To Be Argued By:
STEVEN M. WISE, ESQ.
Time Requested: 30 Minutes

New York Supreme Court

APPELLATE DIVISION-FOURTH DEPARTMENT

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

App. Div. No. *2014-00357*

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

Petitioners-Appellants,

-against-

CARMEN PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc., CHRISTIE E. PRESTI, individually and as an officer and director of The Primate Sanctuary, Inc. and THE PRIMATE SANCTUARY, INC.,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

ELIZABETH STEIN, ESQ.
Attorney for Petitioners-Appellant s
The Nonhuman Rights Project, Inc., on behalf of Kiko
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

-and-

STEVEN M. WISE, ESQ.
Attorney for Petitioners-Appellants
Pro Hac Vice
The Nonhuman Rights Project, Inc., on behalf of Kiko
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864

On the Brief:
ELIZABETH STEIN, ESQ.
STEVEN M. WISE, ESQ.

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APPELLATE DIVISION – FOURTH DEPARTMENT

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

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v.

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I. PRELIMINARY STATEMENT

This case raises an important issue of first impression: is a chimpanzee, one of a species that nine of the world's most prominent working ape researchers attest is autonomous, self-determined, self-aware, highly intelligent, emotionally complex, and who suffers from imprisonment, a "person" entitled to a common law writ of habeas corpus when imprisoned within the State of New York? The Supreme Court erroneously held that a chimpanzee is not a "person" within the meaning of CPLR Article 70, and failed to recognize that "person" in CPLR Article 70 refers to its meaning under the New York common law of habeas corpus, and does not have a separate meaning under the statute. This Court should reverse the judgment of the Supreme Court, hold that Kiko is a "person" under the New York common law of habeas corpus, remand the case to the Supreme Court and order that court to issue a writ of habeas corpus and proceed according to the requirements of Article 70. Alternatively, this Court should issue the writ of habeas corpus, remand the case to the Supreme Court, and order that court to proceed according to the requirements of Article 70.

II. QUESTIONS PRESENTED

1. 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?

The Supreme Court failed to address this question.

2. Is a chimpanzee, who is a member of a species that possesses the capacities for autonomy and self-determination, and possesses an autobiographical self, episodic memory, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, the abilities to plan, engage in mental time-travel, intentional action, sequential

learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception, the abilities to understand cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools, and who suffers from imprisonment the way a human suffers from imprisonment, a "person" under the New York common law of habeas corpus?

The Supreme Court stated that a chimpanzee is not a "person," but did not state whether this referred to the common law of habeas corpus or Article 70 or both.

3. Is a chimpanzee, who is a member of a species that possesses the capacities set out in Question 2, a "person" within the meaning of CPLR Article 70?

The Supreme Court stated that a chimpanzee is not a "person," but did not state whether this referred to the common law of habeas corpus or Article 70, or both.

4. Is the Petitioner/Appellant chimpanzee, who is imprisoned in a cement storefront building in the State of New York, entitled to have a common law writ of habeas corpus issued on his behalf against the Respondents to determine the legality of his restraint?

The Supreme Court refused to issue a common law writ of habeas corpus on behalf of the Petitioner/Appellant chimpanzee.

III. STATEMENT OF THE CASE

On December 3, 2013, Petitioners/Appellants filed a Verified Petition and Order to Show Cause for a common law writ of habeas corpus ("Petition"), pursuant to Article 70 of the CPLR on behalf of Kiko, a chimpanzee, in the Niagara County Supreme Court (R. 23). Petitioners/Appellants petitioned the court to issue a writ of habeas corpus and thereafter order the immediate release of Kiko, who was being unlawfully detained in the State of New York by Respondents (R. 23). In support of the Petition, Petitioners/Appellants filed a Memorandum of

Law (R. 452) and numerous and extensive Expert Affidavits ("Expert Affidavits") attesting to the material facts described below (R. 186-450). On December 9, 2013, the court held a summary *ex parte* hearing by telephone (R. 5). On December 10, 2013, the Court entered an Order in the office of the County Clerk of Niagara County, refusing to issue the writ of habeas corpus (R. 4). On January 9, 2014, Petitioners/Appellants filed a timely Notice of Appeal pursuant to CPLR § 7011, which permits an appeal to be taken from a judgment refusing to grant a writ of habeas corpus or refusing an order to show cause issued under CPLR § 7003 (a) (R. 2).

IV. STATEMENT OF FACTS

Attached to the Petition were nine Expert Affidavits submitted by highly experienced chimpanzee researchers from around the world who have studied chimpanzees extensively, both in captivity and in the wild. They demonstrate in detail that chimpanzees are autonomous, self-determined, self-aware, highly intelligent, and emotionally complex beings who suffer from imprisonment.

Humans and chimpanzees share almost 99% of their DNA (R. 305-306 ¶10; R. 391-93 ¶11). Chimpanzees are more closely related to human beings, than to gorillas (R. 336-37 ¶11; R. 286 ¶12; R. 379 ¶11). Both brains and behavior are plastic, flexible, and heavily dependent upon learning (R. 391¶11a). Both possess the brain asymmetry associated with sophisticated communication and language-like capacities (R. 307 ¶12). Both share similar brain circuits involved in language and communication (R. 305-306 ¶10), and have evolved the large frontal lobes involved in insight and foreplanning (*Id.*). Broca's Area and Wernicke's Area, which enable human symbolic communication, have corresponding areas in chimpanzee brains (R. 393 ¶13).

Both share cell types involved in higher-order thinking, and functional characteristics related to sense of self (R. 305-306 ¶10; R. 243 ¶14). Both brains possess spindle cells (or von Economo neurons) in the anterior cingulate cortex, involved in emotional learning, the processing of complex social information, decision-making, awareness, and, in humans, speech initiation (R. 308 ¶14). This strongly suggests they share many higher-order brain functions (*Id.*). The chimpanzee brain is activated in the same areas and networks as the human brain during activities associated with planning, foresight, episodic memory, and memories of autobiographical events (R. 379-80 ¶12; R. 381-82 ¶¶15-16).

That their brains develop and mature in similar ways indicates that humans and chimpanzees pass through similar cognitive developmental stages (R. 305-306 ¶10). Brain developmental delay, which plays a role in the emergence of complex cognitive abilities, such as self-awareness, creativity, foreplanning, working memory, decision-making and social interaction, is a key feature of both chimpanzee and human prefrontal cortex brain evolution (R. 306-307 ¶11; R. 391 ¶11a; R. 393 ¶12). Chimpanzee development of the use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children; this points to deep similarities in the cognitive processes that underlie communication in both species (R. 252-53 ¶9). Both develop increasing levels of consciousness, awareness, and self-understanding throughout adulthood, through culture and learning (R. 392 ¶11d).

Numerous parallels in the way their communication skills develop suggest a similar unfolding of cognitive processes and an underlying neurobiological continuity (R. 253-54 ¶10). The foundational stages of communication suggest striking similarities between human and chimpanzee cognition (R. 253-56 ¶¶10-11). Chimpanzees show some of the same early

developmental tendencies and changes in their communication skills as children (*Id.*). Children and language-trained chimpanzees begin communicating using natural gestures before moving to more frequent use of symbols (*Id.*). In both, the ratio of symbol to gestures increases with age, with the overwhelming majority of gestures serving a communicative purpose (*Id.*). Both show a primacy of natural gestures in development over learning a symbolic system of communication (R. 252-54 ¶¶9-10).

Chimpanzees and humans are autonomous (R. 286 ¶11; R. 379 ¶11), freely choosing, not acting on reflex, innate behavior, or through any conventional category of learning such as conditioning, discrimination learning, or concept formation, directing behavior based on internal cognitive processes (R. 286 ¶11). The simplest explanation for chimpanzee behavior that looks autonomous is they are based on similar human capacities (R. 286 ¶12). Chimpanzees possess the "self" that is integral to autonomy, being able to have goals and desires, intentionally act towards those goals, and understand whether they are satisfied (R. 308-309 ¶15).

Responding differently to one's own name than to other sounds, showing specific brain wave responses to the sound of one's name, signifies self in both chimpanzees and humans (R. 307-308 ¶13). Chimpanzees recognize themselves in mirrors (R. 308-309 ¶15), a marker of self-awareness (R. 189 ¶12; R. 394-95 ¶16). They recognize themselves on television, in videos and photographs, and examine the interior of their mouths with flashlights (R. 394-95 ¶16). They recognize pictures of themselves, and others, when they were very young (*Id.*). Self-recognition requires that one hold a mental representation of what one looks like from another perspective (R. 189 ¶12). This capacity to reflect upon one's behavior allows one to become the object of one's own thought (R. 394-95 ¶16). Chimpanzees show such capacities that stem from self-awareness, as self-monitoring, self-reflection, and metacognition (R. 308-309 ¶15). They are

aware of what they know and do not know (*Id.*). "Self-agency," a fundamental component of autonomy, allows one to distinguish one's own actions and effects from external events (R. 309 ¶16). Both chimpanzees and humans share the fundamental cognitive processes underlying the sense of being an independent agent (*Id.*; R. 392 ¶11e).

Similar brain structures of humans and chimpanzees support the behavioral and cognitive evidence for both human and chimpanzee autobiographical selves (R. 381 ¶15). Both are aware of their past and envision their future (R. 381-82 ¶16). Both share the sophisticated cognitive capacity necessary for the "mental time travel" the episodic system enables (R. 379-80 ¶12; R. 381 ¶15; R. 353-54 ¶10). Without understanding one is an individual who exists through time, one cannot recollect past events in one's life and plan future events (*Id.*). Autonoetic, or self-knowing, consciousness allows an autobiographical sense of a self with a past and future (*Id.*).

Chimpanzees delay a strong current drive for a better future reward, generalize a novel tool for future use, and select objects for a much-delayed future task (R. 380-81 ¶14). They can remember the "what, where and when" of events years later (R. 379-80 ¶12). They can prepare themselves for such a future action as tool use a day in advance (*Id.*). Wild chimpanzees demonstrate such long-term planning for tool use as transporting stones to locations to be later used later as hammers to crack nuts; a captive chimpanzee routinely collected, stockpiled, and concealed stones he would later hurl at visitors when he was agitated (R. 380 ¶13; R. 191 ¶16). This ability to mentally construct a new situation to alter the future (in this case the behaviors of human zoo visitors) and plan for events where one is in a different psychological state signals the presence of an episodic system (R. 380 ¶13).

Autonomous individuals possess a self-control that depends upon the episodic system (R. 380-81 ¶14). Chimpanzees, like humans, delay gratification for a future reward, indeed possess a

high level of self-control under many circumstances (*Id.*). Chimpanzees plan for future exchanges with humans (*Id.*). They may use self-distraction (playing with toys) to cope with the impulse of grabbing immediate candies instead of waiting for more (*Id.*).

Perceptual simulations enabled by episodic memory bring the future into the present by braking current drives in favor of delayed rewards, and is available only those who a sufficiently sophisticated sense of self and autobiographical memory (*Id.*). Chimpanzees can disregard a small piece of food in favor of a tool that will allow them to obtain a larger piece of food later (*Id.*). They can select a tool they have never seen, guess its function, and use it appropriately (*Id.*). This would be impossible without being able to mentally represent the future event (*Id.*).

Chimpanzees re-experience and anticipate pains and pleasures (R. 381-82 ¶16). Like humans, they experience pain around an anticipated future event (*Id.*). Confining someone in a prison or cage loses its power as punishment if the individual had no self-concept, as each moment will be a new with no conscious relation to any other (*Id.*). As chimpanzees conceive a personal past and future, and suffer the pain of being unable to fulfill their goals or move about as they wish, like humans they experience the pain of anticipating a never-ending situation (*Id.*).

Language, a volitional process that involves creating intentional sounds for the purpose of communication, reflects autonomous thinking and behavior (R. 307-308 ¶13). Chimpanzees exhibit referential and intentional communication (R.190-91 ¶15). They produce sounds to capture the attention of an inattentive audience (*Id.*). The development of their use and understanding of sign language, along with their natural communicative gestures and vocalizations, parallels the development of language in children, which points to deep similarities in the cognitive processes that underlie communication in both (R. 252-53 ¶9). They point and vocalize when they want another to notice something and adjust their gesturing to

insure they are noticed (*Id.*). In tasks requiring cooperation, chimpanzees recruit the most skilled partners and take turns requesting, and helping a partner (*Id.*). They intentionally and purposefully inform naïve chimpanzees about something (*Id.*). Wild chimpanzees direct alarm calls to friends arriving on the scene, who cannot see a snake, and stop calling once the others are safe from the predator (*Id.*).

Chimpanzees demonstrate purposeful communication, conversation, understanding of symbols, perspective-taking, imagination, and humor (R. 252-53 ¶9; R. 393-94 ¶¶14-15). They learn, and remember for decades, symbols for hundreds of items, events and locations; they learn new symbols just by observing others using them (R. 396 ¶20). They master syntax (*Id.*). They understand such "if/then" clauses as, "if you share your cereal with Sherman, you can have some more" (R. 396 ¶21). They announce important social events, what that they are about to do, where they are going, what assistance they want from others, and how they feel (R. 398 ¶25). They announce they are going to retrieve from an array of objects they've seen in another room (*Id.*). They recount what happened yesterday (R. 399 ¶27).

There is no essential difference between what words chimpanzees learn mean to them, and what words humans learn mean to them (R. 396 ¶20). They understand there is no one-to-one relationship between utterances and events, that there are infinite linguistic ways of communicating the same or similar things (R. 396-97 ¶22). They use symbols to comment about other individuals as well as about past and future events (R. 253-54 ¶10). They purposefully create declarative sentences and combine gestures with pointing to refer to objects (*Id.*).

Language-trained chimpanzees spontaneously use language to communicate with each other (R. 256 ¶12; R. 393-94 ¶15). Those who understand spoken English answer "yes/no" questions about their thoughts, plans, feelings, intentions, dislikes and likes (R. 393-94 ¶15).

They answer questions about their companions' likes and dislikes and tell researchers what other apes want (*Id.*). They use symbols to express themselves and to state what they are going to do, in advance of acting, then carry out their action (R. 395 ¶17). An example is statements made by two language-trained chimpanzees trained with abstract computer symbols, Sherman and Austin, who told each other the foods they intended to share, and told experimenters which items they were going to give to them (*Id.*). With the emergence of the ability to state their intentions, Sherman and Austin revealed that, not only did they recognize and understand differential knowledge states between themselves, but language allows beings to bring their different knowledge states into accord with their imminent intentions and to coordinate their actions (R. 395-96 ¶¶18-19).

Sherman and Austin would state "Go outdoors," then head for the door, or "Apple refrigerator," then take an apple from the refrigerator (rather than any of the other foods in the refrigerator) (R. 395 ¶18). To produce statements about intended actions for the purpose of co-coordinating future actions with others, one must be able to form a thought and hold it until agreement is reached between two parties (R. 396 ¶20).

The chimpanzee, Loulis was not raised with humans and was not taught ASL by humans (R. 256 ¶12). Nor did humans use ASL in his presence (*Id.*). But he was the adopted son of Washoe, a signing chimpanzee. Loulis acquired signs from observing Washoe and other signing chimpanzees, as well as when Washoe molded his hands into the appropriate signs (*Id.*). Not only did Washoe's behavior toward Loulis show she was aware of his shortcomings in the use of signs as a communication skill, but she took steps to change that situation (*Id.*).

True communication is based on conversational interaction in which the participants takes turns communicating in a give-and-take manner and respond appropriately to the other's

communicative actions (R. 254-56 ¶11). When a conversation becomes confusing, participants make such contingent adjustments as offering a revised or alternative utterance/gesture or repeating a gesture or sign to continue the conversation (*Id.*). ASL-using chimpanzees demonstrate contingent communication with humans at the same level as young human children (*Id.*).

When a human conversation has broken down, they repeat their utterance and add information (*Id.*). Chimpanzees conversing in sign language with humans respond in the same way, reiterating, adjusting, and shifting their signs to create conversationally appropriate rejoinders; their reactions to and interactions with a conversational partner resemble patterns of conversation found in studies of human children (*Id.*). When their request is satisfied, they cease signing it (*Id.*). When their request is misunderstood, refused or not acknowledged, they repeat and revise their signing until they get a satisfactory response (*Id.*). As in humans, this pattern of contingency in conversation demonstrates volitional and purposeful communication and thought (*Id.*).

Chimpanzees understand that conversation involves turn-taking and mutual attention and will try to alter the attentional state of the human (*Id.*). If they wish to communicate with a human whose back is turned to them they will make attention-getting sounds (*Id.*). If the human is turned to them, they switch to conversational sign language with few sounds (*Id.*).

Both language-using and wild chimpanzees understand conversational give-and-take and adjust their communication to the attentional state of the other participant, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture (*Id.*). Even wild and captive chimpanzees untutored in American Sign Language string together multiple gestures to create

gesture sequences, and combine gestures into long series, within which gestures may overlap, interspersed with bouts of response waiting or be exchanged back and forth between individuals (*Id.*).

When Sherman and Austin communicated, they paid close attention to the other's visual regard (R. 396-97 ¶22). If Austin was looking away when Sherman selected a symbol, Sherman would wait until Austin looked back. Then he would point to the symbol he used. If Austin hesitated, Sherman would point to the food the symbol symbolized. If Austin's attention wandered further, Sherman would turn Austin's head toward the keyboard. If Sherman was not attending to Austin's request, Austin would gaze at the symbol until Sherman took note (*Id.*). Both recognized the speaker had to monitor the listener, watch what he was doing, make judgments about his state of comprehension, and decide how to proceed with conversational repair (*Id.*).

In a manner similar to two-through-seven year olds, sign-language trained chimpanzees and chimpanzees trained to use arbitrary computer symbols to communicate, sign among themselves and exhibit a telltale sign of volitional use of language, signing to themselves or "private speech" (R. 256 ¶12; R. 393 ¶14). Private speech has many functions, including self-guidance, self-regulation of behavior, planning, pacing, and monitoring skill, and is a part of normal development of communication (R. 257 ¶13). Children use private speech during creative and imaginative play, often talking to themselves when playing imaginative and pretend games (R. 257 ¶14). The more frequently children engage in private speech, the more creative, flexible, and original thought they display (*Id.*).

Imagination is a key component of mental representation, metacognition, and the ability to mentally create other realities (R. 258 ¶15). Both captive and wild chimpanzees engage in at

least six forms of imaginary play that are similar to the imaginary play of children ages two through six (*Id.*). These include Animation, Substitution, and imaginary private signing (*Id.*). Animation is pretending that an inanimate object is alive, such as talking to a teddy bear; substitution is pretending an object has a new identity, such as placing a block on the head as a hat (*Id.*). In imaginary private signing, chimpanzees transform a sign or its referent to a different meaning, whether it is present or not (R. 257 ¶14). An example is placing a wooden block on one's head and referring to it as a hat (*Id.*). Chimpanzees use imagination to engage in pretend-aggression (R. 400 ¶31). Sherman pretended that a King Kong doll was biting his fingers and toes and would pretend to be in pain, when he poked a needle in his skin and out the other side, being careful to just pierce the thick outer layer of skin (*Id.*).

Deception and imaginary play require behaviors directed toward something that is not there and often involve modeling mental states (R. 258-59 ¶16). They are closely related and by age three chimpanzees engage in both (R. 258 ¶15; R. 394-95 ¶16). For example, a chimpanzee who cached stones to later throw at zoo visitors engaged in deception by constructing hiding places for his stone caches, then inhibiting those aggressive displays that signal upcoming throws (R. 380 ¶13).

Chimpanzees display a sense of humor, and laugh under many of the same circumstances in which humans laugh (R. 259 ¶17).

Together these findings provide evidence for cognitive similarities between humans and chimpanzees in the domains of mental representation, intentionality, imagination, and mental state modeling – all fundamental components of autonomy (*Id.*).

Chimpanzees are attuned to the experiences, visual perspectives, knowledge states, emotional expressions and states of others (R. 190-91 ¶15; R. 244 ¶16; R. 309-10 ¶¶17-18). They

possess mirror neurons, which allow them to share and relate to another's emotional state (R. 243 ¶14). These specialized cells respond to actions performed by oneself, but also when one watches the same action performed by another, which forms the basis for empathy, the ability to put oneself in another's situation (R. 243 ¶14; R. 309 ¶17). They have some theory of mind; they know they have minds, they know humans have minds, thoughts, intentions, feelings, needs, desires, and intentions, and they know these other minds and state of knowledge differ from what their minds know (R. 400-401 ¶32). They know when another chimpanzee does not know something and inform the other about facts he does not know (*Id.*).

Chimpanzees observing another trying to complete a task anticipate their intentions (R. 309 ¶17). They know what others can and cannot see (*Id.*). They know when another's behavior is accidental or intentional (*Id.*). They use their knowledge of others' perceptions to deceive them (*Id.*). In situations where two chimpanzees are competing for hidden food, they employ strategies and counter-strategies to throw each other off the trail and obtain the food for themselves (*Id.*). When placed in a situation where they must compete for food placed at various locations around visual barriers, subordinate chimpanzees only approach food they infer dominant chimpanzees cannot see (R. 190-91 ¶15). They can take the visual perspective of a chimpanzee competitor, and understand that what they see is not the same thing their competitor sees (*Id.*). When ASL-trained and wild chimpanzees adjust their gestures and gestural sequences to the attention state of the individual they are trying to communicate with, using visual gestures towards an attentive partner and tactile and auditory gestures more often toward inattentive partners. If the partner does not respond, they repeat the gesture, demonstrating visual perspective-taking and mental state modeling (R. 254-56 ¶11).

The capacity for self-recognition has been linked to empathy, which is the identifying with, and understanding of, another's situation, feelings and motives. Several lines of evidence indicate chimpanzees possess highly developed empathic abilities (R. 189 ¶13).

When tested in similar experimental situations using video stimuli, chimpanzees show contagious yawning in much the same way as humans do (R. 192 ¶18; R. 310 ¶18). That chimpanzees yawn more frequently in response to seeing familiar individuals yawning compared to unfamiliar others supports a link between contagious yawning and empathy (*Id.*). Chimpanzees shown videos of other chimpanzees yawning or displaying open-mouth facial expressions that were not yawns, showed higher levels of yawning in response to the yawn videos but not to the open-mouth displays (R. 310 ¶18). These findings are similar to contagious yawning effects observed in humans, and are based on the capacity for empathy (*Id*).

In the wild and in captivity, chimpanzees engage in sophisticated tactical deception that requires attributing mental states and motives to others (R. 189-90 ¶14). This is shown when individuals console an unrelated victim of aggression by a third-party (*Id.*). They show concern for others in risky situations. When a chimpanzee group crosses a road, the more capable adult males will investigate the situation before more vulnerable group-members cross, and take up positions at the front and rear of the procession (*Id.*). Knowledge of one's own and others' capabilities is probably at the origin of some instances of division of labor (*Id.*). This includes sex differences in cooperative hunting for live prey, and crop-raiding; these activities often lead to individuals in possession of food sharing it with those who do not (*Id.*).

One consequence of self-awareness may be awareness of death; chimpanzees demonstrate compassion, bereavement-induced depression, and an understanding of the distinction between living and non-living, in a manner similar to humans when a close relative

passes away, which strongly suggests that chimpanzees, like humans, feel grief and compassion when dealing with mortality (R. 192-93 ¶19).

An important indicator of intelligence is the capacity for tool-making and use (R. 337 ¶¶14-15). Tool-making implies complex problem-solving skills and evidences understanding of means-ends relations and causation, for it requires making choices, often in a specific sequence, towards a goal, which is a key aspect of intentional action (R. 337 ¶15; R. 244-45 ¶17).

Wild chimpanzees make and use tools of vegetation and stone for hunting, gathering, fighting, play, communication, courtship, hygiene and socializing (R. 337 ¶15). Chimpanzees make and use complex tools that require them to utilize two or more objects towards a goal (R. 337-38 ¶16). They make compound tools by combining two or more components into a single unit (*Id.*). They make adjustments to attain their goal (*Id.*).

Chimpanzees use "tool sets," two or more tools in an obligate sequence to achieve a goal, such as a set of five objects – pounder, perforator, enlarger, collector, and swab – to obtain honey (R. 338 ¶17). Such sophisticated tool-use involves choosing appropriate objects in a complex sequence to obtain a goal they keep in mind throughout the process (*Id.*). This sequencing and mental representation is a hallmark of intentionality and self-regulation (*Id.*).

Chimpanzees have taken tool-making and use into the cultural realm (*Id.*). Culture is normative (represents something most individuals do), collective (characteristic of a group or community), and socially-learned behavior (learned by watching others) (R. 338-39 ¶18). It is transmitted by social and observational learning (learning by watching others), which characterizes a group or population (*Id.*). Culture is based on several high-level cognitive capacities, including imitation (directly mimicking bodily actions), emulation (learning the results of another's actions, then achieving those results in another way) and innovation

(producing novel ways to do things and combining known elements in new ways), all of which chimpanzees share (*Id.*). Under natural conditions, different chimpanzee cultures construct different rule-based social structures which they pass from one generation to the next (R. 339 ¶19; R. 392-93 ¶11f).

Three general cultural domains are found in humans and chimpanzees: 1) material culture, the use of one or more physical objects as a means to achieve an end, 2) social culture, behaviors that allow individuals to develop and benefit from social living, and 3) symbolic culture, communicative gestures and vocalizations which are arbitrarily, that is symbolically, associated with intentions and behaviors (*Id.*).

Each wild chimpanzee cultural group makes and uses a unique "tool kit," which indicates that chimpanzees form mental representations of a sequence of acts aimed at achieving a goal (R. 339-40 ¶20; R. 191 ¶16). A chimpanzee tool kit is a unique set of about 20 different tools, often used in a specific sequence for foraging and processing food, making comfortable and secure sleeping nests in trees, and personal hygiene and comfort. (*Id.*). These "tool kits" vary across groups, are passed on by observing others using them, and found from savannah to rainforest (*Id.*).

Tool-making is neither genetically determined, fixed, "hard-wired," nor simple reflex (*Id.*). It depends on the mental abilities that underlie human culture, learning from others and deciding how to do things. Each chimpanzee group develops its own culture through its own behavioural choices (*Id.*). At least 40 chimpanzee cultures across Africa use combinations of over 65 identifiable behaviors (*Id.*).

Organic chimpanzee tool kits are not preserved in the archaeological record. But chimpanzee, like human, stone tools are. (R. 340-41 ¶21). The foraging tool kits of some

chimpanzee populations are indistinguishable in complexity from the tools kits of some of the simplest human material cultures, such as Tasmanian aborigines, and the oldest known human artefacts, such as the East African Oldowan Industry (*Id.*). Chimpanzee stone artefacts excavated in West Africa demonstrate there was once a chimpanzee "Stone Age," just as there was a human "Stone Age," that is at least 4,300 years old. This predates settled farming villages and Iron Age technology in West Africa (*Id.*). In one chimpanzee population, chimpanzee tool-making culture has been passed down for 225 generations (*Id.*). With respect to social culture, chimpanzees pass widely variable social displays and social customs from one generation to the next (R. 341 ¶22; for examples, see *id.*). Wild chimpanzees demonstrate symbolic element key to human (R. 342 ¶23). Thus, in one chimpanzee group, arbitrary symbolic gestures communicate desire to have sex, in another group an entirely different symbolic gesture expresses the same sentiment (*Id.*).

Human and chimpanzee cultures are underwritten by a common set of mental abilities (R. 342-43 ¶24). The most important are imitation and emulation. Learning by observation is key to both (*Id.*). Chimpanzees copy methods used by others to manipulate objects and use both direct imitation and emulation, depending on the circumstance (*Id.*). Imitation, which involves copying bodily actions, is a hallmark of self-awareness, as it suggests the individual has a sense of his own body and how it corresponds to another's body, and can manipulate his body in accordance with the other's actions (*Id.*). Chimpanzees precisely mimic the actions of others, even the correct sequence of actions to achieve a goal (*Id.*; R. 191-92 ¶17).

Chimpanzee and human infants selectively imitate facial expressions (R. 191-92 ¶17). Chimpanzees directly imitate another's way to achieve a goal when they have not figured out their own way to achieve that same goal (R. 342-43 ¶24; R. 191-92 ¶17). When chimpanzees

have the skills to complete a task they tend to emulate, not imitate (R. 342-43 ¶24). These findings demonstrate that chimpanzees make choices about whether to directly copy someone else's actions based on whether they think they can figure out how to do the task themselves (*Id.*).

Chimpanzees know when they are being imitated, and respond as human toddlers do (*Id.*). Both "test out" the behavior of the imitator by making repetitive actions and looking to see if the imitator follows (*Id.*). This is similar to how chimpanzees and toddlers test whether an image in a mirror is herself (*Id.*). Called "contingency checking," this is another hallmark of self-awareness (*Id.*). Chimpanzees engage in "deferred imitation," copying actions they have seen in the past (*Id.*; R. 191-92 ¶17). Deferred imitation relies upon more sophisticated capacities than direct imitation, as chimpanzees must remember the actions of another, while replicating them in real time (R. 342-43 ¶24).

These capacities for imitation and emulation are necessary for "cumulative cultural evolution" (R. 343 ¶25; R. 191-92 ¶17). This cultural capacity, found in humans and chimpanzees, involves the ability to build upon previous customs (R. 343 ¶25). Chimpanzees, like humans, tend to be social conformists, which allows them to maintain customs within groups (*Id.*). The evidence suggests a similarity between the mental capacities of humans and chimpanzees in the areas of observational learning, imitation (and thus self-awareness), decision-making, memory and innovation (*Id.*).

Chimpanzees have moral inclinations and some level of moral agency; they behave in ways that we would interpret as a reflection of moral imperatives in humans (R. 343-44 ¶26). They ostracize individuals who violate social norms (*Id.*). They respond negatively to inequitable situations, e.g. when offered lower rewards than companions receiving higher ones, for the same

task (*Id.*). When given a chance to play such economic games as the Ultimatum Game, they spontaneously make fair offers, even when not obliged to do so (*Id.*).

Chimpanzee social life is cooperative and represents a purposeful and well-coordinated social system (R. 344 ¶27). They engage in collaborative hunting, in which hunters adopt different roles that increase the chances of success (*Id.*). They share meat from prey (*Id.*). Males cooperate in territorial defense, and engage in risky boundary patrolling (*Id.*).

Numerosity, the ability to understand numbers as a sequence of quantities, requires both sophisticated working memory (in order to keep numbers in mind), and conceptual understanding of a sequence (R. 310-11 ¶19). This is closely related to "mental time travel" and planning the right sequence of steps towards a goal, two critical components of autonomy (*Id.*). Not only do chimpanzees excel at understanding sequences of numbers, they understand that Arabic symbols ("2", "5", etc.) represent discrete quantities (*Id.*).

Sequential learning is the ability to encode and represent the order of discrete items occurring in a sequence (*Id.*). It is critical for human speech and language processing, learning action sequences, and any task that requires placing items in an ordered sequence (*Id.*). Chimpanzees count, sum arrays of real objects or Arabic numerals, and display ordinality and transitivity (if A = B and B = C, then A = C) when engaged in numerical tasks, demonstrating they understand the ordinal nature of numbers (*Id.*). Chimpanzees understand proportions (e.g., 1/2, 3/4, etc.) (*Id.*). They can name the number, color and type of object shown on a screen (*Id.*). They use a touch screen to count from 0 to 9 in sequence (*Id.*). They understand the concept of zero, using it appropriately in ordinal context (*Id.*). They count to 21 (R. 400 ¶29). They display "indicating acts" (pointing, touching, rearranging) similar to what human children display when counting a sum (R. 310-11 ¶19). Both chimpanzees and children touch each item when counting

an array of items, suggesting further similarity in the way both conceptualize numbers and sequences (R. 311-12 ¶20).

Chimpanzees have excellent working, or short-term, memory (*Id.*). Working memory is the ability to temporarily store, manipulate, and recall items (numbers, objects, names, etc.) (*Id.*). It deals with how good someone is at keeping several items in mind simultaneously (*Id.*). Working memory tasks require monitoring (manipulation of information or behaviors) as part of completing goal-directed actions in the setting of interfering processes and distractions (*Id.*). The cognitive processes needed to achieve this include attention and executive control (reasoning, planning and execution) (*Id.*). When chimpanzees are shown the numerals 1-9 spread randomly across a computer screen (*Id.*), the numbers appearing for just 210, 430, and 650 milliseconds, then replaced by white squares, they touch them in the correct order (1-9) (*Id.*). In another version of the task, as soon as chimpanzees touched the number 1, the remaining numbers were immediately masked by white squares (*Id.*). They had to remember the location of each concealed number and touch them in the correct order (*Id.*). The performance of a number of the chimpanzees on these seemingly impossible memory tasks was not only accurate, but better than human adults (*Id.*). Chimpanzees have an extraordinary working memory capability for numerical recollection, better than adult humans, which underlies a number of mental skills related to mental representation, attention, and sequencing (*Id.*). These remarkable similarities between humans and chimpanzees are not limited to autonomy, but extend to personality and emotion (R. 286 ¶¶12-28; R. 379 ¶11).

Chimpanzees are competent at "cross-modal perceptions." They obtain information in one modality such as vision or hearing, and internally translate it to information in another modality (R. 398-99 ¶26). They match an audio or video vocalization recording of a familiar

chimpanzee or human to her photograph (R. 244 ¶16). They translate symbolically encoded information and into any non-symbolic mode (R. 398-99 ¶26). When shown an object's picture, they retrieve it by touch, and retrieve a correct object by touch when shown its symbol (*Id.*).

On June 26, 2013, the National Institutes of Health ("NIH") announced that it was moving almost 90% of its 360 chimpanzees to sanctuaries. http://www.nih.gov/news/health/jun2013/od-26.htm (accessed February 26, 2014). It intends to retain 50 chimpanzees, at this time, but will not breed them, and requires accepted strict Recommendations concerning their use in NIH-supported research by The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation. (R. 53):

1. Recommendation EA1: Chimpanzees must live in sufficiently large, complex, multi-male, multi-female social groupings, ideally consisting of at least 7 individuals. Even groups of six do not provide the social complexity required to meet their social needs. They should never live alone, except in the most unusual situations (R. 57).
2. Recommendation EA4: Chimpanzees should have the opportunity to climb at least 20 feet vertically and enough climbing opportunities and space to allow all members of larger groups to travel, feed, and rest in elevated spaces (R. 59-60).
3. Recommendation EA5: Chimpanzees must have foraging opportunities and diets that are varied, nutritious, and challenging to obtain and process (R. 60).
4. Recommendation EA6: Chimpanzees must be daily provided with materials to construct new nests (R. 62).

5. Accepted Recommendation EA7 states: "The environmental enrichment program developed for chimpanzees must provide for relevant opportunities for *choice and self determination*." (R. 63) (emphasis added).

Petitioners/Appellants have demanded that Kiko be released into the care of the North American Primate Sanctuary Alliance ("NAPSA"), which was founded by the directors of the seven leading chimpanzee sanctuaries in North America (R. 98 ¶4). NAPSA represents the gold standard in primate care and provides permanent sanctuary to almost 500 chimpanzees (R. 98-99 ¶¶5-6; R R. 99- 100 ¶¶7-8; R. 100-107 ¶¶10-26). It has agreed to evaluate Kiko and send him to that NAPSA sanctuary most appropriate for him to spend the rest of his life.

A. THE PETITIONER/APPELLANT NONHUMAN RIGHTS PROJECT ("NhRP") HAS STANDING.

CPLR § 7002 (a) provides: "[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." In England, concerned third parties brought famous habeas corpus actions on behalf of black slaves. *See Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) and *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810). New York's adoption of English common law as it existed prior to April 19, 1775, *Montgomery v. Daniels*, 338 N.Y.2d 41, 57 (1975); *Jones v. People*, 79 N.Y. 45, 48 (1879); N.Y. Const. Art. I, § 14; N.Y. Const. § 35 (1777), incorporated Lord Mansfield's common law habeas corpus ruling in *Somerset v. Stewart*. New York has similarly long recognized broad common law next friend habeas corpus representation. *See Lemmon v. People*, 20 N.Y. 562 (1860) (dock worker sought habeas corpus on behalf of slaves with whom he had no relationship); *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842) ("every Englishman . . . imprisoned by any authority . . . has an undoubted right, by his agents or

friends, to . . . obtain a writ of habeas corpus") (citations omitted, emphasis added); *People ex rel. Turano v. Cunningham*, 395 N.Y.S.2d 4 (1st Dept. 1977); *State v. Lascaris*, 322 N.Y.S.2d 426 (4th Dept. 1971); *People ex rel. Hubert v. Kaiser*, 150 A.D. 541, 544 (App. Div. 1912); *People ex rel. Sheldon v. Curtin*, 152 A.D. 364 (App. Div. 1912).

B. THE SUPREME COURT ERRED IN RULING THAT PETITIONERS/ APPELLANTS WERE NOT ENTITLED TO SEEK A COMMON LAW WRIT OF HABEAS CORPUS BECAUSE KIKO WAS NOT A "PERSON."

The Supreme Court erred in ruling that Kiko was not a "person" entitled to seek a writ of habeas corpus. It is unclear whether the court ruled that a chimpanzee could not be a "person" within the meaning of CPLR Article 70 or of the common law (R. 19-20). That the court said it was denying the request for a writ of habeas corpus because it "thinks personally this is a more of a legislative issue than a judicial issue" suggests it was interpreting Article 70 without reference to the common law. (R. 19). But it does not matter. "Person" in Article 70 refers to its meaning under the New York common law of habeas corpus, as (1) the legislature's decision not to define "person" in Article 70 required the court to ascertain its meaning by referring to the common law of habeas corpus; (2) the CPLR, including Article 70, solely governs procedure, and not the substance, of causes of action, including the common law writ of habeas corpus; (3) if Article 70 limits the substantive common law of habeas corpus, it violates the "Suspension Clause" of the New York Constitution, Art. 1 § 4.

First, as the legislature did not define "person" in CPLR Article 70, a court must look to its common law habeas corpus meaning in a common law habeas corpus action. The New York "common-law writ of habeas corpus [is] a writ in behalf of liberty, and its purpose [is] to deliver a prisoner from unjust imprisonment and illegal and improper restraint." *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241-42 (1890). It "lies in all cases of imprisonment by commitment,

detention, confinement or restraint, for whatever cause, or under whatever pretence." *McLeod*, 3 Hill at 647 note j. It "is not the creature of any statute . . . and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). *E.g.*, *People ex rel Lobenthal v. Koehler*, 516 N.Y.S 2d 928-29 (1st Dept. 1987) ("The 'Great Writ', although regulated procedurally by article 70 of the CPLR, is not a creature of statute, but a part of the common law of this State"); *People ex rel. Patrick v. Frost*, 133 A.D. 179, 187-88 (2d Dept. 1909); *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907), *aff'd.* 195 N.Y. 610 (1909) ("A writ of habeas corpus is a common law writ and not a statutory one. If every provision of statute respecting it were repealed, it would still exist and could be enforced."). *See* Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013) ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law"). When the legislature intends to define a word in the CPLR, it does. *See* CPLR Article 105. It neither defined "person" nor intended the word to have any meaning apart from its common law meaning. *Application of Siveke*, 441 N.Y.S. 2d 631, 633 (Sup. Ct. 1981).

Generally, in New York, procedural statutes that employ undefined words refer to their common law meaning, particularly where, as here, the action is derived from the common law. *See Scheidelman & Sons, Inc. v Webster Basket Co.*, 257 N.Y.S. 552, 554-55 (Sup. Ct. 1932), *aff'd.* 259 N.Y.S. 963 (4th Dept. 1932) (otherwise undefined, "distress" and "distrain" "must be given their common law meaning"); *Drost v. Hookey*, 25 Misc. 3d 210, 212 (Dist. Ct 2009) (as neither "tenant at will" nor licensee" were defined by Section 713(7) of the New York Property Actions and Proceedings Law, courts look to their common law definitions). This is true in other states. *E.g.*, *State v. A.M.R.*, 147 Wash. 2d 91, 94-95 (2002) (en banc) (courts look

to common law definitions of otherwise undefined word "person" to determine who may appeal certain orders); *Casto v. Casto*, 404 So. 2d 1046, 1048 (Fla. 1981) (courts look to common law definitions of otherwise undefined words "rendition" of judgment and "entry" of judgment to determine time limit in which to appeal); *Addington v. State*, 199 Kan. 554, 561 (1967) (courts look to common law definition of otherwise undefined word "venue" in habeas corpus petition).

Second, the CPLR governs procedure and may neither abridge nor enlarge a party's substantive rights. CPLR §§ 101-102. Therefore it may not abridge Petitioners/Appellants' substantive common law habeas corpus rights. This must necessarily include the threshold determination of whether Kiko is a "person" within the meaning of the New York common law of habeas corpus. The *Tweed* Court emphasized, in reference to the procedural habeas corpus statute in effect at the time, that "the act needs no interpretation and is in full accord with the common law." 60 N.Y. at 569.

Third, to the extent Article 70 limits who is a "person" able to bring a common law writ of habeas corpus, beyond the limitations of the common law itself, it violates the Suspension Clause of the New York Constitution, Art. 1 § 4, which provides that "[t]he privilege of a writ or order of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, or the public safety requires it." The Suspension Clause renders the legislature powerless to deprive any person of its privilege. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). It "cannot be abrogated, or its efficiency curtailed, by legislative action . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion." *Tweed*, 60 N.Y. at 566. *E.g.*, *Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (the Suspension Clause means that legislature has "no power" to "abridge the privilege of habeas corpus"); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 260 (1927) (by

the Suspension Clause, "the writ of habeas corpus is preserved in all its ancient plenitude"); *People ex rel. Whitman v. Woodward*, 150 A.D. 770, 778 (2d Dept. 1912) (Suspension Clause gives habeas corpus "immunity from curtailment by legislative action"). *See People ex rel. Bungart v. Wells*, 57 A.D. 140, 141 (2d Dept. 1901) (habeas corpus "cannot be emasculated or curtailed by legislation"); *Whitman*, 150 A.D. at 772 ("no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse"); *id.* at 781-82 (Burr, J., concurring) ("anything . . . essential to the full benefit or protection of the right which the writ is designed to safeguard is 'beyond legislative limitation or impairment'") (citations omitted); *Patrick*, 133 A.D. at 187 (writ lies "beyond legislative limitation or impairment").

The question of who is a "person" within the meaning of the common law of habeas corpus is the most important individual issue that can come before a court. If Article 70 interferes with a court's ability to determine whether Kiko is a "person" within the meaning of the common law of habeas corpus, it violates the Suspension Clause. Otherwise the legislature could permanently strip judges of their ability to determine who lives, who dies, who is enslaved, and who is free.

C. KIKO IS A "PERSON" WITHIN THE MEANING OF THE COMMON LAW OF HABEAS CORPUS AND THEREFORE OF CPLR SECTION 7002 (A).

1. "Person" is not a synonym for "human being," but designates an entity with the capacity for legal rights.

"[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person." *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) (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) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). Legal persons possess inherent value; "legal things," possessing merely instrumental value, exist for the sake of legal persons. 2 William Blackstone, *Commentaries on the Laws of England* *16 (1765-1769). "Legal person" is not a biological concept. It does not "necessarily correspond" to the "natural order." *Byrn*, 31 N.Y.2d at 201. It is not a synonym for "human being." It is a legal concept, "a term of art." *Wartelle v. Womens' & Children's Hospital*, 704 So. 2d 778, 781 (La. 1997). In short, persons count; things don't. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001).

"Person" may be narrower than "human being." A human fetus is not a Fourteenth Amendment "person." *Roe v. Wade*, 410 U.S. 113 (1973). Before the American Civil War, slaves were not "persons." *See, e.g., Ex parte Boylston*, 33 S.C.L. 41, 43 (S.C. Ct. App. L. 1847); *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828). "Person" may designate an entity broader, or qualitatively different from, a human being. "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). Thus, corporations may be Fourteenth Amendment "persons." *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886). 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. http://nz01.terabyte.co.nz/ots/DocumentLibrary%5CWhanganuiRiverAgreement.pdf (accessed November 20, 2013).

"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), citing, among other authorities, 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,"), and IV Roscoe Pound, *Jurisprudence* 192-193 (1959). The Indian Supreme Court designated the Sikh sacred text a "legal person." *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421 (Indian Supreme Court). A Pakistani court has designated a mosque as a legal person. *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369 (Lahore High Court, Full Bench). A pre-Independence Indian court designated a Hindu idol as a "person" with the capacity to sue. *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925). The struggles over the legal personhood of human fetuses, *Roe*, 410 U.S. 113; *Byrn*, 31 N.Y.2d 194, slaves (*compare Sable v. Hitchcock*, 2 Johns. Cas. 79 (N.Y. Sup. Ct. 1800) (slaves) *with Lemmon*, 20 N.Y. 562 (slaves are free) and *Somerset*, 98 Eng. Rep. at 510 (slavery is "so *odious* that nothing can be suffered to support it but positive law") (emphasis added)), Native Americans, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (Native Americans are Federal Habeas Corpus Act "persons"), women, *Nairn v. University of St. Andrews*, A.C. 147 (1909) ("It is incomprehensible to me that anyone acquainted with our laws or the methods by which they are ascertained can think, if anyone does think, there is room for argument of such a point" [that "all persons" who graduated from certain universities included women]), corporations (corporations are First and Fourteenth Amendment "persons," *Citizens United v. Federal Communications Commission*, 558 U.S. 310 (2009), but are not protected by the Fifth Amendment's Self-Incrimination Clause, *Bellis v.*

United States, 417 U.S. 85 (1974)), and other entities have never been over whether they are human, but whether justice demands that they count.

"[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "The technical legal meaning of a 'person,'" said John Chipman Gray, is "a subject of legal rights and duties." Gray, *supra*, at 27 (This statement lies in Chapter II, cited with approval in *Byrn*, 31 N.Y.2d at 201). "'To be a person' or 'to have a legal personality" is identical to having legal obligations and subjective rights." Hans Kelsen, *Pure Theory of Law* 172 (rev. and enlarged 1967). *See Wartelle*, 704 So. 2d at 780-81 (the "classification of 'person' [there a fetus] is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties."); *Amadio v. Levin*, 509 Pa. 199, 225 (1985) (Zappala, J., concurring) ("'[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" and "'not every human being is necessarily a person, for a person is capable of rights and duties, and there may well be human beings having no legal rights, as was the case with slaves in English law'") (citing *Black's Law Dictionary* 1299, 1300 (4th ed. 1968); Pollock, *First Book of Jurisprudence* 110; Gray, *supra*, for both statements); Paton, *supra*, at 391 ("legal persons are all entities capable of being right-and-duty bearing units – all entities recognized by the law as capable of being parties to a legal relationship").

That Kiko is a chimpanzee does not mean he may never count as a legal person. As Gray explained, *supra*, at 43, there may 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.

Who is deemed a legal person is a "matter which each legal system must settle for itself." *Byrn*, 31 N.Y.2d at 202 (quoting Gray, *supra*, at 3).

The historic question before this Court is whether Kiko counts. In the following sections, Petitioners/Appellants demonstrate that New York common law liberty and equality compel Kiko's recognition as a "person" for purposes of a common law writ of habeas corpus.

2. Kiko is a legal person within the meaning of the common law of habeas corpus and therefore of CPLR § 7002 (a).

a. The New York common law freely changes when reason, facts, and an evolving sense of justice so require.

The Supreme Court's denial of the request for a writ of habeas corpus because it "thinks personally this is a more of a legislative issue than a judicial issue" demonstrates a misunderstanding of both the fundamentally common law nature of habeas corpus and of the duty of a New York common law court to revise or extend the common law when justice so requires (R. 19). Kiko's legal thinghood derives from the common law. When justice requires, New York courts have long refashioned the common law – especially the common law of habeas corpus – with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he held slavery "so *odious* that nothing can be suffered to support it but positive law." Lofft at 19; 98 Eng. Rep. at 510 (emphasis added). "One of the hallmarks of the writ [is] . . . its great flexibility and vague scope." *People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966) (citation omitted). Slaves employed the common law writ of habeas corpus to challenge their imprisonment as things. *Lemmon*, 20 N.Y. at 604-06, 618, 623, 630-31 (citing *Somerset*); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (Sup. Ct. 1846) (citing *Somerset* and *Forbes v. Cochran*, 107 Eng. Rep. 450, 467 (K.B. 1824)); *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam). Nonslaves employed it, including (1) apprentices and indentured servants, *e.g.*,

People v. Weissenbach, 60 N.Y. 385, 393 (1875); *In re M'Dowle*, 8 Johns. 328 (Sup. Ct. 1811); (2) infants, *Weissenbach*; *M'Dowle*; (3) the incompetent elderly, *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996); and (4) mental incompetents, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961).

It is not just in the area of habeas corpus that the New York courts freely revise the common law when justice requires, though habeas corpus law is the broadest and most flexible of all The Court of Appeals has long rejected the claim that "change . . . should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). *See W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998), *aff'd.* 267 A.D.2d 233 (1999) ("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Stewart v. Somerset*, . . . which stands as an eloquent monument to the fallacy of this view"). "We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule" the Court declared. *Id. See also Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 434 (1969) ("we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act"); *Greenburg v. Lorenz*, 9 N.Y. 2d 195, 199-200 (1961) ("Alteration of the law [when the legislature is silent] has been the business of the New York courts for many years"). The common law is "lawmaking and policymaking by judges . . . in principled fashion, to fit a changing society." Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 729 (1992). In response to the question in *Woods* whether the Court should bring "the common law of this state, on this question [of whether an infant could bring suit for injuries suffered before birth]

into accord with justice[,]" it answered: "we should make the law conform to right." 303 N.Y. at 351. It explained that "Chief Judge Cardozo's preeminent work *The Nature of Judicial Process* captures our role best if judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors." *Caceci v. Do Canto, Const. Corp.*, 72 N.Y.2d 52, 60 (1988) (citing Cardozo, *Nature of Judicial Process*, at 152).

Therefore, in New York, "'[w]hen the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice." *Woods*, 303 N.Y. at 355 (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29). New York courts have "not only the right, but the duty to re-examine a question where justice demands it" to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past." *Id.* (quoting *Funk v. United States*, 290 U.S. 371, 382 (1933)). *See, e.g.*, *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968) ("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Millington v. Southeastern Elevator Co.*, 22 N.Y.2d 498, 508 (1968) ("No recitation of authority is needed to indicate that this court has not been backward in overturning unsound precedent"); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . [i]t should be discarded"); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972) ("Stare decisis does not compel us to follow blindly a court-created rule . . . once we are persuaded that reason and a right sense of justice recommend its change").

b. As Kiko is autonomous, he is a common law "person" entitled to the common law right to the bodily liberty that the common law writ of habeas corpus protects.

The common law has been "viewed as a principle safeguard against infringement of individual rights." Judith S. Kaye, *supra*, at 730. The law of England, incorporated into New York law, was long *in favorem libertatis* ("in favor of liberty"). *Moore v. MacDuff*, 309 N.Y. 35, 43 (1955); *Whitford v. Panama R. Co.*, 23 N.Y. 465, 467-68 (1861); *In re Kirk*, 1 Edm. Sel. Cas. at 327; *Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) (on the question of a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johnson Cas. 89, 90 (Sup. Ct. 1800) (Radcliffe, J.); *People ex. rel Caldwell v Kelly*, 33 Barb. 444, 457-58 (Sup Ct. 1862) (Potter, J.) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction"); Francis Bacon, "The argument of Sir Francis Bacon, His Majesty's Solicitor General, in the Case of the Post-Nati of Scotland," in IV *The Works Of Francis Bacon, Baron of Verulam, Viscount St. Alban And Lord Chancellor* 345 (1845) (1608); 1 Sir Edward Coke, *The First Part of the Institutes of the Laws of England* sec. 193, at *124b (1628); Sir John Fortescue, *De Laudibus Legum Angliae* 105 (S.B. Chrimes, trans. 1942 [1545]). The legislature agrees. *See* N.Y. Stat. Law § 314 (McKinney) ("A statute restraining personal liberty is strictly construed"); *Carollo, People ex rel. v. Brophy*, 294 N.Y. 540, 545 (1945); *People v. Forbes*, 4 Parker Crim. Rep. 611, 612 (Sup. Ct. 1860).

Accordingly, "Anglo-American law starts with the premise of thorough-going self determination." *Natanson v. Kline*, 350 P.2d 1093, 1104 (Kan. 1960), *decision clarified on den. of reh'g*, 354 P.2d 670 (1960). The United States Supreme Court famously held that

> No 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).

The word "autonomy" derives from the Greek "autos" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). Its deprivation is a deprivation of common law dignity, *People v. Rosen*, 81 N.Y. 2d 237, 245 (1993); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986); *In re Gabr*, 39 Misc. 3d 746, 748 (Sup. Ct. 2013), that "long recognized the right of competent individuals to decide what happens to their bodies." *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993). *See, e.g., Matter of M.B.*, 6 N.Y.3d 437, 439 (2006); *Rivers*, 67 N.Y.2d at 492; *Schloendorff v. Soc'y of New York Hosp.*, 211 N.Y. 125, 129-30 (1914).

New York common law so powerfully values autonomy that it permits competent adults to decline life-saving treatment. *Matter of Westchester County Med. Ctr. (O'Connor)*, 72 N.Y.2d 517, 526-28 (1988); *Rivers*, 67 N.Y.2d. at 493; *People v. Eulo*, 63 N.Y. 2d 341, 357 (1984); *Matter of Storar*, 52 N.Y.2d 363, 378 (1981), *cert. denied*, 454 U.S. 858 (1981). This "insure[s] that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires." *Rivers*, 67 N.Y.2d at 493. It guarantees the right to defend oneself against criminal charges without counsel. *In re Kathleen K.*, 17 N.Y.3d 380, 385 (2011). It permits a permanently incompetent, once-competent human to refuse medical treatment, if he clearly expressed his desire to refuse treatment before incompetence silenced him, and no over-riding state interest exists. *Matter of Storar*, 52 N.Y.2d at 378. Even the never-competent - severely mentally retarded, the severely mentally ill, and the permanently comatose - who will never be competent, lack the ability, have always lacked the ability, and always will lack the ability, to choose, understand, or make a reasoned decision about medical treatment

possess common law autonomy and dignity equal to the competent. *In re M.B.*, 6 N.Y.3d at 440; *Rivers*, 67 N.Y.2d at 493 (citing *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728 (1977)); *Matter of Storar*, 52 N.Y.2d at 380; *Delio v. Westchester County Medical Center*, 129 A.D.2d 1, 15 (2d Dept. 1987); *Matter of Mark C.H.*, 28 Misc. 3d 765, 775 n.25 (Sur. Ct. 2010) (quoting *Saikewicz*, 373 Mass. at 746); *In re New York Presbyterian Hosp.*, 181 Misc. 2d 142, 151 n.6 (Sup. Ct. 1999). *Cf. O'Connor*, 72 N.Y. 2d. at 530 ("[I]t is inconsistent with our fundamental commitment to the notion that no person or court should substitute its judgment as to what would be an acceptable quality of life for another"). *But see id.* at 537 (Hancock, J. concurring) (criticizes *Storar* as it "ties the patient's right of self-determination and privacy solely to past expressions of subjective intent"); *id.* at 540-41 (Simons, J., dissenting) (criticizes *Storar's* refusal to adopt a substituted judgment rule). In 2002, the legislature adopted a substituted judgment rule, SCPA 1750(2).

Chimpanzees' capacities for autonomy and self-determination, which subsume many of their numerous complex cognitive abilities, are set forth in the Expert Affidavits. These include possession of an autobiographical self, episodic memory, self-determination, self-consciousness, self-knowingness, self-agency, referential and intentional communication, empathy, a working memory, language, metacognition, numerosity, and material, social, and symbolic culture, their ability to plan, engage in mental time-travel, intentional action, sequential learning, mediational learning, mental state modeling, visual perspective-taking, cross-modal perception; their ability to understand cause-and-effect and the experiences of others, to imagine, imitate, engage in deferred imitation, emulate, to innovate and to use and make tools.

In June 2013, the NIH recognized the ability of chimpanzees to choose and self-determine. Accepted Recommendation EA7 states: "The environmental enrichment program

developed for chimpanzees must provide for relevant opportunities for *choice and self determination.*" (R. 63) (emphasis added). The NIH noted "[a] large number of commenters who responded to this topic strongly supported this recommendation as a way to ensure both the complexity of the captive environment and chimpanzees' ability to *exercise volition with respect to activity, social grouping, and other opportunities.*" (*Id.*) (emphasis added).

Autonomous and possessed of self-determination, the ability to choose how to live his life, and dozens of allied complex cognitive capacities, Kiko is entitled to common law personhood and the common law right to bodily liberty protected by the New York common law writ of habeas corpus.

3. Kiko is a common law person entitled to the common law equality right to bodily liberty that the common law writ of habeas corpus protects.

Kiko is entitled to common law personhood and the right to bodily liberty as a matter of common law equality, too. Equality has always been a vital New York value, embraced by constitutional law, statutes, and common law. Article 1, § 11 of the New York Constitution contains both an Equal Protection Clause, modeled on the Fourteenth Amendment to the United States Constitution, and an anti-discrimination clause. "[T]he principles expressed in those sections [of the Constitution] were hardly new." *Brown v. State*, 89 N.Y.2d 172, 188 (1996). As the Court of Appeals explained:

> The Equal Protection Clause of the Fourteenth Amendment had been thoroughly debated and adopted by Congress and ratified by our Legislature after the Civil War, and the concepts underlying it are older still. Indeed, cases may be found in which this Court identified a prohibition against discrimination in the Due Process Clauses of earlier State Constitutions, clauses with antecedents traced to colonial times (*see* [citation omitted] Charter of Liberties and Privileges, 1683, § 15, reprinted in 1 Lincoln, Constitutional History of New York, at 101).

Id. New York equality values are embedded into common law. For example, under the common law, such private entities as common carriers, victualers, and innkeepers may not discriminate

unreasonably or unjustly. *See, e.g., Hewitt v. New York, N.H. & H.R. Co.*, 284 N.Y. 117, 122 (1940) (quoting *Root v. Long Island R. Co.*, 114 N.Y. 300, 305 (1889)); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911) (quoting *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894)); *People v. King*, 110 N.Y. 418, 427 (1888).

> The origins of the duty to serve and the recent direction of the case law suggest that a basic concern for individual autonomy animates the duty to serve. This concern recognizes the vulnerability of individuals to the arbitrary and unreasonable power of private entities. Realizing the importance to the individual of some goods, services, and associations, the duty to serve seeks to limit the power of the controlling entities by allowing exclusion only when based on fair and reasonable grounds.

Note, *The Antidiscrimination principle in the Common Law*, 102 HARVARD L. REV. 1993, 2001 (1989).

Common law equality, which forbids discrimination founded on unreasonable means or unjust ends, prohibits racial discrimination. *Odom v. E. Ave. Corp.*, 34 N.Y.S.2d 312 (Sup. Ct. 1942), *aff'd.* 37 N.Y.S.2d 491 (4th Dept. 1942). "New York has led in the proclamation and extension of its liberal policy favoring equality and condemning [racial] discrimination." *In re Young*, 211 N.Y.S 2d 621, 626 (Sup. Ct. 1961). The common law reaches the conduct of private organizations that arbitrarily refuse admission to an applicant. *Pinsker v. Pac. Coast Soc. of Orthodontists*, 12 Cal. 3d 541, 548 (1974) (en banc). This principle was embraced as public policy by New York statute. *Fritz v. Huntington Hospital*, 39 N.Y.2d 339, 344 (1976) (arbitrary rejection of a membership application prohibits rejection pursuant to an unfair procedure as well as an improper reason).

The Expert Affidavits demonstrate that genetically, physiologically, and psychologically, Kiko's interest in exercising his autonomy, choice, and self-determination is as fundamental to him as it is to a human being. Recall the United States Supreme Court's admonition 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[.]" *Botsford*, 141 U.S. at 251 (emphasis added). On this ground alone, this Court must hold that, as a matter of common law equality, Kiko is entitled to bodily liberty, and his right is protected by the common law writ of habeas corpus.

However, New York equality is not merely a product of its constitutions, statutes, and common law operating independently. Two decades ago, Chief Justice Kaye confirmed that the two-way street between common law decision-making and constitutional decision-making had resulted in a "common law decision making infused with constitutional values." Judith S. Kaye, *supra*, at 747. In harmony with the common law equality principles that forbid private discrimination founded on unreasonable means or unjust ends, the common law of equality embraces, at a minimum, its sister fundamental constitutional equality value - embedded within the New York and the United States Constitutions - that prohibits discrimination based on irrational means or illegitimate ends. *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("'Equal protection of the laws is not achieved through indiscriminate imposition of inequalities'") (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950)).

Common law equality decision-making differs from constitutional equal protection decision-making in that it has nothing to do with a "respect for the separation of powers." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 441-42 (1985). Instead it applies constitutional equal protection values to an evolving common law. The outcomes of similar common law and constitutional cases may therefore be different.

For example, in *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), the Court affirmed the constitutionality of New York's statutory limitation of marriage to opposite-sex couples. "*The*

critical question [was] whether a rational legislature could decide that these benefits should be given to opposite-sex couples, but not same-sex couples." *Id.* at 358 (emphasis added). The Court held the legislature could rationally conclude that same-sex relationships are more casual or temporary, to the detriment of children, and assume children do best with a mother and father. *Id.* at 359, 360. In the face of a dissent that concluded, "I am confident that future generations will look back on today's decision as an unfortunate misstep," *id.* at 396 (Kaye, C.J., dissenting), the majority "emphasize[d] . . . we are deciding only this constitutional question. *It is not for us to decide whether same-sex marriage is right or wrong.*" *Id.* at 366 (emphasis added).

In contrast, a classification's appropriateness is important to a court deciding the common law. It *should* decide what is right and wrong. Its job *is* to do the "right thing." This Court *should* recognize Kiko's common law personhood. This Court *should* determine that the classification of a chimpanzee as a "legal thing" invokes an illegitimate end. This Court *should* decide Kiko has a common law right to bodily liberty sufficient to entitle him to a writ of habeas corpus and a chance to live the autonomous, self-determining life of which he is capable.

Kiko's common law classification as a "legal thing," unable to possess any legal rights, rests upon an illegitimate end. *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. denied,* 534 U.S. 826 (2001). *See, e.g., Goodridge v. Department of Public Health*, 440 Mass. 309, 330 (2003); *Cleburne*, 473 U.S. at 452 (Stevens, J., concurring).

> Without such a requirement of legitimate public purpose it would seem useless to demand even the most perfect congruence between means and ends, for each law would supply its own indisputable - and indeed tautological fit: if the means chosen burdens one group and benefits others, then the means perfectly fits the end of burdening just those whom the law disadvantage and benefitting just those it assists.

Laurence H. Tribe, *American Constitutional Law* 1440 (second ed. 1988).

In *Romer*, the United States Supreme Court struck down the so-called "Amendment 2," because its purpose of repealing all existing anti-discrimination positive law based upon sexual orientation, was illegitimate. 517 U.S. at 626. It violated equal protection because "*[i]t is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board.*" *Id.* at 633 (emphasis added). This statute was "simply so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated *basic equal protection values*." *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998) (emphasis added). *See Mason v. Granholm*, 2007 WL 201008 (E.D. Mich. 2007); *Goodridge*, 440 Mass. at 330 (same-sex marriage ban impermissibly "identifies persons by a single trait and then denies them protection across the board").

As it would be a tautology for the Equal Protection Clause to fail to demand that a legitimate public purpose or set of purposes based on some conception of the general good be the legislative end, it would be a tautology to determine whether class members are similarly situated for all purposes. The true test is "'whether they are similarly situated *for purposes of the law challenged.*'" *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 158 (2008) (quoting *Stuart v. Commissioner of Correction*, 266 Conn. 596, 601-602 (2003)) (emphasis added).

Denying Kiko his common law right to bodily liberty solely because he is a chimpanzee is a tautology. . "'[S]imilarly situated' [cannot] mean simply 'similar in the possession of the classifying trait.' All members of any class are similarly situated in this respect and consequently, any classification whatsoever would be reasonable by this test." *Varnum v. Brien*, 763 N.W. 2d 862, 882-83 (Iowa 2009) (citations omitted). The "equal protection guarantee

requires that laws treat all those who are similarly situated with respect to the purposes of law alike." *Id.* In *Goodridge*, the Supreme Judicial Court of Massachusetts swept aside the argument that the legislature could refuse gays the right to marry because the purpose of marriage is procreation, which they could not accomplish. 440 Mass. at 330. This argument "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage." *Id.* at 333. Kiko is imprisoned for one reason: he is a chimpanzee. Possessing that "single trait," he is "denie[d] . . . protection across the board." *Romer*, 517 U.S. at 633.

Homo sapiens membership is laudably a sufficient condition for legal personhood. Even permanently comatose and anencephalic humans are entitled to legal rights. However, "the thesis that humans should be ascribed rights simply for being human has received practically no support from philosophers." Daniel Wikler, "Concepts of Personhood: A Philosophical Perspective," in *Defining Human Life: Medical, Legal, and Ethical Implications* 13, 19 (Margery W. Shaw and A. Edward Doudera, eds. 1983). *See* L.W. Sumner, *The Moral Foundation of Rights* 206 (1987); Christina Hoff, "Immoral and moral uses of animals," 302(2) *New England Journal of Medicine* 115, 115 (Jan. 19, 1980).

The respected Federal Circuit Judge Richard A. Posner implicitly concedes that no rational arguments exist to support an invidious discrimination against every nonhuman. He argues instead that such discrimination is justified because it originates from a "moral intuition deeper than any reason that could be given for it and impervious to any reason that you or anyone could give against it. Membership in the human species is not a 'morally irrelevant fact,' as the race and sex of human beings has come to seem." Richard A. Posner, *Animal Rights*, Slate, http://www.slate.com/articles/news_and_politics/dialogues/features/2001/animal_rights/_3.html

(June 12, 2011) (accessed March 9, 2014). It also acknowledges both that race and gender were once morally relevant facts that justified invidious discrimination against humans, *Dred Scott v. Sandford*, 60 U.S. 393, 407-09 (1856) (blacks), *In re Goodell*, 39 Wis. 232, 240 (1875) (women); *People v. Hall*, 4 Cal. 399, 405 (1854) (Chinese), and that which facts are morally relevant can change.

The great Yale historian of slavery, David Brion Davis, has recently written that human slaves were "animalized" to justify their brutal treatment and that "[t]he animalization of humans first required the 'animalization' of animals." David Brion Davis, *The Problem of Slavery in the Age of Emancipation* 23 (2014). This required human "anthropodenial . . . a blindness to the humanlike characteristics of other animals, or the animal-like characteristics of ourselves." *Id.* at 24.

All nonhuman animals were once believed unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, not only do the Expert Affidavits and the June 13, 2013 NIH acceptance of The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation confirm chimpanzees' extraordinarily complex, often human-like, cognitive abilities and expose those ancient, pre-Darwinian prejudices as untrue, at least with respect to chimpanzees, but so does the 2011 report of the Institute of Medicine and National Research Council of the National Academies in 2011 discussing the use of chimpanzees in biomedical research:

> Chimpanzees live in complex social groups characterized by considerable interindividual cooperation, altruism, deception, and cultural transmission of learned behavior (including tool use). Furthermore, laboratory research has demonstrated that chimpanzees can master the rudiments of symbolic language and numericity, that they have the capacity for empathy and self-recognition, and that they have the human-like ability to attribute mental states to themselves and

> others (known as the "theory of mind"). Finally, in appropriate circumstances, chimpanzees display grief and signs of depression that are reminiscent of human responses to similar situations.

Chimpanzees in Biomedical and Behavioral Research - Assessing the Necessity 27 (Bruce M. Altevogt, *et. al*, eds., The National Academies Press 2011). At least twenty-five large private research companies, including GlaxoSmithKline, PLC, Merck & Co., Inc., DuPont, AstraZeneca, PLC, Colgate-Palmolive Company, and Novo Nordisk have committed not to use chimpanzees in research, http://www.humanesociety.org/issues/chimpanzee_research/tips/companies_chimpanzee_policies.html#.Uzc6nV6T4W0 (accessed March 28, 2014), while The Board of Editors of *Scientific American* recently called for the end of captivity for such cognitively complex nonhuman animals as great apes, cetaceans, and elephants, "Free Willy – And His Pals," *Scientific American* 10 (March 2014).

For centuries New York courts have rejected slavery. The famous *Lemmon* case, 20 N.Y. 562, is acknowledged as "one of the most extreme examples of hostility to slavery in Northern courts," Paul Finkleman, *Slavery in the Courtroom* 57 (1985). *See Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835). Judges "kn[o]w times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003). The Expert Affidavits, the June 13, 2013 NIH acceptance of The Working Group on the Use of Chimpanzees in NIH-Supported Research within the Council of Councils' Recommendation, and the 2011 Institute of Medicine and National Research Council of the National Academies report are merely the tip of a mountain of facts that demonstrate that chimpanzees self-determine, are autonomous, and possess a wide range of extraordinarily complex cognitive abilities that can neither be denied nor ignored. The invidious discrimination Kiko faces is sustained by nothing stronger than morally and legally flawed

intuition. The legal thinghood of chimpanzees, at least with respect to their right to a common law writ of habeas corpus, has become an anachronism.

Humans who have never been sentient nor conscious nor possessed of a brain *should* have basic legal rights. But *if* humans bereft even of sentience are entitled to personhood, *then* this Court must either recognize Kiko's just equality claim to bodily liberty or reject equality. Abraham Lincoln understood that the act of extending equality protects it: "[i]n *giving* freedom to the slave, we *assure* freedom to the free, honorable alike in what we give, and what we preserve." 5 *Collected Works of Abraham Lincoln* 537 (Roy P. Basler, ed. 1953) (annual message to Congress of December 1, 1862) (emphasis in original). The act of denying equality in order to enslave, based on a single trait, jeopardizes everyone's equality.

The purpose of equal protection review is "to protect constitutional rights of individuals from legislative enactments that have denied those rights, even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed as impervious to the passage of time." *Varnum*, 763 N.W. 2d at 876. Today, no less than one hundred and fifty years ago, "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV." *People v. Liberta*, 64 N.Y.2d 152, 167 (1984) (quoting Oliver Wendell Holmes, Jr., *The path of the law*, 10 HARV. L. REV. 457, 469 (1897)).

Petitioners/Appellants claim only that Kiko has a common law right to bodily liberty protected by the common law writ of habeas corpus. What, if any, other common law rights Kiko possesses will be determined on a case-by-case basis. In *Byrn*, the Court of Appeals noted that fetuses are "persons" for some purposes in New York, including inheritance, devolution of property, and wrongful death, while not being "persons in the law in the whole sense," such as being subject to abortion. 31 N.Y.2d at 200.

4. Kiko is a "person" within the meaning of EPTL § 7-8.1.

Kiko is not only a "person" within the meaning of the common law of habeas corpus and therefore CPLR § 7002 (a) but, as a beneficiary of an *inter vivos* trust created by the NhRP pursuant to EPTL §7-8.1 for the purpose of his care, he is a "person" under that statute, as only "persons" may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947). "Before this statute [EPTL § 7-8.1] trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because non-human lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries,* N.Y. Est. Powers & Trusts Law § 7-8.1 (2013). *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952); *In re Estate of Howells*, 260 N.Y.S. 598, 607 (Sur. Ct. 1932). New York did not even recognize honorary trusts for nonhuman animals, which lack beneficiaries. *In re Voorhis' Est.*, 27 N.Y.S.2d 818, 821 (Sur. Ct. 1941).

In 1996, the Legislature enacted EPTL § 7-6 (now EPTL §7-8), § (a), which permitted "domestic or pet animals" to be designated as trust beneficiaries. Section (a) stated in relevant part: "A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none . . . by a trustee." The Sponsor's Memorandum attached to the bill that became EPTL § 7-6.1 (and now § 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.

This section thereby acknowledged these nonhuman animals as "persons" capable of possessing legal rights. Accordingly, in *In re Fouts*, 677 N.Y.S.2d 699 (Sur. Ct. 1998), the

Surrogate's Court recognized that five chimpanzees were "income and principal beneficiaries of the trust" and referred to its chimpanzees as "beneficiaries" throughout. In *Feger v. Warwick Animal Shelter*, 870 N.Y.S.2d 124, 126-27 (2d Dept. 2008), the Appellate Division observed "[t]he reach of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner."

In 2010, the legislature renumbered EPTL § 7-6.1 as EPTL § 7-8.1, removed "Honorary" from the statute's title, "Honorary Trusts for Pets," leaving it to read, "Trusts for Pets," and amended section (a) to read:

> A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. *Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.*

(emphasis added). The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York's report to the legislature stated, "we recommend that the statute be titled 'Trusts for Pets' instead of 'Honorary Trusts for Pets,' as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute." N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).

In removing "Honorary" and the twenty-one year limitation on trust duration, the legislature dispelled any doubt that a nonhuman animal was capable of being a trust beneficiary in New York. By allowing "designated domestic or pet animals" to be trust beneficiaries able to own the trust corpus, New York recognized these nonhuman animals as "persons" with the capacity for legal rights. Because Kiko is a New York trust beneficiary, he is a legal "person."

As EPTL § 7-8.1 created legal personhood in those nonhuman animals within its reach, New York public policy already recognizes that at least some nonhuman animals are persons capable of possessing one or more legal rights.

V. CONCLUSION

Both New York common liberty and equality principles compel this Court to recognize Kiko's personhood and fundamental right to bodily integrity for the purpose of a common law habeas corpus action. Kiko is therefore a "person" within the meaning of CPLR Article 70. In *Somerset*, *supra*, Lord Mansfield assumed, without deciding, that the slave, James Somerset, was a "person" protected by the common law writ of habeas corpus, and issued the writ that required the Respondent to demonstrate Somerset's imprisonment was legal. Petitioners/Appellants urge this Court similarly to reverse the judgment of the Supreme Court, remand the case to the Supreme Court, and order it to follow the same laudatory procedure, issue a writ of habeas corpus and proceed according to the requirements of Article 70. Alternatively, this Court should issue the writ of habeas corpus, remand the case to the Supreme Court, and order that court to proceed according to the requirements of Article 70.

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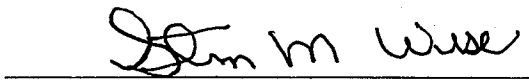
Respectfully Submitted,

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



Steven M. Wise, Esq.
Attorney for Petitioners/Appellants
5195 NW 112th Terrace
Coral Springs, FL 33076
(954) 648-9864