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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 *AMICUS CURIAE* BRIEF OF RICHARD L. CUPP, JR.

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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: May 6, 2022

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes & Other Authorities:

INTRODUCTION

The arguments that amicus curiae Richard L. Cupp Jr. ("Cupp") advance in his brief for denying Happy habeas corpus relief are erroneous, irrational, arbitrary, and dangerous. They also incorrectly frame the fundamental issue before this Court, which is not whether Happy is a "person" but whether she has the common law right to bodily liberty protected by habeas corpus.

In large part, Cupp's writings on legal personhood form the basis of the First and Third Departments chimpanzee decisions in the two *Lavery* cases, which hold that a legal person must have the capacity to bear duties and be human.[1] The Trial Court "regrettably" felt compelled to deny an autonomous and extraordinarily cognitively complex being her freedom because of those erroneous decisions. Now Cupp seeks to inject his personhood arguments directly before this Court.

Since the two *Lavery* cases, Cupp's arguments have been subjected to devastating criticisms, including by prominent philosophers who are amici curiae in this case. This Court must reject Cupp's arguments, correct the erroneous personhood conclusions of the *Lavery* cases, and, in keeping with its common law duty to correct manifest injustice, grant Happy her freedom.

[1] *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151-52 n.3 (3d. Dept 2014) ("*Lavery I*"); *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78 (1st Dept. 2017) ("*Lavery II*"). *See* NhRP Br. 11-12, 44 (explaining *Lavery I* and *Lavery II*).

A. Cupp incorrectly focuses on legal personhood, ignores the injustice of Happy's arbitrary imprisonment, and ignores this Court's common law duty to rule in Happy's favor

Cupp incorrectly focuses on whether Happy fits his erroneous view of legal personhood. The fundamental question is *not* whether Happy fits the definition of "person" (although she does, *infra* p. 8), but whether she has the common law right to bodily liberty protected by habeas corpus. The answer will depend on the intrinsic nature of elephants.[2] "[C]ourts must frame the threshold question in these cases carefully if they are to resolve them in a way that does justice to the importance of the values they invoke and the concerns they present." Br. of *Amici Curiae* Shannon Minter and Evan Wolfson 7 (Apr. 7, 2022), https://bit.ly/38iXxxt.

"Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057-58 (2018) (Fahey, J., concurring) ("*Tommy*").

[2] Once this Court recognizes Happy's common law right to bodily liberty protected by habeas corpus, she is a "person" for purposes of habeas corpus. Possessing a right entails that one is a "person" for that purpose, *infra* p. 8.

On whether a chimpanzee is entitled to habeas corpus relief, the Honorable Judge Eugene M. Fahey understood that the "better approach" is to "ask not whether a chimpanzee fits the definition of a person . . . but instead *whether he or she has the right to liberty protected by habeas corpus*"—the "precise moral and legal" question that "matters here." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (emphasis added). The answer "will depend on our assessment of the intrinsic nature of chimpanzees as a species." *Id*. The same is true in Happy's case.

Judge Fahey recognized that chimpanzees are "autonomous, intelligent creatures." *Id*. at 1059. He presented a detailed summary of the present-day understanding of chimpanzees' "advanced cognitive abilities," and referenced "recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences."[3] *Id*. at 1058. Similarly, the uncontroverted scientific evidence concerning the intrinsic nature of elephants is before this Court. Based on the NhRP's six "expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants," the Trial Court found that "elephants are autonomous beings possessed of extraordinarily cognitively complex minds."[4] *The Nonhuman Rights*

[3] Judge Fahey relied upon the NhRP's unrebutted expert affidavits "from eminent primatologists" and evidence cited by "amici philosophers with expertise in animal ethics and related areas." *Id*. at 1058.

[4] The Trial Court noted that the NhRP "placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some

Project v. Breheny, 2020 WL 1670735 *3, *10 (N.Y. Sup. Ct. 2020) (A-10; A-16). "Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. . . . She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." (A-22).

Cupp's incorrect focus on legal personhood obscures the profound injustice of Happy's arbitrary imprisonment at the Bronx Zoo. He ignores the Trial Court's recognition of Happy's "plight" and its finding that the NhRP's arguments are "extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit . . . to an elephant sanctuary on a 2300 acre lot." (A-22).[5]

Cupp ignores that this Court has a common law duty to "bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past.'" *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). For "'the common law of this State is not an anachronism.'" *Millington v. Southeastern El*. Co., 22 N.Y.2d 498, 509 (1968) (citation omitted). The "genius of

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of the most prominent elephant scientists in the world." (A-16). By contrast, Respondents' three affiants are not elephant scientists and do not purport to possess any expertise on elephant cognition or behavior by training, education, or experience. (A-319; A-329; A-333). It is notable that none of Respondent Wildlife Conservation Society's own elephant scientists, who have done outstanding research on wild elephants, contributed affidavits in support of keeping Happy confined at the Bronx Zoo. (A-474, para. 4).

[5] Happy only lost because, "[r]egrettably," the Trial Court felt bound by Appellate Division precedent to rule in Respondents' favor. (A-21). That precedent is erroneous and must be overturned by this Court. *See* NhRP Br. 43-53.

the common law lies in its flexibility and . . . in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared." *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939) (citation omitted). This Court updates the common law based on wisdom, justice, right, ethics, fairness, policy, shifting societal norms, and the surging reality of changed conditions, as well as the fundamental common law principles of liberty and equality. NhRP Br. 21-43. When these principles and standards are applied to the uncontroverted scientific evidence before this Court, it must recognize Happy's common law right to bodily liberty protected by habeas corpus.[6]

Cupp further ignores the unique role of the common law writ of habeas corpus, "which has been broadly applied throughout our nation's history to protect individuals and groups once deemed outside of the law's protection, as our understanding of the principles of equality and freedom have evolved." Minter and Wolfson Br. 9. "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." Br. of *Amici Curiae* Habeas Corpus Experts 26 (Sept. 24, 2021), https://bit.ly/3q4RsLN. It has been used in situations "where no precise legal solution existed under codified law, but where leaving the status quo unchallenged

[6] *See also Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 460 (2013) (Lippman, J., dissenting, Rivera, J., joining in dissent) ("The common law must evolve with advances in scientific understanding to fashion relief and provide redress for wrongs newly understood . . . .").

would be unjust." *Id*. at 16 (citing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 133 (2010)).

Cupp asserts that "proposals for new animal protections should instead be addressed to the legislature." Amicus Br. 30. However, Happy's case is not an "animal welfare" or "animal protection" case, as animal welfare laws have nothing to do with the right to bodily liberty.[7] This Court has also generally rejected the argument that changes to the common law should come from the legislature. "Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."[8] *Woods*, 303 N.Y. at 355; *accord Battalla v. State of New York*, 10 N.Y.2d 237, 239 (1961); *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957); *Millington*, 22 N.Y.2d at 508.

Moreover, ruling in Happy's favor would not be "radical" and "unacceptable." Amicus Br. 29. The 18 amicus briefs filed in support of Happy's freedom by over 145 distinguished and diverse amici—including some of the world's most renowned philosophers, habeas corpus experts, legal scholars, attorneys, and religious experts—demonstrate it would be "radical" and

[7] *See* NhRP Reply Br. 7.

[8] "The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power." *Woods*, 303 N.Y. at 356 (citation and internal quotations omitted).

"unacceptable" to *ignore* the injustice of her arbitrary imprisonment at the Bronx Zoo. This Court must not do that. "When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred. We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice."[9] *Woods*, 303 N.Y. at 355 (internal quotations and citation omitted).

B. Cupp's understanding of legal personhood is wrong

1. Legal personhood does not require the capacity to bear duties

Cupp fails to provide this Court with a correct explanation of legal personhood.[10] According to Cupp, Happy should be denied habeas corpus relief because of his view that "legal personhood rights are intertwined with a norm of legal accountability." Amicus Br. 3. There are only two possible interpretations of Cupp's view, one is false, and one is irrelevant.

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[9] *See also Millington*, 22 N.Y.2d at 508 ("[T]his court will continually seek to keep the common law of this State abreast of the needs and requirements of our age.") (citation omitted); *People v. Molineux*, 168 N.Y. 264, 310 (1901) ("[O]ur own common law . . . is the product of all the wisdom and humanity of all the ages.").

[10] Cupp's personhood arguments have been subjected to devastating criticisms. *See generally* KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 41-55 (2018); Craig Ewasiuk, *Escape Routes: The Possibilities of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48.2 COLUM. HUM. RTS. L. REV. 70, 82-87 (2017); Joe Wills, *Animal rights, legal personhood and cognitive capacity: addressing 'leveling-down' concerns*, 11.2 J. OF HUM. RTS. AND THE ENV'T 199, 212-223 (2020); Br. of *Amici Curiae* Philosophers 12-18 (Sept. 16, 2021), https://bit.ly/3JMSDaa; Br. of *Amici Curiae* Peter Singer, Gary Comstock, and Adam Lerner 20-25 (Apr. 8, 2022), https://bit.ly/37LCQue.

The first possible interpretation reflects the erroneous conclusions of the two *Lavery* cases, which is that personhood requires the capacity to bear duties.[11] Cupp notes those decisions "emphasize the significance of legal accountability in rejecting legal personhood rights for animals." *Id*. at 6. However, the ability to bear duties is not required for legal personhood. A "person is any being whom the law regards as capable of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not." *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).[12] *See also* IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("The significant fortune of legal personality is the capacity for rights."); Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 121-22 (Arthur Peacocke & Grant Gillett eds. 1987) ("[L]egal personality can be given to just about anything. . . . It is an empty slot that can be filled by anything that can have rights or duties."); Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928) ("To confer legal rights or to impose legal duties . . . is to confer legal personality."); NhRP Br. 43-44 (discussing legal personhood).[13]

[11] *See Lavery I*, 124 A.D.3d at 151-52; *Lavery II*, 152 A.D.3d at 78.

[12] Illustrative quotations from leading scholars such as John Salmond are included in Black's to "provide the seminal remark—the *locus classicus*—for an understanding of the term." PREFACE TO THE ELEVENTH EDITION, BLACK'S LAW DICTIONARY xiv (11th ed. 2019).

[13] *See also* 1 ENGLISH PRIVATE LAW § 3.24, 146 (Peter Birks ed. 2000) ("A human being or entity . . . capable of enforcing a particular right, or of owing a particular duty, can properly be described

As this Court stated in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972), a "legal person . . . simply means that upon according legal personality to a thing the law affords it the *rights and privileges* of a legal person." (emphasis added). *Byrn* never mentioned duties, and this Court has never limited personhood to those with the capacity to bear duties—for good reason. Imposing such a requirement would threaten the rights of vulnerable humans.

"[M]any legal persons lack duties." Br. of *Amici Curiae* Law Professors 4 (Mar. 18, 2022), https://bit.ly/3Mxoyw1 (citing examples). "It is simply not the rule in New York (or anywhere else) that 'society extends rights in exchange for implied agreement from its members to submit to social responsibilities,' as *Lavery I* put it." *Id*. at 5 (citation omitted). "If the liberty rights protected by habeas corpus were confined to those able to bear societal obligations, then infants, the senile, and people with profound congenital cognitive disabilities would lack liberty rights." Br. of *Amici Curiae* Peter Singer, Gary Comstock, and Adam Lerner 21 (Apr. 8, 2022), https://bit.ly/37LCQue. This is why Judge Fahey repudiated the erroneous personhood conclusions of *Lavery I* and *Lavery II*, writing:

> Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus

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as a person *with that particular capacity*," though not necessarily "a person *with an unlimited set of capacities* . . . ."); J.-R. Trahan, *The Distinction Between Persons and Things: An Historical Perspective*, 1 J. CIVIL L. STUD. 9, 14 (2008) ("First, the modern theory (re-) defines 'person' as the '*subject* of rights and duties,' in the sense of that which is 'capable' of being 'subjected' to duties and/or of being 'invested' with rights.").

> on behalf of one's infant child or a parent suffering from dementia. In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs (*see generally* Tom Regan, The Case for Animal Rights 151-156 [2d ed 2004]).

Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring) (cleaned up). *See also* Br. of *Amici Curiae* Laurence H. Tribe, Sherry F. Colb, and Michael C. Dorf 14 (Oct. 22, 2021), https://bit.ly/3qGOgWV ("[I]nfants, young children, and adults suffering from dementia are unquestionably legal persons."); Br. of *Amici Curiae* Joe Wills, et al., UK-based Legal Academics, Barristers and Solicitors 3 (Oct. 8, 2021), https://bit.ly/3q3LtXH ("[T]he ability to bear duties is unnecessary to be a legal person in theory and practice."); Br. of *Amici Curiae* Philosophers 16 (Sept. 16, 2021), https://bit.ly/3JMSDaa ("Infants, children, and those found not guilty by reason of insanity cannot be held accountable and cannot bear legal or societal duties. They are, nonetheless, persons with legal rights. Bearing responsibilities is not a prerequisite of personhood.").

Cupp claims "[h]umans are the only beings who, as a norm, possess sufficient moral agency to be held accountable under our legal system." Amicus Br. 13. His assertion that "this *norm* is what matters" for possessing legal personhood is nowhere found in the law, but merely reflects Cupp's own peculiar and idiosyncratic opinion, advanced for the unjust purpose of supporting Happy's arbitrary imprisonment. *Id*. at 16. There is simply no legal requirement—and Cupp cites

none—that elephants must, "either as a norm or as individuals, demonstrate a *sufficient* level of moral agency . . . to possess legal personhood rights under our human legal system."[14] *Id*. at 5.

The second possible interpretation of Cupp's view that "legal personhood rights are intertwined with a norm of legal accountability," Amicus Br. 3, is that rights impose duties upon others. *See* Tribe, Colb, and Dorf Br. 14 ("[T]he possession of a right entails the '*bearing of a legal duty by someone else*.'") (citation omitted; emphasis added).[15] That the possession of a right may impose a duty upon a third party does not mean legal personhood is contingent upon the capacity to bear duties or that nonhuman animals cannot bear rights. Accordingly, rights and duties being "intertwined" in this sense is irrelevant.[16]

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[14] The irrelevant statement, "[w]e cannot tell the tiger that it is morally wrong to eat us and expect the tiger to comply," neatly encapsulates the irrationality of Cupp's argument. Amicus Br. 11 (quoting Margaret Foster Riley, *CRISPR Creations and Human Rights*, 11.2 L. & ETHICS HUM. RTS. 225, 240 (2017)). This Court *can* tell Respondents to stop imprisoning Happy and expect them to comply, even if Happy cannot.

[15] *See also* Wills, et al. Br. 11 ("What [Wesley Newcomb] Hohfeld called a 'right in the strictest sense' involves the possession of a claim that places another under a duty, either to act or refrain from acting. Thus, while rights are inextricably linked with duties owed *to* the rights-holder, they do not logically entail 'that the right holder bear duties herself.'") (citation omitted); Saskia Stucki, *Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights*, 40(3) OXF. J. LEG. STUD. 533, 539 (2020) ("Except in the very unusual circumstances where someone holds a right against himself, X's possession of a legal right does not entail X's bearing of a legal duty; rather, it entails the bearing of a legal duty by somebody else.") (internal quotations and citation omitted).

[16] The point applies equally to Cupp's similarly vague description of rights and duties being "interrelated" and "connected." Amicus Br. 8, 11.

For example, Cupp cites an article which states: "[A]ll human rights imply duties." Amicus Br. 10 (quoting Fernando Berdion Del Valle & Kathryn Sikkink, *(Re)discovering Duties: Individual Responsibility in the Age of Rights*, MINN. J. INT'L L. 189, 190 (2017)). All this means is that there are duties to respect such rights. As the authors of the article make clear:

> A legal duty can be understood as 'a legal obligation that is owed or due to another and that must be satisfied.'. . . [T]he existence of a right implies a duty to respect that right. . . . Most often in the human rights context the state is portrayed as the primary and often exclusive duty holder. A right to free expression, therefore, implies a state duty to refrain from undue censorship, and to create the conditions under which people may express themselves freely.

Del Valle & Sikkink at 204-205.[17]

Similarly irrelevant is the American Declaration of the Rights and Duties of Man, which Cupp claims "repudiat[es] the NRP's efforts to disconnect accountability from rights." Amicus Br. 8. Nothing in this human rights instrument requires individuals to bear duties to possess rights.[18] The preamble language that

[17] Some duties in the human rights context are duties to oneself, such as where "the individual possessing the right to education also has a duty to acquire that education." Del Valle & Sikkink at 206. Examples of the rights-holder and duty-holder being one and the same person provides no support for the notion that an individual must bear duties in order to have rights.

[18] Cupp incorrectly states the American Declaration's language pertains to "*all* rights capable of being asserted by the rights holder," not just "human society rights." Amicus Br. 8. The introductory statement of the American Declaration expressly makes clear it was adopted to strengthen and affirm "essential human rights." American Declaration on the Rights and Duties of Man, *Whereas* (1948). This case concerns Happy's common law right to bodily liberty protected by habeas corpus, not any "human right."

Cupp cites is merely rhetorical and aspirational, and to incorrectly construe it as requiring duties for the possession of rights would undermine rights for human beings.[19]

2. Legal personhood is not synonymous with being human

Cupp also attempts to defend *Lavery II*'s error that a "person" must be human, claiming that "[f]ocusing on the human community in limiting legal personhood is rational" because all humans—unlike nonhuman animals—have the "significant identifying characteristic" of "humanity." Amicus Br. 12-13. However, this circular argument is nothing more than "a simple biological prejudice that incorrectly equates personhood with humanness." Law Professors Br. 2.

This Court in *Byrn* made clear that "whether legal personality should attach" is a "policy question" that requires a "policy determination," and "not a question of biological or 'natural' correspondence." 31 N.Y.2d at 201. Personhood is therefore not synonymous with being human. Indeed, "any being" capable of rights or duties is a "person," whether that being is human or not. *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed.

[19] *See generally* Liora Lazarus et al., *The Relationship between Rights and Responsibilities*, 18.9 MINISTRY OF JUST. RSCH. PAPER SERIES 1, 17 (2009) (The American Convention on Human Rights "grew out of a concern that the general provision in the [American Declaration of the Rights and Duties of Man], taken together with the specified duties, allowed states to render enumerated rights contingent upon responsibilities"); *id*. at 30 ("[I]t is essential to be clear about the risks associated with even rhetorical or aspirational statements about duties. . . . [W]e risk undermining rights by implying that the fulfilment of duties is an essential prerequisite to the enjoyment of certain rights.").

1947)), *supra* p. 8.[20] As the Fourth Department observed, "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018).

Many nonhuman animals are already legal persons, contrary to Cupp's assertion that rights are only "fit" for humans.[21] Amicus Br. 9. For example, New York's pet trust statute (EPTL § 7-8.1) allows "domestic or pet animals" to be "beneficiaries" of legally enforceable trusts. These nonhuman animals are "persons" as only "persons" can be trust beneficiaries.[22] *See Beneficiary*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("beneficiary" is "[a] person to whom another is in a fiduciary relation . . . esp., a person for whose benefit property is held in trust."); EPTL § 1-2.18 ("A testamentary beneficiary is a person in whose favor a disposition of property is made by will."); NhRP Br. 20-21, 29-30, 48; NhRP Reply Br. 12.

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[20] *See also* Br. of *Amici Curiae* Animal Legal Defense Fund 5 (Apr. 7, 2022), https://bit.ly/3LlxQuG ("Presumptions that equate being a person with being a human are incorrect because 'person' is a legal term that simply describes *any* entity with at least some legally protected rights."); Wills, et al. Br. 17 ("An individual does not need to be a human to be a legal person.").

[21] Examples of nonhuman animals bearing rights decisively refute Carl Cohen's assertion: "Animals cannot be bearers of rights because the concept of rights is *essentially human*; it is rooted in the human moral world and has force and applicability only within that world." Amicus Br. 4 (quoting Carl Cohen & Tom Regan, *The Animal Rights Debate* 30 (2001)). For incisive philosophical critiques of Cohen's arguments, *see generally* Nathan Nobis, *Carl Cohen's 'Kind' Arguments For Animal Rights and Against Human Rights*, 21(1) J. APPL. PHILOS. 43 (2004); Mylan Engel Jr. and Gary Comstock, *Do Animals Have Rights and Does It Matter If They Don't?*, *in* THE MORAL RIGHTS OF ANIMALS 48-51 (2016).

[22] Happy is the beneficiary of a trust created by the NhRP. (A-83-91).

Moreover, courts around the world have recognized the rights of some nonhuman animals.[23] One Argentinian court granted habeas corpus relief to an imprisoned chimpanzee named Cecilia, declared her a "nonhuman legal person," and ordered her transferred to a sanctuary.[24] The Islamabad High Court in Pakistan ordered the release of an imprisoned Asian elephant named Kaavan from the Islamabad Zoo to an elephant sanctuary, stating "without any hesitation" that he is the subject of legal rights.[25] Most recently, in a habeas corpus action brought on behalf of a monkey named Estrellita, the Constitutional Court of Ecuador ruled 7-2 that "[a]nimals are subjects of rights protected by the rights of Nature."[26]

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[23] NhRP Br. 30-33 (citing examples); Br. of *Amici Curiae* K.S. Panicker Radhakrishnan 7 (Apr. 8, 2022), https://bit.ly/3veNHWv (former Indian Supreme Court Judge notes that "Indian Courts have recognized several rights that inhere in non-human animals, irrespective of whether these rights are statutorily recognized.").

[24] *Presented by A.F.A.D.A. About the Chimpanzee "Cecilia" – Nonhuman Individual*, File No. P.72.254/15 at 32 (Third Court of Guarantees, Mendoza Argentina, Nov. 3, 2016) [English translation]. COMP-32.

[25] *Islamabad Wildlife Mmgt. Bd. v. Metropolitan Corp. Islamabad*, W.P. No. 1155/2019 at 59, 62 (H.C. Islamabad, Pakistan May 21, 2020). COMP-293, 296. The court recognized the "exceptional abilities" of elephants and cited with approval Judge Fahey's concurrence in *Tommy* as well as the NhRP's litigation on behalf of Happy, whom the court characterized as "an inmate at the Bronx [Z]oo." *Id*. at 12, 40, 41-42, 58. COMP-246, 274, 275-76, 292.

[26] Judgment No. 253-20-JH/22 *Rights of Nature and animals as subjects of rights, 'Estrellita Monkey' Case*, ¶ 181, p. 55 (Constitutional Court of Ecuador, 2022) [English translation], https://bit.ly/3seY1fK. The court also stated:

> [T]he rights of a wild animal must be protected objectively, taking its life, freedom and integrity as their own inherent rights, and not based on the claims, desires or intentions of third parties. In these cases, if the judges prove that the deprivation or restriction of the freedom of a wild animal is unlawful, they must provide the most suitable alternative for the preservation of the life, freedom, integrity and other

Cupp irrelevantly claims "[h]umans with normal moral agency have unique natural bonds with other humans who have cognitive limitations, and denying rights to those with cognitive limitations also harms the interests of society." Amicus Br. 14. However, the NhRP has never challenged the notion that being human is *sufficient* for rights. The NhRP challenges the notion that being human is *necessary* for rights. Before this Court is not whether any human should be denied rights, but whether Happy should be denied habeas corpus relief merely because she is not human.

Cupp provides no rational reason why protecting the rights of humans precludes granting Happy habeas corpus relief, when our legal system can and should do both. As Judge Fahey correctly recognized, while "all humans beings possess intrinsic dignity and value, . . . in elevating our species, we should not lower the status of other highly intelligent species." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). Judge Fahey thus appropriately rejected *Lavery II*'s arbitrary "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to

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> related rights of the victim; they may order, without being restrictive, its reinsertion in its natural ecosystem, its translocation to shelters, sanctuaries, aquariums, eco zoos, or its treatment in animal rehabilitation centers.

Id. at ¶ 173, p. 53.

habeas relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species."[27] *Id*. (citation omitted).

Denying Happy habeas corpus relief merely because she is not human, as Cupp would have this Court do, is the "kind of across-the-board disqualification for rights [that] harkens back to dark days in our past, when race, gender, national origin, religion, and other inherited or immutable characteristics later understood to be arbitrary were used to justify the denial of rights to whole swaths of humanity."[28] Tribe, Colb, and Dorf Br. 20. It has no place before this Court.

3. Social contract theory does not support denying Happy habeas corpus relief

Cupp perverts social contract theory to justify denying Happy habeas corpus relief.[29] He wrongly argues that the ability to participate in the social contract is required for the possession of legal rights, including the fundamental right to bodily

[27] The arbitrary nature of the *Lavery* decisions reflects the fact that they are "results-driven," devoid of any coherent, principled basis. Law Professors Br. 8. Those decisions create an irrational standard and arbitrarily impose it only on nonhuman animals, merely because they are not human. *See id*. at 7-8 (The *Lavery* "cases create a rule (personhood requires legal duties), then create an exception that swallows the rule (but *really* personhood is coextensive with species membership, even in the absence of legal duties).").

[28] *See also* Philosophers Br. 11 ("[I]t is arbitrary to use human species membership as a necessary condition of personhood, and it fails to satisfy a basic requirement of justice: that we treat like cases alike."); Singer, Comstock, and Lerner Br. 24 n.36 ("[W]e have strong reason to be suspicious of any view that makes the possession of rights depend on group membership. Humans have a long history of defending such group-based views (e.g., racism, sexism), and time has invariably proven each and every view to be mistaken.").

[29] The NhRP also addresses Cupp's distortion of social contract theory in its opening brief. *See* NhRP Br. 48-53.

liberty protected by habeas corpus: "No animals are capable of participating in the social contract that is our human government, including its legal system." Amicus Br. 18-19. However, Happy's ability to participate in the social contract is irrelevant to the question of her entitlement to habeas corpus relief.

For example, in *Jackson v. Bulloch*, 12 Conn. 38 (1837), the Connecticut Supreme Court made clear the irrelevance of social contract theory to habeas corpus relief. It held that enslaved humans, like Nancy Jackson, were neither parties to the "social compact" described in the Connecticut constitution nor "represented in it." *Id*. at 42-43. Yet, the court ordered Jackson freed pursuant to habeas corpus.[30] *Id*. at 54.

There is no requirement that the possession of certain rights, such as the right to bodily liberty, depends on the existence of a social contract or the ability to participate in it. Influential pioneers of social contract theory such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau "maintain that all persons have 'natural rights' that they possess independently of their willingness or ability to take on social responsibilities." Philosophers Br. 12 (citations omitted). In other words:

[30] Cupp cites *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 192 Conn.App. 36, 46 (2019), which concluded that elephants are not legal persons because they are "incapable of bearing duties and social responsibilities required by [Connecticut's] social compact." This decision directly conflicts with *Jackson*, which made clear that entitlement to habeas relief does not depend on being part of the social compact. It is also grounded upon *Lavery I*'s errors. *See* NhRP Br. 43-53 (discussing *Lavery I*'s errors).

> [I]ndividuals have *natural rights* even *before* they enter into social contracts. They *surrender* some of their rights in order to form stable governments. One cannot surrender what one does not have. It follows that, on the contractualist tradition, people need not enter into an agreement and assume social obligations to have rights.

Singer, Comstock, and Lerner Br. 21. *See also* Br. of *Amicus Curiae* Christine M. Korsgaard 15-16 (Aug. 25, 2021), https://bit.ly/3LlKdH8 (The notion that society grants rights in return for assuming duties "is not in general the view of the social contract tradition. . . . [C]entral social contract theories and others in the tradition accept the idea of natural rights, which are not in the gift of society.").

The Connecticut Supreme Court similarly explained: "The social compact theory posits that *all individuals are born with certain natural rights* and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'"[31] *Moore v. Ganim*, 233 Conn. 557, 598 (1995) (citing, *inter alia*, II JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184, ¶ 123 (Hafner Library of Classics ed. 1961)) (emphasis added).

[31] Cupp incoherently argues that natural rights do not negate his position on social contract theory. Amicus Br. 19. As best as the NhRP can tell, Cupp seems to be suggesting—before contradicting himself in the next sentence—that natural rights only relate to "moral personhood," rather than "*legal* personhood under our legal system." *Id*. This is incorrect. Natural rights are directly related to legal personhood: they are rights recognized and protected under the law. *E.g.*, *Lemmon v. People*, 20 N.Y. 562, 617 (1860) ("[S]lavery is repugnant to natural justice and right, has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government."); *Jooss v. Fey*, 129 N.Y. 17, 22 (1891) ("The disabilities of the woman, which were the consequences of her coverture at common law, were incompatible with modern notions and with that recognition of her natural rights . . . .").

Contrary to Cupp, it is not a "red herring" to argue that the social contract creates citizens, not persons. Amicus Br. 18. The argument decisively refutes the erroneous notion that personhood is contingent upon the social contract.[32] Cupp cites Professor Philippa Strum's statement that "individual responsibility to the community is central to rights and contract theory as articulated in the Western tradition." *Id*. at 18 (quoting Philippa Strum, *Rights, Responsibilities, and the Social Contract, in* INTERNATIONAL RIGHTS AND RESPONSIBILITIES FOR THE FUTURE 19 (Kenneth W. Hunter & Timothy C. Mack eds. 1996)). However, Professor Strum was referring to *rights associated with citizenship*, such as the right to vote:

> [T]he right to vote was equated with an assumption of responsibility. Suffrage initially was limited to white males over the age of twenty-one who owned a specified minimum of land. Political acumen was assumed to be the monopoly of those with at least a modicum of formal education, which essentially meant white men. . . . [T]he relatively small proportion of the population eligible to vote was expected to take an active role in the governmental system, and it therefore can be argued that the *concept of citizen responsibility* was implicit in the social contract.

Strum at 30 (emphasis added). Thus, it is Cupp who is creating a "red herring," not the NhRP.

[32] *See generally* Philosophers Br. 14-16 (explaining that social contracts create citizens, not persons.); NhRP Br. 53 (same).

Moreover, scholarship has shown that social contract theory is compatible with, and can support, rights for nonhuman animals.[33] As Cupp recognizes, "the social contract *ideal* is not oppressive." Amicus Br. 21 (emphasis added). But Cupp does not apply the ideal. Instead, he invokes his own repressive theory in defense of a profound injustice—the arbitrary imprisonment of an autonomous and extraordinarily cognitively complex being.

The "use of the social contract theory as a basis for excluding individuals from the moral, political, and legal community . . . should be troubling." Law Professors Br. 9. Throughout American history, "judges' reliance on social contractarianism has served the interests of injustice—even extremes of injustice. Past errors of inadequate rationalization and injustice are easily repeated, so long as the myths and

[33] *See, e.g.,* Ewasiuk at 105 (the social contract theories of Hobbes, Locke, and John Rawls do not "preclude animal rights by insisting on the reciprocity of rights and duties," and "another aspect of social contract theory, tacit consent, can provide alternative yet immanent support for animal rights by emphasizing the shared lot of humans and animals alike"); Mark Rowlands, *Contractarianism and Animal Rights*, 14.3 J. OF APPLIED PHIL. 235, 246 (1997) ("a contractarian approach to morality based on the sort of position developed by Rawls can provide a sound theoretical foundation for the attribution of rights to non-human animals"); ANDREWS ET AL. at 59 (2018) (social contract theory can "*support* the idea of nonhuman personhood and rights"); Jennifer Swanson, *Contractualism and the Moral Status of Animals*, 14.1 BETWEEN THE SPECIES 1, 2 (2011) ("contractualism does, in fact, allow for animals to be afforded full moral standing"); Mark Bernstein, *Contractualism and Animals*, 86.1 PHIL. STUD.: AN INT'L. J. FOR PHIL. IN THE ANALYTIC TRADITION 49, 66 (1997) ("contractualism is compatible with according full moral standing to non-human animals"); Shane D. Courtland, *Hobbesian Justification for Animal Rights*, 8.2 ENV'T PHIL. 23, 24 (2011) (defending "the possibility of a Hobbesian justification for animal rights").

metaphors of social contract theory retain force."[34] Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 13 (1999). This Court must not repeat those errors "to justify the exclusion of animals from the community of legal rights-holders, as the Appellate Division did in the *Lavery* cases." Law Professors Br. 12.

C. Cupp is wrong that ruling in Happy's favor would endanger vulnerable humans

Cupp makes the baseless and absurd assertion that ruling in Happy's favor "would endanger humans with significant cognitive limitations." Amicus Br. 26. As the NhRP repeatedly stated, autonomy is sufficient—though not necessary—for the common law right to bodily liberty protected by habeas corpus.[35] Cupp's suggestion that recognizing Happy's common law right would somehow cause humans to lose their rights has no basis in fact, logic, reason, or history, and resembles the rationale used for centuries to justify the continued oppression of vulnerable groups.[36] *See*

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[34] *See* Anita L. Allen and Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, *in* A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY 132 (2006) ("Slavery is antithetical in contemporary ideals of liberal social contract theory," yet "nineteenth-century judges were able to deploy the apparatus of social contract theory to lend support to slavery in the United States."); *id*. at 126 (One contractarian argument justified permitting slavery on the ground that "the U.S. Constitution is a white-only social contract under which blacks are not free and equal.").

[35] NhRP Br. 39 n.40; NhRP Reply Br. 5-6.

[36] In one of his articles, Cupp admits "[t]he sky would not immediately fall if courts started treating chimpanzees as persons." Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather than Legal Personhood*, 33.3 PACE ENVTL. L. REV. 517, 523 (2016).

Obergefell v. Hodges, 576 U.S. 644, 671 (2015) ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied.").

Moreover, social psychology research has shown that "support for legal personhood for nonhuman animals is likely to be associated with higher levels of moral concern for marginalized humans." Joe Wills, *Animal rights, legal personhood and cognitive capacity: addressing 'leveling-down' concerns*, 11.2 J. OF HUM. RTS. AND THE ENV'T 199, 218 (2020). Precisely the opposite of what Cupp fears:

> The type of legal recognition that the NhRP are pushing for clearly brings humans and some animals within the same paradigm of legal consideration. The research . . . would suggest that it is precisely because the recognition of certain nonhumans as persons would bridge the gap between them and humans that it would have *more potential* to reduce prejudicial and dehumanizing attitudes and behaviours towards marginalized human groups.

Id. at 222.

If anything, the danger to vulnerable humans stems from Cupp's own position on personhood, which emphasizes "the significance of the norm of legal responsibilities among humans." Amicus Br. 15. This view is not only erroneous but troubling. For it suggests a two-tiered hierarchy consisting of "normal" humans, whose rights are necessarily linked to their cognitive capacities, and those below

them, whose rights are bestowed "by courtesy or by proxy." ANDREWS ET AL. at 63. This hierarchy is highly objectionable:

> [It] makes the personhood of some of us dependent on our being the beneficiaries of the benevolence of those deemed *real* persons. History shows that "self-standing persons" [individuals who are persons by virtue of possessing the capacities deemed necessary for personhood] have not always felt a strong attachment to those with disabilities, and, indeed, have often sought ways to disassociate from them or even to eliminate them through eugenics and sterilization. The status of persons-by-proxy is therefore precarious and vulnerable to shifting sentiments amongst their sponsors. It is also stigmatizing to implicitly or explicitly mark some individuals as deficient in relation to allegedly normative persons.

Id. (citation omitted). *See also* Wills at 217 (criticizing attempts by Cupp and others to "tie the Gordian Knot between their valorization of rational capacities as the basis for moral status on the one hand with accounts of the basis for the protection of the cognitively impaired on the other" as "unsatisfactory if one takes ableism seriously").

One thing is clear after the submission of over 30 briefs in this case, including by over 150 amici curiae: there is not a single rational reason to deny Happy habeas corpus relief, while this Court has every reason to end the injustice of her arbitrary imprisonment. This Court must rule accordingly.

Dated: May 6, 2022

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NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

On May 6, 2022

deponent served the within: **RESPONSE TO *AMICUS CURIAE* BRIEF OF RICHARD L. CUPP, JR.**

upon:

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Mariana Braylovskiy

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