SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - THIRD DEPARTMENT

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. INTRODUCTION

This Court should grant Appellant Nonhuman Rights Project, Inc.'s ("NhRP") Motion for Leave to Appeal to the Court of Appeals ("Motion for Leave to Appeal"), as the appeal raises novel, important, and complex legal issues that are of great public importance and interest in New York, throughout the United States, and internationally. Among the novel, important and complicated questions of law the Court of Appeals should consider, and to which it has not spoken, are:

(1) Must a common law habeas corpus claimant have the capacity to bear duties and responsibilities in order to protect 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 potentially to suffer a lifetime of imprisonment, solely because he is a chimpanzee said to be incapable of bearing duties and responsibilities?

(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?

Further, the NhRP respectfully submits that this Court's Opinion and Order, *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*") contains substantial legal errors and an unsupported factual statement that ought to be reviewed by the Court of Appeals.

The NhRP submits this Memorandum of Law in support of its Motion for Leave to Appeal pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a) from this Court's Opinion that affirmed the Fulton County Supreme Court'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. It incorporates by reference, and fully adopts, all the arguments, evidence, exhibits,

memoranda, testimony and authorities previously filed in this case.[1] This Motion for Leave to Appeal and Memorandum of Law are timely filed pursuant to CPLR 5513 and 22 NYCRR § 800.2(a).

For the reasons set forth below, this Court should grant the NhRP's Motion for Leave to Appeal.

II. STANDARD OF REVIEW

In determining whether to grant leave to appeal, courts generally look 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) (granting leave on an "important issue"); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching consequences"); *see also* 22 N.Y.C.R.R. § 500.22 (leave should be granted when "the issues are novel or of public importance"); COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011) (leave is most often granted to address "novel and difficult questions of law having statewide importance"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("Motion to appeal granted as the questions of law presented are of general public importance and ought to be reviewed by the Court of Appeals.").

Leave to appeal to the Court of Appeals is particularly warranted where, as here, a case presents an important and novel issue of law involving issues not just of individual or local import, but of statewide, national, and international significance. *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996). In addition to being the subject of numerous legal commentaries, national and international news articles and reports, this case is already having an impact on the law in other states. By way of illustration, the Supreme Court of Oregon recently

[1] A full statement of the facts can be viewed on pages 4-31 of the Brief submitted by the NhRP in this appeal.

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).

As discussed in detail below, the novel and important questions raised in this case should be heard by the Court of Appeals.

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

The question of who is a "person" within the meaning of New York's common law of habeas corpus 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. This Court 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. 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 this Court would release 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 this Court, 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.

This Motion for Leave to Appeal should also be granted because the case raises complicated questions of law and fact. *See Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923). The question of whether a chimpanzee is entitled to legal personhood is inherently complicated as it involves inquiry not only into the legal issue of personhood generally, but also

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.

IV. THE COURT OF APPEALS SHOULD DETERMINE WHETHER, AND TO WHAT EXTENT, THIS COURT ERRED AS A MATTER OF LAW.

In addition to presenting novel and complex questions of law and issues of state, national, and international importance, the Court's ruling should be reviewed by the Court of Appeals to determine whether, and to what extent, it erred as a matter of law. *See Shindler v. Lamb*, 9 N.Y.2d 621 (1961).

A. This Court applied the incorrect standard of law.

In its Opinion, this Court wrote: "[t]his 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 (emphasis added). This Court further 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." *Id*. 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 this Court cited support its proposition quoted above. The cases cited 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 1175-1176; *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

[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 their domicile.

law. *See Opinion* at *3 ("we must look to the common law surrounding the historic writ of 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 this Court's statement that "habeas corpus has never been provided to any nonhuman entity," (*Opinion* at *4) if what this 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 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

[3] The Court in *Graham* 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.

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. 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.

Contrary to this Court'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

[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.

"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 and responsibilities, this statute undermines this Court's assertion that legal personhood in New York depends on the ability to bear duties and responsibilities and that nonhuman animals may therefore not be legal persons for any purpose.

C. Whether an individual can bear duties and responsibilities is irrelevant to whether that individual can be characterized as a "person" for the purposes of a common law writ of habeas corpus.

1. Personhood is a public policy decision.

The Court of Appeals should determine whether this Court erred in requiring that a "person" for the purpose of securing a common law writ of habeas corpus be capable of bearing duties and responsibilities, in practical terms, that the claimant be a human being. *Opinion*, at *4-6. The NhRP respectfully submits that this Court ignored not just EPTL 7-8.1, *supra*, but multiple teachings of the New York Court of Appeals set forth in the leading "personhood" case of *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194 (1972).

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[.]" *Id.* 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.[5]

The NhRP points out that this Court 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 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-

[5] 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).

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 agree. "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).[6]

The Court of Appeals should therefore have the opportunity to determine whether this Court erred in failing to recognize that the decision whether Tommy is a "person" for the purpose of a common law writ of habeas corpus is entirely a policy question, and not a biological question, and further, whether this Court erred in failing to address the powerful uncontroverted policy arguments, based upon fundamental common law values of liberty and equality, that NhRP presented in great detail. This has left the Court's Opinion as the *first in Anglo-American history* in which an inability to bear duties and responsibilities constituted the sole ground for denying such a fundamental common law right as 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

[6] 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.

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."

"Person" has never been equated with being human and 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 by the *Byrn* Court 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").[7] 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, slaves, or women could bear duties and responsibilities was entirely irrelevant to their personhood. At a minimum, this Court should permit such important issues of personhood to be determined by the Court of Appeals.

3. This Court mistook Tommy's demand for the "immunity-right" of bodily liberty, to which the ability to bear duties and responsibilities is irrelevant, with a "claim-right"

Linking personhood to an ability to bear duties and 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 NhRP respectfully points out that this Court'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

[7] *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).

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 this Court 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.'[8]

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 this Court applied in its Opinion.

[8] 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.

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 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.

The NhRP argues that Tommy has the common law immunity-right to the bodily liberty protected by the common law writ 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 entirely 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 writ of habeas corpus, he must possess the ability to bear duties and responsibilities, when this ability has *nothing whatsoever 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 and 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.[9]

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

[9] 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 purposes 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.

identifies persons by a single trait and then denies them protection across the board," *Romer v. Evans*, 517 U.S. 633 (1996).[10]

V. THIS COURT'S STATEMENT THAT A CHIMPANZEE IS UNABLE TO BEAR DUTIES AND RESPONSIBILITIES IS UNSUPPORTED AND CONTRADICTED BY THE RECORD.

Lastly, the Court should grant leave to appeal to allow the Court of Appeals to determine whether a factual error was made by this Court's decision. Specifically, the NhRP submits that this Court's statement that a chimpanzee is not able to bear duties and 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 and responsibilities, this Court 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.

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[10] In its *Opinion*, at *5, n.3, this Court 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 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 of Appeals 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 EPTL 7-8.1 to the extent of being a trust beneficiary.

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 NhRP raises numerous complex legal arguments establishing that this Court made substantial legal errors that ought to be reviewed by the Court of Appeals, and as this Court's statement that a chimpanzee is not able to bear duties and responsibilities is unsupported by the record, this Court should grant the NhRP's Motion for Leave to Appeal to the Court of Appeals.

Respectfully Submitted,

Dated:

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