DOCKET NO._____

In the matter of a Petition for a Common Law Writ of Habeas Corpus,	:	
	:	SUPERIOR COURT
NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN,	:	JUDICIAL DISTRICT OF TOLLAND
	:	AT ROCKVILLE
Petitioner,	:	
v.	:	
	:	
R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.,	:	
Respondents.	:	June 7, 2018

MEMORANDUM IN SUPPORT OF THE VERIFIED PETITION FOR A COMMON LAW WRIT OF HABEAS CORPUS

I. Connecticut courts have the duty to re-evaluate Beulah, Minnie, and Karen's common law classification as rightless things and to determine whether they should be accorded legal personhood for purposes of obtaining the right to common law bodily liberty secured by the common law of 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 N.Y.2d 194, 201 (1972) (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909) ("Gray"); Hans Kelsen, *General Theory of Law and State*, 93-109 (1945); George Whitecross Paton, *A Textbook of Jurisprudence* 349-356 (4th ed., G.W. Paton & David P. Derham eds. 1972) ("Paton"); Wolfgang Friedman, *Legal Theory* 521-523 (5th ed. 1967)). *See Town of Colchester v. Town of Lyme,* 13 Conn. 274, 278 (1839).

"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). In short, persons count in law; things don't. *See Note, What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1746 (2001). *Accord The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 912 (N.Y. Sup. Ct. 2015) (citing Note).

"Person" never has been, is not now, and never will be a synonym for "human being." *See* 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* 192-193 (1959)). It is neither a biological concept nor does it "necessarily correspond" to the "natural order." *Byrn*, 31 N.Y.2d at 201; *Stanley*, 16 N.Y.S.3d at 916-17. Rather, 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 Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, No. 2018-268, 2018 WL 2107087, at *1 (N.Y. May 8, 2018) ("*Tommy*") (Fahey, J., concurring) ("This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention."); *Stanley*, 16 N.Y.S.3d at 912 ("legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States."). "'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.'" *Id.* (citing *Obergefell v. Hodges*, 135 S.Ct. 2602 (2015)).[1]

"Person" has been defined more narrowly than "human being." *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."). Human slaves were not "persons" in Connecticut until slavery was abolished in 1848,[2] women were not "persons" for many purposes until well into the twentieth century,[3] and human fetuses are not "persons" within the meaning of the Fourteenth Amendment to the United States Constitution.[4]

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. "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). Precisely to the point, Gray (at 43) noted that there may be

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[1] While Connecticut "public policy is often embodied in our statutory scheme, it can also be found in our common law[.]" *Journal Publ'g Co. v. Hartford Courant Co.*, 2014 WL 5094970, at *4 (Conn. Super. Ct. Sept. 4, 2014). *See also South Windsor v. South Windsor Police Union*, 41 Conn. App. 649, 654 (1996) ("Our statutes and case law are sources of public policy").

[2] *E.g., Town of Columbia v. Williams*, 3 Conn. 467, 471 (1820) (recognizing slaves as property); *Geer v. Huntington*, 2 Root 364 (Conn. Super. 1796) (same); *Pettis v. Warren*, 1 Kirby 426, 427 (Conn. Super. Ct. 1788) (same); *Jackson v. Bulloch*, 12 Conn. 38 (1837) (same, but granting habeas corpus to a manumitted slave); *Arabas v. Ivers*, 1 Root 92, 93 (Conn. Super. 1784) (same).

[3] *E.g., Brown v. Brown, 88* Conn. 42, 43 (1914) ("By the common law the husband might restrain the wife *of her liberty and* might chastise her.").

[4] *See Roe v. Wade*, 410 U.S. 113 (1973); *State v. Courchesne*, 296 Conn. 622, 703-05 (2010).

> systems of law in *which animals have legal rights . . . animals may conceivably be legal persons* . . . when, if ever, this is the case, the wills of human beings must be attributed to the animals. There seems no essential difference between the fiction in such cases and those where, to a human being wanting in legal will, the will of another is attributed. (Emphasis added).

Sister common law countries are designating an expanding number of nonhuman entities as "persons." In 2018, the Colombian Supreme Court designated its part of the Amazon rainforest as "as an entity subject of rights," in other words, a "person."[5] In 2017, the New Zealand Parliament designated the New Zealand's Whanganui River Iwi as a "person" that owns its riverbed.[6] In 2014, New Zealand's Te Urewara park was designated a "legal entity, having all the rights, powers, duties, and liabilities of a person."[7] Also in 2014, the Indian Supreme Court held that nonhuman animals have a constitutional and statutory right to personhood and certain legal rights.[8] In 2000, the Indian Supreme Court designated the Sikh's sacred text, the Sri Guru Granth Sahib, a "person,"[9] thereby permitting it to own and possess property. Pre-Independence Indian courts designated certain Punjab mosques as legal persons,[10] to the same end, as well as designating a Hindu idol as a "person" with the capacity to sue.[11] The historic struggles over the legal personhood of human fetuses,[12] human slaves,[13] Native Americans,[14] women,[15] Jews,[16] and

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[5] *See* STC4360-2018 (2018-00319-01), 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 accessed May 4, 2018).

[6] 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 September 25, 2017).

[7] Te Urewara Act 2014, Subpart 3, §11(1), *available at*: http://www.legislation.govt.nz/act/public/2014/0051/latest/DLM6183705.html (last accessed November 10, 2017).

[8] *Animal Welfare Board v. Nagaraja*, 6 SCALE 468 (2014), *available at* https://indiankanoon.org/doc/39696860/ (last accessed May 14, 2018).

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

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

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

[12] *Roe v. Wade*, 410 U.S. 113 (1973); *State v. Courchesne*, 296 Conn. 622, 704-05 (2010); *In re Valerie D.*, 25 Conn. App. 586, 591 (1991) *rev'd*, 223 Conn. 492 (1992); *State v. Anonymous (1986-1)*, 40 Conn. Supp. 498, 499 (1986); *Hatala v. Markiewicz*, 26 Conn. Supp. 358 (1966).

nonhuman entities[17] have never been over whether they are human, but whether justice requires that they count in law. That Beulah, Minnie, and Karen are elephants does not mean they may never count as "persons" for any purpose.

B. Detained "things" are entitled to invoke the common law writ of habeas corpus to challenge their status as "things," and the writ must issue if there is any possibility that they *could be* reclassified as "persons" for the sole purpose of possessing the common law right to bodily liberty.

Habeas corpus is "'one of the most extraordinary and unique legal remedies in the procedural armory of our law.'" *Lebron v. Comm'r of Corr.*, 274 Conn. 507, 530 n.17 (2005) (quoting *McNally v. Hill*, 293 U.S. 131, 136 (1934)), *overruled on other grounds, Peyton v. Rowe*, 391 U.S. 54 (1968)). It is "a prerogative common-law writ providing a special and extraordinary legal remedy." *Wojcuulewicz v. Cummings*, 143 Conn. 624, 627 (1956). "'[The writ] is not now and never has been a static, narrow, formalistic remedy; its scope has grown to

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[13] *Compare Town of Columbia v. Williams*, 3 Conn. 467, 470 (1820) (slave is property); *Town of East Hartford v. Pitkin*, 8 Conn (1831) (same) *with Jackson*, 12 Conn. at 54 (slaves are free); *id.* at 40 ("slavery is contrary to the principles of natural right"); and *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499, 510 (K.B. 1772) (slavery is "so odious that nothing can be suffered to support it but positive law"). *See also* David Menschel, *Abolition Without Deliverance: The Law of Connecticut Slavery* 1784-1848, 111 YALE L.J. 183, 185 (2001). In *Pitkin*, 8 Conn. 393, Justices Daggett, Hosmer, and Peters, "showed little or no moral outrage while deciding a technical financial issue concerning a particular slave, while the two newer judges appointed in 1829, Williams and Clark Bissell, expressed their moral outrage in dissent." Wesley W. Horton, *The Pre-Civil War Connecticut Supreme Court*, 34 CONN. L. REV. 1209, 1210 (2002).

[14] *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (over the objection of the U.S. Attorney, court held Native Americans were "persons" within meaning of the Federal Habeas Corpus Act).

[15] *In re Goodell*, 39 Wis. 232, 240 (1875) (women could not be lawyers); Blackstone, *Commentaries on the Law of England* *442 (1765-1769) ("By marriage, the husband and wife are one person in law: that is the very being or legal existence of the woman is suspended during the marriage . . . "). *But see In re Hall*, 50 Conn. 131, 131 (1882) (rejecting argument that women could not be lawyers because it was not within the contemplation of the legislature).

[16] 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).

[17] A corporation is a Fourteenth Amendment "person," *Santa Clara Cnty. v. Southern Pacific Railroad*, 118 U.S. 394 (1886), but is not protected by the Fifth Amendment's Self-Incrimination Clause. *Bellis v. United States*, 417 U.S. 85 (1974); *accord Lieberman v. Reliable Refuse Co.*, 212 Conn. 661, 667-71 (1989) (same). *See also Benjamin v. Bailey*, 234 Conn. 455, 473-76 (1995) (corporation "person" for equal protection purposes).

achieve its grand purpose – the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.'" *Buster v. Bonzagni*, 1990 WL 272742, at *3 (Conn. Super. Ct. Apr. 5, 1990), *aff'd sub nom. Buster v. Comm'r of Correction*, 26 Conn. App. 48 (1991) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)). Habeas corpus has been available to all individuals, regardless of age,[18] mental capacity,[19] or present thinghood status.[20]

As alleged in the accompanying Verified Petition for a Common Law Writ of Habeas Corpus ("Petition"), this Court need *not* determine that Beulah, Minnie, and Karen are "persons" in order to *issue* the writ of habeas corpus. (Pet. at ¶¶20-25). On the contrary, this Court *must* issue the writ if there is *any possibility* that they *could* be "persons" under Connecticut common law solely for the purpose of obtaining the right to bodily liberty protected by the writ of habeas corpus. (*Id.*) (citing *inter alia*, *Somerset*, 98 Eng. Rep. 499; *Stanley*, 16 N.Y.S.3d 898). *See also Tommy*, 2018 WL 2107087, at *2 (Fahey, J., concurring); Gray, *supra* at 43 ("animals may conceivably be legal persons"). There is ample common law precedent (*Somerset* and its American progeny) adopted into Connecticut common law in which the writ of habeas corpus was used by or on behalf of individuals not hitherto recognized as legal persons to secure their bodily liberty and consequently, legal personhood.[21] Moreover, courts in northern states frequently freed black slaves, who were also not hitherto considered "persons," upon writs of habeas corpus.[22] The granting of those petitions resulted in freedom from bodily restraint but not

[18] *See Cinque v. Boyd*, 99 Conn. 70, 93-95 (1923) (minor in training school); *Dart v. Mecum*, 19 Conn. Supp. 428, 434 (Super. Ct. 1955) (minor held under illegal commitment order ordered released then returned to parents); *see also Buster*, 1990 WL 272742, at *2.

[19] *E.g.*, *Fasulo v. Arafeh*, 173 Conn. 473, 483 (1977) (mental patient); *Blackburn v. Normandin*, 1993 WL 394312, at *5 (Conn. Super. Ct. Sept. 27, 1993); *Anonymous v. Superintendent of Hosp.*, 33 Conn. Supp. 191, 194 (Super. Ct. 1977); *Melville v. Sabbatino*, 30 Conn. Supp. 320, 320 (Super. Ct. 1973); *Rodd v. Norwich State Hosp.*, 5 Conn. Supp. 360, 363 (Super. Ct. 1937); *Miller v. Burlingame*, 4 Conn. Supp. 186, 194 (Super. Ct. 1936).

[20] An entity who is not a "person" may invoke the common law writ of habeas corpus to argue that she should be a "person." *E.g.*, *Jackson*, 12 Conn. at 40-42; *Arabas*, 1 Root at 93.

[21] *See Jackson*, 12 Conn. at 40-42; *Arabas*, 1 Root at 93.

[22] *E.g.*, *Lemmon v. People*, 20 N.Y. 562 (1860); *Commonwealth v. Aves*, 35 Mass. 193 (1836); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846); *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam); *State v. Lyon*, 1 N.J.L. 403 (1789); *State v. Pitney*, 1 N.J.L. 165 (N.J. 1793); *Respublica*

necessarily other legal rights, such as the right to vote.[23]

The Petition, along with this Memorandum, demonstrate that there is much more than a possibility that Beulah, Minnie, and Karen could be legal persons. The court in *Stanley* issued the order to show cause on behalf of two chimpanzees pursuant to the New York habeas corpus procedural statute; subsequently it 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 905.

The *only* written opinion from an American jurisdiction's highest court on the issue of the entitlement of nonhuman animals to habeas corpus is the recent concurrence by Judge Fahey in *Tommy*, 2018 WL 2107087, at *1-2. There, Judge Fahey wrote:

> 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*.

Id. at *2 (emphasis added). Judge Fahey went on to explicitly declare that the lower courts were wrong on the merits, averring that the "Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Id.*

Adopting the Nonhuman Rights Project's ("NhRP") strategy, a petition for a writ of habeas corpus was filed on behalf of a chimpanzee named Cecilia in an Argentine court to free her from the Mendoza Zoo. In November 2016, that court granted the writ, declared Cecilia a "non-human legal person" with "nonhuman rights," and ordered her transfer to a sanctuary.[24]

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v. Blackmore, 2 Yeates 234, 1797 WL 744, *1 (Pa. 1797); *Pirate v. Dalby*, 1 Dall. 167, 168, 1786 WL 225 (Pa. 1786).

[23] *See generally Plessy v. Ferguson*, 163 U.S. 537 (1896); *Bryan v. Walton*, 14 Ga. 185, 198 (1853) ("That the act of manumission confers no other right but that of freedom from the dominion of the master, and the limited liberty of locomotion; that it does not and cannot confer *citizenship*, nor any of the powers, civil or political, incident to *citizenship*").

[24] 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

Rejecting the claim that Cecilia could not avail herself of habeas corpus because she was not a human,[25] the court declared:

> societies evolve in their moral conducts, thoughts, and values, and also in [their] legislations. More than a century ago most of the individual rights that are expressly recognized today in the constitutions of the different countries and by the Human Rights International Treaties were ignored and in some cases they were even overlooked, or worse, insulted like the rights related to gender perspective.
>
> At present, we can see an awareness of situations and realities that although . . . have been happening since unmemorable times, they were not recognized by social figures. That is the case of gender violence, marriage equality, equal voting rights, etc. There is an identical situation with the awareness of animal rights.

Id. at 19, 20. The *Mendoza* court (at 23-24) further explained that classifying

> animals as things is not a correct standard . . . chimpanzees have the capacity to reason, they are intelligent, are conscientious of themselves, they have culture diversity, expressions of mental games, they manifest grief, use and construction of tools to access food or to solve simple problems of daily life, abstraction capacity, skills to handle symbols in communication, conscience to express emotions such as happiness, frustration, desires or deceit, planned organization for intraspecific battles and ambush for hunting, they have metacognitive capabilities, they have a moral, psychic, and physical status, they have their own culture, they have affectionate feelings (they caress and groom each other), they are capable of lying, they have symbols for human language and use tools.

The following sections illustrate that not only is there more than a mere possibility that Beulah, Minnie, and Karen could be legal persons under Connecticut common law, but that liberty, equality, and justice *require* this Court to change their common law classification as "things" for the sole purpose of possessing the common law right to bodily liberty that is protected by common law habeas corpus.

C. As Connecticut common law is broad and flexible, its courts are obligated to change the common law when reason and equity demand it.

Connecticut courts are "charged with the ongoing responsibility to revisit our common-

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available at https://www.nonhumanrights.org/content/uploads/2016/12/Chimpanzee-Cecilia_translation- FINAL-for-website.pdf (last accessed November 10, 2017).

[25] *Id.* at 5, 19.

law doctrines when the need arises." *State v. Brocuglio*, 264 Conn. 778, 793 (2003). They "must have and exert the capacity to change a rule of law when reason so requires," *State v. Vakilzaden*, 251 Conn. 656, 663-64 (1999) (internal quotation marks omitted), and overturn "'precedent it thinks is unjust.'" *State v. Miranda*, 274 Conn. 727, 734-35 (2005) (citation omitted).[26] They have the duty to "make a principled declaration of the common law as it now is, not as it might have been had it been declared at the birth of this State more than two centuries ago." *Rosado v. Bridgeport Roman Catholic Diocesan Corp*., 1995 WL 348181, at *11 (Conn. Super. Ct. May 31, 1995).[27] While all Connecticut law, including constitutional[28] and statutory[29] law, is flexible and sensitive to the effects of scientific discovery, evolving standards of morality, public opinion, and experience, the most flexible law in Connecticut is the common law, which is

> the prevailing sense of the more enlightened members of a particular community, expressed through the instrumentality of the courts, as to those rules of conduct which should be definitely affirmed and given effect under the sanction of organized society, in view of the particular circumstances of the time, but with due regard to the necessity that the law should be reasonably certain and hence that its principles have permanency and its development be by an orderly process. Such a definition necessarily implies that the common law must change as circumstances change.

Dacey v. Connecticut Bar Association, 184 Conn. 21, 25-26 (1981) (quoting *State v. Muolo*, 118 Conn. 373, 378 (1934)). Its "adaptability . . . to the changing needs of passing time has been one of its most beneficent characteristics." *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 196 (1996) (internal quotation marks omitted). It "is not a frozen mold of ancient ideas, but such

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[26] *See also Craig v. Driscoll*, 262 Conn. 312, 330 n.15 (2003); *State v. Guess*, 244 Conn. 761, 778 (1998); *Conway v. Town of Wilton*, 238 Conn. 653, 659 (1996).

[27] *See Baker v. Comm'r of Corr*., 281 Conn. 241, 250-52 (2007) (observing Connecticut courts' "expansion of the writ beyond its initial objective of securing immediate release from illegal detention"). *See also* Section III, *infra* (citing cases expanding scope of writ in Connecticut).

[28] *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 161-62 (2008).

[29] *In re Hall*, 50 Conn. at 132 ("But if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the mind of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptively from a state of public opinion that utterly condemns some course of action to one that strongly approves it").

law is active and dynamic and thus changes with the times and growth of society to meet its needs." *Guess*, 244 Conn. at 775 (citation and internal quotation marks omitted).[30]

Connecticut courts never hesitate to discard outmoded common law rules or create common law rights when justified by changing experience, morality, and scientific discovery. In *Goodrich v. Waterbury Republican-Am., Inc.*, 188 Conn. 107, 126 (1982), the Court criticized other states that had refused to recognize a common law right to privacy on the grounds that "this issue was more properly one for legislative determination." It has never been the policy of the Connecticut Supreme Court "to close its eyes to change or to disregard reality." *Guess*, 244 Conn. at 776 (citing *Clohessy v. Bachelor*, 237 Conn. 31, 56 (1996) (recognizing cause of action for closely-related bystander emotional distress)).[31] In short, "'[w]hen these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the judge is to pass through them undeterred.'" *Tursi v. New England Windsor Co.*, 19 Conn. Supp. 242, 248 (Super. Ct. 1955) (quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29).[32]

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[30] *Accord Swentusky v. Prudential Ins. Co.*, 116 Conn. 526, 531 (1933) (common law "can never be static, but it must be everlastingly developing . . .").

[31] *See also Craig*, 262 Conn. 312 (recognizing common law cause of action for negligent infliction of emotional distress on a bystander against purveyor of alcohol); *Bohan v. Last*, 236 Conn. 670, 680-81 (1996) (changing common law rule to "hold that it is appropriate to limit the common law liability of purveyors of alcohol"); *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362, 370-73 (1996) (changing common law rule of subrogation to avoid "unjust results"); *Fahy v. Fahy*, 227 Conn. 505, 509, 513-16 (1993) ("We also conclude, [apart from the statute] . . . that as a matter of common law the modification of alimony orders should be treated the same as support orders are required to be treated"); *Goodrich v. Waterbury Republican- Am., Inc.*, 188 Conn. 107, 126-27 (1982) (creating common law cause of action for invasion of privacy); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 477 (1980) (recognizing new common law cause of action for wrongful discharge based on violation of public policy).

[32] *See also Brunswick v. Inland Wetlands Commission*, 222 Conn. 541, 554-55 (1992) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid have vanished long since, and the rule simply persists from blind imitation of the past") (quoting Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)); *Rumsey v. New York and New England Railway Co.*, 133 N.Y. 79, 85 (1892) (quoting 1 *Kent's Commentaries* 477 (13th edition 1884) ("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")).

D. Because habeas corpus is a common law cause of action, and Beulah, Minnie, and Karen's classification as "things" derives from the common law, the determination of whether to grant them legal personhood for the sole purpose of protecting their bodily liberty through the common law of habeas corpus is for this Court rather than the legislature.

This Court has "common law power to declare the law in the absence of legislative action." *Bartholomew v. Schweizer*, 217 Conn. 671, 679 (1991). *See also Courchesne*, 296 Conn. at 673-75 (finding that common law determines whether infant born alive who dies of injuries sustained *in utero* is "person" under murder statute); *Craig*, 262 Conn. at 330 n.15 (refusing to relinquish matters of public policy "to the legislature in an area in which this court has common-law authority[.]").[33] No legislation precludes this Court from declaring Beulah, Minnie, and Karen to be common law persons for the purpose of habeas corpus. The statutes governing the common law writ, C.G.S.A. § 52-466(a)(1) and Conn. Practice Book § 23-21 *et seq*., are purely procedural and do not control substantive entitlement to the writ. In evaluating whether chimpanzees were "persons" for the purposes of New York's common law of habeas corpus (and the procedural statutes governing the common law writ), the court in *Stanley* observed:

> "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.

16 N.Y.S.3d at 911. The same is true in Connecticut. The habeas corpus statutes and rules cited above do not abrogate this Court's common law authority for three related reasons.

First, Connecticut habeas corpus is a substantive common law cause of action that exists independently of any statutes governing its procedure. *See Negron v. Warden, Hartford Cmty.*

[33] *See also Guess*, 244 Conn. at 778 (rejecting "defendant's contention that only the legislature can determine whether brain death should be recognized in law," reasoning that while the "legislature clearly has the authority to define by statute the standards by which a hospital may determine death," the Court was "confident in our *parallel authority, as a matter of common law*, to determine what constitutes death and to embrace the advances made in medical science and technology during the last three decades.") (citations omitted, emphasis added)).

Corr. Ctr., 180 Conn. 153, 157 (1980) (the statutes just cover "procedures governing habeas corpus proceedings."); *Wojcuulewicz*, 143 Conn. at 627.[34] It is "a writ antecedent to statute, and throwing its root deep into the genius of our common law. . . . It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." *Ortega v. Myers*, 2002 WL 31440756, at *2 (Conn. Super. Ct. Oct. 3, 2002) (quoting 3 *Blackstone Commentaries* *129). Furthermore, a "'substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress.'" *D'Eramo v. Smith*, 273 Conn. 610, 621 (2005) (citations omitted). As C.G.S.A. § 52-466(a)(1) only prescribes the methods of enforcing the common law of habeas corpus, it must be interpreted through the lens of the common law. Likewise, Connecticut courts interpret the "'provisions of the Practice Book through the lens of the common law.'" *Rosado v. Bridgeport Roman Catholic Diocesan Corp*., 292 Conn. 1, 44 (2009) (citation omitted).[35] Indeed, the "precise nature of the writ, and the relief which may be granted to a successful habeas petitioner, have been shaped by decisional law." *Miller v. Warden*, 1996 WL 168004, at *42 (Conn. Super. Ct. Mar. 27, 1996), *aff'd sub nom., Miller v. Comm'r of Correction*, 242 Conn. 745 (1997). "'English legislation and common law have been recognized by the United States Supreme Court [and Connecticut Supreme Court] as authoritative guides in applying the writ.'" *Lebron*, 274 Conn. at 523. *See id*. at 530 n.17 (looking to the common law to construe the term "custody" in the habeas corpus statutes).[36] Therefore, the common law controls the parties' substantive rights, including who is entitled to the writ.

Second, and relatedly, statutes cannot abrogate the substantive right to the common law writ. *See Lebron*, 274 Conn. at 529 n.17; *Weidenbacher*, 234 Conn. at 64-65 ("It does not

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[34] *E.g., Weidenbacher v. Duclos*, 234 Conn. 51, 64-65 (1995) (though father could not meet statutory requirements for establishing paternity, he could seek common law writ of habeas corpus); *Hudson v. Groothoff*, 10 Conn. Supp. 275, 278 (Conn. C.P. 1942) (citing Swift's Digest).
[35] *Accord Wiseman v. Armstrong*, 295 Conn. 94, 110-11 (2010) (quoting C.G.S.A. § 51–14(a); *In re Samantha C.*, 268 Conn. 614, 639 (2004)). *See* C.G.S.A. § 51-14 ("Such rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts.").
[36] *See also Craig*, 262 Conn. at 330 n.15; *Carpenter v. Meachum*, 229 Conn. at 199.

necessarily follow, however, that unless the petitioner qualifies under the terms of that statute [§ 46b–172a], he cannot demonstrate paternity for purposes of petitioning a court for a common law writ of habeas corpus for custody of a child."); Conn. CONST. ART. I, § 12 ("The privileges of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature."). "'It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.'" *Fine v. Comm'r of Correction*, 147 Conn. App. 136, 142-43 (2013) (citation omitted). Because "the writ is intended to safeguard 'individual freedom . . . ,' it must be 'administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.'" *Luurtsema v. Comm'r of Correction*, 299 Conn. 740, 757 (2011) (citation omitted). Its "scope and flexibility . . . its capacity to reach all manner of illegal detention - its ability to cut through barriers of form and procedural mazes - have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Third, although this common law proceeding does not turn on legislative intent, it is telling that the legislature did not define "person" for purposes of habeas corpus. When the legislature intends to define a word, it does. *See Town of New Hartford v. Connecticut Resources Recovery Auth*., 2007 WL 824562, at *4 (Conn. Super. Ct. Feb. 22, 2007) ("A corporation is included in the definition of a 'person' in C.G.S.A. § 52-278a *et seq*. If the Legislature wished to exempt a town from the attachment statutes, it easily could have done so by excluding either a municipal corporation or quasi-public entity from the definition.").[37] When the legislature does

[37] *See, e.g.*, C.G.S.A. § 1-1(k) ("The words 'person' and 'another' may extend and be applied to communities, companies, corporations, public or private, limited liability companies, societies and associations."). This statute poses not barrier to the NhRP's *common law* habeas corpus petition. *E.g., Weidenbacher*, 234 Conn. at 64-65. In fact, "1-1(k) by its own terms only applies to the 'construction of the statutes' not to the language of the Practice Book." *See F.D.I.C. v. Peabody N.E. Inc*., 1996 WL 57010, at *7 (Conn. Super. 1996), *rev. on other grounds*, 239 Conn. 93 (1996) (rejecting argument that State could not be impleaded since "none of the definitions would include the State" on grounds that § 1-1(k) was inapplicable to the practice book rules).

not define a term, the Court may, "as a matter of common-law adjudication, define that term." *Guess*, 244 Conn. at 771, 778 ("Because the legislature did not provide a definition of death in the Penal Code, we interpret the term in accordance with," *inter alia*, the "common law").[38] Even in cases involving the interpretation of statutes, personhood is not limited to those who the legislature had in mind when it used the word "person."[39]

As Judge Fahey noted, 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*, 2018 WL 2107087, at *1 (concurring). He explained that the lower courts,

> in deciding that habeas corpus is unavailable to challenge the legality of the chimpanzees' confinement, rely in the first instance on dictionary definitions. The habeas corpus statute does not define "person," but dictionaries instruct us that the meaning of the word extends to any "entity . . . that is recognized by law as having most of the rights and duties of a human being" . . .

Id. After discussing the logical flaws of the lower courts' appeal to dictionary definitions (discussed in more detail *infra* at 27-34 herein), Judge Fahey admonished:

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or 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. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species.

Id. Likewise, this Court's common law analysis will not turn on any legislative or dictionary definition of "person," but will instead turn on "ethics and policy" as well as "unrebutted

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[38] *See also Red Rooster Const. Co. v. River Associates, Inc*., 224 Conn. 563, 569-70 (1993); *Faulkner v. Solazzi*, 79 Conn. 541, 545 (1907); *Hatala*, 26 Conn. Supp. at 360-61 (looking to common law to determine whether injured fetus has cause of action against the wrongdoer); *Gorke v. Le Clerc*, 23 Conn. Supp. 256, 257 (Super. Ct. 1962) ("In the absence of such [survival] statutes the common law governs."); *cf. Courchesne*, 296 Conn. at 674-75 (in determining whether a fetus was a "person" under the statute, the Court noted "[w]e also look for interpretive guidance to common-law principles governing the same general subject matter").

[39] *See In re Hall*, 50 Conn. at 132 (that legislature had neither women nor blacks in mind when it enacted statute permitting "persons" to practice law held irrelevant to whether they may now become attorneys).

evidence, in the form of affidavits from eminent [scientists]." *Id.* In short, nothing bars this Court from determining that Beulah, Minnie, and Karen are "persons" for the purpose of seeking a common law writ of habeas corpus and this Court has the common law duty to do so.

E. Beulah, Minnie, and Karen are entitled to the right to bodily liberty, secured by the common law of habeas corpus, both as a matter of common law liberty and equality.

Although personhood is not a biological concept, *supra*, biology is not irrelevant to this Court's personhood determination. *See Guess*, 244 Conn. at 771; *Tommy*, 2018 WL 2107087, at *2 (Fahey, J., concurring) (focusing on scientific evidence of chimpanzees' autonomy). On the contrary, as shown below, autonomy is a sufficient (though not a necessary) condition for personhood for the purposes of securing the right to bodily liberty protected by the common law of habeas corpus. *See id.* (agreeing with the NhRP that autonomy should be a sufficient condition for personhood). This is so based on both the: (1) non-comparative principle of liberty and (2) comparative principle of equality, *infra.*

1. As they are autonomous, Beulah, Minnie, and Karen have a common law liberty right to the bodily liberty protected by habeas corpus.

All autonomous beings, regardless of their species, should possess the common law liberty right to bodily liberty secured by the common law writ of habeas corpus. *See Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (explaining that the question should not turn on whether the nonhuman animals at issue are able to bear duties and responsibilities like humans, or meet a dictionary definition of "person," "but instead whether he or she has the right to liberty protected by habeas corpus."). Habeas corpus is "the great writ of liberty" and protects all natural "persons" from unlawful detention, whether public or private. *Lozada v. Warden*, 223 Conn. 834, 840 (1992) (private). As Chief Justice Swift wrote, "this writ furnishes the strongest security for … liberty." 1 Zephaniah Swift, *A Digest of the Laws of the State of Connecticut* 568 (1822). "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail." *Gonzalez v. Comm'r of Corr.*, 308 Conn. 463, 483-84 (2013).

The common law of habeas corpus "is deeply rooted in our cherished ideas of individual autonomy and free choice." *Stanley*, 16 N.Y.S.3d at 903-04 (citations omitted). The word "autonomy" derives from the Greek "auto" ("self") and "nomos" (law"). Michael Rosen, *Dignity – Its History and Meaning* 4-5 (2012). A deprivation of the bodily liberty of an autonomous being is a deprivation of self-determination. *See, e.g., Indiana v., Edwards*, 554 U.S. 164, 187 (2008) ("if the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made."); *State v. Connor*, 292 Conn. 483, 516 (2009); *Sherwood v. Danbury Hospital*, 278 Conn. 163, 180 (2006) (quoting *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.'")). This "fundamental legal tradition of self-determination prevails throughout the United States." *McConnell v. Beverly Enterprises–Connecticut, Inc.*, 209 Conn. 692, 701 (1989).

> That common law right, and its roots in our legal tradition, have a long and impressive pedigree. More than one century ago, the United States Supreme Court recognized that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestioned authority of law." *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891).

Stamford Hospital v. Vega, 236 Conn. 646, 664 (1996). "The right to one's person may be said to be a right of complete immunity: to be let alone." *Botsford*, 141 U.S. at 251 (quoting *Cooley on Torts* 29). Connecticut supremely values the autonomy whose protection is at the heart of the common law of habeas corpus, so much so that it permits competent adults to decline life-saving treatment. *Vega*, 236 Conn. at 665-66; *McConnell*, 209 Conn. at 701. Even the permanently comatose possess common law autonomy equal to the competent. *Foody v. Manchester Mem'l Hosp.*, 40 Conn. Supp. 127, 132-33 (1984) (recognizing the common law right to self-determination, and noting that "[t]he courts have recognized the right of a guardian of the person to vicariously assert the right of an incompetent or unconscious ward to accept or deny medical

care.") (citations omitted). To "deny the exercise because the patient is unconscious or incompetent would be to deny the right. . . . It is incumbent upon the state to afford an incompetent the same panoply of rights and choices it recognizes in competent persons." *Id.* (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)).[40]

The Expert Scientific Affidavits demonstrate that Beulah, Minnie, and Karen are autonomous and that their interest in exercising their autonomy is as fundamental to them as it is to us.[41] *See also Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) ("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."); *Nitin Singhvi v. Union of India & Others*, W.P. No. 6/2016, ¶12 at 7-8 (High Court of Chhattisgarh Aug. 18, 2017) ("It is a salutary principle . . . to uphold the right of the animals to say, 'Let Us Alone.'"). A "'moral patient' who can be wronged" should at least "have the right to redress wrongs." *Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (citing Tom Regan, *The Case for Animal Rights* 151–156 [2d ed 2004]). And it is uncontroverted that these elephants, as autonomous beings, are wronged through the inability to exercise their autonomy. They therefore should possess, as a minimum, the right to protect that autonomy through the common law of habeas corpus.

As demonstrated above, the right to bodily liberty is a non-comparative right, predicated upon one's interest in exercising their autonomy *independent* of the treatment of others similarly situated. *See Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (the answer to whether a nonhuman animal has "the right to liberty protected by habeas corpus" depends

[40] *See also McConnell*, 209 Conn. at 710 (adopting rationale of *Foody* and *Botsford*); *id.* at 718-19 (Healey, J., concurring) ("this case is governed by the common law right to self-determination . . .There being clear and convincing evidence that it is McConnell's wish never to have her body and dignity invaded in order to provide extraordinary treatment that would maintain her in this tragic and terminal condition, and there being no state interests that outweigh the exercise of this right, McConnell's gastrostomy tube must be removed.").

[41] Bates & Byrne Aff. ¶30, ¶34, ¶37, ¶47, ¶50, ¶60; McComb Aff. ¶24, ¶31, ¶41, ¶44, ¶54; Poole Aff. ¶22, ¶26, ¶29, ¶39, ¶42, ¶53; Moss Aff. ¶18, ¶22, ¶25, ¶35, ¶38, ¶48.

primarily "on our assessment of the intrinsic nature of chimpanzees as a species."). *See also id.* (opining that "an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do" should "have the right to the protection of the law against *arbitrary* cruelties and enforced detentions") (emphasis added).

2. Beulah, Minnie, and Karen, have a common law equality right to bodily liberty protected by habeas corpus.

The Court must ultimately decide whether Beulah, Minnie, and Karen's common law classification as "things" must remain or change. The common law classification of Beulah, Minnie, and Karen as "things" violates common law equality. In making this determination, this Court must be mindful of the fact that "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.'" *Kerrigan*, 289 Conn. at 261 (quoting *Lawrence v. Texas*, 539 U.S. 558, 579 (2003)).[42] The Court must equally remember that the "inherent capacity of the common law for growth and change is its most significant feature." 15 Am.Jur.2d, Common Law, §§ 1, 2, pp. 794-96.

> 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*: 'The nature of the common law requires that each time a rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. 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.'"

Rodriguez v. Bethlehem Steel Corp., 12 Cal.3d 382, 394 (1974) (citations omitted, emphasis added). In this case, equality, reason, and equity demand a change. There is no legitimate reason to sustain the longstanding and arbitrary common law classification of Beulah, Minnie, and Karen as "things" unable to possess the common law right to bodily liberty, *infra.*

Connecticut courts expand and define the common law based on a public policy that "can be found in express statutory or constitutional provisions, or in judicially conceived notions of

[42] *See also id.* at 262 ("Like these once prevalent views, our conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection."); *Varnum v. Brien*, 763 N.W. 2d 862, 877-78 (Iowa 2009).

public policy." *Curry v. Community Sys., Inc*., 1993 WL 383281, at *3 (Conn. Super. Ct. Sept. 17, 1993). The Connecticut Supreme Court has expressly declared "there exists a *general public policy* in this state to eliminate all forms of invidious discrimination[.]" *Thibodeau v. Design Grp. One Architects, LLC,* 260 Conn. 691, 706 (2002) (emphasis added). Connecticut constitutional law and statutory law are strong sources of Connecticut's public policy in favor of equality.[43] For example, in *Thibodeau v. Design Group One Architects, LLC*, 64 Conn. App. 573, 589, *rev'd on other grounds*, 260 Conn. 691 (2002), the court found a public policy against gender discrimination in the Connecticut Constitution, Article 1, § 20, as well as in the United States Constitution's Equal Protection Clause.[44]

More importantly, equality is independently enshrined in Connecticut common law. For more than a century, Connecticut common law has prohibited public and private entities from discriminating unreasonably or unjustly. *See, e.g.*, *Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 296 (1987) ("Public accommodation statutes in general have their origins in the common law duties of innkeepers and common carriers to offer their services to the general public without discrimination."); *Turner v. Connecticut Co*., 91 Conn. 692, 697-98 (1917) ("as a general principle the service of a public utility should be equal to all patrons").[45]

This Court should utilize settled constitutional equal protection analysis to evaluate

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[43] Conn. CONST. ART. 1, § 1 (Equal Protection Clause); ART. 1, § 20 (Anti-discrimination Clause); *Hall*, 50 Conn. at 137 ("all statutes are to be construed, as far as possible, in favor of equality of rights."); *State v. Conlon*, 65 Conn. 478, 489 (1895) ("[n]o legislative act is law that clearly and certainly is obnoxious to the principle of equality in rights thus solemnly made the condition of all exercise of legislative power.").

[44] *See also Int'l Bhd., Local 361 v. Town of New Milford*, 81 Conn. App. 726, 735 (2004) ("It is axiomatic that Connecticut adheres to a public policy prohibiting discrimination on the basis of disabilities. Such a policy is embodied in C.G.S.A. § 46a-60(a)(1)."); *Morin v. Athena Health Care*, CV166033956S, 2017 WL 1240411, at *2 (Conn. Super. Mar. 6, 2017) ("Connecticut's Supreme Court recognizes a common-law cause of action for wrongful termination, so long as it is derived from an important public policy.")

[45] *See also Bilton Mach. Tool Co. v. United Illuminating Co*., 110 Conn. 417, 425-26, 430 (1930); *Faulkner*, 79 Conn. at 542-43.

common law equality claims because "Connecticut has not historically drawn hard lines of separation between constitutional, statutory and common law precepts." *State v. Joyner*, 225 Conn. 450, 467-68 (1993). *See also* E. Peters, *Common Law Antecedents of Constitutional Law in Connecticut,* 53 ALB. L. REV. 259, 261 (1989); 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 (1992) (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."); *Joyner*, 225 Conn. at 467-68 ("Contrary to our federal constitutional heritage, our constitutional tradition in Connecticut has not historically drawn hard lines of separation between constitutional, statutory and common law precepts.").[46]

Constitutional equal protection analysis looks to: (1) whether a classification treats one group differently from others similarly situated; (2) the purpose of the classification and its legitimacy; and (3) the fit between the classification and the purpose. *Kerrigan*, 289 Conn. at 157-58.

A court can eschew this entire tripartite analysis, however, when, as here, a classification uses a single trait to deny that 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

[46] *See also Commissioner of Correction v. Coleman*, 303 Conn. 800, 812 n.5 (2012) ("there is substantial overlap in the analysis [of the common law right to bodily integrity claim not to be force fed by prison officials] and the analysis that generally applies for analyzing these constitutional [privacy] claims."); Christopher Collier, *The Common Law and Individual Rights in Connecticut Before the Federal Bill of Rights*, 76 CONN. B.J. 1 (2002); Christopher Collier, *The Connecticut Declaration of Rights Before the Constitution of 1818: A Victim of Revolutionary Redefinition,* 15 CONN. L. REV. 87, 94 (1982).

"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 of judicial review." *Romer*, 517 U.S. at 633 (emphasis added).[47]

Beulah, Minnie, and Karen are detained solely because they are not human. They are thereby "denie[d] . . . protection across the board." *Id.* As in *Romer*, the breadth of the classification of all nonhuman animals, even autonomous ones, as things, and the denial of all rights across the board, is "so far removed" from any legitimate state interest that it would be "impossible to credit them." 517 U.S. at 635. Indeed, Justice Fahey squarely recognized the "arbitrary" nature of denying autonomous nonhuman animals legal rights based solely on their status as non-humans, contending that the "Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on *nothing more than the premise that a chimpanzee is not a member of the human species*." *Tommy*, 2018 WL 2107087, at *1 (emphasis added). Accordingly, Beulah, Minnie, and Karen's common law classification as "things" is so arbitrary that it contravenes fundamental equality.

Though the inquiry should end here, the *Romer* Court went on to find that even under traditional equal protection strictures, the amendment could not survive minimum rational review because it sought to repeal all existing anti-discrimination law based upon sexual orientation. *Equal. Found.*, 128 F.3d at 299 (citing *Romer*, 517 U.S. at 626). The same result obtains here.

Under the first part of the analysis, the relevant question is not whether elephants are similarly situated to humans *generally*, but "whether they are similarly situated for the purposes of the law challenged." *State v. Dyous*, 307 Conn. 299, 315-16 (2012) (quoting *Kerrigan*, 289

[47] *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.").

Conn. at 157-58). "'Much as in the lawyer's art of distinguishing cases, the relevant aspects are those factual elements which determine whether reasoned analogy supports, or demands, a like result.'" *Id.* (citation omitted). 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*, 2018 WL 2107087, at *1-2 (Fahey, J., concurring). *See also Ex parte Siebold*, 100 U.S. 371, 377 (1879) (recognizing that habeas corpus is essential because "personal liberty is of so great moment . . ."). Because the Expert Scientific Affidavits demonstrate that Beulah, Minnie, and Karen are autonomous and that their interest in exercising their autonomy is as fundamental to them as it is to us (Footnote 41), they are similarly situated to human beings for the purpose of habeas corpus. *Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (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. *See id.* ("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"); *see also Foody*, 40 Conn. Supp. at 132-33 ("The courts have recognized the right of a guardian of the person to vicariously assert the right of an incompetent or unconscious ward to accept or deny medical care.").[48] As humans bereft of consciousness are deemed "persons" and are therefore entitled to seek the remedy of habeas corpus to protect their bodily liberty, this Court must either recognize an elephant's just equality claim to bodily liberty or reject the principle of equality.

Indeed, the very idea of equality is fatally undermined when an anencephalic human is rightly characterized as a "person" with the panoply of legal rights, while an autonomous, highly social, extraordinarily cognitively complex being such as Beulah, Minnie, or Karen is characterized as a "thing" that lacks the capacity for any legal right.

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[48] *See also Anonymous v. Superintendent of Hosp.*, 33 Conn. Supp. 191, 191 (1977) (discharging 14-year-old deaf-mute confined in state mental hospital on habeas corpus); *Sullivan v. Ganim*, 2009 WL 4916520, at *1 (Conn. Super. Ct. Nov. 30, 2009) (87-year-old conserved woman in nursing home entitled to habeas corpus).

Next, we turn to the second step, the legitimacy of the classification's purpose. Connecticut has no legitimate interest in permitting any autonomous being to be confined against her will. In determining whether a classification lacks a legitimate purpose, this Court cannot blindly accept history and tradition and must instead "'consider the changing needs and expectations of the citizens of our state.'" *Kerrigan*, 289 Conn. at 257, 261 (citation omitted). As this case involves "a matter of common-law adjudication," this Court *must* make its evaluation in tandem with "science and technology as they have evolved in recent years." *Guess*, 244 Conn. at 771. Moreover, unlike courts reviewing an equal protection claim, "courts have the common law power to declare what the common law is." *Rosado*, 1995 WL 348181, at *11.

The legal thinghood of elephants with respect to their right to bodily liberty has become an anachronism. *See Tommy*, 2018 WL 2107087, at *2 (Fahey, J., concurring); *State v. Fessenden*, 355 Or. 759, 769-70 (2014).[49] All nonhuman animals were once thought unable to think, believe, remember, reason, and experience emotion. Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993). Today, the Expert Scientific Affidavits confirm elephants' complex cognitive abilities — most especially autonomy — and expose those ancient, pre-Darwinian prejudices as false. Judge Fahey recognized the illegitimacy of the common law classification of chimpanzees as "things" when he wrote: "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." *Tommy*, 2018 WL 2107087, at *1 (concurring). He found such a position at odds with uncontroverted evidence that reveals "a chimpanzee is an individual with inherent value who has the right to be treated with respect." *Id.* The "evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings," he added. *Id.* The evidence here is just as compelling. (Pet. at ¶¶89-11).

[49] *See also 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").

The third part of the equality analysis looks to whether the fit between the classification and the legitimate purpose is rationally related. But in the case at bar, this step "is unnecessary and not feasible", as there is "no concrete problem" or legitimate interest to try to fit. *Awad v. Ziriax,* 670 F.3d 1111, 1130-31 (10th Cir. 2012). *See also Dyous,* 307 Conn. at 317.

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

Laurence H. Tribe, *American Constitutional Law* 1440 (2nd ed. 1988). There is no rational connection between the sole trait justifying the detention of Beulah, Minnie, and Karen—not being human—and the right to bodily liberty protected by habeas corpus for which the relevant trait is *autonomy*. *See Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (if a "'moral patient' [such as a chimpanzee] can be wronged'" she should have "the right to redress wrongs").

F. Connecticut public policy already recognizes nonhuman animals as "persons."

Connecticut courts "look to statutory policy to shape the common law." *Guess*, 244 Conn. at 779. The Connecticut legislature has already granted the rights of a true beneficiary to nonhuman animals, and therefore personhood, for the purpose of the Connecticut "Pet Trust" statute, C.G.S.A. § 45a-489a ("Trust to provide for care of animal"). Only legal "persons" may be trust beneficiaries.[50] "Historically, it was only possible for pet owners to establish honorary arrangements for financial support of their animals." Kate McEvoy, "§ 2:16. Pet trusts," 20 CONN. PRAC., CONN. ELDER LAW § 2:16 (2014 ed.).[51] Such trusts were treated as honorary or

[50] *See* RESTATEMENT (THIRD) OF TRUSTS § 43 *Persons Who May Be Beneficiaries* (2003) ("A person who would have capacity to take and hold legal title to the intended trust property has capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary."); BENEFICIARY, *Black's Law Dictionary* (9th ed. 2009); *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).

[51] *See Fidelity Title & Trust Co. v. Clyde*, 143 Conn. 247, 256 (1956).

charitable, which by definition lack an ascertainable beneficiary.[52] In 2009, the legislature enacted § 45a-489a, expressly to allow "animals" to be designated as trust beneficiaries:

> A trust created pursuant to this section shall designate a trust protector in the trust instrument whose sole duty *shall be to act on behalf of the animal* or animals provided for in the trust instrument. A trust protector shall be replaced in the same manner as a trustee under section 45a-474.

C.G.S.A. § 45a-489a (a) (emphasis added).[53] As Senator McDonald noted:

> someone would be able to create such an inter vivos trust *for the benefit of one or more animals* and would generally follow the ordinary provisions of trust law. . . . The role of a trustee and of a trust protector is well defined in the law and is a *fiduciary relationship* which requires the fiduciary to put the interests of the individual *or, in this case, the animal* over their own personal interests. *It is the highest standard of responsibility* under the law.

CONNECTICUT SENATE TRANSCRIPT, 5/28/2009 (emphasis added). Senator Frantz opined: "I just want to be sure that we're talking about the *same levels* that would apply to those of us with two legs, regardless of whether we have four or wings or spears on our heads, or whatever." *Id.* (emphasis added). Senator McDonald responded: "Yes, the *general principles of trust law would apply*. This was merely creating a separate framework to deal with the situation of *animals as beneficiaries* of a trust, but the legal responsibilities of the trustee would be very familiar to our courts." *Id.* (emphasis added). Senator Frantz then concluded: "I now sit in favor of it." *Id.*

II. Beulah, Minnie, and Karen's detention by Respondents is presumed unlawful.

The NhRP challenges the lawfulness of the Respondents' detention of Beulah, Minnie, and Karen and the deprivation of their bodily liberty. (Pet. at ¶¶72-75). All common law natural persons are presumed entitled to personal liberty (*in favorem libertatis*). *See Scott v. Crane*, 1 Conn. 255, 258 (1814) ("In all suits, it is the object of the law in favor of the liberty of the citizen"). *See also State v. Oquendo*, 223 Conn. 635, 650 (1992) ("no man can be restrained of

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[52] *See Cheshire Bank & Trust Co. v. Doolittle*, 113 Conn. 231, 233 (1931) ("the principal characteristics of a charitable trust is uncertainty as to the ultimate beneficiaries of the trust").
[53] *See also* Kate McEvoy, "§ 2:16. Pet trusts," 20 CONN. PRAC., CONN. ELDER LAW § 2:16 (2014 ed.) ("the trust document must designate a trust protector to act on behalf of the *beneficiary animal[s]*") (emphasis added).

his liberty; be prevented from removing himself from place to place, as he choses; be compelled to go to a place contrary to his inclination, or be in any way imprisoned, or confined, unless by virtue of the express laws of the land.") (quoting Zephaniah Swift, *A Digest of the Laws of Connecticut* 180 (1795)); *id.* at 650 ("every detention is an imprisonment."); *In re Hall*, 50 Conn. at 137 (restrictions upon liberty "can only be sustained by the clear expression or clear implication of the law."); *Jackson*, 12 Conn. at 40; *Burlingame*, 4 Conn. Supp. at 194 (in the absence of positive law, detention in a state mental hospital was unlawful). It is undisputed that Beulah, Minnie, and Karen are detained by Respondents and that such deprivation of liberty would be presumptively unlawful if they were human. After the writ is issued the burden shifts to Respondents to prove the confinement is lawful. Conn. Practice Book § 23-30. *See also Fasulo*, 173 Conn. at 483.

III. Beulah, Minnie, and Karen need not be unconditionally released to be entitled to habeas corpus relief.

Upon this Court's final determination that Respondents' detention of Beulah, Minnie, and Karen is unlawful, it should order their immediate release to an appropriate sanctuary. *See Stanley*, 16 N.Y.S.3d at 917 n.2 (rejecting respondents' argument that because the NhRP sought the chimpanzees' "transfer 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); *Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring) (noting that release to a sanctuary is appropriate habeas corpus relief in a case involving a nonhuman animal); *In re Cecilia*, File No. P-72.254/15 at 22-23 (chimpanzee ordered transferred to a sanctuary in Brazil). In Connecticut, habeas corpus has never been limited to those capable of being unconditionally released. In the case of minors, for example, a court first releases the individual from her illegal detention and then determines into whose care and custody she should be placed. *Dart*, 19 Conn. Supp. at 434 (minor held under illegal commitment order ordered released then returned to parents); *Buster*, 1990 WL 272742, at *2 ("It is the duty of the court, in such cases, *to set them free from any improper restraint*; they are not bound to deliver them over

to any body, or give them any privilege. They will dispose of them in such manner as in their discretion they shall judge best, according to the particular circumstances of each case") (quoting 1 Zephaniah Swift, *A Digest of the Laws of the State of Connecticut* 568 (1822)) (emphasis added). *See also Weidenbacher*, 234 Conn. at 61. Before the Civil War, slave children were discharged through common law writs of habeas corpus despite ultimately being placed in another's care.[54] Incapacitated and mentally ill adults have been discharged from illegal confinements pursuant to the writ and placed into the care and custody of another.[55] The relief sought in the case at bar is analogous to the relief accorded to child slaves and juveniles.

Connecticut courts have even expanded the relief afforded by the common law writ of habeas corpus to situations where a petitioner is simply challenging the conditions of confinement. *Arey v. Warden*, 187 Conn. 324 (1982). "[O]ur Supreme Court has stated that the habeas court has discretion in fashioning the relief to be granted." *Miller v. Warden*, 1996 WL 168004, at *131 (Conn. Super. Ct. Mar. 27, 1996) (citing *Medley v. Commissioner*, 235 Conn. 413 (1995)). However, the NhRP does not challenge the conditions of Beulah, Minnie, and Karen's current detention. The Court is not "'confronted with the dilemma . . . of having to choose between ordering an absolute discharge of the prisoner and denying him all relief.'" *Gaines v. Manson*, 194 Conn. 510, 518 (1984) (citation omitted). Instead, the Court should order their immediate release from the illegal detention to an elephant sanctuary that recognizes their liberty and autonomy, such as the Performing Animal Welfare Society.[56]

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[54] *Lemmon*, 20 N.Y. 562 (discharged slaves included children ages two, five, and seven); *Commonwealth v. Taylor*, 44 Mass. 72, 72-74 (1841) (child slave discharged into care of Boston Samaritan Asylum for Indigent Children); *Aves*, 35 Mass. 193 (seven-year-old girl discharged into custody of Boston Samaritan Asylum for Indigent Children); *Commonwealth v. Holloway*, 2 Serg. & Rawle 305 (Pa. 1816); *Pitney*, 1 N.J.L. 165. Connecticut courts have long discharged minors from reform schools despite the fact that such minors remained subject to the custody of parents or guardians. *Cinque*, 99 Conn. at 93-95 (14-year-old boy illegally detained at Connecticut School for Boys released to father); *Dart*, 19 Conn. Supp. at 434 (16-year-old girl).

[55] *E.g.*, *Burlingame*, 4 Conn. Supp. at 194 (ordering release).

[56] Two New York Appellate Divisions ruled that habeas corpus in New York is limited to unconditional release and somehow construed the NhRP's petitions as seeking a mere change in the conditions of the chimpanzees' confinement rather than a challenge to the detention itself.

IV. The ability to bear legal duties is not required for personhood.

Connecticut 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. Alarmingly, however, the New York State Supreme Court Appellate Division, Third Judicial Department ("Third Department") in *Lavery*, 124 A.D.3d at 150-53 and, in implicit reliance upon *Lavery*, the New York State Supreme Court Appellate Division, First Judicial Department ("First Department") in *Tommy*, 152 A.D.3d at 78, held for the first time in Anglo-American history that the capacity to bear legal rights *and* duties is a *necessary* condition for legal personhood.[57]

See Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 152 A.D.3d 73, 80 (N.Y. App. Div. 1st Dept. 2017) ("*Tommy*"), *leave to appeal denied*, No. 2018-268, 2018 WL 2107087 (N.Y. May 8, 2018); *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 999 N.Y.S.2d 652-54 (N.Y. App. Div. 4th Dept. 2015), *leave to appeal denied*, 3 N.Y.S.3d 698 (N.Y. App. Div. 4th Dept. 2015), *and leave to appeal denied*, 38 N.E.3d 827 (N.Y. 2015) ("*Presti*"). But the NhRP always challenged the *legality* of the chimpanzees' detentions. *Tommy*, 152 A.D.3d at 80; *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015); *Stanley*, 16 N.Y.S.3d at 901. Regardless, unconditional release is not required in New York. *E.g.*, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *People ex rel. Saia v. Martin*, 289 N.Y. 471, 477 (1943). Judge Fahey agreed with the NhRP that the Fourth Department erred, "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' [citation omitted]. The chimpanzees' predicament is analogous to the former situation, not the latter." *Tommy*, 2018 WL 2107087, at *1 (concurring).

[57] The *Lavery* court went on to state, as a matter of fact, that chimpanzees are unable to bear such duties, even though there was no evidence relating to a chimpanzee's ability to bear duties and responsibilities before the court. In response, the NhRP proved this to be untrue by filing sixty pages of new scientific affidavits in the First Department *Tommy* case, affirmatively stating that chimpanzees *in fact* bear duties and responsibilities. Inexplicably, however, the First Department contended that the new affidavits merely continued "to support [NhRP's] 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." 152 A.D.3d at 76. Apart from being false, this statement reflects that court's failure to grasp the NhRP's overarching argument (supported by its initial round of scientific affidavits) that chimpanzees are autonomous and that autonomy is a sufficient condition for common law personhood, and that the ability to bear duties and responsibilities has never been such a requirement.

On appeal, Judge Fahey, in his concurrence, declared that those courts were wrong. First, he noted that the Third Department was wrong to assume chimpanzees are unable to bear such duties, observing, "amici law professors Laurence H. Tribe, Justin Marceau, and Samuel Wiseman question this assumption." *Tommy*, 2018 WL 2107087, at *1. He continued:

> 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.

Id. Judge Fahey also made clear 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 question is "one of precise moral and legal status," the answer to which "will depend on our assessment of the intrinsic nature of chimpanzees as a species." *Id.* In that regard he noted, as relevant here: "The record before us in the motion for leave to appeal 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." *Id.*

Of course, this Court is not bound by these two out-of-state intermediate appellate outlier decisions, which have now been called into question by a judge of that state's highest court. Nonetheless, the NhRP addresses them because any reliance upon these cases would prove dangerous both to the rights of humans and nonhuman animals in Connecticut. As discussed below, each case relied upon: (1) an error that *Black's Law Dictionary* conceded it made regarding a misreading of John Chipman Gray's *The Nature and Sources of the Law*; and (2) upon a failure to understand that the immunity right of bodily liberty does not correlate with a capacity for duties.

First, in reaching its holding, the *Lavery* court relied principally upon John Chipman Gray's *The Nature and Sources of the Law*, ch. II at 27 (Quid Pro Books 2012) (2nd ed. 1921), which stated, according to the court, at 251, that the "legal meaning of a 'person' is "a subject of legal rights and duties," as well as *Black's Law Dictionary* (7th ed. 1999), and cases citing *Black's Law Dictionary*, 124 A.D.3d at 152. But Gray's *Nature and Sources of the Law* stands for the *opposite* proposition. Gray meant that a "person" may be the subject of legal rights and duties in the sense that a bucket may hold dirt and water, but may also hold *either* dirt or water. That is why Gray further averred that "[o]ne who has rights but not duties, or has duties but no rights, is . . . a person." Gray at 27. Gray specifically addressed the possibility of nonhuman animal personhood directly, stating that "animals may conceivably be legal persons. . . . [There may be] systems of Law in which animals have legal rights." *Id.* at 42-43.

The court further failed to realize that the single source to which *Black's Law Dictionary* cited, *Salmond on Jurisprudence* (10th edition), supported the proposition that the capacity to bear duties is a not a necessary condition for personhood and legal rights. Every edition of *Salmond on Jurisprudence*, including the 10th edition, states that "a person is any being whom the law regards as capable of legal rights *or* duties." (emphasis added).[58] When the NhRP brought this error to the attention of the editor-in-chief of *Black's Law Dictionary*, he immediately agreed to make the correction in the upcoming 11th edition.[59] The NhRP then filed a

[58] John Salmond, *Salmond on Jurisprudence* (Patrick John Fitzgerald, Sweet & Maxwell, 12th ed. 1966) 299; John Salmond, *Salmond on Jurisprudence* (Glanville Williams, London, Sweet & Maxwell, Limited, 11th ed. 1957) 350; Glanville L. Williams, *Salmond on Jurisprudence* 318 (10th ed. 1947); John Salmond, *Jurisprudence* (C.A.W. Manning, London: Sweet & Maxwell, Limited, 8th ed. 1930) 329; John Salmond, *Jurisprudence*, 7th ed. (London: Sweet & Maxwell, Limited, 1924) 329; John Salmond, *Jurisprudence*, 6th ed. (London: Sweet & Maxwell, Limited, 1920) 272; John Salmond, *Jurisprudence*, 4th ed. (London, Stevens and Haynes, 1913) 272; John Salmond, Jurisprudence, 2nd ed. (London: Stevens and Haynes 1907) 275; and John Salmond, *Jurisprudence or The Theory of the Law* (London, Stevens & Haynes 1902) 334.

[59] *See* Affidavit of Kevin Schneider, Esq., Exhibit 1 (letter and email from Kevin Schneider to Bryan Garner dated April 6, 2017) and Exhibit 2 (Garner's email reply). *See also* 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 November 10, 2017).

motion with the First Department asking it to review the NhRP's exchange with *Black's Law Dictionary* and recognize that the major support for *Lavery* had been recanted by the source itself. But the First Department *denied* the motion then perpetuated the Third Department's error.

Second, *Lavery* conflated an immunity-right (which the NhRP was seeking) with a claim-right, The great Yale jurisprudential professor Wesley N. Hohfeld's conception of the comparative structure of rights has, for a century, been employed as the overwhelming choice of courts, jurisprudential writers, and moral philosophers when they discuss what rights are. *See generally* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 16 (1913). In his famous article, Hohfeld noted that:

> One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to "rights" and "duties" and that these latter categories are therefore adequate for the purpose of analyzing even the most complex legal interests," and that the term 'rights' tends to be used indiscriminately to cover what in a given case may be a privilege, a power, or an immunity, rather than a right in the strictest sense . . .

Id. at 28, 30. Basing personhood upon an ability to bear duties is particularly inappropriate in the context of a common law writ of habeas corpus sought to enforce the fundamental common law immunity-right to bodily integrity, for it commits a serious "category of rights" error by mistaking an "immunity-right" for a "claim-right," as Hohfeld pointed out. *Id*. at 27.[60] The reason is that a claim-right, which is *not* being sought in the case at bar, is comprised of a claim and a correlative duty. Steven M. Wise, *Hardly a Revolution – The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VERMONT L. REV. 807-810 (1998). The fundamental immunity-right to bodily liberty the NhRP seeks on behalf of Beulah, Minnie, and

[60] Even Gray misunderstood this in his *Nature and Sources of the Law*. As Hohfeld, at 27 notes:

> In [Gray's] chapter on "Legal Rights and Duties," the distinguished author takes the position that a right always has a duty as its correlative; and he seems to define the former relation substantially according to the more limited meaning of 'claim.' Legal privileges, powers, and immunities are *prima facie* ignored, and the impression conveyed that all legal relations can be comprehended under the conceptions 'right' and 'duty.'

Karen is what the United States Supreme Court was referring to when it famously stated that "[t]he right to one's person may be said to be a right of complete immunity: to be let alone." *Botsford*, 141 U.S. at 251. An immunity-right correlates *not* with a duty, but with a *disability*.[61] *See Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring); Steven M. Wise, *Hardly a Revolution*, at 810-15.[62] Another example of a fundamental immunity-right is the right not to be enslaved, guaranteed by the Thirteenth Amendment to the United States Constitution. An individual is entitled to that right irrespective of whether she can bear any duties. Beulah, Minnie, and Karen's fundamental common law immunity-right to bodily liberty therefore correlates solely with the Respondents' *disability* to detain them. The existence or nonexistence of their ability to bear duties is entirely irrelevant for the immunity-right that the NhRP seeks on their behalf. *Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring).[63]

In support of its conclusion, the *Lavery* court rested its decision partially on "principals of social contract," stating that "[t]he ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principals of social contract. . . ." 124 A.D.3d at 151. But, again, the court entirely misunderstood what those principles actually are. Long ago the United States Supreme Court recognized that social contract lies "among the great juristic myths of history. . . . As a practical concept, from which practical conclusions can be drawn, *it is valueless.*" *FPC v. Nat. Gas Pipeline Co*., 315 U.S. 575, 605 n.6 (1942) (emphasis added) (citation omitted).

Apart from being a valueless legal myth, social contract is irrelevant to the NhRP's claims for bodily liberty and habeas corpus, as it addresses the authority of the State over the

[61] The *Lavery* court's fundamental misunderstanding becomes even more obvious when one considers that when one party has a claim, it is the *other* party who bears the correlative duty.
[62] *See, e.g., Harris v. McRea*, 448 U.S. 297, 316-18, 331 (1980) (illustrating the difference between the immunity-right to have the state not interfere with a woman's choice to have an abortion and the claim-right that the state has the duty to pay for the abortions).
[63]That Beulah, Minnie, and Karen can be a "person" for the purpose of the common law writ of habeas corpus would not necessarily mean that they would be a "person" for any other purpose.

individual, which was not an issue presented in *Lavery*.[64] Social contract is grounded upon the idea that individuals submit some freedoms to the power of the State in exchange for the State's protection of their other freedoms.[65] Social contract theorist John Locke argued that individuals are bound morally by the law of nature not to harm each other, but that an individual's rights are not secure without government to defend them. Under the social contract, as Locke imagined it, "the State has an interest in protecting its citizens. . . . [T]his surely is at the core of the Lockean 'social contract' idea." *Roberts v. Louisiana*, 431 U.S. 633, 646 (1977). To this end, fundamental rights impede and temper the exercise of *state* power. Thus, rights cases invoke a breach of *state* responsibilities, not social responsibilities of the individual.[66] Social contract does *not* require the correlative holding of rights and duties. The holder of the right is *the individual* while the holder of the responsibility is the *government*.

Moreover, any reliance on social contract specifically to deny *all rights* to Beulah, Minnie, and Karen would ignore the fact that habeas corpus has long been available to those who are not part of any mythic "social contract." In *Rasul v. Bush*, 542 U.S. 466, 481-82 & n.11 (2004), the Supreme Court permitted Guantanamo petitioners, who were not part of any "social contract" — indeed the United States alleged they desired to destroy any social contract that may exist — to seek habeas corpus, stating:

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[64] *See* J.W. Gough, *The Social Contract* 2-3 (Oxford Clarendon Press 1936).

[65] *See, e.g.*, *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874) ("There are limitations on [State] power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name").

[66] *E.g.*, *Moore v. Ganim*, 233 Conn. 557, 598 (1995) ("social compact theory posits that all individuals are born with certain natural rights and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'") (quoting J. Locke, "Two Treatises of Government," book II (Hafner Library of Classics Ed.1961) ¶ 123, p. 184); see also 1 Z. Swift, *A System of the Laws of the State of Connecticut* (1795) pp. 12-13); *State v. Santiago*, 318 Conn. 1, 354–55, *reconsideration denied*, 319 Conn. 912 (2015) ("A social compact is an agreement 'between the people and the government they create [that] binds the agencies of government to respect the blueprint of government and the rights retained by the people."); *State v. Hine*, 59 Conn. 50, 21 A. 1024, 1025–26 (1890); *State v. Culmo*, 43 Conn. Supp. 46, 69-70 (Super. Ct. 1993) ("Providing protection from stalking conduct is at the heart of the state's social contract with its citizens")..

> Application of the habeas statute to person detained at the base (in Guantanamo) is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm. . . . [Citing, *inter alia, Somerset* and *Case of the Hottentot Venus*]

In *Jackson*, a slave was freed pursuant to habeas corpus despite being excluded from the social compact. 12 Conn. at 42-43.[67] 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." *Tommy*, 2018 WL 2107087, at *1 (Fahey, J., concurring).

Finally, *Lavery* ignored the statement of the New York Court of Appeals in *Byrn* that personhood decisions should be based upon public policy and not biology. 31 N.Y.2d at 201. In accordance with *Byrn*, a determination of personhood requires a mature weighing of public policy and moral principle, in which the capacity to bear duties and responsibilities plays no part. *See Tommy*, 2018 WL 2107087, at *1-2 (Fahey, J., concurring).

Appearing to recognize the obvious frailty of the Third Department's reasoning as stated in Footnote 3 of *Lavery*,[68] the First Department in *Tommy* noted that: "Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they 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

[67] *See also United States v. Villato*, 2 Dall. 379 (CC Pa. 1797) (granting habeas corpus relief to prisoner charged with treason as he was not a citizen of the United States) (citations omitted).

[68] "To be sure, some humans are less able to bear legal duties or responsibilities than others. These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise." *Lavery*, 124 A.D.3d at n.3.

"ignores the fact that these are still human beings, members of the human community." *Id.* This was sheer unexplained bias. Judge Fahey agreed, contending: "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*, 2018 WL 2107087, at *1 (Fahey, J., concurring). Similar examples of such bias have constituted lasting errors of historic proportions. Before the United States Supreme Court in 1857, Dred Scott's lawyers ignored the fact that he was not white. *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857). The lawyers for the Native American, Chief Standing Bear, ignored 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. The California Attorney General ignored the fact that a Chinese witness to a murder was not white when he insisted, in 1854, without success before the California Supreme Court, that a Chinese person could testify against a white murderer in court. *People v. Hall*, 4 Cal. 399, 404 (1854). The lawyer for Lavinia Goodell ignored the fact that she was not a man before the Wisconsin Supreme Court denied her the right to practice law because she was a woman. *In re Goodell*, 39 Wis. at 245-46.

In short, both the First and Third Department decisions should be disregarded in their entirety. Not only because a judge sitting on the highest court expressly found them wrong, but also because other courts within New York have not found them persuasive. New York's Fourth Judicial Department in *Presti* disregarded *Lavery* despite the fact that it involved the identical issue. 999 N.Y.S.2d at 653-54. The Fourth Department even twice assumed, without deciding, that a chimpanzee could be a "person" for habeas corpus purposes.[69] The Supreme Court in *Stanley* also found *Lavery* unpersuasive. It reluctantly concluded it was bound by *Lavery*, because New York "trial courts must follow a higher court's existing precedent '*even though*

[69] *Id.* ("assuming, *arguendo*, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application, . . .") and ("Regardless of whether we agree with petitioner's claim that Kiko is a person within the statutory and common-law definition of the writ . . .").

they may disagree.'" 16 N.Y.S.3d at 916 (citations omitted, emphasis added). Nonetheless, the court recognized that "the parameters of legal personhood . . . will not be 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 law." *Id.* at 912. Additionally, the court understood that "[e]fforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed," and that although courts "are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration," the "pace may now be accelerating." *Id.* at 917-18.

V. Conclusion

It is clear that elephants are autonomous beings able to choose how to live rich and fulfilling lives. The central purpose of common law habeas corpus is to release autonomous beings from detention that violates the right to bodily liberty that autonomy generates. 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 Beulah, Minnie, and Karen as "persons" with the common law right to bodily liberty protected by the common law of habeas corpus, as a matter of common law liberty and equality, and order their immediate discharge. As Beulah, Minnie, and Karen cannot safely be released to Africa, Asia or onto the streets of Connecticut, this Court should order them discharged into the care of the Performing Animal Welfare Society where they will be able to enjoy their autonomy and bodily liberty to the greatest extent possible in North America.

THE PETITIONER,
THE NONHUMAN RIGHTS PROJECT, INC.

BY:_____

David Zabel, Esq. Cohen and Wolf, P.C.
1115 Broad Street, Bridgeport, CT 06604
Tel: 203-368-0211
Fax: 203-394-9901
Email: dzabel@cohenandwolf.com Juris No. 010032

Steven M. Wise, Esq.
Subject to *pro hac vice* admission
Attorney for Petitioner
5195 NW 112th Terrace Coral Springs, Florida 33076
(954) 648-9864
swise@nonhumanrights.org