No. 18-_____

In The

Supreme Court of the United States

CANER DEMIRAYAK,

Petitioner,

v.

CITY OF NEW YORK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Petitioner, an attorney, proceeding pro se

November 29, 2018

QUESTIONS PRESENTED

This case presents a split between the circuits and conflict with this Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), as to the fundamental right of access to the courts by persons with disabilities, including petitioner who is a wheelchair-bound trial attorney. Here, petitioner was totally denied access to a court proceeding only reachable by a staircase and continues to be forced to conduct proceedings in the hallway. This case is of great National importance as any holding remedying petitioner's wheelchair access to the courthouse will serve to assist all others with disabilities and further promote the inclusion and integration of the disabled into society.

The questions presented are:

1. Whether a public entity may "avoid liability" under Title II of the Americans with Disabilities Act by providing "alternate accessible accommodations" without being required to demonstrate such accommodations are "effective" to afford meaningful access in an existing court facility, as mandated by *Lane*?

2. Whether a circuit court may accept and rely upon facts and statements raised for the first time on appeal and in opposition to a motion for an injunction pending appeal in considering the merits of an appeal of the denial of a motion for a preliminary injunction, where such facts and statements were not

QUESTIONS PRESENTED – Continued

presented to the district court as it denied the underlying motion before receiving opposition and without finding any facts as required by Federal Rule of Civil Procedure 52(a)(2), or whether the circuit court should have remanded the matter for fair compliance with the fact finding mandate of Rule 52(a), as required by this Court's decision in *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310 (1949), and its progeny?

PARTIES TO THE PROCEEDING BELOW

Petitioner is Caner Demirayak, the plaintiff-appellant below. Petitioner is an attorney proceeding *pro se*.

Respondents are City of New York, New York City Department of Citywide Administrative Services, Lisette Camilo, Rick Chandler, P.E., Ira Gluckman, RA, New York City Department of Buildings, State of New York, Office of Court Administration, and Barry Clarke, the defendants-appellees below.

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Caner Demirayak respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The order denying the timely petition for rehearing and rehearing *en banc* is unreported and is found at App.13. The opinion of the court of appeals is unreported but available at 2018 U.S. App. Lexis 23954 and found at App. 1. The district court's order is unreported and is found at App. 8.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2018. The court of appeals denied a timely petition for rehearing and rehearing *en banc* on November 16, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the Americans With Disabilities Act (42 U.S.C. §§ 12101, *et seq*.), Rehabilitation Act of 1973 (29 U.S.C. §§ 701, *et seq*.), and the Department of Justice regulations implementing such

statutes (35 C.F.R. Part 35) are provided in the Appendix annexed to this petition.

STATEMENT OF THE CASE

Demirayak, a wheelchair-bound litigation attorney, brought the instant action against the City and State of New York based on pervasive disability discrimination occurring at a courthouse petitioner regularly practices in. This courthouse was built in the 1950s. The majority of the courtrooms, restrooms, chambers, conference rooms, judge's benches, and the law library are not wheelchair accessible. These barriers to access impede petitioner's ability to practice law and advocate for clients, requiring him to practice law in the hallway or at the bottom of stairs.

On August 16, 2017 petitioner was denied access to observe an ongoing jury trial as same was conducted in an area of the courthouse totally inaccessible to a person in a wheelchair. The respondents failed to provide any accommodations.

Thereafter on September 25, 2017 petitioner was assigned to conduct a jury trial before a judge in a totally inaccessible courtroom. Once the court realized petitioner was the trial attorney on the case, it requested he agree to a reassignment of a judge in a different courtroom. Petitioner refused, to avoid harm to his client's interests, and was made to wait almost one (1) hour before the trial was moved to a different

courtroom. The alternative courtroom was not ADA-compliant, had many other barriers to access and the restroom servicing the courtroom was not accessible.

Petitioner then filed a motion for a preliminary injunction on October 30, 2017 seeking, *inter alia*, the purchase and installation of temporary and portable ramps and lifts pending litigation and the maintenance of the court's "accessible" bathrooms in working order pending litigation. In his motion petitioner acknowledged the court attempted to accommodate him on September 25, 2017 but argued such accommodations were ineffective to ensure his right to meaningful access. The motion sought to avoid such further ineffective accommodations pending litigation by requiring the respondents to provide access via temporary ramps and lifts.

By way of docket entry on October 31, 2017 the district court denied petitioner's motion without a written order. The district court denied the motion prior to the receipt of any opposition or evidence from the respondents. The district court then issued a memorandum and order on November 2, 2017, concluding that plaintiff had failed to establish a clear likelihood of success on the merits and that he was inappropriately seeking the ultimate relief requested. *See* App. 8. The court made no reference to any of the factual claims made by petitioner in his motion papers. *See id*.

Demirayak then filed an interlocutory appeal arguing that the district court erred in holding that petitioner had failed to make a substantial showing of a

likelihood of success on the merits of his ADA and RA claims. Petitioner further argued that the district court's handing of the preliminary injunction motion, by denying same so rapidly and without an evidentiary hearing, was error. Petitioner relied upon several cases of this Court and other circuits which demonstrated that the district court's disregard for Rule 52(a) conflicted with settled precedent. Petitioner sought an order remanding the matter back to the district court for a hearing and for proper compliance with Rule 52(a).

During oral argument on the merits of the appeal, the Second Circuit ordered the parties to proceed to mediation. The panel stated during oral argument that it was "behaving like district judges." *See* Oral Arg. Rec. 20:55 (2d Cir. Jun. 7, 2018). However, the parties failed to resolve the appeal after seven (7) hours of mediation.

After mediation, the Second Circuit accepted factual statements and arguments made by respondents for the first time on appeal and affirmed the district court's order denying petitioner's motion for a preliminary injunction. *See* App. 1. The Second Circuit held that a "Defendant may avoid liability by providing alternate accessible accommodations," without assessing whether such alternates are reasonable, effective, or sufficient to afford petitioner with meaningful access. *See* App. 6.

The Second Circuit's decision was based primarily on facts and arguments raised by the respondents on appeal, which were not presented to the district court.

The Second Circuit thus held that plaintiff failed to establish a likelihood of success because he failed to acknowledge the accommodations defendants had provided and are willing to provide, in the form of alternate accessible accommodations. *See* App. 6. The Circuit held that plaintiff failed to demonstrate that extreme or serious damage would occur without the requested preliminary injunction since he was not denied total access to the courthouse. In reaching these holdings the Second Circuit relied upon respondents' outside of the record statements and false claims[1] that petitioner was otherwise provided full access to ADA compliant[2] courtrooms. *See* App. 6.

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[1] After the circuit issued its decision, respondents admitted their statements were inaccurate in response to petitioner's motion to vacate the circuit's decision for fraud on the court.

[2] The Second Circuit here used the terms ADA-accessible and ADA-compliant separately. Common sense dictates that a building or courtroom constructed in the 1950s cannot be deemed "accessible" or compliant in the absence of renovations. The term "accessible" is not defined in the text of the ADA or in the regulations implementing it. "Accessible" is however defined in the 2010 and 1991 ADA Standards for Accessible Design and the Uniform Federal Accessibility Standards as "A site, building, facility or portion thereof that complies with this part." *See* 36 C.F.R. App. A to Part 36; 49 FR 31528 (Aug. 7, 1984); *see also Chevron USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.") A courtroom cannot be "accessible" if it is not compliant with the design standards. Plaintiff's papers below established that no courtroom of this existing courthouse is compliant or "accessible," apart from a single renovated wing which created 4 "fully compliant" and "accessible" courtrooms in

The Respondents' outside of the record facts and arguments were initially raised in opposition to petitioner's emergency motion for an injunction pending appeal, which was considered first by the Circuit. The district court did not consider such material as it denied the underlying motion before receiving any opposition. However, in the Circuit Court, the Respondents submitted sworn affidavits from architects, government actors, and referenced a private agreement with a law firm it was working with to allegedly remedy barriers to accessibility. In addition, the defendants explained its alleged willingness to offer petitioner accommodations pending appeal, while also conceding that an analysis of whether such accommodations are reasonable and sufficient to afford meaningful access, was unsettled. None of these facts and arguments were part of the record on appeal or considered by the district court.

Respondents misrepresented these outside of the record facts on the appeal below by claiming that holding a proceeding in a hallway or in a courtroom that fits a wheelchair, but has other barriers, is "ADA compliant." The Second Circuit quoted verbatim from the Respondent's brief on same.

The Second Circuit further held that an evidentiary hearing was not required on the motion because the district court accepted the truth of plaintiff's claims of access to the courthouse on the motion,

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2009. The circuit's decision is thus based on a fundamental misunderstanding of the ADA.

obviating the need for compliance with Rule 52(a). *See* App. 6. In holding as such the Second Circuit overlooked the respondents' admission during oral argument and in their briefs that disputes existed over reasonable accommodations. *See* Oral Arg. Rec. 12:53 (2d Cir. Jun. 7, 2018).

REASONS FOR GRANTING CERTIORARI

A. Certiorari Should be Granted as the Second Circuit's Decision Conflicts with this Court's Decision in *Tennessee v. Lane*, as to the "Ineffectiveness" Standard set Forth Relating to the Obligation of a Public Entity to Provide Reasonable Accommodations to the Disabled in Existing Facilities

The Americans with Disabilities Act ("ADA") was enacted by Congress to address "irrational disability discrimination" caused by the "pervasive unequal treatment in the administration of state services and programs." *See Lane*, 541 U.S. at 522–25. While the ADA was being considered Congress learned that "many individuals . . . were being excluded from . . . court proceedings by reason of their disabilities." *Id.* at 527.

In 2004 this Court upheld the constitutionality of Title II of the ADA and established that persons with disabilities have a fundamental right of access to the courts. *See Lane*, 541 U.S. at 533–34. This right imposed upon public entities an affirmative duty to

accommodate the disabled in the provision of judicial services. *Id.*

This Court recognized in *Lane* that the ADA was designed to require States to take reasonable measures to remove architectural and other barriers to accessibility. *See Lane*, 541 U.S. at 531. Such measures would not, however, be required if same would comprise the public program or fundamentally alter the nature of the service. *Id.* at 532.

Since most judicial facilities were constructed prior to the enactment of the statute the Department of Justice promulgated regulations providing public entities with a variety of ways to accommodate. *See* 35 C.F.R. 35.150(b).

However, this Court set a bright line rule in *Lane* that where such methods are "ineffective" to achieve accessibility, reasonable structural changes must be made in the public facility. *See Lane*, 541 U.S. at 532. This Court stated that in performing such accommodations "[O]rdinary considerations of cost and convenience alone cannot justify a State's failure to provide individuals with a meaningful right of access to the Courts." *Id.* at 533.

Certiorari is warranted in this case because the Second Circuit's denial of plaintiff's claim for preliminary injunctive relief was caused by a misreading of this Court's decision in *Lane* and a misunderstanding of the regulations implementing Title II. The Second Circuit's holding that a public entity "May avoid liability by providing alternate accessible accommodations,"

without discussing this Court's "ineffectiveness" standard as set forth in *Lane* and required by the regulations, will unnecessarily narrow the scope of the fundamental right of access to the courts and permit State and local court systems to deny disabled persons effective and meaningful access to the judicial system. A result not permitted by *Lane*.

In this case, petitioner presented evidence that he was denied physical access to court proceedings and proffered a plausible accommodation in the form of portable or temporary ramps and lifts to allow physical access to the inaccessible courtrooms.

Based on the petitioner's outright exclusion from a court proceeding and subsequent provision of an inadequate alternate weeks later, it is clear the respondent's current purported accommodations are insufficient. At the very least, plaintiff's papers on the motion below raised a disputed factual question as to whether the methods used to accommodate are ineffective, such that reasonable structural changes, albeit temporary, would have to be made. These factual questions invariably required a hearing on the preliminary injunction motion (as the respondents acknowledged a dispute over reasonable accommodations). *See* Oral Arg. Rec. 12:53 (2d Cir. Jun. 7, 2018). The Second Circuit's decision avoided these necessary factual analyses by misapplying the ineffectiveness standard.

In this Court's unanimous decision in *Fry v. Napolean Community Schools*, 137 S. Ct. 743, 756 (2017), the discriminatory effects of architectural barriers were discussed in *dicta*. This Court stated

> Suppose . . . that a wheelchair bound child sues his school for discrimination under Title II . . . because the building lacks access ramps. In some sense, that architectural feature has educational consequences. . . . After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later real world) success.

See id. The same principle should apply to a lack of access ramps in a court facility or accommodations which strip a wheelchair user of his sense of independence and inclusion in the practice of law.

Instead, the Circuit, in a departure from *Lane*, and improper application of 35 C.F.R. 35.150(b), improperly held that providing alternate accommodations is simply enough to avoid liability. As such, certiorari should be granted to ensure that the precedent of *Lane* is maintained.

B. Certiorari Should be Granted as This Case is a Great Vehicle to Resolve a Split Among all Circuits as to Whether a Public Entity May Assert as a Defense, and Thus Avoid Liability Under the ADA, by Providing Alternate Accessible Accommodations Without Being Required to Demonstrate That Same Are Effective to Ensure Meaningful Access

Following *Lane*, and based on this Court's holding in *Alexander v. Choate*, 469 U.S. 287, 301 (1985), the circuits have applied the standard that a public entity's accommodations must provide "meaningful access" to be deemed valid. "The ADA requires more than physical access to public entities: it requires public entities to provide meaningful access to their programs and services." *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007).

Simply providing an alternate accommodation does not end the analysis. The alternate offered must be proven to be effective in achieving meaningful access; a fact specific inquiry. Thus, the Second Circuit's decision here that: "Defendant may avoid liability under the ADA by providing alternate accommodations," without the required inquiry into meaningful access, constitutes a split from all other circuits, including its own, on this subject.

The Circuits have all applied the standard that meaningful access requires the public entity to provide reasonable accommodations or modifications in the program, service or activity offered. *See Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 80 (1st Cir. 2018) (holding

meaningful access required via reasonable modifications unless such modifications would fundamentally alter the program); *Wright v. N.Y. State Dep't of Corr. & Cmty. Supervision*, 831 F.3d 64, 72 (2d Cir. 2016) (holding that a public entity must provide reasonable accommodations to ensure meaningful access that are effective); *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 2018 U.S. App. Lexis 22489, *2 (3d Cir. 2018) ("When necessary to realize [meaningful] access . . . the statutes require reasonable modifications"); *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507–08 (4th Cir. 2016) (holding that a public entity must make reasonable modifications that allow the disabled meaningful access and that the burden of proving a modification is not necessary rests on the defendant); *Frame v. City of Arlington*, 657 F.3d 215 (5th Cir. 2011) ("Reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access"); *Bedford v. Michigan*, 722 Fed. Appx. 515, 518 (6th Cir. 2018) ("Reasonable accommodation may be necessary to ensure meaningful access and a refusal to modify . . . may in view of the circumstances, become unreasonable and discriminatory"); *Banks v. Patton*, 2018 U.S. App. Lexis 20823, *14–15 n.1 (7th Cir. 2018) (holding that providing meaningful access requires accessible reasonable alternatives that are effective); *Folkerts v. City of Waverly*, 707 F.3d 975, 984 (8th Cir. 2013) (holding disabled persons are entitled to meaningful access and that a public entity must afford such access via reasonable modifications); *Crowder v. Kitagwa*, 81 F.3d 1480, 1483 (9th Cir. 1996) (holding that in determining disability discrimination it must

be assessed whether disabled persons are denied meaningful access and that public entities may need to make reasonable modifications to avoid discrimination); *Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001) (holding that a county is obligated to ensure each service program or activity at its courthouse, when viewed in its entirety, was readily accessible and that structural changes may need to be made where other methods to accommodate are not effective); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1268 (D.C. Cir. 2008) (holding that reasonable accommodations must be made to ensure meaningful access and acknowledging a pattern that meaningful access is generally denied when a plaintiff identifies an obstacle impeding access such as an inaccessible staircase).

The Circuits have made clear that determining whether a disabled person is not afforded meaningful access is a fact specific inquiry, where the defendant has the burden to establish otherwise. In *Folkerts*, the Eighth Circuit stated that this "Inquiry is inherently fact intensive and largely depends on context." 707 F.3d at 984. Likewise, the Ninth Circuit held in *Crowder* that the "Determination of what constitutes reasonable modification is highly fact specific." 81 F.3d at 1483. Similarly, the D.C. Circuit held "Cases addressing meaningful access are necessarily fact specific." *Am. Council of the Blind*, 525 F.3d at 1268; *see also Wright*, 831 F.3d at 72 (Second Circuit holding that "Determining the reasonableness of an accommodation is a fact specific question that often must be resolved by fact finder.").

The provision of other alternate reasonable accommodations is a defense that may be raised and demonstrated by defendants in ADA cases. The Third Circuit has made clear that "[W]hile a plaintiff may not insist on a particular accommodation if another reasonable accommodation was offered . . . such alternative, in order to serve as a defense, also must provide . . . meaningful access." *Berardelli*, 2018 U.S. App. 22489 at *2. The D.C. Circuit also held that a defendant "May assert as an affirmative defense to liability that accommodating the disabled would constitute an undue burden." *Am. Council of the Blind*, 525 F.3d at 1268. As such, "Reasonable modifications . . . are necessary to avoid discrimination . . . unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the . . . program." *Crowder*, 81 F.3d at 1485.

Even where such an alternate accommodation permits a disabled person physical access to a court proceeding, meaningful access may still be denied because a "Violation of Title II does not occur only when a disabled person is completely prevented from enjoying a program." *Shotz*, 256 F.3d at 1080. This is because "As [the] circuits have recognized, by requiring public infrastructure to be wheelchair accessible . . . the Rehabilitation Act's ("RA") emphasis on independent living and self-sufficiency ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons." *Am. Council of the Blind*, 525 F.3d at 1267. Thus, the Second Circuit has held that an accommodation that requires a disabled

person to seek out and rely on third persons is ineffective and denies such person meaningful access. *See Wright*, 831 F.3d at 72.

Here the Second Circuit split from all other circuits, including its own, by holding that a defendant may "avoid liability under the ADA by providing alternate accessible accommodations," without analyzing, as required, whether such alternates are effective to constitute meaningful access and whether the accommodations proposed by petitioner would fundamentally alter the program or constitute an undue burden. At the very least, since the Circuits agree that this is a fact specific inquiry, the Second Circuit further split from the Circuits by not remanding this matter for a proper fact-finding hearing on the preliminary injunction motion.

Here, the "Alternate means . . . of participating [as offered by defendants] do not address the scope of the denial of access that plaintiff" showed in his underlying motion papers. *See Am. Council of the Blind*, 525 F.3d at 1269. The position by defendants that plaintiff "[M]ay be able to rely on the assistance of strangers in navigating architectural barriers . . . is anathema to the stated purpose of the Rehabilitation Act," by requiring such dependence. *See id*. It is thus settled law that the mere provision of accessible accommodations does not serve as a defense to a claim under the ADA or RA. Instead, a fact specific inquiry is required into whether a plaintiff requires reasonable accommodations to ensure meaningful access and whether a defendant is able to show its current scheme

of accommodations are effective in an existing court facility.

In the specific context of court facilities and with reference to the factual allegations herein, the Eleventh Circuit held: "If the courthouse wheelchair ramps are too steep or if the bathrooms are unfit for the use of a disabled person, it cannot be said that the trial is readily accessible regardless as to whether the disabled person manages to attend trial." *Shotz*, 256 F.3d at 1080. Likewise, the Eighth Circuit held: that a single exclusion from a court proceeding on the second floor of a courthouse, despite an alternate accommodation, violated the ADA and entitled a wheelchair bound litigant to reasonable structural changes in the courthouse. *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998).

The Second Circuit's decision here is a direct split from the Eighth and Eleventh Circuits' decisions on courthouse access. The Second Circuit held that inaccessible restrooms are merely an inconvenience whereas the Eleventh Circuit held same render a court proceeding not readily accessible. Moreover, the Second Circuit held that a single exclusion from a court proceeding is insufficient to demonstrate a likelihood of success whereas the Eighth Circuit held same as enough to demonstrate a violation and the need for reasonable structural modifications.

Accordingly, certiorari should be granted as this split in the circuits may easily be resolved by this Court when reaffirming its *Lane* decision and the meaningful access standard established by *Choate*.

C. Certiorari is Necessary Here as the Second Circuit's Handling of this Matter and Stating it was "Behaving Like District Judges" During Oral Argument Was a Significant Departure from the Accepted and Usual Course of Judicial Proceedings and Sanctioned the District Court's Similar Departures by Violating the Fact-Finding Mandate of Rule 52(a) and Inappropriately Expanding the Record on Appeal Requiring this Court to Exercise its Supervisory Power

This Court has held that "It is of the highest importance to a proper review of the action of the court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a)." *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1949). Where the lower court fails to comply with the fact-finding mandate of Rule 52(a) this Court has required that the matter be remanded to the court for a hearing and disposition with proper findings of fact. *See id.* at 319; *see also Matton Oil Transfer Corp. v. The Dynamic*, 123 F.2d 999, 1001 (2d Cir. 1944) (must have proper findings of fact as per Rule 52(a)); *Featherstone v. Barash*, 345 F.2d 246, 249 (10th Cir. 1965) (findings of fact are mandatory); *Bowles v. Rossel Packing Co.*, 140 F.2d 354 (7th Cir. 1944) (holding that the ends of justice and orderly procedure will be best served by remanding to the district court for factual findings); *Davis v. United States*, 422 F.2d 1139, 1141 (5th Cir. 1970) (compliance with Rule 52(a) required on preliminary injunction); *Carpenters' Dist. Council v. Cicci*, 261 F.2d 5, 7 (6th Cir. 1953) (holding Rule 52(a) is mandatory

even if the party opposing a motion for preliminary injunction does not dispute facts); *Chas Pfizer and Co. v. Zenith Lab*, 339 F.2d 429, 430–31 (3d Cir. 1964) (noncompliance with Rule 52(a) requires remand for proper compliance); *Carey v. Carter*, 344 F.2d 567, 568 (D.C. Cir. 1965) (remanding for compliance with Rule 52(a)).

Here, the district court made no factual findings in its decision as required by Rule 52(a). The court did not even attempt to assess the facts and denied the motion before any opposition was filed and without a hearing. The district court stated it felt the motion was prematurely made and denied same for additional factual development through discovery. *See* App. 9.

In denying the motion no reference was made to the facts alleged by plaintiff or any defenses or claims made by the defendants. *See* App. 8–13. The court did not state it accepted plaintiff's factual claims for the purposes of determining the motion. *See id*. The record on appeal only consisted of plaintiff's motion papers and the court's decision. The court's swift denial of the motion before defendants could oppose same did not render the facts undisputed.

On appeal of such conduct by a district court the normal course is to remand the matter for compliance with Rule 52(a) and for a hearing if facts are disputed on the preliminary injunction motion. *See Mayo*, 309 U.S. at 316; *Bowles*, 140 F.2d at 354; *Davis*, 422 F.2d at 1141. Here however, the respondents, on appeal for the first time, presented facts and arguments not presented to the district court, and hence outside of the

record. Yet, the respondents admitted that disputes existed over reasonable accommodations. *See* Oral Arg. Rec. 12:53 (2d Cir. Jun. 7, 2018).

In response and abruptly during oral argument, the Second Circuit said "it was behaving like district judges" and ordered the parties to attempt mediation to determine whether plaintiff's proposed accommodations could be provided. *See* Oral Arg. Rec. 20:55 (2d Cir. Jun. 7, 2018). The Circuit stated it was requiring respondents to produce employees who would be able to state with certainty whether the accommodations were feasible. *See* Oral Arg. Rec. 17:50; 22:50; 23:15 (2d Cir. Jun. 7, 2018). The parties then proceeded to mediation, with the expectation the mediation would be confidential.

After mediation the panel affirmed and duplicated the role of the district court, which failed to comply with Rule 52(a). The panel relied upon facts and arguments raised by respondents for the first time on appeal and beyond the record, i.e., that it "otherwise provides petitioner with reasonable accommodations in the form of fully ADA complaint courtrooms and is willing to provide same." *See* App. 6.

Such conduct conflicts with this Court's single decision involving Federal Rule of Appellate Procedure 10, where it was stated that "[T]he record on appeal consists of the papers and orders filed in the district court." *Ballard v. Comm'r*, 544 U.S. 40, 62 (2005). The Circuits have likewise held that appellate courts are not permitted to consider matters outside of the record

on appeal. *Int'l Bus. Machines Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975); *Huelsman v. Civic Center Corp.*, 873 F.2d 1171, 1175 (8th Cir. 1989) (holding an appellate court can properly consider only the record and facts before the district court); *United States v. Elizal de-Adame*, 262 F.3d 637, 641 (7th Cir. 2007) (holding a party may not add new material to the record on appeal); *Stotts v. Memphis Fire Dep't*, 1985 U.S. App. Lexis 14093, *6 (6th Cir. 1985).

The Second Circuit's decision to rely on such matter constitutes a direct split from the Sixth Circuit on the role of an appellate court in such situation. The Sixth Circuit held: "The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court . . . by substituting the arguments of the parties for considered findings of the district court." *See Stotts*, 1985 U.S. App. Lexis 14093 at *6–9 (quoting *Anderson v. City of Bessemer*, 105 S. Ct. 1504, 1511 (1985).

The Second Circuit further departed from the usual course of proceedings by holding that there were no disputed facts on plaintiff's motion because the district court accepted the truth of his claims, in order to avoid the necessity of an order remanding for a hearing. *See Forts v. Ward*, 566 F.2d 849, 854 (2d Cir. 1977) (holding that "even if the basic facts were conceded, the inferences to be drawn from them are in dispute" requiring an evidentiary hearing); *see also Societe Comptoir de L'Industrie Cotonniere, Establissements Boussac v. Alexander's Dep't Stores, Inc.*, 190 F. Supp. 594, 601 (S.D.N.Y. 1961), *aff'd*, 299 F.2d 33 (2d Cir.

1962) ("As support for a preliminary injunction the court can consider only facts presented by affidavit or testimony and cannot consider facts provable under the modern liberal interpretation of the complaint but which have not yet been proved.").

Nevertheless, the panel decided to inappropriately duplicate the role of the district court instead of reversing its improper conduct in avoiding compliance with Rule 52(a). *See Stotts*, *supra* at p. 20. The factual predicate for the Second Circuit's decision here is based entirely on matters outside of the record on appeal. This is clear as the Circuit stated "[I]t was behaving like district judges," and relied on select facts and evidence presented for the first time on appeal. In doing so, the circuit cherry picked new facts that favored affirmance and ignored the respondents' admission of factual disputes over reasonable accommodations during argument. *See* Oral Arg. Rec. 20:55 (2d Cir. Jun. 7, 2018).

As this Court has explained, "Proceeding in this manner seems to us incredible. . . . Fact finding is the basic responsibility of district courts, rather than appellate courts, and the Court of Appeals should not have resolved in this first instance this factual dispute which had not been considered by the district court." *Pullman-Standard Div. of Pullman v. Swint*, 456 U.S. 273, 291–92 (1982) (quoting *DeMarco v. United States*, 415 U.S. 449, 450 (1974)).

These errors were a significant departure from the accepted and usual course of judicial proceedings requiring this Court to exercise its supervisory power.

The actions by the lower courts were extremely harmful as it permitted defendants to prevail on an insufficient record without being required to submit any evidence or opposition. These errors and split in authority may easily be resolved by this Court, by avoiding all other issues presented, and remanding the case to the district court to conduct a hearing and issue a decision with proper factual findings.

CONCLUSION

For the reasons set forth herein, this Court should grant the petition.

Respectfully submitted,

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