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# New York Supreme Court

## Appellate Division—First Department

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In the Matter of a Proceeding under Article 70 of the CPLR  
for a Writ of Habeas Corpus and Order to Show Cause,  
THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,  
*Petitioner-Appellant,*

**Appellate  
Case No.:  
2020-02581**

– against –

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

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**BRIEF FOR AMICI CURIAE GARY COMSTOCK, PH.D.,  
G.K.D. CROZIER, PH.D., ANDREW FENTON, PH.D., TYLER  
JOHN, L. SYD M JOHNSON, PH.D., ROBERT C. JONES,  
PH.D., LETITIA MEYNELL, PH.D., NATHAN NOBIS, PH.D.,  
DAVID PEÑA-GUZMÁN, PH.D., JAMES ROCHA, PH.D.,  
BERNARD ROLLIN, PH.D. AND JEFF SEBO, PH.D. IN  
SUPPORT OF PETITIONER-APPELLANT**

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Ph.D., Bernard Rollin, Ph.D. and  
Jeff Sebo, Ph.D.*

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**Supreme Court, Appellate Division,  
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STATE OF NEW YORK

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THE NONHUMAN RIGHTS PROJECT, INC., ON  
BEHALF OF HAPPY,

*Petitioner-Appellant,*

—against—

JAMES J. BREHENY, IN HIS OFFICIAL CAPACITY AS THE  
EXECUTIVE VICE PRESIDENT AND GENERAL DIRECTOR OF ZOOS  
AND AQUARIUMS OF THE WILDLIFE CONSERVATION SOCIETY AND  
DIRECTOR OF THE BRONX ZOO, AND WILDLIFE  
CONSERVATION SOCIETY,

\_\_\_\_\_  
*Respondents-Respondents.*

**BRIEF OF *AMICI CURIAE* PHILOSOPHERS\*  
IN SUPPORT OF PETITIONER-APPELLANT**

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\* Gary Comstock, Ph.D., G.K.D. Crozier, Ph.D., Andrew Fenton, Ph.D., Tyler John, L. Syd M Johnson, Ph.D., Robert C. Jones, Ph.D., Letitia Meynell, Ph.D., Nathan Nobis, Ph.D., David Peña-Guzmán, Ph.D., James Rocha, Ph.D., Bernard Rollin, Ph.D., and Jeff Sebo, Ph.D. *Amici* thank Rachel Banks for her invaluable assistance.

## **I. Interest of the *Amici Curiae***

We the undersigned submit this brief as philosophers with expertise in ethics, animal ethics, political theory, the philosophy of animal cognition and behavior, and the philosophy of biology in support of the Nonhuman Rights Project's (NhRP's) efforts to secure habeas corpus relief for the elephant named Happy. The Supreme Court, Bronx County, in *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 (Sup. Ct. 2020) ("*Breheny*"), declined to grant habeas corpus relief and order Happy's transfer to an elephant sanctuary, referencing previous decisions in the appellate courts that denied habeas relief for the NhRP's chimpanzee clients, Kiko and Tommy, namely *People ex rel Nonhuman Rights Project Inc v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*") and *Nonhuman Rights Project Inc ex rel Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) ("*Lavery II*"). Those decisions use a number of incompatible conceptions of 'person' which, when properly understood, are either philosophically inadequate or in fact compatible with Happy's personhood. The undersigned have long-standing active interests in our duties to other animals. We reject arbitrary distinctions that deny adequate protections to other animals who share with protected humans relevantly similar vulnerabilities to harms and relevantly similar interests in avoiding such harms. We submit this brief to affirm our shared interest in ensuring a more just coexistence with other animals who live in our communities. We strongly urge this Court, in keeping with the best

philosophical standards of rational judgment and ethical standards of justice, to recognize that, as a nonhuman person, Happy should be released from her current confinement and transferred to an appropriate elephant sanctuary, pursuant to habeas corpus.

## **II. Summary of the Argument**

The NhRP is challenging the lawfulness of the captivity of the elephant Happy.

As recently noted by the Supreme Court, Bronx County, the NhRP's goal is

to [change] 'the common law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.'

*Breheny*, at \*2.

To date, the courts have decided against the NhRP, although without fully addressing whether any nonhuman animal is the sort of being who can enjoy habeas corpus relief. The central issue is whether the concept of 'personhood' applies to animals like Happy. In denying habeas corpus relief to Happy the court does not contest the scientific evidence of elephant agential and psychological capacities presented by NhRP, nor the facts of the case. Instead, it references appellate court decisions that the concept of 'personhood' cannot refer to nonhuman animals.

We write as a diverse group of philosophers who share the conviction that if the concept of 'personhood' is being employed by the courts to determine whether



to extend or deny habeas corpus relief, they should employ a consistent and reasonable definition of ‘personhood’ and ‘persons.’ We believe that the previous relevant judgments of the appellate courts applied inconsistent definitions of ‘personhood.’

In this brief, we argue that there is a diversity of ways in which humans (*Homo sapiens*) are ‘persons’ and there are no non-arbitrary conceptions of ‘personhood’ that can include all humans and exclude all nonhuman animals. To do so we describe and assess the four most prominent conceptions of ‘personhood’ that can be found in the rulings of the appellate courts:

1. Species Membership. This conception of personhood is arbitrary because it picks out one level of biological taxonomic classification, species, and then confers moral worth and legal status on members of one particular species, *Homo sapiens*. Attempts to justify this approach are self-defeating because they demonstrate that it is the various criteria used to defend this choice that are actually doing the moral work. These criteria invariably exclude some humans or include some nonhuman animals. This is because our species, like every other, is the product of gradual evolutionary processes that create an array of similarities between species and an array of differences within them.

2. **Social Contract.** This conception has been misconstrued by previous Courts as endowing personhood only on members of the social contract. Instead, social contracts make citizens out of persons. The exclusion of an individual (or a species) from the contract does not strip that individual (or species) of personhood. Social contract philosophers have consistently maintained that the characteristics that persons must possess to enter into social contracts are rationality (i.e., the ability to advance their own interests) and autonomy (i.e., the capacity for self-rule or self-governance). These capacities are reasonably ascribed to elephants like Happy.
3. **Community Membership.** This conception rests on the idea that personhood has a social dimension and is importantly linked to membership in the human community. On one view, to be a person is to be embedded in social relationships of interdependency, meaning, and community. Happy clearly meets this criterion: we have made her a part of our human community of persons. On another view, to be a person requires not just social embedding, but also the possession of certain psychological capacities, such as beliefs, desires, emotions, rationality, and autonomy. Again, these capacities are reasonably ascribed to Happy. On either view, she is a member of our community.

4. Capacities. This conception, which is endorsed by the NhRP, maintains that personhood rests on having certain capacities. Autonomy is typically considered a capacity sufficient (though not necessary) for personhood. Violations of autonomy constitute a serious harm. In light of the affidavits from elephant scientists, the lower court has affirmed that Happy is autonomous. As she qualifies as an autonomous being, Happy qualifies as a person.

Each of these different conceptions supports different reasoning regarding personhood. The first, species membership, is morally weak due to its arbitrary character. The other three, when properly understood, entail that Happy can qualify as a person. On these grounds we agree with the NhRP that it is unjust to deny Happy habeas corpus relief.

### **III. Argument**

#### **1. Species Membership**

##### **1.1 About the species membership criterion for ‘personhood’**

The lower court recognizes that Happy exhibits “advanced analytic abilities akin to human beings,” that “[s]he is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty;” yet it determines that she “is not a ‘person’ entitled to the writ of habeas corpus.” *Breheny*, at \*10. In its argument, the lower court references *Lavery I*, which similarly

determined that chimpanzees are not ‘persons’ in part upon the species membership conception of personhood. By grounding its conclusions in the arguments of *Lavery I*, the lower court tacitly relies upon the species membership conception of personhood.

Historically, U.S. law, and in particular the ascription of rights and privileges, has made use of various biological categories. The biological traits and classifications that have been considered legally salient have changed significantly over time, keeping pace with both scientific and moral progress, and correcting some of the egregious errors of earlier scientific theories and political regimes. For instance, sex differences and the supposedly biological categories of race were once employed to determine who had basic legal rights, while maturity continues to inform when individuals attain various rights.

We endorse the idea that the biological sciences must inform legal practice, but we maintain that species membership alone cannot rationally be used to determine who is a person or a rights holder. The concept of ‘personhood,’ with all its moral and legal weight, is not a biological concept and cannot be meaningfully derived from the biological category *Homo sapiens*. Moreover, species are not ‘natural kinds’ with distinct essences; therefore, there is no method for determining an underlying, biologically robust, and universal ‘human nature’ upon which moral and legal rights can be thought to rest. Any attempt to specify the essential features

of ‘human nature’ either leaves out a considerable number of humans—often the most vulnerable in our society—or includes members of some other species. Finally, any attempt to justify the use of species membership (or any other biological classification) to confer personhood status, will inevitably draw on other criteria—such as the social contract, community membership, or psychological capacities—in which case it is these other criteria that are doing the moral work, rendering species membership itself irrelevant.

## **1.2 Species as a biological category**

Species is only one level of biological classification that reflects what is sometimes called the ‘Tree of Life.’ The great insight of Charles Darwin was that the differences between species do not reflect the existence of essential characteristics, but instead are the product of a gradual process of natural selection. Darwin (1859) emphasized the diversity of organic populations, due to a slow accumulation of changes producing distinct varieties within a population and, eventually, new species.

The gradualism of evolution suggests there are no species essences: no set of properties both necessary and jointly sufficient for an organism to be a member of a particular species. There are three central reasons for this:

1. There is a great deal of similarity across species because all organisms on the planet are more or less closely related to each other. It is often

the case that the more closely two species are related, the more similar they tend to be, though there are countless exceptions to this rule due to convergent evolution.

2. There tends to be a substantial degree of natural variation among organisms within a particular species—a feature of populations ‘exploited’ by natural selection.
3. Species change over time—they evolve—so even if all members of a species shared some characteristic at one time, this would probably not be true of all their descendants, and it was definitely not true of all their ancestors.

These facts about the process of evolution and the character of living organisms create a fundamental problem for scientists studying the classification of organisms, referred to as the ‘Species Problem.’ Although evolutionary theory facilitates the grouping aspect of classification, offering a principled criterion for grouping organisms together—shared ancestry—it offers no clear criteria for the level at which to rank them. Whether an ancestral grouping should be considered a variety, subspecies, species, superspecies, subgenus, or genus can be an open question. While among sexual species interbreeding has often been used to define the boundaries of species groups, this is controversial and leads to its own set of problems and counterexamples (Mishler and Brandon 1987).

When understood as a biological classification, it is difficult to see why species, or indeed any other taxonomic category (such as subspecies, genus, family, order, and so on), should bear any moral weight, let alone be used as the grounds for conferring personhood status. Like other species categories, the biological category *Homo sapiens* cannot offer a sufficiently stable or consistent foundation for some core essence universally shared by all and only human beings, which is what is typically meant by ‘human nature’ (Hull 1986). Although there are capacities or relationships that may typically be shared by the members of a particular species that are morally relevant (as we discuss in later sections), it is those capacities, and not species membership per se that is relevant.

### **1.3 Convergent evolution**

Many people believe that the more closely related to humans other animals are, the more likely they are to have ‘human-like characteristics’ that are considered relevant to personhood. This isn’t quite right. Certainly, general similarity tends to be shared by any species with its closest relatives and *Homo sapiens* is no exception. But it is a mistake to think that a human trait that most of our close relatives do not share cannot be shared with more distantly related animals. Consider bipedalism. While all primates other than humans are typically quadrupedal, we share our bipedalism with kangaroos, birds, and a number of extinct dinosaurs. This is explained through convergent evolution.

Convergent evolution identifies phenomena where distantly related species evolve similar traits, not because their shared ancestors had these traits but because their environmental challenges and ways of life are relevantly similar. A favorite example of convergence is the evolution of the camera type eye, which is now known to have evolved multiple times and is a trait that we share with very distant relatives, such as members of the order Octopoda (octopuses). Elephants are, of course, considerably more closely related to humans, so it is already more likely that they might share traits with us that are relevant to their being persons. However, as noted above, evolutionary proximity is only a suggestive indicator of greater general similarity between two species. Until we look, we cannot know whether elephants have characteristics that justify the conferral of personhood status. We need to judge individual animals, like Happy, on their own merits, informed by both the characteristics that appear to be typical of their species and what can be observed of them as individuals.

#### **1.4 Conclusions regarding species membership**

Efforts to identify a set of diagnostic traits both universal and unique to *Homo sapiens* invariably fail. Either they leave out some humans, or they include members of some other species. Using the biological category *Homo sapiens* to define ‘personhood’ and to determine who has legal status is arbitrary, and it makes little sense given what we know of evolutionary processes. Because efforts to justify using



species membership as grounds for conferring personhood invariably depend on appeals to criteria that are entirely separate and outside the realm of taxonomic classification, this suggests that species membership is, in fact, irrelevant.

The NhRP seeks to have Happy classified as a person based on the capacities she shares with other persons. If persons are defined as ‘beings who possess certain capacities,’ and humans usually possess those capacities, then being human can be used to predict with a degree of accuracy that a particular individual will also have those capacities and thereby be a person. But it is an arbitrary decision to use human species membership as a condition of personhood, and it fails to satisfy a basic requirement of justice: that we treat like cases alike. It picks out a single characteristic as the something that confers rights, without providing any reason for thinking it has any relevance to rights.

## **2. A social contract conception**

The Third Department in *Lavery I* argues that “Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of [the US] system of government. Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, ‘rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights’.” 124 A.D.3d at 151 (citations omitted).

The influential social contract theories that emerged in Europe in the 17th and 18th centuries, and which inspired the language and ideals found in the US Constitution, would disagree with this statement for at least three reasons. These reasons are: (1) not all rights depend on the existence of a social contract, (2) the social contract does not produce ‘persons,’ and (3) personhood is not conditional on bearing duties and responsibilities.

### **2.1 Not all rights depend on the existence of a social contract**

Among the most influential of social contract philosophers are Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, who maintain that all persons have ‘natural rights’ that they possess independently of their willingness or ability to take on social responsibilities (Hobbes 1651; Locke 1698; Rousseau 1762). These rights, which we possess in the state of nature, include the right to absolute freedom and liberty. Upon contracting with our fellows, we do not become ‘persons’, but rather ‘citizens’; and we do not suddenly acquire rights, but rather give up our natural rights, sometimes in exchange for civil and legal rights.

*Lavery I* advances the argument that persons are those who have rights by virtue of their capacity to bear responsibilities. They acquire those responsibilities the moment they assent to an “express or implied” social contract. The social contract, according to this line of thought, is the mechanism whereby persons take up societal duties and responsibilities, receiving rights in exchange. But this is not

how political philosophers have understood the meaning of the social contract historically or in contemporary times.

Rousseau explicitly rejected the idea that the social contract gives rights to persons, proclaiming, “Man is born free, and everywhere he is in chains” (Rousseau 1762, Book 1, Chapter 1). These chains, for Rousseau, are self-imposed, forged by ourselves when we give up our natural rights and freedoms and place ourselves under the authority of another. The social contract ‘chains’ us. We find a similar argument in Hobbes. What we acquire with a social contract, according to Hobbes, are law and morality, not rights. In fact, in the act of creating a social contract, we give up nearly all of our natural rights, save one: the right to life. And what we receive in exchange for giving up all these rights are not new rights, but rather security in the form of the protection of the sovereign.

Locke believed that we form societies to protect the institution of private property. We make a compact to leave the state of nature and form a society because we have a shared interest in protecting our property, including our own bodies. In this transition from the state of nature to the state of civil society, we gain some valuable things, including laws, the executive power needed to enforce the laws, and judges to adjudicate property disputes. But we lose our previously held natural rights, including the right to protect ourselves by any means necessary and punish those who transgress against our property.

We ought not understand the social contract, therefore, in terms of the acquisition of rights, per se. Rather, we should think about it in terms of the acquisition of a single duty: to obey the law.

## **2.2 The social contract does not produce ‘persons’**

In the philosophies of Hobbes and Rousseau, with the advent of the social contract we see the creation of an ‘artificial man’ (the sovereign or Leviathan), not a ‘person.’ This artificial man is an abstraction, since no real person could be literally composed of the rights and powers of others. Rousseau describes this ‘new person’ as a collective created only by a truly democratic social contract. Locke describes a ‘body politic’ to which contractors submit. The sole person or body created by the social contract, while important, is a mere abstraction, and by no interpretation an actual person.

The upshot of this is that social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized by the contract. Notably, the U.S. Constitution mentions the term ‘persons’ fifty-seven times, but it does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its ‘signatories.’

Social contract philosophers have been consistent about the characteristics that are necessarily possessed by persons who enter into social contracts: they are rational (i.e., capable of advancing their own interests) and autonomous (i.e., self-ruling or self-governing). Indeed, it is only because we are rational, autonomous persons that we can use these capacities to consent to another's authority over ourselves. But there is no reason to assume that only humans can meet this definition of the rational, autonomous person. Elephants possess the requisite characteristics. The Supreme Court, Bronx County, describes the elephant Happy as “an autonomous being” and “an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings.” *Breheny*, at \*10. Happy, in other words, has the qualities social contract theories recognize as belonging to persons.

It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities). Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow any being with personhood. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract,

there would be no contract at all since only persons can contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

### **2.3 Personhood is not conditional on bearing duties and responsibilities**

In *Lavery II*, the First Department claims that “nonhumans lack sufficient responsibility to have any legal standing.” 152 A.D.3d at 78. The Third Department in *Lavery I* also argued that, “unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions,” and thus cannot have legal rights. 124 A.D.3d at 152.

The NhRP has argued that an entity is a ‘person’ if she can be the subject of rights or can bear legal and societal responsibilities. The reason for this broader understanding of ‘person’ is that not all persons can be held accountable for their actions and bear societal duties. Infants, children, and those found not guilty by reason of insanity cannot be held accountable and cannot bear legal or societal duties. They are, nonetheless, persons with legal rights. Bearing responsibilities is not a prerequisite of personhood.

At issue in the case of Happy is not whether she can bear legal duties or be held legally accountable for her actions, but whether she is a person and has legal rights. Among individuals, only those who are already legally recognized as persons can have legal duties and responsibilities. Things cannot. The personhood of

elephants, therefore, cannot be conditional on bearing legal duties and responsibilities, because being legally recognized as a person is and must be logically prior to bearing legal duties and responsibilities. The writ of habeas corpus challenges the status of ‘thing’ currently ascribed to Happy. The trial court has agreed that Happy is “more than just a legal thing, or property,” *Breheny*, at \*10, just as Justice Fahey in *Nonhuman Rights Project Inc on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) (Fahey, J., concurring) found that a chimpanzee is “not merely a thing.”

#### **2.4 Conclusions regarding the social contract**

While legal duties, legal accountability, and societal responsibilities are acquired by citizens under social contracts, neither the status of citizenship nor personhood depend on the ability to bear those duties and responsibilities. Many humans who are uncontroversially legally recognized as persons and citizens cannot bear those duties and responsibilities and cannot be held legally accountable for their actions. Therefore, whether or not Happy can bear legal duties and responsibilities, or be held legally accountable, is irrelevant to her legal status as a person. Secondly, social contracts do not create the rights associated with personhood. In agreeing to a social contract, we give up our natural rights in exchange for other societal benefits. Finally, social contract philosophers have consistently maintained that social contracts do not make us persons, but rather create citizens out of existing persons.

Personhood, and the requisite possession of autonomy and rationality, is a precondition of being party to a social contract. Indeed, it is hard to imagine how it could be otherwise. The trial court agreed that Happy is rational and autonomous, and thus, under a social contract view, she qualifies as a person.

### **3. Community Membership**

#### **3.1 A community membership conception of personhood**

Noting that she is constrained by case law and legal precedent, Justice Tuitt finds in the decision of the Supreme Court, Bronx County that Happy is not a “person.” *Breheny*, at \*10. Justice Tuitt's decision references *Lavery II* concerning the legal status of the captive chimpanzees Kiko and Tommy. In that decision, the First Department finds that humans who lack the ability to acknowledge legal duties and responsibilities, such as infants and comatose individuals, are still persons because such individuals are members of “the human community,” but since Kiko and Tommy are not members of the human community, they cannot be persons. 152 A.D.3d 78.

One interpretation of 'human community' puts the exclusive emphasis on 'human,' understood as a biological category, so that 'human community' is a synonym for 'members of the species *Homo sapiens*.' This interpretation amounts to the species membership view dismissed in Section 1.



A second interpretation puts the emphasis on 'community,' referring to membership in a community of which humans are members. On this view, personhood is not just grounded in discrete traits or capacities of individuals. Rather, personhood is something that we achieve through development and recognition within a community of individuals. This idea is captured in the Ubuntu philosophy of personhood stated as “I am because we are,” in which personhood arises from participating in the social life of a community of persons, or, as stated in a traditional Zulu saying, “a person is a person through other people” (Eze 2010: 94).

There are different ways of interpreting the idea of membership in a community of persons. We discuss two such views below—which we call Wide and Narrow—and show that on both of them, Happy should be seen as a member of a community of persons.

### **3.2 The Wide view**

According to the Wide view, someone is a member of a community of persons because they are embedded in interpersonal webs of interdependency, trust, communication, and normative responsiveness (i.e., our behavior is informed by various norms). Persons do not exist as independent islands, floating free of each other.

On this view, children and individuals with cognitive disabilities are clearly persons even if they cannot enter into contracts or bear certain legal responsibilities.

The fact that they have guardians for certain legal purposes, far from disqualifying them from personhood, confirms that they are members of these webs of social connection. We all are dependent on others at some points in our lives, and interdependent at all times. Infants depend on their parents and caretakers to feed them, teach them a language, and help them to see the world from others' perspectives. Adolescents and some individuals with cognitive disabilities may not have all of the capacities of mature, developmentally typical adults, and may not have all of the moral duties and citizenship responsibilities that come with them, but they are embedded in the web of interpersonal relationships on which personhood rests.

The Wide view recognizes the psychological reality that our individual capacities and identities are formed in social interaction (and, by implication, it recognizes the profound harm caused by unlawful detention and denial of society). It also avoids the exclusionary tendencies of conceptions of personhood that require high thresholds of individual capacity. The Wide view has been endorsed in particular by philosophers of disability, who emphasize that individuals with cognitive disabilities, like everyone else, are persons because of their embeddedness in social relations (Kittay 2005; Silvers and Francis 2015; Arneil and Hirschman 2016). Personhood rights help to ensure that individuals are able to form and

maintain appropriate social bonds, while protecting them from the arbitrary power of others to detain, confine, neglect, or isolate them.

Happy is embedded in interpersonal webs of dependency, meaning, and care with other human persons, and so is part of a human community. When she was captured as an infant, humans denied Happy her membership in an elephant community. She has lived at the Bronx Zoo for four decades, and is a member of a human community and embedded in social relationships with humans, and so she, too, should be protected when others exercise arbitrary power over her. Happy remains a member of a community with humans because, however inadequate her care, she is dependent on her keepers for food, water and shelter, and, as evidenced by the NhRP lawsuit and this brief, there are humans who recognize her as part of the community. The fact that Happy is simultaneously the subject of instrumentalization and the subject of legal advocacy shows that her membership is disputed. But this has also been true for many humans seeking habeas corpus relief. Indeed, one of the functions of habeas corpus is to protect members of the community who are being treated as things.

In short, the Wide view accepts the link between personhood and community, but denies that community membership is exclusive to human beings, not least because we have in fact brought nonhuman individuals, such as Happy, into our community. Membership in a human community is available to any individual who

is embedded in the relevant relationships of interdependency and who would suffer if excluded from those relationships.

### **3.3 The Narrow view**

One could adopt a less inclusive conception of community. On the Narrow conception, 'personhood-as-community-membership' requires persons to have traits that are more than sentience or vulnerability to harm, but less than the capacity to bear legal responsibilities. These traits may be biological or psychological.

Biological traits are exemplified by such properties or characteristics as having forty-six chromosomes or having human parents. This would be a return to the view that only members of the species *Homo sapiens* qualify for personhood, and, as argued in Section 1, restriction of personhood on the basis of species is arbitrary and unsupported by the biological sciences.

Psychological traits are mental capacities: having beliefs and desires, for example, or emotions, autonomy, and rationality. We will have more to say about such capacities in Section 4, where we will discuss the psychological capacities sufficient for personhood.

The key point for our purposes is that, as will be shown in Section 4, this Narrow view will include Happy as a person. She is clearly the kind of psychological being found in our community. As we note again, in her decision Justice Tuitt “recognizes that Happy is an extraordinary animal with complex cognitive abilities,

an intelligent being with advanced analytic abilities akin to human beings.” *Breheny*, at \*10. While Happy is not a member of the species *Homo sapiens*, she is clearly relevantly similar to humans in the kind of psychological being she is, as it is reasonable to ascribe to her such psychological traits as beliefs, rationality, desires, emotions of care, as well as the capacity for autonomy.

### **3.4 Conclusions regarding community membership**

The idea that personhood has a social dimension, and is importantly linked to membership in the human community, is familiar and plausible. However, we cannot simply assume that it excludes Happy.

If one accepts either the Wide or Narrow view of human community, Happy is a person. On the Wide view, to be a person is to be embedded in social relationships of interdependency, meaning, and community. Happy clearly meets this criterion: we have made Happy part of our human community of persons by embedding her within relations of care and intersubjective response, and rendering her vulnerable to forms of exclusion from this community. On the Narrow view, to be a person requires not just social embedding, but also the possession of certain basic, and familiar psychological capacities, such as beliefs, desires, emotions, rationality, and autonomy. It is reasonable to think that Happy has these capacities.

On either the Wide or Narrow view, Happy is a member of our community, and so is owed protection from the arbitrary power of others to define her social conditions.

#### **4. Capacities**

The decision of the Supreme Court, Bronx County does not dispute the claims made by elephant experts about the cognitive, affective, or behavioral capacities of elephants, whether free-living or captive. As we have already noted, Justice Tuitt also affirms that Happy is “an intelligent, autonomous being.” *Breheny*, at \*10. Citing *Lavery I* and *Lavery II*, concerning the legal status of the captive chimpanzees Kiko and Tommy, Justice Tuitt notes that she is bound by the ruling that “animals are not ‘persons.’” *Breheny* at \*10. Notwithstanding these previous rulings, it remains a fundamental claim made by the NhRP that the capacity for autonomy is sufficient for personhood. To defend the NhRP’s claim about autonomy, we provide a brief analysis of personhood that is consistent and ensures that all those human beings commonly regarded as persons remain so, but does not introduce ad hoc exclusions of other beings who also meet the criteria. If elephants possess the same relevant capacities that qualify humans as persons, then the reasonable conclusion should be that elephants are also persons.

##### **4.1 Conditions of personhood**

The philosopher John Locke described what it is to be a person this way: “a thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing in different times and places; which it does only by that consciousness which is inseparable from thinking and...essential to it” (Locke 1689, II. XXVII .9, p.280). Though Locke’s view is still influential, contemporary philosophical discussions of personhood tend to provide a more explicit breakdown of core capacities. Of those commonly listed, we find reference to autonomy (minimally, to act voluntarily or to control our behavior in light of our preferences or goals), emotions, linguistic mastery, sentience (the capacity for conscious awareness, sensation, pleasure, and pain), rationality, reflective self-awareness (that is, being aware of ourselves as ‘selves’), and reciprocity (e.g., Andrews 2016; DeGrazia 2007; Dennett 1988; Rowlands 2019).

There is no disputing the personhood of individuals who possess all of these capacities. However, there is no way to hold that possessing all of these capacities is necessary for personhood without excluding some humans who lack one or more of them. Furthermore, most of these capacities develop gradually in humans, so possession of them is not a clear-cut matter. Instead, to be a person one must have multiple personhood-making capacities, although which ones cannot be non-arbitrarily specified. Conceiving personhood in this way means that there is no

defensible minimum threshold of capacities that can definitively draw a line separating persons from near-persons or non-persons (DeGrazia 2007).

As noted earlier, the lower court ruling acknowledges the affidavits submitted by a number of respected elephant experts in support of the view that elephants share many relevantly similar characteristics with humans regarded as persons. Examples include self-awareness, with evidence from a mirror self-recognition study (e.g., Bates and Byrne Aff.). Importantly, of the three elephants involved in that study, Happy was the research subject in the experiment who demonstrated mirror self-recognition (Plotnik, de Waal, and Reiss 2006).

Evidence that elephants may have strong emotional bonds is found in their empathetic responses to others who are struggling or in distress. Such responses demonstrate expectations of normal elephant behavior, a recognition of another's need, and an understanding of what to do to meet those needs. Interestingly, their behavior markedly changes around others who have died (their vocalizations and movements are noticeably subdued), prompting experts to talk of "mourning" (e.g., Poole Aff.). Further evidence of emotional bonds includes having preferred community members or "friends" (de Silva, Ranjeewa, and Kryazhimskiy 2011). The elephant experts also agree that Asian elephants can engage in means-end reasoning to solve problems and cooperate to achieve a beneficial goal (evidence of both a level of rationality and intentional planning). These observations point to the



presence of goals, desires to satisfy goals, and preferences. That Asian elephants can control their behavior is demonstrated by a cooperative experiment referenced in the elephant experts' affidavits (Plotnik et al 2011). Such experimental results suggest a capacity for self-control and voluntary behavior. Given the evidence that elephants are autonomous, emotional, self-aware, sentient beings who have beliefs and desires, elephants fulfill the requirements for personhood on a capacities conception.

#### **4.2 Personhood and autonomy**

The NhRP's case is based on one particular capacity—autonomy—and this is for good reason. For one, it is a capacity that philosophers have historically associated with personhood. A traditional conception of personhood is framed in terms of autonomy where that capacity requires a great deal of cognitive sophistication. For example, it requires the ability to abstractly consider principles of action and judge them according to prudential values or rationality (see Johnson and Cureton 2017). This traditional conception has been criticized given that few humans engage in abstract reflection before every action, and yet we are still acting autonomously (as opposed to acting under the influence of a mind-altering substance or because of a compulsion). On the traditional view, humans would be rarely autonomous, and young children and some humans with cognitive disabilities would fail to be autonomous actors, despite appearances to the contrary.

To address this kind of worry, the bioethicist and philosopher Tom Beauchamp, together with the comparative psychologist Victoria Wobber, have suggested that an act is autonomous if an individual self-initiates an “action that is (1) intentional, (2) adequately informed...and (3) free of controlling influences” (Beauchamp and Wobber 2014). As the lower court has apparently affirmed by not contesting the claims in the affidavits provided by elephant experts, elephants such as Happy can act intentionally (they can respond intelligently to problems and act to achieve goals), and so they can satisfy (1). The elephant experts also note that elephants are born with “35% of their adult [brain] weight” (e.g., Moss Aff.). Coupled with a “[d]elayed development” (e.g., Moss Aff.), this shows the importance of learning to elephants’ flourishing in adulthood. They, like the chimpanzees on which Beauchamp and Wobber focus, must learn how to navigate complex physical and social worlds, and so satisfy (2). Whether elephants act free of controlling influences will depend on their environment and the options available to them, but there is no doubt that elephants can so act when they find themselves in contexts without autonomy-depriving controlling influences.

A second reason to focus on autonomy is that it is a cluster concept. As highlighted by Beauchamp and Wobber, it brings together capacities to act intentionally (which assumes capacities to form goals and direct one’s behavior) and to be adequately informed (which assumes capacities to learn, to make inferences,

and acquire knowledge through rational processes), each of which requires sentience. This means that an autonomous capacity requires other personhood capacities, namely sentience and rationality. So understood, evidence of autonomy is sufficient evidence of personhood. Thus, elephants qualify as persons on autonomy grounds alone.

### **4.3 Why elephant autonomy matters**

A final reason for the NhRP's focus on autonomy is the concept's direct connection to ethics. Violating someone's autonomy is widely regarded as a harm. After all, autonomous individuals have a basic interest in exercising their autonomy, and to violate it is to violate a basic interest (Beauchamp and Childress 2001). This brings us to another point of contention in the cases involving the chimpanzees Kiko and Tommy, as noted by Justice Tuitt. The appellate court in *Lavery II*, relying on the Fourth Department in *Nonhuman Rights Project Inc ex rel Kiko v. Presti*, 125 A.D.3d 1334 (4th Dept. 2015), ruled that habeas corpus relief was unavailable to Kiko or Tommy because the NhRP is not seeking their release from captivity but rather their relocation to a suitable sanctuary. 152 A.D.3d at 79. Justice Tuitt seems to disagree with this way of thinking about the options on the table with regards to Happy. She uses terms like "solitary, lonely one-acre exhibit" to describe Happy's current housing in contrast to "an elephant sanctuary on a 2300 acre lot." *Breheny*,

at \*10. This is a contrast in both social opportunities and space for movement and exploration.

Our discussion of autonomy provides a way to distinguish Happy's current captive conditions from those afforded her in a sanctuary. As noted by Justice Tuitt, Happy is currently housed alone in a relatively small space. An option is to have her moved to an appropriate elephant sanctuary. Should Happy be relocated to such a sanctuary, several things change: she will no longer be housed alone, she will have liberty to roam, explore, and forage, she will have the opportunity to develop and exercise typical elephant social capacities, all the while expanding her goals and preferences to reflect the greater opportunities afforded her. In Happy's current conditions of captivity, her interests in acting autonomously are violated. An appropriate sanctuary promises not only much greater liberty, but a setting where her autonomous capacities can be better respected (Stewart Aff.).

#### **4.4 Conclusions regarding capacities**

The NhRP argues that elephants are persons under a capacities approach to the concept of personhood. This reflects their view that this concept of personhood is already enshrined in law and that, as it stands, it applies to elephants just as it does to humans. Affidavits by a number of eminent elephant experts have attested to the fact that elephants possess the relevant capacities to qualify as persons, and the lower court has not disputed these claims. Importantly, a capacities account of personhood

makes no reference to species identity. It is no coincidence that contemporary philosophers writing on personhood using a capacities conception are open to the existence of nonhuman persons (Andrews 2016; Rowlands 2019). If elephants possess the relevant person-making capacities, whatever they might be, then logical consistency requires that they too qualify as persons. Given our discussion above, we think that there is only one inescapable conclusion: that on a capacities conception of personhood, Happy qualifies as a person.

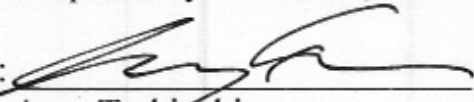
#### **IV. Conclusion**

In rejecting habeas relief for Happy, an elephant, the lower court referenced previous decisions concerning a different nonhuman species, chimpanzees. As we have argued, of the four conceptions of personhood contained in those previous decisions, species membership is arbitrary and must be rejected, while the other three imply that Happy is a person. This Court should recognize that when criteria for personhood are reasonable and consistently applied, Happy satisfies them and is entitled to habeas corpus relief.

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Respectfully submitted,

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## **PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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