UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

YANAHIT PADILLA TORRES, *et al.*, Plaintiffs, -against- THE CITY OF NEW YORK, *et al.*, Defendants.	Civil Action No. 13-CV-0076 (MKB) (RER)

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA
REGARDING DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] in order to articulate the proper scope and application of the national origin nondiscrimination protections of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d through 2000d-7 ("Title VI"), and its implementing regulations, 28 C.F.R. Part 42, Subpart C; and to set out the circumstances under which private plaintiffs can bring intentional discrimination claims under Title VI involving the failure by recipients of federal funds to provide language assistance services to limited English proficient ("LEP") individuals.[2] This Statement of Interest is submitted because the United States has a critical interest in ensuring that recipients of federal financial assistance, such as Defendants City of New York and the New York City Police Department ("NYPD"), provide LEP individuals nondiscriminatory and meaningful access to police services, pursuant to Title VI's statutory and regulatory prohibitions against national origin discrimination and in accordance with binding legal obligations as recipients of federal funds.

In this Statement of Interest, the United States respectfully submits that the Plaintiffs have sufficiently alleged intentional national origin discrimination to survive a motion to dismiss. Defendants have moved to dismiss, incorrectly arguing that the prohibition against national origin discrimination contained in Title VI does not include protections for individuals

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

[2] The nondiscrimination provision of the Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act") prohibits national origin discrimination by recipients of Department of Justice federal funds in the same manner as Title VI. 42 U.S.C. § 3789d(c)(1). Thus, the analysis of the standard for intentional national origin discrimination presented in this Statement of Interest applies to the Safe Streets Act as well.

who are subject to discrimination based on their limited English proficiency. To the contrary, as set forth below, longstanding Executive agency regulations interpreting Title VI's statutory commands and federal judicial precedent have clearly established that national origin discrimination under Title VI includes language-based discrimination.

BACKGROUND

Plaintiffs in this action are six victims of domestic violence and the Violence Intervention Program ("VIP"). According to the Second Amended Complaint, the six domestic violence victims are LEP, meaning that their primary language is not English and that they are limited in their ability to speak, read, write, and understand English. (ECF No. 33, Second Am. Compl. ¶¶ 46, 74, 99, 122, 136, 161.) Plaintiff VIP is a non-profit organization that "aims to remedy and to prevent violence against women." (*Id.* ¶ 186.) VIP provides a full range of services, including counseling, residential accommodations, and child care. (*Id.*) The majority of VIP's clients are Spanish-speaking women with limited English proficiency. (*Id.* ¶ 187.)

Plaintiffs allege that the NYPD and its staff refuse to communicate in Spanish with LEP Spanish-speaking victims of domestic violence through bilingual officers, qualified interpreters, and/or translated documents and information. (*Id.* ¶¶ 3, 93, 104, 128, 152.) They assert that the NYPD's denial of interpreter services has deprived the individual plaintiffs of their "right to report crimes, to protect themselves from dangerous abusers, and to communicate effectively" with the NYPD. (*Id.* ¶ 3.) Plaintiffs further allege that the NYPD has arrested LEP victims of domestic violence who could not communicate effectively with the police, relying instead on the reports of English proficient abusers. (*Id.* ¶ 4.) Plaintiffs claim that the NYPD even ridicules

and mistreats LEP individuals who request interpreter services and demeans them for their lack of English proficiency.[3] (*Id.*)

Plaintiffs further assert that the United States Department of Justice ("DOJ") placed the NYPD on notice of its obligations to provide meaningful access to police programs and activities (*see id.* ¶¶ 39, 42), but that the NYPD routinely failed to provide language assistance services and has denied LEP individuals meaningful access and the ability to effectively communicate and participate in NYPD programs and activities. (*See id.* ¶¶ 42-44.) These actions and inactions, Plaintiffs allege, constitute intentional national origin discrimination in violation of Title VI and the Safe Streets Act. (*See id.* ¶¶ 194-203.)

Defendants have moved to dismiss Plaintiffs' Title VI and Safe Streets Act claims. In their motion, Defendants contend that the alleged remarks and behavior, and indeed, intentional discrimination against LEP individuals by recipients of federal funds, do not constitute national origin discrimination. (*See* Mem. of Law in Support of Defendants' Mot. to Dismiss the Second Am. Compl. ("Defs. Mem.") at 1, 8.) As explained herein, that contention is mistaken.

ARGUMENT

This Statement of Interest addresses two areas of Title VI interpretation raised by Defendants' motion to dismiss. First, as discussed in Section A below, and contrary to Defendants' contention, federal agency regulations interpreting the commands of Title VI, decades of consistent interpretation of those regulations by DOJ, and well-established judicial precedent make clear that language-based discrimination constitutes a form of national origin

[3] In one alleged incident, a Plaintiff asked, in Spanish, if an NYPD officer spoke Spanish, to which the officer allegedly replied, "Oh si, si hablo espanol. Gol! Gol! Mexico! Vamos Mexico! Chicharito!" which means in English, "Oh yeah, I speak Spanish. Goal! Goal! Mexico! Let's go Mexico! (Chicharito is the name of a Mexican soccer player.)" (Second Am. Compl. ¶ 88.) Another plaintiff alleges that when she asked an NYPD officer for someone who spoke Spanish, the officer responded by allegedly saying, in sum and substance, "This is America, you have to speak English." (*Id.* ¶ 143.)

discrimination prohibited by Title VI. Second, as discussed in Section B, the NYPD, as a recipient of federal financial assistance, is not only legally required to provide language assistance services to such individuals, but has been on notice of this obligation and of the harm associated with failing to meet this obligation based on years of agency guidance, signed contractual assurances, and a DOJ compliance review.

A. Language-Based Discrimination Constitutes a Form of National Origin Discrimination Prohibited by Title VI

1. DOJ and Other Federal Agencies Have Consistently Found that Language-Based Discrimination Constitutes a Form of National Origin Discrimination

Title VI—which was enacted as part of the landmark Civil Rights Act of 1964—provides, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. For over 40 years, federal agencies have interpreted Title VI's prohibition against national origin discrimination to require that LEP individuals have meaningful access to federally funded programs and activities. *See, e.g.*, Dep't of Health, Education, and Welfare, Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970) ("Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.").

By executive order, DOJ is responsible for coordinating federal agency Title VI compliance and enforcement. *See* Executive Order No. 12250, Leadership and Coordination of Nondiscrimination Laws, 45 Fed. Reg. 72,995 (Nov. 2 1980) ("Exec. Order No. 12250"); *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1124 (6th Cir. 1996); *see also* 28 C.F.R. § 42.401

("In accord with the authority granted the Attorney General under Executive Order 12250, this subpart shall govern the respective obligations of federal agencies regarding enforcement of title VI."); 28 C.F.R. § 50.3 (setting forth guidelines for federal agencies to follow in their enforcement of Title VI). In accordance with DOJ's Title VI compliance and enforcement responsibilities, it has provided written policy guidance to federal agencies regarding "compliance standards" that recipients of federal funds must follow to ensure that the programs and activities they provide in English are accessible to LEP persons and thus do not discriminate on the basis of national origin in violation of Title VI and its implementing regulations. *See* DOJ Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons With Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123 (Aug. 16, 2000) ("Policy Guidance") ("This policy directive concerning the enforcement of Title VI . . . is being issued pursuant to the authority granted by Executive Order No. 12250 and Department of Justice regulations."); *see also* Executive Order No. 13166, Improving Access to Services for Persons with Limited English Proficiency, 65 Fed. Reg. 50,121 (Aug. 16, 2000) ("Exec. Order No. 13166") (directing that each federal agency's guidance documents be consistent with the compliance standards and framework detailed in the Policy Guidance to agencies).

DOJ's Policy Guidance to federal agencies explains that Title VI and its regulations require recipients of federal funds to ensure that LEP individuals have "meaningful access" to the "information and services they provide." 65 Fed. Reg. at 50,124. The Guidance further makes clear that a recipient is engaged in national origin discrimination when it fails to provide adequate language assistance services to an LEP individual. *See* 65 Fed. Reg. 50,124 (citing *Lau v. Nichols*, 414 U.S. 563 (1974)); *see also Nat'l Multi Housing Council v. Jackson*, 539 F. Supp. 2d 425, 430 (D.D.C. 2008) ("Longstanding Justice Department regulations also expressly require

communication between funding recipients and program beneficiaries in languages other than English to ensure Title VI compliance.").

Further, DOJ's more specific guidance to recipients of funds from DOJ followed this general Policy Guidance, and served as a model for other federal agencies. *See* DOJ Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002) ("DOJ LEP Guidance"). As made clear in that Guidance, language assistance services are meaningful when they are "provided at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or delay in important rights, benefits, or services to the LEP person." DOJ LEP Guidance at 41,461; *see also, Alexander v. Choate*, 469 U.S. 287, 301 n. 21 (1985) (the Court refers to *Lau* in analogizing meaningful access to reasonable accommodations standards).

While meaningful access is always required, the level of language assistance services a recipient must provide is a fact-specific inquiry that includes consideration of the number and frequency of encounters with LEP individuals in the recipient's service area, the importance and impact of the program or activity on the LEP individual, and the resources appropriate to the circumstances. *See* 65 Fed. Reg. 50,124; *see also* DOJ LEP Guidance at 41,459. For example, police officers are generally not required to bring a certified interpreter with them when going to a live crime scene. However, it is critical that where an incident involves LEP individuals, officers obtain qualified interpreters or bilingual staff as soon as practicable in order to conduct the investigation. *See* DOJ LEP Guidance at 41,467. The Policy Guidance and DOJ LEP Guidance also make clear that any claims of limited resources from large recipients or those serving a significant LEP population must be "well-substantiated" before those recipients are

permitted to limit language assistance services. 65 Fed. Reg. at 50,125; 67 Fed. Reg. at 41,460. Providing competent language assistance services may be as simple as utilizing a telephonic interpretation service or calling for backup from qualified bilingual staff, depending upon the circumstances. *See* DOJ LEP Guidance at 41,468. Importantly, the DOJ LEP Guidance provides that absent "exigent circumstances that are not reasonably foreseeable," *id.* at 41,462, the failure to provide language assistance services to victims, witnesses, and potential perpetrators when investigating a domestic violence call constitutes national origin discrimination; police departments in jurisdictions with significant LEP communities must create and implement strategies to ensure that meaningful access is provided during these encounters. *See id.* at 41,468.

In accordance with DOJ's unique role in interpreting Title VI, this Court should afford significant deference to DOJ's interpretation that Title VI and its implementing regulations require "funding recipients to ensure LEP persons have meaningful access to the recipient's programs," and that a recipient's failure to do so constitutes national origin discrimination. *United States v. Maricopa Cnty.*, 915 F. Supp. 2d 1073, 1080 (D. Ariz. 2012) (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013) ("When an agency interprets its own regulation, the Court, as a general rule, defers to it unless that interpretation is plainly erroneous or inconsistent with the regulation." (citations and internal quotation marks omitted)).

2. Courts Have Consistently Found that Language-Based Discrimination Constitutes National Origin Discrimination

Consistent with the Executive Branch's interpretation of Title VI and its implementing regulations, longstanding and well-established federal judicial precedent holds that Title VI's prohibition against national origin discrimination covers discrimination against individuals on

the basis of their limited English proficiency. Indeed, nearly forty years ago, the Supreme Court held in *Lau v. Nichols*, 414 U.S. 563 (1974), that Title VI requires that LEP individuals be provided with meaningful access, and that a denial of such language assistance services constituted national origin discrimination.

In *Lau*, the Supreme Court concluded that Title VI and its implementing regulations required a federally-funded school district to ensure that LEP students were provided with meaningful access to the district's educational programs. *Lau*, 414 U.S. 563. That case involved a group of approximately 1,800 public school students of Chinese origin who did not speak English, and to whom the school system provided the same services—an education solely in English—that it provided to students who spoke English. The Court held that by failing to provide LEP Chinese-speaking students meaningful access to educational programs, the school's practices violated Title VI's prohibition against national origin discrimination. Thus, the Court ruled that the municipal school system violated Title VI by failing to provide LEP students with bilingual education or other adequate instruction. *Id.* at 566-69. The Court observed, "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program—all earmarks of the discrimination banned by" Title VI and its implementing regulations. *See id.* at 568.

Consistent with the holding of *Lau*, lower federal courts have also determined that language-based discrimination constitutes a form of national origin discrimination prohibited by Title VI. *See, e.g.*, *Maricopa Cnty.*, 915 F. Supp. 2d at 1079 (citing *Lau*, 414 U.S. at 568); *see also Colwell v. Dep't of Health & Human Servs.*, 558 F.3d 1112, 1116-17 (9th Cir. 2009) (noting that *Lau* concluded "discrimination against LEP individuals was discrimination based on

national origin in violation of Title VI"); *Jones v. Gusman*, ___ F. R. D. ___, 2013 WL 2458817, at *28 (E.D. La. June 6, 2013) ("[L]ongstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI." (citing *Maricopa Cnty.*, 915 F. Supp. 2d at 1079)); *Aghazadeh v. Maine Med. Ctr.*, No. 98-421, 1999 WL 33117182, at *1 (D. Me. June 8, 1999) (denying hospital-defendant's motion to dismiss where LEP patient-plaintiffs alleged that a failure to provide interpreter services violated Title VI); *Mendoza v. Lavine*, 412 F. Supp. 1105, 1110 (S.D.N.Y. 1976) (denying motion to dismiss in case alleging that defendants' failure to provide language assistance services violated Title VI); *Pabon v. Levine*, 70 F.R.D. 674, 677 (S.D.N.Y. 1976) (summary judgment for defendants denied in case alleging that State officials failed to provide unemployment insurance information in Spanish, in violation of Title VI).

Although the Defendants rely upon *Alexander v. Sandoval*, 532 U.S. 275 (2001), they implicitly concede—as they must—that *Lau* remains good law. *See* Defs. Mem. at 12-13. In *Sandoval*, the Supreme Court addressed whether a private right of action existed to enforce a DOJ regulation promulgated pursuant to Title VI. The Court concluded that the disparate impact regulation at issue, did not give rise to private rights of action. *See Sandoval*, 532 U.S. at 293. The Court, however, did not disturb *Lau*'s holding that Title VI requires recipients to provide LEP individuals with meaningful access, and that a denial of meaningful access constitutes national origin discrimination. *See id.*, at 279. Indeed, it is "beyond dispute" that private plaintiffs may bring intentional national origin discrimination claims under Title VI. *Sandoval*, 532 U.S. at 280; *Zeno v. Pine Plains Cent. School Dist.*, 702 F.3d 655, 664 (2d Cir. 2012) ("Title VI prohibits intentional violations of the statute." (citing *Sandoval*)).

B. Failure by Recipients of Federal Financial Assistance to Comply with the Nondiscrimination Requirements of Title VI, Including the Requirement to Provide Meaningful Access to LEP Individuals, May be Proof of an Intent to Discriminate

Private plaintiffs bringing private lawsuits in federal court to challenge language-based national origin discrimination must prove both that the recipient discriminated on the basis of national origin, and that the discrimination was intentional. Broadly, Plaintiffs here allege that institutional Defendants were on notice of their obligation to provide meaningful access to LEP individuals, which was a condition of receiving federal funds, and that their knowledge of the requirement and the impact of failing to comply with these obligations is proof of their discriminatory intent. *See* Second Am. Compl. ¶¶ 38-40, 42-44. Defendants, however, contend that Plaintiffs cannot bring such a claim. Further, in response to Plaintiffs' assertions that DOJ LEP Guidance has put them on notice of such obligation, Defendants contend that the Guidance "has been rejected as authoritative on the subject of interpreters." (Defs. Mem. at 13.) Defendants are wrong on both counts.

1. Plaintiffs Allege Intentional Discrimination

Where, as here, private plaintiffs have adequately alleged that a recipient of federal funds intentionally failed to provide LEP individuals with meaningful access through the provision of language assistance services in violation of Title VI, courts have denied motions to dismiss their claims of intentional national origin discrimination. *See, e.g.*, *Cabrera v. Alvarez*, ___ F. Supp. 2d ___, 2013 WL 1283445, at *5-*6 (N.D. Cal. Mar. 27, 2013); *Almendares v. Palmer*, 284 F. Supp. 2d 799, 808 (N.D. Ohio 2003). For example, in *Cabrera*, the district court found that Spanish-speaking LEP plaintiffs stated a plausible claim of intentional discrimination under Title VI because they alleged sufficient facts to support an inference that the federally-funded public housing authority's repeated failures to provide language assistance services "were motivated by discriminatory intent." *Cabrera*, 2013 WL 1283445, at *6. According to the plaintiffs in

Cabrera, an employee of the defendant public housing authority told a Spanish-speaking plaintiff to "learn English now that she is in America." *Id.*, at *1. Additionally, the plaintiffs alleged that the defendants had rebuffed their requests for interpreter assistance and translation services to complain about conditions in their rental units. *Id.*, at *2. Based on these two allegations, the court concluded that the plaintiffs had adequately stated a claim for intentional national origin discrimination under Title VI. *Id.*, at *5-6 (citing, *inter alia*, 28 C.F.R. § 42.405(d)(1), which requires recipients of federal financial assistance to provide "information in appropriate languages").

Further, in *Almendares*, the court found that plaintiffs, numerous LEP Spanish-speaking food stamp beneficiaries, sufficiently stated an intentional discrimination claim under Title VI where they alleged that State officials administering a State food stamp program purposefully discriminated against them by adopting a policy or practice of distributing program materials only in English, while knowing that Spanish-speaking applicants and beneficiaries could not understand the materials. 284 F. Supp. 2d at 807-08. The court found that even when a policy or practice is treated as facially neutral, that policy or practice can constitute evidence of intentional discrimination when established through evidence of "disparate impact, history of the state action, and foreseeability and knowledge of the discriminatory onus placed upon the complainants." *Id.* at 806 (quoting *South Camden Citizens in Action v. New Jersey Dep't of Envtl. Prot.*, 254 F. Supp. 2d 486, 497 (D.N.J. 2003)); *see also Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464-65 (1979) (holding that "actions having foreseeable and anticipated disparate impact are relevant evidence to prove the ultimate fact, forbidden purpose"); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such

circumstantial and direct evidence of intent as may be available. The impact of the official action whether it bears more heavily on one race than another may provide an important starting point." (citation and internal quotation marks omitted)); *Pryor v. NCAA*, 288 F.3d 548, 565 (3d Cir. 2002) (allegations that facially-neutral rule, which established scholarship and athletic eligibility criteria for incoming student athletes, was adopted to reduce number of African-American athletes who would become eligible for athletic scholarships and compete in intercollegiate athletics as freshman stated a claim for purposeful race discrimination in violation of Title VI).

Defendants also rely upon *Soberal-Perez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), for the proposition that discrimination based on an inability to speak English does not constitute national origin discrimination for purposes of the Equal Protection Clause. (*See* Defs. Mem. at 11-12.) There are four reasons why *Soberal-Perez* is distinguishable from the instant matter.

First, in *Soberal-Perez*, the Hispanic plaintiffs sued the United States Department of Health and Human Services ("HHS") on the grounds that HHS allegedly violated Title VI and the Equal Protection Clause by not providing Social Security notices in Spanish. There, the court held that HHS was not a "recipient" of federal financial assistance for purposes of Title VI and, therefore, could not be sued for the alleged violation of Title VI.[4] *See Soberal-Perez*, 717 F.2d at 38 ("[Title VI] was meant to cover only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary.").

[4] In *Soberal-Perez*, the court observed that regulations promulgated by the Secretary of Health and Human Services under Title VI defined a "recipient" as "any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program." *Soberal-Perez*, 717 F.2d at 38-39 (quoting 45 C.F.R. § 80.13(i)).

Thus, unlike the plaintiffs in *Cabrera* and *Almendares*, who sued recipients of federal financial assistance, the plaintiffs in *Soberal-Perez* failed to allege discrimination by a recipient of federal financial assistance and had no standing to assert a Title VI claim.

Second, and more fundamentally, the Second Circuit affirmed the dismissal of an equal protection challenge to the federal agency-defendant's failure to provide Spanish language assistance services where plaintiffs alleged merely that such failure had a "disproportionate impact" on Hispanics. *See id.* at 42. The court observed that the plaintiffs could not "allege in good faith, much less prove, any other evidence of discriminatory intent" other than a preference for English over all other languages. *Id.* In other words, the court found that the facts alleged by the plaintiffs did not sufficiently state an intentional discrimination claim. Here, unlike in *Soberal-Perez*, the individual Plaintiffs allege that they are victims of intentional national origin discrimination; provide specific examples of discriminatory actions and comments; and do not rely upon a disparate impact theory. For example, in one incident alleged, a Plaintiff asked, in Spanish, if an NYPD officer spoke Spanish, to which the officer allegedly replied, "Oh si, si hablo espanol. Gol! Gol! Mexico! Vamos Mexico! Chicharito!" which means in English, "Oh yeah, I speak Spanish. Goal! Goal! Mexico! Let's go Mexico! (Chicharito is the name of a Mexican soccer player.)" (Second Am. Compl. ¶ 88.) Another plaintiff alleges that when she asked an NYPD officer for someone who spoke Spanish, the officer responded by allegedly saying, in sum and substance, "[t]his is America, you have to speak English." (*Id.* ¶ 143.)

Third, since *Soberal-Perez* was decided, courts have determined that statistical evidence of discriminatory impact on a particular race or national origin is a key indicator of intent, when combined with other factors. *See The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 702-05 (9th Cir. 2009) (Title VI and Equal Protection case finding that

statistical evidence was sufficient to create an inference of intent where race-neutral precondition to receiving municipal services served to exclude Latino neighborhoods). Notice to a recipient of the requirement to provide meaningful access and the impact and harm associated with failing to do so, combined with the impact, constitutes a *prima facie* case of intentional national origin discrimination. *See Arlington Heights*, 429 U.S. at 267; *Almendares*, 284 F. Supp. 2d at 806.

The *Soberal-Perez* plaintiffs, unlike the plaintiffs in the instant case, could not allege that the defendant had been on notice of the civil rights requirement to provide meaningful access to LEP individuals, nor of the impact of a failure to do so. As discussed below, the NYPD is obligated under Title VI—as a recipient of federal financial assistance—to provide LEP individuals meaningful access to its programs and activities. Here, Plaintiffs' allegations of a refusal by the NYPD to provide meaningful access to LEP individuals under these circumstances plausibly alleges an intentional discrimination claim.

Finally, over three decades have passed since *Soberal-Perez* and, as discussed above, during that time, both the Executive and Judicial Branches have repeatedly recognized the critical importance of providing LEP individuals with meaningful access to federally funded programs and activities. *See, e.g.*, DOJ LEP Guidance, 67 Fed. Reg. 41,455; *Colwell*, 558 F.3d at 1116-17; *Gusman*, 2013 WL 2458817, at *28; *Cabrera*, 2013 WL 1283445, at *5-*6; *Maricopa Cnty.*, 915 F. Supp. 2d at 1079; *Almendares*, 284 F. Supp. 2d at 808; *Aghazadeh*, 1999 WL 33117182, at *1. It is unsurprising, then, that both the Executive and Judicial Branches have separately concluded that language-based discrimination constitutes a form of national origin discrimination prohibited by Title VI. *See id*. This Court should reach the same legal conclusion.

2. Recipients of Federal Funds are on Notice of Their Title VI Obligation to Provide Meaningful Access to LEP Individuals

As noted above, a plaintiff can make out a case of Title VI intentional national origin discrimination where the plaintiff can show that a recipient was on notice of its obligations to ensure meaningful access and provide language assistance services and failed to act on those obligations. There can be no question that NYPD had such notice.

Even before an entity receives federal financial assistance from a federal agency, it is on notice of the obligations that attach to its receipt of funds, including its Title VI obligation to take reasonable steps to provide LEP individuals meaningful access to its programs and activities.[5] Thereafter, through guidance, technical assistance, contractual assurances, compliance reviews, and when applicable, enforcement actions, recipients of federal funds are repeatedly and clearly notified of Title VI's obligation to provide language assistance services when encountering LEP individuals.

For example, with respect to the Title VI language access obligations of a police department that receives federal financial assistance from DOJ, the DOJ LEP Guidance provides, *inter alia*, that "when the victim of domestic violence speaks only Spanish and the perpetrator speaks English, the officers have no way to speak with the victim so they only get the perpetrator's side of the story. The failure to communicate effectively with the victim results in further abuse and failure to charge the batterer." 67 Fed. Reg. at 41,468; *see also id.* at 41,462

[5] *See, e.g.*, Office of Justice Programs, Sample Award Letter, *available at* http://www.ojp.usdoj.gov/financialguide/PDFs/award.pdf (stating, "In accordance with Department of Justice Guidance pertaining to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, recipients of Federal financial assistance must take reasonable steps to provide meaningful access to their programs and activities for persons with limited English proficiency (LEP). For more information on the civil rights responsibilities that recipients have in providing language services to LEP individuals, please see the website at: http://www.lep.gov.").

("[W]hen police officers respond to a domestic violence call . . . use of family members or neighbors to interpret for the alleged victim, perpetrator, or witnesses may raise serious issues of competency, confidentiality, and conflict of interest and is thus inappropriate."). DOJ enforces the Title VI meaningful access requirement against law enforcement entities and other recipients.[6]

Further, as a condition to the award of federal financial assistance, recipients must enter into a written contract assuring their compliance with Title VI and agreeing to comply with the requirements imposed by the agency awarding the funds. *See* 28 C.F.R. § 42.105 (requiring assurances);[7] *see also Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (observing that Title VI

[6] DOJ has conducted investigations of law enforcement authorities and other recipients who have failed to provide LEP individuals with meaningful access to programs and activities. *See, e.g.*, DOJ Letter of Finding re: Maricopa County Sheriff's Office ("MCSO"), dated Dec. 15, 2011, at 9, *available at* http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf (DOJ found MCSO violated Title VI by failing to provide language assistance services to Latino LEP inmates in MCSO jails; for example, one Latino LEP inmate reported a detention officer refused to accept a tank order (request form) written in Spanish and said: "This is America. You have to fill [your tank order] out in English."); DOJ Letter of Finding re East Haven Police Department ("EHPD"), dated Dec. 19, 2011, at 16, *available at* http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf (DOJ found EHPD "made scant efforts to provide Spanish language assistance" and "failed to utilize language line" to communicate with LEP individuals officers encountered, and the failure to provide language assistance services in Spanish violated Title VI and "was evidence of intentional bias."); DOJ Letter of Finding and Report of Findings re: Investigation of the North Carolina Administrative Office of the Courts ("NC AOC"), dated Mar. 8, 2012, Letter at 1, Report at 10, *available at* http://www.justice.gov/crt/about/cor/TitleVI/030812_DOJ_Letter_to_NC_AOC.pdf (DOJ found NC AOC violated Title VI by failing to provide LEP individuals meaningful access to criminal and civil court proceedings and practices that included permitting assistant district attorneys to interpret for LEP criminal defendants.). The Court may take judicial notice of these and other documents referenced herein that are matters of public record. *See Blue Tree Hotel Inv. (Can.), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004); *Vasquez v. City of New York*, No. 99-CV-4606, 2000 WL 869492, at *1 n. 1 (S.D.N.Y. June 29, 2000) (Chin, J.).

[7] Similarly, executive agencies require applicants for federal financial assistance to assure that they will comply with Title VI and with all requirements imposed pursuant to the executive regulations issued under Title VI. *See* 7 C.F.R. § 15.4 (Department of Agriculture); 15 C.F.R. § 8.5 (Department of Commerce); 32 CFR § 300.6 (Department of Defense); 34 C.F.R. § 100.4 (Department of Education); 10 C.F.R. § 1040.4 (Department of Energy); 45 C.F.R. § 80.4 (Department of Health and Human Services); 6 C.F.R. § 17.115 (Department of Homeland Security); 24 C.F.R. § 1.5 (Department of Housing and Urban Development); 43 C.F.R. § 17.4 (Department of Interior); 29 C.F.R. § 31.6 (Department of Labor);

invokes Congress's power under the Spending Clause and that Title VI has been characterized by the Supreme Court as contractual in nature: recipients of federal funcs agree to comply with federally imposed conditions. (citations omitted)); *Lau*, 414 U.S. at 569 ("The Federal Government has power to fix the terms on which its money allotments . . . shall be disbursed." (citation omitted)). Recipients of federal funds are obligated to perform the conditions of that contract, thus creating an inherent right on the part of the United States to seek enforcement of the recipient's contractual obligations. *See Barnes*, 536 U.S. at 189; *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 605-606 (1986) (observing that a recipient's acceptance of federal financial assistance "triggers coverage under the nondiscrimination provision[s]" of Title VI); *see also Guardians Ass'n v. Civil Serv. Comm'n of City of New York*, 463 U.S. 582, 633 (1983) (Marshall, J., dissenting) ("When a court concludes that a recipient has breached its contract, it should enforce the broken promise by protecting the expectation that the recipient would not discriminate."); *Bryan v. Koch*, 627 F.2d 612, 616 (2d Cir. 1980) (As a recipient of federal funds, New York City's municipal hospital system "contractually bound itself" to follow Title VI regulations.). Here, the institutional Defendants are contractually obligated to comply with Title VI and its implementing regulations. [8]

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22 C.F.R. § 141.4 (Department of State); 49 C.F.R. § 21.7 (Department of Transportation); and 31 CFR § 51.59 (Department of Treasury).

[8] *See* Office of Justice Programs (OJP), Standard Assurances, *available at* http://www.ojp.usdoj.gov/funding/forms/std_assurances.pdf.

3. DOJ's Compliance Review of NYPD's Policies Made The NYPD Aware Of Continuing Problems In Interviewing LEP Witnesses and Victims

The City of New York and the NYPD receive millions of dollars in federal financial assistance from DOJ.[9] On this basis alone, they are on notice of and must comply with the nondiscrimination requirements of Title VI and its implementing regulations, as well as the terms of DOJ contractual assurances.

Further, in 2010, DOJ conducted a compliance review focusing on whether the NYPD's language access policies comply with Title VI and its implementing regulations. In a letter dated January 15, 2010, the DOJ Office of Justice Programs, Office for Civil Rights ("OJP"), informed the NYPD that it had been selected for a compliance review of its policies and procedures that address language assistance services for LEP individuals. On November 8, 2010, OJP issued a compliance review report containing its findings along with recommendations to bring the NYPD policies into compliance with Title VI.[10] The report advised NYPD to revise its language-access policies, establish quality-control measures for staff interpreters, provide better training to its uniform and civilian staffs, recruit additional officers with foreign language abilities, improve community relations, and translate vital documents into New York City's most commonly spoken foreign languages. After working with NYPD for nearly two years, OJP

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[9] *See* Edward Byrne Memorial Justice Assistance Grant Program (JAG Program) FY 2011 ($5,108,013), *available at* http://grants.ojp.usdoj.gov:85/selector/awardDetail?awardNumber=2011-DJ-BX-2927&fiscalYear=2011&applicationNumber=2011-H6318-NY-DJ&programOffice=BJA&po=All; JAG Program FY 2012 ($4,130,203.00), *available at* http://grants.ojp.usdoj.gov:85/selector/awardDetail?awardNumber=2012-DJ-BX-0658&fiscalYear=2012&applicationNumber=2012-H3296-NY-DJ&programOffice=BJA&po=All; JAG Program FY 2013 ($4,038,230.00), *available at* http://grants.ojp.usdoj.gov:85/selector/awardDetail?awardNumber=2013-DJ-BX-0379&fiscalYear=2013&applicationNumber=2013-H5722-NY-DJ&programOffice=BJA&po=All.

[10] DOJ Compliance Review of NYPD, dated Nov. 8, 2010, *available at* http://www.ojp.usdoj.gov/about/ocr/pdfs/nypdcompliancereport.pdf.

administratively closed its compliance review in a letter dated July 19, 2012.[11] *See* Appendix to Statement of Interest, Letter from OJP, dated July 19, 2012 ("OJP July 19, 2012 Letter").

However, even as OJP closed its compliance review of NYPD policies and procedures, in its July 19, 2012 letter, OJP raised continuing concerns about the efficacy and quality of the NYPD officer training regarding the provision of interpreter services for LEP individuals. *See* OJP July 19, 2012 Letter at 4. The letter explained that on March 6, 2012, OJP staff observed two training sessions at Precinct No. 109 in Flushing, Queens to evaluate the effectiveness of the language access training to be provided more broadly to NYPD personnel. *Id*. OJP alerted NYPD that during both training sessions "the trainer noted, without sufficient explanation, that personnel in interacting with LEP individuals, should, as a first resort, rely on individuals who have no certified foreign-language ability." *Id.* OJP explained in its letter that this instruction from the trainer was inconsistent with their understanding of NYPD policy and that "reliance on individuals whose foreign-language abilities may be unreliable is the exception to the general rule that personnel should use unequivocally qualified language assistance to communicate with LEP persons."[12] *Id.* Accordingly, the NYPD is well aware of its legal obligation to provide language assistance services to LEP individuals, particularly to witnesses and victims of crime.

[11] Title VI authorizes DOJ to open a new compliance review or investigation if it receives a new complaint or otherwise determines that such action is necessary. *See* 28 C.F.R. pt. 42, subpart C.

[12] All of the alleged incidents in the Plaintiffs' Second Amended complaint occurred after OJP's November 8, 2010 compliance review report, and most of the alleged incidents occurred after the July 19, 2012 letter regarding the NYPD training.

CONCLUSION

For the foregoing reasons, the Court should decline to adopt the NYPD's incorrect contention that the prohibition against national origin discrimination contained in Title VI does not include protections for LEP individuals. As discussed above, longstanding executive agency regulations and judicial precedent have clearly established that national origin discrimination under Title VI includes language-based discrimination. Moreover, as recipients of federal financial assistance, the City of New York and NYPD are bound by and subject to the nondiscrimination provisions of Title VI and the Title VI regulations, as well as contractual assurances, to provide meaningful access to LEP individuals.

Plaintiffs' complaint adequately states a claim of intentional discrimination under Title VI. The complaint contains numerous examples of discriminatory comments, acts and omissions. The complaint also alleges that the NYPD was on notice that Title VI requires recipients to provide meaningful access to LEP individuals and was aware of the harm associated with the failures to comply with those requirements and provide language assistance services. Accordingly, Defendants' motion to dismiss should be denied.

Dated: Brooklyn, New York
November 22, 2013

Respectfully submitted,

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APPENDIX

U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

July 19, 2012

VIA CERTIFIED AND ELECTRONIC MAIL

Raymond W. Kelly
Police Commissioner
New York City Police Department
One Police Plaza
Room 1400
New York, NY 10038

Re: Compliance Review of New York City Police Dep't (10-OCR-0015)

Dear Commissioner Kelly:

In January 2010, the Office for Civil Rights (OCR), Office of Justice Programs, U.S. Department of Justice notified you that the OCR selected the New York City Police Department (NYPD or Department), as a recipient of federal financial assistance, for a civil rights compliance review in accordance with Title VI of the Civil Rights Act of 1964 (Title VI), the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act), and their implementing regulations. The compliance review focused on the NYPD's provision of services to limited English proficient (LEP) individuals. In connection with its preparation of a Compliance Review Report (Report), the OCR conducted onsite visits on April 13-23 and June 8, 2010.

On November 8, 2010, the OCR issued its Report to the NYPD,[1] which contained forty-six recommendations to ensure the Department's compliance with Title VI and the Safe Streets Act, in accordance with the DOJ's published guidance document.[2] After the OCR issued its Report, the NYPD proactively implemented various corrective action items in response to the OCR's recommendations. As part of these remedial measures, the Department refined its language access training for sworn and civilian members of the service. On March 6, 2012, the OCR conducted a third site visit to observe the language access training provided by the Department to personnel at Precinct No. 109 in Flushing, Queens. Below, the OCR (1) describes several of the NYPD's significant responses to the OCR's Report recommendations, (2) provides feedback on the language access training it recently observed, and (3) concludes that the NYPD is in substantial compliance with the standards set forth in the DOJ Guidance.

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[1] *See* New York City Police Dep't, No. 10-OCR-0015, Office for Civ. Rts. Compl. Rev. Rep. (U.S. Dep't of Justice Nov. 8, 2010), *available at* http://www.ojp.usdoj.gov/about/ocr/pdfs/nypdcompliancereport.pdf.

[2] Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455 (June 18, 2002) (DOJ Guidance).

I. Notable Responses to Compliance Review Report Recommendations

The OCR commends the NYPD for taking prompt and substantial steps to respond to the recommendations contained in the OCR's Report and to strengthen its provision of language services to LEP communities throughout New York City. We especially appreciate the Department's diligence in promulgating various policies and procedures regarding language access. Of particular note, since the issuance of the OCR's Report, the NYPD implemented orders that accomplish the following:

- explain the processes for securing interpretation and translation assistance in the field, at Department facilities, and within the Internal Affairs Bureau;[3]
- provide members of the service with citywide access to a telephonic interpretation service;[4]
- ensure that language assistance resources are available at point-of-service locations;[5]
- require documentation that a member of the service used an interpreter, or that an interpreter will be required in the future, in connection with the investigation of certain complaints;[6]
- require documentation by a member of the service of the need for an interpreter in communicating with a prisoner or a parent or guardian of a juvenile;[7]

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[3] Interim Order No. 31, Revision to Patrol Guide 212-90, "Volunteer Language Program/Language Line" (Aug. 26, 2011); Interim Order No. 13, Translation of Department Written Material (Apr. 1, 2011); Procedure No. 620-40, Revision No. 11-02, Internal Affairs Bureau Guide, Guidelines for Obtaining Translators and Translation Services for IAB Investigators (Mar. 22, 2011).

[4] Operations Order No. 9, Citywide Expansion of Pilot Program – Telephonic Interpretation Service (Feb. 10, 2012).

[5] Interim Order No. 32, Revision to Patrol Guide 202-11, "Operations Coordinator," at 1 (Aug. 26, 2011).

[6] *Id.* at 1-2 (revising Patrol Guide Procedure Nos. 207-07 ("Preliminary Investigation of Complaints (Other Than Vice Related or Narcotics Complaints)"), 207-30 ("Civilian Complaints – Witness Statements"), 207-31 ("Processing Civilian Complaints")).

[7] *Id.* at 3, 5 (revising Patrol Guide Procedure Nos. 208-03 ("Arrests – General Processing"), 208-09 ("Rights of Persons Taken Into Custody"), 208-15 ("Arrests Report Preparation at Stationhouse"), 210-01 ("Prisoners General Procedure")).

- describe the protocol for providing language assistance in connection with family offense and domestic violence matters;[8]

- explain the protocol for handling Domestic Incident Reports;[9] and

- describe the benefits under its Career Program of being a qualified interpreter.[10]

In addition, the NYPD issued a revised Language Access Plan on June 14, 2012, which provides helpful guidance to the public about the Department's various efforts to provide language assistance services to LEP individuals.

II. OCR Training Observations

In response to the OCR's Report, the NYPD revised its training curriculum to provide additional detailed guidance to sworn and civilian personnel on communicating effectively with LEP individuals. According to the Department's thirteen-page lesson plan for this subject, after receiving the training, personnel should be able to do the following:

(1) identify an individual's need for oral language assistance;

(2) evaluate, when providing language services to an LEP person, whether to rely on (a) a bilingual member of the service, (b) a bilingual member of the public, (c) the NYPD's telephonic interpretation service, or (d) the Department's Language Initiative Program;

(3) access (a) the telephonic interpretation service and (b) the Language Initiative Program;

(4) record the identity of any interpreter who provides assistance;

(5) understand the mechanics of working with an interpreter; and

(6) be aware of (a) the NYPD's Community Affairs Bureau's Immigrant Outreach Unit and (b) the information that is available to LEP persons on the Department's Web site.

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[8] *Id.* at 4 (revising Interim Order No. 34, series 2010 ("Revision to Patrol Guide 208-36, 'Family Offenses/Domestic Violence'")).

[9] *Id.* at 5 (revising Patrol Guide Procedure No. 208-70 ("Processing of New York State Domestic Incident Reports in the Domestic Violence Database")).

[10] Interim Order No. 17, Revision to Patrol Guide 205-15, "Police Officer's Career Program" (May 2, 2011).

The lesson plan allots twenty minutes to achieve these broad learning objectives and provides a clear outline for an instructor to follow in discussing the material to be covered.

To evaluate the effectiveness of this training, on March 6, 2012, the OCR observed two training sessions at Precinct No. 109 in Flushing, Queens; the first session involved sworn members of the service while the second session included sworn and civilian personnel. In both training sessions, the instructor effectively conveyed information about several topics. He provided helpful information about identifying an individual's need for language assistance and distributed materials to personnel on identifying an LEP individual's language. The trainer also explained the protocols for accessing the Department's telephonic interpretation service and Language Initiative Program and noted the importance of documenting basic information about an interpreter who provides language assistance to facilitate a particular communication. In addition, the instructor emphasized the importance of not relying on an LEP person's family members for language assistance.

While the instructor provided useful information to participants during these training sessions, the NYPD could strengthen several critical areas of its language access training.[11] Based on the OCR's onsite visit, we make three general observations that likely warrant further review by the Department as it continues to monitor and develop this aspect of its training program.

- During both training sessions, the trainer noted, without sufficient explanation, that personnel, in interacting with LEP individuals, should, as a first resort, rely on individuals who have no certified foreign-language ability. Under Department policy, however, and as reflected in the lesson plan, personnel should carefully consider several factors *before* relying on language assistance from a member of the public or non-certified members of the service. Moreover, there are multiple settings in which reliance on such persons for language assistance would not be appropriate. Thus, within this framework, reliance on individuals whose foreign-language abilities may be unreliable is the exception to the general rule that personnel should use unequivocally qualified language assistance to communicate with LEP persons. In both training sessions, however, the instructor exalted the exception over the rule. The NYPD may wish to review more carefully the ability of training sergeants to describe the Department's language access policies, including the importance of relying on qualified telephonic or in-person interpreters for certain interactions.

- During both training sessions, the trainer provided insufficient information to satisfy several of the performance objectives of the training, as identified by the Department's lesson plan. He did not convey any information to participants about certain topics, such as the role of the Immigrant Outreach Unit or the availability of online materials; he also

[11] While the OCR limited its onsite training observations to two training sessions at Precinct No. 109, the NYPD should carefully consider whether our suggestions for improvement at this precinct can be applied to the provision of language access training at the Department's other point-of-service locations.

covered in a cursory fashion other areas, such as the process for identifying whether bilingual individuals are available to provide language assistance and the mechanics of working with an interpreter. The instructor also did not reference or distribute Interim Order No. 31, Patrol Guide 212-90, even though the lesson plan designates that order as student material. As part of an enhanced review of its training process, the OCR encourages the NYPD to evaluate whether training sergeants sufficiently address all critical aspects of its language access curriculum. To ensure that personnel receive sufficient information on each learning objective, the Department may wish to consider covering the curriculum during two or more successive training sessions.

- The instructor did not consistently conduct the two training sessions, even though they covered the same subject matter as described in the Department's lesson plan and occurred mere hours apart from one another at the same location. During the first session, the training lasted approximately ten minutes and provided little in-depth information about any topic. In contrast, the second session consisted of a twenty-minute presentation that provided more detail about various language access issues and elicited more questions from the participants. Given these markedly contrasting approaches, the NYPD should monitor more carefully its training sessions to ensure that training sergeants, in discussing language access issues, consistently satisfy the objective minimum standards contemplated by the lesson plan.[12] As part of its ongoing review of this training program, it may also be helpful for the Department to attempt to measure the effectiveness of this curriculum in providing sufficient information to personnel and in improving interactions with LEP individuals.

III. Conclusion

While the OCR encourages the NYPD to make further refinements to its language access training program for sworn and civilian personnel, we recognize that the Department has made significant progress in enhancing its ability to interact effectively with LEP persons. The OCR has thoroughly reviewed the NYPD's responses to the Report and concludes that the Department is in substantial compliance with the standards set forth in the DOJ Guidance. Given the Department's implementation of various appropriate language access measures, including those discussed above, at this time we will administratively close this matter.

I would like to thank the NYPD for its continued cooperation during the course of the compliance review and the professional courtesies that Department personnel extended to the OCR Investigative Team, George Mazza, Christopher Zubowicz, and Joseph Swiderski, during the compliance review. If you have any further questions regarding this matter, please contact

[12] The OCR recognizes that the second training, unlike the first session, included civilian personnel and did not occur between work shifts. Based on the NYPD's language access lesson plan, these distinctions do not appear to be material ones. The lesson plan is designed for all members of the service and applies the same performance objectives to sworn and civilian personnel, regardless of whether they participate in the training at the beginning of their shift or at some later point in their shift assignment.

Mr. Zubowicz at 202.305.9012. He remains available to provide the NYPD with assistance as you continue to take steps to provide the most effective services to LEP communities throughout New York City.

Sincerely,

Michael L. Alston
Director

Enclosure

cc: John Donohue, Deputy Chief, Office of Management Analysis and Planning
(Via Certified and Electronic Mail)