

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

AFFIDAVIT

THE NONHUMAN RIGHTS PROJECT, INC., on behalf
of HAPPY,

Index No.: 18-45164

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums
of the Wildlife Conservation Society and Director of the
Bronx Zoo, and WILDLIFE CONSERVATION
SOCIETY,

Respondents.

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

Kenneth A. Manning, Esq., being duly sworn, deposes and says:

1. I am an attorney admitted to practice in the state of New York and a partner with Phillips Lytle LLP, attorneys for Respondents James J. Breheny and the Wildlife Conservation Society. In that capacity, I am familiar with the facts stated herein and submit this affidavit in opposition to the Nonhuman Rights Project, Inc.'s ("NRP") petition for a writ of habeas corpus.

2. I also submit this affidavit in support of Respondents' motion to transfer the venue of this proceeding to Bronx County and, alternatively, in support of Respondents' motion to dismiss NRP's petition for failure to state a cause of action.

A. Procedural History

3. On October 2, 2018, Petitioner NRP announced on its website that it had filed a petition for a writ of habeas corpus in Orleans County Supreme Court on behalf of Happy, an elephant at the Bronx Zoo. *See* <https://www.nonhumanrights.org/blog/lawsuit-happy-bronx-zoo/>.

4. On or about October 3, 2018, Respondents received an unsigned copy of NRP's proposed order to show cause and verified petition from NRP. **Exhibit 1** is a copy of NRP's proposed order to show cause. **Exhibit 2** is a copy of NRP's Verified Petition.

5. Respondents opposed NRP's proposed order to show cause by filing and serving a memorandum of law in opposition, and the affidavit of Mr. Breheny. **Exhibit 3** is a copy of the Affidavit of Respondent James J. Breheny, sworn to October 9, 2018, in opposition to NRP's proposed order to show cause.

6. The following day, NRP filed a motion to strike Respondents' opposition, asserting that Respondents had no right to participate in the proceeding. **Exhibit 4** is a copy of NRP's Notice of Motion to Strike, and the Affirmation of Elizabeth Stein, Esq. in support of that motion, dated October 10, 2018.

7. On October 25, 2018, NRP filed a motion to rule on its petition for habeas corpus, asking the Court to "rule on the Petition on November 30." **Exhibit 5** is a copy of NRP's Notice of Motion to Rule, and the Affirmation of Elizabeth Stein, Esq. in support of that motion, dated October 25, 2018.

8. On November 14, 2018, Respondents filed and served their opposition to NRP's motion to strike and NRP's motion to rule. **Exhibit 6** is a copy of the Affidavit of Joanna J. Chen, Esq. in opposition to NRP's motions, sworn to November 14, 2018.

9. The Court held oral argument via telephonic conference on whether NRP's proposed order to show cause should be signed, and to address NRP's pending motions, on November 16, 2018.

10. The Court then signed the order to show cause on November 16, 2018, scheduling argument on the merits of NRP's petition for a writ of habeas corpus for December 14, 2018 at 11:30 a.m. in Orleans County Supreme Court, 1 South Main Street, Suite 3, Albion, New York 14411.

11. Respondents received a copy of the signed order to show cause from NRP via mail on November 20, 2018. **Exhibit 7** is a copy of the signed order to show cause.

12. On November 21, 2018, Respondents served a demand to change the venue of this proceeding to Bronx County, pursuant to CPLR 511. **Exhibit 8** is a copy of Respondents' Demand for Change of Venue, with proof of service.

13. On November 27, 2018, Respondents served a Notice to Admit pursuant to CPLR 408 and 3123. **Exhibit 9** is a copy of the Notice to Admit, with proof of service.

14. Respondents' received NRP's Affirmation in opposition to Respondents' Demand to Change Venue via regular mail on December 1, 2018. **Exhibit 10** is a copy of the Affirmation of Elizabeth Stein, Esq., dated November 27, 2018.

15. To date, NRP has not served a response to Respondents' Notice to Admit.

B. Respondents' Motions

16. Respondents move to change venue to Bronx County pursuant to CPLR 510 and CPLR 7004(c). Because NRP brought this proceeding to challenge allegedly unlawful detention, venue should be in the county where that alleged detention occurred, and where the subject of the proceeding is located. As explained in the accompanying memorandum of law, these and all other relevant considerations warrant a change in venue to Bronx County.

17. Change of venue is also appropriate in light of petitioner's public admission that it brought this petition in Orleans County to avail itself of a perceived litigation advantage in the Fourth Judicial Department. *See* Ex. 8, ¶¶ 30-31; *id.*, Ex. 3, p. 3.

18. In the event this Court chooses to rule on the merits of NRP's petition, the petition should be dismissed with prejudice for failing to state a habeas corpus cause of action under New York law.

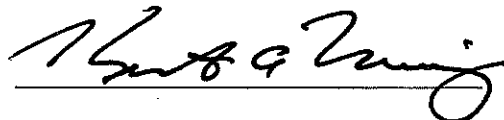
19. Respondents also note several apparent facts concerning the Performing Animal Welfare Society sanctuary ("PAWS"), which is identified in NRP's petition and suggested by NRP as the more appropriate home for Happy the elephant. As described in the affidavit of Ed Stewart, sworn to September 26, 2018 ("Stewart Aff.") and submitted in support of NRP's petition, PAWS is a "captive" environment. Stewart Aff. ¶¶ 4, 12-13, 21. This contradicts the statement in NRP's petition that it seeks Happy's "immediate release" as a remedy in this proceeding. NRP's Verified Petition, ¶¶ 8, 118.B.

20. Respondents also note that PAWS appears to advertise certain events featuring its resident elephants on a website bearing its name,¹ including "Seeing the

¹ PAWS, *News and Events*, http://www.pawsweb.org/calendar_of_events.html (accessed Nov. 30, 2018).

Elephant” getaways at \$850 per person for a “2-day Getaway,”² and an “Elephant Grape Stomp” winetasting and food event, for an undisclosed price. Respondents served requests for admission concerning these facts in their Notice to Admit on November 27, 2018, but have not yet received responses from NRP. *See* Ex. 9, ¶¶ 56-58.

21. The Bronx Zoo currently advertises all-access tickets online at \$28.95 for an adult and \$20.95 for a child, with free admission for children two years and under.³ The public is welcome to visit the Bronx Zoo on Wednesdays free of charge.



Kenneth A. Manning

Sworn to before me this
3rd day of December, 2018.


Notary Public

KAREN M. FINNERTY
No. 01F16836611
Notary Public, State of New York
Qualified in Erie County
My Commission Expires 02/08/2020

² PAWS Wildlife Sanctuaries, PAWS “Seeing the Elephant,” http://www.pawsweb.org/seeing_the_elephants.html (accessed Nov. 30, 2018)

³Bronx Zoo, *Winter Total Experience Tickets*, <https://bronxzoo.com/checkout/tickets/winter-total-experience-tickets/cart> (accessed Dec. 1, 2018)

EXHIBIT 1

At I.A.S Part ____ of the
Supreme Court of the State of
New York, held in and for the
County of Orleans, at the
Courthouse thereof, 1 South Main
Street, Suite 3, Albion, NY on the
_____ day of October, 2018

PRESENT: HON. _____
Justice of the Supreme Court

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS**

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

**[PROPOSED] ORDER TO
SHOW CAUSE**

Index No.:

JAMES J. BREHENY, in his official capacity as the Executive
Vice President and General Director of Zoos and Aquariums of the
Wildlife Conservation Society and Director of the Bronx Zoo, and
WILDLIFE CONSERVATION SOCIETY,

Respondents.

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law
Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise,
Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the _____ day of _____, 2018 at _____ o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

- A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;
- B. Awarding Petitioner the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, by personal delivery, on or before the _____ of _____, 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than ____ of _____, 2018. Reply papers, if any, must be served on or before the ____ day of _____, 2018.

Dated: _____, 2018
Albion, New York

Honorable

ENTER:

EXHIBIT 2

STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums
of the Wildlife Conservation Society and Director of the
Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

VERIFIED PETITION

**ORAL ARGUMENT
REQUESTED**

Index No.

“In the interval since we first denied leave to the Nonhuman Rights Project¹, I have struggled with whether this was the right decision . . . 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.”

Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054, 1058 (May 8, 2018) (“*Tommy*”) (Eugene Fahey, J., concurring)

“[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals[.]”

People v. Graves, 163 A.D.3d 16, 21 (4th Dept. June 15, 2018) (citations omitted)

¹ 26 N.Y.3d 901, 2015 WL 5125507 [2015]; 26 N.Y.3d 902, 2015 WL 5125518 [2015].

PETITIONER, THE NONHUMAN RIGHTS PROJECT, INC. ("the NhRP" or "Petitioner"), by its attorneys ELIZABETH STEIN, ESQ. and STEVEN M. WISE, ESQ. (subject to *pro hac vice* admission), alleges as follows:

I. Preliminary Statement

1. This Verified Petition is for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") filed by the NhRP pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70 on behalf of an elephant named Happy, dubbed by the *New York Times* as "The Bronx Zoo's Loneliest Elephant,"² who is being unlawfully imprisoned by Respondents at the Bronx Zoo. Attached to the Petition is a Memorandum of Law in Support ("Memorandum"), Expert Affidavits (including five Expert Scientific Affidavits) and exhibits annexed thereto, and a proposed Order to Show Cause (attached hereto as **Exhibit 1**).

2. This Petition seeks a good faith and well-supported extension of the New York common law of habeas corpus to Happy, who is autonomous, and being unlawfully imprisoned solely because she is an elephant.

3. The timely intervention of this Court is necessary to grant Happy her common law right to bodily liberty and immediate release so as to prevent future unlawful deprivations of her liberty and allow her to exercise her autonomy to the greatest degree possible.

4. Autonomous nonhuman animals such as Happy should have "the right to liberty protected by habeas corpus." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). "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. Instead, we should consider

² Tracy Tullis, "The Bronx Zoo's Loneliest Elephant," THE NEW YORK TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/28/nyregion/the-bronx-zoos-loneliest-elephant.html> (last visited Sept. 22, 2018).

whether a chimpanzee is an individual with inherent value who has the right to be treated with respect[.]” *Id.* at 1058 (citation omitted).

5. This case will turn on whether an extraordinarily cognitively complex and autonomous nonhuman being such as Happy should be recognized as a legal person with the right to bodily liberty protected by the common law of habeas corpus pursuant to a New York common law that keeps abreast of evolving standards of justice, morality, experience, and scientific discovery and an evolving New York public policy which already recognizes certain nonhuman animals as “persons.” (Mem. at Part I). As recently recognized by Court of Appeals Associate Justice Eugene Fahey in *Tommy*, 31 N.Y. 3d at 1058 (Fahey, J. concurring), this question is “a deep dilemma of ethics and policy that demands our attention.” Further, “[t]he evolving nature of life makes clear that chimpanzees and humans exist on a continuum of living beings To solve this dilemma, we have to recognize its complexity and confront it.” *Id.* at 1059.³

6. To dismiss this Petition without issuing the requested Order to Show Cause would amount to a “refusal to confront a manifest injustice.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring) (lower courts that refused to consider the NhRP’s arguments erred).

7. CPLR Article 70 governs the application of the common law writ of habeas corpus. This Petition invokes this Court’s common law authority to apply the common law of habeas corpus to an autonomous nonhuman being such as Happy.

8. This Petition specifically requests that this Court: a) issue the requested Order to Show Cause requiring Respondents to justify their imprisonment of Happy; b) after the return, determine that Happy possesses the common law right to bodily liberty, thereby rendering

³ Judge Fahey also asserted “that denial of leave to appeal is not a decision on the merits of petitioner’s [NhRP’s] claims.” *Tommy*, 31 N.Y.3d at 1056 (Fahey, J., concurring).

unlawful Respondents' imprisonment and deprivation of that bodily liberty; c) order Happy's immediate release from Respondents' unlawful imprisonment; and d) decide where Happy should thereafter be placed, which the NhRP suggests is the Performing Animal Welfare Society ("PAWS") near Sacramento, California (attached hereto is the Affidavit of Ed Stewart, Co-Founder and President of PAWS ["Stewart Aff."]).⁴

9. "One of the hallmarks of the writ [is] . . . its great flexibility and vague scope." *People ex rel. Keitt v. McCann*, 18 N.Y.2d 257, 263 (1966) (citation omitted). In New York, habeas corpus is not "the creature of any statute . . . and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). The writ "cannot be abrogated, or its efficiency curtailed, by legislative action. . . . The remedy against illegal imprisonment afforded by this writ . . . is placed beyond the pale of legislative discretion." *Id.* at 566.

10. The term "person" designates the law's most fundamental category by identifying those entities capable of possessing a legal right. Personhood can determine, among other things, who counts, who lives, who dies, who is enslaved, and who is free. *See Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y. 2d 194, 201 (1972) ("[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person.") (citing John Chipman Gray, *The Nature and Sources of the Law*, Chapter II (1909)).

11. "Person" has never been a synonym for "human being" and may designate an entity broader, narrower, or qualitatively different from a human being. *Id. People v Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018).

⁴ "For elephants in captivity, especially those born into it or kept there for a majority of their lives, going back to the 'wild' is unfortunately not an option. For these elephants, human-run sanctuaries are currently the best option." Supplemental Affidavit of Joyce Poole ¶ 5.

12. Historically, nonhuman animals were recognized as rightless legal things under the common law. The New York State Supreme Court Appellate Division, Fourth Judicial Department ("Fourth Department"), recently declared, however, that now "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals." *Id.* (citing *inter alia* *Matter of Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334 [4th Dept 2015], *lv denied*, 26 N.Y.3d 901 [2015])). Similarly, Judge Eugene Fahey recently opined that "there is no doubt that [a chimpanzee] is not merely a thing." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

13. The adjudication of personhood for purposes of the common law of habeas corpus is a matter for the courts rather than the legislature, and is based upon public policy rather than biology or taxonomy. *See Byrn*, 31 N.Y.2d at 201-02; *Tommy*, 31 N.Y.3d at 1056-57 (Fahey, J., concurring). Relying on *Byrn*, the Fourth Department reiterated that "personhood is 'not a question of biological or natural' correspondence." *Graves*, 163 A.D.3d at 21 (quoting *Byrn*, 31 N.Y.2d at 201).

14. This Petition and accompanying Memorandum demonstrate that this Court has a common law duty to recognize that modern scientific evidence and justice require that Happy be recognized as a "person" with the common law right to bodily liberty vindicated through common law habeas corpus. *See, e.g., Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968) ("the common law of the State is not an anachronism, but is a living law which responds to the surging reality of changed conditions"); *Bing v. Thunig*, 2 N.Y.2d 656, 668 (1957) (a rule of law "out of tune with the life about us, at variance with modern day needs and with concepts of justice and fair dealing . . . should be discarded"); *Silver v. Great American Ins. Co.*, 29 N.Y.2d 356, 363 (1972) ("Stare decisis does not compel us to follow blindly a court-

created rule . . . once we are persuaded that reason and a right sense of justice recommend its change.”).

15. New York courts have “not only the right, but the *duty* to re-examine a question where justice demands it” to “bring the law into accordance with present day standards of wisdom and justice rather than ‘with some outworn and antiquated rule of the past.’” *Woods v. Lancet*, 303 N.Y. 349, 355 (1951) (emphasis added). “When the ghosts of the past stand in the path of justice clanking their mediaeval chains the proper course for the judge is to pass through them undeterred.’ [The Court] act[s] in the finest common-law tradition when [it] adapt[s] and alter[s] decisional law to produce common-sense justice.” *Id.* (citation omitted).

16. In *Woods*, the Court of Appeals rejected the claim that common law “change . . . should come from the Legislature, not the courts.” *Id.* (“We abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.”). See also *Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 434 (1969) (“we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the legislature has not seen fit to act”).

17. To dismiss the Petition without issuing the writ would amount to a “refusal to confront a manifest injustice.” *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. . . . To solve this dilemma, we have to recognize its complexity and confront it.”) (emphasis added).

18. The NhRP is not seeking any right for Happy other than the common law right to bodily liberty protected by common law habeas corpus.

19. The common law of habeas corpus “is deeply rooted in our cherished ideas of individual autonomy and free choice.” *Article 70 of CPLR 70 for a Writ of Habeas Corpus, The Nonhuman Rights Project, Inc. on Behalf of Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 903-04 (citations omitted) (“*Stanley*”). As set forth in more detail in the accompanying Memorandum at Part III, autonomy is a sufficient condition for the right to bodily liberty secured by the common law of habeas corpus. The Expert Scientific Affidavits attached hereto demonstrate that elephants are autonomous beings who possess complex cognitive abilities and that Happy’s interest in exercising that autonomy and bodily liberty is as fundamental to her as it is to us. Like humans, elephants are a social species who suffer immensely when confined in small spaces and deprived of social contact with other members of their species. “Elephants have evolved to move. Holding them captive and confined prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior. Held in isolation elephants become bored, depressed, aggressive, catatonic and fail to thrive. Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.”⁵ Indeed, elephants thrive and depend on that social interaction, which cannot be achieved when housed alone.⁶ Elephants exhibit a level of empathy – incorrectly assumed to belong to humans only – that “is a cornerstone of normal social interaction.”⁷ Respondent’s imprisonment of Happy deprives her of her ability to exercise her autonomy in meaningful ways, including the freedom to choose where to go, what to do, and with whom to be.

⁵ Supplemental Affidavit of Joyce Poole ¶ 4.

⁶ Affidavit of Joyce Poole ¶¶ 37-39.

⁷ *Id.* ¶ 32.

20. Denying the common law right to bodily liberty to an autonomous nonhuman being solely because she is not human is arbitrary, irrational, and violates fundamental equality. (Mem. at p.15.) All humans in New York possess the right to bodily liberty secured by the common law of habeas corpus, even those who have always, and will always, lack the ability to choose, to understand, or make a reasoned decision about, for example, medical treatment. *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (“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”). Because even humans bereft of consciousness may seek the remedy of habeas corpus to protect their bodily liberty, this Court must either recognize an autonomous nonhuman being's just claim to bodily liberty or contravene the fundamental principle of equality that is deeply enshrined in New York statutory, constitutional, and common law. (Mem. at Parts III. A-B).

21. The Fourth Department has made clear that “personhood can and sometimes does attach to nonhuman entities like . . . *animals*.” *Graves*, 163 A.D.3d at 21 (emphasis added).

22. In determining whether New York public policy supports common law personhood for nonhuman animals, this Court may look to statutes which “can serve as an appropriate and seminal source of public policy to which common-law courts can refer.” *Reno v. D'Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citations omitted). By enacting sec. 7-8.1 of the Estates, Powers and Trusts Law (“EPTL”), which allows certain nonhuman animals the right to be trust beneficiaries, the Legislature acknowledged their personhood, *See In re Fouts*, 677 N.Y.S.2d 699 (Sur. 1998) (five chimpanzees), as only “persons” may be trust beneficiaries. *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947); *Gilman v. McCardle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) (“Beneficiaries . . . must be persons”), *rev. on other grounds*, 99 N.Y. 451 (1885); RESTATEMENT (THIRD) OF TRUSTS § 43 *Persons Who May Be Beneficiaries* (2003) (“A person

who would have capacity to take and hold legal title to the intended trust property has capacity to be a beneficiary of a trust of that property; ordinarily, a person who lacks capacity to hold legal title to property may not be a trust beneficiary.”); RESTATEMENT (THIRD) OF TRUSTS § 47 (Tentative Draft No. 2, approved 1999); RESTATEMENT (SECOND) OF TRUSTS § 124 (1959); BENEFICIARY, *Black's Law Dictionary* (9th ed. 2009).

23. This Court need not address the question of Happy’s personhood in order to issue the Order to Show Cause. *See Stanley*, 16 N.Y.S.3d at 900 (“[T]he court need not make an initial determination that Hercules and Leo are persons in order to issue the writ and show cause order.”).

24. In 2015, the *Stanley* court issued an Order to Show Cause under CPLR 7002 on behalf of two chimpanzees, Hercules and Leo, and expressly rejected the State’s argument that issuance “requires an initial, substantive finding that chimpanzees are not entitled to legal personhood for the purpose of obtaining a writ of habeas corpus.” 16 N.Y.S.3d at 908, 917. *See also id.* at 900; *The Nonhuman Rights Project, Inc. v. Stanley Jr., M.D.*, 2015 WL 1804007 (N.Y. Sup. 2015), *amended in part*, *The Nonhuman Rights Project, Inc. v. Stanley*, 2015 WL 1812988 (N.Y. Sup. 2015).⁸

⁸ Although the court ultimately ruled against the NhRP because it believed it was bound by *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) (personhood is contingent upon the ability to shoulder legal duties and responsibilities) (Mem. at Part IV), the court opined that the NhRP *could* eventually prevail. 16 N.Y.S.3d at 903, 912-13, 917-18. The foundation for the New York State Supreme Court Appellate Division, Third Judicial Department’s (“Third Department”) decision in *Lavery*, 124 A.D. 3d, at 151-152 was flawed in large part because it principally relied upon a definition of “person” found in *Black's Law Dictionary* and in several cases that relied upon *Black's Law Dictionary* that defined a “person” as one with the capacity for both duties *and* responsibilities, instead of one with the capacity for duties *or* responsibilities. However, *Black's Law Dictionary* relied solely upon the 10th edition of *Salmond on Jurisprudence*, which actually defines “person” as an entity that can bear rights *or* responsibilities, as the NhRP claimed. When the NhRP pointed out this error, the editor-in-chief of *Black's Law Dictionary* promptly agreed to correct it in its next edition. See James Trimarco, “Chimps Could Soon Win Legal Personhood,” YES! Magazine (Apr. 28, 2017), *available at*: <http://www.yesmagazine.org/peace-justice/chimps-could-soon-win-legal-personhood-20170428> (last visited Sept. 27, 2018).

25. This Court is precluded from following the personhood holding in *Lavery*, 124 A.D. 3d, at 150-53, because it was: (1) disregarded by the Fourth Department in *Presti* (decided months later), which twice assumed, without deciding, that a chimpanzee could be a “person” for habeas corpus, *Presti*, 124 A.D.3d 1334; (2) explicitly rejected by Judge Fahey in *Tommy*, 31 N.Y.3d at 1056-1057; and (3) implicitly rejected by the Fourth Department in *Graves*, which expressly cited *Presti* for the notion that it is “common knowledge that personhood can and sometimes does attach to . . . animals.” 163 A.D.3d, at 21.⁹

26. Writs of habeas corpus have been issued on behalf of nonhuman animals in foreign countries.

27. Deciding a case based upon the NhRP’s legal strategy, an Argentine court in November 2016 recognized a chimpanzee named Cecilia as a “non-human person,” ordered her released from a Mendoza Zoo pursuant to a writ of habeas corpus, and sent her to a sanctuary in Brazil. *In re Cecelia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23 (November 3, 2016).

28. A writ was issued on behalf of an orangutan named Sandra in Buenos Aires, Argentina in 2015. *Asociacion de Funcionarios y Abogados por los Derechos de los Animales y Otros contra GCBA, Sobre Amparo (Association of Officials and Attorneys for the Rights of Animals and Others v. GCBA, on Amparo)*, EXPTE. A2174-2015 (October 21, 2015).

29. A writ was issued on behalf of a bear named Chucho in Colombia, though that ruling was overturned by a higher court and further appeal is pending. *Luis Domingo Gomez*

⁹ The Fourth Department correctly understands that the ability of an entity to bear duties and responsibilities is irrelevant to the determination of personhood under any and all circumstances. (Mem. at Part IV). *Graves*, 163 A.D. 3d 16; *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). An entity is a “person” if she can either bear rights or duties. *Id.* Judge Fahey made clear that it is irrelevant “that nonhuman animals cannot bear duties,” as the “same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child.” *Id.*

Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas, AHC4806-2017 (July 26, 2017).

30. Writs of habeas corpus were frequently issued on behalf human slaves who were not at the time deemed legal persons in order to determine their personhood status.

31. In *Somerset v. Stewart*, 1 Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), adopted into New York's common law,¹⁰ Lord Mansfield assumed, without deciding, that the slave, James Somerset, could possibly possess the right to bodily liberty protected by the common law writ of habeas corpus, and famously issued the habeas corpus requiring the respondent to justify the detention. *See also W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1009 (Sup. Ct. 1998), *aff'd*, 267 A.D.2d 233 (1999) ("For those who feel that the incremental change allowed by the Common Law is too slow compared to statute, we refer those disbelievers to the holding in *Somerset v. Stewart*, . . . which stands as an eloquent monument to the fallacy of this view.").

32. In *Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 630-31 (1860), the Court, relying heavily upon *Somerset*, issued a writ of habeas corpus upon the petition of five slave children who were not deemed legal "persons" at the time the writ was issued, to determine their personhood status.

33. In *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846), the free black abolitionist dockworker, Lewis Napoleon, filed a petition for habeas corpus on behalf of a black slave boy who "was closely confined on board the brig . . . and bound in chains." The respondent, a Georgia slaveholder, claimed the boy was his lawful property who had escaped to New York. *Id.* The circuit judge issued a writ to determine whether the boy was a legal person or property, explicitly ruling: "the party had a right to bring the matter at once before me; under our statute I

¹⁰ New York adopted the English common law as it existed prior to April 19, 1775. N.Y. Const. Art. I, § 14; N.Y. Const. § 35 (1777).

was bound to allow the writ of habeas corpus, even if I had been fully convinced of the legality of the imprisonment; and . . . it becomes my duty to consider and decide it--*a duty from which I am not at liberty to shrink.*" *Id.* at 332 (emphasis added). The court added: "I approach this with all the caution becoming the gravity of the case, yet with a lively sense of what is *due to personal liberty* and the fraternal relations existing among the members of the union." *Id.* at 335 (emphasis added). The court eventually concluded: "This boy must at all events be discharged. The law allows it and the court awards it." *Id.* at 344.

34. In *In re Belt*, 2 Edm. Sel. Cas. 93 (Sup. Ct. 1848), a writ of habeas corpus was issued on behalf of a fugitive slave from Maryland. The slaveholder's lawyer argued: "That in a slave State all colored men are presumed to be slaves; and that the same presumption must be allowed here." *Id.* at 105. The court held that there "was only one case in which a fugitive slave could be held by his master, in his personal custody, in this State. That was, under the law of congress, to take him without delay before the proper authorities, in order to obtain the certificate necessary to justify his removal out of the State. This had not been done in this case," and therefore the slave was entitled to legal personhood. *Id.* at 106.

35. In *In re Tom*, 5 Johns. 365 (N.Y. 1810) (per curiam), a writ of habeas corpus was issued on behalf of a slave who was being detained by his alleged master, and was subsequently set free after the writ was issued and he showed proof that he had been manumitted.

36. Analogously, in *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C. Neb. 1879), the court rejected the United States Attorney's argument that no Native American could ever be a "person" able to obtain a writ of habeas corpus and issued a writ of habeas corpus on behalf of the Ponca Chief, Standing Bear.

II. Parties

37. The NhRP is a not-for-profit corporation organized pursuant to the laws of the State of Massachusetts with a principal address at 5195 NW 112th Terrace, Coral Springs, FL 33076. It is the only civil rights organization in the United States dedicated to changing “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.” <https://www.nonhumanrights.org/who-we-are/>. For the past twenty years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP does not seek to reform animal welfare legislation. *See Stanley*, 16 N.Y.S.3d at 900-01 (“In accordance with its mission, petitioner commenced this litigation and has filed similar cases in several other New York courts with the goal of obtaining legal rights for chimpanzees, and ultimately for other animals.”).

38. The NhRP submits this Petition on behalf of Happy, who is being unlawfully imprisoned by Respondents in the Bronx Zoo. Upon information and belief, the NhRP further alleges the following: Happy is a 47-year-old female Asian elephant who was captured in the wild and imported to the United States when she was a year old. She along with six other calves were purchased by the Lion County Safari, Inc. and lived initially in California and then Florida until 1977, when she and one other elephant named Grumpy were sent to the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas,” including tug-of-war contests. In 2002, Grumpy was euthanized after she was attacked by Patty and Maxine, two other elephants imprisoned at the zoo. The zoo separated Happy from them and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. In 2005, Happy became the *first* elephant to pass the mirror self-recognition-test, considered to be a

true indicator of an animal's self-awareness and "is thought to correlate with higher form of empathy and altruistic behavior."¹¹ In 2006, Sammie was euthanized after suffering from kidney failure and shortly thereafter the zoo announced that it was ending its captive elephant exhibit. Since that time, Happy has been and continues to be denied direct social contact with any other elephants and "spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies."¹²

39. Happy is the beneficiary of an *inter vivos* trust created by the NhRP pursuant to EPTL section 7-8.1 for the purpose of her care and maintenance if she is transferred to an appropriate elephant sanctuary. A true and correct copy of the trust is attached hereto as **Exhibit 2**.

40. Respondent James J. Breheny, 2300 Southern Boulevard, Bronx, New York 10460, is Wildlife Conservation Society's ("WCS") Executive Vice President and General Director of Zoos and Aquariums and is the Director of the Bronx Zoo.

41. Respondent WCS is a 501(c) non-profit organization headquartered in the Bronx Zoo at 2300 Southern Boulevard, Bronx, New York 10460. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos.

III. Venue and Standing

42. CPLR 7002(b) provides in part: "a petition for the writ shall be made to: ... 3. *any justice of the supreme court*." (emphasis added). In *Stanley*, the court ruled that venue was proper in New York County, though the chimpanzees were detained in Suffolk County. 16 N.Y.S.3d at

¹¹ Joshua M. Plotnik, Frans B.M. deWaal, and Diana Reiss, *Self-recognition in an Asian elephant*, 103 PNAS 17053 (Nov. 7, 2006)

¹² Brad Hamilton, *Happy the Elephant's Sad Life Alone at the Bronx Zoo*, NEW YORK POST (Sept. 30, 2012), <https://nypost.com/2012/09/30/happy-the-elephants-sad-life-alone-at-the-bronx-zoo/> (last visited Sept. 26, 2018).

905-07. This Petition is therefore properly brought before this Court even though Happy is unlawfully imprisoned in Bronx County.

43. Once the requested Order to Show Cause issues, it must be made returnable to Orleans County as the county of issuance, unless the Court makes it returnable to the county of detention. CPLR 7004 (c).¹³ However, “where no factual issues are raised, no one sought the production in court of [the nonhuman animal], and [a]ll that remains is for the Court to issue its decision,’ a change of venue is not required.” *Stanley*, 16 N.Y.S. 3d at 908, quoting *Chaney v. Evans*, No. 2012-940, 2013 WL 2147533, at *3 (Sup Ct. Franklin County May 7, 2013).

44. The NhRP has standing to file the Petition on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “one acting on . . . behalf” of “[a] person illegally imprisoned or otherwise restrained in his liberty within the state.” CPLR 7002(a) places no restriction on who may file the petition, consistent with the longstanding common law practice of allowing anyone—including complete strangers—to file habeas corpus petitions on another’s behalf. *See People v. McLeod*, 3 Hill 635 n. “j” sec.7 (N.Y. 1842) (“The common law right was clear . . . ‘that every Englishman who is imprisoned by any authority whatsoever, has an undoubted right, by his *agents* or *friends*, to apply for and obtain a writ of *habeas corpus* in order to procure his liberty by due course of law.’”) (emphases in original); *Somerset*, 1 Lofft 1, 98 Eng. Rep. 499 (unrelated third parties received common law writ of habeas corpus on behalf of a slave imprisoned on a ship); *Lemmon*, 20 N.Y. at 562, 599-600 (dockworker had standing to seek

¹³ Pursuant to CPLR 7004(c), a writ *must* be returnable to the county in which it is issued except: a) where the writ is to secure the release of a prisoner from a state institution, it must be made returnable to the county of detention; or b) where the petition was made to a court outside of the county of detention, the court *may* make the writ returnable to such county. As Respondents are not a “state institution,” the Court should make the writ returnable to Orleans County. *See Stanley*, 16 N.Y.S.3d at 907 (Hercules and Leo were not being detained in a state institution within the meaning of CPLR 7004(c) even though they were imprisoned in a state educational facility).

a common law writ of habeas corpus on behalf of slaves with whom he had no relationship); *In re Kirk*, 1 Edm. Sel. Cas. at 315 (same).¹⁴

45. The New York Supreme Court in *Stanley* correctly ruled: “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, . . . petitioner [NhRP] has met its burden of demonstrating that it has standing.” 16 N.Y.S.3d at 905 (citing CPLR 7002(a)).

46. Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, not a single court found that the NhRP lacked standing. *See id.*; *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 n.1 (1st Dept. 2017) (“*Tommy*”) (“[a]ssuming habeas relief may be sought on behalf of a chimpanzee, 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.*, No. 2018-268, 2018 WL 2107087 (N.Y. May 8, 2018); *Lavery*, 124 A.D.3d at 150-53 (3d Dept. 2014); *Presti*, 124 A.D.3d 1334; *Matter of Nonhuman Rights Project, Inc. v Stanley*, 2014 NY Slip Op 68434(U) (2d Dept. 2014).

IV. The NhRP is entitled to the issuance of the writ pursuant to CPLR 7002(c) and 7003.

47. The NhRP is entitled, as of right, to the issuance of the writ.

48. Article 70 governs the procedure applicable to common law writs of habeas corpus. *See* CPLR 7001 (“the provisions of this article are applicable to common law or statutory writs of habeas corpus”). Article 70 is purely procedural and does not—*cannot*—curtail substantive entitlement to the writ, including the determination of who constitutes a “person.” *Tweed*, 60

¹⁴ *See also Case of the Hottentot Venus*, 13 East 185, 104 Eng. Rep. 344 (K.B. 1810) (Abolitionist Society sought habeas corpus on behalf of black woman being exhibited in London); *In re Trainor*, *New York Times*, May 11, 14, 21, 25, June 14 (1853) (abolitionist and underground railway conductor Jacob R. Gibbs 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—“the Lembrança slaves”—whom he had never met after he was told they were being held captive on a ship in New York harbor).

N.Y. at 569 ("the [habeas corpus] act needs no interpretation and is in full accord with the common law").

49. Article 70 permits a common law "person" unlawfully detained, or any "person" acting on his or her behalf, to seek a common law writ of habeas corpus or order to show cause to require the detainer to demonstrate a legal basis for that "person's" detention and denial of liberty. CPLR 7002.

50. CPLR 7003 (a) provides in part: "The court to whom the petition is made *shall issue* the writ without delay on any day, or, where the petitioner does not demand production of the person detained . . . order the respondent to show cause why the person detained should not be released." (Emphasis added). *See Stanley*, 16 N.Y.S.3d at 908 ("And the legislature was concerned that judges issue valid writs that it enacted a provision, unique in all respects, that a judge or group of judges who refuse to issue a valid writ must forfeit \$1,000 to the person detained."). As the NhRP does not demand that Respondents produce Happy, an order to show cause must be issued. *See Stanley*, 16 N.Y.S.3d at 904-05 ("This proceeding thus commenced with the signing of an order to show cause.") (citing CPLR 7003).

51. CPLR 7003 provides just three grounds upon which a court may deny a habeas petition: (1) if the petition is "successive" within the meaning of 7003(b); (2) "a court or judge of the United States has exclusive jurisdiction;" or (3) "[i]f it appears from the petition or the documents annexed thereto that the person is not illegally detained[.]" None of these grounds is applicable to the case at bar, *infra*.

52. This is the first petition filed on behalf of Happy. No appeal has been taken from any order by virtue of which Happy is detained.

53. No court or judge of the United States has exclusive jurisdiction to order Happy's release.

54. Assuming, as the Court must at this juncture, that Happy reasonably *could be* a legal person, *supra*, her imprisonment by Respondents is unlawful under the common law, which presumes that all natural persons are free absent positive law. *See Somerset*, 98 Eng. Rep. at 510 (slavery "is so *odious* that nothing can be suffered to support it but positive law"); *Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) (on the question of a slave's manumission, "all presumptions in favor of personal liberty and freedom ought to be made"); *People ex. rel Caldwell v Kelly*, 33 Barb. 444, 457-58 (Sup Ct. 1862) (Potter, J.) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction[.]"). Stated differently, as a "person" under the common law of New York, Happy's detention by Respondents is *per se* unlawful.

55. Once the NhRP satisfies the requirements of CPLR 7002(c) (requiring petitioner to state the "person" is "detained" and the "nature of the illegality"), this Court must issue the Order to Show Cause, pursuant to CPLR 7003(a), after which the burden shifts to the Respondents to demonstrate that the detention of Happy is lawful. CPLR 7006(a), 7008(b).

56. That Respondents may not be in violation of any federal, state, or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. This habeas corpus case is neither an "animal protection" nor "animal welfare" case, just as a habeas corpus case brought on behalf of a detained human would not be a "human protection" or "human welfare" case. *See Lavery*, 124 A.D.3d at 149; *Stanley*, 16 N.Y.S.3d at 901. This Petition does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions[.]" nor does it seek improved welfare for Happy. *Presti*, 124 A.D.3d at 1335. Rather,

this Petition demands that this Court recognize Happy's common law right to bodily liberty and order her immediate release from Respondents' current and continued unlawful detention so that her liberty and autonomy may be realized. It is the fact Happy is imprisoned *at all*, rather than the conditions of her imprisonment, that the NhRP claims is unlawful. *See Stanley*, 16 N.Y.S.3d at 901 ("The conditions under which Hercules and Leo are confined are not challenged by petitioner . . . and it advances no allegation that respondents are violating any federal, state or local laws by holding Hercules and Leo."). The Third Department in *Lavery* understood: "we have not been asked to evaluate the quality of Tommy's current living conditions in an effort to improve his welfare." 124 A.D.3d at 149.

57. The NhRP seeks Happy's immediate release from her imprisonment. This Court then has the authority to release her to PAWS which has agreed to provide permanent sanctuary for her.¹⁵ At PAWS, Happy, along with other elephants, will flourish in an environment that respects her autonomy to the greatest degree possible, as close to her native Asia as may be found in North America.

58. That this Court may order Happy sent to a sanctuary such as PAWS rather than into the wild or onto the streets of New York does not preclude her from habeas corpus relief (Mem. at Part VI). *See Tommy*, 31 N.Y.3d at 1058-59 (Fahey, J., concurring) (noting habeas corpus could be used for "transfers of the chimpanzees to a primate sanctuary" and that the Fourth Department erred in holding that habeas corpus was not an appropriate remedy based upon a misinterpretation of the relevant case law);¹⁶ *Stanley*, 16 N.Y.S.3d at 917 n.2 (citing *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dept. 1995); *Matter of MHLS v. Wack*, 75 N.Y.2d 751 (1989)).

¹⁵ Stewart Aff. ¶ 2.

¹⁶ In addition to the Fourth Department's misinterpretation of the relevant case law, it also misconstrued the relief sought by the NhRP. In response, the NhRP has painstakingly and specifically made clear in this Petition that the NhRP is seeking Happy's immediate release from her unlawful imprisonment and is not seeking a change in the conditions of her detention.

In *Stanley*, the court rejected the respondents' argument that, because the NhRP sought Hercules and Leo's "transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus," as habeas corpus has been used to "secure [the] transfer of [a] mentally ill individual to another institution." *Id.*

A. The NhRP's arguments are meritorious and supported by a New York Court of Appeals Justice, Harvard Law and Habeas Corpus Professors, Foreign Courts, Philosophers, and Respected Scientists.

59. "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); *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.").

60. As the *Stanley* court noted after issuing an order to show cause on behalf of two chimpanzees, "[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.'" 16 N.Y.S.3d at 912. "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id.* (citing *Obergefell v. Hodges*, 135 S. Ct. 2602 (2015)). *See, e.g., United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (D. Neb. 1879) (that no Native American had previously sought relief pursuant to the Federal Habeas Corpus Act did not foreclose a Native American from being characterized as a "person" and being awarded the requested habeas corpus relief); *Somerset*, 1 Lofft 1, 98 Eng. Rep. 499 (that no slave had ever been granted a writ of habeas corpus was no obstacle to the court granting one to the slave petitioner); *see also Lemmon*, 20 N.Y. at 562.

61. The only written opinion from any judge of the New York Court of Appeals, or any American high court, on the issue presented in this case is Judge Fahey's concurrence in *Tommy*, which found the NhRP's arguments meritorious, *supra*.

62. In addition to Judge Fahey's opinion, the Supreme Court of Oregon referenced NhRP's "ongoing litigation" and declared in a similar fashion: "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[.]" *State v. Fessenden*, 355 Or. 759, 769-70 (2014).

63. At least four courts, including the New York Supreme Court in *Stanley*, have issued writs of habeas corpus or orders to show cause on behalf of nonhuman animals, *supra* at paragraphs 24 and 27 through 29.

64. The Indian Supreme Court has held that nonhuman animals have both a statutory and a constitutional right to personhood and certain legal rights. *Animal Welfare Board v. Nagaraja*, 6 SCALE 468 (2014), available at: <https://indiankanoon.org/doc/39696860/> (last visited Sept. 27, 2018).

65. In 2018, the Colombian Supreme Court designated its part of the Amazon rainforest as "as an entity subject of rights," in other words, a "person."¹⁷

66. Constitutional law scholar 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, submitted *amicus curiae* briefs in favor of the

¹⁷ See STC4360-2018 (2018-00319-01), <http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>, excerpts available at <https://www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf?x54537> (last visited Sept. 27, 2018).

NhRP's habeas corpus lawsuits.¹⁸ See *Tommy*, 31 N.Y.3d at 1056-57 (Fahey, J., concurring) (finding persuasive the *amicus curiae* briefs of Tribe, Marceau, and Wiseman).

67. A group of North American philosophers submitted an *amicus curiae* brief in support of extending habeas corpus to such autonomous nonhuman animals as chimpanzees.¹⁹ See *id.* at 1058 (“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”). These philosophers included: Kristin Andrews (York University); Gary Comstock (North Carolina State University); G.K.D. Crozier (Laurentian University); Sue Donaldson (Queen’s University); Andrew Fenton (Dalhousie University); Tyler M. John (Rutgers University); L. Syd M Johnson (Michigan Technological University); Robert Jones (California State University, Chico); Will Kymlicka (Queen’s University); Letitia Meynell (Dalhousie University); Nathan Nobis (Morehouse College); David Peña-Guzmán (California State University, San Francisco); James Rocha (California State University, Fresno); Bernard Rollin (Colorado State); Jeffrey Sebo (New York University); Adam Shriver (University of British Columbia); and Rebecca L. Walker (University of North Carolina at Chapel Hill).

68. The NhRP’s cases have captured the interest of the world’s leading legal scholars and the most selective academic publications,²⁰ while catalyzing the development of an entire

¹⁸ The *amicus curiae* brief of Laurence Tribe in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_Tribe_ITMO-The-NonHuman-Rights-Project-v.-Presti_Amicus-1-2.pdf (last visited Sept. 27, 2018). The *amicus curiae* brief of Justin Marceau and Samuel Wiseman in *Kiko* is available at: https://www.nonhumanrights.org/content/uploads/2016_150149_ITMO-The-Nonhuman-Rights-Project-v.-Presti_Amici.pdf (last visited Sept. 27, 2018).

¹⁹ See <https://www.nonhumanrights.org/content/uploads/In-re-Nonhuman-Rights-v.-Lavery-Proposed-Brief-by-PHILOSOPHERS-74435.pdf> (last visited Sept. 27, 2018).

²⁰ See Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal*

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.²¹

Rights: Legal Philosophical, and Pragmatic Perspectives, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); VI. *Aesthetic Injuries*, *Animal Rights, and Anthropomorphism*, 122 HARV. L. REV. 1204, 1216 (2009); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581 (2003); Richard A. Epstein, *Drawing the Line: Science and the Case for Animal Rights*, 46 PERSPECTIVES IN BIOLOGY AND MEDICINE 469 (2003); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017); Adam Kolber, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163 (2001); Will Kymlicka, *Social Membership: Animal Law beyond the Property/Personhood Impasse*, 40 DALHOUSIE LAW JOURNAL 123 (2017); Kenan Malik, *Rights and Wrongs*, 406 NATURE 675 (2000); Greg Miller, *A Road Map for Animal Rights*, 332 SCIENCE 30 (2011); Greg Miller, *The Rise of Animal Law: Will Growing Interest in How the Legal System Deals with Animals Ultimately Lead to Changes for Researchers?* 332 SCIENCE 28 (2011); Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 DENV. L. REV. 609, 615 (2017); Martha C. Nussbaum, *Animal Rights: The Need for A Theoretical Basis*, 114 HARV. L. REV. 1506, 1541 (2001); Richard A. Posner, *Animal Rights*, 110 YALE L.J. 527, 541 (2000); Diana Reiss, *The Question of Animal Rights*, 418 NATURE 369 (2002); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 401 (2003); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1 (2001).

²¹ Richard A. Epstein, *Animals as Objects of Subjects of Rights*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Richard A. Posner, *Animal Rights: Legal Philosophical, and Pragmatic Perspectives*, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Justin F. Marceau and Steven M. Wise, "Exonerating the Innocent: Habeas for Nonhuman Animals," WRONGFUL CONVICTIONS AND THE DNA REVOLUTION - TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Daniel S. Medwed, ed. Cambridge University Press 2017); Steven M. Wise, *A Great Shout: Legal Rights for Great Apes*, in THE ANIMAL ETHICS READER (Susan J Armstrong & Richard G. Botzler eds., 2017); Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS (Cass R. Sunstein & Martha C. Nussbaum eds. 2004); Steven M. Wise, *The Capacity of Non-Human Animals for Legal Personhood and Legal Rights*, in THE POLITICS OF SPECIES: RESHAPING OUR RELATIONSHIPS WITH OTHER ANIMALS (Raymond Corbey & Annette Lanjouw eds., 2013); Katrina M. Albright, *The Extension of Legal Rights to Animals Under A Caring Ethic: An Ecofeminist Exploration of Steven Wise's Rattling the Cage*, 42 NAT. RESOURCES J. 915, 917 (2002); Jeffrey L. Amestoy, *Uncommon Humanity: Reflections on Judging in A Post-Human Era*, 78 N.Y.U. L. REV. 1581, 1591 (2003); Pat Andriola, *Equal Protection for Animals*, 6 BARRY U. ENVTL. & EARTH L.J. 50, 64 (2016); Louis Anthes & Michele Host, *Rattling the Cage: Toward Legal Rights for Animals*, by Steven M. Wise, 25 N.Y.U. REV. L. & SOC. CHANGE 479, 482 (1999); Matthew Armstrong, *Cetacean Community v. Bush: The False Hope of Animal Rights Lingers on*, 12 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 185, 200 (2006); Rich Barlow, *Nonhuman Rights: Is It Time to Unlock the Cage?*, BOSTON UNIVERSITY SCHOOL OF LAW, July, 18, 2017, <https://www.bu.edu/law/2017/07/18/nonhuman-rights-is-it-time-to-unlock-the-cage/>; David Barton, *A Death-Struggle Between Two Civilizations*, 13 REGENT U. L. REV. 297, 349 (2001); Douglas E. Beloof, *Crime Victims' Rights: Critical Concepts for Animal Rights*, 7 ANIMAL L. 19, 27 (2001); Lane K.

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V. The Expert Scientific Affidavits demonstrate that Happy's interest in exercising her autonomy is as vital to her as it is to humans.

69. Attached are the following affidavits, including four affidavits from five of the world's most renowned experts on the cognitive abilities of elephants and a supplemental affidavit from one of those elephant experts ("Expert Scientific Affidavits"), and an affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In total, these affidavits include:

- (a) Joint Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.
- (b) Affidavit of Joyce Poole, Ph.D.
- (c) Affidavit of Karen McComb, Ph.D.
- (d) Affidavit of Cynthia Moss
- (e) Supplemental Affidavit of Joyce Poole, Ph.D.
- (f) Affidavit of Ed Stewart

70. The Expert Scientific Affidavits—(a) through (e)—demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-

6 ANIMAL L. 259, 262 (2000); Richard York, *Humanity and Inhumanity: Toward a Sociology of the Slaughterhouse*, 17 ORGANIZATION AND ENVIRONMENT 260 (2004); Randall S. Abate and Jonathan Crowe, *From Inside the Cage to Outside the Box*, 5(1) Global Journal of Animal Law (2017); Jonas - Sebastian Beaudry, *From Autonomy to Habeas Corpus: Animal Rights Activists Take the Parameters of Legal Personhood to Court*, 4(1) Global Journal of Animal Law (2016); Natalie Prosin and Steven M. Wise, *The Nonhuman Rights Project - Coming to a Country Near You*, in 2(2) Global Journal of Animal Law (2014); "Why Things Can Hold Rights: Reconceptualizing the Legal Person," LEGAL PERSONHOOD: ANIMALS, ARTIFICIAL INTELLIGENCE AND THE UNBORN (Tomasz Pietrzykowski and Visa Kurki, eds., Springer, 2017); Brandon Keim, *The Eye of the Sandpiper: Stories from the Living World*, Comstock (2017), pp. 132-150; Charles Seibert, "Should a Chimp Be Able to Sue Its Owner?", *New York Times Magazine* (April 23, 2014), available at: <https://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> (last visited Feb. 15, 2018); Astra Taylor, "Who Speaks for the Trees?", *The Baffler*, (Sept. 7, 2016), available at: thebaffler.com/salvos/speaks-trees-astra-taylor (last visited Feb. 15, 2018); Sindhu Sundar, "Primal Rights: One Attorney's Quest for Chimpanzee Personhood.", *Law360* (March 10, 2017), available at: <https://www.law360.com/articles/900753> (last visited Feb. 15, 2018).

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; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand 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; 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.

71. African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.²²

72. Many of these capacities have been considered — erroneously — as uniquely human; each is a component of autonomy.²³ African and Asian elephants are autonomous, as they exhibit “self-determined behaviour that is based on freedom of choice. As a psychological

²² Joint Affidavit of Lucy Bates and Richard M. Byrne [“Bates & Byrne Aff.”] ¶37; Affidavit of Karen McComb [“McComb Aff.”] ¶31; Affidavit of Joyce Poole [“Poole Aff.”] ¶29; Affidavit of Cynthia Moss [“Moss Aff.”] ¶25.

²³ Bates & Byrne Aff. ¶37; McComb Aff. ¶31; Poole Aff. ¶29; Moss Aff. ¶25.

concept it implies that the individual is directing their behaviour based on some non-observable, internal cognitive process, rather than simply responding reflexively.”²⁴

73. Elephants possess the largest absolute brain of any land animal.²⁵ Even relative to their body sizes, elephant brains are large.²⁶

74. An encephalization quotient (“EQ”) of 1.0 means a brain is exactly the size expected for that body size; values greater than 1.0 indicate a larger brain than expected for that body size. (*Id.*)²⁷ Elephants have an EQ of between 1.3 and 2.3 (varying between sex and African and Asian species).²⁸ This means an elephant’s brain can be more than twice as large as is expected for an animal of its size.²⁹ These EQ values are similar to those of the great apes, with whom elephants have not shared a common ancestor for almost 100 million years.³⁰

75. A large brain allows greater cognitive skill and behavioral flexibility.³¹ Typically, mammals are born with brains weighing up to 90% of the adult weight.³² This figure drops to about 50% for chimpanzees.³³ At birth, human brains weigh only about 27% of the adult brain weight and increase in size over a prolonged childhood period.³⁴ This lengthy period of brain development (termed “developmental delay”) is a key feature of human brain evolution.³⁵ It provides a longer period in which the brain may be shaped by experience and learning, and plays a role in the emergence of complex cognitive abilities such as self-awareness, creativity, forward

²⁴ Bates & Byrne Aff. ¶30, ¶60; McComb Aff. ¶24, ¶31, ¶54; Poole Aff. ¶22, ¶53; Moss Aff. ¶18; ¶48.

²⁵ Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

²⁶ Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

²⁷ Encephalization quotients (EQ) are a standardized measure of brain size relative to body size, and illustrate by how much a species’ brain size deviates from that expected for its body size. Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

²⁸ Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

²⁹ Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

³⁰ Bates & Byrne Aff. ¶32; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

³¹ Bates & Byrne Aff. ¶¶32-33; McComb Aff. ¶26; Poole Aff. ¶24; Moss Aff. ¶20.

³² Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

³³ Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

³⁴ Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

³⁵ Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

planning, decision making and social interaction.³⁶ Elephant brains at birth weigh only about 35% of their adult weight, and elephants accordingly undergo a similarly protracted period of growth, development and learning.³⁷ This similar developmental delay in the elephant brain is likewise associated with the emergence of analogous cognitive abilities.³⁸

76. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness.³⁹ Elephant and human brains share deep and complex foldings of the cerebral cortex, large parietal and temporal lobes, and a large cerebellum.⁴⁰ The temporal and parietal lobes of the cerebral cortex manage communication, perception, and recognition and comprehension of physical actions, while the cerebellum is involved in planning, empathy, and predicting and understanding the actions of others.⁴¹

77. Elephant brains hold nearly as many cortical neurons as do human brains, and a much greater number than do chimpanzees or bottlenose dolphins.⁴² Elephants' pyramidal neurons — the class of neurons found in the cerebral cortex, particularly the pre-frontal cortex, which is the brain area that controls “executive functions” — are larger than in humans and most other species.⁴³ The term “executive function” refers to controlling operations, such as paying attention, inhibiting inappropriate responses, and deciding how to use memory search. These abilities develop late in human infancy and are often impaired in dementia. The degree of complexity of pyramidal neurons is linked to cognitive ability, with more complex connections

³⁶ Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

³⁷ Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

³⁸ Bates & Byrne Aff. ¶33; McComb Aff. ¶27; Poole Aff. ¶25; Moss Aff. ¶21.

³⁹ Bates & Byrne Aff. ¶34; Poole Aff. ¶26; McComb Aff. ¶28; Moss Aff. ¶22.

⁴⁰ Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.

⁴¹ Bates & Byrne Aff. ¶34; McComb Aff. ¶28; Poole Aff. ¶26; Moss Aff. ¶22.

⁴² Humans: 1.15×10^{10} ; elephants: 1.1×10^{10} ; chimpanzees: 6.2×10^9 ; dolphins: 5.8×10^9 . Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

⁴³ Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

between pyramidal neurons being associated with increased cognitive capabilities.⁴⁴ Elephant pyramidal neurons have a large number of connections with other neurons for receiving and sending signals, known as a dendritic tree.⁴⁵

78. Elephants, like humans, great apes, and some cetaceans, possess *von Economo neurons*, or spindle cells, the so-called “air-traffic controllers for emotions,” in the anterior cingulate, fronto-insular, and dorsolateral prefrontal cortex areas of the brain.⁴⁶ In humans, these cortical areas are involved, among other things, with the processing of complex social information, emotional learning and empathy, planning and decision-making, and self-awareness and self-control.⁴⁷ The presence of spindle cells in the same brain locations in elephants and humans strongly implies that these higher-order brain functions, which are the building blocks of autonomous, self-determined behavior, are common to both species.⁴⁸

79. Elephants have extensive and long-lasting memories.⁴⁹ McComb et al. (2000), using experimental playback of long-distance contact calls in Amboseli National Park, Kenya, showed that African elephants remember and recognize the voices of at least 100 other elephants.⁵⁰ Each adult female elephant tested was familiar with the contact-call vocalizations of individuals from an average of 14 families in the population.⁵¹ When the calls came from the test elephants’ own family, they contact-called in response and approached the location of the loudspeaker; when they were from another non-related but familiar family, one that had been shown to have a high

⁴⁴ Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

⁴⁵ Bates & Byrne Aff. ¶35; McComb Aff. ¶29; Poole Aff. ¶27; Moss Aff. ¶23.

⁴⁶ Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

⁴⁷ Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

⁴⁸ Bates & Byrne Aff. ¶36; McComb Aff. ¶30; Poole Aff. ¶28; Moss Aff. ¶24.

⁴⁹ Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

⁵⁰ Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

⁵¹ Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

association index with the test group, they listened but remained relaxed.⁵² However, when a test group heard unfamiliar contact calls from groups with a low association index with the test group, the elephants bunched together and retreated from the area.⁵³

80. McComb et al. has demonstrated that this social knowledge accumulates with age, with older females having the best knowledge of the contact calls of other family groups, and that older females are better leaders than younger, with more appropriate decision-making in response to potential threats (in this case, in the form of hearing lion roars).⁵⁴ Younger matriarchs under-reacted to hearing roars from male lions, elephants, most dangerous predators.⁵⁵ Sensitivity to the roars of male lions increased with increasing matriarch age, with the oldest, most experienced females showing the strongest response to this danger.⁵⁶ These studies show that elephants continue to learn and remember information about their environments throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they age.⁵⁷

81. Further demonstration of elephants' long-term memory emerges from data on their movement patterns.⁵⁸ African elephants move over very large distances in their search for food and water.⁵⁹ Leggett (2006) used GPS collars to track the movements of elephants living in the Namib Desert, with one group traveling over 600 km in five months.⁶⁰ Viljoen (1989) showed

⁵² Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

⁵³ Bates & Byrne Aff. ¶54; McComb Aff. ¶48; Poole Aff. ¶49; Moss Aff. ¶42.

⁵⁴ Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

⁵⁵ Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

⁵⁶ Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

⁵⁷ Bates & Byrne Aff. ¶55; McComb Aff. ¶49; Poole Aff. ¶50; Moss Aff. ¶43.

⁵⁸ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁵⁹ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁶⁰ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

that elephants in the same region visited water holes approximately every four days, though some were more than 60 km apart.⁶¹

82. Elephants inhabiting the deserts of Namibia and Mali may travel hundreds of kilometers to visit remote water sources shortly after the onset of a period of rainfall, sometimes along routes that have not been used for many years.⁶² These remarkable feats suggest exceptional cognitive mapping skills that rely upon the long-term memories of older individuals who may have traveled that same path decades earlier.⁶³ Thus, family groups headed by older matriarchs are better able to survive periods of drought.⁶⁴ These older matriarchs lead their families over larger areas during droughts than families headed by younger matriarchs, again drawing on their accrued knowledge, this time about the locations of permanent, drought-resistant sources of food and water, to better lead and protect their families.⁶⁵

83. Studies reveal that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to “management” practices initiated by humans.⁶⁶ Shannon, *et al.* (2013) demonstrated that South African elephants who experienced trauma decades earlier showed significantly reduced social knowledge.⁶⁷ As a result of archaic culling practices, these elephants had been forcibly separated from family members and subsequently taken to new locations.⁶⁸ Two decades later, their social knowledge and skills and decision-making abilities were

⁶¹ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁶² Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁶³ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁶⁴ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁶⁵ Bates & Byrne Aff. ¶56; McComb Aff. ¶50; Poole Aff. ¶51; Moss Aff. ¶44.

⁶⁶ Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

⁶⁷ Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

⁶⁸ Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

impoverished compared to an undisturbed Kenyan population.⁶⁹ Disrupting elephants' natural way of life has substantial negative impacts on their knowledge and decision-making abilities.⁷⁰

84. Elephants demonstrate advanced working memory skills.⁷¹ Working memory is the ability to temporarily store, recall, manipulate and coordinate items from memory.⁷² Working memory directs one's attention to relevant information, utilized in reasoning, planning, coordination, and execution of cognitive processes through a "central executive."⁷³ Adult human working memory has a capacity of around seven items.⁷⁴ When experiments were conducted with wild elephants in Kenya in which the locations of fresh urine samples from related or unrelated elephants were manipulated, the elephants responded by detecting urine from known individuals in surprising locations, thereby demonstrating the ability continually to track the locations of at least 17 family members in relation to themselves, as either absent, present in front of self, or present behind self.⁷⁵ This remarkable ability to hold in mind and regularly update information about the locations and movements of a large number of family members is best explained by the fact that elephants possess an unusually large working memory capacity that is much larger than that of humans.⁷⁶

85. Elephants display a sophisticated categorization of their environment on par with humans.⁷⁷ Bates, Byrne, Poole, and Moss experimentally presented the elephants of Amboseli National Park, Kenya with garments that gave olfactory or visual information about their human wearers, either Maasai warriors who traditionally attack and spear elephants as part of their rite

⁶⁹ Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

⁷⁰ Bates & Byrne Aff. ¶57; McComb Aff. ¶51; Poole Aff. ¶52; Moss Aff. ¶45.

⁷¹ Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

⁷² Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

⁷³ Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

⁷⁴ Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

⁷⁵ Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

⁷⁶ Bates & Byrne Aff. ¶58; McComb Aff. ¶52; Poole Aff. ¶53; Moss Aff. ¶46.

⁷⁷ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

of passage, or Kamba men who are agriculturalists and traditionally pose little threat to elephants.⁷⁸ In the first experiment, the only thing that differed between the cloths was the smell, derived from the ethnicity and/or lifestyle of the wearers.⁷⁹ The elephants were significantly more likely to run away when they sniffed cloths worn by Maasai men than those worn by Kamba men or no one at all. (See "Video 7" attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit K").⁸⁰

86. In a second experiment, they presented the elephants with two cloths that had not been worn by anyone; one was white (a neutral stimulus) and the other red, the color ritually worn by Maasai warriors.⁸¹ With access only to these visual cues, the elephants showed significantly greater, sometimes aggressive, reactions to red garments than white.⁸² They concluded that elephants are able to categorize a single species (humans) into sub-classes (*i.e.*, "dangerous" or "low risk") based on either olfactory or visual cues alone.⁸³

87. McComb, *et al.* further demonstrated that these same elephants distinguish human groups based on voices.⁸⁴ The elephants reacted differently, and appropriately, depending on whether they heard Maasai or Kamba men speaking, and whether the speakers were male Maasai versus female Maasai, who also pose no threat.⁸⁵ Scent, sounds and visual signs associated specifically with Maasai men are categorized as "dangerous," while neutral signals are attended to but categorized as "low risk."⁸⁶ These sophisticated, multi-modal categorization skills may be exceptional among non-human animals and demonstrate elephants' acute sensitivity to the

⁷⁸ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁷⁹ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸⁰ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸¹ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸² Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸³ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸⁴ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸⁵ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸⁶ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

human world and how they monitor human behavior and learn to recognize when we might cause them harm.⁸⁷

88. Human speech and language reflect autonomous thinking and intentional behavior.⁸⁸ Similarly, elephants vocalize to share knowledge and information.⁸⁹ Male elephants primarily communicate about their sexual status, rank and identity, whereas females and dependents emphasize and reinforce their social units.⁹⁰ Call types are separated into those produced by the larynx (such as “rumbles”) and calls produced by the trunk (such as “trumpets”), with different calls in each category used in different contexts.⁹¹ Field experiments have shown that African elephants distinguish between call types. For example, such contact calls as “rumbles” may travel kilometers and maintain associations between elephants, or “oestrus rumbles” may occur after a female has copulated, and these call types elicit different responses in listeners.⁹²

89. Elephant vocalizations are not merely reflexive; they have distinct meanings to listeners and communicate in a manner similar to the way humans use language.⁹³ Elephants display more than two hundred gestures, signals and postures that they use to communicate information to their audience.⁹⁴ Such signals are adopted in many contexts, such as aggressive, sexual or socially integrative situations, are well-defined, carry a specific meaning both to the actor and recipient, result in predictable responses from the audience, and together demonstrate

⁸⁷ Bates & Byrne Aff. ¶59; McComb Aff. ¶53; Poole Aff. ¶54; Moss Aff. ¶47.

⁸⁸ Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

⁸⁹ Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

⁹⁰ Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

⁹¹ Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

⁹² Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

⁹³ Bates & Byrne Aff. ¶50; McComb Aff. ¶44; Poole Aff. ¶42; Moss Aff. ¶38.

⁹⁴ Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Poole Aff. ¶43; Moss Aff. ¶40.

intentional and purposeful communication intended to share information and/or alter the others' behavior to fit their own will.⁹⁵

90. Elephants use specific calls and gestures to plan and discuss a course of action.⁹⁶ These may be to respond to a threat through a group retreating or mobbing action (including celebration of successful efforts), or planning and discussing where, when and how to move to a new location.⁹⁷ In group-defensive situations, elephants respond with highly coordinated behaviour, both rapidly and *predictably*, to specific calls uttered and particular gestures exhibited by group members.⁹⁸ These calls and gestures carry specific meanings not only to elephant listeners, but to experienced human listeners as well.⁹⁹ The rapid, predictable and collective response of elephants to these calls and gestures indicates that elephants have the capacity to understand the goals and intentions of the signalling individual.¹⁰⁰

91. Elephant group defensive behavior is highly evolved and involves a range of different tactical maneuvers adopted by different elephants.¹⁰¹ For example, matriarch Provocadora's contemplation of Poole's team through listening and "j-sniffing," followed by her purposeful "perpendicular-walk" (in relation to Poole's team) toward her family and her "ear-flap-slide" clearly communicated that her family should begin a "group-advance" upon Poole's team.¹⁰² This particular elephant attack is a powerful example of elephants' use of empathy, coalition and cooperation.¹⁰³ Provocadora's instigation of the "group-advance" led to a two-and-a-half minute "group-charge" in which the three other large adult females of the 36-member

⁹⁵ Bates & Byrne Aff. ¶52; McComb Aff. ¶46; Poole Aff. ¶43; Moss Aff. ¶40.

⁹⁶ Poole Aff. ¶44.

⁹⁷ Poole Aff. ¶44.

⁹⁸ Poole Aff. ¶45.

⁹⁹ Poole Aff. ¶45.

¹⁰⁰ Poole Aff. ¶45.

¹⁰¹ Poole Aff. ¶45.

¹⁰² Poole Aff. ¶45.

¹⁰³ Poole Aff. ¶45.

family took turns leading the charge, passing the baton, in a sense, from one to the next.¹⁰⁴ Once they succeeded in their goal of chasing Poole's team away, they celebrated their victory by "high-fiving" with their trunks and engaging in an "end-zone-dance."¹⁰⁵ "High-fiving" is also typically used to initiate a coalition and is both preceded by and associated with other specific gestures and calls that lead to very goal oriented collective behavior.¹⁰⁶

92. Ostensive communication refers to the way humans use particular behavior, such as tone of speech, eye contact, and physical contact, to emphasize that a particular communication is important.¹⁰⁷ Lead elephants in family groups use ostensive communication frequently as a way to say, "Heads up – I am about to do something that you should pay attention to."¹⁰⁸

93. In planning and communicating intentions regarding a movement, elephants use both vocal and gestural communication.¹⁰⁹ For example, Poole has observed that a member of a family will use the axis of her body to point in the direction she wishes to go and then vocalize, every couple of minutes, with a specific call known as a "let's-go" rumble, "I want to go this way, let's go together."¹¹⁰ The elephant will also use intention gestures — such as "foot-swinging" — to indicate her intention to move.¹¹¹ Such a call may be successful or unsuccessful at moving the group or may lead to a 45-minute or longer discussion (a series of rumble exchanges known as "cadenced rumbles") that researchers interpret as negotiation.¹¹² Sometimes such negotiation leads to disagreement that may result in the group splitting and going in

¹⁰⁴ Poole Aff. ¶45.

¹⁰⁵ Poole Aff. ¶45.

¹⁰⁶ Poole Aff. ¶45.

¹⁰⁷ Poole Aff. ¶36.

¹⁰⁸ Poole Aff. ¶36.

¹⁰⁹ Poole Aff. ¶46.

¹¹⁰ Poole Aff. ¶46.

¹¹¹ Poole Aff. ¶46.

¹¹² Poole Aff. ¶46.

different directions for a period of time.¹¹³ In situations where the security of the group is at stake, such as when movement is planned through or near human settlement, all group members focus on the matriarch's decision.¹¹⁴ So while "let's go" rumbles are uttered, others adopt a "waiting" posture until the matriarch, after much "listening," "j-sniffing," and "monitoring," decides it is safe to proceed, where upon they bunch together and move purposefully, and at a fast pace in a "group-march."¹¹⁵

94. Elephants typically move through dangerous habitat and nighttime hours at high speed in a clearly goal-oriented manner known as "streaking," which has been described and documented through the movements of elephants wearing satellite tracking collars.¹¹⁶ The many different signals — calls, postures, gestures and behaviors elephants use to contemplate and initiate such movement (including "ear-flap," "ear-flap-slide") — are clearly understood by other elephants (just as they can be understood after long-term study by human observers), mean very specific things, and indicate that elephants: 1) have a particular plan which they can communicate with others; 2) can adjust their plan according to their immediate assessment of risk or opportunity; and 3) can communicate and execute the plan in a coordinated manner.¹¹⁷

95. Elephants can vocally imitate sounds they hear, from the engines of passing trucks to the commands of human zookeepers.¹¹⁸ Imitating another's behavior is demonstrative of a sense of self, as it is necessary to understand how one's own behavior relates to the behavior of others.¹¹⁹ African elephants recognize the importance of visual attentiveness on the part of an intended recipient, elephant or human, and of gestural communication, which further

¹¹³ Poole Aff. ¶46.

¹¹⁴ Poole Aff. ¶46.

¹¹⁵ Poole Aff. ¶46.

¹¹⁶ Poole Aff. ¶46.

¹¹⁷ Poole Aff. ¶46.

¹¹⁸ Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.

¹¹⁹ Bates & Byrne Aff. ¶51; McComb Aff. ¶45; Poole Aff. ¶47; Moss Aff. ¶39.

demonstrates that elephants' gestural communications are intentional and purposeful.¹²⁰ This ability to understand the visual attentiveness and perspective of others is crucial for empathy, mental-state understanding, and "theory of mind," the ability to mentally represent and think about the knowledge, beliefs and emotional states of others, while recognizing that these can be distinct from your own knowledge, beliefs and emotions.¹²¹

96. As do humans, Asian elephants exhibit "mirror self-recognition" (MSR) using Gallup's classic "mark test."¹²² MSR is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror.¹²³ If the individual uses the mirror to investigate the mark, the individual must recognize the reflection as herself. (See "Video 1," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit D").¹²⁴

97. MSR is significant because it is a key identifier of self-awareness.¹²⁵ Self-awareness is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires.¹²⁶ By demonstrating they can recognize themselves in a mirror, elephants must be holding a mental representation of

¹²⁰ Bates & Byrne Aff. ¶53; McComb Aff. ¶47; Poole Aff. ¶48; Moss Aff. ¶41.

¹²¹ Bates & Byrne Aff. ¶40, ¶53; McComb Aff. ¶34, ¶47; Poole Aff. ¶32, ¶48; Moss Aff. ¶28, ¶41.

¹²² Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26. Happy has specifically been found to possess Mirror Self-Recognition (MSR) which is an indicator of self-consciousness. See *supra* n.11.

¹²³ Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

¹²⁴ Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

¹²⁵ Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

¹²⁶ "Autobiographical memory" refers to what one remembers about his or her own life; for example, not that "Paris is the capital of France," but the recollection that you had a lovely time when you went there. Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

themselves from another perspective and thus be aware that they are a separate entity from others.¹²⁷

98. One who understands the concept of dying and death must possess a sense of self.¹²⁸ Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members.¹²⁹ Having a mental representation of the self, which is a pre-requisite for mirror-self recognition, likely confers an ability to comprehend death.¹³⁰

99. Wild African elephants have been shown experimentally to be more interested in the bones of dead elephants than the bones of other animals. (See "Video 2," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit E").¹³¹ They have frequently been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead individuals.¹³² Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead they engage in more "mournful" or "grief-stricken" behavior, such as standing guard over the body with dejected demeanor and protecting it from predators. (See "Photographs," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit F").¹³³

100. Wild African elephants have been observed to cover the bodies of their dead with dirt and vegetation.¹³⁴ Mothers who lose a calf may remain with the calf's body for an extended

¹²⁷ Bates & Byrne Aff. ¶38; McComb Aff. ¶32; Poole Aff. ¶30; Moss Aff. ¶26.

¹²⁸ Poole Aff. ¶31; Bates & Byrne Aff. ¶39; Moss Aff. ¶27.

¹²⁹ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³⁰ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³¹ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³² Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³³ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³⁴ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

period, but do not behave towards the body as they would a live calf.¹³⁵ Indeed, the general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations.¹³⁶ These behaviors are akin to human responses to the death of a close relative or friend and demonstrate that elephants possess some understanding of life and the permanence of death. (See "Photographs," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit E").¹³⁷

101. Elephants' interest in the bodies, carcasses and bones of elephants who have passed is so marked that when one has died, trails to the site of death become worn into the ground by the repeated visits of many elephants over days, weeks, months, even years.¹³⁸ The accumulation of dung around the site attests to the extended time that visiting elephants spend touching and contemplating the bones.¹³⁹ Poole observed that, over years, the bones may become scattered over tens or hundreds of square meters as elephants pick up the bones and carry them away.¹⁴⁰ The tusks are of particular interest and may be carried and deposited many hundreds of meters from the site of death.¹⁴¹

102. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities.¹⁴² Empathy is defined as identifying with and understanding another's experiences or feelings by relating personally to their situation.¹⁴³

103. Empathy is an important component of human consciousness and autonomy and is a cornerstone of normal social interaction.¹⁴⁴ It requires modeling the emotional states and desired

¹³⁵ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³⁶ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³⁷ Bates & Byrne Aff. ¶39; McComb Aff. ¶33; Poole Aff. ¶31; Moss Aff. ¶27.

¹³⁸ Poole Aff. ¶31.

¹³⁹ Poole Aff. ¶31.

¹⁴⁰ Poole Aff. ¶31.

¹⁴¹ Poole Aff. ¶31.

¹⁴² Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

¹⁴³ Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

goals that influence others' behavior both in the past and future, and using this information to plan one's own actions; empathy is only possible if one can adopt or imagine another's perspective, and attribute emotions to that other individual.¹⁴⁵ Thus, empathy is a component of "theory of mind."¹⁴⁶

104. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, such as assisting injured individuals to stand and walk, or helping calves out of rivers or ditches with steep banks. (See "Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F").¹⁴⁷ Elephants have been seen to react when anticipating the pain of others by wincing when a nearby elephant stretched her trunk toward a live wire, and have been observed feeding those unable to use their own trunks to eat and attempting to feed those who have just died.¹⁴⁸

105. In an analysis of behavioural data collected from wild African elephants over a 40-year continuous field study, Bates and colleagues concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand the physical competence and emotional state of others, and attribute goals and mental states (intentions) to others.¹⁴⁹

106. This is borne out by examples such as:

IB family is crossing river. Infant struggles to climb out of bank after its mother. An adult female [not the mother] is standing next to calf and moves closer as the infant struggles. Female does not push calf out with its trunk, but digs her tusks into the mud behind the calf's front right leg which acts to provide some anchorage for the calf, who then scrambles up and out and rejoins mother.

¹⁴⁴ Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

¹⁴⁵ Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

¹⁴⁶ Bates & Byrne Aff. ¶40; McComb Aff. ¶34; Poole Aff. ¶32; Moss Aff. ¶28.

¹⁴⁷ Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Poole Aff. ¶33; Moss Aff. ¶29.

¹⁴⁸ Bates & Byrne Aff. ¶41; McComb Aff. ¶35; Poole Aff. ¶33; Moss Aff. ¶29.

¹⁴⁹ Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.

At 11.10ish Ella gives a "lets go" rumble as she moves further down the swamp . . . At 11.19 Ella goes into the swamp. The entire group is in the swamp except Elspeth and her calf [<1 year] and Eudora [Elspeth's mother]. At 11.25 Eudora appears to "lead" Elspeth and the calf to a good place to enter the swamp — the only place where there is no mud.

(See "Video 3," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit G").¹⁵⁰

107. In addition to the examples analyzed in Bates, *et al.*, Poole observed two adult females rush to the side of a third female who had just given birth, back into her, and press their bodies to her in what appeared to be a spontaneous attempt to prevent injury to the newborn.¹⁵¹ In describing the situation, Poole wrote:

The elephants' sounds [relating to the birth] also attracted the attention of several males including young and inexperienced, Ramon, who, picking up on the interesting smells of the mother [Ella], mounted her, his clumsy body and feet poised above the newborn. Matriarch Echo and her adult daughter Erin, rushed to Ella's side and, I believe, purposefully backed into her in what appeared to be an attempt to prevent the male from landing on the baby when he dismounted.¹⁵²

108. Such examples demonstrate that the acting elephant(s) (the adult female in the first example, Eudora in the second, and Erin and Echo in the third) were able to understand the intentions or situation of the other (the calf in the first case, Elspeth in the second, Ella's newborn and the male in the third), and could adjust their own behavior to counteract the problem being faced by the other.¹⁵³

109. In raw footage Poole acquired of elephant behavior filmed by her brother in the Mara, Kenya, an "allo-mother" (an elephant who cares for an infant and is not the infant's mother or father) moves a log from under the head of an infant in what appears to be an effort to make him more comfortable. (See "Video 1," attached to the Affidavit of Joyce Poole, Ph.D. on

¹⁵⁰ Bates & Byrne Aff. ¶42.

¹⁵¹ Poole Aff. ¶34.

¹⁵² Poole Aff. ¶34.

¹⁵³ Bates & Byrne Aff. ¶42; McComb Aff. ¶36; Poole Aff. ¶34; Moss Aff. ¶30.

CD as "Exhibit C").¹⁵⁴ In a further example of the ability to understand goal directedness of others, elephants appear to understand that vehicles drive on roads or tracks and they further appear to know where these tracks lead.¹⁵⁵ In Gorongosa, Mozambique, where elephants exhibit a culture of aggression toward humans, charging, chasing and attacking vehicles, adult females anticipate the direction the vehicle will go and attempt to cut it off by taking shortcuts *before* the vehicle has begun to turn.¹⁵⁶

110. Empathic behavior begins early in elephants. In humans, rudimentary sympathy for others in distress has been recorded in infants as young as 10 months old; young elephants similarly exhibit sympathetic behavior.¹⁵⁷ For example, during fieldwork in the Maasai Mara in 2011, Poole filmed a mother elephant using her trunk to assist her one-year-old female calf up a steep bank. Once the calf was safely up the bank she turned around to face her five-year-old sister, who was also having difficulties getting up the bank. As the older calf struggled to clamber up the bank the younger calf approached her and first touched her mouth (a gesture of reassurance among family members) and then reached her trunk out to touch the leg that had been having difficulty. Only when her sibling was safely up the bank did the calf turn to follow her mother. (See "Video 2," attached to the Affidavit of Joyce Poole, Ph.D. on CD as "Exhibit D").¹⁵⁸

111. Captive African elephants attribute intentions to others, as they follow and understand human pointing gestures.¹⁵⁹ The elephants understood that the human experimenter was pointing to communicate information to them about the location of a hidden object. (See

¹⁵⁴ Poole Aff. ¶34.

¹⁵⁵ Poole Aff. ¶34.

¹⁵⁶ Poole Aff. ¶34.

¹⁵⁷ Poole Aff. ¶34.

¹⁵⁸ Poole Aff. ¶34.

¹⁵⁹ Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

“Video 4,” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit H”).¹⁶⁰ Attributing intentions and understanding another’s reference point is central to both empathy and “theory of mind.”¹⁶¹

112. There is evidence of “natural pedagogy,” or true teaching — whereby a teacher takes into account the knowledge states of the learner as she passes on relevant information — in elephants. Bates, Byrne, and Moss’s analysis of simulated “oestrus behaviours”¹⁶² in African elephants — whereby a non-cycling, sexually experienced older female will simulate the visual signals of being sexually receptive, even though she is not ready to mate or breed again — demonstrates that these knowledgeable females can adopt false “oestrus behaviours” to demonstrate to naïve young females how to attract and respond appropriately to suitable males.¹⁶³ The experienced females may be taking the youngster’s lack of knowledge into account and actively showing them what to do — a possible example of true teaching as it is defined in humans.¹⁶⁴ This evidence, coupled with the data showing they understand the ostensive cues in human pointing, suggests that elephants understand the intentions and knowledge states (minds) of others.¹⁶⁵

113. Coalitions and cooperation have been frequently documented in wild African elephants, particularly to defend family members or close allies from (potential) attacks by

¹⁶⁰ Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

¹⁶¹ Bates & Byrne Aff. ¶43; McComb Aff. ¶37; Poole Aff. ¶35; Moss Aff. ¶31.

¹⁶² Bates & Byrne Aff. ¶44. Ostension is the way that we can “mark” our communications to show people that that is what they are. If you do something that another copies, that’s imitation; but if you deliberately indicate what you are doing to be helpful, that’s “ostensive” teaching. Similarly, we may “mark” a joke, hidden in seemingly innocent words; or “mark” our words as directed towards someone specific by catching their eye. Ostension implies that the signaller knows what she is doing.

¹⁶³ Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.

¹⁶⁴ Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.

¹⁶⁵ Bates & Byrne Aff. ¶44; McComb Aff. ¶38; Poole Aff. ¶36; Moss Aff. ¶32.

outsiders, such as when one family group tries to "kidnap" a calf from an unrelated family.¹⁶⁶ These behaviors are generally preceded by gestural and vocal signals, typically given by the matriarch and acted upon by family members, and are based on one elephant understanding the emotions and goals of a coalition partner.¹⁶⁷

114. Cooperation is evident in captive Asian elephants, who demonstrate they can work together in pairs to obtain a reward, but also understand the pointlessness of attempting the task if their partner was not present or could not access the equipment. (See "Video 5," attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as "Exhibit I").¹⁶⁸ Problem-solving and working together to achieve a collectively desired outcome involve mentally representing both a goal and the sequence of behaviors that is required to achieve that goal; it is based on (at the very least) short-term action planning.¹⁶⁹

115. Wild elephants have frequently been observed engaging in such cooperative problem-solving as retrieving calves kidnapped by other groups, helping calves out of steep, muddy river banks (see "Video 3," attached to the Affidavit of Karen McComb, Ph.D. on CD as "Exhibit F"), rescuing a calf attacked by a lion (acoustic recording calling to elicit help from others), and navigating through human-dominated landscapes to reach a desired destination such as a habitat, salt-lick, or waterhole.¹⁷⁰ These behaviors demonstrate the purposeful and well-coordinated social system of elephants and show that elephants can collectively hold specific

¹⁶⁶ Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.

¹⁶⁷ Bates & Byrne Aff. ¶45; McComb Aff. ¶39; Poole Aff. ¶37; Moss Aff. ¶33.

¹⁶⁸ Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.

¹⁶⁹ Bates & Byrne Aff. ¶46; McComb Aff. ¶40; Poole Aff. ¶38; Moss Aff. ¶34.

¹⁷⁰ Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.

aims in mind, then work together to achieve those goals.¹⁷¹ Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy.¹⁷²

116. Elephants also show innovative problem-solving in experimental tests of insight, defined as the “a-ha” moment when a solution to a problem suddenly becomes clear.¹⁷³ A juvenile male Asian elephant demonstrated such a spontaneous action by moving a plastic cube and standing on it to obtain previously out-of-reach food.¹⁷⁴ After solving this problem once, he showed flexibility and generalization of the technique to other similar problems by using the same cube in different situations, or different objects in place of the cube when it was unavailable. (See “Video 6,” attached to the Affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D. on CD as “Exhibit J”).¹⁷⁵ This experiment demonstrates that elephants can choose an appropriate action and incorporate it into a sequence of behavior to achieve a goal they kept in mind throughout the process.¹⁷⁶

117. Asian elephants demonstrate the ability to understand goal-directed behavior.¹⁷⁷ When presented with food that was out of reach, but with some bits resting on a tray that could be pulled within reach, elephants learned to pull only those trays baited with food.¹⁷⁸ Success in this kind of “means-end” task demonstrates causal knowledge, which requires understanding not just that two events are associated with each other, but that some mediating force connects and

¹⁷¹ Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.

¹⁷² Bates & Byrne Aff. ¶47; McComb Aff. ¶41; Poole Aff. ¶39; Moss Aff. ¶35.

¹⁷³ Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36. In cognitive psychology terms, “insight” is the ability to inspect and manipulate a mental representation of something, even when you can’t physically perceive or touch the something at the time. Simply, insight is using only thinking to solve problems.

¹⁷⁴ Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

¹⁷⁵ Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

¹⁷⁶ Bates & Byrne Aff. ¶48; McComb Aff. ¶42; Poole Aff. ¶40; Moss Aff. ¶36.

¹⁷⁷ Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

¹⁷⁸ Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

affects the two which may be used to predict and control events.¹⁷⁹ Understanding causation and inferring object relations may be related to understanding psychological causation, which is appreciation that others are animate beings who generate their own behavior and have mental states (*e.g.*, intentions).¹⁸⁰

CONCLUSION

118. An extraordinarily cognitively complex autonomous individual's species should be irrelevant to whether she should have the fundamental right to the bodily liberty — the autonomy — that habeas corpus protects.

WHEREFORE, the NhRP respectfully demands the following relief:

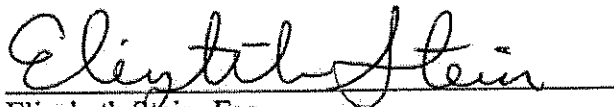
A. Issuance of the attached Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis for their imprisonment of Happy;

B. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably PAWS;

D. Award the NhRP the costs and disbursements of this action; and

E. Grant such other and further relief as this Court deems just and proper.

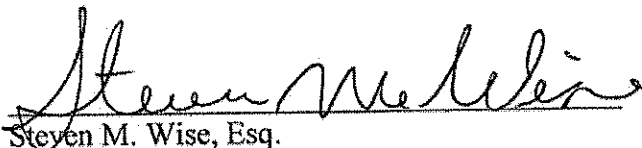
Dated: October 2, 2018



Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726

¹⁷⁹ Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.

¹⁸⁰ Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.



Steven M. Wise, Esq.

Of the Bar of the State of Massachusetts

Subject to *pro hac vice* admission

Attorney for Petitioner

5195 NW 112th Terrace

Coral Springs, Florida 33076

(954) 648-9864

TO:

New York State Supreme Court, Orleans County
Orleans County Courthouse
Courthouse Square
1 South Main Street
Suite 3
Albion, NY 14411
By overnight delivery service

James J. Breheny, in his official capacity as Executive Vice President and General Director of
Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo
2300 Southern Boulevard
Bronx, New York 10460
(718) 220-5100
By overnight delivery service

Wildlife Conservation Society
2300 Southern Boulevard
Bronx, New York 10460
(718) 220-5100
By overnight delivery service

VERIFICATION

The undersigned is an attorney admitted to practice in the courts of New York State and is the attorney of record for Petitioner, The Nonhuman Rights Project, Inc. ("NhRP") in this action. Deponent has read the foregoing Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause and is familiar with the contents thereof; the same is true to the deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent and not by the NhRP, because the NhRP does not reside nor maintain its office in the county where your deponent maintains her office. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are based upon a review of the facts, pleadings and proceedings in this matter, as well as conversations with the NhRP.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: October 2, 2018

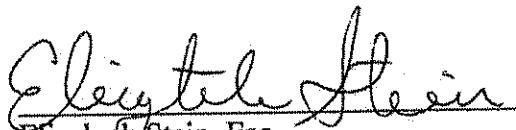

Elizabeth Stein, Esq.

EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf
of HAPPY,

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums
of the Wildlife Conservation Society and Director of the
Bronx Zoo, and WILDLIFE CONSERVATION
SOCIETY,

Respondents.

AFFIDAVIT OF JAMES J.
BREHENY IN
OPPOSITION TO
ORDER TO SHOW CAUSE

Index No.:

STATE OF NEW YORK)
) SS.:
COUNTY OF BRONX)

James J. Breheny, being duly sworn, deposes and says:

1. I was appointed Director of the Bronx Zoo in 2005, and Executive Vice President and General Director, Zoos and Aquarium, and Jonathan Little Cohen Director, Bronx Zoo in 2011. I earned a B.S. in Biology from Manhattan College and an M.S. in Biology from Fordham University. I have been a staff member of Respondent Wildlife Conservation Society for 37 years, and taught as an adjunct professor of Biology at Manhattan College for 17 years. As such, I am fully familiar with the facts and circumstances of this matter.

2. Respondents submit this affidavit in opposition to Petitioner the Nonhuman Rights Project, Inc.'s ("NRP") petition for a writ of habeas corpus by order to show cause (attached as **Exhibit A**).

A. The Wildlife Conservation Society and Bronx Zoo

3. Respondent the Wildlife Conservation Society is a not-for-profit corporation whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education, and inspiring people to value nature.

4. Opened in 1899, the Bronx Zoo, a Wildlife Conservation Society park, cares for thousands of endangered or threatened animals, and provides experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats.

B. The Nonhuman Rights Project, Inc. ("NRP")

5. NRP "is a not-for-profit corporation organized pursuant to the laws of the State of Massachusetts" and presents itself as

the only civil rights organization in the United States dedicated to changing '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.

Ex. A ¶ 37.

6. Some of NRP's stated goals are "[t]o develop . . . issue-oriented grassroots and legislative campaigns to promote recognition of nonhuman animals as beings . . . with their own inherent interests in freedom from captivity . . ." and "to build a broad-based coalition of organizations and individuals to secure legally recognized fundamental rights for nonhuman animals." See <https://www.nonhumanrights.org/who-we-are/>.

7. NRP vows on its website to lead "the fight to secure actual legal rights for nonhuman animals through a state-by-state, country-by-country, long-term litigation campaign." See <https://www.nonhumanrights.org/litigation/>.

C. Petitioner openly admits to forum shopping

8. On October 2, 2018, NRP announced via its blog that it had filed a petition in Orleans County Supreme Court on behalf of Happy, a 47-year old Asian elephant at the Bronx Zoo. See <https://www.nonhumanrights.org/blog/lawsuit-happy-bronx-zoo/>.

9. NRP states that although it "can file suit in any county [it] chose to file in Orleans County (part of the Fourth Department) because the First Department, which oversees the county where the Bronx Zoo is located, 'has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human.'" *Id.*

10. NRP's decision to commence this matter in Orleans County is, by their own admission, based upon a notion that the courts in the Fourth Department would be more likely to grant the relief sought by NRP than those in the First Department.

D. NRP's order to show cause and petition should be denied

11. As provided in the accompanying memorandum of law, there is no basis in New York law for the relief NRP seeks.

12. NRP also does not and cannot allege that Happy's current living conditions are in any way unlawful or below accepted standards of care.

13. NRP's petition for writ of habeas corpus therefore should be denied.

14. Moreover, the events addressed in NRP's petition, namely the current living conditions of Happy, occurred in Bronx County.

15. Respondents have no operations located in Orleans County.

16. Happy also is currently located in Bronx County, and it would be exceedingly difficult, expensive and potentially dangerous to transport Happy to Orleans County, should the Court require Happy's attendance at a hearing.

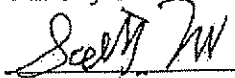
17. Happy is 47 years old and an older elephant. The trip from Bronx Zoo to Orleans County, which spans approximately 385 miles, would be highly stressful and detrimental to Happy's well-being.

18. The trip from Happy's current location to the suggested Performing Animal Welfare Society's sanctuary near Sacramento, California could be even more harmful to Happy, as experience has shown us that she doesn't transport well.

19. In light of the foregoing, and because NRP seems to have chosen Orleans County purely for perceived litigation advantage, Respondents respectfully request that the Court transfer venue to Bronx County if NRP's order to show cause is granted.


James J. Breheny

Sworn to before me this
9th day of October, 2018.


Notary Public

Doc #01-3153589

SCOTT F. WIGHT
Notary Public, State of New York
No. 01W16242543
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires 6 JUNE 20 19

EXHIBIT 4

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of Zoos
and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

Index No.: 18-45164

**NOTICE OF MOTION
TO STRIKE**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, Esq., an attorney of record for Petitioner the Nonhuman Rights Project, Inc. ("NhRP"), dated October 10, 2018, the Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition"), Memorandum of Law in Support thereof, and upon all other affidavits, exhibits, and attachments filed therewith, the NhRP will move this Court to strike ("Motion to Strike") Respondents' Memorandum of Law in Opposition to Proposed Order to Show

Cause ("Memorandum") that appears to have been filed with this Court on October 9, 2018, on the following grounds:

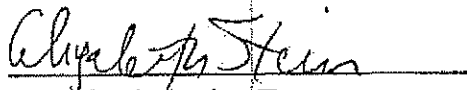
1. The NhRP properly filed its Petition on behalf of Happy pursuant to Civil Practice Law and Rules ("CPLR") Article 70, which governs the procedure used in habeas corpus proceedings.
2. There is no provision in Article 70 or anywhere else in the CPLR that allows the filing of any documents by Respondents prior to the issuance of the Order to Show Cause by this Court. CPLR 7002 specifies by whom the petition may be made, to whom, and its contents. CPLR 7003 instructs the Court to issue the writ of habeas corpus or order to show cause without delay. CPLR 7004 states before whom the writ of habeas corpus or order to show cause shall be returnable. CPLR 7005 sets forth how the issued writ is to be served.
3. Article 70 does not require or provide for the service of the petition upon the respondents. The NhRP served the Respondents in this case merely as a courtesy.
4. A respondent may appear if, but only if, a writ or order to show cause as set forth in CPLR 7008(a) is issued. ("The return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and filed at the time and place specified in the writ, or where the writ is

- returnable forthwith, within twenty-four hours after its service"). In a special proceeding, which habeas corpus is, a respondent's objections may only be made by answer or a motion to dismiss. CPLR 404(a).
5. But for the limitations described above, a respondent could improperly meddle in the decision of this Court as to whether and where the order to show cause may issue and be returned by filing random documents, which Respondents here have apparently attempted to do.
 6. Moreover, no motion was filed asking the Court for leave to file the improper Memorandum. This deprived the NhRP even of its ability to object to its filing and necessitated this Motion to Strike.
 7. In addition to the fact that Respondents have no authority to file the Memorandum at this time, they have also failed to properly serve it upon the NhRP. As of the date of this Motion, the only service to the NhRP was via email with no certificate of service verifying mailing. As Orleans County does not recognize e-filing, this service was improper.
 8. The New York State Attorney General in *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898 (Sup. Ct. 2015), properly complied with Article 70 when it waited until the court issued its order to show cause to respond. That allowed the court to set return and hearing dates as well as a briefing schedule for the parties.

9. In short, Respondents' Memorandum was filed in violation of the CPLR, without motion or leave of court, without proper service, and without giving the NhRP an opportunity to contest it or respond in a timely way, all apparently in an effort to meddle with the decision of this Court as to whether it should issue the requested order to show cause and where the order should be returned. Respondents' Memorandum should therefore be promptly stricken.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 9:30 A.M. on Monday, October 29, 2018, or as soon thereafter as it may be heard, at the Courthouse located at Courthouse Square, 1 South Main Street, Suite 3, Albion, NY 14411. The Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted. Pursuant to CPLR § 2214(b), opposition papers, if any, are to served by no later than October 22, 2018.

Dated: October 10, 2018


Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com

NOTICE TO:

Kristin E. Nicholson, Chief Clerk
Orleans Supreme and County Court
Orleans County Courthouse
Courthouse Square
1 South Main Street
Suite 3
Albion, NY 14411
By overnight mail and Email to knichols@nycourts.gov

PHILLIPS LYTLE LLP
Kenneth A. Manning, Esq.
Joanna J. Chen, Esq.
Attorneys for Respondents *James J. Breheny* and *Wildlife Conservation Society*
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Tel: (716) 847-8400
*By overnight mail and Email to: kmanning@phillipslytle.com,
jchen@phillipslytle.com*

STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Index No.: 18-45164

Petitioner,

**ATTORNEY
AFFIRMATION**

-against-

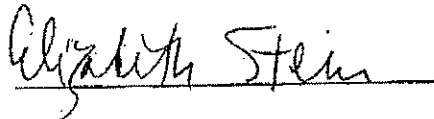
JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of
Zoos and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo, and
WILDLIFE CONSERVATION SOCIETY,

Respondents.

I, ELIZABETH STEIN, an attorney duly admitted to practice law in the State of
New York, hereby affirm the following under penalty of perjury:

1. I am an attorney of record for Petitioner, the Nonhuman Rights Project, Inc. in
the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read
and know the contents thereof and submit this affirmation in support of the within
Motion to Strike.
3. Pursuant to 22 N.Y.C.R.R. § 1301.1, this motion is not frivolous.

Dated: October 10, 2018

A handwritten signature in cursive script, reading "Elizabeth Stein", written over a horizontal line.

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
Tel: (516) 747-4726
Email: lizsteinlaw@gmail.com
Attorney for Petitioner

AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)

STATE OF NEW YORK, COUNTY OF NASSAU ss.:

I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:

On October 10, 2018, I personally served the within Notice of Motion to Strike

- | | |
|--|--|
| Service by
Mail | by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name: |
| Individual
Personal
Service | by delivering a copy to each of the following <i>attorney(s)</i> at the last known address set forth after each name below. I knew the <i>attorney(s)</i> served to be the <i>attorney(s)</i> for the <i>party(ies)</i> stated below. |
| Hand Delivery
Service | by dispatching a copy by a messenger delivery service to each of the persons at the last known address set forth after each name below. |
| X Service by
Overnight
Mail and
Additional
Copy by
Electronic
Means | by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name and by transmitting a copy to the following persons by email to the address set forth after each name below: |

PHILLIPS LYTTLE LLP
Kenneth A. Manning, Esq.
Joanna J. Chen, Esq.
Attorneys for Respondents *James J. Breheny and Wildlife Conservation Society*
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Tel: (716) 847-8400
kmanning@phillipslytle.com
jchen@phillipslytle.com


Elizabeth Stein, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Index No.: 18-45164

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of Zoos
and Aquariums of the Wildlife Conservation Society and
Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

ELIZABETH STEIN, ESQ.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com
Attorneys for Petitioner

EXHIBIT 5

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of Zoos
and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

Index No.: 18-45164

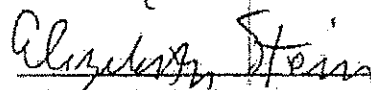
**NOTICE OF MOTION
TO RULE ON
PETITION FOR
HABEAS CORPUS**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, Esq., an attorney of record for Petitioner the Nonhuman Rights Project, Inc. ("NhRP"), dated October 25, 2018, the Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") filed with this Court on October 2, 2018, the Memorandum of Law in Support thereof and all other affidavits, exhibits, and attachments filed therewith, and for the reasons set forth in the accompanying Memorandum of Law in Support of Motion to Rule on Petition for Habeas Corpus ("Memorandum"), the NhRP moves this Court to rule on the

Petition on November 30 (the return date established by the Court for all other pending motions) or immediately thereafter. As set forth in the accompanying Memorandum, the Court need only decide whether to issue the requested Order to Show Cause at that time.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable on Friday, November 30, 2018, at the Courthouse located at Courthouse Square, 1 South Main Street, Suite 3, Albion, NY 14411. Respondents are hereby given notice that the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted. Pursuant to CPLR § 2214(b), opposition papers, if any, are to be served by no later than November 23, 2018.

Dated: October 25, 2018


Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com

NOTICE TO:

Karen Lake-Maynard
County Clerk, Orleans County
3 South Main St.
Albion, NY 14411
By Mail and Email to Karen.Lake-Maynard@orleanscountyny.gov

PHILLIPS LYTLE LLP

Kenneth A. Manning, Esq.

Joanna J. Chen, Esq.

Attorneys for Respondents *James J. Breheny* and *Wildlife Conservation Society*

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Tel: (716) 847-8400

By Mail and Email to: *kmanning@phillipslytle.com, jchen@phillipslytle.com*

STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of
Zoos and Aquariums of the Wildlife Conservation
Society and Director of the Bronx Zoo, and
WILDLIFE CONSERVATION SOCIETY,

Respondents.

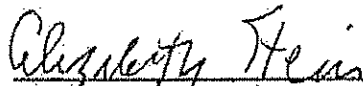
Index No.: 18-45164

**AFFIRMATION IN
SUPPORT OF MOTION
TO RULE ON
PETITION FOR
HABEAS CORPUS**

I, ELIZABETH STEIN, an attorney duly admitted to practice law in the
State of New York, hereby affirm the following under penalty of perjury:

1. I am an attorney of record for Petitioner, the Nonhuman Rights Project, Inc. in
the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read
and know the contents thereof and submit this affirmation in support of the within
Notice of Motion to Rule on Petition for Habeas Corpus.
3. Pursuant to 22 N.Y.C.R.R. § 1301.1, this motion is not frivolous.

Dated: October 25, 2018

A handwritten signature in cursive script, appearing to read "Elizabeth Stein", is written over a horizontal line.

Elizabeth Stein, Esq.

Attorney for Petitioner

5 Dunhill Road

New Hyde Park, New York 11040

(516) 747-4726

lizsteinlaw@gmail.com

STATE OF NEW YORK
SUPREME COURT COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the
Executive Vice President and General Director of Zoos
and Aquariums of the Wildlife Conservation Society
and Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

Index No.: 18-45164

**MEMORANDUM
OF LAW IN
SUPPORT OF
MOTION TO
RULE ON
PETITION FOR
HABEAS CORPUS**

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, NY 11040
Phone (516) 747-4726

Steven M. Wise, Esq.
Of the Bar of the State of Massachusetts
Subject to *pro hac vice* admission
5195 NW 112th Terrace
Coral Springs, FL 33076
Phone (954) 648-9864

Attorneys for Petitioner

I. Introduction

On October 2, 2018, Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") on behalf of an elephant named Happy, alleging that she is being unlawfully imprisoned by Respondents at the Bronx Zoo. A Notice of Motion for Admission *Pro Hac Vice* of Steven M. Wise was filed therewith that the NhRP made returnable on October 22, 2018. The Court then re-scheduled the return date on the motion for November 30, 2018. On October 9, 2018, Respondents sent the Court and the NhRP – via email only – a "Memorandum of Law in Opposition to Proposed Order to Show Cause" ("Memorandum"). On October 16, 2018, the NhRP filed with the Court a Notice of Motion to Strike Respondents' Memorandum.¹ The NhRP made that motion returnable on October 29, 2018, which the Court also re-scheduled for November 30, 2018.²

In accordance with both the language of New York Civil Practice Law and Rules ("CPLR") Sections 7003(a), 7005, and 7009(c)³ and the exigent and summary nature of habeas corpus itself as recognized by the Court of Appeals, the NhRP respectfully submits that it is entitled to a prompt ruling by this Court on whether it will issue the Order to Show Cause so that Happy's ongoing unlawful

¹ Despite the fact that no order has yet issued from this Court which would serve as a basis for any opposition, Respondents were properly served with the Notice of Motion to Strike. Among other reasons, the NhRP moved to strike Respondents' Memorandum on the ground that Respondents had no authority, statutory or otherwise, to file any documents prior to the issuance of the Order to Show Cause by the Court.

² The original return dates in both the *pro hac vice* motion and the motion to strike were set in compliance with CPLR 2214.

³ CPLR Article 70 governs the procedure applicable to common law writs of habeas corpus. See CPLR 7001 ("the provisions of this article are applicable to common law or statutory writs of habeas corpus").

imprisonment may be addressed "without delay."⁴ As the Petition has been pending before this Court since October 2, the NhRP requests that this Court issue its decision on November 30, which is the return date the Court already selected for the other outstanding motions, or immediately thereafter.

II. The Court must rule on the NhRP's request for an Order to Show Cause "without delay."

Recognizing the import of the denial of bodily liberty, the Court of Appeals in *People ex rel. Robertson v. New York State Division of Parole*, 67 N.Y. 2d 197, 201 (1986), unambiguously declared that habeas corpus is by nature an exigent proceeding that must be litigated without delay "except of necessity":

The purpose of habeas corpus is to test the legality of the detention of the person who is the subject of the writ (CPLR 7002[a]); *People ex rel. Shapiro v. Keeper of City Prison*, 290 N.Y. 393, 399, 49 N.E.2d 498) ... Thus ... we noted in *People ex rel. Duryee v. Duryee*, 188 N.Y. 440, 445-446, 81 N.E. 313, that: "The writ of habeas corpus, as its history shows, is a summary proceeding to secure personal liberty. It strikes at unlawful imprisonment or restraint of the person by state or citizen, and by the most direct method known to the law learns the truth and applies the remedy. *It tolerates no delay except of necessity*, and is hindered by no obstacle except the limits set by the law of its creation."

(emphasis added).

The Court further noted that:

The summary and exigent nature of the proceeding is evidenced by the requirement of CPLR 7003(a) that the court "issue the writ

⁴ For purposes of issuing the requested Order to Show Cause, this Court need not address the question of Happy's personhood but may assume without deciding that Happy could possibly be a "person" solely for the purpose of securing the right to bodily liberty protected by the common law of habeas corpus. Once the order to show cause is issued, Respondents must come forward to justify their detention of Happy, at which time the issue of her personhood will be litigated.

without delay on any day,” the provision of CPLR 7005 authorizing service of a writ on any day notwithstanding that service of other process on a Sunday is void (General Business Law § 11), and the direction of CPLR 7009(c) that “[t]he court shall proceed in a summary manner.”⁵

Id.

With respect to the case at bar, Steven M. Wise, the putative *pro hac vice* trial attorney, is scheduled for major surgery on October 30, 2018. When the NhRP filed the Petition on October 2, 2018, it did not envision any conflict with his surgery date as the Supreme Courts, in the previous six similar petitions the NhRP filed in New York, made their decisions whether to issue the requested order to show cause within one week of the filing of the petition. However, because this Court has chosen to re-schedule the NhRP’s two pending motions for November 30, 2018, and now because of the impending major surgery which necessitates a brief delay, the NhRP asks that the decision whether to issue the Order to Show Cause be made on November 30, 2018 or immediately thereafter. To postpone this critical decision past the date established by this Court would constitute an improper delay.

III. The novelty of the Petition does not justify a delay in the Court’s decision on whether to issue the Order to Show Cause.

While this case involves an emerging question of law – the personhood of an autonomous nonhuman being – the Petition must still be acted upon without delay. The legal status of autonomous nonhuman animals has been rapidly evolving from rightless “things” to rights-bearing “persons” in New York State and throughout

⁵ CPLR 7003 (a) provides, in relevant part: “The court to whom the petition is made shall issue the writ *without delay* on any day, or, where the petitioner does not demand production of the person detained . . . order the respondent to show cause why the person detained should not be released.” (Emphasis added).

the world. The Appellate Division, Fourth Judicial Department ("Fourth Department") recently declared that it is now "*common knowledge* that personhood can and sometimes does attach to nonhuman entities like . . . *animals*." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (emphasis added, citations omitted). In support, the Fourth Department cited, *inter alia*, *Nonhuman Rights Project, Inc., ex rel. Kiko v Presti*, in which it had twice assumed, without deciding, that a chimpanzee (Kiko) could be a "person" for habeas corpus purposes. 124 A.D.3d 1334 (4th Dept. 2015), *leave to appeal den.*, 126 A.D. 3d 1430 (4th Dept. 2015), *leave to appeal den.*, 2015 WL 5125507 (N.Y. Sept. 1, 2015).

Court of Appeals Judge Eugene Fahey recently issued an opinion on the issue of personhood for autonomous nonhuman animals, in that case a chimpanzee, in *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) ("*Tommy*") (Fahey, J., concurring). There, he concluded that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. . . . While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *Id.* Significantly, a New York State Supreme Court *already* has issued an order to show cause pursuant to CPLR Article 70, which required the State to justify its detention of two chimpanzees. *The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 908, 917 (Sup. Ct. 2015) ("*Stanley*").⁶

⁶ The Oregon Supreme Court cited the NhRP's New York habeas corpus cases with approval, declaring: "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." *State v. Fessenden*, 355 Or. 759, 769-70 (2014); *see also In re Cecilia*, Third Court of Guarantees, Mendoza, Argentina, File No. P-72.254/15 at 22-23, 24 (as translated from original Spanish by attorney Ana Maria Hernandez), a certified copy of which is available at <https://bit.ly/2PFQJWq> (last visited Oct. 24, 2018) (Argentinian court granted writ of habeas corpus to a chimpanzee while declaring her a "non-human legal person" with "nonhuman rights," and ordering her immediate release from a zoo).

Happy is an extraordinarily cognitively complex and autonomous being whose interest in exercising her autonomy is as fundamental to her as it is to us. Respondents' imprisonment of Happy deprives her of her ability to exercise her autonomy in any meaningful way, including the freedom to choose where to go, what to do, and with whom to be. Such deprivation of a "person's" bodily liberty is *per se* unlawful. On Happy's behalf, the NhRP invokes this Court's common law authority to recognize that she is a common law person with the common law "right to liberty protected by habeas corpus." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). The NhRP seeks Happy's immediate release from Respondents' continued imprisonment so that Happy's autonomy may be realized to the fullest extent possible.⁷

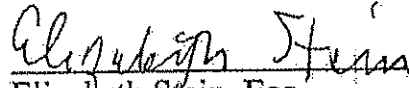
As noted above, this Court need not make an initial determination of whether Happy is a "person" with the right to bodily liberty for the purpose of issuing the Order to Show Cause. But to refuse to rule on the request for that order past November 30, 2018 or immediately thereafter would constitute an improper delay.

IV. Conclusion

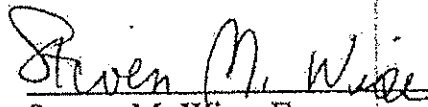
This Court must decide "without delay" whether it will issue the Order to Show Cause on behalf of Happy in this summary and exigent proceeding. Under the circumstances, the NhRP respectfully requests that the Court make its decision to issue the Order to Show Cause on November 30, 2018 or immediately thereafter.

⁷ This habeas corpus case is not about Happy's welfare any more than a human habeas corpus case alleging that a human is being imprisoned against her will is about that human's welfare. *Stanley*, 16 N.Y.S.3d at 901 (recognizing chimpanzee habeas corpus case was not about "animal welfare"). The NhRP does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions" nor does it seek improved welfare for Happy. *Id.* The sole issue is whether Happy, an autonomous being, may be imprisoned at all.

Dated: October 25, 2018


Elizabeth Stein, Esq.

Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
lizsteinlaw@gmail.com


Steven M. Wise, Esq.

Of the Bar of the State of Massachusetts
Subject to *pro hac vice* admission
Attorney for Petitioner
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com

AFFIRMATION OF SERVICE OF PAPERS (CPLR 2103)

STATE OF NEW YORK, COUNTY OF NASSAU ss.:

I, the undersigned, an attorney admitted to practice in New York State, with offices at the address set forth on the reverse side, affirm under penalties of perjury:

On October 25, 2018, I personally served the within Notice of Motion to Rule on Petition for Habeas Corpus, Memorandum of Law, and Attorney Affirmation

- | | |
|--|--|
| Service by Mail | by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name: |
| Individual Personal Service | by delivering a copy to each of the following <i>attorney(s)</i> at the last known address set forth after each name below. I knew the <i>attorney(s)</i> served to be the <i>attorney(s)</i> for the <i>party(ies)</i> stated below. |
| Hand Delivery Service | by dispatching a copy by a messenger delivery service to each of the persons at the last known address set forth after each name below. |
| X Service by Mail and Additional Copy by Electronic Means | by depositing a true copy thereof in a post-paid wrapper, in an official depository under the exclusive care and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last known address set forth after each name and by transmitting a copy to the following persons by email to the address set forth after each name below: |

PHILLIPS LYTTLE LLP
Kenneth A. Manning, Esq.
Joanna J. Chen, Esq.
Attorneys for Respondents *James J. Breheny and Wildlife Conservation Society*
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Tel: (716) 847-8400
kmanning@phillipslytle.com
jchen@phillipslytle.com



Elizabeth Stein, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Index No.: 18-45164

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of Zoos
and Aquariums of the Wildlife Conservation Society and
Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

ELIZABETH STEIN, ESQ.
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com
Attorney for Petitioner

EXHIBIT 6

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf
of HAPPY,

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums
of the Wildlife Conservation Society and Director of the
Bronx Zoo, and WILDLIFE CONSERVATION
SOCIETY,

Respondents.

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

JOANNA J. CHEN, being duly sworn, deposes and says:

1. I am an attorney admitted before this Court and an associate with
Phillips Lytle LLP, attorneys for Respondents James J. Breheny and the Wildlife
Conservation Society. As such, I am fully familiar with the facts and circumstances of this
matter.

2. I submit this affidavit in opposition to (i) NRP's motion to strike
Respondents' memorandum of law in opposition to NRP's proposed order to show cause;
and (ii) NRP's motion for the Court to rule on NRP's proposed order to show cause.

**AFFIDAVIT IN
OPPOSITION TO
PETITIONER'S
MOTION TO STRIKE
AND MOTION TO RULE**

Index No.: 18-45164

A. Respondents' opposition to NRP's proposed order to show cause was timely served and procedurally proper

3. On October 2, 2018, Petitioner The Nonhuman Rights Project, Inc. ("NRP") announced on its website that it had filed a petition for writ of habeas corpus in Orleans County Supreme Court on behalf of Happy, an elephant at the Bronx Zoo. *See* <https://www.nonhumanrights.org/blog/lawsuit-happy-bronx-zoo/>.

4. On or about October 3, 2018, Respondents received an unsigned copy of NRP's proposed order to show cause and verified petition by Federal Express.

5. In order to determine the status of the proposed order to show cause, I contacted the Orleans County Clerk's Office on October 5, 2018, which advised that NRP had filed an application for an index number and the proposed order to show cause, but had neglected to pay the application for index number fee required under CPLR 306-a.

6. As a result, no proceeding had been commenced at the time Respondents received notice of the proposed order to show cause, and no judge had been assigned to the proceeding.

7. Respondents submitted their arguments opposing the proposed order to show cause via email to the Orleans County Clerk's Office on October 9, 2018, so that the opposition could be presented at the time the Court considered whether to sign or decline to sign the proposed order to show cause.

8. Respondents also served a copy of their opposition upon counsel for NRP via email on October 9, 2018, to ensure that NRP received timely notice of the opposition.

9. NRP confirmed receipt of Respondents' opposing papers within minutes of service by email. Attached as **Exhibit A** is a true and correct copy of NRP's confirming email.

10. Based upon the foregoing, Respondents' memorandum of law and affidavit in opposition to NRP's proposed order to show cause are not procedurally improper, and Respondents request that the Court deny NRP's motion to strike.

**B. NRP's motion to strike should be denied
as a result of NRP's refusal to effectuate proper service**

11. In its motion to strike, NRP asserts that Respondents are not entitled to an opportunity to be heard on NRP's proposed order to show cause. NRP's subsequent correspondence further contends that Respondents *are not even entitled to notice* in this proceeding.

12. On October 10, 2018, Respondents received an unstamped copy of NRP's motion to strike. The notice of motion to strike indicated that the return date for the motion was 9:30 a.m., on Monday, October 29, 2018.

13. On October 22, 2018, Respondents contacted the Orleans County Clerk's Office, only to learn that the return date for NRP's motion to strike had been changed from October 29, 2018, to November 30, 2018.

14. Respondents received no notice of the change in return dates.

15. Counsel for Respondents contacted NRP's counsel to request that any motion papers in this proceeding be served as required under CPLR 2214.

16. In response, NRP's counsel sent correspondence to Respondents' counsel stating

Please be advised that we have served you solely as a matter of professional courtesy and not because we are required to do so. Your clients have no authority to involve themselves in our case until the Court issues our requested Order to Show Cause. That is why we filed a motion to strike your 'Memorandum in Opposition' and why we will file a motion to strike any document you attempt to file before the Order to Show Cause issues.

Attached as **Exhibit B** is a true and correct copy of the October 29, 2018 correspondence from NRP's counsel.

17. To date, NRP has not served Respondents with a notice of motion that accurately reflects "the time and place of the hearing on the motion," as required under CPLR 2214(a).

18. For this independent reason, NRP's motion to strike should be denied.

**C. Respondents' motion to rule also
should be denied as procedurally improper**

19. In addition to its attempts to prevent Respondents from participating in this proceeding, NRP seeks to compel the Court to issue an accelerated decision upon NRP's unsigned order to show cause.

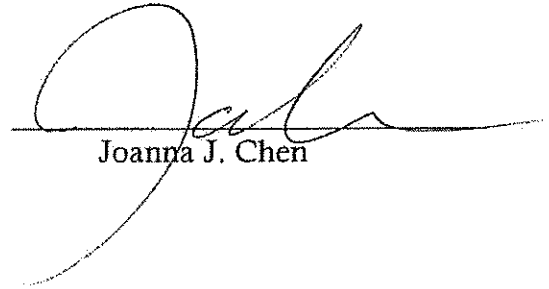
20. However, a court has at least sixty days to make an order determining a motion not relating to a provisional remedy. CPLR 2219(a).

21. Here, NRP did not submit its petition for writ of habeas corpus to the Orleans Supreme Court until October 2, 2018.

22. Moreover, the Orleans County Supreme Court did not assign an index number to this matter until October 9, 2018, as a result of NRP's failure to submit the application for index number fee required under CPLR 306-a.

23. Thus, the CPLR does not require the Court to make a decision regarding NRP's proposed order to show cause by November 30, 2018.

24. Based upon the foregoing, Respondents respectfully request that the Court deny NRP's motion to strike, deny NRP's motion to rule, and decline to execute NRP's proposed order to show cause.



Joanna J. Chen

Sworn to before me this
14th day of November, 2018.


Notary Public

Doc #01-3155625

CLAUDIA A. ROWLAND
Notary Public, State of New York
Qualified in Nassau County
My Commission Expires 06/30/2019

EXHIBIT 7

At I.A.S Part — of the
Supreme Court of the State of
New York, held in and for the
County of Orleans, at the
Courthouse thereof, 1 South Main
Street, Suite 3, Albion, NY on the
16th day of October, 2018
November

PRESENT: HON. Tracey A. Bannister
Justice of the Supreme Court

COPY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as the Executive
Vice President and General Director of Zoos and Aquariums of the
Wildlife Conservation Society and Director of the Bronx Zoo, and
WILDLIFE CONSERVATION SOCIETY,

Respondents.

TAB
~~PROPOSED~~ ORDER TO
SHOW CAUSE

Index No.: 18-45164

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law
Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise,
Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part _____, Room _____, of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the 14th day of December, 2018 at 11:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

- A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;
- B. Awarding Petitioner the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon JAMES J. BREHENY, in his official capacity as the Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY, by personal delivery, on or before the 20th day of November, 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than the 3rd day of December, 2018. Reply papers, if any, must be served on or before the 10th day of December 2018.

Dated: 11/16, 2018
Albion, New York

Tracey A. Benister
Honorable Tracey A. Benister

ENTER:

EXHIBIT 8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf
of HAPPY,

Petitioner,

v.

**DEMAND FOR
CHANGE OF VENUE**

Index No. 18-45164

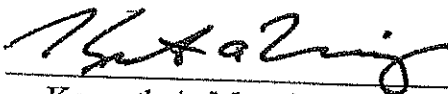
JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and
Aquariums of the Wildlife Conservation Society and
Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

PLEASE TAKE NOTICE that Respondents James J. Breheny and Wildlife
Conservation Society, by and through their attorneys, Phillips Lytle LLP, hereby demand,
pursuant to CPLR Rule 511, that the venue of the above-captioned proceeding be changed
from the County of Orleans, where it has been improperly placed, to the County of Bronx,
where venue would be proper, as provided by CPLR 503, 510(1), and 7004(c).

Dated: Buffalo, New York
November 21, 2018

PHILLIPS LYTTLE LLP

By: 

Kenneth A. Manning

Joanna J. Chen

Attorneys for Respondents

James J. Breheny and

Wildlife Conservation Society

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Telephone No. (716) 847-8400

kmanning@phillipslytle.com

jchen@phillipslytle.com

TO: Elizabeth Stein, Esq.
Attorneys for Petitioner
The Nonhuman Rights Project, Inc.,
on behalf of Happy
5 Dunhill Road
New Hyde Park, New York 11040

Doc #01-3163118

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for
a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of
HAPPY,

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums of
the Wildlife Conservation Society and Director of the Bronx
Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

BRYAN J. JENKINS, being duly sworn, deposes and says:

I am an employee of Phillips Lytle LLP, attorneys for Respondents
James J. Breheny and Wildlife Conservation Society, and not a party to the action, and am over the
age of 18 years. On November 21, 2018, I served Respondents' Demand to Change Venue on
the following individual at the address indicated:

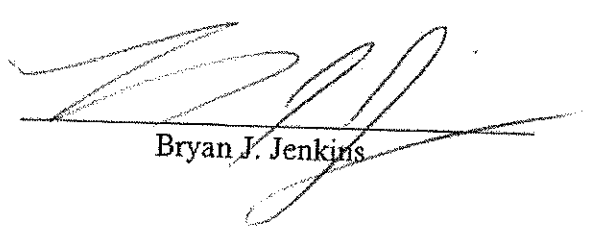
Elizabeth Stein, Esq.
Attorneys for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040

by depositing a true copy of same enclosed in a properly addressed wrapper, into the custody of
Federal Express Corporation for overnight delivery, prior to the latest time designated by Federal
Express Corporation for overnight delivery.

Sworn to before me this
21st day of November, 2018


Notary Public

SHERRI A. BEALS
Notary Public, State of New York
Qualified in Erie County
My Commission Expires February 13, 2022


Bryan J. Jenkins

**AFFIDAVIT OF
SERVICE BY FEDEX**

Index No. 18-45164

EXHIBIT 9

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as
Executive Vice President and General Director of Zoos
and Aquariums of the Wildlife Conservation Society and
Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents.

NOTICE TO ADMIT

Index No. 18-45164

PLEASE TAKE NOTICE Respondents James J. Breheny and Wildlife Conservation Society ("Respondents") hereby request that Petitioner, the Nonhuman Rights Project, Inc., pursuant to CPLR 408 and 3123, admit the truth of each of the following matters, the truth of which will be deemed admitted unless NRP serves a sworn statement either specifically denying each matter of which an admission is requested or setting forth in detail the reason why NRP either cannot truthfully admit or deny such matter.

DEFINITIONS

1. The use of the singular form includes the plural and vice versa.
2. "Any" and "all" shall be construed as any and all.

3. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request all responses that might otherwise be construed to be outside its scope.

4. The term “concerning,” means constituting, having to do with, with respect to, involving, dealing with, regarding, discussing, defining, explaining, respecting, describing, relating to, referring to, or otherwise pertaining to.

5. “NRP” shall refer to the Petitioner in this action, the Nonhuman Rights Project, Inc.

6. “NRP Petition” shall refer to the Verified Petition for a writ of habeas corpus filed by NRP in this action and dated October 2, 2018.

7. “PAWS” shall refer to the Performing Animal Wildlife Society sanctuary located in San Andreas, California.

8. “Happy” shall refer to the animal currently residing at the Bronx Zoo who NRP purports to represent in this action.

9. “Joyce Poole Affidavit” shall refer to the Affidavit of Joyce Poole, sworn to December 2, 2016, and filed by NRP in support of its petition in this action.

10. “Supplemental Joyce Poole Affidavit” shall refer to the Supplemental Affidavit of Joyce Poole, sworn to October 1, 2018, and filed by NRP in support of its petition in this action.

11. “Cynthia Moss Affidavit” shall refer to the Affidavit of Cynthia Moss, sworn to May 6, 2017, and filed by NRP in support of its petition in this action.

12. “Karen McComb Affidavit” shall refer to the Affidavit of Karen McComb, sworn to December 22, 2016, and filed by NRP in support of its petition in this action.

13. "Bates & Byrne Affidavit" shall refer to the Joint Affidavit of Lucy Bates and Richard W. Byrne, sworn January 25, 2017, and December 5, 2016, respectively, and filed by NRP in support of its petition in this action.

14. "Stewart Affidavit" shall refer to the Affidavit of Ed Stewart, sworn to September 26, 2018, and filed by NRP in support of its petition in this action.

15. "First Connecticut Decision" shall refer to the decision of the Connecticut Superior Court, Judicial District of Litchfield, dated December 26, 2017, addressing NRP's petition for a writ of habeas corpus, filed on behalf of three elephants, in the action captioned *Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie, & Karen v. R.W. Commerford & Sons, Inc.*, No. LLI-CV-5009822-S.

16. "Second Connecticut Decision" shall refer to the decision of Connecticut Superior Court, Judicial District of Litchfield, dated February 27, 2018, addressing NRP's motion to reargue and request for leave to amend NRP's petition for habeas corpus on behalf of three elephants, in the action captioned *Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie, & Karen v. R.W. Commerford & Sons, Inc.*, No. LLI-CV-5009822-S.

REQUESTS FOR ADMISSION

1. Happy is an Asian elephant.
2. Happy is not a human being.
3. Happy never asked NRP to act on her behalf.
4. Happy never communicated to NRP that she wants to leave the Bronx Zoo.
5. Happy never communicated to NRP that she desired to be transferred to PAWS.
6. NRP does not seek improved welfare for Happy.

7. NRP does not allege that Happy's living conditions at the Bronx Zoo are unsuitable.

8. The NRP Petition does not ask this Court to release Happy into the wild.

9. NRP filed a petition for habeas corpus for the release of three different elephants on or about November 13, 2017 to the Connecticut Superior Court, in an action captioned *Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie, & Karen v. R.W. Commerford & Sons, Inc.*, No. LLI-CV-5009822-S ("Connecticut Petition").

10. The Connecticut Petition suggested that three elephants, named Beluah, Minnie, and Karen, be transferred to PAWS.

11. NRP filed the Joyce Poole Affidavit in support of the Connecticut Petition.

12. NRP filed the Cynthia Moss Affidavit in support of the Connecticut Petition.

13. NRP filed the Karen McComb Affidavit in support of the Connecticut Petition.

14. NRP filed the Bates & Byrne Affidavit in support of the Connecticut Petition.

15. The Superior Court of Connecticut denied the Connecticut Petition.

16. The First Connecticut Decision attached as Exhibit 1 is an accurate copy of the decision of the Superior Court of Connecticut, Judicial District of Litchfield, dated December 26, 2017.

17. The Superior Court of Connecticut denied the Connecticut Petition, stating in the First Connecticut Decision, that "the petition is wholly frivolous on its face in legal terms." Ex. 1, p. 1.

18. Following the First Connecticut Decision, NRP filed a motion to reargue and a request for leave to amend its Connecticut Petition on behalf of three different elephants.

19. The Superior Court of Connecticut denied the NRP's motion to reargue and request for leave to amend concerning the Connecticut Petition.

20. The Second Connecticut Decision attached as Exhibit 2 is an accurate copy of the decision of the Superior Court, Judicial District of Litchfield, dated February 27, 2018.

21. The Superior Court of Connecticut denied NRP's request for leave to amend the Connecticut Petition, stating in the Second Connecticut Decision that "even were this court to determine that the petitioner's proposed amendments resolve the issue of standing, the resulting amended petition would still lack the possibility or probability of victory, constraining the court to deny it once again." Ex. 2, p. 4.

22. The Karen McComb Affidavit does not provide an opinion based on Karen McComb's personal observation, treatment, or evaluation of Happy.

23. The Joyce Poole Affidavit does not provide an opinion based on Joyce Poole's personal observation, treatment, or evaluation of Happy.

24. The Supplemental Joyce Poole Affidavit does not provide an opinion based on Joyce Poole's personal observation, treatment, or evaluation of Happy.

25. The Cynthia Moss Affidavit does not provide an opinion based on Cynthia Moss's personal observation, treatment, or evaluation of Happy.

26. The Bates & Byrne Affidavit does not provide an opinion based on Lucy Bates' or Richard Byrne's personal observation, treatment, or evaluation of Happy.

27. PAWS is, as stated in the Stewart Affidavit, a "captive sanctuary."

28. PAWS is surrounded by barriers that prevent the animals inside the sanctuary from leaving the sanctuary.

29. NRP owns and operates a publically accessible website, available at <https://www.nonhumanrights.org/>.

30. NRP's website provides information concerning NRP's legal representation of nonhuman animals in ongoing litigation.

31. NRP's website states that NRP filed the NRP Petition in Orleans County because "the First Department, which oversees the county where the Bronx Zoo is located, 'has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human.'" Exhibit 3 is a copy of the article containing this statement, dated October 2, 2018.

32. NRP's website recites NRP's "Objectives," the first of which is "[t]o change the common law status of great apes, elephants, dolphins, and whales from mere 'things,' which lack the capacity to possess any legal right, to 'legal persons,' who possess such fundamental rights as bodily liberty and bodily integrity." Exhibit 4 is a copy of the webpage containing this statement, last visited November 25, 2018.

33. NRP does not allege that Respondents' custody of Happy violates any municipal, state, or federal law.

34. On or about December 5, 2013, NRP filed a petition for a writ of habeas corpus on behalf of two chimpanzees by order to show cause in Suffolk County Supreme Court, in the action captioned *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley* ("Suffolk County Petition.")

35. The Suffolk County Supreme Court declined to sign NRP's order to show concerning the Suffolk County Petition.

36. NRP filed an appeal from Suffolk County Supreme Court's decision concerning the Suffolk County Petition.

37. The New York State Supreme Court, Appellate Division, Second Department, dismissed NRP's appeal concerning the Suffolk County Petition and declined to grant NRP leave to appeal its decision.

38. On or about December 11, 2013, NRP filed a petition for a writ of habeas corpus on behalf of a chimpanzee by order to show cause in Niagara County Supreme Court, in an action captioned *In re Nonhuman Rights Project ex rel. Kiko v. Presti* ("Niagara County Petition").

39. The Niagara County Supreme Court declined to sign NRP's order to show cause concerning the Niagara County Petition.

40. NRP filed an appeal from the Niagara County Supreme Court's decision concerning the Niagara County Petition.

41. The New York State Supreme Court, Appellate Division, Fourth Department, affirmed the decision of the Niagara County Supreme Court concerning the Niagara County Petition.

42. On or about December 18, 2013, NRP filed a petition for a writ of habeas corpus on behalf of a chimpanzee by order to show cause in Fulton County Supreme Court, in an action captioned *People ex rel. Nonhuman Rights Project, Inc. v. Lavery* ("Fulton County Petition").

43. The Fulton County Supreme Court declined to sign NRP's order to show cause concerning the Fulton County Petition.

44. NRP filed an appeal from the Fulton County Supreme Court's decision concerning the Fulton County Petition.

45. The New York State Supreme Court, Appellate Division, Third Department, affirmed the decision of the Fulton County Supreme Court concerning the Fulton County Petition.

46. NRP filed a motion with the New York Court of Appeals seeking leave to appeal the Third Department's affirmance concerning the Fulton County Petition.

47. The New York Court of Appeals denied NRP's motion for leave to appeal the Third Department's affirmance concerning the Fulton County Petition.

48. On or about March 19, 2015, NRP filed a petition for a writ of habeas corpus on behalf of a chimpanzee by order to show cause in New York County Supreme Court, in an action captioned *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo* ("New York County Petition").

49. The New York County Supreme Court denied the New York County Petition.

50. NRP filed an appeal of the denial of the New York County Petition.

51. The New York State Supreme Court, Appellate Division, First Department, affirmed the denial of the New York County Petition.

52. NRP filed a motion with the New York Court of Appeals seeking leave to appeal the First Department's affirmance of the denial of the New York County Petition.

53. The New York Court of Appeals denied NRP's motion for leave to appeal the First Department's affirmance of the denial of the New York County Petition.

54. PAWS is not accredited by the American Association of Zoological Parks & Aquariums (d/b/a the Association of Zoos and Aquariums).

55. PAWS is not open to the general public.

56. PAWS's website advertises a "one-day getaway" for \$300 per person to "receive an insider's tour of the elephant habitat and spend an educational, fun-filled day with PAWS' elephants," and to "dine outdoors (weather permitting) within view of the elephants."

57. PAWS's website advertises a "two-day getaway" entitled "Seeing the Elephant" for visitors to meet the "PAWS elephants" in exchange for \$850 per person, or \$1,600 for two persons. *Id.*

58. PAWS's website advertises tickets for an "Elephant Grape Stomp" scheduled for April 20, 2019, featuring "food" and "winetasting."

Dated: Buffalo, New York
November 27, 2018

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5 Dunhill Road
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EXHIBIT 1

DOCKET NO. LLI-CV-17-5009822-S	SUPERIOR COURT
NONHUMAN RIGHTS PROJECT, INC. EX REL. BEULAH, MINNIE, & KAREN	JUDICIAL DISTRICT OF LITCHFIELD
V.	AT TORRINGTON
R.W. COMMERFORD & SONS, INC.	DECEMBER 26, 2017

MEMORANDUM OF DECISION

PETITION FOR WRIT OF HABEAS CORPUS (NO. 101)

The petitioner, Nonhuman Rights Project, Inc., seeks a writ of habeas corpus on behalf of three elephants, Beulah, Minnie, and Karen, which are owned by the respondents, R.W. Commerford & Sons, Inc. a/k/a Commerford Zoo, and William R. Commerford, as president of R.W. Commerford & Sons, Inc. The issue is whether the court should grant the petition for writ of habeas corpus because the elephants are "persons" entitled to liberty and equality for the purposes of habeas corpus. The court denies the petition on the ground that the court lacks subject matter jurisdiction and the petition is wholly frivolous on its face in legal terms.

The petitioner filed this petition; Docket Entry no. 101; on November 13, 2017, along with a supporting memorandum of law; Docket Entry no. 102; and thirteen exhibits consisting of expert affidavits and related material.¹ The petitioner's "mission is to change the common law status of at least some nonhuman animals from mere things, which lack the capacity to possess

¹ The petitioner's exhibits include: (1) affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (2) CD of exhibits to affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (3) affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (4) CD of exhibits to affidavit of Lucy Bates, Ph.D. and Richard Byrne, Ph.D.; (5) affidavit of Joyce Poole, Ph.D.; (6) CD of exhibits to affidavit of Joyce Poole, Ph.D.; (7) affidavit of Karen McComb, Ph.D.; (8) CD of exhibits to affidavit of Karen McComb, Ph.D.; (9) affidavit of Cynthia Moss; (10) CD of exhibits to affidavit of Cynthia Moss; (11) affidavit of Ed Stewart; and (12) CD of exhibits to affidavit of Ed Stewart.

12/26/17 Copy of memo mailed to Atty. David B. Zabel,
Cohen & Wolf PC, 1115 Broad St., Bridgeport, CT 06604; Atty.
Steven M. Wise, 5195 NW 112th Terr., Coral Springs, FL 33076;
Department of Judicial Decisions, 231 Capitol Ave., Haddam, CT 06106. PL

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. The [petitioner] does not seek to reform animal welfare legislation.” Pet. Writ Habeas Corpus, ¶ 1, Docket Entry no. 101. “While this Petition challenges neither the conditions of their confinement nor Respondents’ treatment of the elephants; but rather the fact of their detention itself, the deplorable conditions of Beulah’s, Minnie’s, and Karen’s confinement underscore the need for immediate relief and the degree to which their bodily liberty and autonomy are impaired.” Pet. Writ Habeas Corpus, ¶ 51, Docket Entry no. 101. “The Expert Affidavits submitted in support of this Petition set forth the facts that demonstrate that elephants such as Beulah, Minnie, and Karen are autonomous beings who live extraordinarily complex emotional, social, and intellectual lives and who possess those complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty protected by the common law of habeas corpus, as a matter of common law liberty, equality, or both.” Pet. Writ Habeas Corpus, ¶ 10, Docket Entry no. 101.

I

DISCUSSION

The petition was filed pursuant to Practice Book § 23-24 and General Statutes § 52-466. See Pet. Writ Habeas Corpus, ¶ 7, Docket Entry no. 101. Practice Book § 23-24 provides: “(a) The judicial authority shall promptly² review any petition for a writ of habeas corpus to

² Although “promptly” is not defined for the purposes of Practice Book § 23-24, General Statutes § 52-470 (a) provides: “The court or judge hearing any habeas corpus shall proceed in a summary way to determine the facts and issues of the case, by hearing the testimony and arguments in the case, and shall inquire fully into the cause of imprisonment and thereupon dispose of the case as law and justice require.” “The proceeding is ‘summary’ in the sense that it should be heard promptly, without continuances . . . but the use of the word also implies that the proceeding should be short, concise and conducted in a prompt and simple manner, without the

determine whether the writ should issue. The judicial authority shall issue the writ unless it appears that: (1) the court lacks jurisdiction; (2) the petition is wholly frivolous on its face; or (3) the relief sought is not available. (b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this rule.”

PRACTICE BOOK § 23-24 (a) (1)

“THE COURT LACKS JURISDICTION”

“Subject matter jurisdiction for adjudicating habeas petitions is conferred on the Superior Court by General Statutes § 52-466, which gives it the authority to hear those petitions that allege illegal confinement or deprivation of liberty.” (Internal quotation marks omitted.) *Small v. Commissioner of Correction*, 144 Conn. App. 749, 753; 75 A.3d 35 (2013). Section 52-466 provides in relevant part: “(a) (1) An application for a writ of habeas corpus, other than an application pursuant to subdivision (2) of this subsection, shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person’s liberty. (2) An application for a writ of habeas corpus claiming illegal confinement or deprivation of liberty, made by or on behalf of an inmate or prisoner confined in a correctional facility as a result of a conviction of a crime, shall be made to the superior court, or to a judge thereof, for the judicial district of Tolland.”

The petitioner claims that the elephants are illegally confined in Goshen, Connecticut, which lies within the judicial district of this court, Litchfield. The petitioner therefore, has

aid of a jury, or in other respects out of the regular course of the common law.” *State v. Phidd*, 42 Conn. App. 17, 31, 681 A.2d 310 (1996) (discussing § 52-470 [a]), cert. denied, 238 Conn. 907, 679 A.2d 2 (1996), cert. denied, 520 U.S. 1108, 117 S. Ct. 1115, 137 L. Ed. 2d 315 (1997). Black’s Law Dictionary (9th Ed. 2009) defines a summary proceeding as: “A nonjury proceeding that settles a controversy or disposes of a case in a relatively prompt and simple manner.”

complied with § 52-466 (a) (1) in the sense that it requires application to be made in the superior court for the judicial district in which the person who's custody is in question is claimed to be illegally confined. Had the petition been "made . . . on behalf of an inmate . . . as a result of a conviction of a crime," the petitioner would have been required to make its application "to the superior court . . . for the judicial district of Tolland"; see § 52-466 (a) (2); the point being that the petitioner cannot rely on § 52-466 (a) (2).

Although 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. In this sense, § 52-466 (a) (1) is inapposite to what the petitioner claims to be an equivalent statute in the state of New York, N.Y. C.P.L.R. 7002 (a), which governs by whom a petition for a writ of habeas corpus may be brought in that state, and provides: "A person illegally imprisoned *or otherwise restrained* in his liberty within the state, *or one acting on his behalf* . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." (Emphasis added.) Unlike § 52-466, N.Y. C.P.L.R. 7002 (a) does not distinguish between a person whose confinement is a result of a criminal conviction, and one whose confinement is not. In *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 49 Misc. 3d 746, 755-56, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015), the New York trial court relied on this provision in determining that the petitioner had standing to seek a writ on behalf of two chimpanzees. "As [N.Y. C.P.L.R. 7002 (a)] places no restriction on who may bring a petition for habeas on behalf of the person restrained, and absent any authority for the proposition that the statutory phrase

'one acting on his behalf' is modified by a requirement for obtaining standing by a third party, petitioner has met its burden of demonstrating that it has standing." *Id.*

Although § 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. On the contrary, "[i]t is well settled in Connecticut law that a petition for a writ of habeas corpus is a proper procedural vehicle with which to challenge the custody of a child." *Weidenbacher v. Duclos*, 234 Conn. 51, 60, 661 A.2d 988 (1995). The court must, however, first "determine whether the person seeking the equitable remedy of habeas corpus has standing to initiate the action. Standing focuses on whether a party is the proper party to request adjudication of the issues, rather than on the substantive rights of the aggrieved parties. . . . It is a basic principle of law that a plaintiff must have standing for the court to have jurisdiction. Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." (Citations omitted; internal quotation marks omitted.) *Weidenbacher v. Duclos*, *supra*, 234 Conn. 61-62.

"This court, recognizing that courts must be ever mindful of what is in the best interests of a child and of who should be allowed to intrude in the life of a child, has placed limits on the class of persons who have standing to bring a habeas petition for custody. In *Doe v. Doe*, [163 Conn. 340, 345, 307 A.2d 166 (1972)], the court held that a person must allege parenthood or legal guardianship of a child born out of wedlock in order to have standing. In *Nye v. Marcus*, 198 Conn. 138, 143-44, 502 A.2d 869 (1985), where foster parents sought custody of their foster child, the court reiterated that 'only parents or legal guardians of a child have standing to seek habeas corpus relief,' and explained that 'parents' could include either biological or adoptive parents, but not foster parents." *Weidenbacher v. Duclos*, supra, 234 Conn. 62-63. In response to *Nye*, our legislature enacted subsection (f) to § 52-466, which provides: "A foster parent or an approved adoptive parent shall have standing to make application for a writ of habeas corpus regarding the custody of a child currently or recently in his care for a continuous period of not less than ninety days in the case of a child under three years of age at the time of such application and not less than one hundred eighty days in the case of any other child." See *Weidenbacher v. Duclos*, supra, 63 n.18. The petitioner in the present case naturally does not allege that it is a parent of any sort to the elephants. On the contrary, 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. Of course, as there are avenues other than habeas for a stranger to ensure the removal of a child from an abusive home; see General Statutes § 17a-101g (governing removal of child from home due to abuse or neglect); there are also in the case of animal cruelty. See General Statutes §§ 22-329a (governing removal of animal from home for animal cruelty) and 53-247 (criminalizing animal cruelty, including "harass[ing] or worry[ing] any animal for the purpose of making it perform for amusement, diversion or exhibition").

Outside 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. See *State v. Ross*, 272 Conn. 577, 597, 863 A.2d 654 (2005) (death penalty). "It is clear . . . that a person who seeks next friend status by the very nature of the proceeding will have no specific personal and legal interest in the matter." *Id.* "A next friend does not himself become a party to the habeas corpus action in which he participates, but simply pursues the cause on behalf of the detained person, who remains the real party in interest. Most important for present purposes, next friend standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another. Decisions applying the habeas corpus statute have adhered to at least two firmly rooted prerequisites for next friend standing. First, a 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. . . . Second, the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate . . . and it has been further suggested that a next friend must have some significant relationship with the real party in interest." (Citations omitted; internal quotation marks omitted.) *Whitmore v. Arkansas*, 495 U.S. 149, 163-64, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990); see also *State v. Ross*, *supra*, 272 Conn. 599-611 (adopting *Whitmore*).

"It suffices . . . to conclude that no preexisting relationship whatever is insufficient." (Footnote omitted.) *Hamdi v. Rumsfeld*, 294 F.3d 598, 604 (4th Cir. 2002). "To begin with, this conclusion is truest to the language of *Whitmore* itself. The first prong of the next friend standing inquiry disposed of that case because the purported next friend had failed to show that the prisoner was unable to proceed on his own behalf. . . . Nevertheless, the Court thought it important to begin by stating that there are 'at least two firmly rooted prerequisites for "next

friend" standing,' . . . thereby suggesting that there may be more. And after specifying the first two requirements, the Court went out of its way to observe that 'it has been further suggested that a "next friend" must have some significant relationship with the real party in interest.' . . .

Whitmore is thus most faithfully understood as requiring a would-be next friend to have a significant relationship with the real party in interest."³ (Citations omitted; emphasis in original.)

Hamdi v. Rumsfeld, supra, 604. See also *Massie ex rel. Kroll v. Woodford*, 244 F.3d 1192, 1194 (9th Cir. 2001) (reading *Whitmore* as requiring that "the next friend ha[ve] some significant relationship with, and [be] truly dedicated to the best interests of, the petitioner"); id., 1199 n. 3; *T.W. v. Brophy*, 124 F.3d 893, 897 (7th Cir. 1997) ("[i]t follows, as the Court suggested in the *Whitmore* case, that not just anyone who expresses an interest in the subject matter of a suit is eligible to be the plaintiff's next friend - that he 'must have some significant relationship with the real party in interest'"); *Amerson v. Iowa*, 59 F.3d 92, 93 n. 3 (8th Cir. 1995) (under *Whitmore*, "next friend has burden to establish why real party in interest cannot prosecute habeas petition, that 'next friend' is 'truly dedicated' to best interests of person on whose behalf she litigates, and that she has some significant relationship with real party in interest").

In *Hamdi*, the detainee "was captured as an alleged enemy combatant during military operations in Afghanistan." *Hamdi v. Rumsfeld*, supra, 294 F.3d 600. In response, a public defender and a concerned citizen, both individually filed habeas petitions on the detainee's

³ The court in *Hamdi* indicated that the situation might be different in the case of a detainee that has no significant relationships. *Hamdi v. Rumsfeld*, supra, 294 F.3d 606 ("We do not have here the situation of someone who has no significant relationships. If we did, this might be a different case.") The petitioner here makes no such allegation, and thus, the court shall not make the allegation for it. See *Moye v. Commissioner of Correction*, 316 Conn. 779, 789, 114 A.3d 925 (2015) ("a habeas petitioner is limited to the allegations in his petition"). The petitioner, instead, cited a number of cases for the broad proposition that a stranger has standing to bring a petition for writ of habeas corpus on behalf of another before this court; see *Pet. Writ Habeas Corpus*, ¶ 48, Docket Entry no. 101; which, after examination, proved to be an inaccurate understanding of those cases.

behalf. *Id.*, 601. The court concluded that both petitioners lacked standing to pursue their petitions because neither had any preexisting relationship with the detainee. *Id.*, 606 ("However well-intentioned [the concerned citizen]'s actions may be, his rationale for filing a habeas petition on [the detainee]'s behalf is not consonant with [the constitutional requirement of standing]. The Supreme Court [has] emphasized . . . that the 'generalized interest of all citizens in constitutional governance' does not confer . . . standing.")

"The burden is on the next friend clearly to establish the propriety of his status and thereby justify the jurisdiction of the court." (Internal quotation marks omitted.) *Whitmore v. Arkansas*, *supra*, 495 U.S. 164. The elephants, naturally, lack the competence and accessibility to bring an action for habeas on their own behalf. What is at issue here is whether the petitioner is "truly dedicated to the best interests of the [elephants]"; *State v. Ross*, *supra*, 272 Conn. 599; and whether it has "some significant relationship with the [elephants]." *Id.* Because the petitioner has failed to allege that it possesses *any* relationship with the elephants, the petitioner lacks standing. Thus the court need not reflect over the second prong. For the foregoing reasons, the court dismisses the petition for writ of habeas.

PRACTICE BOOK § 23-24 (a) (2)

"THE PETITION IS WHOLLY FRIVOLOUS ON ITS FACE"

Setting aside that the petitioner lacks standing to bring this petition on behalf of the elephants, § 52-466 (a) (1) provides for an application to "be made to the superior court . . . for the judicial district in which the *person* whose custody is in question is claimed to be illegally confined or deprived of such *person's* liberty." (Emphasis added.) Section 52-466 (a) (1). This

language indicates that in order to invoke the writ of habeas corpus, an elephant must be considered, in the eyes of the law, a “person” for such purposes.⁴

“[T]he writ of habeas corpus [has] evolved as a remedy available to effect discharge from any confinement contrary to the [c]onstitution or fundamental law [I]n order to invoke successfully the jurisdiction of the habeas court, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty, [however] the interest must be one that is *assured* either by statute, judicial decree, or regulation. (Citations omitted; emphasis in original; internal quotation marks omitted.) *Fuller v. Commissioner of Correction*, 144 Conn. App. 375, 378, 71 A.3d 689, cert. denied, 310 Conn. 946, 80 A.3d 907 (2013). Thus, even if the petitioner here had standing, resolution in its favor would require this court to determine that the asserted liberty interests in its petition are assured by statute, constitution, or common law, i.e., that an elephant is a person for the purposes of this land’s laws that protect the liberty and equality interests of its persons.

“A habeas appeal . . . is not . . . frivolous . . . if the appellant can show: that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.” (Citation omitted; internal quotation marks omitted.) *Fernandez v. Commissioner of Correction*, 125 Conn. App. 220, 223-24, 7 A.3d 432 (2010), cert. denied, 300 Conn. 924, 15 A.3d 630 (2011). There, “[i]n his petition for a writ of habeas corpus, the petitioner alleged that he is a ‘foreign national,’ who is being treated as a ‘slave’ and a ‘prisoner of war’ in that he is being held at the ‘plantation of MacDougall-Walker’ in violation of his constitutional rights and ‘Geneva Convention Treaties,

⁴ The petitioner agrees that “[o]nly a ‘person’ may invoke a common law writ of habeas corpus and the inclusion of elephants as ‘persons’ for that purpose is for this Court to decide.” (Pet. Writ Habeas Corpus, ¶ 22, Docket Entry no. 101).

Convention Against Torture, European Convention on Human Rights and U.S. Human Rights Acts.' He asserted that his status as a 'slave' and 'prisoner of war' constitutes both a deprivation of due process and cruel and unusual punishment, and that he is being improperly held as an 'enemy combatant' as a result of 'Post Sept[ember] 11' policies of the government. Because the record amply reveals that the petitioner is not a 'prisoner of war' and is not 'enslaved' but, rather, is incarcerated as a result of convictions for crimes of which he was found guilty, we conclude that the court did not abuse its discretion in determining that the petition was frivolous and declining to issue a writ of habeas corpus." *Id.*, 224 (petitioner had been convicted of five counts for sales of narcotics).

In *Henry E.S., Sr. v. Hamilton*, Superior Court, judicial district of Stamford-Norwalk, Docket No. F02-CP-07-003237-A (February 28, 2008, *Maronich, J.*), Judge Maronich discussed the meaning of "wholly frivolous" under Practice Book § 23-24 (a) (2)⁵ relative to the requirement for habeas in family matters, which requires that the petition be "meritorious." See Practice Book § 25-41 (a) (2).⁶ "Meritorious is defined as 'meriting esteem or reward . . . meriting a legal victory; having legal worth.' Black's Law Dictionary (8th Ed. 2004). Conversely, a frivolous claim is defined as being '[a] claim that has no legal basis or merit" Black's Law Dictionary (8th Ed. 2004). One must conclude that the Practice Book § 25-41 (a) (2) provision that the petition be 'meritorious' is the higher standard. The requirement of § 23-

⁵ Practice Book § 23-24 (a) (2) provides in relevant part: "The judicial authority shall issue the writ unless it appears that . . . the petition is wholly frivolous on its face"

⁶ Practice Book § 25-41 provides: "(a) The judicial authority shall promptly review any petition for a writ of habeas corpus to determine whether the writ should issue. The judicial authority shall issue the writ if it appears that: (1) the court has jurisdiction; (2) the petition is meritorious; and (3) another proceeding is not more appropriate. (b) The judicial authority shall notify the petitioner if it declines to issue the writ pursuant to this section."

24 (a) (2) is that of a possibility of victory, while the requirement of § 25-41 (a) (2) is that of a probability of victory." *Henry E.S., Sr. v. Hamilton*, supra.

Habeas corpus has been called "the great writ of liberty." *Lozada v. Warden*, 223 Conn. 834, 840, 613 A.2d 818 (1992). Does the petitioner's theory that an elephant is a legal person entitled to those same liberties extended to you and I have a possibility or probability of victory? 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. Based on the law as it stands today, this court cannot so find.

II

CONCLUSION

For the foregoing reasons, the court dismisses the petition for writ of habeas, and points the petitioner to this state's laws prohibiting cruelty to animals; see §§ 22-329a and 53-247; as a potential alternative method of ensuring the well-being of any animal.

SO ORDERED.

BY THE COURT,

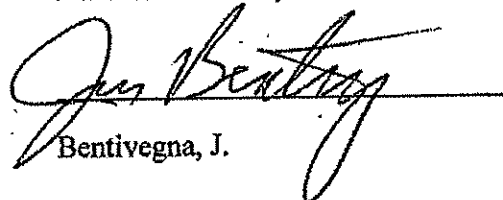

Bentivegna, J.

EXHIBIT 2

DOCKET NO. LLI-CV-17-5009822-S	SUPERIOR COURT
NONHUMAN RIGHTS PROJECT, INC. EX REL. BEULAH, MINNIE, & KAREN	JUDICIAL DISTRICT OF LITCHFIELD
V.	AT TORRINGTON
R.W. COMMERFORD & SONS, INC.	FEBRUARY 27, 2018

2018 FEB 27 PM 3:24
JUDICIAL DISTRICT OF
LITCHFIELD
STATE OF CONNECTICUT

OFFICE OF THE CLERK
SUPERIOR COURT

MEMORANDUM OF DECISION

MOTION TO REARGUE AND REQUEST FOR LEAVE TO AMEND, NO. 109

The petitioner, Nonhuman Rights Project, Inc., seeks a writ of habeas corpus on behalf of three elephants, Beulah, Minnie, and Karen, which are owned by the respondents, R.W. Commerford & Sons, Inc. a/k/a Commerford Zoo, and William R. Commerford, as president of R.W. Commerford & Sons, Inc. On December 26, 2017, the court denied the petition on the grounds that (i) the petitioner lacks standing; and (ii) the petition is wholly frivolous on its face in legal terms. (Docket Entry nos. 106-108). The issue is whether the court should grant the petitioner's motion to reargue and request for leave to amend; (Docket Entry no. 109); which it filed along with a supporting memorandum of law; (Docket Entry no. 109.5); on January 16, 2018.

After due consideration, the court denies the motion and request on the grounds that (i) the petitioner fails to put forth any controlling principle of law that runs contrary to the two grounds for which the court denied the petition; and (ii) the petitioner's proposed amendments do not resolve this court's conclusion that – under the law as it stands today – the petition lacks the possibility or probability of victory, meaning it is wholly frivolous on its face in legal terms.

2-27-18 Copy of memorandum of Decision mailed to Atty. David Zabel, Cohen & Wolf PC, PO Box 1821, Bridgeport, CT 06601; to Reporter of Judicial Decisions, Supreme Court Building, 231 Capitol Avenue, Hartford, CT 06106; and to Atty. Steven M. Wise, 5195 NW 112th Terr., Coral Springs, FL 33076. P.L.

DISCUSSION

I

MOTION TO REARGUE

“A motion to reargue is not a device to obtain a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument. . . . Rather, reargument is proper when intended to demonstrate to the court that there is some . . . principle of law which would have a controlling effect, and which has been overlooked” (Citation omitted; internal quotation marks omitted.) *Durkin Village Plainville, LLC v. Cunningham*, 97 Conn. App. 640, 656, 905 A.2d 1256 (2006). The petitioner here fails to put forth any controlling principle of law that is in contrast with the two grounds for which the court denied the petition. For this reason, the court denies the plaintiff’s motion to reargue.

II

REQUEST FOR LEAVE TO AMEND

In this court’s memorandum of decision denying the petition, the court concluded that the petitioner lacks standing because it failed to allege that it had a significant relationship with the elephants. The court also noted that such failure *may* be overcome when the confined person has no significant relationships with anyone, but that the petitioner had failed to allege this in its petition as well. The petitioner requests leave to amend to address these flaws.

“While our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court’s discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . Whether to allow an amendment is a

matter left to the sound discretion of the trial court.” (Citations omitted; internal quotation marks omitted.) *LaFlamme v. Dallessio*, 65 Conn. App. 1, 7, 781 A.2d 482 (2001), rev’d on other grounds, 261 Conn. 247, 802 A.2d 63 (2002). Our Appellate Court in *LaFlamme* held that the trial court did not abuse its discretion by granting the defendant’s motion for summary judgment without having ruled on the plaintiff’s request for leave to amend. See *id.* (“It was well within the court’s discretion to grant or deny the plaintiff’s request. The court exercised its discretion by first hearing and ruling on the defendant’s motion for summary judgment. Having granted the motion and rendered judgment, the court no longer was compelled to act on the plaintiff’s request. We are not persuaded that the court abused its discretion by acting on the earlier filed motion.”)

Although our Appellate Court has subsequently held that it was an abuse of discretion for a trial court to grant summary judgment without having ruled on a pending request for leave to amend when such amendment would have served to defeat summary judgment; see *Miller v. Fishman*, 102 Conn. App. 286, 293-97, 925 A.2d 441 (2007), cert. denied, 285 Conn. 905, 942 A.2d 414 (2008); the court there distinguished *LaFlamme v. Dallessio*, *supra*, 65 Conn. App. 7, by pointing out that in *LaFlamme*, the granting of summary judgment “did not rest on a failure of the operative complaint that could be remedied through a proper amendment.” *Miller v. Fishman*, *supra*, 292. Here, as in *LaFlamme*, even if the court were to grant the petitioner leave to amend, its proposed amendments¹ do not change the outcome. Denial of the petition did not rest exclusively on the petitioner’s lack of standing, but also on the legal conclusion that the

¹ The petitioner includes as an exhibit to this motion a blacklined proposed amended petition where it appears as though the original petition alleged that the elephants lacked any significant relationships and provided supporting law. (See Pet’r Ex. 3, pp. 13-17, Docket Entry no. 109). It should be noted for the purposes of review that the original petition; (Docket Entry no. 101); did not contain any of the language that is crossed out on these pages.

basis for the petition is not a constitutionally protected liberty, which is required in order to issue a writ of habeas corpus. See *Fuller v. Commissioner of Correction*, 144 Conn. App. 375, 378, 71 A.3d 689, cert. denied, 310 Conn. 946, 80 A.3d 907 (2013). Thus, even were this court to determine that the petitioner's proposed amendments resolve the issue of standing, the resulting amended petition would still lack the possibility or probability of victory, constraining the court to deny it once again. Accordingly, the court denies the petitioner's request for leave to amend.

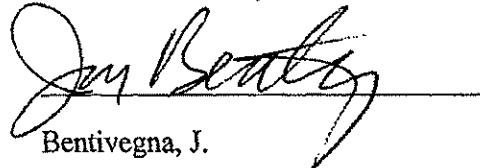
III

CONCLUSION

For the foregoing reasons, the court denies the motion to reargue and request for leave to amend, No. 109.

SO ORDERED.

BY THE COURT,

A handwritten signature in black ink, appearing to read "Jay B. Bentivegna", is written over a horizontal line. Below the line, the name "Bentivegna, J." is printed in a serif font.

Bentivegna, J.

EXHIBIT 3



Get Involved

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Cases

New Elephant Rights Lawsuit Demands Liberty, Sanctuary for Elephant Confined Alone at the Bronx Zoo

By [Lauren Choplin](#) on October 2, 2018

Share this story:



NONHUMAN RIGHTS PROJECT

New Elephant Rights Lawsuit Demands Liberty, Sanctuary for Elephant Confined Alone at the Bronx Zoo

~ *The Nonhuman Rights Project (NhRP) argues the zoo's "imprisonment of Happy deprives her of her ability to exercise her autonomy in meaningful ways, including the freedom to choose where to go, what to do, and with whom to be" ~*

~ *Filed in New York Supreme Court, the petition is the NhRP's*

latest on behalf of captive nonhuman animals scientifically proven to be self-aware and autonomous and follows two recent nonhuman rights wins in New York ~

Oct. 2, 2018—New York, NY—The Nonhuman Rights Project (NhRP) announced today it is filing a petition in New York Supreme Court, Orleans County for a common law writ of habeas corpus and order to show cause on behalf of Happy, a 47-year-old Asian elephant held alone in captivity at the Bronx Zoo and the first elephant in the world to demonstrate self-awareness via the mirror self-recognition test.

With support from world-renowned elephant experts, the NhRP is demanding recognition of Happy's legal personhood and fundamental right to bodily liberty as well as her transfer to an elephant sanctuary. For the last twelve years, the zoo has housed Happy in a rotating portion of its 1.15-acre exhibit, separated from elephants Patty and Maxine who, in 2002, fatally injured Happy's longtime elephant companion Grumpy.

"Our world-class experts say that, like all elephants, Happy is an autonomous being who evolved to walk 20 or more miles a day as a member of a multi-generational large social group," said Steven M. Wise, founder and president of the NhRP. "The entirety of the zoo's elephant exhibit provides far less than even one percent of the space she would roam in a single day in the wild. She doesn't belong to a social group. Her autonomy is thwarted daily. This has got to stop."

The filing of the suit follows New York courts' recent embrace of nonhuman legal personhood and rights. In May, New York Court of Appeals Judge Eugene Fahey wrote in a concurring opinion in the NhRP's chimpanzee rights cases that "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.” In June, New York’s Fourth Judicial Department cited to the NhRP’s case on behalf of chimpanzee Kiko in *People v. Graves*, writing, “[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals.”

Under New York habeas corpus procedure, the NhRP can file suit in any county. The NhRP chose to file in Orleans County (part of the Fourth Department) because the First Department, which oversees the county where the Bronx Zoo is located, “has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human,” said Elizabeth Stein, NhRP staff attorney and New York counsel. Judge Fahey noted in May that the First Department’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.”

Happy’s habeas corpus petition is the NhRP’s third on behalf of captive elephants. The NhRP has filed two petitions on behalf of Beulah, Karen, and Minnie, three elephants held in captivity at a Connecticut-based traveling circus called the Commerford Zoo.

As the only civil rights organization in the US seeking recognition of the personhood and rights of self-aware, autonomous nonhuman animals, the NhRP views its mission and work as part of the broader struggle to uphold and strengthen the fundamental values and principles of justice—such as liberty, autonomy, equality, and fairness—that already help protect vulnerable human beings from

abuses of power.

“As Martin Luther King, Jr. wrote in his Letter from the Birmingham Jail, ‘Injustice anywhere is a threat to justice everywhere.’ Happy, other elephants, and other autonomous nonhuman animals are the victims of severe ongoing injustices,” Wise said. “We have a moral duty to recognize these injustices as such and to correct them: not just for the sake of animals like Happy, but also to preserve justice for human beings.”

Visit the NhRP’s Litigation page for more information about this case and the NhRP’s other cases.

- Petition
- Memorandum of Law
- Supplemental Affidavit by Joyce Poole

About the Nonhuman Rights Project

Founded in 1996 by attorney Steven M. Wise, the Nonhuman Rights Project (NhRP) works to secure legally recognized fundamental rights for nonhuman animals through litigation, advocacy, and education. Our mission is to change the legal status of at least some nonhuman animals from mere “things,” which lack the capacity to possess any legal right, 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. Our current plaintiffs are members of species who have been scientifically proven to be autonomous: currently, great apes, elephants, dolphins, and whales. We are working with teams of attorneys on four continents to develop campaigns to achieve legal rights for nonhuman animals that are suited to the legal systems of these countries. We filed our

first cases in December of 2013, and our work is the subject of the 2016 Pennebaker Hegedus/HBO documentary film *Unlocking the Cage*, which has been seen by millions around the world.

#

Lauren is the NhRP's Communications Director. She heads up internal and external communications, coordinating media coverage of our legal and policy work and managing our blog and social media pages.

Must Reads

Nonhuman Rights in Colombia: An Interview with Luis Domingo Gómez Maldonado in Interviews

Chimpanzee Cecilia Finds Sanctuary: An Interview with GAP Brazil in Interviews

Building An International Nonhuman Rights Movement in Collaborations

Why the First Department's Decision In Our Chimpanzee Rights Cases Is Wildly Wrong in Cases

A Conversation with Thalia Field, Author of Experimental Animals in Interviews

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NONHUMAN RIGHTS PROJECT

We are the only civil rights organization in the United States working to secure legally recognized fundamental rights for nonhuman animals.



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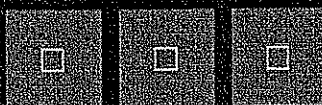




EXHIBIT 4



Get Involved

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Our Mission

We work to secure legally recognized fundamental rights for nonhuman animals through litigation, legislation, and education.

Our Objectives

- 1 To change the common law status of great apes, elephants, dolphins, and whales from mere “things,” which lack the capacity to possess any legal right, to “legal persons,” who possess such fundamental rights as bodily liberty and bodily integrity.
- 2 To draw on the common law and evolving standards of morality, scientific discovery, and human experience to consider other qualities that may be sufficient for recognition of nonhuman animals’ legal personhood and fundamental rights.

- 3 To develop local, national, and global issue-oriented grassroots and legislative campaigns to promote recognition of nonhuman animals as beings worthy of moral and legal consideration and with their own inherent interests in freedom from captivity, participation in a community of other members of their species, and the protection of their natural habitats.
- 4 To build a broad-based coalition of organizations and individuals to secure legally recognized fundamental rights for nonhuman animals.
- 5 To foster understanding of the social, historical, political, and legal justice of our arguments and the scientific discovery of other species' cognitive and emotional complexity that informs them.

Our Team

**Steven M.
Wise**
Founder and President

**Gail Price-
Wise**
Board Member

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Jane Goodall

Board Member

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Kevin
Schneider

Executive Director

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Lauren
Choplin

Communications
Director

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Elizabeth
Stein

Staff Attorney

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Shirley

Monica Miller
Staff Attorney

[View full profile >](#)

Shtiegman
International
Coordinator

[View full profile >](#)

Erika Mathews
Development Director

[View full profile >](#)

Courtney Fern
Director of Government
Relations and
Campaigns

[View full profile >](#)

Our Values

- 1** We communicate truthfully, authentically, respectfully, and in a dignified manner with the courts, the legal profession, lawmakers, the media, and the public and make available and accessible all our legal documents.
- 2** We give credit generously and unfailingly to anyone who assists with achieving our mission.

- 3 We work in harmony with any individual or organization that assists in advancing our objectives.
- 4 We treat our coworkers, donors, and volunteers with the greatest respect and gratitude for their efforts on behalf of nonhuman animals.
- 5 We deeply value all donations and administer them with the utmost responsibility with an emphasis on practical effectiveness.

“How should we relate to beings who look into mirrors and see themselves as individuals, who mourn companions and may die of grief, who have a consciousness of ‘self?’ Don’t they deserve to be treated with the same sort of consideration we accord to other highly sensitive beings: ourselves?”

- Jane Goodall



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NONHUMAN RIGHTS PROJECT

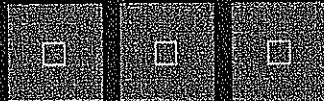
We are the only civil rights
organization in the United
States working to secure
legally recognized fundamental
rights for nonhuman animals.



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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for
a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of
HAPPY,

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums of
the Wildlife Conservation Society and Director of the Bronx
Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

STATE OF NEW YORK)
) SS.:
COUNTY OF ERIE)

BRYAN J. JENKINS, being duly sworn, deposes and says:

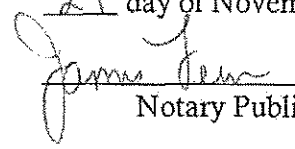
I am an employee of Phillips Lytle LLP, attorneys for Respondents
James J. Breheny and Wildlife Conservation Society, and not a party to the action, and am over the
age of 18 years. On November 21, 2018, I served Respondents' Notice to Admit on the
following individual at the address indicated:

Elizabeth Stein, Esq.
Attorneys for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040

by depositing a true copy of same enclosed in a properly addressed wrapper, into the custody of
Federal Express Corporation for overnight delivery, prior to the latest time designated by Federal
Express Corporation for overnight delivery.


Bryan J. Jenkins

Sworn to before me this
29 day of November, 2018


Notary Public

JAMES D. FERRIS
No. 01FE6256995
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Mar. 5, 2020

EXHIBIT 10

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of
HAPPY,

Petitioner,

-against-

JAMES J. BREHENY, in his official capacity as Executive
Vice President and General Director of Zoos and Aquariums
of the Wildlife Conservation Society and Director of the
Bronx Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

Index No.: 18-45164

**AFFIRMATION IN
OPPOSITION TO
RESPONDENTS'
DEMAND TO
CHANGE VENUE**

I, Elizabeth Stein, an attorney duly admitted to practice law in the State of
New York, affirm the following under penalty of perjury:

1. I am an attorney of record for Petitioner, the Nonhuman Rights Project, Inc.,
in the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter and
have read and know the contents thereof.
3. For the reasons set forth below, I submit this Affirmation in opposition to
the "Demand for Change of Venue" ("Demand") filed by Respondents

JAMES J. BREHENY and the WILDLIFE CONSERVATION SOCIETY
("Respondents") and dated November 21, 2018.

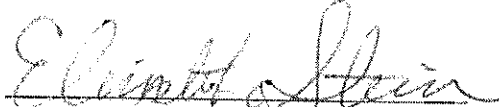
4. On October 2, 2018, Petitioner filed in this Court a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") on behalf of the elephant Happy along with a Memorandum of Law and other supporting papers, which explain at length why the Petition was properly filed in Orleans County. Petitioner has filed six verified petitions for writs of habeas corpus in New York State on behalf of detained chimpanzees since 2013. In none of these cases did a party seek production of the chimpanzee and none of them involved the testimony of material witnesses. Because Petitioner is likewise not seeking the production of Happy in Orleans County, it sought the writ by Order to Show Cause.
5. Respondents allege in their Demand that Orleans County is an "improper" venue for the above-captioned case and demand that it be changed to Bronx County where Happy is imprisoned.
6. In sole support of their Demand, Respondents cite CPLR 503 and 510(1), which are inapplicable to the case at bar, and 7004(c), which supports Petitioner's assertion that venue is proper in Orleans County, as the venue in this case is governed by CPLR Article 70 and not by CPLR Article 5.

7. CPLR 506(a) provides that, “[u]nless otherwise prescribed in subdivision (b) or in the law authorizing the proceeding, a special proceeding may be commenced in any county within the judicial district where the proceeding is triable.” The Commentary to CPLR 506 makes clear that “(i)n order to determine the venue for a special proceeding, counsel must begin by consulting the statute authorizing the particular proceeding. See, e.g., *CPLR 7002(b) (habeas corpus)*; CPLR 7502(a) (proceedings relating to arbitration). If the authorizing statute is silent as to venue, the general venue rules of CPLR Article 5, such as those with respect to party residence in CPLR 503, would be applicable.” (emphasis added). As Article 70 authorizes the case at bar and CPLR 7001 designates it as a special proceeding, the venue provisions contained at CPLR 7002(b), and not CPLR 503, control.
8. CPLR 7002(b), which governs venue in habeas corpus actions, provides, in relevant part: “a petition for the writ shall be made to: ... 3. *any justice of the supreme court.*” (emphasis added).
9. CPLR 7004(c) provides that “the writ shall be made returnable in the county where it was issued” except where the “petition was made to the supreme court ... outside the county in which the person is detained” in which case

the court, in its discretion, may “make the writ returnable before any judge authorized to issue it in the county of detention.”

10. In the case at bar, this Court properly made its Order to Show Cause returnable to Orleans County as the county of issuance, though it was within its discretion to make it returnable to Bronx County as the county of detention.
11. In a similar case, *The Nonhuman Rights Project, Inc. on Behalf of Hercules and Leo v. Stanley*, 16 N.Y.S.3d 898, 908 (N.Y. Cty. Sup. Ct. 2015), the Court ruled that venue was proper in New York County though the chimpanzees were detained in another county, stating “where no factual issues are raised, no one sought the production in court of [the nonhuman animal], and ‘[a]ll that remains is for the Court to issue its decision,’ a change of venue is not required,” (quoting *Chaney v. Evans*, No. 2012-940, 2013 WL 2147533, at *3 (Sup Ct. Franklin County May 7, 2013)).
12. This Petition is therefore properly brought before this Court even though Happy is unlawfully detained in Bronx County.
13. As venue is proper in Orleans County under CPLR 7002(b), CPLR 510(1) is inapplicable, and Petitioner rejects the Demand.

Dated: November 27, 2018


Elizabeth Stein, Esq.

Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com