

**Court of Appeals**  
*of the*  
**State of New York**

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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,*

— 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.*

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**MOTION FOR LEAVE TO FILE *AMICUS* BRIEF**

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COURT OF APPEALS OF THE STATE OF NEW YORK

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In the Matter of a Proceeding under Article 70 of the CPLR  
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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.

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APL 2021-00087

App. Div. Case No.:  
2020-02581

Index No.: 260441/2019  
(Bronx County)

**NOTICE OF MOTION  
OF EASTERN  
ORTHODOX  
THEOLOGIAN FOR  
LEAVE TO FILE  
BRIEF AS AMICI  
CURIAE IN SUPPORT  
OF PETITIONER-  
APPELLANT**

PLEASE TAKE NOTICE that, upon the annexed affirmation of Lan Cao, Esq., dated April 1, 2022, and the papers attached thereto, the undersigned will move this Court, on behalf of Amici Curiae Eastern Orthodox Theologians for an order granting their motion for leave to file the attached brief as *Amici Curiae* in support of the Petitioner-Appellant Nonhuman Rights Project, Inc. (“NhRP”) in the above-captioned proceedings.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o’clock in the forenoon on April 18, 2022, which is at least 9 days from the date of service of these papers. Parties are hereby advised that arguments will be on the papers and no appearance is required or permitted. Parties are further advised that

answering papers, if any, must be served and filed in the Court of Appeals with proof of service on or before the return date of this motion.

Dated: April 5, 2022

Respectfully submitted,

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COURT OF APPEALS OF THE STATE OF NEW YORK

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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,

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Respondents-Respondents.

---

APL-2021-00087

App. Div. Case No.: 2020-  
02581

Index No.: 260441/2019  
(Bronx County)

**AFFIRMATION OF  
LAN CAO IN SUPPORT  
OF MOTION OF  
EASTERN ORTHODOX  
THEOLOGIAN FOR  
LEAVE TO FILE  
BRIEF AS *AMICI  
CURIAE* IN SUPPORT  
OF PETITIONER-  
APPELLANT**

I, Lan Cao, hereby affirm under penalty of perjury:

1. I am an attorney duly admitted to practice in the courts of the State of New York. I submit this affirmation on behalf of *Amici Curiae* Eastern Orthodox Theologians in support of their motion for leave to file the attached brief in support of the Petitioner-Appellant Nonhuman Rights Project, Inc. (“NhRP”) in its appeal before this Court in the above-captioned proceedings. I am not a party to this proceeding, nor do I represent any of the parties to it.

2. Pursuant to Rule 500.23 of the Rules of Practice of this Court, Amici's proposed brief has identified arguments that might otherwise escape the Court's consideration and would be of assistance to the Court.
3. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner.
4. The Petitioner-Appellant Nonhuman Rights Project funded the costs of printing, filing, and serving the brief and motion in support. No other person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

WHEREFORE, I respectfully request that this Court enter an order: (i) granting the motion of *Amici Curiae* for leave to file the annexed brief; (ii) accepting the brief that has been filed and served along with this motion, and; (iii) granting such other and further relief as this Court deems just and proper.

Dated: April 5, 2022

Respectfully submitted,

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**EXHIBIT A**

**Court of Appeals**  
*of the*  
**State of New York**

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In the Matter of a Proceeding under Article 70 of the CPLR  
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**BRIEF FOR *AMICI CURIAE* EASTERN ORTHODOX  
THEOLOGIANs IN SUPPORT OF PETITIONER-  
APPELLANT**

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## **I. Statement of Interest of Amici Curiae<sup>1</sup>**

From the outset, we make perhaps, an unusual amici curiae declaration to the court, which we suspect has little knowledge of early Christian theology and doctrine that relates directly to the use of ‘person’ in Roman Law. We briefly identify our three arguments:

- 1) Via the Christian theological doctrine of the Trinity, we argue that Justinian’s use of the word ‘person’ should not have been ascribed exclusively to humans, thus implicitly denying all other animals any role or participation in God's living Creation, nor indeed used to distinguish between or separate, human-beings from nonhuman-beings. We will also show how a modern contextualization of that teaching can inform contemporary legal discussions and decisions on how the legal term ‘person’ can be applied to both human and nonhuman-beings.
- 2) Using the philosophical tool of False Dilemma, we will show why this debate continues to be unresolved.
- 3) That laws and the science pertaining to this issue have changed over these past 1500 years, thus setting the precedent for further changes in the law on this issue to better reflect the science and social norms of contemporary society.

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<sup>1</sup> Pursuant to Rule 500.23 of the Rules of Practice of this Court, the proposed Amici Curiae brief has identified arguments that might otherwise escape the Court’s consideration and would be of assistance to the Court. No party’s counsel contributed content to the brief or participated in the preparation of the brief in any other manner.

We argue that these main points offer the court the opportunity to amend the law so that it better reflects the contemporary science and social recognition that differences between human-beings and nonhuman-beings is a matter of degree, not of kind. Whichever term the court chooses – be it ‘person’, ‘being’ or some other word, it should be applied to both human *and* nonhuman animal beings.

## **II. Argument**

### **Trinitarian Theology**

For many contemporary Orthodox, the use of the term ‘person’ and ‘personhood’ for any ‘being’ outside of the Trinity, is a misuse of the term. For example, resistance to the more widely used contemporary use of ‘person’ and ‘personhood’ as found in its Zizioulean<sup>2</sup> form was a highly fractious issue in the 2015 Great and Holy Council in Crete, as the Russian delegation objected to this specific language in council documents and demanded the rewriting of those sentences that used those terms outside of discussions on the Trinity.

Briefly, in theological terms and in accordance with the teachings of the Christian Church at that time, the contemporary use of the term ‘person’ for human-beings is fundamentally in error. ‘Person’ was *only* applicable to the *three persons* of the Trinity – Father, Son, and Holy Spirit. Human exceptionalism, it

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<sup>2</sup> John Zizioulas, (Met. John of Pergamon). See *Communion & Otherness. Further Studies in Personhood and the Church* (London/NY: T&T Clark, 2006); *Being as Communion. Studies in Personhood and the Church* (Crestwood, NY: St. Vladimir’s Seminary Press, 1985).

can be argued, can only be used in reference to ‘Image of God’, and not in discussions on ‘person’ or ‘personhood’.<sup>3</sup>

In our earliest doctrine, which is sung every Sunday in its various forms of the Creed, human-beings are ‘created beings’ not ‘persons’. In this context the use of ‘person’ to describe either a human-being or another created being, such as the unique individual elephant being known as Happy, is incorrect. To explain the significance of this point to the court, we briefly map both the role of the Emperor of New Rome and Trinitarian theology.

Emperors at that time were heads of the Christian Church. They would either have been in attendance or had a representative in attendance at the great Church Councils. Byzantine Emperor Justinian 1 (527-565) reformed the government, which had long suffered from corruption, and codified centuries of legislation and outmoded laws (Codex Justinianus - 529). He would have known that St. Athanasius, St Basil the Great, St Gregory of Nyssa and St Gregory Nazianzen, succeeded in formulating the Christian doctrine of God and the Trinity.

As stated, the doctrine of the Trinity uses the term ‘person’ (*hypostasis*) only for the *three persons* of the Trinity - Father, Son, and Holy Spirit. According

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<sup>3</sup> Even this idea is being challenged, see Nikolaos Asproulis, ‘Animals and the *Imago Dei*: An Addendum to Christian Anthropology in Nellist, C. (Ed.) *Climate Crisis and Creation Care: Historical Perspectives, Ecological Integrity, and Justice*, (Cambridge Scholars Publishing, UK, 2021). Asproulis argues that it is possible to incorporate animalhood as a dimension of the image through the lens of communion/relationship, which is the core characteristic of personhood. In this context it is therefore acceptable to refer to animals as persons or individuals.

to Christian doctrine, the Incarnation is a theophany - a revelation of the Trinity as a primordial fact. Christ is the revelation of the full divinity of the Father.

Delving deeper, Papanikolaou (2018) states that “the challenge was to discern the language and categories that would describe the antinomic nature of God’s being as Trinity, as simultaneously one and many.” As was commonplace at that time, the early church Fathers drew from Greek philosophical categories. They selected *hypostasis* and *ousia*. Papanikolaou continues: “*Ousia* indicates that which is attributable to all persons of the Trinity, and *hypostasis* points to what is irreducibly unique to each of the three persons - the Father is not the Son, etc.” The key point here is that in this teaching, “hypostasis is synonymous with *ousia*, indicating that the three *hypostases* of the Trinity were also of the same *ousia*. In this way, the distinction affirms the antinomy of God’s Trinitarian being, but also when thinking of either pole of this antinomy—*hypostasis or ousia*—one is always referred to the other side of the antinomy.”<sup>4</sup>

Quoting another Orthodox theologian, Vladimir Lossky: “What the image of causality wishes to express is the idea that the Father, being not merely an essence but a person, is by that very fact the cause of the other consubstantial Persons, [Son and Holy Spirit] who have the same essence as He has.”<sup>5</sup>

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<sup>4</sup> Aristotle Papanikolaou ‘From Sophia to Personhood: The Development of 20th Century Orthodox Trinitarian Theology’, PHRONEMA, VOL. 33(2), 2018, 1-20.

<sup>5</sup> Vladimir Lossky, (Eds.) John H. Erickson and Thomas E. Bird. ‘The Procession of the Holy Spirit’ in *In the Image and Likeness of God* (Crestwood, NY: St Vladimir’s Seminary Press, 1974).

## **Contextualizing these teachings for today**

Having briefly outlined why, for many, the use of the term ‘person’ to promote human exceptionalism is a misuse of the term, and having briefly outlined the definition of *ousia*, we can argue that historically, the use of the word ‘person’ to either human-beings or nonhuman-beings in both theological and legal contexts, can be viewed as fundamental errors. However, if we contextualize this argument using contemporary Orthodox theology as expounded by Zizioulas<sup>6</sup> and others, we note that ‘person’ can be applied to humans for they are called to personalize all creation. In this context, ‘person’ means irreducible uniqueness that is realized as a relational event. To personalize creation means to facilitate relational patterns that manifest the irreducible uniqueness of all living entities, including animals. ‘I’ and ‘thou’ in relationship and communion, rather than ‘I’ and ‘it’.

Equally, if we contextualize this argument using science, it is obvious to all reasonably minded people, that whilst nonhuman animals are clearly not human animals, they are certainly not objects or things – i.e., they are not a house or a painting. Contemporary science shows us that many nonhuman-beings are sentient creatures, who think, have language, have, or have the potential for consciousness of self, use tools, display various forms of moral behaviour, family units, etc. In fact, the very criteria and more, that was originally used to ascribe

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<sup>6</sup> See note 1 above.

rationalism and personhood status to human-beings. It is worth remembering the 2011 work of the Nobel Prize winner Daniel Kahneman, who showed quite clearly that whilst humans believe they are rational beings, this is far from always the case!

In addition, there is now a wider (though insufficient) recognition that nonhuman animals are essential co-workers whose labor is necessary for the future of critical infrastructure - both human and planetary. Quoting Pershouse (2021): “Their work underpins all food systems, regional and global water security, transportation of materials, health systems, and the climate, and metabolism of our planet.”<sup>7</sup> It may well be, that the judge who has the vision to apply the legal definition of ‘person’ to nonhuman animal beings, will be the very same judge who saves the humans from non-rational and self-destructive practices that jeopardizes not only their own, but all forms of life on this planet via climate change.

In summary, if the court wishes to use the word ‘person’ as opposed to the term ‘ousia’ to denote the ‘sameness’ of the beings of the Animal Kingdom, as opposed to, for example, the ‘sameness’ of the individual creations in the Plant Kingdom, logically they must right the legal errors of the past and use the same term for both human animals and nonhuman animals, because contemporary

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<sup>7</sup> See Pershouse D, ‘Other Species are Essential Workers in the Earth’s Economy’ in, Nellist, C. (Ed.) *Climate Crisis and Creation Care: Historical Perspectives, Ecological Integrity, and Justice*, (Cambridge Scholars Publishing, UK, 2021).

science informs us that they are constituted of the same ousia/essence – i.e., they are all animals regardless of their species.

### **False Dilemma**

Secondly, we ought to ask why this issue continues across the millennia. We proffer the suggestion that the entire argument is clearly an example of what in philosophy is described as a ‘false dilemma’ - two things that are presented as opposites but are not really so: in this instance the human animal being as person and the nonhuman animal being as object. This narrative, and this forced choice, should be resisted. From Darwin until today, a huge corpus of scientific studies proves that differences between human and nonhuman animals are a matter of degree, not of kind.

It is important to analyze why this false dilemma is presented in the first place, and who benefits from it. It is noticeably clear in the cases brought by the Nonhuman Rights Project (NhRP) that those who oppose the allocation of the title ‘person’ or ‘personhood’ to nonhuman animal beings – referred to here as the ‘vested interests’ – consist of those whose ‘ownership’ of nonhuman animal beings enables them to make financial profit from them. Examples in this case are Big Pharma, Big Agri, and the Bronx Zoo.

On the other hand, those that stand in opposition to these vested interests, have little money or political influence, and have only the animal’s physical and psychological interest at heart. Examples here consist of those from non-profit animal protection charities, veterinarians who oppose the deeply flawed animal-

testing model, and theologians and philosophers from multiple religions, who can show from sacred texts that harming animals is not only a moral wrong but also a sin with soteriological implications, not only for those who perpetrate acts of harm/cruelty but also for those who are aware of any form of animal suffering that is not for the animals benefit, yet fail to act in some way to alleviate that suffering. In other words, those complicit in the perpetuation of harm/suffering to an individual, group or species of nonhuman animal. This notion of complicity is found in legal systems around the world.

Here again, we see that the fates/interests of people and animals are closely intertwined; helping one automatically leads to helping, or at least trying to help, the other, be that spiritually so that salvation can be achieved, or physically, and psychologically. For example, by revealing the 90-97% failure rate of the animal-testing model used by Big Pharma, we can highlight the subsequent harm/suffering to human and nonhuman beings by the use of this flawed model.<sup>8</sup> In revealing the overuse of antibiotics in nonhuman beings in the intensive farming system and the shocking conditions of animal husbandry, wastage of water, spoiling of land, huge emissions of harmful greenhouse gas emissions and rampant deforestation associated and scientifically linked to Big Agri, we highlight the subsequent harm/suffering to human and nonhuman beings alike in

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<sup>8</sup> US FDA acknowledged failure figures and the subsequent harm/death to humans from drugs that have passed animal tests.

the rise of antibiotic resistance, and the considerable and proven link between animal-based diets, environmental destruction and climate instability.

When researching American and English history, we see great similarities in the NhRP cases and the arguments between the vested interests of slave owners and those of the abolitionists. We must remember that until quite recently in historical timeframes, certain types of human beings e.g., slaves and women – were, in a previous example of flawed law, classified as the ‘property’ of another ‘person’.

### **Flawed Science**

As noted, Emperor Justinian’s misuse of the word ‘person’ was an act made in the context of that time. Again, research proves that the early Church Fathers were influenced by the teachings and social norms of that time. The most prominent of them were all schooled in the great Greek philosophical schools of their time and were especially influenced by the philosophy of Aristotle and Plato. It was the teaching and the social norm, to accept that human beings were rational and nonhuman beings were not. This was primarily based upon early Greek myths and the ‘scientific fact’ that in order to think/be rational, one needed to possess the human form of language. Today both this narrow idea of ‘language’ and much of Aristotle’s ‘science’ in relation to nonhuman animal beings is discredited by a large corpus of scientific research.

Justinian’s misuse of the word ‘person’ resulted in human exceptionalism being enshrined in Roman law, which in turn meant that everything else became

an object or a thing that was allegedly created for the use, or potential property, of the human ‘person’.

Thus, this original false premise has led not only to the separation of human beings from the rest of God’s nonhuman beings, but also to the flawed philosophical treaties of the prominent tradition’s philosophers and theologians across the centuries, who have used this term to deny personhood, justice, and rights to the rest of God’s created world.

The flawed philosophical, and theological arguments of the past have also led us to the present climate crisis<sup>9</sup>, for the additional misuse of ‘Image of God’, which gave ontological priority to reason/intellect over body/matter, undervalued the sacredness of the material creation and contributed to a clear anti-ecological orientation. The misinterpretation of ‘dominion’ as domination rather than that of benevolent ruler/steward, has only compounded the failure to recognize the interconnectedness of all things, and the key point of relational, loving, reciprocity between God’s creatures and between all created beings and God – the true Image for us to emulate.

### **Flawed Laws and Concluding Points**

Finally, we do not know the judge/judges in this case, but we do know that throughout history, laws - especially fundamentally flawed laws - have been

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<sup>9</sup> Detailed arguments on these points are well known in Philosophy, Theology and Animal Ethics and cannot be repeated here.

amended or removed. We have no doubt that in many of these cases, it took great courage by the judge/judges involved in that process.

Throughout the history of the American and English peoples, certain individuals stand out among the rest. For us, three such people are William Wilberforce, Dr. Martin Luther King, and Dr Desmond Tutu. All three men stood against the vested interest and bad/flawed laws of their time. The former, though wishing to become a priest, spent his adult life fighting for the abolition of the evil slave trade; he was also cofounder of the first Society for the Prevention of Cruelty to Animals in the UK. Dr. King, the courageous pastor, famously led the fight against social injustice and racism in America, and tragically for us all, was martyred for that cause. For decades Dr Desmond Tutu stood against the flawed apartheid laws in South Africa, yet few know that he linked the evil inherent in that legal system to the suffering of animals in our present legal systems. All received untold opposition from the vested interests of their day.

Not only will the judge/judges in this case need the moral, ethical, spiritual conviction that the present law is fundamentally flawed and an insult to righteousness and the science of our time, but they will also need to possess the courage to take the legal decision to grant freedom through the allocation of ‘person’ status, to this *unique individual animal being* named Happy. In so doing they will be championed and upheld by millions around the world who clearly see the folly of a law that categorizes nonhuman animal beings as objects and things.

Dated: April 5, 2022

Respectfully submitted,

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

Pursuant to the Rules of the Court of Appeals (22 NYCRR) §§ 500.1 (j), 500.13 (c) (1) and (3), and 500.23 (a) (1) (i), I hereby certify that:

*Word-Processing System.* The foregoing brief was prepared on a computer using Microsoft Word.

*Type.* A proportionally spaced typeface was used as follows:

Typeface:	Times New Roman
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Line spacing:	Double

*Word Count.* The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, corporate disclosure statement, questions presented, statement of related cases, or any authorized addendum containing statutes, rules, and regulations, etc., is 2877.

Dated: April 5, 2022



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