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COURT OF APPEALS OF THE STATE OF NEW YORK

LUZ SOLLA,

Petitioner-Respondent,

– v. –

ELIZABETH BERLIN, et al.,

Respondents-Appellants.

ON APPEAL FROM THE APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK ON BEHALF OF PETITIONER-RESPONDENT LUZ SOLLA

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STATEMENT OF INTEREST

Amicus curiae is The Association of the Bar of the City of New York. The Association of the Bar of the City of New York is a 24,000 member organization, founded in 1870, which addresses issues of law, legal ethics, and public policy at the local, national, and international levels.

The Association of the Bar of the City of New York, by its Civil Rights Committee, Committee on Legal Services for Persons of Moderate Means, Pro Bono and Legal Services Committee and Social Welfare Law Committee, files this brief to express its view that affirming the "catalyst" theory for attorneys' fees under the State's Equal Access to Justice Act (EAJA) will (1) strengthen the ability of poor persons to secure private or legal services counsel when they fall victim to the unjustified actions of state agencies, and (2) create a critical financial incentive for state agencies to properly administer essential entitlement programs.

QUESTION PRESENTED

Does a litigant substantially prevail under the New York EAJA (and therefore qualify for an award of reasonable attorneys' fees) where the lawsuit indisputably prompted (*i.e.*, catalyzed) the State's voluntary corrective conduct, thereby mooting the suit by providing the relief that plaintiff sought, or must a litigant receive a favorable final judgment, order, or consent decree to "substantially prevail?"

The court of original jurisdiction in *Matter of Luz S. v. Berlin*[1] held that while petitioner's Article 78 proceeding was "undoubtedly" the catalyst for respondents' compliance, this did not make petitioner a prevailing party under New York law in light of the First Department's decision in *Auguste v. Hammons.*[2]

In *Matter of Solla v. Berlin,*[3] the Appellate Division, First Department reversed, stating, "There is no evidence to suggest that the New York State Legislature, in enacting the State EAJA, ever intended to eliminate attorneys' fee awards under the catalyst theory. In fact, ample evidence supports the contrary conclusion."

STATEMENT OF THE CASE

The facts of the underlying case are not in dispute. The Court is respectfully referred to the detailed statement of factual and procedural history set forth in Petitioner-Respondent's Brief (pp. 9–13).

In short, on September 16, 2010, Appellants issued a Notice that reduced Respondent Luz Solla's "restricted shelter payment" from $1390.98 per month to $1181.98 per month. Following Ms. Solla's prompt appeal, the State Office of Temporary and Disability Assistance (OTDA) issued a Decision after Fair Hearing

[1] 32 Misc 3d 1215 (A) (Sup Ct New York County 2011).
[2] 285 AD2d 417, 418 (1st Dept 2001).
[3] 106 AD3d 80, 82 (1st Dept 2013).

that ordered the Defendants-Appellants to withdraw the Notice of Intent and restore any benefits unlawfully withheld.

Nevertheless, no action was taken by City Respondents to comply with the order. In May 2011, after five months of fruitless efforts outside the courts, and following a letter from OTDA alleging compliance with the decision, Ms. Solla, through counsel, filed an Article 78 proceeding in New York County Supreme Court seeking to compel Appellants to comply with the OTDA order and requesting attorneys' fees.

As a direct result of the filing, Appellants issued all lost benefits and restored Ms. Solla's benefits to the pre-reduction level. However, in July 2011, the trial court dismissed the Article 78 as moot and denied Respondent's motion for attorney's fees under the EAJA. In March 2013, the Appellate Division, First Department, reversed, remanding the case to the trial court for a determination of appropriate fees. This appeal followed.

SUMMARY OF ARGUMENT

The State EAJA was enacted to enable litigants of modest means to access the courts to contest the unjustified actions of state agencies. *See* CPLR § 8602(d) (defining a "party" able to collect fees as an individual with a net worth under $50,000, a small business, or a non-profit organization). For years, litigants generally prevailed for fee purposes if their litigation spurred a state agency's

corrective action. Fee eligibility was premised on the "catalytic" effect of the lawsuit and was unaffected by the subsequent dismissal of the action on mootness grounds.

However, in 2001, in the wake of the U.S. Supreme Court's decision *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Resources*,[4] the Appellate Division, First Department, in *Wittlinger v. Wing*[5] departed from long-established "prevailing party" jurisprudence by holding, "The 'catalyst theory' . . . is no longer a viable basis for an award of attorneys' fees."[6]

Under the so-called "judgment or consent decree" rule, a litigant whose court action indisputably prompted corrective action is not entitled to a State EAJA fee award in the absence of a favorable judicial disposition; this standard gives agencies every reason to take a "sue us attitude" toward such requests.[7] Furthermore, private attorneys and legal service programs will have little incentive

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[4] 532 US 598 (2001).

[5] 289 AD2d 171, 171 (1st Dept 2001).

[6] Quite significantly, *Buckhannon* itself has since been superseded in one context by the Open Government Act of 2007 (OGA), which authorized the award of attorneys' fees under the Freedom of Information Act (FOIA) where "the complainant has obtained relief through . . . a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial" 5 U.S.C. § 552 (a)(4)(E). The OGA thus specifically codified the "catalyst theory" as defined by the Second Circuit in *Vt. Low Income Advocacy Council, Inc. v. Usery*, 546 F2d 509, 513 (2d Cir 1976), which held, "In order to obtain an award of attorney fees in an FOIA action, a plaintiff must show at minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." *See Davis v. U.S. Dep't of Justice*, 610 F3d 750, 752 (DC Cir. 2010) (holding that the OGA reinstated the catalyst theory in FOIA cases).

[7] *See New York State Defenders Ass'n v. New York State Police*, 87 AD3d 193 (3d Dept 2011).

(or ability) to take such cases and commit the necessary time and resources to induce agency corrective action if the agency can simply moot the proceeding by providing corrective action following the filing of an Article 78 petition.

While this Court decided in *Wittlinger v. Wing*[8] "neither [to] endorse nor repudiate the Appellate Division's alternative holding as to the vitality of the catalyst theory," the resulting confusion among some lower courts continues to jeopardize access to justice for low-income individuals throughout New York State. This situation is particularly problematic at a time when the unmet civil legal needs of the poor have reached crisis proportions and public funding to civil legal service programs—at the federal, state, and local levels—has been significantly reduced in the long shadow of the Great Recession.

Ultimately, this Court should affirm that the "catalyst theory" is plainly consistent with the clear purpose of the State EAJA. An unambiguous decision to this effect will comport with the Legislature's intent, ameliorate the well-documented need of the poor to obtain access to justice, and deter the unjustified actions of state agencies. As we will argue in this brief, appellants incorrectly assert that there are no data to support the argument that interpreting the statute to include the catalyst theory would further those goals and thus comport with the

[8] 99 NY2d 425, 433 (2003).

Legislature's purpose.[9] To the contrary, the data highlight the *efficacy* of awarding fees to attorneys whose court filings effectuate changes in agency action.

ARGUMENT

I. AFFIRMING THE USE OF THE 'CATALYST TEST' UNDER THE EQUAL ACCESS TO JUSTICE LAW FOR COUNSEL FEES WILL IMPROVE INDIGENT NEW YORKERS' ACCESS TO JUSTICE AND BENEFIT NEW YORK'S ECONOMY

A. The Lack of Civil Legal Services Has Reached Crisis Proportions.

Over a decade ago, then-Chief Judge Judith S. Kaye expressed concern that access to justice "[not] be thwarted by lack of money, and surely not by barriers erected by the courts themselves"[10] Noting that the poor are particularly hard-hit during times of economic downturn, the Chief Judge was "appall[ed]" that "we are meeting only a small percentage of the civil legal needs of the poor," and was troubled that "available services now may dwindle even further"[11]

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[9] Furthermore, the purpose dovetails with the text. *See* Resp. Br., Point I. Under longstanding precedent, the Court may look to purpose and intent of a statute only when the text is unclear, which, here, it is not. *See, e.g., In re Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Huntington*, 97 NY2d 86, 91 (2001) (requiring courts to give effect to a statute's plain meaning); *New York Bankers Ass'n v. Albright*, 38 NY2d 430, 437 (1975)(permitting recourse to legislative intent as an aid to understanding). Nonetheless, as this brief will demonstrate, the purpose of the statute is well served by interpreting the text to incorporate the catalyst theory law that existed at the time of the EAJA's enactment.

[10] *See* Chief Judge Judith S. Kaye, *The State of the Judiciary 2002* at 6 (Jan. 14, 2002), *available at* http://www.nycourts.gov/ctapps/LD10Transcript.pdf (accessed Nov. 20, 2014).

[11] *Id.* at 11.

Chief Judge Kaye was far from the first person to express concerns about the availability of civil legal services.[12] And, as a Bar Association whose members collectively spend tens of thousands of hours annually providing free or low-cost services to low-income New Yorkers, we know that Chief Judge Kaye and those who sounded the alarm before her were not the last.[13]

On May 1st, 2010, Chief Judge Jonathan Lippman announced the creation of a first-in-the-nation, state-wide Task Force to Expand Civil Legal Services in New York for addressing legal matters involving the essentials of life.[14] As Chief Judge Lippman would later note, funding civil legal services is "one of the highest

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[12] *See, e.g., Preliminary Report of Comm. to Improve the Availability of Legal Serv.* at 1 (June 30, 1989) (stating "[I]n New York, there is an imbalance of crisis proportions between the . . . unmet need for civil legal services among the poor . . . and the legal resources now available to address it. . . . "); *see also Final Report to the Chief Judge of the State of New York of the Comm. to Improve the Availability of Legal Serv.* at 9 (April 27, 1990) (noting "[T]he unmet civil legal needs of the poor in New York is a critical problem that has a devastating impact on the lives of vast numbers of poor people who need legal assistance and cannot afford it."); *Final Report of the Pro Bono Review Comm.* at 46 (Apr. 18, 1994) ("The inability of the poor to obtain representation in judicial and administrative proceedings of critical importance to their lives is an affront to our system of justice and to the premise that all stand equal before the law, and are equally entitled to vindication of their legal rights."); *Report to the Chief Judge of the Legal Serv. Project, "Funding Legal Services for the Poor,"* at 3 (May 1998) ("The unmet need for critical legal services among poor New Yorkers has been thoroughly documented, is very great and is worsening. Poor people in New York State encounter literally millions of problems each year without the assistance of a lawyer.").

[13] As Carey R. Dunne, former President of the Bar Association of the City of New York testified, the City Bar Justice Center alone provided the equivalent of $21 million worth of legal services to low-income New Yorkers, in areas such as homelessness, debt relief, veteran's benefits, immigration, and elder law, with a staff of 18 attorneys and a *pro bono* cadre of over 1,000 attorneys. *Chief Judge's Hearing on Civil Legal Services, First Dept.* at 76 (Sept. 19, 2013), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/1stDept2013-HearingTranscript.pdf (accessed Nov. 20, 2014).

[14] *See* Chief Judge Jonathan Lippman, *Law in the 21st Century: Enduring Traditions, Emerging Challenges* at 14–21 (May 1, 2010), *available at* http://www.nycourts.gov/ctapps/LD10Transcript.pdf (accessed Nov. 20, 2014)

priorities in our society"[15] and "is one of the best investments the public, New York State, could make because in the end it's an investment that's paid itself back many times over."[16]

The first annual report of the Task Force to Expand Access to Civil Legal Services in New York[17] found:

- 99 percent of tenants were unrepresented in eviction cases in New York City, and 98 percent were unrepresented in such cases outside of the City;
- 99 percent of borrowers were unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City;
- 97 percent of parents were unrepresented in child support matters in New York City, and 95 were unrepresented in these cases in the rest of the State; and
- 44 percent of homeowners went unrepresented in foreclosure proceedings statewide.

In recent years, as the effects of the Great Recession have stretched government budgets in Washington, Albany, and New York City, the situation for poor litigants has deteriorated further. Indeed, a recent report by The Community

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[15] *Chief Judge's Hearing on Civil Legal Services, Fourth Dept.* at 86 (Oct. 3, 2013), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/4thDept2013-HearingTranscript.pdf (accessed Nov. 20, 2014).

[16] *Id.* at 41.

[17] Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* at 1 (Nov. 2010), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT.pdf (accessed Nov. 20, 2014).

Service Society found nearly three quarters of New Yorkers across all income levels were worried about a disappearing middle class, while a majority of New Yorkers felt it was not possible for the poor to make it into the middle class.[18]

The 2012 report of the Task Force to Expand Access to Civil Legal Services in New York noted assistance of counsel can have "a life-changing impact for vulnerable low-income families and individuals who can remain in their homes, escape from domestic violence, stabilize their families, maintain or obtain subsistence income, or gain access to health care or an education- all of which are truly the essentials of life."[19] That report also noted a number of obstacles to providing such assistance.

While the efforts of the Chief Judge and the Task Force to boost funding in the Judiciary budget, as well as a first-of-its-kind plan to require new applicants to the Bar to provide 50 hours of pro bono service[20] have improved circumstances for many of these litigants in recent years, the unmet need for counsel is still

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[18] Nancy Rankin & Apurva Mehrotra, The Community Service Society, *For Richer or Poorer: What New Yorkers Want In The Next Mayor* at 4, http://b.3cdn.net/nycss/f09fdbae8c6a952aa5_qom6bzw7l.pdf (accessed Nov. 2, 2014).

[19] Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* at 1 (Nov. 2012), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceREPORT_Nov-2012.pdf (accessed Nov. 20, 2014). In 2013, the Task Force reported that the gap between need and services continues. *See* Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* at 1 (Nov. 2013), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/CLS-TaskForceReport_2013.pdf (accessed Nov. 20, 2014).

[20] Rules of Ct of Appeals § 520.16.

daunting.[21] At the most recent Task Force hearing in the Appellate Division, First Department, multiple witnesses testified that "the state is nowhere near closing a 'justice gap' in legal representation for low-income New Yorkers despite increased funding for civil legal services in recent years."[22]

Discussing the judiciary's responsibility to promote greater provision of civil legal services funding, Chief Judge Jonathan Lippman noted "if we don't take the lead in this area, no one else will."[23] Diminished funding coupled with a significant cut in federal aid for the Legal Services Corporation as a result of budget sequestration have led to a scenario in which "more than 2.3 million low-income New Yorkers must navigate the complexities of the State's civil justice system without the assistance of counsel in disputes over the most basic necessities of life."[24] Lack of representation in Civil Court matters raises litigation and other costs, diminishes early case resolutions and settlements, diverts judicial resources,

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[21] *See generally* Chief Judge Jonathan Lippman, *The State of the Judiciary 2013: Let Justice Be Done, Though The Heavens Fall* at 12–14 (Feb. 5, 2013), *available at* http://www.nycourts.gov/ctapps/news/SOJ-2013.pdf (accessed Nov. 20, 2014).

[22] Tania Kanas, *Justice Gap Remains Wide, Hearing Witnesses Say*, NYLJ Sep. 23, 2014, http://www.newyorklawjournal.com/id=1202670975341/Justice-Gap-Remains-Wide-Hearing-Witnesses-Say?slreturn=20140925151322 (accessed Oct. 25, 2014).

[23] *Hearing on Civil Legal Services, Fourth Dept.* at 4.

[24] 2012 *Report to the Chief Judge* at 1. In the 2013 hearings, witnesses continued to relate substantially greater clogging of the courts where litigants were unrepresented. *See* 2013 *Report to the Chief Judge* at 20–21.

and creates clearly disparate results between parties depending upon whether one has obtained representation.[25]

The benefits of providing civil legal representation for low-income New Yorkers cannot be emphasized enough. Currently, estimates indicate that for every dollar spent on civil legal services, six dollars return to New York State overall.[26] For example, funding anti-eviction legal services ultimately saves the government money by avoiding homeless individuals' recourse to shelters, and the attendant public expenditures.[27] In 2012, multiplier effects of spending for civil legal services resulted in additional funding streams of revenue which culminated in a $679 million economic stimulus to New York State and the economic activity resulting from the provision of civil legal services generated 6,776 jobs —an overall increase of 20% from the prior year.[28] In essence, New York has recognized that there is both a strong need for greater funding for civil legal services as well as a fiscal benefit to the State for funding legal representation; other jurisdictions have made similar findings.[29]

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[25] *Id.*

[26] 2012 *Report to the Chief Judge* at 2–3; *See also Chief Judge's Hearing on Civil Legal Services, Third Dept.* at 23 (Sept. 17, 2013), *available at* http://www.nycourts.gov/ip/access-civil-legal-services/PDF/3dDept2013-HearingTranscript.pdf.

[27] 2013 *Report to the Chief Judge* at 3.

[28] *Id.* at 3.

[29] *See* Legal Services Corporation, *Budget Request Fiscal Year 2014* at 1–2, *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/LSC_FY2014_Budget%20Request_FINrev_6.5.pdf (accessed Nov. 20, 2014).

The overriding purpose of the State EAJA is "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses" by low-income litigants "in certain actions against the state of New York."[30] Many of these suits are brought by organizations or firms that provide crucial legal services to the poor and the possibility of generating counsel fees would help support such litigation.

Affirming the award of counsel fees under the EAJA would also prove vital to solo and small firm practitioners seeking to represent people in cases who, in the absence of the EAJA, might not be able to receive representation at all. Empirical studies on *pro bono* work have demonstrated that issues such as time constraints, high billable hour expectations, lack of expertise, lack of administrative support, and other cost concerns have effectively discouraged solo practitioners, small firms, mid-size firms, and eligible legal service attorneys from pursuing more *pro bono* litigation.[31] Yet despite those concerns, more solo and small firm lawyers provide free and reduced fee services to the poor than other lawyers,[32] making them among the most experienced in dealing with legal issues affecting low income individuals. It stands to reason that these experienced attorneys' ability to

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[30] CPLR 8600.

[31] *See* A.B.A Standing Comm. on Pro Bono and Pub. Serv., *Supporting Justice: A Report on the Pro Bono Work of America's Lawyers,* at 18 (August 2005); *see also* Leslie C. Levin, *Pro Bono Publico In a Parallel Universe: The Meaning of Pro Bono in Solo And Small Law Firms*, 37.3 Hofstra L. Rev. 699, 714 (2009).

[32] Levin, at 713.

recover counsel fees under the EAJA would promote greater work through EAJA litigation by offsetting such costs and concerns through counsel fee recovery. A disavowal of the so-called "catalyst test" would unfairly impede access to justice by inefficiently discouraging more-experienced but smaller firms and eligible legal service attorneys with resource limitations from pursuing EAJA litigation.

B. The EAJA Helps to Address This Crisis by Enabling Plaintiffs of Modest Means to Obtain Counsel to Enforce Favorable Decisions by State Agencies.

In July 1990, former Chief Judge Sol Wachtler commissioned the Committee to Improve the Availability of Legal Services (the Marrero Commission) to ascertain "the amount of and types of *pro bono* work being done by New York lawyers, to measure the increase in that activity that results from renewed voluntary efforts, and to determine what effect those efforts are having on the availability of legal services for the poor in New York."[33] In its final report, the Marrero Commission found that private practitioners in smaller firms were more likely to identify *financial concerns as the primary impediment to increased pro bono activity.*[34]

Financial concerns are particularly acute for many members of the private bar who would like to take on cases like the instant matter, but who are generally

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[33] *Final Report of the Pro Bono Review Committee* at 1.

[34] *Id.* at 23 (emphasis added) (finding 41.5 percent of 1,570 responding private law firms with 10 or fewer members had cited financial circumstances as the primary impediment to *pro bono* work).

unfamiliar with the intricacies of benefits law. As a result, before venturing into such unfamiliar legal terrain, a private attorney must decide whether the potentially mammoth investment of time and effort carries with it a reasonable chance of fair compensation.

Prior to *Wittlinger*, it was difficult enough to attract private counsel. Nevertheless, those who developed the requisite expertise had a fair chance of compensation if the lawsuit attained the sought-after relief via favorable mooting, settlement stipulation, court order, judgment, or consent decree.

In the aftermath of *Buckhannon* and *Wittlinger*, uncertainty regarding the vitality of the "catalyst test" has upended the cost-benefit analysis for prospective counsel willing to represent low income individuals with some expectation of obtaining counsel fees. If the offending state agency can avoid fee liability simply by mooting the litigation before a judge issues a favorable judgment, then private attorneys and eligible legal services programs will have little reason to grapple with a complex, challenging case, and the poor who require such attorneys will largely go without them.

Without the catalyst theory in place, state agencies will simply respond to the bright glare of litigation by issuing corrective action prior to judicial disposition, thereby disqualifying litigants from a State EAJA fee award. While this result might ultimately lead to relief for some litigants who were fortunate

enough to have counsel or the wherewithal to represent themselves, this erroneous interpretation of the EAJA shuts the door on other litigants obtaining compliance with agency decisions. Prohibiting counsel fees under the catalyst theory disincentivizes both attorneys from taking cases and agencies from complying expeditiously with decisions favorable to would-be plaintiffs (*see*, *infra*, Point II).

In an earlier State of the Judiciary address, Chief Judge Kaye, lamenting the lack of legal representation for poor persons in matters of "shelter, income, food and health services," aptly noted that "the scales of justice balance best when both sides have equal access to justice."[35] While the State EAJA cannot unilaterally recalibrate the scales of justice, that statute carries with it the potential and the obligation to ameliorate the problem of access to life-sustaining benefits.

II. AN AWARD OF COUNSEL FEES IN CASES SUCH AS THIS WILL DETER AGENCY MISCONDUCT AND COMPORT WITH THE LEGISLATURE'S INTENT

An award of State EAJA fees in cases like this one will have the designed effect Legislature intended: to arm citizens, no matter how poor, with access to legal assistance in actions against state agencies, thereby creating a strong incentive for agencies to comply with statutory obligations.

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[35] Chief Judge Judith S. Kaye, *State of the Judiciary Address 1999* (Feb. 8, 1999), http://www.nycourts.gov/admin/stateofjudiciary/stofjud9/State99.htm (last visited November 3, 2013).

When the State EAJA was enacted, then-Governor Mario Cuomo expressed the hope that the statute would provide the financial impetus to engage the private bar, and thus "improve access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency acting without justification."[36]

While the Legislature made the award of fees under the EAJA subject to the discretion of the presiding judge within the limitations of the act, the Supreme Court of the United States and New York State courts have long held that said discretion may not be exercised in a manner that contravenes clear legislative intent.[37]

Furthermore, in the absence of attorneys' fees awarded under the "catalyst test," state agencies would be free to stonewall citizens who seek redress through administrative channels, since even if a lawsuit was filed, the agency could moot the case without any accountability for its recalcitrance. The EAJA is intended to

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[36] *See* Governor's Mem approving L.1989, ch. 770 at 20.

[37] *See, e.g., Newman v. Piggie Park Enter. Inc.*, 390 US 400, 401 (1968) (noting discretion must be exercised in accordance with the "purposes of the counsel-fee provision"); *Blanchard v. Bergeron*, 489 US 87, 93 (1989) (holding that a contingent-fee contract does not impose an automatic ceiling on an award of attorney's fees, since to hold otherwise would be "inconsistent with the statute and its policy and purpose"); *see also Rahmey v. Blum*, 95 AD2d 294, 296 (2d Dept 1983) (citing *Hensley v. Eckerhart*, 461 US 424 (1983) (interpreting the Civil Rights Attorney's Fees Awards Act of 1976 to provide prevailing plaintiffs an attorney's fee *unless* "special circumstances would render such an award unjust")); *Continental Bldg. Co. v. Town of N. Salem*, 211 AD2d 88 (3d Dept 1995) (noting the amount of an award, while in the discretion of the trial court, could not be reduced if said reduction was in violation of the legislative purpose animating the fee regime).

compensate parties who are forced to bring litigation to enforce their rights, especially involving the most egregious of agency violations. Such compensation is particularly important in light of the extraordinary crisis in the availability of legal services to the poor, since many New Yorkers do not have the time, money, or skill required to battle a deep-pocketed agency in court.

An attorneys' fee system that encourages this "wait-and-see approach" is also likely to have severe implications for the efficiency of the judiciary, since agencies will be more likely to flout the administrative process designed to eliminate the need for litigation in the first place.

Recent decisions concerning analogous fee-shifting statutes highlight concerns about intransigent agency behavior, and reaffirm how a clear endorsement of the "catalyst" theory under the EAJA will serve to both reduce such unlawful agency behavior and comport with legislative intent.

In *New York State Defenders Ass'n v. New York State Police*[38]—a case involving the attorneys' fee provision of the State's Freedom of Information Law (FOIL)—petitioners sought records pertaining to the State Police's policies on videotaping of custodial interrogations through the administrative mechanism created by FOIL.

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[38] 87 AD3d 193.

Like the instant case, petitioners in *State Defenders* were forced to file an Article 78 petition seeking the records after being denied at every stage of the administrative process. After the lawsuit was filed, the State Police immediately and without reservation reversed its prior decision and agreed to disclose the requested records.

Originally, FOIL lacked an attorneys' fee provision. As a result, many state agencies employed a "sue us" approach to FOIL.[39]

This problem with FOIL enforcement led the good-government group Citizens Union to issue a letter of support for an attorneys' fee clause,[40] which read, in part:

> [Without a fee provision] An agency may routinely deny access to records, thus leaving a petitioner recourse only to the courts, a route few people can afford to take. If a person does undertake a court challenge, the agency can then simply release the records, and face no further sanctions. An agency thus has nothing to lose by continually refusing to provide access.[41]

Like the EAJA statute at issue in this case, FOIL's attorneys' fee clause states that a court "may assess, against such agency involved, reasonable attorney's fees and

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[39] *See, e.g.*, Budget Report on Bills, S-7693 (1982) noting the Committee on Oversight, Analysis, and Investigation study had found nearly 60 percent of State agencies in violation of some aspect of FOIL.

[40] Citizens Union, Letter in Bill Jacket, L.1982, c. 73 (March 22, 1982).

[41] The letter was authored by Alan Rothstein, then-Associate Director of Citizens Union and now General Counsel of *amicus* Bar Association of the City of New York.

other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has ***substantially prevailed***."[42]

As a result of this legislative history, the Third Department, in determining whether the petitioner had "substantially prevailed," held that "the 'voluntariness' of such disclosure is irrelevant to the issue of whether petitioner substantially prevailed . . . [since] to allow a respondent to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purposes of FOIL's fee-shifting provision."[43]

The ruling in *State Defenders* is of particular interest in the case at bar, since the attorneys' fee provision of FOIL was enacted seven years *prior to* the statute at issue here. Thus not only was the catalyst theory a well-recognized part of the relevant case law at the time the EAJA was enacted, but the Legislature had very recently expressed concern about agency behavior in the absence of a stronger fee-shifting provision.[44]

Ultimately, if state agencies can defeat awards simply by mooting actions prior to final judgment, then state agencies will once again have carte blanche to adopt a "sue us" attitude in cases like this one. That result would create a costly

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[42] Pub. Off. Law § 89 (4)(c)(i) (emphasis added).

[43] *New York State Defenders Ass'n,* 87 AD3d at 195.

[44] Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. Chi. L. Rev. 1347, 1362 (2002).

and onerous barrier to justice for New Yorkers the EAJA and thwart the laudable intent of the State EAJA.

CONCLUSION

For all of the above reasons, amicus respectfully requests that this Court affirm the First Department's decision, and clarify that the "catalyst theory" applies to the attorneys' fee provision of the State's Equal Access to Justice Act.

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