COURT OF APPEALS
OF THE STATE OF NEW YORK

IN RE LUZ SOLLA, Respondent, v. ELIZABETH BERLIN, ET AL., Appellant.	)	**Docket No. [APL-2013-00224]**

BRIEF OF THE LEGAL AID SOCIETY, THE NEW YORK CIVIL LIBERTIES UNION, THE NEW YORK LEGAL ASSISTANCE GROUP, HOUSING WORKS AND THE EMPIRE JUSTICE CENTER AS AMICI CURIAE IN SUPPORT OF RESPONDENT-PETITIONER

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I. PRELIMINARY STATEMENT

Pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York, The Legal Aid Society ("Legal Aid"), the New York Civil Liberties Union ("NYCLU"), the New York Legal Assistance Group ("NYLAG"), Housing Works, Inc. and the Empire Justice Center respectfully submit this *amici curiae* brief in support of Respondent-Petitioner Luz Solla's response to the appeal of Appellant, Elizabeth Berlin, which seeks to reverse the decision of the Appellate Division, First Department entered on March 5, 2013. The First Department correctly decided that the "catalyst theory" applies to the New York Equal Access to Justice Act, Article 86 of the CPLR ("EAJA").[1] *Amici* respectfully urges this Court to affirm the First Department's decision.

II. QUESTION PRESENTED

Whether the EAJA permits the award of attorney fees based on the "catalyst theory" where the State was not substantially justified in its position and voluntarily granted the relief sought as a result of litigation? The Appellate Division, First Department reversed the decision of the Article 78 court and answered this question in the affirmative.

III. STATEMENT OF INTERESTS OF *AMICI CURIAE*

This *amici* brief is submitted in support of the Appellate Division, First

[1] CPLR §§ 8600–8605.

Department's Judgment and Order, dated March 5, 2013 (the "Judgment and Order"), which reversed the Article 78 court's denial of Plaintiff-Respondent's request for reasonable attorneys' fees pursuant to the EAJA. This Court should affirm the Judgment and Order because it correctly concludes that the EAJA provides for the award of reasonable attorney fees to a plaintiff whose action is the "catalyst" for the State's voluntary granting of the relief sought in cases where the State was not substantially justified in its position.

Legal Aid respectfully submits that this *amici curiae* brief will assist the Court in rendering a final disposition in this appeal. As set forth in its Mission Statement, Legal Aid is dedicated to one simple but powerful belief: that no New Yorker should be denied access to justice because of poverty.[2] As part of that mission, Legal Aid is dedicated to ensuring that poor and low-income individuals are not denied the opportunity to challenge actions by governmental entities on which such individuals are so often dependent.

Legal Aid is the nation's oldest and largest not-for-profit legal services organization and has been providing legal services to low-income New Yorkers for 138 years. Legal Aid takes on more cases for more clients than any other legal services organization in the United States, providing legal assistance in more than 300,000 individual cases and legal matters for low-income New Yorkers annually.

[2] *Mission of The Legal Aid Society*, http://www.legal-aid.org/en/las/aboutus.aspx (last visited Feb. 27, 2014).

Legal Aid does not charge fees to any of its clients. Notwithstanding its commitment to assisting low-income New Yorkers, due to limited resources and the increasing demand for legal services, Legal Aid is unable to help a substantial number of potential clients who seek representation in meritorious cases.[3] As a not-for-profit legal services organization, all sources of funding help in Legal Aid's effort to provide access to justice to New York's low-income population including fees recovered under the EAJA and similar statutes. As a long-standing member of New York's legal and access to justice community, Legal Aid is also keenly aware that private practitioners and other legal service organizations depend on fee recovery under the EAJA to support their representation of low-income New Yorkers. Accordingly, Legal Aid has a strong interest in the outcome of this appeal, offers a unique perspective on the matters at issue, and believes it can assist the Court in rendering a final disposition.

Since its founding in 1990, NYLAG has used the power of the law to protect the rights of the vulnerable, strengthen communities, and fight poverty. NYLAG provides free civil legal services to over 76,000 New Yorkers each year. The agency serves not only the abject poor, but also low-income and working poor individuals, and undocumented immigrants. NYLAG reaches even isolated

[3] For example, while Legal Aid provided assistance to about 100,000 clients in 2012, it turned away about 89 percent of those seeking aid due to budgetary limits. *See* John Caher, *Hearing Begins Evaluation of Need for More Civil Legal Services*, N.Y.L.J., Sept. 18, 2013.

populations by placing attorneys within community centers, courts, hospitals and local agencies. Among NYLAG's practice areas are matrimonial and family law for victims of domestic violence, health care, public benefits, eviction and foreclosure prevention, employment, consumer, disaster relief, education and immigration. In addition to case consultation and representation in court, the agency engages in impact litigation on behalf of large groups of similarly situated individuals.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a non-profit, non-partisan organization with tens of thousands of members. The NYCLU is dedicated to the defense and protection of civil rights and civil liberties. For over sixty years, the NYCLU has been involved in litigation and public policy on behalf of New Yorkers, fighting against discrimination and advocating for individual rights and government accountability. The NYCLU has also been involved in fighting for the rights of New York's poor. Accordingly, the NYCLU has an interest in ensuring that the New York EAJA is correctly interpreted and applied to promote access to justice for low-income New Yorkers in civil proceedings.

Housing Works is a non-profit organization that, among other things, provides free civil legal services to low-income New Yorkers who cannot afford private attorneys. The legal department at Housing works practices poverty law

and serves Housing Works clients in areas such as housing, family, and benefits law. Housing Works also engages in impact litigation, working independently or with other organizations and pro bono counsel to litigate issues of broad importance regarding welfare, homelessness, HIV/AIDS, LGBT rights, and discrimination. The Legal Department at Housing Works is underfunded and depends upon attorneys' fees to fund their efforts on behalf of indigent New Yorkers and to ensure its continued existence.

The Empire Justice Center is a not-for-profit law firm that provides support services, such as research, case assistance, and coordination of statewide training and substantive law task forces to civil legal service attorneys across New York State. In addition, the Empire Justice Center provides legal assistance to low income individuals in a wide variety of civil matters including public benefits, Medicaid, consumer, immigration, social security and employment. With a focus on poverty law, Empire Justice undertakes research and training, acts as an informational clearinghouse, and provides litigation backup to local legal services programs and community based organizations. As an advocacy organization, Empire Justice engages in legislative and administrative advocacy on behalf of those impacted by poverty and discrimination. As a non-profit law firm, Empire Justice provides legal assistance to those in need and undertakes impact litigation in order to protect and defend the rights of disenfranchised New Yorkers.

IV. STATEMENT OF THE CASE

Ms. Solla, a recipient of public assistance benefits, requested a fair trial before the New York State Office of Temporary and Disability Assistance ("OTDA") to challenge the City's Notice of Decision that reduced Ms. Solla's shelter allowance benefits by approximately $200 per month. Ms. Solla secured a favorable Decision After Fair Hearing ("DAFH") from the OTDA, which ordered the City respondents to withdraw the Notice of Decision and restore Ms. Solla's benefits, retroactive to the date of the action reducing her benefits.

The City respondents did not comply with the fair hearing directive and failed to restore Ms. Solla's benefit for over five months. Ms. Solla, with the assistance of counsel, was forced to commence an Article 78 proceeding seeking enforcement of the DAFH and attorneys' fees under the EAJA. Two weeks later, the City complied with the DAFH and retroactively restored Ms. Solla's benefits and the Article 78 court dismissed Ms. Solla's petition as moot. The court found that Ms. Solla's Article 78 proceeding was "undoubtedly" the catalyst for the City respondents' eventual compliance with the DAFH, the City respondents' delay was arbitrary, and the petition "was the only way left for [Ms. Solla] to get [the City respondents'] attention after being ignored for months." *Solla v. Berlin*, No. 401178/2011, 2011 NY Slip Op. 33638[U], at *2 (Sup. Ct. NY Cnty. 2011). Nonetheless, the court concluded that Ms. Solla was not a "prevailing party" under

the EAJA and thus was not entitled to recover attorneys' fees. *Id.*

Ms. Solla appealed to the Appellate Division, First Department. The First Department reversed the Article 78 court and granted Ms. Solla's application for attorneys' fees. The court declined to follow its prior decision in *Matter of Auguste v. Hammons* and held that the "catalyst theory" applies to the EAJA. *Matter of Solla v. Berlin*, 106 A.D.3d 80, 81-82 (1st Dep't 2013) (declining to follow *Matter of Auguste v. Hammons*, 285 A.D.2d 417 (1st Dep't 2001)). The court held that "[i]t would be inconsistent with the laudatory goals of the State EAJA to interpret the legislation as depriving plaintiffs of attorneys' fees simply because the State decided to concede its position." *Id.* at 93. Accordingly, the First Department remanded the case for a hearing to determine the appropriate amount of fees due to Ms. Solla. *Id.* The Appellant then filed this appeal.

V. ARGUMENT

The EAJA was enacted to assist economically disadvantaged plaintiffs in obtaining counsel to challenge the unjustified actions of New York State agencies. Permitting the award of attorneys' fees based on the "catalyst theory" under the EAJA is consistent with the intent of the EAJA to provide access to justice to low-income New Yorkers, assists organizations such as The Legal Aid Society and other organizations and private practitioners in providing legal representation to low-income New Yorkers, and deters unwarranted State agency action and

promotes compliance.

A. ATTORNEYS' FEES BASED ON THE CATALYST THEORY SUPPORT AND IMPROVE ACCESS TO JUSTICE FOR LOW-INCOME NEW YORKERS

1. New York's Access to Justice Crisis

Access to justice is a systemic and ongoing problem. The importance of providing access to justice to indigent persons in New York with civil legal needs was repeatedly recognized when the EAJA was enacted. The EAJA was supported as a "desperately needed" avenue to improve access to justice for the poor. Letter from Advocates for Children, August 7, 1989, Bill Jacket, L. 1989, ch. 770. Passage of the EAJA was viewed as "particularly timely" in light of reports[4] that documented "the critical problem of underrepresentation of the poor." Letter from New York State Bar Association, August 6, 1989, Bill Jacket, L. 1989, ch. 770. The Letter submitted on behalf of the New York State Bar Association pointed out that at the time the EAJA was passed there was a real concern expressed by the New York courts about the lack of access to justice for low-income New Yorkers. *Id.* A study on the lack of legal assistance for the poor conducted by the New York State Bar association along with a special committee appointed by Chief Judge Wachtler found that "the problem ha[d] assumed 'crisis proportions which jeopardizes both the welfare of poor persons and the legitimacy of the legal system

[4] Committee to Improve the Availability of Legal Services, *Preliminary Report to the Chief Judge of the State of New York* (1989); New York State Bar Association, *New York Legal Needs Study* (1989).

itself.'" Letter from New York State Bar Association, August 6, 1989, Bill Jacket, L. 1989, ch. 770.

Regrettably, the crisis of the unrepresented has continued. At best only 20% of the legal needs of low-income New Yorkers are currently being met. The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York*, at 17 (November 2013). More than 2.3 million litigants still attempt each year to navigate the complex civil justice system without a lawyer. *Id.* at 20; New York State Courts, New York State Courts Access to Justice Programs 2013 Report.

Equal access to justice is "not a luxury payable only in good times. It is one of the most fundamental obligations we owe our citizenry." Press Release, Chief Judge Jonathan Lippman, Testimony before Senate and Assembly Hearing on IOLA and Civil Legal Services (January 7, 2010). For

> vulnerable New Yorkers, civil legal services are the ultimate safety net—often the only means by which they can keep their lives afloat. Yet, even when the economy was strong, these chronically underfunded programs managed to serve only a fraction of those in need—perhaps 20% or so. Clearly, our state is failing to provide low-income New Yorkers with meaningful access to justice.

Id.

Any reduction in funding and legal representation perpetuates the access to justice crisis and causes harm to low-income New Yorkers with the greatest need of legal representation.

2. The Intent of the EAJA is to Provide Access to Justice

On its face, the intent of the EAJA is to "create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York." The EAJA sponsoring memorandum identified the purpose of the EAJA:

> To encourage individuals, small businesses and not-for-profit corporations to challenge State action when it lacks substantial justification by allowing them to recover fees and litigation expenses.

Sponsor's Mem., Bill Jacket, L. 1989, ch. 770, 1989 N.Y. Legis Ann. at 334-35.

Low-income New Yorkers "may often be reluctant or unable to initiate a suit against the State due to legal costs involved in bringing an action." Mem. from Robert J. Freeman, Executive Director, Department of State Committee on Open Government, June 14, 1989, Bill Jacket, L. 1989, ch. 770. Upon approving the EAJA, Governor Cuomo specifically noted that:

> a program of providing recompense for the cost of correcting official error is highly desirable [and] is a worthwhile experiment in improving access to justice for individuals . . . who may not have the resources to sustain a long legal battle against an agency that is acting without justification.

Governor's Approval Mem., October 25, 1989, Bill Jacket, L. 1989, ch. 770, 1989 N.Y. Legis. Ann. at 335.

Removing economic barriers that prevent or discourage individuals from contesting erroneous government action is necessary to overcome the access to

justice crisis. The EAJA:

> directly promotes equal access to justice by significantly lowering economic barriers that currently prevent many individuals from contesting irrational and illegal State government action.

Association of the Bar of the City of New York, *Report on Legislation S. 3321-A & A. 3313-A*, Bill Jacket, L. 1989, ch. 770.

3. The Intent of the EAJA is Promoted by Application of the "Catalyst Theory"

The "catalyst theory" is an important component of fee shifting statutes and is consistent with the policies that the EAJA supports. As in Ms. Solla's case, the doctrine comes into play when certain conditions have been met: (i) an individual was subject to some erroneous or improper conduct by a State agency, (ii) the individual was forced to commence litigation, and (iii) the litigation resulted in the erroneous or improper conduct being voluntarily reversed by the state. That is precisely the type of litigation and result that the EAJA was intended to encourage. Economic barriers to that type of proceeding are exactly what the EAJA was intended to lower.

Without the "catalyst theory," Legal Aid and other attorneys considering representing low-income New Yorkers can never count on fee recovery, even in meritorious cases. There is always a risk of non-payment for attorneys handling statutory fee recovery cases. That risk increases significantly if in addition to

making a judgment as to whether a plaintiff has a good case, the attorney has to predict whether the State agency will deprive her of a fee by simply capitulating at some point during the litigation. In a rather cruel irony, this could make the ***most*** meritorious cases the ***least*** attractive to counsel because the strong cases are the ones in which the State agencies would seem most likely to voluntarily reverse their conduct. Low-income New Yorkers will have even more difficulty obtaining counsel if attorneys are denied fees precisely because the litigation they commenced was successful.

The "catalyst theory" encourages and allows attorneys to provide legal representation to low-income New Yorkers in pursuing their claims against State agencies. Incentivizing attorneys to provide legal representation is consistent with the EAJA which was viewed as:

> a significant step in making legal assistance more available to those most in need [by providing] an incentive for (or, at least eliminate an obstacle against) making representation available to those with legitimate challenges to unreasonable state action.

Letter from Community Action for Legal Services, Inc., July 31, 1989.

There is "no substitute for full legal representation, especially for the most vulnerable litigants in our society." Chief Judge Lippman, *Law in the 21st Century* (May 3, 2010). The "catalyst theory" provides a means of acquiring full legal representation and enables low-income New Yorkers to challenge inappropriate conduct by government agencies by bringing meritorious, low-value

suits, which plaintiffs routinely must forego.[5] Authorizing recovery of fees and litigation expenses under the "catalyst theory" places "the State and [low-income New Yorkers] on more equal footing." Letter from Sponsor, September 21, 1989, Bill Jacket, L. 1989, ch. 770. Disavowing the catalyst theory would exacerbate an already widespread problem and undermine the intent of the EAJA.

In line with the legislative history, the Appellate Division, First Department correctly concluded that:

> [t]here 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.

Solla, 106 A.D.3d at 82. The Appellate Division, First Department also correctly concluded that "preservation of the catalyst theory is critical to achieving the legislative purpose behind the State EAJA." *Solla*, 106 A.D.3d at 93.

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[5] *See* Catherine R. Albitson and Laura Beth Neilson, *The Procedural Attack on Civil Rights: the Empirical Reality of Buckhannon for the Private Attorney General,* 54 UCLA L. Rev. 1087, 1130, 1121 (2011) (findings from a study of 221 public interest law organizations that rejecting fee recovery under the "catalyst theory" results in strategic capitulation, discouragement of settlement, avoidance of representing clients in enforcement cases, and that organizations engaging in "classic social change litigation: class actions, actions against states, and impact litigation claims" are the most detrimentally impacted); *see also* Jonathan T. Molot, *Fee Shifting and the Free Market*, 66 Vand. L. Rev. 1807, 1811 (2013) ("Conversely, where plaintiffs have meritorious claims, fee shifting is the only mechanism that can truly compensate them for their injuries by reimbursing them for the expenses they have incurred in litigation as well as for the underlying harm they have suffered. Indeed, only a fee-shifting regime can enable plaintiffs to bring meritorious, low-value suits, which plaintiffs routinely must forego in a non-feeshifting regime."); Issachar Rosen-Zvi, *Just Fee Shifting*, 37 Fla. St. U. L. Rev. 717, 733-34 (2010) (noting that fee shifting "not only increases the likelihood of challenges to inappropriate conduct by governmental agencies and big businesses, but it also gives such challenges teeth . . . one-way fee shifting enables the latter to engage in expensive protracted litigation that they could otherwise not afford").

4. The Court Properly Interpreted the EAJA

Appellant's arguments fail to establish error in the First Department's construction of the State EAJA. "The fundamental principle of construction under New York Law is to give effect to the intention of the legislature." *Roe v. City of New York*, 232 F. Supp. 2d 240, 254 (S.D.N.Y. 2002). Despite Appellant's arguments for a narrow construction of the statute, as the Third Department has stated, "no statute may be construed so strictly as to result in the perversion of the legislative intent." Resp't Br. at 29 (quoting *In re Schacht*, 20 A.D.2d 507, 510 (3d Dep't 1964). In *Schacht*, the court went on to note that even if there is an "inclination" to interpret a statute a certain way, such rules of interpretation are not permitted to override the more-important doctrine that the intent of the Legislature is the primary object of statutory construction. 20 A.D.2d at 510.

Appellant's cite to *Rodriguez v. United States*, 480 U.S. 522 (1987) to support their argument that the EAJA should not be interpreted to include the catalyst theory. Appellant Reply Br. at 20. *Rodriguez* dealt with the issue of repeal by implication in which the court found that "the totality of the legislative history of the Act demonstrate[d] with ***unusual clarity*** that no repeal was intended." 480 U.S. at 525 (emphasis added). Here there is no such "clarity" that the Legislature's intent under the EAJA was to exclude the catalyst theory. To the contrary, it is clear that the theory is wholly consistent with and compelled by the

intent of the EAJA.

As discussed above, the clear legislative intent behind the New York EAJA was to provide access to justice to the low-income individuals who otherwise would have no recourse to address unjustified state action. Appellant argues that despite the clear statutory intent, courts should not "add features that will achieve the statutory 'purposes' more effectively." Appellant Reply Br. at 20 (quoting *Dir., Office of Worker's Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). However, the *Office Worker's* Court also noted that the principle of liberal construction "may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme." *Id.*at 135-36 (citing *N.E. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977)). In *Northeast Marine*, the Court held that a statute created to cover injuries from new technologies also covered a worker injured from an antiquated technology finding that Congress' intent was also to create a "uniform compensation system." 432 U.S. at 271-72.

As noted in Respondent's brief, the New York EAJA was adopted at a time when the catalyst theory was an accepted feature of the Federal EAJA. Resp't Br. at 2, 27-32. While the New York EAJA included noted departures from its federal counterpart, the catalyst theory was not one of them. *Id.* Accordingly, the First Department correctly found that the catalyst theory fits squarely within the

legislative intent of the New York EAJA and to hold otherwise would work to undermine the very purpose of the legislation.

Finally, Appellant's argument that adopting the First Department's decision would require a reconsideration of all decisions which applied federal case law in interpreting the New York EAJA is without merit. Appellant Reply Br. at 13. Several of the cases cited by the Appellant do not rely solely on an interpretation of federal case law post-enactment of the New York EAJA and deal with issues unrelated to the catalyst theory. *Id.* (citing *e.g. Kimmel v. State of N.Y.*, 115 A.D.3d 1323 (4th Dep't 2014); *Cintron v. Calogero*, 99 A.D.3d 456 (1st Dep't 2012); *Riley v. Dowling*, 221 A.D.2d 446 (2d Dep't 1995). For example, in *Kimmel*, the issue addressed by the court dealt with whether the plaintiffs sufficiently established a net worth of less than $50,000. 115 A.D.3d. at 1323. While the court noted that the New York EAJA was intended to be similar to the federal EAJA, the court pointed out that the state legislature specifically departed from the federal EAJA when it chose to limit the net-worth requirement to $50,000. *Id.* at 1324. In determining whether plaintiff's proofs were sufficient, the court cited both New York State and federal decisions. *Id.* at 1324-25. In *Cintron*, the issue was also whether the petition met the New York EAJA net worth requirement. 99 A.D.3d at 457-58. The court supported its holding by citing state and federal case law. *Id.* Finally, in *Dowling* the court denied fees because it

found that the state's position was substantially justified, citing, without analysis, both state and federal case law. 221 A.D.2d at 447. None of these cases are instructive here, as they did not solely rely on an interpretation of the federal EAJA or federal case law as applied to the New York EAJA and dealt with issues unrelated to the catalyst theory. Further, Respondents make no representation that the federal case law they cite differed at all from the federal case law on these respective issues prior to the enactment of the New York EAJA. Accordingly, adopting the First Department's decision would not require a reconsideration of these cases. In any event, such considerations are not sufficient to overcome giving the EAJA its proper scope and interpretation as the First Department did here.

B. ATTORNEYS' FEES BASED ON THE CATALYST THEORY ASSIST LEGAL AID AND SIMILAR NOT-FOR-PROFIT ORGANIZATIONS PROVIDE ACCESS TO JUSTICE

Legal Aid and the other amici are on the front lines of assisting impoverished New Yorkers access justice. Legal Aid and other organizations with similar missions and practices, have ample experience representing low-income New Yorkers and are well positioned to litigate cases against State government agencies. Unfortunately, Legal Aid does not have sufficient resources to provide legal representation to all low-income New Yorkers with meritorious civil cases. Legal Aid is forced to turn away three out of four civil cases due to resource

limitations.[6]

With only 20 percent of the legal needs of low-income New Yorkers being met and 2.3 million unrepresented civil litigants annually, the services of Legal Aid, the other amici and organizations like them are crucial to overcome the access to justice crisis. Providing attorneys' fees under the EAJA pursuant to the "catalyst theory" assists Legal Aid and these organizations in their representation of low-income New Yorkers. The "catalyst theory" provides greater assurance of compensation through attorneys' fees when a lawsuit is a catalyst for a plaintiff achieving the relief sought. Assurance of recovering attorneys' fees in all meritorious cases provides greater certainty of additional resources allowing Legal Aid and organizations like it to represent more low-income New Yorkers. If attorneys' fees are denied under the "catalyst theory," Legal Aid and other not-for-profit organizations, as well as private attorneys dedicated to practice in the area, will suffer additional losses of funding that will curtail their ability to represent low-income New Yorkers. Anything that takes away from the financial support of Legal Aid and other organizations that provide similar services, leaves people with the greatest need at greater risk.

[6] Testimony of Steven Banks, Legal Aid Society, 2014-2015 Executive Budget, S. Fin. Comm. and Assembly Comm. on Ways and Means (February 5, 2014).

C. ATTORNEYS' FEES BASED ON THE CATALYST THEORY WILL PROMOTE STATE AGENCY COMPLIANCE

1. Attorneys' Fees Based on the Catalyst Theory Promote State Agency Compliance with Fair Hearings Reducing the Burden on Litigants and New York Courts

State agencies' failure to comply with Fair Hearings places a significant burden on unrepresented litigants and New York courts. Hundreds of fair hearings are held each day and about 98 percent of litigants appear *pro se*.[7] Fair Hearings were established to create a simple and accessible process for *pro se* litigants and were meant to provide expeditious resolution of disputes with State agencies. *See Goldberg v. Kelly*, 397 U.S. 254 (1970); *see also Brown v. Lavine,* 37 N.Y.2d 317, 321 (1975) (noting that the current due process standards provide a method of easily obtaining a fair hearing, in compliance with the standards set forth in *Goldberg*). "The procedure as a whole would appear designed to minimize inaccuracies and to assure quality and fairness in adjudication."); *Matter of Cisco v. Lavine*, 340 N.Y.S.2d 275, 282-83 (1973) (citing *Goldberg* to support the proposition that the requirements of speedy decisions are necessary because of the nature of the litigants in these matters and noting that the interest served by the time limitation rules is "the right of aggrieved recipients to prompt resolution of their appeals" and that the "recipient, or applicant, who lacks independent

[7] *Mission Statement*, Project Fair, http://www.projectfair.org/about-us/mission-statement/ (last visited Nov. 17, 2014).

resources . . . becomes immediately desperate . . . . [t]his interest is a vital one, necessitating procedural fairness and expediency").

When State agencies fail to comply with fair hearing orders, *pro se* litigants are forced into the complex and expensive court system where the State adversary has a distinct advantage in terms of resources and expertise. This is exactly what happened to Ms. Solla. In a letter to Governor Cuomo regarding the EAJA, Robin Schimminger stated

> [t]oo often, people have no choice but to concede an action taken against them by a State agency, even if convinced of their innocence, because of the prohibitive cost of contesting such actions. But State agencies, with legal staffs on the ready, are equipped to withstand the escalating costs of extended court battles.

Letter from Robin Schimminger to Governor Cuomo, September 21, 1989, Bill Jacket, L. 1989, ch. 770.

Judges have reported that "many valid claims are lost, because the unrepresented often do not present evidence or understand the law." The Task Force to Expand Access to Civil Legal Services in New York, *Report to the Chief Judge of the State of New York* (November 2010). The influx of unrepresented litigants turning to courts to challenge unjustified State action also creates a burden on New York courts and consumes judicial resources. The substantial number of unrepresented litigants in New York courts

> severely taxes our resources and poses daunting challenges for judges and court staff, who must spend inordinate time explaining

> complicated legal procedures and dealing with errors on important legal forms. But the people who suffer most are the vulnerable – the elderly, children, struggling families, disabled people, abuse victims.

Press Release, Chief Judge Jonathan Lippman, Testimony before Senate and Assembly Hearing on IOLA and Civil Legal Services (January 7, 2010).

Fee shifting under the "catalyst theory" is integral to achieving State compliance with fair hearing orders. The "catalyst theory" has the effect of promoting compliance by encouraging State agencies to promptly alter unjustified conduct in order to minimize their ultimate fee liability. Ideally, the "catalyst theory" will rarely be invoked because its mere presence will encourage State agencies to comply with fair hearing orders before the need for an Article 78 proceeding arises. To the extent litigation to enforce fair hearing orders become necessary, parties will be more likely to have experienced attorneys able to represent them and alleviate burden on the courts. Compliance with fair hearing orders achieves an expeditious resolution of disputes, alleviates a significant burden on individual litigants and reduces court congestion.

2. Attorneys' Fees Based on the Catalyst Theory Will Deter State Agencies From Engaging in Unjustified Action or Inaction

Fee shifting under the "catalyst theory" is also essential to deterring improper State agency behavior. The "catalyst theory" is consistent with the intent of the EAJA to "rein in any abuse" of government agencies, but will not affect

State agencies that are behaving properly. Letter from Robin Schimminger, September 21, 1989, Bill Jacket, L. 1989, ch. 770. The EAJA promotes accountability:

> [b]y providing an award of attorneys' fees only where the State's action is arbitrary or unreasonable, the [EAJA] will provide a deterrent not only to such inappropriate governmental action, but also to knee-jerk court defense of such actions.

Letter from New York Lawyers for the Public Interest, Inc., August 4, 1989, Bill Jacket, L. 1989, ch. 770.

Awarding attorney's fees pursuant to the "catalyst theory" under the EAJA "does not deter State agencies from pursuing legitimate goals." Governor's Approval Mem., October 25, 1989, Bill Jacket, L. 1989, ch. 770, 1989 N.Y. Legis. Ann. at 335. However, the award of attorneys' fees under the "catalyst theory" will place a check on State action and will ensure that State agencies pursue a course of action only if it is "substantially justified" in order to minimize their fee liability.

The "catalyst theory" is a central aspect of EAJA fee shifting because it deters arbitrary and unlawful State conduct and holds State agencies accountable for unwarranted action or inaction. Awarding attorneys' fees under the "catalyst theory" will deter unlawful denial and termination of public assistance benefits to low-income New Yorkers and will encourage State agencies to examine their behavior quickly to determine if they are justified. When State agencies are not

justified they will be more inclined to resolve cases quickly to avoid payment of attorneys' fees. Quick resolution of disputes alleviates court congestion and, more importantly, quickly puts the plaintiff in the place he or she ought to be.

VI. CONCLUSION

For all of the foregoing reasons, *Amici* respectfully submit that the Judgment and Order of the First Department, Appellant Division be affirmed.

Dated: November 21, 2014

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