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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 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.

RESPONSE TO *AMICI CURIAE* BRIEF OF PROTECT THE HARVEST, ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS, ANIMAL AGRICULTURE ALLIANCE, AND THE FELINE CONSERVATION FOUNDATION

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Date Completed: September 17, 2021

COURT OF APPEALS OF THE STATE OF NEW YORK

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Petitioner-Appellant, Nonhuman Rights Project, Inc. ("NhRP"), certifies that the NhRP has no corporate parents, subsidiaries or affiliates.

Dated: September 17, 2021

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Amici Curiae Protect the Harvest, Alliance of Marine Mammal Parks and Aquariums, Animal Agriculture Alliance, and the Feline Conservation Foundation (collectively, "Amici") erroneously assert that this Court's recognition of Happy's common law right to bodily liberty protected by habeas corpus would constitute a judicial taking in violation of the Fifth Amendment Takings Clause. The concept of a judicial taking, however, has never been recognized by the United States Supreme Court or any New York court and has been highly criticized in legal scholarship. Further, it would be immoral to apply such a concept to an autonomous and extraordinarily cognitively complex being such as Happy.

The erroneous arguments in Amici's prior two briefs, which they attached as Exhibits B and C, should also be rejected.

A. Neither the United States Supreme Court nor any New York court has recognized the concept of judicial takings

Amici cite the United States Supreme Court decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection*, 560 U.S. 702 (2010) for their mistaken proposition that the Fifth Amendment Takings Clause[1] "applies to judicial acts no less than legislative ones," Amicus Br. 8, and falsely conclude that, "[a]s the Supreme Court has made clear, an illegal taking, even by courts, is prohibited by the United States Constitution." *Id*. at 13. Notably, *Stop the Beach* did

[1] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

not rule on "whether there is such a thing as a judicial taking." 560 U.S. at 716. That was only endorsed by a four-member plurality.[2] Justice Scalia delivered "the opinion of the Court with respect to Parts I, IV, and V," and authored the plurality opinion "with respect to Parts II and III." *Id*. at 706. Amici cite statements in Parts II and III (specifically on pages 713-14, 722, 723-24, and 727-28) as if those statements were made by the full Court or a majority of the Court. Amicus Br. 8, 11-12. They were not.

"[A]ll *Stop the Beach* ultimately stands for is that, whether or not judicial takings can occur, [the Florida Supreme Court's decision at issue] was not one." *Judicial Takings, Judicial Federalism, and Jurisprudence: An* Erie *Problem*, 134 HARV. L. REV. 808, 814 (Dec. 11, 2020). *See Stop the Beach*, 560 U.S. at 733-34 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]his case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause . . . ."); *id*. at 742 (Breyer, J., concurring in part and concurring in the judgment) (question of judicial takings "unnecessarily" addressed by plurality "better left for another day").

As numerous federal and state courts make clear, *Stop the Beach*'s plurality opinion regarding the possibility of judicial takings is not precedential. *See, e.g.*,

[2] *Stop the Beach* unanimously held, by an 8-0 vote, that as a Florida Supreme Court's decision "did not contravene the established property rights of petitioner's members, Florida has not violated the Fifth and Fourteenth Amendments." 560 U.S. at 733.

Petro-Hunt, L.L.C. v. U.S., 862 F.3d 1370, 1386 n.6 (Fed. Cir. 2017) (plurality opinion in *Stop the Beach* "that a cause of action for a judicial taking exists is . . . not a binding judgment"); *TZ Manor, LLC v. Daines*, 815 F. Supp. 2d 726, 735 n.5 (S.D.N.Y. 2011), *aff'd*, 503 Appx. 82 (2d Cir. 2012) ("*Stop the Beach*'s [plurality] discussion was not a holding"); *N. Nat. Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 939 (Kan. 2013) (plurality opinion in *Stop the Beach* has "no precedential value"); *Sagarin v. City of Bloomington*, 932 N.E.2d 739, 744 n.2 (Ind. App. 2010) (citations to the "plurality portions of [*Stop the Beach*]" are "without precedential authority").[3] And no New York court has ever endorsed or recognized a judicial takings theory.

Moreover, the concept of judicial takings has been widely and severely criticized in legal scholarship,[4] including for its potential to "challenge our nation's

[3] *See also Petro-Hunt, L.L.C. v. U.S.*, 126 Fed. Cl. 367, 379 (Fed. Cl. 2016), *aff'd*, 862 F.3d 1370 (Fed. Cir. 2017) ("The justices [in *Stop the Beach*] . . . did not agree on the definition of a judicial taking, or even whether judicial takings claims are cognizable in federal court."); *Pavlock v. Holcomb*, 2021 WL 1213525 at *9 (N.D. Ind. Mar. 31, 2021) ("no binding precedent on the concept of judicial takings was established . . . as only four justices endorsed the concept in *Stop the Beach*"); *Shinnecock Indian Nation v. U.S.*, 112 Fed. Cl. 369, 385 (Fed. Cl. 2013), *aff'd in part, vacated in part, remanded*, 782 F.3d 1345 (Fed. Cir. 2015) (plurality opinion in *Stop the Beach* "did not create binding precedent"); *Burton v. Am. Cyanamid Co.*, 775 F. Supp. 2d 1093, 1099 (E.D. Wisc. 2011) ("Defendants cite no authority for the proposition that there can be a judicial taking. In [*Stop the Beach*], four justices supported this idea, not enough to establish a binding precedent.").

[4] *See generally, e.g.*, E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1198 (2011) (arguing that the plurality in *Stop the Beach* "defies a century of deference and poses a serious threat to the development of state property law"); John D. Echeverria, *Stop the Beach Renourishment: Essay Reflections from Amici Curiae*, 35 VT. L. REV. 475, 480 (2010) (arguing that the "proposed takings test [advanced

federal structure, improperly freeze the common law, and create a host of potentially insurmountable practical problems." Daniel L. Siegel, *Why We Will Probably Never See a Judicial Takings Doctrine*, 35 VT. L. REV. 459, 460 (2010); Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 2011 (2011) ("[T]he reason that judicial takings sits uneasily is because the idea of a 'taking' by a court denies the court's function, competence, and interpretative mission. Judicial decision-making, frozen in time, is a functional oxymoron."); Timothy M. Mulvaney, *The New Judicial Takings Construct,* 120 YALE L.J. ONLINE 247, 267 (2011) ("[T]he new judicial takings construct may very well threaten the ability of the law to adapt and evolve in the face of changing economic, environmental, social, and technological developments.").[5]

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by the plurality in *Stop the Beach*] would upend a good deal of apparently settled law"); J. Peter Byrne, *Stop the* Stop the Beach *Plurality!*, 38 ECOLOGY L.Q. 619, 619 (2011) (article highlighting "the central failings in the *Stop the Beach* plurality's analysis"); Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 2011 (2011) ("The idea of judicial takings, as advanced by the plurality in *Stop the Beach Renourishment* employs a series of misconceptions.").

[5] *See also Judicial Takings, Judicial Federalism, and Jurisprudence: An* Erie *Problem*, 134 HARV. L. REV. at 808 ("The judicial takings doctrine advocated by the *Stop the Beach* plurality poses a serious risk to the autonomy of states and state courts to adhere to their preferred jurisprudential philosophies."); *Stop the* Stop the Beach *Plurality!*, 38 ECOLOGY L.Q. at 630 ("Surely good-faith differences of legal interpretation by judges trained in their state's common law and charged by their state constitutions with its preservation and adaptation do not give rise to federal constitutional objections."); *Stop the Beach Renourishment: Essay Reflections from Amici Curiae*, 35 VT. L. REV. at 480 ("The Supreme Court has long recognized that common law courts have the power, without triggering the Takings Clause, to modify legal rules over time 'in light of changed circumstances, increased knowledge, and general logic and experience.'") (quoting *Rogers v. Tennessee*, 532 U.S. 451, 464 (2001)); Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 108 (2011) (judicial takings doctrine poses a "general threat to common-law evolution"); Elizabeth B.

B. This Court should reject Amici's immoral argument that Happy should be treated like an inanimate object

Amici provide no support for the proposition that the Fifth Amendment's Taking Clause—let alone the concept of judicial takings—can apply in habeas corpus cases. To suggest it could apply is immoral.

In support of the contention that granting Happy habeas corpus relief would violate the Takings Clause, Amici cite cases dealing with a beach,[6] money,[7] firearms,[8] tax rates,[9] and raisins,[10] none of which are remotely analogous to Happy. Amicus Br. 6-8. The Trial Court "agree[d] that Happy is more than just a legal thing, or property."[11] *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *10 (N.Y. Sup. Ct. 2020). (A-22). Based on the NhRP's six "expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of

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Wydra, *Constitutional Problems with Judicial Takings Doctrine and the Supreme Court's Decision in* Stop the Beach Renourishment, 29 UCLA J. ENVTL. L. & POL'Y 109, 121 (2011) ("In addition, federal judicial takings review could chill important state innovations to the common law.").

[6] *Stop the Beach*, 560 U.S. 702.

[7] *People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463 (2d Dept. 1963).

[8] *Dodson v. United States*, 2019 WL 1034215 (E.D. Mich. 2019).

[9] *Ocean City Taxpayers for Soc. J. v. Mayor and City Council of Ocean City*, 2015 WL 7567722 (D. Md. 2015).

[10] *Horne v. Dep't. of Agric.*, 576 U.S. 350 (2015).

[11] As Respondents concede that Happy is not a "thing" they must agree that Happy is a "person." NhRP's Reply Br. 1-2.

elephants" (A-10), the Trial Court found that Happy "is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." (A-22). The immoral comparison of an autonomous and extraordinarily cognitively complex being to merchandise and inanimate objects (i.e., legal "things") is inherently insidious and reminds us all of a regrettable history of judicial biases.[12]

For example, in *State v. Van Waggoner*, 6 N.J.L. 374, 376 (1797), the Supreme Court of Judicature of New Jersey denied habeas corpus relief to an Indigenous American, reasoning it would be a "great . . . violation of the rights of property to establish a contrary doctrine at the present day, as it would in the case of Africans." In *Matter of Archy*, 9 Cal. 147, 162 (1858), the Supreme Court of California ordered an escaped slave sent back into the custody of his owner because "where slavery exists, the right of property of the master in the slave must follow as a necessary incident." In *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857), the Supreme Court of the United States denied Dred Scott his freedom, reasoning there exists "a perpetual and impassable barrier . . . between the white race and the one

[12] Habeas corpus has long been used to free slaves. *E.g.*, *Lemmon v. People*, 20 N.Y. 562 (1860) (eight slaves), regarded as "one of the most extreme examples of hostility to slavery in Northern courts." Paul Finkelman, *Slavery in the Courtroom* 57 (1985); *In re Belt*, 2 Edm.Sel.Cas. 93 (N.Y. Sup. Ct. 1848) (slave boy); *In re Kirk*, 1 Edm.Sel.Cas. 315 (N.Y. Sup. Ct. 1846) (slave boy imprisoned on brig); *Jackson v. Bulloch*, 12 Conn. 38 (1837) (slave); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (slave child). However, under Amici's morally repugnant theory, freeing slaves would have amounted to an unconstitutional taking (or due process violation).

which they had reduced to slavery, . . . and which they then looked upon as so far below them in the scale of created beings." In the famous habeas corpus case of *Lemmon v. People*, 20 N.Y. 562, 641, 644 (1860), a dissenting judge, who favorably cited the "celebrated Dred Scott case," argued that the anti-slavery statute at issue was "unconstitutional and void" as applied to citizens of other states who traveled to New York for a temporary purpose with their slaves.[13]

Amici would like this Court to treat Happy no differently than money or raisins. And they would like this Court to treat Happy's habeas corpus case as if hers was a property dispute. Amicus Br. 6. Judge Fahey understood that:

> To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.

Matter of Nonhuman Rights Project, Inc. v. Lavery, 31 N.Y.3d 1054, 1058 (2018) (Fahey, J. concurring) (citation omitted).

Unlike merchandise and inanimate objects, Happy is not a "mere resource for human use" but an individual with "inherent value." Amici's contrary suggestion is repugnant; their position aligns with courts that once disregarded the fundamental liberty interests of enslaved humans and relegated them as legal "things." This Court

[13] *See also State v. Post*, 20 N.J.L. 368 (1845) (denying habeas corpus relief to slave); *State v. Hoppess*, 2 West.L.J. 279 (1845) (same).

should therefore reject Amici's entire judicial takings argument as an unsupported and immoral legal theory.

C. Amici's other erroneous arguments do not support denying Happy habeas corpus relief

Amici's assertion that ruling in Happy's favor "would open the floodgates to more cases like Happy's, thereby creating societal and economic upheaval, especially as it relates to New York State's agriculture industry," is based on a perversion of this case. Amicus Br. 3 (citing Exhibit B at 3-10; Exhibit C at 6-10). *See Matter of Johannesen v. New York City Dept. of Hous. Preserv. & Dev.*, 84 N.Y.2d 129, 138 (1994) (A "[floodgates] argument is often advanced when precedent and analysis are unpersuasive.").

First, Happy is an elephant, not an agricultural animal. Moreover, contrary to Amici's misrepresentation, this case is not about "*virtually all* nonhuman animals," Exhibit B at 3, but a specific nonhuman animal and her one common law right. *See* NhRP's Br. 17 ("this Court is only being asked to recognize one right for Happy."). It is irrelevant now whether other nonhuman animals may or may not be entitled to the protections of habeas corpus in the future.[14]

[14] Amici falsely claim that, should NhRP prevail, it "would immediately" attempt to use the precedent to free "all other animals from their confines in zoos, farms, and homes throughout New York, and, indeed, across America." Exhibit C at 4.

Recently in *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513, 516 (2021), this Court's one "task" was "simply . . . to determine whether a grandchild may come within the limits of her grandparent's 'immediate family,' as that phrase is used in zone of danger jurisprudence." Concluding that a grandchild does come within those limits, this Court left "[u]nsettled" whether other categories of individuals also qualify as "immediate family" under the common law. *Id*. Similarly, this Court's one "task" is simply to determine whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus. It can therefore recognize Happy's common law right and appropriately leave "unsettled" whether other species of nonhuman animals may invoke the protections of habeas corpus.

Second, this Court has long "rejected as a ground for denying a cause of action that there will be a proliferation of claims."[15] *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969). "It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts." *Id*. *See Battalla v. State of New York*, 10 N.Y.2d 237, 241-42 (1961) ("even if a flood of litigation were realized by abolition of the exception [prohibiting recovery for injuries incurred by fright negligently induced], it is the duty of the courts to willingly accept the opportunity

[15] Lord Manfield famously stated in *Somerset v. Stewart*, 1 Lofft 1, 17 (KB 1772), "fiat justitia, ruat ccelum" (let justice be done though the heavens fall). COMP-170. "The heavens did not fall, but certainly the chains of bondage did for many slaves in England." Paul Finkelman, *Let Justice Be Done, Though the Heavens May Fall: The Law of Freedom*, CHI.-KENT L. REV., Vol. 70, No. 2 at 326 (1994).

to settle these disputes."); *Matter of Nonhuman Rights Project, Inc. v. ex rel. Hercules and Leo v. Stanley*, 49 Misc.3d 746, 772 n.2 (Sup. Ct. 2015) (relying upon *Tobin*, rejecting "floodgates argument" in chimpanzee habeas corpus case as not being "a cogent reason for denying relief"); *Greene*, 36 N.Y.3d at 538 n.5 (Rivera, J., concurring) ("Courts are on shaky justificatory ground to begin with when they shape substantive law to avoid an increase in their workloads.") (citing Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1057 (2013)).

Third, Amici erroneously claim that the issue of Happy's personhood is solely a matter for the "legislature, not the courts," Amicus Br. 3, but make no attempt to address the NhRP's arguments for why this common law habeas corpus matter is not for the legislature. *See* NhRP's Br. 13-21.

Fourth, Amici claim it is "the public policy of the State of New York . . . that animals may continue to reside in zoos and aquaria, and are not in need of 'liberation.'" Amicus Br. 3. But New York's public policy with respect to some nonhuman animals may be different than its public policy with respect to other nonhuman animals.[16] For example, New York has had a public policy since 1996 of

[16] Amici contend that "recent grants" from the State of New York to "exhibitors like the Aquarium of Niagara" is evidence of New York State's "public policy" that "animals may continue to reside in zoos and aquaria, and are not in need of 'liberation.'" Amicus Br. 3. This argument is a weak attempt at justifying Happy's continued imprisonment. As Emma Marris notes in the *New York Times*, in a zoo environment, "[e]lephants bob their heads over and over. Chimps pull out their own hair. Giraffes endlessly flick their tongues. Bears and cats pace." Emma Marris, *Modern Zoos Are Not Worth the Moral Cost*, N.Y. TIMES (June 11, 2021), https://nyti.ms/3mlE83M. In fact, "[s]ome studies have shown that as many as 80 percent of zoo carnivores, 64 percent of zoo chimps

granting trust beneficiary rights to "domestic or pet animals" but not other nonhuman animals. EPTL § 7-8.1. NhRP's Br. 20-21, 29-30, 48.

Even in the case of humans, there was a time in which New York had different public policies with respect to whether certain persons had fundamental rights. On July 5, 1799, the New York legislature designated freedom as a birthright of Black persons born on or after July 4, 1800. However, "'[t]he Act for the gradual abolition of slavery' implemented a maddeningly indirect program of emancipation for African American New Yorkers born any time after the nation's twenty-third birthday. The law declared the children of slave mothers to be free but obligated those children to endure a period of service to their mother's masters extending well into adulthood." David N. Gellman, *Emancipating New York – The Politics of Slavery and Freedom 1777-1827* 1 (2006).[17]

Finally, Amici argue that transferring Happy to an elephant sanctuary would not result in true freedom since Happy wouldn't be allowed to roam the streets.

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and 85 percent of elephants have displayed compulsive behaviors or stereotypies." *Id.* For elephants, zoo-like captivity is especially terrible as many endure "arthritis and other joint problems from standing on hard surfaces; elephants kept alone become desperately lonely; and all zoo elephants suffer mentally from being cooped up in tiny yards while their free-ranging cousins walk up to 50 miles a day." *Id.*

[17] *See also* New York State Archives, NYSA_13036-78_L1799_Ch062 ("That any Child born of a slave within this State after the fourth day of July next; shall be deemed and adjudged to be born free: Provided nevertheless that such Child shall be the servant of the legal proprietor of his or her mother, until such servant if a male shall arrive at the age of twenty eight years, and if a female at the age of twenty-five years.").

Amicus Br. 4; Exhibit B at 8-9; Exhibit C at 11-12. However, they ignore the NhRP's uncontroverted expert evidence demonstrating the obvious differences between a blossoming elephant life at a renowned sanctuary where elephants live together within thousands of acres of trees, water, and grass, and Happy's imprisonment at the Bronx Zoo where she is forced to live alone in a miserable one-acre, and often tinier, enclosure. *See* NhRP's Br. 7-9, 55-56; (A-476-78, paras. 11-17, 19); (A-479, paras. 27-28.). Captive elephants sent to sanctuaries undergo "extremely positive transformations." (A-476, para. 11). This is because the "orders of magnitude of greater space" offered at sanctuaries "permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior." (A-478, para. 19).

Dated: September 17, 2021

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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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 17, 2021

deponent served the within: **Response to *Amici Curiae* Brief of Protect The Harvest, Alliance of Marine Mammal Parks and Aquariums, Animal Agriculture Alliance, and the Feline Conservation Foundation.**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on September 17, 2021

Mariana Braylovskiy

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