

No. 18-710

IN THE
Supreme Court of the United States

CANER DEMIRAYAK,

Petitioner,

v.

CITY OF NEW YORK, NEW YORK, et al.,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF IN OPPOSITION FOR
STATE OF NEW YORK AND BARRY CLARKE**

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

1. Whether it was an abuse of discretion for the district court to deny petitioner's motion for a preliminary injunction without prejudice when petitioner's motion papers failed to establish either irreparable injury or a likelihood of success on his claims under the Americans with Disabilities Act and the Rehabilitation Act.
2. Whether the district court permissibly declined to hold a factual hearing on petitioner's motion for a preliminary injunction when there were no facts in dispute and the district court accepted petitioner's allegations as true.

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT	2
REASONS FOR DENYING THE PETITION	9
A. Certiorari Is Not Warranted to Review the Court of Appeals' Assessment of the Sufficiency of Demirayak's Pleadings and Motion Papers in This Interlocutory Appeal.....	9
B. Certiorari Is Not Warranted to Consider Whether the District Court Properly Declined to Hold a Factual Hearing in This Case.....	10
C. This Case Would Be a Poor Vehicle in Any Event.....	12
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Anderson v. City of Albuquerque</i> , 690 F.2d 796 (10th Cir. 1982)	11
<i>Disabled in Action v. Board of Elections</i> , 752 F.3d 189 (2d Cir. 2014)	10
<i>Hamilton-Brown Shoe Co. v. Wolf Bros.</i> , 240 U.S. 251 (1916)	12,13
<i>Henrietta D. v. Bloomberg</i> , 331 F.3d 261 (2d Cir. 2003)	9
<i>Hicks v. United States</i> , 368 F.2d 626 (4th Cir. 1966)	11
<i>Hyundai Mipo Dockyard Co. v. AEP/Borden Indus. (In re Rationis Enters., Inc. of Panama)</i> , 261 F.3d 264 (2d Cir. 2001).....	11
<i>Kern v. Clark</i> , 331 F.3d 9 (2d Cir. 2003).....	11
<i>Mohawk Indus., Inc. v. Carpenter</i> , 558 U.S. 100 (2009)	12
<i>Supermercados Econo, Inc. v. Intergrand Assurance Co.</i> , 375 F.3d 1 (1st Cir. 2004)	11
<i>Virginia Military Inst. v. United States</i> , 508 U.S. 946 (1993)	12
<i>Ziae v. Vest</i> , 916 F.2d 1204 (7th Cir. 1990).....	11
 Regulations	
28 C.F.R. § 35.150(b)(1).....	10
 Miscellaneous Authorities	
Stephen M. Shapiro et al., <i>Supreme Court Practice</i> (10th ed. 2013).....	13

INTRODUCTION

Petitioner Caner Demirayak’s petition for a writ of certiorari is based on a fundamental mischaracterization of the legal issue considered and resolved by the United States Court of Appeals for the Second Circuit. The only question presented in this interlocutory appeal is whether the United States District Court for the Eastern District of New York (Kuntz, J.) abused its discretion in denying a preliminary injunction—without prejudice—on the ground that Demirayak, a wheelchair-bound attorney, failed to identify any irreparable injury or a likelihood of success on any viable legal claim based on the alleged inaccessibility of a particular New York State courthouse. The Second Circuit found no abuse of discretion, agreeing with the district court that Demirayak’s pleadings and motion papers utterly failed to satisfy the prerequisites for obtaining preliminary injunctive relief. Specifically, the court of appeals noted that Demirayak has “been provided full access to an ADA-accessible courtroom when he practices in the courthouse” and that Demirayak had never acknowledged the undisputed “accommodations defendants had previously provided and are currently willing to provide” him. (Pet. App. 5–6.)

Thus, contrary to Demirayak’s characterization, the Second Circuit’s decision turned on no novel interpretation of federal law, but rather on the failure of a particular set of motion papers to establish the prerequisites for obtaining the extraordinary relief of a preliminary injunction. Indeed, like the district court, the court of appeals was careful to note that its ruling was limited to the propriety of a preliminary injunction, and observed that Demirayak remains free

to pursue his underlying claims and, were he to prevail, to obtain appropriate relief “after a more complete development of the factual record.” (Pet. App. 7 n.1.) District court proceedings on Demirayak’s underlying claims remain pending.

Certiorari is not warranted to review the Second Circuit’s interlocutory and case-specific assessment of the sufficiency of Demirayak’s request for a preliminary injunction here.

STATEMENT

1. Petitioner Caner Demirayak is a lawyer who regularly practices in New York State Supreme Court, Kings County, which is located in Brooklyn. (2d Cir. App’x (A.) 24.) He has a form of muscular dystrophy and, as a result, requires a wheelchair. (A. 24.) In September 2017, he filed a lawsuit in the United States District Court for the Eastern District of New York alleging, among other things, that the Brooklyn courthouse does not comply with Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12131–12134, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794.¹ Demirayak named as defendants (respondents here) the State of New York, the New York Office of Court Administration (OCA), the City of New York, the City Department of Citywide Administrative Services (DCAS), the City Department

¹ Demirayak has twice amended his complaint. Because the first amended complaint was the operative complaint when the district court issued the order from which Demirayak appeals, and because the second amended complaint retains the ADA and Rehabilitation Act claims that were at the core of the first amended complaint, we refer to the allegations in Demirayak’s first amended complaint.

of Buildings, and several individual defendants sued in their official capacities, all of whom work for OCA or the Department of Buildings. (A. 25–26.)

Demirayak’s complaint alleges several instances in which he had trouble maneuvering in the Brooklyn courthouse, and claims that signs within the courthouse inaccurately describe the location of wheelchair-accessible bathrooms. (A. 27–32.) But the complaint also acknowledges that Demirayak has received multiple accommodations that have enabled him to participate in court proceedings despite his disability. It alleges, for instance, that one of Demirayak’s trials was transferred to a courtroom that the complaint concedes was “accessible”—albeit “barely”—thus enabling him to try the case to verdict. (A. 32.) On another occasion, the complaint alleges, Demirayak could not access a judge’s chambers for a conference, so the judge relocated the conference to the hallway so that Demirayak could participate. (A. 28.)

As ultimate relief, the complaint demands a permanent injunction requiring respondents to remove “structural and architectural barriers and make” the Brooklyn courthouse “wheelchair accessible, with respect to its lavatories, courtrooms, conference rooms, chambers, paths of travel, and all other areas constituting public accommodations.” (A. 41.)

2. Soon after filing this lawsuit—and before any defendant had answered the complaint or moved to dismiss—Demirayak sought a temporary restraining order and preliminary injunction. (*See* A. 3.) Demirayak’s motion asked the district court to order respondents to complete, within 120 days, a comprehensive design plan to remove all architectural barriers to access in the Brooklyn courthouse;

purchase and install new temporary ramps and lift equipment in various portions of the building; replace certain wheelchair-accessibility signs; and keep wheelchair-accessible bathrooms in working order. (A. 5–6.) Demirayak also demanded an injunction barring respondents from retaliating against him for filing this lawsuit, including through “any attempts to circumvent the random assignment of judges.” (A. 6.)

The district court denied the motion before responsive papers were filed. (Pet. App. 8–12.) The court observed that the motion did not seek merely “to maintain the status quo,” but instead sought all the injunctive relief that the complaint requested, and further sought “to order [respondents] to undertake several affirmative acts” that would “require the expenditure of financial and other resources, well before discovery has even commenced in this action.” (Pet. App. 11.) Because the motion sought such extraordinary, mandatory relief, the court explained, Second Circuit case law mandated that Demirayak “meet a higher standard” than is required for an ordinary preliminary injunction. (Pet. App. 10 (quoting *Tom Doherty Assocs., Inc. v. Saban Entm’t, Inc.*, 60 F.3d 27, 33 (2d Cir. 1995)).) That higher standard requires the movant to show “a ‘clear’ or ‘substantial’ likelihood of success on the merits. (Pet. App. 12 (quoting *Tom Doherty*, 60 F.3d at 34).) The court found that Demirayak had “not even attempted to meet” that “heightened standard”—and indeed, had failed even to mention that standard in his moving papers. (Pet. App. 12.) The district court accordingly denied Demirayak’s motion “at this time, without prejudice to his seeking appropriate permanent injunctive relief after further development of the record and/or a finding of liability on the merits.” (Pet. App. 12.)

3. Demirayak appealed. A week after filing his notice of appeal, Demirayak moved in the Second Circuit for an emergency injunction pending appeal. Demirayak's emergency motion demanded essentially the same injunctive relief he had sought in the district court. (See Pl.-Appellant's Emergency Mot. for an Inj. & Expedited Appeal at 1–2, 2d Cir. ECF No. 23-2.)

In opposing that motion, respondents explained that the motion was partially moot because they had already remedied certain problems that Demirayak had raised. For instance, respondents offered evidence that the allegedly inaccurate signage Demirayak had identified had been removed and that the three bathrooms that Demirayak acknowledged were wheelchair-accessible were now operational. (Decl. of Jesus Coombs ¶ 5, 2d Cir. ECF No. 53-3.) Respondents also submitted evidence that the City, as part of structured settlement negotiations with the New York Lawyers for the Public Interest, had hired an architectural firm to survey the courthouses in the City, identify features that do not comply with the ADA and Rehabilitation Act, propose remediation, and carry out that remediation. (Decl. of Suzanne Lynn ¶¶ 7, 10, 2d Cir. ECF No. 53-2.) And respondents assured the Second Circuit that they are working to accommodate Demirayak while this case is pending, including by relocating his proceedings to ADA-compliant courtrooms. (Oral Argument at 6:50–7:19, 8:59–9:30 (Dec. 5, 2017).²)

The Second Circuit denied Demirayak's motion. (Order, 2d Cir. ECF No. 68.)

² Recordings of oral argument are available on the court's website: www.ca2.uscourts.gov/oral_arguments.html.

4. The parties then briefed the merits of the appeal and presented oral argument. During oral argument, Demirayak withdrew his requests for relief other than the installation of ramps and lifts in the courthouse and the maintenance of the courthouse’s wheelchair-accessible restrooms. (See Pet. App. 3–4.) Given that withdrawal, the panel directed the parties to participate in court-ordered mediation to try to resolve the narrow issues that remained. (Oral Argument at 20:31–20:59 (June 7, 2018).) After the parties reported that mediation had not succeeded, the Second Circuit affirmed the district court’s order. (Pet. App. 1–7.)

In an unpublished, nonprecedential summary order, the Second Circuit held that the district court had not abused its discretion in finding that Demirayak’s motion papers failed to meet the standard for a mandatory injunction.

First, Demirayak failed to make a “clear showing of extreme and serious damage” in the absence of an injunction. (Pet. App. 5.) As for his ability to use wheelchair-accessible restrooms, the court held that Demirayak “did not allege any day where all three accessible bathrooms were inoperable” and thus failed to show “actual and imminent harm.” (Pet. App. 5.) As for his ability to access other parts of the courthouse, Demirayak had made only one “specific allegation” about “the damage caused to him by the lack of ramps and lifts”: “his inability to observe a single trial.” (Pet. App. 5.) Otherwise, the court observed, Demirayak has “been provided full access to an ADA-accessible courtroom when he practices in the courthouse.” (Pet. App. 5.)

Second, Demirayak had not established a clear likelihood of success on the merits under the

heightened standard for mandatory injunctive relief. Because Demirayak had failed to allege “that he was denied access to all available bathrooms at any given time, the availability of one or more functioning accessible bathrooms could qualify under the ADA as an ‘alternate accessible’ bathroom.” (Pet. App. 6 (quoting 28 C.F.R. § 35.150(b)(1).) And, the court noted, respondents “can avoid liability under the ADA by providing alternate accessible accommodations.” (Pet. App. 6.) The court also held that Demirayak had “not established a clear likelihood of success on the merits with regard to his claim for construction and installation of ramps and stair lifts,” because “[h]is motion papers did not acknowledge the accommodations [respondents] had previously provided and are currently willing to provide, including the use of alternate accessible and fully ADA-compliant courtrooms in the very same courthouse.” (Pet. App. 6–7.)

Third, the Second Circuit held that district court had properly declined to hold a factual hearing, since “there were no facts in dispute as to [Demirayak’s] access to the courthouse.” (Pet. App. 7.) “Rather,” the Second Circuit concluded, “the District Court accepted [Demirayak’s] allegations as true for the purposes of the motion before it.” (Pet. App. 7.)

5. Demirayak moved for panel rehearing or rehearing en banc. While that motion was pending, Demirayak moved to supplement the motion, claiming that he had recently discovered that the state respondents—the State of New York and OCA’s Chief of Operations—had made “fraudulent statements” by arguing in their merits brief that one of Demirayak’s trials in the Brooklyn courthouse had been transferred to an ADA-compliant courtroom and that one of his conferences had been moved to an accessible location.

(*See* Mot. for Leave to Supp. Pet. for Reh’g, 2d Cir. ECF No. 162-1.)

Far from “admit[ting]” any inaccuracy, as Demirayak inaccurately asserts here (*see* Pet. 5 n.1), the state respondents opposed Demirayak’s motion to supplement and vigorously denied his allegations. They explained that Demirayak’s allegations—including his admission that he had been able to conduct a multiday trial in the courtroom to which respondents had moved his proceeding—supported their conclusion that Demirayak had been reasonably accommodated under the ADA. (Opp. to Mot. for Leave to Supp. at 8–10, 2d Cir. ECF No. 166-1.) They also explained that Demirayak’s more recent claims about how that particular courthouse fails to comply with the ADA were wrong, and that, in any event, Demirayak’s own interrogatory responses in the ongoing district court proceedings conceded that he has indeed been accommodated through “the use of fully ADA-compliant courtrooms.” (*Id.* at 9 & n.3 (quotation marks omitted).) The state respondents further noted that Demirayak’s allegations of fraud accorded with his broader pattern of accusing several different attorneys for respondents of misconduct in an effort to gain a litigation advantage. (*Id.* at 12–13.)

The Second Circuit denied Demirayak’s motion to supplement, and later denied his motion to reconsider that denial. (*See* 2d Cir. ECF Nos. 176, 181.) The court ultimately denied Demirayak’s petition for panel rehearing or rehearing en banc as well. (Pet. App. 13–14.)

REASONS FOR DENYING THE PETITION

A. Certiorari Is Not Warranted to Review the Court of Appeals’ Assessment of the Sufficiency of Demirayak’s Pleadings and Motion Papers in This Interlocutory Appeal.

Demirayak asserts that the Second Circuit below articulated a definitive legal interpretation of Title II of the ADA (and, by extension, § 504 of the Rehabilitation Act³) that would allow state governments to provide ineffective accommodations to persons with disabilities. (Pet. i, 7–10.) The Second Circuit issued no such ruling. Instead, the decision below held only that the particular pleadings and motion papers that Demirayak filed in this proceeding failed to satisfy the stringent standards for obtaining a preliminary injunction—particularly one that, as here, would “either alter[] the status quo or . . . provide the ultimate relief sought in the underlying action.” (Pet. App. 4.)

Demirayak’s petition identifies no error, let alone clear error, in the Second Circuit’s conclusion that Demirayak failed to identify any irreparable injury in light of his “full access to an ADA-accessible courtroom” and concessions that respondents had made available at least one accessible bathroom at all times and alternate accessible locations for all but one

³ Because the standards under Rehabilitation Act § 504 mirror those under Title II of the ADA, courts “treat claims under the two statutes identically,” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003)—a point that Demirayak acknowledged below (see 2d Cir. Br. for Pl.-Appellant at 30–31, ECF No. 77). We therefore refer only to Title II of the ADA in this section, but the analysis applies equally to Demirayak’s claims under Rehabilitation Act § 504.

of his alleged courthouse proceedings. (Pet. App. 5.) And Demirayak is simply wrong in describing the Second Circuit as allowing respondents to provide *ineffective* accommodations to satisfy their obligations under the ADA. To the contrary, the decision below correctly cited cases holding that a reasonable accommodation under the ADA must provide “meaningful access” to public services by people with disabilities. *Disabled in Action v. Board of Elections*, 752 F.3d 189, 197 (2d Cir. 2014), *cited in* Pet. App. 6. Applying that standard, the Second Circuit noted that Demirayak himself had acknowledged receiving accommodations for his disability from respondents (*see, e.g.*, A. 28 (Compl. ¶ 40), 32 (Compl. ¶ 62)), and that Demirayak’s motion papers had wholly failed to explain why those accommodations were insufficient to make the Brooklyn courthouse “readily accessible to and usable by” him, 28 C.F.R. § 35.150(b)(1). (See Mem. of Law in Supp. of Mot. for a Preliminary Injunction at 12–14, E.D.N.Y. ECF No. 15-3.)

In other words, the decision below relied on no novel interpretations of federal law, and instead turned entirely on whether Demirayak’s specific arguments and allegations in this proceeding satisfied the well-established criteria for obtaining preliminary injunctive relief. Certiorari is not warranted to review this narrow, case-specific determination.

B. Certiorari Is Not Warranted to Consider Whether the District Court Properly Declined to Hold a Factual Hearing in This Case.

Demirayak also objects to the district court’s decision not to hold a factual hearing on his preliminary-injunction motion. The court of appeals affirmed the district court’s determination, finding

that “there were no facts in dispute as to [Demirayak’s] access to the courthouse” and that, to the extent any disputes existed, “the District Court accepted [Demirayak’s] allegations as true for the purposes of the motion before it.” (Pet. App. 7.) Certiorari is also not warranted to review this case-specific ruling.

The courts of appeals—including the Second Circuit—have consistently held that district courts need not hold a factual hearing or make factual findings unless essential facts are in dispute. *See Hyundai Mipo Dockyard Co. v. AEP/Borden Indus. (In re Rationis Enters., Inc. of Panama)*, 261 F.3d 264, 269 (2d Cir. 2001) (quotation marks omitted).⁴ The Second Circuit’s decision below adhered to this uniform precedent. To the extent that the courts below drew on any facts, those facts came from Demirayak’s complaint or filings, or were otherwise conceded by Demirayak below. For example, the Second Circuit relied on allegations in Demirayak’s own complaint to note that the Brooklyn courthouse contains three accessible bathrooms and that respondents had transferred his proceedings to accessible courtrooms. (Pet. App. 6–7; *see* A. 28, 32.)

Demirayak is simply wrong in suggesting that the district court and the court of appeals improperly resolved disputed facts against him. He claims (Pet. 19) that the parties disputed whether certain accommodations he received were reasonable. But the

⁴ *See also*, e.g., *Supermercados Econo, Inc. v. Intergrand Assurance Co.*, 375 F.3d 1, 4 (1st Cir. 2004); *Kern v. Clark*, 331 F.3d 9, 12 (2d Cir. 2003) (per curiam); *Hicks v. United States*, 368 F.2d 626, 630–31 (4th Cir. 1966); *Ziaeem v. Vest*, 916 F.2d 1204, 1210 (7th Cir. 1990); *Anderson v. City of Albuquerque*, 690 F.2d 796, 803 (10th Cir. 1982).

courts below did not reach any definitive resolution about the reasonableness of those accommodations; the crux of the rulings below was that Demirayak had conceded to receiving accommodations but had failed as a threshold matter to make any showing that those accommodations were inadequate as a matter of law. (See Pet. App. 6–7, 12.) In other words, it was the deficiency of Demirayak’s legal filings, not the resolution of factual disputes against him, that supported the lower courts’ denial of his request for a preliminary injunction.⁵

C. This Case Would Be a Poor Vehicle in Any Event.

Because Demirayak seeks review of an interlocutory appellate decision, this case would be a poor candidate for this Court’s review even if it did raise any legal issue of any import. This Court “generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction.” *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari); *see, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916). Indeed, in emphasizing “the virtues of the final-judgment rule,” the Court has cautioned that “piecemeal, prejudgment appeals” risk “undermin[ing] efficient judicial administration.” *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quotation marks omitted). The interlocutory

⁵ Demirayak plucks out of context (Pet. 21) the statement by a member of the Second Circuit panel that the judges were “behaving like district judges” (June 7 Oral Argument at 20:55). That statement had nothing to do with finding facts; it pertained solely to the court’s decision to order the parties to mediation. (*Id.* at 20:31–20:59.)

nature of this case “alone” thus “furnishe[s] sufficient ground for the denial of the application” for certiorari. *Hamilton-Brown Shoe*, 240 U.S. at 258; *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 282–83 (10th ed. 2013).

This case is an especially poor candidate for interlocutory review, given that the questions presented could become moot before this Court decides them. *See, e.g.*, Shapiro et al., *supra*, § 4.18, at 285. For instance, the district court may grant Demirayak’s pending motion under Federal Rule of Civil Procedure 60(b) to vacate the decision under review in this appeal (E.D.N.Y. ECF No. 87-1). The district court may also grant a new motion—which Demirayak remains free to make—for the same injunctive relief he sought at the outset based on facts developed through discovery. Or the parties may settle the case in whole or in relevant part. And quite apart from this litigation, the City of New York, as part of its structured settlement negotiations with the New York Lawyers for the Public Interest (see *supra* at 5), may permanently renovate the Brooklyn courthouse, thus obviating the need for the temporary features that Demirayak sought through his injunction motion. These circumstances also weigh heavily against certiorari here.

CONCLUSION

For these reasons, the Court should deny Demirayak's petition for certiorari.

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