

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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BROOKLYN CENTER FOR INDEPENDENCE :  
OF THE DISABLED, a nonprofit organization, :  
CENTER FOR INDEPENDENCE OF THE :  
DISABLED, NEW YORK, a nonprofit :  
organization, GREGORY BELL, an individual, :  
and TANIA MORALES, an individual, :  
:  
Plaintiffs, : No. 11 Civ. 6690 (JMF)  
:  
- against - :  
:  
MICHAEL R. BLOOMBERG, in his official :  
Capacity as Mayor of the City of New York, and :  
the CITY OF NEW YORK, :  
:  
Defendants. :  
----- X

**STATEMENT OF INTEREST  
OF THE UNITED STATES OF AMERICA**

PREET BHARARA  
United States Attorney for the  
Southern District of New York  
86 Chambers Street, Third Floor  
New York, New York 10007  
Tel.: (212) 637-2774  
Fax: (212) 637-2702  
Email: rebecca.tinio@usdoj.gov

REBECCA S. TINIO  
Assistant United States Attorney  
- Of Counsel -

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The United States, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517,<sup>1</sup> in support of Plaintiffs, regarding the applicability of the Americans with Disabilities Act of 1990, as amended, (“ADA”), 42 U.S.C. § 12101, *et seq.*, and Section 504 of the Rehabilitation Act of 1973 (“Section 504”), 29 U.S.C. § 794, *et seq.*, to Defendants’ municipal emergency management and preparedness plans.<sup>2</sup>

### **PRELIMINARY STATEMENT**

New York City is one of the most densely populated cities in the United States, with more than 8.2 million people occupying just 305 square miles. *See* Trial Ex. 33 at CNY017703.<sup>3</sup> The very characteristics that define the City, however – “its dense population, international stature, and complex infrastructure – also increase the potential significance of hazards, making it more susceptible to their effects than many other cities.” *Id.* Among natural hazards alone, New York City is vulnerable to a variety of notice and no-notice disasters, including coastal erosion, coastal storms, drought, earthquakes, extreme temperatures, flooding, windstorms and tornadoes, and winter storms. *Id.* at CNY017702.

Emergency threats to the City’s resources and infrastructure have a unique impact on individuals with disabilities. As Plaintiffs demonstrated at trial, limited accessible transportation,

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<sup>1</sup> 28 U.S.C. § 517 states that “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”

<sup>2</sup> This Statement of Interest addresses only Defendants’ liability under the ADA and Section 504, and does not comprehensively discuss potential remedies. Should the Court determine that Defendants are liable on all or some of Plaintiffs’ claims, the United States would offer its assistance to the Court and the parties in fashioning and implementing the appropriate remedies. For example, as discussed herein, the Disability Rights Section of the Department of Justice (“DRS”) possesses considerable technical competence in the areas of emergency preparedness and management as they relate to the needs of individuals with disabilities. *See infra* at 10-11.

<sup>3</sup> All “Trial Ex.” citations refer to exhibits admitted during the trial of this matter.

communication, and housing options, as well as reliance on the availability of specialized equipment, disability-related assistance, consumable medical supplies, durable medical equipment, and food, interfere with the ability of individuals with a variety of disabilities to equally respond to and recover from the City's emergencies and disasters. Emergency plans that fail to incorporate the unique requirements of individuals with disabilities exclude those individuals from equal participation in emergency services. Furthermore, New York City contains a sizable community of individuals with disabilities; although precise numbers are difficult to obtain, according to the City, "it is estimated that there are 889,219 individuals with disabilities, making up 11% of the population. . . . 183,651 individuals have a serious hearing difficulty, 210,903 have serious vision difficulties, and 535,840 individuals have difficulty walking or climbing stairs. Within Zone A, which was subject to a mandatory evacuation order during Hurricane Sandy, there are at least 118,000 people with disabilities." Trial Ex. 120 at P003738; *see also, e.g.*, Trial Ex. 7 at CNY000361-CNY000362 (Social Vulnerability Statistics by evacuation zone); Trial Ex. 24 at CNY018522 (NYC Demographic Information); Testimony of Aaron Belisle, March 12, 2013, 286:1-3 (discussing the "rule of thumb" that twenty percent of the City's population has some form of disability).

Unfortunately, despite the obvious importance of accounting for the unique needs of individuals with disabilities in planning for emergencies, New York City's emergency plans, like many state and local emergency plans throughout the nation, fail to do so. The National Council on Disability ("NCD"), an independent federal agency charged with advising the President, Congress, and other agencies regarding policies, practices, and procedures that affect people with disabilities,<sup>4</sup> reported in 2009 that:

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<sup>4</sup> See <http://www.ncd.gov/about>. NCD's functions are authorized by Title IV of the Rehabilitation Act of 1973, 29 U.S.C. § 780, *et seq.*

The challenges faced by persons with disabilities (physical, sensory, cognitive, psychiatric, etc.) . . . in all disaster-threat situations have been made even more clear through events such as September 11, Hurricane Katrina, and the latest wildfires in Southern California. Problems with warning transmission and receipt, transportation, evacuation, shelter, and long-term recovery have been documented through both research studies and government investigations . . . . Lack of planning and lack of inclusion of persons with disabilities . . . remains a problem across the nation.

Trial Ex. 65 (“Effective Emergency Management: Making Improvements for Communities and People with Disabilities”) at CNY020238. NCD stressed that “[p]lanning is possibly the most important, albeit the most difficult, stage in the emergency management process. . . . Emergency planners must plan ahead to effectively provide services and communicate with people with disabilities before, during, and after an emergency.” *Id.* at CNY020273, CNY020277.

Accounting for the needs of individuals with disabilities in emergency planning is also mandated by the ADA. Specifically, the City’s emergency planning is a public service and activity subject to Subtitle A of Title II of the ADA, as well the implementing regulations issued by the United States Department of Justice (the “DOJ Regulations”). *See* 42 U.S.C. §§ 12131-12134; 28 C.F.R. §§ 35.101-35.190. Subtitle A of Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The term “public entity” includes local governments. *See* 42 U.S.C. § 12131(1)(A). Pursuant to Title II and its implementing regulations, “[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150(a). Plaintiffs presented significant evidence at trial in support of their claim that the City’s emergency plans, in many areas, exclude individuals with disabilities from benefitting equally from the City’s services, and fail to comply with the

Title II implementing regulations. The Attorney General has authority to enforce Title II of the ADA, and pursuant to Congressional mandate, the Department of Justice has the authority to issue the DOJ Regulations. 42 U.S.C § 12134. The United States, therefore, has a strong interest in this matter.

Despite the ADA's mandate, the City's emergency plans fail to account for and include the needs of individuals with disabilities relating to, at a minimum, shelters, transportation and evacuation, and emergency-related communications. Defendants offer no argument or evidence that reasonably modifying the City's policies, practices, or procedures in order to avoid discrimination on the basis of disability would fundamentally alter the nature of its emergency planning services. *See* 28 C.F.R. § 35.130(b)(7). Rather, the City insists that *ad hoc* solutions to the gaps in their plans are adequate. However, general assurances to individuals with disabilities of an *ad hoc* response during the exigencies of an emergency are not equal to the access and services afforded to individuals without disabilities, for whom planning and preparations have already occurred. The City must explicitly recognize and address the unique needs of individuals with disabilities in its emergency plans in order to ensure that their safety and well-being are safeguarded to the same extent as the rest of the City's residents.

### **STATUTORY AND REGULATORY BACKGROUND**

Two decades ago, Congress determined that there was a "compelling need" to remedy widespread discrimination against individuals with disabilities through a "clear and comprehensive national mandate." H.R. Rep. No. 101-485 (II), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 332. In 1990, Congress enacted the ADA to implement that broad mandate. *See* 42 U.S.C. § 12101(b). The ADA has a "sweeping purpose," and "forbids discrimination against disabled individuals in major areas of public life." *PGA Tour, Inc. v. Martin*, 532 U.S.

661, 675 (2001). As a remedial statute, moreover, the ADA “should be construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Henrietta D. v. Bloomberg*, 331 F.3d 261, 279 (2d Cir. 2003). Indeed, the ADA’s “comprehensive character” is one of its “most impressive strengths.” *See PGA Tour*, 532 U.S. at 675 (quoting the Hearings on S. 933 before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 101st Cong., 1st Sess., 197 (1989) (statement of the Attorney General)).

#### **A. Title II of the ADA**

Title II of the ADA has been interpreted to reach “all actions by public entities.” *Innovative Health Sys., Inc. v. City of White Plains*, 931 F. Supp. 222, 232 (S.D.N.Y. 1996), *aff’d in part*, 117 F.3d 37 (2d Cir. 1997), *superseded by rule change on other grounds as noted in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). Subtitle A of Title II provides that:

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. The term “public entity” means “any State or local government,” and “any department, agency, special purpose district, or other instrumentality of a State or States or local government.” 42 U.S.C. § 12131.<sup>5</sup> Responsibility for implementing regulations necessary for carrying out Subtitle A is vested in the Department of Justice. 42 U.S.C. § 12134.<sup>6</sup>

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<sup>5</sup> The United States is not aware of any claim in this case that Plaintiffs are not “qualified individuals,” that Defendants are not “public entities,” or that Defendants’ emergency plans are not “services, programs, or activities” within the meaning of Subtitle A of Title II and its implementing regulations.

<sup>6</sup> Title II extended the protections of Section 504, which prohibits discrimination under, exclusion from participation in, and the denial of benefits of “any program or activity receiving Federal financial assistance,” 29 U.S.C. § 794(a), to all state and local government programs, services, and activities. The provisions of Title II can provide no lesser protection than that afforded by Section 504, but the Title II

Courts interpreting the non-discrimination mandate of Title II have explained in more detail what public entities must do to comply with the statute. At a minimum, a public entity must ensure that individuals with disabilities are afforded “meaningful access” to that entity’s publicly offered services, benefits, and activities. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 301 (1985).<sup>7</sup> A public entity will frequently have to make modifications to its policies, practices, and procedures in order to avoid discriminating against individuals with disabilities, and to truly afford them “meaningful access.” *Id.*; *see also Tennessee v. Lane*, 541 U.S. 509, 531 (2004) (“failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion”); 28 C.F.R. § 35.130(b)(7).

In the only Title II case of which the United States is aware that squarely examines a public entity’s emergency management planning, a district court in the Central District of California concluded in February 2011 that the emergency preparedness program of the City of Los Angeles was a governmental program under Title II, the City’s plans failed to comply with Title II and the DOJ Regulations in numerous respects, and “individuals with disabilities lack meaningful access to the City’s emergency preparedness program due to the City’s failure to address or provide for their unique needs.” *Communities Actively Living Independent and Free v. City of Los Angeles*, No. CV 09-0287 CBM (RZx), 2011 WL 4595993, at \*13 (C.D. Cal. Feb.

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implementing regulations do not prevent Title II from providing greater protection to persons with disabilities than Section 504. *See* 28 C.F.R. § 35.103(a). Apart from these distinctions, and in all ways relevant to this discussion, the ADA and Section 504 are generally construed to impose the same or similar requirements. *See, e.g., Henrietta D.*, 331 F.3d at 272; *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 357 (S.D.N.Y. 2005). Therefore, this Statement of Interest will not separately discuss the City’s compliance or lack thereof with Section 504, but will solely address Title II and its implementing regulations.

<sup>7</sup> This “meaningful access” standard was formulated under Section 504 before Title II was enacted, and several years before the promulgation of the DOJ Regulations.

10, 2011) (“*CALIF* Case”).<sup>8</sup> The *CALIF* Court found, among other things, that: (1) the City’s emergency preparedness program did not include provisions to notify, evacuate, transport, or temporarily house individuals with disabilities during or immediately following an emergency (*id.*); (2) no individual City departments had plans to address the needs of individuals with disabilities in emergencies (*id.*); (3) the City had not assessed its capacity to respond to the needs of individuals with disabilities in an emergency (*id.*); (4) the City did not know which of its shelters were accessible to individuals with disabilities, and those individuals had no way to know which shelters were accessible (*id.* at 14, 16); (5) the City’s reliance on *ad hoc* reasonable accommodations was “both legally inadequate and practically unrealistic” (*id.* at 14); (6) the City’s references to the importance of personal planning and preparedness were irrelevant to the question of whether the City afforded meaningful access to individuals with disabilities to its own emergency plans and services (*id.* at 15); (7) the denial of meaningful access to the City’s emergency preparedness program was by reason of Plaintiffs’ disabilities (*id.*); and (8) the City presented no evidence that any reasonable modification would fundamentally alter the nature of its emergency preparedness program or create an undue burden (*id.* at 16). Among the *CALIF* Court’s most important legal insights was its conclusion that “[b]ecause individuals with disabilities require special needs, the City disproportionately burdens them through its facially neutral practice of administering its program in a manner that fails to address such needs.” *Id.* at 14.

## **B. DOJ Regulations**

The DOJ Regulations implementing Title II are codified at 28 C.F.R. Part 35. For the convenience of the Court, all of the DOJ Regulations are attached hereto at Appendix A.

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<sup>8</sup> The Statement of Interest filed by the United States in the *CALIF* case can be accessed at [http://www.ada.gov/briefs/calif\\_interest\\_br.pdf](http://www.ada.gov/briefs/calif_interest_br.pdf).

As interpretations of the meaning and scope of Title II, the DOJ Regulations are entitled to “controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *see also Civic Ass’n of Deaf of New York City, Inc. v. Giuliani*, 915 F. Supp. 622, 635 (S.D.N.Y. 1996) (opining that the regulations implementing Title II “must be given legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute,” and ultimately concluding that a municipal plan to remove alarm boxes from city streets violated the ADA and Section 504) (citation and internal quotation marks omitted). In *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the Supreme Court, in upholding a challenge by individuals with disabilities to their confinement in segregated environments, credited DOJ’s interpretation of Title II as implemented through the Part 35 regulations requiring services to individuals with disabilities to be provided in an integrated setting. *See id.* at 596-98; *see also* 28 C.F.R. § 35.130(d). The Court wrote that because DOJ “is the agency directed by Congress to issue regulations implementing Title II . . . its views warrant respect. . . . [I]t is enough to observe that the well-reasoned views of the agencies implementing a statute constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Id.* at 597-98 (citations and internal quotation marks omitted). Here, the Court should accord the DOJ Regulations “legislative and controlling weight,” and may conclude that a violation of Title II has occurred wherever the City’s emergency plans do not comport with one of those regulations.

The DOJ Regulations are generally divided among several categories, three of which are most relevant here: (1) general prohibitions against discrimination (Subpart B); (2) prohibitions against inaccessible facilities and programs (Subpart D); and (3) prohibitions against inaccessible communications (Subpart E).

With respect to the general prohibitions, the regulations mirror the statutory mandate against discrimination set forth in 42 U.S.C. § 12132. *See* 28 C.F.R. § 35.130(a). Furthermore, a public entity may not provide an individual with a disability an opportunity to participate in or benefit from a service that is not equal to that afforded to others, or provide a service that is not as effective in affording equal opportunity to obtain the same result as that provided to others. 28 C.F.R. § 35.130(b)(1)(i)-(iii). The regulations also require a public entity to make reasonable modifications to policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can prove such modifications would fundamentally alter the nature of the service. 28 C.F.R. § 35.130(b)(7).

Regarding specific facilities and programs operated by public entities, the regulations prohibit excluding individuals with disabilities from the benefits of a public entity's services because facilities are inaccessible. 28 C.F.R. § 35.149. A public entity is required to operate services, when viewed in their entirety, that are readily accessible to and usable by individuals with disabilities. 28 C.F.R. § 35.150(a). Significantly, when choosing the site or location of a facility, a public entity cannot make a selection that would exclude individuals with disabilities from a service, or substantially impair the service with respect to individuals with disabilities, 28 C.F.R. § 35.130(b)(4)(i)-(ii), and each facility or part of a facility constructed for the use of a public entity must be designed and constructed such that the facility or part of the facility is readily accessible to and usable by individuals (or, if altered, the facility must be accessible to the maximum extent feasible). 28 C.F.R. § 35.151 (a)(1), (b)(1).

Finally, the regulations require public entities' communications with individuals with disabilities to be as effective as the entities' communications with others. 28 C.F.R. § 35.160(a)(1)). This requirement includes providing auxiliary aids and services, accessible

emergency telephone services, and appropriate signage, and ensuring that interested persons can obtain information as to the existence and location of accessible services. 28 C.F.R. §§ 35.160-35.163.

**C. Federal Guidance Regarding the Implementation of Title II and the Importance of Advance Planning**

DOJ is also specifically authorized to issue technical assistance and policy guidance under Title II, to ensure consistent interpretation of the statute and to aid public entities in complying with its requirements. *See* 42 U.S.C. § 12206(a)(1), (c)(1), (c)(2)(B)(i), (c)(3) (among other things, directing DOJ to assist entities covered under the ADA in “understanding the responsibility of such entities . . . under this chapter,” and to provide technical assistance manuals to those entities); *see also* 28 C.F.R. § 35.190(a). Pursuant to this directive, DOJ developed an ADA Title II Tool Kit “designed to teach state and local government officials how to identify and fix problems that prevent people with disabilities from gaining equal access to state and local government programs, services, and activities.” *See* “ADA Best Practices Tool Kit for State and Local Governments” (“DOJ Tool Kit”), *available at* <http://www.ada.gov/pccatoolkit/toolkitmain.htm>. Chapter 7 of the DOJ Tool Kit, “Emergency Management Under Title II of the ADA,” is particularly germane to the issues in this case and addresses all of the major components of emergency management. *See* Declaration of Rebecca S. Tinio, dated May 10, 2013 (“Tinio Dec.”), Ex. A. Addendum 1 to Chapter 7 consists of a checklist for use by public entities “as a preliminary assessment of [their] emergency management programs, policies, procedures, and shelter facilities . . . to see if there are any potential ADA problems” (*id.*, Ex. B); Addendum 2 provides detailed information regarding the provision of accessible shelters (*id.*, Ex. C); and Addendum 3 consists of an accessibility

checklist for emergency shelters (*id.*, Ex. D).<sup>9</sup>

In advising emergency managers on how to implement the non-discrimination mandate of the ADA, the DOJ Tool Kit emphasizes the importance of advance planning to account for the rights and needs of individuals with disabilities across the spectrum of emergency management areas, including preparation, testing, notification, community evacuation and transportation, emergency sheltering, temporary lodging and housing, social services, emergency medical care and services, relocation and transition, and remediation of damages. *Id.*, Ex. A at 3, 8; *id.*, Ex. B at 2-4; *id.*, Ex. C at 1-2. As the Tool Kit advises, “[e]qual access requires advance planning. During emergencies and disasters, people with disabilities sometimes have different, disability-related needs than other individuals. Many of these needs cannot be met during emergencies and disasters without advance planning.” *Id.*, Ex. C at 1.

Indeed, the importance of advance planning in order to provide equal, effective access to individuals with disabilities to public entities’ emergency services is stressed in numerous federal publications relating to emergency management. For example, as already discussed, the 2009 NCD report titled “Effective Emergency Management: Making Improvements for Communities and People with Disabilities” devotes its first substantive section to preparedness and planning. *See* Trial Ex. 65 at CNY020268-CNY020301; *see supra* at 2-3. The Federal Emergency Management Agency (“FEMA”), in its November 2010 “Guidance on Planning for Integration

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<sup>9</sup> Chapter 7 has proved to be of significant practical use to emergency managers; for example, local governments routinely enter into settlement agreements with the United States to resolve ADA compliance reviews that commit the public entity to compliance with the principles and guidelines set forth in Chapter 7. *See* <http://www.ada.gov/civicac.htm> (discussing Project Civic Access, a nationwide effort to enforce Title II in municipalities, and providing links to settlement agreements); *see also* Tinio Dec., Ex. E (ADA settlement agreement entered into on April 19, 2013 between the United States and the City of Jacksonville, Florida, providing in paragraphs 29 and 30 that Chapter 7 of the DOJ Tool Kit is “[t]he touchstone for compliance with ADA requirements relating to emergency management,” the City of Jacksonville is “committed to compliance with the ADA requirements as outlined in Chapter 7,” and the City will revise its emergency plan to be consistent with Title II “as outlined in Chapter 7”).

of Functional Needs Support Services in General Population Shelters” (“2010 FEMA Guidance”), notes that “[c]hildren and adults with disabilities have the same right to services in general population shelters as other residents. Emergency managers and shelter planners have the responsibility of planning to ensure that sheltering services and facilities are accessible. . . . The importance of advanced planning in developing and implementing [functional needs support services] in general population shelters cannot be overstated.” Trial Ex. 153 at P001967, P001974. *See also* Tinio Dec., Ex. F (April 15, 2005 NCD report titled “Saving Lives: Including People with Disabilities in Emergency Planning”), at 21-22 (“People with disabilities are often left out of planning activities . . . People with disabilities should be able to use the same systems as other residents of the community in which they live. Although they may need additional services, the emergency management system must work to build provisions for these services into its plans so that people with disabilities are not excluded from services available to the rest of the community.”).

Similarly, the National Preparedness Goal published by the Department of Homeland Security, pursuant to a Presidential Policy Directive, defines the national policy of the United States relating to emergency management: “[W]e seek to enable the whole community to contribute to and benefit from national preparedness. This includes . . . individuals with disabilities . . . Their needs and contributions must be integrated into our efforts.” *See* “National Preparedness Goal,” *available at* <http://www.fema.gov/library/viewRecord.do?fromSearch=fromsearch&id=5689>, at 1. To effectuate this National Preparedness Goal, FEMA recently issued an updated National Response Framework, which provides substantial guidance regarding the inclusion of individuals with disabilities and their unique needs throughout emergency planning and preparedness processes.

See “National Response Framework,” *available at* <http://www.fema.gov/library/viewRecord.do?id=7371>, at 4-6, 8, 9, 12, 13, 19-22, 24, 27, 46 (“Emergency management staff in all jurisdictions have a fundamental responsibility to consider the needs of all members of the whole community, including . . . individuals with disabilities . . . [t]he local emergency manager’s duties often include . . . [c]oordinating integration of the rights of individuals with disabilities . . . into emergency planning and response.”).

In short, the federal agencies involved in enforcing Title II, implementing its directives through regulations, helping emergency managers comply with its requirements, and framing national emergency management policies uniformly recognize the critical importance of advance planning for the unique needs of individuals with disabilities in emergencies, to make sure that those individuals can participate in and benefit equally from a public entity’s emergency services.

## **ARGUMENT**

### **NEW YORK CITY’S EMERGENCY MANAGEMENT PLANS DO NOT ADEQUATELY PROTECT THE RIGHTS OF INDIVIDUALS WITH DISABILITIES UNDER TITLE II AND ITS IMPLEMENTING REGULATIONS**

Plaintiffs have shown by a preponderance of the evidence that the City’s current emergency preparedness plans do not comply with Title II of the ADA and its implementing regulations at least with regard to: (1) the provision of accessible evacuation centers and general population shelters; (2) the transportation and evacuation of individuals with disabilities before and during an emergency; and (3) communications with individuals with disabilities before, during, and after an emergency. The Court should therefore find that Defendants have violated Title II of the ADA and its implementing regulations as to at least those aspects of its emergency

preparedness plans.<sup>10</sup>

**A. Accessibility of Evacuation Centers and General Population Shelters**

The evidence at trial revealed that the City has failed to afford an equal opportunity to individuals with disabilities to benefit from the City’s sheltering plans and systems, as required by the ADA and its implementing regulations. Indeed, a post-Hurricane Sandy briefing paper of the City’s Human Services & Governmental Affairs Divisions to the New York City Council, dated February 5, 2013, and addressing shelter management, reported that “[d]espite the large number of people with disabilities living in Zone A, many of the City’s evacuation shelters were not accessible. Advocates reported inaccessible entrances at shelters . . . a lack of accessible bathrooms and cots . . . [and] a lack of accessible communication within the shelters due to a failure to provide ASL interpreters or large-print or Braille written materials.” Trial Ex. 120 at P003738-P003739.

The City’s sheltering plans and systems are deficient because they do not commit the City to (or safeguard) a level of accessibility that satisfies the ADA and the DOJ Regulations, the latter of which detail the requirements under Title II for program accessibility. As noted above, public entities cannot, among other things, defeat or impair a public service with respect to individuals with disabilities by selecting inaccessible sites or locations. 28 C.F.R. §§ 35.130(b)(4)(i)-(ii). Two different regulations address the specific accessibility requirements for existing facilities, on the one hand, and new construction and alterations, on the other; both regulations incorporate the “readily accessible to and usable by individuals with disabilities” standard. 28 C.F.R. §§ 35.150, 35.151. The regulation regarding existing facilities also

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<sup>10</sup> This Statement of Interest does not discuss other areas of emergency preparedness addressed during trial of this matter and in the parties’ pre-trial memoranda, including, for example, high-rise evacuations and post-emergency temporary housing. The United States does not intend to suggest, by its silence, agreement or disagreement with any party on these issues.

mandates that a public facility has the burden to prove that complying with the requirements for program accessibility would result in a fundamental alteration in the nature of a service or undue financial and administrative burdens. 28 C.F.R. § 35.150(a)(3).

Contrary to the requirements of the DOJ Regulations, the City's main sheltering plan (Trial Ex. 7, Coastal Storm: Sheltering Plan), which describes the "solar system" shelter structure that the City uses (*id.* at CNY000357), nowhere sets forth rules or guidelines to ensure that accessible shelter sites are selected, or that shelter sites are modified so as to be accessible to individuals with disabilities. Other sheltering plans, such as the Coastal Storm Plan Evacuation Center Field Guide (Trial Ex. 15) and the Coastal Storm Plan Hurricane Shelter Field Guide (Trial Ex. 16), also do not confirm that ADA accessibility rules will be satisfied in shelters.

The testimony of Aaron Belisle, Office of Emergency Management ("OEM") Special Needs Outreach Coordinator, provides evidence that the City has not, in fact, been committed to providing an ADA-compliant accessible shelter system. Rather, the City refers to its own undefined concept of "usability." *See, e.g.*, Belisle Testimony at 363:8-11 (stating that the City trains staffers to check that shelters have a "usable" entrance for people with disabilities); 330:6-11 (testifying that the City confirmed before Hurricane Sandy that all shelters had a "wheelchair usable entrance" and accessible bathrooms); 333:18-22 (admitting that the City does not actually know what percentage of shelters have accessible bathrooms). The City's witnesses admitted, however, that "usable" does not mean "accessible" and is not a substitute for compliance with ADA standards; indeed, the City's expert agrees that full accessibility is the ADA standard. *See* Testimony of Victor Calise, March 13, 2013, 439:3-15; Testimony of Elizabeth Davis, March 19, 2013, 912:25-913:14 (the concept of "usability" indicates non-compliance with the ADA Standards for Accessible Design); *id.* at 915:22-916:5 (the ADA Standards for Accessible

Design represent the goal, in the field or in other jurisdictions, that should be met); *id.* at 930:5-8 (“It’s my opinion that the goal in identifying shelters should be that they are accessible.”).<sup>11</sup>

Because the City has not committed or planned to provide accessible shelters, there was ample evidence introduced at trial that: (1) many of the City’s evacuation centers and shelters are not accessible, and (2) the City cannot even identify *how many* of these centers and shelters are accessible, and therefore cannot accurately analyze the accessibility of its shelter system as a whole. *See, e.g.*, Belisle Testimony at 359:21-22 (“Not all of our shelters are accessible.”); *id.* at 359:23-360:9 (inability to identify how many evacuation centers are accessible); Davis Testimony at 916:6-10 (not all evacuation centers appear to be accessible); Trial Ex. 146 (showing that dozens of the public schools used as Hurricane Irene shelters were inaccessible); Trial Ex. 534 (Declaration of Margi Trapani), ¶¶ 40-41, 52-54, 58, 61-62; Trial Ex. 540 (Declaration of Susan Dooha), ¶¶ 57-58, 81-85. Because the City cannot assess the level of accessibility across its shelter system (or, in many cases, even the level of accessibility within a single shelter), it cannot comply and has not complied with its obligation under the ADA to “operate each service . . . so that the service . . . when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” 28 C.F.R. § 35.150(a).

During his testimony, Mr. Belisle referred to a one-page Facility Accessibility Checklist (Trial Ex. 472) that he stated was used in training and provided to shelter staff, outlining minimal steps to improve accessibility in shelters. *See* Belisle Testimony, 391:8-392:6. Mr. Belisle’s testimony made clear, however, that the Facility Accessibility Checklist is insufficient to assure that a shelter will be accessible. *Id.* For example, the Checklist does not define accessible entrances or bathrooms. *Id.* Appropriate accessibility guidelines and checklists are set forth in

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<sup>11</sup> The ADA Standards for Accessible Design are issued by DOJ and codified at Appendix A to 28 C.F.R. Part 36. *See* <http://www.ada.gov/adastd94.pdf>.

Chapter 7 of the DOJ Tool Kit and the addenda thereto, and in the 2010 FEMA Guidance. *See* Tinio Dec., Exs. A-D; Trial Ex. 153. In order to comply with the ADA and the DOJ Regulations, the City's plans should incorporate the guidelines contained in these sources.

Finally, Mr. Belisle testified about a City initiative to survey its shelters to assess their accessibility. While this survey is undoubtedly a positive step, it does not erase the City's liability under the ADA and DOJ Regulations for failing to plan for and provide an accessible shelter system.<sup>12</sup> The City's failures in this regard implicate not only 28 C.F.R. § 35.150(a), cited above, but also, at a minimum, 28 C.F.R. § 35.149, 28 C.F.R. § 35.130(b)(4)(i)-(ii), and 28 C.F.R. § 35.151(a)(1), (b)(1).

#### **B. Transportation and Evacuation**

The City's emergency plans also fail to make sure that individuals with disabilities have equally effective access to emergency services, because the plans do not adequately account for the specialized transportation and evacuation needs of the disabled. When the City issues a mandatory evacuation order, individuals with disabilities are disproportionately burdened if they are not afforded transportation and evacuation services and options that are equally effective as those provided to the general public. *See* 28 C.F.R. § 35.130(b)(1)(i)-(iv). Plaintiffs elicited significant evidence at trial that, in fact, individuals with disabilities were not provided with equally effective transportation and evacuation options after the mandatory Hurricane Sandy evacuation order, and that the City's plans do not provide any assurance that the same problems will not reoccur in future crises.

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<sup>12</sup> In addition, the United States does not concede that the survey itself, or the methods used to administer it, are adequate under the ADA and the DOJ Regulations. *See* Trial Ex. 483. For example, Mr. Belisle acknowledged problems with the methodology used to assess bathroom accessibility. Belisle Testimony at 390:19-391:5. In the United States' view, the materials included in Chapter 7 of the DOJ Tool Kit comprise the most reliable methods of assessing shelter accessibility and compliance with Title II and the DOJ Regulations. *See* Tinio Dec., Exs. A-D.

The City's plans reflect its heavy reliance on public transportation systems – much of which are inaccessible to individuals with disabilities – to evacuate the majority of residents. *See, e.g.*, Trial Ex. 6 (Coastal Storm - Evacuation Plan) at CNY000107 (“The City will encourage evacuees to use public transportation to travel to Evacuation Centers.”); *id.* at CNY000130 (“[A] successful evacuation will depend on the efficient use of mass transportation assets . . . [under a worst case scenario evacuation order,] about 1.83 million are expected to use public transportation.”); Trial Ex. 245A (Area Evacuation Plan) at 25 (“The New York metropolitan area’s public transportation network . . . will be a key component of many evacuation operations.”); Trial Ex. 4A (“Ready New York: Hurricanes and New York City”) (“If asked to evacuate, do so as directed. Use public transportation if possible.”). The City does not dispute that only a very small portion of the New York City subway system is accessible. *See* Trial Ex. 157 (MTA Subway Accessibility Information). In addition, only two seats on each City bus – assuming that a disabled individual is able to ambulate to a bus stop and receive assistance boarding the bus – are wheelchair accessible. *See* Testimony of June Kailes, March 11, 2013, at 187:8-11; *see also* Trial Ex. 547 (Declaration of Kenneth Martinez), ¶¶ 34-35 (before Hurricane Sandy, evacuation buses were too full to accommodate him and his wheelchair). Moreover, only a tiny fraction of taxicabs in New York are accessible; those taxis pick up passengers only in Manhattan; and individuals with disabilities may not uniformly be able to afford the cost of taxis. *See, e.g.*, Belisle Testimony at 315:16-18; Calise Testimony at 455:20-456:19; Trial Ex. 538 (Declaration of Mary Conner), ¶ 17.

To fill these gaps, the Metropolitan Transit Authority (“MTA”) provides paratransit, also known as Access-A-Ride, services, via which an individual calls the service in advance to arrange a pick-up and drop-off. Unlike other forms of public transportation available to

individuals without disabilities, Access-A-Ride typically requires a reservation at least 24 hours ahead of time. *See, e.g.*, Testimony of Mary Conner, March 13, 2013, at 425:3-23; Trial Ex. 397 (October 26, 2012 Situation Report) at CNY00022779 (as Hurricane Sandy approached, reporting that MTA paratransit was “[s]etting up schedules from two-day to one-day booking for clients”).

The deficiencies of Access-A-Ride as a means of evacuating individuals with disabilities became apparent during Hurricane Sandy. Before Hurricane Sandy made landfall in New York City, Mayor Bloomberg issued a mandatory Zone A evacuation order effective as of 11:30 a.m. on Sunday, October 28. *See, e.g.*, Trial Ex. 68; Trial Ex. 76 at CNY00023346. The MTA began to shut down subway service at 7 p.m. on October 28, and bus service as of 9 p.m. *See* Trial Ex. 76 at CNY00023346; Trial Ex. 354 at CNY00021257. However, Access-A-Ride service began to be curtailed almost immediately after the evacuation order. *See* Trial Ex. 354 at CNY00021257 (indicating that “[o]utbound Access-A-Ride trips are being scheduled only until 12 p.m. today, and return trips will continue until 5 p.m. Any previously scheduled trips after that time, including subscription trips, are canceled.”); *see also* Trial Ex. 160 at P003382. By this shutdown of Access-A-Ride services, even individuals with disabilities who had planned ahead to be evacuated on October 28, well in advance of the landfall of Hurricane Sandy, could have been left effectively stranded. It is clear from the record, therefore, that in the crucial hours between the evacuation order and the shutdown of all public transit, individuals with disabilities were provided less effective transportation and evacuation options and were therefore disproportionately and unfairly burdened.<sup>13</sup>

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<sup>13</sup> The City’s Governmental Affairs & Human Services Divisions identified this very problem in their post-Sandy Briefing Paper to the City Council on Disaster Management, noting that “[t]he timing [of the] evacuation order made evacuation difficult for all New Yorkers, especially those with special needs.” *See* Trial Ex. 115 at P003667.

Furthermore, nothing in the City’s plans prevented this unequal treatment from occurring, or would prevent it from occurring in the future. There appear to be no provisions in the City’s evacuation plans mandating a minimum amount of time between the issuance of an evacuation order and the shutdown of transportation services (and thereby reasonably accounting for the advance planning needs of individuals with disabilities), or requiring that paratransit services be provided to the same extent and during the same hours as transit options for the general population. The Coastal Storm Evacuation Plan does not address paratransit or the needs of individuals with disabilities whatsoever, except to refer to the limited Homebound Evacuation Operation (“HEO,” *see infra* n. 14). *See* Trial Ex. 6 at CNY000130-CNY000138. The Area Evacuation Plan makes only vague references to possible means of addressing the evacuation needs of individuals with disabilities, and also leans heavily on the HEO, which it outlines only in the barest detail. *See* Trial Ex. 245A at 28 (*e.g.*, “MTA may reroute paratransit vehicles to support special needs evacuations”), 36 (discussing the HEO). The evidence at trial showed plainly that the City’s emergency plans do not ensure that individuals with disabilities are afforded transportation and evacuation services that are equal to those available to individuals without disabilities.<sup>14</sup>

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<sup>14</sup> To the extent the City relies on the HEO to argue that its emergency evacuation plans comply with the ADA, that argument fails. For a number of reasons, the HEO does not remedy the City’s deficiencies in providing equally effective access to individuals with disabilities to municipal transportation and evacuation services. As an initial matter, the City does not inform the public about the HEO. *See* Belisle Testimony at 293:13-18. Rather, the City relies on individuals to call 311 on their own initiative to request assistance, and the City instructs its residents that they should do so only if absolutely necessary in an emergency. *See, e.g.*, Trial Ex. 3 at CNY001091 (“Call 911 if you are stranded and need emergency assistance to evacuate your home.”) (emphasis added). The City does not publicize that, in fact, the HEO should be available before danger arises. *See* Trial Ex. 8 at CNY018285 (indicating that the HEO should commence at the same time evacuation centers open and an evacuation order is issued); Trial Ex. 76 at CNY00023346 (internal Situation Report indicating that during the build-up to Hurricane Sandy, the HEO was activated at 9 a.m. on October 28, at the same time that shelters opened). The City’s failure to educate the public about the availability and features of the HEO creates a risk that individuals with disabilities will wait until they are seriously endangered before calling for evacuation.

### **C. Communications**

Finally, the City does not comply fully with Title II and the DOJ Regulations in that its emergency plans do not provide for effective communications with individuals with disabilities. *See* 28 C.F.R. § 35.160(a)(1).

#### **1. Failure to comply with DOJ Regulations regarding accessible communications in and relating to shelters**

Evidence in the record indicates serious deficiencies in the City’s provision of accessible communications and appropriate auxiliary aids and services at shelters. *See* 28 C.F.R. § 35.160(a)(1); 28 C.F.R. § 35.160(b)(1)-(2). Mr. Belisle admitted that the City’s emergency plans do not provide for any sign language interpreters at shelters, for example. Belisle Testimony, 338:17-21. Indeed, the City seems to expressly disclaim any responsibility for providing auxiliary aids and services at shelters, instead instructing, for example, deaf or hard of hearing individuals to “practice communicating your needs through gestures, flashcards, or other means.” Trial Ex. 1 at CNY000039; *see also* Trial Ex. 3 at CNY001089-90.

The City is also obligated to “ensure that interested persons . . . can obtain information as to the existence and location of accessible services, activities, and facilities.” 28 C.F.R. § 35.163(a). The evidence at trial showed that because the City’s plans and public informational materials do not confirm that interested persons can obtain clear, complete information about

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Furthermore, the HEO’s reliance on calls to 311 – the City’s general informational line – during an emergency, when incredibly high call volumes must be expected, also undermines the proposition that the HEO is an equally effective evacuation option for individuals with disabilities. *See, e.g.*, Trial Ex. 115 at P003666 (reporting that during Hurricane Sandy, “the 3-1-1 system experienced a very high volume of calls before, during and after the hurricane that resulted in call takers being overwhelmed and unable to respond to the calls”); *id.* at P003669 (“many people reportedly received busy signals, recordings, or very long wait times.”). Thus, as it currently exists, the HEO does not remedy the City’s deficiencies in providing equally effective access to individuals with disabilities to emergency transportation and evacuation services. Indeed, the City’s expert testified that the HEO “has gotten good bones, but the City should probably figure out how to beef it up.” Davis Testimony at 897:1-19.

accessible evacuation centers and shelters, the City has failed to comply with this regulation. Indeed, Mr. Belisle confirmed in his testimony that the City only informs the public about the locations of evacuation centers, not shelters. *See, e.g.*, Belisle Testimony at 322:17-20; *see also* Trial Ex. 4(A) (Ready New York: Hurricanes and New York City, with map of evacuation center locations). The City’s rationale is that while all of the City’s evacuation centers will be open in, for example, a coastal storm emergency, the other shelters will open only as needed, and a disabled individual with accessibility needs could be directed to an appropriate shelter. *See, e.g.*, Belisle Testimony at 373:8-23. There are flaws in the City’s informational plan, however, that create serious concerns under 28 C.F.R. § 35.163(a).

First, as discussed above, the City admits that not all of its evacuation centers are accessible, and it cannot reliably identify all of the centers that are accessible. *See supra* at 16. Therefore, simply informing the public about evacuation center locations does not satisfy the City’s obligation to inform interested persons as to the existence and location of accessible services and facilities. Compounding the problem, the City’s witnesses admitted that during Hurricane Sandy, the public was incorrectly told that all evacuation centers were accessible. *See, e.g.*, Belisle Testimony at 360:10-15.

Second, much of the City’s public messaging does not, in fact, clearly direct individuals to seek out evacuation centers (which, in theory, would all be accessible). For example, Trial Exhibit 1 (Ready New York: For Seniors and People with Disabilities) advises readers to, in case of an evacuation, “[g]et to the nearest safe place as soon as instructed.” Trial Ex. 1 at CNY000040. It continues, “[f]or evacuees who have no alternative shelter, disaster shelters may be set up . . . Shelters are subject to change depending on the emergency. To find an accessible shelter near you during an emergency, call 311.” *Id.* at CNY000041. Trial Exhibit 2, Ready

New York: Preparing for Emergencies in New York City, gives similar advice (Trial Ex. 2 at CNY000008), as does Trial Exhibit 3, Ready New York: My Emergency Plan (Trial Ex. 3 at CNY001092). *See also* Trial Ex. 2 at CNY000007 (“Go to the nearest safe place or shelter.”); Trial Ex. 4A (“For those who have no other shelter, the City will open hurricane shelters throughout the five boroughs. City shelters include accessible facilities and accommodations for people with special needs.”). Thus, the City’s instructions to the public simultaneously advise individuals to seek out the nearest shelter in an emergency but fail to identify where individuals with disabilities will be able to receive accessible services. (And in the case of Trial Ex. 4A, the City incorrectly implies that all City shelters are accessible.) The direction to call 311 “during an emergency” to find the nearest accessible shelter does not satisfy 28 C.F.R. § 35.163(a), given the heightened importance to individuals with disabilities of advance planning, and the reality that during an emergency, communication and transportation options for these individuals in particular may be severely curtailed. *See, e.g.,* Calise Testimony at 451:25-452:3 (acknowledging that individuals who use wheelchairs or have other disabilities need to plan and learn in advance where accessible shelters are located). Plaintiffs introduced significant evidence at trial that during Hurricanes Irene and Sandy, individuals with disabilities were not able to obtain reliable information about accessible shelters. *See, e.g.,* Trial Ex. 533 (Declaration of Joyce Delarosa), ¶¶ 3, 31, 33, 35, 36; Trial Ex. 534 (Trapani Dec.), ¶ 37; Trial Ex. 545 (Declaration of Tania Morales), ¶¶ 14-22.

The City’s reluctance to inform the public about shelters that may not be open in a particular emergency does not relieve the City of its obligation to ensure, or prevent it as a factual matter from ensuring, that interested persons can learn where accessible shelters will be

located.<sup>15</sup> For example, Robert Van Pelt testified that generally, the City’s evacuation center sites do not change. *See* Testimony of Robert Van Pelt, March 18, 2013, at 836:14-837:9. If the City achieves its stated goal of making all evacuation centers accessible, it should, in its written guidances, explicitly state that they are accessible and direct individuals to those centers. Until the City reaches that goal, it should inform the public of which centers are accessible. In addition, the City could confirm that “first-choice” shelters (in the “solar system” structure) – in other words, any shelters that the City can reasonably anticipate will be open in most emergencies – are accessible and advertised to the public as such. By not providing consistent and clear information to interested persons about accessible shelters, the City runs afoul of Title II and the DOJ Regulations.<sup>16</sup>

## **2. Additional violations of DOJ Regulations regarding communications**

Additional trial evidence further indicates that there are no provisions in the City’s emergency plans requiring that, for example, televised warnings and alerts issued by the City contain audio and captioning components. *See, e.g.*, Belisle Testimony at 295:18-22. The City’s emergency plans also do not expressly require that sign language interpreters or closed captioning will be provided at Mayor Bloomberg’s press conferences. Indeed, Mayor Bloomberg’s press conferences during Hurricane Irene were not translated into American Sign Language, *see id.* at 296:9-11, and his press conferences during Hurricane Sandy were not captioned. *See* Trial Ex. 548 (Declaration of Christina Curry), ¶ 22. Moreover, Plaintiffs elicited

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<sup>15</sup> The City did not argue or present evidence that informing the public about the locations of accessible shelters would fundamentally alter the nature of any service or create any undue burden. *See* 28 C.F.R. § 35.164.

<sup>16</sup> Aside from 28 C.F.R. § 35.163(a), it also seems clear from the trial record that the City does not comply with 28 C.F.R. § 35.163(b), which requires the City to “provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities.”

evidence that surveys distributed by City workers during post-Sandy canvassing efforts, designed to assess the status and needs of City residents, were not provided in accessible formats. *See* Trial Ex. 477; Testimony of Ryan Murray, March 18, 2013, 693:12 to 695:12. Based on this evidence, the Court should conclude that the City has violated Title II and the DOJ Regulations that require effective communication with individuals with disabilities.

### **CONCLUSION**

It is notable that at no point during the trial of this matter did the City produce any evidence that reasonable modifications to its emergency management policies, practices, or procedures, to avoid discriminating against individuals with disabilities, would fundamentally alter its emergency services. *See* 28 C.F.R. § 35.130(b)(7). Nor did the City produce evidence that complying with the regulations regarding program accessibility or accessible communications would result in a fundamental alteration, or cause an undue burden. *See* 28 C.F.R. § 35.150(a)(3); 28 C.F.R. § 35.164. In the absence of any such defenses from the City, the sole question for the Court is whether the City's emergency plans fail to provide a level of access to its emergency services to individuals with disabilities that is equal to the access provided to others. For the reasons discussed herein, the City has failed to comply with the mandates of Title II and the DOJ Regulations by not providing, in its emergency plans, equal access to its emergency facilities and services to individuals with disabilities.

Accordingly, the Court should conclude that Defendants have violated Title II of the ADA and its implementing regulations, as well as Section 504.

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PREET BHARARA  
United States Attorney for the  
Southern District of New York  
Attorney for the United States

By: /s/ Rebecca S. Tinio  
REBECCA S. TINIO  
Assistant United States Attorney  
86 Chambers Street  
New York, New York 10007  
Tel.: (212) 637-2774  
Fax: (212) 637-2702