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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.

BRIEF OF *AMICI CURIAE* HABEAS CORPUS EXPERTS FOR PLAINTIFFS-APPELLANTS

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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, Amici state that, as of the date of this brief's completion, no related litigation is pending before any court.

STATEMENT OF AMICI 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, Amici state that no party's counsel contributed content to this brief or participated in the preparation of this brief in any other manner. The Petitioner-Appellant contributed money to fund the printing and submission of this brief. Otherwise, no person or entity, other than movants or movants' counsel, contributed money intended to fund the preparation or submission of this brief.

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INTEREST OF AMICI CURIAE

Amici are experts in habeas corpus from a variety of backgrounds, including academics and practitioners-experts.

Some amici, including Hollis Whitson, Gail Johnson, Jane Byrialsen, and David Fisher have long practice histories in the field, seeking writs of habeas corpus in state and federal courts across the United States. These amici have used the writ to help free persons from unjust confinement, including persons who were wrongfully convicted. The lawyers worked on what is commonly known as the Central Park Jogger case.

The breadth and depth of the practice experience for the lawyers is extensive, and their expertise with the writ beyond dispute. We will not try to distill their experience here, beyond noting that their backgrounds in seeking justice through the writ and other procedural tools make them uniquely qualified to opine on the importance of a robust interpretation of the common law writ of habeas corpus. These lawyers have worked on cutting-edge state and federal habeas issues in all types of courts and their understanding of the writ is beyond question.

Some amici, by contrast, are academics with a research agenda that focuses on the history and application of the writ of habeas corpus. Professor Justin Marceau is a habeas corpus scholar and the Brooks Institute Research Scholar at

the University of Denver, Sturm College of Law. He has been a full-time law professor at the University of Denver, Sturm College of Law for eight years, and was awarded tenure in 2012. During the Spring of 2020, he was a visiting professor at Harvard Law School where he taught both criminal procedure and animal law. He specializes in constitutional and criminal law with an emphasis on habeas corpus procedures and teaches habeas corpus courses in addition to criminal law and advanced criminal procedure. Professor Marceau regularly researches and writes in the field of habeas corpus. He co-authored the book *Federal Habeas Corpus,* Andrea D. Lyon, Emily Hughes, Mary Prosser, & Justin Marceau, Federal Habeas Corpus Carolina Academic Press, (2d ed. 2011), and has written approximately 15 scholarly papers dealing with issues related to habeas corpus. His publications have been cited by numerous courts, including the United States Supreme Court and state supreme courts. His work has also been cited by more than 400 scholarly works, including leading treatises such as *Federal Habeas Corpus Practice* and *Procedure and Criminal Procedure*. Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure (6th ed. 2011); Wayne R. LaFave et al., Criminal Procedure (3d ed. 2014). His habeas corpus publications have appeared in the Yale Law Journal, the William & Mary Law Review, the Hastings Law Journal, and many others.

Samuel Wiseman is a Professor of Law at Penn State Law in University Park. After graduating from law school, he served as a law clerk to Chief Justice Wallace B. Jefferson of the Supreme Court of Texas and to Judge Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit. Between 2009 and 2010, Professor Wiseman served as a Fellow in the Texas Solicitor General's Office, focusing on post-conviction litigation before the Fifth Circuit. He has written numerous articles on habeas corpus and post-conviction remedies, and his works on these topics have appeared in the Minnesota Law Review, the Boston College Law Review, and the Florida Law Review.

Amici submit this brief as habeas corpus scholars and practitioners in support of the Nonhuman Rights Project, Inc.'s ("NhRP") appeal to this Court and to attest that the case brought by the NhRP on behalf of an elephant named Happy is of significant importance to the meaning and development of habeas corpus as an equitable doctrine. The previous courts that have addressed the matter have issued decisions that are in tension with our understanding of the core tenets of the historical writ of habeas corpus. *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery,* 152 A.D.3d 73 (1st Dept. 2017). Specifically, there is nothing in the common law that confines the habeas procedures available to challenge one's confinement to humans alone.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the greatest blemishes on our justice system is the wrongful detention of persons. The writ of habeas corpus is one of the tools available to correct injustices by requiring a person's captors to justify the person's imprisonment to the courts. While the writ has provided a procedural vehicle for vindicating the rights of thousands of humans to not be unlawfully detained, this brief argues that the time has come to consider the writ's application to other cognitively complex beings who are unjustly detained. The nonhumans at issue are unquestionably innocent. Their confinement, at least in some cases, is uniquely depraved—and their sentience and cognitive functioning, and the cognitive harm resulting from this imprisonment, is like that of human beings.[1]

Happy is an innocent being who is being actively and unjustly confined. Unless this Court recognizes Happy as a legal person for purposes of habeas corpus relief and orders her freed, she will be unjustly confined for the remainder

[1] As a conceptual matter, the point is not that similarity to humans is a necessary precondition to enjoy rights. But for common law courts, this argument by analogy to humans is a simple way of framing the issues before this Court. And strikingly, emerging literature demonstrates that the sort of suffering experienced by confined humans is in significant ways mirrored by cognitively complex animals who are confined. *See, e.g.,* Lori Gruen, *The Ethics of Captivity* (Oxford 2014) (devoting several chapters, including one on elephants, to the impact of confinement on physical and psychological well-being); *Id.* at 50 (including a chapter by Catherine Doyle who notes that "Elephants in Zoos face a variety of problems that are linked to the conditions of captivity, including obesity, abnormal repetitive behaviors . . . and deadly foot and joint diseases."). *See also* Lori Alward, *Why Circuses are Unsuited To Elephants*, *in* Elephants and Ethics 216 (Christen Wemmer & Catherine A. Christen, eds., 2008) ("It is not sufficient to show that, say, an elephant has enough to eat and is free of disease . . . [instead the question is] whether they are able to live fully elephantine lives.").

of her life. While Happy's claim is admittedly novel, this novelty should not prevent her from seeking habeas corpus relief. *See Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1058–59 (2018) (Fahey, J., concurring) ("The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it.").

There are three primary reasons that this Court should recognize Happy as a legal person and allow her to benefit from the procedural mechanisms afforded by the common law writ of habeas corpus. First, Happy should be classified as a legal person, and thus entitled to habeas corpus, given the overwhelming amount of scientific evidence showing how cognitively complex and cognitively similar to humans elephants are. Second, throughout this nation's history, habeas corpus has had a symbolic and sometimes useful role in hastening the end of social practices that are outdated or unjust. The writ has been used in novel ways to bring about social change that would seem unlikely based on controlling legal principles at the time, including within the realms of family law, slavery, and in wartime. Finally, applying habeas corpus to nonhuman animals like Happy is arguably consistent with the writ's historical uses.

To summarize the procedural history of this case, on October 2, 2018, the NhRP filed a Petition for Common Law Writ of Habeas Corpus on behalf of Happy in the Supreme Court, Orleans County. On November 16, 2018, the Orleans Court issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held in Albion, New York. In a notice of motion dated December 3, 2018, Respondents moved to transfer the proceeding to the Supreme Court, Bronx County or, in the alternative, to dismiss the Petition. On January 18, 2019, the Orleans Court granted Respondent's motion to transfer venue. On February 18, 2020, Justice Alison Y. Tuitt of the Supreme Court, Bronx County issued her Decision and Order granting Respondents' motion to dismiss the Petition and did so solely on the basis of the Appellate Division, Third Department's holding that nonhuman animals are not "persons" for purposes of habeas corpus in New York because they lack the capacity to bear legal duties. *Lavery*, 124 A.D.3d 148 (3d Dept. 2014).

ARGUMENT

I. Happy Should be Classified as a Legal Person and Entitled to Habeas Corpus.

A "legal person" is any entity capable of possessing a legal right. There is no principled reason that elephants, such as Happy, should be deprived of legal personhood in the context of habeas corpus. As an elephant, Happy is an intelligent being who understands her surroundings and experiences suffering much like a

human being would in circumstances of unjust confinement.[2] Moreover, the notions of guilt and innocence underlying the habeas corpus doctrine apply equally to nonhuman animals like Happy. Happy—as an autonomous and self-determining being, innocent and unjustly confined—should be recognized as a legal person who is entitled to the common law right to bodily liberty protected by habeas corpus, as historically used by persons imprisoned under similar unjust circumstances.

A. Captive Nonhuman Animals are Intelligent and Experience Suffering.

In just the past decade, advances in the scientific community's understanding of DNA have played a transformative role in our justice system. It has allowed us to exonerate and liberate innocent persons who were previously found under the highest standard of proof known to law—proof beyond a reasonable doubt—to be guilty. Science of a similarly profound and powerful character is beginning to change our understanding of the effects of confinement on nonhuman animals.

DNA and other scientific advances have allowed the scientific community to coalesce around a recognition that the cognitive function of certain cognitively

[2] We reiterate our sensitivity to the notion that animals are entitled to protections or rights only to the extent that they can manifest behaviors and capacities that are analogous to those enjoyed by humans. *Cf.* Will Kymlicka & Sue Donaldson, *Rights*, *in* Critical Terms For Animal Studies 320–337 (Lori Gruen, ed., 2018). This brief is not intended to articulate boundaries of animal rights, but rather to advance a framework for understanding Happy as deserving of the relief requested in this case.

complex nonhuman animal species, including Asian and African elephants, rivals that of humans.[3] Even beyond the sequencing of DNA, there is a growing consensus that nonhuman animals have sentience, consciousness, emotions, autonomy, and other brain functioning that is remarkably like that of humans. In 2013, a group of leading scientists signed the "Cambridge Declaration on Consciousness," which explained that "non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors." It went on to explain that "the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness."

The research is increasingly conclusive: nonhuman animals can feel, and suffer, and in fact have brains that function very similarly to our own. Marc Bekoff, *Scientists Conclude Nonhuman Animals are Conscious Beings*, Psychology Today (Aug. 10, 2012). Elephants in particular are known for their mental aptitude and deep emotional capacities, both of which are strikingly similar

[3] It is virtually unchallenged in the scientific community that the DNA of humans and certain nonhuman animals are remarkably similar. *See* American Museum of Natural History, *DNA: Collecting Humans and Chimps*, AMNH.ORG (2021) https://www.amnh.org/exhibitions/permanent/human-origins/understanding-our-past/dna-comparing-humans-and-chimps ("Humans and chimps share a surprising 98.8 percent of their DNA."). A recent article in Scientific American clarifies: "In 1871 Charles Darwin surmised that humans were evolutionarily closer to the African apes than to any other species alive. The recent sequencing of the gorilla, chimpanzee and bonobo genomes confirms that supposition and provides a clearer view of how we are connected: chimps and bonobos in particular take pride of place as our nearest living relatives, sharing approximately 99 percent of our DNA, with gorillas trailing at 98 percent." Kate Wong, *Tiny Genetic Differences between Humans and Other Primates Pervade the Genome*, Sci. Am. (Aug. 19, 2014).

to human cognition. Ferris Jabr, *The Science Is In: Elephants Are Even Smarter Than We Realized*, Sci. Am. (Feb. 26, 2014). Elephants are complex creatures with distinct emotions, societies, and lives. They form associations that foster the welfare of each member, in which their development and emotions from childhood through adulthood are readily evident. Martha Nussbaum, *The Capabilities Approach and Animal Entitlements*, *in* The Oxford Handbook of Animal Ethics 5 (Tom L. Beauchamp & R. G. Frey, eds., 2011).

The Capabilities Approach to personhood, developed by Martha Nussbaum and Nobel Prize-winning economist Amaryta Sen, is the appropriate approach for determining Happy's classification as a legal person. This approach embraces the notion that society should examine the capacities of each creature and support the approach that a whole life for said creature includes the ability for grief, compassion, and self-recognition. While this approach examines each being individually to determine their capabilities, the same dignity afforded to humans belongs to animals as well.

According to Nussbaum, one of the capabilities most fundamental to elephants is their ability to form complex, lifelong social bonds, particularly female elephants. Elephants have one of the most progressive mammalian social systems– residing in complex societies and displaying strong affiliative behaviors. Ellen Williams, Anne Carter, Carol Hall, & Samantha Bremner-Harrison, *Social*

Interactions in Zoo-Housed Elephants: Factors Affecting Social Relationships, 9 Animals 1, 2 (2019). Elephants are extremely social animals that form resilient, permanent bonds with their family members and herd. Female elephants, specifically, live in family herds with their young, and remain together throughout their entire lives. Young females acquire an array of skills from the older females of their herd, including mating and caring for calves. Joyce Poole & Petter Granli, Mind and Movement: Meeting the Interests of Elephants 11 (2008).

Because elephants have complex emotional and cognitive experiences, they are vulnerable to mental and physical suffering in unjust and cruel confinement, just as a human would be. Captive-held Asian elephants subjected to attachment divisions, such as maternal separation and premature weaning, socio-emotional deprivation and social isolation, and the chronic restriction of movement and freedom are common factors responsible for the development of Complex Post-Traumatic Stress Disorder. Jessica Bell Rizzolo & G.A. Bradshaw, *Prevalence and Patterns of Complex PTSD in Asian Elephants (Elephas maximus)*, *in* Asian Elephants in Culture & Nature (Nilanthi Bandara, Thilina Wickramaarachchi, Harini Navoda De Zoysa, eds., 2016). Elephant Post-Traumatic Stress Disorder ("PTSD") demonstrates that nonhuman animals have a consciousness comparable to that of humans and that our knowledge about human minds and brains applies to elephants and vice versa with equivalent rigor. Jessica Bell Rizzolo & G.A.

Bradshaw, *Nonhuman Animal Nations: Transforming Conservation into Wildlife Self-Determination*, 29 Society & Animals 393, 394–395 (2019). African elephant PTSD, later detected in Asian elephants, provides undeniable, statistically robust evidence of neuroscience's prediction; specifically, "neural substrates and psychological capacities possessed by elephants and other animals render them vulnerable to trauma comparable to humans." *Id.* at 395.

As Happy was removed from her herd at only one year old, she was cheated of one of the capabilities most fundamental to elephants. She never had the opportunity to form social bonds in the wild, and her captivity and solitary confinement further impeded her ability to do so. Given that she has not only experienced maternal separation at such a young age, but also social isolation by living in solitary confinement, and the chronic restriction of movement and freedom in her small enclosure, she is more prone to developing Complex Post-Traumatic Stress Disorder.

Even Judge Tuitt recognized that "Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings." *The Nonhuman Rights Project, Inc. v. Breheny*, Index No. 260441/2019, Decision and Order (Feb. 8, 2020). She further remarked, "Happy is more than just a legal thing, or property. She is an intelligent, autonomous being

who should be treated with respect and dignity, and who may be entitled to liberty." *Id.*

It is because of the intense and concrete suffering associated with unjust imprisonment that habeas corpus developed in the first place—if unjustly confined elephants suffer in the way a human would, the same remedy should protect elephants, too.

B. Exonerations and Notions of Innocence are Equally Applicable to Humans and Nonhumans.

There is a fundamental obligation to obey laws. This obligation classifies individuals who break laws as guilty, and individuals who do not as innocent. Writs of habeas corpus first and foremost allow those who are innocent, yet incarcerated, to be released from their unjust confinement and exonerated from their initial guilt. These fundamental principles of guilt and innocence or wrongful confinement are equally relevant to nonhuman animals and Happy's current confinement.

Nonhumans can likewise be guilty or innocent. Indeed, nonhumans have previously been pardoned or granted clemency. *Emprise Pardon Rejected*, Dayton Beach Morn. J. (Sept. 28, 1977), (discussing a corporation's request for a formal pardon to President Carter); *White House Rejects Emprise Pardon*, Chi. Trib. (Sept. 29, 1977); *see also* Ronald Everett & Deborah Periman, *"The Governor's Court of Last Resort:" An Introduction to Executive Clemency in Alaska*, 28

Alaska L. Rev. 57, 89 (2011) (discussing a governor's grant of such a pardon); Sarah Schindler, *Pardoning Dogs*, 21 Nev. L.J. 117 (2020), available at https://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1836&context=nlj. Additionally, at least one federal court has granted a corporation's request for a writ of *coram nobis* (or a writ of error). *United States v. Mett,* 65 F.3d 1531, 1534 (9th Cir. 1995).

While nonhuman animals are not indicted for crimes, that does not necessarily mean they cannot be exonerated or deemed innocent. While exoneration is generally thought of as a criminal conviction being reversed, the actual meaning of exoneration is much broader, meaning "[t]he removal of a burden, charge, responsibility, or duty." Black's Law Dictionary (10th ed. 2014). Under this definition, being released from unwanted and cruel confinement would constitute exoneration. Since habeas corpus is historically used to secure exonerations, it has application in this context.

Additionally, the law allows certain defenses for nonhuman animals when they conduct "criminal" behavior, indicating that the law more broadly does recognize some form of "guilt" or "innocence" for animals. For example, leading criminal law theorist Markus Dubber has observed that animal control statutes often function in ways that are very similar to human criminal codes. Not only are the definitions of "offenses familiar from criminal codes," the animal control codes

"lay out defenses to an allegation of dangerousness analogous to the defenses recognized in criminal law." Markus Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights 44 (2006).

Examining the New York animal control code, Dubber noted that an otherwise (criminally) dangerous dog has several available defenses including "defense of others," a "defense of property," "self-defense," and even an "extreme emotional disturbance" or provocation defense. *Id.* at 44–45 (quoting NY Agric. & Mkts. § 123(4) (2011)); *see also* Colo. R. Stat. § 18-9-204.5 (applying defenses to "dangerous dogs"). In other words, although nonhuman animals may not be subjected to criminal prosecution in a formal sense, when an animal's actions are subject to review by the state for their propriety, it is taken for granted that some defenses available to humans may also justify the acts of a nonhuman animal. Dubber at 45 ("If anything the canine versions of these defenses are more generous than the human ones."). Therefore, some nonhuman animals are already exonerated in a sense through codified state procedures providing relief from unwanted incarceration or execution.

Moreover, animals—and elephants in particular—have certainly been deemed guilty, and they have even been executed as a response to unwanted, or even criminal, action or behavior. In 1903, for example, Topsy the elephant was executed by electrocution after killing a human. Kat Eschner, *Topsy the Elephant*

was a Victim of Her Captors, Not Thomas Edison, Smithsonian Magazine (Jan. 4, 2017). In 1916, the elephant Big Mary was hung, twice—the first rope broke and she slammed into the ground, where she writhed for hours before a second chain was found—after killing a trainer. David Krajicek, *'Fed Up' Circus Elephant Big Mary Lynched for 'Murder' In 1916*, New York Daily News (Mar. 14, 2015).

If nonhuman animals can bear guilt and innocence, it is a plausible logical extension that nonhuman animals should also be able to be avail themselves of the mechanisms to secure an exoneration. Though not indicted for a crime, Happy is undoubtedly innocent. In other contexts, the law recognizes the concept of an innocent nonhuman entity, including corporations and nonhuman animals. Happy's innocence should weigh in favor of allowing her to benefit from the writ of habeas corpus.

Furthermore, without this type of procedural vehicle, Happy has no possible remedy to secure relief from the cruel confinement conditions, and her treatment could become even worse—potentially leading to her death. If even the most sentient animals confined in the worst conditions, like Happy, are never entitled to habeas relief, humans could continue to cruelly confine animals, and even execute sentient, emotionally and cognitively complex individuals. Such a result seems unjust, and unnecessary as a matter of habeas history and practice.

II. The Writ of Habeas Corpus has Historically Been Used in Novel Situations to Bring About Social Change.

Habeas corpus has been used throughout history in situations where no precise legal solution existed under codified law, but where leaving the status quo unchallenged would be unjust. Paul D. Halliday, Habeas Corpus: From England to Empire 133 (2010).

A. Family Law

Historians have documented that physical violence directed by husbands toward their wives moved from acceptable towards unacceptable during the eighteenth century. However, "some men found new ways to exert power over their wives," including "[c]onfinement, either within the home or in private madhouses." Elizabeth Foyster, *At the Limits of Liberty: Married Women and Confinement in Eighteenth-Century England*, 17 Continuity and Change 39, 40 (2002) ("The subject of confinement raised issues about women's rights over their bodies, personal liberties and identity within the law."). Disputes over such confinement were often adjudicated through habeas proceedings, because the writ of habeas corpus was said to be rightly employed as a check on "every unjust restraint of personal freedom in *private life*." *Id.* at 41 (emphasis added). Historians have noted that the use of the writ to challenge private confinement was not uncommon. *Id.* ("This writ was directed to a private individual and not a court

of law. It directed the person detaining the other to bring the detainee to the King's Bench").

Historian Elizabeth Foyster examined every existing affidavit from a habeas case involving child or spouse custody before the King's Bench between 1738 and 1800. *Id.* Foyster observes that the writ of habeas corpus provided a vehicle, much like the case before this Court, to test the very boundaries of one's legal power to confine. Habeas actions provided a "forum where the boundaries of men's rights and women's freedoms were tested," as private parties, including the "supporters of wives who were being confined" sought writs of habeas corpus against husbands or their agents. *Id.* at 42.[4]

More generally, the King's Bench in England utilized habeas corpus to adjudicate problems within families. Halliday at 121–132. Scholars have noted that this small number of cases are highly significant to the writ's history because they "reveal more about process and the writ's possibility than any other category of cases." *Id.* at 121. Consistent with the arguments of the NhRP, historians have noted that the "equity of a common law writ [was] constrained by little more than

[4] As with legal history more generally, the history of the writ of habeas corpus is not one of linear progress. Foyster herself observes that in addition to habeas actions filed on behalf of wives, "husbands requested writs to be directed to those who were offering refuge to their runaway wives." *Id.* at 42. There is, then, something of a mixed story when it comes to progress against injustice through the use of the writ. But it cannot be gainsaid that the writ provided women, children, and others a forum to "contest those rights." *Id.*

the justices' creativity." *Id.* (noting that the "creativity" extended to the remedies "beyond simply declaring someone remanded or released").

Without the creative deployment of the writ of habeas corpus, women subjected to abusive situations may have lacked any legal vehicle to seek relief. *Id.* at 24. Since women and children were deemed by the law to be less than full legal persons, many courts would have certainly scoffed at the idea that habeas corpus would be available to such parties.[5] Yet historians have observed that the flexibility of the writ allowed it to work in "an experimental mode," and it was the writ of habeas corpus that, despite the formalistic barrier presented by the lack of legal personhood, allowed wives and children to challenge their confinement or mistreatment. The writ was deployed to "release wives from abusive husbands," and in so doing, the writ became enshrined as a legal vehicle capable of "pierc[ing] the cultural wall" around established or longstanding practices and norms.[6] *Id.* at 125 (describing the writ's use as a "striking innovation"). Habeas corpus provided

[5] Peter Singer has eloquently retold the history of mocking the ascension of beings deemed less than human. "The idea of 'The Rights of Animals' actually was once used to parody the case for women's rights. When Mary Wollstonecraft published her Vindication of the Rights of Women in 1792, her views were widely regarded as absurd, and before long, an anonymous publication appeared entitled A Vindication of the Rights of Brutes. The author of this satirical work (now known to have been Thomas Taylor, a distinguished Cambridge philosopher) tried to refute Mary Wollstonecraft's arguments by showing that they could be carried one stage further. If the argument for equality was sound when applied to women, why should it not be applied to dogs, cats, and horses?" Peter Singer, Animal Liberation, first published 1975, 2nd ed., 1990 (Ecco, New York), pp.1.

[6] To be fair, the writ was not always about securing release. Halliday at 124 (noting that wives obtain "articles of peace" against their husbands). The writ was used against those who housed wives who had fled their husbands as well.

the procedures to litigate reforms that were well in front of statutorily mandated protections.

Importantly, habeas corpus was not used simply as a tool to secure freedom from abusive "captors," but rather was also used to "assign custody"—women and children could be transferred to a different, non-abusive household. *Id.* at 129. This use of the writ demonstrates that it can be used for more than simply seeking release from custody, but rather includes transfer to a safer environment, even if the end result was not utter liberation.[7] *Id.* From the perspective of family law disputes, perhaps what is most notable is that there are notable historical examples of the writ being used to "negotiate solutions to problems on a case-by-case basis." *Id.* at 133.

B. Slavery

Analogies to slavery in service of animal rights can be treacherous. Majorie Spiegel, The Dreaded Comparison: Human and Animal Slavery (1996). Any claim that enslaved moved completely from the category of "property" and into the realm of "person," falsely suggests that struggles against racial inequality are complete. But neither the writ of habeas corpus, nor a civil war achieved this goal.

[7] It may be of some historical relevance to mention that when spouses alleged that their partner was insane and in need of confinement, the courts would look to outside experts to help evaluate the situation. *Id.* at 127 (noting that Mansfield's "court then tried a new approach: relying on [outside] expertise" from doctors).

Yet the strategic, if imperfect use of the of writ of habeas corpus in this realm warrants mention. In the historic *Somerset* decision, the King's Bench declared that slavery was contrary to the British common law, and thus refused to force James Somerset back into involuntary servitude. *See generally* Steven M. Wise, Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery IX (Da Capo Press 2005).

It is a striking case because although no clear procedural or substantive basis existed for doing so, the court granted James Somerset's requested habeas corpus relief. Without resorting to sweeping claims about the writ's emancipatory power, in this particular case, habeas corpus offered a flexible and powerful tool for ending an instance of unjust captivity.

The write of habeas corpus provided a procedural vehicle to challenge a wrongful private confinement. Eric M. Freedman, *Habeas by Any Other Name*, 38 Hofstra L. Rev. 275, 277 (2009). Despite, or perhaps because of, the lack of alternative legal avenues or frameworks, habeas provided a procedural vehicle to challenge confinement when no other legal recourse was available. Jonathan Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 Yale J.L & Human 413 (1993). One need not regard the *Somerset* case as paradigmatic, or treat it as causing the end of human slavery in order to appreciate that, just as in the family law context, the writ of habeas corpus has proved itself to be a useful

procedural stop-gap for individual litigants. There is not a promise of sweeping change, but the reality of case-by-case determinations that can bring redress to individuals who are unjustly confined.

C. Wartime Habeas

Although it is true that "[t]oday, habeas corpus is understood primarily as a legal remedy for prisoners, [in the] nineteenth century Americans frequently used the process in other ways, from disputing child custody to questioning the validity of military enlistments." Frances M. Clarke & Rebecca Jo Plant, *No Minor Matter: Underage Soldiers, Parents, and the Nationalization of Habeas Corpus in Civil War America*, 35 Law & Hist. Rev. 881 (2017). The writ of habeas corpus was used, for example, to challenge the improper enlistment of children in the Army. *Id.* at 885 (noting cases involving parents who "insisted on their right to recover children from the military's clutches"); *Id.* at 887, 889 ("a writer for the New York Times claimed with some hyperbole that the judge [McCunn] had released "more than two full regiments of soldiers, on one pretext or another," earning himself the nickname "Habeas Corpus MCCUNN."); *but see Id.* at 889 ("the very first instance of a military officer refusing a writ of habeas corpus during the Civil War involved a case of an enlisted minor.").

Less numerous but more celebrated are the habeas cases challenging the confinement of political detainees held without trial. *Id.* at 885; *see generally,*

Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay (2017) (recounting the history of wartime habeas corpus). The wartime history of habeas starts with the glorification of the writ by Blackstone as the bulwark of liberty and the "second magna carta." Indeed, the writ's legacy was so legendary that refusal of the British to extend the protections of habeas corpus to the colonists is regarded as one of the rationales contributing to the push for independence. *Id.* at 5.

Although it has proven far from perfect in protecting liberty in times of emergency, both in England and in the United States, the common law writ has provided novel procedural opportunities to contest confinement. For example, habeas corpus has been used to provide non-citizen detainees an opportunity to challenge their confinement, despite their incarceration outside of the United States.

The United States' efforts to combat terrorism after September 11, 2001 led to legislative action regarding the habeas corpus rights of aliens designated by military authorities as enemy combatants. Specifically, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 statutorily eliminated habeas rights for enemy combatants detained at Guantanamo Bay, Cuba. The location of the Guantanamo Detainee Center was chosen not only for its large land availability and distance from known terrorist cells, but because it was thought that the

statutory and constitutional rights of non-citizen detainees could be limited if they were not physically present in the United States itself. However, the United States Supreme Court in *Rasul v. Bush* held that a district court does have jurisdiction to hear habeas corpus petitions by alien detainees at Guantanamo concerning the legality of their detentions. 542 U.S. 466, 483–84 (2004).

Additionally, in 2008, the Court ruled that Guantanamo detainees possessed habeas rights because the United States exercised some sovereignty over that territory. In *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause had full effect at Guantanamo Bay, even though Congress had attempted through legislation to strip federal courts of jurisdiction to hear habeas claims. 553 U.S. 723, 771 (2008). Therefore, detainees are entitled to the privilege of habeas corpus to challenge the legality of their detention. *Id.* In holding that the Suspension Clause applied at Guantanamo Bay, the Court noted that "at the absolute minimum" the Clause protects the writ as it existed when the Constitution was ratified. *Id.* at 746–47. Moreover, the Court held that Guantanamo detainees were entitled to habeas corpus despite the fact that the Court had previously "never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution." *Id.* at 771.

The writ of habeas corpus certainly did not swing the gates of Guantanamo Bay's detention facility open. Nor is the writ's overarching wartime history particularly rosy. But habeas corpus has provided a unique check on the confinement of individuals, even when those individuals are assumed by those confining them to be beyond the protections of law. At the very least, the common law writ's history includes a strain of precedent reflecting flexibility and an evolving doctrine that can be shaped by judges. Happy's case provides an opportunity to do justice for a confined being by relying on this justice-oriented aspect of the prerogative writ's history.

III. Applying Habeas Corpus to Nonhuman Animals, like Happy, is Consistent with the Writ's Historical Uses.

Happy is not a human being; however, without intending to dehumanize the marginalized humans whose recourse to habeas is discussed in this brief, it is important to note that Happy is confined, and according to experts is suffering. Happy is a being who has emotions, cognition, and the ability to suffer physical and psychological pain. Granting Happy the right to petition for habeas corpus is consistent with the history of considering habeas writs when more traditional legal remedies are unavailable or inadequate.

Allowing abused spouses or children, or a person like James Somerset to seek common law habeas relief did not end the abhorrent violence inherent in racism or sexism. The writ did not end slavery or domestic violence or wartime

detentions without trials, but it provided a procedurally significant vehicle for litigating the interest of the being. In short, habeas can serve as a mechanism for generating momentum in the direction of social change that cuts against prevailing unjust cultural norms. The writ can, in the words of a historian, act "as a lifeline" for those parties deprived of other available procedural vehicles. Foyster at 49.

Certainly, animal cruelty statutes, which provide remedies including criminal punishment for humans who harm nonhuman animals, exist. However, this type of statute provides no substantive basis for nonhuman animals to challenge their confinement per se. Indeed, courts have rejected efforts relying on anti-cruelty statutes as a basis for securing many forms of civil relief for the animal. Put differently, these statutes simply provide a mechanism for punishing humans for their cruel treatment of nonhuman animals, rather than substantively ensuring the wellbeing of the harmed animals.[8] Habeas corpus has never been a panacea, but it may very well be the only substantive legal basis Happy has to challenge her confinement.

CONCLUSION

[8] It is worth noting that a non-trivial amount of animal protection litigation is focused on a carceral solution to the problem of animal suffering. It is often argued that advancing the status of animals as victims in the service of human incarceration is the best way to protect the rights of animals. The Nonhuman Rights Project, by contrast, pursues litigation that opposes carceral logics and has more in common with traditional civil rights and movement lawyering. In this historical moment when the country is searching for alternatives to tough-on-crime solutions to social problems, litigation seeking access to habeas corpus relief should be recognized as a unique approach to protecting the dignity of animals. *See* Justin Marceau, *Beyond Cages* (Cambridge 2019).

While habeas corpus has not yet been applied to a nonhuman animal in New York or the United States, its application in this context is justified. The very history of habeas corpus is one of providing a mechanism for challenging the status quo and litigating the meaning of fundamental liberty and autonomy rights. Habeas corpus has historically been used in novel factual situations where no other legal vehicle exists.

We respectfully request that this Court recognize an expanded–but still limited–universe of legal personhood that affords the possibility of providing relief to some nonhuman animals in particularly egregious conditions. For the reasons above, Happy should be classified as a legal person and granted a writ of habeas corpus.

Dated: September 24, 2021

Respectfully submitted,

By: _____

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NEW YORK STATE COURT OF APPEALS
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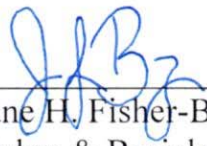

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action,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

On September 24, 2021

deponent served the within: **BRIEF OF *AMICI CURIAE* HABEAS CORPUS EXPERTS FOR PLAINTIFFS-APPELLANTS**

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Sworn to before me on September 24, 2021

Mariana Braylovskiy

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