APL 2021-00087
Bronx County Clerk's Index No. 260441/19
Appellate Division–First Department Docket No. 2020-02581

Court of Appeals

of the

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 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.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

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COURT OF APPEALS OF THE 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 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.	APL 2021-00087 App. Div. Case No.: 2020-02581 Index No.: 260441/2019 (Bronx County) **NOTICE OF MOTION OF SHANNON MINTER AND EVAN WOLFSON FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT**

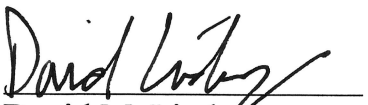
PLEASE TAKE NOTICE that, upon the annexed affirmation of David M. Lindsey, dated April 8, 2022, and the papers attached thereto, the undersigned will move this Court on behalf of Shannon Minter and Evan Wolfson for an order granting their motion for leave to file the attached brief as *Amici Curiae* 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 7, 2022

Respectfully submitted,

By: 

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COURT OF APPEALS OF THE STATE OF NEW YORK

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APL-2021-00087

App. Div. Case No.: 2020-02581

Index No.: 260441/2019 (Bronx County)

AFFIRMATION OF DAVID M. LINDSEY IN SUPPORT OF MOTION OF SHANNON MINTER AND EVAN WOLFSON FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER-APPELLANT

I, David M. Lindsey, 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 Shannon Minter and Evan Wolfson in support of their motion for leave to file the attached brief as *Amici Curiae* 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, the proposed *Amici Curiae* 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. Amici have not submitted a brief in this case prior to this one.

5. The Petitioner-Appellant 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 Amici's motion 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 7, 2022

Respectfully submitted,

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EXHIBIT A

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BRIEF OF *AMICI CURIAE* SHANNON MINTER AND EVAN WOLFSON IN SUPPORT OF PETITIONER-APPELLANT

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Table of Contents

Page

Table of Authorities ii

I. Statement of Interest 1

II. Summary of Argument 4

III. Argument 4

a. Much as in prior cases brought by others formerly excluded, oppressed, or deemed too "different," the liberty claim of a non-human being such as Happy the elephant presents significant and substantial concerns that courts must meaningfully address, not arbitrarily turn away 4

b. Relief for Happy the elephant does not turn on constricted conceptions of personhood but, rather, on whether this intelligent non-human shares some right to liberty protected by habeas corpus 7

c. The shared liberty interest and the need for relief are similarities that easily outweigh differences concerning an overly narrow definition of personhood 13

d. As in prior cases involving LGBT people and other excluded groups, this court must take care to frame the questions and consider the urgent claim for relief seriously, commensurate with the weighty and shared liberty interest at stake here for this non-human being 20

Table of Authorities

Page(s)

Cases:

Baehr v. Miike,
910 P.2d 112 (1996).....3

Baker v. Nelson,
490 U.S. 810 (1972).....8

Bowers v. Hardwick,
478 U.S. 186 (1986)..... *passim*

Boy Scouts of America v. James Dale,
530 U.S. 640 (2000).....3

Christian Legal Society v. Martinez,
561 U.S. 661 (2010).....1

Garcia v. Spaulding,
324 F. Supp. 3d 228 (D. Mass. 2018).....23

Glossip v. Gross,
576 U.S. 863 (2015).....22

Harris v. Nelson,
394 U.S. 286 (1969).....11

In re Marriage Cases,
43 Cal. 4th 757 (Cal. 2008).....1

Katz v. United States,
389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).....21

Kitchen v. Herbert,
961 F. Supp. 2d 1181 (D. Utah 2013),
affirmed, 755 F.3d 1193 (10th Cir. 2014); *stay granted*,
134 S. Ct. 893 (2014); *petition for certiorari denied*,
No. 14-124, 2014 WL 3841263 (Oct. 6, 2014) 23

Lawrence v. Texas,
539 U.S. 558 (2003)..... *passim*

Matter of Nonhuman Rights Project, Inc. v. Lavery,
152 A.D.3d 73 (1st Dep't 2017) 5, 9, 14

Matter of Nonhuman Rights Project, Inc. v. Lavery,
31 N.Y.3d 1054 (2018) ..... *passim*

Matter of Nonhuman Rights Project, Inc. v. Presti,
124 A.D.3d 1334 (4th Dep't 2015) 5

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 8

People ex rel Nonhuman Rights Project, Inc. v. Lavery,
124 A.D.3d 148 (3d Dep't 2014) 5

People ex rel. DeLia v. Munsey,
26 N.Y.3d 124 (2015) 10, 11

Rockey v. Krueger,
306 N.Y.S.2d 359 (Sup. Ct., Nassau Co. 1969) 23

Stanley v. Georgia,
394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969) 21

United States v. Virginia,
518 U.S. 515 (1996) 10

Statutes & Other Authorities:

American Kennel Club, "Sled Dog Breeds: From Arctic Exploration to the Iditarod" (Nov. 22, 2020) 18

Animal Legal & Historical Center, "The Development of the Anti-Cruelty Laws During the 1800's" 16

Animal Legal Defense Fund, "Animals as Crime Victims: Development of a New Legal Status" 16

Animal Legal Defense Fund, "California's New 'Pet Custody' Law Differentiates Companion Animals from Other Types of Property" 16

Ann Lee, "What's new, pussycat? How feline film stars are trained to perform," The Guardian (Jan. 3, 2022) 19

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CPLR 7000 ..... 10, 11

Dareh Gregorian, "New California divorce law: Treat pets like people — not property to be divided up," NBC News (Dec. 29, 2018) 16

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Erin Tracy, "Modesto CHP dog trained at Disneyland, provided security for Mike Pence. Now he's retiring," Modesto Bee (Dec. 30, 2021).....18

"Guide Dogs for the Blind and American Foundation for the Blind Launch Extensive Research Study," Business Wire (Oct. 21, 2020).....19

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Jasmine Cooper, Marni Hughes, "Search and rescue dogs look for tornado victims in Kentucky," NewsNation (Dec. 14, 2021).....17

Jeffrey Kluger, "Strong and Smart, Service Monkeys Give a Helping Hand to People With Quadriplegia," TIME (Oct. 24, 2018) 19

Jen Reeder, "Former CIA analyst shares adventures with guide dogs over 33-year career," TODAY (Sept. 29, 2021)..... 18-19

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Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273 (2011).....17

Kelli Bender, "Connecticut Police Dog Finds Missing 10-Year-Old Girl," PEOPLE (Dec. 15, 2021) 17

Kim Bellware and Adela Suliman, "Coronavirus-sniffing dogs unleashed at Miami International Airport to detect virus in employees," Washington Post (Sept. 9, 2021) 17-18

Kitson Jazynka, "Denali has only sled dogs in National Park Service," Washington Post (Feb. 19, 2018) 18

KTVL, "Shady Cove woman recovered after getting lost in wilderness" (Jan. 3, 2022) 17

Leslie Nemo, "How Do Dogs Sniff Out Diseases?," Discover Magazine (July 19, 2021).....18

Mark Ellwood, "These Elite $125,000 Guard Dogs Are Trained to Detect Danger Before It Happens," Robb Report (Aug. 3, 2021).....18

Meredith Geaghan-Breiner and Kyle Desiderio, "How 10 Different Types of Animals Train for Film and TV Roles," Insider (Apr. 19, 2021) 19

NY State Senate Bill S4248 (2021) 16

Or. Rev. Stat. § 167.305.....16

Penny Leigh, "Dogs in Demand for Explosives Detection Work in U.S." American Kennel Club (Apr. 13, 2018) 18

Philip Johnson, "The Advocate, or the Hour of the Pig".....17

Poppy Koronka, "The Best Guard Dogs, According to Experts," Newsweek (Jul. 16, 2021) 18

Samantha Mathewson, "Celebrating the animal astronauts who paved the way for human spaceflight," Space (Dec. 28, 2021).....19

Sara Kiley Watson, "Humans have partnered with sled dogs for 9,500 years," Popular Science (Jul. 14, 2020).....18

Sara M. Butler, "Persons under the Law? Medieval Animal Rights – Legal History Miscellany".....17

Simon Spichak, MSc, "Training Dogs to Diagnose Parkinson's," Being Patient (Dec. 13, 2021) 17

Suzanne Monyak, "When the Law Recognizes Animals as People," The New Republic (Feb. 2, 2018) 16

Tiffany Rizzo, "At Naples Therapeutic Center, horses help with grief and mental health," Wink News (Dec. 16, 2021).....18

U.S. Dep't of Homeland Security, "Federal Protective Service Explosive Detection Canine Teams" 18

Univ. of Toledo, "Study finds evidence emotional support animals benefit those with chronic mental illness," Newswise (May 20, 2021) 19

Vincent Alexander, Practice Commentaries, McKinney's CPLR 7001.....10

I. Statement of Interest

Amici are attorneys and longtime leaders in the lesbian, gay, bisexual, and transgender ("LGBT") movement, with experience and expertise in achieving social transformation and advancing rights and inclusion. They believe it is a particular obligation of courts to carefully scrutinize measures that exclude or harm those who are vulnerable, stigmatized, and underrepresented by the political system.

Shannon Minter is the Legal Director of the National Center for Lesbian Rights (NCLR), one of the nation's leading advocacy organizations for lesbian, gay, bisexual, and transgender people. Minter was lead counsel for same-sex couples in the landmark California marriage equality case which held that same-sex couples have the fundamental right to marry and that laws that discriminate based on sexual orientation are inherently discriminatory and subject to the highest level of constitutional scrutiny. *In re Marriage Cases*, 43 Cal 4th 757 (Cal. 2008). Minter was also NCLR's lead attorney in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), a U.S. Supreme Court decision upholding student group policies prohibiting discrimination based on sexual orientation and gender identity, and rejecting the argument that such policies violated a student group's rights to freedom of speech, religion, and association. NCLR represented Hastings Outlaw, an LGBTQ student group who intervened to help defend the nondiscrimination

policy. In 2009, Minter was named a "California Lawyer of the Year" by *California Lawyer*. In 2008, he was named among six "Lawyers of the Year" by *Lawyers USA* and among "California's Top 100 Lawyers" by the legal publication *The Daily Journal*. He also received the 2008 Dan Bradley Award from the National Gay and Lesbian Bar Association for outstanding work in marriage cases and was the recipient of the Cornell Law School Exemplary Public Service Award. In 2005, Minter was one of 18 people to receive the Ford Foundation's "Leadership for a Changing World" award. In 2004, he was awarded an Honorary Degree from the City University of New York School of Law for his advocacy on behalf of same-sex couples and their families. Minter has also received the Anderson Prize Foundation's "Creating Change Award" by the National Gay and Lesbian Task Force and the Distinguished National Service Award from GAYLAW, the bar association for LGBTQ lawyers, law students, and legal professionals in Washington, D.C., Cornell Law School's Exemplary Public Service Award, the Unity Award from Bay Area Lawyers for Individual Freedom, the Advocacy Award from the San Francisco Bar Association, and the Justice Award from Equality California.

Evan Wolfson founded and led Freedom to Marry, the campaign to legalize same-sex marriage in the United States. He is widely considered the architect of the freedom to marry movement that led to nationwide victory in 2015. In 1983,

Wolfson wrote his Harvard Law School thesis on gay people and the freedom to marry. During the 1990s he served as co-counsel in the historic Hawaii marriage case, *Baehr v. Miike*, 910 P.2d 112 (1996), that launched the ongoing global movement for the freedom to marry. He has participated in numerous gay rights and HIV/AIDS cases. Wolfson earned a B.A. in history from Yale College in 1978 and a J.D. from Harvard Law School in 1983. He served as a Peace Corps volunteer in a Togo, West Africa village before law school. He wrote, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, published by Simon & Schuster in July 2004. Citing his national leadership on marriage and his appearance before the U.S. Supreme Court in *Boy Scouts of America v. James Dale*, 530 U.S. 640 (2000), *The National Law Journal* in 2000 named Wolfson one of "the 100 most influential lawyers in America." *Newsweek/The Daily Beast* dubbed Wolfson “the godfather of gay marriage” and *Time* magazine named him one of “the 100 most influential people in the world.” In 2012, Wolfson received the Barnard Medal of Distinction alongside President Barack Obama.

Since achieving his goal for the legalization of same-sex marriage across the United States in 2015, Wolfson has devoted his time to advising and assisting diverse movements and causes in the U.S. and around the world to adapt the model and apply the lessons that made the Freedom to Marry campaign successful in the U.S. For example, he has worked within the worldwide organization Freedom to

Marry Global to direct a team of attorneys and experts advising marriage freedom movements. Wolfson has taught law and social change as a Distinguished Visitor from Practice at Georgetown Law Center and as a Distinguished Practitioner in Grand Strategy at Yale University. He serves as Senior Counsel at Dentons, the world's largest law firm with nearly 200 offices in more than 75 countries.

II. Summary of Argument

Just as courts came to understand that, notwithstanding assertions or discredited assumptions that difference justifies denial, they have a responsibility to frame questions appropriately and to take seriously the claims and needs of gay and transgender people and other formerly excluded groups, this Court has the obligation to consider carefully this non-human being's urgent liberty claim for relief.

III. Argument

a. Much as in prior cases brought by others formerly excluded, oppressed, or deemed too "different," the liberty claim of a non-human being such as Happy the elephant presents significant and substantial concerns that courts must meaningfully address, not arbitrarily turn away.

This case presents an issue of great public importance: Whether the courts of this state are barred from exercising their broad common law jurisdiction to hear a habeas petition on behalf of Happy, a 50-year-old elephant who was born free in Thailand and now lives in isolation at the Bronx Zoo. There is no dispute that

elephants are intelligent, self-aware, social creatures who are harmed by prolonged isolation. Had the lower court reached the merits of Happy's claim, it would have been required to determine whether depriving an intelligent social creature of any contact with other members of her species is an unlawful deprivation of liberty. Instead, cabined by the decisions in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017), *People ex rel Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3rd Dept. 2014), and *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015), it was required to dismiss the petition solely because relief is sought by a non-human, rather than a human, being.

These earlier rulings improperly impose artificial, judicially created constraints on the enormous flexibility of the common law. Nothing in the common law or prior cases addressing the scope of habeas petitions warrants slamming the courthouse door on otherwise valid petitions simply because the petitioner is not a human being. In holding otherwise, the lower courts have been forced to deflect the questions presented by these cases and have fallen short of their responsibility to apply the common law to new insights and to changing social conditions.

The improper limitations at work in these prior decisions are strikingly like those identified by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003),

when it struck down state laws criminalizing same-sex intimacy and reversed as wrong and short-sighted its own prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). As the Supreme Court rightly confessed in *Lawrence*, earlier rulings, including its own in *Hardwick*, asked the wrong questions. Rather than acknowledging the full breadth of the asserted constitutional privacy claim, the decision in *Hardwick* allowed the apparent novelty of the plaintiff's claim and identity as a gay man to obscure "the extent of the liberty at stake." 538 U.S. at 567.

The decision below warrants this Court's review because it betrays a similar failure to address the important questions presented by this case. To be clear, in making this comparison, amici do not suggest that the substantive issues in *Lawrence* and this case are the same, nor do they seek to make a facile comparison between the subject of this petition and LGBT people or members of other minority groups. Rather, they wish to show that the analytical errors identified by the Supreme Court when it reversed *Hardwick* can shed a powerful light on similar analytical errors by the lower courts here.

Amici acknowledge forthrightly that in this case, they do not have all the answers. But just as amici over the course of their careers as advocates have pressed courts in cases to fulfill their role and safeguard freedom and bodily autonomy, amici do so here as well. That we do not know all the answers is no

reason for the courts, including this court, to refuse to take the questions posed by this non-human being's claims seriously.

b. Relief for Happy the elephant does not turn on constricted conceptions of personhood but, rather, on whether this intelligent non-human shares some right to liberty protected by habeas corpus.

Like Justice Kennedy writing for the Court in *Lawrence*, Judge Fahey explained in his concurrence in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) that courts must frame the threshold question in these cases carefully if they are to resolve them in a way that does justice to the importance of the values they invoke and the concerns they present. Unfortunately, thus far, the courts have not asked, as they should, whether the subject of the petition has a *liberty interest* that habeas must protect, but, formalistically, whether the subject is a person. "The better approach," as Justice Fahey notes, "is to ask not whether a chimpanzee fits the definition of a person…, but instead whether he or she has the right to liberty protected by habeas corpus." *Id*. at 1057. By focusing instead on whether an animal can be considered a person—a question that itself is more complex than a superficial first instinct may suggest—the courts have evaded the more fundamental question of whether an intelligent, self-aware, social creature such as Happy has a liberty interest that the common law of habeas is capacious enough to protect. "Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law

against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Id*. at 1058.

The courts' failure to address that central question is reminiscent of the Supreme Court's error in cases such as *Hardwick* when it focused on the identity of the plaintiff rather than the nature of the interest asserted. In *Hardwick*, the Court was presented with a claim that laws criminalizing same-sex intimacy violated the fundamental right to privacy. 478 U.S. at 188. Addressing that claim on its merits would have required a careful consideration of whether gay people have a protected privacy interest in consensual adult relationships, as the Court subsequently undertook in *Lawrence*. Instead, the Court dismissed the plaintiff's claim out of hand, ruling that because of its novelty—and because of plaintiff's stigmatized identity—the very assertion of such a claim was definitionally preposterous, or, in the Court's words, "facetious." 478 U.S. at 194. In effect, the Court held that because the plaintiff in *Hardwick* is gay, his assertion of a right to privacy in intimate relationships warranted no consideration.[1]

[1] The Supreme Court initially adopted a similarly dismissive and cursory response to the claims of same-sex couples seeking the freedom to marry. In *Baker v. Nelson*, 490 U.S. 810 (1972), the Court dismissed a petition by a gay male couple seeking review of the Minnesota Supreme Court's denial of their right to marry with a single sentence, summarily concluding: "The appeal is dismissed for want of a substantial federal question." Forty-three years later, the Supreme Court belatedly recognized that, to the contrary, same-sex couples have the same constitutionally protected freedom to marry as different-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

In *Lawrence*, the Supreme Court reversed *Hardwick* and recognized its prior error in tautologically defining the fundamental right to privacy to apply only to non-gay people, simply because the right had not previously been applied to gay people in the past. Noting that the principles protected by the Due Process Clauses of the Fifth Amendment and Fourteenth Amendments are deliberately broad, the Court explained that their drafters "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." 539 U.S. at 579. The same is true of the common law writ of habeas corpus, which has been broadly applied throughout our nation's history to protect individuals and groups once deemed outside of the law's protection, as our understanding of the principles of equality and freedom have evolved.

The decisions in *Laverty I*, *Laverty II*, *Presti*, and this case repeat *Hardwick*'s analytical error of focusing on the identity of the petitioner rather than the substance of the questions raised. Rather than examining whether a being who is intelligent, self-aware, and capable of complex social relationships has asserted a liberty interest that habeas protects, these decisions reflexively bar such claims even from being considered, based on the mere identity of the petitioner rather than on substantive engagement with the values and concerns underlying Happy's

claims. Like the Supreme Court's flawed approach in *Hardwick*, the reasoning of these decisions is circular: Because animals have not brought habeas petitions in the past, they cannot bring them now. Because the petitioners are animals rather than people, their assertion of any liberty interest must be dismissed out of hand, regardless of the potential strength of such a claim on the merits. This is not justice, nor is such blindness to injustice and suffering compelled by our Constitution or the law in all its majesty and scope. "A prime part of the history of our Constitution," as the Supreme Court has noted, "is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

It is no answer to say that the decisions in these prior New York cases foreclosing protection rely on the legislature's use of the word "person" in CPLR 7000 *et seq*. Those provisions simply codify the common law writ of habeas to make a summary procedure available; they do not limit its substantive scope.[2] To the contrary, "[a]lthough article 70 governs the procedure of the common-law writ of habeas corpus, [r]elief from illegal imprisonment by means of this remedial writ is not the creature of any statute." *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015) (internal citations and quotation marks omitted). Rather, "the right to

[2] *See* Vincent Alexander, *Practice Commentaries*, McKinney's CPLR 7001 ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.").

invoke habeas corpus, the historic writ of liberty, the greatest of all writs, is a primary and fundamental one." *Id*. (internal citations and quotation marks omitted). It "cannot be abrogated, or its efficiency curtailed, by legislative action." *Id*. "Moreover, statutes pertaining to the writ of habeas corpus must be construed in favor of, and not against, the liberty of the subject and the citizen." *Id*. (internal citations and quotation marks omitted).

Based on this well-settled law, the use of the word "person" in CPLR 7000 *et seq.* provides no basis to limit a court's authority to hear any habeas petition it deems proper or to impose an artificial, definitional limit on its scope. As the U.S. Supreme Court has noted, the "writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" and must be "administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers." *Id*. at 291. These considerations apply equally to the application of habeas petitions in New York courts.

Moreover, even if this broad historic flexibility did not exist and habeas relief could be limited arbitrarily only to "persons," the assumption that an animal

can never be considered a "person" in this context is flawed in ways that are also reminiscent of the Supreme Court's deficient and subsequently repudiated reasoning in *Hardwick*. There, the Court dismissed the plaintiffs' claims by defining the right to privacy narrowly, to protect only an arbitrarily circumscribed set of relationships, and then finding that gay people could not possibly participate in those relationships. Specifically, the Court held that the fundamental right to privacy applies only to issues related to family, procreation, and marriage, not to "any kind of private sexual conduct between consenting adults." 478 U.S. at 191. Having found the right to be so strictly limited, the Court then pronounced it "evident that none of the rights announced in [prior] cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." *Id*. 190-91.

But as amici over their careers argued again and again—during which time the LGBT movement gained traction and successes began to come after long and repeated rejection—*rights are not defined by who is denied them*. The Supreme Court finally corrected its own prior failure of empathy and inability to acknowledge legitimate claims in *Lawrence*. There, the Court recognized that the right to privacy is not, as *Hardwick* claimed, limited to familiar relationships based

on marriage and procreation. Instead, transcending mere identity, the Court in *Lawrence* noted that precedent properly applied meant that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." 539 U.S. at 565.

In addition, the Court held that even when it comes to the more typically recognized areas of "personal decisions relating to marriage, procreation, and family relationships," what matters is that gay people have the same underlying interests as others. *Id*. at 574. Rather than affirming *Hardwick's* characterization of gay people as definitionally excluded from these core constitutional interests, *Lawrence* held that, notwithstanding their differences from the majority, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id*.

c. The shared liberty interest and the need for relief are similarities that easily outweigh differences concerning an overly narrow definition of personhood.

The Supreme Court's correction of the above errors in *Hardwick* is instructive here in yet another way. In this and prior cases, the lower courts adopted an arbitrarily narrow definition of who is a "person," holding that the term refers exclusively to someone who exercises duties as well as rights, and that such a definition necessarily excludes all animals. But neither of these assumptions holds water. Rather, as was true of the Court's crabbed definition of the right to

privacy in *Hardwick*, the lower courts' arbitrary limit on who counts as a person and conclusory determination that animals cannot possibly meet that arbitrary standard seem designed to avoid, rather than answer, the important questions presented by these cases.

As Justice Fahey and many others have pointed out, such a narrow rule would exclude children, persons who are ill or incapacitated, and others who indisputably are able to bring habeas petitions in our common law and constitutional traditions. *See* 31 N.Y.3d at 1057. When confronted with this seemingly fatal flaw, the courts have responded only that while there may be exceptions to its judicially created definition of "person," these exceptions "are still human beings," not animals. *Nonhuman Rights Project, Inc*., 152 A.D.3d at 78. But that response simply averts the eyes from injustice and suffering, sidestepping the problem. If our legal tradition contains—as it does—many examples of persons who are protected by the right of habeas corpus and yet who are incapable of exercising duties, why is that limitation properly applied only to exclude Happy and other similarly situated intelligent, self-aware, social beings? Courts must not so casually evade their duty to apply principle and logic to do justice.

Like the Supreme Court's conclusory definition of the right to privacy in *Hardwick*, the lower courts' reliance on a conclusory definition of "person" relies

on a misleadingly partial view of history and law. In *Hardwick*, the Court sought to justify its holding that gay people are excluded from the fundamental right to privacy by claiming that "[p]roscriptions against [same-sex] conduct have ancient roots." 478 U.S. at 192. In *Lawrence*, the Court corrected the record by showing that "the historical grounds relied upon in *Bowers* [*v. Hardwick*] are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicated. Their historical premises are not without doubt and, at the very least, are overstated." 539 U.S. at 571. The Court also stressed the importance of more recent legal developments, including especially "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id*. at 572.

Similar concerns about oversimplifying history and disregarding the evolution of contemporary law are evident here. In concluding that history does not support courts' jurisdiction to hear habeas corpus petitions on behalf of nonhuman animals, the lower courts have overstated the impact of laws that treat animals merely as property and understated the significant and continuing growth of new laws that treat animals as persons. Laws requiring that animals be given a degree of freedom appropriate to their nature and capacities date back to the origins of the

common law.[3] More recently, New York and many other states have enacted laws that expressly treat animals as persons for certain purposes.[4] Oregon law recognizes that "animals are sentient beings capable of experiencing pain, stress and fear."[5] Federal and state courts have recognized that each individual animal who suffered because of violation of an amical cruelty law is a crime victim for sentencing purposes.[6]

In addition, the assumption that animals cannot exercise duties is far from self-evident. There are many examples, both historically and now, of circumstances in which animals are treated as responsible agents. For example, historically in medieval Europe, there was a long tradition of prosecuting non-human beings for murder and other crimes and of conducting trials in such cases in

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[3] Animal Legal & Historical Center, "The Development of the Anti-Cruelty Laws During the 1800's," available at: https://www.animallaw.info/article/development-anti-cruelty-laws-during-1800s.

[4] NY State Senate Bill S4248 (2021), available at: https://www.nysenate.gov/legislation/bills/2021/s4248; Dareh Gregorian, "New California divorce law: Treat pets like people — not property to be divided up," NBC News (Dec. 29, 2018), available at: https://www.nbcnews.com/politics/politics-news/new-california-divorce-law-treat-pets-people-not-property-be-n952096; Suzanne Monyak, "When the Law Recognizes Animals as People," The New Republic (Feb. 2, 2018), available at: https://newrepublic.com/article/146870/law-recognizes-animals-people; Animal Legal Defense Fund, "California's New 'Pet Custody' Law Differentiates Companion Animals from Other Types of Property," available at: https://aldf.org/article/californias-new-pet-custody-law-differentiates-companion-animals-from-other-types-of-property/.

[5] Or. Rev. Stat. § 167.305.

[6] Animal Legal Defense Fund, "Animals as Crime Victims: Development of a New Legal Status," available at: https://aldf.org/article/animals-as-crime-victims-development-of-a-new-legal-status/.

which the accused animal was represented by a lawyer.[7] These examples may seem far removed from our current reality; nonetheless, they underscore the seriousness of this question and the error of simply assuming, without careful investigation, that the concept of animals as legally responsible agents has no place in our legal tradition. As a matter of historical accuracy, the opposite is true.

Today, while we no longer prosecute animals for crimes, there are many contexts in which animals have significant responsibilities, including in matters of life and death. For example, dogs perform a wide variety of critical jobs, from tracking kidnapped children and lost hikers[8] to detecting diseases[9], sniffing out

[7] *See, e.g.*, Sara M. Butler, "Persons under the Law? Medieval Animal Rights – Legal History Miscellany," available at: https://legalhistorymiscellany.com/2018/02/19/persons-under-the-law-medieval-animals-rights/; Philip Johnson, "The Advocate, or the Hour of the Pig," available at: https://animalsmattertogod.com/2012/05/25/the-advocate-or-the-hour-of-the-pig/; Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273 (2011), available at: https://www.animallaw.info/sites/default/files/lralvol17_2_273.pdf.

[8] KTVL, "Shady Cove woman recovered after getting lost in wilderness" (Jan. 3, 2022), available at: https://ktvl.com/news/local/shady-cove-woman-recovered-after-getting-lost-in-wilderness; Kelli Bender, "Connecticut Police Dog Finds Missing 10-Year-Old Girl," PEOPLE (Dec. 15, 2021), available at: https://people.com/pets/connecticut-police-dog-finds-missing-girl/; Jasmine Cooper, Marni Hughes, "Search and rescue dogs look for tornado victims in Kentucky," NewsNation (Dec. 14, 2021), available at: https://www.newsnationnow.com/prime/search-and-rescue-dogs-look-for-tornado-victims-in-kentucky/.

[9] Simon Spichak, MSc, "Training Dogs to Diagnose Parkinson's," Being Patient (Dec. 13, 2021), available at: https://www.beingpatient.com/dogs-sniff-dementia/; Dark Daily, "New Study Shows Dogs Can be Trained to Sniff Out Presence of Prostate Cancer in Urine Samples" (Dec. 10, 2021), available at: https://www.darkdaily.com/2021/12/10/new-study-shows-dogs-can-be-trained-to-sniff-out-presence-of-prostate-cancer-in-urine-samples/; Clara Benitez, "COVID sniffing dogs: 2 dogs trained to smell virus in people," Fox5 San Diego (Nov. 18, 2021), available at: https://fox5sandiego.com/news/coronavirus/sniffing-out-covid-how-these-2-pups-were-trained-to-detect-the-virus-in-people/; Kim Bellware and Adela Suliman, "Coronavirus-

unlawful drugs or explosives,[10] protecting businesses and homes[11], providing transportation in remote areas[12], and many other critical tasks. Across the country, dogs, horses, and other animals support individuals who are blind or have mental health issues.[13] The U.S. military counts on dolphins to detect underwater mines.[14]

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sniffing dogs unleashed at Miami International Airport to detect virus in employees," Washington Post (Sept. 9, 2021), available at: https://www.washingtonpost.com/nation/2021/09/09/covid-sniffer-dogs/; Leslie Nemo, "How Do Dogs Sniff Out Diseases?," Discover Magazine (July 19, 2021), available at: https://www.discovermagazine.com/the-sciences/how-do-dogs-sniff-out-diseases.

[10] Erin Tracy, "Modesto CHP dog trained at Disneyland, provided security for Mike Pence. Now he's retiring," Modesto Bee (Dec. 30, 2021), available at: https://www.modbee.com/news/local/article256899017.html; Penny Leigh, Dogs in Demand for Explosives Detection Work in U.S.," American Kennel Club (Apr. 13, 2018), available at: https://www.akc.org/expert-advice/news/dogs-in-demand-explosives-detection-us/; U.S. Dep't of Homeland Security, "Federal Protective Service Explosive Detection Canine Teams," available at: https://www.dhs.gov/explosive-detection-canine-teams.

[11] Ian Randal, "Archaeology: Funerary complex dating back up to 2,000 years dug up in Rome included a dog statue," Daily Mail Online (Jan. 3, 2022), available at: https://www.dailymail.co.uk/sciencetech/article-10364395/Archaeology-Funerary-complex-dating-2-000-years-dug-Rome-included-dog-statue.html; Mark Ellwood, "These Elite $125,000 Guard Dogs Are Trained to Detect Danger Before It Happens," Robb Report (Aug. 3, 2021), available at: https://robbreport.com/lifestyle/svalinn-guard-dogs-1234622969/; Poppy Koronka, "The Best Guard Dogs, According to Experts," Newsweek (Jul. 16, 2021), available at: https://www.newsweek.com/best-guard-dogs-according-experts-1609598.

[12] American Kennel Club, "Sled Dog Breeds: From Arctic Exploration to the Iditarod" (Nov. 22, 2020), available at: https://www.akc.org/expert-advice/dog-breeds/sled-dog-breeds-history-future/; Sara Kiley Watson, "Humans have partnered with sled dogs for 9,500 years," Popular Science (Jul. 14, 2020), available at: https://www.popsci.com/story/animals/sled-dog/; Kitson Jazynka, "Denali has only sled dogs in National Park Service," Washington Post (Feb. 19, 2018), available at: https://www.washingtonpost.com/lifestyle/kidspost/park-ranger-needs-furry-friends-to-help-get-around-the-alaskan-wilds/2018/02/16/5323ca6c-0b62-11e8-95a5-c396801049ef_story.html.

[13] Tiffany Rizzo, "At Naples Therapeutic Center, horses help with grief and mental health," Wink News (Dec. 16, 2021), available at: https://www.winknews.com/2021/12/16/at-naples-therapeutic-center-horses-help-with-grief-and-mental-health/; Jen Reeder, "Former CIA analyst shares adventures with guide dogs over 33-year career," TODAY (Sept. 29, 2021), available at:

Animals paved the way for human space flight.[15] Horses and dogs play an essential role on many cattle ranches and sheep farms. Trained monkeys provide lifesaving support for people with spinal cord injuries.[16] And, as this case itself demonstrates, elephants and other animals often work long hours to provide entertainment in multiple settings, from zoos and parks to television and movie productions.[17]

In sum, it is simply untrue that animals do not bear significant duties and responsibilities in our culture. They do, and this Court should address the important question of whether they also have a right to, or at least some meaningful interest in, liberty. The alternative, as Justice Fahey has noted, is to

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https://www.today.com/pets/former-cia-analyst-shares-adventures-guide-dogs-over-33-year-t232486; Univ. of Toledo, "Study finds evidence emotional support animals benefit those with chronic mental illness," Newswise (May 20, 2021), available at: https://www.newswise.com/articles/study-finds-evidence-emotional-support-animals-benefit-those-with-chronic-mental-illness; "Guide Dogs for the Blind and American Foundation for the Blind Launch Extensive Research Study," Business Wire (Oct. 21, 2020), available at: https://www.businesswire.com/news/home/20201021005166/en/Guide-Dogs-for-the-Blind-and-American-Foundation-for-the-Blind-Launch-Extensive-Research-Study.

[14] John Ismay, "Why Whales and Dolphins Join the Navy, in Russia and the U.S.," New York Times Magazine (Apr. 30, 2019), available at: https://www.nytimes.com/2019/04/30/magazine/beluga-whale-russia-military-dolphins.html.

[15] Samantha Mathewson, "Celebrating the animal astronauts who paved the way for human spaceflight," Space (Dec. 28, 2021), available at: https://www.space.com/animals-in-space-history-human-spaceflight.

[16] Jeffrey Kluger, "Strong and Smart, Service Monkeys Give a Helping Hand to People With Quadriplegia," TIME (Oct. 24, 2018), available at: https://time.com/longform/service-monkeys-quadriplegia/.

[17] Ann Lee, "What's new, pussycat? How feline film stars are trained to perform," The Guardian (Jan. 3, 2022), available at: https://www.theguardian.com/film/2022/jan/03/whats-new-pussycat-how-feline-film-stars-are-trained-to-perform; Meredith Geaghan-Breiner and Kyle Desiderio, "How 10 Different Types of Animals Train for Film and TV Roles," Insider (Apr. 19, 2021), available at: https://www.insider.com/how-animal-trainers-wranglers-train-bugs-animals-for-movies-tv-2021-3.

treat even an intelligent, self-aware animal "as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others" and to avoid "consider[ing] whether a chimpanzee [or an elephant] is an individual with inherent value who has the right to be treated with respect." 31 N.Y.S.3d at 1058. There must at least be a range between the all-or-nothing of subject or object, protected being or but a thing—and it is the obligation of courts to consider appeals for relief, rather than turn them away.

d. As in prior cases involving LGBT people and other excluded groups, this court must take care to frame the questions and consider the urgent claim for relief seriously, commensurate with the weighty and shared liberty interest at stake here for this non-human being.

The question at stake here—how to define the nature and scope of the liberty interest asserted by Happy—points to a final parallel between this case and *Hardwick*. In *Hardwick* the court defined the question presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Bowers* at 190. In *Lawrence*, the Court rejected that framing, holding that it had erred by construing the plaintiffs' claim as an interest in a particular sexual act. As the Court explained, "[t]hat statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* [*v. Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a

married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. As the Court further explained, when a person chooses to engage "in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id*.

Even before *Lawrence*, Justice Blackmun recognized this profound error in his dissent from the majority opinion in *Hardwick*:

> This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante*, at 191, than *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), was about a fundamental right to place interstate bets from a telephone booth...

Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). As Justice Blackmun recognized, it is dangerous, and inimical to the rational and humane development of the law, when the very framing of a legal question is tinged with unexamined bias and implicitly rests on a false conception of the subject of the litigation as inferior or as having no relationship to interests that courts readily understand to be important for others. In this case, one need not equate animals and humans in every respect to acknowledge that an intelligent, self-aware animal such as Happy may have important liberty interests that warrant habeas corpus relief.

Instead, the decision below erroneously reduces Happy's interest to the mere avoidance of physical suffering. Like the erroneous framing of the asserted interest in *Hardwick*, this formulation fails "to appreciate the extent of the liberty at stake." Rather than seeking mere freedom from physical maltreatment, Happy seeks relief from being deprived of the freedom to interact with other elephants in a normal social environment, a cruel deprivation that is causing her severe emotional suffering and harm. Contrary to the argument of the defendants in this case, there is no valid legal reason to restrict the scope of an animal's liberty interest to the avoidance of physical harm, any more than there was a valid legal reason in *Hardwick* to reduce the plaintiffs' claims to an asserted right to engage in a particular physical act.

By wrongly accepting this distorted framework, the lower court obscured the similarity between the liberty interest asserted by Happy and that asserted by people held in prolonged isolation. Today we recognize the profound harm caused by subjecting individuals to prolonged periods of isolation, which has been deemed akin to torture. *See Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting) (noting that "the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days"). In addition, because being held in solitary confinement is such a unique circumstance and inflicts such serious harm, courts have held that prisoners and other detainees may

seek habeas relief from solitary confinement. *See, e.g.*, *Rockey v. Krueger*, 306 N.Y.S.2d 359 (Sup. Ct., Nassau Co. 1969); *Garcia v. Spaulding*, 324 F.Supp.3d 228 (D. Mass. 2018) ("Habeas cases are not limited to those persons seeking complete freedom from confinement. Requests to change the level of restrictions or the form of confinement may also sound in habeas.").

Just as a human can seek habeas relief from solitary confinement, there are compelling arguments that Happy should be permitted to do so as well. But rather than grapple with those arguments in this and other similar cases, the lower courts have been forced to frame the urgent claims presented in a manner that improperly short circuits them and predetermines a negative result. This is not right. This Court must not turn away from Happy's plight, or from this being's plea for justice, for relief.

When he struck down Utah's denial of same-sex couples' freedom to marry in 2013, Judge Robert Shelby refused to perpetuate a longstanding injustice and injury. Rebuffing the suggestion that the Constitution and laws did not apply to those coming before the court for inclusion and redress, he wrote, "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian."[18] In that telling passage, he captured and reflected the obligation of courts

[18] *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), *affirmed*, 755 F.3d 1193 (10th Cir. 2014); *stay granted*, 134 S.Ct. 893 (2014); *petition for certiorari denied*, No. 14-124, 2014 WL 3841263 (Oct. 6, 2014).

to truly seek to understand, and uphold, principles that underlie, and sometimes require change, in familiar or longstanding practices that harm and exclude.

Here, too, all the answers may not be immediately apparent (or, indeed, needed to resolve this case), but this Court should not turn away. This Court should review Happy's claim for relief and meaningfully address the important questions and stakes for this intelligent, social, self-recognizing—and now cruelly confined—living being.

Dated: April 7, 2022

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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:

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Dated: April 7, 2022

David M. Lindsey

STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On April 7, 2022

deponent served the within: **Motion for Leave to File Amicus Brief**

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