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Court of Appeals

of the

State of New York

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner-Appellant,

– against –

JAMES J. BREHENY, in his official capacity as Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

RESPONSE TO *AMICI CURIAE* BRIEF OF AMERICAN VETERINARY MEDICAL ASSOCIATION, NEW YORK STATE VETERINARY MEDICAL SOCIETY, AND AMERICAN ASSOCIATION OF VETERINARY MEDICAL COLLEGES

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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: October 22, 2021

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Purporting to speak on behalf of the veterinary community, Amici Curiae American Veterinary Medical Association ("AVMA"),[1] New York State Veterinary Medical Society ("NYSVMS"), and American Association of Veterinary Medical Colleges ("AAVMC") (collectively "Amici") submit a brief in support of keeping the extraordinary cognitively complex and autonomous elephant, Happy, imprisoned in her solitary one-acre exhibit at the Bronx Zoo. None of Amici's arguments support denying Happy habeas corpus relief. As is demonstrated, it is

[1] The AVMA is a multi-million-dollar 501(c)(6) trade association. https://bit.ly/3vAoMLv. It "represents the interests of veterinarians through strategically targeted advocacy in Congress, with regulatory agencies, and before the courts," https://bit.ly/3vxB9YT, and has taken policy positions in the economic interests of their veterinarian members rather than in the best interests of nonhuman animals. For example, the AVMA:

> (1) supports veterinary lien laws, which allow veterinarians to refuse to return patient animals to their owners if the veterinary bill cannot be paid in full. Mark I. Weinstein, *Veterinary Lien Laws: Hypocrisy in a Healing Profession*, 25 ANIMAL L. 29, 29-35, 44-45, 50 (2018).
>
> (2) supports limiting damages to an animal's fair market value in negligence cases, including veterinary malpractice. *Id.* at 40.
>
> (3) opposed legislation, passed in New York (Agriculture and Markets Law § 381), banning the barbaric practice of declawing cats for non-medical purposes. Nicole Pallotta, *New York Becomes First State to Ban Cat Declawing*, ANIMAL LEGAL DEFENSE FUND (October 1, 2019), https://bit.ly/3aSfj8L.
>
> (4) opposes legislation that would ban devocalization surgery for non-medical purposes. *Report on Legislation by the Animal Law Committee*, N.Y.C. BAR 2, 4-5 (2013), https://bit.ly/3pkjFxY.
>
> (5) opposes the Big Cat Public Safety Act, which would prohibit the private ownership of big cats (e.g., tigers, lions, leopards, cheetahs, jaguars, and cougars). *Legislative Agenda for the 116th Congress*, AVMA GOVERNMENT RELATIONS 1, 7 (2020), https://bit.ly/3vA6s5m.

neither true nor relevant that animal ownership principles protect nonhuman animals or that ruling in Happy's favor would lead to any adverse consequences.

This Court's recognition of Happy's common law right to bodily liberty protected by habeas corpus will not depend on who, if anyone, owns her. Rather it will depend on the intrinsic nature of elephants as a species. *See Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring) ("*Tommy*") (The question is "not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. . . . [T]he answer to that question will depend on . . . the intrinsic nature of chimpanzees as a species."). The Trial Court, which was "regrettably" bound by prior precedent, "agree[d] that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *9, *10 (N.Y. Sup. Ct. 2020) (A-21, 22).

The scientific evidence before this Court demonstrating the intrinsic nature of elephants answers the question "whether [an elephant] has the right to liberty protected by habeas corpus" in the affirmative.

I. Keeping Happy imprisoned at the Bronx Zoo is neither "protective" nor "pro-animal"

Amici erroneously assert that "animal ownership . . . is protective" and "the true pro-animal position,"[2] Amicus Br. 4, and that Happy's "lawsuit promotes animal personhood rights above animals' welfare."[3] *Id*. at 5. Their position is a familiar one, reminiscent of disgraceful arguments made by slave owners touting the "protective" benefits of slavery:

> [H]ow does slavery affect the slave? . . . We provide for each slave, in old age and in infancy, in sickness and in health, not according to his labor, but according to his wants . . . . A Southern farm . . . is a joint concern, in which the slave consumes more than the master . . . and is far happier, because although the concern may fail, he is always sure of a support; he is . . . as happy as a human being can be . . . hence, though men are often found at variance with wife or children we never saw one who did not like his slaves, and rarely a slave who was not devoted to his master.

George Fitzhugh, *Sociology for the South*, *in* SLAVERY DEFENDED: THE VIEWS OF THE OLD South 34, 44-45 (Eric L. McKitrick ed. 1963). *See also* James Henry Hammond, *Selections from the Letters and Speeches of the Hon James H. Hammond*

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[2] *See generally, e.g.*, David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021, 1027 (2010) ("Up through the 1860s, the law was dealing primarily with the economic value that an animal represented. . . . However, beginning in the 1860s, there was a clear transition in the laws dealing with animals—from mere protection of the property interests of owners and the economic value of those interests, which did not restrict what an owner could do to her animal, to concerns about the animals themselves, regardless of the actor.").

[3] Happy's case is not an "animal welfare" case as animal welfare laws have nothing to do with protecting the right to bodily liberty protected by habeas corpus. NhRP's Reply Br. 7-8. In any event, granting Happy habeas corpus relief could not possibly "undermine animal welfare," Amicus Br. 19, since animal welfare laws would still continue to apply.

of South Carolina (1866), in SLAVERY DEFENDED: THE VIEWS OF THE OLD South 121, 123 (Eric L. McKitrick ed. 1963) ("[S]laves are hired for life and well compensated; there is no starvation, no begging, no want of employment among our people, and not too much unemployment either . . . . They are happy, content, unaspiring, and utterly incapable of, from intellectual weakness, ever to give us any trouble by their aspirations.").

In 1906, Respondent Wildlife Conservation Society ("WCS") imprisoned and displayed Mbye Otabenga ("Ota Benga"), a Black man, in a cage at the Bronx Zoo's Monkey House. Although many zoo attendees observed Ota Benga frequently walking to the door of his enclosure "with eyes pleading for his keepers to release him from public view," the zoo director claimed Ota Benga was "quite pleased" with his accommodations and had "one of the best rooms in the primate house." PAMELA NEWKIRK, SPECTACLE: THE ASTONISHING LIFE OF OTA BENGA 483, 578, 654 (eBook, 2016). It took until 2020 for WCS to condemn its terrible wrong and promise "to never look away whenever and wherever injustice occurs."[4]

Although the injustice inflicted upon Happy may not be of the same magnitude as the injustice inflicted upon slaves and Ota Benga, her imprisonment at the Bronx Zoo is an undeniable injustice. There is nothing "protective" or "pro-

[4] *Reckoning With our Past, Present, and Future*, WCS (July 29, 2020), https://bit.ly/2ZebxEz.

animal" about it. All the scientific evidence presented to the Trial Court demonstrates that imprisoning Happy—an extraordinary cognitively complex and autonomous being—is contrary to her basic social, emotional, and autonomy needs, and that sending her to an elephant sanctuary would promote those needs.[5]

The Trial Court recognized "Happy's plight" at the Bronx Zoo, and found the NhRP's arguments "extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit . . . to an elephant sanctuary on a 2300 acre lot." (A-22). "[F]ive of the world's most renowned experts on the cognitive abilities of elephants" submitted six uncontroverted expert scientific affidavits in support of Happy's freedom (A-10), while neither Respondents nor Amici proffered any scientific evidence supporting Happy's continued imprisonment.

In her supplemental affidavits, Dr. Joyce Poole, a "foremost expert in elephant behavior,"[6] discussed the physical and psychological harms of holding elephants in captivity as well as Happy's plight specifically. "Elephants have evolved to move.

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[5] *Cf.* Newkirk at 473:

> We cannot know exactly what Benga felt, but research on the psychological trauma associated with shame suggests that it is not substantially different from the effects of physical torture. Studies also consistently show a strong correlation between event-related shame and post-victimization symptoms including depression, post-traumatic stress disorder, withdrawal, and phobias. . . . That would certainly apply to Benga as he endured the gawking of spectators utterly indifferent to his feelings. They howled. Gasped. Gaped. Pointed. Jeered.

[6] Natalie Angier, *What Has Four Legs, a Trunk and a Behavioral Database?*, N.Y. Times (June 4, 2021), https://nyti.ms/3uRkBdN.

Holding them captive and confined prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior." (A-243, para. 4). "When elephants are forced to live in insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems." (A-478, para. 19). Moreover, when held in isolation, "elephants become bored, depressed, aggressive, catatonic and fail to thrive." (A-243, para. 4).

Dr. Poole observed that the Bronx Zoo is unable to "meet Happy's basic needs." (A-475, para. 9). Imprisoned alone in "a space that, for an elephant, is equivalent to the size of a house," Happy cannot exercise her autonomy. *Id*. "[S]ince the psychological well-being of elephants is very much dependent on the ability to socialize appropriately with other elephants and this is dependent on having adequate space, the zoo has failed to meet Happy's psychological requirements." (A-479, para. 24). Being kept in a "solitary condition means" Happy has almost no ability to engage in species typical behavior. (A-480, para. 30). "[I]n her 40 year long history at the Bronx Zoo Happy has had the opportunity to socialize with only four elephants and has spent a quarter of this time in solitary confinement. (A-474, para.10). Further, videos showing Happy lifting her feet repeatedly indicate she is either trying to "take weight off painful, diseased feet . . . or engaging in stereotypic behavior." (A-480, para. 31; A-478, para. 22).

The "*true* pro-animal position" endorses sending Happy to an elephant sanctuary which, as Dr. Poole attested, is "the best option" since "going back to the 'wild' is unfortunately not an option." (A-243-44, para. 5). Unlike zoos, the "orders of magnitude of greater space" offered at sanctuaries "permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior." (A-478, para. 19). "[E]xtremely positive transformations . . . have taken place when captive elephants are given the freedom that larger space in sanctuaries . . . offer." (A-476, para. 11). This is because a sanctuary offers elephants "more autonomy and the possibility to choose where to go, what to eat and with whom and when to socialize."[7] *Id*.

Amici falsely accuse the NhRP of "advancing its institutional public policy and financial interests" over Happy's interests, Amicus Br. 15, when the NhRP's sole goal in this case is to place Happy in an elephant sanctuary in order to remedy Respondents' horrible deprivation of her autonomy.[8] Anyone claiming to "deeply care about animals" would actually favor, and not oppose, the NhRP's petition. Amicus Br. 22. Thus, contrary to Amici's suggestion, there is no analogy between

[7] Amici tout the Association of Zoos & Aquariums ("AZA") standards that allegedly "result in excellent overall elephant well-being." Amicus Br. 25 (quoting *AZA Standards for Elephant Management & Care* (Revised April 2012)). However, Dr. Poole's "more than four decades long study of free living elephants shows that the AZA specifications are woefully inadequate for meeting the needs of elephants." (A-479, para. 27).

[8] The NhRP offered to drop the case if Respondents agreed to send Happy to a sanctuary.

Happy's common law habeas corpus case and *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), a federal copyright infringement complaint filed under the Copyright Act on behalf of a crested macaque named Naruto.[9] Amicus Br. 14-15.

Amici's false accusation echoes U.S. Senator and Vice-President John C. Calhoun's attack upon human abolitionists for being "blind fanatics . . . waging war" against slavery. Senator John C. Calhoun, Address at the U.S. Senate: Speech on the Reception of Abolition Petitions (Feb. 6, 1837), https://bit.ly/2XwSJj9. In fighting for Happy's freedom, the NhRP has no fear of similarly being viewed as "blind fanatics . . . waging war" on her behalf.

II. Granting Happy habeas corpus relief would not lead to adverse consequences

Misrepresenting this case, Amici assert that the NhRP is "asking the Court to expand the definition of persons to include animals." Amicus Br. 8. They further claim ruling in Happy's favor would require this Court to "upend the entire human-animal legal regime," leading to numerous adverse floodgate consequences. *Id*. at 6, 19-22. For example, Amici absurdly suggest that granting Happy habeas corpus relief would disrupt the food chain and cause the New York dairy industry to be "irreparably harmed and harassed by lawsuits." *Id*. at 21-22. *See Matter of Johannesen v. New York City Dept. of Hous. Preserv. & Dev.*, 84 N.Y.2d 129, 138

[9] The Ninth Circuit found that, while Naruto had standing under Article III, he lacked statutory standing to sue under the Copyright Act. 888 F.3d at 424-25.

(1994). (A "[floodgates] argument is often advanced when precedent and analysis are unpersuasive."). But this habeas corpus case does not concern all nonhuman animals or "the entire human-animal legal regime." Rather, "this Court is only being asked to recognize one right for Happy."[10] NhRP's Br. 17.

This Court should approach the resolution of Happy's case as it did in *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513 (2021), a common law case the NhRP cited and Amici do not seek to distinguish. NhRP's Br. 17-18. There, this Court recognized its single "task" was "simply . . . to determine whether a grandchild may come within the limits of her grandparent's 'immediate family,' as that phrase is used in zone of danger jurisprudence," and concluded that a grandchild does come within those limits. *Id*. at 516. It had no problem leaving "[u]nsettled" whether other categories of individuals also qualify as "immediate family" under the common law. *Id*. Similarly, this Court's single "task" is "simply" to determine whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus. As in *Greene*, this Court can recognize Happy's right and leave "unsettled" whether she has any other rights, whether a member of another species may invoke the protections of habeas corpus, and any other question not before this Court.

[10] Thus, Amici's floodgate concerns regarding the alleged adverse consequences of a favorable ruling are unfounded and irrelevant. The only adverse consequences at stake in this case relate to Happy's continued imprisonment at the Bronx Zoo.

Amici also incorrectly claim this case requires "line-drawing," specifically a determination of "which species fall above and below" the line to qualify for personhood. Amicus Br. 16. In *Greene*, this Court rejected the idea that line-drawing is required in a common law case. 36 N.Y.3d at 516 ("[W]e are not asked to fix permanent boundaries of the 'immediate family.'"); *id*. at 518 (noting this Court's prior common law decision in *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984) "was not an exercise in line-drawing. Although it identified certain relationships that come within the class of 'immediate family members,' *Bovsun* did not establish exhaustive boundaries with respect to the universe of 'immediate family members.'").

This Court has also long "rejected as a ground for denying a cause of action that there will be a proliferation of claims."[11] *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969). "It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts." *Id*. *See Battalla v. State of New York*, 10 N.Y.2d 237, 241-42 (1961) ("even if a flood of litigation were realized by abolition of the exception [prohibiting recovery for injuries incurred by fright negligently induced], it is the duty of the courts to willingly accept the opportunity to settle these disputes."); *Matter of Nonhuman Rights Project, Inc. v. ex rel.*

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

Hercules and Leo v. Stanley, 49 Misc.3d 746, 772 n.2 (Sup. Ct. 2015) (relying upon *Tobin*, rejecting "floodgates argument" in chimpanzee habeas corpus case as not being "a cogent reason for denying relief"); *Greene*, 36 N.Y.3d at 538 n.5 (Rivera, J., concurring) ("Courts are on shaky justificatory ground to begin with when they shape substantive law to avoid an increase in their workloads.") (citing Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1057 (2013)).[12]

III. None of Amici's other arguments support denying Happy habeas corpus relief

In support of Happy's imprisonment, Amici argue that (i) courts have denied legal personhood for nonhuman animals; (ii) the legislature is the appropriate body for determining whether fundamental legal rights should be accorded to nonhuman animals; (iii) ruling in Happy's favor on the basis of her autonomy and extraordinary

[12] *See also Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 133 (1983) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'; and it is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do . . . Even if the caseload increases, the 'proper remedy' is an expansion of the judicial machinery, not a decrease in the availability of justice.") (internal quotations and citation omitted); *Sinn v. Burd*, 486 Pa. 146, 163 (1979) ("(T)he fundamental concept of our judicial system (is) that any (caseload) increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights.") (internal quotations and citation omitted); *Falzone v. Busch*, 45 N.J. 559, 567 (1965) ("And, of more importance, the fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."); *Robb v. Pennsylvania R. Co.*, 8 Storey 454, 463 (1965) ("It is the duty of the courts to afford a remedy and redress for every substantial wrong. . . . Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard.").

cognitive complexity would be subjective and unprincipled; and (iv) nonhuman animals are property. None support denying Happy habeas corpus relief.

First, this Court should reject the three habeas corpus decisions cited by Amici: *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*"), *Nonhuman Rights Project Inc v. RW Commerford and Sons Inc*, 192 Conn. App. 36 (2019), and *Rowley v. City of New Bedford*, 2020 WL 7690259 (Mass. App. Ct. 2020) (unpublished). Amicus Br. 7. As the NhRP painstakingly demonstrated, *Lavery I* was based upon two major errors: a "person" (1) must have the capacity to bear duties and (2) must be human. *See* NhRP's Br. 43-53; NhRP's Reply Br. 9-13. Judge Eugene M. Fahey criticized *Lavery 1* in *Tommy*. 31 N.Y.3d at 1057 (Fahey, J., concurring). *Commerford* subsequently relied upon the same personhood errors,[13] and the unpublished *Rowley* opinion—litigated by a non-lawyer—is also inapposite as it was based upon an interpretation of Massachusetts' habeas corpus statute.[14]

[13] In addition, *Commerford*'s misunderstanding of social compact theory is contrary to the Connecticut Supreme Court, which has made clear that the social compact does not require individuals to have the capacity to bear duties. *See Moore v. Ganim*, 233 Conn. 557, 598 (1995) ("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.'") (quoting J. Locke, "Two Treatises of Government," book II (Hafner Library of Classics ed.1961) ¶ 123, p. 184) (emphasis added). And social compact theory is irrelevant to habeas corpus. *See Jackson v. Bulloch*, 12 Conn. 38, 43 (1837) (slave ordered freed pursuant to habeas corpus notwithstanding that slaves were not members of the social compact).

[14] Similarly, Amici's citation to *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment, Inc.*, 842 F.Supp.2d. 1263 (S.D. Cal. 2012) is irrelevant, for

Second, Amici erroneously claim that "determining the rights and protections afforded to animals is ideally suited for the legislature," Amicus Br. 22-23, and cite the existence of various animal welfare laws in support of their contention. *Id*. at 23-26. However, Happy's case is not an animal welfare case; it is a common law habeas corpus case that is a matter for this Court, not the legislature, to decide. NhRP's Br. 13-21; NhRP's Reply Br. 17-21. The "'Legislature did not intend to change the instances in which the writ was available,' which has been determined by 'the slow process of decisional accretion.'" *Lavery I*, 124 A.D.3d at 150 (quoting *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966)).[15] Accordingly, this Court "must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach," *id*., and apply the long-established principles and standards for updating the common law (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's Br. 21-43.

This is because the "common law . . . is not an anachronism," *Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 509 (1968) (internal quotations and citation

its personhood conclusion was based upon an interpretation of the Thirteenth Amendment, not the common law of habeas corpus.

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

omitted), and habeas corpus is unique in the common law in that it "cannot be abrogated, or its efficiency curtailed, by legislative action." *People ex Rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875). *See* NhRP's Br. 13-21. Amici ignore *Woods v. Lancet*, 303 N.Y. 349, 355 (1951), which, as a general rule, rejected the argument that changes to the common law "should come from the legislature, not the courts." *See id*. ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule"); NhRP's Br. 16-17 (citing cases).[16]

Third, there is nothing "subjective" or "unprincipled" in deciding that Happy's proven autonomy and extraordinary cognitive complexity is sufficient for the recognition of her common law right to bodily liberty protected by habeas corpus. Amicus Br. 13. In *Tommy*, Judge Fahey relied upon "unrebutted evidence . . . from eminent primatologists" and evidence cited by "amici philosophers with expertise in animal ethics and related areas" in concluding that chimpanzees are "autonomous, intelligent creatures." *Tommy*, 31 N.Y.3d at 1058, 1059 (Fahey, J., concurring). Similarly, based on the uncontroverted scientific evidence from renowned elephant experts, the Trial Court found that "elephants are autonomous

[16] Amici cite *Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332, 348 (2020) for the proposition that it is the legislature's role to "recalibrate[] rights and chang[e] course when it deems such alternation appropriate," Amicus Br. 26. But that decision concerned interpretations of statutory law and constitutional due process requirements.

beings possessed of extraordinarily cognitively complex minds" (A-16), and that "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). The recognition of Happy's common law right is compelled by these objective facts and "the immutable principles of our common law." *Greene v. Knox*, 13 Bedell 432, 440 (1903).

Amici fail to provide any principled justification for imprisoning Happy at the Bronx Zoo. It would, however, be unprincipled to allow Happy's continued imprisonment solely because she is not human, or because she may not possess the "ability to engage in societal rights and responsibilities." Amicus Br. 16. *See Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (criticizing "Appellate Division's conclusion that a chimpanzee cannot be considered a "person" and is not entitled to habeas relief" as being "in fact based on nothing more than the premise that a chimpanzee is not a member of the human species"); *id*. ("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 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.") (citations omitted).

Fourth, Amici erroneously contend this Court cannot grant Happy habeas corpus relief because nonhuman animals are property and therefore cannot be "persons," Amicus Br. 8-12, which falsely presumes that an entity cannot be both property and a legal person.[17] For example, in the early nineteenth century New York slaves had statutory rights to a jury trial, to own and transfer property by will, to marry, and to bear legitimate children; they were both property and "persons."[18]

In 1996, the New York legislature enacted EPTL § 7-6 (now § 7-8.1), which recognizes certain nonhuman animals as legal persons for they are "beneficiaries" of legally enforceable trusts. *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."); NhRP's Br. 20-21, 29-30, 48; NhRP's Reply Br. 12. Amici's assertion that "legislatures have never conveyed legal 'personhood' on animals" is therefore false.[19] Amicus Br. 26. The

[17] "[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)). NhRP's Br. 43-44.

[18] EDGAR J. MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 63, 65, 177-78 (1966).

[19] Other states also allow legally enforceable trusts to be created for nonhuman animal "beneficiaries," thereby recognizing them as legal persons for trust purposes, including: Colorado

Fourth Department also recognized "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (citations omitted).

In Oregon, the Court of Appeals held that the state's emergency aid exception to the warrant requirement, which permits a police officer to conduct a warrantless entry to render aid to "persons," "extends to providing emergency aid to nonhuman animals." *State v. Fessenden*, 258 Or.App. 639, 649 (2013) (cited by the Fourth Department in *Graves*, 163 A.D.3d at 21). In that case, the court found that the exception justified the warrantless seizure of a starving horse. *Id*. at 651. Amici cite *State v. Fessenden*, 355 Or. 759, 776 (2014), in which the Oregon Supreme Court affirmed the Court of Appeals' decision on the alternative ground that the sezisure was lawful under Oregon's exigent cirucmstances exception, which is applicable to protecting property. Amicus Br. 11. However, Amici misleadingly omit that the Oregon Supreme Court expressly left open the question of whether the emergency aid exception—applicable to "persons"—extends to nonhuman animals.[20] 355 Or. at

(C.R.S. § 15-11-901), Massachusetts (M.G.L. 203E § 408), Nevada (Nev. Rev. Stat. § 163.0075), and Virginia (Va. Code § 64.2-726).

[20] Since *Fessenden*, the Oregon Court of Appeals held that the emergency aid exception justified a warrantless entry to render aid to starving cattle. *State v. Hershey*, 286 Or.App. 824, 834 (2017).

774-75. None of Amici's other authorities support the proposition that property and personhood are necessarily mutually exclusive concepts.[21] Amicus Br. 9-12.

Contrary to Amici, the resolution of this case does not depend on Happy's property status. Rather, this Court must first decide whether Happy has the common law right to bodily liberty protected by habeas corpus. Once this Court recognizes Happy's common law right—thereby rendering her imprisonment at the Bronx Zoo unlawful—it must order her immediate release pursuant to CPLR 7010(a). This Court should then remit the case to the Trial Court to determine whether Happy will be transferred to The Elephant Sanctuary in Tennessee or Performing Animal Welfare Society.[22] Although unnecessary to the resolution of this case, the Court may decide: (a) Happy is not property; (b) Happy is the property of the elephant sanctuary to which she will be transferred; or (c) Happy is the property of the Bronx Zoo even though she will be permanently placed in an elephant sanctuary.[23]

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[21] The Ninth Circuit in *Naruto*, which Amici also cite, noted that corporations are both "persons" for constitutional and statutory purposes and "owned by humans." 888 F.3d at 426 n.9.

[22] Both elephant sanctuaries have agreed to provide Happy with lifetime care at no cost to Respondents. (A-8; A-10).

[23] Under the "historic common-law doctrine" of "retroactivity," this Court can declare that Happy always possessed her common law right to bodily liberty protected by habeas corpus. *People v. Morales*, 37 N.Y.2d 262, 267-68 (1975) ("The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated."). *See People v. De Renzzio*, 19 N.Y.2d 45, 49 (1966) ("[T]he pronouncement of the common-law court is deemed retroactively to have been

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the rule of the past. A decision states the law as it ought rightly to have been understood from the beginning.").

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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

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