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Thank you Senator Coleman, Representative Fox, ranking members, members.

With me is Perry Zinn Rowthorn, my deputy, and Maite Barainca, head of my office's Torts department. Maite handled the Nash claim before the Claims Commission and is an expert on the law of sovereign immunity.

I know you will have questions, which we will be happy to address, so I will keep my opening remarks brief.

As you know, and as I have stated publicly, I am strongly opposed to the legislature overturning the Claims Commissioner's decision dismissing Ms. Nash's claim. I appreciate the opportunity to explain the reasons I have taken this position.

But, first, let me emphasize what I am NOT here to argue:

- I am not here to diminish Ms. Nash's suffering – it has been and will continue to be horrific. She deserves both our deep sympathy and our profound admiration for how she has handled her challenges.
- Nor am I here to convince you that the DEP's actions were flawless. If we have to defend the agency's actions in court, we will. But, emphatically, for reasons we will discuss, your decision should not turn on the quality of DEP's response.
- Nor am I arguing that Ms. Nash should be without *any* remedy for her injuries. She very appropriately sued the chimp's owner for negligence and recovered substantial compensation — property valued at a minimum of \$4 million — from her estate.

Rather, my argument is this: Regardless of the extent of Ms. Nash's injuries, or whether in hindsight DEP could have done things differently or better, the law does not support this claim. Nor is it in the public interest to grant it.

Your decision should turn on a legal question, the answer to which is clear: Did the State owe a legal duty to protect Ms. Nash from attack by a privately owned chimp on private property? It did not.

Why not? Unlike Travis's owner who was and should have been liable, the State did not possess the instrumentality of harm nor did the state own the property on which the harm occurred.

Ms. Nash argues that the state's duty arose under a statute that required chimp owners to have permits. It should be clear that that law did not prohibit private ownership of chimps. Even had DEP sought a court order to seize the chimp – a cherished pet with no real history of aggression – it is far from certain that a court would have ordered removal for what amounted to a mere infraction by Ms. Herold, the owner.

It has been pointed out that the animal permit statute stated that DEP “shall” seize unpermitted primates weighing more than 50 pounds. As you know, the word “shall” is often construed to be directory, not mandatory – that is particularly true when the action in question is the exercise of enforcement discretion, and even more so when the enforcement action would implicate a person's due process rights, as in this case.

Under well-established legal doctrine, there is a straightforward test to determine if that statute – or any statute – creates a tort duty and a private right to sue the State. It is simply this: Did the legislature clearly say so in the statute? Under clear and controlling precedent, when the legislature wants to allow a private lawsuit against the state for failure to follow a law, the legislature must write its intention in the law.

The statute Ms. Nash relies upon did not create a right to sue the State.

This rule is grounded in sound public policy – it helps to ensure that the legislature consider the potential liability costs of enacting regulatory statutes.

You have been told that this is a unique case, and that you need not fear creating a precedent. With all due respect, that is wrong.

The types of injuries Ms. Nash has sustained – and the manner in which she received them – are certainly unique.

But, there have been past cases in which individuals were gravely injured – in some instances killed -- by a private party's negligence and they sought permission to sue the State for some alleged regulatory failure. Those cases were denied.

Ms. Nash's lawyers cite cases they say serve as precedent for granting permission to sue. None of those cases is instructive or similar.

- The Torres case involved a convict who escaped from a Connecticut prison and killed a child in Florida. It has long been established that the State has a “special relationship” with people in their custody, and a common law duty to protect the public from harm by those people.
- Similarly, the Krauth matter involved a common law duty on the part of the State to protect people from harm on state property.
- The Vogel matter was, in effect, a highway defect claim, and the legislature has expressly waived immunity for those claims.

None of those cases involved the kind of claim before you -- an alleged failure to enforce a regulatory statute that was silent as to waiving the State's immunity.

Make no mistake: There will be other cases of alleged failures in licensing, permitting or other regulatory functions in the future. Those cases might involve negligent drivers, doctors or electricians licensed by the state. I have no doubt that a decision permitting this claim will be cited in those cases to the Claims Commissioner, to you and to courts as precedent.

That would be a very dangerous precedent, exposing the State and its taxpayers to costly litigation arising from a variety of licensing and regulatory laws.

It would threaten your own prerogatives to enact such laws without fear that they might expose the State to practically unlimited money damages claims.

Equally troubling is the prospect that state agencies and workers will think and act defensively, enforcing laws primarily to limit liability and without appropriate discretion and flexibility.

So, this is not just a "pocket book defense" to this claim, although Ms. Nash does seek \$150 million, money that state residents would ultimately have to pay. Your concerns should be broader -- opening the floodgates to regulatory claims in the future and fairness to those who have had regulatory claims dismissed in the past.

If the legislature wants to change the rules on regulatory claims, it should do so through statute, after full hearings and debate. That decision has consequences too far reaching for it to be made on the fly in the context of one claim.

As sympathetic as I am to Ms. Nash, I urge you uphold the claims commissioner's decision.

We are happy to take your questions.