

COURT OF APPEALS OF THE STATE OF NEW YORK

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The Nonhuman Rights Project, Inc., : APL 2021-00087
on behalf of Happy,

Petitioner-Appellant;

-against- : Bronx County
: Index No. 260441/19

James J. Breheny, in his official capacity as :
Executive Vice President and General Director
of Zoos and Aquariums of the Wildlife
Conservations Society and Director of the
Bronx Zoo, and Wildlife Conservation
Society,

Respondents-Respondents;

-----X

**NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER-APPELLANT**

PLEASE TAKE NOTICE that, upon the annexed affirmation of Marc Greco, dated April 7, 2022, and upon the accompanying proposed *amicus curiae* brief, on behalf of the Animal Legal Defense Fund, Marc Greco will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, on April 18, 2022, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York granting the Animal Legal Defense Fund leave to file the accompanying brief as *amicus curiae* in support of

Petitioner-Appellant in the above-entitled proceeding, and for such other and further relief as the Court may deem just and proper.

Dated: April 7, 2022
New York, New York

Respectfully submitted,



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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, counsel for proposed *amicus curiae* the Animal Legal Defense Fund certifies that the Animal Legal Defense Fund is a nonprofit membership organization that has no corporate parents, subsidiaries, or affiliates.

Dated: April 7, 2022
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COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents-Respondents :

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**AFFIRMATION OF MARC GRECO IN SUPPORT OF
MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE***

Marc Greco, an attorney admitted to practice in the courts of the State of New York, and not a party to this proceeding, hereby affirms the following to be true under penalty of perjury:

1. I am an associate at the law firm of Fenwick & West LLP, counsel for proposed *amicus curiae* the Animal Legal Defense Fund (“ALDF”) in the above-captioned proceeding. I am familiar with the facts and circumstances set forth herein. I submit this affirmation in support of ALDF’s motion for leave to appear

as *amicus curiae* in support of Petitioner-Appellant in the above-captioned proceeding.

2. Submitted herewith is a true and accurate copy of the *amicus curiae* brief ALDF seeks leave to submit to the Court.

The Movant's Identity and Interest

3. ALDF is the preeminent legal advocacy organization for animals in the United States. ALDF's mission is to protect the lives and advance the interests of animals through the legal system by various means, such as litigation and legislation. In furtherance of its mission, ALDF regularly files state and federal lawsuits seeking to enjoin violations of animal protection laws in situations where the government has not enforced the law due to resource or other constraints. ALDF also has brought actions directly on behalf of animal-plaintiffs to vindicate their legal rights in manners that promote their legal interests.

4. ALDF seeks leave to file the proposed *amicus curiae* brief submitted herewith because it has a strong interest in protecting animals through lawsuits brought by private parties in civil court to ensure enforcement of animal protection laws. That interest is directly implicated in this appeal by the legal questions of whether animals' legal rights can ever be privately enforced, and whether *habeas corpus* relief specifically is available to animals such as Happy. Here, Happy's life, welfare, and interests turn on the availability of legal relief under *habeas*

corpus. Thus, ALDF has a strong interest in appearing as *amicus curiae* in this appeal because the key question of law is of great importance to ALDF's mission to protect the lives and advance the interests of animals.

Nonparticipation of Parties

5. No party or its counsel contributed content to this brief or otherwise participated in the brief's preparation.

6. No party or its counsel contributed money intended to fund the preparation or submission of this brief.

7. No person or entity other than movant or its counsel contributed money intended to fund preparation or submission of this brief.

Basis for *Amicus Curiae* Relief

8. Pursuant to Rule 500.23(a)(4)(i) of the Rules of Practice of the Court of Appeals of the State of New York, the Court should grant movant ALDF leave to appear as *amicus curiae* because ALDF's proposed *amicus* brief identifies law or arguments that might otherwise escape the Court's attention.

9. In the first part of the brief, ALDF construes the meaning of legal personhood, which is a pivotal concept at issue on this appeal—and one subject to much confusion. In particular, ALDF explains that a legal person includes any entity with legal rights, such as animals who have legal rights under some statutes

such as the animal cruelty statute. Happy therefore already qualifies as a legal person with some legal rights.

10. ALDF further explains how an entity may be simultaneously a legal person in some ways, and property in other ways. It provides this explanation with a useful illustration in which a federal judge granted an application that gave a community of hippopotamuses the legal authority to collect evidence in the United States to support their lawsuit in Colombia where they are plaintiffs.

11. In the second part of the brief, ALDF explains that Happy's status as a legal person with rights under the state's animal cruelty statute provides additional support for Happy's *habeas* claim. ALDF provides an analysis explaining that keeping Happy in solitary confinement causes her unjustified suffering in violation of her statutory rights under the animal cruelty law.

12. Ultimately, ALDF's argument complements the arguments of Petitioner-Appellant by identifying an additional basis for finding that Happy is a legal person entitled to *habeas* relief.

WHEREFORE, for the reasons set forth herein, ALDF respectfully requests that the Court grant this motion in all respects, grant ALDF leave to file the attached *amicus* brief in this appeal, and award such other and further relief as the Court may deem just and proper.

Affirmed: April 7, 2022
New York, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marc Greco". The signature is fluid and cursive, with the first name "Marc" being more prominent than the last name "Greco".

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Court of Appeals
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State of New York

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,

—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.

**PROPOSED BRIEF OF *AMICUS CURIAE* ANIMAL LEGAL
DEFENSE FUND IN SUPPORT OF PETITIONER-APPELLANT**

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Date Completed: April 7, 2022

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 500.1(f) of the Rules of Practice of the Court of Appeals of New York, Animal Legal Defense Fund states that it is a non-profit membership organization, with no parents, subsidiaries, or affiliates.

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Animal Legal Defense Fund states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

STATEMENT OF *AMICUS CURIAE*

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, Animal Legal Defense Fund states that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner; no party or party's counsel contributed money that was intended to fund preparation or submission of the brief; and no person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

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INTEREST OF AMICUS

The Animal Legal Defense Fund (“ALDF”) is the nation’s preeminent legal advocacy organization for animals. ALDF’s mission is to protect the lives and advance the interests of animals through the legal system. It pursues this mission through a variety of means, including litigation, legislation, education, and public outreach.

ALDF has a strong interest in promoting the justiciability of animal protection lawsuits brought by private parties in civil court. In connection with its advocacy, ALDF often files state and federal lawsuits seeking to enjoin violations of animal protection laws when government agencies are unwilling to enforce the law themselves. In these cases, defendants typically challenge the human (or corporate) plaintiff’s standing, or the availability of a private right of action to enjoin violation of the animal protection laws at issue.

Two examples illustrate situations in other states where cases involving animal cruelty were dismissed or never brought due to lack of standing or right of action. In one case, a court dismissed a lawsuit filed by ALDF on behalf of the Society for the Prevention of Cruelty to Animals seeking to enjoin a business’s practice of leaving unprofitable, infirm calves to slowly die in a pile of other dying animals without providing any veterinary treatment or euthanasia. The grounds for

dismissing that lawsuit was the lack of a private right of action. In a second case, ALDF sought to bring a lawsuit to enjoin a facility from continuing to kill wolf-dog hybrids in violation of the state's animal cruelty law, and from selling the wolf-dogs' pelts in violation of a federal law that prohibits the same. However, there was no apparent right of action appropriate to enjoin violation of either law, and neither federal nor state law enforcement authorities took any action against the facility despite their knowledge of the situation. ALDF has investigated animal cruelty and filed lawsuits in New York, and has encountered the same challenges regarding human or corporate plaintiff standing and the availability of a private right of action to enjoin cruelty violations.

Recognition that animals are legal persons with respect to some laws, such as animal cruelty and habeas corpus—i.e., that animals have legal rights under those laws and a judicially cognizable interest in enforcing those rights—would cure this manifest injustice. As such, the Animal Legal Defense Fund has brought cases directly on behalf of animal plaintiffs in other jurisdictions. One of these cases involves a negligence per se lawsuit filed on behalf of Justice, a horse in need of lifelong costs of care due to severe animal neglect that he suffered, which is currently before the Oregon Court of Appeals. *See Justice v. Vercher*, Appeal No. A169933 (Or. Ct. App. filed Jan. 22, 2019). Another of these cases involves a successful

application filed on behalf of the Community of Hippopotamuses Living in the Magdalena River—who are litigants in a Colombian lawsuit that seeks to compel sterilization instead of slaughter to manage their population—to exercise their rights as “interested persons” under 28 U.S.C. § 1782 to compel the testimony of two experts residing in the United States. *See Cmty. of Hippopotamuses Living in the Magdalena River*, Case No. 1:21-mc-00023 (S.D. Ohio Oct. 15, 2021).

ARGUMENT

This Court should recognize that Happy is a person for purposes of habeas corpus. Happy is already a legal person with the right to be free from unjustified suffering under the state’s animal cruelty statute (N.Y. Agric. & Mkts. Law §§ 350 & 353), and that fact supports finding her to be a person for purposes of habeas corpus. Moreover, the Bronx Zoo (“Zoo”) is violating Happy’s right to be free from cruelty by keeping her in solitary confinement. Under these circumstances, the Zoo is not only violating Happy’s common law right to bodily liberty but is also violating a statutory right to be free from cruelty. Thus, this Court should grant her writ of habeas corpus because Happy is a legal person whose confinement is unlawful.

I. HAPPY IS A LEGAL PERSON WITH RESPECT TO HER STATUTORY RIGHT TO BE FREE FROM ANIMAL CRUELTY.

“Legal person” simply describes any entity that has legal rights or duties. Such an entity may be a “limited” person with only some legal rights, or may be a “whole”

person with the same rights usually assigned to a human being. Under this framework, animals already qualify as legal persons with regard to the animal cruelty statute because the cruelty statute exists to protect animals rather than humans.

A. ANY ENTITY WITH LEGAL RIGHTS QUALIFIES AS A LEGAL PERSON WITH RESPECT TO THOSE RIGHTS.

The word “person” can take on different meanings depending on the context and background assumptions made by those using the term. This variability in meaning can create confusion and talking at cross-purposes about the subject. *See* Ngaire Naffine, *Legal Persons as Abstractions: The Extrapolation of Persons from the Male Case*, in *Legal Personhood: Animals, Artificial Intelligence and the Unborn* 15 (Visa A.J. Kurki & Tomasz Pietrzykowski eds., 2017). In a casual conversation, for example, “person” is often presumed to be synonymous with “human.” By contrast, the term clearly includes an array of nonhuman entities when used in a legal context. *See, e.g.*, N.Y. Comp. Codes R. & Regs. Tit. 10, § 14-1.22 (definition of “person” for purpose of food service regulations includes an “individual, firm, estate, partnership, company, corporation, trustee, association or any public or private entity”). However, participants in legal conversations sometimes reflexively presume that being a “person” refers to possessing the *whole* collection of rights typically associated with human persons, such as the right to vote

and other civil liberties. See Pet’r’s Br. at 17, *Matter of Nonhuman Rights Project, Inc. v. Breheny*, APL 2021-00087 (N.Y. filed July 2, 2021) [hereinafter “NhRP Brief”] (referring to remarks at an oral argument in the appeal below in this case that recognizing Happy as a person for purposes of habeas corpus would imply that she has the right to vote).

Presumptions that equate being a person with being a human are incorrect because “person” is a legal term that simply describes *any* entity with at least some legally protected rights. In his classic treatise on jurisprudence, John Salmond observed that “a person is any being whom the law regards as capable of rights or duties . . . whether a human being or not.” Sir John William Salmond, *Salmond on Jurisprudence* § 61 (P.J. Fitzgerald ed., 12th ed. 1966). Bryant Smith, in his classic treatment of legal personhood, similarly observed that “[t]o confer legal rights or to impose legal duties . . . is to confer legal personality.” Bryant Smith, *Legal Personality*, 37 *YALE L.J.* 283, 283 (1928).

It is possible to be a legal person in a limited sense without the whole array of rights usually associated with being a human person: “where there is a legal right or duty . . . so there is a legal person, though if the rights are few, the person is a weak one.” Naffine, *supra*, at 17 (citing Richard Tur, *Persons and Personalities: A Contemporary Inquiry* (Arthur Peacocke & Grant Gillett eds., 1987)). Thus,

different types of persons may have different collections of rights: “[i]t follows that we can be different legal persons, have different legal characters, according to the way we are afforded rights and duties in different relations and contexts.” *Id.*; see also Richard Tur, *Persons and Personalities: A Contemporary Inquiry* (Arthur Peacocke & Grant Gillett eds., 1987) (“[T]he concept of legal personality . . . is an empty slot that can be filled by anything that can have rights or duties.”). In addition to the examples provided in the briefing of Petitioner-Appellant, see, e.g., NhRP Brief at 2, 20, corporations also exemplify this concept of limited personhood because they lack rights that humans usually possess, like the right to vote and the right to be free from arbitrary termination, see N.Y. Bus. Corp. Law § 1001(b) (authorizing shareholders to dissolve a corporation by a simple majority vote).

Furthermore, an entity may be both a legal person—with limited rights—and property. The law regularly “blend[s] the two concepts of personality and property,” resulting in “a continuum” with whole personhood on one end and utter thinghood on the other. Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* 47 (2009). Margaret Davies concurs that “the distinction between persons and property . . . is not a bright line, but is rather contextual and flexible.” Margaret Davies, *Property: Meanings, Histories, Theories* 80 (2008). Thus, “an entity can simultaneously be a legal person for some purposes and a

nonperson for others.” Visa A.J. Kurki, *Why Things Can Hold Rights: Reconceptualizing the Legal Person*, in *Legal Personhood*, *supra*, at 85. Corporations exemplify this dual status because they qualify both as legal persons and as property that can be bought and sold.

A recent federal district court order illustrates how animals can qualify as limited persons with regard to only some legal rights. In *Community of Hippopotamuses Living in the Magdalena River v. Ministerio de Ambiente y Desarrollo*, the Southern District of Ohio recognized the legal right of hippopotamuses to compel two witnesses in the United States to testify in a lawsuit in Colombia because the hippos qualified as “interested person[s]” under 28 U.S.C. § 1782(a).. No. 1:21-mc-23, 2021 WL 5025353 (S.D. Ohio Oct. 15, 2021). The hippos themselves are the litigants in Colombia where they contend via their attorney that their population should be managed through sterilization rather than slaughter. *See Ex Parte Appl.* at 2-3, *Cmty. of Hippopotamuses*, Case No. 1:21-mc-00023, ECF No. 1. The hippos sought the testimony of hippo-sterilization experts in the United States under a federal statute that allows “any interested person” to apply for an order compelling testimony or document production for use in a foreign proceeding. 28 U.S.C. § 1782. To invoke section 1782, the applicant must show—and the court must find—that the applicant qualifies as an interested

person. *Id.*; *Chubb Ins. Co. of Eur. SE v. Zurich Am. Ins. Co.*, No. 1:09-MC-0116, 2010 WL 411323, at *6 (N.D. Ohio Jan. 28, 2010) (citing *Schmitz v. Bernstein, Liebhard, & Lifshitz, LLP*, 376 F.3d 79, 82–83 (2d Cir. 2004)). Although the order did not include an analysis, it presumably followed U.S. Supreme Court precedent holding that a litigant in a foreign proceeding “no doubt” qualifies as an interested person. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004). Thus, the order illustrates both that (1) animals may qualify as persons capable of exercising some legal rights, and (2) the status of being a person in a limited sense does not transform animals into “whole” persons possessing the same rights as an adult human.

B. HAPPY IS A LEGAL PERSON WITH RESPECT TO THE ANIMAL CRUELTY STATUTE BECAUSE SHE HAS A LEGAL RIGHT NOT TO BE TREATED CRUELLY IN VIOLATION OF THAT LAW.

In support of its argument that Happy is a person with a right to bodily liberty protected by habeas corpus, NhRP highlights that some animals, including Happy, are already legal persons because they enjoy legal rights as beneficiaries under New York’s pet trust statute. NhRP Brief at 20 (citing N.Y. Est. Powers & Trusts Law § 7-8.1). Additionally, this Court should consider that animals have legal rights—and therefore also qualify as legal persons—with respect to this state’s animal cruelty statute. *See* N.Y. Agric. & Mkts. Law § 353.

Whether animals themselves bear legal rights under the cruelty statute—and therefore qualify as legal persons by implication—is fundamentally a question of statutory construction. See *Matter of Adirondack Wild: Friends of the Forest Preserve v. N.Y. State Adirondack Park Agency*, 34 N.Y.3d 184, 191 (2019). The foundational animal cruelty provision resides in the New York Agriculture and Markets Law, which generally prohibits “any act of cruelty to any animal” with various exemptions that are not germane to this case. See N.Y. Agric. & Mkts. Law § 353. In turn, “cruelty” includes “every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted.” *Id.* § 350.

The principal design of the cruelty statute is to protect animals themselves rather than to protect the interests of the animals’ owners or other humans. This design is self-evident in the cruelty standard, which applies to any act that causes unjustifiable pain or suffering to an animal regardless of whether there is any incidental harm to some human. See N.Y. Agric. & Mkts. Law § 353. In line with this logic, the New York County Supreme Court espoused “New York’s long-standing public policy, under both statutory and case law, to broadly protect all animals from unjustified abuse.” *People v. Garcia*, 777 N.Y.S.2d 846, 852 (Sup. Ct. 2004); see also *State v. Hess*, 273 Or. App. 26 (2015) (adopting the holding of an Oregon Supreme Court opinion that Oregon’s animal cruelty law is intended to

“protect[] individual animals themselves from suffering” despite the fact that “ early animal cruelty legislation may have been directed at protecting animals as property of their owners or as a means of promoting public morality”) quoting *State v. Nix*, 355 Or. 777, 798-99 (2014))).

Legal commentary supports the inference that protecting animals from cruelty constitutes a grant of legal rights to animals. McKinney’s practice commentaries characterize “[t]he concept of ‘unjustifiable’” in this state’s animal cruelty statute as “the ‘line in the sand’ where human property rights end and inherent animal rights begin.” Jed L. Painter, *Practice Commentaries*, McKinney’s Consolidated Laws of New York, Agric. & Mkts. Law § 353. Constitutional scholar Cass Sunstein provides similar insight, stating “it is entirely clear that animals have legal rights, at least of a certain kind.” Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1335 (2000). Courts in the United States have recognized that animals possess some legal rights. *See, e.g., Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (“Animals have many legal rights, protected under both federal and state laws.”). Similarly, the Supreme Court of India explained that animal cruelty laws “cast not only duties on human beings, but also confer corresponding rights on animals.” *Animal Welfare Board of India v. A. Nagaraja &*

Ors., MANU/SC/0426/2014 ¶ 76 (Supreme Court of India, July 5, 2014);¹ *see also id.* ¶¶ 27, 29, 30, 32, 60, 64, 71.

II. THE ZOO'S VIOLATIONS OF HAPPY'S RIGHTS UNDER THE ANIMAL CRUELTY STATUTE PROVIDE ADDITIONAL SUPPORT FOR HER HABEAS CORPUS CASE.

Happy being a legal person with regard to the animal cruelty statute supports her entitlement to habeas corpus relief in two ways. First, the fact that she is already a legal person under the cruelty statute supports finding her to be a legal person with regard to habeas corpus. Second, the record in this case indicates that the Zoo is violating the animal cruelty statute by needlessly causing Happy to live in solitary confinement. The Zoo's violation of Happy's legal rights under the cruelty statute provides an additional basis to grant her habeas corpus petition.

A. HAPPY'S STATUS AS A PERSON UNDER THE ANIMAL CRUELTY STATUTE SUPPORTS HER STATUS AS A PERSON FOR PURPOSES OF HABEAS CORPUS.

NhRP contends that Happy is a person with a common law right to bodily liberty protected by habeas corpus. It supports this argument in part by emphasizing her autonomy, extraordinary cognitive capacity, and her status as a pet trust beneficiary. *See* NhRP Brief at 17-21. In addition to these points, this Court can refer

¹ *Available at* <https://indiankanoon.org/doc/39696860/> (last accessed Apr. 4, 2022).

to Happy’s status as a legal person under the animal cruelty statute—as explained in the previous section, *see supra* § I.B—to support the conclusion that she is a person with regard to habeas corpus. Indeed, it is well established that common law courts can, and often do, refer to statutes “as an appropriate and seminal source of public policy.” *Reno v. D’Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

B. HAPPY’S SOLITARY CONFINEMENT VIOLATES HER RIGHTS UNDER THE CRUELTY STATUTE, WHICH PROVIDES AN ADDITIONAL BASIS TO GRANT HER HABEAS CORPUS PETITION.

NhRP iterates that this is a case about Happy’s common law right to bodily liberty and is not a “welfare” case. (A-48 to 49, para. 59.) NhRP’s argument that this Court should recognize Happy’s common law right to bodily liberty for purposes of habeas corpus is persuasive independent of any interplay between habeas corpus jurisprudence and the animal cruelty statute. Nonetheless, the fact that Happy’s solitary confinement appears to violate her rights under the cruelty statute supports her need for a writ of habeas corpus and provides a narrow additional ground to rule in her favor. This fact also dismantles one of the Zoo’s key arguments that its treatment of Happy is lawful. (Zoo’s Opp. Brief, 45-46).

The animal cruelty statute prohibits “cruelty,” which is in turn defined to include “every act, omission, or neglect, whereby unjustifiable physical pain,

suffering, or death is caused or permitted.” N.Y. Agric. & Mkts. Law §§ 350 & 353. This statutory language broadly protects animals from omissions and neglect that cause or permit unjustifiable suffering. Its broad proscription is not limited to only malicious or intentional acts that cause physical injury. *See id.* Whether an animal is experiencing unjustified suffering due to neglect is a question of fact based on the circumstances. *See People v. Curcio*, 874 N.Y.S.2d 723, 729 (Crim. Ct. 2008); *see also People v. Voelker*, 658 N.Y.S.2d 180, 183 (Crim. Ct. 1997).

In *Kuehl v. Sellner*, a federal district court found after trial that a zoo keeping a social primate in solitary confinement constituted an illegal “harassment” under the Endangered Species Act (“ESA”). 161 F. Supp. 3d 678, 710 (N.D. Iowa 2016), *aff’d*, 887 F.3d 845 (8th Cir. 2018). The standard for “harass[ment]” under the ESA is “an intentional or negligent act or omission which creates a likelihood of injury to wildlife”, which is similar to New York law that defines as cruelty “every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted.” *Kuehl*, 161 F. Supp. 3d at 709, *quoting* 50 C.F.R. § 17.3; N.Y. Agric. & Mkts. Law §§ 350 & 353. In *Kuehl*, the plaintiffs sued a zoo under the ESA for keeping an endangered lemur named Lucy in solitary confinement, among other practices. *Id.* at 710-712. According to credible expert testimony on which the *Kuehl* court relied, “isolation [is] extremely harmful” because lemurs are “highly

developed animals” with “advanced cognitive abilities” who “never live alone.” 161 F. Supp. 3d at 710. Even though Lucy could see two other lemurs from her enclosure, the court found that “keeping [her] in a small cage without the opportunity to socialize with other lemurs *causes [her] to suffer*” and therefore violated the ESA. *Id.* at 710-11 (emphasis added). The Eighth Circuit affirmed that decision. *Kuehl v. Sellner*, 887 F.3d 845 (8th Cir. 2018).

In the same way that Lucy’s social isolation violated the ESA, Happy’s social isolation violates New York’s animal cruelty statute. The record in this case strongly supports the conclusion that keeping Happy in solitary confinement violates the cruelty law because it causes her to unjustifiably suffer. Elephants are cognitively complex, intelligent, and autonomous, exhibiting complex cognitive abilities such as “self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.” (A-57, para. 71.) Elephants are “highly social animals” who are “suited to the company of other elephants” such that social interactions comprise a very important dimension of elephant behavior. (A-474, para. 6; A-480, para. 30.)

In conflict with Happy’s basic social needs, the Zoo has kept her in solitary confinement since 2006, after it euthanized her last companion (A-10), resulting in the *New York Times* dubbing her “The Bronx Zoo’s Loneliest Elephant.” (A-32,

para. 1.) Significantly, the Association for Zoos and Aquariums (“AZA”) issues standards for zoos wishing to be accredited by the AZA, and the standard for “group composition” requires that “[e]ach zoo holding elephants must hold a minimum of three females (or the space to hold three females), two males or three elephants of mixed gender.” AZA Standards for Elephant Management and Care § 2.2.1.1 (Apr. 2012).² The standards go on to specify that only “[a]dult *males* (6 years and older) may be housed alone, but not in complete isolation.” *Id.* (emphasis added). The standards do not endorse adult *females* being housed alone. Although the Zoo has maintained its AZA accreditation, this does not change the fact that Zoo is failing to comply with elephant management standards for socialization that only permit keeping adult males alone.

Happy not only lives in solitary confinement but also lacks adequate space and other enrichment to stay mentally and physically healthy. Adequate space “permits autonomy and allows elephants to develop more healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior.” (A-478, para. 19.) Moreover, “[w]hen elephants are forced to live in

² The AZA Standards for Elephants are available online at https://www.aza.org/assets/2332/aza_standards_for_elephant_management_and_care.pdf (last accessed Apr. 4, 2022).

insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems.” (*Id.*) Despite these needs, Happy “spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals’ bodies.” (A-44, para. 38.)

Happy’s isolation and inability to engage in appropriate behaviors such as foraging and roaming has caused her to develop stereotypic behaviors indicative of physical pain and mental suffering:

[Happy is] engaged in only five activities/behaviors: Standing facing the fence/gate, dusting, swinging her trunk in stereotypic behavior, standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior, and once, eating grass. Only two, dusting and eating grass, are natural. Alone, in a small space, there is little else for her to do.

(A-480, para. 41; A-17.)

The Zoo’s refusal to release Happy to a sanctuary where her social and environmental needs can be met renders Happy’s suffering “unjustified.” *See* N.Y. Agric. & Mkts. Law §§ 350 & 353. The Zoo claims that it keeps Happy in solitary confinement because she doesn’t get along with other elephants, but the record shows that Happy was compatible with two out of four of her previous companions. (A-475, para. 9-10.) Thus, the problem is not Happy, but the Zoo’s refusal to provide

the space and other resources sufficient to foster a healthy relationship between Happy and potential companions:

Elephants are highly social animals and . . . they are suited to the company of other elephants. Elephants in captivity, including Happy, often do not get on with the elephants their captors select to put them with. Being forced into areas too small to permit them to select between different companions and when to be with them, they have no autonomy. Elephants need a choice of social partners, and the space to permit them to be with the ones they want, when they want, and to avoid particular individuals, when they want.

(A-474, para. 6.)

The Zoo’s animal cruelty violations do not become “lawful” simply because the U.S. Department of Agriculture (“USDA”) grants it an Animal Welfare Act (“AWA”) license. An individual may be granted a driver’s license but this does not mean the individual is complying with all traffic laws. Moreover, AWA regulations are notoriously weak and unenforced,³ such that as a practical matter most state

³ For example, the USDA’s Office of Inspector General conducts audits of AWA enforcement every few years. In one audit, it found that the “enforcement process was ineffective against problematic dealers” and “inspectors did not cite or document violations properly.” Dep’t of Agric., Off. of Inspector Gen., *Audit Report: APHIS Animal Care Program Inspections of Problematic Dealers 2* (May 2010), <https://www.usda.gov/sites/default/files/33002-4-SF.pdf>. In another audit, the OIG reiterated findings over the years that the agency’s AWA enforcement of regulated research facilities has been “regarded [] as a cost of doing business”, “basically meaningless”, “ineffective”, and that “some violators that committed

animal cruelty laws provide more protection than the AWA. Remarkably, the AWA regulations for most mammals—including elephants—do not prohibit keeping even highly intelligent and social animals in solitary confinement. *See, e.g.*, 9 C.F.R. § 3.133 (providing husbandry standards for mammals other than cats, dogs, primates, and marine mammals). The USDA’s passivity on the issue of solitary confinement does not indicate that the practice is humane or legal, but rather indicates that the USDA has done a poor job at promulgating comprehensive humane husbandry regulations.⁴ Regardless, the AWA explicitly authorizes state and local governments to “promulgat[e] standards *in addition* to” the AWA, 7 U.S.C. § 2143(a)(8) (emphasis added), which New York has done here by enacting an animal cruelty statute that more comprehensively protects animals like Happy.

grave violations only received [] warning letters.” Dep’t of Agric., Off. of Inspector Gen., *Audit Report: Animal and Planet Health Inspection Service Oversight of Research Facilities* 3, 13 (Dec. 2014), <https://www.usda.gov/sites/default/files/33601-0001-41.pdf>; *see also* Karin Brulliard, *USDA’s Enforcement of Animal Welfare Laws Plummeted in 2018, Agency Figures Show*, WASH. POST (Oct. 18, 2018), <https://www.washingtonpost.com/science/2018/10/18/usdas-enforcement-animal-welfare-laws-plummeted-agency-figures-show/>.

⁴ USDA’s AWA regulations fall short in many other ways. For example, the AWA imposes no restriction on killing animals other than the fact that the facility must have a written guidance document regarding the method of euthanasia. *See* 9 C.F.R. § 2.40(b)(4). Thus, the AWA would *not* prohibit a licensed dog breeding facility from killing healthy but reproductively spent five-year-old dogs by gunshot or even drowning as long as that protocol was written down on a guidance document somewhere.

Given that Happy is subjected to such unjustified suffering, her plight crosses the animal cruelty “‘line in the sand’ where human property rights end and inherent animal rights begin.” *Painter, supra*, § 353. Under these circumstances, where the cruelty has otherwise gone unabated, there should be no question that habeas corpus relief is an appropriate means to protect Happy from her unlawful confinement.

CONCLUSION

This Court should recognize that a legal person includes any entity that bears legal rights, and that animals bear rights under the pet trust and animal cruelty statutes. As such, this Court should hold in favor of Happy’s common law right to bodily liberty protected by habeas corpus. Habeas corpus is particularly appropriate in this case where the Zoo subjects Happy to solitary confinement in apparent violation of her legal right under the cruelty statute to be free from unjustified suffering.

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**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**

I hereby certify pursuant to 22 N.Y.C.R.R. §§ 500.1(j), 500.13(c)(1), and 500.23(a)(1)(i) that:

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