16, 2005 interviews were supportable. *Id*. at 63a n.16.

The DOC ultimately decided that SRS would create an unacceptable security risk. According to DOC officials, they could neither transport Ms. Kosilek safely to and from the surgery nor ensure her safety—and that of other inmates—after the procedure. Pet. App. 292a, 323a, 325a. Accordingly, the DOC denied Ms. Kosilek her prescribed course of treatment.

C. *Kosilek II*

Ms. Kosilek challenged the DOC's refusal to provide her with SRS, and the district court conducted a 28-day bench trial on this issue (*Kosilek II*) that spanned nearly two years and multiple DOC commissioners. The district court heard testimony from twenty-four witnesses (including several witnesses whom the court asked to be recalled multiple times) and reviewed 114 exhibits—more than 6,000 record

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[5] In making this finding, the district court credited Dennehy's *deposition* testimony that the first meeting occurred on May 19, 2005, and did not credit her *trial* testimony that some meetings occurred earlier. Pet. App. 283a n.11.

pages in all. The court heard medical testimony from Ms. Kosilek's five treating physicians and medical experts, from the DOC's litigation expert, Dr. Chester Schmidt,[6] and also from Dr. Stephen Levine,[7] an independent medical expert whom the court engaged to review and assess the competing medical testimony. Pet. App. 286a-291a. On this factual record, the district court concluded that the DOC had violated Ms. Kosilek's Eighth Amendment rights by refusing to provide SRS. More specifically, the court made the following findings:

1. The district court found that Ms. Kosilek had a serious medical need—severe GID—and that she "continue[d] to suffer intense mental anguish" and would attempt suicide again if she did not receive SRS. Pet. App. 294a-295a.

2. The district court found that SRS offered the only adequate treatment for Ms. Kosilek's GID. The court concluded that "the Standards of Care continue to describe the quality of care acceptable to prudent professionals who treat individuals suffering from gender identity disorders," Pet. App. 298a, and that the treatment plan recommended by the DOC's expert witness, Dr. Schmidt—continued access to estrogen therapy and female clothing, plus psychotherapy—failed to comply with those standards, *id.* at 308a. More specifically, the court found that Dr.

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[6] The DOC retained Dr. Schmidt shortly before the deadline for expert disclosures, on the recommendation of Osborne. Pet. App. 284a. Like Osborne, Dr. Schmidt worked in the Johns Hopkins psychiatry department. *Id.*

[7] Dr. Levine was the Co-Director of the Center for Marital and Sexual Health in Cleveland, Ohio, as well as a co-author of the Standards of Care. Pet. App. 290a.

Schmidt was not a prudent professional and that his treatment plan "[was] not within the range of treatment that a prudent professional would prescribe." *Id.* at 311a. Instead, relying on the opinions of the six other doctors who testified at trial—including the DOC's own treating clinicians and the court-appointed independent expert—the district court found that surgery was the only medically adequate treatment in Ms. Kosilek's case. *Id.*

3. The district court determined that the DOC acted with deliberate indifference by denying SRS. It concluded that DOC officials had actual knowledge that Ms. Kosilek faced a substantial risk of harm if she did not receive SRS. Pet. App. 313a. Among other evidence, the court relied on Dennehy's testimony that she accepted the DOC clinicians' opinions and did not dispute that Ms. Kosilek had a serious medical need; rather, "she testified that only safety and security concerns were preventing Kosilek from receiving the prescribed treatment." *Id.* at 315a.

4. The district court found that the DOC's proffered security concerns were "pretextual" because they were "not reasonable and made in good faith." Pet. App. 318a. Instead, it found, the DOC denied the surgery to avoid "public and political criticism." *Id.* at 284a, 318a-319a. To support these findings, the district court relied on evidence of Dennehy's long history of conduct aimed at avoiding the provision of care to transgender inmates. Among other things, it found that Dennehy participated in the decision to terminate a physician after he recommended SRS for Ms. Kosilek, stalled treatments for Ms. Kosilek and other transgender prisoners, and took the "unprecedented" step of directly hiring a social

worker who was known to oppose the provision of SRS to inmates to peer review the report prepared by the DOC's own physicians. *Id.* at 319a-320a.

The district court also cited the manner in which the DOC had conducted its security evaluation, finding that Dennehy had departed from written DOC procedures, had spoken with the media before actually conducting the required review, and had failed to consult with the DOC's security experts before making up her mind. Pet. App. 321a. The district court further found that Dennehy and subsequent-Commissioner Harold Clarke lacked credibility on numerous key points. For example, the court found incredible Dennehy's and Clarke's contentions that they believed Ms. Kosilek might attempt to flee during transport to or from the surgery. *Id.* at 323a-325a.

Though the district court was "far from anxious to grant the [injunctive] relief sought," Pet. App. 338a, based on the record before it the court concluded that the DOC had violated Ms. Kosilek's Eighth Amendment rights, and it ordered the DOC to "take forthwith all of the actions reasonably necessary to provide Kosilek sex reassignment surgery as promptly as possible," *id.* at 344a.

D. The Panel Decision

A three-judge panel of the First Circuit affirmed. The panel majority explained that "the success of Kosilek's claim depends almost entirely on questions of credibility (in assessing the state's motives) and on questions of medical care (in assessing Kosilek's medical needs)," Pet. App. 171a, and it reviewed these "quintessentially factual findings" "for clear

error only," *id.* at 169a, 171a. The panel majority noted that the district court "engaged in a careful and close analysis of the trial evidence," *id.* at 169a, and that "there [wa]s certainly evidentiary support for [the court's] findings," *id.* at 192a.

The DOC filed a petition for rehearing *en banc*, which the First Circuit granted just twelve days later, without first calling for a response.

E. The *En Banc* Decision

In a 3-2 decision, with a 71-page majority opinion and separate dissents by Judges Thompson and Kayatta, the First Circuit reversed the district court on essentially all fronts.

The majority determined that the district court's Eighth Amendment analysis involved "a multitude of questions that present elements both factual and legal," and that it would review such questions under its continuum of deference—a standard of "variable exactitude" whereby "the more law-based a question, the less deferential[]" the review. Pet. App. 38a-39a. The majority then spent approximately twenty-five pages considering the evidence anew, making its own credibility determinations and citing the evidence that it found most persuasive. *See infra* pp. 21-27 (providing examples of the First Circuit's fact-finding). Throughout these twenty-five pages, the court did not articulate whether it considered the district court's determinations to be "more law-based" or more factual in nature, nor did it articulate the precise standard of review it was applying.

Ultimately, the majority disagreed with practically every finding made by the district court—including both its subsidiary and ultimate findings of fact.

Thus, whereas the district court found (1) that SRS was not only clinically appropriate but also medically necessary for Ms. Kosilek, Pet. App. 233a, and (2) that the DOC's chosen course of treatment was medically inadequate, *id.* at 310a-311a, the First Circuit determined (1) that SRS was not medically necessary for Ms. Kosilek, and (2) that the DOC had selected one of two alternative treatment regimens, both of which were "reasonably commensurate with the medical standards of prudent professionals," *id.* at 53a; *see also id.* at 48a (stating that Dr. Schmidt's testimony demonstrated a "reasonable difference in medical opinion[]"). And, while the district court found that the security reasons proffered by the DOC for denying SRS were "largely false," "greatly exaggerated," and pretextual, *id.* at 321a, the First Circuit determined that "[t]he DOC's concerns about safety and security were reasonable," *id.* at 58a. Armed with these reconstructed facts, the First Circuit held that the DOC had not violated Ms. Kosilek's Eighth Amendment rights.

Two judges dissented. Both emphasized the same point: the majority had wildly overstepped the bounds of an appellate court. As Judge Thompson stated: "Given the clearly fact-intensive nature of the court's review, our own examination into whether the court was correct that the DOC violated the Eighth Amendment should be deferential, as opposed to the fresh look the majority proposes." Pet. App. 76a (Thompson, J., dissenting); *see also id.* at 108a (Kayatta, J., dissenting) ("[E]ven if one agrees with the majority that the district court got the fact-finding wrong, we should defer unless the result is clearly erroneous.").

REASONS FOR GRANTING THE PETITION

I. The First Circuit's Degree-Of-Deference Continuum Is Inconsistent With This Court's Precedents And Conflicts With The Standards Used In Other Circuits.

The First Circuit has created its own standard of review for appeals involving both legal and factual questions: a "degree-of-deference continuum" under which it provides (unquantified) greater or lesser deference to the district court depending on the extent to which it believes the issue decided is more legal or more factual in nature. As the *en banc* majority explained here:

> The test for establishing an Eighth Amendment claim of inadequate medical care encompasses a multitude of questions that present elements both factual and legal. Review of such "mixed questions" is of variable exactitude; the more law-based a question, the less deferentially we assess the district court's conclusion. *In Re Extradition of Howard*, 996 F.2d 1320, 1328 (1st Cir. 1993) ("The standard of review applicable to mixed questions usually depends upon where they fall along the degree-of-deference continuum . . . .").[8]

[8] The *en banc* majority erred in labeling as "mixed questions" all "questions that present elements both factual and legal." Pet. App. 39a. Instead, this Court has defined a "mixed question of law and fact" to refer simply to "the rule of law as applied to the established facts." *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

Pet. App. 38a-39a (alteration in original).

Application of the First Circuit's continuum standard is not limited to this case, or even to other Eighth Amendment cases. Instead, it applies to *any* appeal in *any* civil case in which the district court decided issues that have both legal and factual components. It is therefore not surprising that the First Circuit has invoked this standard in a number of different contexts. *See, e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 52 (1st Cir. 2014) (unconstitutional abuse and neglect of children in foster care); *Braunstein*, 571 F.3d at 124 (bankruptcy proceeding); *Fid. & Guar. Ins. Co. v. Star Equip. Corp.*, 541 F.3d 1, 5 (1st Cir. 2008) (enforceability of settlement agreement).

A. The Degree-Of-Deference Continuum Is Inconsistent With This Court's Precedents.

This Court has acknowledged that it can be difficult, at times, to determine whether a particular issue is legal or factual in nature. *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990) ("The Court has long noted the difficulty of distinguishing between legal and factual issues."); *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (noting "the vexing nature of the distinction between questions of fact and questions of law"). But it nonetheless has required courts to make such distinctions and then to apply one of two standards of review: clear error (to predominantly factual issues) or *de novo* (to predominantly legal issues). *See Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 839 (2015) (rejecting the argument that, because "sepa-

rating 'factual' from 'legal' questions is often difficult," appellate courts can avoid applying clear-error review to factual findings to make things "simpler"). This Court has never allowed courts of appeals to apply some intermediate standard of "variable exactitude," as the *en banc* majority did here.

As this Court often has cautioned, appellate courts should not be in the business of reconsidering issues that are fundamentally factual in nature: "[W]hen reviewing the findings of a 'district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.'" *Teva*, 135 S. Ct. at 837 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). An appellate court may not reverse the district court, sitting as trier of fact, "simply because it is convinced that it would have decided the case differently." *Anderson*, 470 U.S. at 573.

Instead, the role of appellate courts is circumscribed: If an appellate court believes that the district court failed to consider relevant evidence, it must remand. *See Pullman-Standard*, 456 U.S. at 291-92. In order to *reverse* a district court's fact-based decision, an appellate court must expressly declare the district court's finding to be clearly erroneous. *See Teva*, 135 S. Ct. at 843 (court of appeals erred in failing to accept the district court's factual finding "without finding that [it] was 'clearly erroneous'"); *Pullman-Standard*, 456 U.S. at 283 (faulting the court of appeals for coming to a different factual conclusion than the district court when the court of appeals did not "expressly set aside or find clearly erroneous" the district court's findings). Courts may not do what the First Circuit's continuum standard

effectively allowed it to do here—to reach contrary factual conclusions without ever holding that the district court clearly erred.

Not only is the First Circuit's continuum standard inconsistent with this Court's precedent, it is also inconsistent with the text and purpose of the Federal Rules of Civil Procedure. Rule 52(a)(6) provides that "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." This Rule serves "the public interest in the stability and judicial economy . . . promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of facts." Fed. R. Civ. P. 52 advisory committee's note (1985).

The First Circuit's degree-of-deference continuum runs afoul of this Court's precedents and Rule 52(a)(6). By creating and invoking a "degree-of-deference continuum," the First Circuit has allowed itself to apply standards of review of "variable exactitude," without expressly stating precisely what standard of review is warranted, or what standard of review it is applying. This, in turn, gives the First Circuit free reign to do as it did here: to independently review and reweigh the trial evidence and to make its own factual findings, without ever holding that the district court clearly erred. This not only undermines the "unchallenged superiority of the district court's factfinding ability," *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991), it also sends an improper message to litigants that, in the First Circuit, trial on the merits is a "tryout on the road," rather than the "main event," *Anderson*, 470 U.S. at

575 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

B. The Degree-Of-Deference Continuum Conflicts With The Standards Of Review Applied By Other Circuit Courts.

The First Circuit stands alone in applying a sliding scale of deference to the findings made by a district court. Other circuits recognize that they must choose between clear-error and *de novo* review. These circuits typically "break down [the district court's] conclusions into their components and apply the appropriate standard of review to each component." *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008). As explained by the Fourth Circuit, for example: "We review mixed questions of law and fact 'under a hybrid standard, applying to the factual portion of each inquiry the same standard applied to questions of pure fact and examining *de novo* the legal conclusions derived from those facts.'" *U.S. Dep't of Health & Human Servs. v. Smitley*, 347 F.3d 109, 116 (4th Cir. 2003) (citation omitted); *see also Diebold Found., Inc. v. Comm'r*, 736 F.3d 172, 182 (2d Cir. 2013) (issues are reviewed "de novo to the extent that the alleged error is based on the misunderstanding of a legal standard, and for clear error to the extent that the alleged error is based on a factual determination"); *Davila v. Menendez*, 717 F.3d 1179, 1184 (11th Cir. 2013) ("'We review [mixed] questions *de novo* to the extent they involve application of legal principles to established facts, and for clear error to the extent they involve an inquiry that is essentially factual.'" (citation omitted)); *Beech v. Hercules Drilling Co., LLC*, 691 F.3d 566, 569-70 (5th Cir. 2012) (holding that, where ul-

timate findings rest on both factual and legal underpinnings, appellate courts should "review the factual components under the clearly erroneous standard, and the legal components *de novo*" (citation omitted)); *Pell*, 539 F.3d at 305; *In re Behlke*, 358 F.3d 429, 433 (6th Cir. 2004) ("Mixed questions are to be separated into their component parts and reviewed under the appropriate standard.").

Even if a particular question cannot be broken down into purely factual or purely legal components, other circuits have recognized that they still must choose between clear-error and *de novo* review. *See, e.g.*, *Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1175 n.4 (10th Cir. 2006) ("mixed questions" are reviewed "under either the clearly erroneous standard or *de novo* standard depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles"); *Krist v. Kolombos Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012) (same).[9] No

[9] Although some courts have suggested that "mixed questions" should always receive *de novo* review, in such cases the term "mixed questions" refers to questions involving the application of the relevant legal standard to the *established* facts—not to questions, like those at issue here, that include disputes about underlying factual determinations. *See, e.g.*, *In re Green Hills Dev. Co., LLC*, 741 F.3d 651, 654-55 (5th Cir. 2014) ("To the extent that we are presented with a mixed question of law and fact, we consider the question de novo, although we have recognized that the 'underlying facts' in mixed questions should be reviewed for clear error."); *Morales v. Thaler*, 714 F.3d 295, 301 (5th Cir. 2013) ("When examining mixed questions of law and fact, we also utilize a de novo standard by independently applying the law to the facts found by the district court, as long as the district court's factual determinations are not clearly erroneous."); *see also McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991) (defining "mixed question[s]" as those in which "the underlying facts are established[ ] and the rule of law is undis-

court of appeals, aside from the First Circuit, applies a standard of its own design that is neither clear-error nor *de novo* review.

Indeed, several circuits have expressly rejected the notion that it is acceptable to "glue together" factual findings and legal determinations in order "to review the first question, the factual one, de novo." *Kaplun v. Att'y Gen.*, 602 F.3d 260, 271 (3d Cir. 2010); *accord Vitug v. Holder*, 723 F.3d 1056, 1063 (9th Cir. 2013). But, as discussed below, by invoking its continuum standard, that is precisely what the First Circuit did here.

C. This Case Is An Ideal Vehicle For The Court To Address This Critical Issue.

This case presents an ideal opportunity for this Court to address whether issues with both factual and legal components may be reviewed as a whole along a continuum of deference—as the First Circuit *en banc* majority held—or whether a court must instead apply clear-error or *de novo* review to each underlying factual or legal question, as other circuits do. Not only is the issue squarely presented,[10] but (as the two dissenters observed) the *en banc* majority's application of its continuum of deference was outcome-determinative here. As illustrated below, the *en banc* majority used the continuum approach to reverse the district court's purely factual findings on

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puted, [and] the issue is whether the facts meet the statutory standard").

[10] *See* Pet. App. 38a-39a (expressly declaring that *en banc* majority was applying the continuum standard to its review of the "multitude" of questions underlying Ms. Kosilek's Eighth Amendment claim).

the central questions in this case: (1) whether SRS was medically necessary, and (2) whether the DOC's purported security concerns were merely pretextual.

1. Adequacy of Medical Care: The relevant standard of medical care and the necessity or adequacy of a particular medical treatment are factual issues. *See, e.g.*, *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979) (treating medical standard of care as finding of historical fact); *Snow v. McDaniel*, 681 F.3d 978, 988 (9th Cir. 2012) ("whether any option other than surgery was medically acceptable" is a factual issue), *overruled on other grounds by Peralta v. Dillard*, 744 F.3d 1076 (9th Cir. 2014); *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1258 (11th Cir. 2011) ("The record presents material issues of fact over what amount of private duty nursing hours are medically necessary for Moore, which must be resolved by a factfinder at trial."); *Moore v. Duffy*, 255 F.3d 543, 545 (8th Cir. 2001) (whether treatment provided deviated from the applicable standard of care treated as factual question).

But here, the First Circuit did not accept the district court's findings on these factual issues, and whatever standard of "variable exactitude" it applied bore no resemblance to clear-error review. Instead, the First Circuit decided *de novo* that SRS was not, in fact, medically necessary for Ms. Kosilek. In so doing, the First Circuit re-considered, re-weighed, and drew its own factual inferences from the evidence to reverse many of the district court's subsidiary factual findings. For example:

- The district court found that "the [treatment] approach proposed by Dr. Schmidt would not reduce Kosilek's suffering to the point that

[s]he no longer had a serious medical need." Pet. App. 310a. "As [four other physicians] persuasively testified, antidepressants and psychotherapy would not eliminate Kosilek's distress or diminish it to the point where there was no longer a significant risk of serious harm." *Id.* The *en banc* majority, ignoring that finding completely, concluded just the opposite: "Trial testimony established that [Dr. Schmidt's] plan offers real and direct treatment for Kosilek's GID. It employs methods proven to alleviate Kosilek's mental distress while crafting a plan to minimize the risk of future harm." *Id.* at 52a-53a.[11]

- The district court found that "Osborne's known positions and foreseeable advice that Kosilek should not be provided [SRS] were precisely the reasons that Dennehy decided to hire her." Pet. App. 277a. The *en banc* majority ignored that finding and instead stated that the DOC retained Osborne because of her "substantial expertise," *id.* at 10a, and because she "may do more objective evaluations," *id.* at 9a. The majority went on to state that the DOC did not seek out a specific doctor willing to support its desired outcome but, rather,

[11] The First Circuit's reliance on Dr. Schmidt's testimony was misplaced not only because the district court had discredited it, but also because Dr. Schmidt was merely a *trial* expert for the DOC, and his post-hoc medical opinion did not enter into the DOC's decisionmaking process at the time the DOC denied SRS for Ms. Kosilek. Indeed, as the *en banc* majority itself noted, albeit in a footnote, the DOC *did not even argue* that its denial was based on or justified by the existence of "conflicting medical opinions." Pet. App. 55a n.13.

that the DOC made a reasonable and "considered decision to seek out a second opinion." *Id.* at 54a n.12.

- The district court found that Ms. Kosilek had met the prerequisites for SRS set forth in the Standards of Care, explaining that "the prison environment has provided Kosilek with an even more stringent 'real life experience' test than many transsexuals have outside prison, because inmates are constantly under observation and any failure to live as a woman would be readily noted." Pet. App. 309a.[12] The *en banc* majority, without reference to the clear error standard, simply reached a contrary factual conclusion: "Dr. Levine noted that an incarcerative environment might well be insufficient to expose Kosilek to the variety of societal, familial, and vocational pressures foreseen by a real-life experience. This viewpoint aligned with that of Dr. Schmidt and Osborne." *Id.* at 49a.

2. Pretext: Scienter-based findings such as discriminatory intent and pretext are uniformly considered factual and, thus, subject to clear-error review. *See, e.g.*, *Pullman-Standard*, 456 U.S. at 287-88 (discriminatory intent); *Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 341 (6th Cir. 1997) (determination of pretext); *Cornwell v. Robinson*, 23 F.3d 694, 706 (2nd Cir. 1994) (findings of discrimination, discriminatory intent, and pretext); *United States v. Knight*, 342

[12] S*ee also* Pet. App. 301a ("For someone like Kosilek who is serving a sentence of life without the possibility of parole, prison is, and always will be, h[er] real life.").

F.3d 697, 713 (7th Cir. 2003) (whether reason given for striking juror was pretextual).

But here, the First Circuit gave no indication that it considered the district court's finding of pretext to be factual in nature, and its review of the court's subsidiary and ultimate findings on this issue went far beyond clear-error review: Although the district court found that the DOC's asserted security concerns were "largely false and . . . greatly exaggerated," Pet. App. 321a, the First Circuit independently considered and re-weighed the evidence, downplayed testimony on which the district court relied, and emphasized other testimony that supported its own conclusion that the DOC's proffered concerns were reasonable and valid, *id.* at 58a-61a. For example:

- The district court did not credit the proffered concern that SRS would present a risk of violence within the prison, noting that Ms. Kosilek "has been living at MCI Norfolk with breasts, long hair, makeup, and feminine clothes for many years," which "has not provoked any assaults or created any other problems." Pet. App. 327a. In light of that history, and the factual inferences that may properly be drawn therefrom, the district court found that "neither Dennehy nor Clarke . . . provided a credible explanation for their purported belief" that SRS would magnify the risk of violence. *Id.* at 328a. The First Circuit simply disagreed, drawing its own factual inferences, and making its own factual findings about the reasonableness of Dennehy's and Clarke's testimony: "[T]hat Kosilek had so far been safe within MCI-Norfolk's prison population does

not negate the DOC's well-reasoned belief that safety concerns would arise in the future after SRS." *Id.* at 59a.

- The district court found that DOC officials refused to even explore the option of interstate transfer to address the DOC's purported concern that Ms. Kosilek's SRS might prove too "disrupt[ive]" to the "climate" of MCI Norfolk (where Ms. Kosilek was incarcerated) or MCI Framingham (the state's women's prison). Pet. App. 327a-328a. The *en banc* majority ignored this finding, relying on and emphasizing different evidence in the record to suggest that the refusal to rely on interstate transfer was a calculated, rational decision by DOC officials. *See id.* at 31a, 33a.

- The district court found that, at the time Dennehy gave media interviews suggesting that SRS would raise security reasons, the DOC had not yet conducted the security review required by DOC procedures and had not had any discussions regarding these concerns with key DOC personnel. Pet. App. 280a-283a. This finding was based on the district court's express witness credibility determination. *Id.* at 283a n.11. But the First Circuit, upon its own review of the record, found that Dennehy had discussed security concerns with key personnel at meetings between January and April 2005, and started to formalize the DOC's findings into a report in April 2005. *Id.* at 16a.

- Notwithstanding the district court's express finding that Dennehy's *and Clarke's* claims

> that security considerations motivated their decisions to deny SRS were "largely false" and "greatly exaggerated," Pet App. 321a, the *en banc* majority stated that "Clarke was never found . . . to be noncredible," *id.* at 65a.

Because the First Circuit did not, and could not, declare the district court's findings on these credibility issues clearly erroneous, the outcome of its review necessarily would have been different had it applied the appropriate standard.

Finally, this case is an ideal vehicle because it illustrates perfectly the problem with the First Circuit's novel standard of review. As Judge Thompson aptly observed, the *en banc* majority "formulate[d] a standard of review that, though articulated as one of variable exactitude, amounts to sweeping de novo review." Pet. App. 67a (Thompson, J., dissenting). By invoking the continuum of deference, and then never precisely articulating what standard of review it was applying, the *en banc* majority allowed itself to reweigh the evidence and reach the conclusion it preferred. And that is precisely what this Court has held that appellate courts cannot do. *See Pullman-Standard*, 456 U.S. at 291-92; *Anderson*, 470 U.S. at 573-74.

D. In The Alternative To Granting Certiorari, This Court May Vacate In Light Of *Teva v. Sandoz* Or Issue A Summary Reversal.

This Court has, on several occasions, granted certiorari and issued an opinion correcting an appellate court's erroneous articulation or application of the relevant standards of review. *See, e.g.*, *Anderson*,

470 U.S. at 566 (granting certiorari and reversing where "the Court of Appeals misapprehended and misapplied the clearly-erroneous standard"); *Pullman-Standard*, 456 U.S. at 290-91 (1982) (granting certiorari and reversing where, "although the Court of Appeals acknowledged and correctly stated the controlling standard of Rule 52(a)," the appellate court erroneously applied that standard). This Court also has granted certiorari to correct an appellate court's failure to apply the clear-error standard where its application is required. *See, e.g.*, *Teva*, 135 S. Ct. at 835 (factual findings underlying claim construction). Thus, granting certiorari would be an appropriate way to address the First Circuit's improper degree-of-deference continuum.

Nevertheless, this Court also may resolve this case by granting, vacating, and remanding in light of *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831 (2015). In *Teva*, this Court made clear that (1) a district court's resolution of factual disputes underlying its legal conclusions is subject to clear-error review, *id.* at 835, and (2) courts of appeals may not disregard district court findings without declaring them to be clearly erroneous, *id.* at 843. The First Circuit's decision, which was issued before *Teva*, violates both of these precepts. Accordingly, this Court may properly vacate the First Circuit's judgment and remand for reconsideration pursuant to the standard-of-review principles set forth in *Teva*.

Alternatively, the Court could resolve this case via summary reversal, as it has done in other recent cases involving an appellate court's gross misapplication of Supreme Court precedent concerning the appropriate legal standard. *See, e.g.*, *Erickson v. Pardus*,

551 U.S. 89 (2007) (per curiam summary reversal on pleading standard); *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (per curiam summary reversal on summary judgment standard). As explained above, many of the findings made by the district court and disregarded or implicitly reversed by the First Circuit are precisely the types of findings that this Court already has suggested should be reviewed for clear error. *See supra* pp. 21-27. Whatever standard the *en banc* majority applied within its continuum of deference, that standard bore no similarity to clear-error review, and in no instance did the court determine that the district court's findings on these issues were clearly erroneous. Accordingly, if this Court is not inclined to grant certiorari to address the "degree-of-deference continuum," it can instead summarily reverse the decision below.

II. The First Circuit's Rule That Prison Officials May Constitutionally Deny Medical Care For Non-Medical Reasons Is Inconsistent With This Court's Jurisprudence And The Holdings Of Other Circuits.

The *en banc* majority held that a denial of adequate medical care will not violate the Eighth Amendment so long as prison officials can cite a non-medical justification for denying treatment—in this case, a security concern—that is "within the realm of reason." *See* Pet. App. 58a; *see also id.* at 38a ("[E]ven a denial of care may not amount to an Eighth Amendment violation if that decision is based in legitimate concerns regarding prison safety and institutional security."). Citing its own precedent, the majority stated that "[w]hen evaluating medical

care and deliberate indifference, security considerations inherent in the functioning of a penological institution must be given significant weight." *Id.* (citing *Battista v. Clarke*, 645 F.3d 449, 453 (1st Cir. 2011)). The majority's holding is inconsistent with the Eighth Amendment principles articulated by this Court and with the holdings of several other circuits.

A. The First Circuit's Holding Is Inconsistent With This Court's Eighth Amendment Jurisprudence.

As this Court recently explained in *Brown v. Plata*, "[a] prison that deprives prisoners of . . . adequate medical care[] is incompatible with the concept of human dignity and has no place in civilized society." 131 S. Ct. 1910, 1928 (2011). Because "[a]n inmate must rely on prison authorities to treat his medical needs," the Eighth Amendment imposes an *obligation* on state officials "to provide medical care for those whom it is punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Farmer v. Brennan*, 511 U.S. 825, 832 (1970) ("[P]rison officials must ensure that inmates receive adequate . . . medical care . . . ."). This duty, and consequently the Eighth Amendment, is violated whenever an inmate has a serious medical need and a prison official knowingly fails to respond to it with medically adequate care, whether or not that failure is malicious. *See Farmer*, 511 U.S. at 835-36, 842; *Estelle*, 429 U.S. at 104-05. This Court has prescribed no other requirement—such as the lack of a countervailing security concern—to prove an Eighth Amendment claim.

The First Circuit's rule that security concerns can save the state from an otherwise-established Eighth Amendment violation ignores that prisoner safety and security is an *additional* duty imposed by the Eighth Amendment, not an *alternative* one. As this Court stated in *Farmer*, "prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, *and* must 'take reasonable measures to guarantee the safety of the inmates.'" 511 U.S. at 832 (emphasis added) (citation omitted). But under the First Circuit's holding, prison officials faced with any medical treatment that implicates security concerns—*e.g.*, offsite treatments that pose a risk of prisoner escape, or the provision of necessary medical equipment that could be used as a weapon—can simply choose between their constitutional duties, electing to provide adequate medical treatment *or* ensure prisoner safety. Such a holding has no basis in this Court's jurisprudence.

In the decision below, the *en banc* majority relied on First and Fourth Amendment cases in which this Court balanced inmates' constitutional rights against prison officials' need to ensure institutional security and internal order. Pet. App. 59a. But these cases are inapposite, because First and Fourth Amendment rights are not absolute. *See Hudson v. Palmer*, 468 U.S. 517, 528 (1984) (holding that "the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells" because there is no legitimate expectation of privacy in prison); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (First Amendment rights "at times . . . must yield to other societal interests"); *see also Elrod v. Burns*, 427 U.S. 347, 360 (1976) ("[T]he prohibition on encroachment of First Amendment protections is

not an absolute. Restraints are permitted for appropriate reasons."). And, while "certain privileges and rights must necessarily be limited in the prison context," the right to be free from cruel and unusual punishment is not among them, because "the integrity of the criminal justice system depends on full compliance with the Eighth Amendment." *Johnson v. California*, 543 U.S. 499, 510-11 (2005).[13]

B. The First Circuit's Holding Is Inconsistent With The Holdings Of Other Circuits.

The First Circuit's holding is inconsistent with the prevailing rule in other circuits, which have held, in a number of contexts, that medical care cannot be denied "for non-medical reasons." *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) ("[I]f necessary medical treatment has been delayed for non-medical reasons, a case of deliberate indifference has been made out."); *see also Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993) ("[I]f the failure to provide adequate care in the form of physical therapy was deliberate, and *motivated by non-medical factors*, then Durmer has a viable claim." (emphasis added)).

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[13] If non-medical considerations could be considered at all—and they should not be—the court should subject such justifications to strict scrutiny, rather than the "wide-ranging deference" that the First Circuit afforded to the DOC's proffered security concerns. Pet. App. 57a. "[M]echanical deference to the findings of state prison officials in the context of the eighth amendment would reduce that provision to a nullity in precisely the context where it is most necessary." *Spain v. Procunier*, 600 F.2d 189, 193-94 (9th Cir. 1979) (Kennedy, J.), *quoted in Johnson*, 543 U.S. at 511.

Other circuits repeatedly have held, for example, that prison officials cannot refuse medical treatment to avoid administrative burdens or expenses. *See, e.g.*, *Roe v. Elyea*, 631 F.3d 843, 862-63 (7th Cir. 2011) ("[T]he Constitution is violated when [administrative convenience and cost] are considered to the exclusion of reasonable medical judgment about inmate health." (emphasis omitted)); *Johnson v. Doughty*, 433 F.3d 1001, 1013 (7th Cir. 2006) ("The cost of treatment alternatives" cannot justify the selection of an "easier course of treatment that [officials] know is ineffective."); *Durmer*, 991 F.2d at 68-69 (holding Eighth Amendment claim viable where factfinder could have concluded that prison officials failed to provide physical therapy after a stroke to avoid "considerable burden and expense on the prison"); *Ancata*, 769 F.2d at 705 ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates."); *see also Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014) ("Lack of resources is not a defense to a claim for prospective relief . . . .").

Several circuit courts also have held that practical constraints, such as overcrowding or understaffing, cannot justify the delay or denial of medical care under the Eighth Amendment. *See, e.g.*, *Inmates of Allegheny Cnty. Jail v. Pierce*, 612 F.2d 754, 762-63 (3d Cir. 1979) (discussing staffing deficiencies); *Wellman v. Faulkner*, 715 F.2d 269, 272-74 (7th Cir. 1983) (inadequate medical care caused by staffing deficiencies and overcrowding demonstrates Eighth Amendment violation).

The First Circuit's rule, which permits prison officials to deny necessary medical treatment for rea-

sons that have nothing whatsoever to do with medical need, stands in stark contrast to these decisions and creates a circuit split that only this Court can resolve.

C. This Question Presents An Issue Of Critical Importance.

Recent cases have demonstrated the practical constraints imposed on prison officials by increasing prison populations and budget cuts. *See, e.g.*, *Brown*, 131 S. Ct. 1910; *Peralta*, 744 F.3d 1076. Given these increasing pressures, courts are likely to see more and more cases involving prison officials' reliance on non-medical considerations, such as cost, administrative convenience, and security, to justify the denial of medical treatment. Until this Court makes clear that security and other non-medical concerns cannot justify a denial of adequate medical care, the duty articulated by this Court decades ago in *Farmer v. Brennan* will remain toothless—at least in the First Circuit.

D. This Case Presents An Appropriate Vehicle For This Court To Reach This Question.

This issue is squarely presented, was reached by the court below, and was central to the First Circuit's conclusion. It is thus appropriately presented for this Court's review.[14]

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[14] Although this issue alone is not dispositive, if the Court vacates and remands on the first question presented in this petition, then resolving this question will help to narrow the scope of the issues that the First Circuit must reconsider under the proper standard of review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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