

Court of Appeals

STATE OF NEW YORK



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

Plaintiffs-Appellants,

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,

Defendants-Respondents.

**MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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Date Completed: March 8, 2021

Oral Argument Not Requested

APL-2020-02581
Bronx County Clerk's Index No. 260441/19

**COURT OF APPEALS
STATE OF NEW YORK**

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,
Plaintiffs-Appellants,

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.,
Defendants-Respondents.

NOTICE OF MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jay Shooster,
dated March 8, 2021, and the accompanying motion and proposed brief, proposed
amici law professors will move this Court on March 22, or as soon thereafter as
counsel may be heard, at Court of Appeals Hall, 20 Eagle Street, Albany, New York
12207, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of
Appeals of the State of New York granting the proposed amici law professors leave

to file the accompanying brief as *amici curiae* in support of the Plaintiffs-Appellants the Nonhuman Rights Project, Inc., in the above-entitled proceeding, and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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Defendants-Respondents.

**AFFIRMATION OF JAY SHOOSTER IN SUPPORT OF
MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE***

Jay Shooster, an attorney admitted to practice in the courts of the State of
New York, and not a party to this action, hereby affirms the following to be true
under the penalties of perjury, pursuant to CPLR 2106:

1. I am Jay Shooster with the law firm Richman Law & Policy, attorneys for the proposed amici law professors in the above-captioned action. I submit this affirmation in support of the law professors' motion to appear as *amici curiae* in support of appellants in the above-captioned action.

2. Attached hereto as Exhibit A is a copy of the brief the law professors wish to submit to the Court.

3. The proposed *amici curiae* are 50 law professors from across the country and the world who teach and research in the rapidly evolving field of animal law.

4. The proposed *amici* seek leave to file this brief because they have a special expertise in the issues presented by this case and the significance these issues hold for the broader development of animal law as a discipline. *Amici* have a special interest in guiding the evolution of their field and in assisting the Court in grappling with the foundational jurisprudential issues that this case raises.

5. In addition, pursuant to Rule 500.23 of the Rules of Practice of this Court, the proposed *amici curiae* brief has identified law and arguments that might otherwise escape the Court's consideration and would be of assistance to the Court. Specifically, the brief explains the public importance of this appeal by describing the growth of animal law as a respectable field of academic inquiry, how this case

foregrounds important questions that are at the center of this field, and why the precedent upon which the First Department relied ought to be reconsidered.

6. No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner.

7. No party or party's counsel contributed money that was intended to fund preparation or submission of the brief.

8. No person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

WHEREFORE, for the reasons set forth herein, the proposed *amici* respectfully request that the Court grant this motion in all respects, grant leave to file the attached brief in this appeal, and award such other and further relief as the Court may deem just and proper.

Affirmed: March 8, 2021
Brooklyn, New York



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PROPOSED BRIEF OF *AMICI CURIAE* LAW PROFESSORS
IN SUPPORT OF PLAINTIFFS-APPELLANTS

Oral Argument Not Requested

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DATE COMPLETED: MARCH 8, 2021

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Amici state that, as of the date of 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, Amici state that 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 movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are 50 law professors from across the country and the world who teach and research in the rapidly evolving field of animal law. *Amici* have a special expertise in the issues presented by this case and the significance these issues hold for the broader development of animal law as a discipline. *Amici* have a special interest in guiding the evolution of their field and in assisting the Court in grappling with the foundational jurisprudential issues that this case raises. *Amici* respectfully urge the Court to grant the Petitioner-Appellant Nonhuman Rights Project’s Motion for Permission to Appeal, based on their interest in ensuring the field of animal law develops according to rational principles of justice that are consistent with our legal system’s commitment to equality and liberty.

II. SUMMARY OF THE ARGUMENT

This brief argues that *Nonhuman Rights Project v. Breheny* warrants review by this Court because “the issues are novel [and] of public importance.”¹ The case asks whether at least some nonhuman animals – including Happy, a 50-year-old Asian elephant captured from the wild in Thailand and held in lonely confinement at the Bronx Zoo – are legal persons entitled to writs of habeas corpus when they are unlawfully detained. As Judge Fahey astutely observed, “The question will have to

¹ 22 NYCRR § 500.22(b)(4).

be addressed eventually.”² *Amici* humbly suggest that this case provides the appropriate vehicle for addressing the question now – and is perhaps the last opportunity for the Court to do so for the foreseeable future, as this is the final case of its kind pending in New York.

This brief explains the public importance of this appeal by describing the growth of animal law as a respectable field of academic inquiry, how this case foregrounds important questions that are at the center of this field, and why the precedent upon which the First Department relied ought to be reconsidered.

III. ARGUMENT

1. The Rapid Growth of Animal Law Demonstrates the Public Importance of the Issues That This Appeal Raises.

Although once considered a niche and trivial area of law,³ today animal law commands respect as one of the fastest growing fields of law.⁴ More than 150 ABA-

² *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1056 (2018) (Fahey, J., concurring).

³ Delcianna J. Winders, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 *Animal L.* 1, 2 (2006) (“As Joyce Tischler, co-founder of the Animal Legal Defense Fund (ALDF) and animal law practitioner for over a quarter of a century, noted . . . in the early days, animal law practitioners were isolated and frequently mocked.”); Naomi Pfefferman, *A Lawyer’s Call of the Wild*, *Jewish J.* (June 2, 2016), https://jewishjournal.com/current_edition/186005/a-lawyers-call-of-the-wild/ (quoting Steven Wise: “I would walk into a courtroom and even judges or clerks would laugh. Some people even barked at me.”).

⁴ Akisha Townsend, *An Opportune Quest: The Development of Animal Law Courses in the United States*, 3 *J. Animal Ethics* 72, 72 (2013); Peter Sankoff, *Charting the Growth of Animal Law in Education*, 4 *J. Animal L.* 105, 105–06 (2008) (“[O]ne thing about the [animal law] movement cannot be disputed: it is growing at a remarkable pace, both in the United States and abroad. For one thing, there are more people working as animal lawyers and studying to earn this informal classification than ever before.”).

accredited law schools offer courses in animal law, up from just nine such courses in 2000.⁵ In New York, NYU, Cornell, Pace, Brooklyn, Touro, Columbia, and others offer animal law courses, and the University at Buffalo offers an animal law clinic.⁶ The growth of courses in animal law reflects demand from law students, who recognize that the field raises important issues of public concern.⁷

Law schools at Harvard, Yale, Lewis & Clark, and elsewhere not only offer introductory animal law courses, but have created robust programs that include advanced electives, clinics, and other opportunities for students to learn about the relationship between animals and the law. In 2008, Lewis & Clark Law School created the Center for Animal Law Studies in collaboration with the Animal Legal Defense Fund. Lewis & Clark offers more than 25 different animal law classes, as well as three separate animal law clinics, an annual conference, and the nation's first animal law journal, the *Animal Law Review*.⁸ In 2014, Harvard created its Animal Law & Policy Program, which offers three courses in animal law, an animal law

⁵ Animal Legal Defense Fund, *Animal Law Courses*, <https://aldf.org/article/animal-law-courses>; Joyce Tischler, *A Brief History of Animal Law, Part II (1985-2011)*, 5 *Stan. J. Animal L. & Pol'y* 27, 36-37, 39 (2012).

⁶ University at Buffalo School of Law, *Animal Law Clinic*, <https://www.law.buffalo.edu/beyond/clinics/animal.html>.

⁷ Townsend, *supra* note 4, at 75 (“The momentum driving the upsurge of animal law courses corresponds with greater numbers of students attending law school solely to pursue careers in animal protection law. For many, the passion to address societal problems facing animals begins well before law school.”).

⁸ Lewis & Clark Law School, *Center for Animal Law Studies*, https://law.lclark.edu/centers/animal_law_studies/.

clinic, and robust academic fellowships.⁹ In 2019, Yale founded its Law, Ethics & Animals Program, which offers a policy lab on animals and climate change, as well as several animal law courses.¹⁰ In 2020, the University of San Francisco School of Law launched its Justice for Animals Program, offering courses in animal law and a seminar on Animals & Justice.¹¹ Michigan State University College of Law hosts the Animal Legal & Historical Center, the largest legal website in the world devoted to animal issues.¹² The University of Connecticut offers a clinic in which students participate in animal cruelty cases as court-appointed advocates to promote the interests of justice.¹³ Vermont Law School offers a Concentration in Animal Law and clinical training in partnership with the National Wildlife Federation.¹⁴

Outside of the law schools themselves, major legal institutions have recognized the importance of animal law. The Association of American Law Schools has a Section on Animal Law.¹⁵ The American Bar Association's Tort Trial &

⁹ Animal Law & Policy Program: Harvard Law School, *About Us*, <https://animal.law.harvard.edu/about/>.

¹⁰ Yale Law School, *The Law, Ethics & Animals Program*, <https://law.yale.edu/animals>.

¹¹ University of San Francisco, *Animal Law*, <https://www.usfca.edu/law/academics/areas-of-study/animal-law>.

¹² Michigan State University, *Animal Legal & Historical Center*, <https://www.animallaw.info/>.

¹³ University of Connecticut School of Law, *Clinic: Animal Law*, <https://www.law.uconn.edu/academics/courses/LAW7384/clinic-animal-law>.

¹⁴ Vermont Law School, *Concentration in Animal Law*, <https://www.vermontlaw.edu/academics/concentrations/concentration-in-animal-law>; Vermont Law School, *Environmental Advocacy Clinic*, <https://www.vermontlaw.edu/academics/clinics-and-externships/environmental-advocacy-clinic>.

¹⁵ Association of American Law Schools, *Section on Animal Law*, <https://www.aals.org/sections/list/animal-law/>.

Insurance Practice Section has an Animal Law Committee and the International Section has an International Animal Law Committee.¹⁶ The ABA has adopted several resolutions endorsing animal protection positions, including most recently a resolution that “urges all nations to negotiate an international convention for the protection of animals.”¹⁷ The New York City Bar’s Animal Law Committee was the first of its kind, and the New York State Bar also hosts a Committee on Animals and the Law, as do the county bar associations for Nassau and Suffolk.¹⁸ Similar committees exist in other states’ bar associations.¹⁹

The growth of animal law is not limited to the United States. In Canada, 18 of the country’s 24 law schools have recently offered animal law courses, and Canada now hosts its own animal law conference, hosted by Animal Justice, attracting more than 80 presenters from across the globe. Animal law is also gaining serious interest in the United Kingdom, China, Africa, Brazil, New Zealand, Australia, and

¹⁶ Tort Trial & Insurance Practice Section, American Bar Association, *Animal Law*, https://www.americanbar.org/groups/tort_trial_insurance_practice/committees/animal-law/; International Law Section, American Bar Association, *Committees*, https://www.americanbar.org/groups/international_law/committees/.

¹⁷ International Law Section & Tort Trial & Insurance Practice Section, American Bar Association, *Report to the House of Delegates, Resolution 101C* (2021) (adopted), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/02/midyear-resolutions/101c.pdf>.

¹⁸ New York City Bar, *Animal Law Committee*, <https://www.nycbar.org/member-and-career-services/committees/animal-law-committee/>; New York State Bar Association, *Animals and the Law*, <https://nysba.org/committees/animals-and-the-law/>.

¹⁹ See, e.g., State Bar of Texas Animal Law Section, <https://www.animallawsection.org/>; Florida Bar, *Animal Law Section*, <https://www.floridabar.org/about/section/section-an/>; Maryland State Bar Association, *Animal Law*, <https://www.msba.org/for-members/sections/animal/>.

elsewhere.²⁰

Interest in animal law has not been confined to lawyers and law students. Popular interest in animal law cases reveals a strong public engagement with the jurisprudential and philosophical questions raised by our legal relationships with animals. The number of non-lawyer members and supporters of legally focused animal organizations like the Animal Legal Defense Fund in the United States and Animal Justice in Canada have grown significantly in the last decade. The litigation at issue in this case and its predecessors has received widespread national and international press coverage including numerous stories in the *New York Times*, *Washington Post*, and *The Wall Street Journal*.²¹ The documentary *Unlocking the Cage*, which follows the Nonhuman Rights Project, premiered at the Sundance Film Festival and was featured on HBO, garnering positive reviews and widespread

²⁰ See, e.g., Simon Brooman, *Animal Law in the United Kingdom: Academics, Conferences, A-Law and Student Engagement*, 39 *Liverpool L. Rev.* 1 (2018); Shih-Yun Wu, *Animal Welfare Legislation in Taiwan and China: Examining the Problems and Key Issues*, 23 *Animal L.* 405 (2017); Jim Karani, *Bringing Advocates Together at the 4th Annual Africa Animal Welfare Conference*, Lewis & Clark Law School (Sept. 24, 2020), <https://law.lclark.edu/live/news/44310-bringing-advocates-together-at-the-4th-annual>; Tagore Trajano De Almeida Silva, *Origins and Development of Teaching Animal Law in Brazil*, 31 *Pace Env'tl. L. Rev.* 501 (2014); *Animal Law in Australasia: Continuing the Dialogue* (Peter Sankoff, Steven White, and Celeste Black eds., 2nd ed. 2013); Bruce Wagman & Matthew Liebman, *A Worldview of Animal Law* (2011).

²¹ See, e.g., Michael Gold, *Is Happy the Elephant Lonely? Free Her, the Bronx Zoo Is Urged*, *N.Y. Times* (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/nyregion/bronx-zoo-elephant-lawsuit-happy.html>; Karin Bruillard, *A Judge Just Raised Deep Questions About Chimpanzees' Legal Rights*, *Washington Post* (May 9, 2018), <https://www.washingtonpost.com/news/animalia/wp/2018/05/09/a-judge-just-raised-some-deep-questions-about-chimpanzees-legal-rights/>; Melanie Grayce West, *Bronx Zoo's Happy the Elephant Has Day in Court*, *Wall Street Journal* (Oct. 21, 2019), <https://www.wsj.com/articles/bronx-zoos-happy-the-elephant-has-day-in-court-11571701359>.

interest in the question presented by this appeal.²²

In light of this extensive interest in animal law within law schools, the legal profession, and society more broadly, there is no question that this case raises “issues [that] are novel [and] of public importance.”²³

2. This Case Raises Jurisprudential Issues That Are at the Philosophical Center of the Growing Field of Animal Law.

The burgeoning field of animal law is concerned not only with studying and interpreting existing statutory protections for animals, such as state anti-cruelty laws and federal regulatory legislation, but also with normative questions of jurisprudence. In other words, animal law is concerned not only with the complex provisions of, for example, the New York anti-cruelty law or the federal Animal Welfare Act, but also with more fundamental questions of how our legal systems should regard other animals.

This case raises one of the core issues in the courses *Amici* teach and the scholarship in which they engage: whether our legal system should regard nonhuman animals as legal persons with legitimate claims to justice or, instead, as property that lacks enforceable legal rights. The majority of animal law courses address this question both theoretically and doctrinally, asking both what animals’ status should be and how courts are increasingly deciding cases in which animals’ legal status is

²² *Unlocking the Cage* (Pennebaker Hegedus Films 2016).

²³ 22 NYCRR § 500.22(b)(4).

at issue.

Some of the most influential and cited legal scholars of modern times have engaged with these questions, including Cass Sunstein, Martha Nussbaum, Richard Posner, Laurence Tribe, Deborah Rhode, Michael Dorf, Sherry Colb, Catharine MacKinnon, and Angela Harris, to name a few.²⁴ Although these scholars reach different conclusions, they recognize that the normative and theoretical questions that animal law raises are novel and of significant public importance – the same criteria that guides this Court’s decision whether to grant review in this case. Even critics of animal personhood recognize that “the question of whether the law should consider particularly intelligent species of animals to be legal persons has developed roots as a matter of serious public debate” and that “the issues involved are on the cutting edge of legal rights jurisprudence.”²⁵

Given the centrality of the personhood question to the rapidly evolving field

²⁴ See, e.g., Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. Rev. 1333 (2000); Cass R. Sunstein, *The Rights of Animals*, 70 U. Chi. L. Rev. 387 (2003); Martha C. Nussbaum, *Animal Rights: The Need for a Theoretical Basis*, 114 Harv. L. Rev. 1506 (2001); Martha C. Nussbaum, *Working with and for Animals: Getting the Theoretical Framework Right*, 94 Denv. L. Rev. 609 (2017); Richard A. Posner, *Animal Rights*, 110 Yale L.J. 527 (2000); Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 Animal L. 1 (2001); Deborah Rhode, *What Dogs Deserve* (forthcoming); Michael C. Dorf, *The Constitution and the Political Community*, 27 Const. Comment. 499 (2011); Sherry F. Colb & Michael C. Dorf, *Beating Hearts: Abortion and Animal Rights* (2016); Catherine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in Sunstein & Nussbaum, *supra*; Angela P. Harris, *Compassion and Critique*, 1 Colum. J. Race & L. 326 (2012); Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. Animal L. 15 (2009).

²⁵ Richard L. Cupp, *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 Fla. L. Rev. 465, 469, 467 (2017).

of animal law, this Court should take this unique opportunity to further develop this nascent area of jurisprudence.

3. The Lavery Cases Are Widely Considered to Be Wrongly Decided and Should Be Reconsidered.

This case presents an ideal opportunity to revisit the holdings of *People ex rel. Nonhuman Rights Project v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (*Lavery I*) and *Matter of Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (*Lavery II*), which are widely regarded by animal law scholars as legally and philosophically untenable.

Taken together, the *Lavery* decisions hold that nonhumans are categorically excluded from legal personhood because they do not have legal duties.²⁶ Under this rule, legal rights and legal responsibilities are inseparably linked with one another, such that one who lacks legal duties cannot count as a legal person. In other words, “the ascription of rights has historically been connected with the imposition of societal obligations and duties.”²⁷

Such a view is patently incorrect, however, because many legal persons lack legal duties, as even the First and Third Departments recognized in the *Lavery* cases. For example, in New York, “a person less than eighteen years old is not criminally

²⁶ *Lavery I*, 124 A.D.3d at 152; *Lavery II*, 152 A.D.3d at 78.

²⁷ *Lavery I*, 124 A.D.3d at 151.

responsible for conduct.”²⁸ Persons under the age of 18 may also disaffirm contracts without civil liability in New York.²⁹ Most significantly, children under the age of four are *non sui juris* – they cannot be held civilly liable for their actions in New York.³⁰

Yet no one would argue that a three-year-old child, incapable of civil or criminal liability, lacks legal personhood or the capacity to have rights. “While an infant under a specified age may be considered as lacking legal capacity, infants are, however, possessed of certain rights.”³¹ An infant who cannot be held civilly liable for the harms she causes may nevertheless sue someone who harms her. The same is true of persons with cognitive disabilities that inhibit their capacity for criminal or civil culpability.³² A person who is not criminally liable by reason of insanity nevertheless has basic rights, such as the right to humane conditions if she is civilly confined. 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

²⁸ N.Y. Penal Law § 30.00. In some circumstances, persons over the age of 13 may be criminally responsible for murder or certain felonies, but under no circumstance is a person younger than 13 criminally responsible for their actions. *Id.*

²⁹ N.Y. Gen. Oblig. Law § 3-101.

³⁰ *Meyer v. Inguaggiato*, 258 A.D. 331, 332, 16 N.Y.S.2d 672, 674 (2nd Dept. 1940); *Verni v. Johnson*, 295 N.Y. 436, 437, 68 N.E.2d 431, 432 (1946) (“In every reported case where the question has been squarely raised, this court has held that a three-year-old child is conclusively presumed to be incapable of negligence.”); *M.F. ex rel. Flowers v. Delaney*, 37 A.D.3d 1103, 1105, 830 N.Y.S.2d 412, 414 (4th Dept. 2007).

³¹ 43 C.J.S. Infants § 220.

³² *See, e.g.*, N.Y. Penal Law § 40.15 (“In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect.”).

social responsibilities.”³³ To be a child under the age of four or a person with a severe cognitive disability in New York is to be that which the *Lavery* decisions suggests cannot exist: a person without legal responsibilities.

For this reason, Judge Fahey repudiated the reasoning in *Lavery I*, arguing that an animal’s inability to accept legal responsibility does not undermine her possession of legal rights: “Even if it is correct . . . 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[.]”³⁴

Faced with the difficult implications of a rule that excludes infants and some people with disabilities, both *Lavery I* and *Lavery II* abandoned the principle they had just established (that personhood requires responsibilities) and collapsed back into a simple biological prejudice (all humans and only humans are persons) – thus presuming the answer to the question they were asked to decide. In *Lavery I*, the Third Department acknowledged, “[t]o be sure, some humans are less able to bear legal duties or responsibilities than others.” But, the court argued, “it is undeniable that *collectively* human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human

³³ *Lavery I*, 124 A.D.3d at 152.

³⁴ *Lavery*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

beings”³⁵ Similarly, the First Department in *Lavery II* acknowledged the argument that “infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights.”³⁶ But the court rejected the argument by simply pointing to “the fact that these are still human beings, members of the human community.”³⁷

As Judge Fahey observed, these holdings are “in fact based on nothing more than the premise that a chimpanzee is not a member of the human species.”³⁸ The *Lavery* courts reduced the question of personhood to the species membership of the litigant, contrary to both the rule they had just established (requiring “[r]eciprocity between rights and responsibilities”³⁹) and the well-established jurisprudential recognition that “a person is *any being* whom the law regards as capable of rights or duties. . . . *whether a human being or not*[.]”⁴⁰

The *Lavery* courts try to have it both ways by conditioning legal personhood on the capacity to participate in the social contract and bear legal duties, while at the same time granting legal personhood to humans who lack such capacity – as if “by

³⁵ *Lavery I*, 124 A.D.3d at 152 n.3 (emphasis added).

³⁶ *Lavery II*, 152 A.D.3d at 78.

³⁷ *Id.*

³⁸ *Lavery*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

³⁹ *Lavery I*, 124 A.D.3d at 151.

⁴⁰ Sir John William Salmond, *Salmond on Jurisprudence* § 61 (P.J. Fitzgerald ed. 12th ed 1966) (emphasis added).

courtesy or by proxy.”⁴¹ Such a theory of personhood is not only *speciesist*, but it is also *ableist* – conditioning paradigmatic membership in the human community on a narrow view of human capabilities that marginalizes people with disabilities.⁴²

As animal law professors, many of the *Amici* teach the *Lavery* decisions in their animal law classes and struggle to articulate a coherent and principled holding from the case. This difficulty stems from the fact that the 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). *Amici*’s students typically regard the *Lavery* decisions as results-driven, avoiding the jurisprudential challenge of finding consistent criteria for legal personhood in order to uphold interspecies inequity and retain a biological/juridical equivalency between humanness and personhood.

Because these inconsistencies plague the *Lavery* decisions upon which the *Breheny* court relied, this Court should take this opportunity to revisit the question

⁴¹ Kristin Andrews et al., *Chimpanzee Rights: The Philosopher’s Brief* 63 (2019) (“This view has been widely criticized by disability advocates and theorists, among others, for setting up a hierarchy of so-called real, normal, or ‘charter’ persons, whose personhood is tied to their individual capacities and those who are given the protections of personhood ‘by courtesy or by proxy.’”).

⁴² See generally, Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2007) (critiquing the social contract theory and advocating justice for persons with disabilities and animals based on their capabilities and right to flourish); Sunaura Taylor, *Beasts of Burden: Disability Studies and Animal Rights*, 19 *Qui Parle* 191, 199 (2011) (“[T]he physical vulnerability of disabled individuals and animals is immensely problematic under a social contract tradition of justice, because even in a ‘state of nature’ an asymmetry in power exists between these groups and able-bodied human beings. . . . [These] problems are built into the theory’s foundations, and thus new theories are needed.”).

of who counts as a legal person under New York law.

IV. CONCLUSION

Amici respectfully request that the Court grant the Nonhuman Rights Project's Motion for Permission to Appeal in light of the significant public importance of the questions raised by this case and the need to develop a just jurisprudence of animal law.

Respectfully submitted,



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