February 23, 2015

Court of Appeals

FOR THE STATE OF NEW YORK

**THE PEOPLE OF THE STATE OF NEW YORK ex rel.
THE NONHUMAN RIGHTS PROJECT, INC. on behalf of TOMMY,**

Appellant,

-v-

**PATRICK C. LAVERY, individually and as an officer of
Circle L Trailer Sales, Inc., DIANE LAVERY and CIRCLE L
TRAILER SALES, INC.,**

Respondents.

MOTION FOR LEAVE TO APPEAL and AFFIRMATION IN SUPPORT

ELIZABETH STEIN, ESQ.
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The Nonhuman Rights Project, Inc.,
on behalf of Tommy
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COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Appellant,

v.

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents.

Index No.: 518336
NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE that, upon the annexed Statement in Support of Motion for Leave to Appeal, upon the annexed affidavit of Elizabeth Stein, Esq., attorney for Appellant The Nonhuman Rights Project, Inc. ("NhRP"), upon the annexed Memorandum of Law in Support of this Notice of Motion for Leave to Appeal, upon the briefs and record entered in the New York State Supreme Court Appellate Division, Third Judicial Department ("Appellate Division, Third Department") on the prior appeal in this action, upon the denial of the NhRP's Motion for Leave to Appeal to the Court of Appeals in the Appellate Division, Third Department entered January 30, 2015, and upon all papers and prior proceedings in this action, the NhRP will move this Court at the Courthouse of the Court of Appeals, Court of Appeals Hall, Albany, New York, on Monday, March 9, 2015, for an order granting the NhRP leave to appeal to the Court of Appeals

from the order of the Appellate Division, Third Department entered December 4, 2014, affirming an order and judgment of the Supreme Court, Fulton County, which denied the NhRP's petition for a writ of habeas corpus and order to show cause, and for such other and further relief as this Court finds just and proper.

The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition thereto is neither required nor permitted.

Answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of this motion.

Dated: February 23, 2015

From: Elizabeth Stein

Elizabeth Stein, Esq.
Attorney for Appellant
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(516) 747-4726

Steven M Wise

Steven M. Wise, Esq.
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COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Appellant,

v.

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents.

Index No. 518336

AFFIDAVIT IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

STATE OF NEW YORK)
) ss:
COUNTY OF _____)

ELIZABETH STEIN, ESQ. being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice in the courts of the State of New York and am the attorney of record for the above-named Appellant, Nonhuman Rights Project, Inc. ("NhRP"), with respect to both the proceedings in the Supreme Court, Fulton County and the appeal taken from those proceedings.

2. I am fully familiar with the facts and with the questions of law involved in the appeal.

3. This affidavit is submitted in support of the NhRP's Motion for Leave to Appeal to the Court of Appeals ("Motion for Leave to Appeal") pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a)(1)(i).

4. Attached to the Motion for Leave to Appeal as **Exhibit 1** is a true and correct copy of the Order of the Supreme Court, Fulton County entered December 18, 2013 incorporating by reference the transcript of the oral argument heard in the case in which the court denied the NhRP's verified petition for a common law writ of habeas corpus and order to show cause filed on behalf of Tommy, a chimpanzee detained in the State of New York. A timely appeal was taken.

5. Attached to the Motion for Leave to Appeal as **Exhibit 2** is a true and correct copy of the opinion and order of the New York State Supreme Court Appellate Division, Third Judicial Department ("Appellate Division, Third Department") entered on December 4, 2014, unanimously affirming the order of the lower court, without costs, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 N.Y. App. Div. LEXIS 8451, *3-4 (3rd Dept. Dec. 4, 2014) ("Opinion").

6. The NhRP filed a Motion for Leave to Appeal to the Court of Appeals with the Appellate Division, Third Department. On January 30, 2015, the

Appellate Division, Third Department entered a Decision and Order on Motion denying the motion, a true and correct copy of which is attached hereto as **Exhibit 3**.

7. This Motion for Leave to Appeal is filed fewer than thirty days from the date of the written notice of entry of the appellate court's order and therefore is timely filed pursuant to CPLR 5513(b).

8. This Court has jurisdiction over the NhRP's Motion for Leave to Appeal because the action originated in the Supreme Court, Fulton County and is taken from a final order of the Appellate Division, Third Department and is not appealable as of right. CPLR 5602(a)(1)(i).

9. The reasons why this Court should grant the NhRP's Motion for Leave to Appeal are: (1) this appeal raises novel and complex legal issues of state, national, and international importance that require review by the Court of Appeals; (2) the Appellate Division, Third Department committed errors of law and fact in rendering its decision; and (3) the Opinion directly contradicts prior decisions of this Court. These reasons are discussed in detail in the NhRP's Statement in Support of Motion for Leave to Appeal to the Court of Appeals and the accompanying Memorandum of Law.

10. The fundamental question raised in the NhRP's original proceeding in the Supreme Court, Fulton County and on appeal to the Appellate Division, Third

Department was whether a chimpanzee, who is a member of a species that possess the capacities for autonomy and self-determination, is a "person" for the purpose of demanding a common law writ of habeas corpus to protect his common law right to bodily liberty. This question has not been decided by the Court of Appeals.

11. I respectfully submit that the Appellate Division, Third Department erred as a matter of law when it concluded "that a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus" because he is unable to bear duties or responsibilities. *Opinion* at *3. This conclusion directly contradicts the Court of Appeals leading personhood case of *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 210 (1972), in which this Court held that personhood is a public policy determination and "not a question of biological or 'natural' correspondence." Further, the appellate court relied on inapposite cases in support of its proposition, cited law review articles that endorse a minority philosophical view and overlooked the legal implications of the New York pet trust statute (see below). The court also failed to recognize that the right to bodily liberty is an immunity right to which there is no correlative duty or responsibility. Lastly, the court's determination is unsupported by the uncontroverted facts in the record and is therefore factually incorrect.

12. I respectfully submit that the Appellate Division, Third Department erred as a matter of law in its statement that "animals have never been considered

persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." *Opinion* at *4. In fact, with the exception of this case, no federal or state court has ever been asked to determine whether a nonhuman animal is a "person" for purposes of securing habeas corpus relief. Further, New York has expressly granted personhood to certain nonhuman animals by allowing "domestic or pet" animals to be trust beneficiaries pursuant to Estates, Powers and Trusts Law 7-8.1.

13. The Court of Appeals should determine whether, and to what extent, the Appellate Division, Third Department erred as a matter of law.

14. The Court of Appeals should determine whether, and to what extent, the Appellate Division, Third Department erred as a matter of fact.

15. As this appeal raises novel and complex issues of law that are of state, national, and international importance and that have not been reviewed by the Court of Appeals; as the Appellate Division, Third Department made substantial errors of law and fact in rendering its Opinion that ought to be reviewed by the Court of Appeals; and as the Opinion directly contradicts opinions of the Court of Appeals, the NhRP's Motion for Leave to Appeal should be granted.

WHEREFORE, I respectfully pray that the Court grant the NhRP's Motion for Leave to Appeal to the Court of Appeals and the relief prayed for in the annexed proposed order.

Dated: February 23, 2015

Respectfully submitted:

Elizabeth Stein

Elizabeth Stein, Esq.
Attorney for Appellant
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

Sworn to before me this:

23rd day of February, 2015

Victoria DeGennaro

Notary Public

VICTORIA DeGENNARO
Notary Public, State Of New York
No. 01DE6087047
Qualified In Nassau County
Commission Expires February 10, 2019

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Index No.: 518336

Appellant,

v.

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents.

STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

Appellant, Nonhuman Rights Project, Inc. ("NhRP"), by its attorneys Elizabeth Stein, Esq. and Steven M. Wise, Esq., (subject to admission *pro hac vice*), respectfully submits this Statement in Support of Motion for Leave to Appeal to the Court of Appeals.

PROCEDURAL HISTORY

1. On December 2, 2013, the NhRP filed an application for an order to show cause and verified petition for a common law writ of habeas corpus (Index No. 02051) pursuant to New York Civil Practice Law and Rules ("CPLR") Article

70 in the New York State Supreme Court, Fulton County, on behalf of Tommy, a chimpanzee detained in the State of New York. As the NhRP was not demanding production of Tommy, it asked the court to "order the respondent to show cause why the person detained should not be released" pursuant to CPLR 7003(a). R. 32-467.

2. An ex-parte hearing was held on such date before the Honorable Joseph M. Sise, Justice of the Supreme Court, at which time the court denied the NhRP's petition, stating: "You make a very strong argument. However, I do not agree with the argument only insofar as Article 70 applies to chimpanzees." R. 29 ll. 19-21. On December 18, 2013, the Fulton County Supreme Court entered an Order in the office of the County Clerk incorporating the transcript of the hearing by reference as the court's order. A true and correct copy of the Order is attached hereto as **Exhibit 1**.

3. On January 9, 2014, the NhRP filed a timely Notice of Appeal with the Clerk of the Supreme Court, Fulton County and served the Respondents on the same date.

4. On March 24, 2014, the NhRP served Respondents with a Brief and Record on Appeal (Index No. 518336) and filed these documents with the Clerk of the New York State Supreme Court Appellate Division, Third Judicial Department ("Appellate Division, Third Department") on the same date. Counsel for

Respondents submitted a letter to the court stating that they would not be submitting a reply brief.

5. On July 9, 2014, the Appellate Division, Third Department granted the NhRP's motion for a preliminary injunction to restrain Respondents from removing Tommy from the State of New York during the pendency of the proceedings or further order of the court.

6. Oral argument was heard on October 8, 2014 in the Appellate Division, Third Department. The court affirmed the ruling of the lower court denying the petition. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 NY Slip Op 08531, 2014 N.Y. App. Div. LEXIS 8451, *2-4 (3rd Dept. Dec. 4, 2014) ("Opinion"). Respondents did not serve the NhRP with the order of the Appellate Division, Third Department. A true and correct copy of the Opinion is attached hereto as **Exhibit 2**.

7. On December 16, 2014, the NhRP served Respondents by regular mail with a Motion for Leave to Appeal to the Court of Appeals in the Appellate Division, Third Department and filed the motion with the Clerk of the Court on the same date. Respondents filed no opposition.

8. On January 30, 2015, the Appellate Division, Third Department entered a Decision and Order on Motion denying the NhRP's motion for leave to appeal.

Respondents never served the NhRP with the order. A true and correct copy of the Order is attached hereto as **Exhibit 3**.

9. This Motion for Leave to Appeal to the Court of Appeals ("Motion for Leave to Appeal") is filed fewer than thirty days from the date of the written notice of entry of the appellate court's order and therefore is timely filed pursuant to CPLR 5513(b).

JURISDICTIONAL STATEMENT

10. This Court has jurisdiction over the NhRP's Motion for Leave to Appeal pursuant to CPLR 5602(a)(1)(i), which provides that permission by the Court of Appeals for leave to appeal may be taken "in an action originating in the supreme court . . . from an order of the appellate division which finally determines the action and which is not appealable as of right." As noted above, the action giving rise to this appeal was commenced in the Supreme Court, Fulton County. The Appellate Division, Third Department finally determined the action by affirming the lower court's denial of the NhRP's application for an order to show cause and verified petition for a writ of habeas corpus. *See* CPLR 5611 ("If the appellate division disposes of all issues in the action its order shall be considered a final one.").

QUESTIONS PRESENTED

11. The NhRP seeks this Court to review the following legal issues that it asked the lower courts to address: (a) Does the word "person" in CPLR Article 70, which is undefined in the statute, refer to its meaning under the New York common law of habeas corpus?; (b) Is a chimpanzee, who is a member of a species that possess the capacities for autonomy and self-determination, a "person" under the New York common law of habeas corpus?; (c) Is a chimpanzee, who is a member of a species that possess the capacities for autonomy and self-determination, a "person" within the meaning of CPLR Article 70?; and (d) Is Tommy, a chimpanzee who is imprisoned alone in a cage in a warehouse, entitled to have a common law writ of habeas corpus issued on his behalf to determine the legality of his restraint? R. 468-557.

REASONS FOR GRANTING THE NHRP'S MOTION FOR LEAVE TO APPEAL[1]

12. In determining whether to grant leave to appeal, the Court of Appeals looks to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. The Appellate Division, Third Department explicitly recognized the novelty of the issues in the case at bar when it wrote "This appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." *Opinion* at *2.

[1] The reasons why this Court should grant the NhRP's Motion for Leave to Appeal are discussed in detail in the accompanying Memorandum of Law.

13. This Court should grant the NhRP's Motion for Leave to Appeal as it raises the following novel, important, and complex legal issues that are of great public importance and interest in New York, throughout the United States, and internationally: (a) Must a common law habeas corpus claimant have the capacity to bear duties or responsibilities in order to vindicate his common law right to bodily liberty?; (b) May an autonomous and self-determining individual be denied the relief of a common law writ of habeas corpus, and thereby be condemned to suffer a lifetime of imprisonment, solely because he is a chimpanzee?; and (c) As a matter of public policy, should a chimpanzee be deemed a "person" for the purposes of demanding a common law writ of habeas corpus? R. 468-557.

14. This Court should grant the NhRP's Motion for Leave to Appeal because this is the first case in which a petition for a common law writ of habeas corpus has been filed on behalf of a nonhuman animal in the State of New York or any other common law jurisdiction.

15. This Court should grant the NhRP's Motion for Leave to Appeal because it raises complicated questions of law and fact. The question of whether a chimpanzee should be granted legal personhood involves inquiry not only into the legal issue of personhood generally but also into the uncontroverted evidence offered by the NhRP establishing that chimpanzees possess those capacities for autonomy and self-determination, among others, sufficient for legal personhood for

purposes of demanding a common law writ of habeas corpus. R. 202-457.

16. This Court should grant the NhRP's Motion for Leave to Appeal because the Appellate Division, Third Department's Opinion directly conflicts with a decision of the Court of Appeals. *See* 22 NYCRR 500.22(b)(4). Specifically, the court ignored the multiple teachings of the Court of Appeals in the leading personhood case of *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972), in which this Court established that personhood is a public policy determination and "not a question of biological or 'natural' correspondence[,]" when it erroneously ruled that a "person" must be capable of bearing duties or responsibilities to have a legal right to a common law writ of habeas corpus.

17. This Court should grant the NhRP's Motion for Leave to Appeal because the Appellate Division, Third Department committed several substantial errors of law. First, the court erred as a matter of law in its statement that "animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." *Opinion* at *3. Specifically, no federal or state court has ever been asked to determine whether a nonhuman animal should be deemed a "person" for the purpose of securing habeas corpus relief and none of the cases cited by the court support its proposition. Further, the New York State legislature has already granted statutory personhood to those nonhuman animals who may be beneficiaries

of a trust established pursuant to Estates, Powers and Trusts Law ("EPTL") 7-8.1, as is Tommy. Second, the cases cited by the Appellate Division, Third Department do not support its statement that "habeas corpus has never been provided to any nonhuman entity" (*Opinion* at *4), insofar as these cases only deal with nonhuman entities that could not be detained against their will, such as corporations. Third, the Appellate Division, Third Department's statement that an individual must be able to bear duties or responsibilities to be characterized as a "person" for the purpose of demanding a common law writ of habeas corpus contradicts the prior rulings of this Court (see paragraph 16 above). Further, the court relied on inapposite cases in support of its proposition, cited law review articles that endorse the argument of a tiny minority of philosophers and overlooked the legal effect of EPTL 7-8.1 on the issue of personhood. This left the Opinion as the *first in Anglo-American history* in which an inability to bear duties or responsibilities constituted the sole ground for denying the fundamental common law right to bodily liberty to an individual - except in the interest of the individual's own protection - much less an entity who is autonomous and able to self-determine, much less an entity who is merely seeking the relief of a common law writ of habeas corpus.

18. This Court should also grant the NhRP's Motion for Leave to Appeal because the Appellate Division, Third Department committed a factual error when it stated that a chimpanzee is unable to bear duties or responsibilities and is

therefore precluded from possessing the fundamental immunity right to bodily liberty protected by the common law of habeas corpus. As no facts in the uncontroverted record support this statement, the Court of Appeals should correct this error on appeal.

CONCLUSION

19. As this appeal raises novel legal issues, as the novel legal issues it raises are of great public importance and interest within New York and throughout the United States and internationally, as the Appellate Division, Third Department's opinion contradicts opinions of this Court, as the NhRP raises numerous complex legal arguments establishing that the Appellate Division, Third Department made substantial legal errors that ought to be reviewed by the Court, and as the Appellate Division, Third Department's statement that a chimpanzee is not able to bear duties or responsibilities is unsupported by the record, this Court should grant the NhRP's Motion for Leave to Appeal.

Dated: February 23, 2015

By: _____

Elizabeth Stein, Esq.
Attorney for Appellant
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

_____

Steven M. Wise, Esq.

Subject to *pro hac vice* admission
Attorney for Appellant
5195 NW 112th Terrace
Coral Springs, Florida 33076
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EXHIBIT 1

COPY

SUPREME COURT STATE OF NEW YORK
COUNTY OF FULTON

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC. on behalf of TOMMY,

Petitioners,

-against-

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY and CIRCLE L TRAILER SALES, INC.,

Respondents.

ORDER
Index No. 02051

Applications for an Order To Show Cause and Writ of Habeas Corpus having been made to this Court on December 2, 2013, and this Court having considered same upon the oral arguments of petitioner's counsel in support thereof on such date, it is hereby

ORDERED, that the transcript of such arguments before the Court, a copy of which is appended hereto and incorporated herein by reference, constitutes the Order of this Court thereon.

Signed this 17th **day of December 2013 in Chambers at Fonda, New York.**

ENTER:

HON. JOSEPH M. SISE
JUSTICE SUPREME COURT

FILED
FULTON COUNTY CLERK
2013 DEC 18 AM 9:22
RECEIVED

EXHIBIT 2

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 4, 2014 518336

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NONHUMAN RIGHTS PROJECT, INC., on Behalf of TOMMY,
Appellant,

v

OPINION AND ORDER

PATRICK C. LAVERY, Individually and as an Officer of Circle L Trailer Sales, Inc., et al.,
Respondents.

Calendar Date: October 8, 2014

Before: Peters, P.J., Lahtinen, Garry, Rose and Lynch, JJ.

Elizabeth Stein, New Hyde Park, and Steven M. Wise, admitted pro hac vice, Coral Springs, Florida, for appellant.

Peters, P.J.

Appeal from a judgment of the Supreme Court (J. Sise, J.), entered December 18, 2013 in Fulton County, which denied petitioner's application for an order to show cause to commence a CPLR article 70 proceeding.

The subject of this litigation is a chimpanzee, known as Tommy, that is presently being kept by respondents on their property in the City of Gloversville, Fulton County. On behalf of Tommy, petitioner sought an order to show cause to commence a habeas corpus proceeding pursuant to CPLR article 70 on the ground that Tommy was being unlawfully detained by respondents.

In support, petitioner submitted the affidavits of several experts in an effort to establish that, in general, chimpanzees have attributes sufficient to consider them "persons" for the purposes of their interest in personal autonomy and freedom from unlawful detention. Collectively, these submissions maintain that chimpanzees exhibit highly complex cognitive functions - such as autonomy, self-awareness and self-determination, among others - similar to those possessed by human beings. Following an ex parte hearing, Supreme Court found that the term "person" under CPLR article 70 did not include chimpanzees and issued a judgment refusing to sign an order to show cause. Petitioner appeals.[1] [2]

This appeal presents the novel question of whether a chimpanzee is a "person" entitled to the rights and protections afforded by the writ of habeas corpus. Notably, we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare. In fact, petitioner's counsel stated at oral argument that it does not allege that respondents are in violation of any state or federal statutes respecting the domestic possession of wild animals (see e.g. ECL 11-0512). According to petitioner, while respondents are in compliance with state and federal statutes, the statutes themselves are inappropriate. Yet, rather than challenging any such statutes, petitioner requests that this Court enlarge the common-law definition of "person" in order to afford legal rights to an animal. We decline to do so, and conclude that a chimpanzee is not a "person" entitled to the

---

[1] As Supreme Court's judgment finally determined the matter by refusing to issue an order to show cause to commence a habeas corpus proceeding, it is appealable as of right (see CPLR 7011; see generally People ex rel. Seals v New York State Dept. of Correctional Servs., 32 AD3d 1262, 1263 [2006]; People ex rel. Tatra v McNeill, 19 AD2d 845, 846 [1963]).

[2] During the pendency of this appeal, this Court granted petitioner's motion for a preliminary injunction enjoining respondents from removing Tommy to Florida (2014 NY Slip Op 77524[U] [2014]).

rights and protections afforded by the writ of habeas corpus.

The common law writ of habeas corpus, as codified by CPLR article 70, provides a summary procedure by which a "person" who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention (CPLR 7002 [a]). The statute does not purport to define the term "person," and for good reason. The "Legislature did not intend to change the instances in which the writ was available," which has been determined by "the slow process of decisional accretion" (People ex rel. Keitt v McMann, 18 NY2d 257, 263 [1966]) [internal quotation marks and citation omitted]). Thus, we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.

Not surprisingly, animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law (see e.g. Lewis v Burger King, 344 Fed Appx 470, 472 [10th Cir 2009], cert denied 558 US 1125 [2010]; Cetacean Community v Bush, 386 F3d 1169, 1178 [9th Cir 2004]; Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v Sea World Parks & Entertainment, Inc., 842 F Supp 2d 1259, 1263 [SD Cal 2012]; Citizens to End Animal Suffering & Exploitation, Inc. v New England Aquarium, 836 F Supp 45, 49-50 [D Mass 1993]). Petitioner does not cite any precedent - and there appears to be none - in state law, or under English common law, that an animal could be considered a "person" for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity (see e.g. United States v Mett, 65 F3d 1531, 1534 [9th Cir 1995], cert denied 519 US 870 [1996]; Waste Management of Wisconsin, Inc. v Fokakis, 614 F2d 138, 139-140 [7th Cir 1980], cert denied 449 US 1060 [1980]; Sisquoc Ranch Co. v Roth, 153 F2d 437, 441 [9th Cir 1946]; Graham v State of New York, 25 AD2d 693, 693 [1966]).

The lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its "great flexibility and vague scope" (People ex rel. Keitt v McMann, 18

NY2d at 263) [internal quotation marks and citation omitted]). While petitioner proffers various justifications for affording chimpanzees, such as Tommy, the liberty rights protected by such writ, the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (see Richard L. Cupp Jr., Children, Chimps, and Rights: Arguments From "Marginal" Cases, 45 Ariz St LJ 1, 12-14 [2013]; Richard L. Cupp Jr., Moving Beyond Animal Rights: A Legal/Contractualist Critique, 46 San Diego L Rev 27, 69-70 [2009]; see also Matter of Gault, 387 US 1, 20-21 [1967]; United States v Barona, 56 F3d 1087, 1093-1094 [9th Cir 1995], cert denied 516 US 1092 [1996]). Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights" (Richard L. Cupp Jr., Children, Chimps, and Rights: Arguments From "Marginal" Cases, 45 Ariz St LJ 1, 13 [2013]; see Richard L. Cupp Jr., Moving Beyond Animal Rights: A Legal/Contractualist Critique, 46 San Diego L Rev 27, 69 [2009]).

Further, although the dispositive inquiry is whether chimpanzees are entitled to the right to be free from bodily restraint such that they may be deemed "persons" subject to the benefits of habeas corpus, legal personhood has consistently been defined in terms of both rights and duties. Black's Law Dictionary defines the term "person" as "[a] human being" or, as relevant here, "[a]n entity (such as a corporation) that is recognized by law as having the rights and duties [of] a human being" (emphasis added). It then goes on to provide:

> "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties.. . . Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the

> exclusive point of view from which personality receives legal recognition" (Black's Law Dictionary [7th ed 1999], citing John Salmond, Jurisprudence 318 [10th ed 1947]; see John Chipman Gray, The Nature and Sources of the Law [2d ed], ch II, at 27 [stating that the legal meaning of a "person" is "a subject of legal rights and duties"]).

Case law has always recognized the correlative rights and duties that attach to legal personhood (see e.g. Smith v ConAgra Foods, Inc., 431 SW3d 200, 203-204 [Ark 2013], citing Calaway v Practice Mgmt. Servs., Inc., 2010 Ark 432, *4 [2010] [defining a "person" as "a human being or an entity that is recognized by law as having the rights and duties of a human being"]; Wartelle v Womens' & Children's Hosp., 704 So 2d 778, 780 [La 1997] [finding that the classification of a being or entity as a "person" is made "solely for the purpose of facilitating determinations about the attachment of legal rights and duties"]; Amadio v Levin, 509 Pa 199, 225, 501 A2d 1085, 1098 [1985, Zappala, J., concurring] [noting that "'[p]ersonhood' as a legal concept arises not from the humanity of the subject but from the ascription of rights and duties to the subject"]).[3] Associations of human beings, such as corporations and municipal entities, may be considered legal persons, because they too bear legal duties in exchange for their legal rights (see e.g. Pembina Consol. Silver Mining & Milling Co. v Pennsylvania, 125 US 181, 189 [1888]; Western Sur. Co. v ADCO Credit, Inc., 251 P3d 714, 716 [Nev 2011]; State v A.M.R., 147 Wash 2d 91, 94, 51 P3d 790, 791 [2002]; State v Zain, 207 W Va 54, 61-65, 528 SE2d 748, 755-759 [1999], cert denied 529 US 1042 [2000]).

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[3] To be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights - such as the fundamental right to liberty protected by the writ of habeas corpus - that have been afforded to human beings.

Our rejection of a rights paradigm for animals does not, however, leave them defenseless. The Legislature has extended significant protections to animals, subject to criminal penalties, such as prohibiting the torture or unjustifiable killing of animals (see Agriculture and Markets Law § 353), the abandonment of animals in a public place (see Agriculture and Markets Law § 355), the transportation of animals in cruel or inhuman manners (see Agriculture and Markets Law § 359 [1]) or by railroad without periodically allowing them out for rest and sustenance (see Agriculture and Markets Law § 359 [2]), and the impounding of animals and then failing to provide them sustenance (see Agriculture and Markets Law § 356). Notably, and although subject to certain express exceptions, New Yorkers may not possess primates as pets (see ECL 11-0103 [6] [e] [1]; 11-0512). Thus, while petitioner has failed to establish that common-law relief in the nature of habeas corpus is appropriate here, it is fully able to importune the Legislature to extend further legal protections to chimpanzees.

Lahtinen, Garry, Rose and Lynch, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

Robert D. Mayberger
Clerk of the Court

EXHIBIT 3

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 30, 2015 518336

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NONHUMAN RIGHTS PROJECT, INC., on Behalf of TOMMY,

Appellant,

v

DECISION AND ORDER ON MOTION

PATRICK C. LAVERY, Individually and as an Officer of Circle L Trailer Sales, Inc., et al.,

Respondents.

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion, and no papers having been filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Peters, P.J., Lahtinen, Garry, Rose and Lynch, JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus,

Index No. 518336

THE PEOPLE OF THE STATE OF NEW YORK ex rel. THE NONHUMAN RIGHTS PROJECT, INC., on behalf of TOMMY,

Appellant,

v.

PATRICK C. LAVERY, individually and as an officer of Circle L Trailer Sales, Inc., DIANE LAVERY, and CIRCLE L TRAILER SALES, INC.,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

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I. PRELIMINARY STATEMENT

The Appellant Nonhuman Rights Project, Inc. ("NhRP") submits this Memorandum of Law in support of its Motion for Leave to Appeal to the Court of Appeals pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a) ("Motion for Leave to Appeal") from the State of New York Supreme Court Appellate Division, Third Judicial Department's ("Appellate Division, Third Department") Opinion and Order in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 2014 NY Slip Op 08531, 2014 N.Y. App. Div. LEXIS 8451 (3rd Dept. Dec. 4, 2014) ("Opinion").[1] That Opinion affirmed the Supreme Court, Fulton County's refusal to issue a common law writ of habeas corpus and order to show cause on behalf of Tommy, a chimpanzee detained in New York.

This Court should grant the NhRP's Motion for Leave to Appeal as it raises the following novel, important, and complex legal issues that are of great public significance and interest in New York, throughout the United States, and internationally:

(1) Must a common law habeas corpus claimant have the capacity to bear duties or responsibilities in order to vindicate his common law right to bodily liberty?

(2) May an autonomous and self-determining individual be denied the relief of a common law writ of habeas corpus, and thereby be condemned to suffer a lifetime of arbitrary imprisonment, solely because he is a chimpanzee?

[1]This Memorandum of Law incorporates by reference, and fully adopts, all the arguments, evidence, exhibits, memoranda, testimony and authorities previously filed in this case.

(3) As a matter of public policy, should a chimpanzee be deemed a "person" for the purposes of demanding a common law writ of habeas corpus?

The Court should also grant the Motion for Leave to Appeal because the Opinion contains substantial legal errors that conflict with the decisions of this Court and rests upon unsupported factual assumptions.

II. STANDARD OF REVIEW

In determining whether to grant leave to appeal, the Court looks to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. *See In re Shannon B.*, 70 N.Y.2d 458, 462 (1987); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949); *see also* 22 NYCRR § 500.22; COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011). It is beyond cavil that this appeal raises novel issues of statewide, national and even international importance.

In addition to being the subject of hundreds of ongoing legal commentaries and national and international news articles and reports, this case is already being cited by the courts in other states. By way of illustration, the Supreme Court of Oregon recently cited the present case and wrote:

> As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]

State v. Fessenden, 355 Ore. 759, 769-70 (2014).

Moreover, leave to appeal to this Court is particularly warranted where, as here, a decision of the Appellate Division conflicts with a decision of this Court, *e.g.*, 22 NYCRR § 500.22(b)(4); *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996). As discussed in more detail below, the Court should grant the NhRP's Motion for Leave to Appeal so that it may determine whether the court below erred as a matter of law.

III. THE NOVEL AND IMPORTANT QUESTIONS REQUIRE CONSIDERATION BY THE COURT OF APPEALS.

The question of who is a "person" is the most important individual issue that can come before a New York court. Personhood determines who counts, who lives, who dies, who is enslaved, and who is free. The Appellate Division, Third Department explicitly recognized that the issues raised in this case are novel and implicitly recognized their great importance and legal significance statewide, nationally and internationally when it wrote: "This appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." *Opinion* at *2.

The importance of this unresolved issue of State common law cannot be overstated. New York has always vigorously embraced the common law writ of habeas corpus, *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890), *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875), and there is no question any court would release the chimpanzee, Tommy, if he were a human being, for his detention grossly interferes with his exercise of his autonomy, self-determination, and bodily liberty. As the NhRP argued to the Appellate Division, Third

Department, the term "person" has never been a synonym for "human being." Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. On this ground alone, the Court should grant the NhRP's Motion for Leave to Appeal. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) ("[T]here being novel and significant issues tendered for review, we grant the application for leave [to appeal].").

While such novel and significant questions raised by this appeal alone merit this Court's review, the Motion for Leave to Appeal should also be granted because the case raises complicated questions of law and fact. *See, e.g.*, *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014) (leave to appeal was granted in a "scientifically complicated" case); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249-50 (1999) (leave to appeal granted in case involving "complicated legal questions associated with electronic bulletin board messages" for defamation purposes); *Matter of George L.*, 85 N.Y.2d 295, 298, 302 (1995) (granting leave to appeal in case presenting a "difficult question [regarding] a mentally ill individual"); *Schulz v. State*, 81 N.Y.2d 336, 344 (1993); *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986); *Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923). The question of whether a chimpanzee is entitled to legal personhood is complicated as it involves inquiry not only into the legal issue of personhood generally, but into the complex and detailed scientific evidence offered in support of the NhRP's assertion that chimpanzees possess sufficient qualities for legal personhood. Nine prominent working primatologists from around the world have submitted expert

affidavits demonstrating that chimpanzees possess the autonomy and self-determination that allows them to choose how they will live their own emotionally, socially, and intellectually rich lives. These scientific affidavits demonstrate that chimpanzees possess those complex cognitive abilities, including autonomy and self-determination, that the NhRP argues are sufficient for personhood for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both.

Such complex issues regarding personhood and the scope of the common law writ of habeas corpus merit this Court's immediate attention. *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

IV. THIS COURT SHOULD DETERMINE WHETHER THE APPELLATE DIVISION, THIRD DEPARTMENT ERRED AS A MATTER OF LAW AND WHETHER ITS OPINION IS IN CONFLICT WITH DECISIONS OF THIS COURT.

In addition to presenting novel and complex questions of law and issues of state, national, and international importance, the Appellate Division, Third Department should be reversed by the Court of Appeals because it erred as a matter of law. *Shindler v. Lamb*, 9 N.Y.2d 621 (1961); *Hamlin v. Hamlin*, 224 A.D. 168, 172 (4th Dept. 1928) ("in order that the law applicable may be definitely settled, and the matter disposed of accordingly, leave to appeal to the Court of Appeals is granted").

A. The Appellate Division, Third Department applied an incorrect standard of law.

In its Opinion, the Appellate Division, Third Department stated that "animals have never been considered persons for the purpose of habeas corpus relief, nor have they been explicitly considered as persons or entities for the purpose of state or federal law." *Opinion* at *3. However, *no federal or state court has ever rejected* the claim of personhood on behalf of an autonomous and self-determining nonhuman animal for the purpose of seeking common law habeas corpus relief, *as no such claim has ever been presented.*

None of the cases the Opinion cited support this proposition. The cases are all "standing" cases that were either dismissed pursuant to Article III of the United States Constitution or because the specific definition of "person" provided by the enabling statute did not include nonhuman animals. Not one case involved common law claims, as in Tommy's case; all involved statutory or constitutional interpretation. In *Lewis v. Burger King*, 344 Fed. Appx. 470 (10th Cir. 2009), *cert. den.*, 558 US 1125 (2010), the *pro se* plaintiff, untrained in law, claimed her service dog had been given Article III standing to sue under the Americans with Disabilities Act of 1990, a claim the federal court properly rejected. In *Cetacean Community v. Bush*, 386 F. 3d 1169 (9th Cir. 2004), the federal court held that all the cetaceans of the world had not been given Article III standing to sue under the Federal Endangered Species Act and were not "persons" within that statute's definition of "person." In *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment*, 842 F. Supp.2d 1259 (S.D. Cal.

2012), the federal district court held that the legislative history of the Thirteenth Amendment to the United States Constitution (which, unlike the Fourteenth Amendment, does not contain the word "person") makes clear that it was only intended to apply to human beings. Finally, in *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993), the federal district court dismissed the case on the ground of Article III standing, stating that a dolphin was not a "person" within the meaning of Section 702 of Title 5 of the Federal Administrative Procedures Act.

The courts in the above cases however agreed that a nonhuman animal *could be* a "person" if Congress so intended, but concluded that, with respect to the statutes or constitutional provisions involved in these cases, Congress had not so intended. *Lewis*, 344 Fed. Appx. at 472; *Cetacean Community*, 386 F.3d at 1175-76; *Tilikum*, 842 F. Supp.2d at 1262, n.1; *Citizens to End Animal Suffering & Exploitation, In.*, 842 F. Supp.2d at 49.

The NhRP, which was an *amicus curiae* in the *Tilikum* case *supra*, and whose counsel was plaintiff's counsel in *Citizens to End Animal Suffering & Exploitation, Inc.*, *supra*, did not bring Tommy's case in a federal court subject to Article III.[2] Nor, importantly, did the NhRP base its claims on federal or state statutes or on constitutional provisions. The NhRP instead sought a New York writ of habeas corpus, which substantively is *entirely* a matter of common law. *See Opinion* at *3 ("we must look to the common law surrounding the historic writ of

[2] NhRP filed an *amicus* brief in the *Tilikum* case in which it argued that the capacity of the orcas to sue should be determined by the law of their domicile.

habeas corpus to ascertain the breadth of the writ's reach."); CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus").

Similarly, none of the three cited cases support the Appellate Division, Third Department's statement that "habeas corpus has never been provided to any nonhuman entity" (*Opinion* at *4), if what that court meant was that no entity that could *possibly be detained* against its will has ever been denied a writ of habeas corpus. In *United States v. Mett*, 65 F. 3d 1531, 1534 (9th Cir. 1995), *cert. den.*, 519 US 870 (1996), the federal court *permitted* a corporation to utilize a writ of coram nobis. In *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F. 2d 138, 140 (7th Cir. 1980), *cert. den.*, 449 US 1060 (1980), the federal court refused to grant habeas corpus to a corporation solely "because a corporation's entity status precludes it from being incarcerated or ever being held in custody." In *Sisquoc Ranch Co. v. Roth*, 153 F. 2d 437, 439 (9th Cir. 1946), the federal court held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek a writ of habeas corpus on its own behalf. Finally, in *Graham v. State of New York*, 25 A.D.2d 693 (3rd Dept. 1966), the court stated that the purpose of a writ of habeas corpus is to free prisoners from detention, not to secure the return of *inanimate* personal property, which was the relief demanded.[3] In sum, no nonhuman who could possibly be imprisoned has ever

[3] The *Graham* court relied on *People ex rel. Tatra v. McNeill*, 19 A.D.2d 845, 846 (2d Dept. 1963), which held that habeas corpus could not be used to secure the return of an inmate's funds. There was no argument that the money was a legal person in *McNeill*, whereas here, the NhRP has provided ample legal and scientific evidence that a chimpanzee has sufficient qualities for legal personhood.

demanded the issuance of a writ of habeas corpus, whether common law or statutory in the United States.

The reason there is no precedent for treating nonhuman animals as "persons" for the purpose of securing habeas corpus relief then is *not* because the claim *has been rejected* by the courts. It is because no nonhuman entity capable *of being imprisoned* (unlike a corporation), certainly not a nonhuman animal, and most certainly not an autonomous self-determining being such as a chimpanzee, has ever *demanded* a writ of habeas corpus. This is the *first* such demand ever made by a nonhuman animal in a common law jurisdiction. But the novelty of his claim is no reason to deny Tommy habeas corpus relief. *See, e.g., United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon v. People*, 20 N.Y. 562 (1860).

So far as Tommy's personhood for the purpose of habeas corpus common law is concerned, the judicial page is blank.

B. <u>When the New York legislature enacted Estates, Powers and Trusts Law ("EPTL") 7-8.1, it granted personhood to the nonhuman animals within its scope.</u>

Contrary to the Appellate Division, Third Department's statement that nonhuman animals have never "been explicitly considered as persons or entities for

the purpose of state or federal law," New York is among the few states that *expressly allow* nonhuman animals to be trust beneficiaries. Pursuant to EPTL 7-8.1, every "domestic or pet" animal beneficiary is a "person" for the purposes of this statute, as only "persons" may be trust beneficiaries.[4] *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries may be natural or artificial persons, but they must be persons . . . In general, any person who is capable in law of taking an interest in property, may, to the extent of his legal capacity, and no further, become entitled to the benefits of the trust."), *rev'd on other grounds*, 99 N.Y. 451 (1885). *See In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998) (court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout).

In addition to making nonhuman animals trust beneficiaries, EPTL 7-8.1(a) provides for an "enforcer" for a nonhuman animal beneficiary who "performs *the same function as a guardian ad litem for an incapacitated person* [.]" *In re Fouts*, 677 N.Y.S.2d at 700 (emphasis added). As the personhood of the nonhuman animal beneficiaries is not conditioned upon their ability to bear duties or responsibilities, this statute undermines the Appellate Division, Third Department's assertion that legal personhood in New York depends on the ability

[4] The Sponsor's Memorandum attached to the bill that became EPTL 7-6.1 (and now EPTL 7-8.1) stated the statute's purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. The Senate Memorandum made clear the statute allowed "such animal to be made the beneficiary of a trust." Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159.

to bear duties or responsibilities and that nonhuman animals may therefore not be legal "persons" for any purpose.

C. The Appellate Division, Third Department's statement that an individual must be able to bear duties or responsibilities to be characterized as a "person" for the purposes of a common law writ of habeas corpus contradicted prior decisions of this Court.

1. Personhood is a public policy decision.

This Court should grant the NhRP's Motion because the Appellate Division, Third Department's Opinion conflicts with a decision of this Court, *e.g.*, 22 NYCRR § 500.22(b)(4). Specifically, the Appellate Division, Third Department ignored the teachings of the Court set forth in the leading New York personhood case of *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194 (1972) by abdicating its duty to determine, as a matter of public policy, whether Tommy is a "person" for the purposes of a common law writ of habeas corpus.

The Appellate Division, Third Department erred in requiring that a "person" for the purpose of securing a common law writ of habeas corpus be capable of bearing duties or responsibilities; in practical terms, that the claimant be a human being. *Opinion* at *4-6. In arriving at this conclusion, the Appellate Division, Third Department relied on inapposite cases, cited law review articles that endorse a minority view shared by only a few philosophers, and ignored not just EPTL 7-8.1, *supra*, but multiple teachings of the Court of Appeals set forth in the *Byrn* case establishing that personhood is a matter of public policy. In its *Opinion* at *4, the Appellate Division, Third Department wrote:

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity of rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system. (see Richard L. Cupp, Jr., "Children, Chimps, and Rights: Arguments from 'Marginal' Cases,'" 45 *Ariz. St. LJ* 1, 12-14 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69-70 (2009); *see also Matter of Gault*, 387 U.S. 1, 20-21 (1967); *United States v. Barona*, 56 F.3d 1087, 1093-1094 (9th Cir. 1995), *cert. denied* 516 US 1092 (1996). Under this view, society extends rights in exchange for an express or implied agreement of its members to submit to social responsibilities. In other words, "Rights [are] connected to moral agency and the ability to accept societal responsibility for [those] rights" (Richard L. Cupp Jr., "Children, Chimps, and Rights: Arguments from 'Marginal Cases,'" 45 *Ariz. St. LJ* 1, 13 (2013); Richard L. Cupp, Jr., "Moving Beyond Animal Rights: A Legal Contractualist Critique," 46 *San Diego L. Rev.* 27, 69 (2009)

None of the citations support the text. The *Gault* court merely stated that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. at 20-21. There is no relevance to the case at bar. In *United States v. Barona*, 56 F.3d at 1093-94, the Ninth Circuit merely noted that resident aliens of the United States

> must first show that they are among the class of persons that the Fourth Amendment was meant to protect . . . . Unlike the Due Process Clause of the Fifth Amendment, which protects all "persons," the Fourth Amendment protects only "the People of the United States" [citations omitted] which "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community" [citation omitted]. The Fourth Amendment therefore protects a much narrower class of individuals than the Fifth Amendment. Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract" [citation omitted], "the

> scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." [citations omitted] . . . "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution." [citation omitted]. The term "People of the United States" includes "American citizens at home and abroad" and lawful resident aliens within the borders of the United States "who are victims of actions taken *in the United States by American officials* [citation omitted] (emphasis in original). It is yet to be decided, however, whether a resident alien has undertaken sufficient obligations of citizenship or has "otherwise developed sufficient connection with this country" [citation omitted] to be considered one of the "People of the United States" even when he or she steps outside the territorial borders of the United States.

That case is not relevant to the case at bar because it deals with an interpretation of the United States Constitution, rather than New York common law, and concerns the interpretation of the constitutional phrase "the People of the United States," not the New York common law meaning of the term "person," which is the issue here. Finally, the two law review articles cited in the Opinion merely set out Professor Cupp's minority personal preference for the philosophical theory of contractualism, in support of which he cites no cases.

Moreover, the writ of habeas corpus has *always* been applied to aliens and others who may not be a part of the fictitious "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481, 482 & n.11 (2004), the United States Supreme Court stated that:

> [a]pplication of the habeas statute to persons[5] detained at the base (in Guantanamo) is consistent with the historical reach of the writ of

[5] The Supreme Court noted that, after the September 11, 2001 attack, "the President sent U.S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti

habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, [n.11] *See, e.g., King v. Schiever,* 2 Burr. 765, 97 Eng. Rep. 551 (K.B.1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett v. Stewart*, 20 How. St. Tr. 1, 79–82 (K.B.1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B.1810) (reviewing the habeas petition of a "native of South Africa" allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, *e.g.*, *United States v. Villato*, 2 Dall. 379 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson v. Izard*, 30 F. Cas. 131 (No. 131 (No. 17, 810); (Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

In *Jackson v. Bulloch*, 12 Conn. 38, 42-43 (1837), the Supreme Court of Errors noted that the first section of the Connecticut Bill of Rights declares that "all men, when they form a social contract, are equal in rights . . . seems evidently to be limited to those who are parties to the social compact thus formed. Slaves cannot be said to be parties to that compact, or be represented in it." *Despite being excluded from the social compact*, the petitioner slave was freed pursuant to a writ of habeas corpus.

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citizens who were captured abroad during hostilities between the United States and the Taliban." 542 U.S. at 470-71. This Court may take judicial notice that not only were these petitioners not part of any "social contract," but the United States alleged they desired to destroy whatever social contract may exist. Still they were eligible to seek a writ of habeas corpus.

As the *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K.B. 1810), illustrates, a writ of habeas corpus has long reached individuals from cultures so dramatically different from our own that they cannot be considered a part of our social compact, *see* Anita Jacobson-Widding, "'I lied. I farted, I stole …' dignity and morality in African discourses on personhood," in *The Ethnography of Moralities* 48, 48 (Routledge 1997) (some cultures lack a word for "morality," "self," "mind" or "society"); Suzette Heald, *Manhood and Morality – Sex, violence and ritual in Gisu society* 3 (Routledge 1999) (describing a society in which "the very definition and self-conception [of men] is in terms of a capacity for violence"). Individuals who seek to destroy our social compact, as some Guantanamo inmates are alleged to have done, may also avail themselves of the writ of habeas corpus. Chimpanzees, who have their own cultures as established by the uncontroverted facts in the case at bar, are not part of our social compact, either. They are not voluntarily in our custody, however, and similarly may not be imprisoned for their entire lives without access to a writ of habeas corpus.

The *Byrn* majority stated that "[u]pon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" 31 N.Y.2d at 201 (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"); Hans Kelsen, *General Theory of Law and State* 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972), and Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). The words "duty," "duties," or "responsibility" do not appear anywhere in the *Byrn* majority opinion, which concerned the issue of whether a fetus was a

"person" within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution.[6]

The Appellate Division, Third Department ignored the teaching of *Byrn* that "[w]hether the law should accord legal personality is a *policy question.*" *Id.* at 201 (emphasis added). "It is not true . . . that the legal order necessarily corresponds to the natural order." *Id.* "The point is that it is a *policy determination* whether legal personality should attach and *not a question of biological or 'natural' correspondence.*" *Id.* (emphasis added). *See* Paton, *supra*, at 349-350, *Salmond on Jurisprudence* 305 (12th ed. 1928) ("A legal person is any subject-matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination").

Moreover, as has been made clear in legal actions in sister common law countries, an individual may be a "person" without having the capacity to assume any duties or responsibilities. Thus, an agreement between the indigenous peoples of New Zealand and the Crown, p.10, ¶¶ 2.6, 2.7, and 2.8 recently designated New Zealand's Whanganui River Iwi as a legal "person" that owns its river bed. It has no duties or responsibilities. The Indian Supreme Court designated the Sikh's sacred text as a "legal person," *Shiromani Gurdwara Parbandhak Committee*

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[6] The words "duty," "duties, or "responsibility" do not appear anywhere in the Second Department's *Byrn* opinion either, with the single exception of the court noting that a lower federal court had upheld a restrictive abortion statute and stated that once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the State the duty of safeguarding it. *Byrn v. New York City Health & Hospitals Corp.*, 39 A.D.2d 600 (2d Dept. 1972).

Amritsar v. Som Nath Dass, A.I.R. 2000 S.C. 421, which permits it to own and possess property, citing, among other authorities, those cited in *Byrn, supra*. It has no duties or responsibilities. Several pre-Independence Indian courts designated Punjab mosques as legal "persons," to the same end. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, para, 15 (Lahore High Court, Full Bench). They have no duties or responsibilities. Another pre-Independence Indian court designated a Hindu idol as a "person" with the right to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925). It has no duties or responsibilities.

Esteemed commentators cited both by the *Byrn* majority and the Indian Supreme Court concur. "Legal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." George Whitecross Paton, *A Textbook of Jurisprudence* 393 (3rd ed. 1964). Idols have no duties or responsibilities. Indeed, John Chipman Gray, cited by the *Byrn* Court and this Court, makes clear that a "person" need not even be alive. "There is no difficulty giving legal rights to a *supernatural* being and thus making him or her a legal person." Gray, *supra* Chapter II, 39 (1909) (emphasis added). Such a being has no duties or responsibilities. As Gray explained, there may also be

> *systems of law in which animals have legal rights . . . animals may conceivably be legal persons* . . . when, if ever, this is the case, the wills of human beings must be attributed to the animals. *There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed.*

Id. at 43 (emphasis added).[7]

This left the Opinion as the *first in Anglo-American history* in which an inability to bear duties or responsibilities constituted the sole ground for denying the fundamental common law right to bodily liberty to an individual - except in the interest of the individual's own protection - much less an entity who is autonomous and able to self-determine, much less an entity who is merely seeking the relief of a common law writ of habeas corpus.

2. "Person" has *never* been equated with "human."

In New York, "person" has never been equated with being human, while many humans have not been "persons." A human fetus, which the *Byrn* Court acknowledged, 31 N.Y.2d at 199, "is human," was still not characterized as a Fourteenth Amendment "person." *See also Roe v. Wade*, 410 U.S. 113 (1973). All humans were not "persons" in New York State until the last slave was freed in 1827. Human slaves were not "persons" throughout the entire United States prior to the ratification of the Thirteenth Amendment to the United States Constitution in 1865. *See, e.g., Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they are human beings . . . (are not treated as a person, but (*negotium*), a thing").[8] Women were not "persons" for many purposes until well into the Twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007). Whether fetuses,

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[7] The New York Legislature recognized this when it enacted EPTL 7-8.1, which provided for an "enforcer" to enforce the nonhuman animal beneficiary's right to the trust corpus.

[8] *E.g., Trongett v. Byers*, 5 Cow. 480 (N.Y. Sup. Ct. 1826) (recognizing slaves as property), *Smith v. Hoff*, 1 Cow. 127, 130 (N.Y. 1823) (same); *In re Mickel*, 14 Johns. 324 (N.Y. Sup. Ct. 1817) (same); *Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (same).

slaves, or women could bear duties or responsibilities was entirely irrelevant to their personhood.

3. The Appellate Division, Third Department mistook Tommy's demand for the "immunity-right" of bodily liberty, to which the ability to bear duties or responsibilities is irrelevant, with a "claim-right."

Linking personhood to an ability to bear duties or responsibilities is particularly inappropriate in the context of a common law writ of habeas corpus to enforce the fundamental common law *immunity* right to bodily integrity. The Appellate Division, Third Department's linkage of the two caused it to commit a "category of rights" error by mistaking an "immunity-right" for a "claim-right." *See generally*, Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). The great Yale jurisprudential professor, Wesley N. Hohfeld's, conception of the comparative structure of rights has, for a century, been employed as the overwhelming choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are. Hohfeld began his famous article by noting that "[o]ne of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to 'rights' and 'duties'" and that "the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense." *Id.* at 28, 30.

With the greatest delicacy, Hohfeld gently pointed out, *id.* at 27, that even the distinguished jurisprudential writer, John Chipman Gray, made the same

mistake as did the Appellate Division, Third Department in his *Nature and Sources of the Law*.

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions, 'right' and 'duty.'[9]

The reason is that a claim-right – which the NhRP does *not* demand for Tommy – is comprised of a claim and a duty that correlate one with the other. Steven M. Wise, *Rattling the Cage – Toward Legal Rights for Animals* 56-57 (Perseus Publishing 2000); Steven M. Wise, "Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy," 22 VERMONT L. REV. 807-810 (1998). The most conservative, but hardly the most common, way to identify which entity possesses a claim-right is to require that entity to have the capacity to assert claims within a moral community. Steven M. Wise, *Rattling the Cage*, at 57; Steven M. Wise, "Hardly a Revolution," at 808-810. This is roughly akin to the personhood test the Appellate Division, Third Department applied.

Tommy is *not* seeking a *claim-right*. He is seeking the fundamental *immunity-right* to bodily liberty that is protected by a common law writ of habeas corpus. This immunity-right is what the United States Supreme Court was referring to when it famously stated that:

> [n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and

[9] Gray's error becomes obvious when one recalls that Gray also agreed that both animals and supernatural beings could be "persons,' *See supra* at 10.

> control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . . "The right to one's person may be said to be a right of complete *immunity*: to be let alone."

Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891) (quoting *Cooley on Torts* 29) (emphasis added).

An *immunity*-right correlates *not* with a duty, but with a *disability*, Steven M. Wise, *Rattling the Cage*, at 57-59; Steven M. Wise, "Hardly a Revolution," at 810-815. Other examples of fundamental immunity-rights are the right not to be enslaved guaranteed by the Thirteenth Amendment to the United States Constitution, in which all others are *disabled* from enslaving those covered by that Amendment, and the First Amendment right to free speech, which the government is *disabled* from abridging. One need *not* be able to bear duties or responsibilities to possess these fundamental rights to bodily liberty, freedom from enslavement, and free speech.

The decision of the United States Supreme Court in *Harris v. McRea*, 448 U.S. 297, 316-18, 331 (1980) illustrated the difference between a claim-right and an immunity-right. Eight years previous to *Harris*, the United States Supreme Court in *Roe v. Wade* recognized a woman's immunity right to privacy and against interference by the state with her decision to have an abortion in the earlier stages of her pregnancy. The *Harris* plaintiff claimed she *therefore* had the right to have the state pay for an abortion she was unable to afford. The Supreme Court recognized that the woman's *immunity*-right to an abortion correlated with the state's *disability* to interfere in her decision to have the abortion; it did *not*

correlate with the state's *duty* to fund the abortion. Therefore she had no claim against the state for payment for her abortion.

Tommy has the common law immunity-right to the bodily liberty protected by the common law of habeas corpus. This fundamental immunity-right correlates solely with the Respondents' *disability* to imprison him. The existence or nonexistence of Tommy's ability to bear duties or responsibilities is irrelevant, as it is irrelevant to *every* immunity-right. It is particularly inappropriate to demand that, for Tommy to possess the fundamental immunity right to bodily liberty protected by the common law of habeas corpus, he must possess the ability to bear duties or responsibilities, when this ability has nothing to do with his fundamental immunity-right to bodily liberty. It might make sense, for example, if Tommy was seeking to enforce a common law contractual right. But the ability to bear duties or responsibilities is not even a prerequisite for the claim-right of a "domestic or pet" animal in New York, pursuant to EPTL 7-8.1. Moreover, this statute actually does grant not just Tommy, but every other "domestic or pet" animal in New York, the *claim right* to the money placed in the trust to which that nonhuman animal is a named beneficiary.[10]

[10] That "domestic or pet" animals in New York State are "persons" within the meaning of EPTL 7-8.1 does not necessarily mean they are persons for any other reason, just as Tommy being a "person" for the purpose of the common law writ of habeas corpus would not necessarily mean he is a "person" for any other purpose.

D. The refusal to recognize the personhood of a nonhuman animal who, the uncontroverted evidence demonstrates, is an autonomous and self-determining being, for the purpose of a common law writ of habeas corpus, undermines the supreme common law values of liberty and equality.

Any requirement that an autonomous and self-determining individual must also be able to bear duties or responsibilities to be recognized as a "person" for the purpose of a common law writ of habeas corpus undermines both the fundamental common law values of liberty and of equality. It undermines fundamental liberty because it denies personhood and all legal rights to an individual who uncontrovertibly possesses the autonomy and self-determination that are supremely valued by the common law, even more than human life itself, *Rivers v. Katz*, 67 N.Y. 2d 485, 493 (1986); *In re Storar*, 52 N.Y. 2d 363 (1981), *cert. den.*, 454 U.S. 858 (1981). It undermines fundamental equality both because it endorses the illegitimate end of the permanent enslavement of an uncontrovertibly autonomous and self-determining individual, *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. den.*, 534 U.S. 826 (2001) and also because "[i]t identifies persons by a single trait and then denies them protection across the board," *Romer v. Evans*, 517 U.S. 633 (1996).[11]

[11] In its *Opinion* at *5, n.3, the Appellate Division, Third Department states: "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings." This is a controversial, and a distinctly minority, opinion in the philosophical literature, *see, e.g.*, Daniel A. Dombrowski, *Babies and Beasts – The Argument From Marginal Cases* (University of Illinois Press 1997). It is irrelevant to the case at bar, as Tommy is seeking the protection of an immunity-right guaranteed by the common law writ of habeas corpus, to which no corresponding duty exists, and ignores both the teaching of the Court in *Byrn, supra*, that personhood is an issue of policy, and not of biology, and the Legislature's grant of claim-rights to "pets and domestic" animals in

V. THE APPELLATE DIVISION, THIRD DEPARTMENT'S STATEMENT THAT A CHIMPANZEE IS UNABLE TO BEAR DUTIES OR RESPONSIBILITIES IS UNSUPPORTED AND CONTRADICTED BY THE RECORD.

Lastly, the Court should grant leave to appeal to determine whether a factual error was made by the Appellate Division, Third Department in rendering its decision. Specifically, the NhRP submits that the court's statement that a chimpanzee is not able to bear duties or responsibilities is unsupported by the record. To the contrary, the record reveals uncontroverted statements by one of the NhRP's experts, Dr. William McGrew (R.357-58). Dr. McGrew states:

> Chimpanzees appear to have moral inclinations and some level of moral agency, that is, they behave in ways that, if we saw the same thing in humans, we would interpret as a reflection of moral imperatives and self-consciousness. They ostracize individuals who violate social norms (citation omitted). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same task (citation omitted). When given a chance to pay economic games (e.g. Ultimatum Game), they spontaneously make fair offers when not obliged to do so. (citations omitted).

Because there are no facts in the record that Tommy is indeed unable to bear duties or responsibilities, the Appellate Division, Third Department is incorrect in its assertion that a chimpanzee may not be deemed a "person" for the purpose of a common law writ of habeas corpus for that reason. Factual assumptions that have no support in the record should be corrected by the Court of Appeals on appeal.

EPTL 7-8.1 to the extent of being a trust beneficiary. This proposition should not be introduced into New York common law.

VI. CONCLUSION

As this appeal raises novel legal issues, as the novel legal issues it raises are of great public importance and interest within New York and throughout the United States and internationally, as the Appellate Division, Third Department's opinion contradicts opinions of this Court, as the NhRP raises numerous complex legal arguments establishing that the Appellate Division, Third Department made substantial legal errors that ought to be reviewed by the Court, and as the Appellate Division, Third Department's statement that a chimpanzee is not able to bear duties or responsibilities is unsupported by the record, this Court should grant the NhRP's Motion for Leave to Appeal.

Respectfully Submitted,

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