To Be Argued By:
Andrew R. Borelli
Time Requested: 30 Minutes

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Appellate Division, Fourth Department Docket No. CA 21-01301

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.

REPLY BRIEF FOR PETITIONER-APPELLANT

GALE GALE & HUNT, LLC
Attorneys for Petitioner-Appellant
7136 East Genesee Street
P.O. Box 97
Fayetteville, New York 13066
315-637-3663
aborelli@gghlawoffice.com

Of Counsel:
Andrew R. Borelli

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

The status of the related medical malpractice matter has not changed since the filing of Petitioner Jun Wang, M.D.'s (Dr. Wang) opening brief on this appeal. Accordingly, the Court is respectfully directed to Dr. Wang's statement concerning related litigation in his opening brief (*see* App Br at i-ii).

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QUESTION PRESENTED

1. Was the New York State Department of Corrections and Community Supervision (DOCCS) required to specifically ask Dr. Wang to perform the necessary pathology of the biopsy specimen taken from incarcerated individual Omar Alvarez to receive defense and indemnification from the State of New York (the State) pursuant to Correction Law § 24-a?

   No. It is undisputed that DOCCS, at least generally, requested and approved the necessary pathology review to complete the biopsy performed by DOCCS-contracted physician R. Wayne Cotie, M.D. and therefore, Dr. Wang is entitled to defense and indemnification from the State pursuant to Correction Law § 24-a.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The relevant procedural history and statement of facts were provided in Dr. Wang's opening brief (*see* App Br at 2-6). The Court is respectfully referred to those sections of the opening brief for purposes of this reply brief.

The only other procedural issue that bears some discussion here is the State's discussion of Public Officers Law § 17 (7) (*see* Resp Br at 35-36 n 7). Even if that provision applies here, any concern with Dr. Wang's private medical malpractice insurance coverage has no bearing on the ability of this Court to determine whether Dr. Wang was acting at the request of DOCCS in performing the subject pathology review for purposes of receiving defense and indemnification from the State under Correction Law § 24-a. Indeed, any concern with insurance coverage does not pose an issue of standing for this appeal and has no bearing in determining the applicability of Correction Law § 24-a.

ARGUMENT

This appeal turns on one issue: whether DOCCS must have expressly asked Dr. Wang to perform the subject pathology review on Omar Alvarez, an incarcerated individual, to receive the protections of Correction Law § 24-a. The answer to that question is no because the pathology review is an indisputably indispensable component of the DOCCS-approved biopsy performed by a DOCCS-contracted surgeon, R. Wayne Cotie, M.D. Therefore, the State's determination to the contrary is not entitled to deference because the only reasonable determination is that Dr. Wang acted at the request of DOCCS in performing the necessary pathology review to complete the DOCCS-approved biopsy performed by Dr. Cotie.

DETERMINING WHETHER DR. WANG IS ENTITLED TO THE PROTECTIONS OF CORRECTION LAW § 24-a IS A MATTER OF PURE STATUTORY INTERPRETATION AND, BASED ON THE PLAIN LANGUAGE AND LEGISLATIVE PURPOSE OF THE STATUTE, DR. WANG IS ENTITLED TO DEFENSE AND INDEMNIFICATION FROM THE STATE.

The phrase "at the request of" in Correction Law § 24-a—as demonstrated by the State's narrow interpretation of the statute on this appeal—unequivocally involves a matter of pure statutory interpretation and therefore, the Attorney General's determination is not entitled to deference. Accordingly, as a matter of pure statutory interpretation, Dr. Wang is entitled to defense and indemnification

based on the plain language of Correction Law § 24-a and the legislative history of the statute.

It is well-settled that, where "the question is one of pure statutory reading and analysis, 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, as such, no deference is given to the administrative agency's interpretation (*Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]; *see also Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [noting that courts do not defer to administrative agencies in matters of pure statutory interpretation]; *see generally Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 59 [2004]). The parties agree on this point. It is only where the "question is one of specific application of a broad statutory term" (*Matter of O'Brien*, 7 NY3d at 242 [internal quotation marks omitted]), or the "application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom" (*Kurcsics*, 49 NY2d at 459), that deference is given to the agency's interpretation of the statute.

As demonstrated below, determining the meaning of "at the request of" under Correction Law § 24-a is unequivocally one of pure statutory reading and analysis because there is absolutely no special expertise or knowledge needed from the State to determine the meaning. This is especially true in this case because the

State directs the Court to a dictionary to determine the meaning of the phrase. If that does not demonstrate this appeal presents a matter of pure statutory reading, it is difficult to determine what would constitute a matter of pure statutory interpretation.

A. The Attorney General's determination is not entitled to deference.

Notably, the State spends a disproportionately small amount of time in its opposition brief on the issue of whether the Attorney General's determination that Dr. Wang was not entitled to defense and indemnification is entitled to deference (*see* Resp Br at 20-21). The State argues—in a conclusory fashion—only that the Attorney General's interpretation of the phrase "at the request of" involved a specific application of a broad statutory term (*see id.*). The State offers little analysis on this point and, instead, reaches its conclusion by stating simply that the Attorney General applied the statute to the specific facts of the underlying medical malpractice case, i.e., Dr. Wang's services were retained by Cortland Regional Medical Center (CRMC) with no input from DOCCS and that Dr. Wang acted in response to Dr. Cotie's request for pathology services from CRMC's pathology laboratory (*see id.*).

That reasoning is unavailing for two reasons. First, every matter of statutory interpretation involves application of the statute to the specific facts in a case. As such, there must be some limits as to what constitutes a specific application of a

broad statutory term, otherwise an administrative agency's determination becomes infallible and leaves litigants with virtually no legal recourse to challenge such determinations. Similarly, there would never be matters of pure statutory interpretation and the principle would become meaningless. Indeed, here, the State's knowledge and understanding of operational practices is not required to interpret this statute. That is proven, as discussed in Point B below, by the State's reliance on a dictionary definition to determine the meaning of "at the request of" under Correction Law § 24-a.

Second, Dr. Wang's relationship with CRMC is a red herring and does not justify giving deference to the Attorney General's determination. The State acknowledges that Dr. Cotie alone could not have completed the biopsy, meaning that DOCCS requested someone to perform the necessary pathology review, just not Dr. Wang specifically (*see* Resp Br at 28-29). DOCCS knew that its contracted surgeon, Dr. Cotie, performed surgeries at CRMC (*see* R. at 74) and nevertheless approved the biopsy and therefore, there is no surprise that the pathology review of the biopsy specimen would be completed by a pathologist at CRMC. Indeed, because the State essentially admits that DOCCS contemplated and authorized a pathology review of the biopsy sample (*see* Resp Br at 28-29), any relationship between Dr. Wang and CRMC, vis-à-vis the contract between

Cortland Pathology, P.C. and CRMC, is irrelevant to the Court's analysis in this appeal.

As such, it is simply illogical for the State to agree that the pathology review was a necessary and indivisible component of Dr. Cotie's biopsy, and approve same, without being responsible for the pathology review. Dr. Wang's services were not an unknown and thus, Dr. Wang is entitled to defense and indemnification.

B. Determining whether Dr. Wang acted at the request of DOCCS pursuant to Correction Law § 24-a is a matter of pure statutory interpretation, and the only reasonable interpretation is that Dr. Wang is entitled to defense and indemnification from the State.

Because this application of Correction Law § 24-a in this case is a matter of pure statutory interpretation, the Court must look to the plain language of the statute as well as to its history and purpose. Upon review of the statutory language and its history and purpose, it becomes clear that Dr. Wang should receive defense and indemnification from the State.

1. <u>The plain language of Correction Law § 24-a demonstrates that Dr. Wang is entitled to defense and indemnification from the State in this matter.</u>

In matters of statutory interpretation, "words of ordinary import" are given "their usual and commonly understood meaning" when interpreting a statute (*Matter of Peyton v New York City Bd. of Stds. and Appeals*, 36 NY3d 271, 279 [2020] [internal quotation marks omitted]; *Chambers v Town of Shelby*, 211 AD3d

1456, 1458 [4th Dept 2022]). However, neither the Court nor the administrative agency can impute its own requirements that are not expressly authorized by the statute (*see generally 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]).

Here, determining whether Dr. Wang acted at the request of DOCCS in performing his pathology review of the biopsy specimen taken by Dr. Cotie is a matter of pure statutory interpretation. The determination requires only a reading of the plain language of Correction Law § 24-a and does not require any special expertise or knowledge of the State to interpret the statute (*see generally Kurcsics*, 49 NY2d at 459). The State essentially argues that DOCCS must have explicitly handpicked Dr. Wang to perform the pathology review (*see* Resp Br at 22-29), but that is not required by the plain language of Correction Law § 24-a. That is reading a requirement into the statute that simply does not exist. To justify its position, the State relies on the dictionary definition of "at the request of," which purportedly means "being asked by someone" (Resp Br at 23; *see generally e.g. Lighthouse Pointe Property Assocs. LLC v New York State Dept of Envtl. Conservation*, 14 NY3d 161, 176-177 [2010]). Even accepting that definition as true, that still does not require that the requestor name the specific individual to

perform the task or service. The State concedes that DOCCS asked someone to perform the pathology review of the specimen taken by Dr. Cotie during the biopsy he performed on Mr. Alvarez (*see* Resp Br at 28-29). Thus, DOCCS requested the subject pathology review, generally, and Dr. Wang performed the pathology review pursuant to that request. The requirements of Correction Law § 24-a were therefore fulfilled, and Dr. Wang is unequivocally entitled to defense and indemnification from the State.

For these reasons, this case is distinguishable from the non-binding Seventh Circuit decision in *Common Cause Indiana v Lawson* (937 F3d 944 [7th Cir 2019]). The issue in *Common Cause* was that a voter's registration was removed from Indiana's voter rolls based on information received from a third-party database about a registrant voting in a different jurisdiction as opposed to a request for removal from the registrant him or herself (*see* 937 F3d at 946, 960-962). The National Voter Registration Act required that a voter's registration be removed at the request of the registrant (i.e., the voter) (*see id.* at 960). Based on that rule, the Seventh Circuit determined that the voter had to request removal of his or voting registration from the State of Indiana directly and therefore, determined that the information from the third-party database was insufficient for Indiana to remove voters from its registration rolls (*see id.* at 962). Here, there is no third-party who asked for the pathology review performed by Dr. Wang. Although Dr. Cotie may

have sent the specimen to the laboratory for the pathology review, per the State's admission on appeal, DOCCS itself approved the biopsy, including the required pathology review of the biopsy specimen, not some other third-party on behalf of DOCCS (*see* Resp Br at 28-29). Moreover, DOCCS knew Dr. Cotie would perform the biopsy at CRMC (*see generally* R. at 74), and therefore, it must be said that DOCCS also approved the biopsy sample to be reviewed by pathology at CRMC.

Additionally, contrary to the State's position, the non-binding Connecticut Supreme Court's decision in *Connecticut v Winer* (286 Conn 666 [2008]), is not instructive. The issue in *Winer* was that a criminal trial was not continued at the request of the prosecutor within the meaning of Connecticut's speedy trial statute because the requirements of the speedy trial statute would have been fulfilled only if the prosecutor explicitly, as opposed to implicitly, asked for a continuance (*see* 286 Conn at 677-678). Here, however, Dr. Wang's pathology review was an indispensable component of the surgical biopsy that was expressly requested by DOCCS-contracted surgeon, Dr. Cotie, and approved by DOCCS, points the State does not genuinely contest in opposition to the instant appeal. Therefore, because a biopsy is meaningless without the accompanying pathology review, the express request of DOCCS for the biopsy necessarily was a request for the pathology review. They are one and the same. Accordingly, Dr. Wang was acting at the

request of DOCCS in performing the pathology review of the specimen taken by Dr. Cotie during the biopsy.

There is also no employment or contractual relationship required between the physician and DOCCS under Correction Law § 24-a. If the Legislature intended Correction Law § 24-a to apply only to employees of DOCCS or physicians who are independent contractors of DOCCS for a physician to be acting at the request of DOCCS, it would have stated as much in Correction Law § 24-a as it did in Public Officers Law § 17 (*see generally e.g. Schoonmaker v Capital Region Bd. of Co-op. Educ. Servs.*, 80 AD3d 965, 967 [3d Dept 2011], *lv denied* 16 NY3d 711 [2011]; *Matter of Sweeney v Dennison*, 52 AD3d 882, 883-884 [3d Dept 2008]). Notably, the Legislature repealed, and reenacted with substantial revisions, both Correction Law § 24-a and Public Officers Law § 17 at the same time (*see* L 1978, ch 466, §§ 1, 4).

Furthermore, given the State's concessions that a pathology review is a necessary component of a surgical biopsy and that DOCCS contemplated and at least implicitly authorized the pathology review at issue in this matter, and the fact that the plain language of Correction Law § 24-a does not require that DOCCS expressly ask the specific physician to perform the requested and/or approved medical procedure or service, the only reasonable conclusion is that Dr. Wang is entitled to the protections of Correction Law § 24-a. To conclude otherwise

demonstrates the absurdity of the State's position. Because the surgical biopsy and the accompanying pathology review are one and the same, it is illogical for the State to accept responsibility for only a portion of the procedure DOCCS requested for an incarcerated individual. DOCCS is responsible for the completion of the pathology review. If this Court agrees with the State's position, it permits the State to arbitrarily terminate its responsibility for the healthcare professional performing a necessary component of a medical procedure DOCCS approved and paid for simply because it does not ask a particular provider to perform the service. Put differently, to agree with the State's position is essentially to limit the meaning of "any person" under Correction Law § 24-a to individuals with a formal employment or contractual relationship where no such limitation exists.

In light of the foregoing, the plain language of Correction Law § 24-a requires the State to defend and indemnify Dr. Wang.

2. <u>The purpose and legislative history of Correction Law § 24-a demonstrate that Dr. Wang is entitled to defense and indemnification from the State in this matter.</u>

Generally, "[i]n matters of statutory construction, legislative intent is the great and controlling principle" and the "proper judicial function is to discern and apply the will of the Legislature" (*Mowczan v Bacon*, 92 NY2d 281, 285 [1998] [citations and internal quotation marks omitted]). To ascertain the legislative intent of the statute requires a court to inquire as to the spirit and purpose of the

statute, including an assessment of the context and legislative history of the statute (*see id.*; *see also* McKinney's Cons Laws of NY, Statutes § 124 ["In ascertaining the purpose and applicability of a statute, it is proper to consider the legislative history of the act, the circumstances surrounding the statute's passage, and the history of the times"] [Note: online version]). Regardless of the clarity of the statutory language, there is no prohibition against using a statute's legislative history to discern the meaning and/or applicability of the statute (*see Riley v County of Broome*, 95 NY2d 455, 463-464 [2000]).

Here, the State's position results in an end-run around the protections of Correction Law § 24-a. If the State's position is adopted, it would be able to avoid liability as long as DOCCS does not handpick a particular physician to perform a medical procedure or service it has approved for an incarcerated individual. However, the purpose of Correction Law § 24-a is to defend and indemnify *non-employee* health professionals who rendered professional care at the request of DOCCS (among other agencies), despite acknowledging the potential fiscal implications for defending and indemnifying these additional individuals (Letter from St Dept of Health, June 30, 1978 at 2, Bill Jacket, L. 1978, ch 466 [Note: reference to pagination of document]). Nothing in the legislative history of

Correction Law § 24-a indicates in what format, or how, the request must be made.[1]

Nevertheless, the State indicates that the requisite request under Correction Law § 24-a, as it sees it, is "*typically* established" by a direct contact between DOCCS and the healthcare professional, either through some employment agreement or other contractual or formal understanding (Resp Br at 25 [emphasis added]). In taking this position (*see* Resp Br at 26-27), the State relies on Dr. Cotie's contract with DOCCS, which contains an indemnification clause indicating that the State would defend and indemnify Dr. Cotie for professional services rendered pursuant to the contract (*see* R. at 658-659). If that is the State's typical practice, then there would be no need for Correction Law § 24-a since those protections are separately memorialized in the contract. Furthermore, even if DOCCS typically engages in employment or contractual relationships with healthcare professionals for purposes of providing medical services to incarcerated individuals, that does not signal how the requisite request for professional services *must* be made for purposes of Correction Law § 24-a.

[1]Additionally, nothing could be found in the legislative history of Mental Hygiene Law § 7.35, Mental Hygiene Law § 13.35, Mental Hygiene Law § 19.35, Public Health Law § 14, or Executive Law § 522, which also provide defense and indemnification to certain licensed healthcare professionals providing professional services at the request of the New York State Offices of Mental Hygiene, Public Health, Children and Family Services, Alcoholism and Substance Abuse, and People with Developmental Disabilities, that offered guidance as to the meaning and/or parameters of "at the request of" in the respective statutes.

In fact, the State freely concedes on appeal that DOCCS contracts with private medical centers and hospitals to provide care and treatment for incarcerated individuals without identifying the specific physicians who would be treating the incarcerated individuals at the facility or requesting that a specific physician at the medical center perform certain medical services on incarcerated individuals (*see* Resp Br at 34). The State, however, suggests that, in scenarios where specific healthcare providers are not identified in a contract between DOCCS and a private medical center or hospital, the specific medical providers who treated the incarcerated individual pursuant to the medical center or hospital's contract would not necessarily receive the protections of Correction Law § 24-a (*see* Resp Br at 34-35). If not, then it begs the question as to who would be defended and indemnified by DOCCS under such contracts.

Even if the general purpose of Correction Law § 24-a is to provide insurance against litigation, as the State argues (*see* Resp Br at 30; *see generally Matter of O'Brien*, 7 NY3d at 243), that argument is unavailing. That argument is premised on the theory that the State, similar to a private insurance company, would have allegedly had the opportunity to vet the physicians whom it sought to provide medical services to incarcerated individuals to determine if they were a tolerable

risk (*see* Resp Br at 30-31).[2] However, certain decisions from the Federal District Courts—*Colon v New York State Dept. of Corrections and Community Supervision* (2017 WL 4157372, *9 [SD NY 2017]) and *Wright v Genovese* (694 F Supp 2d 137 [ND NY 2010], *affd* 415 Fed Appx 313 [2011])—demonstrate that, even if a treating physician may not be necessarily a party to, or specifically identified in, a contract between DOCCS and a private hospital to provide healthcare services to incarcerated individuals, the treating physician would seemingly be entitled to defense and indemnification from the State pursuant to a defense and indemnification clause in the contract mirroring the language of Correction Law § 24-a. Although the State argues that these cases are not instructive because they neither definitively explain when Correction Law § 24-a applies nor identify specific healthcare professionals covered by the contract between DOCCS and the private hospital, that is not entirely true for the reasons that follow (*see* Resp Br at 34-35).

[2]To the extent the State suggests that Dr. Wang is not entitled to the protections of Correction Law § 24-a because private physicians routinely obtain their own medical malpractice insurance and because the legislature would not have intended to substitute the State for the private malpractice insurance (*see* Resp Br at 35-36), it is irrelevant and is another red herring. Dr. Cotie, who was defended and indemnified by the State in the underlying medical malpractice action, did the same thing. Dr. Cotie almost certainly maintained private malpractice insurance because he was initially represented by a private attorney, not the Attorney General's office, and Dr. Cotie's private attorney tendered his defense to the State after answering on his behalf (*see* R. at 651).

In *Colon*, the District Court stated that, based on the contract between the hospital and DOCCS, there was no debate that the private hospital and the private physician were entitled to indemnification from the State based on an indemnification clause in the contract that cited to, and essentially repeated the language of Correction Law § 24-a (*see* 2017 WL 4157372 at *9). In *Wright*, the private defendant-hospital was party to a contract with DOCCS to provide healthcare services for incarcerated individuals and the contract included a clause that expressly provided for DOCCS to defend and indemnify treating physicians, apparently without identifying the specific treating physicians to be covered (*see* 694 F Supp 2d at 151-152). Although the treating physician and his practice group at issue in the case had an ongoing relationship with the private hospital and had previously provided services to state inmates, they were not parties to that contract (*see id.* at 152). The District Court nevertheless commented that the indemnity provisions of the hospital's contract with DOCCS would seemingly extend to the treating professionals as to any claims of negligence by the incarcerated individual (*see id.* at 152 n 10). Therefore, if the State is required to defend and indemnify unnamed treating physicians based on contracts between DOCCS and private hospitals (with defense and indemnification clauses), there is no reason Dr. Wang should be barred from receiving defense and indemnification from the State under Correction Law § 24-a. Indeed, in situations like Dr. Wang's, where he is

performing an indivisible and necessary component of a DOCCS-approved surgical biopsy that was performed by a DOCCS-contracted surgeon (Dr. Cotie) at the private hospital where the surgeon maintained privileges, a point the State does not contest on appeal, it is only reasonable that the protections of Correction Law § 24-a would be equally extended to Dr. Wang as the reviewing pathologist.

Therefore, with respect to its vetting argument, the State is suggesting that Correction Law § 24-a is limited to individuals with whom DOCCS has formal employment or contractual relationships. That argument is unavailing. First, as just discussed, there is no employment or contractual relationship with the physician himself or herself where DOCCS maintains the contractual relationship with the hospital and yet, the suggestion is that the State will provide defense and indemnification for the treating physicians. Second, as further discussed above in this reply brief, there are no employment or contractual limitations in Correction Law § 24-a itself. The State certainly understood the concept of employee, independent contractor, and volunteer because it specifically used those terms in Public Officers Law § 17. It did not do so in Correction Law § 24-a. Rather, under Correction Law § 24-a, the protections of Public Officers Law § 17 extend to "any person" licensed to practice medicine (among other professions) who provide professional services to incarcerated individuals at the request of DOCCS. For the

reasons stated throughout this reply brief, and without repeating those reasons again, Dr. Wang has satisfied those requirements.

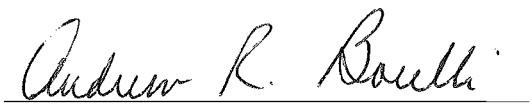
Therefore, based on an examination of the legislative purpose of Correction Law § 24-a, Dr. Wang is entitled to defense and indemnification from the State.

CONCLUSION

In the light of the foregoing, Dr. Wang is entitled to the protections of Correction Law § 24-a and the Appellate Division's decision must be reversed.

Dated: September 21, 2023
Fayetteville, New York

Respectfully submitted,



Andrew R. Borelli, Esq.
GALE GALE& HUNT, LLC
Attorneys for Petitioner-Appellant
Jun Wang, M.D.
P.O. Box 97
Fayetteville, New York 13066
(315) 637-3663

CERTIFICATE OF COMPLIANCE

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

Type: This brief uses a proportionally-spaced typeface as follows:

- Typeface—Times New Roman
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Word Count—The total number of words in this brief, exclusive of the statement of the status of related litigation, the corporate disclosure statement (if any), the table of contents, the table of cases and authorities, the statement of questions presented required by 22 NYCRR 500.13 (a), and any authorized additional materials pursuant to 22 NYCRR 500.1 (h), is 4,113, as calculated by the word processing system used to prepare the reply brief.

Dated: September 21, 2023

Andrew R. Borelli, Esq.
GALE GALE& HUNT, LLC
Attorneys for Petitioner-
Appellant Jun Wang, M.D.