APL-2023-00008

To be argued by:
KEVIN C. HU
15 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of JUN WANG, M.D.,

Appellant,

-against-

LETITIA JAMES, Attorney General of the State of New York,

Respondent.

BRIEF FOR RESPONDENT

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Supreme Court, Onondaga County, Index No. 004977/2021
Fourth Department No. CA 21-01301

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

State Statutes

State Statutes **Page(s)**

Federal Statutes

Miscellaneous Authorities

PRELIMINARY STATEMENT

During the time period relevant to this case, the New York State Department of Corrections and Community Supervision (DOCCS) had a contract with a general surgeon at the Cortland Regional Medical Center to provide surgical services to individuals in its custody. Pursuant to that contract, DOCCS made an appointment with the surgeon to examine a mass under the right armpit of Omar Alvarez, an individual in its custody. The surgeon performed a biopsy and referred the specimen to the pathology laboratory located in the hospital, where it was examined by petitioner Dr. Jun Wang. Petitioner diagnosed the mass as benign, but it was later found to be malignant. Petitioner was thereafter named as a third-party defendant in Alvarez's suit for medical malpractice.

The State contemplated and paid for the pathology services rendered. At issue here is whether the State is also responsible for petitioner's defense and indemnification in Alvarez's suit pursuant to Correction Law § 24-a. That statute entitles the licensed healthcare providers enumerated therein to defense and indemnification when they provide services "while acting at the request of the department [*i.e,* DOCCS] or a facility of the department." Respondent Attorney General

of New York denied petitioner's request for defense and indemnification on the ground that DOCCS had not asked petitioner to perform the pathology services rendered; indeed, DOCCS had no communication with petitioner and no input into his selection as the pathologist who rendered those services. This C.P.L.R. article 78 proceeding ensued. After Supreme Court, Onondaga County, sustained respondent's determination and dismissed the petition, the Fourth Department unanimously—and correctly—affirmed.

As the Fourth Department observed, deference is due to respondent's determination that petitioner is not entitled to defense and indemnification at state expense under Correction Law § 24-a because the determination entailed the application of a statutory term, the meaning of which is clear, to a specific set of facts, and respondent's determination was rational. Even absent deference, respondent's determination is based on an understanding of Correction Law § 24-a that follows from its plain language and is further supported by its purpose and legislative history. The Court should therefore affirm.

QUESTION PRESENTED

Did respondent Attorney General reasonably deny petitioner's request for defense and indemnification under Correction Law § 24-a, given that (1) DOCCS did not specifically request petitioner's services, (2) DOCCS had no contract with petitioner to provide medical services, and (3) DOCCS's contract with the general surgeon whose services were specifically requested did not name petitioner as a healthcare provider who would provide medical services for incarcerated individuals?

STATEMENT OF THE CASE

A. The Legislature Enacts Correction Law § 24-a, Entitling Certain Licensed Healthcare Professionals Who Provide Services for DOCCS to Defense and Indemnification.

At common law, when people who work for the State of New York are sued for damages based upon acts they performed while doing that work, they must provide for their own legal defense and must pay any ultimate judgment out of their own pocket. *See Olmstead v. Britton*, 48 A.D.2d 536, 538 (4th Dep't 1975). Over time, the Legislature has enacted a variety of exceptions to this common-law rule. In 1978, the Legislature overhauled the exceptions that had by then been codified and

consolidated them into a handful of statutes, including the two relevant here: L. 1978, ch. 466, § 1 (codified at Public Officers Law § 17) and L. 1978, ch. 466, § 4 (codified at Correction Law § 24-a).

Public Officers Law § 17 applies to "employees" of the State. The State is required to provide for the defense of an employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged to have occurred while the employee was acting within the scope of the employee's public employment. *Id.* § 17(2)(a). Further, the employee is entitled to indemnification in the amount of any judgment obtained against the employee, or in the amount of any settlement of a claim, provided that the act or omission occurred while the employee was acting within the scope of employment and did not result from intentional wrongdoing. *Id.* § 17(3). Requests for defense and indemnification are to be made to the Attorney General and must satisfy various procedural requirements. *Id.* § 17(4). Under Public Officers Law § 17(7), however, the provisions of the statute "shall not be construed to impair, alter, limit or modify the right and obligations of any insurer under any policy of insurance."

Contemporaneously with Public Officers Law § 17, the Legislature enacted, among other provisions, Correction Law § 24-a. It extends all of Public Officers Law § 17's provisions to the licensed healthcare professionals enumerated therein who render professional services authorized by their licenses "while acting at the request of the department [*i.e,* DOCCS] or a facility of the department." Specifically, under Correction Law § 24-a:

> The provisions of section seventeen of the public officers law shall apply to any person holding a license to practice a profession pursuant to article one hundred thirty-one, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-six, one hundred thirty-seven, one hundred thirty-nine, one hundred forty-one, one hundred forty-three, one hundred fifty-six or one hundred fifty-nine of the education law [*i.e.,* the provisions of the Education Law covering healthcare professionals], who is rendering or has rendered professional services authorized under such license *while acting at the request of the department or a facility of the department* 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.

(Emphasis added.) The Legislature simultaneously extended the same benefits to certain enumerated licensed healthcare professionals rendering authorized services at the request of the Office of Mental

Health and the Office for People with Developmental Disabilities. *See* L. 1978, ch. 466 (codified, respectively, at Mental Hygiene Law § 7.35 and Mental Hygiene Law § 13.35).[1]

The Senate sponsor's memorandum in support of the legislation that became Public Officer's Law § 17 (and these additional statutes) observed that "[t]he performance of public responsibilities often involves exposure to risks which involve major loss or damage due to accidental circumstances." Senate Introducer's Mem. in Support at 2, *in* Bill Jacket, L. 1978, ch. 466. "The public interest is served if officers and employees are free to carry out their official duties without fear that a claim or cause of action for negligence may arise which threatens to impair or destroy their individual security and solvency." *Id.* at 2-3. The defense and indemnification obligations contained in the subject legislation would "afford[] this kind of protection," the Senator's memorandum advised. *Id.*

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[1] The Legislature subsequently extended the same benefits to certain enumerated licensed healthcare professionals rendering services at the request of the Department of Health, *see* L. 1979, ch. 442 (codified at Public Health Law § 14); the Office of Alcoholism and Substance Abuse Services, *see* L. 1992, ch. 223, § 29 (codified at Mental Hygiene Law § 19.35); and the Office of Children and Family Services, *see* L. 1993, ch. 552, § 1 (codified at Executive Law § 522).

The Senate sponsor did not deny—and the Assembly sponsor expressly acknowledged—that affording such protection could have "indeterminable additional fiscal implications" for the State. Assembly Introducer's Mem. in Support at 1, *in* Bill Jacket, L. 1978, ch. 466. As one of the agencies urging passage of the legislation cautioned: The program of mandatory defense and indemnification at state expense "may be costly" and "could have significant budgetary implications." Letter from Office of General Services at 1, *in* Bill Jacket, L. 1978, ch. 466.

While most of the memoranda and letters submitted in support of the legislation addressed only Public Officers Law § 17, *see generally* Bill Jacket, L. 1978, ch. 466, the Department of Health submitted a letter specifically addressing the scope of the provisions extending the benefits of defense and indemnification by the State to licensed healthcare professionals. *See* Letter from the Department of Health, *in* Bill Jacket, L. 1978, ch. 466. Expressing support for the legislation, the Department of Health stated that "this bill extends the benefits of Public Officers Law section 17 to non-employee health professionals of the Department of

Correction[2] and the Department of Mental Hygiene who render professional care at the request of those agencies." *Id.* at 2. The Department of Health approvingly observed that it had previously "proposed legislation providing similar protection for consultant physicians rendering part-time health care services in hospitals operated by it." *Id.*

Until the decision rendered in this proceeding, the only other interpretation of the scope of Correction Law § 24-a's coverage was found in an Attorney General opinion issued in 1980. In response to an inquiry from DOCCS as to "whether health care providers who render professional services to the Department of Correctional Services under contract" are entitled to the benefits of Public Officers Law § 17 through Correction Law § 24-a, the Attorney General opined that they were. 1980 N.Y. Op. Atty. Gen. 40 (N.Y.A.G.), 1980 WL 107179. The Attorney General acknowledged the concern that DOCCS "experienced difficulty

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[2] The reference to the "Department of Correction" was likely intended to be a reference to the Department of Correctional Services, the predecessor agency to DOCCS. *See* L. 2011, ch. 21, § 1, part C, § 1, subpart A (merging the Department of Correctional Services and the Division of Parole into DOCCS).

in recruiting health care providers to work on a full time basis in correctional facilities," and thus was "obtain[ing] these services from the providers as independent contractors," and that these independent contractors "are particularly concerned about possible litigation or liability arising out of services performed at facilities under the jurisdiction of [DOCCS]." *Id.* at *1. The Attorney General reasoned that the Department of Health's above-discussed letter supporting the passage of Public Officers Law § 17 and Correction Law § 24-a reflected the Department of Health's preference, as a matter of policy, for an interpretation of Correction Law § 24-a that would make defense and indemnification available to these independent contractors, and that such an interpretation "was before the Governor when he decided to approve" the legislation enacting Public Officer Law § 17 and Correction Law § 24-a. *Id.* at *2. He further observed that Correction Law § 24-a "would thus add little if anything to the law existing in its absence if it were interpreted so strictly as to deny extension of the benefits of section 17 to the identified independent contractors." *Id.* at *2.

B. Petitioner Diagnoses as Benign a Mass Under Alvarez's Armpit that Is Later Found To Be Malignant.

Omar Alvarez has been in DOCCS custody since 1996. (Record on Appeal "R." 29.) In May 2012, while housed at Auburn Correctional Facility, he complained to a nurse about a mass under his right armpit. (R. 43, 378-381.) The nurse referred him to one of the facility's doctors, who performed a physical examination. (R. 43, 381-382.) Following the examination, the doctor opined that Alvarez needed a surgical evaluation and arranged for him to attend a surgical clinic held once a month at Auburn by Dr. Robert Wayne Cotie. (R. 43, 45, 75.)

Dr. Cotie was a general surgeon in private practice and affiliated with the surgical department at Cortland Regional Medical Center, an outside hospital. (R. 56, 63 78-79.) Pursuant to his contract with DOCCS, he provided general surgical services to persons incarcerated at Auburn (via the aforementioned monthly clinic) and several other correctional facilities in Central New York. (R. 73-75, 658-660.) Dr. Cotie would submit invoices for services rendered pursuant to that contract and receive reimbursement accordingly. (R. 659.) Dr. Cotie obtained his contract by submitting an application to DOCCS that set forth, among other things, his qualifications to provide surgical services. (R. 73.) Under

the contract, Dr. Cotie was required at all times to "remain responsible." (R. 660.) DOCCS reserved the right to suspend the agreement if it found evidence calling Dr. Cotie's "responsibility" into question, and to terminate the agreement if it determined that Dr. Cotie was "non-responsible." (R. 660.) Cortland Regional Medical Center was neither a signatory to nor mentioned in Dr. Cotie's this contract. (R. 658-660.) Nor did Cortland Regional Medical Center have its own contract with DOCCS.

In August 2012, during an Auburn clinic session, Dr. Cotie examined Alvarez and concluded that he should undergo a biopsy, *i.e.*, that the underarm mass or a portion thereof should be removed for testing. (R. 45, 95-96.) Dr. Cotie submitted a recommendation to that effect to Auburn's health service director. (R. 45, 81-83, 209.) His recommendation was approved both at the facility level and then by DOCCS's central office in Albany. (R. 44, 74, 223-224, 409.) The procedure was scheduled for September 2012 at Cortland Regional Medical Center. (R. 44.)

On the scheduled date, Dr. Cotie performed the operation. (R. 44, 456-457.) He removed a portion of the mass and sent the specimen to the hospital's pathology laboratory for review. (R. 113-115.)

The pathology laboratory was run by Cortland Pathology, an independent corporation that employed two pathologists, including petitioner. (R. 684, 754-756, 871-884.) Cortland Pathology provided pathology services to the hospital pursuant to a contract with the hospital. (R. 872.) Under that contract, Cortland Pathology was required to make at least one of its pathologists available and on duty at any given time. (R. 872-873.) The contract further required Cortland Pathology to maintain malpractice insurance for each of its employees. (R. 875.) In return, the hospital paid Cortland Pathology a flat monthly fee. (R. 813, 877.) There is no evidence that DOCCS had any input regarding the formation of Cortland Pathology's contract with the hospital, Cortland Pathology's performance thereunder, or the qualifications of the pathologists it employed.

Cortland Pathology's custom and practice was to have each incoming specimen routed for review to one of its two pathologists—either petitioner or his co-employee. (R. 763-764.) When the specimen

removed from under Alvarez's right armpit arrived at the pathology laboratory, it was routed to petitioner. (R. 869-870.) While the record does not explain why it was routed to petitioner rather than his co-employee, there is no evidence that Dr. Cotie, anyone affiliated with Auburn Correctional Facility, or anyone affiliated with DOCCS requested pathology services from petitioner in particular.

Petitioner studied the specimen, as well as the results of specialized tests he ordered performed on the specimen at another hospital. (R. 737-738, 772, 869-870.) Based upon that review, petitioner concluded that Alvarez was suffering from lymphoid hyperplasia, a condition characterized by an unusually large number of normal, healthy cells in the lymph nodes. (R. 869.) Lymphoid hyperplasia is benign. (R. 120.)

Cortland Regional Medical Center sent DOCCS a bill for the services rendered to Alvarez, including the pathology review of the specimen removed from Alvarez's underarm mass, and DOCCS paid the bill. (R. 506-507, 509-510.)

In 2013, just over a year after that biopsy, the mass under Alvarez's right armpit had grown in size and was continuing to bother him. (R. 181-183, 291.) Alvarez once again visited the Auburn Correctional Facility

on-site surgery clinic held by Dr. Cotie, who recommended a complete excision of the mass. (R. 182-183.) Ultimately, Alvarez was admitted to the State University of New York Upstate Medical Center, where he was diagnosed with lymphoma, a malignant condition. (R. 185-186.)

C. Alvarez Files a Medical Malpractice Suit, and Respondent Determines that Correction Law § 24-a Does Not Entitle Petitioner to State-Provided Defense and Indemnification.

In 2015, Alvarez filed a complaint in Supreme Court, New York County, against Cortland Regional Medical Center, Dr. Cotie and Auburn's regional medical director, Dr. Pang Kooi. (R. 28-38.) In that case, styled *Alvarez v. Kooi*, Index No. 805085/2015, Alvarez alleged that the defendants negligently failed to detect his lymphoma in a timely fashion and likewise failed to properly treat it. (R. 31-35.) Alvarez sought compensatory damages in an amount to be determined by a jury. (R. 35.)

In March 2021, Cortland Regional Medical Center filed a third-party complaint in the *Alvarez* action against petitioner and his employer, Cortland Pathology. (R. 514-526.) The hospital alleged that any failure to timely diagnose Alvarez's lymphoma was the fault of these

third-party defendants and thus that any damages awarded against the hospital should be assigned to them. (R. 519-524.)

Petitioner wrote to respondent Attorney General requesting that the State provide for his legal defense in the *Alvarez* action and indemnify him for any damages ultimately assessed against him. (R. 633-634, 637-638.) He acknowledged that he was not an "employee" to whom the provisions of Public Officers Law § 17 applied. (*See* R. 638.) He asserted that he was nonetheless entitled to be treated like an employee for purposes of defense and indemnification because he had provided pathology services "at the request of" DOCCS or a DOCCS facility, within the meaning of Correction Law § 24-a. (R. 633-634, 637-38.) Specifically, petitioner asserted that DOCCS had specifically approved (and thus requested) Dr. Cotie's surgical services, and that this approval necessarily contemplated the provision of pathology services to examine any tissue removed during the surgery. (R. 637-638.) Petitioner did not suggest, however, that DOCCS had specifically approved the provision of those services by petitioner in particular, as opposed to the hospital's pathology laboratory more generally, or that DOCCS had vetted petitioner's qualifications in any way.

Respondent denied petitioner's request.[3] (R. 636, 639-640.) Respondent concluded that petitioner was not entitled to defense and indemnification under Correction Law § 24-a because petitioner did not undertake his review of Alvarez's underarm mass "while acting at the request of" DOCCS or a DOCCS facility, as required by that statute. (R. 639.) Respondent explained that the plain language of the statute makes clear that DOCCS must request the act or services of a particular physician to activate the extraordinary protections, and state monies and resources, afforded by Correction Law § 24-a. (R. 639.) And that request "requires some employment agreement or other advance contractual or formal understanding between the provider and DOCCS." (R. 639.) Respondent's records showed no such agreement or understanding, however; indeed, it showed no communication between petitioner and DOCCS at all. (R. 639.) To the contrary, the biopsy specimen was sent in accordance with routine practice to the hospital's pathology department. (R. 639.) And the "mere fact that the patient from whom the specimen

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[3] Although correspondence cited here appears to contemplate further review by respondent (R. 639), there is no dispute that respondent's email dated March 23, 2021, constituted respondent's final determination.

originated was an inmate, does not render Dr. Wang a de facto employee, or in any other way entitled to State defense or indemnification for that pathology interpretation." (R. 639.)

D. Supreme Court and the Fourth Department Uphold Respondent's Determination Denying Petitioner State-Provided Defense and Indemnification.

In May 2021, petitioner commenced this article 78 proceeding in Supreme Court, Onondaga County, seeking to annul respondent's determination. (R. 14-25.) Petitioner contended that the determination was legally erroneous, arbitrary and capricious, and an abuse of discretion.[4] (R. 15.)

Supreme Court sustained respondent's determination and denied the petition. (R. 5-13.) Supreme Court concluded that respondent's determination was entitled to deference because it hinged on respondent's understanding of the nature of the "request" required to trigger a right to defense and indemnification by the State under Correction Law § 24-a. (R. 12.) With or without deference, however, the

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[4] Petitioner also sought a declaratory judgment that he was entitled to State-provided defense and indemnification in *Alvarez*. (R. 15, 24.) He subsequently withdrew that request. (R. 6.)

court concluded that there was no possible factual or legal basis upon which the State was obligated to represent and indemnify petitioner in the *Alvarez* case. (R. 9-12.) The court explained that by making the provisions of Public Officers Law § 17 applicable to healthcare professionals working within the authorization of their licenses "while acting at the request of the department of a facility of the department," Correction Law § 24-a extends coverage to persons who render services to DOCCS as independent contractors. (R. 9-10.) While the surgeon, Dr. Cotie, fit that description, petitioner did not. (R. 11-12.) And the court reasoned that, if Dr. Cotie's request for services from petitioner's laboratory were sufficient to extend coverage to petitioner, then section 17 coverage would effectively extend to any medical provider who provides services to any incarcerated individual in any capacity, a result the court rejected as one the Legislature would likely not have intended. (R. 12.)

The Fourth Department unanimously affirmed, but on somewhat different reasoning. (R. 910-911.) At the outset, the court agreed that respondent's determination was entitled to deference because it hinged on the application, to a specific set of facts, of a broad term in Correction

Law § 24-a and therefore should be upheld if rational. (R. 910 [citing *Matter of O'Brien v. Spitzer,* 7 N.Y.3d 239, 242 (2006)].) Rather than focus on whether petitioner had rendered services pursuant to a contract with DOCCS, however, the court considered simply whether DOCCS had "expressly requested the services of a particular health care provider." (R. 910-911.) Here, there was no evidence that DOCCS had done so. (R. 911.) Instead, petitioner's pathology services were requested by the hospital when petitioner's specimen was randomly assigned to him with no input from DOCCS. (R. 911.) And the court rejected petitioner's contention that the professional services of a healthcare professional that are contemplated but not directly requested and approved by DOCCS qualify as services rendered "while acting at the request of the department or a facility of the department," as required to trigger defense and indemnification under Correction Law § 24-a. (R. 911.)

This Court granted petitioner's motion for leave to appeal. (R. 908.)

ARGUMENT

PETITIONER IS NOT ENTITLED TO DEFENSE AND INDEMNIFICATION AT STATE EXPENSE UNDER CORRECTION LAW § 24-A

A. The Attorney General's Determination Is Entitled to Deference and Should Be Sustained as Rational.

To the extent the Court views this case as raising a question of the specific application of a broad statutory term, the meaning of which is well understood, the Fourth Department properly afforded deference to respondent's determination and sustained it as rational. While courts do not defer to administrative agencies in matters of "pure statutory interpretation," *Matter of O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006) (internal quotation omitted), "deference is appropriate 'where the question is one of specific application of a broad statutory term.'" *Id.* (quoting *Matter of American Telephone & Telegraph Co. v. State Tax Commn.*, 61 N.Y.2d 393, 400 (1984)).

There is no dispute that respondent is the governmental official responsible for determining whether an individual sued in a civil action is entitled to defense and indemnification under Correction Law § 24-a. Further, respondent's determination hinged on the application of a broad term in the statute—the term requiring that a healthcare professional

render services "while acting at the request of the department or a facility of the department"—to the specific facts at hand. Petitioner was not acting at any such request. He was acting in response to a request by Dr. Cotie for pathology services from the pathology laboratory located in the hospital; Cortland Pathology, the corporation operating that laboratory and petitioner's employer, routed the assignment to him by happenstance, without any input from DOCCS. The Fourth Department correctly recognized as much. (R. 911.) Because respondent's determination reflects a rational application of the facts to a clear statutory term, the Court may affirm the Fourth Department's decision on that basis.

B. Respondent's Determination In Any Event Reflects a Correct Interpretation of Correction Law § 24-a, Which Requires that DOCCS Directly Request the Services of a Licensed Healthcare Professional.

To the extent this Court views this case as raising a question of pure statutory interpretation, it should affirm the Fourth Department's decision on the ground that respondent correctly interpreted the statute in rendering the determination at issue. Respondent's determination follows from the plain language of the statute and is further supported

by the statute's purpose and legislative history. The Court should thus affirm, regardless of whether deference is due.

1. The Determination Follows from Correction Law § 24-a's Plain Language.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility*, 36 N.Y.3d 32, 36 (2020) (quoting *Patrolmen's Benevolent Assn. of City of New York v. City of New York*, 41 N.Y.2d 205, 208 (1976)); Courts are to "look first to the statutory text, which is the clearest indicator of legislative intent." *Id.* at 36 (quoting *Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 N.Y.3d 712, 721 (2012)). And, at least absent the most compelling of countervailing concerns, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." *People v. Talluto*, 39 N.Y.3d 306, 311 (2022) (quoting *Matter of Tall Trees Constr. Corp. v. Zoning Bd. of Appeals of Town of Huntington*, 97 N.Y.2d 86, 91 (2001)).

Here, the Legislature used plain language to extend the rights of defense and indemnification provided to employees by Public Officers

Law § 17 to licensed healthcare professionals who render professional services authorized by their licenses "while acting at the request of the department or a facility of the department." Correction Law § 24-a. The best evidence of the legislative intent behind those "words of ordinary import" is their "usual and commonly understood meaning." *Matter of Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 524 (2019) (quoting *Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016)). Dictionary definitions are "useful guideposts" in that inquiry. *Id.* (quoting *Yaniveth R.*, 27 N.Y.3d at 192). And to that end, the dictionary definition of the phrase "at someone's request" is "being asked by someone." *McGraw-Hill's Dictionary of American Idioms and Phrasal Verbs* 25 (2005). Thus, a licensed healthcare professional is working within the authorization of his or her license "while acting at the request of the department or a facility of the department" only if the person is performing healthcare work that DOCCS or a DOCCS facility asked that person to perform.

The Seventh Circuit's decision in *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), is instructive. There, the court ruled that the State of Indiana does not remove a registrant from its voter rolls "at the request of the registrant" within the meaning of the National

Voter Registration Act ("NVRA"), 52 U.S.C. §§ 20501–20511, when removal occurs in response to the State's having received an alert from a third-party database that the registrant has registered to vote in another jurisdiction. "The ordinary meaning of 'removal at the request of the registrant' is that *the registrant requests removal*," the court explained. *Id.* at 960 (alteration marks omitted, ellipsis omitted). Indeed: "The only straightforward reading of the phrase 'at the request *of the registrant*' is that the registrant herself makes the request to the state." *Id.* at 961.

To find for NVRA purposes that removal "at the request of the registrant" occurred on the basis of the alert sent by the third-party database service would be to impermissibly "twist that language," the Seventh Circuit explained. *Id.* It would improperly countenance the notion "that *indirect* contact with the voter or the possession of third-party information is the equivalent of *direct* contact with the voter" on the State's part, as the statute requires. *Id.* at 959. The State of Indiana cannot be said to remove voters from the rolls "at their request" without first "hearing from them directly." *Id.*

Moreover, when a statute requires that a request be made, the request must be explicit, as the Connecticut Supreme Court explained in

Connecticut v. Winer, 286 Conn. 666 (Conn. 2008). The court there held that a criminal trial was not "continued at the request of the prosecuting attorney" within the meaning of a speedy-trial statute when a prosecutor's statement in court did not expressly request continuance but rather "had the *effect* of a continuance" *Id.* at 677. The statute would have been satisfied only if a continuance had been granted in response to an "overt act of asking for a continuance," meaning that the ask itself "must be explicit." *Id.* at 678.

Similarly here, under Correction Law § 24-a's plain text, a licensed healthcare professional works within the authorization of the professional's license "while acting at the request of the department or a facility of the department" only when DOCCS has expressly required the services of a particular heathcare professional. As respondent's determination explained, the requisite request is typically established by some form of direct contact between the healthcare professional and DOCCS, such as "some employment agreement or other advance contractual or formal understanding between the provider and DOCCS." (R. 639.) Where, as here, there is no evidence of *any* direct communication between the healthcare professional and DOCCS, the professional's

services cannot be considered to have been rendered at DOCCS's request, even if DOCCS understood that someone not specifically requested would be performing those services. After all, what is at issue here is not DOCCS's responsibility to pay for services contemplated, but rather whether the State is required to defend and indemnify the particular healthcare professional who rendered those services at the request of an individual or entity independent of DOCCS.

Petitioner is not covered by Correction Law § 24-a because DOCCS did not ask petitioner to perform the services rendered. There is no evidence that petitioner was ever asked by anyone affiliated with DOCCS or a DOCCS facility to do that job, either with respect to the specimen taken from Alvarez or more generally. Indeed, there is no evidence that anyone affiliated with DOCCS or any DOCCS facility even knew petitioner was doing that job.

The healthcare professional who rendered services "while acting at the request of the department" was Dr. Cotie. DOCCS had a contract with Dr. Cotie and, in accordance with the terms of that contract, made an appointment with him to perform a biopsy of the mass under Alvarez's armpit at Cortland Regional Medical Center. (R. 44, 74, 224-225, 409.)

And Dr. Cotie performed that service. (R. 44, 456-457.) Dr. Cotie then requested pathology services by sending the biopsy specimen to the pathology laboratory located at the hospital. (R.115.)

Even Dr. Cotie did not specifically request that petitioner perform that review. (R. 44, 113-115, 456-457.) The hospital's pathology laboratory was staffed by Cortland Pathology, an independent entity, which provided pathology services to the hospital pursuant to a contract between those two entities. And Cortland Pathology, not the hospital, employed petitioner and his co-pathologist. (R. 869-870.) The record does not address why the assignment was ultimately routed to petitioner. Regardless, however, there is no evidence that Dr. Cotie, anyone affiliated with Auburn Correctional Facility, or anyone affiliated with DOCCS specifically requested petitioner's services.

While petitioner suggests that he "had no choice but to review the biopsy specimen sent to him" (Br. at 25), he fails to acknowledge that his obligation to perform pathology review services arose not from any request from DOCCS or even Dr. Cotie for him to perform services, but rather from his employment relationship with Cortland Pathology and

its contractual relationship with Cortland Regional Medical Center. (R. 754-756, 869-884.)

Indeed, petitioner concedes, as he must, that DOCCS did not specifically or explicitly ask him to perform the pathology review of the Alvarez specimen. (*See* Br. at 23-25.) Instead, he contends that any healthcare professional who "engaged in providing indispensable components of DOCCS-approved medical services" should receive the benefits of Correction Law § 24-a. And he argues that respondent's plain language interpretation of Correction Law § 24-a "would result in an absurd application" in this proceeding. (Br. at 15-16.)

There is no absurdity, however, in denying State-provided defense and indemnification to petitioner and similarly situated healthcare professionals who are not directly asked by DOCCS to provide services. It is undisputed here that, by approving the biopsy, DOCCS contemplated and implicitly authorized an accompanying pathology review of the biopsy sample. Indeed, Cortland Medical Regional Center billed DOCCS for the costs associated with the pathology review, and DOCCS paid those costs without objection. (R. 505-510.) DOCCS's authorization of the pathology services generally merely demonstrates

that DOCCS requested *someone* to review the specimen; it does not show that DOCCS requested or otherwise expected this service be performed by *petitioner in particular*, as Correction Law § 24-a requires in order for petitioner to be eligible for State-provided defense and indemnification.

In sum, respondent's determination, to the extent it turns on statutory construction, was based on the statute's plain meaning and thus was proper.

2. The Determination Is Further Supported By the Purpose and History of Correction Law § 24-a.

Because this appeal can be resolved on the basis of Correction Law § 24-a's plain meaning, which does not give rise to any absurdity or contradiction, there is no need to examine additional indicia of legislative intent. *See People v. Roberts*, 31 N.Y.3d 406, 418 (2018). Consideration of legislative purpose and history, however, only further supports respondent's plain-language approach, and with it the propriety of her determination that petitioner is not entitled to defense and indemnification at state expense in the *Alvarez* case. *See Riley v. Cnty. of Broome*, 95 N.Y.2d 455, 463–64 (2000) ("[T]he legislative history of an

enactment may also be relevant and is not to be ignored, even if words be clear.") (internal quotation marks omitted).

"The purpose of Public Officers Law § 17 is, in essence, to provide insurance against litigation," *Matter of O'Brien*, 7 N.Y.3d at 242, with the State functioning as the insurer and its employees as the insureds, *Matter of Garcia v. Abrams*, 98 A.D.2d 871, 873 (3d Dep't 1983). The same purpose underlies Correction Law § 24-a, which extends the insurance provided by Public Officers Law § 17 to specified categories of licensed healthcare professionals performing authorized healthcare work "while acting at the request of the department or a facility of the department."

The concept of insurance presupposes that the insurer has had the opportunity to vet its potential insureds and to determine whether they present a tolerable risk from a cost-benefit standpoint. This core precept underscores the importance of assuring that the State has the opportunity to vet persons covered by Correction Law § 24-a, just as it has the opportunity to vet those it hires before they receive the benefits of Public Officers Law § 17 as "employees." The requirement that the State, via DOCCS and its facilities, request the services of a particular healthcare professional serves to assure that vetting opportunity,

allowing the State to evaluate relevant credentials, experience, and other factors before committing the State to represent and indemnify the professional for the authorized healthcare services rendered.

The history of the legislation that enacted Correction Law § 24-a and analogous provisions for other state agencies emphasizes the magnitude of the risk that the State, as insurer, accepted. The Assembly sponsor's memorandum expressly acknowledged that the defense and indemnification obligations could have "indeterminable additional fiscal implications" for the State. Assembly Introducer's Mem. in Support at 1, *in* Bill Jacket, L. 1978, ch. 466. One of the agencies urging passage of the legislation cautioned: "The program [of mandatory defense and indemnification at state expense] may be costly" and "could have significant budgetary implications." Letter from Office of General Services at 1, *in* Bill Jacket, L. 1978, ch. 466. While thus appreciating the significant scale of potential payouts that the legislation could cause, the Legislature would have had no reason to expose the State to liability for professional services rendered by individuals it did not even have the opportunity to vet and thereby assess any potential risk. It should thus

be presumed that the Legislature included the request requirement to avoid any such unreasonable and unnecessary risk.

In this case, there is no evidence that anyone affiliated with DOCCS or a DOCCS facility even knew who petitioner was, let alone formed the judgment that he was a sufficiently capable pathologist.

Contrast petitioner's circumstances with those of Dr. Cotie, who respondent determined *is* entitled to defense and indemnification at state expense in the *Alvarez* action. (R. 637.) Dr. Cotie had a contract with DOCCS under which he provided surgical services to persons incarcerated in DOCCS custody. (R. 73-75, 658-660.) He obtained that contract by submitting an application that set forth, among other things, his qualifications for the work. (R. 73.) And the contract itself indicates that DOCCS assessed those qualifications, found Dr. Cotie to be "responsible," and reserved the right to terminate the arrangement were it ever to find otherwise.[5] (R. 660.)

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[5] When the State contracts with hospitals and other large providers, it may not be practicable for it to review the qualifications of all of the providers' licensed healthcare workers. Nevertheless, the State has the opportunity to do so, as well as to assess the overall reputation of the health care facility. And it has the opportunity to refuse to request the

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There is also no support for petitioner's characterization (Br. at 28) of Correction Law § 24-a as a "remedial statute" that must be "liberally construed in favor of physicians in [petitioner]'s position." To the contrary, the State's obligation to indemnify and defend under Correction Law § 24-a must instead be strictly construed because Correction Law § 24-a abrogated the common law in imposing this obligation on the State. As this Court has explained, a statute enacted in derogation of the common law is to be strictly construed in "the narrowest sense that its words and underlying purposes permit, since the rules of the common law must be held no further abrogated than the clear import of the language used in the statute absolutely requires." *Oden v. Chemung Cnty. Indus. Dev. Agency*, 87 N.Y.2d 81, 86 (1995) (internal quotation marks and citation omitted). And as explained above, neither the plain language nor the legislative history of Correction Law § 24-a demonstrates that the Legislature intended to extend State-provided defense and indemnification to healthcare professionals who are not specifically requested by DOCCS to perform services.

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services of particular licensed healthcare workers who possess bad professional disciplinary records.

Finally, respondent's position is reasonable in light of the practical realities. Physicians and companies employing healthcare providers are sophisticated parties who often have the means to retain counsel to negotiate agreements with the State governing the provision of their services. In practice, DOCCS contracts not only with individual physicians such as Dr. Cotie, but also with hospitals, clinics, and other healthcare organizations for the provision of a wide variety of medical services to incarcerated persons. Some of these contracts identify licensed healthcare professionals by name or include specific licensed healthcare professionals as signatories, evidence that the services of those identified professionals may have specifically been requested, within the meaning of Correction Law § 24-a. Others reference that statute without explaining when it applies or identifying specific healthcare professionals by name. *See, e.g., Colon v. New York State Dept. of Corrections and Community Supervision,* 2017 WL 4157372 at * 9 (S.D.N.Y. 2017) (discussing indemnity provisions of a contract between DOCCS and Albany Medical Center); *Wright v. Genovese*, 694 F.Supp.2d 137, 151-152

& n.10 (N.D.N.Y. 2010) (same).[6] While the absence of any such specific information suggests that defense and indemnification by the State would not extend to individual healthcare professionals retained by such entities, the Court need not decide that question to resolve the appeal before it.

Moreover, most physicians and other licensed healthcare providers secure malpractice insurance. Indeed, petitioner's brief to the Court not only acknowledges his having malpractice insurance, but discloses that he and Cortland Regional Medical Center settled the hospital's third-party claim against them in *Alvarez* "within the bounds of their respective insurance policy limits" (Br. at ii). Petitioner thus merely seeks to shift the risk and cost of insurance from his malpractice insurance carrier to the State.[7] Because DOCCS never requested

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[6] In *Colon* and *Wright*, the district court discussed the contract between Albany Medical Center and DOCCS for the distinct purpose of analyzing whether a defendant private physician should be treated as a state actor in a civil rights action under 42 U.S.C. § 1983. Whether the physician was entitled to defense and indemnification under Correction Law § 24-a presents a state law question that was not considered.

[7] Indeed, even if the Court finds that petitioner *is* covered by Correction Law § 24-a, that coverage would arguably be secondary to the primary coverage provided by his malpractice insurance carrier. As

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petitioner in particular to provide services to incarcerated individuals, respondent correctly determined that the Legislature did not authorize such cost-shifting to taxpayers.

Public Officers Law § 17(7) expressly states, its provisions—which are extended to Correction Law § 24-a when the conditions of the latter statute are satisfied—"shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance." *See Frontier Ins. Co. v. State*, 197 A.D.2d 177, 182–83 (3d Dep't 1994) (accepting State's argument that subdivision 7 provides indemnification only to the extent that available commercial coverage is "inadequate for the purpose"), *aff'd on other grounds*, 87 N.Y.2d 864 (1995). Accordingly, should the Court reverse here, a remand to respondent would be warranted to consider the extent of coverage available under Correction Law § 24-a.

CONCLUSION

The Appellate Division's order should be affirmed.

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September 8, 2023

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Kevin C. Hu, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,919 words, which complies with the limitations stated in § 500.13(c)(1).

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