

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF BRONX: TRIAL TERM PART IA-5

3 - - - - - X
4 In the Matter of a Proceeding under Article 70
of the CPLR for a Writ of Habeas Corpus,

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

Petitioner,

7 - against -

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

11 Respondents.

12 - - - - - X

13 Index No. 45164/2018
14 October 21, 2019

851 Grand Concourse
Bronx, New York 10451

16 B E F O R E: ALISON TUITT, Supreme Court Justice.

17 A P P E A R A N C E S

18 NONHUMAN RIGHTS PROJECT
Attorneys for the Petitioner
19 BY: KEVIN SCHNEIDER, ESQ.

and

20 BY: SPENCER LO, ESQ.

21 STEVEN WISE, ESQ
Pro Hac Vice for the Petitioner
22 5195 North West 112 Terrace
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23 (Appearances continued on next page.)

24 Catherine Callahan, RPR

25 Senior Court Reporter

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1 APPEARANCES:

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12 and
13 BY: JOANNA J. CHEN, ESQ.

14 WILDLIFE CONSERVATION SOCIETY
15 Attorneys for the Respondent
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17 Bronx, New York 10460
18 BY: CHRISTOPHER J. McKENZIE, ESQ.

19 KELLEY, DRYE, ESQS.
20 Attorneys for Respondent
21 BY: JOSEPH WILSON, ESQ.

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1 (Whereupon, the following takes place on the
2 record in open court, in the presence of the Court and
3 Counsel.)

4 THE COURT: Welcome back. Just for the record,
5 can we just go over what we have done and what we have left
6 to argue. I received a transcript from the reporter.

7 My court attorney has gone over the motions
8 discussed with counsel, and I just want to make sure we are
9 all on the same page.

10 Now, the motion to dismiss as well as the motion
11 to strike the answer are argued and submitted; am I
12 correct?

13 MR. WISE: Yes.

14 THE COURT: All right, so we have done that.

15 Now the motion for protective order, we still
16 have to argue that.

17 MR. MANNING: Your Honor, if I may, the Court at
18 the last session indicated that it was the Court's
19 preference to receive that on papers. That was a discovery
20 motion and the Court directed some commentary on the
21 transcript.

22 THE COURT: So, you want to rest on the record?

23 MR. MANNING: We are satisfied.

24 MR. WISE: If Your Honor would like to hear more
25 argument, but we are content to having it be submitted on

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1 paper at this point.

2 THE COURT: That one will be submitted.

3 Now, the petition for habeas corpus.

4 MR. WISE: We are definitely arguing that this
5 morning.

6 THE COURT: That one will be argued.

7 The preliminary injunction.

8 MR. WISE: There was a temporary restraining
9 order that this Court issued that expires today to give us
10 a chance to come into court to argue the preliminary
11 injunction.

12 THE COURT: We still need to argue this.

13 MR. WISE: Yes.

14 THE COURT: Or are we in agreement that we can
15 extend the injunction until the case is decided?

16 MR. MANNING: We are not in agreement, Your
17 Honor.

18 MR. WISE: We think that's the appropriate thing
19 to do.

20 THE COURT: We are not in agreement to just
21 extend it until the case is decided so that the case is
22 status quo until then.

23 There will be no moving of Happy -- for lack of a
24 better term, I will call her Happy until the case is argued
25 or decided.

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1 MR. MANNING: If I may respond.

2 Yes, the reason we object is Happy has been where
3 she is for forty years without a Court Order. The Court
4 the petitioner want the Court to grant a T.R.O. under the
5 First Department case, a showing of likelihood of success
6 on the merits by petitioner.

7 We have briefed the motion to dismiss, and
8 without rearguing it, we have a First Department case
9 squarely on point that shows that the petition should be
10 dismissed.

11 I think -- we think there is a basis for a T.R.O.
12 We think there is no basis for a preliminary injunction,
13 the argument to which the Court wishes to hear the motion,
14 but that's the reason we oppose it, Your Honor.

15 THE COURT: So that the reason that you are in
16 opposition is that it would imply that they are going to be
17 successful on the motion to dismiss and -- yes, that would
18 be the motion for Habeas Corpus --

19 MR. WISE: If I may. We had not argued the
20 preliminary injunction motion before, because we spoke to
21 my brothers and said, is Happy going to be there, and with
22 his representation, Happy is going to be there.

23 We don't have any problem moving, if my brother
24 will say Happy will remain at the Bronx zoo.

25 THE COURT: That's what I was going to suggest.

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1 The motion would be withdrawn, and based on the stipulation
2 that Happy -- again for a lack of a better, or the corpus
3 would not be moved until the completion of the case.

4 MR. MANNING: Well, Your Honor, we represent to
5 the Court and to Counsel there is no present intention of
6 moving Happy.

7 THE COURT: So there would be no harm by making a
8 stipulation.

9 MR. MANNING: It's actually the opposite, Your
10 Honor. We briefed it. The point isn't whether there will
11 be irreparable harm if it's granted.

12 The question is whether it is irreparable if it
13 is granted, and there has been no showing.

14 THE COURT: The issue would not be addressed. It
15 would be moot because the motion would be withdrawn -- the
16 application would be withdrawn. So, it's not granted or
17 denied.

18 MR. MANNING: If I may, Your Honor.

19 Your Honor, we would like to argue in opposition
20 to the preliminary injunction for the reasons I have stated
21 as well as some additional reasons.

22 THE COURT: Okay. And the only thing that we
23 have -- we have the preliminary injunction motion, and then
24 we have the motion to file late papers.

25 Does that need to be argued?

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1 MR. SCHNEIDER: No. That was December 12th when
2 the case was still in Orleans. We had to file a response,
3 I believe, to one of their filings and we missed the
4 deadline. We filed it 12:02 A.M., so we were two minutes
5 late.

6 We filed a motion to file late papers just for
7 completeness of the Orleans Court to see that we weren't
8 trying to sneak anything by and the Court explicitly
9 accepted all papers as of the December 14th hearing.

10 So, we think that they effectually ruled on it,
11 but we want to provide it, for the purpose of completeness,
12 but we don't think it requires any time.

13 THE COURT: Is there any opposition?

14 MR. MANNING: We have no objection to that, Your
15 Honor. That motion was made around the same time as the
16 preliminary motion to strike our papers that were submitted
17 in opposition to the T.R.O., and I think that motion has
18 been withdrawn by petitioner as well.

19 MR. SCHNEIDER: I am sorry. What was that? We
20 have not filed another motion.

21 MR. MANNING: There was a motion at the outset
22 to strike our papers, when we simply filed in opposition.

23 MR. SCHNEIDER: Yes.

24 THE COURT: Now, was that the motion to strike
25 the answer?

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1 MR. MANNING: No, it was the --

2 THE COURT: So, there are two separate motions to
3 strike the answer?

4 MR. WISE: If I may explain.

5 THE COURT: That's okay. We had a --

6 MR. WISE: At the onset of the case, it is our
7 position the judge had to issue an Order to Show Cause or
8 not, without hearing from the other side.

9 The other side filed a paper anyway. We moved to
10 strike it. And now that's water under the bridge. It's
11 moot.

12 THE COURT: The motion to strike is a moot issue?

13 MR. WISE: Withdrawn, no issue.

14 MR. SCHNEIDER: And the motion to strike the
15 Answer is submitted. So --

16 THE COURT: Great. This just helps us out a
17 little bit.

18 Let's take the --

19 MR. MANNING: Your Honor, if I may. There are
20 two motions or admissions of making briefs.

21 When we were here last time, petitioner had
22 objected to the motion because we had no one here to argue
23 those motions.

24 THE COURT: But now we do.

25 MR. MANNING: We do. We do have people here.

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1 On behalf of the Zoological Association of
2 America, and two other interested parties, Mr. Joseph
3 Wilson from the law firm is here to argue on behalf of his
4 clients.

5 And on behalf of Professor Richard Cupp, my
6 associate, Joanna Chen, has been engaged by Professor Cupp
7 to argue his motion to file his papers.

8 And as well, we are prepared to proceed.

9 THE COURT: There is still opposition to the
10 motion being granted for the amicus motions?

11 MR. SCHNEIDER: We do object. We have our
12 argument as to both amicus are improper.

13 However, in our letter to the Court of
14 October 11th, we informed all parties, amicus and
15 respondents, that we asked the Court to just consider those
16 motions on the papers alone.

17 We think the Court has enough to deal with and
18 frankly, we object to the amicus being given time to argue
19 on the record.

20 My co-counsel here, Attorney Wise, was saying
21 prior to beginning here, that in his forty-seven years of
22 practice, including every time he tried to argue, he has
23 never been able to do so and we think the papers are more
24 than sufficient.

25 And we, of course, don't object to the Court

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1 considering both motions on the papers.

2 MR. MANNING: Well, the reason for that, Your
3 Honor, is because in their paper in opposition to the
4 motion, they have argued the merits opposed to the brief we
5 seek to file. And that's the whole point.

6 THE COURT: I am sorry.

7 MR. MANNING: In the opposing papers that were
8 filed in opposition to our -- the motions for amicus file,
9 they argued against the merits of the underlying brief that
10 we were supposed to submit.

11 So, of course they are comfortable with
12 submitting the paper. That's why we ask for oral argument
13 to those motions.

14 THE COURT: Do they, the persons who are trying
15 to -- the entities who are trying to -- I shouldn't use
16 that term loosely -- to submit the amicus briefs, are they
17 willing to rest on their papers?

18 MR. MANNING: We don't have papers, Your Honor,
19 except for proposed briefs.

20 THE COURT: You do have the proposed briefs
21 though?

22 MR. MANNING: Those are part of the motions.

23 THE COURT: Then we can take those arguments as
24 being arguments that you would have elicited before the
25 Court.

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1 MR. WILSON: Your Honor, Joseph Wilson. I
2 represent one of the proposed Amici orders and one being --

3 THE COURT: You are representing all three for
4 this purpose?

5 MR. WILSON: Professor Cupp is represented by a
6 different one. We have our proposed briefs that were
7 submitted.

8 I would like a chance to respond to some of the
9 arguments made in opposition to the NhRP as to why this
10 Court should not accept my client's proposed amicus brief.

11 THE COURT: Well, you know, if you can put it in
12 writing, then it would be more, I think, sufficient for --
13 more than sufficient for us, and that way we can have it to
14 refer back to while deciding the motion. And the briefs
15 would be fully submitted at that time.

16 Do you think that that's not --

17 MR. WILSON: I will proceed however the Court
18 prefers. I am here. I think you asked us to be here.

19 THE COURT: Yes. Well, we just wanted to make
20 sure --

21 MR. WILSON: If that's the Court's -- I am here.
22 I would love to be heard but --

23 THE COURT: Can I just confer with my court
24 attorney before I make a ruling on whether or not we will
25 take a reply and -- we don't do sur-reply.

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1 If we take a reply, that would be completely
2 submitted. But she usually likes to hear argument as well
3 as I, so we can converse and confer.

4 So, if you can just hold that in abeyance --

5 MR. WILSON: I will. I can be brief.

6 MR. SCHNEIDER: If I may, we just found out this
7 morning that Joanna Chen, for the respondent, is now
8 purported to represent Professor Cupp, one of the other
9 amicus who is not here today.

10 We just think it is improper for an attorney to
11 represent both a proposed amicus and party in the case,
12 because they are supposed to be bring in a view of law and
13 of the facts that come outside their party, which it
14 appears they have not.

15 THE COURT: Could you wait one second?

16 Could you wait one second, ma'am?

17 (Pause held.)

18 THE COURT: Is that the only other application
19 besides the T.R.O., the second T.R.O.?

20 MR. SCHNEIDER: By a letter dated October 15th,
21 we actually withdrew the second T.R.O. So, for all
22 intents, that is off the list as well.

23 THE COURT: So, the second T.R.O. is withdrawn.

24 MR. MANNING: I believe all that remains, if I am
25 clear on it, is the two motions for the amicus relief and

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1 motion for preliminary injunction, and then the request of
2 petitioner to be heard on the merits, notwithstanding the
3 motion to dismiss.

4 THE COURT: Well, the motion to dismiss we have
5 already argued. So, you are saying the only thing is for
6 Habeas Corpus relief and preliminary injunction?

7 MR. MANNING: Yes.

8 THE COURT: We need to know whether or not I will
9 hear the amicus application.

10 Why don't we start with the motion for
11 preliminary -- yes, let's start with the preliminary
12 injunction, or would you like to do --

13 MR. WISE: If I may, we do the Habeas Corpus --
14 we talk about the merits of the case within the Habeas
15 Corpus.

16 THE COURT: Okay. One second please.

17 (Pause held.)

18 MR. MANNING: Your Honor, during the break we
19 conferred and -- we are trying to simplify things but we
20 are getting messages from the bench --

21 THE COURT: There is no message. The problem
22 with the amicus arguments though -- in fact, in viewing the
23 hour, and I apologize for having to take you after my
24 calendar, but I knew that this would be extensive so that I
25 can commit to just this case itself -- and as you saw we

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1 had a lengthy calendar, that's why I didn't -- I wasn't
2 able to have you before this.

3 But, if the zoological amicus people would like
4 to argue briefly, and then Ms. Chen can argue also why it
5 is that she can represent both the respondent in this case
6 as well as Professor Cupp.

7 Okay, would you like to argue, Ms. Chen?

8 MS. CHEN: Good morning, Your Honor -- or I
9 should say good afternoon.

10 Professor Cupp has retained Phillips Lytle to
11 represent him for the purposes of this.

12 THE COURT: Keep your voice up. The acoustics in
13 here are terrible.

14 MS. CHEN: Just for purposes of this motion, as
15 he is a professor at Pepperdine School of Law, the Court
16 may understand that Professor Cupp is hard pressed to just
17 leave in the school year, given the pressures of exams and
18 of lectures.

19 And so, he asked that we appear on his behalf
20 this morning. And we think that Professor Cupp's amicus
21 brief should be submitted for very simple reasons.

22 His brief in summary states that there is no U.S.
23 Court decision that supports the Nonhuman Rights Project
24 regarding legal person of animals, and this includes
25 Justice Fahey in the Court of Appeals denial for leave of

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1 appeal.

2 Professor Cupp also points out that the Nonhuman
3 Rights Project's argument for legal personhood for animals
4 is dangerous and could undermine the rights for humans with
5 disabilities, with cognitive limitations and other marginal
6 persons.

7 Also, contrary to what the Nonhuman Rights
8 Project states, the connection between rights and
9 responsibilities has long been recognized in our legal
10 system, and just one example of the statement of that
11 principle is found in the American Declaration of the
12 Rights and duties of Man from 1948, which is a founding
13 international human rights document that states, rights and
14 duties are interrelated in every social and political
15 activity of man. While rights exalt individual liberty,
16 duties express the dignity of that liberty.

17 The First and Third Department in the Appellate
18 Division recognize the relevance of Professor Cupp's amicus
19 brief, not only allowed the brief, they replied on it
20 previously in their decisions.

21 However, much like how the Nonhuman Right Project
22 dismisses the First and Third Department decision as dicta,
23 they believe that Professor Cupp's brief that has been
24 submitted should not be considered because they disagree
25 with what Professor Cupp states. And they stated as much

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1 the last time we were in front of the Court on
2 September 23rd.

3 Because the Nonhuman Rights Project has already
4 addressed Professor Cupp's argument on the merits, we
5 believe that his brief should be limited by the court in
6 response --

7 THE COURT: The question of why you can represent
8 both parties?

9 MS. CHEN: Well, Professor Cupp has retained
10 whichever legal counsel he is able to.

11 And we would point out that with regard to the
12 Court of Appeals decision --

13 THE COURT: Which Court of Appeals decision?

14 MS. CHEN: Nonhuman Rights Project Incorporated
15 on behalf of Tommy versus Lavery. The reported citation is
16 31 NY 3d 1054.

17 We would point out that Counsel Spenser Lo
18 appeared on behalf of Justin Marcy and Laurence Tribe who
19 are amicus for that decision.

20 And Mr. Lo I believe is sitting at counsel table.

21 MR. SCHNEIDER: If I may.

22 I informed Counsel before the hearing of the
23 argument of this -- Spenser Lo, at the time he filed that
24 amicus motion, because we were always mindful that if the
25 amicus motion is going to be filed, it should not be one of

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1 us who is the attorney on it.

2 Mr. Lo is not employed by the NhRP. So,
3 counsel's representation that we have done the same thing
4 as them are completely off the mark.

5 MS. CHEN: Your Honor, we are not aware of there
6 being any tort that would limit Professor Cupp's ability to
7 choose which counsel he would like to retain. And that's a
8 right that he should be able to partake in, absent any
9 authority that NhRP can cite.

10 THE COURT: Okay.

11 MR. SCHNEIDER: I think this follows on their
12 previous brief where they responded to a memorandum before
13 the Court. They attempted to incorporate Professor Cupp's
14 amicus -- which I think just demonstrates the really
15 improper amount of overlap between the two, because an
16 amicus is supposed to be a friend of the Court and a
17 non-party, coming from outside, not somebody who is filing
18 papers along with one of the parties.

19 And if I could also, I would just ask that
20 Mr. Wise have a moment to respond to specifically why we
21 think Professor Cupp's amicus is not appropriate or will
22 aid the Court --

23 MR. WISE: I am ready to go.

24 I got into it to some degree the last time and I
25 will try not to repeat everything at all.

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1 Professor Cupp, indeed, filed a amicus brief to
2 which -- wait a minute. Actually in the Third Department
3 he did not file a amicus.

4 The Third Department simply referred to Professor
5 Cupps' -- two of his Lavery articles. We had no knowledge
6 of that, and --

7 THE COURT: You had no knowledge?

8 MR. WISE: We had no knowledge they were going
9 to -- there was no amicus who brought that up.

10 The first time that Professor Cupp's ideas ever
11 came to our notice is when we read the decision of the
12 Third Department.

13 THE COURT: How did the articles come up before
14 the Court?

15 MR. WISE: They somehow found -- the Court found
16 the articles on their own. So, we never had a chance to
17 say what I am about to say, which is that Professor Cupp
18 has a gross misunderstanding of his ideas.

19 He has a unique idiosyncratic idea of what social
20 contract means.

21 THE COURT: When you say a gross misunderstanding
22 of his ideas --

23 MR. WISE: He knows his ideas. His problem is
24 that he alone in the world is a proponent of his ideas. He
25 says things, and like my sister just repeated, that somehow

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1 the connection between right and duty is something that has
2 been around for a long time and they are necessarily
3 connected.

4 The problem is that nobody agrees with him.
5 Nobody said that.

6 The problem that the Court has, there is nothing
7 for the amica -- like a Frye test, that the Court might
8 use.

9 If the scientist starts testifying to something,
10 you can have the Frye test hearing to determine whether or
11 not the Court should even hear it. There is no Frye
12 hearing for an amicus.

13 Anyone like Professor Cupp can just come up and
14 start giving his opinion, and unless someone like us has an
15 idea that it's coming, there is no way for the Court to
16 realize that Professor Cupp's ideas are unique to him, are
17 idiocratic and physiologically wrong.

18 As I said the last time, Professor Cupp's ideas
19 are junk political science. They are junk philosophy.

20 He couldn't pass the Frye test. And one of the
21 reasons that I know he couldn't pass is that when the
22 Nonhuman Rights Project went and brought an appeal to the
23 Court of Appeals, which is the Fahey decision, Judge Fahey
24 actually pointed out there wasn't an independent -- that
25 there was an independent amicus brief filed by 17

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1 Philosophers.

2 One thing that the Frye test, for example, takes
3 into consideration is really the number of folks who are
4 agreeing with you.

5 Well, there were fifteen North American
6 philosophers that -- who filed an amicus brief specifically
7 addressed to the strange ideas that Professor Cupp makes a
8 habit of promulgating in his amicus beliefs, and he wants
9 the Third Department to cite his articles at that point.

10 He then starts filing amicus briefs. And if you
11 go onto his website, he talks about the fact that the Court
12 cited his arguments, but the fact is, that no one has ever
13 been made to - we couldn't cross-examine him. We don't
14 know what it was.

15 But once we knew it was coming, then others knew
16 it was coming. And 17 Philosophers filed a joint amicus
17 brief.

18 And 17 Philosophers -- to have them agree on
19 anything is extraordinary. To have 17 Philosophers agree
20 that Professor Cupp has no idea what he is talking about --

21 THE COURT: And those briefs are with the Third
22 Department?

23 MR. WISE: Those were briefs filed with the Court
24 of Appeals. Judge Fahey then noted them in his concurring
25 opinion.

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1 THE COURT: Do you have them in your arguments,
2 in your briefs?

3 MR. SCHNEIDER: We have a copy of the entire
4 amicus in the binder that we provided to the Court this
5 morning.

6 MR. WISE: They said that -- specifically say
7 that Professor Cupp claims -- I quote, is not how political
8 philosophers have understood the meaning of social contract
9 historically or in contemporary times.

10 Rather, according to the 17 Philosophers brief,
11 what social contracts do, they don't create persons, they
12 create citizens. And you have to -- so it's --

13 THE COURT: That's totally --

14 MR. WISE: Different category.

15 They said, social contract philosophers have
16 never claimed, not now and not in the seventeenth century,
17 that the social contract can undo personhood on any being.

18 It's simply a gross misrepresentation of what the
19 ideas of social contract are. And it's one that he makes
20 all by himself.

21 I think when he was here a few weeks ago, he
22 talked about the fact that he was citing-- he generally
23 cites himself, so we go in a circle.

24 But one thing that he did, he cites this
25 philosopher named Peter Marneff. And he, as we pointed

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1 out, doesn't say what he says -- what Professor Cupp says
2 he says.

3 In fact, in the Columbia Human Life Journal,
4 there was an article by a man -- a lawyer named Craig
5 Wasner, which I believe was given to you, in which he
6 basically deconstructs Professor Cupp and shows Professor
7 Demrof never says what Professor Cupp says he says.

8 And then the only other person that Professor
9 Cupp ever cites is Philosopher John Locke, except he says,
10 see these eight chapters of one of John Locke's books --
11 and they simply do not support what Professor Cupp says.

12 As part of my argument with respect to the
13 petitioner's review, I will show how the idea of -- that
14 the New York Courts do not accept and never have
15 accepted -- until the unexpected Third Department cited two
16 of Professor Cupp's articles.

17 But the New York Courts do not require any kind
18 of corresponding duties in order to have any kind of
19 rights. And indeed, the common law and Western Law
20 generally has never done that, and that's the one thing
21 that Judge Fahey noted.

22 To say that in order to have a -- you know, we
23 are talking about any kind of rights, that means the right
24 not to be killed, it means the right not to be imprisoned
25 arbitrarily. That -- what about all of the hundreds of

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1 thousands of New Yorkers who have infants, who have
2 children who are in comas.

3 At that point they would not have any kind of
4 right at all. And it's not my word, it's Judge Fahey's
5 words, saying this is an example of why the kind of
6 argument that Professor Cupp makes is not only his kind of
7 unique way of looking at rights and duties, but all you
8 have to do is look around the State of New York and you
9 know that is palpably wrong.

10 All New Yorkers have a very large number of
11 rights, even though they have no capacity whatsoever for
12 duties.

13 THE COURT: Thank you.

14 MR. MANNING: I have to point out on behalf of
15 Professor -- on behalf of respondent, we received a few
16 minutes ago a binder of --

17 THE COURT: Now, Counsel, you are arguing on
18 Professor Cupps' behalf also?

19 MR. MANNING: No, I am not arguing on behalf of
20 Professor Cupp.

21 We received a binder a few minutes ago when the
22 Court received it. And in that binder there is no index on
23 our copy.

24 MR. SCHNEIDER: It's on the front.

25 THE COURT: Your copy doesn't have it?

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1 MR. MANNING: It must have mysteriously fell out.
2 My point is, in this submission --

3 THE COURT: This young lady can only take one
4 person at a time and she is going to take me.

5 So, that's the first rule that we have to
6 establish here.

7 Secondly, if someone is speaking, then you please
8 be courteous and let them finish their point. Because I
9 can't decipher both arguments at the same time.

10 This gentleman was speaking, so you can wait your
11 turn, and I promise you, I will let you be heard.

12 MR. WISE: Thank you. I apologize.

13 MR. MANNING: Thank you, Your Honor.

14 My point is very narrow. In the submission
15 that -- item 41, is the lengthy amicus brief on 17
16 Philosophers submitted to the Court without arguments. And
17 simply added to the packet of material handed to the Court.

18 We are being put to the test of contested motion,
19 written brief permission and oral argument.

20 Why should there be two standards?

21 MR. SCHNEIDER: Your Honor, we merely submitted
22 it because it was relied on by Judge Fahey in a highly
23 relevant opinion, and it goes directly not only to why
24 Professor Cupp should not be entertained, but the duty --

25 THE COURT: It seems we have to at least take a

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1 look at it to make a decision on it. I would at least have
2 to take a look at the amicus brief submitted by Professor
3 Cupp to say whether or not -- whether it's valid or
4 invalid.

5 And I will take a look at your arguments also to
6 see whether or not it does not support Professor Cupp's
7 declaration.

8 So, I think that that reaches -- completes the
9 argument on that.

10 But on behalf of the Zoological Association,
11 would you like to respond?

12 MR. WILSON: Sure, Your Honor. And if I may
13 approach?

14 I am going to rely briefly on one of the cases
15 that -- I am going to frame the Frye argument -- on the few
16 minutes that I have -- based on one of the cases that NhRP
17 cited in opposition to our motion.

18 Just some facts to consider on whether to allow
19 an amicus --

20 THE COURT: Do you have copies?

21 MR. WILSON: I didn't read the transcript from
22 the September 29th hearing.

23 I understand Your Honor likes copies. I don't
24 know how you keep track of all your papers. So, I will say
25 this for the record.

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1 The Court --

2 THE COURT: I think the petitioner here seems
3 like they're surprised about something.

4 MR. WILSON: They cited this in their opposition.

5 MR. SCHNEIDER: We rely on it to make our
6 argument as to why --

7 MR. WILSON: Turn to page 112. There is a list
8 of factors for the court. And I think I boxed in
9 underneath the motion for leave to file an amicus brief.

10 Just some facts for the Court to consider. I
11 will frame my argument in terms of those facts, or at
12 least, some of the facts or try to keep it succinct.

13 Let me start the overview as to why you should
14 accept my client's amicus brief.

15 First, my clients definitely have an interest in
16 the issues involved in this claim. They can bring unique
17 perspective to those issues.

18 I will come back to that.

19 Point two, my client's amicus brief contains
20 policy arguments, that otherwise are going to escape
21 consideration of this Court, important policy arguments in
22 dealing with this issue.

23 You need to consider these policies. NhRP's
24 whole basis for extending legal personhood and Habeas
25 Corpus right to animals is based on policy.

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1 Point three, it's evident, Your Honor, here that
2 the issues being raised by NhRP raise important questions
3 of public policy.

4 Point four, my argument for why you should keep
5 my client's brief. There is going to be no prejudice to
6 any party here if you accept -- my brief is succinct and
7 outlines pretty clear points. So, let me elaborate a bit
8 on those.

9 The interest of my clients in the issue involved
10 in this case -- my clients are the Alliance of Marine Parks
11 and Aquariums. They are a nationally accredited body for
12 various parks that have marine mammals.

13 Another, my client is the Zoological Association
14 of America, the second largest trade association for zoos.
15 They are an accredited body.

16 Both Alliance of Marine Parks and the Zoological
17 Association, they strive to expand and promote the
18 interests of animals and their care and standards.

19 So, A.Z.A. has several members here in the State
20 of New York. They will be impacted by your decision. They
21 represent the shareholders, including animal and
22 agricultural interests.

23 What you rule here, if you were to grant legal
24 person status to animals, Your Honor, it doesn't even
25 require an explanation how that's going to impact the

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1 interest of my client and those situated like them.

2 The second point, we have outlined-- I will talk
3 to the second and third points.

4 We bring to this table in our brief, important
5 public policy arguments that otherwise may not be raised
6 before the Court. That is one of the key factors.

7 Not only are we interested in the question of all
8 of it, but we can bring perspective here and arguments here
9 that may otherwise escape the Court.

10 And the third point again, an important
11 question --

12 THE COURT: Namely --

13 MR. WILSON: I will elaborate on that.

14 As we state in our brief, granting legal
15 personhood to animals -- and let me be frank, NhRP isn't
16 just -- this isn't just a case about Happy. This is one
17 steppingstone to grant legal person status in a Habeas
18 Corpus as part of their campaign for numerous animals that
19 is going to disrupt so many aspects of legal, social and
20 economic relationships within this state.

21 When you listen to their policy argument, I hope
22 Your Honor takes clear those policy arguments.

23 For instance, a finding by Your Honor that Happy
24 in this case or any animals to have legal person status,
25 and have Habeas Corpus rights is going to stand on its head

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1 centuries of New York Law that holds that animals are
2 property.

3 That is a question, with all due respect to your
4 Honor and the judiciary, much better left for deliberative
5 thought and input of many from legislature.

6 It also grants a legal personhood in habeas
7 status to animals.

8 You are going to see a flood of litigation coming
9 before the Courts and you will have -- the Courts aren't
10 adequately equipped to deal with it.

11 They're going to have arbitration lines drawn to
12 say, yes for this animal, and no for that animal.

13 How are you going to do it? And then what's
14 going to become of any animals that you free?

15 Here they have a trust, but others -- what about
16 other animals that don't have that. These are all going to
17 become wards of the state.

18 These are important public policy questions. And
19 then think of the economic impacts. Some of my clients,
20 you free the animals, they go out of business.

21 But also, think of that with some our animal
22 parks.

23 The biggest economic impact, and also impact to
24 the welfare of citizens of this great State of New York,
25 probably comes in the term, animal agriculture. You grant

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1 legal person status to agriculture.

2 New York has a big dairy industry. Think about
3 what's going to happen there. You may shut it down.
4 That's going to cut out a significant source of protein for
5 millions and millions of growing New York persons and
6 families.

7 I am sorry, Counsel, did you have something to
8 say?

9 THE COURT: We will let them respond.

10 We should refrain from making noises or speaking
11 about Counsel's arguments.

12 MR. WILSON: I am sorry, Your Honor.

13 So, there is no prejudice here in accepting my
14 client's brief.

15 Last point, in closing, I want to debunk a few of
16 the points that NhRP made in opposition to my client's
17 request for leave to file an amicus brief.

18 The first point is, they may try to make that
19 this case is just about one elephant in one zoo. Well,
20 it's not. These guys are on the record in various
21 interviews and other filings that they are trying to get
22 legal person status and habeas rights for a wide range of
23 animals.

24 And this is in response to questions that NhRP
25 submitted to the animal charity. I will hand it up.

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1 They were asked in articles, how likely is it --
2 if NhRP's tactic were to succeed for apes, how likely is it
3 they would lead to progress with farm animals.

4 The argument should be NhRP is not geared to any
5 specific species of nonhuman animals -- not geared to any
6 specific species of nonhuman, nor any species of nonhuman
7 excluded.

8 Again, Your Honor, the point being, this isn't
9 just about Happy.

10 THE COURT: This is the citing from where?

11 MR. WILSON: The nonhuman research, animal
12 charity. They evaluate animals. They ask questions. NhRP
13 responded.

14 THE COURT: Do you have a copy?

15 MR. WILSON: I have a similar instance where
16 Mr. Wise or NhRP indicated that, hey, the animals for which
17 we are seeking these rights, it's not just Happy the
18 elephant, it's other species. It's going to have a huge
19 impact. This requires a lot of thought.

20 I will give you the documents here.

21 THE COURT: Would you like to have these
22 documents marked?

23 MR. WILSON: Yes. Let's call them Alliance
24 Exhibits 1 through four.

25 THE COURT: Do we have --

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1 MR. WILSON: I submit we should be granted leave,
2 and I would hope and believe it will help.

3 THE COURT: As well as the arguments included
4 therein?

5 MR. WILSON: Yes, thank you.

6 THE COURT: Would you like to respond?

7 (Whereupon, the items referred to are marked
8 Alliance Exhibits 1 through 4 for identification.)

9 THE COURT: Mr. Wise, would you like to respond?

10 MR. WISE: Yes, briefly, Your Honor.

11 Well, my brother's argument is an argument for
12 the Court not taking any sort of credence in his client's
13 brief. He is not representing an elephant organization.
14 He is -- apparently he is representing marine and mammal
15 parks. He is representing agriculture.

16 They were not used for agricultural interest.
17 But what this is, is simply kind of a standard law school
18 type of slippery slope.

19 If you do one thing, that's going to lead to all
20 kinds of -- a parade of horrible things and, therefore, you
21 shouldn't do that -- take that first step.

22 Justice Jaffe, in the Stanley case, was also
23 faced with a similar argument by the state attorney or the
24 State Attorney General's Office when the Nonhuman Rights
25 Project brought a lawsuit on behalf of two chimpanzees.

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1 And she noted in a footnote in the Stanley case,
2 that -- I think that the Court of Appeals has said that
3 this Court has rejected talking about the Court of Appeals,
4 that this Court has, in Tobin versus Grossman, this Court
5 has rejected as a ground for denying causative action, that
6 there will be a proliferation of claims.

7 So, the Stanley Court said that the floodgate
8 argument is not a cogent reason for denying relief. That's
9 all he is making, is a floodgate argument.

10 Happy -- and I am happy to demonstrate as our
11 petitioners have -- Happy is an entity who is
12 extraordinarily cognitively complex and in a way, that's
13 human. Human -- very human like.

14 And the idea that this Court should not give
15 relief to this creature who has been imprisoned, who is
16 extraordinarily cognitive, who has been in prison on one
17 acre of land for forty years, because he imagines what we
18 imagine, and what he imagines is wrong, which usually
19 happens when people try to imagine what other people are
20 trying to imagine.

21 This Court can read whatever my brother just
22 handed up. But nowhere will you find something that says
23 the next thing that the Nonhuman Rights Project is trying
24 to get -- makes everybody a vegan or maybe everybody is a
25 vegan or starts litigating on behalf of cows or sheep or

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1 chicken.

2 The Nonhuman Rights Project has not ever said
3 that. And what it does do, it has been spending the first
4 six years, only six years -- it's been in existence since
5 2013 -- litigating on behalf of those handful of
6 extraordinarily cognitively complex animals, chimpanzees,
7 elephants and likely perhaps whales or dolphins, orcas,
8 those animals, when we go to the experts in the world, like
9 we have done with elephants here, and we say, tell us about
10 who these beings are -- because there are a millions
11 species of animals in our world, and we just don't have the
12 time to file a lawsuit on behalf of them.

13 The one that we are filing lawsuits on are those
14 two, the chimpanzees and elephants, the species of
15 elephants in which we argue that the science and the law
16 shows that they are entitled to the rights to bodily
17 liberty that's protected by common law writ of Habeas
18 Corpus.

19 The problem is that my brother's brief doesn't
20 address that. Because there are no -- there are no good
21 arguments that are against ourselves, because our arguments
22 are carried in the midstream of hundreds of years of common
23 law, both generally and also within the State of New York.

24 His entire brief is based on something that he
25 imagines that we imagine. And I will tell that you, we

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1 don't imagine that. And that's an error in doing so.

2 If this Court decides my brother's brief, he will
3 find all kinds of argument that we don't make, that we
4 never said that we make. And it's all a way of throwing
5 sand in the Court's eyes so the Court can't see that there
6 is an elephant here who is extraordinarily cognitively
7 complex, and who has been -- who has the capacity for
8 autonomy, that is being undermined, and she is being harmed
9 every single day and has been for decades.

10 And that this specific elephant, Happy, is
11 entitled to a writ of Habeas Corpus which I will argue.
12 You will not find any argument in his brief about that,
13 because it's not about that.

14 It's about pretending and making up the fact that
15 the Nonhuman Rights Project is bringing a lawsuit on behalf
16 of cows or really bringing a lawsuit on behalf of some
17 other species of nonhuman animals. That is not about it.

18 And that's why -- what the Court of Appeals was
19 talking about in Tobin versus Grossman.

20 The species, human beings, is the entity before
21 the judge, which is what Justice Jaffe said in the Stanley
22 case, and what the Court of appeals said in the Tobin
23 versus Grossman case.

24 If the entity before you has suffered a
25 recognizable wrong, this Court should then rule in their

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1 favor. And it will be another day, it will be another
2 court in which someone else, perhaps nonhuman or maybe
3 nobody, will then bring a lawsuit on behalf of an entity
4 who is not a chimp, who is not an elephant.

5 And then this Court -- that Court will then see
6 what the scientists see, who are these beings, and are they
7 indeed the sort of beings that might be entitled to certain
8 kinds of rights, or any right at all.

9 That's what this case is about. His amicus brief
10 is not about this case. His amicus brief is about
11 something else.

12 And apparently, his representing agriculture
13 folks has nothing whatsoever to do with us. Nothing
14 whatsoever to do with us.

15 And this Court, I am sure, will understand, and
16 just in case it doesn't, I will remind the Court that the
17 case in front of the Court is indeed solely on behalf of an
18 imprisoned, illegally detained elephant named Happy, and
19 that's all this case is about.

20 THE COURT: Thank you, Counsel.

21 Before I forget, and I think this is a little off
22 the argument that we are listening to with respect the
23 amicus briefs, but when we say that Happy is in a distinct
24 class of animals that are highly functioning, highly
25 cognitive animals, have we had the opportunity or have you

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1 had the opportunity to test specifically Happy and just not
2 other elephants, or have you tested Happy's degree of --

3 MR. WISE: That has indeed happened to some
4 extent. There is something called the mirror
5 self-recognition test. And that was developed with
6 actual -- with chimpanzees in the 1970's in New York by
7 Gordon Gallup.

8 The idea is that -- it's also known as the
9 recognized dot the test. That if you put a dot on the
10 forehead or on the face of a chimpanzee and then you show
11 them a mirror, if they look at the mirror, will they touch
12 the dot on the mirror or will they touch the dot on their
13 forehead.

14 If they touch the dot on their own head, that is
15 powerful evidence that they understand that they are --
16 that it's them.

17 We know that they're not only conscious, but they
18 are self-conscious and they are likely autonomous beings as
19 well.

20 Happy is the -- is actually the first elephant in
21 the world who passed the mirror self-recognition test.
22 Scientists came down in 2008, and they did the mirror
23 self-recognition test on Happy specifically. And Happy
24 indeed did pass the mirror test.

25 And we would be happy to send the article to the

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1 Court, a copy of that to my brother of the scientific
2 article that came out that she is indeed -- Happy is indeed
3 a self-conscious being and understands that she is Happy.
4 The other --

5 THE COURT: You mean in the whole looseleaf
6 binder that you supplied to the Court, that that article is
7 not in here?

8 MR. WISE: We tried to anticipate, but we did not
9 know you might want us to provide it. We will be happy to
10 do so.

11 THE COURT: Especially since Happy is the rare
12 elephant in the whole population of elephants that's passed
13 the --

14 MR. WISE: She is the only one that passed the
15 test, but from that, it's almost certainly clear, unless
16 Happy is somehow the Einstein elephant, which is
17 unlikely --

18 THE COURT: That's what I am saying.

19 MR. WISE: There have been other elephants who
20 have been given the mirror test and passed. It's just that
21 Happy happens to have the status of being the first
22 elephant in the world -- other elephants had actually
23 failed the test before Happy, and it turned out that the
24 mirrors that they were using were too small for an
25 elephant, and once they -- the researchers realized that an

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1 elephant needs a really big mirror, they did that with
2 Happy and since then, others have passed too.

3 One of the books I wrote, I actually talked about
4 some elephants in Las Vegas who also passed the mirror
5 test. So, I don't think it's -- I think it's clear that
6 elephants can pass a mirror test, but also through our
7 affidavits, through all of the many affidavits, we have
8 people who are experts, the greatest experts who study the
9 elephant in the -- for over fifty years, and it's clear
10 that there are other ways of also showing that you are
11 conscious, that you are self-conscious, that you are an
12 autonomous being, that I can actually make rational choices
13 and decide how you are going to live your life.

14 But it just so happens that Happy was the first
15 elephant to show she was self-conscious and understood that
16 the being she was looking at was Happy.

17 THE COURT: Notwithstanding the fact she has been
18 incarcerated.

19 MR. WISE: She was able to do even though she had
20 been incarcerated.

21 THE COURT: For the thirty --

22 MR. WISE: She didn't gain it by being
23 incarcerated, but she didn't lose it.

24 THE COURT: Briefly you can respond, and then I
25 want to note due to the hour, that we are going to have to

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1 adjourn for lunch.

2 So, the two arguments that are still left are the
3 ones relating to Habeas Corpus relief as well as the
4 preliminary injunction.

5 So, you have about five minutes to respond and we
6 don't need sur-reply.

7 MR. WILSON: So, Counsel made some points for me
8 in the sense that he talks about cognitively complex.
9 Animals are -- Happy is a cognitively complex animal. What
10 does that mean?

11 I mean, how is this Court going to have to deal
12 with that question? There are other animals that are
13 cognitively complex, maybe not like an elephant, but does
14 it merit person status?

15 You will get this other information. How are you
16 going to draw that line, if, indeed, cognitively complex
17 should be standard?

18 In terms of the impacted animals, it's going to
19 impact -- he just said, there are hundred of species that
20 are cognitively complex. This is not about one elephant.

21 Again, I am reading from one of the exhibits. A
22 conversation with Steven Wise, the animal --

23 MR. WISE: That's me, Your Honor.

24 MR. WILSON: These evaluators are asking, where
25 do they see this case leading to for other animals.

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1 And the NhRP responds, they do intend to extend
2 their augment to as many nonhumans being species as they
3 can. And they understand this is a long-term struggle.

4 The other -- it is not a slippery slope. They
5 are real arguments that are going to impact a lot of human
6 people if the Court were to grant the relief that he is
7 seeking.

8 He was actually silent. He didn't even mention
9 the economic or social disruptive or legally disruptive
10 outcome of a ruling in their favor.

11 THE COURT: Okay, the attorneys, we are going to
12 have to come back this afternoon.

13 Is there a problem?

14 MR. MANNING: I was going to ask if the Court had
15 some indication what time that would be so we can organize
16 our thoughts over the break.

17 THE COURT: At 2:15, which is our usual time to
18 return after lunch.

19 I guess you guys can have lunch together because
20 I understand you are not from the neighborhood and the
21 Yankees won't be available. Have a great lunch. We will
22 see you back here.

23 (Lunch break held.)

24 THE COURT: Okay, Counsel, as promised, we are
25 going to start with the two motions that we have

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1 outstanding, the application for Habeas Corpus as well as
2 preliminary injunction.

3 You want to argue them both together?

4 MR. WISE: At the Court's discretion, maybe it
5 might be -- make more sense to argue one at a time, but
6 whatever --

7 THE COURT: Okay.

8 MR. WISE: Thank you, Your Honor.

9 THE COURT: You are going to begin with --

10 MR. WISE: With the petition for Habeas Corpus,
11 your Honor.

12 THE COURT: Let me just say this. If you see my
13 court attorney or somebody else, I am actually the ex-parte
14 judge this week also. So, sometimes I have dual
15 responsibilities. So, I was doing a Court ruling before
16 you guys entered. So, just note that I am not not
17 listening to you, I just want to --

18 MR. WISE: Because two is one more thing I can do
19 at a time. Thank you, Your Honor.

20 So, this is the argument on the merits of the
21 petition for Habeas Corpus. Now, we had argument as to the
22 motion to dismiss. So, there is overlap between the two.

23 When I think there is overlap between the two,
24 since we were here several weeks ago, I will just kind of
25 touch upon what I think is the overlap and refer to the

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1 highlights, but I won't get into the depth that I got into
2 on those issues a few weeks ago.

3 So, I think there are really only three issues
4 there in any kind of overlap --

5 THE COURT: Three issues?

6 MR. WISE: Three of which I believe there is
7 likely to be any significant sort of overlap.

8 So, one of them is the issue of standing. I just
9 want to reiterate, the Nonhuman Rights Project has
10 third-party standing.

11 That, number one, that C.P.L. 7002 A says that a
12 person illegally imprisoned or otherwise retained or one
13 acting on his behalf may petition the domicile with a Writ
14 of Habeas Corpus.

15 That the First Department in the Nonhuman Rights
16 Project versus Lavery, had said that the Nonhuman Rights
17 Project indisputably has standing pursuant to C.P.L. 7002
18 A, which authorizes anyone to seek habeas relief on behalf
19 of a detainee.

20 If the chimpanzee essentially is a person, well,
21 that is -- that sentence there really mixed up the idea of
22 standing with the idea of merits.

23 This Court can't rule on whether or not the
24 elephant has a right to a Writ of Habeas unless we have
25 standing to make the arguments.

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1 So, it's the -- indeed the First Department
2 itself, if they believe we lacked standing, they were -- it
3 was their duty -- as lacking subject matter jurisdiction,
4 to simply note that, by the way, you lose because you don't
5 have standing. But they didn't rule that way. They ruled
6 against on the grounds that it was an improper successive
7 petition.

8 Well, they shouldn't have gotten that far, if
9 they believe they lacked subject matter jurisdiction, that
10 they lacked standing.

11 So, 7002 A shows that anyone acting on another's
12 behalf has standing; that the First Department says
13 essentially undisputable, we have standing at least to
14 raise the issue of whether or not our client is a person
15 for the Court.

16 In the Stanley case, Justice Jaffe indeed
17 specifically addressed the issue, standing issue and said
18 that the Nonhuman Rights Project on behalf of chimpanzees,
19 Hercules and Lilo did have standing.

20 Those are the cases involving nonhuman animals in
21 the State of New York. But you have to look at those
22 against a long background of third-party standing, of those
23 who are indisputably persons on behalf of those who
24 potentially could be persons.

25 So, this was both in England and in New York.

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1 And indisputably, *Somerset versus Stewart*, the 1772
2 case --

3 THE COURT: Correct. I remember you did this
4 before.

5 MR. WISE: If you remember it --

6 THE COURT: I do remember it.

7 MR. WISE: Then I won't do it again, Your Honor.
8 I will move on.

9 THE COURT: Thank you so much.

10 MR. WISE: The next issue then is, was the issue
11 of collateral estoppel -- whether -- and again, that's also
12 briefed --

13 THE COURT: And argued.

14 MR. WISE: Briefed and argued, yes.

15 So, as I believe I argued, the Court of Appeals
16 case of *Lawrence versus Brady* says that issue preclusion
17 and claim preclusion don't apply to Habeas Corpus.

18 And the advisory committee notes to C.P.L.
19 7003 B, states that it can -- quote, continues to common
20 law and the present position of New York that *res judicata*
21 has no application to the writ.

22 The commentary says that 7003 B is a response to
23 the traditional doctrine that *res judicata* has no
24 obligation to a writ of Habeas Corpus. But perhaps in our
25 case, obviously, is that you don't even get to that issue.

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1 The only time that you get to the issue of
2 collateral estoppel would be at -- certainly you can
3 potentially do it if there had been a case called Nonhuman
4 Rights Project on behalf of Happy versus the Wildlife
5 Conservation Society and the same issues were being raised.

6 At that point, even then collateral estoppel
7 would not apply because 7003 B specifically allows the
8 Court in that kind of a situation, in its discretion, to
9 allow the second case to go forward.

10 In its discretion, however, it can decide that
11 it's a successive position, that it does not wish to go
12 forward, or it can decide it's a successive position, that
13 it does wish to go forward.

14 However, the case in front of this Court is that
15 there has never been a lawsuit on behalf of Happy. And in
16 her entire forty-seven years, Happy has never been a party,
17 if you can imagine that, to a lawsuit. And she certainly
18 has not been a party to a lawsuit seeking her freedom under
19 a Writ of Habeas Corpus.

20 It's therefore absolutely impossible for there to
21 be a -- for collateral estoppel to be issued to preclusion
22 or claimed preclusion now.

23 I believe the only way that my brother is trying
24 to really claim -- issue a claim of preclusion is argue
25 that the party in the case of Nonhuman Rights Project Happy

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1 versus Wildlife Conservation Society, is the nonhuman.

2 But we are obviously not a party. We are a
3 third-party bringing a case on behalf of the party in
4 interest.

5 Now, my brothers argue that because we brought a
6 series of cases, that we are really -- the real party
7 interest, that we don't care about Happy, we are trying to
8 vindicate our own corporate whatever values.

9 However, I think -- and this is indeed part of
10 our filings, is that at the outset of the case, we sent a
11 letter on -- which is November 26, 2018, to my brother
12 saying if you send Happy to a sanctuary, we will drop the
13 case.

14 We have no interest. Once Happy become our
15 client, we treat Happy as if Happy was our human client.
16 We don't vindicate our interest. We vindicate Happy's
17 interest.

18 And that's why we will treat Happy as one of our
19 nonhuman clients, if we can settle the case by having you
20 simply send our nonhuman to a sanctuary. We don't have --
21 we have an interest in moving forward on the case, and we
22 will move to dismiss it.

23 We are clearly not the party. The party, the --
24 real party interest is always -- in a Habeas Corpus case,
25 the real party interest -- if we can persuade you to move

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1 the real party of interest to a sanctuary, we will drop the
2 case, because we don't see -- because our interests don't
3 have anything to do with this case.

4 So, that's why there cannot be -- it's impossible
5 there will be collateral estoppel. That's the collateral
6 estoppel issue.

7 THE COURT: You said there is one more.

8 MR. WISE: One more issue from the last time is
9 the issue of this Court not being bound by the First
10 Department's decision or anything the First Department
11 said, after it said, quote, without even addressing the
12 merits of plaintiff's argument, we find the motion -- the
13 Court properly declined to sign the Orders to Show Cause,
14 since these were successive Habeas Corpus, which were not
15 warranted or supported by changed circumstance, under
16 7003 B.

17 That's the holding of the case. That there is --
18 that it was proper for the Supreme Court, the lower court
19 to dismiss us under 7003 B, because they found it to be a
20 successive habeas petition.

21 Anything it said after that is dicta. And that
22 means that this Court is not required to follow it, nor is
23 any other Court required to follow it. Because it's a
24 procedural issue. It's not a substantive issue. So,
25 you recall that.

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1 And then they also argued that Lavery I, being
2 the Third Department, and Lavery II, being in the First
3 Department.

4 THE COURT: Lavery I is the first --

5 MR. WISE: Lavery II we have been calling it, in
6 the First Department case. That this Court is also not
7 required to follow them as a matter of stare decisis,
8 because both of them were demonstrable misunderstandings of
9 the law, which is an exception to stare decisis.

10 And the misunderstandings of the law, were,
11 number one, that in order to be a person for any reason --
12 and I touched upon this in my rebuttal to my brother who
13 was arguing on behalf of Professor Cupp -- that the idea
14 that there have to be duties, that you have to be able to
15 assume duties in order to be able to have any rights of any
16 kind, which include the right not to be killed, the right
17 to be not imprisoned, somehow you have to be able to assume
18 duties.

19 There are obviously some legal requirements. For
20 example, if you can't assume duties, then you -- you're
21 unable to sign a contract.

22 But the whole idea that your bodily integrity can
23 be violated, or your bodily liberty, because you can't
24 assume duties, has never been part of the law. And I
25 talked about that earlier this morning.

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1 That indeed was a demonstrable misunderstanding
2 which was -- which came about under the unusual congruence
3 of -- first of all, the Third Department not applying the
4 Frye test that they would apply to any type of scientific
5 expert, but simply taking what Professor Cupp had to say
6 without looking at it, which they did not.

7 So, there was that.

8 The second one is that they also relied upon
9 Black's Law dictionary which cited a single source saying
10 that you had to be able to bear both the duties or have
11 rights, and then the Nonhuman Rights Project went and ran
12 down finally that source from 1927, in Salman's
13 Jurisprudence, and realized that Black's Law Dictionary had
14 actually misquoted what Salman had said, and then we went
15 back and made changes.

16 I don't recall if I did say this, but the Court
17 remembers what I said last time, which was, after that
18 occurred, we then filed a motion in front of the First
19 Department before they issued the Lavery II decision,
20 saying don't rely upon Lavery I, because while the Third
21 Department cited Black's correctly, Black's incorrectly
22 cited the source. Blacks has changed its' mind.

23 Here is the correspondence, and they denied our
24 motion and wouldn't read it. So, that --

25 THE COURT: Well, that wasn't the sole reason.

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1 MR. WISE: That was not the sole reason. The
2 other reason was because they relied upon Professor Cupp
3 and his idiosyncratic idea that nobody else believes in,
4 and when you take a look at the brief of 17 Philosophers,
5 again they explained it very clearly.

6 So, that's all I will talk about those things.
7 It appears the Court remembers that.

8 I will get into now what I have never talked
9 about in front of the Court.

10 THE COURT: Well, let me say, Counsel for the
11 Respondent, would you like to speak about any of those
12 things or would you just rest on your argument and briefs?

13 MR. MANNING: If I may briefly respond to the
14 newer items raised today on the -- about the prior items.

15 THE COURT: The new ruling?

16 MR. MANNING: No, the argument made last time.

17 THE COURT: I didn't think he made anything new,
18 but if you had -- I don't think -- you probably have a
19 better grasp of the argument from the last time than I do.

20 MR. MANNING: I will remain concise, Your Honor.

21 The argument that -- if we were to concede the
22 litigation and turn over the elephant to the people at NhRP
23 as a condition of discontinuing the case, we reject for the
24 same reasons the Court asked us earlier about attaching
25 conditions to our handling of the elephant by way of

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1 stipulation.

2 We read the cases differently. We think there is
3 no basis in fact or law to support a Habeas Corpus on
4 behalf of an elephant. We will cover that a little bit
5 later, when it's our turn.

6 THE COURT: You would never concede to that?

7 MR. MANNING: We would not. The Frye issue is a
8 new thing. Frye standard is this -- this is an evidentiary
9 basis standing for factual evidence. It's not something
10 that policy issues, which are replete in the papers of
11 NhRP.

12 So, we don't think any Frye standard has anything
13 to do with these arguments at this point.

14 Last item. Referencing again to the amicus brief
15 that was offered to this Court without a motion, without
16 opposition, without notice and without oral argument or
17 representation is being incorporated again into the
18 argument of NhRP.

19 It stands in stark contrast to what we are being
20 put through to offer the same type of amicus brief.

21 THE COURT: The 17 Philosophers I believe you
22 offered in the previous case.

23 MR. WISE: Yes. And Judge Fahey referred to the
24 amicus brief of the 17 Philosophers in his Lavery --

25 THE COURT: That was never ruled upon by any

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1 Court that you can submit these, this amicus brief.

2 MR. WISE: In the Court of Appeals it was.

3 MR. SCHNEIDER: They -- specifically 17
4 Philosophers filed a motion for leave to file it and that
5 was granted. So, the Court of Appeals did specifically
6 grant the relief.

7 THE COURT: But you are not allowed to respond to
8 that.

9 MR. MANNING: We weren't even part of that case.
10 How could -- secondly --

11 THE COURT: That was for the chimpanzee.

12 MR. MANNING: It wasn't a case where the Wildlife
13 Conservation Society was even a party. We weren't
14 involved.

15 All the case reference, all four of them, and all
16 the Fourth Department cases were all brought by NhRP. We
17 weren't part of any of it.

18 MR. WISE: That's why there can't be any
19 collateral estoppel. There has never been an argument
20 between Happy and Wildlife Conservation or Happy and anyone
21 else before.

22 MR. MANNING: On collateral estoppel, we are
23 going to brief collateral estoppel. There is nothing I can
24 add. Except it should be obvious from the four cases, the
25 real party in interest is NhRP. And they fully developed

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1 the facts, argued the cases very strenuously, as they have
2 in this Court, and received unfavorable rulings from each
3 of the departments.

4 At some point a party is bound by the decisions
5 that have been rendered, that they have to control through
6 their own litigation effort.

7 Even if it doesn't -- even if it shouldn't apply,
8 stare decisis should apply when you have a First Department
9 case. That case, unless I misread it --

10 THE COURT: A Fourth Department case.

11 MR. MANNING: First Department case. That Habeas
12 Corpus --

13 THE COURT: That's Lavery II.

14 MR. MANNING: Exactly. Even the most -- any
15 animal, even the one which lacks capacity for social or
16 legal duties, underpin the Court's decision. It's directly
17 on point.

18 We disagree, but I have to say, that's our
19 reading of it and we offer that to the Court. That's all I
20 have for the newer items.

21 THE COURT: Thank you.

22 Let's go on to the Habeas Corpus argument in and
23 of itself.

24 MR. WISE: Your Honor, the first question is
25 really what does being a person mean. So, it's often

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1 understood, and I believe the wrong suit has sometime
2 misunderstood it.

3 Some people believe incorrectly that being a
4 person automatically means that you have certain rights.
5 Some argue that it means that everyone who is a person has
6 all the same rights.

7 And I am going to try to speak slower.

8 So, what personhood is, is a capacity for rights.
9 It's a capacity for -- it's a capacity for rights.

10 The fact that I had my glass here -- sometimes
11 the way I demonstrate this, if this bottle is empty, so if
12 I assume that all the droplets of water in this bottle are
13 rights, and I just start pouring rights out, if all the
14 right were all over the floor, there is -- no one actually
15 has those rights.

16 However, if I pour one right and say there is
17 nothing in the bottle, and I pour it right to both liberty
18 in the bottle, the bottle is a metaphor for a legal person.

19 In other words, when you are making a person, you
20 are constructing a rights container.

21 The only entity who have can rights are a person
22 by definition. If you have a right, you have a person. If
23 you are a person, you don't necessarily have a right, but
24 you have the capacity for rights.

25 Of course if you have a right, at that point you

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1 have to be a person because that means you have the
2 capacity for rights, because you are -- you have one.

3 THE COURT: That seems sort of circular to me.
4 Perhaps you can break it down.

5 MR. WISE: I promise you it's not. Here's --

6 THE COURT: Perhaps I'm not getting what you are
7 saying.

8 MR. WISE: That's because I am not explaining it
9 very well.

10 THE COURT: If a person has rights --

11 MR. WISE: Let me start over again.

12 THE COURT: The container --

13 MR. WISE: If an entity has even one legal right,
14 that entity is a person. And the reason is that a person
15 has the capacity for one or more rights.

16 So, therefore, you can have the capacity for
17 rights, but not actually have any rights, or have one right
18 or two rights, because all of this may have different
19 rights. So a person has a capacity.

20 It's a capacity for one or even up to an infinite
21 number of legal rights. If you are a person, that means
22 you have the capacity.

23 And we argue that Happy through the Pet Trust
24 Statute is already a person in the State of New York
25 because she already has certain rights under the Pet Trust

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1 Statute as a beneficiary of the trust.

2 So, we argue the legislature has already created
3 the personhood, but the only right in that bottle, in that
4 person, is the right to be a beneficiary of the trust.

5 We have come before this Court asking that second
6 right be poured in that person, which is the right to
7 bodily liberty that's protected by a Writ of Habeas Corpus.

8 THE COURT: So, you are saying that the Court by
9 creating a trust or the legislature --

10 MR. WISE: The legislature has created the trust.
11 The legislature created a trust that commits to create the
12 trust.

13 THE COURT: The legislature allows a third-party
14 to create a trust on behalf of pets or animals?

15 MR. WISE: Yes.

16 THE COURT: And as such, because they have a
17 trust, that's a right and they should be considered a
18 person because they have the capacity?

19 MR. WISE: Because they have that right and they
20 are referred to repeatedly as beneficiaries of the trust.
21 And to be a beneficiary of a trust means you have a right
22 to the corpus of the trust.

23 Also, the commentary from the early 19th Century
24 talks about the fact that -- that if you are the
25 beneficiary of a trust and if you can empower the trust,

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1 you are certainly a beneficiary.

2 The legislature, in creating that trust, set up a
3 trustee, so Patty has a trustee of her trust, but Patty
4 also has an enforcer, because they know that Patty has --
5 I'm saying Patty. I meant Happy. Happy has the -- that
6 was terrible. Let me --

7 THE COURT: Happy.

8 MR. WISE: Happy is the beneficiary of a trust.
9 Happy has a trustee. And also, Happy has an enforcer
10 because the legislature has set up an enforcer of the
11 trust, because Happy, an elephant, is unable to enforce her
12 right to the trust. So, there is an enforcer to do that.

13 Under New York law it's clear that Happy has to
14 be -- or anyone under the Pet Trust Statute, has to be a
15 beneficiary.

16 THE COURT: Is that the case now that Happy has a
17 trust?

18 MR. WISE: Yes, Happy has a trust.

19 THE COURT: And she is the beneficiary of that
20 trust?

21 MR. WISE: Yes, she is, and there is a trustee.

22 THE COURT: And there is a --

23 MR. WISE: An enforcer of the trust and that, I
24 believe, is attached to our petition for Habeas Corpus.

25 MR. SCHNEIDER: Yes.

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1 THE COURT: So, the basis for creating these
2 rights was the legislature --

3 MR. WISE: The basis for creating the right to be
4 a beneficiary to the corpus of a trust was the legislature.
5 So, in giving that they made Happy a person -- but we
6 should prevail, if they hadn't done that.

7 THE COURT: Do they say in the statute
8 specifically that the beneficiary of the trust is to be
9 considered a person?

10 MR. WISE: They do not. They simply say that
11 this is the beneficiary. That these animals are the
12 beneficiaries of trusts.

13 Under New York law, a beneficiary of a trust is a
14 person. And we cite those cases in our memorandum and
15 petition.

16 THE COURT: It specifically says that the person
17 that's a beneficiary of a trust -- and it says, a disabled
18 person --

19 MR. WISE: Only --

20 THE COURT: A disabled child. And a trust is
21 established in the disabled child's name. Then the
22 beneficiary of the child -- the child is a person?

23 MR. WISE: Yes.

24 THE COURT: According to the --

25 MR. WISE: Not according to the Pet Trust

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1 Statute, but probably according to other statute.

2 THE COURT: Okay. If I have Grumpy Cat -- the
3 cat Grumpy Cat, he is to be considered a person because
4 Grumpy Cat is the beneficiary of a trust, if that's the
5 case?

6 MR. WISE: Yes. Grumpy Cat would be a person.
7 Again, person simply means Grumpy Cat now is the container.

8 The only right that the legislature gave Grumpy
9 Cat or Happy is the right to the corpus of trust. That's
10 the only right they have as a person.

11 However, it means they have the capacity. So,
12 under that theory what we are in court for would be to
13 argue not that you need to create the personhood for Happy,
14 but now we are arguing that Happy should have a second
15 right -- not Grumpy Cat, because we don't have any evidence
16 about what cats are, or whether they are autonomous.

17 It's simply an elephant. And we would say that
18 Happy -- because of who Happy is -- and I will talk a
19 little bit about that, would have to have the right to
20 bodily liberty protected by the Writ of Habeas Corpus.

21 THE COURT: Okay.

22 MR. WISE: Even without the Pet Trust Statute, we
23 would then argue that this Court should use its common law
24 powers to create the personhood, which I will argue, and I
25 will tell you why and --

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1 THE COURT: The first argument is that Happy
2 is -- the person of the beneficiary of the trust is already
3 a person because the person has rights.

4 MR. WISE: That's one argument.

5 THE COURT: The second argument is that -- we
6 should create other rights for people, persons under the
7 statute.

8 MR. WISE: Under the Pet Trust Statute?

9 THE COURT: No, under the petition for Habeas
10 Corpus.

11 MR. WISE: Yes, but --

12 THE COURT: You are going to -- you are giving a
13 person another right?

14 MR. WISE: Yes. But even if there was no Pet
15 Trust Statute, we would then come in and say, although
16 there is one, and we say Happy is already a person, and we
17 are asking the Court to add a certain right -- even if that
18 wasn't true, we would be in front of the Court asking for
19 the Court to use her common law powers to create common law
20 personhood or the single person of that, of having the
21 right to bodily liberty that is protected under a
22 common-law Writ of Habeas Corpus.

23 That's what the Somerset case was. When James
24 Somerset went into court, he was a thing, he was a slave,
25 and what happened was that Lord Mansfield said that slavery

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1 was so odious, that common law would not support.

2 So, James Somerset walked into a court a common
3 law thing, and walked out of court a common law person. He
4 wasn't a slave anymore.

5 So that's -- to some degree, that's how the
6 Nonhuman Rights Project models its litigation upon, the
7 litigation of James Somerset.

8 Whereby, there were reasons -- and I will just
9 mention that. I did write an entire book about the
10 Somerset case, and the reason was to try for me to be able
11 to understand what, and to be able to explain to the rest
12 of the world what went on.

13 But, in essence, what that means is that this is
14 how, in one of the most famous ways, in which the common
15 law was used to create personhood from someone.

16 So, James Somerset walked in a thing and walked
17 out a person, a person.

18 And I think we also talked about, for example,
19 the Standing Bear case where you have an Indian chief, when
20 he was taken to Oklahoma, and he didn't want to be there
21 and he came back to Nebraska, where his home was, he was
22 arrested and thrown into jail for doing that.

23 And what happened was that Standing Bear, his
24 lawyer brought a Writ of Habeas Corpus on his behalf and
25 the US attorney argued that one could not bring a Writ of

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1 Habeas Corpus because he was white Native American, and
2 they were not persons. And the judge there said, no, he is
3 a person for the purpose of the Writ of Habeas Corpus and
4 he issued a Writ of Habeas Corpus.

5 THE COURT: Again, that was a human being into
6 and --

7 MR. WISE: Part of my argument is that, yes, it's
8 a human being, but there is an infinite number of ways of
9 categorizing our world for centuries.

10 And so, one of the arguments that we make is that
11 we argue why the world should be the common law world.
12 There are compelling policy and principle reasons why the
13 common law world should be no longer categorized so that
14 what your species is matters.

15 It's not the question of what your species is.
16 It's the question of who you are, what kind of entity are
17 you.

18 By the way, it is exactly what Judge Fahey said
19 in his opinion, and I will talk about that briefly. His
20 opinion, he says, what we do, we don't look to see whether
21 we are going to call him a person. We look to see what is
22 the intrinsic nature of the species, who are they.

23 So, for example, if we stumbled upon a
24 Neanderthal, someone who managed to still be alive, the
25 question would be, is a Neanderthal a person.

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1 Well, they are not a homo sapien. So, they would
2 not be a human being in that way. But Judge Fahey would
3 say, well, let's see who they are. What kind of capacity
4 are they. What kind of cognition -- what do they have.
5 What's their mind.

6 That would be what the decision would be as to
7 whether or not you would treat the Neanderthal as a person.
8 And it's what I am saying what Judge Fahey was saying, is
9 that you don't just look at the species.

10 In fact, he specifically says that it's the wrong
11 thing to look at, and it is because you can have a species
12 like elephants and like chimpanzees, which are the two
13 animals that we have been litigating on behalf of.

14 We bring in the top experts in the world who
15 spend their entire lives, whether it's Jane Goodall or
16 Joyce Poole, Cynthia Moss, and we say, tell the Court who
17 they are so that the judge understands.

18 And in a few minutes I will actually tell you
19 what they say they are. And they say, they are these
20 extraordinarily cognitively complex beings, and they are
21 cognitively complex in a way that you and I identify with
22 immediately, because they not only cognitively complex --
23 they are so much like us in ways that once you get to know
24 them, it's extraordinary.

25 And we also laid the foundation -- or our experts

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1 laid the foundation for that by talking about what type of
2 brains do they have.

3 And they showed the kind of brains that are
4 important to the autonomy of human beings, which are also
5 present in elephants. The part of the brain and neurons
6 that are in the brain that cause us to be who we are, we
7 are as complex, autonomous, self-conscious,
8 self-determining, that the elephant -- we spend page after
9 page showing that they have those parts of the brain too.
10 They have those neurons too, and we should be looking at
11 who they are in order to determine whether or not they
12 should the right to liberty protected by a Writ of Habeas
13 Corpus.

14 THE COURT: Notwithstanding neurological
15 perspective, how would these animals -- and I was speaking
16 with some folks over lunch who say, how would the hand and
17 the mirror -- how would Happy determine that Happy
18 identifies with Happy?

19 Why would the -- how would Happy finger or
20 indicate that that's the dot when you look in the mirror?

21 MR. WISE: I forgot exactly, but I believe she
22 did that with her trunk, but I'm not one hundred per sure.

23 THE COURT: That seems to be the only way.

24 MR. WISE: One way Happy could have potentially
25 seen it and tried to like get -- I think Happy had this

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1 kind of big white cross on her and she was trying -- I
2 don't know.

3 And this problem was even more complex with one
4 of the very few other species.

5 The other species who passed the mirror
6 recognition test was a dolphin. And you have to read the
7 specific paper to see how the scientist -- they put the
8 dot -- dolphins don't have any hands and how they were able
9 to know how they were looking --

10 THE COURT: That would be -- I would question
11 what -- the validity of that.

12 MR. WISE: I promise you that you would see the
13 answer in the scientific test which you will see. We are
14 going to send you the mirror self-recognition study so you
15 can see exactly --

16 THE COURT: It's not that?

17 MR. WISE: I didn't know you were going to ask
18 for it, so we will have it to you by tomorrow.

19 THE COURT: I don't think I need anymore papers.
20 I am just saying, because lately, the T.V. -- and I confess
21 I watch T.V. -- has this emu that sees an emu in the glass
22 and he is attacking himself. And I am saying --

23 MR. WISE: He is probably not attacking himself.
24 He probably thinks he is looking at another emu.

25 THE COURT: Exactly, but he didn't recognize that

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1 that is him.

2 MR. WISE: Happy recognizes that she is looking
3 at herself.

4 THE COURT: That's what I want to know. How?

5 MR. WISE: Yes. And we promise, if you would be
6 so kind as to accept our offer of the scientific article
7 that shows --

8 THE COURT: I would have to ask whether or not --
9 whether it would be on consent or --

10 MR. SCHNEIDER: The research in question was done
11 by the Wildlife Conservation Society by Mr. Flatik who is
12 on the payroll of W.C.S. when he did it.

13 MR. WISE: Your Honor, we are citing that in our
14 petition, so the Court can go find it or we can just simply
15 send it to you.

16 THE COURT: Counsel.

17 MR. MANNING: For the first time in my memory,
18 Frye has been introduced as an evidentiary standard during
19 oral argument, and now we are being offered studies to the
20 Court without any opportunity to review those studies or
21 even determine if there is a Frye objection to them.

22 The reality is that under the First Department,
23 the Lavery decision, none of this is relevant.

24 THE COURT: Well, I was going to ask that too.

25 MR. WISE: If I may, Your Honor.

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1 THE COURT: You can't say that you are not aware
2 of it because the scientists work at your facility.

3 MR. WISE: Your Honor, it is safe to say I have
4 very little knowledge about all the workings of the
5 Wildlife Conservation Society unless there is some reason
6 for me to look into it. And I don't know about the --

7 THE COURT: I am saying, as an officer of the
8 Court, I am sure they weren't making up a representation if
9 they weren't certain of it.

10 MR. WISE: I believe we cited it.

11 THE COURT: Perhaps maybe you want to confer --

12 MR. WISE: I was told it was not a Wildlife
13 Conservation Society study. It was just done over a period
14 of months.

15 THE COURT: You know what, I am not going to take
16 the time to argue it right now. If it's in here, I will
17 take a look at it. If it's not, if you want to include it,
18 you have to put the other side on notice that you want to
19 include that.

20 Now, are you finished with the --

21 MR. WISE: No, I just started. A lot of terrific
22 questions I want to address. So, the important thing is
23 that --

24 THE COURT: I will stop asking.

25 MR. WISE: It's a privilege.

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1 The important part of our conversation is that
2 being a person is a capacity -- is different from the
3 rights that would go -- that a person might have.

4 So, just because sometimes people think that if
5 you say they are a person, that means they can vote, they
6 can go to school.

7 It just means you have the capacity. And what
8 really then is argued before Court is what are the rights
9 that are appropriate for an individual person.

10 Whether there is a human being, because we can
11 have -- different human beings have different rights, and
12 there are different kinds of other species. What rights
13 might be appropriate. There may be one or two.

14 That would be up to the Court under common law
15 and legislature under statute.

16 THE COURT: You want me to go beyond the person
17 in question to determine what rights --

18 MR. WISE: Only on the rights that we are asking
19 the Court, which is the right of bodily liberty protected
20 by Writ of Habeas Corpus, that Happy be ordered freed from
21 her captivity and sent to a sanctuary where she can live
22 the rest of her life with other elephants on twenty-five
23 hundred acres instead of one.

24 THE COURT: Would that not be sort of
25 imprisonment also, just a bigger prison?

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1 MR. WISE: Well, that's -- that's like saying
2 like Earth is a prison. I can't go off the Earth. I can
3 be forced to stay in my house or I am forced to stay on the
4 Earth.

5 THE COURT: Didn't you give me an example that
6 the facility was a determining factor into whether or not a
7 person was limited in their movement last time? You said
8 that the writ was denied because it was just going from one
9 facility to another.

10 MR. WISE: Indeed, as Judge Fahey pointed out --

11 THE COURT: Didn't you tell me --

12 MR. WISE: That was the error that the Fourth
13 Department made, that then the First Department also made
14 the error.

15 They took -- they misunderstood the two cases.
16 There was one case, that's the Johnson case from -- it's a
17 case from 1961, where you had someone who is moved from
18 a -- I believe a mental institution to another sort of
19 institution.

20 Then you have another -- the Brown case from
21 1986, where someone wanted to -- a prisoner wanted to be
22 moved from one section within an institution to another
23 section within the institution. And so, essentially, there
24 is the -- it's kind of a dichotomy of tests.

25 One test is, do you want to move from one

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1 institution to a different kind of institution or different
2 institution. That's the Johnson case from 1969.

3 The other one is -- I am trying to get the
4 prisoner to be moved from one section within an institution
5 to another section within the same institution.

6 So, at that point, what the Fourth Department --
7 the mistake they made, and again the First Department just
8 kind of brought it into their's, and Judge Fahey noted they
9 are both wrong, that we are not asking that Happy be moved
10 from one part of the Bronx Zoo to another part of the Bronx
11 Zoo.

12 We are asking that Happy be moved from the Bronx
13 Zoo to an entirely different kind of facility, to a
14 sanctuary that's just for elephants. That's -- the likely
15 one we are looking at now is the Tennessee Elephant
16 Sanctuary, so Happy would not have to be trucked over to
17 Sacramento.

18 And the Tennessee Elephant Sanctuary is either
19 twenty-three hundred or twenty-five hundred acres. I have
20 been there. And that's where she would live out the rest
21 of her life in that sanctuary.

22 She would be with other elephants. She wouldn't
23 have to stand on one acre alone and by herself. And now
24 winter is starting to come.

25 Happy is going to be moved from -- she won't even

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1 have the one acre outside. Now she will moved into a much
2 smaller barn inside, and that's where she is going to spend
3 the winter months.

4 While she is in Tennessee, she would be able to
5 go out all year round, go around twenty-five hundred acres.
6 Plus, Happy is alone and has been alone for seventeen
7 years.

8 And during her entire life at the Bronx Zoo, she
9 only had the opportunity to know four elephants, two of
10 whom have attacked her, and two of whom killed her
11 companion. Maxine and Patty, who both attacked her and
12 killed her companion --

13 THE COURT: They killed Grumpy.

14 MR. WISE: I think it was -- I don't think it was
15 Grumpy. I am sorry. The Court remembers more than I do.

16 THE COURT: I told you I was paying attention.

17 MR. WISE: I need to listen to what I am saying
18 better. Yes, she has only been able to see really one
19 elephant -- one other elephant who hadn't been killed --
20 either killed by them or by --

21 THE COURT: How much -- how do we know if we put
22 Happy in this sanctuary she won't be killed by another
23 elephant?

24 MR. WISE: One of the reasons that -- in the
25 wild, the idea is that if you have two female elephants

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1 kill another female elephant it's extraordinary. Again, if
2 it's ever happened.

3 When you cram elephants into one acre of land,
4 it's like having -- it's like Attica State Prison. You are
5 cramming all of these people into a very small place.

6 They have the extraordinary cognition that the
7 elephant -- they react the way we do.

8 Dr. Joyce Poole, in one of her affidavits, notes
9 when you cram them on such a small amount of land, they get
10 sick, they get aggressive and actually -- I don't remember,
11 there are five other bad things about the way it would get
12 if you said, I have to live with someone that I don't like
13 for my entire life. We can get --

14 THE COURT: There is no indication that Happy is
15 unhappy.

16 MR. WISE: Oh, there is a lot of indication Happy
17 is unhappy.

18 If you look at the affidavits that were filed,
19 there is not a single affidavit -- there is an affidavit
20 from James Breheny, there is an affidavit from the man who
21 is the chief veterinarian of all of the animals in all of
22 the zoos, and then there is another man who is Patrick
23 Thomas who is in charge of making sure that the various
24 regulations of the AZA are followed.

25 None of them -- none of them have been trained

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1 with elephants. None of them said anything about
2 elephants.

3 In fact, none of them say that they understand
4 anything about the emotional state of elephants.

5 If the Court looks really closely, James Breheny
6 has a Master's Degree in Biology.

7 Then there is the veterinarian, and there is
8 someone else, I don't know who, but it's nothing like the
9 experts we have.

10 All of our experts have degrees that focus
11 directly on elephant behavior and they are not
12 administrators of zoos. They are people that spent fifty
13 years studying wild elephants. They know the way elephants
14 behave the way I know the back of my hand.

15 And Dr. Poole, in her second supplemented
16 affidavit -- second supplemental affidavit points out that
17 none of these people note that Happy is happy, other than
18 that Happy has any kind of emotion. All they focus on is
19 Happy as a machine.

20 Although -- do they wash her trunk? It's the
21 same thing if something was in a state prison hospital.
22 That's what people would do.

23 They would go in and say, how is your blood? How
24 are your blood cells? Are you okay? Are you eating okay?
25 That's what they do.

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1 None of have them say a single thing about how
2 they protect autonomy, how they are able to make her life a
3 life that she can live.

4 And the reason that they cannot do that is,
5 number one, she lives by herself. She is a social being
6 who lives by herself.

7 And number two, no matter how you swing it, she
8 lived on one acre of land for decades.

9 THE COURT: That's another thing. I mean, she
10 lived that way for decades. She has lived and not
11 dwindled, or her health hasn't declined.

12 I mean, she is eating properly. She is well
13 nourished. It's not like she went into a depressive state
14 and stopped eating.

15 MR. WISE: I would suggest that this Court go
16 visit Happy, and you will see a depressed elephant, because
17 you will -- I have been to Kenya. You will see a depressed
18 elephant that does nothing but stand there, just stand
19 there hour after hour, day after day.

20 Dr. Poole notes that is not all the -- she has
21 seen video of Happy. She notes that there is nothing that
22 Happy does essentially except like stand there and eat
23 grass, but what else is there for Happy to do? She is by
24 herself.

25 If you see the elephants who are in the

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1 sanctuary, they can choose their own friend, because as
2 Dr. Poole says, elephants are kind of incredibly social who
3 need to choose their own friend.

4 She will get a chance to be with her own friend,
5 choose her own friend, live her own life because she is an
6 autonomous being. The one who chooses how to live her
7 life.

8 She can choose to be alone. She can choose to be
9 on one thousand acres that way, rather than on one hundred
10 feet that way.

11 She will have an entirely different life, which
12 is the life that her genes tell her she lives.

13 As Dr. Poole said in another part of the
14 affidavit, elephants are supposed to move. And if you can,
15 go look at Happy. We don't have to be there. And you will
16 see an elephant that doesn't move.

17 THE COURT: I wouldn't do anything without all
18 the parties being there.

19 MR. WISE: I would be happy to go.

20 THE COURT: Perhaps we will all go see Happy.

21 But --

22 MR. WISE: So --

23 THE COURT: We were talking --

24 MR. WISE: Please interrupt me. The questions
25 are terrific and give me the privilege of being able to

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1 respond to them.

2 THE COURT: We are talking about personhood.

3 MR. WISE: Personhood. The leading case on
4 personhood in New York is the Byrn case. 1972, Byrn versus
5 New York Hospitals. And in that case you had the
6 legislature, not statute, an abortion liberalization
7 statute, and then it was challenged, and the question was,
8 was a fetus a person within the meaning of either the New
9 York Constitution or the United States Constitution.

10 So, the New York Court of Appeals then gave the
11 longest exegeses of what personhood means in the State of
12 New York.

13 And, importantly, the Byrn Court stated that
14 quote, "in according legal personality to a thing, the law
15 affords it the rights and privileges of a legal person."
16 That's what a person is.

17 That's how a person has always been, unless
18 someone somehow gets sucked into what Professor Cupp says,
19 and the wrong definition of Black's Law dictionary, that
20 when you are a person you are afforded the rights and the
21 privileges of a person.

22 It says nothing about having to assume duties.
23 It says the rights and privileges.

24 So then this Court -- then, you know, I urge you
25 to carefully consider Judge Fahey's continuing opinion. He

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1 still is the only high court judge in the United States to
2 ever give an opinion as to the correctness of the argument
3 for the Nonhuman Rights Project.

4 He was saying -- he specifically attacked the
5 reasoning of the First Department, and the fact that they
6 had said that our argument, the Lavery argument, the
7 ability to acknowledge a legal duty or legal responsibility
8 should not be determinative of entitlement to Habeas
9 relief, since, for example, infants cannot comprehend that
10 they owe duties or responsibilities, and a comatose person
11 lacks sentience, yet both have legal rights.

12 This argument ignores the fact they are still
13 human beings, members of the human community.

14 That's what the First Department said. That even
15 though -- that's the argument -- have a legal duty or legal
16 responsibility should not be determinative. Ignoring the
17 fact that, as the Court said, these are still human beings.

18 In other words, they didn't accept what the Third
19 Department says. They also understood that there are all
20 of these human beings who don't --

21 THE COURT: When you say "they", are you not
22 saying Judge Fahey?

23 MR. WISE: "They" is the -- I am sorry. Infants
24 in the -- let's see.

25 Infants can't comprehend their duties and

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1 responsibilities, and a comatose person lacks sentience,
2 yet they are still human beings.

3 Therefore, that's why they have -- they should
4 have a right.

5 The First Department itself did not accept the
6 Third Department's argument because we argued to them,
7 look, just like we are arguing to this Court, there are
8 hundred of thousands of New Yorkers who can't bear duties
9 and responsibilities.

10 Therefore, how can that be a requirement. And I
11 am looking -- the First Department rejected that because
12 they did not stick with that. They moved on to the next
13 argument.

14 Well, look, they are human beings. In other
15 words, they are saying, being human beings is a necessary
16 condition for rights only a human being can have. Judge
17 Fahey said -- I disagree with this.

18 I agree with the principle that all human beings
19 possess intrinsic dignity and value and have the privilege
20 of Habeas Corpus, but in elevating our species we should
21 not lower the status of other species.

22 Then he says, the Appellate Division's
23 conclusion -- the First Department's conclusion that a
24 chimpanzee cannot be considered a person, and is not
25 entitled to habeas relief is, in fact, based on nothing

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1 more than the premise that a chimpanzee is not a member of
2 the human species.

3 Now, I will say in a minute, he didn't like that.
4 He said there are other ways of determining that that are
5 more appropriate.

6 Then the next month, the Fourth Department itself
7 in People versus Graves in June 2018, says that it was
8 common knowledge that animals can be and sometimes are
9 persons, and they cite both to the Presti case and also to
10 Byrn.

11 So secondly, the Byrn Court made clear that a
12 person is not a synonym for human being, because there the
13 Court said that the fetus was both a person-- I am sorry --
14 was both a human, but not a person.

15 So, that is a clear statement in the State of
16 New York who -- that human beings and persons are not
17 synonyms. Some humans are not persons and some persons
18 yes --

19 THE COURT: Well no, no person is not human.

20 MR. WISE: Well, I think under the Pet Trust
21 Statute there are many -- no persons are not human. The
22 Pet Trust Statute, you have persons who are pets who are
23 not human, but they are persons because they are
24 beneficiaries and have the right to the Court under the Pet
25 Trust.

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1 So, it's already -- there are a lot of entities
2 who are not human. That was person number one, which I
3 apparently forget.

4 And then I think it may have also said, in New
5 Zealand, a river is a person, a nature park is a person.
6 Because a person, as is said in Byrn, there is no magical
7 biological equivalent to a person.

8 A person means -- a judicial department has
9 decided that some entity, whether a corporation or an
10 elephant, is important enough to be designated a person.

11 It means it has the capacity of rights. Then the
12 question is, what rights do we give to that person.

13 Now, then the third thing about Byrn is, Byrn
14 said that personhood -- it is policy determination whether
15 legal personality should attach and not a question of
16 biological or natural correspondence.

17 Now, what Byrn also noted was that as a matter of
18 history, that the policy issue in most cases has evolved
19 upon the legislature, which is true.

20 Usually it's the legislature who makes personhood
21 decisions as in the Pet Trust Statute.

22 However, and that occurred in the abortion
23 liberalization statute that Byrn was doing.

24 However, the case in front of this Court is
25 different. The case in front of this Court is not under a

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1 statute, but it's common law writ of habeas.

2 The word common law means that the Court
3 determines who is going to be a person, which is what Lord
4 Mansfield said in the Somersett case. He said slavery was
5 too odious, it won't hold up in England.

6 He or the Court of Appeals bench in 1772
7 translated James Somersett's legal position from being a
8 thing to a person.

9 Even more importantly, being a -- it's not a
10 common law issue. It's the common -- we are working on the
11 common law. We are working with the common law of Habeas
12 Corpus.

13 The Court of Appeals in the case of Tweed -v-
14 Liscomb, were stated -- and stated -- quote, "The right to
15 relief from unlawful imprisonment through the
16 instrumentality of the Writ of Habeas is not the creation
17 of any statute, but exists as part of a common law of the
18 state.

19 The writ cannot be an abrogated or its efficiency
20 impaired, by legislative action, and cases within the
21 relief afforded by the writ at common law, cannot, under
22 the State constitution, be placed beyond its reach.

23 The various statutes relating to the writ have
24 not been intended to detract from its force, but to add to
25 its efficiency.

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1 Every common law principle, especially when you
2 are dealing with common law Writs of Habeas Corpus, that is
3 the decision for the Court to make and not for legislators
4 to make.

5 Now, how does the Court make that decision?

6 Now, under the common law, you look traditionally
7 for centuries -- you look to the issue of scientific
8 discovery. You look at experience. You look at principle.
9 And you look to scientist discovery.

10 So, Article 70 of 7001, Habeas Corpus statute.
11 When it says a person can sue under the -- can sue, they
12 are not doing anything but referring back to what is going
13 to be a person under common law. The reason being, it's a
14 C.P.L.R.

15 So, C.P.L.R. by definition, solely governs
16 procedure, and C.P.L.R. 101 and 102 says that it can
17 neither abridge nor enlarge substantive rights.

18 So, the substantive right is -- that's for the
19 Court to decide.

20 Assuming that you don't agree with us, although
21 we think you should, the legislature already decided that a
22 nonhuman can be person under the Pet Trust Statute.

23 Even if you don't pay attention to that, you make
24 a decision -- Article 70 is referring to the common law.
25 And because C.P.L.R. can only govern procedure.

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1 C.P.L.R. 105 says, when the legislature intended
2 to define a word, it can -- if you don't know -- if the
3 word is undefined, then we also cite cases in our memo
4 where the New York State undefined's word -- you look to
5 the common law.

6 Now, let me focus on when the Court is trying to
7 make public policy decisions as to whether or not Happy --
8 assuming you don't accept the Pet Trust Statute argument --
9 which public policy is relevant.

10 What is the public policy that's relevant to the
11 issue of whether Happy is entitled to the -- is entitled to
12 bodily liberty, that's protected by Habeas Corpus.

13 First, you look to the public policy set out in
14 the Pet Trust Statute. I also want to cite the Foust case
15 from 1995, which interpreted the Pet Trust statute, that
16 noted it dealt with chimpanzees and it authorized -- quote,
17 authorized the creation of enforceable trust for animals,
18 end quote.

19 Also noted that the five chimpanzees involved
20 were quote, both principle beneficiaries.

21 The second policy issue for this Court would be
22 the unchallenged and un rebutted sworn affidavits, multiple
23 ones that the Nonhuman Rights Project has offered by the
24 most cognition experts in the world that make it clear that
25 elephants like Happy are extraordinarily cognitively

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1 complex beings. And they have at least the following
2 characteristics -- I won't give you all of them. They list
3 among them all -- about forty-two of them.

4 But, first of all, they are autonomous, and
5 Dr. Poole notes that being -- it means that we are able to
6 make choices as to how to live our life, rational choices.

7 It means it doesn't involve instinct, it doesn't
8 mean us being pushed around by things that we cannot
9 understand or deal with. It means we can make rational
10 choices.

11 Now, one of the examples she gives -- numerous
12 examples -- one of the examples she gives for elephants is
13 the fact in one of her affidavits, I think it's her first
14 affidavit, is that when you have a group of elephants that
15 come to some place, they will have discussions and they
16 use -- she uses the word quote, discuss.

17 They, by using body language and by using sounds,
18 you actually have a group of elephants who actually discuss
19 what their next action is.

20 And then they last up to forty-five minutes, at
21 which point the group either moves along in the same
22 direction that they were moving or the group divides and
23 some of the elephants move one way, some move the other
24 way.

25 But the important thing is that they are

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1 autonomous beings. And along with that, it means they have
2 empathy. So, they understand what other beings are
3 feeling, especially other elephants. They are self-aware.

4 The red dot mirror test, self-recognition shows
5 they can self-determine. They have a theory of mind and --
6 theory of mind means that not only do you know that you
7 have a mind, but you think others have minds too.
8 Especially other elephants.

9 They have insight. They have working memory.
10 They can act intentionally. They can try to achieve goals.
11 They can understand the emotional state of others. They
12 can teach each other. They teach. They cooperate. They
13 build coalitions. They cooperate in problem solving. They
14 engage in innovative problem solving.

15 THE COURT: You said you wouldn't --

16 MR. WISE: I will stop at eleven.

17 In other words, they are extraordinarily
18 cognitively complex beings.

19 Third, when you look to public policy, recently,
20 just since this case began, New York City elected officials
21 have spoken out about Happy and urge that Happy be sent to
22 the sanctuary.

23 Corey Johnson, who is an Ex Officio of the Bronx
24 Zoo and of the Wildlife Conservation Society, he
25 specifically says that after having spent the last

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1 thirty-nine years of her life in her enclosure, it is time
2 for Happy to be moved to an elephant sanctuary where she
3 will have the space and freedom she deserves.

4 Mayor DeBlasio, who is also a trustee of the
5 Wildlife Conservation Society and the Bronx Zoo, he said,
6 quote, something doesn't feel right, unquote, about keeping
7 Happy at the Bronx Zoo.

8 And he acknowledged that, quote, there is a
9 reason that social animals might be deeply affected by that
10 experience.

11 Also Representative Alexandria Ocasio Torres has
12 tweeted, their office is concerned about Happy and her
13 team. We are looking at what they can do to help Happy.

14 With respect to public policy, as Judge Fahey
15 explained in his decision, he said, the better approach, in
16 my view, is -- when dealing with chimpanzees, is to ask not
17 whether a chimpanzee fits the definition of a person, or
18 whether a chimpanzee has the same rights and duties as a
19 human being, but whether it has a right to liberty
20 protected by Habeas Corpus.

21 That question, one of precise moral and legal
22 status, is the one that matters here.

23 Moreover, the answer to that question will depend
24 on our assessment of the intrinsic nature of chimpanzees,
25 as a species, the intrinsic nature of elephants, which is

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1 why we provided so many affidavits by the world's greatest
2 elephant expert, who they are as a species.

3 Judge Fahey notes here, the record before us for
4 the motion for leave to appeal contain unrebutted evidence
5 in the form of affidavits from eminent primatologists, that
6 chimpanzees have advanced cognitive abilities.

7 And he specifically noted the 17 Philosophers and
8 the fact that he noted actually eleven cognitive
9 capabilities which chimpanzees have as well -- which
10 elephants have as well.

11 Now, the fifth --

12 THE COURT: And they quote specifically
13 elephants?

14 MR. WISE: Elephants and chimpanzees. Very
15 similar advanced cognitive abilities. Not identical, but
16 very similar.

17 THE COURT: But I am saying, these experts say
18 that elephants are very close to chimpanzees?

19 MR. WISE: Yes. I don't know, we have five
20 different experts. Dr. Poole is the clearest.

21 As I said, they talk about, you know, the brains,
22 neurons, the cognitive capability. They give numerous
23 examples from fifty years of working with elephants.

24 And indeed, often times they will say they are
25 like humans in that way. But, of course, they are

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1 elephants, but cognitively, with things that matter.

2 Again, not with respect to their right to vote or
3 their right to go to school, but with respect to their
4 right to bodily liberty, not to be detained and imprisoned
5 for another day when Happy has already been in prison for
6 forty-seven years.

7 But what it means that -- to recognize her bodily
8 liberty and send her to a place where she won't be in
9 prison, unless the Court or anyone wants to characterize
10 being with a lot of other elephants on twenty-three hundred
11 acres, which we don't characterize that way.

12 That's the reason we feel that the Tennessee
13 Elephant sanctuary, or the Performing Animal Welfare in
14 Sacramento, that is the best place that an elephant can be
15 in North America.

16 We can't do any better than that, but we can do
17 much, much better than the Bronx Zoo.

18 The fifth issue, around the public policy, these
19 are major policy arguments that are grounded upon the
20 fundamental legal principles that are held in the highest
21 esteem by the New York Courts and have always been that.

22 Again, in reading Judge Fahey's opinion, he wrote
23 again involving chimpanzees. Does an intelligent nonhuman,
24 who thinks and plans and appreciates life as human beings
25 do, have the right to protection of law against -- dot,

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1 dot, dot -- enforced detention visited on him or her.

2 This is not merely a definitional question, but
3 it's a deep dilemma of ethics and policy that demands our
4 attention.

5 To treat a chimpanzee -- that is no different
6 than an elephant -- as if he or she had no right to liberty
7 protected by habeas corpus is to regard the chimpanzee or
8 elephant as entirely lacking independent worth, as a mere
9 resource for human use, the value of which consists
10 exclusively in its usefulness to others.

11 Instead, we should consider whether a chimp is an
12 individual with inherent value who has the right to be
13 treated with respect.

14 That's why he notes the First Department
15 conclusion, that chimpanzees cannot be considered a person,
16 and is not entitled to habeas relief, was based on nothing
17 more than a premise that a chimpanzee is not a member of
18 the human being species.

19 So therefore, instead of entering into the
20 required mature weighing of public policy, moral principle
21 that's required, for a change in the common-law, Judge
22 Fahey notes that determines personhood, which Byrn did as
23 well.

24 The First Department simply pronounced that only
25 humans could have legal rights. And the Court, they didn't

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1 give it an entire sentence. They say they are not humans.
2 Well, they gave no justification.

3 I mean, with respect, that is simply a naked bias
4 against nonhumans. And these kinds of naked biases have
5 always led to the wrong place. And they lead to the wrong
6 place when you are dealing with racial basis. They lead to
7 the wrong place when dealing with gender bias.

8 We cite the case of People versus Hall, where the
9 California Supreme Court in 1854, refused to allow a
10 Chinese person, who was a witness to a murder, to testify
11 against the white person who murdered the person.

12 We cite in our book on the grounds that Chinese
13 people were stupid, Chinese people were inherently liars
14 and a whole list of things about what Chinese people are.
15 They weren't white, and, therefore, they were not allowed
16 to testify in court.

17 We cite the Goodell case. Lavinia Goodell wanted
18 to be first woman in Wisconsin to be a lawyer. And they
19 said you can't practice law. And they did give some
20 reason.

21 Now, it's hard to read it without laughing out
22 loud at what delicate blossoms women are, and they can't
23 possibly hear all the things that happened or -- in all of
24 these other things.

25 But the fact is they made their decisions based

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1 on sympathy, some kind of a biological capability which
2 they decided was not good enough.

3 Naturally, what we are saying, those kinds of
4 decisions always lead to bad places, because they are
5 always based upon nothing except clear bias.

6 Now, as Judge Fahey wrote, the answer to the
7 question of whether Happy has the right to liberty
8 protected by Habeas Corpus will depend on our assessment of
9 the intrinsic nature of nonhuman animals as a species.

10 Now, the Nonhuman Rights Project specifically
11 answered that question by applying the fundamental New York
12 common law, statutory and constitutional values of liberty
13 and quality.

14 In the middle of those is the idea of autonomy
15 because autonomy is perhaps the supreme legal value in New
16 York.

17 Judge, I don't have to tell the Court, you are a
18 judge and I'm not, but judges clearly believe that an
19 important part of their work as a judge is to allow the
20 citizens of New York to live autonomous lives to the extent
21 they don't harm anyone else.

22 It's supreme legal value that, for example, in
23 the Storer case, trumps the value of human life itself.

24 In Storer, 1986, I believe where you had --
25 Brother Fox went into a coma during surgery and the

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1 question was whether he can be taken off of life support.
2 And he had said before he went in, before he went into
3 surgery, if anything happened to him he would rather die
4 than be kept on life support.

5 And they said in order to protect Brother Fox's
6 autonomy, that if what he said, when he was able to, I
7 don't want to live this way, he would not have him live
8 that way.

9 Perhaps even more important, there is the case of
10 Rivers versus Katz which is a 1986 case that involved
11 people -- Rivers, who was involuntarily committed as an
12 incompetent to a -- wherever in New York -- where
13 involuntarily incompetents go.

14 The question was, could he decline antipsychotic
15 medication.

16 And the Court of Appeals of New York, even though
17 he was involuntarily committed, he was psychotic and he was
18 incompetent, they were so concerned about whatever autonomy
19 that he might have, that they dealt with the issue of
20 whether or not he can still decline antipsychotic
21 medication.

22 One thing they cite is the U.S. Supreme Court
23 from Union Pacific versus Botsford, saying no right is held
24 more sacred or more carefully guarded than the right of
25 every individual to the possession and control of his own

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1 person, free from all restraint or interference of others.
2 And the right of complete immunity, the right to be let
3 alone. That's the Botsford case.

4 The Rivers versus Katz case said this: In our
5 system of free government where notions of individual
6 autonomy and free choice are cherished, it's the individual
7 who must have the final say with respect to decisions --
8 and there was regarding medical treatment.

9 Why was that? To ensure the greatest possible
10 protection is accorded his autonomy and freedom from
11 unwanted interference with the furtherance of his own
12 desires.

13 The Courts are protecting a specific value. They
14 are protecting the value of autonomy and there is no reason
15 why an autonomous being, especially a human, why their
16 autonomy should not be respected as well.

17 Unfortunately for them they did not come into the
18 world with autonomy. They came into the world an
19 autonomous elephant. And there is no -- but the thing is
20 that they are indeed autonomous in a way that humans are
21 autonomous, and to enslave them like we do, as Judge Fahey
22 knows, is simply -- it's morally wrong, it's a violation of
23 principle.

24 And whenever we have done that over the years, we
25 come to the conclusion it's legally wrong and perhaps we

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1 should -- we should understand that it should be legally
2 wrong.

3 Now, an important thing about autonomy -- this is
4 precisely what Habeas Corpus is about. That's one of the
5 major reasons why Habeas Corpus has been brought before the
6 court.

7 So, the Stanley judge says -- the Stanley case
8 that said, quote, Habeas Corpus is deeply rooted in our
9 cherished ideas of individual autonomy and free choice.

10 In other words, autonomy and free choice are the
11 fundamental interests that Habeas Corpus protects.

12 Now, the unrebutted expert testimony that we have
13 put in front of the Court, is that central to the intrinsic
14 nature of elephants is the autonomy and the capacity for
15 free choice that Habeas Corpus protects. That's a matter
16 of liberty.

17 Then there is a matter of equality.

18 THE COURT: The Court is going to have to take a
19 five minute recess.

20 However, it is now almost 4:00 o'clock, and I do
21 want to allow the respondent to respond to your arguments.

22 Now, should we just take the first issues that
23 you have gone through and leave -- you have more issues?

24 MR. WISE: Indeed, Your Honor.

25 THE COURT: So, I would like for him to at least

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1 get the opportunity to respond to these issues. And if you
2 would like to say anything towards that, but I am going to
3 take a five minute recess.

4 (Break held.)

5 MR. MANNING: Thank you, Your Honor.

6 Ken Manning, Wildlife Conservation Society, and
7 for Mr. James.

8 Thank you, Your Honor.

9 The Pet Trust was enacted by legislature to
10 provide -- was enacted to provide pet owners the
11 opportunity to provide for their animals.

12 If you examine the legislative history, you will
13 see no intent on the part of legislature by implication to
14 provide for persons on the part of domestic pet animals in
15 that statute. It's simply not there.

16 THE COURT: So, you are saying that the Pet Trust
17 Statute are the rights of the pet owners and not of the
18 beneficiary?

19 MR. MANNING: That's the way we look at it. And
20 the legislature provides no intention whatsoever to convert
21 the beneficiary of Pet Trust in persons.

22 The legislature knows well how to do that when
23 they do chose to enact he definitions.

24 In fact, the Byrn case from the Court of Appeals
25 indicates in so many words that -- if I may borrow a

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1 sentence from that decision -- I am quoting from the Byrn
2 case, whether the law should accord legal personality is a
3 policy question which, in most instances, is devoted on the
4 legislature subject verses -- against the constitution as
5 has been legally rendered.

6 In the first instance, this is a legislative
7 initiative.

8 Now, you have approximately six hours of argument
9 which bears very little in relation to usual argument of
10 contested motions, but bears a very strong likeness to what
11 you experience in the legislature and committee hearings,
12 when a proposed piece of legislation is aired to the
13 public, and their varying viewpoints to pass that piece of
14 legislation.

15 It sounds very much like the process, and that's
16 where this group, NhRP, has been asked by two Courts to
17 spend their time to present their position to the
18 legislature, not to the Courts.

19 And from our perspective, this is a legislative
20 initiative, not a judicial solution.

21 But please don't accept our word for it, because
22 the First Department has answered virtually every point
23 raised today by NhRP.

24 And if I may, if the Court would allow me, I will
25 cite a few passages from the First Department case that

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1 directly bear upon some of the questions asked by the Court
2 of the petitioner here.

3 And I am quoting from the Lavery II decision from
4 2017. I don't think we have to go back to the 1800 or
5 early 1900's for guidance.

6 We have a two year old decision from the First
7 Department. And the First Department had this to say about
8 the common law writ of Habeas Corpus -- Article 70,
9 provides a summary procedure by which a person who has been
10 illegally imprisoned or otherwise restrained in his or her
11 liberty can challenge the legality of the contention.

12 While the word person is not defined in the
13 statute, there is no support for the conclusion that the
14 definition includes nonhumans, chimpanzees. That case
15 involves a chimpanzee. The same argument raised today are
16 raised on behalf of elephants.

17 We quote from the Lavery II decision: While
18 petitioner's cited studies attest to the intelligence and
19 social capabilities of chimpanzees, petitioner does not
20 cite any sources indicating that the United States or New
21 York Constitutions were intended to protect nonhuman
22 animals' rights to liberty, or that the Legislature
23 intended the term person in C.P.L.R. Article 70 to expand
24 the availability of habeas protection beyond humans.

25 The answer could not be clearer coming from the

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1 Appellate Court in this department.

2 The Court went on: No precedent exists, under
3 New York law, or English common law, for a finding that a
4 chimpanzee could be considered a person and entitled to
5 habeas relief.

6 In fact -- this again is the Court saying this --
7 habeas relief has never been found applicable to any
8 animal -- and it goes on to cite a bunch of cases.

9 So, the Court points -- the First Department has
10 analyzed the issue specifically and come down in favor of
11 no Habeas Corpus relief for animals.

12 Going onto the complex cognitive nature of
13 elephants as presented by Mr. Wise, the Court had this to
14 say in the context of chimpanzee:

15 The asserted cognitive and linguistic
16 capabilities of chimpanzees do not translate to
17 chimpanzee's capacity or ability, like humans, to bear
18 legal duties, or to be held legally accountable for their
19 actions.

20 They have addressed the issue, Your Honor. The
21 studies they have included in the papers don't meet the
22 test articulated by the First Department.

23 Also, if I may, Judge, a lot of time has been
24 spent on Judge Fahey's opinion, but it bears note that
25 Judge Fahey is an eminent jurist. He knew what he was

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1 doing at the time. He denied leave to appeal. That was
2 the decision he made.

3 He said the Court shouldn't even hear the case.
4 What he had to say was what he wished to say, and I
5 acknowledge that, but it had nothing to do with the
6 decision of him or the Court. He denied leave, as have
7 other courts under these circumstances.

8 So, what Judge Fahey may have said, while it
9 might be interesting, has no legal bearing whatsoever as
10 far as the Court of appeals is concerned or as far as the
11 law of the State of New York is concerned.

12 To read more into it than the concurring opinion
13 as to denial for leave of appeal I think would be
14 unreasonable to read that into that act.

15 The next point I will make. A lot of time was
16 spent about that Happy's conditions. If you go back to the
17 petition in this case, which is now a year old, the
18 petition -- I am quoting from the petition, paragraph 56,
19 and I quote:

20 This petition does allege that Happy is illegally
21 confined because she is kept in unsuitable conditions, nor
22 does it seek positive welfare for Happy.

23 Well, at the Wildlife Conservation Society, we
24 know that to be the situation, and we presented not one but
25 three affidavits.

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1 Even though Happy's condition are not even in
2 this case, the petitioner spends a lot of time on it
3 knowing that the petition didn't even allege unsuitable
4 conditions.

5 So, we put in affidavits indicating that Happy
6 has, in fact, received good care over the years and has
7 prospered.

8 She is now forty-eight years old, and frankly,
9 towards the end of the life expectancy of an elephant.

10 THE COURT: I was going to ask, what is the life
11 expectancy of an elephant.

12 MR. MANNING: So --

13 THE COURT: No one knows.

14 MR. MANNING: We feel qualified to say she is a
15 lot closer to the end than to the beginning.

16 So, to call the conditions -- to characterize
17 Happy's conditions as something from Attica is, I think, an
18 extreme statement.

19 Her conditions aren't even in the case, if you
20 accept the verified pleadings.

21 There were some references to political campaign
22 rhetoric from people who don't have affidavits in this
23 case.

24 I suggest that it's inappropriate, but in any
25 event, I don't think the Court should give much weight to

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1 what a political person might have to say about conditions
2 with respect to an elephant at the Bronx Zoo, when we don't
3 have an affidavit. It's unsworn, it's uncertified and it's
4 not credible.

5 Those are my short points.

6 THE COURT: Thank you so much.

7 You want to continue on?

8 MR. WISE: Yes, Your Honor.

9 Your Honor, two of the major policy issues
10 that -- which I think is number five are liberty and
11 equality.

12 So, I talked about liberty. Now I want talk
13 about equality.

14 So, in 1992, Chief Justice Kaye wrote that there
15 was a two-way street that runs between the common law and
16 common institutional-decision making, and that that has
17 resulted in a common law decision making that's become
18 infused with constitutional values.

19 This is true for equality, which is protected
20 both under the 14th Amendment of the United States
21 Constitution as well as under -- which is equal protection,
22 as well under Article 1 of the New York Constitution, which
23 is equal protection and anti-discrimination clause.

24 I would like to specifically direct the Court's
25 attention to the United States Supreme Court case of Romer

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1 versus Evans.

2 So, Romer versus -- do I need to explain that?

3 THE COURT: You should for the record, just
4 briefly.

5 MR. WISE: I will do it briefly.

6 So, in Romer versus Evans, there had been cities
7 in Colorado who had passed anti-discrimination ordinances
8 that said you cannot discriminate against gay people.

9 As a result, there was -- Amendment Two was a
10 separate referendum in Colorado which the United States
11 Supreme Court can be read as taking away all of the rights
12 of gay people.

13 And the United States Court said that the purpose
14 of repealing all existing anti-discrimination positive law
15 was this -- there are really two reasons.

16 One reason why Romer versus Evans is so important
17 for us is that it struck down Amendment Two for using a
18 suspect classification.

19 But under the minimal rational test -- the
20 minimal rational test simply means that if you have a
21 rational means to a legitimate end, the Court will allow it
22 to be upheld.

23 The United States Supreme Court struck it down
24 saying that there was no legitimate end, that the end of
25 depriving gays of their rights was not a legitimate

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1 governmental end.

2 Moreover, they say it violated equal protection
3 because -- it is at once too narrow and too broad.

4 It identifies persons by a single trait, and then
5 denies them protection across the board.

6 In short as the Sixth Circuit interpreted soon
7 after Romer, they said, Amendment Two was, quote, simply so
8 obviously and fundamentally inequitable, arbitrary and
9 oppressive that it literally violated basic equal
10 protection values.

11 And we cite -- that's equality. Equality
12 Foundation of Greater Cincinnati versus the City of
13 Cincinnati and we cite that.

14 Now, that's very close to what Judge Fahey was
15 saying.

16 Now, by the way, Judge Fahey did vote not to hear
17 our case, but only because he said it was a successive
18 petition and he upheld the lower court, saying, if you
19 remember under 7003 B, a judge is permitted to use
20 discretion both to hear a successive petition and not to
21 hear a successive petition.

22 So, they vote not to and Judge Fahey then upheld
23 that saying they were allowed to do that. But he said --
24 and that's -- and he felt that he had to vote for that.

25 However, he only said, now I regret having voted

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1 against hearing their case before successive petitions when
2 it originally came before the Court.

3 So, we had brought Labor 1 before the Court where
4 Judge Fahey had been one of the judges not to hear the
5 case. Three years later, when Lavery comes before him, he
6 finds that he has to uphold the lower court's ruling that
7 it was successive petition, therefore, he has rule against
8 us.

9 But this time he says, I don't think I have been
10 thinking about this now for the last three years.

11 Unfortunately, I have to vote against you this
12 time because you are bringing it again.

13 However, I regret having voted against you the
14 first time.

15 And that's when he ends, saying that it may be
16 that a chimpanzee is not a person, or there may be argument
17 that a chimpanzee is not a person, but they are certainly
18 not a thing.

19 THE COURT: But they are who?

20 MR. WISE: But a chimpanzee is certainly not a
21 thing.

22 That's the last sentence of his opinion. I
23 believe the quote -- there may be argument that a
24 chimpanzee is not a person. He doesn't say there may be
25 argument a chimpanzee is a person.

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1 He said, there may be argument against -- there
2 may be, but a chimpanzee is certainly not a thing.

3 So, he is saying it's certainly not an entity who
4 lacks the capacity for all legal rights.

5 So, Judge Fahey, then in his concurrency which is
6 an important concurrency. It was only one judge, but he
7 is, indeed, the only high court judge in the United States
8 to give an opinion as to the validity of argument that the
9 Nonhuman Right Project has been making before this Court.

10 So, Judge Fahey noted that the First Department
11 case, Lavery II, that the ability to acknowledge a legal
12 duty or legal responsibility should not be determinative of
13 entitlement to habeas relief -- because you could have
14 comatose people -- and that ignores the fact that they are
15 still human beings.

16 He says that's because this conclusion that a
17 chimpanzee can't be considered a person is not entitled to
18 Habeas Corpus is, in fact, based on nothing more than the
19 premises that a chimpanzee is not a member of the human
20 species. Which is a similar kind of argument that the
21 Supreme Court was making in Romer.

22 So, in short, as a matter of equality, the
23 Nonhuman Rights Project argument that is, Happy is entitled
24 to the right to bodily liberty as a matter both of common
25 law liberty and as a matter of common law equality, because

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1 it at the center of both liberty and equality lies the idea
2 of autonomy.

3 And the unrebutted detailed affidavits that the
4 Nonhuman Rights Project support make it completely clear
5 that elephants are autonomous in ways that are important
6 for the right to bodily liberty.

7 We are not saying they are autonomous, that they
8 should have a right to vote and marry your sister.

9 We are saying -- we are talking about -- can they
10 be, as Judge Fahey said, detained against their will. And
11 we are saying that they have at least enough autonomy and
12 they have far more than that to be able to have the right
13 to bodily liberty so that they can live a life in which
14 they exercise their autonomy so that their forced
15 detention -- which is not every minute of every day,
16 impinges upon their ability to live the autonomous life of
17 which they are genetically and evolutionally capable.

18 If I may move to the next section or is that for
19 another day?

20 THE COURT: Well, it is 4:25, so, you know, by
21 the rules of the Court, we have to conclude at 4:30.

22 But I have one other question before we leave.
23 And we were speaking of the competent sense of ability of a
24 chimpanzee.

25 So, someone posed a question to me about a

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1 service dog. Would that qualify as a person?

2 MR. WISE: A service dog would qualify under the
3 Pet Trust Statute but --

4 THE COURT: Are you saying that that's the
5 owner's right? That's what they're arguing?

6 MR. WISE: As Judge Fahey was saying, in order to
7 make that kind of a personhood decision, you have to
8 determine what the intrinsic nature of the species is.

9 We have like the greatest chimpanzee expert's
10 filed affidavit and the greatest elephant expert's, so all
11 we do is follow the science. We don't know the science of
12 dogs and we would not bring a lawsuit unless the science of
13 dogs made clear they had a mind that was appropriate for us
14 to bring this kind of a lawsuit. And so, we never brought
15 this kind of a lawsuit, simply -- not because they don't,
16 but simply because we don't know.

17 THE COURT: Because a service animal doesn't
18 necessarily have to be a dog.

19 MR. WISE: It won't be an elephant and it won't
20 be a chimpanzee and those --

21 THE COURT: Perhaps they may be either one of
22 those. We don't know.

23 MR. WISE: If the Court --

24 THE COURT: Probably not an elephant, but perhaps
25 maybe a chimpanzee.

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1 MR. WISE: There are monkeys. Some monkeys who
2 are service animals. And we don't have an opinion on
3 monkeys because we haven't spoken to the expert of any of
4 the species. Having visited chimpanzees and spent time
5 around them, I would advise against having a chimpanzee as
6 a service animal.

7 THE COURT: Thank you so much all. So, we are
8 left with one more day.

9 MR. WISE: For certain.

10 THE COURT: What's the next date. Perhaps you
11 can check with the court after consulting with your
12 respective colleagues and then we can come up with one more
13 date.

14 MR. WISE: The only thing I would ask Your Honor
15 if I may renew my request that my brother stipulate that
16 the status quo be maintained and this court.

17 THE COURT: Absolutely. Absolutely.

18 The status quo shall remain with respect to
19 Happy, that she is not to be removed from your facility
20 during the pendency.

21 MR. MANNING: Your Honor, we are not prepared to
22 stipulate to the relief suggested because to do so would be
23 to acknowledge merit to the preliminary injunction motion.

24 THE COURT: I am not asking you to stipulate. I
25 am ordering that the status quo remain.

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1 MR. MANNING: That's why I am trying to clarify.
2 We understand that's a direction of the Court.

3 THE COURT: I am not asking for a stipulation.
4 The Court is ordering that the person or entity in this
5 case, Happy, for lack of a better term, remain as so
6 situated today until the pendency of the conclusion of this
7 case.

8 MR. WISE: Thank you.

9 THE COURT: And that's clear. It's not a
10 stipulation.

11 MR. MANNING: If I understand you correctly, you
12 would like the direction to last until you decide the
13 preliminary injunction motion.

14 THE COURT: Correct. You can see the clerk for
15 the next possible date. Thank you.

16 * * * *

17 Certified to be a true and accurate
18 transcript of the stenographic
19 minutes taken within.

20

21 _____
22 Catherine Callahan
23 Senior Court Reporter
24
25