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# UNEQUAL ACCESS TO JUSTICE: *SOLLA V. BERLIN* AND THE UNPRINCIPLED EVISCERATION OF NEW YORK'S EAJA

Armen H. Merjian\*

*The Legislature enacted the Equal Access to Justice Act to help litigants secure legal assistance to contest wrongful actions of state agencies. By allowing victorious plaintiffs to gain attorneys' fees, the statute seeks to help those whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight City Hall.*

New York Court of Appeals<sup>1</sup>

*[I]n civil proceedings involving fundamental human needs, it is extremely difficult, if not impossible, for a person to be assured a fair outcome without a lawyer's help. As Chief Judge, I see this as one of the great challenges facing our justice system today. No issue is more fundamental to our constitutional mandate of providing equal justice under law than ensuring adequate legal representation.*

Jonathan Lipmann, Chief Judge of the New York Court of

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1. Wittlinger v. Wing, 786 N.E.2d 1270, 1273 (N.Y. 2003) (internal citation omitted).

Appeals<sup>2</sup>

*The basis for the common-law liability of the master or principal for the conduct of the servant or agent is stated in the Latin maxim, “qui facit per alium, facit per se”—“he who acts through another, acts through himself.”*

MODERN TORT LAW<sup>3</sup>

## I. INTRODUCTION

“[L]et me remind you,” wrote the eminent constitutional scholar Charles L. Black, “that most successful and unsuccessful claims of infringement of human rights are made *against the actions of state and local governments.*”<sup>4</sup> The state and local governments of New York are no exception to this phenomenon, particularly with regard to the State’s indigent citizens. Myriad cases – many of them landmark cases – illustrate this principle. For example, in *Goldberg v. Kelly*, perhaps the most famous public assistance case in U.S. history, indigent New York City residents challenged the State’s termination of their public assistance benefits “without prior notice and hearing, thereby denying them due process of law.”<sup>5</sup> Ruling for the plaintiffs, the district court observed that “to cut off a welfare recipient in the face of . . . ‘brutal need’ without a prior hearing of some sort is unconscionable . . . .”<sup>6</sup> The Supreme Court agreed, finding that the “termination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he

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2. Jonathan Lippman, Chief Judge, N.Y. Ct. App., Law Day Ceremony: Law in the 21st Century: Enduring Traditions, Emerging Challenges, at 17 (May 3, 2010) [hereinafter Lippman], <http://www.nycourts.gov/ctapps/LD10Transcript.pdf>.

3. BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 7:2 (2d ed. 2013) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*417).

4. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 32 (1997).

5. *Goldberg v. Kelly*, 397 U.S. 254, 256 (1970).

6. *Kelly v. Wyman*, 294 F. Supp. 893, 900 (S.D.N.Y. 1968), *aff’d*, *Goldberg*, 397 U.S. at 271.

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waits.”<sup>7</sup>

Decades later, to take but another emblematic example, tens of thousands of indigent New York City residents living with AIDS challenged the failure of the State and City of New York to provide them with critical subsistence benefits in *Henrietta D. v. Giuliani*.<sup>8</sup> “The extensive evidence proffered at trial,” the district court opined, “establishes unequivocally that defendants are chronically and systematically failing to provide plaintiffs with meaningful access to critical subsistence benefits and services, with devastating consequences.”<sup>9</sup>

The plaintiffs in these cases were fortunate: they managed to secure legal representation. For most indigent plaintiffs, that is sadly not the case, as New York’s Chief Judge has explained:

If they are very fortunate, a small number of these litigants may be represented by one of the civil legal services programs that provide free representation to low-income New Yorkers. But, because of lack of resources, more and more of these programs must turn away potential clients. Some who are turned away may find representation from pro bono programs, but our State’s lawyers, who already donate an estimated two million hours of pro bono work a year, cannot by themselves possibly fill the huge gap that still exists.<sup>10</sup>

In stark contrast, the State of New York, when sued, enlists the help of the Attorney General: “Over 650 Assistant Attorneys General and over 1,700 employees, including forensic accountants, legal assistants, scientists, investigators and support staff serve in the Office of the Attorney General in many locations across New York State.”<sup>11</sup> The disparity in

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7. *Goldberg*, 397 U.S. at 264.

8. *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261, 291 (2d Cir. 2003).

9. *Giuliani*, 119 F. Supp. 2d at 209.

10. Lippman, *supra* note 2, at 16.

11. *Our Office*, ATTY GEN. ERIC T. SCHNEIDERMAN, <http://www.ag.ny.gov/>

resources between the average citizen – to say nothing of indigent citizens – and the government in litigation is often profound.<sup>12</sup>

Article 86 of the New York Civil Practice Law and Rules, otherwise known as the Equal Access to Justice Act, or “EAJA,” was designed to address this disparity.<sup>13</sup> EAJA authorizes “the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York.”<sup>14</sup> The New York Legislature enacted EAJA to help indigent litigants and small businesses secure the legal assistance that they could not otherwise afford in order to contest the wrongful actions of state agencies.<sup>15</sup> “The purpose of the EAJA is to reduce the economic imbalance between an individual claimant and the

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our-office. New York City’s Law Department, meanwhile, “is staffed with 690 lawyers and 850 support professionals in 10 offices located in all five boroughs[.]” New York City Law Department, LINKEDIN, <https://www.linkedin.com/company/new-york-city-law-department>.

12. See, e.g., Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act – A Qualified Success*, 11 YALE L. & POL’Y REV. 458, 463 (1993) (“The government can marshal more resources in litigation than can most private noninstitutional parties. Indeed, the government’s sheer size may give it an unfair advantage in litigation, much like that which General Motors or Exxon enjoy over smaller adversaries. Private parties may not be able to afford protracted litigation against the government, as plaintiffs or defendants, because of this comparative lack of resources.”); Macon Dandridge Miller, Comment, *Catalysts as Prevailing Parties Under the Equal Access to Justice Act*, 69 U. CHI. L. REV. 1347, 1365 (2002) (“A disparity exists because of the government’s greater resources and expertise.”). Congress noted as much in passing the federal EAJA statute: “While the influence of the bureaucracy over all aspects of life has increased, the ability of most citizens to contest any unreasonable exercise of authority has decreased. Thus, at the present time, the Government with its greater resources and expertise can in effect coerce compliance with its position.” H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 1980 WL 12964.

13. N.Y. C.P.L.R. § 8600 (McKinney 2015).

14. *Id.* The statute provides that a court “shall” award attorneys’ fees and expenses to a prevailing party in civil actions against New York State, with limited exceptions: “[E]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.” N.Y. C.P.L.R. § 8601(a) (McKinney 2015).

15. EAJA is limited to individuals with a net worth under \$50,000; (ii) businesses with no more than 100 employees; and tax-exempt organizations. N.Y. C.P.L.R. § 8602(d) (McKinney 2015).

[government] in order to reduce the likelihood that challenges to unreasonable bureaucratic actions will be deterred by the high cost of litigating against the Government.”<sup>16</sup> As the New York Court of Appeals (“Court of Appeals”) has explained, “the statute seeks to help those whose rights have been violated but whose potential damage awards may not have been enough to induce lawyers to fight City Hall.”<sup>17</sup> In addition, like all fee-shifting statutes, New York’s EAJA serves as a deterrent to those who might otherwise violate the law with impunity.<sup>18</sup>

The recent decision of the Court of Appeals in *Solla v. Berlin* radically upends this design. *Solla* unjustly forecloses access to the courts in numerous cases where the State’s agents—local municipalities administering public assistance benefits—have violated the rights of indigent New Yorkers and disregarded directives that the State has wrongfully failed to enforce.<sup>19</sup> As we shall see, this is in fact an all-too-common

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16. *Reyes v. Sec’y of Health & Human Servs.*, 807 F. Supp. 293, 297 (S.D.N.Y. 1992). *See, e.g.*, *Sullivan v. Hudson*, 490 U.S. 877, 883 (1989) (citations omitted) (“Congress passed the [analogous federal] EAJA in response to its concern that persons ‘may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.’”); *N.Y. State Clinical Lab. Ass’n., Inc. v. Kaladjian*, 649 N.E.2d 811, 813 (N.Y. 1995) (citation omitted) (quoting Governor’s Approval Mem, L 1989, ch 770, 1989 NYLegisAnn, at 336) (“The statute was enacted to ‘improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification.’”); *Solla v. Berlin*, 961 N.Y.S.2d 55, 59 (App. Div. 2013), *rev’d on other grounds*, 27 N.E.3d 462, 465 (N.Y. 2015) (“The ‘spirit and purpose’ of the State EAJA are clear. The Legislature desired to level the playing field for those without the necessary resources to challenge State action through litigation.”).

17. *Wittlinger v. Wing*, 786 N.E.2d 1270, 1273 (N.Y. 2003) (citation omitted).

18. *See, e.g.*, *Johnson v. Blum*, 448 N.E.2d 449, 458 (N.Y. 1983) (citation omitted) (“[The Supreme Court] has also recognized that the imposition of attorney’s fees would help to insure that those who violate . . . fundamental laws could not proceed with impunity.”); Annabelle Chan, Note, *The Buckhannon Stops Here: Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources Should Not Apply to the New York Equal Access to Justice Act*, 72 FORDHAM L. REV. 1341, 1375-76 (2004) (“[C]itizen suits against the sovereign function as an important check on government. These suits deter improper government actions, allow private citizens to protect their own interests, and achieve important public policy goals.”).

19. *Solla*, 27 N.E.3d at 462.

occurrence.

*Solla* is noteworthy not merely in light of the baleful effects of its ruling, but because of its reasoning: it is categorically wrong. The decision wholly elides a cornerstone and settled principle of New York welfare law, namely, that in the administration of public assistance, the municipalities act as the agents of the State, while blatantly violating the most fundamental of agency principles, namely, that a principal is vicariously liable for the actions of its agent acting within the scope of its authority. Indeed, this principal/agent relationship is established both by statute and by decades of uniform state and federal rulings, specifically with regard to public assistance and the EAJA statute. This includes, ironically, Court of Appeals decisions directly on point, as we shall see. In the realm of public welfare law, it is difficult to overstate the enormity, and the clarity, of the court's error.

To make matters worse, the court additionally misstated—and thereby severely restricted—the requisite criteria for determining a prevailing party under EAJA pursuant to the “catalyst theory.”<sup>20</sup> The court then proceeded to rule against Ms. Solla on the basis of this erroneous and unduly restrictive criteria.<sup>21</sup>

Section II of this article provides an overview of the relevant social services law. Section II.A. discusses the established principle that municipalities act as the agents of the State of New York in the administration of public assistance benefits. Section II.B. describes the fair hearing process in New York, while Section II.C. examines the chronic failure of State officials to enforce fair hearing decisions. Section III analyzes the decision of New York's highest court in *Solla v. Berlin*, providing a brief summary of the case (Section III.A.), and highlighting the court's errors with respect to both vicarious liability (Section III.B.) and the catalyst theory (Section III.C.). A short conclusion follows in Section IV.

## II. AN OVERVIEW OF THE RELEVANT NEW YORK SOCIAL SERVICES LAW

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20. See discussion *infra* Section III.C.

21. *Solla*, 27 N.E.3d at 465.

A. *City and State: Agent and Principal*

States have a choice in the manner in which they administer their social welfare programs: they can either utilize a single state agency to do so, or they can employ local agencies acting as their agents to disburse benefits and administer those programs.<sup>22</sup> New York has chosen the latter,<sup>23</sup> engaging a total of “58 local social services districts under the general supervision of the [New York State Office of Temporary and Disability Assistance, or OTDA] and the State Commissioner of [OTDA].”<sup>24</sup> This is a critical factor in the analysis that follows: in administering public assistance benefits, local districts act *on behalf of* and *in the place of* OTDA. The districts perform the tasks that the State would have to perform if it opted to utilize a single state agency for this purpose: operating welfare centers, processing applications, determining eligibility, conferring benefits, and serving beneficiaries on a day-to-day basis.

Accordingly, New York Social Services Law expressly establishes that in administering public assistance benefits, the local district is the “agent” of the State: “*The county commissioner shall act as the agent of the department [i.e., OTDA] in all matters relating to assistance and care administered or authorized by the town public welfare officers.*”<sup>25</sup> The Social Services Law reinforces this

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22. See, e.g., *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 404 (S.D.N.Y. 2006) (citations omitted) (“States may directly administer these programs or may delegate the administration to agencies of local government, subject to state supervision.”); *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 385 (S.D.N.Y. 2000) (citations omitted), *rev’d on other grounds*, 506 F.3d 183, 199 (2d Cir. 2007) (“States participating in the Food Stamp and Medicaid programs may choose one of two ways in which to administer benefits: designate a single State agency to implement the programs, or operate the programs on a decentralized basis using local agencies.”).

23. See, e.g., *Reynolds*, 118 F. Supp. 2d at 385 (“New York has chosen to administer the Food Stamp and Medicaid Acts on a decentralized basis. . . .”); *Moore v. Perales*, No. CV-85-1638, 1990 U.S. Dist. LEXIS 20995, at \*5 (E.D.N.Y.) (May 3, 1990) (“The state has chosen to administer these programs through local agencies, including the City Agency.”).

24. *Beaudoin v. Toia*, 380 N.E.2d 246, 247 (N.Y. 1978).

25. N.Y. SOC. SERV. LAW § 65(3) (McKinney 1997) (emphasis added).

principal/agent relationship by mandating that the State “supervise all social services work, as the same may be administered by any local unit of government and the social services officials thereof within the state, advise them in the performance of their official duties and regulate the financial assistance granted by the state in connection with said work.”<sup>26</sup> Similarly, the law provides that the Commissioner of OTDA shall “exercise general supervision over the work of all local welfare authorities.”<sup>27</sup>

The State, as principal, is required to “determine the policies and principles upon which public assistance, services and care shall be provided within the state *both by the state itself and by the local governmental units . . .*”<sup>28</sup> Further, the State is authorized:

to promulgate any regulations the commissioner determines are necessary . . . and to withhold or deny state reimbursement, in whole or in part, from or to any social services district, in the event of the failure of any such district to comply with such regulations relating to such district’s organization, administration, management or program.<sup>29</sup>

The State’s duty to supervise the local agencies in the provision of public assistance is also established in the federal statutes governing the Food Stamp, Medicaid, and Temporary Assistance to Needy Family (“TANF”) programs.<sup>30</sup> These statutes make it clear that the State bears the ultimate responsibility for providing the benefits in questions and for complying with the law. The Food Stamp Act (“FSA”), for example, provides that the “State agency of each participating State shall have responsibility for certifying applicant

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26. *Id.* § 20(2)(b) (McKinney 2014).

27. *Id.* § 34(3)(d) (McKinney 1994).

28. *Id.* § 17(a) (McKinney 2007) (emphasis added).

29. *Id.* § 20(3)(f) (McKinney 2014).

30. *See* 7 U.S.C. § 2020(a)(1) (2012); 42 U.S.C. §§ 602(a)(4), 1396a(5) (2012).

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households and issuing EBT cards.”<sup>31</sup> The statute expressly states that the “responsibility of the agency of the State government shall not be affected by whether the program is operated on a State-administered or county-administered basis.”<sup>32</sup>

In addition, the implementing regulations mandate that “[e]ach State agency shall ensure that project areas operate the Food Stamp Program in accordance with the Act, regulations, and FNS-approved State Plan of Operation.”<sup>33</sup> To ensure compliance with program requirements, the regulations require states to conduct reviews in order “to measure compliance with the provisions of FNS regulations.”<sup>34</sup> This includes providing “a systematic method of monitoring and assessing program operations in the project [i.e., the local] areas,”<sup>35</sup> and “a continuing flow of information between the project areas, the States, and FNS, necessary to develop the solutions to problems in program policy and procedures.”<sup>36</sup> The regulations also provide that the “State agency shall ensure that corrective action plans are prepared at the project area . . . level . . . .”<sup>37</sup>

The legislative history of the FSA further supports this conclusion:

In essence, state welfare agencies are responsible for the day-to-day administration of the food stamp program (under Federal rules) and a substantial portion of their administrative costs. *In a number of states, these responsibilities are passed down to local welfare agencies because of the structure of the state’s welfare system. The state, however, remains ultimately responsible and is the unit with which the [United States*

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31. 7 U.S.C. § 2020(a)(1).

32. 7 U.S.C. § 2020(a)(2).

33. 7 C.F.R. § 275.5(a) (2015).

34. *Id.*

35. *Id.* § 275.5(a)(1) (2015).

36. *Id.* § 275.5(a)(3) (2015).

37. *Id.* § 275.18(a) (2015).

Department of Agriculture] deals.<sup>38</sup>

Not surprisingly, then, courts examining the FSA's provisions have concluded that they "impose an enforceable duty on the State to supervise the City's administration of the Food Stamp program in New York City"<sup>39</sup> and to "ensure that Plaintiffs timely receive their food stamps."<sup>40</sup>

The Medicaid statute similarly requires states to "provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan."<sup>41</sup> And the TANF statute requires a "certification by the chief executive officer of the State specifying which State agency or agencies will administer and supervise the program . . . ."<sup>42</sup> Like the FSA, these statutes likewise impose a duty upon the State to supervise the local districts' administration of the programs.<sup>43</sup>

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38. H.R. REP. NO. 95-464, at 299 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1978, 2235 (emphasis added).

39. *Williston v. Eggleston*, 379 F. Supp. 2d 561, 569 (S.D.N.Y. 2005). *See also* *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 404 (S.D.N.Y. 2006) (food stamp program is "subject to state supervision"); *Williston*, 379 F. Supp. 2d at 568 ("The FSA is clear in its conferral of responsibility onto the State to administer, supervise, and review the distribution of food stamp assistance to applicants at each local agency. . . . Further, the implementing regulations impose a duty on the State to supervise the City's acts or failures to act."); *Reynolds v. Giuliani*, No. 98 Civ. 8877, 2005 U.S. Dist. LEXIS 2743, at \*62 (S.D.N.Y. Feb. 14, 2005) ("[T]he Food Stamp and Medicaid Acts require participating states to administer these programs and actively supervise local agencies to ensure compliance."), *rev'd on other grounds*, 506 F.3d 183 (2d Cir. 2007).

40. *Williston*, 379 F. Supp. 2d at 569.

41. 42 U.S.C. § 1396a(5) (2012). The governing regulations require that state agencies take final action on fair hearing decisions within 90 days. *See* 42 C.F.R. § 431.244(f)(1) (2012).

42. 42 U.S.C. § 602(a)(4) (2012).

43. *See, e.g., K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 112 (4th Cir. 2013) (explaining the Medicaid statute's "vesting of responsibility over a state's Medicaid program in a single agency . . ."); *Shakhnes v. Berlin*, 689 F.3d 244, 247-48 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1808 (citations omitted) ("Any state that participates in Medicaid must designate 'a single State agency' ('State agency') to administer—or to supervise the administration of—the state's Medicaid plan. Although the State agency may delegate to local entities the performance of certain responsibilities, the State agency must (1) [h]ave methods to keep itself currently informed of the adherence of local [entities] to the State plan provisions and the agency's

Given that this legal relationship is expressly established in both the state and federal statutory schemes, courts interpret these statutes *uniformly* to impose liability upon the State for the local agencies' actions (or inactions) in the administration of public assistance benefits. Indeed, nearly four decades ago, the Court of Appeals explained:

The county commissioners are denominated by statute "agents" of the State department (Social Services Law, § 65, subd 3). In the administration of public assistance funds, whether they come from Federal, State or local sources, the authority and responsibility is that of the county commissioners of social services, not the counties; *the local commissioners act on behalf of and as agents for the State. Each is a part of and the local arm of the single State administrative agency.*<sup>44</sup>

Thirteen years later, the Court of Appeals reiterated this holding. Examining the now-defunct federal AFDC program, which is wholly analogous to the Food Stamp and Medicaid programs described above, the court explained, in a unanimous decision:

[T]he AFDC administrative scheme creates an interconnected and inextricable chain of authority, with ultimate power reposed in the

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procedures for determining eligibility' and (2) '[t]ake corrective action to ensure their adherence.'"); *Hillburn ex rel. Hilburn v. Maher*, 795 F.2d 252, 261 (2d Cir. 1986) (citations omitted) ("[T]he reason for the requirement that a state designate a 'single State agency' to administer its Medicaid program was to avoid a lack of accountability for the appropriate operation of the program."); *Gray Panthers v. Schwarzenegger*, No. C 09-2307, 2009 U.S. Dist. LEXIS 78335, at \*4 (N.D. Cal. Sept. 1, 2009) (citations omitted) ("The state must designate a 'single state agency' to be responsible for administration and supervision of the state plan. Once designated as the single state agency for Medicaid, this agency may not delegate the administration of the program or any activities related to rule-making and policy development to any entity other than its own officials."); *M.K.B.*, 445 F. Supp. 2d at 404 (citations omitted) (Medicaid and TANF programs are "subject to state supervision").

44. *Beaudoin v. Toia*, 380 N.E.2d 246, 247 (N.Y. 1978) (emphasis added).

State DSS. The State, under Federal and State law, has the duty to supervise AFDC plans and is authorized to sanction local districts for failure to comply with State DSS rules. Local social service commissioners “act on behalf of and as agents for the State. Each is a part of and the local arm of the single State administrative agency.”<sup>45</sup>

As we have just seen, this remains the case under both the State Social Services Law and under the federal programs that OTDA administers.<sup>46</sup> Indeed, the Court of Appeals again confirmed this principle eleven years later, noting, “we have recognized that local social services commissioners act as agents for the State.”<sup>47</sup> New York’s intermediate appellate courts have repeatedly reached the same conclusion,<sup>48</sup> as have the federal courts.<sup>49</sup>

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45. *Thomasel v. Perales*, 585 N.E.2d 359, 363 (N.Y. 1991) (citations omitted).

46. *See supra* notes 25-37 and accompanying text. *See, e.g.*, *Tormos v. Hammons*, 687 N.Y.S.2d 336, 337 (App. Div. 1999) (citations omitted) (“Under the Federal and State statutory schemes, State social service agencies have complete supervisory authority over the local departments. . . . [T]he local departments function ‘as agents of the State and not of their respective counties’. . . .”).

47. *Hernandez v. Hammons*, 780 N.E.2d 498, 499 (N.Y. 2002) (citation omitted). *See also* *Wittlinger v. Wing*, 786 N.E.2d 1270, 1270 n.3 (N.Y. 2003).

48. *See, e.g.*, *Miller v. DeBuono*, 709 N.Y.S.2d 391, 144 (App. Div. 2000) (“it is well settled that the City agency acts on behalf of the State agency . . . .”); *Tormos*, 687 N.Y.S.2d at 337; *Mitchell v. Bane*, 630 N.Y.S.2d 495, 497 (App. Div. 1995); *Cleary v. Perales*, 594 N.Y.S.2d 207, 209 (App. Div. 1993) (City’s “denial of the benefit was determined as an agent of the State respondent, which bears the final responsibility”); *Unger v. Blum*, 498 N.Y.S.2d 154, 155 (App. Div. 1986); *N.Y. St. Elec. & Gas Corp. v. Fortier*, 483 N.Y.S.2d 760, 762 (App. Div. 1984).

49. *See, e.g.*, *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) (“New York State is also liable to guarantee that those it delegates to carry out its programs satisfy the terms of its promised performance, including compliance with the [law].”); *Strouchler v. Shah*, 286 F.R.D. 244, 245 (S.D.N.Y. 2012) (home care services are “administered by the State through its agent the City using Medicaid dollars.”); *Williston v. Eggleston*, 379 F. Supp. 2d 561, 569 (S.D.N.Y. 2005); *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 216 (E.D.N.Y. 2000), *aff’d*, 331 F.3d 261 (2d Cir. 2003), (citations omitted) (“[U]nder New York State law, State defendant has a duty to supervise City defendants in the provision of public benefits and services.

As discussed in Section II.B, finally, the Court of Appeals has established this principle with respect to the award of attorneys' fees in particular, and New York courts have consistently done so with respect to a local agent's failure to comply with the State's decisions after fair hearing ("DAFHs").<sup>50</sup>

### B. *The Fair Hearing Process*

In the aforementioned *Goldberg v. Kelly*,<sup>51</sup> the Supreme Court ruled that recipients of public assistance have a constitutional right to a hearing prior to termination of their benefits.<sup>52</sup> In New York, the right to challenge the actions and inactions of social service officials through a "fair hearing" is codified in the Social Services Law, which expressly provides that recipients "may appeal to the department [i.e., OTDA] from decisions of social services officials or failures to make decisions. . . ."<sup>53</sup> The statute provides that the "department shall review the case and give such person an opportunity for a fair hearing thereon."<sup>54</sup>

OTDA employs approximately 140 hearing officers<sup>55</sup> to conduct these fair hearings and to render decisions pursuant to the social services law.<sup>56</sup> These DAFHs are binding upon the

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Indeed, in the administration of public assistance funds, the local commissioners act on behalf of and as agents for the State."); *Meachem v. Wing*, 77 F. Supp. 2d 431, 446 (S.D.N.Y. 1999) ("[City is] the designee of State authority . . . [and] . . . its agent."); *Swift v. Blum*, 502 F. Supp. 1140, 1145 (S.D.N.Y. 1980) (citations omitted) ("The state commissioner is responsible, pursuant to statute, for the actions of the county commissioners.").

50. See *infra* Section III.B.

51. See *supra* note 5 and accompanying text.

52. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

53. N.Y. SOC. SERV. LAW § 22(1) (McKinney 2014).

54. *Id.*

55. Stephen Loffredo & Don Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 284 (2009).

56. See N.Y. SOC. SERV. LAW § 22(2) ("[T]he commissioner may designate and authorize one or more appropriate members of his staff to consider and decide such appeals. Any staff member so designated and authorized shall have authority to decide such appeals on behalf of the commissioner with the same force and effect as if the commissioner had made the decisions.").

social services districts.<sup>57</sup> Governing regulations establish that definitive and final administrative action on those decisions must be taken promptly, and no later than in 90 days from the date of the fair hearing request.<sup>58</sup> As the court in *Williston v. Eggleston* explained, “[t]he fair hearing process represents an important aspect of the State’s supervision of the local districts’ compliance with program requirements.”<sup>59</sup>

Federal laws similarly establish the right to a fair hearing. Hence, Medicaid law requires that states “provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness.”<sup>60</sup> Similarly, the FSA provides that States must grant “a fair hearing and a prompt determination thereafter to any household aggrieved by the action of the State agency under any provision of its plan of operation.”<sup>61</sup>

Finally, as the governing statutes and regulations mandate, and as numerous courts examining the issue have concluded, “[i]t is the state . . . that is ultimately responsible for ensuring that a fair hearing is held and that [timely] compliance with the DAFH is accomplished through the local agencies.”<sup>62</sup> Indeed, in the event that the districts fail to

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57. *See Id.* § 22(9)(a) (“All decisions of the commissioner pursuant to this section shall be binding upon the social services districts involved and shall be complied with by the social services officials thereof.”).

58. N.Y. COMP. CODES R. & REGS. tit. 18, § 358-6.4(a) (2015) (“For all decisions, except those involving food stamp issues only, definitive and final administrative action must be taken promptly, but in no event more than 90 days from the date of the request for a fair hearing.”).

59. *Williston v. Eggleston*, 379 F. Supp. 2d 561, 566 (S.D.N.Y. 2005).

60. 42 U.S.C. § 1396a(a)(3) (2012).

61. 7 U.S.C. § 2020(e)(10) (2012). The implementing regulations reinforce this obligation. *See* 7 C.F.R. § 273.15(b) (2015) (“Each State agency shall provide for either a fair hearing at the State level or for a hearing at the local level which permits the household to further appeal a local decision to a State level fair hearing.”).

62. *Moore v. Perales*, 692 F. Supp. 137, 139 (E.D.N.Y. 1988). *See also* *Shakhnes v. Berlin*, 689 F.3d 244, 248 (2d Cir. 2012) (citation omitted) (state agency “remains responsible . . . for ensuring the fair hearing system’s compliance with federal law and regulations.”); *Cincotta v. N.Y.C. Human Res. Admin.*, No. 00 Civ. 9064, 2001 U.S. Dist. LEXIS 11457, at \*11 (S.D.N.Y. Aug. 9, 2001) (citations omitted) (“The State, however, is ultimately responsible for compliance with the requirements of the FSA.”); *Morel v. Giuliani*, 927 F. Supp. 622, 627 (S.D.N.Y. 1995); *Roberta G. v. Perales*, No. 90

comply with a DAFH, the governing regulations oblige the State to “secure compliance by whatever means is deemed necessary and appropriate under the circumstances of the case.”<sup>63</sup>

Each year, OTDA receives hundreds of thousands of fair hearing requests.<sup>64</sup> Sadly, because there is no right to representation in these cases,<sup>65</sup> nearly 95% of individuals appear without representation at fair hearings.<sup>66</sup> Many find this process so daunting that they choose not to contest the local agency’s actions at all, as a New York State Bar Association report concluded: “It takes a fair amount of confidence and fortitude for unsophisticated people to come forward to dispute the local agency decision. Countless thousands lose desperately needed governmental benefits to which they are entitled because they do not contest the local decision.”<sup>67</sup> When beneficiaries do manage to contest those

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Civ. 3485, 1992 U.S. Dist. LEXIS 16304 (S.D.N.Y. Oct. 23, 1992).

63. N.Y. COMP. CODES R. & REGS. tit. 18, § 358-6.4(c) (2015). *See, e.g., In re Shvartzayd*, N.Y.L.J., June 26, 1995, at 28 (Sup. Ct. N.Y. Cty. June 26, 1995), *aff’d sub nom.* *Shvartzayd v. Dowling*, 656 N.Y.S.2d 631, 632 (App. Div. 1997) (citation omitted) (quoting *Brown v. Bane*, Nos. 401044/93, 401045/93, 1993 WL 13717602 (N.Y. Sup. Ct. Nov. 17, 1993) (Trial Order)) (“[T]he state was obliged in the first instance to see that their lawful rulings were complied with. And if this did not happen, then they were bound to ascertain expeditiously the reason why and take immediate steps to remedy the situation.”).

64. Loffredo & Friedman, *supra* note 56, at 284 (“Each year, OTDA receives over 200,000 requests for ‘fair hearings’ . . .”). *See also* *Espinosa v. Shah*, No. 09 Civ. 4103, 2014 U.S. Dist. LEXIS 168875, at \*5 n.6 (S.D.N.Y. Dec. 5, 2014) (“In calendar year 2013, for all programs, [the New York Office of Administrative Hearings] received 326,872 requests for fair hearings, scheduled 348,820 fair hearings, and issued 125,515 fair hearing decisions.”).

65. *See* Loffredo & Friedman, *supra* note 56 (for an excellent discussion of the need for representation at these proceedings).

66. *Project FAIR (Fair Hearing Assistance, Information, and Referral)*, THE LEGAL AID SOC’Y, <https://www.legal-aid.org/en/civil/civilpractice/projectfair.aspx> (last visited Sept. 15, 2015) (“In the hundreds of State administrative fair hearings held each day to resolve problems involving public benefits, almost 95% of individuals appear without representation or assistance.”).

67. TASK FORCE ON ADMINISTRATIVE ADJUDICATION, N.Y. ST. B. ASS’N, REPORT 177 (Jul. 14, 1988). *See also* *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (“[The welfare recipient’s] need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.”); *Mayer v. Wing*, 922 F. Supp. 902, 909 n.8 (S.D.N.Y. 1996) (“Russell J. Hanks, Deputy General Counsel in charge of the State Defendant’s Office of Administrative Hearings, estimates that only

decisions, however, and to prevail, they face yet another great challenge: securing enforcement of a favorable DAFH, as the next section reveals.

*C. The Recurrent Failure of State Officials to Enforce Favorable Fair Hearing Decisions*

To understand the ramifications of the court's decision in *Solla*, it is critical to note the frequency with which the State demonstrably fails to ensure compliance with its fair hearing decisions, particularly in cases involving public assistance, and the severity of the resulting consequences.

It is sadly common in New York for an individual to win a fair hearing, only to see the State fail to secure timely compliance—or, at times, any compliance at all—from its agent. That is precisely what happened in *Solla*,<sup>68</sup> and in fact in several of the EAJA cases examined here.<sup>69</sup> The evidence is not, however, merely anecdotal. In *Shakhnes v. Eggleston*, for example, the court found that the plaintiffs, a class of New York City Medicaid recipients, “have proffered substantial evidence that the City systematically fails to implement fair hearing decisions on a timely basis.”<sup>70</sup> Plaintiffs proffered evidence demonstrating “striking noncompliance,” with timely compliance achieved in only 2% of cases, and fully 91% taking more than 150 days to secure compliance.<sup>71</sup> While the applicants wait, the court noted, “they may face medical choices that reach into all aspects of their lives – whether to move in with family, or out of State, or to sell a home, or simply whether to purchase pain-easing treatment.”<sup>72</sup>

In *Henrietta D. v. Giuliani*, to take another example, the court examined the claims of tens of thousands of indigent plaintiffs living with AIDS, clients of the New York City

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about ten to twenty percent of individuals who receive a notice of reduction request a fair hearing.”).

68. See *infra* notes 97-98 and accompanying text.

69. See, e.g., *infra* notes 130-32, 136 and accompanying text.

70. *Shakhnes v. Eggleston*, 740 F. Supp. 2d 602, 632 (S.D.N.Y. 2010), *aff'd in part, vac'd in part*, *Shakhnes v. Berlin*, 689 F.3d 244 (2d Cir. 2012).

71. *Id.*

72. *Id.*

Division of AIDS Services and Income Support, or “DASIS.”<sup>73</sup> The court ruled, following a bench trial, that DASIS “often—even in a majority of cases—fails to comply with fair hearing decisions for months or even over a year.”<sup>74</sup> “Even where plaintiffs prevail at fair hearings,” the court found, “the evidence shows that City defendants often delay compliance with the courts’ directives or ignore the decisions altogether.”<sup>75</sup> Indeed, Plaintiffs proffered evidence that “ensuring compliance [with favorable fair hearing decisions] was a struggle in up to seventy-five percent of cases.”<sup>76</sup> As the court observed: “Mr. John Maher, DASIS’ deputy director of field operations, admitted that even where a DASIS client wins a fair hearing concluding that DASIS wrongfully reduced or terminated the client’s benefits, if ‘we believe we did the right thing, we take the action again.’”<sup>77</sup>

Three years earlier, the New York City Bar Association noted “a total breakdown in the city’s ability to comply with fair hearings when the caseworkers make improper determinations to discontinue or deny benefits to recipients.”<sup>78</sup> The State repeatedly issues DAFHs overturning those determinations, the Association observed,

and still the recipient goes without the mandated benefits because the City refuses or fails to withdraw its original action and comply with the State’s directive to provide those benefits. Former recipients wait months, sometimes years, for the local agency to comply with their fair

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73. *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 216 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). DASIS, now known as the HIV/AIDS Services Administration, or “HASA,” is a division of the New York City Human Resources Administration, or “HRA.” HUMAN RES. ADMIN., HISTORY AND EVOLUTION OF THE HUMAN RESOURCES ADMINISTRATION 6 (2015), [http://www1.nyc.gov/html/hra/downloads/pdf/about/history\\_of\\_welfare\\_and\\_hra.pdf](http://www1.nyc.gov/html/hra/downloads/pdf/about/history_of_welfare_and_hra.pdf).

74. *Giuliani.*, 119 F. Supp. 2d 181 at 215.

75. *Id.* at 217.

76. *Id.* at 199.

77. *Id.*

78. Ass’n of the Bar of the City of N.Y., *The Pataki Welfare Plan*, 52 REC. 13, 24 (1997).

hearing decisions, all the while without the benefits for which they are clearly eligible.<sup>79</sup>

That same year, a class of indigent New Yorkers filed suit alleging that “delays by the City in complying with the DAFH’s and the State’s non-enforcement of those DAFH’s have caused them a great deal of suffering, which continues to this day.”<sup>80</sup> Plaintiffs’ counsel “cited statistics showing that delays in complying with DAFHs and enforcing these DAFHs is the rule rather than the exception.”<sup>81</sup> *Plus ç a change*.

These cases and reports demonstrate a recurrent and often systemic failure by the State to ensure compliance with its fair hearing decisions. The brutal and at times life-threatening consequences of this failure, however, cannot be gleaned from the statistical evidence. They are, instead, apparent in the harrowing accounts that the individual plaintiffs relate each time the City ignores a DAFH, and each time the State fails to secure compliance with that DAFH.<sup>82</sup>

Henry Bradley’s experience is illustrative. Mr. Bradley was a 51 year-old man living with AIDS and a host of attendant maladies when he went to trial in *Henrietta D. v. Giulliani*.<sup>83</sup> Over and over again, DASIS wrongfully terminated Mr. Bradley’s public assistance benefits, often without notice. For instance, “[a]fter initially funding Mr. Bradley’s housing, DASIS closed his case without notice in February, 1994.”<sup>84</sup> Mr. Bradley won DAFH that ordered DASIS to reopen the case and pay the benefits due retroactively. “Despite the fair hearing decision, DASIS did not

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79. *Id.*

80. *Piron v. Wing*, N.Y.L.J., June 27, 1997, at 26 (App. Div. June 27, 1997).

81. *Id.*

82. *See, e.g., id.* (“Here, it is clear that all of the plaintiffs and their families have suffered enormously from the delay in receiving moneys they are entitled to. They claim, without dispute, that they are lacking funds for food, clothing and furniture and in some cases fear eviction. Their injury is irreparable and continues until payment is received.”)

83. *Henrietta D. v. Giuliani*, 119 F. Supp.2d 181, 186-88 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). At the time, Mr. Bradley followed “a medication regimen that require[d] taking fifty-one different tablets, plus liquid supplements, daily.” *Id.* at 187.

84. *Id.* at 187.

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pay the rent arrears and Mr. Bradley lost his apartment.”<sup>85</sup> Because his case was wrongfully closed, during this same period, “Mr. Bradley’s Medicaid was not active, and he was unable to maintain his medication regimen.”<sup>86</sup>

Each time DASIS wrongfully closed Mr. Bradley’s public assistance case, he was left without a shelter allowance, cash assistance, food stamps, or medical assistance. “During this time without public benefits, Mr. Bradley relied primarily on church charity in order to live.”<sup>87</sup> Mr. Bradley repeatedly won fair hearing decisions, but DASIS simply ignored them, and the State failed to secure compliance with its decisions.<sup>88</sup>

At one point, Mr. Bradley “was not able to follow his medication regime for over two years. As a result, his health deteriorated, affecting his vision, and multiplying his regimen from 3 tablets per day to seventeen tablets three times per day.”<sup>89</sup> From August 1996 until March 1998, to take but one additional example, Mr. Bradley went without food stamps after the state failed to secure DASIS’ compliance with yet another fair hearing decision in his favor.

In each of these instances, Mr. Bradley managed to file for and win a fair hearing ordering DASIS to restore his critical subsistence benefits. Over and over again, the State failed to enforce those decisions, with devastating consequences. As the court summarized in its post-trial decision:

[B]ecause DASIS’ [sic] failed to properly assist Mr. Bradley, he was deprived of critical subsistence benefits, to which he was fully entitled, for years. As a result of DASIS’ unwillingness or inability to correct his case, Mr. Bradley was repeatedly unable to access his Medicaid benefits, at one point for approximately

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85. *Id.*

86. *Id.*

87. *Id.* Mr. Bradley testified that he was forced “to go to different churches and sit around the street and wait for people to come with bags so that you could get something to eat because I didn’t know what I was going to do.” *Id.* at 191.

88. *Id.* at 187-90.

89. *Id.* at 188.

two years. Without Medicaid, he was unable to take his medication, causing his toenails, fingernails, and even his teeth to fall out. DASIS failed to make any rent payments on behalf of Mr. Bradley for almost two years, and DASIS failed to provide Mr. Bradley with any food stamps for almost two years. During this time, Mr. Bradley was unfairly compelled to pay nearly three-quarters of his monthly SSI income toward rent, leaving him little money on which to live and forcing him, *inter alia*, to go to soup kitchens merely to survive. Mr. Bradley's right to these benefits was unequivocally established in fair hearing proceedings, which DASIS repeatedly chose to ignore.<sup>90</sup>

As we have seen, nearly 95% of public assistance recipients lack legal representation in their fair hearings.<sup>91</sup> For the intrepid few who manage to challenge the local agency and win, the only recourse when the City fails to comply and the State breaches its obligation to secure compliance is to file a lawsuit against the City and State.<sup>92</sup> The need for representation in such litigation is even greater than at the fair hearing level. As two leading commentators have concluded, "it is nearly impossible for an unrepresented party—especially one in the throes of the existential crisis typically occasioned by a loss of subsistence benefits—to mount such a challenge in the courts."<sup>93</sup> In *Solla*, however, the Court of Appeals turned decades of settled law (to say nothing of the relevant and controlling statutes) on its head and established that indigent

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90. *Id.* at 190. "Indeed," the court added, "in each instance that DASIS terminated Mr. Bradley's benefits, Mr. Bradley pursued and obtained a judicial declaration that DASIS' actions were wrongful." *Id.* at 190 n.4.

91. See *supra* note 67 and accompanying text.

92. See N.Y. C.P.L.R. § 7801; *Williston*, 379 F. Supp. 2d at 567 (legal recourse upon losing a fair hearing is "to challenge the adverse [DAFH] by commencing a proceeding in New York State Supreme Court pursuant to New York Civil Practice Law and Rules Article 78").

93. Loffredo & Friedman, *supra* note 56, at n.6. The authors conclude, for example, that the rate of pro se lawsuits challenging unfavorable fair hearing decisions is "less than one in one thousand." *Id.*

litigants like Mr. Bradley can never obtain attorneys' fees under EAJA under these tragically common circumstances. The Court did so, moreover, without so much as considering, much less distinguishing, the relevant law.

### III. *SOLLA v. BERLIN*

#### A. *Background: Facts and Decisions*

In September 2010, HRA sent Ms. Solla, who is indigent and disabled, notice of a reduction in her shelter benefit of more than \$200 per month.<sup>94</sup> This reduction forced Ms. Solla to use her disabled daughter's Supplemental Security Income benefits to pay a portion of the rent, diverting those funds from the care of her child.<sup>95</sup> Ms. Solla promptly appealed this erroneous determination, and on November 29, 2010, the State issued a DAFH ordering the City to withdraw its notice and restore Ms. Solla's benefits, retroactive to the date of the reduction.<sup>96</sup>

HRA failed to comply with the DAFH, and the State failed to ensure compliance within the mandatory time frame.<sup>97</sup> On March 28, 2011, Ms. Solla's counsel notified OTDA's Compliance Unit of the City's failure to comply, requesting the State's assistance.<sup>98</sup> Rather than take action, OTDA responded by alleging that the City had complied with the decision's directives.<sup>99</sup> It had not, as a cursory check of the shared welfare database would have confirmed.<sup>100</sup>

Fortunately, Ms. Solla was able to secure the assistance of South Brooklyn Legal Services ("SBLs"). In early May 2011, over five months after OTDA ordered the City to restore Ms.

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94. *Solla v. Berlin*, 961 N.Y.S.2d 55, 57-58 (App. Div. 2013).

95. Memorandum of Petitioner-Respondent in Support of Motion to Reargue at 2, *Solla v. Berlin*, 27 N.E.3d 462 (N.Y. 2015) (No. 401178/2011) (on file with the author) [hereinafter Memo in Support of Motion to Reargue].

96. *Solla*, 961 N.Y.S.2d at 66.

97. *Luz S. v. Berlin*, No. 401178/2011, 2011 N.Y. Misc. LEXIS 3460, at \*2 (N.Y. Sup. Ct. July 12, 2011).

98. Memo in Support of Motion to Reargue at 4.

99. *Id.*

100. *Id.*

Solla's benefits, and with no other means of redress, SBLs filed an article 78 proceeding in New York County Supreme Court against both the City and State.<sup>101</sup> The proceeding sought restoration of Ms. Solla's full benefits and all benefits wrongfully withheld, along with attorneys' fees under EAJA.<sup>102</sup> The article 78 proceeding, the trial court found, "was the only way left for [Ms. Solla] to get their attention after being ignored for months."<sup>103</sup>

Two weeks later, the City finally complied with the DAFH – and the State finally fulfilled its obligation to secure compliance under the controlling regulations<sup>104</sup> – whereupon the case was dismissed for mootness.<sup>105</sup> Ms. Solla then moved for attorneys' fees under the theory that "the lawsuit was the 'catalyst' for the favorable State action[]" ultimately secured.<sup>106</sup> The trial court "found that [Ms. Solla] was 'undoubtedly' the catalyst for respondents' eventual compliance with the DAFH,"<sup>107</sup> but denied the motion on the ground that Ms. Solla was not a prevailing party pursuant to the First Department's decision in *Auguste v. Hammons*.<sup>108</sup> In *Auguste*, the First Department ruled that the Supreme Court foreclosed recovery of fees under the catalyst theory in *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Resources*.<sup>109</sup>

On appeal, the First Department reversed course, finding that it was not bound by *Buckhannon* or its reasoning.<sup>110</sup> In short, in enacting EAJA, the legislature explicitly stated its

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101. *Id.* at 4-5.

102. *Id.* at 5.

103. *Luz S.*, 2011 N.Y. Misc. LEXIS 3460, at \*3.

104. *See* 18 N.Y.C.R.R. § 358-6.4; *supra* notes 63-64 and accompanying text.

105. *Solla v. Berlin*, 961 N.Y.S.2d 55, 58 (App. Div. 2013).

106. *Id.* at 57 (Under EAJA, fees can only be awarded to a "prevailing party.") *See* N.Y. C.P.L.R. § 8601(a) (McKinney 2015) (providing for an award of fees to a "prevailing party"); *infra* Section III.C.1. The catalyst theory posits that a plaintiff is a "prevailing party" if plaintiff secures some or all of the relief sought, and if the lawsuit was the catalyst for securing that relief. *See infra* Section III.C.

107. *Solla*, 961 N.Y.S.2d at 58.

108. *Id.* at 66; *Auguste v. Hammons*, 727 N.Y.S.2d 880 (App. Div. 2001).

109. *Auguste*, 727 N.Y.S.2d. at 880; *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001).

110. *Solla*, 961 N.Y.S.2d at 69.

intent, in the statute, “to create a mechanism authorizing the recovery of counsel fees . . . similar to the provisions of [the federal EAJA statute] and the significant body of case law that has evolved thereunder.”<sup>111</sup> As the First Department observed, “[i]t is a critical fact that, at the time [EAJA] was enacted in 1989, the ‘significant body’ of case law across the country and in New York that had interpreted the Federal EAJA routinely applied the catalyst theory,” as did New York courts.<sup>112</sup> Accordingly, the court held that “the catalyst theory applies to the State EAJA.”<sup>113</sup> “It would be inconsistent with the laudatory goals of the State EAJA,” the court explained, “to interpret the legislation as depriving plaintiffs of attorneys’ fees simply because the State decided to concede its position.”<sup>114</sup> Under such an interpretation, “aggrieved but impecunious parties would be hard-pressed to find qualified attorneys to commence cases for them, since they would have no assurance of being compensated.”<sup>115</sup>

The Court of Appeals reversed. The court did not reach the question whether the catalyst theory applies to EAJA.<sup>116</sup> Instead, the court ruled that “[u]nder the pre-*Buckhannon* federal precedent that petitioner would have us apply, a fee claimant recovers attorneys’ fees only if his or her lawsuit prompted a change in position by the party from which claimant seeks reimbursement.”<sup>117</sup> The court continued:

Here, petitioner seeks payment of attorneys’ fees from the State of New York. But the State has consistently sided with petitioner regarding HRA’s reduction of her shelter allowance. The City altered its position following petitioner’s commencement of this proceeding, but the State did not. Consequently, petitioner could not

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111. N.Y. C.P.L.R. § 8600 (McKinney 2015).

112. *Solla*, 961 N.Y.S.2d at 61.

113. *Id.* at 65.

114. *Id.*

115. *Id.*

116. *Solla v. Berlin*, 27 N.E.3d 462, 465 (N.Y. 2015) (“It is unnecessary for us to decide whether the catalyst theory is New York law, and we take no position on that question at this time.”).

117. *Id.* at 464 (citations omitted).

recover attorneys' fees under CPLR article 86 even if the catalyst theory were New York law.<sup>118</sup>

In two short paragraphs, the court eviscerated EAJA for poor New Yorkers.<sup>119</sup> It did so without even addressing, much less distinguishing, a mountain of settled case law, governing statutes, and regulations requiring the opposite conclusion. Indeed, as we shall see, the State's vicarious liability for the City's actions is so well established and incontrovertible that counsel hardly addressed the issue. This proved fateful, for the court eschewed the principal issue under review, namely, the viability of the catalyst theory, and instead ruled on the basis that the City, as an ostensibly independent actor, was to blame, and not the State. Had the court obtained full briefing and argument on this issue, it is impossible to believe that it would have issued the same decision. The same is true of the court's unfounded narrowing of the catalyst theory itself. Sections III.B. and III.C., *infra*, examine each of these matters in turn.

#### B. Vicarious Liability

The Court of Appeal's decision in *Solla* flies in the face of, and in two perfunctory paragraphs completely ignores, the fundamental structure of the New York welfare system. This includes the relevant statutes and case law, both state and federal, which uniformly establish a scheme under which the municipalities act as the agents of the State in the administration of public assistance.<sup>120</sup> Ironically, and more particularly, this includes Court of Appeals decisions confirming again and again that "county commissioners are denominated by statute 'agents' of the State department. In the administration of public assistance funds . . . the local commissioners act on behalf of and as agents for the State. Each is a part of and the local arm of the single State

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118. *Id.* at 464-65.

119. Ironically, the First Department majority had observed that if the dissent's restrictive reading of EAJA were adopted, "the State EAJA would be eviscerated." *Solla*, 961 N.Y.S.2d at 64.

120. *See supra* Section II.A.

administrative agency.”<sup>121</sup>

In *Solla*, the Court of Appeals treated City and State respondents as distinct—and thus distinctly culpable—entities: “The City altered its position following petitioner’s commencement of this proceeding, but the State did not.”<sup>122</sup> This is a categorically erroneous distinction: when it comes to welfare, the City and State are one.<sup>123</sup> It is therefore irrelevant what the State did, for under the most fundamental principles of agency law, the State is liable for the City’s actions and inactions. New York Social Services law in fact expressly states that “[t]he county commissioner shall act as the agent of the department [i.e., OTDA] in all matters relating to assistance and care administered or authorized by the town public welfare officers.”<sup>124</sup> In other words, under the law, if the City did it, the State did it, even if the State played no part in the conduct in question.<sup>125</sup> In the administration of social welfare benefits, the State acts through the City, and “*he who acts through another, acts through himself.*”<sup>126</sup>

Well over a century ago, the Supreme Court observed that “[i]t is well established that traditional vicarious liability rules

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121. *Beaudoin v. Toia*, 380 N.E.2d 246, 247 (N.Y. 1978) (citation omitted). *Accord Wittlinger v. Wing*, 786 N.E.2d 1270, 1274 (N.Y. 2003); *Hernandez v. Hammons*, 780 N.E.2d 498, 499 (N.Y. 2002); *Thomasel v. Perales*, 585 N.E.2d 359, 363 (N.Y. 1991). *See also Melendez v. Wing*, 869 N.E.2d 646, 649 n.3 (N.Y. 2007) (“The City respondents filed an answer asking Supreme Court to dismiss Melendez’s petition against them. They took the position that they were bound by OTDA’s determination after fair hearing, and were ‘commanded by statute to follow the guidelines handed down by [OTDA] concerning eligibility for public assistance, including emergency shelter allowances . . .”).

122. *Solla*, 27 N.E.3d at 465.

123. *See supra* Section II.A.

124. N.Y. SOC. SERV. LAW § 65(3) (1997).

125. *See supra* notes 121-125 and accompanying text. Indeed, a principal is liable even for the fraud or deceit of its agent, even where the principal had nothing to do with the act in question. *See, e.g., Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991); *Commodity Futures Trading Comm’n v. Premex, Inc.*, 655 F.2d 779, 784 n.10 (7th Cir. 1981) (“Under common law principles of respondeat superior, a principal is liable for the deceit of its agent, if committed in the very business the agent was appointed to carry out. This is true even though the agent’s specific conduct was carried out without the knowledge of the principal.”).

126. LINDAHL, *supra* note 3, § 7.2 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*417) (emphasis added).

ordinarily make principals or employers vicariously liable for acts of their agents or employees in the scope of their authority or employment.”<sup>127</sup> As the Court later explained:

Undoubtedly formal logic may find something to criticize in a rule which fastens on the principal liability for the acts of his agent, done without the principal’s knowledge or consent and to which his own negligence has not contributed. But *few doctrines of the law are more firmly established* or more in harmony with accepted notions of social policy *than that of the liability of the principal without fault of his own.*<sup>128</sup>

Few decisions are more manifestly incorrect than those that contravene the most firmly established legal doctrines.

It is established, moreover, that this doctrine applies specifically to the State’s liability for attorneys’ fees based upon acts taken by the City on its behalf. As the First Department has noted, “it is well settled that the City agency acts on behalf of the State agency, and the latter is held liable for any attorneys’ fees imposed in this context.”<sup>129</sup> Ironically, once again, it was the Court of Appeals that settled this very principle. In *Thomasel*, the Court of Appeals soundly and unanimously rejected the State’s attempt to distinguish itself from the City:

The State DSS nevertheless resists the imposition of attorney’s fees against it, *arguing that while the City DSS may have violated petitioner’s rights, the State DSS did not* and petitioner is therefore not a “prevailing party”

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127. Meyer v. Holly, 537 U.S. 280, 285 (2003) (citations omitted).

128. Gleason v. Seaboard Air Line Ry. Co., 278 U.S. 349, 356 (1929) (emphasis added) (citations omitted). See also Meyer, 537 U.S. at 285; Brown v. Poritzky, 283 N.E.2d 751, 754 (N.Y. 1972) (citations omitted) (“The rule is well established that a principal is vicariously liable for the torts committed by his agent in the course of the employment.”).

129. Miller v. DeBuono, 709 N.Y.S.2d 391, 391 (App. Div. 2000) (citations omitted).

against it. The State DSS argues that it did everything in its power to restore petitioner's benefits, pointing to its repeated directives to the City DSS, its lack of administrative capacity to directly deliver the continuing aid petitioner sought, which was the responsibility of the *local* agency, and the fact that the *City* DSS ultimately restored petitioner's aid pursuant to the settlement.

However, the AFDC administrative scheme creates an interconnected and inextricable chain of authority, with ultimate power reposed in the State DSS. The State, under Federal and State law, has the duty to supervise AFDC plans and is authorized to sanction local districts for failure to comply with State DSS rules. *Local social service commissioners "act on behalf of and as agents for the State. Each is a part of and the local arm of the single State administrative agency." Imposing responsibility for attorney's fees on the State DSS takes this structure into account and avoids evasion of responsibility by bureaucratic fingerpointing and red-tape shufflings.*<sup>130</sup>

*Thomasel* is directly on point, and diametrically opposed to *Solla*, and yet the court did not so much as mention the case in *Solla*.

New York's appellate courts, meanwhile, have consistently applied this principle specifically to the imposition of attorneys' fees under EAJA: "We have recognized in the past," the First Department explained in *Tormos v. Hammons*, "that State DSS may be vicariously liable for attorneys' fees under EAJA for actions or inactions of City DSS, and for failing to secure City

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130. *Thomasel v. Perales*, 585 N.E.2d 359, 363 (N.Y. 1991) (emphasis added) (citations omitted). See, e.g., *Mitchell v. Bane*, 630 N.Y.S.2d 495, 498 (App. Div. 1995) ("Respondent's argument that it cannot be held liable for the action (or inaction) of the New York City Department of Social Services was rejected by the Court of Appeals in *Matter of Thomasel v Perales*.").

DSS's compliance with its own determinations."<sup>131</sup> "In short," the Second Department opined, "since local social service commissioners merely effectuate the policies of the State commissioner, it is the State commissioner who should be responsible for an award of attorneys' fees."<sup>132</sup> Even more saliently, in *Mitchell v. Bane*, the court ruled that "[State] Respondent has the obligation to supervise the City Agency . . . . It cannot evade liability under the [EAJA] statute by invoking the segmentation of responsibility within the bureaucratic structure, imposed largely for the sake of convenience."<sup>133</sup>

Finally, the courts have repeatedly imposed attorneys' fees upon the State under EAJA for failing to ensure compliance with DAFHs in particular.<sup>134</sup> *Wittlinger v. Wing*, an exception to this rule, actually reconfirmed the agency principle,<sup>135</sup> while finding that the lower court did not abuse its discretion in

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131. *Tormos v. Hammons*, 687 N.Y.S.2d 336, 338 (App. Div. 1999) (emphasis added) (citation omitted).

132. *Unger v. Blum*, 498 N.Y.S.2d 154, 155 (App. Div. 1986). *See also* *Cleary v. Perales*, 594 N.Y.S.2d 207, 209 (App. Div. 1993) (citations omitted) (City's "denial of the benefit was determined as an agent of the State respondent, which bears the final responsibility [for fees].").

133. *Mitchell*, 630 N.Y.S.2d at 499.

134. *See, e.g., Dicont v. Wing*, 724 N.Y.S.2d 595, 596 (App. Div. 2001) (EAJA case seeking enforcement of DAFH, finding State Respondent had no "reasonable basis in law or fact for its inordinate delay" in ensuring compliance with decision); *Tormos*, 687 N.Y.S.2d at 338 (citations omitted) (awarding fees against State Respondent, *inter alia*, "for failing to secure City DSS's compliance with its own determinations"); *Seoane-Morales v. Rockland Cty. Dep't of Soc. Servs.*, 671 N.Y.S.2d 700, 700 (App. Div. 1998) (finding State respondent not substantially justified in a proceeding to compel compliance with a determination "made after a fair hearing"); *In re Shvartzayd*, N.Y.L.J., June 26, 1995, at 28 (Sup. Ct. N.Y. Cty. June 26, 1995) (rejecting the argument that "the State cannot be vicariously liable for the failure of the local agency to comply with the law," i.e., two DAFHs), *aff'd sub nom. Shvartzayd v. Dowling*, 656 N.Y.S.2d 631, 632 (App. Div. 1997) ("The State's failure to enforce the City's compliance with the fair hearing decisions before petitioner's institution of the CPLR article 78 proceeding was not substantially justified."); *Mitchell*, 630 N.Y.S.2d at 497 (awarding fees where City Respondent "refused to comply with the fair hearing decision, and . . . the State Agency . . . failed to secure the City Agency's compliance").

135. *Wittlinger v. Wing*, 786 N.E.2d 1270, 1273 (N.Y. 2003). Citing the specific page in *Thomasel* in which the Court of Appeals found the State responsible for the City with respect to fees, the court noted that the fact that the case involved a city agency not "directly under control of the State, is of no moment." *Id.* at 1273 n.3 (citing *Thomasel v. Perales*, 585 N.E.2d 359, 363 (N.Y. 1991)).

ruling that the State was “substantially justified”<sup>136</sup> under the specific circumstances at issue in that case.<sup>137</sup>

As discussed, the federal welfare statutes similarly vest authority, and responsibility, in a single state agency.<sup>138</sup> As the Fourth Circuit has explained:

[T]he vesting of responsibility over a state’s Medicaid program in a single agency safeguards against the possibility that a state might seek to evade federal Medicaid requirements by passing the buck to other agencies that take a less generous view of a particular obligation. . . . In sum, the single state agency requirement

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136. *Wittlinger*, 786 N.E.2d at 1274. Under EAJA, a party is not eligible for attorneys’ fees if the State was “substantially justified” in its position. *See* N.Y. C.P.L.R. § 8601(a) (McKinney 2014) (“a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified . . .”).

137. In *Wittlinger*, petitioner challenged respondents’ failure to follow a DAFH and restore his benefits for 47 days. *Wittlinger*, 789 N.E.2d at 1273. The First Department ruled that respondents were substantially justified under the specific circumstances of the case, namely, that the 47-day delay “was sufficiently explained and not so egregious as to fall outside the realm of substantial justification.” *Id.* at 1274. The Court of Appeals could only overturn this finding upon a showing that the lower court abused its discretion, and this the court refused to do. *Id.* (“We are unable to say that this determination was an abuse of discretion.”). At one point, the court does erroneously assess the City and State separately, suggesting that the State did all it could to obtain compliance. *Id.* at 1273-74. Unlike *Solla*, for instance, “the State attempted numerous times to prod the City [agency] to issue Wittlinger his benefits.” *Id.* at 1274. To the extent that the court thereby sought to exculpate the principal from the agent’s actions, the court erred for the very reasons discussed herein. The court’s holding, however, was merely that the lower court did not abuse its discretion in finding that the delay in question was substantially justified, a finding applied to both the City and State respondents. *Id.* at 1273. Note, finally, that the Court’s refusal to disturb the lower court’s exculpation of respondents on the basis that “agency delays are all but unavoidable,” flies in the face of the relevant statutes and regulations, which mandate performance within explicit time frames. *Id.* at 1274. It is, however, beyond the scope of this article to critique this and other flaws in the *Wittlinger* decision. *See, e.g.*, Armen H. Merjian, *Substantial Compliance Permits Substantial Suffering: Debunking the Myth of a Principled “Split” in the Circuits over Mandatory Timeliness Requirements in Federal Benefits Law*, 11 B.U. PUB. INT. L. J. 191 (2002).

138. *See supra* Section II.A.

represents Congress's recognition that in managing Medicaid, states should enjoy both an administrative benefit (the ability to designate a single agency to make final decisions in the interest of efficiency) but also a corresponding burden (an accountability regime in which that agency cannot evade federal requirements by deferring to the actions of other entities).<sup>139</sup>

Accordingly, like the state courts, New York's federal courts have consistently imposed vicarious liability upon the State for the actions and inactions of the City, with respect to both State and federal benefits: "Under the federal and state statutory scheme governing the administration of public benefits in New York State, HRA is the agent of the State Defendants."<sup>140</sup> "[A]n attempt by defendant to avoid her obligation to comply with the court's mandate by shifting the responsibility to the county commissioner will not be countenanced by this court," the court announced in *Swift v. Blum*.<sup>141</sup> "The state commissioner is responsible, pursuant to statute, for the actions of the county commissioners."<sup>142</sup> And in *Henrietta D.*, plaintiffs sought to hold the State liable, *inter alia*, for failing to ensure the City's compliance with DAFHs,

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139. *K.C. ex rel. Africa H. v. Shipman*, 716 F.3d 107, 112 (4th Cir. 2013) (citation omitted). *Accord* *Robertson v. Jackson*, 972 F.2d 529, 534 (4th Cir. 1992) ("A state that chooses to operate its program through local, semi-autonomous social service agencies cannot thereby diminish the obligation to which the state, as a state, has committed itself, namely, compliance with federal requirements governing the provision of the food stamp benefits that are funded by the federal government."); *Hilburn ex rel. Hilburn v. Maher*, 795 F.2d 252, 261 (2d Cir. 1986) (citations omitted) ("[T]he reason for the requirement that a state designate a 'single State agency' to administer its Medicaid program was to avoid a lack of accountability for the appropriate operation of the program."); *Woods v. United States*, 724 F.2d 1444, 1447 (9th Cir. 1984) (citations omitted) ("The Food Stamp Act places responsibility for the administration of the food stamp program on the state. . . . While the state may choose to delegate some administrative responsibilities, 'the ultimate responsibility for operation of the [food stamp] plan remain[s] with the state.'").

140. *M.K.B. v. Eggleston*, 445 F. Supp. 2d 400, 436 (S.D.N.Y. 2006) (citations omitted). *See also* *Meachem v. Wing*, 77 F. Supp. 2d 431, 446 (S.D.N.Y. 1999) (City is "the designee of State authority" and "its agent.").

141. *Swift v. Blum*, 502 F. Supp. 1140, 1145 (S.D.N.Y. 1980).

142. *Id.* (citations omitted).

just as in *Solla*. Rejecting the very reasoning applied by the Court of Appeals in *Solla*, the court ruled:

[U]nder New York State law, State defendant has a duty to supervise City defendants in the provision of public benefits and services. Indeed, in the administration of public assistance funds, “the local commissioners act on behalf of and as agents for the State.” Hence, if City defendants have violated plaintiffs’ rights under the federal disability statutes, then State defendant, as City defendants’ principal, and as their supervisor, is also liable.<sup>143</sup>

In fact, numerous New York federal courts have found the State liable to ensure the City’s compliance with the obligation timely to comply with DAFHs. Thus, in *Espinosa v. Shah*, the court ordered State defendants to “provide final administrative action in compliance with the timeliness provisions set forth in [the governing Medicaid regulations] for fair hearings requested by Class Members.”<sup>144</sup> Similarly, in *Shakhnes v. Berlin*, the court confirmed State defendant’s obligation “for ensuring the fair hearing system’s compliance with federal law and regulations.”<sup>145</sup>

In *Henrietta D.*, over the State’s objections, the court ordered the State “to facilitate compliance by City Defendants within 90 days from the date of the request for the Fair Hearing and within 30 days from the date of the decision after Fair Hearing, exclusive of any adjournment of the Fair Hearing.”<sup>146</sup> And in *Moore v. Perales*, the court observed: “The state has chosen to administer these [federal welfare] programs through local agencies, including the City Agency. However,

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143. *Henrietta D. v. Giuliani*, 119 F. Supp. 2d 181, 216 (E.D.N.Y. 2000), *aff’d sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (emphasis added) (citations omitted).

144. *Espinosa v. Shah*, No. 09 Civ. 4103, 2014 U.S. Dist. LEXIS 168875, at \*38 (S.D.N.Y. Dec. 5, 2014).

145. *Shakhnes v. Berlin*, 689 F.3d 244, 248 (2d Cir. 2012) (citation omitted).

146. *Henrietta D. v. Giuliani*, No. 95 CV 641, 2001 U.S. Dist. LEXIS 21849, at \*74 (E.D.N.Y. July 18, 2001).

the state is ultimately responsible for ensuring that a fair hearing is held and that timely compliance with the decision after fair hearing is accomplished.”<sup>147</sup> *Solla* contravenes every one of these cases, and indeed the very foundational principles of New York welfare law.

The State’s liability for the City was in fact so well established that counsel for Ms. Solla did not brief the issue, focusing instead on the question whether the First Department correctly recognized the catalyst theory under EAJA.<sup>148</sup> The words “agency” and “principal” do not appear in Ms. Solla’s brief.<sup>149</sup> Ironically, Ms. Solla’s brief does cite *Thomasel* with respect to the catalyst theory, but not for the agency principle.<sup>150</sup> Oral argument at the Court of Appeals reflected the utter lack of briefing on the subject. Over and over, the judges asked the attorneys, “what did the State do that is - - - that’s the basis for this action to recover attorneys’ fees?”<sup>151</sup> Only in the very last seconds did Ms. Solla’s counsel manage to introduce the concept of vicarious liability: “The - - - City is subservient to the state.”<sup>152</sup> Judge Rivera responded, “So it’s almost like vicarious liability.”<sup>153</sup> “In some sense it is,” counsel replied,<sup>154</sup> noting that a First Department case under EAJA found that “the State can’t just do finger pointing.”<sup>155</sup> That

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147. *Moore v. Perales*, No. CV-85-1638, 1990 U.S. Dist. LEXIS 20995, at \*5 (E.D.N.Y. May 3, 1990).

148. See Brief for Petitioner-Respondent, *Solla v. Berlin*, 27 N.E.3d 462 (N.Y. 2015) (No. 401178/2011) [hereinafter Brief for Respondent].

149. See *id.*

150. See *id.* at 34.

151. Transcript of Oral Argument at 3, *Solla v. Berlin*, 27 N.E.3d 462 (N.Y. 2015) (No. 401178/2011) [hereinafter Transcript]; *id.* at 17-18, (“why is the State to blame for what happened?”); *id.* at 18 (“What did they do wrong?”); *id.* at 18 (“What did they do wrong?”); *id.* at 19 (“But what were they supposed to do?”); *id.* at 20 (“But what - - - what were they supposed to do?”).

152. *Id.* at 32.

153. *Id.*

154. *Id.*

155. *Id.* Counsel was actually referring to the Court of Appeal’s own decision in *Thomasel*, in which the court observed, *inter alia*: “Imposing responsibility for attorney’s fees on the State DSS takes this [interconnected] structure into account and avoids evasion of responsibility by bureaucratic fingerpointing and red-tape shufflings.” *Thomasel v. Perales*, 585 N.E.2d 359, 363 (N.Y. 1991). See *supra* note 131 and accompanying text.

they're ultimately on the hook for - - - ."<sup>156</sup> Those were his last substantive words, and with that, the court utterly failed to examine – in oral argument, or in its decision – the mountain of law establishing that the State is not “almost” or “[i]n some sense” vicariously liable for the City actions and inactions; it is unequivocally liable.<sup>157</sup>

### C. *The Catalyst Theory*

“Under the pre-*Buckhannon* federal precedent that petitioner would have us apply,” the Court of Appeals opined, “a fee claimant recovers attorneys’ fees *only if his or her lawsuit prompted a change in position* by the party from which claimant seeks reimbursement.”<sup>158</sup> Because “[t]he City altered its position following petitioner’s commencement of this proceeding, but the State did not,” the court ruled that Ms. Solla could not recover fees under the catalyst theory.<sup>159</sup> Given that the State is vicariously liable for the City’s conduct, even under the court’s formulation of the catalyst theory, Ms. Solla was a prevailing party, since, as the court acknowledged, the “City altered its position.”<sup>160</sup> Of equal importance, however, the court’s formulation of the catalyst theory was erroneous: while a change in position might be one basis for establishing prevailing status under the catalyst theory – if a change in position was the relief sought – the established criteria under the catalyst theory are far broader. There is, in fact, no basis for the Court of Appeal’s extremely restrictive formulation, which contravenes both state and federal catalyst jurisprudence.

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156. Transcript at 32.

157. Ms. Solla’s lead counsel has explained that he did not anticipate that the court would question the State’s vicarious liability: “We were really taken by surprise at the arguments . . . that they were singularly focused on this issue of what the State, as opposed to the City, had done wrong. It seemed like a throwaway, non-viable issue. Our focus was on the real issue, whether or not the revival of the catalyst theory by the First Department should be upheld.” Telephone Interview with Peter Kempner, lead counsel for Ms. Solla (July 21, 2015).

158. *Solla v. Berlin*, 27 N.E.3d 462, 464 (emphasis added) (citations omitted).

159. *Id.* at 465.

160. *Id.*

### 1. State Case Law

While the federal EAJA fails to define the term “prevailing party,” New York’s EAJA defines the term as “a plaintiff or petitioner in the civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues.”<sup>161</sup> The Court of Appeals has established that in determining whether a litigant is a prevailing party under the statute, courts must focus on the relief obtained. Hence, a prevailing party is one “who can show that it succeeded in large or substantial part by identifying the original goals of the litigation and by demonstrating the comparative substantiality of the relief actually obtained.”<sup>162</sup>

New York’s EAJA also differs from the federal statute in two material respects that demonstrate the Legislature’s endorsement of the catalyst theory as a means of determining prevailing party status. *First*, unlike the federal EAJA, New York’s EAJA expressly contemplates that a “final judgment” for the purposes of awarding fees under the statute includes “settlement” of the claims at issue.<sup>163</sup> *Second*, when the Legislature passed EAJA in 1989, it expressly stated—in the statute itself—its intent “to create a mechanism authorizing the recovery of counsel fees . . . similar to the provisions of [the federal EAJA statute] and the significant body of case law that has evolved thereunder.”<sup>164</sup> At the time, “every Federal Court of Appeals (except the Federal Circuit, which had not addressed the issue) concluded that plaintiffs . . . could obtain a fee award if their suit acted as a ‘catalyst’ for the change they

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161. N.Y. C.P.L.R. § 8602(f) (McKinney 2015).

162. N.Y. State Clinical Lab. Ass’n, Inc. v. Kaladjian, 649 N.E.2d 811, 815 (N.Y. 1995).

163. Compare N.Y. C.P.L.R. § 8602(c), with 28 U.S.C. § 2412(d)(2)(G). In *Buckhannon*, the Court ruled that “defendant’s voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001). New York’s EAJA, however, expressly recognizes that a settlement, which is of course a “voluntary change in conduct,” may form the basis for an award of fees. N.Y. C.P.L.R. § 8602(c).

164. N.Y. C.P.L.R. § 6800 (McKinney 2015).

sought, even if they did not obtain a judgment or consent decree.”<sup>165</sup>

New York cases prior to *Buckhannon* similarly recognized the catalyst theory, whether expressly naming the theory or applying its precepts in practice. Ironically, this includes a Court of Appeals decision directly on point, as well as a First Department decision directly on point. Both involve the precise fact pattern at issue in *Solla*, and both reached the opposite conclusion.

The Court of Appeal’s decision in *Thomasel* is once again directly on point. In *Thomasel*, the City informed petitioner “that her benefits would be reduced.”<sup>166</sup> Petitioner requested and won a DAFH that “ordered the City attorney to direct the appropriate personnel to restore petitioner’s benefits.”<sup>167</sup> The City, however, “persisted in not restoring petitioner’s benefits despite several subsequent additional directives from the State [agency].”<sup>168</sup> With the assistance of pro bono counsel, petitioner sued the City and State.<sup>169</sup> Prior to judicial adjudication, the parties settled the case: “The State and City [agencies] agreed to restore petitioner’s benefits . . . and to repay her the amount of the retroactive shortfall.”<sup>170</sup> Petitioner then moved for attorneys’ fees.

Unanimously reversing the First Department’s denial of attorneys’ fees, the Court of Appeals applied the catalyst theory, ruling that “a plaintiff need not obtain relief by judicial decree or formal judgment” in order to obtain an attorneys’ fee

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165. *Buckhannon*, 532 U.S. at 625-26 (Ginsburg, J., dissenting). Contrary to Justice Ginsburg’s pronouncement, it appears that the D.C. Circuit had indeed recognized the catalyst theory as well, albeit in a case involving a preliminary court order. See *Grano v. Barry*, 783 F.2d 1104, 1110 (D.C. Cir. 1986) (“When a party’s success in achieving his goal results from a settlement, or some other event occurring before there has been a judicial ruling on the merits of the civil rights claims, it is necessary under the attorneys’ fees provision of section 1988 to determine whether there were colorable civil rights claims involved in the case and whether they served as catalysts in securing the result.”). For a full discussion of the application of the catalyst theory under EAJA, see Chan, *supra* note 18.

166. *Thomasel v. Perales*, 585 N.E.2d 359, 360 (N.Y. 1991).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 361.

award.<sup>171</sup> And as we have seen, the court explicitly rejected the State's attempt to evade responsibility for attorneys' fees on the basis that the City, not the State, was the culpable party, since the State had purportedly sided with petitioner all along.<sup>172</sup>

The facts and legal issue in *Thomasel* were not merely similar to the facts in *Solla*; they were precisely the same. The only difference is that petitioner in *Thomasel* sought fees under the Civil Rights Attorney's Fees Award Act of 1976 (the "Fees Act").<sup>173</sup> This is, however, a distinction without a difference. As the Supreme Court has established, the Fees Act's "prevailing party" language<sup>174</sup> is "virtually identical to the [federal] EAJA provision,"<sup>175</sup> the provision after which New York State Legislature expressly patterned EAJA in 1989, together with "the significant body of case law that has evolved thereunder."<sup>176</sup> In *Solla*, however, the court denied fees, creating a requirement that the lawsuit "prompt[] a change in position by the party from which claimant seeks reimbursement," without mentioning, much less distinguishing, its decision in *Thomasel*.<sup>177</sup>

A comparison of the language utilized by the Court of Appeals in both cases is revealing, and highlights this glaring contradiction. In *Thomasel*, the State argued that "while the City [agency] may have violated petitioner's rights, the State [agency] did not . . ."<sup>178</sup> In *Solla*, the Court opined that "[t]he City altered its position following petitioner's commencement of this proceeding, but the State did not."<sup>179</sup> In *Thomasel*, the

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171. *Id.* at 362 (citations omitted).

172. *See supra* note 131 and accompanying text.

173. *Thomasel*, 585 N.E.2d at 361; *See* 42 U.S.C. § 1988 (2012).

174. 42 U.S.C. § 1988(b).

175. *Astrue v. Ratliff*, 560 U.S. 586, 597-98 (2010). *See, e.g.*, *Bryant v. Comm'r of Soc. Sec.*, 578 F.3d 443, 449 (6th Cir. 2009) ("EAJA uses the same 'prevailing party' language as §1988[.]"'). *See also* *Premachandra v. Mitts*, 727 F.2d 717, 720 (8th Cir. 1984), *rev'd on other grounds en banc*, 753 F.2d 635 (8th Cir. 1985) ("Although the EAJA does not define the term 'prevailing party,' the legislative history clearly indicates that the term is to be read consistently with its use in other fee shifting statutes.") (citation omitted).

176. N.Y. C.P.L.R. § 8600 (McKinney 2015).

177. *Solla v. Berlin*, 27 N.E.3d 462, 464 (N.Y. 2015) (citations omitted).

178. *Thomasel*, 585 N.E.2d at 363.

179. *Solla*, 27 N.E.3d at 465.

State argued that it “did everything in its power to restore petitioner’s benefits, pointing to its repeated directives to the City. . . .”<sup>180</sup> In *Solla*, the Court opined that “the State has consistently sided with petitioner regarding HRA’s reduction of her shelter allowance.”<sup>181</sup> These diametrically opposed decisions simply cannot be harmonized.

In *Shvartzayd v. Dowling*, as in *Thomasel* and *Solla*, petitioner filed an article 78 proceeding to challenge the “State’s failure to enforce the City’s compliance with . . . fair hearing decisions. . . .”<sup>182</sup> Petitioner’s benefits issues “were rectified before the return date of the article 78 proceeding.”<sup>183</sup> Petitioner then moved for attorneys’ fees under EAJA “on the basis that she succeeded, as a direct result of filing her lawsuit, in obtaining the entire relief she sought. . . .”<sup>184</sup> Applying the catalyst theory, the court explained:

[I]t is not necessary for petitioner to have obtained the relief sought solely through a final judgment. However, in order to be deemed a “prevailing party,” petitioner must show a causal connection between the ultimate relief obtained and the lawsuit in which the fees are sought. In order to establish the requisite causal nexus, a petitioner must demonstrate that his or her lawsuit was a “catalytic, necessary or substantial factor in obtaining the relief.”<sup>185</sup>

Like the lower court in *Solla* examining the same fact pattern, the court in *Shvartzayd* was “compelled to conclude that the institution of the Article 78 resulted in the award of retroactive benefits. Accordingly, petitioner has established

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180. *Thomasel*, 585 N.E.2d at 363.

181. *Solla*, 27 N.E.3d at 464-65.

182. *Shvartzayd v. Dowling*, 656 N.Y.S.2d 631, 631 (App. Div. 1997).

183. *Id.*

184. *In re Shvartzayd*, N.Y.L.J., June 26, 1995, at 28 (Sup. Ct. N.Y. Cty. June 26, 1995), *aff’d sub nom.* *Shvartzayd v. Dowling*, 656 N.Y.S.2d 631, 631 (App. Div. 1997).

185. *Id.* (citations omitted).

the requisite causal connection.”<sup>186</sup> And unlike the Court of Appeals in *Solla*, the court comprehensively rejected the State’s argument that “an award of fees must be based on the conduct of the State and that . . . the State can not be vicariously liable for the failure of the local agency to comply with the law.”<sup>187</sup> In doing so, the court cited the agency and vicarious liability principles established in *Beaudoin*, *Thomasel*, and the New York Social Services Law, along with the State’s obligation “to see that [its] lawful rulings were complied with . . . [a]nd if this did not happen . . . to ascertain expeditiously the reason why and take immediate steps to remedy the situation.”<sup>188</sup>

The fact that the State had not changed its position was irrelevant to this decision; the State failed to secure compliance with its fair hearing decisions, relief that the petitioner secured by filing the lawsuit. Hence, an award of fees was appropriate. Affirming this decision, the First Department opined:

Twice before instituting the article 78 proceeding, petitioner notified the State in writing of the City’s noncompliance, and it was not a reasonable response to this notice for the State simply to rely upon a report from the City that appropriate compliance action had been taken without conducting any independent investigation of its own.<sup>189</sup>

Finally, in *Diaz v. Franco*, petitioner applied for public housing, but respondent “made no determination as to petitioner’s eligibility” until nine days after petitioner filed the lawsuit, finding her eligible.<sup>190</sup> Awarding fees, the First Department found that the proceeding was “a catalyst of respondent agency’s belated eligibility determination,” i.e., for the relief sought.<sup>191</sup>

None of these cases involved a “change in position” by the

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186. *Id.*

187. *Id.*

188. *Id.* (citation omitted) (internal quotation marks omitted).

189. *Shvartzayd v. Dowling*, 656 N.Y.S.2d 631, 631 (App. Div. 1997).

190. *Diaz v. Franco*, 683 N.Y.S.2d 267, 267 (App. Div. 1999).

191. *Id.*

State. Instead, in each, petitioner sought to force the State to comply with the law. In two of the three, moreover, petitioner sought the same relief as Ms. Solla: to force the State to secure compliance with its DAFH. In each case, the courts, including the Court of Appeals, awarded fees, for each of the proceedings was the catalyst for obtaining the relief sought. *Solla*, which reached the opposite conclusion, did not so much as mention these relevant (and in the case of *Thomasel*, controlling) precedents. Instead, as the following section reveals, the court relied upon, and misconstrued, two federal court decisions while ignoring a plethora of federal cases that universally support the award of fees under the circumstances.

## 2. Federal Case Law

Because the New York State Legislature enacted EAJA in 1989 expressly to mirror the federal EAJA statute “and the significant body of case law that has evolved thereunder[.]”<sup>192</sup> federal case law leading up to the enactment of EAJA is a critical guidepost in interpreting the catalyst theory under EAJA.<sup>193</sup> In determining whether a plaintiff is a prevailing party and thus entitled to fees, the Supreme Court in *Hensley v. Eckerhart* urged a practical approach: “A typical formulation is that ‘plaintiffs may be considered “prevailing parties” for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.’”<sup>194</sup> Over and over again, circuit courts throughout the country utilized this pragmatic approach in applying the catalyst theory prior to the enactment of New York’s EAJA. As Justice Ginsburg explained, reviewing the pre-*Buckhannon* case law: “Interpreting the term ‘prevailing party’ in ‘a practical sense,’ federal courts across the country

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192. N.Y. C.P.L.R. § 8600 (McKinney 2015).

193. See, e.g., *Centennial Restorations Co. v. Abrams*, 608 N.Y.S.2d 559, 559-60 (App. Div. 1994) (citations omitted) (“Inasmuch as CPLR article 86 is modeled after the Federal act, we turn to Federal case law for guidance.”).

194. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citations omitted). See also *Texas State Teachers Ass’n v. Garland Sch. Dist.*, 489 U.S. 782, 783 (1989) (“A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either *pendente lite* or at the conclusion of the litigation.”).

held that a party ‘prevails’ for fee-shifting purposes when its ends are accomplished as a result of the litigation[.]”<sup>195</sup> “The standard applicable,” the Seventh Circuit explained, “is whether the plaintiffs have prevailed in a ‘practical sense.’”<sup>196</sup>

Focusing on the relief that plaintiffs sought through litigation, the courts inquired whether plaintiffs obtained some or all of that relief, and whether their lawsuit was the catalyst for doing so. “To justify an award of such fees,” the Second Circuit ruled, “the prevailing party must show a causal connection between the relief obtained and the litigation in which fees are sought. A causal connection exists if the plaintiff’s lawsuit was ‘a catalytic, necessary, or substantial factor in attaining the relief.’”<sup>197</sup> Catalyst opinions, the Fifth Circuit observed, “have focused upon the type of relief obtained from the defendants as a result of the lawsuit.”<sup>198</sup> As the Fourth Circuit summarized:

[The] initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant’s efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured

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195. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 626 (2001)., (Ginsburg, J., dissenting) (citations omitted).

196. *Stewart v. Hannon*, 675 F.2d 846, 851 (7th Cir. 1982) (citations omitted). *Accord Buckhannon*, 532 U.S. at 641 (Ginsburg, J., dissenting) (citation omitted) (“It bears emphasis, however, that in determining whether fee shifting is in order, the Court in the past has placed greatest weight not on any ‘judicial *imprimatur*,’ ante, at 6, but on the practical impact of the lawsuit.”); *Clark v. City of Los Angeles*, 803 F.2d 987, 990 (9th Cir. 1986) (“More important, they achieved the practical result they sought.”).

197. *Gerena-Valentin v. Koch*, 739 F.2d 755, 758-59 (2d Cir. 1984) (citations omitted).

198. *Robinson v. Kimbrough*, 652 F.2d 458, 465 (5th Cir. 1981).

against the benchmark condition.<sup>199</sup>

“Usually,” the Third Circuit explained, “a common-sense comparison between relief sought and relief obtained will be sufficient to indicate whether a party has prevailed.”<sup>200</sup> In fact, *every circuit to address the issue prior to the enactment of EAJA in New York focused upon the practical question whether plaintiffs obtained some or all of the relief sought in the lawsuit.*<sup>201</sup> If plaintiffs’ lawsuit was the catalyst for obtaining

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199. *Bonnes v. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979) (citations omitted). See *Hewitt v. Helms*, 482 U.S. 755, 761 (1987) (“If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has ‘prevailed’ in his suit, because he has obtained the substance of what he sought.”).

200. *Institutionalized Juveniles v. Sec’y of Pub. Welfare*, 758 F.2d 897, 911 (3d Cir. 1985) (citations omitted).

201. See *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978) (“[P]laintiffs may be considered ‘prevailing parties’ for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.”); *Gerena-Valentin*, 739 F.2d 755; *Disabled in Action of Pa. v. Pierce*, 789 F.2d 1016, 1019 (3d Cir. 1986) (citations omitted) (“[O]ur first step is to compare the relief sought with that actually obtained. Our second step is to determine the causal connection between the relief obtained and the litigation.”); *Bonnes*, 599 F.2d 1316; *Associated Builders & Contractors of Louisiana, Inc. v. Orleans Parish Sch. Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (citations omitted) (“[I]n the absence of a judgment, a party may be entitled to fees as a prevailing party ‘if its ends are accomplished as a result of the litigation.’”); *Citizens Coal. for Block Grant Compliance, Inc. v. City of Euclid*, 717 F.2d 964, 966 (6th Cir. 1983) (citation omitted) (“[T]he court must first ask whether, as a matter of fact, the plaintiff’s lawsuit was a necessary and important factor in achieving the relief desired. If it answers this first query affirmatively, the court must then determine whether the relief obtained resulted from a gratuitous act on the defendant’s part or whether defendant’s actions were mandated by law.”); *Stewart*, 675 F.2d at 851 (citations omitted) (“[T]his court identified two criteria for determining whether a party is to be considered a prevailing party for the purposes of awarding attorneys’ fees: (1) whether the litigation benefited the plaintiff and members of the class, and (2) whether the lawsuit acted as a catalyst, or was a material factor in the defendant’s decision to change the disputed practices and therefore provide, in substantial part, the relief sought.”); *Premachandra v. Mitts*, 727 F.2d 717, 721 (8th Cir. 1984) (first step in catalyst analysis is determining “whether the plaintiff’s suit served as a catalyst -- i.e., ‘a necessary and important factor’ -- in achieving the relief desired”); *Clark*, 803 F.2d at 989 (“It is enough that plaintiffs received some of the benefit they sought in bringing the suit.”); *J & J Anderson, Inc. v. Town of Erie*, 767 F.2d 1469, 1473 (10th Cir. 1985) (“[A] person who brings an action alleging a civil rights violation, but who does not receive a judgment on the merits, is still a prevailing party for purposes of §

that relief, plaintiffs were prevailing parties.<sup>202</sup> In *Buckhannon*, Justice Ginsburg observed that many circuits required a plaintiff “to demonstrate as well that the suit stated a genuine claim, *i.e.*, one that was at least ‘colorable,’ not ‘frivolous, unreasonable, or groundless.’”<sup>203</sup>

Ms. Solla clearly satisfied these requirements. *First*, she obtained all of the relief that she sought.<sup>204</sup> *Second*, her lawsuit was the catalyst for securing that relief, as the trial court determined.<sup>205</sup> Indeed, the trial court’s determination of this fact was entitled to deference, and only subject to reversal if clearly erroneous.<sup>206</sup> Before the lawsuit, Ms. Solla could not

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1988 if he shows (1) that his lawsuit is causally linked to securing the relief obtained and (2) that the defendant’s conduct in response to the lawsuit was required by law.”); *Doe v. Busbee*, 684 F.2d 1375, 1381 (11th Cir. 1982) (“[I]n order to be a prevailing party, a plaintiff must achieve significant relief to which he was entitled under the civil rights laws through his success on the merits, favorable settlement, or voluntary actions by the defendants.”); *Grano v. Barry*, 783 F.2d 1104, 1108-09 (D.C. Cir. 1986) (citations omitted) (“To qualify as a prevailing party for attorneys’ fees purposes, a plaintiff must show that the ‘final result represents in a real sense, a disposition that furthers their interest.’ In applying this inquiry, the court must ‘focus on the precise factual/legal condition that the fee claimant has sought to change, and then determine if the outcome confers an actual benefit or relief from a burden.’”).

202. *See Associated Builders & Contractors of Louisiana, Inc.*, 919 F.2d at 381.

203. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 627 (2001) (Ginsburg, J., dissenting) (citations omitted).

204. *See Luz S. v. Berlin*, No. 401178/2011, 2011 N.Y. Misc. LEXIS 3460, at \*3 (N.Y. Sup. Ct. July 12, 2011) (“Respondents have provided petitioner the full relief for which she applied, leaving nothing for this court to grant.”).

205. *Id.* (“Her petition appears undoubtedly to have been the catalyst for HRA and HASA’s compliance; indeed, it appears that it was the only way left for her to get their attention after being ignored for months.”). *See also id.* at \*4 (“it apparently took the filing of this Article 78 motion to get respondents’ attention after months of arbitrary delay”).

206. *See, e.g., Ctr. for Biological Diversity v. Norton*, 262 F.3d 1077, 1081 (10th Cir. 2001) (citations omitted) (“Thus, the only issue before this court is whether the Center’s lawsuit was causally linked to the relief obtained. This is a factual determination reviewed under the clearly erroneous standard.”); *Royal Crown Cola Co. v. Coca-Cola Co.*, 887 F.2d 1480, 1485 (11th Cir. 1989) (citations omitted) (“We subject the district court’s factual finding that Royal Crown’s litigation ‘catalyzed’ the appellants’ abandonment to the ‘clearly erroneous’ standard of review.”); *Clark*, 803 F.2d at 989-90 (citation omitted) (“Whether a litigant has shown a sufficient causal relationship between the lawsuit and the practical outcome realized is a pragmatic factual inquiry for

get the City and State to restore her benefits to the correct amount, and to restore lost benefits.<sup>207</sup> She appealed to the State for help in securing compliance with a DAFH, and the State did nothing, not even checking the computer system to confirm that Ms. Solla was still going without her subsistence benefits.<sup>208</sup> After she filed the proceeding, the respondents finally “provided petitioner the full relief for which she applied.”<sup>209</sup> State respondent finally checked the computer system and confirmed that Ms. Solla indeed required compliance.<sup>210</sup> *Third*, her lawsuit was anything but frivolous. In every practical sense, Ms. Solla prevailed.

The pre-*Buckhannon*, relief-focused approach to the catalyst theory is entirely consistent with the Court of Appeal’s approach of “identifying the original goals of the litigation” and “demonstrating the comparative substantiality of the relief actually obtained.”<sup>211</sup> In *Solla*, the Court of Appeals ignored all of these authorities, citing two federal cases, *Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid* and *Omaha Tribe of Nebraska v. Swanson*, that do not in fact support the court’s restrictive formulation.

Neither of these cases remotely states that a claimant can recover fees “only if his or her lawsuit prompted a change in position by the party from which claimant seeks

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the district court. We review the findings for clear error.”)

207. *Solla v. Berlin*, 961 N.Y.S.2d 55, 58 (App. Div. 2013).

208. Brief for Respondent, *supra* note 149, at 12 (“The [State] concedes that [after the filing of the lawsuit], it finally reviewed the Welfare Management System printouts to confirm that retroactive benefits had been issued to Ms. Solla’s landlord and that her budget had been restored to pre-reduction levels.”).

209. *See Luz S.*, 2011 N.Y. Misc. LEXIS 3460, at \*3 (“Respondents have provided petitioner the full relief for which she applied, leaving nothing for this court to grant.”).

210. *See* Brief for Respondent, *supra* note 149, at 49 (“It was only after the filing of this Petition that the appellant changed their position from inaction to action and it was only then that they independently confirmed compliance with the Decision after Fair Hearing.”).

211. *N.Y. State Clinical Lab. Ass’n v. Kaladjian*, 649 N.E.2d 811, 815 (N.Y. 1995). *See also In re Shvartzayd*, N.Y.L.J., June 26, 1995, at 28 (Sup. Ct. N.Y. Cty. June 26, 1995), *aff’d sub nom.* *Shvartzayd v. Dowling*, 656 N.Y.S.2d 631, 632 (App. Div. 1997) (citations omitted) (“to be deemed a ‘prevailing party,’ petitioner must show a causal connection between the ultimate relief obtained and the lawsuit in which the fees are sought”).

reimbursement.”<sup>212</sup> Indeed, the words “change” and “position” do not even appear in these decisions.<sup>213</sup> The Court of Appeals read that criterion into the decisions based upon the facts at issue, but the *actual* criteria set forth in those decisions is far broader; it is, in fact, precisely the same relief-focused, practical approach universally adopted prior to the enactment of EAJA.

Thus, in *Omaha Tribe*, the court explained the relevant criteria as follows: “It is enough if a party succeeds on any significant issue which achieves some of the benefit sought in bringing the suit.”<sup>214</sup> “The important thing,” the court observed, “is *what relief was awarded on the facts and the law . . .*”<sup>215</sup> Similarly, in *Citizens Coalition*, the court explained that the Sixth Circuit followed a “two-part standard.”<sup>216</sup> First, the court must ask “whether, as a matter of fact, the plaintiff’s lawsuit was a necessary and important factor in achieving the relief desired.”<sup>217</sup> If so, “the court must then determine whether the relief obtained resulted from a gratuitous act of the defendant’s part or whether defendant’s actions were mandated by law.”<sup>218</sup> Under either of these formulations, Ms. Solla was a prevailing party. And under neither is there a requirement to demonstrate a “change in position.”

In both *Omaha Tribe* and *Citizens Coalition*, the court based its finding that plaintiffs were not prevailing parties upon the specific facts at issue, facts plainly distinguishable from the facts in *Solla*. In contrast to *Solla*, moreover, in each case, the court merely affirmed the trial court’s factual finding that the lawsuits did not meet the requisite relief-focused criteria. Thus, in *Omaha Tribe*, the court noted that plaintiff

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212. *Solla v. Berlin*, 27 N.E.3d 462, 464 (N.Y. 2015).

213. See *Omaha Tribe of Nebraska v. Swanson*, 736 F.2d 1218 (8th Cir. 1984); *Citizens Coal. for Block Grant Compliance, Inc. v. City of Euclid*, 717 F.2d 964 (6th Cir. 1983).

214. *Omaha Tribe*, 736 F.2d at 1220-21 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

215. *Id.* at 1221 (emphasis added) (citation omitted). See also *id.* at 1220 (citation omitted) (“To determine if a party has prevailed, a court may look to the substance of the litigation’s outcome.”).

216. *Citizens Coal.*, 717 F.2d at 966.

217. *Id.* (citations omitted).

218. *Id.*

“sought to achieve two objectives,” namely, (i) to resolve a dispute with defendant Swanson over leases, and (ii) “to show that the United States had breached its fiduciary duty to the [plaintiff].”<sup>219</sup> Affirming the lower court’s determination, the court ruled that “the settlement reached only the first of these two. . . .”<sup>220</sup> Indeed, the “settlement agreement focuses exclusively on achieving the [plaintiff’s] objectives with respect to Swanson[,]”<sup>221</sup> and plaintiff “did not release any claims it might have had against the United States.”<sup>222</sup> Hence, “there is nothing in the settlement agreement which indicates that the tribe obtained any of the relief it sought from the United States.”<sup>223</sup>

The court applied a relief-focused approach to catalyst theory, and found that plaintiff did not obtain any of the relief sought against the government. This is in stark contrast to *Solla*, where Ms. Solla obtained all of the relief she sought against government respondents.<sup>224</sup> In dicta, however, the court in *Omaha Tribe* observed: “The government consistently had sought Swanson’s compliance; indeed, it had initiated a comprehensive investigation into Swanson’s affairs, and twice had proceeded administratively to cancel Swanson’s leases.”<sup>225</sup> This is in stark contrast to *Solla*, where State defendant did absolutely nothing. More importantly, it is irrelevant to the holding in the case, namely, that plaintiff obtained none of the relief sought against the government.

*Citizens Coalition* is similarly inapposite. There, plaintiffs sought to enjoin the United States Department of Housing and Urban Development (“HUD”) from disbursing funds to the city of Cleveland “pending the City’s submission of an affirmative action fair housing program. . . .”<sup>226</sup> The parties settled, and

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219. *Omaha Tribe*, 736 F.2d at 1221.

220. *Id.*

221. *Id.*

222. *Id.* at 1220.

223. *Id.* at 1221.

224. *See supra* note 205.

225. *Omaha Tribe of Nebraska v. Swanson*, 736 F.2d 1218, 1221 (8th Cir. 1984).

226. *Citizens Coal. for Block Grant Compliance, Inc. v. City of Euclid*, 717 F.2d 964, 965 (6th Cir. 1983).

plaintiffs moved for attorneys' fees.<sup>227</sup> Critically, applying the catalyst criteria examined above, the court affirmed the trial court's finding that the lawsuit was not the catalyst for securing the relief obtained.<sup>228</sup> The trial court found that plaintiffs did not demonstrate that their "action in bringing suit was what finally forced HUD to take a more aggressive stance. Rather, the documents suggest that HUD cut off funds shortly *before suit was initiated*."<sup>229</sup> There was therefore nothing to indicate that "plaintiffs have obtained any of the relief they sought from HUD. . . ."<sup>230</sup> This is the opposite of *Solla*, where the trial court found that Ms. Solla's lawsuit was "undoubtedly" the catalyst for the relief obtained.<sup>231</sup>

The trial court in *Citizens Coalition* noted that "HUD sought [the city's] compliance all along, although no doubt not as aggressively as the plaintiffs desired."<sup>232</sup> The Court of Appeals apparently transmogrified this passage into the holding of the case, and into a finding that a change in position was the operative criterion under the catalyst theory in the Sixth Circuit.<sup>233</sup> It was not, for the trial court found that HUD had already conferred the relief that plaintiffs sought "shortly before suit was initiated," thus precluding a finding that the lawsuit was the catalyst for the relief obtained.<sup>234</sup> This was an unfortunate error.

In short, in *Omaha Tribe*, plaintiff did not meet the first relief-focused catalyst criterion, failing to demonstrate that it "obtained any of the relief it sought from the United States."<sup>235</sup> In *Citizens Coalition*, plaintiffs did not meet the second criterion, failing to show "a causal connection" between the

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227. *Id.* at 966.

228. *Id.* at 967.

229. *Id.* (emphasis added) (quoting *Citizens Coal. for Block Grant Compliance, Inc. v. City of Euclid*, 537 F. Supp. 422, 425 (N.D. Ohio 1982)).

230. *Citizens Coal.*, 717 F.2d at 967 (quoting *City of Euclid*, 537 F. Supp. at 425).

231. *Luz S. v. Berlin*, No. 401178/2011, 2011 N.Y. Misc. LEXIS 3460, at \*3 (N.Y. Sup. Ct. July 12, 2011).

232. *Citizens Coal.*, 717 F.2d at 967 (quoting *City of Euclid*, 537 F. Supp. at 425).

233. *Citizens Coal.*, 717 F.2d at 967.

234. *City of Euclid*, 537 F. Supp. at 425.

235. *Omaha Tribe of Nebraska v. Swanson*, 736 F.2d 1218, 1221 (8th Cir. 1984).

filing of the lawsuit and HUD's actions, i.e., that the lawsuit was the catalyst for obtaining relief.<sup>236</sup> Ms. Solla satisfied both criteria, and under these cases and the significant body of federal case law that evolved under the federal EAJA statute, Ms. Solla was a prevailing party.

The Court of Appeal's creation of a requirement of a change of position under the catalyst theory doomed Ms. Solla to defeat (given the court's concomitant failure to recognize the State's vicarious liability for the City's change in position). After all, the relief that Ms. Solla was seeking was not a change in the State's position. Instead, Ms. Solla was seeking to compel the State to secure its agent's compliance with the DAFH, like myriad indigent New Yorkers before her.<sup>237</sup>

A favorable DAFH that the State fails to enforce is entirely useless to clients, clients who are often desperate to secure relief.<sup>238</sup> Requiring that such clients later show a change of position by the State is nonsensical, and ensures that such clients can never prevail on an a claim for fees under EAJA. It is also contrary to an enormous body of jurisprudence, both state and federal, applying a pragmatic approach to the catalyst theory and focusing on the relief obtained. As Justice Ginsburg observed in *Buckhannon*, "[t]he Court's narrow construction of the words 'prevailing party' is unsupported by precedent and unaided by history or logic."<sup>239</sup>

#### IV. Conclusion

Every year, indigent New Yorkers file hundreds of thousands of requests for fair hearings to challenge the reduction or termination of the subsistence benefits upon which they and their families rely to live, from food stamps to Medicaid to housing assistance. All too often, they prevail at the fair hearing only to see the local agency fail or refuse to implement the DAFH. Their only recourse is to file suit, but

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236. *Citizens Coal.*, 717 F.2d at 967.

237. *See supra* Section II.C.

238. *See supra* notes 82-91 and accompanying text.

239. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 644 (Ginsburg, J., dissenting).

doing so without representation is “nearly impossible.”<sup>240</sup>

The New York Legislature enacted EAJA to enable such individuals to secure representation against the superior resources of the State in precisely these instances.<sup>241</sup> In awarding fees to Ms. Solla, the First Department perfectly summarized the consequences of absolving the State of its obligation to pay attorneys’ fees when petitioners prevail in such lawsuits:

[P]reservation of the catalyst theory is critical to achieving the legislative purpose behind the State EAJA[.] . . . [I]f respondents’ position were upheld, aggrieved but impecunious parties would be hard-pressed to find qualified attorneys to commence cases for them, since they would have no assurance of being compensated. It 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.<sup>242</sup>

Sadly, that is precisely what the Court of Appeals did in *Solla*.<sup>243</sup> The critique of that decision, however, is not based chiefly upon consideration of its frightful consequences, nor upon the spirit and purpose of EAJA. It is based upon black letter law. That law establishes unequivocally that in the administration of welfare, local agencies are the agents of the State, and the State is vicariously liable for the conduct of its agents. Both New York and federal law, meanwhile, establish

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240. See *supra* note 93 and accompanying text.

241. See *supra* notes 13-17 and accompanying text; Chan, *supra* note 18 at 1344 (“The New York legislature enacted the EAJA in response to the difficulties faced by the poor in obtaining legal counsel, which had reached ‘crisis proportions’ and ‘jeopardize[d] both the welfare of poor persons and the legitimacy of the legal system itself.’”) (citation omitted).

242. *Solla v. Berlin*, 961 N.Y.S.2d 55, 65 (App. Div. 2013). See, e.g., *Astrue v. Ratliff*, 560 U.S. 586, 600 (2010) (Sotomayor, J., concurring) (“The EAJA’s admirable purpose will be undercut if lawyers fear that they will never actually receive attorney’s fees to which a court has determined the prevailing party is entitled. The point of an award of attorney’s fees, after all, is to enable a prevailing litigant to pay her attorney.”).

243. *Solla v. Berlin*, 27 N.E.3d 462 (N.Y. 2015).

that in applying the catalyst theory, courts must take a practical approach that focuses upon the relief secured, and not upon the narrow and often inapposite question whether the State has changed its position.

*Solla* cannot be reconciled with the law, or with diametrically opposed Court of Appeals precedents directly on point, *Thomasel* chief among them. There is every reason to believe that when the Court of Appeals revisits this issue, it will correct its error. In the meantime, given that *Solla* is so manifestly wrong, lower courts should continue to apply settled agency principles in cases involving noncompliance with DAFHs.