

November 15, 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, Martha C. Nussbaum, 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:

I, Martha C. Nussbaum, submit this letter in support of Petitioner Nonhuman Rights Project, Inc.'s ("NhRP") habeas corpus petition in the above-captioned matter. Please transmit this letter to the justices for their consideration.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

I am the Ernst Freund Distinguished Service Professor of Law and Ethics, appointed in the Law School and Philosophy Department of the University of Chicago. I am the author of numerous works on animal rights and justice, as well as a recipient of the 2016 Kyoto Prize in Arts and Philosophy, the 2018 Berggruen Prize, the 2021 Holberg Prize, and the 2022 Balzan Prize.

Along with Nobel Prize winner Amartya Sen, I developed a method for conceptualizing well-being for both humans and animals deemed the "capabilities approach." My own version of the approach, somewhat different from Sen's, focuses on how any being can survive and thrive in their natural environment, and this was the focus for the award of the Balzan Prize. Accordingly, I have a special interest in guiding the evolution of the capabilities approach and in ensuring that the field of animal law develops with the capabilities of each animal at the forefront of the legal system's understanding of animal lives. I respectfully urge the Court to hear this case by issuing an Order to Show Cause for the elephants Nolwazi, Amahle, and Mabu, currently held at Fresno Chaffee Zoo.

II. SUMMARY OF THE ARGUMENT

The law requires reformation to protect our modern scientific and philosophical understanding that many animals can live their own meaningful lives, and the Court should reform the law in this case. Modern science demonstrates that elephants are complex beings that can form a conception of the self, as well as strong social and emotional bonds among themselves and others. Modern science also shows that elephants need space, variety, and the availability of choice in their environment to exercise their autonomy and high degree of sentience. Based on this science, we know that the impoverished environment at Fresno Chaffee

Zoo harms Nolwazi, Amahle, and Mabu in both physical and intangible ways.

The proper framework for animal rights is the capabilities approach, which asks how the law can help animals like Nolwazi, Amahle, and Mabu not only live but thrive. This letter explains the legal and moral imperative to release Nolwazi, Amahle, and Mabu from a life of zoo captivity, ensuring they live the rest of their lives in a manner that gives them a set of species-specific capabilities. The capabilities that are central goals for law, in the theory, are not inner abilities, but external opportunities to live and act in species-characteristic and meaningful ways.

III. ARGUMENT

1. It Is Time to Reform the Law to Protect Our Modern Scientific and Philosophical Understanding That Elephants are Capable of Living Their Own Meaningful Lives.

Modern science now recognizes a very important fact about many animals, including elephants: They are not merely biological units that simply need food and a suitable environment to survive and maintain a viable population. Today, scientists view many animals as beings capable of living their own meaningful lives. Early Indian and Roman cultures understood the complexity of animal lives and the implications of this complexity surrounding the humane treatment of animals; public awareness of this fact is widespread today. Almost all ancient Greek and Roman philosophical schools attributed complex forms of cognition and numerous emotions to animals;¹ a precursor to our current laws against cruel practices to animals.

What philosophy and, more recently, science have understood but the law has not, is that elephants are sentient beings who can feel emotion, foster relationships, create communities, and form a conception of the self. Our current legal system fails to respect species-specific, central capabilities. Animal cruelty laws protect only a small number of animals and fail to meaningfully constrain the widespread infliction of suffering. They ban only the intentional, purposeful suffering of some animals, and fail to recognize the impact that captivity and lack of relationships cause creatures like Nolwazi, Amahle, and Mabu.

This Court can create legal precedent that provides these living creatures the legal right to survive and thrive in ways that coincide with their specific capabilities and prevent not only the infliction of physical pain, but emotional and psychological injury as well.

2. The Magical Lives of Elephants

Elephants are cognitively complex creatures with distinct societies, emotions, and lives. They form societies that foster the well-being of each member, in which their emotions and development from childhood through adulthood are readily apparent.² A combat staged

¹ See Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* (1993).

² Nussbaum, *The Capabilities Approach and Animal Entitlements* in *The Oxford Handbook of*

between humans and elephants in 55 B.C. by the Roman leader Pompey paints a prime example of these complex emotions and connections with other animals, namely humans. Surrounded in the arena, the elephants perceived that they had no hope of escape. According to Pliny, the elephants then “entreated the crowd, trying to win its compassion with indescribable gestures, bewailing their plight with a sort of lamentation.”³ The audience, moved to pity and anger by their plight, rose to curse Pompey – feeling, wrote Cicero, that the elephants had a relation of commonality (*societas*) with humans.⁴ However, this connection with humans cannot be substituted for true, similar companionship from other elephants, of which Nolwazi, Amahle, and Mabhu have been severely deprived.

Elephants’ ability to connect with other elephants and animals may be attributable to their long life spans; apart from some species of whales, they are the most long-lived of nonhuman mammals.⁵ Long life spans highly correlate with the ability to develop and exhibit complex forms of intelligence, such as emotional connections within and outside their own societies.⁶ Dr. Cynthia Moss, an American conservationist and wildlife researcher, witnessed and described a herd’s reaction, typical of all elephant species, to the shooting of a young female elephant in Amboseli National Park in Africa:

Teresia and Trista became frantic and knelt down and tried to lift her [the shot elephant] up. They worked their tusks under her back and under her head. At one point they succeeded in lifting her into a sitting position, but her body flopped back down. Her family tried everything to rouse her, kicking and tusking her, and Tallulah even went off and collected a trunkful of grass and tried to stuff it in her mouth.⁷

Eventually, when the elephants realized their efforts were fruitless, they sprinkled and completely covered the corpse with earth before leaving.⁸ Elephants have a standard, almost ritualized response to death, much like humans. This indicates elephants have a conception of a species’ life and the events that can disrupt or enrich it.⁹ Elephants care about other elephants, and above all, members of their group.

Elephants not only form strong social and emotional bonds among themselves and others, but they can also form the conception of the self, a requisite element of autonomy. An elephant named Happy, specifically, recognized herself during a mirror test to determine whether elephants had any conception of their own being, thereby proving she did indeed have

Animal Ethics (Beauchamp & Frey, edits., Oxford Univ. Press, 2011) (hereafter, *Entitlements*).

³ Nussbaum, *The Moral Status of Animals* (Feb. 3, 2006) *The Chron. of Higher Educ.*, page B6. (hereafter, *Moral Status*).

⁴ *Id.*

⁵ *Entitlements*, *supra* note 2, at page 4.

⁶ *Id.*

⁷ Moss, *Elephant Memories: Thirteen Years in the Life of an Elephant Family* (Univ. of Chicago Press, 2000) page 73.

⁸ *Id.*

⁹ Nussbaum, *Compassion: Human and Animal in Ethics and Humanity: Themes from the Philosophy of Jonathan Glover* (Davis et al., edits., 2010) (hereafter, *Compassion*).

a conception of the self.¹⁰ This cognitively complex recognition of the self carries importance in how we perceive and think about animals and their behaviors.

The discussion surrounding animal lives must ask “about mental phenomena that are more precisely specified [than thinking], phenomena such as an animal’s capacity to use tools, to solve problems, to find its way home, to understand its own beliefs and those that others hold, and to learn by imitation.”¹¹ A detailed understanding of the animal’s life, as it has evolved within a particular set of environmental challenges and conditions, must frame each question.¹² Our understanding of the complexities of an elephant’s life, emotions, societies, and thought processes, demonstrates that Nolwazi, Amahle, and Mabu, and all elephants, are more than mere biological units. We should treat all elephants with dignity, respect, and in a manner that understands how their lives could truly flourish, based on their specific set of capabilities, emotions, and needs, whether similar to or entirely different from our own.

3. The Capabilities Approach Is the Correct Philosophical Approach for Determining The Fresno Chaffee Zoo Elephants’ Right to Bodily Liberty

The capabilities approach developed in different ways by me and Nobel Prize-winning economist Amartya Sen is a philosophical-economic approach widely used in development economics to measure welfare. It seeks to grant substantial freedoms to beings to choose to do the things they value, and examines what they can do and be in terms of important areas in their life.¹³ This approach embraces the idea that society should examine the characteristic activities of each creature and embrace the approach that a whole life for a creature includes the ability for love, grief, and self-recognition.

I distinguish three levels of capabilities that comprise my capabilities approach. The first is basic capabilities: innate equipment that serves as the basis for further development.¹⁴ The second is internal capabilities: abilities of a person that develop through nurture and care, which require social resources and help from family and society, that can be used when circumstances are favorable.¹⁵ However, circumstances are not always favorable to exercise these capabilities; for example, although people have the ability to exercise their religion or speak out on issues of importance, many cannot, out of fear of political repression or retaliation.¹⁶ Therefore, the third and most important of the capabilities is comprised of the combined capabilities: internal capabilities plus external conditions that make choice available.¹⁷

¹⁰ Plotnik et al., *Self-Recognition in an Asian Elephant* (2006) 103 Proc. of the Nat’l Acad. of Sci., 17053, 17054.

¹¹ Hauser, *Wild Minds: What Animals Really Think* (2001) page xviii.

¹² *Entitlements*, *supra* note 2, at page 3.

¹³ Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right* (2018) 94 Denv. L. Rev., 609, 621.

¹⁴ See Nussbaum, *Creating Capabilities: The Human Development Approach* (2011) page 23 (hereafter, *Creating Capabilities*).

¹⁵ *Id.* at page 21.

¹⁶ *Id.*

¹⁷ *Id.*

My formulated template takes the capabilities approach one step further, and develops fundamental entitlements that each being has a right to demand as a matter of basic, minimal justice.¹⁸ Applied to humans, I defined ten central capabilities as: life; bodily health; bodily integrity; senses/imagination/thought; emotions; practical reason; affiliation; relationships with other species; play; and control over one's political and material environment.¹⁹ These represent political goals to be developed and promoted for each creature based on their form of life. Thus, the capabilities approach is species-specific: it examines each being individually to determine their capabilities and what they can be.

The same dignity afforded to humans in the previous list of ten central capabilities belongs to animals as well. All animals deserve ethical consideration for the lives they are trying to lead, including being afforded the dignity inherent in their forms of life.²⁰ While the human list is a good fit for elephants at a highly general level, but a bad fit when specified more concretely. We can study each being to mold the broader categories to fit each being. Determining the capabilities or substantive opportunities for each animal involves determining how the animal would normally thrive in the wild:

What life span is normal for that species in the wild? What is the physical condition of the healthy animal? What human [or non-human] acts invade or impair the bodily integrity of that sort of animal? What types of movement from place to place are normal and more pleasurable for that sort of animal? What sensory and imaginative stimulation does this animal seek, and what is it to keep the animal in an unacceptably deficient sensory environment? What is it for this sort of animal to live in a crippling and intolerable fear or depression, or with a lack of bonds of concern? What type of affiliation does this animal seek in the wild, what sorts of groups, both reproductive and social, does it form? What types of communication does the animal engage in, using what sensory modalities? What is it for the animal to be humiliated and disrespected? What is it for the animal to play and enjoy itself? Does the animal have meaningful relationships with other species and the world of nature? What type of objects does the animal use and need to control if it is to live its life?²¹

This Court can apply these questions to Nolwazi, Amahle, and Mabu, as other courts have with other elephants in captivity, and quickly realize that they are not thriving in captivity at the Fresno Chaffee Zoo.

Judge Rowan Wilson of the New York Court of Appeals recognized that an elephant could not thrive at the Bronx Zoo due to the zoo's inability to provide her with anything close to a natural existence: "Happy's habitation at the Bronx Zoo—a living environment that has kept her without any engagement with other elephants since 2006 and that is a miniscule

¹⁸ Nussbaum, *Justice for Animals: A New Approach to Animal Ethics* (2022) pages 91-93.

¹⁹ *Creating Capabilities*, *supra* note 14, at pages 621-623.

²⁰ See generally Harris, *A Right of Ethical Consideration for Non-Human Animals* (2020) 27 *Hastings Env. L. J.* 71, 90.

²¹ *Id.*

fraction of the size of elephants' typical environments—is causing her deep physical and emotional suffering because it is so unnaturally different from conditions that meet the needs of elephants[.]” *Breheeny* (2022) 38 N.Y.3d 555, 619-20 (Wilson, J., dissenting) (citing Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right* (2018) 94 *Denv. L. Rev.*, 609, 624 (“Each creature, then, deserves ethical consideration for what it is, and a kind of constitution that specifies what harms it should not be permitted to suffer—not in terms of its likeness to humans or its possession of some least-common-denominator property, but in terms of what it is itself, the form of life it leads.”)). As Judge Wilson’s reasoning demonstrates, the capabilities approach is a blueprint for granting rights specific to the animal in question.

One of the capabilities most inherent to elephants is their ability to form lifelong, complex, social bonds—especially female elephants. Elephants are highly social animals that form strong, permanent bonds with their family and herd, making zoo captivity extremely detrimental. Female elephants, specifically, live in family herds with their young, and stay together their entire lives. Young females learn a variety of skills from older females in their herd, including mating and caring for newborns.²² Young males begin learning from older males at adolescence, after leaving the herd.²³ This education is crucial, as orphaned males become pathologically aggressive without the guidance of more mature elephants.²⁴ These activities take place within the structure of the strongly bonded matriarchal herd, led primarily by the eldest female elephants, who act as storehouses of vital information necessary for the herd’s survival.²⁵ Most pertinent learning is not simply genetic or automatic, it is social education in the group.

Shirley and Jenny, two former circus elephants, separated for twenty-two years before reuniting at The Elephant Sanctuary in Tennessee, best demonstrate the insurmountable strength of elephant bonds.²⁶ Once reunited, Shirley quickly assumed the role of surrogate mother to Jenny, a baby when they first met at the circus. The effect Shirley and Jenny’s relationship had on other elephants at the sanctuary demonstrates that elephants can form new bonds even years into their lives: “After Shirley’s arrival, elephants who had previously been companions and friends were now sisters and aunts in the mother and daughter relationship of Shirley and Jenny.”²⁷

²² Poole and Granli, *Mind and Movement: Meeting the Interests of Elephants in An Elephant in the Room: The Science and Well Being of Elephants in Captivity* (Forthman et al., eds., Tufts Univ., 2008) page 11 (hereafter, *Mind and Movement*).

²³ Larson, *Once Seen as Loners, Male Elephants Shown to Follow Elders* (Sept. 3, 2020) NBC News, <<https://www.nbcnews.com/science/science-news/seen-loners-male-elephants-shown-follow-elders-rcna107>> (last visited September 20, 2023).

²⁴ Freeman, *Teenage Elephants Need a Father Figure*, BBC Earth, <<https://www.bbcearth.com/news/teenage-elephants-need-a-father-figure>> (last visited September 19, 2023).

²⁵ Vidya and Sukumar, *Social and Reproductive Behaviour in Elephants* (2005) 89 *Current Science* 1200, 1201.

²⁶ *Whatever Happened to Shirley and Jenny?* (Nov. 19, 2000) PBS.org <<https://www.pbs.org/wnet/nature/urban-elephant-whatever-happened-shirley-jenny/11371/>>.

²⁷ *Id.*

Right now, Nolwazi, Amahle, and Mabu, cut off from a larger herd of elephant companions and family members, cannot thrive based on their capabilities as elephants. They are unable to exercise typical elephant social capacities, form relationships of their choosing, and exist in the complex society in which they are biologically determined to thrive. However, at a sanctuary—although not the same as the wild—the elephants would have the opportunity to form complex, life-long bonds similar to the sorts of bonds formed between Shirley, Jenny, and the Tennessee sanctuary elephants. They deserve, and justice requires, their transfer to a sanctuary.

4. The Zoo’s Conduct Harms Nolwazi, Amahle, and Mabu in Both Physical and Intangible Ways.

In order to adequately capture the various ways in which humans interfere with the life activities of other animals, it is important not to focus solely on the intentional infliction of physical pain.²⁸ We would not tolerate a legal system that would require human beings to adapt their expectations and satisfactions to a low standard of living. Similarly, this Court should apply a philosophical approach that allows for the consideration of the deprivation of valuable life activities THAT the animal cannot necessarily appreciate during captivity. The capabilities approach does just that—acknowledging that the law must consider not just what an animal feels, but what it needs to fully thrive.

Elephants cannot thrive where their capabilities for movement and autonomous choice are so severely constrained. The Fresno Chaffee Zoo environment fails to provide Nolwazi, Amahle, and Mabu with their deep need for wide, open spaces in which to roam and forage for a variety of food sources. Lindsay Dec. ¶¶ 7-9, 11-12, 15, 17, 33; Jacobs Dec. ¶ 21(e). The elephants spend their days in extreme confinement, even though elephants’ bodies are adapted for covering large distances; free-living elephants cross approximately 10 kilometers every 24 hours, but commonly cover more distance. Jacobs Dec. ¶ 21(d); Lindsay Dec. ¶ 17. When zoo staff is off duty or when the weather is cold, Nolwazi, Amahle, and Mabu are moved to stalls in an enclosed, windowless barn, spending at least half the day there, which Dr. Keith Lindsay opined is physically and psychologically harmful to the elephants. Lindsay Dec. ¶ 69. When not held in the elephant barn, the elephants only have access to a small enclosure of approximately 3 acres of space, where they are only able to walk directionally for just over 100 yards, making proper exercise impossible. Jacobs Dec. ¶ 21(c)-(d); Lindsay Dec. ¶¶ 60-63. The elephants’ zoo diet (mostly hay and vegetables) is predictable and unvaried, unlike the diverse range of plant foods they would forage and eat in the wild (more than 100 seasonally and geographically varying food species, such as grasses, trees, bark, roots, fruits, and aquatic plants). Lindsay Dec. ¶¶ 19, 67; Jacobs Dec. ¶ 21(e).

Nolwazi, Amahle, and Mabu are also kept in an unacceptably deficient sensory environment, which severely diminishes their quality of life. The elephants live across from a nightclub rather than in a natural grassland, endure constant auditory bombardment from urban transportation arteries that surround the zoo, and are surrounded by faux-“natural” scenery that

²⁸ Nussbaum, *Human Capabilities and Animal Lives: Conflict, Wonder, Law* (2017) 18 J. of Hum. Dev. and Capabilities, 317, 320.

functions as a tableau for the viewing public rather than providing the elephants any enjoyment. Lindsay Dec. ¶¶ 58-59, 66; Jacobs Dec. ¶ 21(e) and (f). The meager and predictable “enrichment” activities they are given, such as food hidden in an artificial rock wall, are far below what elephants’ complex brains actually need to thrive. Lindsay Dec. ¶ 67; Jacobs Dec. ¶ 21(g). As Dr. Keith Lindsay observed:

The behavioral repertoire of the three elephants in the Fresno Chaffee Zoo is extremely limited, widely divergent from that of free-ranging elephants, and indicative of the pathology of zoo husbandry. . . . When the elephants are not simply standing and feeding, they can be seen to walk between the front and back yards on the same path every time. There is no variety in their lives, no challenge to employ their mental capacity for exploration, spatial memory, or problem-solving. There is no opportunity to employ their wide range of vocalisations, to communicate and interact with a range of other elephants over distance.

Lindsay Dec. ¶ 70.

Furthermore, the Fresno Chaffee Zoo invades the elephants’ bodily integrity and demeans their existence. Not only are the elephants forced to perform in demonstration shows for the public, *id.* ¶ 70, they have also been subjected to the zoo’s captive breeding program. *Id.* ¶¶ 48-49. Mabu, the lone male elephant, has been repeatedly transferred between zoos to breed with female elephants throughout the United States, having his social bonds with other elephants ripped away from him each time. *Id.* ¶¶ 45-46. Nolwazi and Amahle were similarly taken from their companions at the Dallas Zoo and transferred to Fresno Chaffee Zoo to be bred in captivity. *Id.* at ¶¶ 48-49. Traumatic transfers to different locations and forced breeding deprive the elephants of any control over their lives or bodies. Now, Nolwazi and Amahle, mother and daughter, are both pregnant by Mabu.²⁹ Unless the elephants are transferred to a sanctuary, Nolwazi and Amahle will be forced to experience pregnancy, give birth, and raise their babies in an environment that causes them relentless stress, and their babies will be born condemned to a lifetime of zoo captivity. This captive breeding program is nothing less than a generational erasure of wild elephants’ capabilities.

It is important to underscore that, just because Nolwazi, Amahle, and Mabu have presumably adapted to life at the zoo, as a result of having spent many years in captivity, does not mean they are not suffering. They may have developed adaptive preferences, allowing them to adjust to what they know or are accustomed to.³⁰ Adaptive preferences are developed when, under conditions of deprivation, humans and animals tailor their preferences to the low level of well-being their surroundings lead them to believe they can attain. This subtle, yet harmful dynamic can cause animals to feel satisfied with subordination, with a reduced form of life. An animal who lives a very confined life, without access to social networks or environments characteristic of their species, may not actually feel pain at the absence of what they have not experienced.³¹ However, this absence should not be taken seriously; an animal’s lack of certain

²⁹ ABC30 News, Baby elephants to be born at Fresno Chaffee Zoo for 1st time ever (Aug. 14, 2023) <<https://abc30.com/fresno-chaffee-zoo-baby-elephants-african-elephant-2024-babies/13647269/>> (as of Sept. 20, 2023).

³⁰ *Entitlements*, *supra* note 2, at page 6.

³¹ *Id.*

rights is relevant and important, regardless of whether they are aware of the deprivation they suffer.³²

Even if Nolwazi, Amahle, and Mabu were all technically healthy and well-adjusted to their surroundings, receiving what current law determines to be adequate care, that does not mean the elephants are thriving or unharmed, evidenced by their inability to exercise their capabilities. They are forced to yield to a diminished life, unable to flourish, and thereby subjected to emotional suffering.

IV. CONCLUSION

We must think carefully about the needs of elephants in confinement for wide space, motion, and for complex social networks characteristic of elephant life. By keeping Nolwazi, Amahle, and Mabu in extreme confinement, the Fresno Chaffee Zoo has deprived them of any sort of meaningful life. They lack adequate space to forage and roam and are deprived of any real relationship with similar beings. Their continued confinement shows a complete lack of understanding of the environmental and social surroundings that they require, and a disregard for their capabilities as elephants. A sanctuary would allow the elephants allow to heal physically and emotionally from their many years of confinement, enabling them to form complex bonds and engage in ordinary elephant behaviors crucial to their ability to thrive.

This Court should issue an Order to Show Cause, and thereafter, it should recognize Nolwazi, Amahle, and Mabu's right to bodily liberty and transfer them to a sanctuary where they can thrive outside of zoo captivity, form relationships, and exercise their physical and mental capabilities.

Respectfully submitted,

/s/ Martha C. Nussbaum

Dr. Martha C. Nussbaum

Ernst Freund Distinguished Service

Professor of Law and Ethics, University of
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³² *Id.* at page 7.

