

## S281614

September 5, 2023

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

Re: Letter of Amicus Curiae, Peter Singer, Gary Comstock, and Adam Lerner, 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. Navarrete:

Peter Singer, Gary Comstock, and Adam Lerner submit this letter in support of the Verified Petition for a Common Law Writ of Habeas Corpus in the above-captioned matter. Please transmit this letter to the justices for their consideration.

### I. STATEMENT OF INTEREST OF AMICI CURIAE

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

*Amici* present ethical reasons supporting Petitioner Nonhuman Rights Project, Inc.'s ("NhRP") habeas corpus petition for the three elephants—Nolwazi, Amahle, and Mabu—at the Fresno Chaffee Zoo. There are strong philosophical arguments that elephants have a basic interest in exercising autonomy, an interest that should be legally protected just as the human interest in exercising autonomy is legally protected. The elephants at the Fresno Chaffee Zoo cannot exercise their autonomy, i.e., make meaningful choices about what to do, where to go, and whom to meet, for they lack, among other things, sufficient open space

to roam and forage; in natural environments, elephants travel miles each day across a variety of terrains, whereas at the zoo, Nolwazi, Amahle, and Mabu are unable to walk more than 100 yards in any direction (when they are allowed outside and not being confined in a barn). At an elephant sanctuary, with its orders of magnitude of greater space, the elephants would be able to exercise their autonomy even though it is not the same as the wild.

*Amici* respectfully urge this Court to consider these arguments by granting the NhRP's request for an Order to Show Cause.

## **II. SUMMARY OF THE REASONS**

This letter summarizes specifically consequentialist reasons for transferring Nolwazi, Amahle, and Mabu to an elephant sanctuary. First, satisfying the elephants' interests in being at an elephant sanctuary brings far greater value than the value achieved by keeping them confined at the Fresno Chaffee Zoo. Second, the elephants have the capacities sufficient for personhood. Third, all persons have a right to relative liberty insofar as they have interests they can exercise only under conditions of relative liberty. Fourth, individuals need not be human beings to be persons. Fifth, individuals need not be able to assume social obligations and duties to be rights-holders.

These reasons reflect commitments to consequentialist reasoning about moral problems. However, influential representatives of the other dominant ethical traditions—the deontological and Aristotelian traditions—arrive at the same conclusion. It makes no difference, in this instance, which ethical theory one adopts. Under all of them, the elephants in question are persons, they each have an interest in relative liberty, and they are all entitled to habeas corpus protection.

## **III. SOME ANIMALS ARE PERSONS**

In *Nonhuman Rights Project, Inc. v. Breheny* (2022) 38 N.Y.3d 555 (hereafter *Breheny*), those writing for the majority that denied a habeas petition for an elephant made a critical, although understandable, mistake. They held that nonhuman animals cannot be persons because they are not capable of assuming obligations; “legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities,” and “nonhuman animals cannot—neither individually nor collectively—be held legally accountable or required to fulfill obligations imposed by law.” *Id.* at 572 (citations omitted). Their mistake was to accept the social contract model of personhood according to which the rights and responsibilities associated with legal personhood can only be found in human beings.

The mistake is understandable because it has misled many reasonable persons. However, the errors in reasoning it commits must be identified as previous rulings have, unfortunately, relied on its misconceptions.

The mistaken reasoning in *Breheny* first appeared in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* (N.Y. App. Div. 2014) 124 A.D.3d 148 (hereafter *Lavery*), where a New York intermediate appellate court decided against granting habeas corpus for Tommy, a chimpanzee, on the grounds that Tommy could not assume any duties. The court relied on a law review article written by Richard Cupp,<sup>1</sup> who mistakenly asserted that under the social contract, “rights are connected to moral agency and the ability to accept societal responsibility in exchange for rights.”<sup>2</sup> Citing Cupp’s mis-construal of the social contract, *Lavery* asserts:

While petitioner proffers various justifications for affording chimpanzees, such as Tommy, the liberty rights protected by such writ, the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government.<sup>3</sup>

The court further relies on Cupp when it claims that:

Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, “rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights.”<sup>4</sup>

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

*Lavery* and Cupp arrive at these erroneous conclusions because they misunderstand the contractualist tradition they invoke. According to the social contract theorists whose

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<sup>1</sup> *Lavery*, 124 A.D.3d at 151 (citing, *inter alia*, Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from “Marginal” Cases*, 45 Ariz. St. L.J. 1, 12-14 (2013)).

<sup>2</sup> *Children, Chimps, and Rights*, 45 Ariz. St. L.J. at 13.

<sup>3</sup> *Lavery*, 124 at 151 (citations omitted).

<sup>4</sup> *Id.* at 151.

work most strongly influenced the U.S. system of government—Locke<sup>5</sup> and Rousseau<sup>6</sup>—individuals have *natural rights* even *before* they enter into social contracts. They *surrender* some of their rights in order to form stable governments. One cannot surrender what one does not have. It follows that, on the contractualist tradition, people need not enter into an agreement and assume social obligations to have rights.

Nor must they be able to do so. As Judge Eugene Fahey writes, human neonates, like nonhuman animals, cannot bear duties and “yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child.” *Matter of Nonhuman Rights Project, Inc. v. Lavery* (2018) 31 N.Y.3d 1054, 1057 (Fahey, J., concurring). One may be inclined to think that infants have such rights only because they have the *potential* to develop the abilities needed to acquire social obligations. If so, we could explain why infants have rights but Nolwazi, Amahle, and Mabu do not.

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

It is worth pausing a moment here to examine an argument briefly stated in *Lavery*.<sup>7</sup> At the point in which the judgment emphasizes that “Case law has always recognized the correlative rights and duties that attach to legal personhood,” the court, in a footnote, seeks to repudiate the apparent implication that humans who are unable to reciprocate, or carry out any duties at all, therefore must lack legal personhood.<sup>8</sup> The footnote acknowledges, as of course we all must, that some humans are less able to bear legal duties or responsibilities than others. Then it states:

These differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings in the context of habeas corpus proceedings or otherwise.<sup>9</sup>

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<sup>5</sup> John Locke, *Second Treatise of Government* (C. B. Macpherson ed., 1980).

<sup>6</sup> Jean Jacques Rousseau, *The Social Contract and Other Later Political Writings* (Victor Gourevitch ed. and trans., 1997).

<sup>7</sup> See 124 A.D.3d at 152 n.3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

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

Such arguments are not valid. We are familiar with many examples of rights without correlative duties, and these examples cannot be explained by an appeal to the collective abilities of humans. Nor can they be explained, as might also be attempted, by claiming that certain abilities are typical or characteristic of the species. Our treatment of others should be dictated by their own characteristics, not the characteristics of their relatives.<sup>10</sup> Hence we cannot base the legal rights that beings have on their ability to understand and carry out their duties. We should, instead, base the legal rights of different beings on their interests.

Nolwazi, Amahle, and Mabu cannot and, for all we know, do not, have the potential to be able to participate in our conversations about promises and obligations. They cannot reciprocate with us or bear legal duties. However, these facts about them, if they are facts, no more eliminate them from the circle of persons than does the fact that some humans cannot contract, reciprocate, or assume responsibilities. The assertion that individuals must

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<sup>10</sup> Imagine an elephant who, through neuroscientific enhancement, has obtained all of the abilities characteristic of human beings. See the case of the “Superchimp” in Jeff McMahan, *Cognitive Disability, Misfortune, and Justice*, 25 *Philosophy & Pub. Affairs* 13 (1996). If individuals had rights only because they are members of a species that typically or characteristically possess such abilities, then we would be forced to withhold rights from this elephant, because elephants do not typically or characteristically possess these abilities. This is absurd. To avoid this implication, one may endorse a disjunctive view, on which individuals have rights *either* because they have such abilities themselves *or* because they are members of a species whose members typically or characteristically possess such abilities. This disjunctive view faces several problems. First, it is theoretically unmotivated. Again, membership in a species whose members typically or characteristically possess such abilities does not by itself allow one to take on social obligations that, according to Cupp and *Lavery*, grounds one’s possession of rights. Second, this disjunctive view implies that human beings who lack these abilities have rights for a fundamentally different reason than other human beings. This offends against ideals of human equality. Third, we have strong reason to be suspicious of any view that makes the possession of rights depend on group membership. Humans have a long history of defending such group-based views (e.g., racism, sexism), and time has invariably proven these views to be mistaken.

be capable of accepting social duties to be persons is a nonstarter. We reject Cupp's position in unqualified terms and call for an end to this unsound line of reasoning.

#### IV. CONCLUSION

Just as common law courts regularly consider habeas corpus requests for the relief of infants from unlawful custody by family members who are unfit to parent, this Court ought to consider the argument that Nolwazi, Amahle, and Mabhu are in unlawful custody at the Fresno Chaffee Zoo. The reasons—i.e., because current custody arrangements are not in their best interests—are equally strong reasons for thinking that Nolwazi, Amahle, and Mabhu might be entitled to habeas corpus relief. Confinement in the Fresno Chaffee Zoo is not in their best interests. We have argued that the explanation of why infants' interests are protected by the writ of habeas corpus implies that Nolwazi, Amahle, and Mabhu's interests ought to be protected by the writ of habeas corpus. This argument ought to be considered in Court. For this reason, we respectfully urge the Court to accept the NhRP's request for an Order to Show Cause.

Respectfully submitted,

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

/s/ Peter Singer

Peter Singer

Ira W. DeCamp Professor of Bioethics,  
Princeton University

/s/ Gary Comstock

Gary Comstock, Ph.D.

Alumni Distinguished Undergraduate  
Professor of Philosophy, North Carolina  
State University

/s/ Adam Lerner

Adam Lerner, Ph.D.

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**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 **September 5, 2023**, I served **Letter of Amicus Curiae, Peter Singer, Gary Comstock, and Adam Lerner, 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 September 5, 2023, at Los Angeles, California.

Fernando Mercado	/s/ Fernando Mercado
[Printed Name]	Signature