APPELLATE COURT

STATE OF CONNECTICUT

A.C. 41464

NONHUMAN RIGHTS PROJECT, INC., on behalf of
BEULAH, MINNIE, and KAREN

v.

R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC.

BRIEF OF AMICUS CURIAE LAURENCE H. TRIBE*

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November 12th 2018

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

My name is Laurence H. Tribe and I am Carl M. Loeb University Professor at Harvard University and Professor of Constitutional Law at Harvard Law School. I am familiar with the legal issues involved in this case and am qualified and competent in the matters therein, particularly with respect to the field of fundamental rights. I have argued before the United States Supreme Court 36 times, including the case of *Bowers v. Hardwick* (1986). I was appointed in 2010 by President Obama and Attorney General Holder to serve as the first Senior Counselor for Access to Justice. I have written 115 books and articles, including my treatise, *American Constitutional Law*, cited more than any other legal text since 1950. I am a member in good standing of the bars of the Unites States Supreme Court (since 1978), the U.S. Court of Appeals for the Federal, First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and D.C. Circuits, the U.S. District Court for the District of Massachusetts (since 1978), the Commonwealth of Massachusetts (since 1978) and the State of California (since 1966). I have written scholarly articles on non-human animal rights, including "Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise," 7 ANIMAL LAW 1 (2001). I have submitted three *amicus curiae* briefs on behalf of Plaintiff, the Nonhuman Rights Project ("NhRP"), in similar litigation in New York. My latest brief on Plaintiff's behalf was cited approvingly by a judge of the New York Court of Appeals. *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring).

[1] The amicus curiae was assisted by an attorney for the Plaintiff in organizing and formatting his own work into this brief. No other party has contributed to the cost of preparation or submission of this brief. The amicus was not compensated for this brief.

ARGUMENT

I. Preliminary Statement

Three elephants, Beulah, Minnie, and Karen, sought a writ of habeas corpus on November 13, 2017 when the Nonhuman Rights Project ("NhRP") demanded that the court recognize the elephants as persons, grant them their right to bodily liberty, and order their immediate release from captivity. This *Amicus Brief* argues that the Appellate Court should set aside the lower court's conclusions that it lacked subject matter jurisdiction because the NhRP lacked standing and that the petition was "wholly frivolous on its face as a matter of law." ("Decision" at 1).

In reaching its decision, the lower court misunderstood the purpose of the common law writ of habeas corpus, which is to allow courts of competent jurisdiction to consider arguments challenging restraint or confinement as contrary to governing law.[2] Connecticut courts have long allowed such challenges even when other areas of law did not recognize the underlying substantive rights at issue, while the lower court's reasoning would summarily shut the doors of the state's judicial system to any consideration of such challenges. In a similar spirit, the United States Supreme Court has emphasized that the writ's "scope and flexibility" and "its capacity to reach all manner of illegal detention," as well as "its ability to cut through barriers of form and procedural mazes . . . have always been emphasized and jealously guarded by courts and lawmakers." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

[2] "It is well established that, in determining whether a court has subject matter jurisdiction, 'every presumption favoring jurisdiction should be indulged,'" *Amodio v. Amodio*, 247 Conn. 724, 727-28 (1999) (citations omitted), and that "[t]here is a judicial bias in favor of jurisdiction in petitions for writs of habeas corpus." *Mock v. Warden*, 40 Conn. Supp. 470, 477 (Sup. Ct. 2003).

II. THE TRIAL COURT'S RULING ON STANDING UNJUSTIFIABLY CURTAILS THE SCOPE OF HABEAS CORPUS

Throughout history, the writ of habeas corpus has served as a crucial guarantor of liberty by providing a judicial forum to beings the law does not (yet) recognize as having legal rights on a footing equal to others. For example, human slaves famously used the common law writ of habeas corpus to challenge their bondage, even when the law otherwise treated them as mere things, by having their petitions brought by third parties who were oftentimes strangers to the slaves.[3]

The leading Connecticut case of a stranger having standing to seek a writ on behalf of a privately detained individual is *Jackson v. Bulloch*, 12 Conn. 38 (1837) in which a black abolitionist successfully sought a common law writ of habeas corpus on behalf of a slave to whom he was a stranger. *Jackson* remains controlling in Connecticut and is consistent with centuries of habeas corpus law that recognizes the supreme importance of bodily liberty and permits anyone to bring a habeas corpus action on behalf of another.[4]

As neither Connecticut case law nor Connecticut's statutory habeas corpus provisions[5] preclude the NhRP from filing the Petition on behalf of the three imprisoned elephants, the court had no reason to deny the NhRP's standing in this case.[6] The court however erroneously applied the second prong of the standing test in *Whitmore v. Arkansas*,

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[3] *E.g.*, *Somerset v. Stewart*, Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

[4] *See In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam) (holding, at a time when slavery was legal in New York, that a slave could bring a habeas corpus action against a man that he alleged was illegally detaining him); *see also Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 630-31 (1860); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. 1848); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846).

[5] Neither C.G.S.A. § 52-466(a)(2) nor P.B. § 23-40(a) places any limitation on *who* may bring a habeas corpus petition on behalf of another.

[6] In fact, the NhRP has filed six similar habeas corpus cases on behalf of chimpanzees in New York and not a single court found that the NhRP lacked standing.

495 U.S. 149, 163-164 (1990) and the dicta in *Whitmore* suggesting that a petitioner must have a "significant relationship" with the person detained, even though Connecticut courts have never adopted this test.[7] The court correctly observed that a "next friend" has standing to file a petition on behalf of a third party but then incorrectly concluded that the "next friend" must plead a "significant relationship" to the detained.

The jurisdictional question of whether Beulah, Minnie, and Karen's detentions can be challenged in the first place must not be conflated or confused with the substantive merits of their habeas petitions and the ultimate legality of their detentions. The failure to distinguish between habeas *jurisdiction* and entitlement to habeas *relief* also conflicts with the historical role of habeas corpus in the jurisprudence of the U.S. Supreme Court. In a series of landmark cases gradually extending federal habeas corpus jurisdiction to detainees held at Guantanamo Bay, for example, that Court clarified this distinction.[8] In the 2004 case of *Rasul v. Bush*, 542 U.S. 466, 470 (2004),[9] the Court limited its inquiry to whether the federal courts

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[7] *Whitmore* established two requirements for Article III "next friend" standing. First, the "next friend" must provide "an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action." *Id*. at 163 (citations omitted). Second, the "next friend" must demonstrate that it is "truly dedicated to the best interests of the person on whose behalf [it] seeks to litigate." *Id*. The Court noted in *dicta* that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest," but said nothing further on that issue. *Id*. at 163-64 (citing only *Davis v. Austin*, 492 F. Supp. 273, 275-276 (N.D. Ga. 1980)).

[8] *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2034 (2007) (drawing analytical distinction between jurisdictional questions, involving the authority of a court to entertain a detainee's petition at all" and "substantive questions, involving whether the Executive has lawful authority to detain particular categories of prisoners.").

[9] *Id.* at 2048.

are endowed with statutory jurisdiction under 28 U.S.C. § 2241 to consider habeas challenges to the detention of noncitizens captured abroad and held at the Guantanamo Bay Naval Base. Without deciding whether the Constitution requires full judicial review of detentions or indeed whether the detainees in question were entitled to any substantive relief, the Court held that habeas jurisdiction over the petitioners' challenges to their detention was proper and the habeas petitioners were at least entitled to a decision on the "merits" of their challenge. *Id.* at 485; *see also* LAURENCE TRIBE AND JOSHUA MATZ, UNCERTAIN JUSTICE 194 (2014) (hereafter "Tribe and Matz").

Four years later in *Boumediene v. Bush*, 552 U.S. 723, 771 (2008), the Supreme Court held that the Suspension Clause entitled "aliens designated as enemy combatants and detained" to use habeas corpus to challenge their detention. While this decision extended constitutional protection to detainees' *jurisdictional* right to habeas review, the Court again made no decision as to the substantive legality of the detentions at issue or as to whether habeas *relief* was proper. *Id.* at 795.[10] As in these cases, the jurisdictional question of whether Beulah, Minnie, and Karen's detentions can be challenged in the first place must not be conflated or confused with the substantive merits of their habeas petitions and the ultimate legality of their detentions.

III. THE PETITION FILED BY THE NHRP IS NOT FRIVOLOUS

By foreclosing any inquiry into whether the detention alleged in this case was unlawful, the trial court confused the issue of habeas corpus *jurisdiction* (the question of whether and

[10] The Court remanded to the Court of Appeals with "instructions that it remand the cases to the District Court" for a decision on the merits of the habeas petition. *Id.* at 798. Five of the six detainees in *Boumediene* were granted writs of habeas corpus and released. *See Boumediene v. Bush*, 579 F. Supp. 2d 191, 198 (D.D.C. 2008); *see also* Tribe & Matz, *supra*.

when a court has authority to entertain a detainee's petition at all) with the analytically separate issue of habeas corpus *relief* (the question of what substantive rights, if any, the detainee may invoke, and what remedy or remedies the detainee may properly seek).

The court's refusal to examine the character of Beulah, Minnie, and Karen's detentions rested on a misunderstanding of the crucial role the common law writ of habeas corpus has played throughout history: providing a forum to test the legality of an individual's ongoing restraint or detention. This forum for review has been available even when the ultimate conclusion is that the detention is lawful, given all the circumstances. While the court accurately observed that nonhuman beings like elephants have never before been provided habeas corpus *relief* by a Connecticut court, that Court was wrong to conflate the novelty of the case with it being frivolous and to assume that a state court's doors must be slammed shut to the plea, made on an elephant's behalf, that the detention complained of is contrary to law.[11]

Holding, as did the trial court, that Beulah, Minnie, and Karen and others like them are not welcome in habeas courts because the case was a matter of first impression is akin to holding that detained human slaves, women, and Native Americans, who were not "persons" at certain points in history should never have been able to invoke the writ of habeas corpus to test the legality of their detention, based on the novelty of their claim.

Holding, as did the trial court, that Beulah, Minnie, and Karen are not welcome in habeas courts solely because of their species reminds us that, at one time, some human

[11] The standard for determining frivolousness under P.B. § 23-24 (a)(2) is set forth in *Henry E.S., Sr. v. Hamilton*, 2008 WL 1001969 at *5 (Conn. Super. Ct. Feb. 28, 2008): it "is that of a *possibility* of victory," not "probable" or even "[m]eritorious." This standard is consistent with decades of Anglo-American habeas corpus jurisprudence and specifically habeas corpus jurisprudence involving non-persons

beings were not granted personhood or legal rights because they were not of the same race or gender as those who then were rights-bearers. Contrary to these holdings, courts have throughout history entertained petitions for writs of habeas corpus from a wide variety of beings considered at the time to be incapable of bearing the same rights as most members of society.

Cases like these recognize that the danger habeas corpus confronts – forceful but unjustified restraint and detention arguably in violation of applicable law – can exist even where the habeas petitioner does not resemble present-day rights holders. The question of Beulah, Minnie, and Karen's legal personality is thus invariably entwined with the broader debate about the "rights" of nonhuman animals and, about the "wrongs" to which they should not be subjected by a decent society.[12] Courts cannot render defensible decisions about the meaning of legal personhood "without expressing certain values, whether they want to or not."[13] The question of Beulah, Minnie, and Karen's legal personhood implicates a "powerfully divisive social issue" as well as "the uncomfortable but inescapable place of status distinctions" in our legal system,[14] but this Court should not "allow the philosophical conundrum of this eternal question to paralyze its analysis," given the "immensely important

[12] *See, e.g.*, PETER SINGER, ANIMAL LIBERATION 8 (2d. ed. 1990) (arguing that the question of whether animals are capable of bearing rights is "irrelevant" to the case for Animal Liberation); ROGER SCRUTON, ANIMAL RIGHTS AND WRONGS 61 (2d. ed. 1998) (making the case that humans bear "duties and responsibilities" to animals even though animals might have no rights).
[13] Note, *What We Talk About When We Talk About Persons: The Language of A Legal Fiction*, 114 HARV. L. REV. 1745, 1764 (2001).
[14] *Id.* at 1767.

pragmatic interests" at stake in the case.[15]

In the end, whether Beulah, Minnie, and Karen should be deemed legal "persons" requires attention not just to some conventional set of formal definitions but to "the social meaning and symbolism of law."[16] The ways in which courts have approached questions of personhood in such "borderline cases" as human embryos and fetuses have obviously been marked by "doctrinal discord,"[17] raising questions about the wisdom of replicating that discordant struggle in a context where it might end up being irresolvable or even irrelevant.

To the degree that competing conceptions of personhood are nonetheless deemed at least pertinent even if not decisive, it is important to remember that legal definitions of what and who constitutes a "person" do much "more than just regulate behavior" when it comes to "America's most divisive social issues": they express "conceptions of [the] relative worth of the objects included and excluded by personhood," and these expressions of "law's values" in turn shape social norms and values.[18]

CONCLUSION

This Court should recognize that Beulah, Minnie, and Karen are autonomous beings who are currently detained and who are therefore entitled to challenge the lawfulness of their

[15] Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 34 (2013) (identifying *Roe v. Wade* as the most important modern legal decision addressing the question of legal personhood and arguing that the Court was forced to put philosophical interests to the side in addressing pressing practical concerns at stake).
[16] *Note*, *supra* note 12, at 1760.
[17] *See generally* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 115-125 (1992) (discussing moral and legal difficulties in defining personhood in the abortion debate and questioning the link between fetal personhood and the rights of the fetus-bearing woman).
[18] *See Note, supra* note 12, at 1761.

detentions by petitioning for the writ, even if that court ultimately concludes that Beulah, Minnie, and Karen's detentions are lawful.

This Court should make clear its view that the trial court erred in ruling that the NhRP lacked standing to bring the Petition on behalf of Beulah, Minnie, and Karen and that the case, while a novel and a matter if first impression, is far from frivolous.

Even if a decision granting jurisdiction while ultimately denying the relief sought would not help Beulah, Minnie, and Karen concretely, this kind of gradually and selectively evolving recognition of the varying forms of legal protection that beings of varying kinds deserve would recognize, as the Supreme Court put it in *Lawrence v. Texas*, 539 U.S. 558, 579 (2003), that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress."[19] If a being like Beulah, Minnie, or Karen is presumptively entitled to *none* of the benefits sometimes associated with legal personhood unless and until courts are ready to extend all arguably similar beings *every* benefit of that

[19] *See also Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ((quoting *United Australia, Ltd., v. Barclay's Bank, Ltd.*, (1941) A.C. 1, 29) ("'When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.' We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.")). Some commentary on the recent New York Supreme Court order to show cause in the detention of two chimpanzees, *see Stanley*, No. 152736/2015 (N.Y.S. Apr. 20, 2015), *supra* note 4, has characterized the order as a "modest" development. Noah Feldman, *Habeas Corpus When You're Not Homo Sapiens*?, BLOOMBERG VIEW, Apr. 21, 2015, *http://www.bloombergview.com/articles/2015-04-21/habeas-corpus-when-you-re-not-homo-sapiens-.* While Professor Feldman is correct in characterizing the issue addressed by this decision as "the more preliminary one of whether the courts will be open to nonhuman litigants," rather than the question of whether chimpanzees possess inherent rights to bodily liberty, his analysis affirms the symbolic significance of the judge's order in the broader evolution of legal principles.

legal status, the evolution of common law writs like habeas corpus will remain chained to the prejudices and presumptions of the past and will lose their capacity to nudge societies toward more embracing visions of justice.[20]

This Court should recognize that when criteria for personhood are reasonably and consistently applied, Beulah, Karen, and Minnie satisfy the criteria and are entitled to *habeas* relief.

Dated: Cheshire, Connecticut
November 12th 2018

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[20] *See* Laurence H. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1338–39 (1974) (describing how legal principles evolve and build on their past development, like "a multidimensional spiral along which the society moves by successive stages, according to laws of motion which themselves undergo gradual transformation as the society's position on the spiral, and hence its character, changes"); *see also id.* at 1340 ("Partly because it seems plausible to believe that the processes we embrace must from the beginning prefigure something of [a] final vision if the vision itself is to be approximated in history, and partly because any other starting point would drastically and arbitrarily limit the directions in which the spiral might evolve, it follows that the process with which we start should avoid a premise of human domination, or indeed a premise of the total subservience of any form of being to any other.").

CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief complies with all provisions of Practice Book § 67-2, and that on this the 12th day of November 2018, the foregoing Brief was both mailed and electronically transmitted to the following, together with a copy of the electronic confirmation receipt:

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This is further to certify pursuant to § 67-2(i) that the foregoing Brief is a true copy of the Brief submitted electronically to the Court on this day, and that the Brief does not contain any information prohibited from disclosure by rule, statute, court order, or case law. A copy of the electronic confirmation receipt is attached hereto.

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