Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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S281614

August 31, 2023

The Honorable Jorge E. Navarrete
Clerk and Executive Officer
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Letter of Amici Curiae, Jewish Scholars, Supporting Verified Petition for a Common Law Writ of Habeas Corpus and Issuance of an Order to Show Cause in *In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus* (No. S281614)

Dear Mr. Navarette:

Pursuant to California Rules of Court, rule 8.500(g), the undersigned Jewish scholars submit this letter in support of the Verified Petition for a Common Law Writ of Habeas Corpus in the above-captioned case. Please transmit this letter to the justices for their consideration.

As set forth below, the undersigned Jewish scholars believe that Petitioner Nonhuman Rights Project, Inc. ("NhRP") has made a prima facie case that Nolwazi, Amahle, and Mabu—three African savanna elephants confined at the Fresno Chaffee Zoo—are entitled to habeas corpus relief. We draw from the rich tradition of Jewish thought and ethics to challenge the notion that membership in the human species is the critical factor for deserving protection from cruelty, and that highly intelligent, autonomous creatures like Nolwazi, Amahle, and Mabu are merely things for human use. Moreover, we believe that where there is abundant evidence of animal suffering in confinement, without any overriding human benefit, courts have a duty to relieve that suffering through the common law writ of habeas corpus. Accordingly, we respectfully urge the Court to issue an order to show cause in this matter.

INTEREST OF AMICI CURIAE

We the undersigned submit this letter as Jewish studies scholars and rabbis with broad expertise in Jewish traditions—including biblical studies, the study of rabbinic texts, Jewish thought and theology, Jewish ethics, animal ethics, bioethics, and more—in support of the NhRP's efforts to see Nolwazi, Amahle, and Mabu released from their present confinement at the Fresno Chaffee Zoo and transferred to an accredited elephant sanctuary, pursuant to habeas corpus. The undersigned have long-standing, active interests in animals, in human duties to them, and in the way that ethical stances towards animals are a constitutive part of any system of ethics and justice.

In a previous case brought by the NhRP, Justice Allison Y. Tuitt recognized, on the basis of uncontroverted scientific evidence, that an elephant is "an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." *The Nonhuman Rights Project, Inc. v. Breheny* (2020) WL 1670735 at *10 (hereafter *Breheny Trial Court*). On appeal before New York's highest court, Judge Rowan Wilson and Judge Jenny Rivera seriously considered the ample scientific evidence submitted in support of NhRP's petition and would have extended habeas corpus protections to that elephant. *Nonhuman Rights Project, Inc. v. Breheny* (2022) 38 N.Y.3d 555, 577 (hereafter *Breheny*) (Wilson, J., dissenting); *id.* at 626 (Rivera, J., dissenting).

For the Court to maintain that Nolwazi, Amahle, and Mabu are somehow simultaneously things would be, per Judge Eugene Fahey in his concurring opinion on another prior case brought by the NhRP, a "manifest injustice." *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery* (2018) 31 N.Y.3d 1054, 1059 (Fahey, J., concurring) (hereafter *Tommy*). Such incoherence and injustice in the legal system threatens not only our ability to treat nonhuman animals justly, but the ethical basis of the law itself. For the Court to establish that autonomous, intelligent beings like Nolwazi, Amahle, and Mabu can be treated as things with impunity is a precedent that concerns us not only for the sake of animals, but for the sake of humanity.

ARGUMENT

A. Introduction

In our view, the essential challenge before the Court in Nolwazi, Amahle, and Mabu's case is how to manage changing social values about our relationship with the nonhuman world in general, and other animals with significant similarities to humans in particular. Before the Court is not only a question of animal ethics, but a question about how important animal ethics should be—about how much our human obligations to animals should drive legal innovation. We therefore wish to emphasize first and foremost the extent to which Jewish traditions provide strong warrant for legal innovation on the basis of (changed) human moral intuitions about the suffering of other animals. As we will explain, Jewish traditions have long seen the question of our treatment of animals as a kind of ultimate concern; it is therefore appropriate that changing attitudes towards animals are ramifying in new legal understandings, like new understandings of the scope of habeas corpus.

In addition, we also note that American Jews, like Americans in general, are showing more concern for animals than ever before. If the Court does not address the issues that the NhRP is raising and continues to treat social mammals like elephants as things, it risks undermining its claims to legal integrity and moral authority.

Finally, we note that Jewish traditions have long argued that how human individuals are allowed by the law to treat animals can have important effects on how they treat other

human beings. To acknowledge a being's emotional life, intelligence, and autonomy, and then to designate that being the legal equivalent of an inanimate object is not just incoherent, but a threat to justice.

B. Nolwazi, Amahle, and Mabu suffer greatly from their confinement at the Fresno Chaffee Zoo.

Nolwazi, Amahle, and Mabu are subjected to relentless physical and psychological stress from the conditions they are forced to endure at the Fresno Chaffee Zoo. Petition exhibits XIII and XV: Declaration of Bob Jacobs ("Jacobs Decl.") ¶¶ 19-21; Declaration of Keith Lindsay ("Lindsay Decl.") ¶¶ 56-77. The size of the elephants' enclosure severely deprives them of movement and exercise. While they would ordinarily roam for approximately 8-10 kilometers every day in the wild, if not more, the Fresno elephants spend at least half of each day in a noisy concrete barn without views to the outside, and when allowed outside, are unable to walk more than 100 yards in any direction. Lindsay Decl. ¶¶ 60-63, 69, 75; Jacobs Decl. ¶ 21 (c) and (d). They cannot exercise their "deep degree of autonomy, sentience, and judgment," or engage in unique elephant behaviors that have evolved over millennia, such as migration, exploring, foraging, and living in complex family structures. Lindsay Decl. ¶¶ 34, 66; Jacobs Decl. ¶ 21 (a)-(e), (g). In their artificial, urban enclosure, the elephants' exhibit provides virtually no stimulation for their highly intelligent brains, forcing them to spend their lives in abject boredom, engaging in the same rote behaviors every day. Lindsay Decl. ¶¶ 70, 75; Jacobs Decl. ¶ 21(a), (c) and (g). The elephants also endure constant auditory bombardment from the nearby roads, highways, and trains, and even a nightclub across the street—sounds which elephants find greatly disturbing. Lindsay Decl. ¶¶ 58-59, 60, 70, 75; Jacobs Decl. ¶ 21(f). Additionally, Zoo officials put the elephants on display and make them perform for crowds of visitors, an "undoubtedly disturbing" and "undeniably cruel" practice. Lindsay Decl. ¶ 70; Jacobs Decl. ¶ 19.[1]

Accordingly, Nolwazi, Amahle, and Mabu's great suffering is undeniable. After years of confinement at the Fresno Chaffee Zoo, Nolwazi and Amahle now exhibit repetitive, purposeless behaviors never seen in the wild called "stereotypies"—observable signs of brain damage. Lindsay Decl. ¶ 68; Jacobs Decl. ¶ 21(h). The elephants have been forced to endure their relentlessly inhumane confinement (which is akin to the confinement experienced by the worst human prisoners) simply because they are elephants, and no court has yet given them legal status higher than that of an inanimate object.

C. Obligations to nonhuman animals are a foundational ethical issue sufficiently serious to merit challenges to previous interpretations of habeas corpus.

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[1] The Zoo's dismal record of elephant illnesses and deaths from diseases of captivity is a further indictment of the environment there for elephants. Lindsay Decl. ¶¶ 50-55; Jacobs Decl. ¶ 21(a).

The issue before the Court cuts to the very foundations of our civil society and legal institutions. In the words of Judge Fahey, "The issue of 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." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J. concurring). Ultimately, we cannot ignore it, but the courts are doing a fairly good job of ignoring it for the moment. We urge the Court to avoid the trap of evading ultimate issues, for we ignore them at great cost. The famous twentieth-century Jewish thinker, Rabbi Abraham Joshua Heschel, wrote in an essay on the interdependence of the world's religious traditions, "No Religion is an Island," that "[t]he supreme issue is today not the *halacha* [law] for the Jew or the Church for the Christian—but the premise underlying both religions." Similarly, at stake in this case is a basic premise of our legal system. Will the Court attempt to engage or evade the fundamental legal question of our duties to nonhuman animals, or at least autonomous, emotional, and intelligent ones? We urge the Court address this issue.

Part of the weightiness of Nolwazi, Amahle, and Mabu's case is that the Court is being asked to challenge earlier thinking that did not envision applying habeas corpus to nonhumans. The question arises of whether the obligations of humans to prevent nonhuman suffering is sufficiently fundamental a moral-legal issue to challenge other values and precedents. We urge that it is.

Jewish traditions, despite their diversity of conclusions about the nature of our obligations to animals, have almost always argued that the primary Jewish legal principle that teaches compassion for animals, known as *tzaar baalei chayim* (literally "the suffering of living beings"), is a "Torah law" rather than a "rabbinic law"—which is to say that it is a principle established in the most authoritative strata of Jewish law. If a particular concern has the status of a Torah law then it trumps any concern with lesser status (for example, the laws enacted by the rabbis). What this means is that one of the only positions about animals that ancient and subsequent Jewish traditions have generally agreed upon is that how we treat animals is a matter of ultimate importance, a direct concern of God. It is certainly, therefore, sufficient to drive consequential changes in the details of how the writ of habeas corpus is applied.

Several judges in similar cases have expressed sympathy with the goals of the NhRP but failed to rule in their favor, with one indicating that they have felt "bound by precedent." *Breheny Trial Court*, 2020 WL 1670735 at *10. This has amounted to a failure to ethically confront the issue the NhRP is trying to raise in the courts. As Judge Fahey observed in his concurring opinion, "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?" *Tommy*, 31 N.Y.3d at 1056 (Fahey, J., concurring). "This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Id*. at 1058.

Given the current state of scientific and social understanding of elephants, and our knowledge of Nolwazi, Amahle, and Mabu as individuals, it is rather obvious they are not things. Things do not have emotions, intelligence, and autonomy; things do not suffer. The Jewish legal-ethical principle of *tzaar baalei chayim* prohibits humans from causing *tzaar* (suffering) to *baalei chayim* (any being possessing life) unless there is some kind of human necessity. Nolwazi, Amahle, and Mabu's case is, for the undersigned, an uncomplicated case of suffering being inflicted without justification. It is the Court's obligation to provide a remedy through habeas corpus.

D. Jewish Americans, like Americans in general, have been expressing greater concern for animals than in the past, and these changed values warrant greater legal protections for animals.

Jewish traditions past and present are united in agreeing that the law requires nonhuman animals be protected from suffering unless there is some overriding human benefit. In different times and places Jews have applied this legal protection differently. In the context of the contemporary U.S., Nolwazi, Amahle, and Mabu's case, in the view of the undersigned, is exceptionally simple as there is both abundant scientific testimony to great suffering and no persuasive argument that human interests are compromised by remedying their situation through habeas corpus. The barrier to remedying the elephants' situation is simply the fact that habeas corpus has previously only been applied to members of the species homo sapiens. Jewish law does not stress species membership as the crucial criteria for deserving protection from cruelty. As the experts' testimony has established the extent of the elephants' suffering and the remedy to it (release to a sanctuary), Jewish ethical principles as understood by the undersigned scholars would mitigate in favor of remedying the elephants' situation. While individual Jewish persons or institutions may of course draw different conclusions, in our expert opinion, not only do Jewish ethical reasonings favor releasing Nolwazi, Amahle, and Mabu to a sanctuary, but this is a conclusion that most Jewish American individuals would support were the Court to adopt it.

Without suggesting the Court should use any particular legal reasoning, we believe that the Court has a duty to bring the law in line with our current social and scientific understanding of the lives of animals, which would include the right of liberty for Nolwazi, Amahle, and Mabu. As Judge Wilson noted in *Breheny*, "What was unknown about animal cognizance and sentience a century ago is particularly relevant to whether [the elephant] Happy should be able to test her confinement by way of habeas corpus, because we now have information suggesting that her confinement may be cruel and unsuited to her well-being." *Breheny*, 38 N.Y.3d at 607 (Wilson, J., dissenting). As in *Breheny*, relevant scientific expertise has made abundantly clear that the elephants' confinement at the Fresno Chaffee Zoo is incompatible with their basic health and thriving, and that releasing them to an animal sanctuary would remedy this situation. Lindsay Decl. ¶¶ 56-77; Jacobs Decl. ¶¶ 20, 21.

Whatever human interest may be claimed to exist in continuing the elephants' confinement does not supersede the duty to relieve their suffering. Though the Fresno Chaffee Zoo, like some other zoos, has attempted to present the exhibition of elephants as aligned with educational efforts, these claims are doubtful and contradicted by several studies. For example, one study of 206 zoos that analyzed more than 6,000 statements by zoo visitors noted that: "In all the statements collected, no one volunteered information that would lead us to believe that they had an intention to advocate for protection of the animal or an intention to change their own behavior" (as quoted in a New York Times opinion piece, https://www.nytimes.com/2021/06/11/opinion/zoos-animal-cruelty.html; full study available here: https://onlinelibrary.wiley.com/doi/epdf/10.1002/zoo.20186). Moreover, the undersigned doubt that any prosocial learning could be associated with witnessing Nolwazi, Amahle, and Mabu's confinement in particular; seeing intelligent, social mammals confined in circumstances that a clear scientific consensus suggests are harmful to the animals' wellbeing is not educational. With no compelling human interests that could justify the elephants' confinement as a "necessity," Jewish ethics would seem to require their release to a sanctuary.

We also note that despite the massive diversity of Jewish views towards animal life, this much is clear: the direction of concern is increasing. This is reflected in society at large but easily witnessed in the Jewish context in terms of increased community programming on issues related to animal protection, the formation of new organizations specifically addressing animal protection from a Jewish perspective, time given to animal ethics at Jewish ethics conferences, and an expansion of Jewish publication about animal ethics. The ancient Rabbis required us to respect and to celebrate the differences between ourselves, elephants, and all animals: "The Sages taught: One who sees an elephant, monkey, or owl says, 'Blessed [are you, Lord] who makes creatures different" (Talmud, Berachot 58b). We urge the Court to bring the law closer in line with the commonsense understanding that beings that possess emotion, intelligence, and autonomy, as established by the expert testimony, also deserve liberty.

E. Failing to remedy Nolwazi, Amahle, and Mabu's confinement threatens the moral foundation of the legal system and ethics more generally. Allowing emotional, intelligent, and autonomous beings to be treated by the Court as things is ethically dangerous.

Longstanding Jewish traditions have consistently argued that violence to animals can be problematic not only because of a potential violation of the law and principle of *tzaar baalei chayim,* but because of the potential harm that participating in violence can pose to humans' ability to act with sensitivity and compassion. Thus, for example, rabbinic texts for the training of *schochtim* (individuals trained in the practice of traditional Jewish animal slaughter) warn of the importance of finding a morally upstanding individual lest the inherent involvement in causing suffering that is essential to the profession lead to

insensitivity to even human misery. This reasonable concern is quite intelligible to contemporary Jews and no less an expert in animal welfare than Dr. Temple Grandin (Colorado State University) has argued that still today the problem of sadistic personalities finding their way into slaughterhouse work remains a real concern that managers need to guard against. The deeper Jewish principle we invoke here is a sentiment that allowing cruelty to animals is not only a wrong to them, to the animals, but a threat to our own compassion, to a treasured aspect of our humanity.

Judge Wilson and Judge Rivera echoed this principle in their *Breheny* dissents. Judge Rivera wrote, "[w]e are here presented with an opportunity to *affirm our own humanity* by committing ourselves to the promise of freedom for a living being with the characteristics displayed by Happy." *Breheny*, 38 N.Y.3d at 628 (Rivera, J., dissenting) (emphasis added). She recognized that Happy's captivity is not only "inherently unjust and inhumane," but "an affront to a civilized society." *Id.* at 642 (Rivera, J., dissenting). Judge Wilson observed that "the rights we confer on others define who we are as a society," and denying rights to intelligent, autonomous animals "denies and denigrates the human capacity for understanding, empathy and compassion." *Id.* at 626 (Wilson, J., dissenting).

This case presents the question: will the law be used to justify subjecting Nolwazi, Amahle, and Mabu to inescapable suffering, or will it affirm their innate dignity, and ours? For the Court to acknowledge that Nolwazi, Amahle, and Mabu are emotional, intelligent, and autonomous beings and then functionally put them in the legal category of "thing" would threaten the law with incoherence and absurdity. We urge the Court to hear both the simple call for justice in the NhRP's arguments to release Nolwazi, Amahle, and Mabu to a sanctuary and to recognize that expanding the application of habeas corpus is essential to preserving the moral coherence of the law. For if the law truly owes not even the foundational protection of habeas corpus to beings acknowledged to possess rich emotional lives, intelligence that is similar to humans, and autonomy, the law has abandoned a fundamental commitment to justice.

CONCLUSION

The undersigned Jewish scholars believe the NhRP has made a prima facie case for habeas corpus relief and respectfully urge this Court to issue an order to show cause.

Respectfully submitted,

Amici Curiae Signatories (institutional affiliations are included for identification purposes only)

Dr. Beth Berkowitz

Professor, Ingeborg Rennert Chair of Jewish Studies, Barnard College, Columbia University
/s/ Beth Berkowitz

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/s/ Jonathan Brumberg-Kraus

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/s/ Sarah Imhoff

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/s/ Adrienne Krone

PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 811 Wilshire Blvd, Ste. 900, Los Angeles, CA 90017. On **August 31, 2023,** I served **Letter of Amici Curiae, Jewish Scholars, Supporting Verified Petition for a Common Law Writ of Habeas Corpus and Issuance of an Order to Show Cause in In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus (No. S281614)** on the interested parties in this action by electronic service pursuant to CRC Rule 2.251. Based on the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic addresses listed below for each party.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 31, 2023, at Los Angeles, California.

Jonathan Redford
[Printed Name]

/s/ Jonathan Redford
Signature