

The Right To Be Rescued: Disability Justice in an Age of Disaster

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abstract. This Note explores the legal responsibilities that local governments have toward marginalized communities in a time of crisis and argues that people with disabilities (PWDs) have a “right to be rescued”: a legal right to have their unique needs accounted for and addressed in emergency planning. Exploring a series of cases that have established this right, the Note focuses on an innovative class action lawsuit in which the court held that the City of New York failed to ensure that PWDs have meaningful access to the City’s emergency services. As the nation continues to rebuild after Sandy and faces a future in which disasters will become the norm, this Note argues that the story of this case and the man-made disaster that surrounded it should serve as a call to action for other urban areas that have yet to adequately plan for the needs of PWDs in emergencies. Such planning is not merely morally correct; it is legally required, and it is critical that local governments get their plans in order before the next storms, and lawsuits, come.

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Introduction

We are living in an age of disaster. Since 1980, the United States has sustained 178 weather and climate disasters in which overall damages reached or exceeded one billion dollars.¹ The United States experienced eight such disasters in 2014 alone, including tornados, hurricanes, post-tropical cyclones, droughts, wildfires, and other severe weather events.² As startling as these figures are, they are likely to get worse in the years ahead; the risk of disasters is on the rise. From 2000 through 2009, there were three times as many natural disasters as there were from 1980 through 1989; climate-related disasters accounted for about eighty percent of this increase.³ The impact of these disasters will continue to increase as population and economic resources become increasingly concentrated, and increasingly concentrated within areas that are disproportionately vulnerable to disasters,⁴ including coastal cities.

As communities face more and more climate-related challenges, they will face more moral ones as well. Although it is tempting to think of weather and climate incidents as “natural” disasters, that is a misnomer; nearly all “natural” disasters arise in part from human error or oversight.⁵ More fundamentally, the choices we make about where to live, how to live, and how to build put us at risk for disasters. In this way, disasters are socially constructed. How we choose to respond to the urgent human needs that arise from large-scale weather events determines the degree to which these

events become “disasters.” As disasters become more frequent, social inequalities will be thrown into sharper relief, and the consequences of such inequalities will become increasingly dire. Communities will be forced to grapple with two essential questions: in preparing for disasters, how “ready” is ready enough, and to what degree should identity and social status determine who is put in danger, left in misery, and left to die?

This Note explores the legal responsibilities of local governments toward marginalized communities in a time of crisis and argues that people with disabilities (PWDs) have a “right to be rescued”: a legal right to have their unique needs accounted for and addressed in emergency planning. Exploring a series of cases that established this right, I focus on an innovative class action lawsuit in which the court found that the City of New York failed to ensure that PWDs have meaningful access to the City’s emergency services. In Part I, I examine the moral challenges inherent in disaster planning for PWDs, arguing that the tendency to under-plan for the needs of PWDs during periods of disaster stems both from a general misunderstanding of their unique needs and from a tacit acceptance of the notion that emergency planning requires prioritizing some lives over others. In Part II, I explain how the Rehabilitation Act of 1973 and the Americans with Disabilities Act create a framework for disability rights litigation, but leave open the question of the extent to which government actors and private entities must plan for the evacuation of and communication with PWDs in times of emergency. I explore the small handful of cases that have addressed this issue to date, providing the context in which the case against the City of New York ultimately arose. In Part III, I discuss the origins of that case, *Brooklyn Center for Independence of the Disabled (BCID) v. Bloomberg*, and describe the parties’ disagreements about what constitutes harm. In Part IV, I detail the dramatic intervention of Hurricane Sandy mere days before the class was certified, and I explore the effect of the storm on the trial. In Part V, I discuss the ruling in the case, the stipulation of settlement, and its significance in helping to strengthen the legal foundation of the right to be rescued. Finally, in Part VI, I discuss the significance and promise of the BCID ruling and the principles that should guide emergency planning for PWDs in light of recent litigation and other considerations. In particular, I argue that cities should consult with PWDs and outside experts to create detailed plans that anticipate and clearly address the needs of PWDs in emergencies, and that cities should clearly communicate the range of available services to provide PWDs with the opportunity to plan for their own needs.

As New York rebuilds after Hurricane Sandy, the nation faces a future in which disasters will become the norm. This Note argues that the story of *BCID v. Bloomberg* and the man-made disaster that surrounded it should serve as a call to action for other urban areas that have yet to adequately plan for the needs of PWDs in emergencies. Adequate planning for the needs of PWDs during disasters is not merely morally correct; it is legally required, and it is critical that local governments get their plans in order before the next storms, and lawsuits, come.

I. the moral challenges of disaster planning for people with disabilities

Almost one in five people in the United States has a disability, and of those, more than half report having severe disabilities.⁶ Despite this reality and despite legal protections that are meant to ensure reasonably equal access to PWDs, many programs, services, public facilities, and private establishments remain inaccessible to PWDs and are not planned with the needs of PWDs in mind.⁷ Similarly, although large-scale disasters occur with relative frequency, few people invest significant mental energy into planning ahead for catastrophes or regard the possible occurrence of an extreme weather event as a part of everyday life. As a result, planning for the needs of PWDs in a time of disaster requires thinking along two axes that are out of the ordinary and present many unique challenges—both moral and legal.

As this nation's experiences during Hurricane Katrina, Hurricane Sandy, and other disasters have made clear, extreme weather events and other emergencies do not impact all populations equally. It is uncomfortable to recognize our collective role in apportioning the burdens of calamitous events; indeed, "natural" disasters are so called because "it suits some people to explain them that way. As 'natural' events, disasters are nobody's fault."⁸ But "risk and vulnerability are not indiscriminately distributed in disasters, nor are preexisting systems of stratification eliminated";⁹ instead, disasters frequently exacerbate forms of social marginalization that existed all along.¹⁰ For instance, people who are poor are less likely to have ready access to cash and private vehicles to evacuate in a disaster.¹¹ Where poor people are concentrated in a neighborhood, entire neighborhoods may be at great risk and face difficulty complying with evacuation orders, as was the case in New Orleans during and after Hurricane Katrina.¹²

PWDs are particularly at risk during times of disaster as a result of various impairments. Many PWDs, including those who are blind, deaf, or hard of hearing, may have difficulty accessing the information they need to escape safely.¹³ Those with mobility issues may be unable to exit their homes and make their way to safe shelter without dedicated assistance and accessible transportation options—an everyday challenge that can quickly become deadly.¹⁴ Sadly, "[i]t is no surprise that people with disabilities are often overlooked or given short shrift when . . . emergencies arise. In the best of circumstances, challenges facing this group may be invisible because they arise out of the implicit assumptions and institutional arrangements that form the backdrop of daily life."¹⁵

The failure to plan for the needs of the most at-risk populations during periods of disaster may also be rooted in the rationale that emergencies require us to prioritize the needs of some at the expense of others. As one scholar has noted,

[T]he principle of utility might translate into a policy of attempting to save the greatest number of lives and thus to direct treatment to those who are most likely to benefit from it. . . . Utilitarian principles might militate against prioritizing care for the disadvantaged in an emergency if such individuals would require a disproportionate amount of resources.¹⁶

Arrested for murder after actively hastening the deaths of patients at the Memorial Medical Center in New Orleans during Hurricane Katrina, one physician went on to argue “for changing the standards of medical care in emergencies,” reportedly contending, “that doctors need to be able to evacuate the sickest or most severely injured patients last.”¹⁷ Although many PWDs are healthy people who live independently, emergency management and disaster responders often incorrectly equate disability with illness and do not see the need to plan for PWDs as part of the general population during times of emergency.¹⁸ Indeed, in many instances, officials may not see the need to plan for PWDs at all, as the BCID plaintiffs argued in their suit against the City of New York.¹⁹ As one expert on the needs of PWDs during disasters explains, “People with disabilities are thought of as almost, but not quite, human. [The attitude of emergency responders is:] ‘We’re doing all we can do to help the real people, and we don’t have any resources left to help the half people.’”²⁰ Few people would argue directly that PWDs deserve less assistance during times of disaster. But the systemic exclusion of PWDs from disaster plans, coupled with arguments that it may be impossible to meet the needs of all people during times of disaster, suggests a widespread, if tacit, endorsement of the notion that it is fine to value lives differently when push comes to shove. Due to widespread prejudice, “[h]istorically, even those with moderately limiting disabilities have been viewed with pity and discomfort rather than as fully functioning human beings worth ‘saving.’”²¹ Such beliefs have already influenced a variety of emergency policies and raised the death tolls of PWDs during disastrous events.²² During Hurricane Katrina, for instance, “[t]he infirm elderly, poor, and disabled were the most likely to die.”²³ Despite the known vulnerabilities of PWDs and other marginalized groups, one study found that fewer than a quarter of the emergency operation plans of numerous county and city governments across the United States address in depth the needs of the most vulnerable population groups.²⁴

Emergency planning for PWDs tests the limits of our commitment to equality and what we imagine to be possible in times of distress. If one starts from the presumption that it is impossible to meet the needs of all people in the event of an emergency, the drive to prioritize the needs of the non-disabled, the healthy, and those most able to survive without any assistance will consistently invite discrimination against PWDs and other vulnerable groups. However, while emergencies present unique challenges, they do not require us to accept a reality in which we know in advance that our plans may be inadequate and can foresee with certainty the groups that are most likely to suffer when the outer limits of our capacity are tested. The either-or choice between helping more people with disabilities and helping more people without disabilities is a false one. Instead, we must decide whether to accept a scarcity of accessible emergency services and extend the widespread discrimination against PWDs to matters of life and death, or whether to increase our capacity to deal with disaster to the point that our plans meet the needs of all who require assistance. Challenges to the adequacy of emergency plans for PWDs to some extent require us to believe that there cannot be—and must not be—any emergency that exceeds our capacity to meet the needs of even the most vulnerable. Rather than accept as inevitable that some people will be left behind, we must significantly increase our overall level of commitment to managing emergency events.

II. the americans with disabilities act, the rehabilitation act, and the right to be rescued

In recent years, PWDs and their advocates have begun to craft arguments that more effective emergency planning for PWDs is not only morally necessary, but legally mandated. Drawing on the robust protections provided by the Rehabilitation Act of 1973 (RA) and the Americans with Disabilities Act (ADA), these cases have created a legal framework for the right to be rescued, establishing that emergency services must be provided on an equal basis to disabled and non-disabled people.

A. Statutory Framework for Legal Challenges to Emergency Plans for PWDs

Emergency planning for PWDs presents challenging legal questions because it poses an extreme test of the meaning of accessibility. The RA and the ADA are the two main federal statutes that aim to prevent discrimination against PWDs. Together, they establish 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.”²⁵ The RA came into effect first, but it applied only to programs receiving federal assistance.²⁶ Hoping to combat persistent forms of discrimination not reached by the RA and to provide courts with a more robust antidiscrimination framework²⁷ that would apply to state and local governments, Congress went on to pass the ADA, issuing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”²⁸ Today, despite the “subtle differences between these disability acts, the standards adopted by Title II of the ADA for state and local government services are generally [regarded as being] the same as those required under § 504 of [the RA for] federally assisted programs and activities.”²⁹ Title II and § 504 “are commonly referred to as ‘program access’ obligations,”³⁰ and together, they establish broad, comprehensive protections for PWDs in the provision of government services and programs. The ADA implementing regulations state that each “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.”³¹ In *Alexander v. Choate*, a seminal case on discrimination against PWDs, the Supreme Court interpreted § 504 as requiring that PWDs

be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee’s program or benefit may have to be made.³²

The *Alexander* holding suggested that courts should regard as “reasonable” requested modifications that concretely benefit PWDs without compromising the “essential nature” of the programs in

question.³³ These same “meaningful access” and “reasonable accommodation” standards were subsequently held to apply to both Title II and § 504.³⁴

Significantly, both Acts are designed to address both intentional and unintentional discrimination. As the Court noted in *Alexander*, “[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.”³⁵ Likewise, the ADA recognizes that discrimination against PWDs could be either overt and deliberate, or pervasive in its effect, and the ADA was designed to combat both “outright intentional exclusion” and “the discriminatory effects of architectural, transportation, and communication barriers, . . . failure to make modifications to existing facilities and practices, . . . and relegation to lesser services, programs, [and] activities.”³⁶

Facing program access litigation based on Title II and § 504, courts struggle to determine the point at which disparate impact may give rise to a finding of impermissible discrimination. In applying the “meaningful access” standard established by these two Acts, courts have acknowledged “two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [the Acts] within manageable bounds.”³⁷ “The Supreme Court has explicitly rejected the position that all conduct that [has] a disparate impact on disabled persons”³⁸ constitutes impermissible discrimination, and has instead found that “[t]he ‘meaningful access’ standard [strikes] a balance”³⁹ between the competing priorities that must govern consideration of such claims. Courts have held that although the entities governed by the ADA and RA “need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, [they] may be required to make ‘reasonable’ ones.”⁴⁰ The *Alexander* decision suggested several criteria to assess whether meaningful access has been provided, including the lack of tests with a particularly exclusionary effect on PWDs,⁴¹ an absence of reliance on traits that PWDs as a group are less likely to have,⁴² and “evenhanded treatment”⁴³ of PWDs such that both disabled and non-disabled people have “identical and effective . . . services fully available for their use.”⁴⁴ However, which program modifications are “fundamental” and which are “reasonable” is largely in the eye of the beholder. Courts have interpreted the standards of the ADA and the RA “in varying ways, sometimes requiring substantial efforts to provide access and sometimes accepting only de minimis efforts.”⁴⁵ Where some courts “have concluded that the meaningful access standard requires actual equality of opportunity,”⁴⁶ others have explicitly rejected the idea that the ADA and RA require equal results,⁴⁷ instead using “a minimalist application of the meaningful access standard.”⁴⁸

As difficult as it can be to determine what the ADA and RA require under ordinary circumstances, the challenge is all the greater during times of emergency. Disaster plans are virtually always insufficient to account for all the problems that may arise, and because disasters arise relatively infrequently, the set of programs and services that constitute a city’s response to disaster will be tested only rarely. Put another way, when the factual circumstances are inherently unreasonable, it may be difficult for judges and policymakers to imagine what “reasonable accommodations” require. Similarly, when many non-disabled people have been ill-served by inadequate disaster plans, courts may find it hard to determine whether services provided to PWDs were significantly worse. Judges may feel ill-equipped to determine whether the “auxiliary aids and services . . .

afford[ed to] individuals with disabilities” were, as federal regulations require, “appropriate” and sufficient to grant PWDs “an equal opportunity to participate in, and enjoy the benefits of,” emergency services.⁴⁹ However, as impossible as these questions may seem, it is vital that local governments strive to answer them; indeed, the law demands that they do so. The legislative history of the ADA indicates Congress’s express intent to ensure that emergency services be accessible to PWDs,⁵⁰ for “when life and death are at stake even minor differences in programs can have catastrophic consequences to the recipients.”⁵¹

B. What Do the ADA and RA Require in an Emergency?

1. Cases Challenging the Practices of Private Entities or Individual Agencies

Only a small handful of cases have addressed issues relating to the accessibility of emergency services. Cases challenging the practices of specific agencies and entities fall into two main types: those that address the ability of PWDs to contact and communicate with emergency services, and those that address evacuation of PWDs during emergencies. Collectively, these cases establish that the emergency response plans of public agencies and private entities must specifically account for the needs of PWDs. These suits have resulted in significant reforms within entities whose practices have been challenged. However, because the cases within this universe have focused on the inadequate plans of discrete agencies and parties, the broader framework of public disaster response services for PWDs—and the systemic failures within that structure—has remained largely untouched.

In one case focused on communication issues, the City of New York was enjoined from removing street alarm boxes that provided deaf individuals with an effective, accessible means of directly reporting emergencies to 911 from the street.⁵² The court found that public telephones would not enable deaf individuals to report the location and type of an emergency, and that the defendants’ proposed removal of the street boxes would violate the ADA and RA.⁵³ The City sought to have the injunction lifted fifteen years later, arguing that its adoption of a “tapping” protocol for public telephones enabled deaf and hearing impaired people to use such phones to indicate and distinguish their need for police or fire services,⁵⁴ thus eliminating the need for separate street alarm boxes. The City argued that its new practices constituted changed circumstances warranting the vacation or removal of the injunction, but the court rejected this argument,⁵⁵ finding the City’s new measures to be insufficient to meet the needs of PWDs.⁵⁶

In another case focused on communications access, a Texas court considered a suit brought by a deaf woman who contacted emergency services to help her ailing boyfriend.⁵⁷ She was not provided with effective, appropriate American Sign Language interpretation services during her encounter with the police and emergency responders, even though she had conveyed her need for interpretive

services when she contacted 911.⁵⁸ The court found that it was unclear whether the City's duty to provide emergency services extended to people such as the plaintiff who were not themselves in peril.⁵⁹ However, "once the emergency responders make an effort to communicate with and extract information from such a person, the public entity has a duty, under the ADA, to ensure that a disabled person is afforded an equal opportunity to benefits from the services provided."⁶⁰ Emphasizing that "the ability to effectively communicate includes not only the act of receiving, but also the act of imparting information," the court found that even if the police had received information adequate to complete their investigation, that receipt did not address whether the plaintiff had been able to adequately communicate with police officers.⁶¹ Just as in the case against the City of New York, the judge concluded that PWDs must be granted the same opportunity as non-disabled individuals to contact and converse with emergency responders.⁶²

Another line of cases has addressed the right of disabled people to be evacuated during an emergency. These cases have emphasized the importance of developing formal policies that address the unique needs of PWDs during catastrophic events and have required the defendants in question to develop protocols to ensure that PWDs can be safely evacuated in the event of an emergency.

In one case, disabled students at the University of California, Berkeley filed a civil class action lawsuit against the University that challenged on-campus physical access barriers.⁶³ After a protracted litigation process, the parties reached an arbitrated settlement, and as part of that settlement, the University agreed to adopt a number of building evacuation measures for PWDs.⁶⁴ Among other terms, the University agreed to adopt formal evacuation policies and procedures for the safe evacuation of PWDs, to provide signage and maps in each building indicating safe evacuation routes for PWDs, to provide evacuation chairs to assist with the evacuation of people with mobility impairments, and to train faculty members and employees on how to assist PWDs in the event of an emergency.⁶⁵ Taken together, the policies help ensure that non-disabled people at the University are aware of the needs of PWDs in an emergency and that PWDs will not be left behind. A similar suit against a Marshalls store in Silver Spring, Maryland⁶⁶ resulted in a settlement that required the store to create accessible evacuation plans as a condition of its obligations under Title III of the ADA,⁶⁷ which applies to privately owned places of public accommodation and commercial facilities.⁶⁸ Prior to this suit, "there was not a clear answer to the question of whether Title III of the ADA applied to emergency plans"⁶⁹ as "there had been no court rulings specifying that companies are required to draw up evacuation plans with disabled people in mind."⁷⁰ The case was brought by a wheelchair user who had been ordered to evacuate the Marshalls store after a fire alarm went off.⁷¹ Like other customers, the plaintiff was directed to evacuate by exiting into the mall, but

[a]s power to the mall escalator and elevator had been shut down, there were no other useable mall exits. Savage, in a wheelchair, was essentially trapped along with an elderly couple, a woman with a leg brace, a man using two canes, an obese woman who

said climbing stairs made her breathless and a woman in a walker. . . . Neither the store nor mall personnel provided assistance or guidance. They waited in the interior mall area for approximately one hour, until an announcement was made that the fire alarm was a false one.⁷²

After the defendants' motion for summary judgment was denied,⁷³ the parties began settlement negotiations and ultimately reached a settlement "that required Marshalls to provide accessible evacuation routes for disabled shoppers in all of its 700 stores in 42 states and Puerto Rico."⁷⁴ In another case, the Fourth Circuit held that the ADA and RA required public entities to adopt policies to address the evacuation needs of PWDs in emergencies, but did not mandate specific results.⁷⁵ In that case, "a severely mobility-impaired student was left alone in her middle school which had been evacuated due to a bomb threat. After her parents complained, the school board developed a plan that designated the middle school library as a 'safe area' for disabled students."⁷⁶ After the same student was left in this area during a subsequent fire drill, her parents sued, alleging that the school board had failed "to develop and implement effective procedures for the safe evacuation of disabled children."⁷⁷ The court agreed that "the appropriate remedy would be injunctive relief requiring the School Board to develop and implement a reasonable evacuation plan for disabled children,"⁷⁸ but found that no further relief was warranted because the school board had already "developed and implemented a reasonable emergency evacuation plan."⁷⁹ Critics of this decision have noted that "the Fourth Circuit Court of Appeals essentially equated actual evacuation with evacuation procedures when it held that the ADA merely required access to safe evacuation procedures."⁸⁰ By "mov[ing] from requiring safe evacuation to access to safe evacuation procedures . . . the Fourth Circuit has interpreted the ADA and Rehabilitation Acts as not requiring that disabled persons have equal access to actual safe evacuation during emergencies."⁸¹ Nonetheless, the court's finding that the school was liable for discrimination based on disability so long as it had "no reasonable plan in place to evacuate disabled children from school buildings during an emergency"⁸² was an important one. In the court's view, a general evacuation procedure did not satisfy the ADA and RA; instead, only emergency procedures that specifically accounted for the needs of PWDs would suffice.⁸³ Taken together, these cases establish that the ADA and RA require that emergency response plans accommodate the specific communication and evacuation needs of PWDs, and each case represented an important victory for the specific plaintiffs in question and PWDs more generally. However, each case was limited to addressing the accessibility of specific emergency response tools or the protocols of one specific agency or entity; none asked for broader systemic changes or fundamentally altered the obligations of emergency responders as a whole during times of disaster. In addition, several of the cases dealing with the rights of PWDs in emergencies resulted in negotiated settlements;⁸⁴ as a result, these cases left open the question of what remedial obligations a defendant would incur if a court found a disaster plan to be inadequate. Although these cases took steps toward establishing a right to be rescued, they left many questions unanswered, and virtually all PWDs remained at risk, with few programs crafted to meet their specific needs.

2. Structural Reform Litigation

Recognizing that the needs of PWDs during disasters far exceeded the remedies that narrow cases could provide, the attorneys of Disability Rights Advocates (DRA) sought to expand the right to be rescued through structural reform litigation that went beyond individual agencies, campuses, or businesses, and instead focused on the emergency plans of an entire city. DRA is one of the leading non-profit disability rights legal centers in the nation, and it seeks to remedy systemic problems through class action and other high-impact litigation.⁸⁵ Run by and for PWDs, DRA has achieved critical victories and secured important legal precedents for PWDs on a broad spectrum of issues, improving the lives of millions of people with a variety of disabilities.⁸⁶

In a lawsuit against the City of Los Angeles, DRA argued that the emergency plans of the City of Los Angeles failed to address the needs of PWDs. By early 2011, DRA had received a landmark ruling in the case, in which the court found that the City of Los Angeles violated the ADA and the RA by failing to account for the needs of PWDs in planning for disasters.⁸⁷ Unlike previous rulings that addressed the accessibility of specific emergency response tools or the protocols of one specific agency or entity, the court in *Communities Actively Living Independent & Free (CALIF) v. City of Los Angeles* found that the city's emergency preparedness program as a whole failed to meet the mandates of the RA and the ADA and failed to provide PWDs with "meaningful access" to emergency services.⁸⁸ The ruling was the first to find the emergency response plan of an entire city to be noncompliant with the ADA.⁸⁹ The court ordered the City to revise its emergency plans to include people with disabilities and to hire an independent expert to assist with the process.⁹⁰ DRA also negotiated a settlement with the County of Los Angeles to revise its emergency plans, securing significant relief for the nearly 1.3 million people with disabilities in the City and County of Los Angeles.⁹¹ Later, DRA negotiated similar settlements with Richmond and Oakland Counties, bringing further relief to PWDs in California.⁹²

The victories were significant ones, in part because the court in *CALIF* did more than simply find that the City of Los Angeles's plans were not compliant with the ADA and the RA; it began to set standards for determining what "meaningful access" means for PWDs in emergency planning at the city level. First, the court rejected the suggestion that personal planning by individual PWDs could or should reduce the City's obligations to account for the needs of PWDs: "The City provides a comprehensive emergency preparedness program and such program must be open and accessible to all of its residents. It is irrelevant for purposes of this action whether individuals should also personally plan and prepare for emergencies and/or disasters."⁹³ Second, the court rejected the argument that the City could absolve itself of responsibility for planning specific to PWDs by delegating responsibility to individual agencies or departments, noting both that "there is no evidence in the record of any City documents explaining how these departments shall assist individuals with disabilities during an emergency or disaster" and that "individual departments which have been delegated the responsibility of assisting such individuals similarly have no plans for addressing the needs of [PWDs]."⁹⁴ In making this finding, the court expressly rejected "[t]he City's contentions that it can make ad hoc reasonable accommodations upon request,"⁹⁵

underscoring that a city that failed to create plans specific to PWDs was noncompliant with the ADA and RA. Third, the court rejected the City's argument that "the City has not taken any action which disproportionately burdens people with disabilities."⁹⁶ Rejecting the defendants' argument that "[p]laintiffs are free to prepare themselves to receive the same benefits, whatever they may be, as everyone else in the City,"⁹⁷ the court underscored 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."⁹⁸ Crucially, the plaintiffs did not need to show affirmative action by the City with respect to the needs of PWDs; a lack of action could violate the ADA.⁹⁹ Finally, the court enumerated nine essential components that effective emergency preparedness plans must include.¹⁰⁰ Among them are the development of a comprehensive plan, assessment of the efficacy of that plan, advance identification of needs and resources, provision of evacuation assistance and transportation, shelter and care for those forced to evacuate their homes, and post-disaster recovery assistance.¹⁰¹ By describing the required elements of a preparedness plan, finding the City's plan as a whole to be noncompliant with regard to PWDs, and directing the City's independent expert to assist with revisions to all components of the City's plans, the court suggested that "meaningful access" requires cities to ensure that each of the fundamental components of an emergency plan address the unique needs of PWDs¹⁰²—a decision DRA's co-founder describes as a "breakthrough."¹⁰³

Still, the ruling and the subsequent settlements left many questions unanswered. Because the plaintiffs had sought "summary judgment solely on the issue of liability . . . the Court consequently [made] no finding as to the appropriate remedy."¹⁰⁴ Although the court found that "[p]laintiffs have established that reasonable modification(s) to the City's emergency preparedness program are available,"¹⁰⁵ the court did not enumerate which of the suggested modifications it found to be "reasonable"—and hence, required—under the ADA and RA. Thus, while the ruling established that cities should ensure that evacuation, temporary shelter, and other emergency services account for the needs of PWDs, it did not clearly establish how cities should create such access,¹⁰⁶ and any modifications agreed to by the City or County of Los Angeles would not serve as binding legal precedent. More fundamentally, the case and settlement helped only a small portion of the PWDs threatened by inadequate emergency planning, and too many PWDs in other urban areas remained at risk. DRA could not afford to stop fighting, and before the ink on the Los Angeles case was dry, DRA had begun to turn its sights to the east.

III. origins of bcid v. bloomberg

DRA had been investigating the City of New York's emergency plans for six months prior to Tropical Storm Irene,¹⁰⁷ a destructive cyclone that descended upon the city in August 2011 and ultimately caused between seven and ten billion dollars in damage.¹⁰⁸ The Center for the Independence of the Disabled, New York (CIDNY)¹⁰⁹ had been trying to collaborate with the City on emergency planning for PWDs ever since the terrorist attacks on September 11, 2001, in an

effort “to get the City to understand that its . . . response to disasters was laden with barriers. And we hoped that we were making progress.”¹¹⁰ Unfortunately, “[t]he problem with disaster preparedness and response work is that it is extremely difficult to get people to care until we have an event at hand,” explains Paul Timmons, the Board Chair of Portlight Strategies, a grassroots organization that assists disabled people in post-disaster situations. “But if you’re one of the [PWDs] who can’t access one of those shelters . . . you’re gonna care a lot . . . right up to the point you die in the storm.”¹¹¹

When Tropical Storm Irene struck the City, the event served as a “reality check”¹¹² to both CIDNY and DRA. Susan Dooha, the Executive Director of CIDNY, explains:

Tropical Storm Irene hit the City . . . [and CIDNY shared critical emergency information with and surveyed] the 900 PWDs who use our offices, and who lived in Hurricane Zone A and B . . . and we heard from them about their barriers to evacuation. We also went out as the hurricane bore down on the City . . . and surveyed shelters and identified that the shelters were riddled with access barriers And because we were a partner of the City’s, and active in their special needs activities, we brought all of the issues we had identified to the attention of the City . . . leading up to the storm, throughout the storm and during its immediate aftermath. And we kept asking for the problems we had identified to be addressed . . . but essentially we got no response, and there were no satisfactory resolutions to any of the resolutions raised, nor was there, evidently, any much curiosity about what we would recommend to rectify the problems. This was very disappointing to us because . . . we had worked hard to become partners, and we were very alarmed that . . . we were seeing the same issues coming up that we had seen and warned of many years before.¹¹³

At that point, says Dooha, “we thought that it was time to pursue a concerted effort to bring the City into federal civil rights law compliance. And we were motivated not only by our frustration, but also by the life-and-death struggles of people that we serve.”¹¹⁴ Although Tropical Storm Irene resulted in relatively few deaths and less damage than had been expected, DRA also “saw the writing on the wall for a future disaster and decided that [it] had to do something.”¹¹⁵ Disability communities in New York were already all too familiar with the degree to which the needs of PWDs would be ignored in times of emergency. Postmortem studies of the 1993 World Trade Center bombing and the September 2001 terrorist attack revealed that disabled people had been left behind in both instances.¹¹⁶ Because of the lack of evacuation assistance, PWDs “did not even have the choice of whether to leave and were essentially trapped and left to die.”¹¹⁷ As Timmons wrote in exasperation shortly before the BCID case was filed, “We have seen [indifference to the needs of PWDs] in every domestic disaster to which we’ve responded. . . . There’s always a lot of talk and posturing from FEMA and state and local emergency response types . . . while [PWDs] suffer . . . and die. . . . [W]e have to stop playing nice. . . . So let’s sue somebody.”¹¹⁸

DRA was well-prepared to bring a case challenging the adequacy of New York City’s emergency preparedness plan. DRA’s experiences in California gave the organization significant expertise and institutional competence in reviewing emergency plans with an eye to meeting the needs of

PWDs.¹¹⁹ Indeed, at the time of the filing of the case against New York City, DRA was the only outfit in the country bringing lawsuits of this nature.¹²⁰ The complaint in BCID was filed in September 2011, just over a month after Tropical Storm Irene.¹²¹ The class action lawsuit alleged that, “Although the Mayor and the City have created emergency plans for the general population, they have failed to plan appropriately for the nearly 900,000 disabled persons within New York City who are especially vulnerable during disasters.”¹²² DRA argued that the City’s failure to plan for PWDs violated the ADA, RA, and the New York City Human Rights Law (NYCHRL).¹²³ Acknowledging the substantial effort and resources the City devoted to emergency preparedness and planning, the complaint echoed the ruling in the CALIF case,¹²⁴ arguing that effective plans must include nine essential components: (1) “comprehensive emergency plans,” (2) “assessments of the efficacy of emergency plans,” (3) “identification of the needs that will arise and resources available to meet those needs,” (4) “public notification and communication,” (5) “policies or procedures concerning the concept of ‘sheltering in place,’” (6) “plans to provide shelter and care for individuals forced to evacuate their homes,” (7) “assistance with evacuation and transportation,” (8) “plans for provision of temporary housing when evacuees cannot return to their homes,” and (9) “plans for . . . recovery and remediation efforts after an emergency or disaster.”¹²⁵ The plaintiffs argued that “with respect to each of these essential components, the Mayor and the City have failed to consider and address the different, yet critical, needs of persons with disabilities.”¹²⁶ As an example, the complaint alleged that the City failed to provide American Sign Language interpretation for televised emergency announcements during Tropical Storm Irene.¹²⁷ The plaintiffs also noted that the City had shut down bus, subway, and paratransit services in the hours before Irene and that Mayor Michael R. Bloomberg advised residents that “you’ll have to walk, or you’re going to find some way to use a car or taxi,” ignoring the fact that many PWDs cannot walk or take for-hire vehicles, the vast majority of which are inaccessible.¹²⁸

The case was filed as a class action on behalf of “all persons with disabilities in the City of New York who have been and are being denied the benefits and advantages of New York City’s emergency preparedness program.”¹²⁹ The named plaintiffs included representative individuals with disabilities and two organizational plaintiffs: the Brooklyn Center for the Independence of the Disabled, Inc. (BCID)¹³⁰ and CIDNY. DRA argued that the individual members of the plaintiff class had been denied meaningful access to the City’s emergency preparedness program as a result of the City’s failure to provide for the unique needs of PWDs.¹³¹ In turn, the complaint asserted that the organizational plaintiffs were harmed because they were forced to expend time and resources advocating for constituents whose needs were not being met, and to provide direct disaster relief assistance to those individuals when government entities were unable to do so.¹³²

According to Julia Pinover-Kupiec, a lead DRA attorney on the case, “the suit was brought as a class action because DRA felt that the harms and proposed remedies were broadly applicable to all members of the class, making a class action the most appropriate vehicle for the claims.”¹³³ Rather than focusing on harms suffered by individual members of the class, the suit argued that the plaintiffs as a group were harmed by the absence of emergency planning that met the needs of PWDs.¹³⁴ As relief, the plaintiffs requested a declaration that the defendants’ failure to adequately

plan for PWDs in emergencies violated the ADA, RA, and NYCHRL, and an order requiring the defendants to develop and implement an emergency plan addressing the needs of PWDs.¹³⁵ Although plaintiffs who allege violations under the ADA and RA are also entitled to seek compensatory damages where policies neutral on their face have resulted in disparate impact and “it is clear that the defendant had knowledge of such disparate impact,”¹³⁶ the plaintiffs did not seek money damages, instead concentrating on the need for injunctive relief. As Pinover-Kupiec explains, the suit aimed to compel the City to “focus[] on the formidable task”¹³⁷ of creating a plan that could meet the needs of PWDs during an emergency. “We were really concerned with achieving substantive relief that would compel the City to get its act together. Injunctive relief was the core of the complaint because, in this situation, an injunction was the most effective way to achieve that goal for the class.”¹³⁸

Throughout the complaint, the plaintiffs emphasized that there was no time to lose. The plaintiffs noted that after the September 11, 2001 attacks, CIDNY issued a report urging the city to train emergency responders and relief agencies on how to meet the needs of PWDs and how to conduct outreach to PWDs to make them aware of what emergency services were available well in advance of a disaster, but that these lessons had been ignored by the City.¹³⁹ The plaintiffs’ experiences echoed the findings of the few studies that have explored the experiences of PWDs in disaster situations, most of which have indicated that “the same access mistakes appear to be made repeatedly in disaster management activities” and “lessons learned after a disaster about reducing access barriers are not subsequently integrated into common practice.”¹⁴⁰ The City “has failed to consistently engage and affirmatively respond to the disability community,” the plaintiffs wrote in their complaint, and the Office of Emergency Management (OEM)

has never provided a draft of a plan for which the disability community can provide input. . . . As a result, persons with disabilities know very little or nothing of the City’s emergency plans. They do not know, for instance, how they will be notified, how and if they will be evacuated, which shelters are accessible, how and if they will be transported and what assistance, if any, they will receive.¹⁴¹

Moreover, they argued, “[t]he City of New York has been on notice for at least ten years that emergency preparedness for persons with disabilities is lacking,”¹⁴² and too little had been done. The time to address this issue, the plaintiffs urged, was now.

Over the course of the next year, the plaintiffs and defendants sharply debated two questions: whether the plaintiffs had standing to seek judicial review of the questions they had raised, and whether class certification was proper in view of the harms alleged. A plaintiff who seeks to invoke federal jurisdiction bears the burden of establishing standing under Article III of the U.S. Constitution. To establish standing,

(1) “the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical”;

(2) “there must be a causal connection between the injury and the conduct complained of”; and

(3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”¹⁴³

Under Federal Rule of Civil Procedure 23, plaintiffs seeking to bring a class action must also satisfy four additional requirements: numerosity, commonality, typicality, and adequacy. A class may be certified only if it is “so numerous that joinder of all members is impracticable”; “there are questions of law or fact common to the class”; “the claims or defenses of the representative parties are typical of the claims or defenses of the class”; and “the representative parties will fairly and adequately protect the interests of the class.”¹⁴⁴ In addition, where injunctive relief is sought, a class may be maintained if “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”¹⁴⁵

In their complaint, the plaintiffs alleged that the injury they suffered was the absence of an adequate emergency preparedness plan.¹⁴⁶ They argued that although “[s]pecific emergencies such as Hurricane Irene and September 11th highlight the glaring deficiencies” of the City’s emergency preparedness plans for PWDs, “these specific events are merely a symptom of the current underlying problem . . . [of the] ongoing failure to prepare for the unique needs of persons with disabilities during emergencies.”¹⁴⁷ The plaintiffs’ argument on this point mirrored that of the successful challenge to the adequacy of the evacuation plan of the Marshalls store in *Savage v. City Place Ltd. Partnership*; there, the court found that “[w]here the harm alleged is directly traceable to a written policy . . . there is an implicit likelihood of its repetition in the immediate future.”¹⁴⁸ In the BCID plaintiffs’ view, the harm was the City’s failure to adequately plan and its lack of preparedness to meet the needs of PWDs in an emergency;¹⁴⁹ because of this, the injury was common to all members of the plaintiff class,¹⁵⁰ and it was unnecessary for the plaintiffs to address the circumstances of individual plaintiffs¹⁵¹ who may have been injured by the City’s failure to plan. Because the absence of a plan was a harm that affected all PWDs in the City, the class consisted of all such people¹⁵² and, in the plaintiffs’ view, satisfied the numerosity, commonality, and typicality requirements for class certification.¹⁵³

The defendants strongly objected to this reasoning, arguing that the plaintiffs lacked standing to sue because they had “fail[ed] to identify any putative class members who have suffered any actual injury in fact arising from Defendants’ conduct.”¹⁵⁴ The defendants dismissed the supposed harms suffered by individual plaintiffs, underscoring that both named plaintiffs had been aware of the approach of Tropical Storm Irene and simply “didn’t pay that much attention to it.”¹⁵⁵ Plaintiff Gregory Bell had testified in his deposition that he and other PWDs were disadvantaged by the City’s failure to convey information about the boundaries of the evacuation in an accessible manner because “[t]he information wasn’t forthcoming through PSA announcements, news, or print media,” and although television announcements may have directed people to visit the City’s website, “if you don’t have a computer and you’re a person who is visually impaired and you can’t afford a computer and a screen reader there’s no way you can obtain the information.”¹⁵⁶

Nevertheless, the defendants insisted that Bell had not suffered an “injury in fact”; rather, all that Bell had was a generalized worry that his needs as a PWD would not be met in the event of a future emergency.¹⁵⁷ Similarly, the defendants emphasized that plaintiff Tania Morales had successfully accessed the City’s website and used it to determine that her residence was not located within an evacuation zone.¹⁵⁸ On that same site, she learned the location of a nearby evacuation center, “a school that she had visited previously and knew to be wheelchair accessible.”¹⁵⁹ Again, the defendants underscored that “Ms. Morales does not allege any injuries during Irene aside from an inability to access the accessible entrance at this evacuation center. However, she states in her declaration that she is ‘extremely worried about what would happen’ during a future emergency.”¹⁶⁰ Citing a prior case that established that “[i]t is the reality of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions,”¹⁶¹ the defendants maintained that “anxiety about future indeterminate emergencies does not confer standing.”¹⁶² The defendants further maintained that the plaintiff organizations lacked associational standing, in part because of their failure to identify any members of their organizations who had been injured during Irene.¹⁶³ The defendants insisted that mere fear was not enough to establish that the plaintiffs had experienced an “injury in fact” or that the defendants had violated the ADA, the RA, and the NYCHRL.¹⁶⁴ According to Supreme Court precedent cited by the defendants, because the “reasonableness of [a plaintiff’s] fear”—and therefore, the plaintiff’s entitlement to standing based on that fear—“is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct,”¹⁶⁵ the plaintiff’s case should proceed only if the court found that the City’s failures were “continuous and pervasive,” such that future harm to the plaintiffs was probable.¹⁶⁶ In contrast, the Court has held that “subjective apprehensions . . . that . . . a recurrence [of the harmful activities] would even take place [are] not enough to support standing.”¹⁶⁷

The defendants asserted that the plaintiffs’ failure to demonstrate injury defeated both their argument for standing and the numerosity element of class certification. “[S]imply by asserting the existence of ‘qualified individuals with a disability,’” wrote the defendants, “[plaintiffs] have [not] demonstrated the existence [of] a proposed class of individuals who have been aggrieved by supposedly discriminatory conduct.”¹⁶⁸ The defendants argued that in the absence of “admissible evidence . . . demonstrating the existence of a class of individuals who suffered an actual violation,”¹⁶⁹ class certification should be denied, as the numerosity requirement is not satisfied when “plaintiffs fail[] to connect putative class members with any concrete deprivation.”¹⁷⁰ The City dismissed the plaintiffs’ “conclusory assertion” that “a large class of . . . aggrieved individuals exists, such that joinder of their claims would be impracticable,” insisting that this claim was “without merit.”¹⁷¹

People tend to underestimate the risk of disasters,¹⁷² and even government officials are not immune from this tendency. Many of the defendants’ arguments implied that the plaintiffs were worrying over nothing and imagining harms that had not occurred and never would—and the plaintiffs’ case would fail if the court found that the alleged harms were absent or unlikely to recur. As the plaintiffs awaited the court’s decisions on standing and the certification of the class, they battled not only this generalized tendency to under-plan for disasters, but also the specific apathy caused

by Tropical Storm Irene. Although Irene was downgraded from a hurricane shortly before it hit New York, it was the largest storm to hit the city in twenty-five years.¹⁷³ Nonetheless, few of the dire predictions that had been made before Irene came true, and city leadership walked away from the experience feeling relieved and satisfied with the city's level of preparedness.¹⁷⁴ Shortly after Irene, the New York Times reported that "after wide-ranging precautionary measures by city officials . . . and issuing evacuation orders for 370,000 people across the city, Hurricane Irene is likely to be remembered by New Yorkers more for what did not happen than for what did."¹⁷⁵ At a press conference shortly after Irene, Mayor Bloomberg said, "[W]e are in pretty good shape because of the exhaustive steps . . . we took to prepare for whatever came our way."¹⁷⁶ To many, Irene appeared to directly contradict the plaintiffs' main assertion: that the City was unprepared to deal with the needs of PWDs during a disaster. The defendants argued that "[i]n light of the fact that Irene triggered a City-wide evacuation order affecting [more] than 350,000 individuals, many of them with disabilities, the fact that none of the putative class members suffered any injury during Irene is particularly striking."¹⁷⁷

The court ordered the conclusion of fact discovery by late July 2012.¹⁷⁸ Had the story stopped there, the questions about the adequacy of the City's plans would have been answered only by reference to the City's written plans and its experience during Irene—but nature had other plans in store. In a dramatic twist of fate, Hurricane Sandy descended on the City in October 2012, putting the theories of both parties to the test and throwing the questions posed by the lawsuit into sharp relief. Outside the courtroom, the people of New York waited with apprehension as the hurricane wound its way north.

IV. the perfect storm: class certification & hurricane sandy

A. Hurricane Sandy Hits

Hurricane Sandy's path remained somewhat unpredictable in the days before it made landfall in New York, and as late as Friday, October 26, 2012, meteorologists and major news outlets were still describing a direct descent on New York City as just one of several possible scenarios.¹⁷⁹ Nevertheless, Governor Andrew Cuomo declared a state of emergency in New York State on that date, "mobiliz[ing] resources to local governments that otherwise are restricted to state use only and suspend[ing] regulations that would impede rapid response."¹⁸⁰ Some New Yorkers who had succumbed to the hysteria preceding Tropical Storm Irene may have discounted the severity of the early reports about Hurricane Sandy, "lulled into a false sense of security" by the false alarm the earlier storm had posed.¹⁸¹ Others were deterred from evacuating because they did not have any friends or family they could stay with—a limitation that is particularly common for PWDs whose mobility impairments require them to remain in accessible environments.¹⁸² As the reports about Sandy's path of destruction grew more worrisome, the City began to take steps to prepare. On

Sunday, October 28, Mayor Bloomberg issued a mandatory evacuation order of 375,000 people living in the city's low-lying areas.¹⁸³ In his address, the Mayor announced that the City's public transportation system would shut down later that evening, and that elevators in the high-rise public housing buildings in the areas that had been ordered to evacuate would also be shut down.¹⁸⁴ Although the Mayor described the various means through which residents would be notified to evacuate, he did not explain what evacuation assistance, if any, was available to those who might not be able to get out in time.¹⁸⁵ Paying scant attention to the challenges faced by elderly and disabled people who had been granted only a few short hours to evacuate before their elevators were shut off and public transportation ceased, the Mayor framed people's potential failure to leave as an irresponsible choice: "[T]hey are being, I would argue, very selfish. They are not only endangering their own lives, they're endangering the lives of others because in an emergency we aren't going to leave them to die. We're going to come in and save them."¹⁸⁶

In the days and weeks that followed, many would come to question the Mayor's assertion that the City would not leave anyone to die and would come to fault the City for its failure to ensure the safety of the residents who had been left behind.¹⁸⁷ The BCID court would later find that "paratransit began to shut down only half an hour after the Mayor issued the evacuation order, while subway and bus service remained open for at least eight more hours."¹⁸⁸ As the U.S. Attorney's Office of the Southern District of New York noted in a statement of interest, because Access-A-Ride requires PWDs to make advance bookings and its services were stopped altogether shortly after the Mayor's speech, "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."¹⁸⁹ However, in the immediate aftermath of the storm, the growing crisis of those abandoned in high-rise buildings had yet to come to the attention of many members of the public or many officials in charge of the City's emergency response.¹⁹⁰ Instead, electricity was restored to Manhattan much sooner than to the outer boroughs,¹⁹¹ leading many people to conclude that the immediate crisis had largely ended only a few days after the storm.¹⁹² Just shy of a week after Sandy, Mayor Bloomberg announced that "the city had been inundated with well-meaning people dropping off goods at relief centers" and "what would be the most helpful is [monetary] donations."¹⁹³ At this point, however, many people living in the outer boroughs—including thousands of elderly and disabled people in nursing and adult homes the City had decided not to evacuate—remained trapped and in dire need of help.¹⁹⁴ As the *New York Times* would later conclude, "[a]gain and again, city officials publicly predicted that the crisis . . . was on the verge of being resolved, contributing to a perception at City Hall"—and beyond—"that there was no need to mobilize an extensive effort to provide medical care"¹⁹⁵ and other assistance.

As much of the city began to breathe a sigh of relief, the harmful effects of the storm on the people who had been abandoned continued to multiply. Many high-rise buildings had lost all heat, water, and electricity, shutting down elevators for days and weeks on end.¹⁹⁶ Although the City's emergency response teams and representatives from FEMA and the Red Cross set up relief centers in impacted neighborhoods, more than ten days passed before City officials coordinated door-to-door canvassing efforts inside buildings to identify elderly, sick, and disabled people in need of

assistance.¹⁹⁷ Fellow residents helped to meet the needs of many of their neighbors,¹⁹⁸ seeing them through until official emergency responders at last made their way to the scene. But in many buildings, all but the most profoundly disabled and elderly residents had already evacuated,¹⁹⁹ and those who remained were not well equipped to help each other.²⁰⁰ Untrained volunteers stepped in to fill the gaps that official response teams had left behind, coordinating major grassroots relief efforts to knock on doors, deliver necessary supplies, and help residents coordinate emergency medical evacuations where needed.²⁰¹ In many instances, the situations that volunteers encountered behind closed apartment doors were grim. Many elderly and disabled people were lacking basic necessities such as food and water.²⁰² Others had run out of necessary medications, or had begun to miss vital dialysis, chemotherapy, and other medical appointments.²⁰³ Still others had been isolated from the friends, relatives, and aides who typically cared for them²⁰⁴—people who were unable to reach those who were trapped as a result of the shutdown of public transportation²⁰⁵ and the severe gas shortages that hindered car travel in the weeks after Sandy.²⁰⁶ Although the volunteers helped to meet many residents' immediate and critical needs,²⁰⁷ most volunteers had no training in medical care or emergency response and had few, if any, qualifications, apart from their willingness to assist.²⁰⁸

The City eventually coordinated a canvassing effort to send health care professionals and members of the National Guard to high-rise buildings that remained without power,²⁰⁹ but at that point, countless people had been living in perilous circumstances and sheer misery almost two weeks.²¹⁰ They would continue to do so until their heat, water, and power was fully restored.²¹¹ Residents subsisted on canned food and military protein packs.²¹² People were not able to bathe and were forced to defecate in buckets.²¹³ The scale of human suffering for all of the people compelled to live in high-rise caves during this period was extreme, but it was clear that PWDs were disproportionately likely to have suffered as a result of official neglect.²¹⁴

Many questions would be raised in the months that followed. Why were people left behind? Why had so many failed to evacuate? Who was responsible? How could the City make sure that this would never happen again? And quietly, a lawsuit that would help to answer some of these questions began to move ahead. On November 7, 2012, United States District Judge Jesse M. Furman issued the opinion and order certifying the proposed class in *BCID v. Bloomberg*.²¹⁵ Writing from his home office²¹⁶ because the downtown federal courthouse was shut down as a result of Hurricane Sandy,²¹⁷ Judge Furman affirmed that the plaintiffs had standing to pursue the case and could do so as a unified class.²¹⁸

B. Standing To Sue and Class Certification

Judge Furman has stated that his decision was in no way influenced by Hurricane Sandy and that the issuance of the order at a moment when disabled New Yorkers remained trapped in their apartments was purely coincidental.²¹⁹ Nevertheless, in finding that the plaintiffs had standing to pursue the case, Judge Furman spoke directly to the manner in which Hurricane Sandy had brought

the plaintiffs' contentions of harm into sharp relief. Discounting the defendants' emphasis on concrete injuries that the individual named plaintiffs may or may not have suffered as a result of the City's emergency planning and procedures, Judge Furman held that "that contention misses the point The gravamen of plaintiffs' claims is, first and foremost, that they have been, and continue to be, deprived of benefits afforded to other citizens—namely, the benefits of an adequate emergency preparedness program."²²⁰ Because plaintiffs alleged a present injury—lack of access to an effective emergency plan—they had standing to bring the case.

Judge Furman also found that the plaintiffs had standing "based on the threat of future harm and the fear and apprehension caused by it."²²¹ Speaking directly to the disaster unfolding outside, he wrote:

It is, of course, not possible to know with certainty if or when disaster will strike the City, but—as the tragic events of the past few weeks make abundantly clear—it is beyond "mere conjecture" that another disaster, whether natural or manmade, will occur and that it will seriously affect members of the proposed class.²²²

Judge Furman further underscored the urgency of the plaintiffs' claims by finding that "a court would be in no better position later than now to resolve the claims presented. Indeed, to conclude otherwise would be perverse, as it would mean that plaintiffs could bring their claims only after their worst fears had been realized."²²³

Judge Furman also granted the plaintiffs' motion for class certification, briefly addressing the requirements of typicality, commonality, and adequacy of representation, and rejecting the defendants' argument that the plaintiffs had failed to satisfy the numerosity requirement.²²⁴ Though the defendants alleged that the plaintiffs had failed to produce any individuals harmed by the City's alleged planning failures during Tropical Storm Irene, much less a significant number of PWDs who were so harmed, "that assertion is based on the same fundamental misunderstanding of plaintiffs' claims that drove defendants' arguments about standing," wrote the court.²²⁵ The court held that the issue was not the specific injuries suffered by individual plaintiffs during one disaster, but the fact that all PWDs in the City were alleged to have been deprived of the benefit of appropriate emergency preparedness planning.²²⁶ Because of this, "the relevant class of people is therefore all people with disabilities in the City," and the numerosity requirement—the only element of class certification that the defendants had seriously challenged—was "plainly satisfied."²²⁷

C. Wal-Mart v. Dukes: The Challenge That Wasn't

Judge Furman considered the plaintiffs' motion for class certification within a legal landscape reshaped by the Supreme Court's 2011 decision in *Wal-Mart Stores v. Dukes*.²²⁸ Although Federal Rule of Civil Procedure 23(b)(2) was designed to facilitate structural reform litigation, the Wal-Mart decision imposed more stringent requirements on class certification, and in particular the element of commonality. The court held that the claims of a proposed class must not only be based on a "common contention," but one "capable of classwide resolution—which means that

determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”²²⁹ It is insufficient to show that proposed class members “have all suffered a violation of the same provision of law”;²³⁰ “[w]hat matters to class certification . . . is not the raising of common ‘questions’ . . . but, rather, the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation.”²³¹

In the aftermath of the decision, many legal experts worried that Wal-Mart had significantly changed the landscape for structural reform litigation in the United States and would make it difficult, if not impossible, to bring broad-based class actions.²³² Nevertheless, shortly after the decision was issued, courts began to issue opinions that sought to cabin its influence, underscoring that Wal-Mart did not preclude class certification where a single policy affected all class members and the experiences and interests of all class members were closely aligned.²³³ In one case, a Pennsylvania district court certified a class of pre-trial detainees of a county jail who sought to challenge the constitutionality of the jail’s delousing policy, finding that, “[u]nlike Dukes, where commonality was destroyed where there was no ‘common mode of exercising discretion that pervade[d] the entire company,’ here there is a solid policy that applied directly to all potential class members.”²³⁴ In another case, a Massachusetts district court refused to de-certify, on the basis of Wal-Mart, a class of children placed in foster care who alleged harm as a result of systemic deficiencies within state foster care system.²³⁵ Stressing the significance of the plaintiffs’ challenge to a single policy, the court wrote:

Unlike the plaintiffs in Wal-Mart, who did not allege any specific, overarching policy of discrimination, Plaintiffs have alleged specific and overarching systemic deficiencies . . . that place children at risk of harm. These deficiencies, rather than the discretion exercised by individual case workers, are the alleged causes of class members’ injuries These systemic shortcomings provide the “glue” that unites Plaintiffs’ claims.²³⁶

The court rejected the notion that Wal-Mart represented a death knell for structural reform litigation, insisting that “the Wal-Mart decision did not change the law for all class action certifications. Instead, it provided guidance on how existing law should be applied to expansive, nationwide class actions”²³⁷

As the BCID case unfolded, courts around the country had just begun to consider the impact of Wal-Mart on litigation on behalf of PWDs, but no clear consensus had emerged. In one California case, a federal court certified a class of PWDs who alleged that the defendant, a national park system, systemically discriminated against PWDs by failing to provide adequate accommodations that would permit access to park facilities.²³⁸ The court held that, unlike in Wal-Mart, where “evidence presented to support commonality [was found to be] insufficient because it did not show a common reason for the alleged disparate treatment of female employees . . . Rehabilitation Act claims do not require proof of the intent behind the alleged barriers,”²³⁹ but only a showing of denial of the benefit of certain programs or activities. Based on the difference in emphasis between intent versus impact, the court concluded that “Wal-Mart is not closely on point.”²⁴⁰ Other courts considering disability rights cases found that Wal-Mart required much more than a showing of a common reason for alleged disparate treatment.²⁴¹ For instance, shortly after Wal-Mart was decided,

the D.C. Circuit de-certified a class of disabled school-age children who alleged violations of their rights under the Individuals with Disabilities Education Act (IDEA) and Rehabilitation Act, holding that,

After Wal-Mart it is clear that defining the class by reference to the [challenged school district's] pattern and practice of failing to provide [a free and adequate public education to special needs children] speaks too broadly because it constitutes only an allegation that the class members "have all suffered a violation of the same provision of law."²⁴²

In the absence of a "single or uniform policy or practice that bridges all [of the class members'] claims,"²⁴³ the court held that class certification was inappropriate.

In BCID, because the City's emergency response services depended on coordinating the efforts of numerous agencies and programs and—per the defendants' theory of the harm—the City's alleged failures toward members of the plaintiff class manifested themselves in many different ways, Judge Furman could have interpreted the case as presenting a series of failures rather than a single common policy, reading the Wal-Mart decision as precluding certification of the plaintiff class. Instead, he construed Wal-Mart narrowly, citing to the case only for the proposition that there must be a common contention capable of class-wide resolution, then relying on an earlier case to hold that "[t]he test for commonality . . . 'is not demanding' and is met so long as there is at least one issue common to the class."²⁴⁴ Disposing of a potentially controversial issue in just a few words, Judge Furman certified the class and allowed the case to move forward.

D. How Hurricane Sandy Impacted the Case

Immediately after the class was certified, the defendants requested that the trial be adjourned, citing the ongoing impact of Hurricane Sandy on their offices and staff. "[K]ey City witnesses are completely occupied with the City's recovery efforts . . . [and] it does not serve the interests of the citizens of New York City, including members of the class, to divert these individuals from this critical work to prepare for a trial to commence in December."²⁴⁵ The court granted the defendants' request, noting that "the immediate priority of the city has to be dealing with what is going on outside of this courtroom"²⁴⁶ and moving the trial date to March 2013.²⁴⁷ Judge Furman also called on the parties to re-open discovery to permit the presentation of evidence related to the City's response to Hurricane Sandy.²⁴⁸ Although the court had initially ordered the completion of expert discovery by October 29²⁴⁹—the very day Sandy would descend on New York²⁵⁰—Judge Furman concluded that "the recent events . . . have obvious bearing on the matter to be tried"²⁵¹ and "how the plans faired [sic] and what the plans were with respect to the recent emergency would presumably be, if not the best evidence, certainly highly relevant and highly probative evidence"²⁵² for the court to consider. As the City continued to conduct its relief and emergency response efforts, it did so with the knowledge that its actions would very soon be put on trial.

As Judge Furman would later explain, Hurricane Sandy "provided a real-time test of the plaintiff's theories,"²⁵³ and real-life events made many of the statements listed in the complaint seem eerily

prescient. Months beforehand, the plaintiffs had cautioned that “[i]f evacuation and transportation from affected areas is necessary, a city must make plans for assisting those who cannot evacuate on their own. For example, persons in wheelchairs or scooters may not be able to leave their building without electricity to operate the elevators.”²⁵⁴ As stories of residents trapped in high-rise apartments in Coney Island, the Rockaways, and Red Hook began to emerge, it seemed as though the complaint had been ripped from the headlines, or the other way around.²⁵⁵

Although the underlying theory behind the case did not change as a result of Sandy, Pinover-Kupiec, one of the DRA attorneys on the case, believes that the descriptions of the horrific experiences of PWDs during Sandy made the plaintiffs’ case much stronger.²⁵⁶ Many of the plaintiffs’ stories were harrowing, and their personal experiences exposed how inadequate the City’s official disaster response had been. For instance, the testimony of Kenneth Martinez, a wheelchair user, illustrated the grave deficiencies in the City’s reliance on public transportation as a means of evacuating PWDs. When Martinez attempted to evacuate from his home in Far Rockaway, Queens—a peninsula that was one of the areas most severely impacted by Hurricane Sandy²⁵⁷—“the buses were so jammed full of people that there was no room for me in my wheelchair.”²⁵⁸ Although he waited for more buses to come, he was eventually forced to return home out of fear that the rain would cause his motorized wheelchair to “short[] out.”²⁵⁹ The following day, Martinez repeatedly called 311, the City’s general hotline for government information, but he was only able to get through after many hours—only to be told that he “should have evacuated the prior day.”²⁶⁰ Absent accessible transportation and timely evacuation assistance, Martinez became trapped in his first-floor apartment when the storm waters surged, floating up to the ceiling and narrowly avoiding a death by drowning with help from his neighbors: “It is a miracle I am alive today, no thanks to the City, which never came to help me.”²⁶¹

The plaintiffs’ attorneys submitted additional depositions and documents to bolster their case and added several named plaintiffs who had been affected by Hurricane Sandy, but doing so presented unique challenges. “The damage done by Sandy, particularly in light of the [lack of] disaster planning for PWDs, made it difficult to stay in touch with clients and to communicate with them,” explains Sid Wolinsky, the co-founder and Director of Litigation of Disability Rights Advocates.²⁶² “It was a real education for me as an attorney,” says Pinover-Kupiec. “I had never worked with people in such difficult circumstances as this.”²⁶³

E. The Trial

As seen in the parties’ briefs, evidence, and in the weeklong trial, the parties’ views on what constitutes effective emergency planning differed in several key respects. First, the defendants insisted that residents of the City are best served when emergency responders are allowed to maintain a degree of flexibility that enables them to respond quickly to the situation at hand. “[I]ndividual circumstances vary almost infinitely,” the defendants wrote, and “so too the array of appropriate and lawful responses that government may implement in order to make its program

available to a diverse community. The ADA should not require a cookie cutter approach to emergency planning, nor prescribe [sic] specific governmental responses to individual needs.”²⁶⁴ However, the defendants’ emphasis on individual circumstances and needs stood in direct contrast to the plaintiffs’ contention that PWDs as a group were disadvantaged by the City’s failure to plan for their needs.²⁶⁵ As the plaintiffs saw it, the City’s inadequate understanding of and attention to the needs of PWDs as a whole made it impossible for the City to address the needs of any specific disabled individual. A comprehensive plan would not seek to limit the flexibility of emergency responders but would instead provide a framework to help ensure that tools and strategies adequate to meet the needs of PWDs would be available.²⁶⁶

Second, the parties diverged sharply in their views of how much of the City’s overall planning should be delegated to individual agencies and non-governmental organizations. In its opening statement and throughout the trial, the City emphasized that “central to the plans and services that the City develops at every level, is developing relationships; roles, responsibilities, and relationships.”²⁶⁷ In the City’s view, the Office of Emergency Management (OEM) could fulfill its responsibility to plan in significant part by designating roles for other agencies and entities: “Emergency plans do describe actions, but even more importantly, they serve to get the right agency partners mobilized to identify and mitigate any impact.”²⁶⁸ However, in the plaintiffs’ opinion, the City relied too heavily on other agencies to carry out tasks for which the OEM was ultimately responsible, and did so with no clear understanding of how, or if, those agencies would actually meet the needs of PWDs. Nowhere was this conflict more evident than during the examination of Aaron Belisle, OEM’s Special Needs Coordinator and the sole OEM staffer whose job title specifically focused on the needs of PWDs during a disaster.²⁶⁹ Belisle was questioned by a plaintiffs’ attorney who contended that “OEM has never done a study to determine if the fire department will have the capacity, or the ability, to actually evacuate people with disabilities from their apartments in the event of a mass emergency.”²⁷⁰ Belisle responded “[t]here is not a study that I’m aware of,”²⁷¹ even while acknowledging that the Fire Department had “primary responsibility for evacuations in emergency.”²⁷² Later, Judge Furman pressed Belisle on this same point, confirming that Belisle was “not aware of any plans of the fire department or the police department or the content of any plans with respect to . . . evacuations of people with disabilities from high-rises.”²⁷³ Belisle confirmed that this was so, but seemed unperturbed by his limited knowledge, replying: “I have confidence that the fire department knows how to evacuate people”²⁷⁴ When asked about her perceptions of the trial, Susan Dooha of CIDNY would wryly remark that she “was surprised that the people who were responsible were the ones who were admitting that they basically didn’t have a clue.”²⁷⁵

Third, the parties had significantly different views about what failings could be excused by exigent circumstances. The defendants argued that “[w]here non-compliance with the overarching policy goals of the statute—access for everyone—is temporary, courts have declined to find a violation.”²⁷⁶ In the defendants’ eyes, the ADA was “not violated by temporary inaccessibility of any specific aspect of [an emergency response] program,” such as “an unexpected blackout in a high-rise . . . so long as the municipality has the necessary structure in place to ensure that the program as a whole

remains accessible.”²⁷⁷ According to the defendants, “[e]mergency managers cannot prevent unpredictable events from happening; instead, effective emergency management creates structures and processes to ensure that temporary inaccessibility in a particular aspect of the program is just that—temporary.”²⁷⁸ But the inaccessibility of the program as a whole was precisely the harm that the plaintiffs sought to challenge.²⁷⁹ In addition, in the context of emergency response efforts—services that must come within a brief window to be of any use at all—“temporary” failures effectively become permanent ones. Finally, the plaintiffs’ entire case was premised on the notion that many of the circumstances the defendants regarded as “unpredictable,” including black-outs in high-rise buildings and the resulting difficulties in evacuating PWDs, were in fact entirely predictable by people with expertise in addressing the needs of PWDs. With more effective planning, the plaintiffs argued, many of the failures of the system would not need to be “temporary” and haphazardly corrected on the fly; they could be avoided altogether.²⁸⁰

Fourth, the parties disagreed about the importance of disseminating detailed information about emergency plans and programs to PWDs and on the adequacy of 311 and 911 as providers of emergency information and services. In the defendants’ view, because 311 operators were capable of connecting PWDs to emergency services and the City consistently directed all residents in distress to call 311 for help, PWDs could readily access the programs available to them.²⁸¹ The plaintiffs, in contrast, emphasized the importance of conveying to PWDs specific information about what services were available, as such information would help PWDs access the programs they most needed and enable them to plan more effectively during times of disaster.²⁸² In her declaration, named plaintiff Joyce Delarosa stated that she had called 911, 311, and the Mayor’s Office for People With Disabilities in an effort to find out “what the emergency plans were for people who use wheelchairs.”²⁸³ Neither the 911 operator nor 311 operator had information about any such plans, and she “was never able to make contact with anyone [at the Mayor’s Office for People With Disabilities].”²⁸⁴ Another witness for the plaintiffs testified that she was unfamiliar with the Homebound Evacuation Operation (HEO)—the City’s sole evacuation mechanism for PWDs—and was not aware of anyone who had successfully been evacuated by calling 311.²⁸⁵ During the plaintiffs’ opening statement, plaintiffs’ counsel emphasized that “the City is not telling people about this [HEO] program. This program will only respond to individualized requests for assistance. . . . As a result . . . this program has served fewer than 300 people in the last two hurricanes combined.”²⁸⁶ Without greater transparency, increased capacity, and a systemic rather than case-by-case approach, the plaintiffs argued, PWDs would not know about or know to seek out evacuation services. Thus, the City’s evacuation program could not be construed as adequate to meet the needs of PWDs.

Fifth, the trial demonstrated the parties’ vastly different perceptions of the baseline level of accessibility faced by PWDs in non-emergency situations—and therefore, the extent to which everyday systems could be relied upon to meet the needs of PWDs in an emergency. A main point of contention was the City’s reliance on public transportation as a means to evacuate PWDs. An attorney for the City pressed an expert witness for the plaintiffs whose testimony suggested that over eighty percent of the subway system was inaccessible. “[W]hat you mean is that a certain

percentage of the stations are inaccessible; that doesn't necessarily mean that the system is inaccessible to people . . . in a wheelchair,"²⁸⁷ the attorney concluded. The expert later explained that "[w]hen you're used to navigating a system that only has very partial access, you know those routes. But when some of those routes may no longer be usable, you can be extremely lost in being able to navigate the system."²⁸⁸ The expert also explained that City buses, though accessible under ordinary circumstances, were only accessible if non-disabled passengers made room for wheelchair users—a social norm that could not be relied upon "in an emergency, when the weather is inclement, when there's a lot of rush and stress going on, [and] that etiquette that you can sometimes count on degrades."²⁸⁹ The testimony underscored the risks of expecting PWDs like Kenneth Martinez and the plaintiffs' expert to be able to evacuate using the public transportation system when the vast majority of that system is inaccessible. "I will never probably in my lifetime have the same access to that system that you [non-disabled people] have,"²⁹⁰ the expert explained. Finally, the parties disagreed about the significance of the new practices the City had adopted in response to Hurricane Sandy. Wishing to be credited for the innovative measures the City had undertaken during the post-Sandy relief efforts and the new protocols developed along the way, the defendants rejected what they perceived as the plaintiffs' desire to "freeze planning at some arbitrary date."²⁹¹ "[D]isaster planning does not and cannot stand still,"²⁹² the defendants argued. "The evidence will show that disaster planning is always a work in progress. Plans and planning are never finished."²⁹³ The plaintiffs, however, were unimpressed by the City's innovations, many of which had been adopted only after Hurricane Sandy. As Pinover-Kupiec explains, "[T]he defendants were pointing to all of [these programs] that we thought were very limited in scope. . . . We're not saying those [new initiatives] are bad, we're saying they're not good enough. . . . This [case] is about the City's underlying planning."²⁹⁴ In the plaintiffs' eyes, each new program only further underscored how ill-prepared the defendants' initial plans had been.

V. the ruling and settlement

Almost one year to the day after Hurricane Sandy, Judge Furman issued a decision finding that the City of New York's emergency plans and procedures failed to comply with the requirements of the Americans with Disabilities Act, the Rehabilitation Act, and the New York City Human Rights Law.²⁹⁵ Acknowledging the "Herculean task" that the City faced in planning for and responding to emergencies and disasters and the City's extensive efforts to meet the needs of all residents in times of disaster, Judge Furman found that "the City's plans are inadequate to ensure that people with disabilities are able to evacuate before or during an emergency; they fail to provide sufficiently accessible shelters; and they do not sufficiently inform people with disabilities of the availability and location of accessible emergency services."²⁹⁶ Though Judge Furman found "no evidence that these failures are a result of intentional discrimination by the City against people with disabilities," he emphasized that "the ADA, the Rehabilitation Act, and the NYCHRL seek to prevent not only

intentional discrimination against people with disabilities, but also—indeed, primarily—discrimination that results from ‘benign neglect.’”²⁹⁷

The decision echoed the ruling in the CALIF case in finding that the City had “fail[ed] to provide people with disabilities meaningful access to its emergency preparedness program.”²⁹⁸ But the BCID ruling went much further, specifying the precise ways in which the City had failed to provide meaningful access to PWDs. Stressing that the City was required to provide emergency services to disabled and non-disabled people on an equal basis, the court found that the City had failed to provide meaningful access to PWDs with regard to evacuation plans, shelter plans, canvassing strategies, post-disaster resource distribution, outreach and education regarding personal emergency planning, and communication regarding the availability of accessible emergency services.²⁹⁹

Not content to leave the ruling at this level of generality, the decision carefully explored each area of lack, identifying specific needs and avenues for improvement. These detailed lists will provide direction to the City as it endeavors to bring its program into compliance, and serve as a powerful tool for advocates seeking reforms in other cities. With regard to emergency shelter, for instance, the court found:

At a minimum, to provide people with disabilities meaningful access to the City’s shelter system, the City’s evacuation centers must be accessible to people with disabilities; a sufficient number of shelters to accommodate people with disabilities must also be accessible; and the City must be able to identify which shelters are, in fact, accessible.³⁰⁰

The court took pains to define accessibility within the meaning of the ADA, rejecting the City’s contention that shelters had met the mandates of the ADA and the RA if shelter entrances could be made “usable”³⁰¹ through ad hoc modifications. “[T]he City must do more than ensure that the buildings in which it locates its shelters are physically accessible,” Judge Furman wrote. “[I]t must ensure that the services offered therein are also accessible.”³⁰² Plaintiffs’ access to the City’s sheltering plans could be meaningful only if the City “ensure[d] effective communication with people with disabilities”³⁰³ in the shelters, including through sign language communication and Braille signage, and provided access to electricity for users of, for instance, ventilators and power wheelchairs.³⁰⁴ The court also rejected the notion that the City could discharge its obligation to provide accessible shelter to PWDs by maintaining special medical needs shelters (SMNSs), finding that “the City may not limit its accommodations of people with disabilities to SMNSs. Instead, those who are able to stay in general shelters must be accommodated there.”³⁰⁵

With regard to evacuation, Judge Furman found that the City’s plans “fail almost entirely to address the needs of people with disabilities during an evacuation of a multi-story building,”³⁰⁶ and instead “assume that people will be able to exit their buildings unassisted and that they will evacuate using public transit.”³⁰⁷ Because these plans did not comprehend that “[p]eople with disabilities may require assistance evacuating their buildings and accessible public transportation in order to reach an evacuation center,” the plans were inadequate.³⁰⁸ In particular, Judge Furman faulted the City for

its failure to account for the fact that most public transportation is inaccessible to PWDs, and for its failure to ensure that paratransit services will be available for PWDs during an emergency.³⁰⁹ Nor was the City's Homebound Evacuation Operation (HEO) sufficient: although the HEO had been adequate to fulfill the requests for evacuation assistance that the City received during Hurricanes Irene and Sandy,³¹⁰ Judge Furman concluded that the evidence had failed to establish that the HEO program would be sufficient to meet the needs of PWDs if they were better informed about the program: "It is difficult to know how many more people would have requested the assistance of the HEO during Hurricanes Irene and Sandy if they had known that it was available, or whether the Operation would have been able to accommodate an increase in requests."³¹¹

The ruling highlighted that people with disabilities are entitled to equal access to emergency services—but nothing more.³¹² This may explain why the court declined to adopt the plaintiffs' framework, which would have required the City's emergency preparedness plans to meet the nine essential components that the CALIF court had enumerated.³¹³ Instead, Judge Furman hewed closely to the City's existing framework for emergency services, finding fault only where the program in place at the time failed to account for the needs of PWDs. For example, the court rejected the plaintiffs' argument that the City's advice that all people be prepared to shelter in place for three days after an emergency disproportionately burdened PWDs, despite evidence that PWDs were less likely to be able to survive for such a period.

[T]he City's plans provide that, where possible, evacuation will take place before an emergency, and that in an emergency without notice, evacuation and life safety measures will take place as soon as possible thereafter. The City's recommendation that people be prepared to shelter in place for up to seventy-two hours is simply personal preparedness advice Such guidance cannot in and of itself disproportionately burden people with disabilities.³¹⁴

Likewise, the court found that "[b]ecause the City does not plan for interim housing for anyone, the ADA does not require that it do so specifically for people with disabilities."³¹⁵ Significantly, the court applied this same comparator group rationale in concluding that PWDs were not entitled to participate in formulating the City's emergency plans. "Plaintiffs . . . have not alleged—let alone demonstrated—that people with disabilities are denied an opportunity to participate in the planning process that those without disabilities are given [so] the ADA does not mandate that the City involve people with disabilities" ³¹⁶

However, within the boundaries of the equal access framework, the court took an expansive view of the meaning of access. For instance, the court faulted the City's plans for their failure to "call for canvassing after an emergency, to help ensure that the services provided to people without disabilities may reach those with disabilities who are unable to leave their buildings."³¹⁷ Rather than describing post-disaster canvassing as a necessary service in its own right, the court emphasized that canvassing efforts were needed to ensure that PWDs would receive the same services as non-disabled people.³¹⁸ But post-disaster canvassing for PWDs who remain trapped in their apartments is most effective where it is implemented immediately, with the aim of reaching people before they become desperate for food, water, and medical services. For PWDs with accessible transportation

and sheltering options, canvassing and evacuation assistance might be the only emergency service required, not a means of connecting to additional services. In light of this, the court might have construed canvassing and individualized high-rise evacuation as separate services—ones not required by or provided to able-bodied individuals, and therefore services that could, on an equal basis, be denied to PWDs. Instead, the court took a broad view of emergency services, recognizing that the emergency program would exclude PWDs absent reasonable modifications to meet their unique needs.³¹⁹

All in all, the decision represented a searing indictment of the City’s treatment of PWDs during disasters. “[E]ven if . . . people with disabilities are included in the City’s planning process,” Judge Furman wrote, “such inclusion does not remedy the failure of the emergency plans themselves to adequately accommodate people with special needs.”³²⁰ Mere tokenism would not satisfy the ADA; the City could not put off the concerns of PWDs by pointing to the occasional involvement in planning of a person with a disability. Instead, the plans would have to stand or fall on their own terms—terms that the plaintiffs, Disability Rights Advocates, and the BCID ruling helped to forever redefine. Having found that the City violated the ADA, RA, and NYCHRL, the court directed the parties to discuss potential remedies for the violations, noting that a remedy would be better accomplished by those with expertise in such matters than by court order.³²¹

Over the course of the next year, the parties worked to reach a settlement that would address the many inadequacies identified by the court, and the parties submitted a joint stipulation of settlement to the court in September 2014. The settlement includes seven separate Memoranda of Understanding (MOUs), which address the City’s plans for emergency communications, high-rise evacuation, accessible transportation, sheltering, power outages, and canvassing.³²² The memoranda also require the City to create a high-level position within the Office of Emergency Management to address the specific needs of PWDs,³²³ as well as a Disability Advisory Community Panel to provide continuous feedback on the City’s emergency plans for PWDs.³²⁴

Taken together, these memoranda create a comprehensive plan that aims to fully integrate the needs of PWDs into all of the City’s critical emergency functions, while reserving a significant role for the plaintiffs in crafting and implementing the City’s plans. For example, the MOU for high-rise evacuation requires the Fire Department to convene and coordinate a task force to develop a plan for high-rise evacuation over the course of the next year.³²⁵ The task force will include stakeholders from relevant City agencies, as well as outsiders—including one chosen by the plaintiffs—with expertise in the needs of PWDs in emergency preparedness and response.³²⁶ The MOU requires that the City’s 311 program—recently updated to allow users to use natural language to get connected to the resources and information they seek—will be coded to “allow a customer to speak ‘disability evacuation’ or ‘homebound evacuation operation,’ or any other combination of designated words . . . [in order to] be routed to a pool of dedicated specialists (who have training with respect to working with people with disabilities and evacuation protocols).”³²⁷ The MOU also describes the City’s intent to increase the capabilities of the 311 system to be able to handle additional callers in the event of an emergency.³²⁸ Once these changes are in place, PWDs seeking assistance will not have to call 311 for hours on end, only to be connected to people with no knowledge of evacuation

and other forms of assistance unique to PWDs. Instead, callers will be able to use their own words to be routed to people specially trained to help meet their needs.

The settlement also requires the City to create a Post-Emergency Canvassing Operation plan, which “will detail the specific operational steps to be taken by the City agencies in the event of an emergency.”³²⁹ This will end the City’s practice of delegating responsibilities to agencies like the FDNY and NYPD with no real apparatus for direction or oversight. Instead, the City will establish a new task force charged with creating a robust canvassing plan and reconvening during emergencies to implement it.³³⁰ Importantly, members of this task force will be required to receive training in disability literacy, as will City staffers designated to provide on-the-ground tactical management during future emergencies.³³¹ The MOU also details tools that must be provided to canvassing teams sent to impacted neighborhoods, explains that data collected by canvassers must be organized in a central database for the purpose of making referrals, and specifies that the information collected must include disability data.³³² Together, these provisions will help ensure that future post-disaster canvassing efforts will not be “haphazard and belated,”³³³ but carefully planned and coordinated.

The settlement establishes similar benchmarks for the City’s transportation and sheltering systems. The plans require the City to create an inventory of City-owned vehicles with accessible features that may be available for use during an emergency, and to conduct a needs analysis that will estimate future demand for such vehicles.³³⁴ The MOU also requires that the City work closely with a variety of other agencies, including the Metropolitan Transit Authority and New York City Housing Authority, to develop transportation and evacuation plans that address the needs of PWDs.³³⁵ The MOU stipulates: “As with all of the City’s emergency plans, the planning documents will define roles and responsibilities and include strategies for decision-making and criteria for implementation, including identifying areas of high need”³³⁶ The parties’ agreement also seeks to ensure that PWDs will be made aware of their options, committing the City to providing “clear and accurate messaging to the disability community about accessible transportation options available during pre-storm or forewarned evacuations, and how and where to access them.”³³⁷

Similarly, the agreement requires that the City conduct a needs analysis to determine the number of City shelters that are currently accessible to PWDs and to estimate the number of facilities that will need to be added to meet the level of demand likely to arise in a future emergency.³³⁸ By 2017, the City will be required to identify or create a minimum of sixty accessible facilities capable of sheltering up to 120,000 PWDs.³³⁹ Importantly, the City must publicly disseminate information about the location of accessible shelters and keep clear internal records of the accessible features at each facility for the purpose of answering questions from members of the public.³⁴⁰ No longer will PWDs be forced to choose between being stranded at home and evacuating to a shelter where basic services may be lacking. If the City meets the obligations of the settlement, PWDs will be able to make informed decisions and evacuate to emergency shelters ready to meet their needs.

In the months after the parties submitted the proposed settlement to the court, members of the class had an opportunity to submit written objections³⁴¹—but not one did. Sid Wolinsky of DRA explains that the absence of formal objections “is rare. Given the size of the class, which numbers in the

hundreds of thousands, and the complexity and reach of the remedy—it does speak a lot that . . . not a single objection [was] filed.”³⁴² But the settlement had one final hurdle to clear: Judge Furman. Rule 23 provides that a class action lawsuit may be settled only if the court approves the settlement as fair, reasonable, and adequate.³⁴³ This form of judicial review of a settlement is a unique feature of class action lawsuits, one that is designed to protect the interests of the class and “is particularly important in injunctive relief litigation brought on behalf of marginalized populations, [where the class members] might find the notion of participating in federal litigation particularly hard to grasp.”³⁴⁴

At the fairness hearing in February 2015, Judge Furman declined to approve the settlement.³⁴⁵ Underscoring that the “rest of the settlement is both impressive and important,”³⁴⁶ Judge Furman expressed concerns about the memorandum of understanding that addressed high-rise evacuation, as that MOU alone established a process by which the City would develop a high-rise evacuation plan, rather than detailing the required elements of the plan itself.³⁴⁷ Since the MOU required only that the City engage in a process of developing recommendations, Judge Furman noted, it was unclear if the court possessed the power to order any remedy other than further process³⁴⁸—even though ordering more of the same defective process would be unlikely to yield different results. Questioning whether the MOU adequately addressed the liability issues identified in the court’s ruling, Judge Furman expressed his concern that deferring the details of the plan to a later date was tantamount to “kicking the can down the road.”³⁴⁹ Sid Wolinsky of DRA explained that the parties needed time to develop a high-rise evacuation plan because “there is no city in America that has a satisfactory high-rise evacuation plan for people with disabilities,” so DRA did not have a model plan at the ready.³⁵⁰ It was for this reason, said Wolinsky, that the settlement extended the court’s jurisdiction over this issue to 2018.³⁵¹ But Judge Furman was not satisfied, and he adjourned the hearing without approving the settlement.³⁵²

The parties may well have been surprised by Judge Furman’s reluctance to approve the settlement; in October 2014, Judge Furman had granted the plaintiffs’ request to enter the MOUs between the parties as an order subject to modification after a fairness hearing,³⁵³ finding that “[t]he seven MOUs lay out in detail concrete steps that Defendants will take in planning for, and responding to, emergencies and disasters to better accommodate [PWDs].”³⁵⁴ Months later and just four days before the fairness hearing, Judge Furman requested that the parties be prepared to address the adequacy of the high-rise evacuation MOU,³⁵⁵ making its lack of specificity a focal point of that hearing and withholding approval of the settlement pending further briefing on the matter.³⁵⁶ Judge Furman requested that the parties address the extent of the court’s authority “to craft and impose its own remedies” if the task force failed to develop recommendations as required by the MOU.³⁵⁷ Perhaps signaling the extent of his concern with the MOU, Judge Furman also requested that the parties discuss “[w]hether the Court has the authority under Federal Rule of Civil Procedure 23 to approve only part of the Settlement Agreement or whether the Settlement Agreement must stand or fall as a whole.”³⁵⁸ In asking these questions, Judge Furman may well have worried that the promise of a plan without more specific requirements about its content would be an empty victory, as had been the case for the disabled children who sued their school to ensure their needs would be met in

an emergency, only to be left behind pursuant to the resulting plan.³⁵⁹ “[T]hese are important issues and [it’s] better to get them right than to get it done prematurely,” Judge Furman concluded.³⁶⁰ In their letters to the court, the parties disagreed about the appropriate course of action in the event of the City’s failure to meet the requirements of the high-rise evacuation MOU. The plaintiffs emphasized the Court’s broad equitable powers upon a motion for enforcement or contempt, underscoring that the court would be empowered to “tak[e] ‘any reasonable action’ to secure compliance, including imposing its own remedial measures.”³⁶¹ In contrast, though the defendants acknowledged the court’s “broad authority to issue an injunction to remedy the violations identified in [its] opinion,”³⁶² the defendants urged that the court “refrain from adding to or modifying the terms of the Settlement Agreement itself”³⁶³ in the event of a default, and instead do no more than “direct the Task Force to take further action in order to achieve the requirements that are set forth in the Settlement Agreement.”³⁶⁴ Despite this critical difference, the parties agreed on one issue: in their view, the court lacked the power to approve the settlement in part. Judge Furman would need to approve the settlement in its entirety or not at all.³⁶⁵

When the parties returned to court in March 2015, Judge Furman made it a point to clarify that in the event of a default, the court would be empowered not only to enforce the remedial contractual terms agreed upon by the parties—in particular, development of recommendations by the high-rise evacuation taskforce—but, if necessary, to issue an injunction to impose alternate means of remedying the violations identified in the court’s opinion.³⁶⁶ Leaving nothing to chance, Judge Furman asked the parties to confirm on the record that the court would have the authority (1) to craft its own remedies “if I ultimately determine that [ordering the task force to develop recommendations] is not effective or futile”;³⁶⁷ (2) to evaluate and decide whether the recommendations developed by the task force adequately “address the existing gaps in New York City’s highrise building evacuation plans” that had been identified by the court, and to order the promulgation of new recommendations or craft other remedies if not;³⁶⁸ and, finally, (3) to direct the City to implement any recommendations that the court found to be “reasonable and achievable,” if the City had refused to do so.³⁶⁹ After the parties affirmed the court’s understanding of the nature and extent of its authority, Judge Furman was ready to approve the settlement. “The fact that we needed to delay the liability trial in this very case because of Hurricane Sandy makes it starkly clear that an emergency can occur at any time,” Judge Furman stated, and the plaintiffs would not be well-served by further delay.³⁷⁰ Noting his ongoing concerns about the high-rise evacuation MOU but concluding that the complexity and novelty of the issue precluded speedy resolution,³⁷¹ Judge Furman approved the settlement in its entirety.³⁷² “I promise you that I will closely monitor the progress of the task force and the implementation of any recommendations,”³⁷³ Judge Furman stated. But “my reservations . . . notwithstanding, . . . the settlement is ‘nothing short of remarkable.’”³⁷⁴ “I have little doubt that this settlement will serve as a model for municipalities nationwide, and, frankly, that all Americans, not just those with disabilities, will be the better for it.”³⁷⁵

Conclusion: Raising Up The Right To Be Rescued: The Significance And Promise Of bcid
Disasters are becoming more and more frequent. As our society confronts more emergencies that test the limits of our capabilities, tough decisions will lie ahead. Although popular media accounts sometimes insist that “[a] tenet of natural disasters is that they choose their victims capriciously and without remorse,”³⁷⁶ the truth is far more disturbing—we choose our victims by failing to accommodate their needs. BCID v. Bloomberg, like the disability rights statutes upon which it is based, serves as a reminder that we cannot settle for what is good enough for most of us if doing so leaves some of us behind. Challenging ourselves to remember that all members of society should have access to opportunities regardless of the impairments we may face may be the most difficult in moments of crisis; it is also no less important then.

BCID is the second ruling to find a right to be rescued under the ADA and the RA: the right of PWDs to equally access any emergency services provided to non-disabled individuals. As Sid Wolinsky of DRA explains, BCID “builds on the CALIF case, but . . . is of far greater significance now than the California case,”³⁷⁷ in part because the BCID ruling resulted from a full trial on the merits. This “brought out a lot more material and a lot more detail . . . [A]fter a judge has had the opportunity to review that sort of record, the decision ends up with more weight.”³⁷⁸ The BCID ruling and the parties’ negotiated settlement agreement are the first to set forth detailed, comprehensive explanations of the manner in which emergency plans must be modified to meet the ADA’s and the RA’s requirement of “meaningful access” for PWDs, and the plans resulting from the settlement “are the most comprehensive disability disaster plans that now exist in the country.”³⁷⁹ As such, the BCID ruling and settlement agreement provide powerful tools for disability rights groups seeking to spur negotiations or file lawsuits to secure the right to be rescued in other jurisdictions. DRA has begun distributing checklists to community groups across the country that describe how to identify and address deficiencies in emergency plans for PWDs,³⁸⁰ and just as the CALIF case served as a model and inspiration for the BCID ruling, now both cases will help fuel the momentum for further reform. Indeed, in the fall of 2014, a coalition of disability rights advocates filed a legal challenge to the adequacy of Washington, D.C.’s emergency plans,³⁸¹ and as of this writing, the parties have agreed to pursue a comprehensive settlement of the dispute.³⁸²

Although the intervention of Hurricane Sandy at a critical juncture makes the story behind this case unusually dramatic, the legal arguments put forward in BCID are easily replicable. The crux of the plaintiffs’ argument was not the stories of suffering post-Sandy; instead, the plaintiffs successfully argued that the City’s failure to provide an adequate emergency plan that expressly included PWDs was the harm. Because of this, advocates for people with disabilities need little more than a bad emergency plan to begin working toward a better one; they need not, and should not, wait for the next disaster to strike before making these moves. By the same token, local governments should heed the lessons of these cases and foster genuine partnerships with PWDs to address shortfalls in disaster planning before further lawsuits arise. After all, says Susan Dooha of CIDNY, advocates now “know that if they cannot persuade people[,] . . . they too can go to court[] and . . . won’t have

to wait as long as we did.”³⁸³ Dooha hopes that “by letting people know about the decision in New York . . . we will be able to accelerate the process of inclusion in other jurisdictions”³⁸⁴ The story of the BCID case illustrates several important principles that must guide emergency planning for PWDs. First, there must be detailed plans that anticipate the needs of PWDs and outline clear strategies for meeting those needs. Where hundreds of thousands of people are at risk and a disaster has further compromised the already-limited transportation, communication, and sheltering options available to PWDs, on-the-fly solutions are almost certain to fail. In BCID, for instance, the court noted that the City’s canvassing efforts to identify people who needed assistance in the days after Sandy were not undertaken pursuant to any plan, and “although the City was able to marshal substantial resources and reach a large number of people, its efforts were haphazard and belated.”³⁸⁵ Even if successful, improvised efforts are not a guarantee of future success; absent any written guidance, “there is no way to know whether or how the City will attempt to make inaccessible [programs] usable for people with disabilities in the future.”³⁸⁶ Echoing a point that Disability Rights Advocates, the National Council on Disability,³⁸⁷ and countless other disability rights organizations have emphasized for years, the court held that “the needs of people with disabilities . . . [can] only be accommodated through advance planning.”³⁸⁸ Significantly, the court found that “ad hoc accommodations ‘are both legally inadequate and practically unrealistic.’”³⁸⁹ Second, cities must provide effective, detailed communication with people with disabilities before, during, and after emergency events. As the BCID ruling explained, “[p]ersonal preparedness is indisputably an important component of emergency planning,”³⁹⁰ but “[w]ithout any information on accessible evacuation centers or transportation, people with disabilities cannot make [an adequate emergency] plan.”³⁹¹ During Hurricane Sandy, the City failed to provide sufficient information to PWDs³⁹² and even gave incorrect information to PWDs in a manner likely to discourage them from making use of emergency services.³⁹³ Incomplete or inaccurate information was not merely bad practice; the ruling emphasized that “[t]he ADA prohibits the provision of such an unequal opportunity to plan.”³⁹⁴

Third, cities should enlist outside experts to assist with modifications to emergency plans. Although doing so requires both institutional humility and added expense, the alternative is to rely on the very professionals and agency insiders whose decisions have long disregarded the needs of PWDs. Admitting that emergency plans may need a fresh set of eyes need not suggest that any past discrimination was intentional; instead, it is an acknowledgment of the challenging nature of planning for PWDs in times of extraordinary crisis. Both the BCID and CALIF courts required the defendants to enlist outside experts, and it is likely that future courts faced with such cases will do the same.

Fourth, PWDs must be allowed to meaningfully participate in emergency planning processes. As Paul Timmons of Portlight Strategies³⁹⁵ explains, “There’s a saying within the movement, nothing about us without us. Within the emergency management rubric, almost everything about us has been without us . . . [and] therein lies the problem.”³⁹⁶ In BCID, the court found that because non-

disabled people had no right to participate in emergency planning, “the ADA does not mandate that the City involve people with disabilities in the formulation of its emergency preparedness program [either]; instead, it requires only that they have meaningful access to that program.”³⁹⁷ While the law may not require cities to involve PWDs in emergency planning—and this is a point that is likely to continue to be debated in subsequent cases—such involvement can help to foster more positive collaboration between city agencies and the disability rights organizations and individuals the city must serve. Because centers for independent living (CILs)—cross-disability, community-based entities that serve PWDs and exist in every state³⁹⁸—are required by the Rehabilitation Act to be designed, operated, and majority-governed by PWDs,³⁹⁹ partnering with such entities will enable government agencies to collaborate⁴⁰⁰ with individuals whose expertise in disability justice stems both from experience as service providers,⁴⁰¹ and from lived experience as PWDs. The failures that the City of New York described as “unforeseeable” in the aftermath of Sandy were entirely foreseeable to, and feared by, the disability community; indeed, those anticipated failures were the impetus of the lawsuit itself. Leveraging years of experience and community building among PWDs, disability rights groups can help make sure that emergency plans are comprehensive and practical and that PWDs can connect to the resources they need. At the same time, such partnerships between government agencies and CILs can bring to bear the significant governmental resources necessary to notify and meet the needs of PWDs in crisis—resources that few CILs may possess on their own.⁴⁰²

The story of BCID teaches one final lesson: we should not rely on lawsuits to motivate us to do what is right. To be sure, BCID is a powerful example of how class action lawsuits can serve as tools to enable marginalized people to be involved in the processes most affecting their lives; absent this case, it is doubtful that the City would have ever collaborated with the plaintiffs to bring about meaningful programmatic reforms. At the same time, the case demonstrates how all too often, litigation serves to drive home lessons a willing listener could have learned long ago. For years, members of the Office of Emergency Management’s Special Needs Advisory Group, including several of the BCID plaintiffs, had warned the City that people with mobility and other disabilities could not self-evacuate from high-rise buildings if elevators were out of service; that many public schools, which were used as emergency shelters, were inaccessible to PWDs; and that the public transportation system could not evaluate PWDs en masse, since it was largely inaccessible to PWDs.⁴⁰³ City officials did not listen; it took a class action lawsuit to make it do so. Had it engaged in serious negotiations with the plaintiffs earlier on and shown greater deference to their expertise on the needs of PWDs, the litigation could have been avoided and the parties could have gotten down to the business of crafting solutions much sooner.

The task of listening to marginalized people is not that of city agencies or federal judges alone—court orders cannot take the place of our own consciences. We must all continue to combat prejudice against people with disabilities outside of the courtroom, taking responsibility for meeting everyone’s needs in times of disaster and in those of lesser crisis. While the law may serve

to concretize and remind us of our obligations to each other, in the end, it is up to us to ensure that no one is left behind when the next storms come.