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

REPLY BRIEF FOR PETITIONER

CANER DEMIRAYAK
Petitioner *Pro Se*
P.O. Box 1537
N. Massapequa, NY 11758
516-765-0570
canerdemirayak@outlook.com

Petitioner, an attorney, proceeding pro se

March 26, 2019

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. The Circuits are Split on Courthouse Access 2

A. Respondents Concede that Alternative Accommodations Must be Effective to Satisfy the Americans with Disabilities Act and Fail to Dispute the Clear Circuit Split 3

II. The Second Circuit's Decision is Wrong 6

III. This Case is an Ideal Vehicle to Resolve an Important National Issue that Continues to Perpetuate Barriers for a Small, Discrete and Insular Minority: Wheelchair Bound Court Users 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Am. Council of the Blind v. Paulson, 525 F.3d 1256 (D.C. Cir. 2008) 6, 7

Benisek v. Lamone, 138 S. Ct. 1942 (2018).....11

Berardelli v. Allied Servs. Inst. of Rehab. Med., 2018 U.S. App. Lexis 22489 (3d Cir. 2018).....7, 8

CIGNA Corp. v. Amara, 563 U.S. 421 (2011).....10

F.C.C. v. Fox TV Stations, Inc., 567 U.S. 239 (2012).....10

Jones v. Bayler, 2019 U.S. App. Lexis 7521 (7th Cir. 2019) 9

Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979 (2016).....10

Lacy v. Cook County, 897 F.3d 847 (7th Cir. 2018) ... 8, 12, 13

Layton v. Elder, 143 F.3d 469 (8th Cir. 1998) ... 3, 4, 5, 13

Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018) 11

New York v. County of Delaware, 82 F. Supp. 2d 12 (N.D.N.Y. 2000).....5

New York v. County of Schoharie, 82 F. Supp. 2d 19 (N.D.N.Y. 2000).....5

Robertson v. Las Animas County Sheriff's Dep't, 500 F.3d 1185 (10th Cir. 2007).....6

Shotz v. Cates, 256 F.3d 1077 (11th Cir. 2001) 6, 8, 13

INTRODUCTION

Respondents attempt to minimize the clear circuit split presented here by asserting that same is manufactured, that all circuits agree that an accommodation must be effective to provide meaningful access, and that the decision below was a summary order and narrowly specific to this case.

In doing so, the respondents attempt to read holdings into the Second Circuit's decision that do not appear in the decision, in a desperate attempt to argue that the circuit silently followed its sister circuits. They argue that the circuit must be assumed to have intended to follow the other circuits, even though the wording of the circuit's decision evinces a departure from every other circuit. The Respondents are wrong.

Respondents also argue the decision below is fact bound without acknowledging the district court immediately denied the preliminary injunction motion without considering any facts – much less attempting to find any facts – as it denied the motion within a day of its filing and before any opposition was submitted.

The Municipal Respondents unequivocally state – in congruence with the petition – that an alternative accommodation must be effective to comply with the Americans with Disabilities Act (hereinafter "ADA") while the State Respondents state that neither the district nor circuit court assessed whether the accommodations proposed by respondents were reasonable, i.e., effective. The lower courts' failures to determine the effectiveness of any accommodations proposed by respondents dooms the validity of the decisions

below – as respondents appear to concede. Indeed, the lower courts could not engage in such an analysis as the motion was denied quickly without even a bare fact-finding exercise.

In the face of the erroneous conduct of the district court, the Circuit was constrained to vacate and remand. Instead, the Second Circuit tried to fill in the gaps, "behaved like district judges," enunciated an incorrect holding as to ADA accommodations and, in doing so, brought this case to the Supreme Court steps.

This Court should grant the petition.

ARGUMENT

I. The Circuits are Split on Courthouse Access

The respondents acknowledge that all circuits utilize the meaningful access standard in determining whether accommodations offered to a disabled person are effective. And, although the Second Circuit's decision, by its clear terms, does not rely upon this standard, the respondents argue that such a holding should be silently inferred by the circuit's citing to cases that have relied upon such standard. This tortured analysis of the circuit's decision further highlights the clear split in authority presented here.

A. Respondents Concede that Alternative Accommodations Must be Effective to Satisfy the Americans with Disabilities Act and Fail to Dispute the Clear Circuit Split

Respondents concede in their briefs that it is "unquestionable" that a public entity must demonstrate that accommodations offered to a disabled person are effective in order to serve as a shield to liability. Respondents then attempt to turn the lowers courts' decisions and petitioner's predicament on its head by claiming the petitioner was not entitled to preliminary injunctive relief as petitioner did not establish that the respondents' proposed accommodations are not effective. Here, since the petitioner demonstrated that he was excluded from a court proceeding by virtue of an inaccessible staircase and that he will continue to suffer harm while utilizing the courthouse, the onus rested on the respondents to prove and provide an effective accommodation.

The Second Circuit in this case held that petitioner failed to show irreparable harm as he was denied access to observe one court proceeding that was held in a courtroom only reachable by a staircase. This holding constitutes a direct split from the Eighth Circuit in *Layton v. Elder*, 143 F.3d 469 (8th Cir. 1998), which held that a single denial of access in a courthouse suffices for mandatory injunctive relief.

In *Layton*, a disabled veteran who used a wheelchair, was summoned to appear in court on a hunting

license violation. *Id.* at 470–471. He was able to enter the courthouse but soon discovered his court proceeding was scheduled to be held before a judge located on the second floor of the courthouse. *Id*. The Arkansas courthouse did not provide any wheelchair access to the second floor. *Id*. The assigned judge instead held the proceeding in the hallway on the first floor. *Id*.

Mr. Layton sued and, after a bench trial, was found to have established the Arkansas court system had violated the ADA. *Id*. Although the district court held that mandatory injunctive relief was not warranted based on the single denial of access, the Eighth Circuit reversed and directed that it was an abuse of discretion not to award mandatory injunctive relief and directed Arkansas to make its courthouse accessible. *Id.* at 472–473.

Here, the Second Circuit split from the Eighth Circuit in holding that petitioner failed to show irreparable harm since he was only denied access on one occasion and that on another occasion was provided with an alternative accommodation. But, unlike *Layton*, petitioner here was provided with no accommodations and completely excluded from observing a trial on August 16, 2017.

Evidently *Layton* involved a request for a permanent injunction, but similar principles apply relating to the requisite showings of a likelihood of success and irreparable harm. *Id*. at 471. Indeed, the Second Circuit should have, at the very least, permitted a hearing

below – as the district court in *Layton* held a bench trial – before rendering any decision in the case at bar.

State Respondents in prior litigation in *New York v. County of Schoharie*, 82 F. Supp. 2d 19, 23–24 (N.D.N.Y. 2000) and its companion case of *New York v. County of Delaware*, 82 F. Supp. 2d 12, 16–17 (N.D.N.Y. 2000), took the position that irreparable harm in ADA cases can be presumed and based purely on statistics. In support of its motions for a preliminary injunction, the State of New York admitted it had not received a single complaint regarding the lack of access to polling places by persons in wheelchairs. *Id*. Instead, it based its claim of irreparable harm on the possibility of a wheelchair user facing difficulty in accessing the polling place. *Id*.

Indeed, in those cases the State secured preliminary injunctions – after a one-day hearing – which required its subdivisions to provide and install temporary ramps to ensure accessibility. *Id*. In fact, it appears the State's position in such cases was in line with the Eighth Circuit's decision in *Layton* that irreparable harm and a likelihood of success is established when a wheelchair bound individual cannot access a fundamental public service, whether it be a polling place or a hall of justice. Thus, the Circuit's decision even conflicts with the respondents' own characterization of what constitutes irreparable harm in a case involving a public entity's obligation to provide effective accommodations.

II. The Second Circuit's Decision is Wrong

All parties now agree that a public entity must demonstrate that its accommodations are effective to satisfy the meaningful access standard and to avoid liability under the ADA. But, the Second Circuit's decision erroneously held that a public entity may avoid liability by simply providing an alternate accessible accommodation. In reaching this holding, the circuit cited to the regulations implementing the ADA, without any case law authority. The circuit made no mention as to whether it analyzed if the accommodations proffered by respondents were effective to ensure meaningful access.

The circuit instead held that since the respondents have been willing to provide an alternate accessible accommodation, same is conclusive evidence that a petitioner cannot show a likelihood of success that meaningful access is denied. The circuit essentially adopted the long since rejected position that the ADA is only violated when a person is denied total access to a public service. *See Shotz v. Cates*, 256 F.3d 1077, 1080 (11th Cir. 2001); *Am. Council of the Blind v. Paulson*, 525 F.3d 1256, 1267 (D.C. Cir. 2008). In reaching this holding the circuit failed to accept that meaningful access requires more than physical access. *Robertson v. Las Animas County Sheriff's Dep't*, 500 F.3d 1185, 1195 (10th Cir. 2007).

Discrimination under the ADA also occurs when a person in a wheelchair is made dependent on third persons to access public services since the purposes of the

ADA and Rehabilitation Act (hereinafter "RA") are to promote the independence, inclusion and equality of the disabled into society. *Am. Council of the Blind*, 525 F.3d at 1267. Had the circuit analyzed this case through the lens of determining whether relocating court proceedings several times a week in one of the busiest civil courthouses in the country could be an effective accommodation[1] – it would have reached a different conclusion. Instead, the court opted to read the regulations implementing the ADA in a vacuum, divorced from the reality of litigation in a busy civil courthouse, and ignoring the body of case law on this subject.

The Second Circuit's holding also resulted in the creation of a further split with the Third Circuit. Here, the Second Circuit held that a public entity may avoid liability by providing an alternative accessible accommodation, without demonstrating it ensures meaningful access and, regardless as to a disabled person's requested accommodation, i.e., temporary ramps. However, in *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, the Third Circuit held that: "[I]f another reasonable accommodation was offered . . . such alternative, in order to serve as a defense, also must provide . . .

[1] As an aside, while this appeal has been pending, the district court denied the State Respondents' Rule 12(b)(1) and (6) motion to dismiss after full briefing. *See* E.D.N.Y. ECF No. 72 Order (Jan. 23, 2019). In denying the motion, the district court rejected the State's arguments that it cannot be liable because it provides sufficient reasonable accommodations to petitioner in the form of relocating court proceedings.

meaningful access." 2018 U.S. App. 22489, *2 (3d Cir. 2018).

Contrary to the respondents' argument, the mere fact that petitioner was able to try a case to a verdict in a non-compliant courtroom without an accessible bathroom, does not serve as a bar to liability under the ADA. *See Shotz*, 256 F.3d at 1080 ("If the courthouse . . . 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."). This further demonstrates the irreparable harm faced by petitioner who has no choice but to tolerate discrimination and ineffective accommodations while defending a client and presenting a case before a jury, while in a wheelchair.

Ultimately, "The reasonable [accommodation] requirement at the heart of this case clearly indicates the intent to combat exclusion that is literally built into our physical environment." *Lacy v. Cook County*, 897 F.3d 847, 863 (7th Cir. 2018). Yet, as the respondents have conceded in their briefs, neither the district nor the circuit court made any determinations as to whether the respondents' proposed accommodations were reasonable. Even still, the circuit wrongly held that being denied access to a court proceeding once or not having access to an accessible bathroom is not enough, in stark contrast to the decisions of its sister circuits and as a rejection of the purposes of the ADA and RA.

Respondents do not dispute that the Second Circuit's decision is wrong because it departed from the accepted and usual course of proceedings by failing to vacate and remand the case back to the district court to properly handle the preliminary injunction motion. In fact, nearly all of the cases relied upon by respondents in their briefs on this subject support petitioner's argument that the lower courts' handling of this proceeding was highly unusual and constituted harmful error. *See* State Resp. Br. 11; Municipal Resp. Br. 16. In a case involving a similar procedural posture, the Seventh Circuit recently stated, "We are troubled that the district court denied [plaintiff's] motions without first holding an evidentiary hearing to air the disputed issues of fact on which those [preliminary injunction] motions were based." *Jones v. Bayler*, 2019 U.S. App. Lexis 7521, *8 (7th Cir. 2019).

In *Jones*, a prison inmate filed a motion for a preliminary injunction, which was initially denied before the defendants could submit opposition. After several repeated motions, the trial court finally permitted the defendants to submit opposition, but still denied the motion without a hearing. Although the appeal was dismissed for a lack of appellate jurisdiction, the Seventh Circuit was so "troubled" by the handling of the preliminary injunction motion that it issued a statement regarding same and indicated that it would have vacated and remanded, but for a lack of appellate jurisdiction.

Here, the Second Circuit, with full appellate jurisdiction, should have adhered to the accepted and usual

course of reviewing preliminary injunction motions, and vacated and remanded same without rendering any determination on an insufficient record that lacked any opposition or findings of fact from an evidentiary hearing. However, the circuit decided to "behave like district judges," consider the evidence submitted by respondents in opposition to the motion for an injunction pending appeal and render a merits-based decision as to the underlying appeal. The Respondents' argument that this was a "quip" or "off the cuff remark" by a member of the circuit panel is not supported by the indisputable language of the circuit's decision which relied upon outside-of-the-record material that the district court never had.

III. This Case is an Ideal Vehicle to Resolve an Important National Issue that Continues to Perpetuate Barriers for a Small, Discrete and Insular Minority: Wheelchair Bound Court Users

Respondents attempt to argue that the Second Circuit's issuance of an unreported summary order is some impediment to review. However, this Court frequently reviews cases arising from unreported summary orders. *See, e.g.*, *CIGNA Corp. v. Amara*, 563 U.S. 421, 434–435 (2011) (granting petition for certiorari on non-precedential and unreported summary order and vacating same); *F.C.C. v. Fox TV Stations, Inc.*, 567 U.S. 239, 252 (2012) (granting certiorari petition arising from a summary order); *Kirtsaeng v. John Wiley &*

Sons, Inc., 136 S. Ct. 1979 (2016) (reversing summary order).

The respondents' claim that the interlocutory nature of this case raises vehicle issues is also without merit. This Court is often called upon to review denials of preliminary injunctions. *See, e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (granting review of circuit court's decision to affirm the denial of a preliminary injunction and vacating such decision); *cf. Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (granting review and affirming the denial of a preliminary injunction).

The respondents also try to argue that this case is not a proper vehicle based on speculation that the request for a preliminary injunction could become moot for various unlikely reasons. First, they allege that the district court here could grant a Rule 60(b) motion to renew or reconsider the motion for a preliminary injunction, which is based on at least four (4) new denials of access[2] to courtrooms and was not considered on this

[2] Petitioner never admitted that the appeal of his preliminary injunction motion was premature. The respondents strip a line of commentary petitioner made in a post appeal judgment motion to vacate the decision. The full section provides: "I now agree with Judge Lynch's sentiment expressed at oral argument, 'Why are we here in the Second Circuit?' the answer is: it was indeed too early to come to the Circuit on this case. Plaintiff-appellant and those with mobility disabilities will have to face discrimination and prejudice for a bit longer before change occurs." *See* 2d Cir. ECF No. 167-1 at 12–13. There, petitioner argued that he should have waited until he was denied access to a courtroom up a flight of stairs and forced to hold court in the hallway a few

appeal. It is hardly likely for the district court to grant this motion and it is irrelevant to this petition as those facts are beyond the record.

Next, the respondents posit that petitioner could make another motion for a preliminary injunction, without recognizing that the district court was clear in the denial of the motion that plaintiff would have to wait until prevailing on the merits before requesting any injunctive relief.

As the Seventh Circuit held in *Lacy*, regarding a request for a preliminary injunction involving wheelchair bound detainees attending court proceedings, "the court should have held a hearing on the preliminary injunction, then tried the legal issues to a jury, and then held a hearing on the permanent injunction." *Lacy*, 897 F.3d at 860. Here, should this Court grant certiorari and remand, the case could be simplified if the evidentiary hearing on the preliminary injunction is consolidated with a hearing on the merits for a permanent injunction.

Finally, respondents' own conduct establishes the importance of this case by having the gall to argue that since it may fully renovate the inaccessible courthouse at some unknown time in the future, that temporary access is not required.

This is not a discrete local issue involving the courthouses in New York. As the case law has

---

more times before filing a request for a preliminary injunction motion, as had occurred in the interim.

displayed, courthouse access issues have arisen, at least in appellate decisions, in Arkansas (*Layton*), Florida (*Shotz)*, Illinois (*Lacy*), and Tennessee. Since courthouses are some of the oldest buildings across the country, this issue will continue to arise until this Court makes clear that persons in wheelchairs need not suffer discrimination when attempting to access the halls of justice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CANER DEMIRAYAK
Petitioner *pro se*
P.O. Box 1537
N. Massapequa, NY 11758
516-765-0570
canerdemirayak@outlook.com

Petitioner, an attorney, proceeding pro se