To Be Argued By:
Andrew R. Borelli
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Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

JUN WANG, M.D.,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78
and CPLR Section 3001

against

LETITIA JAMES, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Respondent-Respondent.

BRIEF FOR PETITIONER-APPELLANT

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STATEMENT CONCERNING RELATED LITIGATION PURSUANT TO SECTION 500.13(a) OF THE RULES OF THE COURT OF APPEALS

Related to the CPLR article 78 proceeding that is the subject of the instant appeal, there was an underlying medical malpractice matter for alleged failure to timely diagnose Hodgkin's lymphoma, in which Petitioner-Appellant Jun Wang, M.D. (hereinafter, Dr. Wang) was a named third-party defendant (*see* R. at 27-38 [summons and verified complaint], 511-528 [third-party summons and complaint]).[1] The alleged injured plaintiff in that underlying matter, Omar Alvarez, was an incarcerated individual in the custody of the New York State Department of Corrections and Community Supervision (hereinafter, DOCCS) at the time of the events in question (*see generally* R. at 44-45).

During the course of the underlying action, Cortland Regional Medical Center (hereinafter, CRMC), which was alleged to be vicariously liable for Dr. Wang, commenced a third-party action against Dr. Wang and his group at the time, Cortland Pathology, P.C. (R. at 511-528; *compare* R. at 543 ¶ 1 [b] [CRMC's demand for particularization of claims of vicarious liability] *with* R. at 550 ¶ 1 [b] [Plaintiffs' response to CRMC's demand for particularization of claims of vicarious liability]). At all times relevant to this action, Dr. Wang was the

[1] The parenthetical citations to "R. at ___" refer to the Record on Appeal before this Court, produced in accordance with the Rules of the Court of Appeals (22 NYCRR) § 500.14 (a) (3).

pathologist who interpreted the specimen that general surgeon, R. Wayne Cotie, M.D., biopsied on September 10, 2012 at CRMC (R. at 485-486).

As of the date of completion of this brief, Dr. Wang and CRMC settled the underlying medical malpractice matter with Plaintiffs Omar Alvarez and his wife, Diana Grecequet-Alvarez, within the bounds of their respective insurance policy limits.[2] Settlement documents and funds have been exchanged, and the stipulation of discontinuance was filed in the underlying medical malpractice matter on November 23, 2022 (*see* Addendum to Brief).

[2] Plaintiffs voluntarily discontinued the underlying medical malpractice action against Pang L. Kooi, M.D. and R. Wayne Cotie, M.D., individually. Upon information and belief, Plaintiffs also maintained an action in the Court of Claims against the State of New York for Drs. Kooi and Cotie, and also settled that matter.

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QUESTION PRESENTED

1. On this issue of first impression, is Dr. Wang, a licensed medical physician, entitled to be defended and indemnified by the State of New York pursuant to Correction Law § 24-a against alleged medical malpractice arising out of his professional services rendered to Mr. Alvarez, an incarcerated individual in DOCCS' custody, during the course of a surgical biopsy approved by DOCCS?

   Yes. Dr. Wang is entitled to a defense and indemnification under Correction Law § 24-a because his pathology examination is an indispensable and integral part of completing a surgical biopsy, which was undisputedly approved by DOCCS. Therefore, it was reversible error to uphold, and give deference to, the New York State Attorney General's (hereinafter, the State) determination that Dr. Wang was not entitled to defense and indemnification from New York State for the pathology services he provided to Mr. Alvarez in September 2012.

PROCEDURAL POSTURE AND JURISDICTION OF THE COURT OF APPEALS

On or about March 2, 2015, Plaintiffs commenced their underlying medical malpractice action in New York County Supreme Court against Pang L. Kooi, M.D., Dr. Cotie, and CRMC, based on an alleged failure to timely diagnose Hodgkin's lymphoma (*see* R. at 27-38). During the litigation of that matter, CRMC commenced a third-party action against Dr. Wang and his group on or about March 1, 2021 (R. at 511-528).

On March 4, 2021, Dr. Wang timely served a tender of defense letter (dated March 3, 2021) upon the State requesting defense and indemnification pursuant to Correction Law § 24-a, which extends the protections of Public Officers Law § 17 to certain professionals providing services to incarcerated individuals while acting at DOCCS' request (R. at 633-635). That same day, the State denied defense and indemnification to Dr. Wang (R. at 636). By letter dated March 16, 2021, Dr. Wang asked the State to reconsider its determination, and on March 23, 2021, the State reiterated its decision to deny Dr. Wang defense and indemnification (R. at 637-640). On May 28, 2021, Dr. Wang commenced a CPLR article 78 proceeding in Onondaga County Supreme Court seeking to vacate the State's determination denying defense and indemnification (R. at 14-642 [including exhibits]). The State opposed Dr. Wang's petition (R. at 643-895 [including exhibits]), and on August 11, 2021, the trial court denied Dr. Wang's petition and upheld the State's

determination, finding that the State's determination was entitled to deference and that there was no possible factual or legal basis on which the State might be obligated to indemnify Dr. Wang (R. at 5-13).

The appeal to the Fourth Department ensued, resulting in a Memorandum and Order dated July 8, 2022 (R. at 909-912, 915-917). The Fourth Department unanimously affirmed the trial court's decision and order denying Dr. Wang's petition (*see id.*).

The Fourth Department agreed that it was undisputed Dr. Wang's profession is covered by Correction Law § 24-a (R. at 910, 916). Nevertheless, the Fourth Department held that the State's determination that Correction Law § 24-a did not apply to Dr. Wang, was entitled to judicial deference because the relevant question was one of specific application of a broad statutory term (*id.*). More specifically, the Fourth Department held that the State's "determination that Correction Law § 24-a applies only where DOCCS has expressly requested the services of a particular health care provider 'is a reasonable one' that 'courts should not second-guess'" (R. at 910-911 [citations omitted], 916-917 [citations omitted]). The Fourth Department concluded that there was no evidence that DOCCS ever expressly requested that Dr. Wang perform pathology services on the excised specimen and that Dr. Wang's pathology services were retained by CRMC without DOCCS' input (R. at 911, 917). Finally, the Fourth Department rejected Dr.

Wang's position that Correction Law § 24-a applies where DOCCS impliedly requested a particular health care service (*id.*).

Dr. Wang moved for leave to appeal and, by order entered January 10, 2023, the Court of Appeals granted the motion (R. at 908). Accordingly, based on the foregoing, this Court has jurisdiction over this appeal pursuant to CPLR § 5602 (a) (1) (i) and the question on appeal is preserved.

STATEMENT OF FACTS

Mr. Alvarez, while incarcerated and in the custody of DOCCS at the Auburn Correctional Facility, had developed a mass in the right axilla (i.e., armpit) area (*see* R. at 42-43, 45). General surgeon, Dr. Cotie, who provided general surgery services to incarcerated individuals pursuant to a contract with DOCCS,[3] evaluated Mr. Alvarez's right axillary mass on August 3, 2012 and recommended a biopsy to rule out non-malignant etiology (i.e., lipoma) versus malignant etiology (i.e., lymphoma) (*see* R. at 45, 113-114, 188-189). According to Dr. Cotie, the entire purpose for the biopsy was to obtain a specimen that would, in turn, allow him to obtain information about the presence or absence of malignancy, which could be provided only by a pathologist's review of the specimen (*see* R. at 188-189).

DOCCS thereafter approved the biopsy recommended by Dr. Cotie (*see* R. at 44-45, 82-83, 109; *see generally* R. at 408-409). At that time, Dr. Cotie was affiliated with, and had admitting privileges at, CRMC (R. at 62-63, 79). On September 10, 2012, Dr. Cotie performed the surgical biopsy and removed a portion of the mass due to the presence of lymph nodes at CRMC (*see* R. at 113-114, 480-481). The specimen Dr. Cotie removed was sent to CRMC's pathology department for examination and anticipated a preliminary report within a week (*see*

[3] Dr. Cotie was represented and defended by the New York State Attorney General's Office during the course of the underlying medical malpractice action (*see* R. at 651).

R. at 115-116). Dr. Cotie relied on the pathologist to identify the histological and hepatological findings, e.g., whether there was any malignancy (*see* R. at 189).

Dr. Wang, who was the Medical Director of the Department of Pathology at CRMC at the time, thereafter interpreted the specimen removed by Dr. Cotie and issued a report (R. at 485-486, 678-679, 751-752).[4] As a result of his review, Dr. Wang concluded that the specimen was a "lymph node with reactive lymphoid hyperplasia," i.e., a non-malignant condition (R. at 120, 485). Based on that interpretation and findings, Dr. Wang submitted the specimen to SUNY Upstate University Hospital to complete a flow cytometry study (R. at 486). DOCCS thereafter paid CRMC for services related to the biopsy, including certain costs associated with the pathology review (*see* R. at 505-510).

Approximately one year later, Mr. Alvarez was diagnosed with Hodgkin's lymphoma (*see* R. at 41).

[4] At the time of his pathology review, Dr. Wang was a member of Cortland Pathology, P.C., which had an exclusive contract with CRMC to provide pathology services at the hospital (R. at 871-884; *see* R. at 874, 884).

ARGUMENT

DR. WANG IS STATUTORILY ENTITLED TO BE DEFENDED AND INDEMNIFIED BY THE STATE OF NEW YORK PURSUANT TO CORRECTION LAW § 24-a BECAUSE HIS PROFESSIONAL SERVICE WAS A NECESSARY AND INDIVISIBLE COMPONENT OF THE BIOPSY SURGERY APPROVED BY DOCCS; THE STATE'S DETERMINATION TO THE CONTRARY IS NOT ENTITLED TO DEFERENCE AND IS OTHERWISE UNREASONABLE, ARBITRARY, AND CAPRICIOUS.

Quite simply, this appeal presents a single question of first impression for this Court: whether a non-DOCCS physician, such as Dr. Wang, is entitled to defense and indemnification from the State pursuant to Correction Law § 24-a where the physician's services are a necessary and indivisible component of a DOCCS-approved procedure for an incarcerated individual.

The only reasonable answer to this question is yes. Dr. Wang is entitled to the protections of Correction Law § 24-a because DOCCS requested the surgical services of Dr. Cotie and approved Dr. Cotie's recommendation for a surgical biopsy, and pathology services are a required and integral part of a surgical biopsy. Accordingly, DOCCS requested professional medical services that necessarily included Dr. Wang's pathology review.

Indeed, this appeal turns entirely on whether Dr. Wang is considered to have acted "at the request of DOCCS or a facility of [DOCCS]" in performing the pathology review. That determination begins with the threshold question as to the level of judicial deference owed to the State's interpretation of the statute. The

answer to that threshold question turns on whether the phrase "at the request of DOCCS" is a matter of pure statutory interpretation or involves either specific application of a broad statutory term or some special knowledge on the part of the State.

Here, understanding the meaning of the phrase "at the request of" involves a matter of pure statutory interpretation and therefore, this Court should not give any deference to the State's determination. Dr. Wang's pathology review was an indivisible and indispensable component of the biopsy that DOCCS approved for Mr. Alvarez. Where the malignancy of a suspicious mass is in question, as it was here (*see* R. at 114, 188), the surgeon's work in removing the specimen is meaningless without a pathology review. Therefore, it must be determined that Dr. Wang performed the pathology review at the request of DOCCS.

Even if the Court disagrees, the State's determination otherwise was without a sound basis in reason because Dr. Wang's pathology services are indivisible from the DOCCS-approved biopsy. Thus, the State's determination was unreasonable, arbitrary and capricious.

A. Undisputed Facts and Statutory Framework of Correction Law § 24-a

The analysis of this issue begins with the undisputed facts and a discussion of the statutes at issue. The following facts are undisputed:

1. Mr. Alvarez was an incarcerated individual in DOCCS' custody at the time of the events in question (*see generally* R. at 40-45);
2. Dr. Cotie, who treated Mr. Alvarez in his capacity as a DOCCS-contracted physician, requested the biopsy (*see* R. at 45, 63-64, 658-660);
3. DOCCS approved the biopsy for Mr. Alvarez and DOCCS paid the invoice from CRMC for services related to the biopsy, including certain pathology services for the biopsy specimen (*see* R. at 44, 109, 505-510); and
4. A pathology review is a necessary component of a biopsy, especially where, as here, the express purpose of the approved biopsy was to determine the presence or absence of malignancy (*see* R. at 188-189).

Additionally, in pertinent part, Public Officers Law § 17 (2) (a) and § 17 (3) (a) provide that the State shall defend, indemnify, and save harmless its employee in a civil action for any alleged acts or omissions committed while acting within the scope of his or her public employment or duties (*see generally Frontier Ins. Co. v State of N.Y.*, 87 NY2d 864, 866-868 [1995]). Correction Law § 24-a extends these protections of Public Officers Law § 17

> "to any person holding a license to practice a [certain] profession pursuant to [various articles] of the education law, who is rendering or has rendered professional services authorized under such license while acting at the request of [DOCCS] or a facility of [DOCCS] in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities . . . without regard to whether such

> health care and treatment or professional consultation is provided within or without a correctional facility."

There is no dispute that Dr. Wang's profession, as a licensed physician, falls within the scope of Correction Law § 24-a (*see* R. at 910). It also cannot be disputed that there is no requirement for an employment or contractual relationship between the physician and DOCCS for Correction Law § 24-a to apply. The statute uses the phrase "any person" without any qualifying employment or independent contractor language, except that the person must be licensed to practice his or her profession in New York State.

B. Standards of Review

1. Judicial Review of Administrative Determination

Generally, an appellate court's review of the determination of an administrative agency in a CPLR article 78 proceeding is limited to "whether there is a rational basis for the action in question or whether it is arbitrary and capricious" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [internal citations omitted]; *see generally* CPLR 7803 [3]). "'An action is arbitrary and capricious when it is taken without sound basis in reason *or* regard to the facts'" (*Matter of Ward v City of Long Beach*, 20 NY3d 1042, 1043 [2013], quoting *Matter of Peckham*, 12 NY3d at 431 [emphasis added]). Although an administrative agency's determination must be sustained where it is supported by a rational basis even if the court would have reached a different conclusion (*see*

Matter of Peckham, 12 NY3d at 431), that rule does not apply where the administrative agency's action was without sound basis in reason or regard to the facts (*see Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010], *rearg denied* 15 NY3d 841 [2010]). In the latter circumstances, the appellate court has the authority to overturn the administrative agency's determination (*see Matter of Wooley*, 15 NY3d at 280).

2. Principles of Statutory Analysis

In administrative determinations where, as here, the issue involves statutory interpretation, the deference analysis is more specific. Courts generally do not defer to administrative agencies concerning matters of pure statutory interpretation except "where the question is one of specific application of a broad statutory term" (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [internal quotation marks omitted]) or the statute's "application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; *see also Matter of Gruber [New York City Dept. of Personnel—Sweeney]*, 89 NY2d 225, 231 [1996]). Where the question of statutory interpretation is "dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded

much less weight" (*Kurciscs*, 49 NY2d at 459; *see also Leggio v Devine*, 34 NY3d 448, 460 [2020]; *Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. and Community Renewal*, 5 NY3d 303, 312 [2005]). Put differently, in such circumstances, the Court may perform a *de novo* review, i.e., the Court "is free to ascertain the proper interpretation from the statutory language and legislative intent" (*Matter of Gruber*, 89 NY2d at 231-232; *see Jones v Bill*, 10 NY3d 550, 553 [2008]; *see generally Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 59-60 [2004]).

To that end, "[g]enerally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature" (McKinney's Cons Laws of NY, Statutes § 143 [Note: online version]; *see generally* McKinney's Cons Laws of NY, Statutes § 145 [Note: online version] [noting that "[a] construction which would make a statute absurd will be rejected"]). Although words of ordinary import are given their usual and commonly understood meaning when interpreting a statute (*see Peyton v New York City Bd. of Stds. and Appeals*, 36 NY3d 271, 279 [2020]; *Chambers v Town of Shelby*, 211 AD3d 1456, 1458 [4th Dept 2022]), neither the Court nor the administrative agency can impute its own requirements that are not expressly authorized by the statute (*see Matter of Destiny USA Dev., LLC v N.Y. State Dept. of Envtl Conservation*, 63 AD3d 1568, 1570 [4th Dept 2009], *lv denied* 66 AD3d

1502 [4th Dept 2009], *lv denied* 14 NY3d 703 [2010]; *see generally Matter of Hernandez v Blum*, 61 NY2d 506, 512 [1984]). Additionally, although a court should not substitute its own perception of what is equitable in interpreting a statute (*see generally Orens v Novello*, 99 NY2d 180, 185 [2002]), a court must ascertain the legislative intent of the statute, which necessarily requires inquiry as to the spirit and purpose of the statute, including an assessment of the statutory context and the legislative history (*see Mowczan v Bacon*, 92 NY2d 281, 285 [1998]). Form should not be elevated over substance in interpreting a statute (*see generally Matter of Am. Tr. Ins. Co. v Corcoran*, 105 AD2d 30, 31-32 [1st Dept 1984], *affd* 65 NY2d 828 [1985]; *Blitstein v Capital Dist. Transp. Auth.*, 81 AD2d 981, 981 [3d Dept 1981]).

C. Pure Statutory Interpretation Versus Deference to the State's Determination

1. The determination as to whether the protections of Correction Law § 24-a extend to Dr. Wang is a matter of pure statutory interpretation because it does not require the State's expertise to interpret and it does not involve the specific application of a broad statutory term.

The phrase "at the request of DOCCS," as contained in Correction Law § 24-a, is a question of pure statutory interpretation because this Court is being asked to simply give the relief the plain language of the statute requires, i.e., defense and indemnification for professional services provided while acting at DOCCS' request. There is no special competence or expertise required to interpret whether

Dr. Wang is considered to have acted at the request of DOCCS in performing his pathology services (*see generally Leggio*, 34 NY3d at 460; *Matter of Madison-Oneida Bd. of Coop. Educ. Servs.*, 4 NY3d at 58-62). Moreover, this case does not involve the specific application of a broad statutory term, as contemplated by this Court in prior case law.

In fact, it is anticipated the State's argument will be, as it was before the Appellate Division, that the benefits of Correction Law § 24-a do not extend to Dr. Wang based on the plain, usual meaning of "at someone's request." Indeed, in its prior argument, the State relied on a dictionary definition that the phrase means "on being asked by someone." That dictionary definition unequivocally demonstrates, and confirms, that the interpretation of Correction Law § 24-a involves no special expertise or competency on the State's or DOCCS' part as it concerns Dr. Wang (*see e.g. Lighthouse Pointe Property Assocs. LLC v New York State Dept of Envtl. Conservation*, 14 NY3d 161, 176-177 [2010] [relying on dictionary definitions in a question of pure statutory interpretation as to the meaning of the terms "present" and "complicate" in the context of whether real property qualifies as a "brownfield site" for acceptance into the Brownfield Cleanup Program]).

In any event, the plain language of Correction Law § 24-a and the State's definition, even if adopted, do not, in any way, require that DOCCS communicate

directly and/or personally with the professional to determine that the professional is acting at DOCCS' request. Although the State will likely take a contrary position, i.e., that the request must be explicit and must be made to the specific individual whose services are sought, those provisions are not in Correction Law § 24-a.

Therefore, if the Legislature had wanted to require such restrictions on the nature of the request, it could have included such language in the statute (*see generally e g. Gandin v Unified Court Sys. of State of N.Y.*, 135 AD3d 755, 757 [2d Dept 2016] [finding that there was no requirement under Judiciary Law § 37 (7) that an individual have continuous or uninterrupted employment with the State to obtain the salary increment credit authorized by that statute and affirming the annulment of the State court system's determination to the contrary], *lv denied* 27 NY3d 906 [2016]; *Destiny USA Dev., LLC*, 63 AD3d at 1570 [finding that reading in additional requirements for real property's inclusion in the Brownfield Cleanup Program conflicted with the intent of the Legislature and constituted an impermissible attempt to legislate]). The Legislature did not do so.

Indeed, to read in these restrictions proposed by the State would result in an absurd application of Correction Law § 24-a in this case (*see generally Lubonty v U.S. Bank Natl. Assn.*, 34 NY3d 250, 255 [2019] [noting that courts must interpret a statute in a way that avoids "an unreasonable or absurd application of the law"

(internal quotation marks omitted)], *rearg denied* 34 NY3d 1149 [2020]). Here, a biopsy necessarily involves two steps: (1) excision of tissue from a suspicious lesion by a surgeon; and (2) examination of the specimen by a pathologist to determine the pathologic nature of the specimen (e.g., malignant versus non-malignant) (*see* R. at 188-189). The purpose of the surgeon's work (excision of the tissue) is to provide a tissue specimen for review by the pathologist. One is dependent on the other and the services are therefore inextricably intertwined. As such, DOCCS undisputedly approved the biopsy, which must be read as an approval of the required pathology review. If not, and direct communication is required as the State will likely suggest, DOCCS would then potentially be liable for medical malpractice in failing to order the necessary pathology review to complete the biopsy. Thus, it is clear that the State's position is tantamount to elevating form over substance in interpreting Correction Law § 24-a, which is improper (*see generally Matter of Am. Tr. Ins. Co.*, 105 AD2d at 31-32; *Blitstein*, 81 AD2d at 981).

a. <u>Survey of Case Law</u>

Although there is no case law directly involving the application of Correction Law § 24-a to medical providers in Dr. Wang's position (other than the

Appellate Division's decision in this case),[5] a sampling of the case law from this Court where an agency's interpretation of a statute *is* given deference is offered to further demonstrate that the interpretation of Correction Law § 24-a in this case does not require any expertise on the part of the State to resolve and does not involve a specific application of a broad statutory term as the case law seems to contemplate (*see e.g. Peyton*, 36 NY3d at 281-282 [finding that the determination as to what constitutes open space is based on interpreting a "complex set of cross-references and interlocking provisions" in a zoning resolution that the administrative agency is charged with administering and therefore is entitled to deference]; *Intl. Union of Painters & Allied Trades, Dist. Council No. 4 v N.Y. State Dept. of Labor*, 32 NY3d 198, 209-211 [2018] [finding that deference was owed to the Department of Labor's determination that, per the Labor Law, apprentices on public work projects may be paid apprentice rates only if they perform tasks in the trade classification for the apprenticeship program in which

[5] Where there is a contract between DOCCS and the medical provider or facility to provide professional services, and that contract contains a clause granting defense and indemnification by DOCCS, it seems the protections of Correction Law § 24-a apply to those private medical providers providing medical services to incarcerated individuals (*see e.g. Colon v N.Y. State Dept. of Corr. and Community Supervision*, 2017 WL 4157372, *9 [SD NY 2017], *Wright v Genovese*, 694 F Supp 2d 137, 152 n 10 [ND NY 2010], *affd* 415 Fed Appx. 313 [2d Cir 2011]; *cf. Snyder v State*, 70 Misc 3d 801, 813-815 [Ct Cl 2020] [without reaching the question of whether the DOCCS-contracted hospital was entitled to defense and indemnification pursuant to Correction Law § 24-a and Public Officers Law § 17 based on its contract with DOCCS, the Court of Claims denied the claimant's summary judgment motion seeking a finding that the State was liable for the hospital under a theory of agency or control in fact and, instead, granted the State's motion for summary judgment finding it was not liable for the hospital under a theory of agency or control in fact]).

they are enrolled and otherwise must be paid journey-worker rates for work outside the trade classification, because the determination requires an understanding of the underlying operational practices of the trades regulated by the Department of Labor]; *Matter of Lemma v Nassau County Police Officer Indemn. Bd.*, 31 NY3d 523, 829-532 [2018] [noting that because the statute at issue (General Municipal Law § 50-*l*) intentionally left the term 'proper' undefined and explicitly allowed the indemnification board to determine the proper discharge of police duties, the board's determination was entitled to deference]; *Matter of O'Brien*, 7 NY3d at 242-243 [giving deference to the Attorney General's determination as to whether the petitioner was an employee or independent contractor, for purposes of indemnification as a public employee under Public Officers Law § 17, because that analysis involved an examination of facts showing the degree of autonomy the petitioner had in performing his duties as a referee in a mortgage foreclosure proceeding]; *Albano v Bd. of Trustees of N.Y. City Fire Dept., Art. II Pension Fund*, 98 NY2d 548, 553-554 [2002] [upholding the determination of the medical board and board of trustees of the fire department pension fund denying the petitioner an accidental disability pension because his testicular cancer did not fall within the scope of General Obligations Law § 207-kk, which provides a rebuttable presumption that a certain class of cancers were incurred during the performance

of firefighting duties, did not expressly include testicular cancer among the covered cancers], *rearg denied* 99 NY2d 553 [2002]).[6]

Matter of O'Brien, relied on by both the State and the Appellate Division, is distinguishable from the facts and circumstances of this case. In that case, this Court held that the Attorney General's determination that the petitioner, a private attorney acting as a mortgage foreclosure referee, was not entitled to the benefits of Public Officers Law § 17, was entitled to deference because it involved a specific application of a broad statutory term (*see Matter of O'Brien*, 7 NY3d at 241-243). More specifically, the determination required an analysis of whether the petitioner was a public "employee" or "independent contractor" under Public Officers Law § 17 based on the petitioner's indicia of public employment or lack thereof (*see id.* at 242-243).

Here, the phrase "at the request of" does not involve a specific application of a broad statutory term, at least as *Matter of O'Brien* seems to contemplate. *Matter of O'Brien* concerned the lawyer's professional relationship with the State, i.e., whether he was an employee or independent contractor. In reading *Matter of*

[6] This line of cases is distinct from an agency's interpretation of its own regulations, where a court "*must* defer to an administrative agency's rational interpretation of its own regulations" (*Andryeyeva v N.Y. Health Care, Inc.*, 33 NY3d 152, 174 [2019] [internal quotation marks omitted] [emphasis added]). Therefore, the principle that an agency's interpretation is not entitled to deference in matters of pure statutory interpretation does not seem to apply in such cases (*see id.* at 175-176). As such, those cases were not included in consideration for the sampling of case law because this case involves interpretation of a state statute, not interpretation of DOCCS' own regulations.

O'Brien as a whole, it is evident this Court suggested that the State had special competency or expertise in determining who is, and is not, a *public* employee for purposes of defense and indemnification based on an examination of the indicia of public employment (i.e., control over the petitioner's work) or lack thereof (*see id.*).

No such expertise on the part of the State is required in this case because this appeal does not involve the issue of determining Dr. Wang's professional relationship with DOCCS. An employment or formal contractual relationship with the State is not required under Correction Law § 24-a. It also cannot be disputed that the pathology review Dr. Wang provided was required to complete the biopsy that DOCCS approved to determine the presence or absence of malignancy in Mr. Alvarez's right underarm mass (*see* R. at 188-189). This appeal is thus a question of pure statutory reading. Once the medical services are provided pursuant to DOCCS' request, Correction Law § 24-a offers no discretion on the part of the State to decline to defend or indemnify the non-employee health professional. Thus, the State's expertise is not required to interpret that part of Correction Law § 24-a at issue in this case.

Furthermore, there naturally must be some limits as to what constitutes a specific application of a broad statutory term, as articulated in *Matter of O'Brien*. If there were no such limits, there would be essentially no questions of pure

statutory interpretation for a court to review because virtually every case involving statutory interpretation involves whether a particular statute or statutory provision applies to the specific facts of a case. In other words, under such an expansive reading of *Matter of O'Brien*, the administrative agency's determination would become virtually infallible, and litigants would have no legal recourse to challenge such determinations.

In contrast, *Matter of Madison-Oneida Board of Cooperative Education Services v Mills* (4 NY3d 51 [2004]) is instructive on this issue.[7] In that case, this Court held that the determination of the New York State Commissioner of Education as to whether a teaching assistant was considered a teacher for purposes of lay-off seniority protection under Education Law § 3013 (2) was not entitled to deference because the determination was one of statutory interpretation and pure questions of law (4 NY3d at 56-62). Nevertheless, the Appellate Division and this Court ultimately agreed with the Commissioner of Education's conclusion (*see id.* at 56, 60). Specifically, the Board of Cooperative Education Services (BOCES) had initially determined teaching assistants were not teachers and therefore did not have to be terminated by seniority or reinstated to full-time teaching positions with back pay and benefits in the event they were rehired as required by Education Law

[7] This case precedes *Matter of O'Brien*. However, as far as can be discerned from the legal research, *Matter of O'Brien* did not overturn *Matter of Madison-Oneida Board of Cooperative Education Services*.

§ 3013 (2) (*see id.* at 55). The Commissioner of Education rejected BOCES' argument and found that teaching assistants were entitled to the protections of Education Law § 3013 (2) (*see id.*). BOCES thereafter commenced a CPLR article 78 proceeding to have the Commissioner of Education's determination annulled (*see id.*). The trial court annulled the Commissioner's determination, the Appellate Division reversed, and this Court granted leave to appeal (*see id.* at 56). This Court affirmed the Appellate Division's decision, determining that, based on the legislative history, statutory and regulatory scheme, and prior case law, a broader definition of "teacher" applied, and teaching assistants were considered teachers for purposes of abolishing positions and lay-off seniority protection under Education Law § 3013 (2) (*see id.* at 59-62).

Accordingly, if the determination as to whether a teaching assistant constituted a teacher was a question of pure statutory interpretation and law, the same should hold true of the determination as to whether Dr. Wang provided his pathology review at the request of DOCCS in this case. In fact, for the reasons set forth above, this case presents an even easier question to answer because the pathology review was an indivisible component of the DOCCS-approved biopsy. Therefore, the State's determination is not entitled to deference in this case.

b. <u>The legislative history of Correction Law § 24-a favors extending its benefits to Dr. Wang.</u>

The aforementioned interpretation of "at the request of," in favor of extending the benefits of Correction Law § 24-a to Dr. Wang, is consistent with the overall statutory scheme. Indeed, the legislative history indicates that the goal of Correction Law § 24-a is to extend the benefits of Public Officers Law § 17, namely defense and indemnification, to non-employee health professionals who rendered *professional care at the request of* DOCCS or the Department of Mental Hygiene (*see* 1980 NY Op Atty Gen 40; Letter from St Dept of Health, June 30, 1978 at 2, Bill Jacket, L. 1978, ch 466 [Note: reference to pagination of document]).[8] Thus, it appears the emphasis is on the professional care being provided at the request of DOCCS, not how or to whom the request was made. That simply makes sense given that there is no employment or formal contractual relationship required between DOCCS and the physician providing the services under Correction Law § 24-a.

Therefore, based on the foregoing, the State's anticipated position that Dr. Wang must have been asked specifically, and explicitly, to perform the pathology review of the biopsy specimen to receive the protections of Correction Law § 24-a,

[8] Although the State issued guidance confirming that non-employee health professionals, who have formal contracts with DOCCS to provide medical services to incarcerated individuals, are entitled to defense and indemnification under Correction Law § 24-a (*see* 1980 NY Op Atty Gen 40), that opinion was limited to that question concerning contracted health professionals and did not address those individuals in Dr. Wang's position.

is arbitrary and unreasonable, and not entitled to deference. This position is not based on an operational practice of DOCCS but, to date, has been based on a dictionary definition (*see generally Lighthouse Pointe Property Assocs. LLC*, 14 NY3d at 176-177; *Claim of Gruber*, 89 NY2d at 231; *Kurcsics*, 49 NY2d at 459). Thus, this is a matter of pure statutory interpretation, and the only reasonable interpretation of Correction Law § 24-a is that Dr. Wang was acting at DOCCS' request in performing the pathology review.

2. Even if the Court disagrees and concludes that this is not a matter of pure statutory interpretation, the State's determination is still unreasonable and must be reversed.

Even if this Court disagrees and decides that the interpretation of the phrase "at the request of" requires the State's special knowledge or expertise or is somehow a specific application of a broad statutory term, the State's determination must still be overturned as irrational and unreasonable.

The State's determination is irrational and unreasonable for the same reasons that Dr. Wang should receive the benefits of defense and indemnification from the State under Correction Law § 24-a based on a pure statutory interpretation analysis (*see* Point C.1 above). Briefly, because a biopsy is both worthless and incomplete without a pathology review, it must be said that DOCCS approved the pathology service as well. Once DOCCS has approved that medical service, there is no

discretion on the State's part as to whether it will defend and indemnify the medical provider offering the approved service.

Accordingly, the only reasonable determination is that Dr. Wang provided the pathology review while acting at the request of DOCCS. Dr. Wang would not have even been involved with Mr. Alvarez if DOCCS had not approved the surgical biopsy be performed by Dr. Cotie at CRMC. Indeed, Dr. Wang had no choice but to review the biopsy specimen sent to him and yet, according to the State, should not receive defense and indemnification. As such, to adopt the State's position, simply because there is no record of direct communication between DOCCS and Dr. Wang for the pathology review amounts to a mere end-run around Correction Law § 24-a to deprive medical providers, who engaged in providing indispensable components of DOCCS-approved medical services on behalf of an incarcerated individual, of the benefits to which they are entitled.

Therefore, even if this Court finds that the determination "at the request of DOCCS" does not involve pure statutory interpretation, the State's determination must still be overturned because it is unreasonable based on the circumstances of this case.

D. Any public policy concerns related to extending the benefits of Correction Law § 24-a to individuals in Dr. Wang's position are unfounded.

Based on the language and construction of Correction Law § 24-a and Public Officers Law § 17, any public policy concerns with extending the protections of Correction Law § 24-a to physicians in Dr. Wang's position are unfounded. Furthermore, any public policy concerns, related to the fiscal implications of extending the protections of Correction Law § 24-a to individuals in Dr. Wang's position, are a red herring because the Legislature considered the issue.

As an initial matter, it is anticipated the State will argue, as it did before the Appellate Division, that because Correction Law § 24-a extends the protections of Public Officers Law § 17 to certain categories of licensed professionals, the public policy behind Public Officers Law § 17, which is essentially to provide insurance against litigation (*see Matter of O'Brien*, 7 NY3d at 243), must also be the public policy behind Correction Law § 24-a. That position, however, is incongruous when the two statutes are read together. The language of Public Officers Law § 17 is completely different from the language of Correction Law § 24-a. Public Officers Law § 17 is much more specific than Correction Law § 24-a is about the relationship of the individual to the State in determining whether the individual providing services is entitled to defense and indemnification.

Indeed, Correction Law § 24-a refers to "any person" licensed in a number of professions, including physicians. There is no requirement of any formal employment or contractual relationship with DOCCS. The statute does not even mention the words employee or independent contractor. Conversely, Public Officers Law § 17 expressly defines and distinguishes among employees, volunteers, and independent contractors in determining who receives defense and indemnification from the State (*see* Public Officers Law § 17 [1] [a]). Thus, the Legislature clearly intended Correction Law § 24-a to have broader application to all non-employee physicians, not just independent contractors, whom the State has already agreed to defend and indemnify (*see* 1980 NY Op Atty Gen 40). Moreover, if the State had formal contracts with each non-employee physician that included a contractual defense and indemnification clause, there would be no need for Correction Law § 24-a as it relates to licensed physicians.

Therefore, the statute clearly contemplated that non-employees who did not have formal contracts with DOCCS would be involved in the care and treatment of incarcerated individuals at DOCCS' request. If the Legislature had intended to limit the protections of Correction Law § 24-a to independent contractors, it would likely have stated as much when compared to the specificity of the language of Public Officers Law § 17, and in light of the fact that both statutes were passed at the same time (*see* L 1978, ch 466, §§ 1, 4; *see generally* McKinney's Cons Laws

of NY, Statutes § 97 Comment [Note: online version] ["So, in construing a statute the court must take the entire act into consideration, or look to the act as a whole, and all sections of a law must be read together to determine its fair meaning"]; *Orens*, 99 NY2d at 187-189; *Matter of Puchalski v Depew Union Free Sch. Dist.*, 119 AD3d 1435, 1437-1439 [4th Dept 2014]). Correction Law § 24-a is therefore a remedial statute, which should generally be construed liberally in favor of physicians in Dr. Wang's position (*see generally e.g. White v County of Cortland*, 97 NY2d 336, 339 [2002]; *Lesser v Park 65 Realty Corp.*, 140 AD2d 169, 173 [1st Dept 1988], *appeal dismissed* 72 NY2d 1042 [1988]).

Furthermore, any public policy concerns related to the fiscal implications of defending and indemnifying a physician in Dr. Wang's position, are irrelevant. The State was, in fact, concerned about the fiscal implications of implementing and/or amending Public Officers Law § 17 and Correction Law § 24-a (and other statutes unrelated to this appeal at the time of their proposal) (*see* Bill Mem, Mem of Assembly Committee on Rules, L 1978, ch 466), but the proposed statutes were nevertheless passed (*see* L 1978, ch 466, §§ 1, 4). Indeed, if the Legislature was worried about the fiscal implications of defending a physician in Dr. Wang's position (i.e., a medical provider who performs an indivisible part of a DOCCS-approved procedure), it could have written Correction Law § 24-a differently (*see generally Destiny USA Dev., LLC*, 63 AD3d at 1570). The Legislature did not do

so and still has not done so. If the State now wishes the language of Correction Law § 24-a was different, that is an exercise for the Legislature, not this Court.

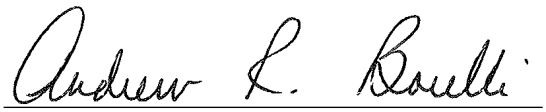
As such, any public policy concerns with extending the benefits of Correction Law § 24-a to individuals in Dr. Wang's position are unfounded. Dr. Wang should therefore receive the protections of Correction Law § 24-a.

CONCLUSION

In light of the foregoing, this Court should reverse the Appellate Division's Memorandum and Order, annul the New York State Attorney General's determination, and determine that Dr. Wang is entitled to defense and indemnification from New York State pursuant to Correction Law § 24-a.

Dated: March 6, 2023
Fayetteville, New York

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR 500.13 (c) (1) of the Rules of Practice of the Court of Appeals, the Brief of Petitioner-Appellant Jun Wang, M.D. was prepared on a computer using Microsoft Word.

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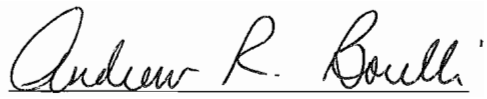

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ADDENDUM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

OMAR J. ALVAREZ and DIANA GRECEQUET-ALVAREZ,

Plaintiffs,

vs.

CORTLAND REGIONAL MEDICAL CENTER, INC.,

Defendant

STIPULATION OF DISCONTINUANCE WITH PREJUDICE

Index No. 805085/2015

CORTLAND REGIONAL MEDICAL CENTER, INC.,

Third-Party Plaintiff,

vs.

JUN WANG, M.D. and CORTLAND PATHOLOGY, P.C.,

Third-Party Defendants

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for all the parties to the above-entitled action, that whereas no party hereto is an infant or incompetent person for whom a guardian has been appointed, and no person not a party has an interest in the subject matter of the action, that plaintiffs have hereby voluntarily discontinued this action, on the merits and with prejudice, together with any claims and cross claims, and that the third-party plaintiff has hereby voluntarily discontinued this third-party action, on the merits and

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with prejudice, together with any claims and cross claims. This discontinuance is made without costs to any party as against the other.

This Stipulation may be signed in counterparts, and electronic signatures shall be deemed valid and binding.

This Stipulation may be filed without further notice with the Clerk of the Court.

Dated: New York, NY
September 19, 2022

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Paul Budhu, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

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Brief for Petitioner-Appellant

upon the attorneys at the address below, and by the following method:

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Sworn to me this
Wednesday, March 8, 2023

KEVIN AYALA
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Paul Budhu

Case Name: ITMO Jun Wang, M.D. v. Letitia James (3)

Docket/Case No: APL-2023-00008

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