No. 18-710

IN THE

Supreme Court of the United States

CANER DEMIRAYAK,

Petitioner,

v.

CITY OF NEW YORK, *et al.*,

Respondents.

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

BRIEF FOR THE MUNICIPAL RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should the Court grant interlocutory certiorari review of the Court of Appeals' decision affirming the denial of a preliminary injunction that would have compelled immediate physical changes to a state courthouse under the Americans with Disabilities Act of 1990 (ADA), where (1) undisputed deficiencies in petitioner Caner Demirayak's underlying motion and appeal render academic the issues presented in the petition; (2) the petition's claim that the Court of Appeals' decision creates a circuit split on ADA law rests on a clear mischaracterization of the court's decision; and (3) the petition's procedural arguments are not only fact-bound and case-specific but mistaken?

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INTRODUCTION

"[I]t was indeed too early to come to the Circuit on this case." Those are petitioner's own words, offered in support of his failed bid for the Court of Appeals to vacate the same interlocutory decision he now claims is ripe for review by the Nation's highest court. It is doubtful that this case will ever present a certworthy question. But it is clear that the case did not belong in the Court of Appeals at this early stage and certainly does not belong in this Court now.

Petitioner, an attorney who uses a wheelchair, seeks certiorari from a decision affirming the denial of his motion for a preliminary injunction—one that would have compelled defendants to make immediate physical changes to a state courthouse that he claims are required by the Americans with Disabilities Act of 1990 (ADA). The interlocutory posture of this case, the sparseness of petitioner's allegations, and the ongoing factual development in the district court make this case a poor vehicle to decide any serious question. But even setting aside those deficiencies, the petition's problems are fundamental.

- The petition entirely ignores Demirayak's admission that his appeal was premature, as well as his failure to show irreparable harm, each of which provide an independent basis for the denial of his motion without even reaching the issues presented in the petition.

- The petition's challenge to the Court of Appeals' likelihood-of-success holding rests on a misreading of the decision as silently overruling the circuit's own precedent and rewriting federal regulations by endorsing ineffective accommodations.

- Demirayak's sundry procedural objections are case-specific and fact-bound, and would amount to nothing more than a plea for error correction, were they were not also meritless.

STATEMENT OF THE CASE

1. Demirayak, an attorney who often practices in a state courthouse in Brooklyn, has a form of muscular dystrophy and uses a wheelchair (*see* Appendix of Plaintiff-Appellant ("A"), 2d Cir. Dkt. 78-1 at 8, 24, 28-33). He brought this lawsuit claiming that the State of New York, the City of New York,[1] and a series of related defendants are in violation of the ADA because some parts of the 1950s-era courthouse are "barely accessible" and others are inaccessible (A25-28, 32). Demirayak maintains, for example, that various courtrooms

[1] The municipal respondents include the City of New York, New York City Department of Citywide Administrative Services, Lisette Camilo, Rick Chandler, New York City Department of Buildings, and Ira Gluckman. The remaining respondents are separately represented; we understand that they will be filing a separate brief in opposition.

have doors that are not ADA compliant, insufficient space between the benches and the bar, or tables that are too low; that two fourth-floor courtrooms are accessible only by stairs; and that the restrooms that are "barely accessible" to him are often out of order (A8-10, 27-28, 30, 32). He contends that his inability to access some areas of the courthouse stopped him from, for example, reviewing his notes in the law library and observing a colleague's trial (A31).

Demirayak concedes, however, that actions have been taken to accommodate him (A28, 32). For example, when he could not access a judge's chambers for a case conference, the conference was held in the hallway (A28). And when he was scheduled to have a trial in a courtroom that could be reached only by stairs, the trial was moved (A32). More broadly, Demirayak acknowledges that a renovated wing in the courthouse contains four "fully compliant" and "accessible" courtrooms (Pet. 5-6 n.2; *see* 2d Cir. Dkt. 167-1 at 4).

2. Soon after filing an amended complaint, Demirayak moved for a preliminary injunction requiring the respondents to, as is relevant to this petition, purchase and install ramps and lifts for use in the courthouse's jury coordinating area, law library, and fourth and fifth floor staircases (A5-6,

11).[2] In support, he echoed the allegations in his complaint and provided photographs of some of the areas at issue (A7-22). And while he claimed that "discriminatory treatment continues to occur" and that "more issues will arise" (A24, 32), nowhere did he clearly address what irreparable harm would occur in the absence of a preliminary injunction.

The district court denied the motion before opposition had been filed (A54-57). The court explained that because Demirayak sought to compel affirmative physical changes to the courthouse in the context of a preliminary injunction, he had to make a clear or substantial showing of entitlement to relief (A55-57). Yet Demirayak had "not even attempted" to meet that heightened standard (A57).

3. After noticing an appeal, Demirayak moved for essentially the same relief in the form of a preliminary injunction pending appeal (*see* 2d Cir. Dkts. 1, 23, 23-2 at 21). Following an oral argument on the motion where Demirayak conceded that some of his requests had already been resolved (*see* 12/5/17 Oral Arg. at 40:10 to 40:13, 40:38 to 40:44),

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[2] It is a reflection of the fluidity of these nascent proceedings that Demirayak initially sought other relief that he would later withdraw or concede had been provided and thus was moot (*see* A5-6, 11; 12/5/17 Oral Argument Recording at 40:10 to 40:13, 40:38 to 40:44, *available at* https://bit.ly/2EMOd2k).

a motion panel denied his application (2d Cir. Dkt. 68).

The appeal itself proceeded. At the merits argument, Demirayak tried to present new evidence, absent from his motion papers below, about the feasibility of using temporary ramps or lifts (6/7/18 Oral Argument Recording at 3:20 to 3:30, *available at* https://bit.ly/2SHNBjv). When a member of the panel pointed out the problem, Demirayak effectively conceded that his moving papers were facially insufficient in this regard, suggesting that he had hoped to fill the gaps in his evidentiary showing through a hearing (*id.* at 5:07 to 5:15).

In an unreported, non-precedential decision, the Court of Appeals affirmed the district court's denial of Demirayak's motion. *Demirayak v. City of N.Y.*, 746 F. App'x 49 (2018). The court applied the Second Circuit's well-settled "heightened standard" for a preliminary injunction that would alter the status quo by commanding a positive act, under which a movant must "clearly show that he is entitled to the relief requested, or that extreme or very serious damage will result from denial of preliminary relief." *Id.* at 51 (cleaned up).

Applying that standard, the court found that Demirayak fell short in his allegations of irreparable harm, observing that, with respect to courtroom access, his only "specific allegation" was

that he had been unable to observe a single trial. *Id.* at 51-52.

The Court of Appeals also found that Demirayak had not established a clear likelihood of success on the merits, because the accommodations provided "could" qualify as appropriate under the ADA. *Id.* But the court was clear that its decision was provisional—rooted in the limited record then before it—emphasizing that the decision "d[id] not, of course, reflect a view about what the ultimate merits … will prove to be after a more complete development of the factual record." *Id.* at 52 n.1. And finally, the court held that Demirayak was not entitled to a fact-finding hearing, because the district court had accepted his allegations as true in deciding the motion. *Id.*

Demirayak petitioned for rehearing (2d Cir. Dkt. 156). Separately, he claimed the appellate decision had to be vacated for lack of jurisdiction because he had filed a new complaint while the appeal was pending (2d Cir. Dkt. 167-1 at 8-12). Incredibly, Demirayak admitted that his appeal was premature: "it was indeed too early to come to the Circuit on this case" (*id.* at 11). The court denied his applications (Pet. App. 13-14).

4. The state of play in the district court has continued to develop since Demirayak filed his notice of appeal in late 2017. As noted, Demirayak filed a new amended complaint, and the parties are now deep into building out the factual record

through an active discovery process (*see* E.D.N.Y. No. 17 Civ. 05205, Dkts. 29, 34, 59, 124-25).

REASONS FOR DENYING THE PETITION

Demirayak's petition offers nothing to warrant an interlocutory grant of certiorari. He has essentially conceded that his motion papers were insufficient to warrant any relief on appeal: (a) he admitted to the Court of Appeals that he had appealed "too early"; and (b) his petition to this Court does not even try to address his motion's failure to show irreparable harm—a prerequisite to any form of preliminary injunctive relief.

. The petition also fails to present a certworthy question for additional reasons. The petition's only substantive legal argument, related to likelihood of success on the merits, rests on a clear misreading of the Court of Appeals' decision: he posits that the court overruled its past decisions and ignored the express language of governing ADA regulations, where nothing in the court's decision suggests this. Based on that distortion, Demirayak tries to manufacture a circuit split where none exists. And, in any event, this case presents a poor vehicle for addressing the question conjured by Demirayak, given the case's interlocutory posture and the sparseness of the pertinent factual allegations. Finally, Demirayak's various procedural challenges present no ground for this Court's review because each is fact-bound, case-specific, and meritless.

A. The issues raised in the petition are academic, where Demirayak has conceded that his appeal was premature, and the petition does not address his failure to show irreparable harm.

Two threshold failings of Demirayak's underlying motion and appeal warrant denial of his petition before the Court even reaches the issues he seeks to present for certiorari review: (1) he has admitted that his appeal was premature, and (2) his motion papers failed to show that he would suffer irreparable harm in the absence of a preliminary injunction.

First, Demirayak explicitly admitted to the Court of Appeals that "it was indeed too early to come to the Circuit on this case" (2d Cir. Dkt. 167-1 at 11). This concession came after he acknowledged omitting key information from his district court motion papers due to a mistaken belief that there would be an evidentiary hearing on the motion (6/7/18 Oral Arg. at 5:07 to 5:15). Simply put, Demirayak has admitted that his underlying district court motion papers were insufficient to compel the relief he sought from the Court of Appeals.

Second, the academic nature of the issues raised in the petition is further confirmed by Demirayak's failure to show a likelihood of irreparable harm—a threshold requirement for any preliminary injunction. *Winter v. NRDC, Inc.*, 555 U.S. 7, 22

(2008). While the Court of Appeals affirmed instead based on Demirayak's failure to meet either of the *heightened* requirements for a mandatory preliminary injunction that would compel immediate positive acts—a clear showing of success on the merits, or extreme or very serious in the absence of injunctive relief—the Court could also have affirmed based on Demirayak's failure to show irreparable harm at all.

As the municipal respondents explained in their Court of Appeals brief, Demirayak's motion papers to the district court were essentially silent on the question of irreparable harm (2d Cir. Dkt. 97 at 15). And to the extent Demirayak described past incidents in which barriers to accessibility allegedly caused him frustration or embarrassment, those allegations failed to establish any likelihood of future irreparable harm (*id.* at 15-18).

Fatal to Demirayak's irreparable harm argument was his admission that his matters in inaccessible parts of the courthouse were moved to areas he could access (*e.g.*, A28, 32). His allegation that his cases were sometimes moved to courtrooms that were only "barely accessible"—with non-compliant doors, insufficient space between the benches and the bar, or tables that were too low—was insufficient to compel a different result (A28). Indeed, he did not seek any preliminary injunctive relief to improve the accessibility of those "barely accessible" courtrooms, thereby conceding that, for the purposes of preliminary injunctive relief, they

were adequate. Nor did any of his requested injunctive relief serve to increase access to the four courtrooms in the courthouse's renovated wing that he acknowledges are fully ADA-compliant (*see* 2d Cir. Dkt. 167-1 at 4).

Based on his facially insufficient motion papers, and his failure to show irreparable harm, Demirayak was right to admit that he went to the Court of Appeals prematurely. These failings render academic the issues raised in his petition. This Court's analysis need go no further.

B. The petition's challenge to the Court of Appeals' holding on likelihood of success on the merits raises no certworthy question.

Demirayak's primary argument for certiorari review is that the Court of Appeals' order violated this Court's decision in *Tennessee v. Lane*, 541 U.S. 509 (2004), and in doing so opened a new split among the courts of appeals (Pet. 7-16). But his argument is premised on a misreading of both *Lane* and the Court of Appeals' decision, and there is no split. Nor would this case in its current posture be a good vehicle for resolving any important question about the meaning of the ADA, even if the case presented such a question.

1. The petition's claim of a circuit split on ADA law is manufactured through a clear misreading of the Court of Appeals' decision.

The petition argues that *Lane* holds that alternative accommodations provided in lieu of making structural changes to existing facilities will satisfy the ADA only if they are effective in achieving accessibility, that the Court of Appeals here held otherwise, and that this holding opened a new circuit split. But the petition mischaracterizes the Court of Appeals' decision.

The applicable ADA standard is governed by federal regulations that apply to buildings constructed before the passage of the ADA and related laws. The petition does not dispute the applicability of those regulations here. The relevant text of the regulations is clear: it provides that a public entity "is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with" the regulation's standards for accessibility. 28 C.F.R. § 35.150(b)(1). Unquestionably, an alternative accommodation must be "effective" in achieving accessibility to satisfy the ADA.

The petition's first error on this point is to attribute the regulatory standard to *Lane* as if it were a court-made rule. But the cited portion of *Lane* was merely summarizing what 28 C.F.R. § 35.150(b)(1) plainly requires, complete with

citation to the regulation. 541 U.S. at 532. Indeed, *Lane* did not adjudicate the merits of any ADA claim, but rather addressed whether Title II of the statute, as applied to cases implicating access to courts, reflected a constitutionally permissible exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment. *Id.* at 533-34. The decision's summary of applicable ADA regulations broke no new ground; it simply paraphrased the regulatory text. *Id.* at 532.

Demirayak's second, and more significant, error is to claim that the Court of Appeals here held that an alternate accommodation need not be effective in achieving accessibility to comply with the ADA. The Court of Appeals cited the controlling regulation, 28 C.F.R. § 35.150(b)(1), and there is no basis to conclude that the court disregarded the regulation's plain language. Rather, in holding that Demirayak had failed to show a clear entitlement to relief sufficient to justify a mandatory preliminary injunction, the court merely concluded that he had not clearly shown that alternate accommodations provided by respondents would fall short of being effective in achieving accessibility.

Demirayak's contrary claim does not withstand scrutiny. He appears to read the Court of Appeals' statement that "defendants can avoid liability under the ADA by providing alternate accessible accommodations," 746 F. App'x at 52, as holding that it does not matter whether those alternate

accommodations are effective in achieving accessibility (*see* Pet. 10-11). But the court's use of the modifier "accessible" in the phrase "alternate *accessible* accommodations" points in precisely the opposite direction.[3] If there were any doubt, the crystalline clarity of the regulation's text would dispel it. *See* 28 C.F.R. § 35.150(b)(1).

Demirayak concedes that every court of appeals has consistently recognized that alternate accommodations will satisfy the ADA only if they are effective in achieving accessibility (Pet. 11-13). He further concedes that the Second Circuit itself has appropriately understood 28 C.F.R. § 35.150(b)(1) in all of its reported decisions (Pet. 12, 15). The unreported decision here cannot fairly be read as silently breaking from all of this law. Accordingly, the petition's claim of a circuit split is baseless.

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[3] Tellingly, Demirayak omits the key word "accessible" when he misquotes the Court of Appeals' decision (*compare* Pet. 11 ("'Defendant may avoid liability under the ADA by providing alternate accommodations'") *with Demirayak*, 746 F. App'x at 52 ("defendants can avoid liability under the ADA by providing alternate accessible accommodations"); *see also* Pet. 10 (arguing that the court "improperly held that providing alternate accommodations [sic] is simply enough to avoid liability")).

2. In any event, this case presents a poor vehicle for review of the proposed question.

If the plain text of 28 C.F.R. § 35.150(b)(1) were indeed the subject of some certworthy dispute, this case would be a poor vehicle to resolve it, due to the provisional nature of the decision below, the sparseness of the pertinent factual allegations, and the ongoing development of the factual record in district court.

First, there is no merits decision for the Court's review. Applying the heightened standard governing Demirayak's request for affirmative injunctive relief, the Court of Appeals merely concluded that Demirayak had not established "a clear likelihood" of success on the merits. *Demirayak*, 746 F. App'x at 52. For example, with respect to Demirayak's allegation regarding inadequate bathroom access, the court observed that the availability at least one functioning accessible bathroom "could qualify"—but did not *necessarily* qualify—as adequate under the ADA; and, thus, Demirayak had made no "clear showing" of success on the merits. *Id.* And the court explicitly stated that its decision did not "reflect a view about what the ultimate merits of plaintiff's suit will prove to be after a more complete development of the factual record." *Id.* at 52 n.1.

Second, this Court's analysis on the likelihood of success prong would be based on only the sparse

allegations set forth in Demirayak's motion papers—which, by his own admission, omitted important information regarding the feasibility of the accommodations he sought (*see* 6/7/18 Oral Arg. at 3:20 to 3:30, 5:07 to 5:15).

Third, while Demirayak filed his preliminary injunction motion before discovery had commenced, discovery is now well under way in the district court.

C. The petition's procedural arguments are fact-bound, case-specific, and mistaken.

Demirayak also raises certain procedural challenges to the decisions below: that the district court should have held a fact-finding hearing and articulated findings of fact in its order, and that the Court of Appeals allegedly relied on facts outside the record. These fact-bound and case-specific arguments raise no compelling basis for this Court's review and, in any event, they are meritless.

As to the district court's decision to deny Demirayak's motion without holding a fact-finding hearing or articulating findings of fact, that decision rested on the court's sound assessment that Demirayak's own allegations, taken as true, failed to demonstrate entitlement to affirmative injunctive relief. Whether the district court abused its discretion in making that fact-intensive

assessment implicates no issue of widespread importance.

Further, the courts of appeals all agree that Rule 52(a) of the Federal Rules of Civil Procedure does not require a district court to state its factual findings if it is clear what facts or allegations formed the foundation for the court's decision. Although a district court, in granting or denying an interlocutory injunction, should "state the findings [of fact] … that support its action," Fed. R. Civ. P. 52(a)(2), a failure to make findings under Rule 52(a) is harmless—and provides no ground for remand—if it is evident from the proceedings below what facts or allegations constituted the basis for the district court's decision, or the parties do not dispute what those facts were. *See* 28 U.S.C. § 2111; *In re Rare Coin Galleries, Inc.*, 862 F.2d 896, 900 (1st Cir. 1988); *Leighton v. One William Street Fund, Inc.*, 343 F.2d 565, 567 (2d Cir. 1965); *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1313 (5th Cir. 1985); *Huard-Steinheiser, Inc. v. Henry*, 280 F.2d 79, 84 (6th Cir. 1960); *Associated Elec. Coop. v. Mid-America Transp. Co.*, 931 F.2d 1266, 1272-73 (8th Cir. 1991); *Magna Weld Sales Co. v. Magna Alloys & Research Pty., Ltd.*, 545 F.2d 668, 671 (9th Cir. 1976); *Mesa Petroleum Co. v. Cities Service Co.*, 715 F.2d 1425, 1434 (10th Cir. 1983). Here, because the district court's ruling was based entirely on Demirayak's own motion papers, an articulation of the pertinent facts or allegations was unnecessary.

A fact-finding hearing was similarly unnecessary, as the Court of Appeals correctly held. *Demirayak*, 746 F. App'x at 52. Courts of appeals have correctly held that no hearing is needed if, as here, the papers alone permit the court to decide a motion or other application. *See*, *e.g.*, *United States v. Delhorno*, 915 F.3d 449, 452 (7th Cir. 2019); *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 512 (2d Cir. 2005); *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980). Demirayak cites no precedent requiring a district court to hold a hearing under such circumstances (*see* Pet. 21-22).

Demirayak's final procedural challenge—that the Court of Appeals allegedly relied on information outside the record—is similarly unworthy of certiorari review. Demirayak's contention is premised on passages in the Court of Appeals' decision that refer to his being provided access to ADA-compliant courtrooms (*see* Pet. 6). His claim that these passages improperly went outside the record raises a fact-intensive question with no bearing beyond this particular case.[4]

In any event, the statements cited by Demirayak were simply describing his allegations,

[4] Similarly fact-intensive is whether Demirayak waived his argument about the Court of Appeals looking "outside the record" by affirmatively presenting non-record evidence to the court during briefing and oral argument (*e.g.*, 2d Cir. Dkt. 104 at 17-20; 6/7/18 Oral Arg. at 3:20 to 3:30).

rather than looking outside the record.[5] By Demirayak's own account, the court's statements were based on an argument in the state respondents' brief that Demirayak had been provided "access to ADA compliant courtrooms" (*see* Pet. 5-6, 19).[6] But that argument cited only Demirayak's amended complaint in support of the point (2d Cir. Dkt. 98 at 4 (citing A28, 32 (¶¶ 40, 62))).

Moreover, Demirayak did not dispute the state respondents' characterization of his allegations either in his reply brief or at oral argument (*see* 2d Cir. Dkt. 104; 6/7/18 Oral Arg.). Yet he now tries to present the point as a basis for certiorari. There is no reason for the Court to grant review simply to

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[5] Demirayak seizes on one judge's off-the-cuff quip during oral argument—that the panel was "behaving like district judges"—to suggest that the circuit judges were deciding questions of fact (Pet. 4, 17, 19, 21). But the transcript shows that the judge made this remark while probing the parties about the feasibility of settlement (6/7/18 Oral Arg. at 20:45 to 21:14), not to suggest that the Court of Appeals was assuming a fact-finding role.

[6] Demirayak's claim that respondents ultimately "admitted" these statements were "inaccurate" (Pet. 5 n.1) mischaracterizes the state respondents' cogent defense of the accuracy of their statements (*see* 2d Cir. Dkt. 166-1 at 7-10). And while Demirayak refers to allegedly inaccurate statements of the "respondents" generally, he has alleged no inaccurate statements by the municipal respondents.

examine the accuracy of the Court of Appeals' understanding of Demirayak's particular allegations, especially where it is clear in any event that his motion papers did not suffice to justify the extraordinary preliminary relief he sought.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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