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**COURT OF APPEALS
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,

v.

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.

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

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Kathleen M. Sullivan, dated September 24, 2021, and upon a copy of the proposed amicus curiae brief attached as an exhibit thereto, the undersigned will move this Court on October 4, 2021, at 10:00 A.M., or as soon thereafter as counsel may be heard, at the Court of Appeals Hall, Albany, New York for an order pursuant to N.Y.C.R.R. § 500.23(a): (1) granting the National Association for Biomedical Research leave

to appear as amicus curiae in the above-captioned action; (2) accepting the brief attached hereto as Exhibit A; and (3) granting such other and further relief as the Court may deem just and proper. Further, should this Court accept the proposed brief, Amicus would request opportunity for appearance at oral arguments before the Court should oral arguments be scheduled in due course.

Respectfully submitted,



Dated: September 24, 2021

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**COURT OF APPEALS
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Respondents-Respondents.

**AFFIRMATION OF KATHLEEN M. SULLIVAN IN SUPPORT OF
MOTION TO APPEAR AS *AMICUS CURIAE***

Kathleen M. Sullivan, an attorney admitted to practice in the State of New
York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Quinn Emanuel Urquhart & Sullivan,
LLP and counsel for amicus. I am familiar with the legal issues involved in the
above-captioned appeal. I submit this affirmation in support of the Motion of
National Association for Biomedical Research (NABR) to submit the attached

Brief as Amicus Curiae in support of Respondents-Respondents James J. Breheny and the Wildlife Conservation Society in the above-captioned proceedings.

2. Founded in 1979, NABR is a 501(c)(6) organization devoted to advancing sound public policy for the humane use of animals in biomedical research, education, and testing. Its members include more than 340 universities, medical and veterinary schools, teaching hospitals, pharmaceutical and biotechnology companies, patient groups, and academic and professional societies that rely on humane and responsible animal research to advance global and human health. Among its members are such important New York institutions as Columbia University, Cornell University, the New York University School of Medicine, and the Memorial Sloan Kettering Cancer Center.

3. NABR's amicus brief explains why under the traditional tools of legal interpretation and common-law development, there is no defensible basis to confer habeas rights on elephants or other animals. The brief further explains how the carefully calibrated system of public enforcement of animal-welfare protections established by federal and state law strikes a balance among important, competing considerations, including not only protecting the welfare of animals, but also conducting life-saving research, ensuring public health, securing an adequate food supply, and educating the public about the Earth's biodiversity through zoos and aquariums. The brief argues that extending habeas rights to animals would

destabilize that proven system and drive up the cost of conducting critical research using animals, threatening to impede important medical breakthroughs and other major scientific advances that benefit humans and animals alike.

4. The issues before the Court have profound importance for the field of biomedical research. The proposed brief presents arguments relating to the current system of animal-welfare protections and the harmful effect of extending habeas rights to animals on biomedical research and the social good. For that reason, the proposed brief will be of assistance to the Court.

5. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. No party or party's counsel contributed money that was intended to fund preparation or submission of the brief, and no person or entity, other than movant or movant's counsel, contributed money that was intended to fund preparation or submission of the brief.

6. NABR does not have any parents, subsidiaries, or affiliates.

7. NABR's proposed brief is attached hereto as Exhibit A.

WHEREFORE, I respectfully request that this Court enter an Order: (i) granting NABR's Motion for Leave to file the proposed brief attached hereto as Exhibit A as Amicus Curiae; (ii) accepting the brief that has been filed and served along with the motion; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: September 24, 2021



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EXHIBIT A

Court of Appeals
of the
State of New York

In the Matter of a Proceeding under Article 70 of the CPLR
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– against –

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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 AMICUS CURIAE
NATIONAL ASSOCIATION FOR BIOMEDICAL RESEARCH
IN SUPPORT OF RESPONDENTS-RESPONDENTS

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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, Amicus states that, as of the date of the completion of this brief, there is no related litigation pending before any court.

STATEMENT OF AMICUS CURIAE

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that it is a 501(c)(6) trade association that has no parent, subsidiaries, or affiliates.

TABLE OF CONTENTS

Statement of Related Litigation	i
Statement of Amicus Curiae	i
Corporate Disclosure Statement	i
Table of Authorities	iii
Question Presented.....	1
Interest of Amicus Curiae	1
Summary of Argument	2
Argument.....	4
I. Habeas Rights Should Not Be Extended To Animals.....	4
II. Conferring Habeas Rights On Animals Would Have Adverse Practical Effects On Research Universities, Hospitals, And Laboratories	15
A. Federal And State Laws Provide Robust Protections For Animal Welfare While Safeguarding Other Important Interests.....	16
B. Authorizing Habeas Petitions On Behalf Of Animals Would Impose Unwarranted Costs On Biomedical Research And Impede Medical Breakthroughs	23
Conclusion	32
Word Count Certification	33

TABLE OF AUTHORITIES

Cases:

<i>Barker v. Parnossa, Inc.</i> , 39 N.Y.2d 926 (1976)	13
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	6, 7, 11, 13
<i>Department of Homeland Security v. Thuraissigiam</i> , 140 S. Ct. 1959 (2020)	14
<i>Flo & Eddie, Inc. v. Sirius XM Radio, Inc.</i> , 29 N.Y.3d 583 (2016)	8
<i>INS v. St. Cyr</i> , 533 U.S. 289 (2001).....	6
<i>Miles v. City Council of Augusta</i> , 710 F.2d 1542 (11th Cir. 1983)	6
<i>Nonhuman Rights Project, Inc. v. Breheny</i> , 189 A.D.3d 583 (1st Dep’t 2020)	9
<i>Nonhuman Rights Project, Inc. v. R. W. Commerford & Sons, Inc.</i> , 231 A.3d 1171 (Conn. App. Ct. 2020)	5
<i>Nonhuman Rights Project v. Stanley</i> , 16 N.Y.S.3d 898 (Sup. Ct. N.Y. Co. 2015)	12
<i>People ex rel. DeLia v. Munsey</i> , 26 N.Y.3d 124 (2015).....	7, 8
<i>People ex rel. Keitt v. McMann</i> , 18 N.Y.2d 257 (1966)	8, 9
<i>People ex rel. Nonhuman Rights Project, Inc. v. Lavery</i> , 124 A.D.3d 148 (3d Dep’t 2014), <i>lv. denied</i> 26 N.Y.3d 902 (2015)	7

<i>Rowley v. City of New Bedford</i> , 159 N.E.3d 1085, 2020 WL 7690259 (Mass. App. Ct. 2020) (table decision), <i>rev. denied</i> , 165 N.E.3d 159 (Mass. 2021).....	5
---	---

Constitutional Provisions, Statutes, and Regulations:

7 U.S.C. § 2131(1)	16
7 U.S.C. § 2132(e)	17
7 U.S.C. § 2132(f).....	17
7 U.S.C. § 2132(h)	17
7 U.S.C. § 2133	17
7 U.S.C. § 2134.....	17
7 U.S.C. § 2136.....	17
7 U.S.C. § 2143(a)(1).....	17
7 U.S.C. § 2146(a)	17
7 U.S.C. § 2149(a)	17
7 U.S.C. § 2149(b)	17, 22
7 U.S.C. § 2149(d)	18
7 U.S.C. § 2159(a)	18
9 C.F.R. §§ 1.1 <i>et seq.</i>	18
9 C.F.R. § 2.31(a).....	18
9 C.F.R. § 2.31(b)(3)(ii).....	18
9 C.F.R. § 2.31(c).....	18
9 C.F.R. § 2.31(d)(1).....	19
9 C.F.R. § 3.75(c)(3).....	19

9 C.F.R. § 3.75(e).....	19
Animal Welfare Act, 7 U.S.C. §§ 2131 <i>et seq.</i>	16
Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 <i>et seq.</i>	20
L.2017, c. 333, § 3 (Oct. 19, 2019).....	21
N.Y. Agri. & Mkts. L. § 350(1).....	20
N.Y. Agri. & Mkts. L. § 353.....	20
N.Y. Agri. & Mkts. L. § 353-a.....	20
N.Y. Agri. & Mkts. L. § 353-c.....	20
N.Y. Agri. & Mkts. L. § 353-f.....	20
N.Y. Agri. & Mkts. L. § 356.....	20
N.Y. Agri. & Mkts. L. § 381.....	20
N.Y. Agri. & Mkts. L. § 380.....	21
N.Y. C.P.L.R. § 7002.....	2
N.Y. C.P.L.R. § 7002(a)	5
N.Y. Const. art. 1, § 4	6
Twenty-Eight Hour Law, 49 U.S.C. § 80502	20
U.S. Const. art. I, § 9, cl. 2.....	6

Secondary Sources:

BLACK’S LAW DICTIONARY (11th ed. 2019).....	5
Animal Legal Defense Fund, <i>Animals Used in Research</i>	25
National Institutes of Health, National Institute of Allergy and Infectious Diseases, <i>The Important Role of Animal Research in COVID-19 Vaccine Development</i> (Aug. 18, 2021).....	26

National Institutes of Health, National Institute for Allergies and Infectious Diseases, <i>Research Using Vertebrate Animals</i>	19
National Institutes of Health, Office of Laboratory Animal Welfare, <i>PHS Policy on Humane Care and Use of Laboratory Animals</i> (Rev. 2015)	19
Nonhuman Rights Project, <i>Frequently Asked Questions</i>	29
Press Release: <i>The Nobel Prize in Physiology or Medicine 2020</i>	27
United States Department of Agriculture, <i>Fiscal Year 2019</i> <i>Annual Report, Animal Usage</i>	25

QUESTION PRESENTED

Whether the privilege of the writ of habeas corpus may be invoked on behalf of an elephant.

INTEREST OF AMICUS CURIAE

Founded in 1979, the National Association for Biomedical Research (NABR) is a 501(c)(6) organization devoted to advancing sound public policy for the humane use of animals in biomedical research, education, and testing. Its members include more than 340 universities, medical and veterinary schools, teaching hospitals, pharmaceutical and biotechnology companies, patient groups, and academic and professional societies that rely on humane and responsible animal research to advance global and human health. Among its members are such important New York institutions as Columbia University, Cornell University, the New York University School of Medicine, and the Memorial Sloan Kettering Cancer Center. NABR strongly supports legislation, regulation, and enforcement systems that ensure animals are treated humanely in laboratories and other research and education environments. But NABR has grave concern that the unprecedented judicial expansion of habeas corpus rights to animals would produce a wave of meritless private actions against research and teaching institutions that would drive up the cost of developing

life-saving drugs and medical technologies and thus would impede the progress of scientific and medical research that produces enormous social good.¹

SUMMARY OF ARGUMENT

This Court should reject Appellant’s request to confer habeas corpus rights on Happy, an elephant residing at the Bronx Zoo. Such a radical departure from the settled understanding of legal personhood and the traditional domain of habeas corpus would disrupt the Nation’s carefully calibrated system of public enforcement of animal-welfare laws and would impose unwarranted costs on conducting life-saving biomedical research.

I. Under the traditional tools of legal interpretation and common-law development, there is no defensible basis to confer habeas rights on elephants or other animals. The habeas statute, N.Y. C.P.L.R. § 7002, makes habeas relief available only to a “person,” the common legal meaning of which does not encompass animals. Likewise, the Suspension Clauses of the United States and New York Constitutions, like other constitutional provisions, have never been understood to endow animals with legal rights. And this Court’s authority to gradually develop the common law of habeas corpus through case-by-case adjudication does not include the

¹ Although human beings are of course animals, this brief uses the word “animal” to refer to nonhuman animals.

power to radically transform the New York legal system by conferring legal personhood on another species. Even if this Court did possess such authority, moreover, extending habeas rights to animals would be exceptionally unwise, as it would generate a litany of difficult conceptual questions and practical problems without any legally manageable standards for resolving them.

II. Extending habeas rights to animals would have adverse practical consequences for scientific and medical research. It would destabilize the carefully calibrated system of public enforcement of animal-welfare laws established by federal and state law, which already heavily regulate the use of animals in scientific and medical research. Under those longstanding legal regimes, specialized federal and state agencies are responsible for ensuring the proper treatment of animals and can impose a range of remedial measures short of release to enforce compliance with legal standards. Those settled frameworks strike a balance among important, competing considerations, including not only protecting the welfare of animals, but also conducting life-saving research, ensuring an adequate food supply, and educating the public about the Earth's biodiversity through zoos and aquariums.

A judicially created system of private enforcement of animal-welfare laws would drive up the cost of conducting critical research using animals by inviting countless legal actions, and as a consequence threaten to impede important medical breakthroughs and other major scientific advances that provide enormous social

good. Medical discoveries and treatments achieved through animal research have saved millions of lives, including most recently in the development of COVID-19 vaccines. Ongoing research promises to save millions more. To the extent that any change to the current regime of animal-welfare laws is warranted, it should be instituted by democratically accountable legislatures that can craft legal standards and remedies to cause the least possible disruption to scientific discovery and medical innovation.

ARGUMENT

I. Habeas Rights Should Not Be Extended To Animals

Appellant asks this Court to be the first court in American history to hold that the privilege of the writ of habeas corpus extends to animals. But under the traditional tools of legal interpretation and common-law development, there is no defensible basis to endow animals with legal rights or legal personhood. Such a monumental change in the basic structure of constitutional government falls far outside of the competence and proper role of the judiciary in a democratic system.

1. The relevant statutory and constitutional provisions governing the writ of habeas corpus do not apply to animals. The New York habeas statute provides:

A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf . . . , may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance. A judge authorized to issue writs of habeas corpus having evidence, in a judicial proceeding before him, that any

person is so detained shall, on his own initiative, issue a writ of habeas corpus for the relief of that *person*.

N.Y. C.P.L.R. § 7002(a) (emphases added). Under the unambiguous text of that provision, habeas relief is available only to a “person.” Although the statute does not include a definition of “person,” in common parlance the word “person” does not refer to an animal. All three definitions of “person” in Black’s Law Dictionary, moreover, exclude other species: “[a] human being,” “[t]he living body of a human being,” or “[a]n entity (such as a corporation) that is recognized by law as having most of the rights and duties of a human being.” BLACK’S LAW DICTIONARY (“person”) (11th ed. 2019). Animals are not, of course, human beings, and they are not recognized as having “most of the rights and duties of a human being” under any legal system in the world, much less the legal system of New York.

Other state courts to consider the question have easily reached the conclusion that the term “person” in a habeas statute does not encompass animals. *See Nonhuman Rights Project, Inc. v. R. W. Commerford & Sons, Inc.*, 231 A.3d 1171, 1176 (Conn. App. Ct. 2020); *Rowley v. City of New Bedford*, No. 20-P-257, 2020 WL 7690259, at *1-*2 (Mass. App. Ct. 2020) (unpublished), *rev. denied*, 165 N.E.3d 159 (Mass. 2021). That is hardly surprising: No ordinary English speaker would use the word “person” to refer to an elephant, a dolphin, a Chihuahua, or a grasshopper.

Nor do the Suspension Clauses of the United States and New York Constitutions apply to animals. *See* U.S. Const. art. I, § 9, cl. 2; N.Y. Const. art. 1, § 4. Appellant has not identified a single judicial decision in American history construing *any* provision of either document to endow animals with legal rights. Constitutional rights belong to humans alone, not animals. As the United States Court of Appeals for the Eleventh Circuit has explained, an animal “cannot be considered a ‘person’ and is therefore not protected by the Bill of Rights.” *Miles v. City Council of Augusta*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983). And there is no plausible basis in text, history, or judicial precedent to construe the Suspension Clauses alone to apply to animals. Indeed, because habeas is merely a procedural vehicle that permits prisoners to challenge their detention as unlawful under other constitutional and statutory provisions, *see Boumediene v. Bush*, 553 U.S. 723, 798 (2008), it would be particularly anomalous to conclude that habeas is the one right that extends to other species.

To be sure, the United States Supreme Court has not “foreclose[d] the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the present scope of the writ.” *Boumediene*, 553 U.S. at 746 (citing *INS v. St. Cyr*, 533 U.S. 289, 300-301 (2001)). But there are no “post-1789 developments” that would support extending constitutional habeas rights to animals. No other constitutional rights have been conferred on animals, either as a

matter of judicial interpretation or constitutional amendment; no legislatures have granted animals statutory habeas rights; and, for reasons set forth below, the practical problems with such an extension would be legion, *see pp. 9-13, infra*.

This case is a far cry from a case like *Boumediene*, where “the historical record” and “the common law” did not “yield[] a definite answer to the question” of whether prisoners held at Guantanamo Bay, Cuba, under *de facto* but not *de jure* U.S. control could invoke the writ. *Boumediene*, 553 U.S. at 752, 755. Here, neither the historical record nor the common law offers even a scintilla of support for the notion that a party may invoke the writ of habeas corpus on behalf of an animal. As the Third Department has explained, “animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law.” *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep’t 2014), *lv. denied*, 26 N.Y.3d 902 (2015).

2. Acknowledging that the text, history, and settled judicial interpretation of the habeas constitutional and statutory provisions do not support its position, Appellant argues that this Court may nevertheless invoke its inherent power to develop the common law of habeas corpus to expand the writ to animals, citing *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015). Appellant’s Br. 15-17. But *DeLia* does not support such a sweeping claim of authority to rewrite the basic rules of the

New York legal system. Rather, *DeLia* explained only that the legislature generally may not “abrogate[]” or “curtail[]” the “historic writ of liberty” because the writ has “constitutional roots.” *DeLia*, 26 N.Y.3d at 130 (internal quotation marks omitted). That holding is not a license for the judiciary to vastly *expand* the writ beyond its traditional domain.

To be sure, the judiciary has considerable discretion to fill in the gaps in the habeas statute and to determine how it applies in new contexts given the writ’s “great flexibility and vague scope.” *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966). But that does not mean that courts may construe the statute in a manner that conflicts with its plain meaning and historical province. Just as the statute’s requirement that the detention be “illegal” could not be construed to authorize the release of prisoners who are lawfully detained, courts may not construe the term “person” to permit habeas relief for a creature that is not a “person” under any reasonable understanding of that term.

3. Even if this Court did possess authority to expand the availability of habeas relief to other species, it would be exceptionally unwise to do so. The State’s elected representatives have never seen fit to confer legal personhood on animals in any context. This Court has cautioned that “[t]he common law . . . evolves slowly and incrementally, eschewing sudden or sweeping changes.” *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 29 N.Y.3d 583, 594 (2016). But Appellant urges the Court to invoke

the common law to impose a revolutionary change inconsistent with such prudence and incrementalism by for the first time extending legal personhood to other species. Such a marked break from the basic tenet that among living creatures only humans enjoy legal rights and bear legal responsibilities—which is woven into the very fabric of our society—would bear no resemblance to “the slow process of decisional accretion” that is the hallmark of common-law development. *Keitt*, 18 N.Y.2d at 263.

Conferring habeas rights on animals would also “lead to a labyrinth of questions that common law processes are ill-equipped to answer.” *Nonhuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583, 583 (1st Dep’t 2020) (decision below). For example, a decision conferring habeas rights on elephants would immediately raise the question of what animal species are sufficiently intelligent, autonomous, or otherwise worthy to enjoy constitutional and statutory rights. Appellant has sought habeas rights on behalf of elephants and chimpanzees. What about dogs, orangutans, pigs, and octopuses, all of which are considered relatively intelligent? Appellant has argued that elephants are entitled to habeas rights because they are “autonomous beings with advanced cognitive abilities.” Appellant’s Br. 38. But animal-rights organizations have made similar arguments about numerous species, including mice and rats—the most commonly used species in biomedical research.

Were this Court to extend habeas rights to elephants, New York courts would be inundated with claims on behalf of thousands of different species and compelled to make species-by-species (or even animal-by-animal) determinations of relative intelligence, autonomy, and personal value. Courts would lack judicially manageable standards to adjudicate such claims, which are better suited to resolution by evolutionary biologists and moral philosophers than lawyers and judges. Even if courts possessed the requisite scientific aptitude to make comparative judgment about the intelligence and autonomy of different species (and even assuming that the science itself were settled on these questions and that the notion of “autonomy” were subject to objective definition), courts would still be left with no clear standard about what levels of functionality, mental acuity, and self-consciousness suffice to merit habeas rights. Animal intelligence presumably exists on a spectrum, and courts would be left at sea as to which species are smart enough to participate in humankind’s legal system.

Moreover, even if New York courts could find their way through the morass of a species-by-species analysis of intelligence and autonomy, they would quickly encounter another problem: what the habeas remedy of “release” means as a practical matter for an animal. Human beings who are illegally detained are typically granted their freedom. But many species of animals could not reasonably be released from confinement, both for their own safety and, in the case of larger animals and

predators, the safety of New Yorkers and their pets. Courts would therefore be drawn into a costly and complex process of identifying appropriate facilities for animal transfers or arranging for animals to be released into wild areas in the United States or other countries. Even putting aside the question of whether an inter-facility transfer qualifies as a “release,” *see* Respondent’s Br. 49-53, it would be costly and time-consuming for courts to superintend the transfer of animals among different facilities or their release into suitable natural environments.

The legal complexities, moreover, would not end with the habeas statute itself. As noted, habeas corpus is merely a “procedural protection[.]” that allows a party to challenge the lawfulness of detention; it does not supply “the content of the law that governs [that] detention.” *Boumediene*, 553 U.S. at 798. Rather, whether a particular detention is unlawful turns on other laws that supply the substantive standards for detention, including both constitutional provisions, such as the Due Process Clause and the Fourth Amendment, and statutory restrictions. If habeas rights were extended to animals, therefore, courts would confront a host of legal questions about whether animals can invoke various legal protections and rights. Are animals protected by principles of due process and the Fourth Amendment’s prohibition on unreasonable seizures? Can animal-welfare laws, which currently are applied only through a system of public enforcement, *see* pp.16-21, *infra*, be invoked on behalf

of animals through habeas petitions, even if the statutes themselves establish no private right of action and do not provide for the remedy of release? If so, what sort of violations warrant release or transfer of an animal? Will even minor violations of housing and care standards merit that relief? And can parties acting on behalf of animals invoke more general laws against false imprisonment and tortious conduct? There are no readily ascertainable standards for answering these questions, because the legislative bodies that enacted the U.S. and New York Constitutions and federal and state animal-welfare laws had no notion that third parties would be able to invoke the laws through habeas petitions filed on behalf of animals.

Still other complex and amorphous questions would arise if this Court were to embrace Appellant's position. How does a judge without zoological expertise determine which facility best serves the needs of an antelope or platypus or sea turtle—or even exactly what those needs are? What if an animal would face predators in the wild? Is that better or worse than residence in a zoo? Also, what does it mean for a party to be acting “on behalf of” an animal? Although one New York jurist has concluded that the habeas statute places no limit on who can file a petition on behalf of an animal, *see Nonhuman Rights Project v. Stanley*, 16 N.Y.S.3d 898, 905 (Sup. Ct. N.Y. Co. 2015), the question of who speaks for an animal will quickly arise: A court could be faced with multiple parties (including the animal's current custodian) asserting that they represent the best interests of a particular animal. And the animal

of course cannot choose its representative or express a preference for a particular legal position or form of relief.

In short, adopting Appellant’s position would jettison the pragmatic, cautious incrementalism of common-law decisionmaking by effecting a departure from settled norms that the legislature has not seen fit to enact and that would generate myriad practical problems for courts. But “[t]he common law is served best by changes in its doctrine based on the progression of actual cases and a process of evolution which does not disrupt the essential pragmatism of the common law by excessive devotion to the promulgation of abstract ideologies.” *Barker v. Parnossa, Inc.*, 39 N.Y.2d 926, 927 (1976) (Breitel, C.J., concurring).

4. Even assuming that the writ of habeas corpus could be invoked on behalf of an animal, Appellant’s argument in this case would suffer from another flaw: Appellant has not identified any cognizable basis to conclude that Happy’s confinement at the Bronx Zoo is *unlawful*—a requirement for habeas relief. The writ of habeas corpus is a vehicle to test the legality of detention, but it does not itself supply substantive rules for whether any particular detention is unlawful. *Boumediene*, 553 U.S. at 798; *see also* Brief for *Amicus Curiae* Laurence H. Tribe in Support of Petitioner-Appellant 21 (1st Dept. July 13, 2020) (noting distinction between “the procedural and institutional question of habeas corpus jurisdiction” and “the sub-

stantive question of entitlement to habeas relief”). And Appellant has in fact expressly declined to argue that Respondents are “in violation of any federal, state or local animal welfare laws.” A-48.

Appellant nevertheless claims that Happy enjoys a “common law right to bodily liberty protected by habeas corpus” that entitles her to release regardless of whether her confinement is otherwise lawful. Appellant’s Br. 3. But there is no such unrestricted right. Habeas corpus is “a means to secure release from *unlawful* detention,” not from lawful detention. *Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1963 (2020) (emphasis altered). Whether a detention is unlawful must be ascertained under some other provision of law. And while human beings enjoy the right not to be deprived of liberty without due process of law, there exists no free-floating right to be free from all detention. Appellant has made no argument that Happy’s residence at the Bronx Zoo violates the Due Process Clause or any other constitutional or statutory provision, and it has long been regarded as lawful for animals to be owned by institutions and individuals and confined within suitable living areas. Indeed, federal and state animal-welfare laws take it as given that animals will be under the custody and control of human beings. There is thus no merit to the argument that Happy has a standalone right to liberty even if its confinement at the zoo otherwise violates no laws.

Recognizing such an unrestricted right to “bodily liberty” for animals, moreover, would have sweeping and impracticable consequences. If the asserted right is freedom from *any* confinement—not from confinement in violation of specific legal prohibitions—then every animal that enjoys habeas rights would be entitled to immediate release into the community or the wild. Such a result would be absurd, not to mention dangerous. Moreover, Appellant’s specific request for the transfer of Happy to a different facility—rather than complete release—is at odds with its legal argument. Since the claimed right to “bodily liberty” does not distinguish between confinement in a zoo and confinement in an elephant sanctuary, Appellant’s sole requested remedy does not actually vindicate the asserted right.

In sum, even assuming the availability of habeas relief, Appellant has identified no cognizable basis to hold that Happy’s residence at the Bronx Zoo is illegal. A habeas petition that does not identify any legal defect in the petitioner’s detention would be insufficient for a human being, let alone an animal.

II. Conferring Habeas Rights On Animals Would Have Adverse Practical Effects On Research Universities, Hospitals, And Laboratories

For the reasons set out above, there is no defensible basis within the ordinary framework of legal interpretation and common-law development to extend habeas rights to animals, much less to conclude that Happy must be transferred out of the Bronx Zoo. But those problems aside, a further practical consideration disfavors the unprecedented ruling that Appellant seeks. Federal and state animal-welfare laws

establish a carefully calibrated system of public enforcement and targeted remedies to protect animal wellbeing while safeguarding other critical public interests, including fostering scientific research, ensuring public health, promoting agriculture, and educating the public about biodiversity through zoos and aquariums. But extending habeas rights to animals would upset the balance that legislatures have struck in animal-welfare protections and impose massive costs on biomedical research facilities in particular, imperiling work that promises to save and improve countless human lives, as well as animal lives.

A. Federal And State Laws Provide Robust Protections For Animal Welfare While Safeguarding Other Important Interests

The current system of federal and state animal-welfare protections has proven extraordinarily effective at preserving the wellbeing of animals and minimizing their discomfort while ensuring that both human beings and animals will benefit from critical biomedical research and fulfilling other important public interests, such as food security and scientific education.

1. The Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*, is the primary federal law governing non-farm animals, including animals commonly used in research (other than certain rodents and birds). The purpose of the statute is “to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment.” 7 U.S.C. § 2131(1). The Act authorizes the Secretary of Agriculture to promulgate standards for the humane care

of animals by research facilities, dealers, and “exhibitors” (*e.g.*, zoos and circuses), 7 U.S.C. § 2143(a)(1); requires dealers and exhibitors to obtain licenses from the Secretary after demonstrating that their facilities comply with those standards, 7 U.S.C. §§ 2132(f) and (h), 2133–2134; and requires research facilities to register with the Secretary, 7 U.S.C. §§ 2132(e), 2136.

The Animal Welfare Act is enforced by the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture. The statute authorizes APHIS inspectors to make unannounced visits to research facilities, exhibitors, and dealers. 7 U.S.C. § 2146(a). APHIS must conduct at least one inspection of a research facility every year “and, in the case of deficiencies or deviations from the standards promulgated under this chapter, . . . such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.” *Id.* The Secretary may assess civil penalties of up to \$10,000 per violation per day on research facilities, exhibitors, and dealers who violate the standards and may suspend the licenses of dealers and exhibitors. 7 U.S.C. § 2149(a) and (b). In determining the amount of a civil penalty, the Secretary must “give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person’s good faith, and the history of previous violations.” 7 U.S.C. § 2149(b). In addition, when the Secretary has “rea-

son to believe” that a dealer or exhibitor “is placing the health of any animal in serious danger in violation of [the statute] or the regulations or standards promulgated thereunder,” the Attorney General may seek an injunction against that party in federal court. 7 U.S.C. § 2159(a). And dealers and exhibitors who knowingly violate the statute are subject to criminal penalties of up to 1 year of imprisonment. 7 U.S.C. § 2149(d).

The Secretary has promulgated comprehensive rules and standards under the statute. 9 C.F.R. §§ 1.1 *et seq.* Among many other provisions, the regulations require each research facility to appoint an Institutional Animal Care and Use Committee to periodically review the facility’s “program for humane care and use of animals,” biannually inspect the facility, prepare reports, investigate public complaints, and approve proposed activities relating to the care and use of animals. 9 C.F.R. § 2.31(a) and (c). At least one member of the committee must be otherwise unaffiliated with the research facility and must “provide representation for general community interests in the proper care and treatment of animals.” 9 C.F.R. § 2.31(b)(3)(ii). In approving proposed activities, the committee must ensure that the activities “will avoid or minimize discomfort, distress, and pain to the animals”; the principal investigator has “considered alternatives to procedures that may cause more than momentary or slight pain or distress to the animals” and has confirmed that “the activities do not unnecessarily duplicate previous experiments”; any painful

activities will “[b]e performed with appropriate sedatives, analgesics or anesthetics” if scientifically possible; and “animals’ living conditions will be appropriate for their species.” 9 C.F.R. § 2.31(d)(1).

Other regulations under the Animal Welfare Act govern standards for particular species. For example, the regulations prescribe extraordinarily detailed requirements for the housing and care of nonhuman primates. *E.g.*, 9 C.F.R. § 3.75(c)(3) (“Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material, and planted enclosures must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta.”); 9 C.F.R. § 3.75(e) (“Only the food and bedding currently being used may be kept in animal areas, and when not in actual use, open food and bedding supplies must be kept in leakproof containers with tightly fitting lids to prevent spoilage and contamination.”).

In addition to the requirements of the Animal Welfare Act and its implementing regulations, research facilities that receive funding from the National Institutes of Health are subject to significant restrictions on their use of animals. *See* National Institutes of Health, Office of Laboratory Animal Welfare, *PHS Policy on Humane Care and Use of Laboratory Animals* (Rev. 2015)²; *see also* National Institutes of

² <https://olaw.nih.gov/policies-laws/phs-policy.htm#PublicHealthServicePolicyonHumaneCareandUseofLaboratory>.

Health, National Institute for Allergies and Infectious Diseases, *Research Using Vertebrate Animals*.³ And other federal laws regulate certain aspects of the treatment of animals used in agriculture, although the protection of farm animals is largely left to the States. *See* Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1901 *et seq.*; Twenty-Eight Hour Law, 49 U.S.C. § 80502.

New York State comprehensively regulates the treatment of animals. The New York Agriculture and Markets Law applies to “every living creature except a human being.” N.Y. Agri. & Mkts. L. § 350(1). It criminally punishes torturing or unjustifiably killing or maiming an animal or depriving a confined animal of “a sufficient supply of good and wholesome air, food, shelter and water.” N.Y. Agri. & Mkts. L. §§ 353, 353-a, 356. The law exempts “scientific tests, experiments or investigations . . . performed or conducted in laboratories or institutions, which are approved for these purposes by the state commissioner of health” under promulgated rules. N.Y. Agri. & Mkts. L. § 353. The commissioner has the power to inspect laboratories and institutions. *Id.* The legislature has also prohibited a number of specific acts, such as tattooing or piercing pets, declawing cats, and electrocuting fur-bearing animals. N.Y. Agri. & Mkts. L. §§ 353-c, 353-f, 381. As particularly relevant here, the legislature recently prohibited using elephants in entertainment

³ <https://www.niaid.nih.gov/grants-contracts/research-vertebrate-animals#A1>.

acts (exempting accredited zoos). L.2017, c. 333, § 3 (Oct. 19, 2019) (N.Y. Agri. & Mkts. L. § 380).

In addition to federal and state legal requirements, well-defined private accreditation standards govern the use of animals in many commercial settings. As Respondents have explained, for example, the Association of Zoos and Aquariums provides and enforces standards for zoos. Respondents' Br. 10–11. Those standards include detailed rules for elephant habitats, medical care, and bathing and require inspections by the United States Department of Agriculture. *Id.* at 11.

2. These interlocking legal regimes have several distinct features that serve to protect the welfare of animals while advancing other important public interests.

First, they provide extraordinarily robust protections for animal wellbeing, safety, and comfort. Some of those protections are substantive, such as specific requirements for animal care, feeding, and housing, as well as prohibitions on certain inhumane and unnecessary practices. Other protections are procedural—in particular, the Animal Welfare Act's Institutional Animal Care and Use Committee framework, which requires careful review of the use of animals in research to ensure that no treatment exceeds that necessary to achieve important scientific objectives. Those protections thus achieve a facility-specific balance between preserving the welfare of animals and ensuring that animals may be used when necessary to advance scientific understanding—and ultimately to save and improve the social good.

Second, the federal and state legal regimes rest on a system of *public* enforcement by expert agencies and prosecutors, not private parties. That structure has important and salutary consequences. It guarantees that expert agency officials, who routinely confront the most challenging animal-welfare issues, control how the law is enforced. That in turn ensures a measure of enforcement consistency across applications. The public-enforcement system also allows for flexibility and case-specific approaches to the balance between animal welfare and other interests. Regulators and prosecutors have the discretion to decline to seek enforcement, or to seek lesser remedies, depending on the factual context, including the intent of the violator, any corrective steps taken, the likelihood of a repeat violation, and the importance of the work done by the institution. Indeed, the Secretary of Agriculture is specifically directed to consider similar factors in deciding the amount of any civil penalties to seek. 7 U.S.C. § 2149(b).

Third, the laws establish a menu of remedial options to address violations of animal-welfare rules, including the denial of grant funding, temporary or long-term suspension of licenses, civil penalties, injunctions, and criminal sanctions. Those remedies and penalties robustly protect animal welfare while ensuring that research institutions, zoos, and other organizations may work cooperatively with regulators to correct deficiencies and prevent missteps in the future.

These features of current law reflect a balance among competing considerations. Undoubtedly animal welfare lies at the core of the laws' concern. But that interest is counterbalanced by other critical interests, including fostering research that can preserve and enhance both human and animal life, exposing the public to the world's biodiversity through zoos and aquariums, and securing the Nation's food supply. This established system has proven effective at ensuring the best possible care and life for animals while protecting other critically important public interests. In a world where the use of animals in research is vitally important to developing new medical treatments, such a system of substantive and procedural protections strikes a sensible balance between the needs and welfare of both human beings and animals.

B. Authorizing Habeas Petitions On Behalf Of Animals Would Impose Unwarranted Costs On Biomedical Research And Impede Medical Breakthroughs

Extending habeas rights to animals would also impose untold new litigation costs on research universities, laboratories, and hospitals, further profoundly disrupting the current proven system of animal-welfare laws and impeding scientific advances and medical progress. Were the Court to adopt Appellant's position, any party could file a habeas petition seeking the release of an animal from a research facility, zoo, or other institution alleging the violation of animal-welfare laws or even constitutional rights.

As the foremost organization in the United States dedicated to representing the interests of universities, companies, and other institutions that conduct biomedical research using animals, including several in the State of New York, NABR is gravely concerned that such a massive change in the current system of animal-welfare protection would impose crippling costs on institutions performing research that is vital to improving human life and essential to combatting new threats to the world. Even though it is likely that the vast majority of habeas petitions brought on behalf of animals would ultimately be found meritless, defending against them would impose significant litigation costs on universities and other research institutions that do not have room in their budgets for higher legal bills. That would in turn impede the development of lifesaving treatments and drugs and the achievement of the next generation of medical breakthroughs. This Court should reject such a potentially substantial burden on the legal framework for biomedical research.

1. The vital role of animal research in advancing medicine cannot be overstated. Animal research has proven essential to studying disease progression, genetics, and lifetime risk of disease and to developing new treatments. Often the necessary research activities would be unethical or infeasible to perform on human beings. The numbers of animals used in biomedical research—and therefore the number of potential habeas petitions were Appellant’s legal theory adopted nationwide—is substantial. For example, it is estimated that, excluding rats and mice, approximately

800,000 animals were used in research in fiscal year 2019. *See* United States Department of Agriculture, *Fiscal Year 2019 Annual Report, Animal Usage*.⁴ If rats and mice were included, that number would likely be in the millions. In New York alone, 22,000 animals (again, excluding rats and mice) were used in research in fiscal year 2019, including 1400 nonhuman primates. *Id.* By one estimate, the National Institutes of Health alone spend over \$14 billion annually on animal research. Animal Legal Defense Fund, *Animals Used in Research*.⁵

Animal research has played a central role in the great majority of significant medical innovations over the last century—from vaccines and cancer therapies to medical devices and surgical procedures. For example, the twenty-five most prescribed drugs were all developed using animal research. That group includes treatments for diabetes, COPD, dementia, high cholesterol, hypertension, and asthma. Among the species used to develop those drugs were monkeys, baboons, rabbits, dogs, and mice.

Most recently, the miraculous COVID-19 vaccines, which have already saved countless lives around the globe and promise to help the world overcome the pandemic, were developed using animal models, including mice, Syrian hamsters, and nonhuman primates. *See* National Institutes of Health, National Institute of Allergy

⁴ https://www.aphis.usda.gov/animal_welfare/annual-reports/2019/fy19-summary-report-column-F.pdf.

⁵ https://aldf.org/focus_area/animals-used-in-research/.

and Infectious Diseases, *The Important Role of Animal Research in COVID-19 Vaccine Development* (Aug. 18, 2021).⁶ As NIH has explained, using these animals was critical to the rapid development and deployment of the vaccines. Syrian hamsters, for example, develop disease from COVID-19 that “closely resembles the disease in humans.” *Id.* And nonhuman primates, which are used late in the development and testing process, have “greater similarity to humans than rodents in innate immune responses” and “allow use of clinically-relevant vaccine doses.” *Id.* As NIH has described the importance of animal research to fighting the global pandemic, “[b]io-medical studies involving animal models have greatly contributed to the public health response to SARS-CoV-2 by assisting in the development of COVID-19 vaccines and treatments” and “will continue to provide vital information as new SARS-CoV-2 variants emerge and new questions arise as to the transmissibility of these variants, whether they are more harmful to people, and if they remain sensitive to available vaccines.” *Id.*

Another striking measure of the importance of animal research is that, among the 222 people who have won the Nobel prize in physiology or medicine, 186 used animals in their research. A recent set of Nobel laureates offers a vivid illustration of just how important animal research is to human health. The winners of the 2020

⁶ <https://www.niaid.nih.gov/news-events/role-animal-research-mrna-covid-19-vaccine-development>.

prize—Harvey J. Alter, Michael Houghton, and Charles M. Rice—were recognized for their discovery of the Hepatitis C virus. As the announcement of that prize explained, “[t]hanks to their discovery, highly sensitive blood tests for the virus are now available and these have essentially eliminated post-transfusion hepatitis in many parts of the world, greatly improving global health.” Press Release: *The Nobel Prize in Physiology or Medicine 2020*.⁷ The work has “allowed the rapid development of antiviral drugs directed at hepatitis C,” and as a result, “[f]or the first time in history, the disease can now be cured, raising hopes of eradicating Hepatitis C virus from the world population.” *Id.*

Critical to the laureates’ discovery was the use of chimpanzees—the same species that the Nonhuman Rights Project has sought to endow with habeas corpus rights through litigation. To determine whether the identified Hepatitis C virus alone could cause hepatitis, Dr. Rice injected an RNA variant of the virus into chimpanzees. When the chimpanzees experienced changes similar to humans who develop chronic liver disease, it was confirmed that the virus could cause certain previously unexplained cases of hepatitis. That study could not have ethically been performed on human beings. Without the use of animals—and in this case, comparatively intelligent animals—the world might have been deprived of a discovery that promises to save innumerable lives.

⁷ <https://www.nobelprize.org/prizes/medicine/2020/press-release/>.

There is thus little question that the use of animals in medical research, including the use of nonhuman primates and other relatively intelligent species, has profoundly improved the quality and length of human life not just in New York and the United States but all over the world. And ongoing efforts to find cures and treatments for the most devastating diseases and conditions continue to rely crucially on animal research. For example, scientists are currently studying nonhuman primates to understand how Alzheimer's disease and other neurological diseases affect the brain. Canine researchers searching for a cure for bone cancer have discovered striking similarities in the genetic makeup of the disease in both children and dogs, and clinical trials with dogs have led to several breakthroughs for treating osteosarcoma in children. And researchers are currently working toward the development of an HIV vaccine by conducting research with monkeys—with the potential to save one million human lives per year worldwide.

2. This important research benefits the lives of every person in the United States, and it would be imperiled if courts were to deputize any individual or group with an interest in animal welfare to file actions against New York-based research institutions to seek to the release or transfer of their animals, all of which would increase litigation costs and force the diversion of scarce resources from researchers to lawyers. Indeed, although this case involves a zoo, Appellant has not hidden the

fact that it will target research institutions. See Nonhuman Rights Project, *Frequently Asked Questions* (explaining that Appellant is seeking the “specific rights” for animals “not to be imprisoned” and “not to be experimented on”).⁸ Even though the great majority of habeas petitions claiming that research institutions have violated animal-welfare laws would likely be meritless, merely defending against such suits could entail years of litigation. For universities or other nonprofit institutions on limited budgets that run multiple facilities that conduct animal research, those costs could escalate quickly. That in turn could impel institutions to reduce the number of new research projects, terminate existing projects early, and shift resources to other areas or other countries. Even if courts were ultimately to hold that none of the species commonly used in animal research are entitled to habeas rights, or that few existing animal-welfare laws could be invoked in a habeas petition to seek an animal’s release or transfer, it would take years of expensive litigation to sort those issues out.

In addition, in cases where entities or individuals that purport to represent animals identify minor or one-off violations of animal-welfare standards, research institutions could be threatened with court orders releasing or transferring their animals, disrupting or ruining ongoing research projects. Unlike the current system,

⁸ <https://www.nonhumanrights.org/frequently-asked-questions/>.

which sensibly gives expert agencies the discretion to work cooperatively with research institutions to fix deficiencies and offers an array of remedial options, an all-or-nothing habeas regime would threaten to derail important projects by seeking release of research animals.

Imposing such litigation costs, risks, and uncertainties on universities, laboratories, hospitals, and research institutions would inevitably impede research into life-saving and life-enhancing treatments, drugs, procedures, and other medical technologies. The resulting public harms would be difficult to measure: No one would know what discoveries were not made or what treatments were not developed because burdensome litigation costs prevented research facilities from conducting new projects or continuing existing projects. But they will be no less serious in human terms—lives unnecessarily lost, pain unnecessarily endured, and quality of life unnecessarily degraded.

For those reasons, the legal mechanisms, standards, and remedies for protecting the welfare of animals should be left to the considered judgment of legislatures and expert agencies that are able to work cooperatively with research institutions to balance the multiple serious public interests at stake and employ remedial measures that are narrowly tailored to those interests. Achieving the right balance between protecting animals and fostering medical research for the benefit of humankind re-

quires careful consideration of the needs of universities, laboratories, and other research institutions, an understanding of the importance of research animals for particular forms of scientific inquiry, and case-specific analysis by officials with relevant expertise—precisely the suite of tools available under current law. Casting aside that tailored regime in favor of judicial decisionmaking through writs of habeas corpus would unduly discount the complex, cross-cutting interests at stake in this challenging area of public policy.

CONCLUSION

This Court should hold that the privilege of the writ of habeas corpus may not be invoked on behalf of an elephant.



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WORD COUNT CERTIFICATION

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under Rule 500.13(c)(3), is 6,977 words. This brief was prepared on a computer using Microsoft Word 2013 and 14-point Times New Roman, a proportionally spaced font.



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STATE OF NEW YORK)
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ss.:

**AFFIDAVIT OF SERVICE
BY MAIL**

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 September 24, 2021

deponent served the within: **MOTION FOR LEAVE TO APPEAR AS AMICUS
CURIAE IN SUPPORT OF RESPONDENTS-
RESPONDENTS**

upon:

SEE ATACHED SERVICE LIST

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, in a postpaid properly addressed wrapper in a Post Office Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

**Sworn to before me on
the 24th day of September, 2021.**



MARIANA BRAYLOVSKIY
Notary Public State of New York
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