Bronx County Clerk's Index No. 260441/19
Appellate Division–First Department Docket No. 2020-02581

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.

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF FOR PETER SINGER, GARY COMSTOCK AND ADAM LERNER IN SUPPORT OF APPELLANT

JAY SHOOSTER
RICHMAN LAW & POLICY
Attorney for Amici Curiae Peter Singer, Gary Comstock and Adam Lerner
One Bridge Street, Suite 83
Irvington, New York 10533
Tel.: (212) 687-8291
Fax: (212) 687-8292
jshooster@richmanlawpolicy.com

Oral Argument Not Requested

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COURT OF APPEALS
STATE OF NEW YORK

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,
Petitioners-Appellants,

v.

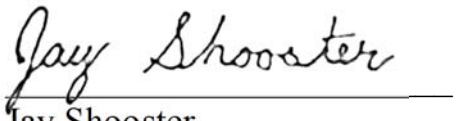
JAMES J. BREHENY, in his official capacity as Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY.,
Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLANTS

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jay Shooster, dated April 8, 2022, and the accompanying motion and proposed brief, proposed *amici* Professors Peter Singer, Gary Comstock, and Adam Lerner will move this Court on April 8, 2022, or as soon thereafter as counsel may be heard, at Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York granting the

proposed *amici* Professor Singer, Professor Comstock, and Mr. Lerner leave to file the accompanying brief as *amici curiae* in support of the Petitioners-Appellants the Nonhuman Rights Project, Inc., in the above-captioned proceeding, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



Jay Shooster
NY Bar No. 5549480
Richman Law & Policy
1 Bridge Street, Suite 83
Irvington, NY 10533
Telephone: (212) 687-8291
Fax: (212) 687-8292
jshooster@richmanlawpolicy.com

Attorney for Amici

TO:

Elizabeth Stein, Esq.
NONHUMAN RIGHTS PROJECT, INC.
5 Dunhill Road
New Hyde Park, NY 11040
Tel.: (516) 747-4726
Fax: (516) 294-1094

– and –

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

Attorneys for Petitioner-Appellant

Kenneth A. Manning
Joanna J. Chen
William V. Rossi
PHILLIPS LYTLE LLP
One Canalside
125 Main Street
Buffalo, New York 14203
(716) 847-8400

Attorneys for Respondents-Respondents

David M. Lindsey
CHAFFETZ LINDSEY LLP
1700 Broadway, 33rd Floor
New York, New York 10019
Tel.: (212) 257-6960
Fax: (212) 257-6950

Attorneys for Amicus Curiae

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AFFIRMATION OF JAY SHOOSTER IN SUPPORT OF MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*

Jay Shooster, an attorney admitted to practice in the courts of the State of New York, and not a party to this action, hereby affirms the following to be true under the penalties of perjury, pursuant to CPLR 2106:

1. I am Jay Shooster with the law firm Richman Law & Policy, attorneys for the proposed *amici* Professors Peter Singer, Gary Comstock, and Adam Lerner in the above-captioned action. I submit this affirmation in support of their motion to appear as *amici curiae* in support of appellants in the above-captioned action.

2. Attached hereto as Exhibit A is a copy of the brief Professors Peter Singer, Gary Comstock, and Adam Lerner wish to submit to the Court.

3. Professor Singer is the Ira W. DeCamp Professor of Bioethics in the University Center for Human Values at Princeton University.

4. Professor Singer's publications in the 1970s are widely credited with creating the philosophical basis of the modern animal rights movement. His work in this area and in the area of our duties to those living in extreme poverty, are some of the most excerpted and reprinted essays in applied ethics anthologies.

5. Professor Comstock is Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University.

6. Professor Comstock is an award-winning researcher and teacher whose book, *Research Ethics: A Philosophical Guide to the Responsible Conduct of Research*, shows how Singer's expanding circle metaphor lends coherence to an otherwise disparate set of issues in research ethics.

7. Professor Lerner is Lecturer at Princeton University. Previously, he was Assistant Professor/Faculty Fellow in the Center for Bioethics at New York University. He earned his PhD in philosophy from Princeton University, where he earned the Porter Ogden Jacobus Fellowship, Princeton's top honor for graduate students.

8. Professor Lerner's work—which lies at the intersection of ethics, metaethics, and moral psychology—has appeared in venues such as *The Journal of Moral Philosophy*, *Oxford Studies in Metaethics*, and *Philosophical Studies.*

9. The proposed *amici* seek leave to file this brief because they have special expertise regarding the issues presented by this case related to the moral status of animals. Professors Singer, Comstock, and Lerner have a special interest in assisting the Court in analyzing the questions that this case raises related to consequentialist ethics, personhood, rights, and duties.

10. In addition, pursuant to Rule 500.23 of the Rules of Practice of this Court, the proposed *amici curiae* brief has identified law and arguments that might otherwise escape the Court's consideration and would be of assistance to the Court. For example, the brief explains the philosophical foundations of rights and duties and why the precedent upon which the Appellate Division relied misconstrues these foundations and ought to be reconsidered.

11. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner.

12. Petitioners-Appellants the Nonhuman Rights Project Inc. contributed money that was intended to fund preparation and submission of the brief.

13. No person or entity, other than Petitioners-Appellants, contributed money that was intended to fund preparation or submission of the brief.

WHEREFORE, for the reasons set forth herein, the proposed *amici* respectfully request that the Court grant this motion in all respects, grant leave to file the attached brief in this appeal, and award such other and further relief as the Court may deem just and proper.

Affirmed: April 8, 2022
Brooklyn, New York

Jay Shooster
NY Bar No. 5549480
Richman Law & Policy
1 Bridge Street, Suite 83
Irvington, NY 10533
Telephone: (212) 687-8291
Fax: (212) 687-8292
jshooster@richmanlawpolicy.com

Attorney for Amici

Exhibit A

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JAY SHOOSTER
RICHMAN LAW & POLICY
Attorney for Amici Curiae Peter Singer, Gary Comstock and Adam Lerner
One Bridge Street, Suite 83
Irvington, New York 10533
Tel.: (212) 687-8291
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Defendants-Respondents.

PROPOSED BRIEF OF *AMICI CURIAE* PETER SINGER, GARY COMSTOCK, and ADAM LERNER[1] IN SUPPORT OF PETITIONERS-APPELLANTS

Jay Shooster
New York Bar No. 5549480
Richman Law & Policy
1 Bridge Street, Suite 83
Irvington, New York 10533

[1] Peter Singer is the Ira W. DeCamp Professor of Bioethics at Princeton University. Gary Comstock is the Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University. Adam Lerner is a Lecturer at Princeton University. University affiliation is noted for identification purposes only. This *amici* brief reflects only the views of Professors Singer, Comstock, and Lerner as scholars, not the views of Princeton, North Carolina State, or any other institution.

Telephone: (212) 687-8291
Fax: (212) 687-8292
jshooster@richmanlawpolicy.com

Attorney for Amici

DATE COMPLETED: APRIL 8, 2022

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, *amici* state that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

STATEMENT OF *AMICI 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, Amici state that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. Petitioners-Appellants the Nonhuman Rights Project Inc. contributed money that was intended to fund preparation and submission of the brief. No person or entity, other than Petitioners-Appellants or Petitioners-Appellants' counsel, contributed money that was intended to fund preparation or submission of the brief.

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amicus Peter Singer is the Ira W. DeCamp Professor of Bioethics at Princeton University. His publications in the 1970s are widely credited with creating the philosophical basis of the modern animal rights movement. His work in this area and in the area of our duties to those living in extreme poverty, are some of the most excerpted and reprinted essays in applied ethics anthologies. *Amicus* Gary Comstock, an award-winning researcher and teacher, is Alumni Distinguished Undergraduate Professor of Philosophy at North Carolina State University. His book, *Research Ethics: A Philosophical Guide to the Responsible Conduct of Research*, shows how Singer's expanding circle metaphor lends coherence to an otherwise disparate set of issues in research ethics. *Amicus* Adam Lerner is Lecturer at Princeton University. His work has appeared in venues such as *The Journal of Moral Philosophy*, *Oxford Studies in Metaethics*, and *Philosophical Studies. Amici* specialize in ethics and have particular expertise in the analysis of issues relating to the moral status of animals.

Amici present ethical reasons that the court should grant the Nonhuman Rights Project's ("NhRP") request for habeas corpus relief for Happy, an elephant. Happy has a basic interest in not being confined, an interest that should be legally protected just as the human interest in not being confined is legally protected. Since the decision in *The Nonhuman Rights Project, Inc. v Breheny* failed to weigh Happy's

interests properly, *Amici* respectfully urge the Court to (2) correct the error.[2] and recognize that the elephant Happy has an interest that has been violated; and (2) grant the Petitioner-Appellant Nonhuman Rights Project's request for habeas corpus relief on her behalf.

II. SUMMARY OF THE ARGUMENT

This Brief argues on consequentialist grounds for the transfer of Happy to an elephant sanctuary. First, we show that satisfying her interest in being transferred brings far greater value than the value achieved by keeping her confined. Second, we show that she has the capacities sufficient for personhood. Third, we show that all persons have a right to relative liberty insofar as they have interests they can exercise only under conditions of relative liberty. Fourth, we show that individuals need not be able to assume social obligations and duties in order to be rights holders.

Our argument reflects commitments, as we say, to consequentialist reasoning about moral problems. However, we note that influential representatives of the other dominant ethical traditions—the deontological and Aristotelian traditions—reach our conclusion, too. It makes no difference, in this instance, which ethical theory one adopts. Under all of them, Happy is a person with an interest in relative liberty entitled to habeas corpus protection.

[2] *Nonhuman Rights Project, Inc. v Breheny*, No. 260441/19 (N.Y. Super. Ct. Bronx Cty. Feb. 18, 2020). The Supreme Court, Bronx County (Trial Court), declined to grant habeas corpus relief and order Happy's transfer to an elephant sanctuary.

III. ARGUMENT

We argue on consequentialist grounds and, specifically, on utilitarian grounds, for Happy's release. Contemporary utilitarianism originates in the writings of the 19th century thinkers Jeremy Bentham,[3] John Stuart Mill,[4] and Henry Sidgwick.[5] Today, *amicus* Peter Singer is perhaps the most widely recognized proponent of the theory.[6] In his book, *The Expanding Circle*, he argues that altruism evolved because environments selected for humans with strong desires to protect their family and community members. Subsequently, people, acting on the basis of reason, can choose to recognize strangers—who may possess interests very different from their own—as moral equals. This idea, that all persons are equal, is a key utilitarian commitment and explains why utilitarians have consistently defended arguments widely regarded as being on the right side of history.[7] This is especially true in the case of controversies about the legal rights of persons. For example, when African-Americans were treated as slaves, utilitarians provided arguments for abolition long before courts recognized their probity. Again, when women were

[3] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns et al. eds., 1996).

[4] John Stuart Mill, *Utilitarianism and On Liberty* (Mary Warnock ed., 2d ed. 2003).

[5] Henry Sidgwick, *The Methods of Ethics* (7th ed. 1907).

[6] Singer first published his argument in a book review in 1979. *See* Peter Singer, *Animal Liberation*, N.Y. Rev. of Books (Apr. 5, 1973). Two years later, in *Animal Liberation* he argued that the ideal of moral equality demands that we give equal weight to the like interests of all parties affected by an action.

[7] Peter Singer, *The Expanding Circle: Ethics, Evolution, and Moral Progress* (2d ed. 2011).

denied the ballot, utilitarians joined hands with suffragists arguing on behalf of women's rights. Once again, when lesbians, gay men, and transgender people faced discrimination in employment, utilitarians objected to this rights violation.

This Court faces a new controversy involving the denial of rights to persons. Following earlier consequentialists, we here argue that the rights of another person, this time a nonhuman person, demand legal protection. Happy's interest in relative freedom has not been properly weighed by previous courts. We ask this Court to correct these errors.

While Happy remains categorized as property, Justice Tuitt recognizes the inaccuracy of this description. By emphasizing the fact that Happy is a sentient, autonomous being, Justice Tuitt sees that Happy resembles a person much more than a thing. And she understands the legal implications of this fact. As she writes in *Breheny*, "Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty."[8]

Justice Tuitt's denial that Happy is property accords with Judge Fahey's concurrence in a prior case involving nonhuman animals. There, Judge Fahey proclaims that "there is no doubt" that chimpanzees are not mere things.[9] Fahey goes

[8] *Nonhuman Rights Project, Inc. v Breheny*, *supra* note 2 at *16.

[9] *Nonhuman Rights Project v. Lavery*, 100 N.E.3d 846, 849 (N.Y. 2018) (Fahey, J., concurring) [hereinafter Lavery I].

on to question "whether the Court was right to deny leave" when the NhRP requested habeas corpus on behalf of the chimpanzee.[10] In denying that nonhuman persons must be property, both Justice Tuitt and Judge Fahey leave open the possibility that nonhuman animals can be persons. Taking it one step further, the Fourth Department affirmed that it is "common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals."[11]

We are pleased to see these favorable judicial assessments concluding that elephants and chimpanzees are not property and may be persons. These legal opinions represent the leading edge of the expanding circle. We write to defend the implicit claim that these animals are persons and have, as a consequence of their personhood, a suitably qualified right to liberty. Philosophical reflection leads inevitably to these conclusions.

Since Happy has the capacities required for personhood and is entitled to be treated with respect, the Court must consider her for protection under habeas corpus. A decision to deny the appeal on her behalf would carry a grave moral risk. The Court cannot avoid moral risk by deferring judgment. A decision *not* to grant habeas corpus is subject to ethical evaluation just as much as a decision to recognize it. Whatever verdict it reaches, the Court faces the potential of doing wrong. In this

[10] *Id.*

[11] *People v. Graves*, 163 A.D.3d 16, 21 (N.Y. App. Div. 2018) (internal citations omitted).

case, as we will show, the potential for doing wrong is much greater if Happy's rights are not protected.

1. The Consequentialist Reasoning Defended by Peter Singer in The Expanding Circle and Other Work Has a Consistent Track Record of Being on the Right Side of History When It Comes to Controversial Decisions About Legal Rights

Most of us have a natural affection for family members. On the basis of our recognition that those outside of our intimate circle have interests like ours, we have come to recognize that our obligations extend to all human beings. Persons beyond our family, tribe, and even nation, are persons. Like us, they have basic interests in life and liberty. In *The Expanding Circle*, Singer shows that the circle is even larger than previously recognized because it includes all sentient animals:

> The only justifiable stopping place for the expansion of altruism is the point at which all whose welfare can be affected by our actions are included within the circle of altruism. This means that all beings with the capacity to feel pleasure or pain should be included; we can improve their welfare by increasing their pleasures and diminishing their pains.[12]

Singer's argument for including sentient animals is motivated by his consequentialist commitments. Consequentialism refers to a group of ethical theories that judge actions by their outcomes. According to the dominant version of consequentialism, an act is right if and only if it produces the best outcome. What is the best outcome? "Best" is defined in various ways, perhaps most persuasively as

[12] Singer, *supra* note 7, at 120.

the greatest sum of relevant benefits over harms for all concerned. "Benefits" and "harms" are also defined in various ways, but pain and frustration are harms on every account. Previous rulings accept Happy's sentience as established fact.[13] The *ethical* question, then, is this: Should Happy's interests be taken into account as we try to achieve the best outcome? And, if they should, how should they be weighted?

Happy's confinement is the cause of her pain and frustration. She is alternately anxious and frustrated, or bored and isolated. Release to a sanctuary would remove these harms and initiate a cascade of goods. In cases where we can prevent grave harms with a minimum of effort, ethical principles dictate that we should do so. If one can save a drowning child simply by reaching down and picking them up, one ought to do so. The obligation to prevent harms is especially acute in cases where significant harms can be prevented or removed at very little cost. The Court has this power in Happy's case. The harms being visited upon her presently can easily be relieved by transferring her to a sanctuary, and the costs involved in doing so, if any, are minimal. Consequently, as we shall argue, rigorous analysis—based not only on utilitarian foundations but also on the other two moral theories most widely accepted among ethicists—leads inevitably to our conclusion.

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[13] *The Nonhuman Rights Project, Inc. v. Breheny*, *supra* note 2, at *16. See also the cases in which the sentience of chimpanzees is unquestioned. *See also Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D. 3d 73 (N.Y. App. Div. 2017) [hereinafter *Lavery II*]; *Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (N.Y. App. Div. 2014) [hereinafter *Lavery III*].

2. Happy's Strong Interest in Being Transferred Has Greater Moral Weight Than Anyone Else's Interest in Keeping Her Confined.

According to consequentialism, the permissibility of transferring Happy to a sanctuary depends on the moral value of the outcome where Happy is confined indefinitely, compared to the moral value of the outcome where Happy is transferred to a sanctuary. The moral value of each of these outcomes is equal to the total value of the benefits to everyone who is benefited in that outcome minus the total disvalue of the harms to everyone who is harmed in that outcome. The right action is the one whose outcome has the greatest moral value.

In the case of Happy, the most salient stakeholder by far is Happy. She spends her time, alone in a space hundreds of times smaller than the space elephants evolved to occupy, unable to fulfill her most basic social, emotional, and physical needs. Although the Zoo claims she would not be benefited by being moved to a sanctuary, we accept the view of independent elephant expert Joyce Poole that she would be much better off with other elephants. (Poole Aff.)[14] In contrast to the very great benefits to Happy from being allowed to go to a sanctuary where she could flourish with other elephants, the marginal benefits to zoo visitors of seeing an elephant from a monorail, as to opposed to in a documentary—if there are any—do not outweigh the profound harm of living as an elephant in solitary confinement.

[14] *See* https://www.nonhumanrights.org/content/uploads/Aff.-Joyce-Poole.pdf (last visited April 6, 2022).

This is why a consequentialist approach to ethics implies that moving Happy to a sanctuary is right and keeping her confined is wrong.

The argument so far assumes that the benefits of keeping Happy confined are limited to the positive experiences people have seeing Happy. One might also wish to include other benefits that Happy's confinement makes possible. For example, keeping Happy at the Bronx Zoo may bring in additional revenue for the Zoo, making it possible to employ more people and to fund conservation efforts. Or perhaps seeing Happy confined leads visitors to take tangible steps to improve the lives of elephants in the wild.

We exclude these benefits, because these count in favor of Happy's confinement only if obtaining them requires Happy's confinement. And that is far from obvious. There are other ways to employ people, fund conservation efforts, and improve wild elephants' lives. Consequentialists would need a strong case that Happy's confinement was necessary for these benefits before they should consider keeping Happy confined in order to promote them.

Indeed, this objection gets to the heart of the consequentialist case for granting legal personhood to nonhuman persons. Unless nonhuman persons are granted legal personhood, their mistreatment will be rationalized by the ever-present possibility of downstream benefits. Without legal protection, the temptation to frustrate animals' interests will prove too strong, leading humans to overlook alternatives that

are less convenient but better for animals and the world as a whole.

3. Happy Has the Capacities Sufficient for Personhood.

A person, according to the Lockean tradition, is an autonomous individual with a unified, continuous, sense of self. Persons identify with their memories of the past and project themselves into the future. They can reflect on where they have been, but they can also plan, aspire, and anticipate where they will go. These time-traveling abilities give persons access to novel benefits, but they also expose them to novel harms. When persons are confined, for example, this does not only frustrate their present interests. It robs them of their future.

On a yet richer conception of personhood, persons not only have memories and projects, but they are also sentient, rational, emotional, social, and autonomous individuals. These characteristics of persons further strengthen their interests in avoiding isolation and confinement. Happy has these characteristics.

Happy has a personality, a unified perspective consisting of her particular set of beliefs, desires, and attitudes. As an Asian elephant, she is a social being, flourishing best in a hierarchically structured herd. To exist in herds, animals must negotiate friendly and antagonistic relationships by learning social rules regarding familial and sexual behavior.[15] Happy, therefore, is fundamentally a social being;

[15] Lisa F. Kane et al., *An Elephant in the Room: The Science and Well-being of Elephants in Captivity* 315 (2009).

she learns to understand herself by being taught by her mother and conspecifics.[16] She flourishes in community and is able to communicate her beliefs and desires in various ways, including vocalizations and gestures. To greet friends, she curls up her trunk and emits a long groan; to express sadness she generates a high-pitched loud call. Happy acquired these abilities to communicate socially by mastering the tools of signaling. She is able to convey to others information, commands, and warnings.

Like other elephants, early in her life Happy came to recognize dozens of other elephants and humans as friends or foes.[17] She experiences happiness, sadness, anger, surprise, disgust, and fear. She is capable of offering protection, aid, and comfort to others.[18] She can act rationally, engaging in means-end reasoning.[19] She can form hypotheses about alternative ways to achieve her ends and then select the course of action she thinks best suited to bring about her goal. She is capable of tool-use, understanding the function of mirrors.[20] For example, Asian elephants like Happy have the demonstrated ability to convert a branch into a fly switch, reducing

[16] Joyce Poole & Peter Granli, *Mind and Movement: Meeting the Interests of Elephants*, *in An Elephant in the Room: The Science and Well-being of Elephants in Captivity* (Lisa F. Kane et al. eds., 2009).

[17] Joyce Poole & Cynthia J. Moss, *Elephant Sociality and Complexity: The Scientific Evidence*, *in Elephants and Ethics: Toward a Morality of Coexistence* (Kate Christen & Chris Wemmer eds., 2008).

[18] *Id.* at 69.

[19] Joshua M. Plotnik et al., *Elephants Know When They Need a Helping Trunk in a Cooperative Task*, 108 Proceedings Nat'l Acad. Sci. 12 (2011).

[20] Joshua M. Plotnik et al., *Self-Recognition in an Asian Elephant*, 103 Proceedings. Nat'l Acad. Sci. 45 (2006.)

a long branch to a shorter length suited for the task.[21]

Happy is aware of herself as demonstrated by her passing the mirror mark test.[22] She may also be aware that her conspecifics have minds, aware, that is, that they are motivated by psychological states similar to her own.[23] For example, observers have seen older Asian female elephants teaching younger females consort behavior. Consort behavior is the female routine of attracting suitable mates by simulating the visual signals of sexual receptivity. Older Asian female elephants who are not sexually receptive are known to teach these behaviors to younger females. (Poole Aff. ¶ 36.) Through such student/teacher interactions, elephants may be showing that they recognize themselves and others as conscious beings with their own interests and goals.

Finally, like other Asian elephants, Happy is able to value her life for the goods it can bring. She is likely also able to grieve over the death of a conspecific for the loss of life it brings.[24] As is widely reported in the popular press, elephants encountering dead elephant bodies exhibit behaviors associated with grief. They attend to the lifeless object, caressing it while quietly and slowly moving around

[21] Benjamin L. Hart et al., *Cognitive Behaviour in Asian Elephants: Use and Modification of Branches for Fly Switching*, 62 Animal Behaviour 839 (2001).

[22] Joshua M. Plotnik et al., *Self-Recognition in an Asian Elephant*, *supra* note 20.

[23] Joyce Poole & Cynthia J. Moss, *Elephant Sociality and Complexity: The Scientific Evidence*, *supra* note 17, at 69.

[24] *Id*., at 69.

it.[25]

Amicus briefs submitted to this Court document these facts. We emphasize them to underscore the importance of the previous Trial Court's ruling that Happy is a sentient, rational, emotional, and autonomous individual with beliefs and desires.[26] We add only that these cognitive capacities suffice to qualify Happy as a *person*. Any human being with the capacities just named is undoubtedly a person. As such, they have strong interests that demand legal protection. This is so even if they lack additional cognitive capacities, such as the ability to act on moral principle. To that capacity we now turn.

4. Rights Holders Need Not be Capable of Bearing Social Obligations.

We here discuss an important objection to our view, an objection that forms the basis of the Third Department's rejection of habeas corpus for the chimpanzee, Tommy. The objection is that to be a rights holder one must be capable of agreeing to uphold certain social obligations. We grant for the sake of argument that neither elephants nor chimpanzees can assume social duties. However, we here show that, contrary to the Third Department's position, rights holders need not meet this requirement.

[25] Joyce Poole, *Coming of Age with Elephants: A Memoir* 287 (1996).
[26] *See Nonhuman Rights Project, Inc. v Breheny*, *supra* note 2 at *10. .

The objection is a significant one, because it has misled many reasonable persons. It demands rebuttal as previous rulings have relied on its misconceptions. These misconceptions stem, in this case, from Cupp's *amicus* brief in the Tommy case. There, Cupp mistakenly asserts that the "principles of the social contract support recognizing that legal rights are intertwined with a norm of legal accountability."[27] Cupp further contends that the concept of rights was created by humans and is "rooted in" and "has force" "only within that world." Cupp's mis-construal made its way into the decision in *Lavery III* when the Third Department decided against granting habeas corpus for Tommy on the grounds that Tommy could not assume any duties. *Lavery III*, citing Cupp, asserts:

> While petitioner proffers various justifications for affording chimpanzees, such as Tommy, the liberty rights protected by such writ, the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government.[28]

The Third Department further relies on Cupp when it claims that:

> Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency

[27] Brief of Richard L. Cupp as *Amicus Curiae* Supporting Petitioner-Appellant, *Nonhuman Rights Project v. Breheny*, No. 2020-02581 (2020) [hereinafter Brief of Cupp].

[28] *See Lavery III*, *supra* note 13 at *151 (citing Richard L. Cupp, Jr., *Children, Chimps and Rights: Arguments from "Marginal" Cases*, 45 Ariz. L. J. 1, 12-14 (2013)) (internal citations omitted).

> and the ability to accept societal responsibility in exchange for [those] rights."[29]

These claims are subject to decisive counterexample. If the liberty rights protected by habeas corpus were confined to those able to bear societal obligations, then infants, the senile, and people with profound congenital cognitive disabilities would lack liberty rights. Such persons are not now, have never been, and should never be thought to lack the protections of habeas corpus.

The Third Department and Cupp arrive at these erroneous conclusions because they misunderstand the contractualist tradition they invoke. According to the social contract theorists whose work most strongly influenced the U.S. system of government—Locke[30] and Rousseau[31]—individuals have *natural rights* even *before* they enter into social contracts. They *surrender* some of their rights in order to form stable governments. One cannot surrender what one does not have. It follows that, on the contractualist tradition, people need not enter into an agreement and assume social obligations to have rights.

Nor must they be able to do so. As Judge Fahey writes, human neonates, like nonhuman animals, cannot bear duties and "yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child."[32] One may

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[29] *Id.* at 151.

[30] John Locke, *Second Treatise of Government* (C. B. Macpherson ed., 1980).

[31] Jean Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Victor Gourevitch ed. and trans., 1997).

[32] *See Lavery III*, *supra* note 13.

be inclined to think that infants have such rights only because they have the *potential* to develop the abilities needed to acquire social obligations. If so, we could explain why infants have rights but Happy does not.

But we cannot limit rights to individuals who have the potential to develop moral autonomy. Such an approach is inconsistent with the idea of the equality of all human beings, because it implies that neurally diverse, congenitally cognitively disabled children without the capacity to develop into moral agents are not persons. These children do not have the potential to develop moral autonomy. However, this is not a reason to exclude them from the circle of protections afforded persons. It would not be improper to seek a writ of habeas corpus on behalf of one's cognitively disabled child. To think otherwise is counterintuitive and offensive.

It is worth pausing a moment here to examine an argument briefly stated in fn. 3, on p. 152 of the judgment in *Tommy.*[33] At the point in which the judgment emphasizes that "Case law has always recognized the correlative rights and duties that attach to legal personhood," the footnote seeks to repudiate the apparent implication that humans who are unable to reciprocate, or carry out any duties at all, therefore must lack legal personhood.[34] The footnote acknowledges, as of course we

[33] *See Lavery III*, *supra* note 13.
[34] *Id.* at 152 n.3.

all must, that some humans are less able to bear legal duties or responsibilities than others. Then it states:

> 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.[35]

The problem with the passage is simple: the second sentence does not follow from the first. From the fact that human beings *collectively* possess the ability to bear legal responsibility, we are not entitled to conclude that all human beings, whether or not they can individually bear legal responsibility, are entitled to the rights which, as the judgement has just emphasized, have always been recognized as requiring correlative duties. One might just as well argue: "It is undeniable that Americans, collectively, possess the unique ability to elect the President of the United States. Accordingly, nothing should limit the rights of Americans (including children) to vote."

Such arguments are not valid. We are familiar with many examples of rights without correlative duties, and these examples cannot be explained by an appeal to the collective abilities of humans. Nor can they be explained, as might also be attempted, by claiming that certain abilities are typical or characteristic of the

[35] *Id.*

species. Our treatment of others should be dictated by their own characteristics, not the characteristics of their relatives.[36] Hence we cannot base the legal rights that beings have on their ability to understand and carry out their duties. We should, instead, base the legal rights of different beings on their interests.

Happy cannot and, for all we know, does not, have the potential to be able to participate in our conversations about promises and obligations. She cannot reciprocate with us or bear legal duties. However, these facts about her, if they are facts, no more eliminate her from the circle of persons than does the fact that some humans cannot contract, reciprocate, or assume responsibilities. The assertion that individuals must be capable of accepting social duties to be persons is a nonstarter.

[36] Imagine an elephant who, through neuroscientific enhancement, has obtained all of the abilities characteristic of human beings. See the case of the "Superchimp" in Jefferson McMahan, *Cognitive Disability, Misfortune, and Justice*, 25 Philosophy & Pub. Affairs 13 (1996). If individuals had rights only because they are members of a species that typically or characteristically possess such abilities, then we would be forced to withhold rights from this elephant, because elephants do not typically or characteristically possess these abilities. This is absurd. To avoid this implication, one may endorse a disjunctive view, on which individuals have rights *either* because they have such abilities themselves *or* because they are members of a species whose members typically or characteristically possess such abilities. This disjunctive view faces several problems. First, it is theoretically unmotivated. Again, membership in a species whose members typically or characteristically possess such abilities does not by itself allow one to take on social obligations that, according to Cupp and the 3rd Department, grounds one's possession of rights. Second, this disjunctive view implies that human beings who lack these abilities have rights for a fundamentally different reason than other human beings. This offends against ideals of human equality. Third, we have strong reason to be suspicious of any view that makes the possession of rights depend on group membership. Humans have a long history of defending such group-based views (e.g., racism, sexism), and time has invariably proven each and every view to be mistaken.

We reject Cupp's position in unqualified terms and urge an end to this unsound line of reasoning.

5. The Question of Happy's Standing Must Not Await Legislative Debate.

One might think Happy's treatment is not unlawful because the legislative branch has not ruled on whether nonhumans can be persons. This is a grave error. While no nonhuman has previously been the recipient of a habeas corpus order, this fact does not prevent Happy from being the first. We have a precedent for an individual who belongs to a group that is not considered eligible for habeas corpus becoming the first individual of that group to receive habeas corpus. A decision by Judge Elmer Dundy is relevant.

Chief Standing Bear was forced by the U.S. government in 1877 to move out of his homeland in Nebraska and relocate to Indian Territory in what is now Oklahoma. His son died on the journey. Intending to bury his son on traditional lands, Standing Bear returned to Nebraska where he was arrested by General George Crook. Standing Bear's attorneys asked Judge Dundy to grant a writ of habeas corpus to free the Chief. Representing the U.S. government, Crooks' attorneys contended that Standing Bear "was neither a citizen, nor a person" and, therefore, did not have the rights furnished by the U.S. Constitution. Dundy found against the District Attorney, issued the writ, and wrote the following justification:

> [T]he habeas corpus act describes applicants for the writ as 'persons,' or 'parties,' who may be entitled thereto. It nowhere describes them as 'citizens,' nor is citizenship in any way or place made a qualification for suing out the writ, and, in the absence of express provision or necessary implication which would require the interpretation contended for by the district attorney, I should not feel justified in giving the words 'person' and 'party' such a narrow construction.[37]

When Dundy decided to free Standing Bear, he was granting habeas corpus for the first time to a member of a group whose members the U.S. Congress did not consider to be persons. While the intent of the legislators clearly was not to include Native Americans, Judge Dundy looked at the facts about the individual before him and rightly applied the law to Standing Bear. His interpretation of the law no doubt surprised many because it broke with the law's framers' interpretation of the facts. Nonetheless, Dundy clearly upheld the law as it applied to the facts before him. In his ruling, Dundy recognized that the legislative branch had erroneously placed Native Americans outside the moral circle. Dundy's application of habeas corpus corrected an unlawful detention. In freeing Standing Bear to return to Nebraska to bury his son,[38] Dundy ruled on an important question that many wanted the legislature first to debate. Dundy, seeing what would happen to Standing Bear should Dundy defer to the machinations of the legislature, made a courageous decision. Few today would hold that he should have deferred the question of Standing Bear's

[37] *Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879).

[38] Stephen Dando-Collins, *Standing Bear Is a Person: The True Story of a Native American's Quest for Justice* 259 (2004).

personhood to the legislative branch. And no one could deny that Dundy placed himself on the right side of history.

It is in cases like that of Standing Bear—where the law fails to recognize a manifest injustice—where moral philosophy becomes relevant. When precedent and statute leave questions open, judges must appeal to moral considerations. If legal personhood could be settled by appeal only to statute and precedent, Dundy could not have recognized Standing Bear as a legal person.

Happy presents another case in which vagueness in the law fails to address a manifest injustice. Since statute and precedent do not settle whether Happy is a legal person, the decision whether to grant her legal personhood must be based on basic moral principles. We argue that these moral principles univocally support granting Happy the status of legal person.

6. The Three Most Widely Accepted Moral Theories Agree on Happy's Case.

We have argued on consequentialist grounds that Happy should be released. However, one need not be a consequentialist to reach this judgment. While no ethical theory enjoys universal acceptance, ethics textbooks tend to recognize three dominant schools of thought: consequentialism, deontology, and the Aristotelian tradition. The Court may not know which of these theories is correct. Fortunately, it does not have to know because, in this matter, all three theories lead to the same

conclusion. As shown in other *amicus* briefs, prominent representatives of the other views reach our conclusion. Christine Korsgaard, arguing from a deontological perspective, argues for Happy's release on the basis of our duties to Happy. Martha Nussbaum, arguing from the Aristotelian tradition, argues for Happy's release on the basis of Happy's capacities.

These circumstances place the Court in an enviable position. The major traditions in moral philosophy converge on the same judgment. It is unusual to find such convergence among ethics specialists. But this country's most influential ethicists agree; some nonhuman animals have rights. The grounds of the claim that Happy ought to be transferred are as strong in moral philosophy as the grounds of any claim in this field are likely to be.

Moreover, these views are not limited to academic philosophy. This philosophical convergence parallels public sentiments that increasingly oppose the confinement of cognitively complex animals like elephants. Indeed, it is these changing sentiments that the owners of Ringling Brothers cited when announcing their decision to remove elephants form their circus in 2016.[39]

[39] Richard Pérez-Peña, *Elephant to Retire from Ringling Brothers Stage*, N.Y. Times (Mar. 5, 2015), https://www.nytimes.com/2015/03/06/us/ringling-brothers-circus-dropping-elephants-from-act.html.

7. Other Jurisdictions Increasingly Edge Toward Recognizing Nonhuman Personhood.

In 2015, the Oregon State legislature declared that "Animals are sentient beings capable of experiencing pain, stress and fear"; "Animals should be cared for in ways that minimize pain, stress, fear and suffering"; and, "The suffering of animals can be mitigated by expediting the disposition of abused animals that would otherwise languish in cages while their defendant owners await trial."[40] (We note parenthetically that Article 13 of the Treaty on the Functioning of the European Union (2016) recognizes elephants, among other animals, as "sentient beings."[41] So does legislation in France, the Netherlands, New Zealand, Sweden, Quebec and the Australian Capital Territory.[42]) A U.S. court has recognized the rights of foreign countries to determine who has standing in proceedings in those countries. In 2021, the U.S. District Court for the Southern District of Ohio recognized the right of Colombia to regard hippopotamuses as persons. Colombia submitted an *Ex Parte* application to depose two U.S. wildlife experts in a case involving methods of sterilization of wild hippopotamuses. The U.S. court applied Section 1782, to allow the Colombian court to conduct discovery in the U.S. In so doing, the U.S. court recognized as plaintiffs "the community of hippopotamuses living in the Magdalena

[40] Or. Revised Statues § 167.305(1) (2015).

[41] *See* 59 Official Journal of the European Union (June 7, 2016), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:C:2016:202:FULL&from=EN.

[42] Ross Kelly, *Recognition of Animal Sentience on the Rise*, VIN News Service (May 14, 2020), https://news.vin.com/default.aspx?pid=210&Id=9639465.

River," and identified them as "'interested persons' within the meaning of Section 1782."[43] We recognize that what we are seeking in regard to Happy goes beyond the application of Section 1782, but we note this case as a further indication that U.S. jurisdictions are edging closer to the recognition of nonhuman animals as persons. Meanwhile, jurisdictions outside the U.S. have begun to directly recognize the personhood of cognitively complex animals. In 2014, India's Supreme Court recognized that Raju, the elephant, had a right to be freed after 50 years of confinement.[44] More recently, the Constitutional Court of Ecuador has recognized the legal right of a monkey to be released from confinement via a writ of habeas corpus.[45] The decision cites Peter Singer in support of the view that denying animals rights on the basis of species is an objectionable prejudice, "speciesism," and that speciesism violates the law's commitment to rights of equality and non-discrimination.[46] We encourage this Court to apply this line of reasoning to the case of Happy.

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[43] Ex parte *Community of Hippopotamuses Living in the Magdalena River*, No. 1:21-mc-00023-TSB-KLL (S.D. Ohio Oct. 15, 2021); Jeffrey Stein (@jeffsteinnyc), Twitter (Oct. 20, 2021, 10:48 PM), https://twitter.com/jeffsteinnyc/status/1451017451265744896.

[44] Krishnadev Calamur, *Indian Court Says Elephant Who Was Chained for 50 Years is Free*, NPR (Dec. 2, 2014), https://www.npr.org/sections/thetwo-way/2014/12/02/368028114/indian-court-says-elephant-who-was-chained-for-50-years-is-free.

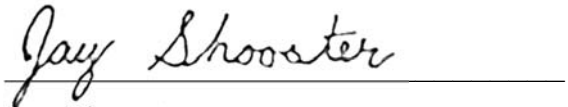
[45] Nonhuman Rights Project, *Constitutional Court of Ecuador Recognizes Animal Rights in Landmark Ruling*, PR Newswire (Mar. 23, 2022), https://www.prnewswire.com/news-releases/constitutional-court-of-ecuador-recognizes-animal-rights-in-landmark-ruling-301509297.html.

[46] Caso Mona Estrellita [El Pleno de la Corte Constitucional del Ecuador] Febr. 22, 2022, No. 253-20-JH, at 25 n.77, 26 n.80 (available in English at https://animal.law.harvard.edu/wp-

IV. CONCLUSION

Amici respectfully assert that Happy's interest in relative liberty is being violated. She spends most of her day engaged in stereotypic behavior, swinging her trunk, swaying, flapping, ritualistically lifting her feet. In humans, stereotypic behaviors—fixed repetitive purposeless behaviors such as head nodding, rocking back and forth, and hand waving—are often signs of mood disorders. They are often responses to severe anxiety, depression, or anhedonia resulting from feelings of confinement or isolation.[47] Happy's interest in relative liberty is equal to any similar interest of a confined human being's interest in relative liberty. In both cases, a basic right is at stake. To right the wrong and produce the best consequences, the Court should honor the NHRP's request to move Happy to a sanctuary.

Dated: April 8, 2022
Brooklyn, New York



Jay Shooster

content/uploads/Final-Judgment-Estrellita-w-Translation-Certification.pdf (last visited Apr. 7, 2022).

[47] *See* https://www.nonhumanrights.org/content/uploads/Aff.-Joyce-Poole.pdf, *supra* note 14.

WORD COUNT CERTIFICATION

Pursuant to Rules 500.1(j) and 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 6,188 words.

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Dated: April 8, 2022
Brooklyn, New York

Jay Shooster

Jay Shooster

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

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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 April 7, 2022

deponent served the within: **Motion for Leave to File an Amici Curiae Brief for Peter Singer, Gary Comstock, and Adam Lerner in Support of Appellant**

upon:

PHILLIPS LYTLE LLP
One Canalside
125 Main Street
Buffalo, New York 14203
(716) 847-8400
kmanning@phillipslytle.com
jchen@phillipslytle.com
wrossi@phillipslytle.com

Attorneys for Respondents-Respondents

ELIZABETH STEIN, ESQ.
NONHUMAN RIGHTS PROJECT, INC.
Five Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
lizsteinlaw@gmail.com

– and –

STEVEN M. WISE, ESQ.
(*Of the Bar of the State of Massachusetts*)
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

the address(es) designated by said attorney(s) for that purpose by depositing **1** 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 April 7, 2022

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

T. Heath

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