STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause,

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

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR HABEAS CORPUS

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I. Introduction

The legal status of nonhuman animals has been rapidly evolving from rightless "things" to rights-bearing "persons" in New York State and throughout the world. The Appellate Division, Fourth Judicial Department ("Fourth Department") recently declared that it is now "*common knowledge* that personhood can and sometimes does attach to nonhuman entities like . . . *animals*." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (emphasis added, citations omitted). In support, the Fourth Department cited, *inter alia*, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, in which it had twice assumed, without deciding, that a chimpanzee (Kiko) could be a "person" for habeas corpus purposes. 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den*., 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den*., 2015 WL 5125507 (N.Y. Sept. 1, 2015). The only relevant opinion from a Court of Appeals Judge is Judge Fahey's recent concurrence in *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) ("*Tommy*") (Fahey, J., concurring). There, he concluded that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. . . . While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *Id.*[1] Significantly, a New York State Supreme Court has *already* issued an order to show cause pursuant to the New York Civil Practice Law and Rules ("CPLR") Article 70, that required the State to justify its detention of two chimpanzees. *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 908, 917 (Sup. Ct. 2015) ("*Stanley*"). These four opinions, *Graves*, *Tommy*, *Presti*, and

[1] Judge Fahey's concurrence should be given "respectful consideration" by this Court. N.Y. Stat. Law §72 cmt. (McKinney) ("dictum by the Court of Appeals is entitled to respectful consideration"). *See Welch v. Mr. Christmas, Inc*., 85 A.D.2d 74, 77 (1st Dept. 1982) ("[T]he view expressed in the concurring opinion [of a Court of Appeals case] has frequently been relied upon."), *aff'd*, 57 N.Y.2d 143; *Darling v. Darling*, 869 N.Y.S.2d 307, 316 (Sup. Ct. 2008) ("The concurring opinion . . . has been cited with approval, and principles it articulates have been recognized."); *see also Bowles v. Sec'y for the Dep't of Corr*., 608 F.3d 1313, 1316 (11th Cir. 2010) (citing Justice O'Connor's concurrence in denial of *certiorari*); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 n.4 (9th Cir. 2007) (citing Justice Stevens' concurrence in denial of *certiorari*); *State v. Santiago*, 318 Conn. 1, 92 (2015) (citing as authoritative Justice Stevens' concurrence in the denial of *certiorari*); *Bonnell v. Mitchell*, 301 F. Supp. 2d 698, 755 (N.D. Ohio 2004) (relying on Justice O'Connor's concurrence in denial of *certiorari*); *State v. Davis*, 504 N.W.2d 767, 771 (Minn. 1993) (same).

Stanley, are consistent with New York's legislatively-established public policy of recognizing the personhood of nonhuman animals as reflected by the conferral of legal rights upon those nonhuman animals within the ambit of Section 7-8.1 of the Estates, Powers and Trusts Law ("EPTL") (Pet. at ¶ 22).[2]

Foreign courts similarly acknowledge not just the general personhood of nonhuman animals, but their specific right to habeas corpus. (Pet. at ¶¶ 26-29, 64). Adopting the NhRP's legal strategy, a petition for a writ of habeas corpus was filed on behalf of a chimpanzee, Cecilia, in an Argentine court to free her from the Mendoza Zoo. In November 2016, the court granted the writ, declared Cecilia a "non-human legal person" with "nonhuman rights," and ordered her immediate release from the zoo and subsequent transfer to a sanctuary.[3] Rejecting the claim that Cecilia could not avail herself of habeas corpus because she was not a human, the court recognized that "societies evolve in their moral conducts, thoughts, and values" and concluded that classifying autonomous "animals as things is not a correct standard."[4]

Happy is an extraordinarily cognitively complex and autonomous being whose interest in exercising her autonomy is as fundamental to her as it is to us.[5] Respondents' imprisonment of

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[2] The Oregon Supreme Court cited Petitioner the Nonhuman Rights Project, Inc.'s (the "NhRP") New York habeas corpus cases with approval, declaring: "we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still." *State v. Fessenden*, 355 Or. 759, 769-70 (2014).

[3] Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-2, 24 (as translated from original Spanish by attorney Ana Maria Hernandez), a certified copy of which is available at https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation-FINAL-for-website.pdf (last visited Sept. 27, 2018).

[4] *Id.* at 5, 19-20, 23-24.

[5] The complex cognitive characteristics of elephants include: autonomy; empathy; self-awareness; self-determination; need to interact with species-specific social partners; need to engage in species-specific activities; theory of mind (awareness others have minds); insight; working memory, and an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of a particular communication; wide variety of gestures, signals, and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan

Happy deprives her of her ability to exercise her autonomy in meaningful ways, including the freedom to choose where to go, what to do, and with whom to be.[6] Such deprivation of a "person's" bodily liberty is *per se* unlawful.[7] On Happy's behalf, the NhRP invokes this Court's common law authority to recognize that she is a common law person with the common law "right to liberty protected by habeas corpus." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring).[8] The NhRP seeks Happy's immediate release from Respondents' continued imprisonment so that Happy's autonomy may be realized to the fullest extent possible.[9]

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). Habeas corpus "lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretence." *People v. McLeod*, 3 Hill 635, 647 note j (N.Y. 1842). New York courts, through the "process of decisional accretion, [have] made increasing use of 'one of the hallmarks of the writ . . . its great flexibility and vague scope.'" *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966) (citation omitted). The "common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions." *Gallagher v. St.*

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according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities, and, an awareness of and response to death, including grieving behaviors. *See* Affidavit of Lucy Bates & Richard M. Byrne ¶30, ¶34, ¶37, ¶47, ¶50, ¶60; Affidavit of Karen McComb ¶24, ¶31, ¶41, ¶44, ¶54; Affidavit of Joyce Poole ¶22, ¶26, ¶29, ¶39, ¶42, ¶53; Affidavit of Cynthia Moss ¶18, ¶22, ¶25, ¶35, ¶38, ¶48.

[6]Elephants are autonomous and exhibit "self-determined behaviour that is based on freedom of choice." Bates & Byrne Aff. ¶30, ¶60; McComb Aff. ¶24, ¶31, ¶54; Poole Aff. ¶22, ¶53; Moss Aff. ¶18; ¶48. "Holding them captive and confined prevents them from engaging in normal, autonomous behavior … [and] [h]eld in isolation elephants become bored, depressed, aggressive, catatonic and fail to thrive." Supplemental Affidavit of Joyce Poole ¶4.

[7] As in *Presti*, the NhRP uses "unlawful" and "illegal" interchangeably. 124 A.D.3d 1334.

[8] A "person" has the *capacity* for legal rights. The question of *which rights* a "person" has is a distinct question.

[9] This habeas corpus case is not about Happy's welfare any more than a human habeas corpus case alleging that a human is being imprisoned against her will is about that human's welfare. *Stanley*, 16 N.Y.S.3d at 901 (recognizing chimpanzee habeas corpus case was not about "animal welfare"). The NhRP does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions" nor does it seek improved welfare for Happy. *Id*. The sole issue is whether Happy, an autonomous being, may be imprisoned at all.

Raymond's R.C. Church, 21 N.Y.2d 554, 558 (1968). New York courts have "the duty to re-examine a question where justice demands it." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951).

The *Stanley* court properly observed that, "given the 'great flexibility and vague scope' of the writ of habeas corpus," it may be issued on behalf of nonhuman animals to determine whether they are common law "persons" entitled to their freedom, 16 N.Y.S.3d at 900, 904-05, and has long been used on behalf of individuals not then recognized as legal persons in order to establish their right to bodily liberty. (Pet. at ¶ 60). For example, slaves then viewed as "things"[10] employed habeas corpus to challenge the legality of their imprisonment.[11] The granting of habeas corpus in such cases resulted in release from imprisonment but not other rights (*i.e.*, voting rights).[12]

This Court need not make an initial determination of whether Happy is a "person" with the right to bodily liberty for the purpose of issuing the Order to Show Cause. (Pet. at ¶ 23); *Stanley*, 16 N.Y.S.3d at 900, 908, 917. But to refuse to issue that Order would constitute "refusal to confront a manifest injustice." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

II. This Court has the duty to determine whether Happy is a "person" with the common law right to bodily liberty protected by common law habeas corpus.

A. "Person" has never been a synonym for "human being," but designates instead an entity with the capacity for legal rights.

The "significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). Upon "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

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[10] *See Pearne v. Lisle,* 1 Amb. 75 (1749) (Hardwicke, Lord Chancellor) ("I have no doubt that trover will lie for a negro slave; it is as much property as any other thing other").

[11] *See, e.g., Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772); *Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 630-31 (1860); *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846); *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam); *Commonwealth v. Aves*, 35 Mass. 193 (1836); *State v. Lyon*, 1 N.J.L. 403 (1789); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793); *Respublica v. Blackmore*, 2 Yeates 234, 1797 WL 744, at *1 (Pa. 1797).

[12] *See generally Plessy v. Ferguson*, 163 U.S. 537 (1896); *Bryan v. Walton*, 14 Ga. 185, 198 (1853) (granting personhood rights to a former black slave only confers "freedom from the dominion of the master, and the limited liberty of locomotion; [] it does not and cannot confer *citizenship,* nor any of the powers, civil or political, incident to *citizenship*") (emphasis in original).

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* 349-56 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-23 (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). Persons count in law; things don't.[13]

"Person" has never been synonymous for "human being." *Byrn*, 31 N.Y.2d at 201; *see Graves*, 163 A.D.3d at 21 (citing *Byrn*); *Tommy*, 31 N.Y.3d at 1056-57 (Fahey, J., concurring); *Stanley*, 16 N.Y.S.3d at 916-17; EPTL 7-8.1 (granting personhood rights to certain nonhuman animals as trust beneficiaries).[14] Nor is personhood a biological concept; nor does it "necessarily correspond" to the "natural order." *Byrn*, 31 N.Y.2d at 201; *see Graves*, 163 A.D.3d at 21 (quoting *Byrn*); *Stanley*, 16 N.Y.S.3d at 912 ("personhood" is not focused on "biology"). It is simply a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997).

Who is deemed a "person" is a "matter which each legal system must settle for itself" in light of evolving public policy. *Byrn*, 31 N.Y.2d at 201-02 (quoting Gray, *supra*, at 3). *See also Graves*, 163 A.D.3d at 21; *Tommy*, 31 N.Y.3d at 1057-58 (Fahey, J., concurring) ("This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention."). "[L]egal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly." *Stanley*, 16 N.Y.S.3d at 912. Referring to expanding habeas corpus to nonhuman animals, *Stanley* observed that although courts "are slow

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[13] *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001); *accord Stanley*, 16 N.Y.S.3d at 912 (citing Note).

[14] *See also* George Whitecross Paton, *A Textbook of Jurisprudence* 349-50 (3rd ed. 1964); *Salmond on Jurisprudence* 305 (12th ed. 1928) ("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."); IV Roscoe Pound, *Jurisprudence* 192-93 (1959); Benjamin N. Cardozo, *The Nature of the Judicial Process* 53 (Yale Univ. Press 1921).

to embrace change," the "pace may now be accelerating." *Id.* at 917-18. Indeed, the Fourth Department recently noted that it is "common knowledge" that personhood "can and sometimes does attach to nonhuman entities like . . . animals." *Graves*, 163 A.D.3d at 21 (citations omitted).

"Person" has also been defined more narrowly than "human being." The *Byrn* court acknowledged that while a fetus "is human," it is not a Fourteenth Amendment "person." 31 N.Y.2d at 199. *See also Roe v. Wade*, 410 U.S. 113 (1973). Human slaves were not "persons" in New York until the last slave was freed in 1827,[15] and were not "persons" throughout the entire United States until 1865.[16] Women were not "persons" for many purposes until well into the twentieth century.[17] Jews were once not "persons,"[18] while the first time a Native American sought a writ of habeas corpus, the U.S. Government claimed he was not a "person" either.[19] On the other hand, "[l]egal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, an idol." Paton, *supra*, at 393. Corporations have long been Fourteenth Amendment persons. And "(t)here is no difficulty giving legal rights to a supernatural being." Gray, *supra* Chapter II, 39 (1909). Gray, *id.* at 43, noted that there may be "systems of law in which animals have legal rights" and are therefore "legal persons."

Other countries are rapidly designating an expanding number of nonhuman entities as "persons." In 2018, the Colombia Supreme Court designated its part of the Amazon rainforest as "as an entity subject of rights," in other words, a "person."[20] In 2017, New Zealand's Parliament

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

[16] *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they are human beings . . . are not treated as a person, but (*negotium*), a thing.").

[17] *See Stanley*, 16 N.Y.S.3d at 912 ("Married women were once considered the property of their husbands, and before marriage were often considered family property, denied the full array of rights accorded to their fathers, brothers, uncles, and male cousins.") (citation omitted); Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007); Blackstone, *Commentaries on the Law of England*, *442 (1765-1769) ("the very being or legal existence of the woman is suspended during the marriage . . . ").

[18] RA Routledge, *The Legal Status of the Jews in England*, 3 THE JOURNAL OF LEGAL HISTORY 91, 93, 94, 98, 103 (1982) (13th century Jews were chattels of the King).

[19] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879).

[20] *See* STC4360-2018 (2018-00319-01),

designated the Whanganui River Iwi a "person" that owns its riverbed,[21] following its 2014 designation of a national park—Te Urewara—as a "legal entity, having all the rights, powers, duties, and liabilities of a person."[22] In 2014, the Indian Supreme Court held that nonhuman animals in general possess constitutional and statutory rights.[23] In 2000, it designated the Sikh's sacred text, the Sri Guru Granth Sahib, a "person,"[24] thereby permitting it to own and possess property. Pre-Independence Indian courts designated certain Punjab mosques as legal persons,[25] and a Hindu idol as a "person" with the capacity to sue.[26]

In short, the "parameters of legal personhood" are not "focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our laws." *Stanley*, 16 N.Y.S.3d at 912.

B. As New York common law is broad and flexible, its courts are obliged to change the common law when reason, experience, scientific progress, and equity demand it.

Referring to the common law thinghood of chimpanzees, *Stanley* admonished: "'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.'" 16 N.Y.S.3d at 917-18 (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)). "'If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights

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http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/, *excerpts available at* https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537 (last visited Sept. 27, 2018).

[21] New Zealand Parliament, "Innovative bill protects Whanganui River with legal personhood," March 28, 2017, *available at:* https://www.parliament.nz/en/get-involved/features/innovative-bill-protects-whanganui-river-with-legal-personhood/ (last visited Sept. 27, 2018).

[22] Te Urewara Act 2014, Subpart 3, §11(1), *available at*: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last visited Sept. 27, 2018).

[23] *Animal Welfare Board v. Nagaraja,* 6 SCALE 468 (2014), *available at* https://indiankanoon.org/doc/39696860/ (last visited Sept. 27, 2018).

[24] *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421.

[25] *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench).

[26] *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925).

once denied.'" *Id.* at 912 (citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)).[27]

Historically, Happy's legal thinghood derives from the common law. *See id.* at 912 ("For purposes of establishing rights, the law presently categorizes entities in a simple, binary, 'all-or-nothing' fashion. . . . Animals, including chimpanzees and other highly intelligent mammals, are considered as property under the law."); *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring). As such, this Court has common law authority to recognize that Happy is a "person" for the purpose of habeas corpus. Habeas corpus "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).[28] When justice requires, New York courts refashion the common law—especially the common law of habeas corpus—with the directness Lord Mansfield displayed in *Somerset* when he held slavery "so odious that nothing can be suffered to support it but positive law." *Somerset*, 1 Lofft at 19.

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 common law "change . . . should come from the Legislature, not the courts." *Woods*, 303 N.Y. at 355. As the Court noted in *Woods*: "We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Id.* at 351.[29] In response to the question of 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:

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[27] *See generally Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683 (2017) (invalidating statutes that "date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are" and are today "stunningly anachronistic").

[28] *See also People ex rel Lobenthal v. Koehler*, 129 A.D.2d 28, 30 (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); *Stanley*, 16 N.Y.S.3d at 904; *People ex rel. Jenkins v. Kuhne*, 57 Misc. 30, 40 (Sup. Ct. 1907) ("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."), *aff'd*, 195 N.Y. 610 (1909).

[29] *See also Flanagan v. Mount Eden General Hosp.*, 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") (emphasis added); *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.").

"we should make the law conform to right." *Id.*

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.* at 355 (emphasis added, citation and internal quotations omitted). "'When 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." *Id.* (citation omitted).[30]

The capacity of the common law for growth and change is its most significant feature. *See generally Woods*, 303 N.Y. at 355. "But that vitality can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it." *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 394 (1974). "'Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.'" *Id.* (citation omitted). *Accord Woods*, 303 N.Y. at 355. In this case, reason and equity demand a change.

For centuries, nonhuman animals were incorrectly believed to be unable to think, believe, remember, reason, and experience emotion.[31] Today, the attached Expert Scientific Affidavits confirm elephants' complex cognitive abilities and autonomy and expose those ancient, pre-

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[30] *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."); *see also Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (1892) ("cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error") (quoting 1 *Kent's Commentaries* 477 (13th edition 1884)).

[31] Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993).

Darwinian prejudices as false.[32] *See also id.* at 1058 (Fahey, J., concurring) ("To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.").

C. No legislation impedes this Court's inherent common law authority to declare Happy a common law person with the common law right to bodily liberty protected by common law habeas corpus.

Nothing precludes this Court from declaring Happy a common law person with the common law right to bodily liberty protected by habeas corpus. CPLR Article 70 is purely procedural and does not—*cannot*—curtail substantive entitlement to the writ, including the determination of who constitutes a "person." *Tweed*, 60 N.Y. at 569 ("the [habeas corpus] act needs no interpretation and is in full accord with the common law"). The common law writ "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." *Id.* at 566.[33] "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." Vincent Alexander, *Practice Commentaries, Article 70 (Habeas Corpus), In General* (2013). In addition, the Suspension Clause precludes the legislature and judiciary from abrogating the substantive right to the common law writ. *See* N.Y. CONST. ART. I, § 4; *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939); *Tweed*, 60 N.Y. at 591-92.

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[32] Happy has been specifically found to possess Mirror Self-Recognition, which is an accepted indicator of self-consciousness. Joshua M. Plotnik, Frans B.M. deWaal, and Diana Reiss, *Self-recognition in an Asian elephant*, 103 PNAS 17053 (Nov. 7, 2006).

[33] *See also Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (Suspension Clause means 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, 772 (2d Dept. 1912) ("no sensible impairment of [habeas corpus] may be tolerated under the guise of either regulating its use or preventing its abuse"); *People ex rel. Bungart v. Wells*, 57 A.D. 140, 141 (2d Dept. 1901).

Because this case is brought under the common law, it requires no legislative deference. In *Hernandez v. Robles*, 7 N.Y.3d 338 (2006), by contrast, the Court affirmed the constitutionality of New York's limitation on marriage to opposite-sex couples but notably concluded in the dissent, "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 say whether same-sex marriage is right or wrong.*" *Id.* at 366 (emphasis added). But it *is* for a *common law* court to decide what is right and wrong. A common law court's job *is* to do the "right thing." When it is time to reach the merits of personhood, this Court *must* determine whether Happy's common law classification as a mere "thing" is *wrong*, and whether according her the sole common law right to bodily liberty—giving her a chance to live the autonomous life of which she is capable—is *right.*

In accordance with *Byrn*, 31 N.Y.2d at 201, and *Graves*, 163 A.D.3d at 21, a determination of personhood does not turn on legislative definitions or biology but on public policy and moral principle. The court in *Stanley*, 16 N.Y.S.3d at 911 correctly understood:

> "Person" is not defined in CPLR article 70, or by the common law of habeas corpus. Petitioner agrees that there exists no legal precedent for defining "person" under article 70 or the common law to include chimpanzees or any other nonhuman animals, or that a writ of habeas corpus has ever been granted to any being other than a human being. Nonetheless, as the Third Department noted in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (124 A.D.3d at 150-51), the lack of precedent does not end the inquiry into whether habeas corpus relief may be extended to chimpanzees.

Judge Fahey agreed that whether "an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law," is not "*a definitional question*, but a deep dilemma of ethics and policy that demands our attention." *Tommy*, 31 N.Y.3d at 1057-58 (Fahey, J., concurring) (emphasis added).

III. Happy's autonomy entitles her to the common law right to bodily liberty.

A. Happy's autonomy is sufficient to entitle her to the right to bodily liberty as a matter of *liberty.*

Although personhood is not a biological concept, Judge Fahey recognized that biology, or at least autonomy, unlike mere taxonomy, is relevant to a court's personhood determination for purposes of habeas corpus. The proper judicial question is whether a nonhuman animal "has the right to liberty protected by habeas corpus," and "the answer to that question will depend on our assessment of the intrinsic nature of [the nonhuman animal] as a species." *Id.*[34] An entity capable of being "wronged" should at least "have the right to redress [that] wrong[]." *Id.* at 1057 (citation omitted). Because an autonomous being is wronged by the deprivation her bodily liberty, she should have the right to redress that wrong. *Id.* And the remedy is habeas corpus.

Like Judge Fahey, the New York Supreme Court in *Stanley* understood that habeas corpus "is deeply rooted in our cherished ideas of individual *autonomy* and free choice." 16 N.Y.S.3d at 903-04 (citations omitted) (emphasis added). Because "notions of individual *autonomy* and free choice are cherished . . . [courts must] insure that the greatest possible protection is accorded [one's] autonomy and freedom from unwanted interference with the furtherance of [one's] own desires." *Rivers v. Katz*, 67 N.Y.2d 485, 4993 (1986) (emphasis added). "The right to one's person may be said to be a right of complete immunity: to be let alone." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891) (quoting *Cooley on Torts* 29).

[34] Judge Fahey, referring to chimpanzees, noted that "[t]he record before us . . . contains unrebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities, including being able to remember the past and plan for the future, the capacities of self–Awareness and self–Control, and the ability to communicate through sign language. Chimpanzees make tools to catch insects; they recognize themselves in mirrors, photographs, and television images; they imitate others; they exhibit compassion and depression when a community member dies; they even display a sense of humor. Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self–Initiating intentional, adequately informed actions, free of controlling influences (*see* Tom L. Beauchamp, Victoria Wobber, *Autonomy in chimpanzees*, 35 Theoretical Medicine and Bioethics 117 [2014]; *see generally* Jane Goodall, The Chimpanzees of Gombe: Patterns of Behavior 15–42 [1986])." 31 N.Y.3d at 1057-58 (Fahey, J., concurring). The Expert Scientific Affidavits in this case similarly demonstrate that elephants have advanced cognitive abilities, including autonomy. (Pet. at Part V).

The deprivation of an autonomous being's bodily liberty constitutes a serious deprivation of the self-determination that judges stoutly defend.[35] The common law protection of autonomy has a long and impressive pedigree in New York.[36] New York common law values autonomy over life itself, permitting competent adults to decline life-saving treatment, thus "insur[ing] that the greatest possible protection is accorded his autonomy." *Rivers*, 67 N.Y.2d at 493.[37] Even humans who will never be competent possess the common law right to bodily liberty in equal measure to the competent.[38] *See Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) ("human infants or comatose human adults" are entitled to "habeas corpus").

The Expert Scientific Affidavits demonstrate that Happy is autonomous and that her interest in exercising her autonomy is as fundamental to her as it is to us. She is no less wronged through the deprivation of her autonomy and should therefore possess, at minimum, the right to redress that wrong by giving her the "right to liberty protected by habeas corpus." *Id.*

B. Happy's autonomy is sufficient to entitle her to the right to bodily liberty as a matter of *equality.*

Equality has always been a vital New York value, embraced and mutually reinforced through 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. But "the principles expressed in those sections [of the Constitution] were hardly new," *Brown v. State*, 89 N.Y.2d 172, 188 (1996), for they were derived from common law. [39] New York has been a common law

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[35] *See, e.g.*, *Indiana v., Edwards*, 554 U.S. 164, 187 (2008) ("the Court . . . should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made."); *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) ("[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body").

[36] *See People v. Rosen*, 81 N.Y. 2d 237, 245 (1993); *Rivers*, 67 N.Y.2d at 492-93; *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993); *Schloendorff*, 211 N.Y. at 129-30.

[37] *Matter of Westchester Cnty. 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).

[38] *Matter of M.B.*, 6 N.Y.3d 437, 439-40 (2006); *Rivers*, 67 N.Y.2d at 493; *Matter of Storar*, 52 N.Y.2d at 380; *Delio v. Westchester Cnty. Med. Ctr.*, 129 A.D.2d 1, 13-14 (2d Dept. 1987).

[39] For more than a century, New York common law has prohibited common carriers from discriminating 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) ("At common law, railroad carriers are

leader "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).

Because there is no common law equality analysis, this Court should utilize settled constitutional equal protection analysis in light of Chief Justice Kaye's observation that common law has long been "viewed as a principle safeguard against infringement of individual rights" and the two-way street that runs between common law decision-making and constitutional decision-making has resulted in a "common law decision making infused with constitutional values." 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, 730, 747 (1992).

Constitutional equality is breached where, as here, a classification uses a single trait to deny a class protection across the board. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (declaring that a state constitutional amendment was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."). The *Romer* Court found that a state constitutional provision that repealed all existing anti-discrimination law based upon sexual orientation was so "obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values." *Equal. Found. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (citing *Romer*, 517 U.S. at 632) (Colorado Amendment 2 "defies" conventional equal protection analysis). Thus, "the Supreme Court directed that the ordinary three-part equal protection query was rendered irrelevant." *Id.* The Court declared: "Amendment 2 *confounds* this normal process

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under a duty to serve all persons without unjust or unreasonable advantage to any. So this court has said that a carrier should not 'be permitted to unreasonably or unjustly discriminate against other individuals to the injury of their business where the conditions are equal.'")); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 508 (1911) (quoting *Lough v. Outerbridge*, 143 N.Y. 271, 278 (1894) ("'His charges must, therefore, be reasonable, and he must not unjustly discriminate against others.")); *People v. King*, 110 N.Y. 418, 427 (1888) ("By the common law, innkeepers and common carriers are bound to furnish equal facilities to all, without discrimination, because public policy requires them so to do."); *see also* Note, *The Antidiscrimination principle in the Common Law*, 102 HARVARD L. REV. 1993, 2001 (1989).

of judicial review." *Romer*, 517 U.S. at 633 (emphasis added).[40]

As the aggrieved citizens in *Romer* were being "denie[d] . . . protection across the board," solely for being homosexual, *id.* at 632-33, so is Happy suffering imprisonment solely because she possesses the "single trait" of not being human. *See Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (recognizing the arbitrariness of depriving chimpanzees of all rights merely because they are not human). Judge Fahey criticized the "[First Department's] conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" because it "is in fact *based on nothing more than the premise that a chimpanzee is not a member of the human species*." *Id.* (emphasis added). The common law condemns such arbitrary distinctions. (*See supra*, n.37). Just as the state in *Romer* had no legitimate interest in disqualifying a class of persons from the right to seek specific legal protection based upon a single irrelevant characteristic, so too the State of New York has no legitimate interest in allowing the imprisonment of an autonomous being merely because she is not human.

At least since Aristotle, formal philosophical equality has required that "like cases be treated alike."[41] This has long been part of legal equality: "[t]he essence of a violation of the constitutional guarantee of equal protection is, of course, that all persons similarly situated must be treated alike." *Bower Assocs. v. Town of Pleasant Valley*, 2 N.Y.3d 617, 630 (2004). The same is true under New York common law. *See*, *e.g.*, *Root*, 114 N.Y. at 305 (under common law a public carrier cannot "discriminate against other individuals . . . where the conditions are equal"). The relevant question however is not whether elephants are similarly situated to humans *generally*, but for purposes of the specific right sought. The relevant characteristic for habeas corpus is autonomy, the central quality that habeas corpus protects. *See Stanley*, 16 N.Y.S.3d at 903-04; *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Because the Expert Scientific

[40] *See also Goodridge v. Dep't of Public Health*, 440 Mass. 309, 330, 333 (2003) (rejecting argument that legislature could refuse same-sex couples the right to marry based on procreation grounds, as it "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage").

[41] Aristotle, *Nicomachean Ethics*, V.3. 1131a10-b15; *Politics*, III.9.1280 a8-15, III. 12. 1282b18-23.

Affidavits demonstrate that Happy's autonomy is as fundamental to her as it is to us, she is similarly situated to humans for the purpose of habeas corpus. *Id.* at 1057 (noting that autonomous nonhuman animals are *at least* similarly situated to "human infants or comatose human adults"). Even humans who have always, and will always, lack the ability to choose, to understand, or make a reasoned decision about, for example, medical treatment, possess the common law right to bodily liberty. *Id.*; *Rivers,* 67 N.Y.2d, at 493. "No one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child . . . or a parent suffering from dementia." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). An "intelligent nonhuman animal who thinks and plans and appreciates life as human beings do" should have at least the same basic "right to the protection of the law against arbitrary cruelties and enforced detentions." *Id.* at 1058.

C. The Fourth Department and New York public policy recognize that nonhuman animals can be "persons" with certain rights.

Just four months ago, the Fourth Department explicitly stated that personhood "can" attach to "animals," *Graves*, 163 A.D.3d at 21, and by citing *Presti*, implicitly acknowledged that it may attach for habeas corpus purposes, *id.* (citing *Presti*, 124 A.D.3d 1334, which twice assumed, without deciding, that a chimpanzee could be a person for habeas corpus purposes). A month before that, Judge Fahey had declared:

> The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt that it is not merely a thing.

Tommy, 31 N.Y.3d at 1059 (concurring). Three years before that, the Supreme Court in *Stanley* had extended New York habeas corpus law to chimpanzees by issuing the order to show cause under Article 70. 16 N.Y.S.3d at 908, 917.

Beyond these judicial pronouncements compelling this Court's public policy determination of Happy's common law personhood rights (*Byrn*, 31 N.Y.2d at 201-02) are statutes which "can serve as an appropriate and seminal source of public policy to which

common-law courts can refer." *Reno v. D'Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citations omitted). New York public policy *already* recognizes the personhood rights of those nonhuman animals within the purview of EPTL 7-8.1, which grants the rights of a true beneficiary to nonhuman animals, and therefore personhood, as only legal persons may be trust beneficiaries.[42]

"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 nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).[43] New York did not even recognize honorary trusts for nonhuman animals, which lack beneficiaries.[44] 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 and, thus, "persons" capable of possessing legal rights.[45] *See Stanley*, 16 N.Y.S.3d at 901; *In re Fouts*, 677 N.Y.S.2d 699 (Sup. Ct. 1998) (recognizing that five chimpanzees were "income and principal beneficiaries of the trust" and referring to its chimpanzees as "beneficiaries" throughout). In 2010, the legislature removed "Honorary" from the statute's title and amended section (a) to read, in part: "Such trust shall terminate when the living *animal beneficiary or beneficiaries* of such trust are no longer alive." (Emphasis added). The legislature dispelled any doubt that a nonhuman animal was capable of being a beneficiary.[46] *See Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008) ("The reach of our laws has been extended to animals in areas which were once reserved only for [humans]. For example, the law

[42] (Pet. at ¶ 22); *see Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries . . . must be persons[.]"), *rev'd on other grounds*, 99 N.Y. 451 (1885).
[43] *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952).
[44] *In re Voorhis' Estate*, 27 N.Y.S.2d 818, 821 (Sur. Ct. 1941).
[45] The Sponsor's Memorandum stated that its 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. *See also* Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).
[46] 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 proclaimed: "[W]e 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).

now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner.").

The *Stanley* court agreed that EPTL 7-8 represents a policy in favor of common law personhood for nonhuman animals, noting that animals "are gradually being treated as more than property[.] . . . Consonant with these recent trends, New York enacted [EPTL 7-8] providing that a domestic or pet animal may be named as a beneficiary of a trust. 16 N.Y.S.3d at 912-13 (internal citations omitted). *See also id.* at 901 (referring to "this state's recognition of legal personhood for some nonhuman animals under the [EPTL]").[47]

IV. An entity's ability to bear legal duties is irrelevant to legal personhood.

The Court of Appeals has never limited personhood, much less the ability to possess the fundamental immunity right to bodily liberty protected by habeas corpus, to entities able to bear legal duties. Otherwise human fetuses, children, the comatose, and those mentally unable to bear duties would be mere "things," lacking the capacity for any legal right. This is why it was so alarming when the Appellate Division, Third Judicial Department ("Third Department") in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015)), and, in implicit reliance upon *Lavery*, the Appellate Division, First Judicial Department ("First Department") in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (1st Dept. 2017) (*Tommy*), erroneously held for the first time in legal history that the capacity to bear legal rights and duties was a *necessary* condition for personhood.[48]

This Court, however, is precluded from following *Lavery* because the Fourth Department has since made clear that personhood is not dependent on the capacity to bear legal rights and duties; instead stating that it is "common knowledge" that personhood "can and sometimes does

[47] The NhRP has set up a trust on behalf of Happy pursuant to EPTL 7-8. See "Exhibit 2" to the Petition, attached.

[48] The *Lavery* court then erroneously took to judicial notice, without giving notice or the opportunity to rebut, that chimpanzees are unable to bear such duties. In response, the NhRP filed sixty pages of new scientific affidavits in the First Department *Tommy* case demonstrating that chimpanzees do *in fact* routinely bear duties and responsibilities.

attach to nonhuman entities like . . . *animals*." *Graves*, 163 A.D.3d at 21 (citations omitted) (emphasis added). In *Graves*, the Fourth Department cited *Presti* in support of this position. *Id.* And in *Presti*, the Fourth Department disregarded *Lavery* (decided just months prior) and twice indicated, without deciding, that a chimpanzee (Kiko) could be a "person" for habeas corpus purposes. 124 A.D.3d at 1335.

Judge Fahey, moreover, explicitly declared that *Lavery* and the First Department decision that relied upon *Lavery* were wrongly decided, as the ability of an entity to bear duties and responsibilities is irrelevant to her ability to have rights:

> Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child . . . or a parent suffering from dementia[.] . . . In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs.

Tommy, 31 N.Y.3d at 1057 (concurring). He reiterated that the question is not whether "a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus." *Id.* And that is a "moral and legal" question. *Id.* Judge Fahey added that "amici law professors Laurence H. Tribe, Justin Marceau, and Samuel Wiseman question [*Lavery*'s] assumption." *Id*. In his amicus brief to the Court of Appeals, Tribe noted that "the lower courts fundamentally misunderstood the purpose of the common law writ of habeas corpus" and "reached its conclusion on the basis of a fundamentally flawed definition of legal personhood."[49] Professor Marceau agreed: "the lower court's resolution of the matter is in fundamental tension with core tenets of the historical writ of habeas corpus."[50]

Recognizing the obvious frailty of the Third Department's reasoning as stated in *Lavery*, 124 A.D.3d at n.3,[51] even the First Department noted that: "infants cannot comprehend that they

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[49] *Letter Brief of Amicus Curiae Laurence H. Tribe*, at 1. Available at: https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Right-Project-v.-Presti_Amicus-1-2.pdf (last visited Sept. 27, 2018).

[50] *Letter Brief of Amicus Curiae Justin Marceau*, at 3. Available at: https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonjuman-Rights-Project-v.-Presti_Amici.pdf (last visited Sept. 27, 2018).

[51] 124 A.D.3d at n.3 ("To be sure, some humans are less able to bear legal duties or responsibilities than

owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights." 152 A.D.3d at 78. It then threw off any pretense at reasoned argument and simply declared that the NhRP "ignores the fact that these are still human beings, members of the human community." *Id.* This was sheer bias. Judge Fahey agreed: "The Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' . . . is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Tommy*, 31 N.Y.3d at 1057 (concurring). As Justice Fahey explained, "I agree with the principle that all human beings possess intrinsic dignity and value, and have, in the United States (and territory completely controlled thereby), the constitutional privilege of habeas corpus, regardless of whether they are United States citizens [citing *Boumediene v. Bush*] but, in elevating our species, we should not lower the status of other highly intelligent species." *Id.* The *Stanley* court found *Lavery* unpersuasive for similar reasons. 16 N.Y.S.3d at 912, 916.

V. The deprivation of Happy's bodily liberty is presumptively unlawful.

Once Happy's common law right to bodily liberty is recognized, her imprisonment is *per se* unlawful, for the imprisonment of an autonomous being is "so odious that nothing can be suffered to support it but positive law." *Somerset*, 1 Lofft at 19. All common law natural persons are presumed entitled to personal liberty (*in favorem libertatis*).[52] *See Whitford v. Panama R. Co*., 23 N.Y. 465, 467-68 (1861) ("prima facie, a man is entitled to personal freedom, and the absence of bodily restraint"); *Lemmon*, 20 N.Y. at 604-05, 617; *Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) ("all presumptions in favor of personal liberty and freedom ought to be made"); *Fish v. Fisher*, 2 Johns. Cas. 89, 90 (Sup. Ct. 1800) (Radcliffe, J.); *People ex. rel Caldwell v*

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others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility.")

[52] References to the overarching value of bodily liberty may be found as early as Pericles' Funeral Oration, Thucydides, *The Complete Writings of Thucydides - The Peloponnesian War*, sec. II. 37, at 104 (1951). *See also* 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]).

Kelly, 35 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."); *In re Kirk*, 1 Edm. Sel. Cas. at 327 ("In a case involving personal liberty [of a fugitive slave] where the fact is left in such obscurity that it can be helped out only by intendments, the well established rule of law requires that intendment shall be in favor of the prisoner.").

New York courts long ago rejected slavery, the essence of which involves the stripping away of the slave's autonomy and harnessing it to the will of the master. *See Jack v. Martin*, 14 Wend. 507, 533 (N.Y. 1835) ("Slavery is abhorred in all nations where the light of civilization and refinement has penetrated, as repugnant to every principle of justice and humanity, and deserving the condemnation of God and man."). To its everlasting credit, the Court of Appeals ruling in *Lemmon*, 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).

VI. Happy is entitled to immediate release from Respondents' unlawful imprisonment.

Upon this Court's final determination that Respondents' imprisonment of Happy is unlawful, it must order her immediate release. *See* CPLR 7010(a). That Happy cannot be released into the wild or, more absurdly, onto the streets of New York, but must be released to a sanctuary, in no way precludes her from habeas corpus relief. *See Tommy*, 31 N.Y.3d at 1058-59 (Fahey, J., concurring); *Stanley*, 16 N.Y.S.3d at 917 n.2 (rejecting argument that because the NhRP sought the chimpanzees' ultimate release "to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," reasoning that habeas corpus is available to "secure [the] transfer of [a] mentally ill individual to another institution") (citation omitted); *In re Cecilia*, File No. P-72.254/15 at 22-23 (chimpanzee transferred to a sanctuary).

Habeas corpus is available to "human infants or comatose human adults" even if they cannot be unconditionally released. *Tommy*, 31 N.Y.3d at 1057 (Fahey J., concurring). New York courts frequently discharge minors from mental hospitals, training schools, and other detention facilities through habeas corpus, understanding that they will ultimately be transferred

into the custody of their parents or guardians.[53] Before the Civil War, children detained as slaves were discharged through habeas corpus into another's care.[54] Incapacitated adults have been discharged from mental institutions pursuant to habeas corpus into the custody of another.[55]

The Court of Appeals has further made clear that habeas corpus is not limited to "release." It can be used, for instance, to order an individual released from an unlawful imprisonment and ultimately sent to a more appropriate place. *See Mental Hygiene Legal Services ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (habeas corpus proper to transfer mental patient from secure facility to non-secure facility); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus proper remedy to test validity of a transfer from a prison to a mental hospital); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("[T]hat the appellant is still under a legal commitment to Elmira Reformatory does not prevent him from invoking the remedy of habeas corpus as a means of avoiding the further enforcement of the order challenged.") (citation omitted); *People ex rel. Meltsner v. Follette*, 32 A.D.2d 389, 391 (2d Dept. 1969) (citing *Johnston* and *Saia* for the notion that "[t]he sustaining of the writ, however, does not require absolute discharge").[56] Prisoners may even use habeas corpus to challenge their conditions of

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[53] *See People ex rel. F. v. Hill*, 36 A.D.2d 42, 46 (2d Dept. 1971) ("petition granted and relator's son ordered discharged from custody forthwith"), *aff'd*, 29 N.Y.2d 17 (1971); *People ex rel. Silbert v. Cohen*, 36 A.D.2d 331, 332 (2d Dept. 1971) ("juveniles in question discharged"), *aff'd*, 29 N.Y. 2d 12 (1971); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991); *People ex rel. Kaufmann v. Davis*, 57 A.D.2d 597 (2d Dept. 1977); *People ex rel. Intner on Behalf of Harris v. Surles*, 566 N.Y.S.2d 512, 515 (Sup. Ct. 1991) (mental hospital); *People ex rel. Cronin v. Carpenter*, 25 Misc. 341, 342 (N.Y. Sup. Ct. 1898); *People ex rel. Slatzkata v. Baker*, 3 N.Y.S. 536, 539 (1888); *People ex rel. Soffer v. Luger*, 347 N.Y.S. 2d 345, 347 (N.Y. Sup. Ct. 1973); *People v. Hanna*, 3 How. Pr. 39, 45 (N.Y. Sup. Ct. 1847) (ordering "discharge" of apprentice); *In re M'Dowle*, 8 Johns 328 (Sup. Ct. 1811) (child apprentice).

[54] *Lemmon*, 20 N.Y. at 632; *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (seven or eight-year-old slave discharged into care of the Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (same); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816) (slave child discharged); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793) (legally manumitted child discharged).

[55] *See generally Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) ("elderly and apparently sick lady").

[56] *See also People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) ("Although relator is also incarcerated on the murder charge, a concededly valid detention, and this writ will not secure his freedom, habeas corpus may be used to obtain relief other than immediate release from physical custody."); *People ex rel. Jesse F. v. Bennett*, 242 A.D.2d 342 (2d Dept. 1997) ("habeas corpus is an appropriate mechanism for transfer"); *McGraw v. Wack*, 220 A.D.2d 291, 293 (1st Dept. 1995); *State ex*

confinement. *See People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (citing *People ex rel. Smith v. LaVallee*, 29 A.D.2d 248, 250 (4th Dept. 1968) ("the issues of whether a prisoner . . . had in fact been receiving adequate psychological and psychiatric treatment during his imprisonment has been held a proper subject for habeas corpus relief")).[57] The NhRP, however, is *not* challenging the conditions of Happy's confinement. Nor is it requesting her transfer. It is seeking her immediate release from unlawful imprisonment..

Though the Fourth Department in *Presti* ruled that, even assuming Kiko was a person, habeas corpus would not lie to release him from imprisonment, this Court is *not* bound by that ruling for two reasons. First, the holding was grounded upon the court's mistaken belief that the NhRP "does not seek Kiko's immediate release, nor does petitioner allege that Kiko's continued detention is unlawful. Rather, petitioner seeks to have Kiko placed in a different facility." 124 A.D. 3d at 1335. The *Presti* court either misread or misunderstood the NhRP's petition, which specifically *did* seek Kiko's immediate release and which repeatedly *did* allege that Kiko's detention was unlawful.[58] The NhRP, in *Presti*—and in every other habeas corpus petition it has ever filed on behalf of an imprisoned nonhuman animal—consistently demanded immediate release and *solely* challenged the *legality* of the imprisonment. In reviewing a virtually identical petition, the Third Department in *Lavery* readily understood this: "we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149. The Supreme Court in *Stanley* agreed: "[t]he conditions under which Hercules and Leo are confined are not challenged by petitioner[.] . . . [T]he sole issue is whether Hercules and Leo may be legally detained at all." 16 N.Y.S.3d at 901. To dispel any present

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rel. Henry L. v. Hawes, 667 N.Y.S.2d 212, 217 (Co. Ct. 1997) ("this court will direct the immediate transfer of relator from Sunmount to a non-secure facility such as Wassaic").

[57] *See also Johnston*, 9 N.Y.2d at 485; *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) ("habeas corpus is available to challenge the conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. Ceschini v. Warden*, 30 A.D.2d 649, 649 (1st Dept. 1968); *People ex rel. Rockey v. Krueger*, 306 N.Y.S.2d 359, 360 (Sup. Ct. 1969).

[58] The First Department subsequently repeated the error. *Tommy*, 152 A.D.3d at 80.

doubt, the NhRP has painstakingly and specifically made it clear in this Petition that it is seeking Happy's *immediate release* and is *not* challenging her *conditions of confinement*. (Pet. at ¶ 56).

Second, this Court *cannot* be bound by *Presti*'s holding limiting habeas corpus to absolute release from detention, as it flatly conflicts with controlling Court of Appeals precedent. *E.g.*, *Johnston*, 9 N.Y.2d at 485; *Saia*, 289 N.Y. at 477; *see also People ex rel. Ardito v. Trujillo*, 441 N.Y.S.2d 348, 350 (Sup. Ct. 1981) (rejecting respondent's argument that the "writ of habeas corpus is rigidly restricted to situations in which the relator seeks absolute release from detention," explaining that the Court of Appeals rejected this "narrow view" in *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257 (1966)).

Judge Fahey agreed that *Presti* is irreconcilable with binding Court of Appeals precedent and thus should not be followed by lower courts. *Tommy*, 31 N.Y.3d at 1058-59 (concurring). Soundly, the *Stanley* court independently refused to follow *Presti*, finding it irreconcilable with controlling precedent. 16 N.Y.S.3d at 917 n.2. Judge Fahey found that *Presti* erred because it had misread the Court of Appeals precedent it relied on, *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986). *See* 31 N.Y.3d at 1058-59 (concurring). *Presti* relied upon *Dawson* for the proposition that "habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself." 124 A.D. 3d at 1335. Yet, in *Dawson*, the Court of Appeals explicitly *reaffirmed* the principle that habeas corpus *can be* used to seek a transfer to an "institution *separate and different* in nature from the correctional facility to which petitioner had been committed[.]" 69 N.Y.2d at 691 (emphasis added) (citing *Johnston*, 9 N.Y.2d 482). In distinguishing *Johnston*, the Court explained, "[h]ere, by contrast, petitioner *does not seek his release from custody in the facility*, but only from confinement in the special housing unit, a particular type of confinement within the facility which the Department of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody[.]" *Id.* (citations omitted, emphasis added). Judge Fahey explained that *Presti* misapplied *Dawson* because the NhRP sought Kiko's immediate release to a "separate and different" environment:

> The Appellate Division held that habeas relief was properly denied, because petitioner "does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility" [citing *Tommy* and *Presti*]. Notably, the Appellate Division erred in this matter, by misreading the case it relied on, which instead stands for the proposition that habeas corpus can be used to seek a transfer to "an institution separate and different in nature from the . . . facility to which petitioner had been committed," as opposed to a transfer "within the facility" (*People ex rel. Dawson v Smith*, 69 NY2d 689, 691 [1986]). The chimpanzees' predicament is analogous to the former situation, not the latter.

Tommy, 31 N.Y.3d 1054, 1058-59 (concurring).

The remaining cases that *Presti* relied upon all involved convicted prisoners attempting to utilize the writ for some reason other than to procure discharge from an unlawful imprisonment, including: (1) to challenge errors in parole revocation hearings;[59] (2) to challenge the sufficiency of the evidence supporting an indictment;[60] (3) to seek "a new trial or new appeal;"[61] or (4) to seek a transfer from a special housing unit of a prison to another part of the prison.[62] Such cases have no bearing here, as the NhRP explicitly alleges that Happy's imprisonment is *unlawful*, entitling her to *immediate release* to an environment completely "separate and different in nature" from the facility of imprisonment. *See Stanley*, 16 N.Y.S.3d at 917 n.2. (Pet. at ¶¶ 56-58).

VII. Conclusion

The central purpose of habeas corpus is to release autonomous beings from illegal imprisonment. As an autonomous self-determining nonhuman, Happy is entitled to immediate release from her unlawful imprisonment. In accordance with its duty to reexamine the common law in light of scientific discovery, evolving standards of morality, public opinion, and experience, this Court should recognize that Happy is a "person" with the common law right to bodily liberty protected by the common law of habeas corpus as a matter of liberty, equality or both, and order her immediate release. As Happy should not be released to the wild or onto the

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[59] *See People ex rel. Gonzalez v. Wayne Cnty. Sheriff*, 96 A.D.3d 1698 (4th Dept. 2012); *People ex rel. Shannon v. Khahaifa*, 74 A.D.3d 1867 (4th Dept. 2010).
[60] *People ex rel. Hall v. Rock*, 71 A.D.3d 1303, 1304 (3d Dept. 2010).
[61] *People ex rel. Douglas v. Vincent*, 50 N.Y.2d 901, 903 (1980); *People ex rel. Kaplan v. Commissioner of Correction*, 60 N.Y.2d 648, 649 (1983).
[62] *Berrian v. Duncan*, 289 A.D.2d 655 (3d Dept. 2001); *People ex rel. McCallister v. McGinnis*, 251 A.D.2d 835 (3d Dept. 1998).

streets of New York, this Court should order that she be sent to a sanctuary that will provide her with the ability to exercise her autonomy to the fullest extent possible, which the NhRP suggests is the Performing Animal Welfare Society in California. In keeping with the language and spirit of Judge Fahey's concurrence: "The issue whether a nonhuman animal has a fundamental right fundamental to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it."

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