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 Project[1], 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)

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[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).

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[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

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[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-Right-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-Nonjuman-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]

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[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-

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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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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

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[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.

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[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

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[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*

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[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

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[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

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[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

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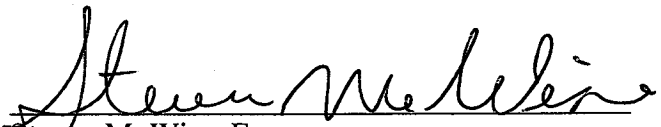
[179] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.
[180] Bates & Byrne Aff. ¶49; McComb Aff. ¶43; Poole Aff. ¶41; Moss Aff. ¶37.



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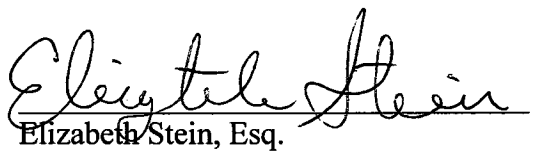
VERIFICATION

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



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