

Court of Appeals
of the
State of New York

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

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

**BRIEF OF *AMICUS CURIAE* PROFESSOR MARTHA C.
NUSSBAUM IN SUPPORT OF PLAINTIFFS-APPELLANTS**

REED SUPER
SUPER LAW GROUP, LLC
Attorney for Amicus Curiae
110 Wall Street
New York, NY 10005
Tel: 212-242-2355 ext. 1
Fax: 855-242-7956
reed@superlawgroup.com

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

STATEMENT OF AMICUS CURIAE

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

TABLE OF CONTENTS

I.	STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
II.	SUMMARY OF THE ARGUMENT	2
III.	ARGUMENT	3
1.	This Case Matters Because It Is Time to Reform the Law to Protect Our Modern Scientific and Philosophical Understanding That Many Animals Are Capable of Living Their Own Meaningful Lives	3
2.	The Magical Lives of Elephants.....	4
3.	The <i>Lavery</i> I and II Decisions Apply an Incorrect Philosophical Approach to Deny Legal Personhood to Non-Human Animals	8
4.	The Capabilities Approach is the Correct Philosophical Approach to Determining Happy’s Personhood	12
5.	The Zoo’s Conduct Harms Happy in Both Physical and Intangible Ways	18
6.	Happy Would Not Be the First Nonhuman Entity to Whom a Court Has Extended Constitutional Protection	21
IV.	CONCLUSION.....	28

TABLE OF AUTHORITIES

Cases

<i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310 (2010)	22, 23, 26, 27
<i>Happy ex rel. Nonhuman Rights Project, Inc. v. Breheny</i> , No. 260441/19 (Sup. Ct. Bronx Co. Feb. 18, 2020).....	15
<i>Matter of Nonhuman Rights Project, Inc. v. Lavery</i> , 152 A.D.3d 73 (1st Dept. 2017).....	2, 8, 9, 10, 11, 22, 23, 27, 28
<i>Nair v. Union of India</i> , Kerala High Court, No. 155/1999, June 2000.....	25
<i>People ex rel. Nonhuman Rights Project v. Lavery</i> , 124 A.D.3d 148 (3d Dept. 2014).....	2, 8, 9, 10, 11, 22, 23, 27, 28
<i>People v. Taylor</i> , 9 N.Y.3d 129 (2007).....	27

Other Authorities

Aaron Kornfield, <i>An Elephant Never Forgets: Pachyderms, Politics and Policy at the San Francisco Zoo</i> , 1 J. Animal L. & Ethics 205 (2006)	19, 20
Black’s Law Dictionary (11th ed. 2019)	9
Cynthia Moss, <i>Elephant Memories: Thirteen Years in the Life of an Elephant Family</i> (Univ. of Chicago Press, 2000 ed. 1988)	6
Chris Berry, <i>All 50 States Now Have Felony Animal Cruelty Provisions!</i> , Animal Legal Def. Fund (Mar. 14, 2014), http://aldf.org/blog/50-states-now-have-felony-animal-cruelty-provisions/	4
John Salmond, <i>Jurisprudence</i> (10th ed. 1947)	9
Joshua M. Plotnik, Frans B. M. de Waal, & Diana Reiss, <i>Self-Recognition in an Asian Elephant</i> , 103 Proc. of the Nat’l Acad. of Sci. 17053 (2006).....	6
Joyce Poole & Petter Granli, <i>Mind and Movement: Meeting the Interests of Elephants</i> (2008)	7, 15, 21

Marc D. Hauser, <i>Wild Minds: What Animals Really Think</i> (2001)	7
Martha Nussbaum, <i>The Capabilities Approach and Animal Entitlements</i> , <i>The Oxford Handbook of Animal Ethics</i> (Tom L. Beauchamp & R. G. Frey, eds., 2011)	4, 5, 7, 11, 18, 19, 20
Martha C. Nussbaum, <i>Compassion: Human and Animal</i> , in <i>Ethics and Humanity: Themes from the Philosophy of Jonathan Glover</i> (N. Ann Davis, Richard Keshen, & Jeff McMahan, eds., 2010).....	6
Martha C. Nussbaum, <i>Creating Capabilities: The Human Development Approach</i> (2011).....	12, 13
Martha C. Nussbaum, <i>Frontiers of Justice</i> (2007)	23, 25
Martha C. Nussbaum, <i>Human Capabilities and Animal Lives: Conflict, Wonder, Law</i> , 18 <i>J. of Hum. Dev. and Capabilities</i> , 317 (2017)	18
Martha C. Nussbaum, <i>Justice for Animals: A New Approach to Animal Ethics</i> , working draft, to be published by Simon and Schuster in New York in 2022	13, 14
Martha Nussbaum, <i>The Moral Status of Animals</i> , <i>The Chron. of Higher Educ.</i> (Feb. 3, 2006)	5
Martha C. Nussbaum, <i>Working with and for Animals: Getting the Theoretical Framework Right</i> , 94 <i>Denv. L. Rev.</i> , 609 (2018).....	12, 22
Michael Harris, <i>A Right of Ethical Consideration for Non-Human Animals</i> , 27 <i>Hastings Env. L. J.</i> 71 (2020).....	14, 15
Richard Cumberland, <i>A Treatise of the Laws of Nature</i> (Liberty Fund. 2005).....	10
Richard Sorabji, <i>Animal Minds and Human Morals: The Origins of the Western Debate</i> (1993).....	3
Robert Hollis, <i>San Francisco Zoo Closes Doors to Elephants</i> , <i>Los Angeles Times</i> , Dec. 12, 2004	24
T.N.C. Vidya & R. Sukumar, <i>Social and Reproductive Behaviour in Elephants</i> , 89 <i>Current Science</i> 1200 (2005)	16

I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Professor Martha C. Nussbaum¹ is the Ernst Freund Distinguished Service Professor of Law and Ethics, appointed in the Law School and Philosophy Department of the University of Chicago. *Amicus* is the author of numerous works on animal rights and justice, and a recipient of the 2016 Kyoto Prize in Arts and Philosophy, the 2018 Berggruen Prize, and the 2021 Holberg Prize.

Amicus, along with Nobel Prize winner Amartya Sen, developed a method for conceptualizing well-being for both humans and animals, deemed the “capabilities approach.” This approach focuses on how any being can survive and thrive in their natural environment, and *amicus* has a special interest in guiding the evolution of the capabilities approach and assisting the Court in understanding the philosophical questions this case presents. *Amicus* respectfully urges the Court to grant the Petitioner-Appellant Nonhuman Rights Project’s Motion to release Happy to an elephant sanctuary, based on her interest in ensuring the field of animal law develops with the capabilities of each animal at the forefront of the legal system’s understanding of animal lives.

¹ Professor Nussbaum would like to acknowledge and thank Friends of Animals’ Wildlife Law Program for their assistance in preparing this brief. In particular, the assistance of the Program’s director, Michael Ray Harris, and legal intern Megan Freveletti, a current third year law student at Indiana University Maurer School of Law.

II. SUMMARY OF THE ARGUMENT

This brief argues that the law requires reformation to protect our modern scientific and philosophical understanding that many animals can live their own meaningful lives and that the Court should reform the law in this case. Modern science demonstrates that elephants are complex beings that can form a conception of the self, as observed by Judge Fahey, form strong social and emotional bonds among themselves and others, and that the Zoo's conduct harms Happy in both physical and intangible ways.

Furthermore, this brief argues that the lower courts in *Lavery I* and *II* applied the wrong philosophical framework to the question of whether certain non-human animals should be considered legal persons. Instead of animal rights being based on the capacity to engage in a social contract and to bear legal duties, the proper framework for animal rights is the capabilities approach, which asks how the law can help animals like Happy not only live but thrive. Accordingly, this brief explains the importance of this appeal, the Court's opportunity to reform the field of animal law, and the potential to release Happy from a life of captivity, ensuring she lives the rest of her life in a manner that respects her capabilities.

III. ARGUMENT

1. **This Case Matters Because It Is Time to Reform the Law to Protect Our Modern Scientific and Philosophical Understanding That Many Animals are Capable of Living Their Own Meaningful Lives.**

Modern science now recognizes a very important fact about many animals, including elephants. They are not merely biological units that simply need food and a suitable environment to survive and maintain a viable population. Today, scientists view many animals as beings capable of living their own meaningful lives. Early Indian and Roman cultures understood the complexity of animal lives and the implications of this complexity surrounding the humane treatment of animals; public awareness of this fact is widespread today. Almost all ancient Greek and Roman philosophical schools attributed complex forms of cognition and numerous emotions to animals;² a precursor to our current laws against cruel practices to animals.

What philosophy and, more recently, science have understood but the law has not, is that elephants are sentient beings who can feel emotion, foster relationships, create communities, and form a conception of the self. Our current legal system fails to respect species-specific, central capabilities. Although each of

² See Richard Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* (1993).

the fifty states has animal cruelty laws,³ these laws protect only a small number of animals and fail to constrain, to any meaningful extent, the widespread infliction of suffering. They ban only the intentional, purposeful suffering of some animals, and fail to recognize the impact that captivity, lack of relationships, and solitude cause a creature like Happy.

This Court has the opportunity to create legal precedent that provides these living creatures the legal right to thrive and survive in ways that coincide with their specific capabilities, and prevent not only the infliction of physical pain, but emotional and psychological injury as well.

2. The Magical Lives of Elephants.

Elephants are cognitive, complex creatures with distinct societies, emotions, and lives. They form societies that foster the wellbeing of each member, in which their emotions and development from childhood through adulthood are readily apparent.⁴ A combat staged between humans and elephants in 55 B.C. by the Roman leader Pompey paints a prime example of these complex emotions and connections with other animals, namely humans. Surrounded in the arena, the elephants perceived that they had no hope of escape. According to Pliny, the

³ Chris Berry, *All 50 States Now Have Felony Animal Cruelty Provisions!*, Animal Legal Def. Fund (Mar. 14, 2014), <http://aldf.org/blog/50-states-now-have-felony-animal-cruelty-provisions/>.

⁴ Martha Nussbaum, *The Capabilities Approach and Animal Entitlements*, The Oxford Handbook of Animal Ethics 5 (Tom L. Beauchamp & R. G. Frey, eds., 2011) [hereinafter, *Entitlements*].

elephants then “entreated the crowd, trying to win its compassion with indescribable gestures, bewailing their plight with a sort of lamentation.”⁵ The audience, moved to pity and anger by their plight, rose to curse Pompey – feeling, wrote Cicero, that the elephants had a relation of commonality (*societas*) with humans.⁶ However, this connection with humans cannot be substituted for true, similar companionship from other elephants, which Happy has lacked for almost two decades.

Elephants’ ability to connect with other elephants and animals may be attributable to their long life spans; they are the most long-lived of nonhuman mammals.⁷ Long life spans highly correlate with the ability to develop and exhibit complex forms of intelligence, such as emotional connections within and outside their own societies.⁸ Dr. Cynthia Moss, an American conservationist and wildlife researcher, witnessed and described a herd’s reaction, typical of all elephant species, to the shooting of a young female elephant in Amboseli National Park in Africa:

Teresia and Trista became frantic and knelt down and tried to lift her [the shot elephant] up. They worked their tusks under her back and

⁵ Martha Nussbaum, *The Moral Status of Animals*, *The Chron. of Higher Educ.* (Feb. 3, 2006) [hereinafter, *Moral Status*].

⁶ *Id.*

⁷ *Entitlements*, *supra* note 4, at 4.

⁸ *Id.*

under her head. At one point they succeeded in lifting her into a sitting position, but her body flopped back down. Her family tried everything to rouse her, kicking and tusing her, and Tallulah even went off and collected a trunkful of grass and tried to stuff it in her mouth.⁹

Eventually, when the elephants realized their efforts were fruitless, they sprinkled and completely covered the corpse with earth before leaving.¹⁰ Elephants have a standard, almost ritualized response to death, much like humans. This indicates elephants have a conception of a species' life and the events that can disrupt or enrich it.¹¹ Elephants care about other elephants, and above all, members of their group.

Elephants not only form strong social and emotional bonds among themselves and others, but they can also form the conception of the self, a requisite element of autonomy. Happy, specifically, recognized herself during a mirror test to determine whether elephants had any conception of their own being, thereby proving she did indeed have a conception of the self.¹² This cognitively complex

⁹ Cynthia Moss, *Elephant Memories: Thirteen Years in the Life of an Elephant Family* 73 (Univ. of Chicago Press, 2000 ed. 1988).

¹⁰ *Id.*

¹¹ Martha C. Nussbaum, *Compassion: Human and Animal*, in *Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (N. Ann Davis, Richard Keshen, & Jeff McMahan, eds., 2010) [hereinafter, *Compassion*].

¹² Joshua M. Plotnik, Frans B. M. de Waal, & Diana Reiss, *Self-Recognition in an Asian Elephant*, 103 *Proc. of the Nat'l Acad. of Sci.* 17053, 17054 (2006).

recognition of the self carries importance in how we perceive and think about animals and their behaviors.

The discussion surrounding animal lives must ask “about mental phenomena that are more precisely specified [than thinking], phenomena such as an animal’s capacity to use tools, to solve problems, to find its way home, to understand its own beliefs and those that others hold, and to learn by imitation.”¹³ A detailed understanding of the animal’s life, as it has evolved within a particular set of environmental challenges and conditions, must frame each question.¹⁴ Our understanding of the complexities of an elephant’s life, emotions, societies, and thought processes, demonstrates that Happy, and all elephants, are more than mere biological units.

We should treat all elephants with dignity, respect, and in a manner that understands how their lives could truly flourish, based on their specific set of capabilities, emotions, and needs. In the wild or at a sanctuary, Happy would join a herd comprised of female elephants and their young, with whom she would potentially stay for the rest of her life.¹⁵ Happy’s ability to form social, familial, and sexual relationships are meaningful elements in an elephant’s life that should

¹³ Marc D. Hauser, *Wild Minds: What Animals Really Think*, at xviii (2001).

¹⁴ *Entitlements*, *supra* note 4, at 3.

¹⁵ Joyce Poole & Peter Granli, *Mind and Movement: Meeting the Interests of Elephants* 11 (2008).

not be eclipsed, by raising Happy in isolation, cut off from fellow group members.¹⁶ Happy, a member of a species demonstrated to thrive in social settings with other elephants, has been alone for fourteen years and unable to participate in any normal elephant activities as she would in the wild or at a sanctuary. Dr. Joyce Poole observed:

Happy is engaged in only five activities/behaviors: standing facing the fence/gate, dusting, swinging her trunk in stereotypic behavior, standing with one or two legs lifting off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior, and once, eating grass. Only two, dusting and eating grass, are natural. Alone, in a small space, there is little else for her to do.¹⁷

Justice Tuitt agreed that Happy is “an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.”¹⁸ As such, the Court should not justify her lack of legal personhood solely from her classification as a nonhuman.

3. *Lavery* I and II Decisions Apply an Incorrect Philosophical Approach to Deny Legal Personhood to Non-Human Animals.

The *Lavery* I and II decisions rely on a philosophical approach that to have legal rights one must be able to participate in a social contract and perform duties

¹⁶ *Id.* at 6.

¹⁷ Brief for Petitioner-Appellant at 8, *Nonhuman Rights Project, Inc. on Behalf of Happy v. Breheny*, APL 2021-00087 (filed Jul. 2, 2021) (citing affidavit of Dr. Joyce Poole).

¹⁸ *Id.* at 24 (quoting Justice Tuitt’s decision regarding Happy’s habeas corpus relief in Supreme Court).

that are considered useful to other humans.¹⁹ This, however, is the incorrect philosophical framework to apply to cases seeking legal personhood for non-human animals for multiple reasons.

First, as thoroughly examined in the *amici curiae* brief of the Law Professors, the *Lavery* decisions are factually incorrect, as many human beings lack capacity to perform legal duties and yet still have rights in the State of New York.²⁰ To name just some examples, people under the age of eighteen cannot be legally bound by contracts; anyone under the age of four is not civilly liable; a person who is not criminally liable by reason of insanity still has basic rights, such as the right to humane conditions if civilly confined.²¹

Second, the decisions are inconsistent with the long-held jurisprudential recognition that “a person is any being whom the law regards as capable of rights or duties . . . whether a human being or not.”²² The *Lavery* decisions thus, not only marginalize certain humans, like those with disabilities, but further ignore that

¹⁹ See *People ex rel. Nonhuman Rights Project v. Lavery*, 124 A.D.3d 148, 152 (3d Dept. 2014) [“*Lavery I*”]; *Matter of Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73, 87 (1st Dept. 2017) [“*Lavery II*”].

²⁰ Proposed Brief of Amici Curiae Law Professors in Support of Plaintiffs-Appellants, *The Nonhuman Rights Project, Inc. v. Breheny*, APL 2020-02581, pp. 9-13 (filed March 8, 2021) [hereinafter, “Law Professors Amici”].

²¹ *Id.*

²² Black’s Law Dictionary (11th ed. 2019) (quoting John Salmond, *Jurisprudence* 318 (10th ed. 1947)) (emphasis added).

nonhuman animals may in certain cases need the law to extend fair and just treatment in order for them to live meaningful lives based on who they are.

Third, the approach taken in the *Lavery* decisions ignores the modern scientific and philosophic understanding of the evolving ethical consciousness of humanity as it relates to animals. As previously noted, the federal and state anti-cruelty statutes in place merely prohibit the intentional infliction of physical pain, and do not remotely protect the animal from emotional and mental suffering. As a result, as New York law currently stands, while appropriately protecting an animal from intentionally-inflicted suffering, it does not protect, as it does humans, their freedom from captivity that can impact the animal's ability to thrive—that is to live a happy, safe and fulfilled life.²³ Indeed, Tommy and Kiko, the chimpanzees at issue in *Lavery* I and II, were housed in a cage in a cement storefront in a crowded residential area and a cage in a warehouse, respectively.²⁴ Simply because Tommy and Kiko were not intentionally subjected to physical harm does not mean they were not suffering. Now this Court has an opportunity to extend protections where humans, whether intentionally or unintentionally, limit an animal's ability to live

²³ In considering, for example, the phrase “Life, Liberty and the pursuit of Happiness,” in the U.S. Declaration of Independence, Richard Cumberland, the 17th-century cleric and philosopher, wrote that a legal system promoting the well-being of our fellow humans is essential to fulfilling Jefferson's' vision. Richard Cumberland. *A Treatise of the Laws of Nature*, pp. 523-24 (Liberty Fund. 2005).

²⁴ *Lavery* II, 152 A.D.3d at 75.

life as it would have otherwise outside of captivity. This is particularly important in cases where captivity of the animal is unnecessary for any urgent human purpose.²⁵

Finally, the philosophical approach taken in the *Lavery* decisions neglects the fact that animals can display adaptive preferences to the surroundings with which they are familiar. Adaptive preferences are developed when, under conditions of deprivation, humans and animals tailor their preferences to the low level of wellbeing their surroundings lead them to believe they can attain. This subtle, yet harmful dynamic can cause animals to feel satisfied with subordination. An animal such as Happy, Tommy, or Kiko, who is given a very confined life without access to social networks they would encounter in the wild, may not feel pain at what they lack, since they may not be aware it even exists. However, this is only part of the adaptive preferences phenomenon. We also know that humans and other animals when released from captivity, can discover new joys and happiness. For instance, animals released from captivity into sanctuaries can form new social bonds, even in advanced age.²⁶

We would not tolerate a legal system that would require human beings to adapt their expectations and satisfactions to a low standard of living. Similarly, this

²⁵ Entitlements, *supra* note 4, at 6.

²⁶ See discussion *infra* notes 37-42.

Court should look for a philosophical approach that allows for the consideration of the deprivation of valuable life activity the animal cannot necessarily appreciate during captivity. The capabilities approach does just that—acknowledging that the law must consider not just what an animal feels, but what it needs to fully thrive.

4. The Capabilities Approach Is the Correct Philosophical Approach for Determining Happy’s Legal Personhood.

The Capabilities Approach to personhood developed by *amicus* and Nobel Prize-winning economist Amartya Sen is a philosophical-economic approach widely used in development economics to measure welfare. It seeks to grant substantial freedoms to beings to choose to do the things they value, and what they can do and be in terms of important areas in their life.²⁷ This approach embraces the idea that society should examine the capacities of each creature and embrace the approach that a whole life for a creature includes the ability for love, grief, and self-recognition. *Amicus* distinguishes three levels of capabilities that comprise her Capabilities Approach. The first are basic capabilities: innate equipment that serves as the basis for further development.²⁸ Second are internal capabilities: abilities of a person that develop through nurture and care, which require social resources and

²⁷ Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 Denv. L. Rev., 609, 621 (2018).

²⁸ See Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* 23 (2011) [hereinafter, *Creating Capabilities*].

help from family and society, and using these capabilities when circumstances are favorable.²⁹ However, circumstances are not always favorable to exercise these capabilities: many people have the ability to exercise their religion or speak out on issues of importance, but cannot, out of fear of political repression or retaliation.³⁰ Therefore, the third and most important of the capabilities are the combined capabilities: internal capabilities plus external conditions that make choice available.³¹ Thus, the list of the ten central capabilities, presented in the next paragraph, represent the third capability: political goals to be developed and promoted for each creature in light of an understanding of their form of life.

Professor Nussbaum's formulated template takes the capabilities approach one step further, and develops fundamental entitlements that each being has a right to demand as a matter of basic, minimal justice, in the form of central or combined capabilities.³² Applied to humans, *amicus* developed ten central capabilities to examine to determine the capabilities of each being: life; bodily health; bodily integrity; senses/imagination/thought; emotions; practical reason; affiliation;

²⁹ *Id.* at 21.

³⁰ *Id.*

³¹ *Id.*

³² Martha C. Nussbaum, *Justice for Animals: A New Approach to Animal Ethics* 6, working draft, to be published by Simon and Schuster in New York in 2022.

relationships with other species; play; and control over one's political and material environment.³³

This approach is species-specific: it examines each being individually to determine their capabilities and what they can be. The same dignity afforded to humans in the previous list of ten central capabilities belongs to animals as well. All animals deserve ethical consideration: ethically informed concern for the lives they are trying to lead, including being afforded the many forms of dignity inherent in their forms of life.³⁴ While the human list may be a poor fit for elephants, we can study each being to mold the broader categories to fit each being. Determining the capabilities for each animal involves determining how the animal would normally thrive in the wild:

What life span is normal for that species in the wild? What is the physical condition of the healthy animal? What human [or non-human] acts invade or impair the bodily integrity of that sort of animal? What types of movement from place to place are normal and more pleasurable for that sort of animal? What sensory and imaginative stimulation does this animal seek, and what is it to keep the animal in an unacceptably deficient sensory environment? What is it for this sort of animal to live in a crippling and intolerable fear or depression, or with a lack of bonds of concern? What type of affiliation does this animal seek in the wild, what sorts of groups, both reproductive and social, does it form? What types of communication does the animal engage in, using what sensory modalities? What is it for the animal to be humiliated and disrespected? What is it for the animal to play and enjoy itself? Does the animal have meaningful

³³ *Creating Capabilities*, *supra* note 28, at 621-623.

³⁴ See generally Michael Harris, *A Right of Ethical Consideration for Non-Human Animals*, 27 *Hastings Env. L. J.* 71, 90 (2020).

relationships with other species and the world of nature? What type of objects does the animal use and need to control if it is to live its life?³⁵

This Court can apply these questions to Happy and quickly realize, as it has previously, that she is not thriving in captivity at the Bronx Zoo. The language used by Justice Tuitt demonstrates this: “[T]he arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300-acre lot.”³⁶

One of the capabilities most inherent to elephants is their ability to form lifelong, complex, social bonds—especially female elephants. Elephants are highly social animals that form strong, permanent bonds with their family and herd, making zoo captivity extremely detrimental. Female elephants, specifically, live in family herds with their young, and stay together their entire lives. Young females learn a variety of skills from older females in their herd, including mating and caring for newborns.³⁷ Young males also learn from their mothers until they leave the herd at adolescence, and recent studies demonstrate they continue learning

³⁵ *Id.*

³⁶ *Happy ex rel. Nonhuman Rights Project, Inc. v. Breheny*, No. 260441/2019 (Sup. Ct. Bronx Co., decided Feb. 18, 2020) at 16.

³⁷ Joyce Poole & Petter Granli, *Mind and Movement: Meeting the Interests of Elephants* 11 (2008).

from older males after leaving the herd.³⁸ This education is crucial, as orphaned males become pathologically aggressive without the guidance of more mature elephants.³⁹ These activities take place within the structure of the strongly bonded matriarchal herd, led primarily by the eldest female elephants, who act as storehouses of vital information necessary for the herd's survival.⁴⁰ Happy, taken from her herd at only one year old, never had the opportunity to form these bonds in the wild, and her captivity and solitary confinement further impeded her ability to do so.

Shirly and Jenny, two former circus elephants, separated for twenty-two years before reuniting at The Elephant Sanctuary in Tennessee, best demonstrate the strength of elephant bonds.⁴¹ Once reunited, Shirley quickly assumed the role of surrogate mother to Jenny, a baby when they first met at the circus. The effect Shirley and Jenny's relationship had on other elephants at the sanctuary

³⁸ Christina Larson, *Once Seen as Loners, Male Elephants Shown to Follow Elders*, ABCNews (Sept. 3, 2020), <https://abcnews.go.com/Weird/wireStory/loners-male-elephants-stick-study-finds-72795215>.

³⁹ Lucy Freeman, *Teenage Elephants Need a Father Figure*, BBCearth, <https://www.bbcearth.com/news/teenage-elephants-need-a-father-figure> (last visited July 27, 2021).

⁴⁰ T.N.C. Vidya & R. Sukumar, *Social and Reproductive Behaviour in Elephants*, 89 *Current Science* 1200, 1201 (2005).

⁴¹ *Whatever Happened to Shirley and Jenny?* PBS.org (Nov. 19, 2000), <https://www.pbs.org/wnet/nature/urban-elephant-whatever-happened-shirley-jenny/11371/>.

demonstrates that elephants can form new bonds even years into their lives. “After Shirley’s arrival, elephants who had previously been companions and friends were now sisters and aunts in the mother and daughter relationship of Shirley and Jenny.”⁴² Happy’s transfer to a sanctuary would allow her to form these complex, lifelong bonds so essential to her well-being.

However, not only is Happy housed alone in captivity, but she spends most of her days in a one-acre enclosure, with an indoor holding area, or in a barren, cemented, walled outdoor elephant yard that appears to be 0.05 of an acre.⁴³ This barren confinement means Happy is unable to play or enjoy herself. The Zoo’s tiny enclosure merely allows Happy to pace around, severely interfering with her ability to move and travel from place to place that would be consistent with her activity in the wild or at a sanctuary. Furthermore, the Zoo previously invaded Happy’s bodily integrity. The Zoo humiliated and disrespected Happy when they subjected her to perform and participate in elephant rides.⁴⁴ Happy does not have any meaningful relationships, does not communicate with any other animals, and is unable to participate in the complex societies crucial to an elephant’s ability to thrive.

⁴² *Id.*

⁴³ Brief for Petitioner-Appellant at 7, *Happy ex rel. Nonhuman Rights Project, Inc. v. Breheny*, APL-2021-00087 (filed Jul. 2, 2021).

⁴⁴ *Id.* at 6.

If Happy were housed at a sanctuary, she could thrive based on her capabilities as an elephant. The sanctuary would house Happy with other Asian elephants, beings of her kind, instead of alone as the Zoo does. She would have the ability to roam and explore over 2300 acres of land suited to elephant use and habitat, instead of resigned to pacing in a barren cage. Most importantly, Happy could develop and exercise typical elephant social capacities, form relationships, and exist in the complex society in which she is biologically determined to thrive. Happy's legal personhood based on the capabilities approach shows unequivocally that Zoo captivity does not, and cannot, afford Happy the life she deserves. Based on the premises of equality, justice, and capabilities-based legal personhood, Happy deserves, and justice requires, her transfer to a sanctuary.

5. The Zoo's Conduct Harms Happy in Both Physical and Intangible Ways.

Focusing solely on animal suffering is inadequate to capture the various ways in which humans interfere with the life activities of other animals.⁴⁵ Animals such as Happy develop adaptive preferences, allowing them to adjust to what they know or are accustomed to.⁴⁶ If an animal has a very confined life, without access to social networks or environments characteristic of their species, they may not

⁴⁵ Martha C. Nussbaum, *Human Capabilities and Animal Lives: Conflict, Wonder, Law*, 18 J. of Hum. Dev. and Capabilities, 317, 320 (2017).

⁴⁶ Entitlements, *supra* note 4, at 6.

actually feel pain at the absence of what they have not experienced.⁴⁷ However, this does not mean this absence should not be taken seriously; an animal's lack of certain rights is relevant and important, regardless of if they are aware of the deprivation they suffer.⁴⁸

Just because Happy has spent most of her life in captivity, a decision she had no ability to make herself, and has adapted to life there, does not mean she is not suffering. Simply not inflicting physical pain on Happy is insufficient to say she is not suffering. And, even if she is not physically suffering, she still cannot flourish, thereby creating emotional suffering. Adaptive preferences mean the animal has adapted to a reduced form of life. The Vice President and general curator of the Wildlife Conservation Society, as well as the associate director, opine that Happy is currently healthy and well-adjusted to her surroundings in the Zoo. Nonetheless, giving Happy “adequate care” does not mean she is thriving or unharmed, evidenced by her inability to exercise her capabilities. No zoo can supply elephants with the grazing space their typical form of life requires. Dr. Daphne Sheldrick, an elephant expert with over fifty years of experience explains, “. . . No artificial situation can give an elephant what it needs in terms of space, for 100 miles is a

⁴⁷ *Id.*

⁴⁸ *Id.* at 7.

mere stroll for these animals.”⁴⁹ Happy lacks adequate space to forage and roam and is deprived of any real relationship with similar beings.

The strength of one elephant’s bond with another is insurmountable, even after years apart, and new bonds can form later in life with newly acquainted elephants—all facts demonstrated by Shirley and Jenny. Instead, many zoos keep one or two female elephants in a tiny enclosure, in which they lack adequate room for foraging, movement, and opportunity for the group life characteristic of their kind.⁵⁰ Happy is completely alone, without a single companion, unable to form relationships and lacks emotional support from other elephants. An elephant herd should include, at minimum, four females with their young, surrounded by one hundred acres of land.⁵¹ By keeping Happy in solitary confinement for over ten years, the Zoo has deprived her of any sort of meaningful life. A sanctuary would allow Happy to form the complex bonds crucial to her ability to thrive. We must think carefully about the needs of elephants in confinement for wide space, motion, and for complex social networks characteristic of elephant life.

Furthermore, the lack of infliction of physical pain does not mean that Happy does not still experience it. In the wild, elephants usually move up to twenty

⁴⁹ Aaron Kornfield, *An Elephant Never Forgets: Pachyderms, Politics and Policy at the San Francisco Zoo*, 1 J. Animal L. & Ethics 205, 211 (2006).

⁵⁰ Entitlements, *supra* note 4, at 13.

⁵¹ *Id.*

hours a day, and their bodies and feet are designed for walking long distances on uneven and rough surfaces.⁵² In zoos, elephants must walk on even and hard surfaces, which causes painful arthritis and other joint problems. Some of Happy's movements, such as lifting her feet off the ground, may be attributed to painful or diseased feet from standing on hard surfaces at the Zoo.⁵³

The Zoo's approach to Happy's well-being, which is limited simply to whether Happy receives adequate care, shows a complete lack of understanding of the environmental and social surroundings that Happy requires to fully thrive. Elephant captivity in zoos contradicts everything they would experience in the wild, and Happy's situation is completely antithetical to the same. Happy has no opportunity for group life, due to her solitary confinement for the past fourteen years, and the Zoo confines her to barren, tiny areas, a miniscule fraction of the space she would have in a sanctuary or in the wild. This Court should grant Happy legal personhood and transfer her to a sanctuary where she will thrive outside of captivity, form relationships, and exercise her physical and mental capabilities.

6. Happy Would Not Be the First Nonhuman Entity to Whom a Court Has Extended Constitutional Protections.

If this Court sides with Happy, it would not be the first time nonhuman beings were granted legal rights and protections. For one thing, the United States

⁵² Poole and Granli, *supra* note 37, at 3.

⁵³ *Id.* See also discussion from Dr. Joyce Poole *supra* page 8.

Supreme Court, in deciding *Citizens United v. Fed. Election Comm'n*,⁵⁴ afforded First Amendment constitutional protections to corporations for free speech.⁵⁵ In *Citizens United*, the Court discussed that political participation is pertinent because it is through politics and voice the conditions of life are agreed to, and someone who has no political standing has no voice in choices that govern his or her life.⁵⁶ Comparably, animals such as Happy, with no legal standing and no legal status that guarantees ethical consideration, are subjected to decisions in which they have no voice as to what happens to them.

While the parties at subject in *Citizens United* meet the standard for legal personhood under the flawed *Lavery* reasoning, the holding from *Citizens United* nonetheless demonstrates that being human is not a legal requisite for attaining legal personhood. The capabilities approach goes one step further in recognizing a more empathetic and greater understanding of beings whose lives do not consist of merely rights as they relate to duties. The capabilities approach as applied to humans can be thought of as a list of guaranteed rights, not unlike the Bill of Rights of the U.S. Constitution. Each person under the U.S. Constitution, regardless of mental capacity, age, or participation in framing the principles for

⁵⁴ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁵⁵ *Id.*

⁵⁶ See generally *Citizens United*, 558 U.S. at 340; *Working with and for Animals*, *supra* note 27, at 624.

justice, is afforded certain rights, irrespective of their legal duties.⁵⁷ Indeed, if we applied the reasoning of the *Lavery* decisions to these human groups, some members might fail the test for personhood in cases where they are incapable of such things as holding a job, paying taxes, voting, or serving on a jury. Such injustice is avoided if the law is shaped through the lens of the capabilities approach.

The capabilities approach, as applied to both human and nonhuman beings, extends this doctrine to include not only inherent legal rights, but the dignity of each individual life, its abilities and needs, and that its functions of life not be impeded, nor its dignity violated.⁵⁸ The aim of the capabilities approach in shaping the human-animal relationship is that no sentient animal should be cut off from the chance for a flourishing life with the type of dignity relevant to that species. All sentient animals should enjoy certain positive opportunities to flourish and should not be treated merely as means to the ends of humans. The Court should go one step further than merely recognizing certain rights of nonhuman beings, as *Citizens United* does, and instead focus on the capabilities and potential to flourish of each individual animal.

⁵⁷ Martha C. Nussbaum, *Frontiers of Justice* 155 (2007).

⁵⁸ *Id.* at 348.

Many zoos around the world have closed their elephant exhibits in recognition of elephant capabilities. In 2004, the Detroit Zoo sent its elephants to a refuge and closed its elephant exhibit. The zoo director explained that, though the zoo had been a leader in animal care, it did not provide adequate habitat for such large and intelligent animals.⁵⁹ The same year, the San Francisco Zoo closed its exhibit after four elephants died in one year, horrifically demonstrating the true inadequacy of urban zoos for elephants.⁶⁰ In 2009, India's Central Zoo Authority issued a directive which banned zoos from exhibiting elephants and ordered all zoo elephants moved to wildlife parks and sanctuaries, with more space to roam and graze.⁶¹

Moreover, numerous international courts have recognized the rights of some nonhuman animals and their inability to thrive in captivity. In June 2000, over two decades ago, the High Court of the State of Kerala in India recognized circus animals, including elephants, as persons under constitutional law: "Though not homosapiens, they are also beings entitled to dignified existence . . . therefore . . . it

⁵⁹ Hugh McDiarmid Jr., *Detroit Zoo Elephants Going to a Refuge*, Detroit Free Press, May 5, 2004.

⁶⁰ Robert Hollis, *San Francisco Zoo Closes Doors to Elephants*, Los Angeles Times, Dec. 12, 2004.

⁶¹ Neha Lalchandani & Deeksha Chopra, *Elephants to be banished from all zoos*, The Times of India, Nov. 12, 2009.

is [] our fundamental duty . . . to recogni[z]e and protect their rights . . . If humans are entitled to fundamental rights, why not animals?”⁶² In May 2014, the Supreme Court of India held that all nonhuman animals possess certain constitutional and statutory rights.⁶³ In November 2016, an Argentinian court granted habeas corpus relief to an imprisoned chimpanzee, declared her a “nonhuman legal person,” and ordered her transfer to a sanctuary.⁶⁴ Notably, in May 2020, the Islamabad High Court ordered the release of an imprisoned elephant from a zoo to a sanctuary, stating “without any hesitation” that he is the subject of legal rights.⁶⁵

Most recently, in December 2020, the Selection Court of Ecuador’s highest court—the Constitutional Court of Ecuador—ruled that the Constitutional Court will hear an appeal from the denial of a writ of habeas corpus for a monkey, stating that it “may develop case law determining the scope of a motion for *habeas corpus* with respect to the protection of other living beings, and if these can be considered as subjects entitled to rights covered by the laws of nature.”⁶⁶ These international

⁶² *Nair v. Union of India*, Kerala High Court, no. 155/1999, June 2000; *see also* *Frontiers of Justice*, *supra* note 57, at 325.

⁶³ Brief for Petitioner-Appellant at 30.

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 32.

⁶⁶ *Id.*

changes demonstrate a deeper understanding of the rights of nonhuman beings in the international zoo and judicial communities.

These decisions, even *Citizens United*, are based on the fundamental understanding that political participation pertains to beings even when it must take place through forms of advocacy or surrogacy. This Court should determine that the Nonhuman Rights Project can speak as a surrogate for what is best for Happy, while also granting Happy legal personhood. Happy's personhood cannot be based on her identity as an elephant but should instead be based on her capabilities as her own individual being; there is no need, or legal federal precedent, to distinguish what beings should be afforded legal rights based solely on their individual or nonhuman identity. In fact, Congress has recognized in connection with animal welfare laws—like the federal Animal Welfare Act and the Marine Mammal Protection Act—this very proposition. While more limited in scope than the protections sought here, those laws do recognize certain animals as capable of suffering and provide them a voice through both federal regulators and advocacy groups utilizing citizen suit provisions. Certainly, this Court has the authority to extend these protections to the emotional and mental suffering of Happy and other animals like her.

By ordering Happy's transfer to a sanctuary, this Court would simply follow in the footsteps of other decisions and make the law conform to right. The lower

courts cited their inability to diverge from precedent in the *Lavery* decisions, but courts are not always required to adhere to *stare decisis*.⁶⁷ When neither party defends the reasoning of a precedent, the principle of adhering to that precedent through *stare decisis* is diminished.⁶⁸ The Zoo does not defend the reasoning of the lower courts as to why Happy’s legal personhood was not recognized, but simply defends *stare decisis* itself. In fact, the Zoo states the doctrine can be deviated from in exceptional circumstances, including when considering the “lessons of time,” an outdated holding “leads to an unworkable rule.”⁶⁹ The recent “lessons of time” from other courts and zoos demonstrate that animals, especially elephants and Happy, who has demonstrated recognition of the self, are more cognitively complex and deserving of rights than previously understood.

The relevant factors courts use to determine whether to adhere to *stare decisis* include: antiquity of the precedent; reliance interests at stake; and, whether the decision was well-reasoned.⁷⁰ For too long, the judicial system has denied animals the ethical consideration they deserve, demonstrating the antiquity of the laws on which the lower court’s decisions regarding Happy rest. The Zoo’s only

⁶⁷ See *Citizens United*, 558 U.S. at 363.

⁶⁸ *Id.*

⁶⁹ Brief for Respondent at 21, *Happy ex rel. Nonhuman Rights Project, Inc. v. Breheny* (N.Y. App. Div. 2020 (No. 2020-02581) (citing *People v. Taylor*, 9 N.Y.3d 129, 149 (2007)).

⁷⁰ *Citizens United*, 558 U.S. at 363.

reliance interest in Happy’s confinement is economic—they do not rely on Happy’s existence at the Zoo to conform with law. Finally, the *Lavery* decisions, used by the lower courts as basis for their decisions, were not well-reasoned. The *Lavery* decisions are logically flawed and based on a misunderstanding of legal doctrine. This Court should use the capabilities approach to determine Happy’s personhood and find that she is a legal person deserving constitutional protection.

IV. CONCLUSION

Amicus respectfully requests that the Court grant the Nonhuman Rights Project’s Request for Habeas Corpus relief and recognition of Happy’s legal personhood considering Happy’s capabilities and rights as a nonhuman being and the incorrectly decided *Lavery* cases.

Respectfully submitted,



Reed Super
Super Law Group, LLC
110 Wall Street
New York, NY 10005
212-242-2355 ext. 1
reed@superlawgroup.com

Attorney for Amicus

Amicus signs this brief in her individual capacity. Her institutional affiliation is included for identification purposes only.

Martha C. Nussbaum, Ph.D.
Ernst Freund Distinguished Service Professor of Law and Ethics
Department of Philosophy and Law School
The University of Chicago
<https://philosophy.uchicago.edu/faculty/nussbaum>

WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 6,450 words.

This brief was prepared on a computer using:

- Microsoft Word for Mac (Version 16.16.27)
- Times New Roman, a proportionally spaced font.
- 14-point sized font, except for footnotes, which are 12-point sized font

Dated: August 20, 2021



Reed Super

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT FEDERAL
EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On August 20, 2021

deponent served the within: **BRIEF OF AMICUS CURIAE PROFESSOR MARTHA C. NUSSBAUM IN SUPPORT OF PLAINTIFFS- APPELLANTS**

upon:

SEE ATTACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing 4 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on August 20, 2021



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022



Job# 306699

SERVICE LIST:

ATTORNEY DETAILS	
Party Name:	Nonhuman Rights Project, Inc.
Party Role:	Appellant
Firm:	
Attorney:	Elizabeth S. Stein Esq.
Address:	5 Dunhill Road New Hyde Park NY 11040-2216
Phone:	(516) 747-4726
Party Name:	John Berkman
Party Role:	Amicus Curiae
Firm:	Chaffetz Lindsey LLP
Attorney:	David M. Lindsey Esq.
Address:	1700 Broadway, 33rd Floor New York NY 10019-5905
Phone:	(212) 257-6966
Party Name:	James J. Breheny
Party Role:	Respondent
Firm:	Phillips Lytle LLP
Attorney:	Kenneth A. Manning Esq.
Address:	125 Main Street Buffalo NY 14203-2887
Phone:	(716) 847-7041
Party Name:	Matthew Liebman
Party Role:	Amicus Curiae
Firm:	Richman Law & Policy
Attorney:	Jay Shooster Esq.
Address:	1 Bridge Street, Suite 83 Irvington NY 10533
Phone:	

Steven M. Wise, Esq.
NONHUMAN RIGHTS PROJECT, INC.
5195 NW 112th Terrace
Coral Springs, Florida 33076
Tel.: (954) 648-9864

Attorneys for Petitioner-Appellant