COURT OF APPEALS OF THE STATE OF NEW YORK

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

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

*Petitioner-Appellan*t,

-against-

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

Respondents-Respondents,

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

Petitioner-Appellant,

-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.

Index Nos. 162358/15 (New York County); 150149/16 (New York County)

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PERMISSION TO APPEAL TO THE COURT OF APPEALS

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I. Preliminary Statement

Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), submits this Memorandum of Law in support of its Motion for Permission to Appeal to the Court of Appeals ("Motion for Permission to Appeal") pursuant to New York Civil Practice Law and Rules ("CPLR") 5602(a) from the State of New York Supreme Court Appellate Division, First Judicial Department's ("First Department") Decision and Order dated June 8, 2017 ("*Decision*") affirming the judgments (denominated orders) of the Supreme Court, New York County (Barbara Jaffe, J.), which declined to sign petitions for writs of habeas corpus and orders to show cause sought by the NhRP seeking the immediate release of two chimpanzees, Tommy and Kiko, from their illegal detention. Index No. 162358/2015 (July 8, 2016, effective *nunc pro tunc* as of December 23, 2015), Appendix 12-14 ("*Tommy*"); Index No. 150149/2016 (January 29, 2016), Appendix 7-11 ("*Kiko*"). A complete copy of both the *Tommy* and *Kiko* appendices are provided to the Court along with this motion, in accordance with 22 NYCRR § 500.22(c). A copy of the *Decision* is attached as "Exhibit 17" to the annexed Affirmation of Elizabeth Stein,

Esq., in accordance with 22 NYCRR § 500.22(b)(6). This Motion for Permission to Appeal and its supporting Memorandum of Law incorporate by reference, and fully adopt, all the arguments, evidence, exhibits, memoranda, testimony and authorities previously filed in these cases,[1] and are timely filed pursuant to CPLR 5513(b) and 22 NYCRR § 600.14(b). The accompanying Affirmation of Elizabeth Stein, Esq. contains the procedural timeline including statement of timeliness, in accordance with 22 NYCRR § 600.14(b)(2).

This Court should grant this Motion for Permission to Appeal for four reasons. First, the appeal raises novel and complex legal issues that are of great public importance and interest in New York, the United States, and the world. Second, the *Decision* conflicts with the plain language of CPLR 7003(b), which makes clear that a petition for a writ of habeas corpus cannot be dismissed as improperly successive if it raises new grounds or if the legality of the detention has never been ruled upon. Third, the *Decision* conflicts with rulings of this Court, the First Department, and other judicial departments of the Appellate

[1] The statement of facts in *Tommy* is found at p. 7 of the Appellate Brief, with a longer version at p. 8 of the Trial Memorandum of Law (Appendix p. 695). The statement of facts in *Kiko* is found at p. 8 of the Appellate Brief with a longer version at p. 11 of the Trial Memorandum of Law (Appendix p. 673).

Division on the following three important issues that can only be resolved by this Court: (1) whether the determination of common law personhood is a matter for the legislature or the courts; (2) whether common law personhood necessarily requires a capacity to bear duties and responsibilities; and (3) whether habeas corpus is appropriate only when the unconditional release of the imprisoned individual is demanded. Fourth, the *Decision* contains numerous substantial legal errors and erroneous factual assumptions that require review and correction by this Court.

II. Statement of the Issues

The novel, important, and complicated questions of law presented in this appeal are:

1. May a court refuse to issue a common law writ of habeas corpus or order to show cause as an improper successive petition under CPLR 7003(b) if all three statutory requirements for dismissal have not been satisfied?

2. May a court properly deny an autonomous being the right to common law habeas corpus solely because she is not human?

3. Is the capacity to bear duties and responsibilities necessary to

possess the common law right to bodily liberty protected by common law habeas corpus?

4. May a court properly refuse to issue a common law writ of habeas corpus solely because the "person" unlawfully imprisoned cannot be released unconditionally and must necessarily be released into the custody of another?

III. Standard of Review

In determining whether to grant a motion for permission to appeal to the Court of Appeals, this Court looks to whether: "the issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR § 500.22(b)(4). This Court also grants leave to appeal to "[d]evelop emerging areas of common law," as well as "[r]eevaluate outmoded precedent," "[c]orrect error[s] below,"[2] and to "cure substantial injustice." New York Court of Appeals Clerk's Office, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, available at https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last

[2] *See* Top of Form*Matter of Ferrara,* 2006 NY Slip Op 5156, ¶ 5, 7 N.Y.3d 244, 251 (2006); *Metro. Life Ins. Co. v. Noble Lowndes Int'l*, 84 N.Y.2d 430, 434 (1994); Top of Form*Perlmutter v. Beth David Hosp*., 308 N.Y. 100, 103-04 (1954); *Hurlburt v. Hurlburt*, 128 N.Y. 420, 426 (1891); *Griffin v. Marquardt*, 17 N.Y. 28, 33 (1858).

accessed February 15, 2018). As discussed below, each of these factors weigh heavily in favor of granting the NhRP's Motion for Permission to Appeal, *infra*.

IV. The novel and important questions raised in this appeal require review by the Court of Appeals.

A. This case presents novel and important issues of law of statewide, national, and international significance.

This case necessitates review by this Court based on the novelty, difficulty, importance, and effect of the legal and public policy issues raised alone. 22 NYCRR § 500.22 (leave should be granted when "the issues are novel or of public importance"); COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011) (leave most often granted to address "novel and difficult questions of law having statewide importance"). *See, e.g.*, *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996).[3]

[3] *See also In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave on an "important issue"); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its far-reaching

The Supreme Court, New York County agreed that, "the issue of a chimpanzee's right to invoke the writ of habeas corpus is best decided . . . by the Court of Appeals, given its role in setting state policy." *The Nonhuman Rights Project ex rel. Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 917 (Sup. Ct. 2015) ("*Stanley*"). The New York Supreme Court Appellate Division, Third Judicial Department ("Third Department") also emphasized the novelty and importance of the issues raised in this case: "This appeal presents the novel question of whether a chimpanzee is a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3rd Dept. 2014), *lv denied*, 26 N.Y.3d 902 (2015) ("*Lavery*").

This case and the arguments it raises have been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts. For example, from March 1, 2017 through September 30, 2017, 2,095 media articles were published on the NhRP's claim that a chimpanzee should have the right

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consequences"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("the questions of law presented are of general public importance").

to a writ of habeas corpus.[4] In the United States, these outlets ranged from *NBC News* and the *Wall Street Journal* to the *Washington Post*, *Associated Press*, *Law360*, *Gizmodo*, *Fox News*, and *Salon*. Around the world they included the *Sydney Morning Herald*, *Kremlin Express*, *Yahoo Japan*, Mexico's *Entrelíneas*, and India's *Economic Times*. Moreover the issues raised by the NhRP, as well as the litigation itself, have captured the interest of the world's leading legal scholars and the most selective academic publications,[5] while catalyzing the development

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[4] A spreadsheet containing the full list of 2,095 media items covering this case between the period of March-October, 2017 is available for download at: https://www.nonhumanrights.org/content/uploads/Media-Coverage-Tommy-Kiko-Appellate-Hearing-Raw-Data.csv (last accessed February 15, 2018).

[5] *See* Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives,* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); *VI. Aesthetic Injuries, Animal Rights, and Anthropomorphism*, 122 HARV. L. REV. 1204, 1216 (2009); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581 (2003); Richard A. Epstein, *Drawing the Line: Science and the Case for Animal Rights*, 46 PERSPECTIVES IN BIOLOGY AND MEDICINE 469 (2003); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017); Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001); Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 DALHOUSIE LAW JOURNAL 123 (2017); Kenan Malik, *Rights and Wrongs*, 406 NATURE 675 (2000); Greg Miller, *A Road Map for Animal Rights*, 332 SCIENCE 30 (2011); Greg Miller, *The Rise of Animal Law: Will Growing Interest in How the Legal System Deals with Animals Ultimately Lead to Changes for Researchers?* 332 SCIENCE 28 (2011); Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 DENV. L. REV. 609, 615 (2017); Martha C. Nussbaum, *Animal Rights: The Need for A Theoretical Basis*, 114 HARV. L. REV. 1506, 1541 (2001); Richard A.

of a whole field of academic research and debate, generating extensive discussion in almost one hundred law review articles, multiple academic books, science journals, and a variety of legal industry publications.[6] Notable scholars of American jurisprudence have

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Posner, *Animal Rights*, 110 YALE L.J. 527, 541 (2000); Diana Reiss, *The Question of Animal Rights*, 418 NATURE 369 (2002); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001).

[6] Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives,* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Justin F. Marceau and Steven M. Wise, "Exonerating the Innocent: Habeas for Nonhuman Animals," WRONGFUL CONVICTIONS AND THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed. Cambridge University Press 2017); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes, in* THE ANIMAL ETHICS READER (Susan J Armstrong & Richard G. Botzler eds., 2017); Steven M. Wise, *Animal Rights, One Step at a Time*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Steven M. Wise, *The Capacity of Non-Human Animals for Legal Personhood and Legal Rights, in* THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS (Raymond Corbey & Annette Lanjouw eds., 2013); Katrina M. Albright, *The Extension of Legal Rights to Animals Under A Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT. RESOURCES J. 915, 917 (2002); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1591 (2003); Pat Andriola, *Equal Protection for Animals*, 6 BARRY U. ENVTL. & EARTH L.J. 50, 64 (2016); Louis Anthes & Michele Host, *Rattling the Cage: Toward Legal Rights for Animals. by Steven M. Wise*, 25 N.Y.U. REV. L. & SOC. CHANGE 479, 482 (1999); Matthew Armstrong*, Cetacean Community v. Bush: The False Hope of Animal Rights Lingers on*, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 185, 200 (2006); Rich Barlow, *Nonhuman Rights: Is It Time to Unlock the Cage?*, BOSTON UNIVERSITY SCHOOL OF LAW, July, 18, 2017, https://www.bu.edu/law/2017/07/18/nonhuman-rights-is-it-time-to-unlock-the-cage/; David Barton, *A Death-Struggle Between Two Civilizations,* 13 REGENT U. L. REV. 297, 349 (2001); Douglas E. Beloof, *Crime Victims' Rights: Critical Concepts for*

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submitted briefs as *amicus curiae* in favor of habeas corpus relief and personhood for chimpanzees, including in the case at bar (these include constitutional law expert Laurence Tribe of Harvard Law School and habeas corpus experts Justin Marceau, of the University of Denver Law School and Samuel Wiseman, of the Florida State University College of Law, all of whom were admitted as *amicus curiae* by the First Department and are listed in the caption of the *Decision*).[7] This case and the arguments it raises are also having an impact on the courts in

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Sebastian Beaudry, *From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court*, 4(1) Global Journal of Animal Law (2016); Natalie Prosin and Steven M. Wise, *The Nonhuman Rights Project - Coming to a Country Near You*, in 2(2) Global Journal of Animal Law (2014); "Why Things Can Hold Rights: Reconceptualizing the Legal Person," LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Tomasz Pietrzykowski and Visa Kurki, eds., Springer, 2017); Brandon Keim, *The Eye of the Sandpiper: Stories from the Living World*, Comstock (2017), pp. 132-150; Charles Seibert, "Should a Chimp Be Able to Sue Its Owner?", *New York Times Magazine* (April 23, 2014), *available at:* https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html (last accessed February 15, 2018); Astra Taylor, "Who Speaks for the Trees?", *The Baffler*, (Sept. 7, 2016), *available at*: thebaffler.com/salvos/speaks-trees-astra-taylor (last accessed February 15, 2018); Sindhu Sundar, "Primal Rights: One Attorney's Quest for Chimpanzee Personhood.", Law360 (March 10, 2017), *available at*: https://www.law360.com/articles/900753 (last accessed February 15, 2018).

[7] The *amicus curiae* brief of Laurence Tribe in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Right-Project-v.-Presti_Amicus-1-2.pdf (last accessed February 19, 2018). The *amicus curiae* brief of Justin Marceau and Samuel Wiseman in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonjuman-Rights-Project-v.-Presti_Amici.pdf (last accessed February 19, 2018). The authors submitted near-identical briefs in *Tommy*. The First Department also admitted Richard Cupp, professor of law at Pepperdine University, as *amicus curiae* in opposition.

other states. *See State v. Fessenden*, 355 Ore. 759, 769-70 (2014) (referring to the "ongoing litigation" brought by the NhRP that "seeks to establish legal personhood for chimpanzees," and noting that "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[.])"

Deciding a case based in part upon the NhRP's work, an Argentine court in November, 2016 recognized a chimpanzee named Cecilia as a "non-human person," ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent her to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23.

B. The question of who is a "person," and the extent to which "personhood" might be limited by one's capacity to bear duties and responsibilities, is perhaps the most important question that could come before a court.

Permission to appeal is especially warranted in this case to "[d]evelop emerging areas of common law," as well as "[r]eevaluate

outmoded precedent."[8] This appeal calls upon the Court to reevaluate the outmoded common law classification of all nonhuman animals as mere "things," regardless of their autonomy, and to determine whether the common law of habeas corpus should extend to such autonomous individuals as chimpanzees. *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

The question of who is a "person" within the meaning of New York's common law of habeas corpus is perhaps the most important individual issue that can come before a New York court. Personhood determines who counts, who lives, who dies, who is enslaved, and who is free. *See* Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001). Legal persons possess inherent value and exist for their own sakes; legal things possess merely instrumental value and exist for the sakes of legal persons. 2 William Blackstone, *Commentaries on the Laws of*

[8] New York Court of Appeals Clerk's Office, *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, available at https://www.nycourts.gov/ctapps/forms/civiloutline.pdf (last accessed February 15, 2018).

England *16 (1765-1769). The term "person" is not now and has never been a synonym for "human."[9] Instead, it designates Western law's most fundamental category by identifying those entities capable of possessing a legal right. This Court has made clear that this important determination is to be based on policy, and not biology. *See Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y. 2d 194, 201 (1972).

As this Court noted in *Byrn*, "upon according legal personality to a thing the law affords it the rights and privileges of a legal person[.]" *Id.* (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"). *See also* 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)).

The First Department concluded that chimpanzees are not and can never be legal persons because: "[n]o precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief." (*Decision*, at 77-

[9] *See Tommy* Appellate Brief at 31 and Trial Court Memorandum at 66 (Appendix at 753); *Kiko* Appellate Brief at 30 and Trial Court Memorandum at 69 (Appendix at 731).

78). But, as *Stanley* correctly noted, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 16 N.Y.S.3d at 912.

The reason no precedent exists specifically for treating nonhuman animals as "persons" for the purpose of securing habeas corpus relief was *not* because the claim had been *rejected* by the courts. It was because no autonomous nonhuman entity, such as a chimpanzee, had ever *demanded* a writ of habeas corpus. The NhRP's cases represent the *first* such demand ever made by a nonhuman animal in any common law jurisdiction.[10]

The mere novelty of their claim however is insufficient to deny Tommy or Kiko habeas corpus relief. *See, e.g.*, *United States ex rel.*

[10] It is worth noting that none of the cases cited in *Lavery* support its statement that "habeas corpus has never been provided to any nonhuman entity." 124 A.D.3d at 150 (citing *United States v Mett*, 65 F.3d 1531 (9th Cir 1995), *cert denied* 519 U.S. 870 (1996); *Waste Mgt. of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138 (7th Cir 1980), *cert denied* 449 U.S. 1060 (1980); and *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 441 (9th Cir 1946)). Apart from being federal cases interpreting federal law, none of these cases have *anything* to do with nonhuman animals. In *Mett*, the court permitted a corporation to invoke the writ of *coram nobis*. In *Waste Management,* the federal court simply refused to grant habeas corpus to a corporation for the obvious reason that "a corporation's entity status precludes it from being incarcerated or ever being held in custody." *Waste Management*, 614 F.2d at 140. In *Sisquoc Ranch,* the federal court merely held that the fact that a corporation has a contractual relationship with a human being did not give it standing to seek habeas corpus on its own behalf.

Standing Bear v. Crook, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772) (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon v. People*, 20 N.Y. 562 (1860). "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 once denied." *Stanley*, 16 N.Y.S.3d at 912 (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)).

Further, this Court must grant leave to determine the overwhelmingly important and novel question raised by the appeal of whether legal personhood turns on an individual's ability to bear duties and responsibilities. This question had never been addressed in New York, or by any English-speaking court until the Third Department in *Lavery* affirmed the refusal of the Supreme Court, Fulton County to issue the requested order to show cause in the first Tommy habeas

corpus case. *Lavery* held, for the first time in the history of the common law, that an entity must have the capacity to bear duties and responsibilities to be a "person" for any purpose. The court then declared, without any evidence having been presented, that chimpanzees lack such capacity and concluded that they therefore could not be "persons" for purposes of habeas corpus protection. 124 A.D. 3d at 152.

After *Lavery*, the Supreme Court in *Stanley* properly issued the order to show cause sought by the NhRP on behalf of two chimpanzees, Hercules and Leo, and ordered the Respondent Stony Brook University to justify its detention of the chimpanzees at a hearing pursuant to CPLR Article 70. 16 N.Y.S.3d at 915-17. Although the court found NhRP's arguments compelling, it believed itself bound by *Lavery*, as that was the only appellate court decision that had directly addressed the issue of personhood for chimpanzees at the time.

The First Department subsequently adopted *Lavery*'s standard for determining personhood — which, as discussed below, directly conflicts with *Byrn* — thereby perpetuating its false and dangerous statement of law that personhood requires the capacity to bear both rights *and*

duties rather than either rights *or* duties, as the NhRP had argued. (*Decision* at 76). Specifically, the First Department ruled that an inability to bear duties and responsibilities may constitute the sole ground for denying such a fundamental common law right as bodily liberty even to an autonomous individual. Not only did the First Department adopt *Lavery*'s standard, but it also held that "person" is synonymous with "human," in further defiance of *Byrn*, *infra.* (*Decision* at 79).

Byrn teaches that the determination of an entity's personhood necessarily entails a mature weighing of public policy and moral principle in which that entity's capacity to bear duties and responsibilities plays no part. The words "duty," "duties," or "responsibility" do not even appear in the *Byrn* majority opinion. Other than *Lavery* and the case at bar, no court has ever ruled that an entity must be able to bear duties and responsibilities to be deemed a legal person. Nor should they. An entity is a "person" if she can *either* bear rights *or* duties.

Moreover, the First and Third Department's decisions are in tension with the Fourth Department's decision in *Nonhuman Rights*

Project, Inc., ex rel. Kiko v. Presti, 124 A.D.3d 1334 (4th Dept. 2015), *lv denied*, 26 N.Y.3d 901 (2015) ("*Presti*"), which was decided after *Lavery*, and yet ignored its sweeping new rule that one must have the capacity to bear duties and responsibilities in order to be accorded legal rights in New York. The Fourth Department in *Presti*, aware of *Lavery*, with every opportunity to follow it, chose not to. Instead, the Fourth Department assumed, *without deciding*, that Kiko could be a legal person, but affirmed the denial of the writ on the erroneous ground that Kiko could not be released unconditionally. *Id.* Thus, at present, personhood rights vary depending on whether one is detained in the First and Third Departments or in the Fourth Department, and only this Court can resolve the conflict, a conflict which of course has serious and fundamental implications for individuals detained in New York.

A major flaw in *Lavery's* and this *Decision's* holdings is the fact that millions of New Yorkers lack the capacity to bear duties and responsibilities and yet are legal persons. When this was pointed out to the First Department, the court merely replied that "[t]his argument ignores the fact that these are still human beings, members of the human community." *Decision* at 78 (emphasis added). Such a

"distinction without a difference" is, alas, mere bias. We have seen similar biases expressed before and they have always been tragic and ultimately regretted.

Before the United States Supreme Court in 1857, Dred Scott's lawyers "ignore[d] the fact" that he was not white. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).[11] The lawyers for the Native American, Chief Standing Bear, "ignore[d] the fact" that Standing Bear was not white when, in 1879, the United States Attorney argued that a Native American could never be a "person" for the purpose of habeas corpus after Standing Bear was jailed for returning to his ancestral lands. *Crook*, 25 F. Cas. at 700-01. A California District Attorney "ignore[d] the fact" that a Chinese person was not white when insisting, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white man in court. *People v. Hall*, 4 Cal. 399 (1854).[12] The lawyer for Ms. Lavinia Goodell "ignore[d] the fact" that she was not a man before the Wisconsin Supreme Court that, in 1876, denied her the right to practice law solely because she was a woman. *In re Goodell*, 39 Wis. 232 (1875).

[11] Has there been a more regretted judicial decision than *Dred Scott*?

[12] The California Supreme Court unanimously regretted its history of anti-Chinese bigotry in California in *In re Hong Yen Chang*, 60 Cal. 4th 1169 (Cal. 2015).

Let us not return to those dark places. Chimpanzees are autonomous. Habeas corpus protects autonomy. An autonomous individual's species should be irrelevant to whether she should have the fundamental right to the bodily liberty — the autonomy — that habeas corpus protects.

Any requirement that an autonomous individual must also be able to bear duties and responsibilities to be recognized as a "person" for the purpose of a common law writ of habeas corpus, not only contravenes *Byrn*, *infra*, but undermines both fundamental common law values of liberty and of equality. It undermines fundamental liberty because it denies personhood and all legal rights to an individual who incontrovertibly possesses the autonomy that is supremely valued by New York common law, even more than human life itself, *Rivers v. Katz*, 67 N.Y. 2d 485, 493 (1986); *In re Storar*, 52 N.Y.2d 363 (1981), *cert. den.*, 454 U.S. 858 (1981). It undermines fundamental equality both because it endorses the illegitimate end of the permanent imprisonment of an incontrovertibly autonomous individual, *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001), *cert. den.*, 534 U.S. 826 (2001), and

because "[i]t identifies persons by a single trait and then denies them protection across the board." *Romer v. Evans*, 517 U.S. 620, 633 (1996).

Until this Court rules on this personhood issue, every lower court in the First Department will be bound by the *Decision*, every lower court in the Third Department will continue to be bound by *Lavery*, and all other lower courts of the Second and Fourth Departments will be bound by both *Lavery* and this *Decision* as those appellate courts have not decided this personhood issue. This Court should determine whether an individual must be capable of bearing rights *and* duties to be considered a "person" for the purpose of securing common law habeas corpus relief and whether even an autonomous claimant must be a human being. Based on the novelty and significance of this issue alone, the Court should grant the NhRP's Motion for Permission to Appeal. *See Board of Educ. of Monroe-Woodbury Cent. School Dist. v. Wieder*, 72 N.Y.2d 174, 183 (1988) ("[T]here being novel and significant issues tendered for review, we grant the application for leave [to appeal].").

C. The complex questions of law and fact raised in this appeal require review by the Court of Appeals.

The Motion for Permission to Appeal should also be granted because the case raises complex questions of law and fact. *See, e.g.*, *Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014) (leave to appeal was granted in a "scientifically complicated" case); *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249-50 (1999) (leave to appeal granted in case involving "complicated legal questions associated with electronic bulletin board messages" for defamation purposes); *Matter of George L.*, 85 N.Y.2d 295, 298, 302 (1995) (granting leave to appeal in case presenting a "difficult question [regarding] a mentally ill individual"); *Schulz v. State*, 81 N.Y.2d 336, 344 (1993); *Sukljian v. Charles Ross & Son Co.*, 69 N.Y.2d 89, 95 (1986); *Melenky v. Melen*, 206 A.D. 46, 51-52 (4th Dept. 1923). The question of whether a chimpanzee is entitled to legal personhood involves inquiry not only into the legal issue of personhood, but into the significance of the detailed uncontroverted expert scientific evidence offered to support the NhRP's allegation that chimpanzees are extraordinarily cognitively complex beings who possess the autonomy sufficient (though not necessary) for personhood

for the purpose of a common law writ of habeas corpus, as a matter of liberty, equality, or both.

Nine prominent primatologists from around the world submitted detailed uncontroverted Expert Affidavits proving that chimpanzees possess the autonomy that allows them to choose how they will live emotionally, socially, and intellectually rich lives. Solely in response to *Lavery*, detailed uncontroverted Supplemental Affidavits were submitted in the cases at bar by Dr. Jane Goodall and five other internationally-respected chimpanzee cognition experts proving that chimpanzees possess not just autonomy, but the capacity to bear duties and responsibilities both within chimpanzee communities and chimpanzee/human communities. Such complex scientific and legal issues regarding personhood and the scope of the common law writ of habeas corpus merit immediate attention by the Court of Appeals. *See Woods*, 303 N.Y. at 355.

V. The *Decision* requires review by the Court of Appeals to resolve the conflicts it creates with CPLR Article 70 as interpreted by New York Courts.

Review by this Court is further necessary because the *Decision* conflicts with the plain language of CPLR 7003(b) and New York precedent. CPLR 7003(b) "continues the common law and present position in New York that *res judicata has no application* to the writ." Advisory Committee Notes to CPLR 7003(b) (emphasis added). *See People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874); *People ex rel. Leonard HH v. Nixon*, 148 A.D.2d 75, 79 (3d Dept. 1989). This is because the "inapplicability of res judicata to habeas . . . is inherent in the very role and function of the writ." *Sanders v. United States*, 373 U.S. 1, 8 (1963).

As the Third Department recognized, "[t]he rule permitting relitigation . . . after the denial of a writ, is based upon the fact that the detention of the prisoner is a continuing one and that the courts are under a continuing duty to examine into the grounds of the detention." *Post v. Lyford*, 285 A.D. 101, 104-05 (3rd Dept. 1954) (prior adjudication no bar to a new application on same grounds). *See also People ex rel.*

Butler v. McNeill, 219 N.Y.S.2d 722, 724 (Sup. Ct. 1961) ("the ban of res judicata cannot operate to preclude the present proceeding" despite the fact it was petitioner's fifth habeas corpus application).

A court may *only* "decline to issue a writ under certain circumstances, thereby permitting successive writs, a construction reflected in the traditional and general common law rule that res judicata has no application in habeas corpus proceedings." *Stanley*, 16 N.Y.S.3d at 909-10. Those circumstances are narrow, few, and inapplicable to the cases at bar. "CPLR 7003(b) *permits* a court to decline to issue a writ of habeas corpus if 'the legality of a detention has been determined by a court of the state in a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined, and the court is satisfied that the ends of justice will not be served by granting it.'" *Decision* at 76 (emphasis added).

As CPLR 7003(b) makes clear, a court only has discretion to deny a petition as improperly successive if all three statutory elements have been satisfied. When this is not the case, as in the appeal at bar, a court has no such discretion and must issue the writ regardless of the fact

that the petition is successive.

Yet the First Department, despite the plain language of CPLR 7003(b) and the decisions of other appellate divisions, dismissed NhRP's petition as improperly successive though none of the elements of CPLR 7003(b) were present, *infra.* This Court must resolve this question of fundamental importance to all habeas corpus litigants, both human and nonhuman.

A. The legality of Tommy's and Kiko's detention has never been determined by a court of New York State in any proceeding and the ends of justice will only be served by issuing the orders to show cause.

Pursuant to CPLR 7003(b), one of the three elements that must be satisfied for a court to dismiss a petition as improperly successive is that the legality of the detention must have been previously determined by a court of the State in a prior habeas corpus proceeding. In the case at bar, neither the Supreme Court, Fulton County, where Tommy's original petition was filed, nor the Supreme Court, Niagara County where Kiko's original petition was filed, ever *issued* the requested order to show cause. The respondents were never served. No hearing

occurred. No decision on the merits issued. There was no final judgment on the merits. Therefore, the legality of the detentions were never determined. The Supreme Court in *Stanley* understood this, and appropriately issued the order to show cause on behalf of Hercules and Leo, despite the fact that it was a successive petition, because no prior determination on the merits had been made. 16 N.Y.S. at 909. The court explained: "there must be a final judgment on the merits in a prior proceeding. Respondents cite no authority for the proposition that a declined order to show cause constitutes a determination on the merits, that is has any precedential value, or that a justice in one county is precluded from signing an order to show cause for relief previously sought from and denied by virtue of a justice in another county refusing to sign the order to show cause." *Id.*

On appeal in Tommy's first case, the Third Department affirmed the lower court ruling, *without deciding the legality of Tommy's detention*, on the ground that chimpanzees are unable to bear duties and responsibilities and therefore could not be legal persons for any purpose. *Lavery*, 124 A.D.3d at 152. On appeal in Kiko's first case, the Fourth Department affirmed, *without deciding the legality of Kiko's*

detention, on the ground that Kiko's immediate release and subsequent placement in a sanctuary was inappropriate habeas corpus relief. *Presti*, 124 A.D.3d 1334. As the legality of Tommy's and Kiko's detention was never adjudicated by *any* New York court, the First Department erroneously affirmed the lower court's refusal to issue the requested orders to show cause under 7003(b).

Further, none of the three cases the First Department cited support its affirmation of the lower court's refusal to sign the orders to show cause. (*Decision* at 75-76) (citing *People ex rel. Glendening v Glendening*, 259 App. Div. 384, 387 (1st Dept. 1940), *aff'd.* 284 NY 598 (1940); *People ex rel. Woodard v Berry*, 163 A.D.2d 759 (3d Dept. 1990) *lv. denied* 76 N.Y.2d 712, 715 (1990); *People ex rel. Lawrence v. Brady*, 56 N.Y. 182, 192 (1874)). The successive petitions in both *Woodward*, 163 A.D.2d at 759-60, and *Glendening*, 259 A.D. 387-88, were dismissed *only* because, unlike in the case at bar, their merits *were* "fully litigated" in a prior petition and either there were no changed circumstances or none were claimed. In *Glendening*, 259 App. Div. at 387, the First Department set forth the appropriate standard: "parties to the same habeas corpus proceeding may not continually relitigate *de*

novo issues that were *fully litigated between them in prior applications in the same proceeding in which long and exhaustive hearings were held where there has been no change in the facts and circumstances determining such issues*." (emphasis added). Not only were the issues raised in the prior applications in this case not "fully litigated," they were not litigated at all. To the contrary, the trial courts refused to even issue the orders to show cause. *Woodward* simply cited *Glendening* for this same standard. *Stanley*, 16 N.Y.S.3d at 909, actually relied upon *Woodward* to justify its *issuance* of an order to show cause from a *successive* petition filed by the NhRP on behalf of Hercules and Leo. Finally, in *Brady*, 56 N.Y. at 192, this Court stated "[i]n this case the relator is restrained of his liberty; and a decision under one writ refusing to discharge him, did not bar the issuing of a second writ by another court or officer."

CPLR 7003 further requires that the ends of justice not be served by granting the second petition. In the present case, the ends of justice will only be served if the NhRP is given a full and fair opportunity to litigate the legality of Tommy and Kiko's detentions. *See Allen v. New York State Div. of Parole*, 252 A.D.2d 691 (3d Dept. 1998). Otherwise

these autonomous individuals will be condemned to a lifetime of imprisonment.

B. The second petitions presented grounds not previously presented and determined.

CPLR 7003(b) precludes a court from dismissing a successive petition if it presents new grounds or changed circumstances. The First Department ruled that "the motion court properly declined to sign the orders to show cause since these were successive proceedings which were not warranted or supported by any changed circumstances." (*Decision* at 75-76). This was error. The second petitions brought on behalf of Tommy and Kiko presented changed circumstances that could not have been raised in the first petitions.

When the NhRP filed its first habeas petitions in December 2013 on behalf of Tommy, Kiko, and Hercules and Leo, neither the petitions nor the eleven supporting affidavits addressed whether a chimpanzee could bear duties and responsibilities.[13] The reason was that the NhRP

[13] Copies of all original memoranda, petitions, and affidavits in both Tommy's and Kiko's cases are available and listed chronologically on the Nonhuman Rights Project website, on the following pages, respectively: https://www.nonhumanrights.org/client-tommy/; https://www.nonhumanrights.org/client-kiko/ (last accessed February 15, 2018).

had no way of knowing that the Third Department in *Lavery* would, for the first time in history, rule that a prisoner is required to have the capacity for rights *and* duties in order to have the right to bodily liberty protected by common law habeas corpus. Nor did the NhRP have any reason to believe that the court would take judicial notice that chimpanzees lack this capacity without having received any evidence on that issue or giving the NhRP any opportunity to rebut that conclusion.

Only to directly respond to *Lavery* did the NhRP file sixty pages of expert Supplemental Affidavits in all subsequent petitions in the Supreme Court, New York County, including the two cases at bar. Their sole purpose was to prove that chimpanzees actually possess the capacity to bear duties and responsibilities both within chimpanzee communities and human/chimpanzee communities, even though that is not the correct standard for personhood. These facts had never been presented to any New York court. These uncontroverted affidavits proved, *for the first time*, that chimpanzees:

- possess the ability to understand and carry out duties and responsibilities while knowingly assuming obligations and then honoring them

- behave in ways that seem both lawful and rule-governed
- have moral inclinations and a level of moral agency
- ostracize individuals who violate social norms
- respond negatively to inequitable situations
- have a social life that is cooperative and represents a purposeful and well-coordinated social system
- routinely enter into contractual agreements, keep promises and secrets, prefer fair exchanges
- perform death-related duties
- and show concern for others' welfare.

(*Decision* at 77).[14]

Clearly the First Department's assertion that these "successive proceedings" were "not warranted or supported by any changed circumstances" (*Decision* at 75-76) is demonstrably false. Likewise, the First Department's assertion that *every* prior petition for habeas corpus

[14] The complete Statement of Facts is found in the Memorandum of Law to the First Department and is near-identical in both *Kiko* and *Tommy*. *See Kiko* Record on Appeal at 673-724.

filed by the NhRP was accompanied by affidavits demonstrating that chimpanzees possess the ability "to fulfill certain duties and responsibilities," (*Id.* at 76) is demonstrably false. So too is the First Department's assertion that "[a]ny new expert testimony/affidavits cannot be said to be in response to or counter to the reasoning underlying the decision of the Court in [*Lavery*]." (*Id.*). The NhRP only filed the supplemental affidavits about duties and responsibilities *because of Lavery*. There was no reason prior to *Lavery* for the NhRP to allege that chimpanzees possess the ability to bear duties and responsibilities as no such standard for personhood had ever existed. The First Department's conclusion that the new affidavits were not "in response" to *Lavery* is simply wrong.

The First Department's failure to realize that the *sole purpose* of the Supplemental Affidavits was *not* to buttress NhRP's argument that chimpanzees are autonomous beings, but to rebut *Lavery*'s taking of judicial notice that chimpanzees lack the capacity to possess duties and responsibilities, is underscored by its following assertions:

(1) "The 'new' expert testimony presented by petition continues to support its basic position that chimpanzees exhibit many of the same

social, cognitive and linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans." (*Decision* at 76);

(2) "The gravamen of petitioner's argument that chimpanzees are entitled to habeas relief is that the human-like characteristics of chimpanzees render them 'persons'" (*Id*. at 76-77);

(3) "While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees" (*Id*. at 77); and

(4) "chimpanzees are intelligent, and have the ability to be trained by humans to be obedient to rules, and to fulfill certain duties and responsibilities." (*Id*. at 76).

The First Department's failure to recognize that *Lavery* created the changed circumstances which necessitated the expert Supplemental Affidavits stemmed from its misunderstanding of the NhRP's claims. The First Department contended, for instance, that the NhRP's argument for legal personhood was that the chimpanzees possess "many of the same social, cognitive and linguistic capabilities as humans" or possess "human-like characteristics" or possess "intelligence and social capabilities" or "are intelligent, and have the ability to be trained by

humans to be obedient to rules, and to fulfill certain duties and responsibilities" (*Decision* at 76-77). But these were straw man arguments. The NhRP never made these claims, and finds them erroneous. The First Department then, unsurprisingly, demolished its own straw man arguments.

The NhRP's *actual* legal arguments were grounded upon the common law liberty and equality[15] that New York courts powerfully embrace in their judicial decisions. Both its liberty and equality arguments rested upon the uncontroverted proof that chimpanzees are autonomous, that they can freely choose how to live their lives, *not on chimpanzee' similarities to human beings*, and not upon their alleged ability to be trained, as set forth in its *original* 100 pages of Expert Affidavits. Moreover, these original Expert Affidavits did *not* address the chimpanzees' ability to bear duties and responsibilities, which is a matter distinct from whether they are autonomous. Liberty, equality,

[15] *Affronti v. Crosson*, 95 N.Y.2d 713, 719 (2001); *Romer v. Evans*, 517 U.S. 620, 633 (1996) (equal protection prohibits both discrimination based upon either irrational means or illegitimate ends, with illegitimate end being the unlawful detention of an autonomous being, and the identification of persons "by a single trait then deny[ing] them protection across the board").

and autonomy beat at the heart of the NhRP's legal arguments.[16] That the *Decision never once* mentioned "equality" or "autonomy," and *never uses* the word "liberty" as part of its analysis of the NhRP's argument provides stark evidence of the failure of the First Department to understand the NhRP's basic claims and thereafter to engage in the required mature weighing of policy and principle. *See Byrn*, 31 N.Y.2d 194.

Contrary to the First Department's assertion that *Lavery* did not "take judicial notice that chimpanzees cannot bear duties and responsibilities," *Decision* at 76, the Third Department in *Lavery unquestionably* took judicial notice of the fact that chimpanzees cannot bear duties and responsibilities. The Third Department stated, *as a fact* that: "[U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights — such as the fundamental

[16] The NhRP invoked "liberty" thirty-three times, "equality" twenty-two times, and "autonomy" sixteen times in its trial memorandum, which was made part of the Record. *Tommy* Trial Memorandum (Appendix at 669); *Kiko* Trial Memorandum (Appendix at 644).

right to liberty protected by the writ of habeas corpus — that have been afforded to human beings." 124 A.D.3d at 152.[17] No evidence was offered by either party on this issue and the assertion itself was subsequently and persuasively refuted by the NhRP's uncontroverted expert Supplemental Affidavits.

VI. The *Decision* conflicts with this Court's decisions, the decisions of the First Department, and the decisions of other Appellate Departments.

Review by the Court of Appeals is further warranted where, as here, a decision of the Appellate Division conflicts with decisions of the Court of Appeals, *e.g.*, *Guice*, 89 N.Y.2d at 38, decisions within its own department, as well as decisions among the other judicial departments. *See* 22 NYCRR § 500.22(b)(4) (leave should be granted when the issues "present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division."). As shown below,

[17] A New York court may only take judicial notice of indisputable facts. *TOA Construction Co. v. Tsitsires*, 54 A.D.3d 109, 115 (1st Dept. 2008). When it takes judicial notice, a court must first notify the parties of its intention to do so, which the Third Department did not do. *Brown v. Muniz*, 61 A.D.3d 526, 528 (1st Dept. 2009). Not only is a chimpanzee's ability to bear duties not indisputable and therefore improper for judicial notice, but the conclusion that a chimpanzee has no such ability is demonstrably false.

the *Decision* readily conflicts with this Court's precedent as well as the decisions of the other judicial departments.

A. The First Department's *Decision* conflicts with this Court's ruling in *Byrn v. New York City Health & Hospitals Corporation*, 31 N.Y.2d 194 (1972).

This Court in *Byrn* made clear more than forty years ago that no entities' personhood depends upon whether they are presently considered to be "persons," and that once a demand for personhood is made, the court must engage in a mature weighing of public policy and moral principle. 31 N.Y.2d at 201.

The *Decision* defied this Court's express admonishment that: "*Whether the law should accord legal personality is a policy question*[.]" *Id.* (emphasis added). "Legal person" is not a biological concept; it does not "necessarily correspond" to the "natural order." *Id.* And as a result of the First Department's failure to recognize personhood as a policy question, it failed to address the NhRP's detailed policy arguments, based upon fundamental common law values of liberty and equality, and not mere biology.

The *Decision* also conflicts with *Byrn* by repeatedly conflating the term "person" with "human," and asserting that "petitioner's argument that the word 'person' is simply a legal term of art is without merit," *Decision* at 78. Both errors require Court of Appeals review, as "person" is not a synonym for "human." *Byrn*, 31 N.Y.2d at 201. *See also* 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,"); IV Roscoe Pound, *Jurisprudence* 192-193 (1959). "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). "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), and at 43, that "animals may conceivably be legal persons," citing, among other authorities, those cited in *Byrn*, *supra*.

"Person" *is* a legal "term of art." *Wartelle v. Womens' & Children's Hosp.*, 704 So. 2d 778, 781 (La. 1997). "[T]he significant fortune of legal personality is the capacity for rights." IV Roscoe Pound, *Jurisprudence* 197 (1959). "Person" has *never* been equated with merely being human; many humans have not been "persons" and many nonhumans have been "persons." A human fetus, which this Court in *Byrn* acknowledged, 31 N.Y.2d at 199, "is human," was not deemed a Fourteenth Amendment "person." *See also Roe v. Wade*, 410 U.S. 113 (1973). All humans were not "persons" in New York State until its last slave was freed in 1827. All humans were not "persons" throughout the entire United States until the Thirteenth Amendment to the United States Constitution was ratified in 1865. *See, e.g.*, *Jarman v. Patterson*, 23 Ky. 644, 645-46 (1828) ("Slaves, although they are human beings . . . (are not treated as a person, but (*negotium*), a thing").[18] Women were not "persons" for many purposes until well into the twentieth century. *See* Robert J. Sharpe and Patricia I. McMahon, *The Persons Case – The Origins and Legacy of the Fight for Legal Personhood* (2007).

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[18] *See, 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).

There is simply no precedent to support the First and Third Department's equation of "person" with "human." The *Decision's* analysis of personhood relied entirely upon *Lavery*, 124 A.D.3d at 151-52, which, in turn, had substantially relied upon the definition of "person" found in *Black's Law Dictionary* as one with the capacity for both rights *and* duties. *Lavery*, 124 A.D.3d at 151-52. The problem however was that *Black's Law Dictionary* had relied solely upon the definition of "person" in the 10th edition of *Salmond on Jurisprudence.* But here *Black's* had made a mistake, for the 10th edition of *Salmond on Jurisprudence* unequivocally supports the NhRP's definition of "person" as an entity that can bear rights *or* duties. When the NhRP pointed out its error to the Editor-in-Chief of *Black's Law Dictionary,* he promptly promised to correct it in its next edition.[19] The NhRP then asked the First Department, by motion, to consider this exchange and recognize that the major support for *Lavery* had collapsed. Inexplicably, the First Department denied the motion. Then it perpetuated the Third Department's error in its *Decision*.

[19] James Trimarco, "Chimps Could Soon Win Legal Personhood," YES! Magazine, April 28, 2017, available at: http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428 (last accessed February 15, 2018).

This Court's decision in *Byrn* is consistent with the growing international precedent in recognizing that "person" is not a biological concept. Sister common law countries demonstrate the principle of law that prevails throughout the common law world that "person" and "human" are not synonyms and it is error to ignore the principles they embody, as did the First Department, as being "not relevant to the definition of 'person' in the United States and certainly . . . of no guidance to the entitlement of habeas relief by nonhumans in New York." *Decision* at 79. These include New Zealand, which bestowed personhood upon a river in 2017[20] and a national park in 2014,[21] and India, which bestowed personhood upon a river and a glacier in 2017, *Mohd. Salim v. State of Uttarakhand & Others*, (PIL) 126/2014 (High Court Uttarakhand, 03/20/2017) and a mosque, *Masjid Shahid Ganj & Ors. v. Shiromani Gurdwara Parbandhak Committee, Amritsar*, A.I.R 1938 369, ¶15 (Lahore High Court, Full Bench), an idol, *Pramath Nath Mullick v. Pradyunna Nath Mullick*, 52 Indian Appeals 245, 264 (1925),

[20] 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 accessed February 15, 2018).

[21] Te Urewara Act 2014, Subpart 3, sec, 11(1), available at: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last accessed February 15, 2018).

and the holy books of the Sikh religion, *Shiromani Gurdwara Parbandhak Committee Amritsar v. Som Nath Dass*, A.I.R. 2000 S.C. 421. Contrary to the First Department's assertion that "habeas relief has never been found applicable to any animal," *Decision* at 78, habeas relief *has* been ordered for at least two nonhuman animals, an orangutan named Sandra in Buenos Aires, Argentina, *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo* (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo), EXPTE. A2174-2015 (October 21, 2015), and a chimpanzee named Cecilia in Mendoza, Argentina, *In re Cecilia*, File No. P-72.254/15 at 22-23. The writ has also issued on behalf of a captive bear in Colombia, though that ruling was overruled by a higher court and is under appeal, *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017).

Some of these cases cite to the same secondary sources as did this Court in *Byrn*. These cases, as well as *Byrn* and the numerous sources it cited, make clear that "person" and "human" are not synonymous, and never have been. Even the New York Legislature recognized, more than

twenty years ago, that "human" and "person" are not synonyms when it designated certain nonhuman animals, including chimpanzees, *In re Fouts,* 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees), as "persons" by enacting EPTL 7-8.1, which allows nonhuman animals to be trust beneficiaries and therefore "persons" as only "persons" may be trust beneficiaries in New York. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883), *rev. on other grounds*, 99 N.Y. 451 (1885).

Finally, the First Department's ruling is also in tension with this Court's precedent expressly allowing the common law writ to be used to establish personhood. Specifically, slaves employed the common law writ of habeas corpus to challenge their status as things in New York State. *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 (N.Y. 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).

In sum, the Court of Appeals should grant NhRP's Motion for Permission to Appeal to resolve the *Decision*'s conflict with *Byrn* in ruling that Tommy and Kiko are not, and can never be, "persons" for

the purpose of a common law writ of habeas corpus, merely because they are not human.

B. The First Department's statement that the determination of who is a "person" under the common law is better suited to the legislature, and that CPLR Article 70 codified the common law of habeas corpus, conflicts with precedent of this Court and the First and Second Departments.

1. The common law writ of habeas corpus has not been codified by legislation.

This Court must also grant review to clarify that the common law writ of habeas corpus continues to exist and is not "codified" by legislation. The First Department ruled that "[t]he common law writ of habeas corpus, *as codified by CPLR article 70,* provides a summary procedure by which a person who has been illegally imprisoned or otherwise restrained in his or her liberty can challenge the legality of the detention." *Decision* at 76 (quoting *Lavery*, 124 A.D.3d at 150, quoting CPLR 7002(a)) (emphasis added). However, this Court's

precedent, and even the First Department's own precedent, make clear that substantive entitlement to the writ is entirely a common law matter.[22] *See People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875) ("[It] is not the creature of any statute . . . and exists as a part of the common law of the State."); *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. 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); 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."). Rather, by definition, CPLR 7002(a) solely governs procedure, that is, *how* a

[22] CPLR 7001 provides in part: "the provisions of this article are applicable to common law or statutory writs of habeas corpus."

lawsuit proceeds, *not who* is a common law "person" for the purpose of habeas corpus (CPLR 102, CPLR 101).[23]

In turn, the First Department's focus on legislative intent in interpreting "person"[24] was a legal *non sequitor*, as legislative intent is *irrelevant* to the *common law* determination of who may be a "person" for purposes of a common law writ of habeas corpus and therefore Article 70. *See Tweed*, 60 N.Y. at 566 (The 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."); *People ex rel. Bungart v. Wells*, 57 A.D. 140,

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[23] 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 an individual of the privilege of the common law writ of habeas corpus. *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939). *See e.g., Matter of Morhous v. Supreme Ct. of State of N.Y.*, 293 N.Y. 131, 135 (1944) (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").

[24] The First Department made the following assertions: (1) "[w]hile the word 'person' is not defined in the statute, there is no support for the conclusion that the definition includes nonhumans, i.e. chimpanzees" (*Decision* at 77); (2) that there is no evidence "the Legislature intended the term 'person' in CPLR article 70 to expand the availability of habeas protection beyond humans" (*Id.* at 77); and (3) "petitioner does not cite any sources indicating that United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty" (*Id.*).

141 (2d Dept. 1901) (habeas corpus "cannot be emasculated or curtailed by legislation").[25] Unless this Court intervenes, the First Department's erroneous ruling that the common law writ of habeas corpus may be abrogated by legislation will stand.

2. New York courts have a duty to reevaluate the common law classification of all nonhuman animals as things for the purposes of the common law writ of habeas corpus, and cannot merely defer to the legislature.

The First Department's ruling that "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process" (*Decision* at 80) (citing *Lewis v. Burger King,* 344 Fed. Appx. 470, 472 [10th Cir 2009], *cert. denied,* 558 U.S. 1125 [2010])), conflicts with this Court's longstanding rejection of the claim that change should come only from

[25] *See also 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 (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); *People ex rel. Patrick v. Frost*, 133 A.D. 179, 187 (2nd Dept. 1909) (writ lies "beyond legislative limitation or impairment").

the legislature, especially when the change sought is to the common law of habeas corpus.

Specifically, the *Decision* conflicts with *Woods* and numerous similar cases in which this Court rejected the claim that "change . . . should come from the Legislature, not the courts." 303 N.Y. at 355. In *Woods*, the Court admonished that 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.* (citation omitted). *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").

As Kiko's and Tommy's thinghood derives from the common law, their entitlement to personhood must be determined thereunder. When justice requires, it is the role of the courts to refashion the common law — most especially the common law of habeas corpus — with the directness Lord Mansfield displayed in *Somerset v. Stewart*, when he

held human slavery "so *odious* that nothing can be suffered to support it but positive law." 98 Eng. Rep. at 510 (emphasis added).

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). 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). *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").[26]

The First Department's conclusion that common law personhood is a matter reserved for the legislature relied solely on *Lewis*, 344 Fed. Appx. 470. (*Decision* at 80). But *Lewis* does not support this position. For one, the NhRP filed its petitions in state court, not federal court, and sought a common law, and neither a statutory nor a constitutional,

[26] *See also 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 *Somerset v. Stewart*, . . . which stands as an eloquent monument to the fallacy of this view"). *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").

remedy. The *Lewis* case has nothing to do with the common law, but merely rejected the *pro se* plaintiff's claim that her service dog has standing under Article III of the United States Constitution to sue under the Americans with Disabilities Act of 1990. The question of who is a *common law* "person" for the purpose of the *common law* writ of habeas corpus is *by definition uniquely* a question for the courts. The legislature, *by definition*, does not make the *common law*.

C. The *Decision*'s holding that habeas corpus is limited to unconditional release conflicts with decades of Court of Appeals and Appellate Department precedent.

This Court must also grant the NhRP's Motion for Permission to Appeal to resolve the clear conflict between the *Decision*, which forecloses habeas corpus relief to anyone who cannot be released unconditionally, and the longstanding precedent of this Court and other judicial departments that unconditional release is not required. The First Department affirmed the dismissal of the petitions in part on the grounds that, "[s]ince Petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different

facility, habeas relief was properly denied by the motion court." (*Decision* at 79). This holding is flawed for two reasons: (1) it runs directly counter to precedent; and (2) it misapprehends the relief sought by NhRP's habeas corpus petitions, *infra*.

First, New York courts at every level have for two centuries used the writ of habeas corpus to order the release of such incompetent humans as child slaves, child apprentices, child residents of training schools, child residents of mental institutions, and mentally incapacitated adults, from the custody of one entity that was illegally detaining them and into the custody of another. *See, e.g.*, *Lemmon*, 20 N.Y. at 632 (five slave children discharged); *People ex rel. Margolis v. Dunston*, 174 A.D.2d 516, 517 (1st Dept. 1991) (juvenile); *State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982) (elderly sick woman); *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969 (4th Dept. 1996) (elderly and ill woman). The court in *Stanley* correctly recognized that the First Department allows such a placement. 16 N.Y.S.3d at 917 n.2. The *Decision* therefore not only contravenes the decision of New York's highest Court but it conflicts with its own decisions.

The writ of habeas corpus can even be used solely to challenge conditions of confinement, even where no release from imprisonment is sought. *See, e.g.*, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) (habeas corpus was proper remedy to test the validity of a prisoner's transfer from a state prison to a state hospital for the insane); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943) ("that 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); *Matter of MHLS ex rel. Cruz v. Wack*, 75 N.Y.2d 751 (1989) (mental patient transferred from secure to non-secure facility); *People ex rel. Kalikow on Behalf of Rosario v. Scully*, 198 A.D.2d 250, 251 (2d Dept. 1993) (habeas corpus "available to challenge conditions of confinement, even where immediate discharge is not the appropriate relief"); *People ex rel. LaBelle v. Harriman*, 35 A.D.2d 13, 15 (3d Dept. 1970) (same); *People ex rel. Berry v. McGrath*, 61 Misc. 2d 113, 116 (N.Y. Sup. Ct. 1969) (an "individual . . . is entitled to apply for habeas corpus" upon a "showing of a course of cruel and unusual treatment"). The First Department's holding that habeas corpus is only available to prisoners

capable of immediate and unconditional release obviously and squarely conflicts with the foregoing authorities.

In ruling that the NhRP could not use the writ of habeas corpus to challenge the conditions of the chimpanzees' confinement, the First Department relied solely upon two inapt cases, *Presti*, *supra,* and *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986). *Dawson,* it asserted, is "analogous to the situation here." (*Decision* at 80). Yet in *Dawson*, this Court *affirmed* 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[.]" *Dawson* at 691 (emphasis added) (citing *Johnston*). In distinguishing *Johnston*, the *Dawson* 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 . . . is expressly authorized to impose on lawfully sentenced prisoners[.]" *Id.* (citations omitted, emphasis added). As in *Johnston*, and unlike *Dawson*, the NhRP seeks release of Tommy and Kiko from their imprisonments to an appropriate chimpanzee sanctuary, an environment manifestly "separate and different in

nature." Unlike the habeas corpus petitioner in *Dawson*, Kiko and Tommy are not inmates properly convicted of a crime. They can be legally ordered released from their illegal detention. The Fourth Department in *Presti* was wrong then for the same reasons the First Department is wrong now.

Second, the First Department fundamentally misunderstood the nature of relief sought by the NhRP. Oddly, the First Department first appeared to recognize that the NhRP "requests that respondents be ordered to show 'why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is *unlawful* and order [their] *immediate release* to an appropriate primate sanctuary.'" (*Decision* at 79) (emphasis added). However, in the very next paragraph, the court stated the opposite, that the NhRP "does not challenge the legality of the chimpanzees' detention," and that "[s]eeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim." (*Id.*)

To be clear, the NhRP's *entire case* is a challenge to the *legality* of Tommy's and Kiko's detentions and an attempt to secure their immediate release. The NhRP argued that Tommy and Kiko are "illegally imprisoned," that their "detention is unlawful," and that they are "unlawfully detained." *See Tommy* Appellate Brief at 61-63, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22); *Kiko* Appellate Brief at 60-61, Verified Petition for Habeas Corpus at 1-5 (Appendix at 15-22).[27] The NhRP never argued that the illegality of their detention is based upon *the conditions of their confinement.* Even *Lavery* recognized this: "[n]otably, 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 (citation omitted). So too did *Stanley*: "[t]he conditions under which Hercules and Leo are confined are not

27 The term "unlawful" appears six times in the appellate brief, *Tommy* Appellate Brief at 61-63, *Kiko* Appellate Brief at 60-62, and the NhRP concludes by asking the court to "issue the order to show cause for a hearing to determine the legality of [the chimpanzees'] detention." *Tommy* Appellate Brief at 67-68; *Kiko* Appellate Brief at 66-67. In addition, the memoranda of law that accompanied the petitions to the lower court with respect to both Tommy and Kiko contained the following sections in its Arguments, none of which deal with the issue of the conditions of the chimpanzees' confinement: "A PERSON ILLEGALLY IMPRISONED IN NEW YORK IS ENTITLED TO A COMMON LAW WRIT OF HABEAS CORPUS" and "As Common law natural persons are presumed free, Respondents must prove they are not unlawfully imprisoning [Tommy and Kiko]." *Tommy* Trial Memorandum at 65, 86 (Appendix at 752, 773); *Kiko* Trial Memorandum at 68, 88 (Appendix at 730, 750).

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.

Only after issuing an order to release would the court need to determine where the chimpanzees should live, as they are neither competent nor indigenous to North America. But this determination had nothing to do with the conditions of Tommy's and Kiko's current confinement. Instead the court was required to determine where the chimpanzees should be sent after their release so that they might exercise their common law right to bodily liberty to the greatest extent possible while remaining in the care and custody of another, which is precisely the remedy afforded by habeas corpus.

Equally concerning was the First Department's finding that habeas corpus relief is unavailable given that "[p]etitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that 'there are no adequate facilities to house [them] in proximity to the [c]ourt.'" (*Decision* at 79). Whether or not Tommy and Kiko could be immediately produced in court after the writ is issued is of course irrelevant to the determination of whether they are entitled to habeas corpus relief.

CPLR 7003(a) even specifically provides for those situations "where the petitioner does not demand production of the person detained" and requires the court to "order the respondent to show cause why the person detained should not be released." The NhRP followed that statute by bringing its action as a petition for a common law writ of habeas corpus and order to show cause. *See, e.g., State v. Connor*, 87 A.D.2d 511, 511-12 (1st Dept. 1982); *Callan v. Callan*, 494 N.Y.S.2d 32, 33 (2d Dept. 1985) ("Plaintiff obtained a writ of habeas corpus by order to show cause when defendant failed to return her infant daughter after her visitation. . . .").[28] As there is no legal requirement that a detained

[28] *See also State ex rel. Soss v. Vincent*, 369 N.Y.S.2d 766, 767 (2d Dept. 1975) ("In a habeas corpus proceeding upon an order to show cause (CPLR 7003, subd. (a)), the appeal is from a judgment of the Supreme Court . . . which granted the petition and ordered petitioner released"); *People ex rel. Bell v. Santor*, 801 N.Y.S.2d 101 (3d Dept. 2005) ("Petitioner commenced this CPLR article 70 proceeding seeking habeas corpus relief. . . . Supreme Court dismissed the petition without issuing an order to show cause or writ of habeas corpus. Petitioner now appeals"); *Application of Mitchell*, 421 N.Y.S.2d 443, 444 (4th Dept. 1979) ("This matter originated when petitioner . . . sought, by an order and petition, a *writ of habeas corpus* (Respondents) to show cause why Ricky Brandon, an infant . . . should not be released and placed in petitioner's custody."); *People ex rel. Smith v. Greiner*, 674 N.Y.S.2d 588 (Sup. Ct. 1998) ("This is a habeas corpus proceeding brought by the petitioner pro se and commenced via Order to Show Cause"); *People ex rel. Goldstein on Behalf of Coimbre v. Giordano*, 571 N.Y.S.2d 371 (Sup. Ct. 1991) ("By order to show cause, in the nature of a Writ of Habeas Corpus proceeding, the petitioner seeks his release from the custody of the New York State Division for Youth. . . . [T]he Court grants the petition and directs that this petitioner be forthwith released"); *In re Henry*, 1865 WL 3392 (N.Y. Sup. Ct. 1865) ("the party arrested can apply for a habeas corpus, calling on the officer to show cause why he is detained, and with the return to the writ the rule is that where the arrest is upon suspicion,

party be brought before the court, any failure to do so is irrelevant to the determination of whether habeas corpus relief should be granted.[29]

As the *Decision* is in stark conflict with established New York precedent at every judicial level, it is incumbent upon the Court of Appeals to settle the controversy.

VII. Conclusion

This appeal raises the important question of whether an autonomous individual may be deprived of her right to bodily liberty protected by common law habeas corpus and relegated to a life of imprisonment merely because she is not human. The First and Third Departments have required every individual who seeks habeas corpus to have the capacity to bear duties and responsibilities. The appellate courts claim, without having been presented with any supporting evidence, that this standard is satisfied by all, but only, human beings, despite the fact that millions of New Yorkers lack that capacity. Moreover, the courts did not even attempt to provide a rational connection between possession of this capacity and the ability to possess

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and without a warrant, proof must be given to show the suspicion to be well founded") (emphasis added in each).

[29] Bringing Tommy and Kiko to court might have been dangerous to both the chimpanzees and the public and was unnecessary to the adjudication of personhood and the legality of their detention.

the fundamental right to bodily liberty that is protected by common law habeas corpus. This standard has never been applied by any other English-speaking court, is arbitrary, and conflicts with this Court's precedent. On these grounds alone, this Court should welcome the opportunity to decide this case of first impression and grant the NhRP's Motion for Permission to Appeal.

In addition, this case warrants the Court's review as the *Decision* from which this appeal is taken: (1) conflicts with the plain language of CPLR 7003(b) which makes clear that a petition for a writ of habeas corpus cannot be dismissed as improperly successive if it raises new grounds or if the legality of the detention has never been ruled upon; (2) conflicts with this Court's, the First Department's, and other Departments' precedent that habeas corpus relief is appropriate and available when the imprisoned "person" must be released into the custody of another; and (3) conflicts with this Court's, the First Department's, and other Departments' precedent that eligibility for common law habeas corpus is a matter uniquely for the courts and not the legislature. As these issues apply to all future habeas corpus

claimants, the failure to address them will adversely impact nonhuman animals and human beings alike.

Finally, the *Decision* contains numerous substantial legal errors and erroneous factual assumptions that require review and correction by this Court.

For the above reasons, this Court should grant the NhRP's Motion for Permission to Appeal to the Court of Appeals.

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