APPELLATE COURT

OF THE

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 PLAINTIFF-APPELLANT

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NATURE OF PROCEEDINGS AND STATEMENT OF FACTS

I. Nature Of The Proceedings

Plaintiff, the Nonhuman Rights Project, Inc. ("NhRP"), filed a Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") seeking a good faith extension or modification of the Connecticut common law of habeas corpus on behalf of three autonomous beings, Beulah, Minnie, and Karen, who are being illegally detained and deprived of their bodily liberty by Defendants. The NhRP seeks the elephants' common law right to bodily liberty protected by habeas corpus.

"Person" has never been a synonym for "human being" but rather designates law's most fundamental category by identifying those entities capable of possessing a legal right. (Petition at ¶ 24) Part One A12. Connecticut common law is broad, flexible, and adaptable, and keeps abreast of evolving standards of justice, morality, experience, and scientific discovery.[1] Connecticut courts are "charged with the ongoing responsibility to revisit our common-law doctrines when the need arises." *State v. Brocuglio*, 264 Conn. 778, 793 (2003); *State v. Guess*, 244 Conn. 761, 793 (1998).

In Connecticut, "[t]he writ of habeas corpus exists as part of the common law and the purpose of the statutes regulating its issuance is to perfect the remedy it is designed to afford. Such statutes have not been intended to detract from its force but to add to its efficiency." (Internal citation omitted.) *Hudson v. Groothoff*, 10 Conn. Supp. 275, 278-79 (1942). *See also Kaddah v. Comm'r of Correction*, 324 Conn. 548, 565-66 (2017). These statutes and rules are set forth in General Statutes §§ 52-466 - 52-470, and Practice Book §§ 23-21 - 23-40 and do not affect the substantive entitlement to the writ.

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[1] *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184, 196 (1996); *Dacey v. Connecticut Bar Association*, 184 Conn. 21, 25-26 (1981).

The determination of common law personhood for the purpose of habeas corpus is a matter for common law adjudication and is based on public policy, not biology. *See Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201-02 (1972); *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054 (2018) (Fahey, J., concurring) ("*Tommy*"); *People v. Graves*, 78 N.Y.S. 3d 613, 617 (4th Dept. 2018), quoting *Byrn,* 31 N.Y. 2d 194, at 201 ("the Court of Appeals has written that personhood is 'not a question of biological or 'natural' correspondence'".) *See generally Craig v. Driscoll*, 262 Conn. 312, 330 n.15 (2003). Accordingly, it is for the courts to decide whether Beulah, Minnie, and Karen are entitled to common law habeas corpus. *E.g.*, *id.*; *Tommy*, 31 N.Y. 3d at 1059 (Fahey, J., concurring) ("The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a 'person' or relegated to the category of a 'thing' amounts to a refusal to confront a manifest injustice. . . ."). Connecticut courts expand and define the common law based on a public policy that "can be found in express statutory or constitutional provisions, or in judicially conceived notions of public policy." *Curry v. Community Sys., Inc.*, 1993 WL 383281, *3 (Conn. Super.). The NhRP's Memorandum of Law in Support of Verified Petition For Common Law Writ of Habeas Corpus ("Memorandum") argues that public policy, autonomy, liberty, and equality compel the expansion of the common law to recognize the elephants' right to bodily liberty.

If Beulah, Minnie, and Karen are "persons" for the purpose of common law habeas corpus, their detention is *per se* unlawful. *See Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499, 510 (K.B. 1772). *See also State v. Oquendo*, 223 Conn. 635, 650 (1992) ("no man can be restrained of his liberty; be prevented from removing himself from place to place, as he chooses; be compelled to go to a place contrary to his inclination, or be in any way

imprisoned, or confined, unless by virtue of the express laws of the land.") (quoting Zephaniah Swift, *A Digest of the Laws of Connecticut* 180 (1795)); *id.* at 650 ("every detention is an imprisonment."). This case is not an "animal protection" or "animal welfare" case, just as a habeas corpus case brought on behalf of a detained child or inmate would not be a "human protection" or "human welfare" case.[2] The issue is whether Beulah, Minnie, and Karen may be legally detained at all.[3]

II. Procedural History

The NhRP filed the Petition on November 13, 2017. Part One A4. On December 26, 2017, the Trial Court refused to issue the writ under Practice Book § 23-24 (a)(1) on the ground the NhRP lacked standing and, in the alternative, under § 23-24 (a)(2), as the Petition was "wholly frivolous on its face as a matter of law." ("Decision" at 1) Part One A43.[4]

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[2] *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 149 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015); *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S. 3d 898, 901 (Supr. Ct. 2015).

[3] Even if Defendants were violating animal welfare statutes, habeas corpus remains available, as alternative remedies do not alter one's ability to bring the writ. *In re Jonathan M.*, 255 Conn. 208, 221 (2001); *Weidenbacher v. Duclos*, 234 Conn. 51, 64-65 (1995). While the Petition does not challenge the conditions of the elephants' confinement or Defendants' treatment of them, but rather their detention itself, the deplorable conditions of Beulah, Minnie, and Karen's confinement underscore the need for immediate relief and the degree to which their bodily liberty and autonomy are impaired.

[4] The Trial Court did not dispute that the relief sought would be available. That the Petition does not seek Beulah, Minnie, and Karen's release into the wild or onto the streets of Connecticut but into the care of a sanctuary does not preclude them from habeas corpus relief. *See Dart v. Mecum*, 19 Conn. Supp. 428, 434 (1955); *Buster v. Bonzagni*, 1990 WL 272742, *2 (Conn. Super.), *aff'd sub Comm'r of Correction*, 26 Conn. App. 48 (1991).

On January 16, 2018, the NhRP filed a Motion to Reargue or, in the Alternative, to Amend the Petition (Part One A57), which was denied on February 27, 2018. ("Second Decision") Part One A61. On March 16, 2018, the NhRP filed a timely appeal of both decisions. Part One A65. On April 18, 2018, the NhRP filed a Motion for Articulation. Part One A72. On May 23, 2018, the Trial Court denied the motion as to all but request number ten. Part One A80. On June 5, 2018, the NhRP filed a Motion for Review of the Trial Court's response to the Motion for Articulation. On July 25, 2018, the Appellate Court granted review but denied the requested relief.

III. Background and Elephant Facts

Defendants are R.W. Commerford & Sons, Inc. (a/k/a Commerford Zoo), a Connecticut corporation, and its President. (Petition at ¶¶ 2-3) Part One A4.

The NhRP is a nonprofit legal organization with a mission "to change the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them." (Petition at ¶ 1) Part One A4. In 2013, the NhRP filed the first-ever habeas corpus petition on behalf of a nonhuman animal in the United States when it filed in New York State on behalf of a chimpanzee named Tommy. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3rd Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015).

Karen is a female African elephant in her mid-thirties. She was captured from the wild around 1983. Defendants have owned Karen since 1984. (Petition at ¶ 4) Part One A5. Beulah is a female Asian elephant in her mid-forties. She was captured from the wild in

1967 in Myanmar. Defendants have owned Beulah since 1973. (Petition at ¶ 5) Part One A5. Minnie is a female Asian elephant. Defendants have owned Minnie since at least 1989. (Petition at ¶ 6) Part One A5. Beulah, Minnie and Karen are beneficiaries of an *inter vivos* trust created by the NhRP pursuant to General Statutes § 45a-489a for the purpose of their care and maintenance should they be released from Defendants' unlawful detention. (Petition at ¶ 45) Part One A15.

The NhRP's four Expert Scientific Affidavits from five leading elephant scientists (all of which are part of the record below) demonstrate that elephants possess complex cognitive abilities such as: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness others have minds); insight; working memory and an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner and to detect animacy and goal directedness in others; understanding the physical competence and emotional state of others; imitation, including vocal imitation; pointing and understanding pointing; engaging in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperation and coalition building; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understanding causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of a particular communication; utilization of a wide variety of gestures, signals, and postures; use of specific calls and gestures to plan and "discuss" a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner;

complex learning and categorization abilities, and; an awareness of and response to death, including grieving behaviors.

ARGUMENT

I. The Trial Court Erred In Dismissing the Habeas Petition Pursuant To Practice Book § 23-24(a)(1) On The Ground Plaintiff Lacked Standing.

A. Standard of Review.

As the Trial Court's decision was a matter of law, this Court's review is plenary. *In re Jonathan M.*, 255 Conn. 208, 217 (2001); *In re David W.*, 254 Conn. 676, 686 (2000).

B. The Trial Court erroneously dismissed the Petition for lack of standing.

"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 "[t]here is a judicial bias in favor of jurisdiction in petitions for writs of habeas corpus." *Mock v. Warden*, 48 Conn. Supp. 470, 477 (2003). General Statutes § 52-466 gives the Trial Court authority to hear petitions that allege illegal confinement or deprivation of liberty. *Hickey v. Comm'r of Corr.*, 82 Conn. App. 25, 31 (2004). The Trial Court nonetheless concluded that it lacked subject matter jurisdiction on the ground that the NhRP lacked standing to file the Petition on behalf of the elephants. (Decision at 3-9) Part One A45-51.

1. Connecticut law permits even strangers to file habeas corpus petitions on another's behalf.

The NhRP has standing pursuant to the Connecticut substantive common law of habeas corpus. Neither General Statutes § 52-466(a)(2) nor Practice Book § 23-40(a)

places any limitation on *who* may bring a habeas corpus petition on behalf of another.[5] In *Jackson v. Bulloch*, 12 Conn. 38 (1837), the famed black abolitionist, James Mars, successfully sought a common law writ of habeas corpus on behalf of a slave named Nancy Jackson, to whom he was a stranger, who had been brought temporarily into Connecticut by her Georgia master. *Jackson* remains controlling and, like § 52-466, 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. *See Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499, 510 (K.B. 1772) (unrelated third parties sought common law writ on behalf of detained slave) (*Somerset* was said to be settled Connecticut law in *Jackson*, 12 Conn. at 53); *Lemmon v. People*, 20 N.Y. 562, 562, 599-600 (1860) (abolitionist Louis Napoleon received a common law writ on behalf of eight detained slaves to whom he was a stranger).[6]

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[5] *See generally Rodd v. Norwich State Hosp.*, 5 Conn. Supp. 360, 360 (1937); *Moye v. Warden*, 2009 WL 3839292, *2 n.1 (Conn. Super.).

[6] *See also State ex rel. v. Malone*, 35 Tenn. 699, 705 (1856) ("It is not absolutely necessary that either the petition for the writ, or the affidavit, should be by the party in detention . . . "); *In re Kirk*, 1 Edm. Sel. Cas. 315, 315 (N.Y. Supr. Ct. 1846) (Louis Napoleon received writ on behalf of slave with whom he had no relationship); *Commonwealth v. Aves*, 35 Mass. 193, 193, 206 (1836) (Abolitionist Levin H. Harris received writ on behalf of eight year old slave to whom he was a stranger) (*Aves* was cited with approval in *Jackson*, 12 Conn. at 42); *Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (English Abolitionist Society received writ to determine whether African woman who spoke no English was being exhibited in London against her will); *In re Trainor*, *New York Times*, May 11, 14, 21, 25, June 14 (1853) (abolitionist Jacob R. Gibbs received writ on behalf of nine year old slave); "Reported for the Express," *New York Evening Express*, July 13, 1847, *New York Legal Observer* 5, 299 (1847) (John Iverness obtained writ on behalf of three slaves whom he had never met who were being held captive on a ship).

General Statutes § 52-466 merely regulates the procedure under which habeas corpus may be litigated. "Such statutes have not been intended to detract from its force but to add to its efficiency." *Hudson v. Groothoff*, 10 Conn. Supp. at 278. The New York State Supreme Court affirmatively recognized the NhRP's standing to seek the writ on behalf of two chimpanzees in *Stanley*, 16 N.Y.S. 3d 898. New York's procedural statute, CPLR 7002(a), allowing "one acting on his behalf" to bring suit, merely codified the common law of habeas corpus standing that New York, English, and Connecticut cases have long employed.[7] In the six habeas corpus cases that the NhRP has filed on behalf of nonhuman animals in New York State, not a single court found that the NhRP lacked standing.[8]

General Statutes § 52-466(a)(2) simply requires a habeas corpus suit to be brought in the judicial district of Tolland when it is "made by or on behalf of an inmate or prisoner confined in a correctional facility as a result of a conviction of a crime." It does not affect the longstanding ability of anyone, including strangers, to seek a common law writ of habeas on behalf of a detained individual. Inexplicably, the Trial Court interpreted § 52-466 as establishing two separate standards for habeas corpus standing, one for inmates and one for all others, stating that "[a]lthough for persons confined as a result of a criminal conviction, § 52-466(a)(2) provides that an application for a writ of habeas corpus may be 'made by or on behalf of an inmate,' § 52-466(a)(1) does *not* provide language regarding a petition being made 'on behalf of' the person whose noncriminal custody is in question."

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[7] *See People v. McLeod*, 3 Hill 635 fn. j sec.7 (N.Y. Sup. Ct. 1842) ("The common law right was clear for any *friend* of the prisoner as well as *agent* to make the application.").

[8] *See, e.g., Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 n.1 (1st Dept. 2017) ("*Tommy*") ("petitioner [NhRP] undisputedly has standing pursuant to CPLR 7002(a), which authorizes anyone to seek habeas relief on behalf of a detainee."), *leave to appeal den.*, 31 N.Y. 3d 1054 (2018); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-53 (3d Dept. 2014), *leave to appeal den.*, 26 N.Y.3d 902 (2015).

(emphasis in original) (Decision at 4) Part One A46. Yet, without support, the Trial Court interpreted this silence about private detention to mean that *only* in inmate cases may a petition be brought by a stranger. But this statute does not concern *who* may bring a habeas corpus petition; it merely confers subject matter jurisdiction on a court to hear a habeas corpus case when an inmate is in "custody" and determines venue in such a case.[9]

While recognizing that Connecticut law allows for third parties to file habeas corpus petitions in private detention cases, without limitation,[10] the Trial Court erroneously applied standing requirements to a private detention case that are limited to child custody and inmate habeas corpus cases. Child custody cases, however, are *sui generis*. *See Weidenbacher v. Duclos*, 34 Conn. App. 129, 132 (1994), *rev'd on other grounds*, 234 Conn. 51 (1995) ("In contrast to the usual habeas corpus case, the illegality of confinement is not at issue in a custody matter.").[11] The Trial Court correctly stated that "[o]utside the context of child custody, a petitioner deemed to be a 'next friend' of a detainee has standing to bring a petition for writ of habeas on the detainee's behalf" (citing *State v. Ross*, 272 Conn. 577, 597 (2005)) (Decision at 7) Part One A49. But it relied on *Ross* and the two-prong *Whitmore v. Arkansas*, 495 U.S. 149, 163-164 (1990) test mentioned in *Ross* to hold that the NhRP could not serve as the "next friend" of Beulah, Minnie, and Karen (*Id.*)

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[9] *See Hickey v. Comm'r of Corr*, 82 Conn. App. 25 (2004) (citing *Abed v. Comm'r of Corr*, 43 Conn. App. 176, 179, *cert. denied*, 239 Conn. 937 (1996)).

[10] Decision at 5 ("[a]lthough § 52-466(a)(1) does not contain language regarding a petition made 'on behalf of' someone else, this does not mean that one cannot make such a petition thereunder").

[11] The Trial Court erred in stating that "were the court to determine that the elephants are 'persons,' it is the *respondents* who are more akin to parents of Beulah, Minnie, and Karen" (Decision at 6) (emphasis in original). Defendants are alleged to have economically exploited the elephants for decades and are therefore unsuitable to act as their "next friends." *See Carrubba v. Moskowitz*, 274 Conn. 533, 549 (2005).

as the NhRP had failed to allege that it had a "significant relationship" with the elephants. As set forth above, this was mistaken.

2. The Trial Court erroneously relied on *Whitmore v. Arkansas'* second prong and *dicta* regarding a "significant relationship," neither of which have been adopted by Connecticut courts.

The Trial Court cited *Ross* for the proposition that the "next friend" standard enunciated in *Whitmore,* a federal habeas corpus case involving a death row inmate,[12] has been adopted by the Connecticut Supreme Court. (Decision at 7) Part One A49. But *Ross,* which also concerned an inmate, merely adopted the first prong of the *Whitmore* two-prong test requiring that the real party in interest lack the ability to sue.

a. Whitmore*'s language regarding a significant relationship is *dicta.

In *Whitmore*, the United States Supreme Court considered whether a death row inmate (Whitmore) had standing to challenge a death sentence imposed on a competent fellow inmate who had elected to forgo his right of appeal. 495 U.S. at 151-53. *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

[12] *Whitmore* involved the "Case or Controversy" requirements of Art. III of the U.S. Constitution. But the Connecticut Constitution contains no "Case or Controversy requirement" and there is no reason why the Connecticut courts should suddenly imply one. *Connecticut Ass'n of Health Care Facilities, Inc. v. Worrell*, 199 Conn. 609, 613 (1986); *Hyde v. Pysz*, 2006 WL 894921, *4 (Conn. Super.).

that issue. *Id.* at 163-64 (citing only *Davis v. Austin*, 492 F. Supp. 273, 275-276 (N.D. Ga. 1980)).[13] Because the death row inmate's competency had been established, he failed the first *Whitmore* standing requirement. *Id.* at 165-66.

Many federal courts have properly understood that the language the Trial Court relied upon regarding a "significant relationship" is mere *dicta* and not a requirement for "next friend" standing, even under *federal* jurisprudence. *See, e.g., ACLU Found. v. Mattis*, 286 F. Supp. 3d 53, 57 (D.D.C. 2017) ("*Whitmore* . . . 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 did not opine on that issue (citation omitted)'"). The U.S. Court of Appeals for the Second Circuit in *Padilla v. Rumsfeld*, 352 F.3d 695, 703 n.7 (2d Cir. 2003), *rev'd and remanded on other grounds*, 542 U.S. 426 (2004) observed:

> Whether a person seeking next friend status must have a "significant relationship" to the petitioner has not been resolved by this Court or by the Supreme Court. The Supreme Court merely said that "it has been further suggested that a "next friend" must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163-64.

The U.S. Court of Appeals for the First Circuit agreed that:

> While the Supreme Court recognized that some courts have "suggested" that a Next Friend must also have a significant relationship with the real party in interest, the Court did not hold that a significant relationship is a necessary prerequisite for Next Friend status. *Id.* at 163-64; *see also Whitmore*, 495

[13] The *Whitmore* dissent, at 177 n.6 (Brennan, J. and Marshall, J.,) correctly noted that "[i]f the Court's suggestion were true, it would necessitate abolishing next-friend standing entirely. In terms of Article III, a next friend who represents the interests of an incompetent person with whom he has a significant relation is no different from a next friend who pursues a claim on behalf of a competent stranger; both rely wholly on the injury to the real party in interest to satisfy constitutional standing requirements."

> U.S. at 177 (Marshall, J., dissenting) (recognizing that the majority opinion suggested, without holding, that a Next Friend may have to prove she has "some significant relationship with the real party in interest") . . . . In evaluating an individual's capacity to serve as Next Friend for minors who lack ties with their parents . . . federal courts have rejected a rigid application of the significant relationship requirement, holding that the common-law concept of Next Friend is capacious enough to include individuals who pursue a suit in good faith on behalf of a minor or incompetent.

Sam M. v. Carcieri, 608 F.3d 77, 90-91 (1st Cir. 2010). Neither the D.C. Circuit nor the Eleventh Circuit has adopted a "significant relationship" requirement.[14] Justice Berzon explained in *Coal. of Clergy v. Bush*, 310 F.3d 1153, 1165-66 (9th Cir. 2002) (concurring):

> the Supreme Court in *Whitmore* did not indicate that a "significant relationship" was part of the second *Whitmore* prong. Rather, only after stating the two-prong *Whitmore* test did the Court add "it has been *suggested* that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 164 (emphasis added).[15]

Even in the case of *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 n.3 (4th Cir. 2002), upon which the Trial Court relied (Decision at 7) Part One A49, the Fourth Circuit admonished that "we reserve the case of someone who possesses no significant relationships at all."

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[14] *See Mattis*, 286 F. Supp. 3d at 58-59; *Does v. Bush*, 2006 U.S. Dist. LEXIS 79175, at *6 (D.D.C.). *See Sanchez-Velasco v. Secretary of Dept. of Corr.*, 287 F.3d 1015, 1026 (11th Cir. 2002) ("'[S]ome significant relationship,'. . . may not be an additional, independent requirement but instead may be one means by which the would-be next friend can show true dedication to the best interests of the person on whose behalf he seeks to litigate.").

[15] *See also Nichols v. Nichols*, 2011 WL 2470135, at *4 (D. Or.) ("The Supreme Court . . . noted that some courts have 'suggested' that a Next Friend must also have a significant relationship with the real party in interest.").

b. Connecticut has neither adopted *Whitmore*'s second prong nor its *dicta* regarding "significant relationship."

The Trial Court improperly relied upon *Whitmore's* second prong and its *dicta* to hold that a pre-existing "significant relationship" is required to obtain a writ on behalf of a privately-detained individual. (Decision at 7-8) Part One A49-50. But Connecticut courts have never adopted this standing test outside of child custody cases, which necessitated the Trial Court's resort to federal cases alone interpreting *Whitmore*'s second prong and its *dicta*. (Decision at 8) Part One A50.

In Connecticut's first case mentioning *Whitmore*, *Phoebe G. v. Solnit*, 252 Conn. 68, 71-72 (1999), the Supreme Court held that "an action on behalf of a conserved person may be brought by a next friend . . . where there are exceptional circumstances." The Court cited *Whitmore* once for the narrow proposition, unrelated to the second prong or the "significant relationship" *dicta,* that "the general rule is that a next friend may not bring an action for a competent person. *See Whitmore v. Arkansas,* 495 U.S. 149, 166 (1990))." *Id.*

The second case to mention *Whitmore* was *Ross*, 272 Conn. 577 (and its subsequent proceedings[16]), which mirrored the facts of *Whitmore*. Again, in *Ross*, the Court applied just *Whitmore*'s first prong. While the Trial Court cited *Ross* at 599, quoting *Whitmore*, to support its "significant relationship" test (Decision at 9) Part One A51, it is clear that this language in *Ross* was *dicta*, as the only issue in *Ross*, as it had been in *Whitmore,* was the first prong. *Id.* at 599-600. The Court stressed that "one necessary condition for 'next friend' standing in federal court is a showing by the proposed 'next friend' that the real party in interest is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability." *Id.* at 599 n.11 (citing *Whitmore*, at 164-

[16] *See In re Ross*, 272 Conn. 653 (2005); *In re Ross,* 272 Conn. 676, 696-711 (2005).

65), and noted that "[t]his court has adopted *that standard* as a matter of state common law" (citing *Phoebe G. v. Solnit*, 252 Conn. 68, 77 (1999)) (emphasis added).

The Court subsequently considered a writ of error brought by Ross' father and the chief public defender, as putative next friends, challenging the dismissal of their respective habeas petitions on the grounds that they lacked standing. *Ross*, 272 Conn. at 655-56. The Court affirmed. In summarizing its prior opinion, the Court confirmed it had only adopted the first *Whitmore* prong and not the "significant relationship" *dicta* (at 659-60):

> We concluded that the chief public defender had not presented any "meaningful evidence" of incompetence that would have entitled it to an evidentiary hearing. . . . Consequently, we determined that the chief public defender did not have standing as next friend to represent Michael Ross.

Other than *Phoebe G.* and *Ross*, the only Connecticut Supreme Court case to refer to *Whitmore* was *Carrubba v. Moskowitz*, 274 Conn. 533, 549 (2005), where a father, as putative "next friend" of his child, was held to lack standing to sue his child's court-appointed counsel for legal malpractice arising from a marital dissolution action. Rather than relying on *Whitmore*, the Appellate Court found that "the only real test to determine whether a person is a proper or improper person to act as a guardian or next friend for a minor is whether that person's interests are adverse to those of the child." *Carrubba v. Moskowitz*, 81 Conn. App. 382, 402 (2004) (citing *Caron v. Adams*, 33 Conn. App. 673, 682 (1994), *affd*, 274 Conn. 533 (2005) ("because the [father's] interests were adverse to those of [the child], he lacked standing to bring the action . . . as his next friend").

In sum, Connecticut has not adopted *Whitmore's* second prong or its *dicta* regarding a "significant relationship." Many *federal* courts have refused to adopt the "significant relationship" requirement, while the few that have, like *Hamdi*, specify it is inapplicable where the "person" has no "significant relationships."

3. Even if *Whitmore* is applied in its entirety, Plaintiff has standing.

Even if Connecticut adopted the second prong of *Whitmore* and its "significant relationship" *dicta*, the Trial Court's dismissal would be erroneous because NhRP satisfies *Whitmore* in its entirety. The first prong of *Whitmore* is indisputably met because Beulah, Minnie, and Karen are legally incompetent. As to the second prong, the NhRP is undeniably dedicated to the best interests of the elephants. (Petition at ¶ 1) Part One A4. The NhRP has not only set up a trust pursuant to General Statutes §45a-489a for the purpose of their care and maintenance (Petition at ¶ 45) Part One A15, it has arranged for a sanctuary to accept them for the rest of their lives where they will "flourish in an environment that respects their autonomy to the greatest degree possible, as close to their native Asia or Africa as may be found in North America." (Petition at ¶¶ 36, 37, 101-103) Part One A14, 37-38.

Even the federal courts cited by the Trial Court (Decision at 7-8) Part One A49-50, including *Hamdi*, that have adopted the "significant-relationship" *dicta* agree that a "significant relationship" is not necessary: (1) where the real party has no "significant relationships," (2) in "desperate circumstances," or (3) in "extreme cases." As the Ninth Circuit observed in *Bush*, "[n]ot all detainees may have a relative, friend, or even a diplomatic delegation able or willing to act on their behalf." 310 F.3d at 1162. *See Mattis*, 286 F. Supp. 3d at 59 ("Even where no relationship—significant or otherwise—exists, next friend standing may be warranted in extreme circumstances.").

The Trial Court properly recognized that "[t]he court in *Hamdi* indicated that the situation might be different in the case of a detainee that has no significant relationships." (Decision at 8 n.3) Part One A50. It then stated "[t]he petitioner here makes no such allegation, and thus, the court shall not make the allegation for it." *Id.* (citing *Moye v.*

Comm'r of Corr., 315 Conn. 779, 789 (2015)). But the NhRP had no way of knowing it had to make such an allegation because *Whitmore's dicta* is not the law in Connecticut. Nonetheless, the Petition, properly construed, contains such allegations. Reasonably, even necessarily, implied is that these elephants have no "significant relationships" for "next friend" purposes, certainly nothing analogous to a relative or friend who could bring habeas corpus on their behalf. Even if they could have "significant relationships" within the meaning of *Whitmore*, the manner in which they are owned and detained by Defendants precludes them from forming such relationships with humans who can help them.[17]

II. In Deciding Plaintiff Lacked Standing, The Trial Court Erred In Denying Plaintiff's Motion to Amend The Petition To Add The Allegation That Plaintiff Either Had A Significant Relationship With The Elephants Or That The Elephants Had No Significant Relationships.

A. Standard of Review.

"The standard of review applicable to a court's decision to allow or deny leave to amend is abuse of discretion." *Town of Canterbury v. Deojay*, 114 Conn. App. 695, 705 (2009).

B. Discussion.

Because the Trial Court unexpectedly required the NhRP to plead the second prong of *Whitmore* and the "significant relationship" *dicta*, it was wrong to deny the NhRP's Motion for Leave to Amend so as to allow pleading of the necessary facts. (*See* "Second Decision") Part One A61. Connecticut courts "are liberal in allowing amendments, and,

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[17] The NhRP alleged that Defendants own the elephants (Pet. at ¶¶ 4, 5, 6, 46, 50; Part One A5, 15, 16) who are being detained in their custody (Pet. at ¶¶ 7, 9, 43, 45, 46, 47, 50; Part One A5, 15-16), that they are forcibly being used for "entertainment and profit" by Defendants even under fear of physical force from bullhooks (Pet. at ¶ 50; Part One A16), and that their detention constitutes a deprivation of their autonomy (Mem. at 21, 22, Pet. at ¶¶ 43, 50). Their only recourse will always be through strangers.

unless there is sound reason for denying permission to amend, it should be granted." *Bennett v. United Lumber & Supply Co.*, 114 Conn. 614, 617 (1932). "The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." *Cook v. Lawlor*, 139 Conn. 68, 72 (1952). *Accord Mozell v. Comm'r of Corr.*, 147 Conn. App. 748, 753-754 (2014). The Petition was filed on November 13, 2017. Part One A4. The Trial Court denied the Petition on December 26, 2017. Part One A43. The Motion to Amend the Petition was filed on January 16, 2018. Part One A57. There was no unreasonable delay — indeed no delay at all — as Defendants had not even been served and only two months had elapsed since the Petition was filed. Consequently, it was an abuse of the Trial Court's discretion to deny the Motion for Leave to Amend the Petition. This was an especially egregious error in light of the fact that "[t]he writ is not now and never has been a static, narrow, formalistic remedy." *Buster v. Bonzagni*, 1990 WL 272742, *3 (Conn. Super.), *aff'd sub nom. Buster v. Comm'r of Corr.*, 26 Conn. App. 48 (1991) (quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963)).

III. The Trial Court Erred In Dismissing The Habeas Petition On The Alternative Ground That It Was "Wholly Frivolous" Under Practice Book § 23-24 (a)(2).

A. Standard of Review.

The standard of review is plenary. *See* Section 1.A. above.

B. The Petition meets the *Lozada* criteria for not being frivolous.

The standard for determining frivolousness under Practice Book § 23-24 (a)(2) is set forth in *Henry E.S., Sr. v. Hamilton*, 2008 WL 1001969, *5 (Conn. Super.): 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. The NhRP made clear that the Trial Court need not determine that Beulah, Minnie, and Karen *are* "persons" in order to issue the writ, but merely be persuaded, without deciding, that a *possibility exists* that Beulah, Minnie, and Karen *could be* legal persons solely for the purposes of seeking to vindicate their common law right to bodily liberty through common law habeas corpus. (Petition at ¶¶ 26-30) Part One A12-13. There is ample precedent where habeas corpus was used by or on behalf of individuals not recognized as legal persons to secure their bodily liberty and consequently, legal personhood, at least with respect to the right to bodily liberty protected by habeas corpus.

In *Somerset*, 1 Lofft 1, 98 Eng. Rep. 499, which was incorporated into Connecticut common law, *Jackson*, 12 Conn. at 40-42, 53,[18] Lord Mansfield issued the writ on behalf of a detained slave. In *Arabas v. Ivers*, 1 Root 92 (Conn. Super. 1784), the court issued a writ of habeas corpus upon the petition of a slave who claimed he was being unlawfully detained. In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), the court issued a writ on behalf of the Ponca Chief, Standing Bear, over the objection of the United States Attorney that no Native American could ever be a "person" able to obtain habeas corpus. And in *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 908, 917 (N.Y. Sup. Ct. 2015), the court issued a habeas order to show cause on behalf of two chimpanzees and rejected the New York Attorney General's argument that the issuance of the writ "requires an initial, substantive finding that chimpanzees are not entitled to legal personhood for the purpose of obtaining a writ of habeas corpus."

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[18]Connecticut adopted English common law as it existed prior to 1776. *See State v. Courchesne*, 296 Conn. 622, 680 (2010).

By analogy, in *Lebron v. Comm'r of Corr.*, 82 Conn. App. 475, 477-79 (2004), a case of first impression, the petitioner claimed the Superior Court improperly concluded that it lacked subject matter jurisdiction because he was not in "custody." The Superior Court properly issued the writ, conducted a hearing, and then dismissed the case only after the respondent filed a motion to dismiss.

The disjunctive three-criteria test derived from *Lozada v. Deeds*, 498 U.S. 430, 432 (1991) (the "*Lozada* criteria") is used for determining whether claims are frivolous for purposes of a habeas court's denial of certification to appeal. *See Fernandez v. Comm'r of Corr.*, 125 Conn. App. 220, 223-24 (2010). Under *Lozada*, a habeas case is not "frivolous" if: (i) "the issues are debatable among jurists of reason," (ii) "a court could resolve the issues [in a different manner]," *or* (iii) "the questions are adequate to deserve encouragement to proceed further." *Id.* Satisfying any one of these criteria is sufficient to demonstrate that a claim is not frivolous. *Id.*[19] The NhRP satisfies all three criteria.

1. The issues are at least debatable among jurists of reason.

The Petition satisfies the first *Lozada* criteria for six reasons.

First, cases of first impression, such as the case at bar, are *per se* not frivolous. *See Torres v. Comm'r of Corr.*, 175 Conn. App. 460, 468 (2017) ("[t]his court has previously concluded that issues of first impression in Connecticut meet one or more of the three criteria"). Because the issues presented in this case have never been decided by a Connecticut appellate court, this case is necessarily debatable among jurists of reason. *See id.* at 468-69 ("Because the petitioner's second petition presents two issues of first

[19] *See also Simms v. Warden*, 230 Conn. 608, 616 (1994) ("A habeas appeal that satisfies one of the *Lozada* criteria is not frivolous."); *Vanwhy v. Comm'r of Corr*, 121 Conn. App. 1, 6 (2010) ("we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria identified in [*Lozada*]").

impression in Connecticut, we will conduct a full review of the merits of his appeal."); *State v. Obas*, 147 Conn. App. 465, 475 (2014) ("Two issues of law were raised by the state before the trial court, neither of which previously has been decided by the Connecticut Supreme or Appellate Courts. . . . These are questions of law on which our state's court of last resort has not ruled, both debatable among jurists of reason and, both deserving encouragement to proceed further.").[20]

Second, jurists have *already* granted the specific relief the NhRP seeks in other jurisdictions. At least four courts have issued writs of habeas corpus (or their equivalents) on behalf of nonhuman animals, one in New York, two in Argentina, and one in Colombia.[21]

Third, the only opinion from an American high court judge on the issue of whether a nonhuman animal could be a person is the May 8, 2018 concurrence of Judge Fahey in *Tommy*, *supra,* which expressed agreement with the NhRP's arguments that nonhuman

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[20] *See also Bates v. Comm'r of Corr*, 86 Conn. App. 777, 781 (2005) ("This case presents an issue of first impression. . . We [therefore] conclude that this case presents an issue that is debatable among jurists of reason."); *Graham v. Comm'r of Corr.*, 39 Conn. App. 473, 476, *cert. denied*, 235 Conn. 930 (1995).

[21] An order to show cause under the New York habeas corpus statute was issued on behalf of two chimpanzees in *Stanley*, 16 N.Y.S.3d at 917 ("[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" *Id.* at 912). A court in Argentina declared a chimpanzee a "non-human person," then ordered her immediate release from imprisonment in a zoo to a sanctuary in Brazil. *In re Cecilia*, File No. P-72.254/15 (Third Court of Guarantees, November 3, 2016). A writ was issued on behalf of an orangutan named Sandra in Buenos Aires, Argentina. *AFADA v. GCBA, on Amparo*, EXPTE. A2174-2015 (October 21, 2015). And a writ was issued on behalf of a bear named Chucho in Colombia. *Maldonado v. Corp. Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 (July 26, 2017) (overturned but pending further appeal).

animals should no longer be deemed mere "things." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring). Though Judge Fahey thought the case was likely properly dismissed on a procedural point, he disagreed with the lower courts' decisions on the merits, writing separately "to underscore that denial of leave to appeal is not a decision on the merits of petitioner's claims." *Id.* at 1056. Judge Fahey declared: "The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing." *Id.* Judge Fahey added:

> In the interval since we first denied leave to the Nonhuman Rights Project . . . I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now [on a procedural issue], I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a "person," there is no doubt *that it is not merely a thing.*

Id. at 1059 (emphasis added).

Fourth, within weeks of Judge Fahey's concurring opinion, a New York Appellate Division declared in *Graves*, 163 A.D.3d at 21:

> it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals . . . *see also* Matter of Nonhuman Rights Project, Inc. v. Presti, 124 A.D.3d 1334, 1335, *lv. denied* 26 N.Y.3d 901 [2015]). Indeed, the Court of Appeals has written that personhood is "not a question of biological or 'natural' correspondence" (*Byrn v. New York City Health & Hosps. Corp.*, 286 N.E.2d 887 [1972]) (citations omitted).

Fifth, *Graves* cited to a Supreme Court of Oregon's decision, *State v. Fessenden*,

355 Or. 759, 769-70 (2014) that referenced the NhRP's "ongoing litigation" in New York and declared: "As we continue to learn more about the interrelated nature of all life, the day may come when humans perceive less separation between themselves and other living beings than the law now reflects. However, we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still[.]" The Indian Supreme Court has gone even further, holding that nonhuman animals have a statutory and a constitutional right to personhood and certain legal rights.[22]

Sixth, noted scholars of American jurisprudence have submitted *amicus curiae* briefs in favor of the extension of habeas corpus relief for nonhuman animals, including Professor Laurence H. Tribe of Harvard Law School and habeas corpus experts Justin Marceau, of the University of Denver Law School and Samuel Wiseman, of the Florida State University College of Law.[23] *See Tommy*, 31 N.Y. 3d at 1057-58 (Fahey, J., concurring) (finding persuasive the amicus briefs of Tribe, Marceau, and Wiseman). A group of North American moral philosophers submitted an *amicus curiae* brief in support of extending habeas corpus to nonhuman animals.[24] *Id.* ("the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self–initiating intentional, adequately informed actions, free of controlling influences."). The NhRP's cases have captured the interest of the world's leading legal scholars and the most selective academic publications, while catalyzing the development of

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[22] *Animal Welfare Board v. Nagaraja,* 6 SCALE 468 (2014). *See also Bhatt v. Union of India* (High Court Uttarakhand, India, 2018).

[23] *See* https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Right-Project-v.-Presti_Amicus-1-2.pdf; https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonjuman-Rights-Project-v.-Presti_Amici.pdf

[24] *See* https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf.

an entire field of academic research and debate, generating extensive discussion in almost one hundred law review articles, multiple academic books, science journals, and a variety of legal industry publications. (Petition at ¶ 21) Part One A7. The issues raised by the NhRP's habeas cases have also been the subject of thousands of legal commentaries, national and international news articles, radio and television programs, and podcasts.[25]

2. A court could resolve the issues in a different manner.

The Petition independently passes muster under the second *Lozada* criteria. For not only *could* a court resolve the issues in a different manner, they *have*, as set forth above.

3. The questions are adequate to deserve encouragement to proceed further.

"The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching." *Tommy,* 31 N.Y. 3d. at 1059. (Fahey, J., concurring). Especially when those nonhuman animals "are autonomous, intelligent creatures." *Id.* To solve this dilemma, courts "have to recognize its complexity and confront it." *Id. See also Stanley*, 16 N.Y.S.3d at 917 ("Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed."). That judges, academics, and other scholars have long been debating the issues presented in the Petition, alone, evidences that the issues deserve to proceed.

To conclude, as the Trial Court did, that this case is "wholly frivolous", it would have to find that it is impossible, ever, under any circumstances, for any autonomous nonhuman animal to have any legal right under Connecticut law. But that can't be, for the Connecticut pet trust statute *already* confers legal rights upon nonhuman animals. Moreover, the

[25] For example, from March 1, 2017, through September 30, 2017, 2,095 media articles were published on the NhRP's claim that a chimpanzee should have the right to a writ of habeas corpus, *see* https://www.nonhumanrights.org/content/uploads/Media-Coverage-Tommy-Kiko-Appellate-Hearing-Raw-Data.csv (last accessed August 30, 2018).

Petition presents a serious, complex, well-researched claim that is supported by cases from other jurisdictions that have already granted the relief requested, numerous complex and relevant expert opinions, and substantial and broad academic support.

4. The Trial Court misapplied the *Lozada* criteria and erroneously conflated "frivolous" with "novel."

The case at bar turns on whether Beulah, Minnie, and Karen are "persons" solely for the purpose of the common law right to bodily liberty that is protected by the common law of habeas corpus. The common law mandates of liberty and equality, which the NhRP extensively briefed, compel the conclusion that they are. Yet the entirety of the Trial Court's discussion on this was: "The petitioner is unable to point to any authority which has held so, but instead relies on basic *human* rights of freedom and equality, and points to expert averments of similarities between elephants and human beings as evidence that this court must forge new law." (emphasis in original) (Decision at 12) Part One A54. That was beside the point. *See Tommy*, 31 N.Y. 3d at 1057 (Fahey, J., concurring) (the question should not turn on whether the nonhuman animals at issue are able to bear duties and responsibilities like humans, or meet a dictionary definition of "person," "but instead whether he or she has the right to liberty protected by habeas corpus.").

The Trial Court wrongly conflated the NhRP's novel case — which seeks a good faith extension of the common law backed by powerful legal arguments and facts — with a "frivolous" case, which it is clearly not. The mere novelty of the NhRP's claim is insufficient, summarily and without a hearing, to deny Beulah, Minnie, and Karen habeas corpus relief. *See, e.g.*, *United States ex rel. Standing Bear*, 25 F. Cas. at 697 (that no Native American had previously sought habeas corpus relief did not foreclose a Native American from being awarded habeas corpus relief); *Somerset*, 1 Lofft 1, 98 Eng. Rep. 499 (that no slave had

been granted the writ was no obstacle to the court granting one); *see also Lemmon*, 20 N.Y. 562. Rather, the very novelty of the NhRP's claim makes it a more meritorious candidate for a hearing, not less, that necessarily deserves to proceed further. *See, e.g.*, *Little v. Comm'r of Corr.*, 177 Conn. App. 337, 349 (2017); *State v. Obas*, 147 Conn. App. 465, 475 (2014); *Rodriguez v. Comm'r of Corr.*, 131 Conn. App. 336, 347 (2011) ("Because such a question has not yet been addressed by any appellate court of this state, we conclude that the . . . claim raised by the petitioner is adequate to deserve encouragement to proceed further"), *aff'd*, 312 Conn. 345 (2014); *Small v. Comm'r of Corr.*, 98 Conn. App. 389, 391-2 (2006) ("No appellate case has decided those precise issues . . . The questions, therefore, . . . deserved encouragement to proceed further").

No case has been brought in Connecticut seeking habeas corpus relief for any nonhuman animal, let alone an autonomous being such as an elephant, and the Trial Court offered no persuasive reason why the principles underlying the Connecticut cases concerning human petitioners cannot and should not extend to the case at bar.

The Trial Court's failure to distinguish between a "novel" claim and a "frivolous" claim saps "[t]he vitality of our common law system (which) is dependent upon the freedom of attorneys to pursue novel, although potentially unsuccessful, legal theories." *Falls Church Grp., Ltd. v. Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 104 (2007) (citation omitted). This is why the Connecticut Rules of Professional Conduct 3.1 specifies that a "good faith argument for an extension, modification or reversal of existing law" is "*not frivolous*" (emphasis added). These rules and precedents support the "strong public policy in Connecticut against deterring attorneys from pursuing causes of action that may have a

very low likelihood of success or advocating for changes in the law." *Ogren v. Lassen*, 2013 WL 6916695, *11 (Conn. Super.).

With respect to the Trial Court's statement that the NhRP's argument should be rejected solely because it relies on "*human*" rights (emphasis in original), the NhRP reminded the court that black people, Native Americans, Chinese, and other nonwhites attained their legal rights by building upon "white" rights, that women attained their legal rights by building upon "male" rights, and that gays and lesbians attained their legal rights by building upon "heterosexual" rights. (Petition at ¶¶ 27, 28, 29) Part One A12-13; (Memorandum at 5, 16-17). Every existing Connecticut common law rule once did not exist and was created through a lawsuit that sought to extend existing common law.[26]

The core of the NhRP's common law argument, novel to Connecticut but not elsewhere, is this: 1) autonomy is a sufficient, though not a necessary, condition for common law personhood for the purposes of securing the right to bodily liberty protected by common law habeas corpus; 2) four Expert Scientific Affidavits from five of the world's

[26] *See, e.g., Craig v. Driscoll*, 262 Conn. 312 (2003) (recognizing common law cause of action for negligent infliction of emotional distress on a bystander against purveyor of alcohol, even where Legislature had purportedly occupied the field by operation of Dram Shop Act); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 127 (1982) (recognizing common law cause of action for invasion of privacy and citing *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980) for the premise that "the common law is not static, but is a dynamic and growing thing and its rules arise from the application of reason to the changing conditions of society."); *Simon v. Mullin*, 34 Conn. Supp. 139 (1977) (recognizing cause of action for prenatal injuries regardless of viability of fetus when child is subsequently born alive); *See also In re Hall*, 50 Conn. 131, 132-33 (1882).

greatest elephant cognition experts prove that elephants are extraordinarily cognitively complex and autonomous beings,[27] *see Tommy*, 31 N.Y. 3d, at 1058 (Fahey, J., concurring) ("the amici philosophers with expertise in animal ethics ... draw our attention to recent evidence that chimpanzees demonstrate autonomy by self–initiating intentional, adequately informed actions, free of controlling influences."); and 3) elephants are therefore entitled to the common law right to bodily liberty that is protected by the common law writ of habeas corpus both as a matter of common law liberty and equality. (Memorandum at 13-20). *See id.* (agreeing autonomy should be a sufficient condition for personhood).

Habeas corpus is "the great writ of liberty" that protects all natural "persons" from unlawful detention, whether public or private. *Lozada v. Warden*, 223 Conn. 834, 840 (1992) (private detention). "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail." *Gonzalez v. Comm'r of Corr.*, 308 Conn. 463, 483-84 (2013). The elephants are entitled to the Great Writ as a matter of common law liberty because the writ of habeas corpus "is deeply rooted in our cherished ideas of individual autonomy and free choice." *Stanley*, 16 N.Y.S.3d at 903-04 (citations omitted). A deprivation of the bodily liberty of an autonomous being is a deprivation of self-determination. *See, e.g.*, *State v. Connor*, 292 Conn. 483, 516 (2009); *Sherwood v. Danbury Hospital*, 278 Conn. 163, 180 (2006) (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) ("'[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.'")). This "fundamental legal tradition of self-determination prevails throughout the United States." *McConnell v. Beverly*

[27] Bates & Byrne Aff. ¶30, ¶34, ¶37, ¶47, ¶50, ¶60; McComb Aff. ¶24, ¶31, ¶41, ¶44, ¶54; Poole Aff. ¶22, ¶26, ¶29, ¶39, ¶42, ¶55; Moss Aff. ¶18, ¶22, ¶25, ¶35, ¶38, ¶48. All expert affidavits are attached to the Petition and are part of the record below.

Enterprises–Connecticut, Inc., 209 Conn. 692, 701 (1989).

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

Stamford Hospital v. Vega, 236 Conn. 646, 664 (1996). "The right to one's person may be said to be a right of complete immunity: to be let alone." *Botsford*, 141 U.S. at 251 (quoting *Cooley on Torts* 29). Connecticut common law so supremely values the autonomy whose protection lies at the heart of habeas corpus that it permits competent adults to decline life-saving treatment. *Vega*, 236 Conn. at 665-66; *McConnell*, 209 Conn. at 701. Even the permanently comatose possess common law autonomy equal to the competent. *Foody v. Manchester Mem'l Hosp.*, 40 Conn. Supp. 127, 132-33 (1984) (recognizing the common law right to self-determination and noting that "[t]he courts have recognized the right of a guardian of the person to vicariously assert the right of an incompetent or unconscious ward to accept or deny medical care.") (Citations omitted). To "deny the exercise because the patient is unconscious or incompetent would be to deny the right. . . . It is incumbent upon the state to afford an incompetent the same panoply of rights and choices it recognizes in competent persons." *Id.* (citing *Superintendent of Belchertown State Sch. v. Saikewicz*, 373 Mass. 728 (1977)).[28]

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

Consequently, autonomy is a sufficient condition for possessing the common law right to bodily liberty protected by common law habeas corpus as a matter of *liberty*. *See Tommy*, 31 N.Y. 3d at 1058 (Fahey, J., concurring) (the answer to whether a nonhuman animal has "the right to liberty protected by habeas corpus" depends primarily "on our assessment of the intrinsic nature of chimpanzees as a species."). *See also id.* ("an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do" should "have the right to the protection of the law against arbitrary cruelties and enforced detentions"). A "'moral patient' who can be wronged" should at least "have the right to redress wrongs." *Id.*[29] These autonomous elephants are wronged through the inability to exercise their autonomy. They should possess, at minimum, the right to protect that autonomy through the common law of habeas corpus.

The elephants are also entitled to the Great Writ as a matter of common law equality. To deny such autonomous beings all rights across the board merely because they are not human violates fundamental and common law equality. In determining whether the common law classification of Beulah, Minnie, and Karen as "things" must change as a matter of public policy, the Court must be mindful of the fact that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135, 261 (2008) (citation omitted). *See also id.* at 262 ("Like these once prevalent views, our

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[29] "Moral agents can act wrongly or rightly in ways that affect moral patients, but moral patients cannot act reciprocally toward moral agents. Contemporary environmental ethics claims that the scope of moral patients should not only include marginal human beings, but also sentient animals, and even the whole biocommunity," *The Blackwell Dictionary of Western Philosophy* (Nicholas Bunnin and Jiyuan Yu, eds. 2004), available at: http://www.blackwellreference.com/public/tocnode?id=g9781405106795_chunk_g978140510679514_ss1-188 (last accessed on July 7, 2018).

conventional understanding of marriage must yield to a more contemporary appreciation of the rights entitled to constitutional protection.").

Equality is also enshrined in Connecticut common law, statutory law, and constitutional law.[30] *See, e.g., Quinnipiac Council, Boy Scouts of Am., Inc. v. Comm'n on Human Rights & Opportunities*, 204 Conn. 287, 296 (1987); *Bilton Mach. Tool Co. v. United Illuminating Co.*, 110 Conn. 417, 425-26, 430 (1930); *Turner v. Connecticut Co.*, 91 Conn. 692, 697-98 (1917). "[T]here exists a general public policy in this state to eliminate all forms of invidious discrimination[.]" *Thibodeau v. Design Grp. One Architects, LLC*, 260 Conn. 691, 706 (2002).[31]

As "Connecticut has not historically drawn hard lines of separation between constitutional, statutory and common law precepts," *State v. Joyner*, 225 Conn. 450, 467-68 (1993), constitutional equal protection analysis can be utilized to evaluate novel common law equality claims. *See* E. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 261 (1989); Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 730 (1992) (common law is "viewed as a principle safeguard

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

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

against infringement of individual rights" *and* is a "two-way street" between common law decision-making and constitutional decision-making that has resulted in a "common law decision making infused with constitutional values."); *Joyner*, 225 Conn. at 467-68 ("Contrary to our federal constitutional heritage, our constitutional tradition in Connecticut has not historically drawn hard lines of separation between constitutional, statutory and common law precepts.").[32]

Traditional equal protection analysis looks to: (1) whether a classification treats one group differently from others similarly situated; (2) the purpose of the classification and its legitimacy; and (3) the fit between the classification and the purpose. *Kerrigan*, 289 Conn. at 157-58. A court can eschew this tripartite analysis when, as here, a classification uses a single trait to deny a class protection across the board. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (holding Colorado's "Amendment 2 confounds this normal process of judicial review" because it was "at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence."). *Romer* found that Amendment 2's repeal of all existing anti-discrimination law based upon sexual orientation was so "obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values" and "defies" conventional equal protection analysis. *Equal. Found. v. City of Cincinnati*, 128

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

F.3d 289, 297 (6th Cir. 1997) (citing *Romer*).[33] Thus, the "Court directed that the ordinary three-part equal protection query was rendered irrelevant." *Id.*

As things, Beulah, Minnie, and Karen are "denie[d] . . . protection across the board." *Romer*, 517 U.S. at 632-33. As in *Romer*, the breadth of the classification of all nonhuman animals, "across the board", as "things," is "so far removed" from any legitimate state interest that it would be "impossible to credit them." 517 U.S. at 635. Judge Fahey recognized the "arbitrary" nature of denying autonomous nonhuman animals rights based solely on their status as nonhumans, noting that the "Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on *nothing more than the premise that a chimpanzee is not a member of the human species*." *Tommy*, 31 N.Y. 3d at 1057 (emphasis added). Accordingly, Beulah, Minnie, and Karen's common law classification as "things" is so arbitrary that it contravenes fundamental equality.

Applying the traditional tripartite analysis reaches the same conclusion. Under the first part, the relevant question is "whether they are similarly situated for the purposes of the law challenged." *Kerrigan*, 289 Conn. at 157-58. The relevant characteristic is the autonomy that habeas corpus protects. *See Stanley*, 16 N.Y.S.3d at 903-04; *Tommy*, 31 N.Y. 3d, at 1058 (Fahey, J., concurring). Because the Expert Scientific Affidavits demonstrate that Beulah, Minnie, and Karen are autonomous and their interest in exercising their autonomy is as fundamental to them as it is to us (Footnote 27, *supra*), they are similarly situated to human beings for the purpose of habeas corpus. *Id.* (autonomous

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[33] *See also Goodridge v. Dep't of Public Health*, 440 Mass. 309, 330, 333 (2003) (legislature could not refuse same-sex couples right to marry based on procreation grounds, as it "singles out the one unbridgeable difference between same-sex and opposite sex couples, and transforms that difference into the essence of legal marriage.").

nonhuman animals are *at least* similarly situated to "human infants or comatose human adults"). Even humans who have always, and will always, lack the ability to choose, to understand, or make a reasoned decision about, for example, medical treatment, possess the common law right to bodily liberty. *See id.* ("no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child . . . or a parent suffering from dementia"); *see also Foody*, 40 Conn. Supp. at 132-33 ("The courts have recognized the right of a guardian of the person to vicariously assert the right of an incompetent or unconscious ward to accept or deny medical care.").[34] As humans bereft of consciousness are deemed "persons" entitled to seek the remedy of habeas corpus to protect their bodily liberty, the Court must either recognize an elephant's equal right to bodily liberty or reject the principle of equality. The Trial Court erroneously chose the latter.

The second step evaluates the legitimacy of the classification's purpose. Connecticut simply has no *legitimate* interest in permitting an autonomous being to be privately detained against her will. The legal thinghood of all nonhuman animals for all purposes has become a dangerous anachronism. *See Tommy*, 31 N.Y. 3d, at 1059 (Fahey, J., concurring); *Fessenden*, 355 Or. at 769-70.[35] While once all nonhuman animals were thought unable to think, believe, remember, reason, and experience emotion, Richard Sorabji, *Animal Minds & Human Morals – The Origins of the Western Debate* 1-96 (1993), today, the Expert Scientific Affidavits confirm elephants' complex cognitive abilities — most

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

[35] *See also Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1683 (2017) (invalidating statutes that "date from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are" and are "stunningly anachronistic").

especially autonomy — and expose those ancient, pre-Darwinian prejudices as false. Judge Fahey recognized the illegitimacy of the common law classification of chimpanzees as "things" when he wrote: "To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others." *Tommy*, N.Y. 3d, at 1058 (concurring). He found such a position at odds with uncontroverted evidence that reveals "a chimpanzee is an individual with inherent value who has the right to be treated with respect." *Id.* The evidence for elephants is just as compelling. (Petition at ¶¶ 55-100) Part One A17-37.

The third part of the equality analysis looks to whether the fit between the classification and the legitimate purpose is rationally related. But in the case at bar, this step "is unnecessary and not feasible", as there is "no concrete problem" or legitimate interest to try to fit. *Awad v. Ziriax*, 670 F.3d 1111, 1130-31 (10th Cir. 2012). *See also State v. Dyous*, 307 Conn. 299, 317 (2012).

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

Laurence H. Tribe, *American Constitutional Law* 1440 (2nd ed. 1988). There is no rational connection between the sole trait justifying the detention of Beulah, Minnie, and Karen — not being human — and the right to bodily liberty protected by habeas corpus for which the relevant trait is *autonomy*.

In sum, the Trial Court gravely erred in finding the Petition "wholly frivolous." Not only are the issues the NhRP raised debatable among jurists of reason, but jurists of

reason have already granted such relief in other jurisdictions. Not only could a court resolve the issues in a different manner, but they have. Not only are the legal questions presented adequate to deserve encouragement to proceed further, but numerous legal academics and writers have long debated them. There is not just a possibility of victory in Connecticut based on fundamental common law concepts of liberty and equality, but a probability. It is a legal *non sequitor* for a Connecticut court to rule that a serious, complex, well-researched, well-written, scholarly Petition and Memorandum that are grounded in numerous complex and relevant expert opinions, that possess substantial and broad academic support, that cite other jurisdictions that have already granted the relief requested, and expressly state that the claim is being brought in good faith seeking to extend the common law, could be categorized as "frivolous." With respect, this was error.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

The Trial Court erred in dismissing the Petition on the grounds that the NhRP lacked standing and, in the alternative, that the Petition was "wholly frivolous" on its face. All three requirements of Practice Book § 23-24 are met. This Court should reverse the Trial Court's Decision and remand with instructions for the court to issue the writ and proceed according to the Practice Book. Alternatively, the NhRP should be granted leave to amend its petition.

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CERTIFICATION

I hereby certify that: copies of the foregoing brief and appendix have been delivered electronically to the last known e-mail address of each counsel of record and the non-appearing defendants for whom an e-mail address has been provided on this 24th day of September, 2018; I have included counsel's names, mailing addresses, e-mail addresses, and telephone and facsimile numbers below; copies of the foregoing brief and appendix have been sent by first-class U.S. mail, postage prepaid to the trial judge listed below on this 24th day of September, 2018; the foregoing brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and the foregoing brief and appendix comply with all applicable rules of appellate procedure, including Practice Book Section 67-2.

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