APL 2021-00087
Bronx County Clerk's Index No. 260441/19
Appellate Division–First Department Case No. 2020-02581

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.

MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF

IRA T. KASDAN
(Pro Hac Vice admission pending)
BEZALEL STERN
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Tel.: (202) 342-8400
Fax: (202) 342-8451
bstern@kelleydrye.com
Attorneys for Amici Curiae

PLEASE TAKE NOTICE that, upon the annexed Affirmation of Bezalel A. Stern, and upon a copy of the proposed *amici curiae* brief attached as an exhibit thereto, the undersigned will move this Court on August 9, 2021, at 10:00 A.M., or as soon thereafter as counsel may be heard, at the Court of Appeals Hall, Albany, New York for an order pursuant to N.Y.C.R.R. § 500.23(a): (1) granting Protect the Harvest, the Alliance of Marine Mammal Parks and Aquariums, the Animal Agriculture Alliance, and the Feline Conservation Foundation leave to appear as *amici curiae* in the above-captioned action; (2) accepting the brief attached hereto as Exhibit A; and (3) granting such other and further relief as the Court may deem just and proper. Further, should this Court accept *Amici*'s proposed brief, *Amici* would further request opportunity for appearance at oral arguments before the Court should oral arguments be scheduled in due course.

Respectfully submitted,

Dated: July 26, 2021

IRA T. KASDAN*
BEZALEL A. STERN
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, DC 20007
Tel: (202) 342-8400
Fax: (202) 342-8451
ikasdan@kelleydrye.com
bstern@kelleydrye.com

Counsel for Amici Curiae
* (*Pro Hac Vice* admission pending)

COURT OF APPEALS STATE
OF NEW YORK

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause, THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY, *Petitioner-Appellant,* – 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.*	APL 2021-00087 Bronx County Clerk's Index No. 260441/19 Appellate Division–First Department Case No. 2020-02581 **AFFIRMATION OF BEZALEL A. STERN IN SUPPORT OF MOTION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF RESPONDENTS-RESPONDENTS**

Bezalel A. Stern, an attorney admitted to practice in the State of New York, hereby affirms under penalty of perjury:

1. I am a partner at the law firm of Kelley Drye & Warren LLP and counsel for *amici*. I am familiar with the legal issues involved in the above-captioned appeal. I submit this affirmation in support of the Motion of Protect the Harvest, Alliance of Marine Mammal Parks & Aquariums, Animal Agriculture Alliance, and the Feline Conservation Foundation to submit the attached Brief as

Amici Curiae in support of the Respondents-Appellees James J. Breheny and the Wildlife Conservation Society in the above-captioned proceedings.

2. The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums, and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, including both for-profit and nonprofit entities, advance the objectives of marine mammal conservation through public display, education, research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild. Two of AMMPA's members are located in the State of New York – Long Island Aquarium and Aquarium of Niagara.

3. Protect the Harvest is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

4. The Animal Agriculture Alliance (the "Alliance") is a 501(c)(3) industry-united nonprofit organization that connects food industry stakeholders; engages with food chain influencers; promotes consumer choice by helping people better understand modern animal agriculture; and protects the future of animal agriculture. Its members include farmers, ranchers, food companies, feed and animal

nutrition companies, veterinarians, animal scientists, agricultural associations and other allied stakeholders.

5. The Feline Conservation Foundation ("FCF") is a non-profit organization that was originally incorporated in the State of New York in 1956 as the Long Island Ocelot Club. It currently has 247 members (including 8 in the State of New York) located in 37 states and nine foreign countries, representing 91 organizations, including zoos, sanctuaries, wildlife parks, educators, hobbyists, veterinary colleges, universities, field researchers, and international conservation organizations. FCF's mission is to promote conservation of wild felines through educational opportunities, responsible ownership and advocacy.

6. Protect the Harvest, AMMPA, the Alliance, and FCF's proposed Brief addresses the issue of whether Happy, the Asian elephant at the center of this case, is a "person" entitled to *habeas corpus* relief.

7. Protect the Harvest, AMMPA, the Alliance, and FCF are familiar with the legal issues in the above-captioned case. Protect the Harvest and AMMPA have already filed an *amicus* brief before the trial and appellate courts. Further, Protect the Harvest, AMMPA, the Alliance, and FCF are all qualified and competent in the matters found in its Brief.

8. The issues before the Court are of great importance. Protect the Harvest, AMMPA, the Alliance, and FCF's proposed Brief contains arguments

relating to property law in the State of New York and to judicial takings that might otherwise escape this Court's consideration, and the proposed Brief will be of special assistance to this Court.

9. No party or its counsel contributed content to the accompanying brief or participated in the preparation of the brief in any other manner.

10. No person other than *Amici* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

11. Protect the Harvest, AMMPA, the Alliance, and FCF's proposed Brief is attached hereto as Exhibit A.

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

Respectfully submitted,

Dated: July 26, 2021

BEZALEL A. STERN
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, DC 20007
Tel: (202) 342-8400
Fax: (202) 342-8451
bstern@kelleydrye.com

Counsel for Amici Curiae

EXHIBIT A

APL 2021-00087
Bronx County Clerk's Index No. 260441/19
Appellate Division–First Department Case No. 2020-02581

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.

BRIEF OF PROTECT THE HARVEST, ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS, ANIMAL AGRICULTURE ALLIANCE, AND THE FELINE CONSERVATION FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENTS-RESPONDENTS

IRA T. KASDAN
(Pro Hac Vice admission pending)
BEZALEL STERN
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, DC 20007
Tel.: (202) 342-8400
Fax: (202) 342-8451
bstern@kelleydrye.com
Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

INTEREST OF *AMICI CURIAE*

Amici are national associations and organizations whose members and stakeholders work with and care for animals in their respective vocations, businesses, industries and fields.[1] As such, *amici* and their members and stakeholders have a keen interest in protecting and caring for the animals they own and love. This case is important to *amici* because the ramifications of a grant of *habeas corpus* in this case would be harmful to them, their members, and other similarly situated people and entities who own and care for animals.

The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums, and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine mammal conservation through public display, education, research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild. Two of AMMPA's members are located in the State of New York – Long Island Aquarium and Aquarium of Niagara.

---

[1] No party or its counsel contributed content to the accompanying brief or participated in the preparation of the brief in any other manner. Further, no person other than *Amici* or their counsel have made any monetary contributions to fund the preparation or submission of this brief.

Protect the Harvest ("PTH") is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

The Animal Agriculture Alliance (the "Alliance") is a 501(c)(3) industry-united nonprofit organization that connects food industry stakeholders; engages with food chain influencers; promotes consumer choice by helping people better understand modern animal agriculture; and protects the future of animal agriculture. Its members include farmers, ranchers, food companies, feed and animal nutrition companies, veterinarians, animal scientists, agricultural associations and other allied stakeholders.

The Feline Conservation Foundation ("FCF") is a non-profit organization that was originally incorporated in the State of New York in 1956 as the Long Island Ocelot Club. It currently has 247 members (including 8 in the State of New York) located in 37 states and nine foreign countries, representing 91 organizations, including zoos, sanctuaries, wildlife parks, educators, hobbyists, veterinary colleges, universities, field researchers, and international conservation organizations. FCF's mission is to promote conservation of wild felines through educational opportunities, responsible ownership and advocacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is the third *amici curiae* brief PTH and the AMMPA have submitted in this case. The previous two *amici* briefs, attached hereto as Exhibits B and C,[2] advanced three fundamental reasons why the Nonhuman Rights Project, Inc. ("NRP") should not prevail.

First, it is NRP's publicly-stated goal to confer personhood status not just on Happy the elephant, and not just on all elephants, but instead on a wide variety of animals. A victory for NRP here would open the floodgates to more cases like Happy's, thereby creating societal and economic upheaval, especially as it relates to New York State's agriculture industry. *See* Exhibit B at 3-10; Exhibit C at 6-10.

Second, the legislature, not the courts, is the appropriate venue to consider an unprecedented new public policy of animal personhood. The public policy of the State of New York, as demonstrated, *inter alia,* by recent grants from the State to exhibitors like the Aquarium of Niagara, a member of AMMPA, is that animals may continue to reside in zoos and aquaria, and are not in need of "liberation." *See* Exhibit B at 6-7; Exhibit C at 6-7; 12-14.

---

[2] Exhibit B is the *Amici Curiae* Brief filed by PTH, AMMPA and the Zoological Association of America in the New York Supreme Court. Exhibit C is the *Amici Curiae* Brief filed by PTH and AMMPA in the Appellate Division, First Department.

Third, *habeas corpus* relief for "person animals" would grant neither Happy, nor others like her, "autonomy." Animals cannot simply roam the streets; Happy would simply move from one living quarter to another, still restrained by enclosures denying her true "freedom." *See* Exhibit B at 8-9; Exhibit C at 11-12.

All these arguments, let alone common sense justice and what is "right," as PTH and AMMPA also argued, *see* Exhibit C at 2-3, remain sound bases to reject NRP's outlandish request of this Court. Nonetheless, in order to conserve judicial resources, this brief will not elaborate on them any further. The Court is urged to consider and take them into account by reviewing the prior *amici* briefs.

Instead, this brief – in which PTH and AMMPA are now joined by the Alliance and FCF – focuses on yet another compelling reason why a writ of *habeas corpus* may not be issued by this Court for Happy the elephant: To do so would amount to an impermissible, unconstitutional taking.

The reasoning is simple and is underpinned by three axiomatic legal principles. **One** – the writ of *habeas corpus* does not apply to property, only to a "person." **Two** – well-established, long-standing New York law provides that animals, like Happy, are property. Ergo, **three** – *habeas corpus* cannot be invoked here.

To circumvent this obvious problem, NRP proposes that the Court resort to alleged flexibility it possesses under common law to transform Happy's status

from a "thing" to a "person," and then order her transfer from the Bronx Zoo to a sanctuary. NRP's proposition must be rejected. An on-point United States Supreme Court (plurality) decision makes clear that the common law cannot be used to uproot the Bronx Zoo's established property rights in Happy. Stated otherwise, this Court cannot magically convert legally-defined property like Happy into non-property.

Even if the Court were to create a new category for animals like Happy, as some "hybrid" between personal property and personhood with limited "liberty" rights, a Court-ordered transfer of Happy from the Bronx Zoo to a sanctuary would amount to a physical taking. Any such judicial taking is unconstitutional and void *ab initio*. And, even if it could be said by this Court that Happy's taking is for some "public purpose" (which NRP has never articulated), Happy's physical taking would remain unconstitutional in the absence of an award of fair compensation to the Bronx Zoo – which the Court has no authority, let alone fiscal ability, to grant.

Happy must remain with her rightful owner, the Bronx Zoo. To hold otherwise will jeopardize the lawful property rights not only of *amici* here, but of all lovers of animals who possess animals. This Court must deny NRP relief.

ARGUMENT

A. Under Established New York Law, Happy Is The Private Property Of The Bronx Zoo; As Such, She Cannot Be Subject To *Habeas Corpus*

The "elephant in the room" in NRP's brief is its conscious omission of the fact that under well-established New York law, animals like Happy are personal property. *See, e.g.*, *Matter of Ruth H,* 159 A.D.3d 1487, 1490 (App. Div. 4th Dep't 2018) (citing *Mullaly v. People,* 86 N.Y. 365, 368 (1881)); *State of New York v. Trustees of Freeholders and Commonalty of the Town Of Southampton*, 472 N.Y.S.2d 394, 396 (App. Div. 2d Dep't 1984) (legally acquired wild animals are held in private ownership) (citing ECL 11-0105). NRP skirts this subject by clever linguistic phrasing. Thus, NRP asks the Court "to change Happy's status from a rightless *'thing'* to an individual with the common law right to bodily liberty protected by habeas corpus." Br. at 21 (emphasis added). But there is agreement that animals are more than mere "things." As Judge Fahey wrote (and as quoted by NRP), "[w]hile it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *Id.* (citation omitted).

The real issue then is not whether animals are "things," but whether animals are not "property" and thus not subject to *habeas corpus* relief. *See People ex rel. Tatra v. McNeill,* 244 N.Y.S.2d 463, 463 (App. Div. 2d Dep't 1963) ("habeas corpus proceeding . . . cannot seek a release of property. The sole purpose of a habeas corpus proceeding is to inquire into the cause of imprisonment or restraint

of the person").[3] Here, Happy is clearly personal property as defined by well-established New York law, and thus not subject to *habeas corpus*.

B. Happy's Status As Personal Property May Not Be Changed Based On Common Law

Given that animals are personal property, the appropriate question becomes whether this Court, using the guise of making "new" common law, may transform them (and Happy) into "persons" subject to *habeas corpus* just like people. This Court must respond in the negative, as any such action would violate the Fifth Amendment Takings Clause as applied to the States under the Fourteenth Amendment.[4]

The Takings Clause states: "nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5. It applies to personal property no differently than to real property. *See Horne v. Dep't of Agriculture,*

---

[3] *See also e.g., Dodson v. United States,* 2019 WL 1034215, *3 (E.D. Mich. 2019) ("a writ of habeas corpus does not apply to property"); *Ocean City Taxpayers for Social Justice v. Mayor and City Council of Ocean City*, 2015 WL 7567722, *5 (D. Md. 2015) ("While the doctrine of *habeas corpus* has been extended beyond its historical ties to individuals in immediate physical custody, *habeas corpus* certainly does not apply to property allegedly held in 'legal custody' by the City.").

[4] *See Seawall Assocs. v. City of N.Y.*, 74 N.Y.2d 92, 102 n.2 (1989) ("The Fifth Amendment 'Takings' Clause applies to the States through the Fourteenth Amendment.") (citing *Chicago, Burlington & Quincy R. R. Co. v. Chicago,* 166 U.S. 226 (1897)).

350 U.S. 350, 358 (2015). (Takings Clause protects "'private property' without any distinction between different types"). And, it applies to judicial acts no less than legislative ones. *Stop the Beach Nourishment, Inc. v. Fla. Dep't of Environmental Protection*, 560 U.S. 702, 713-14 ("The Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor.").

While courts may, at times, create fresh common law, they are prohibited from using their authority over common law as a basis to aid in the confiscation of private property where the property owner's rights are established. As the U.S. Supreme Court in *Stop the Beach* explained: "[I]t is not true that the 'common-law tradition . . . allows for incremental modifications to property law'. . .". 560 U.S. at 722. "[C]ourts [may] merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right." *Id.*, at 727. Rather, "[w]hat counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established. . . . The Takings Clause . . . protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Id.*, at 728, 732.

Applied here, the right of the Bronx Zoo in Happy as property is clearly "established." *See Matter of Ruth H, supra; Trustees of Freeholders, supra.*

Unquestionably, a judicial transformation of Happy from property to a person for transfer from the Zoo to a sanctuary, through the grant of *habeas corpus* relief, would be an unconstitutional taking unprotected by a change in the common law.[5] *See also People v. Hobson*, 39 N.Y.2d 479, 489 (1976) ("those who engage in transactions based on the prevailing law [must] be able to rely on its stability. This is especially true in cases involving property rights").

---

[5] Indeed, NRP's reliance on *Lemmon v. People*, 20 N.Y. 562 (1860) (Br. at 14) proves the point. The Court did use *habeas corpus* to free the slaves in that case, but only because under New York law the slaves *never* were considered "property" but always were "persons" once they escaped into the State. *Id.*, at 602 ("It is impossible not to perceive that the Convention assumed the general principle to be that the escape of a slave from a State in which he was lawfully held to service into one which had abolished slavery would *ipso facto* transform him into a free man."). As the attorney in the case had argued: "The appellant had no property in these persons. It ceased to be property when he brought them into the State of New York." *Id.*, at 590. There are no comparable laws transforming Happy into a legal person when the elephant entered the State. She was and has always remained property under established New York law.

Moreover and in any event, this Court should not rely on cases like *Lemmon*, that deal with human slaves, to find new "rights" for animals**,** like Happy. As PTH and AMMPA argued in their last *amici* brief, NRP's argument below (repeated here, Br. at 41-42) seeking to compare the need for equality between Happy, an elephant, and Blacks, Chinese, Native Americans and women, is "insidious." Exhibit C at 1.

C. Any Order Transferring Happy From The Bronx Zoo To A Sanctuary Would Be A Judicial Taking Prohibited By The United States Constitution

Even if this Court were to decide to grant animals (and Happy) limited personhood for purposes of autonomy or liberty, as NRP seeks, Happy still would remain the property of the Bronx Zoo, at least in part. Further, if this Court were to hold that it is merely "clarifying" property rights in that regard, and not "changing" established ones, any order to physically transfer an animal from one owner to another remains an unconstitutional taking.

By its plain language, any legal taking under the Fifth Amendment must be for a "public purpose" for which "just compensation" must be paid. Here, NRP has not argued that Happy's transfer to a sanctuary would be for a "public purpose." *See Missouri Pacific R. Co. v. Nebraska,* 164 U.S. 403 (1896) (invalidating a compensated taking of property for lack of a justifying public purpose). And even if compensation could be paid, an order sending Happy from the Bronx Zoo to a sanctuary would be void as nothing more than taking one person's property for the benefit of another private person. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241 (1984) ("To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of

another private person without a justifying public purpose, *even though compensation be paid*.'") (citations omitted) (emphasis added).[6]

Yet, even if it could be said that there is a "public purpose" involved here, there can be no "just compensation" awarded by this Court to the Bronx Zoo. Simply put, this Court itself neither has the money nor the authority to pay the Bronx Zoo. Only the legislature can authorize any such compensation; therefore any theoretical decision to "free" Happy from the Zoo by this Court without the ability to afford compensation would be void. *See Stop the Beach,* 560 U.S. at 723-24:

> [I]f we were to hold that the Florida Supreme Court had effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the Members' property. The power to effect a

---

[6] Interestingly enough, the original sanctuary – Performing Animal Welfare Society – that NRP named to house Happy in its petition to the N.Y. Supreme Court and which has never been changed, charges "donations" for the public to view and visit the elephants there. *See* *https://www.pawsweb.org/seeing_the_elephants.html*.

The latest sanctuary proposed by NRP – The Elephant Sanctuary in Tennessee – solicits "VIP's" to donate $10,000 over five years to "to receive an exclusive behind-the-scenes tour of The Sanctuary by making a commitment of support of $2,000 or more every year for five years." *See* https://shop.elephants.com/product/456D65F/vipprogram.php.

In essence, NRP is attempting to fund a sanctuary at the Bronx Zoo's expense of giving up its rights in Happy.

> compensated taking would then reside, where it has always resided, not in the Florida Supreme Court but in the Florida Legislature – which could either provide compensation or acquiesce in the invalidity of the offending features of the Act.

Finally, even if the Court were to decide that the Bronx Zoo retains some residual property right in Happy, an illegal taking nonetheless will have occurred. *See Horne*, 576 U.S. at 362-63:

> The second question presented asks "Whether the government may avoid the categorical duty to pay just compensation for a physical taking of property by reserving to the property owner a contingent interest in a portion of the value of the property, set at the government's discretion."

The answer is no. [Emphasis added.][7]

---

[7] Some courts read *Missouri Pacific R. Co. v. Nebraska, supra,* as having found a violation of due process, not a Takings Clause violation. *See, e.g., Kahlily v. Francis*, 2008 WL 5244596, *2 (N.D. Ill. 2008). *See also* Justice Kennedy's concurrence in *Stop the Beach*: "The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause." 560 U.S. at 736 (citations omitted); *Surfrider Foundation v. Martins Beach 1, LLC,* 14 Cal.App.5th 238, 258 (2017) ("What is clear, however, is that judicial action that would be a taking if it were a legislative or executive act is unconstitutional, under either the takings clause or the due process clause.").

Either theory, however, results in the same remedy, *i.e.,* invalidation of the judicial decision: "The Supreme Court has not made clear which constitutional provision governs private-purpose takings, likely because the remedy – invalidation – is the same." Josh Patashnik, *Bringing A Judicial Takings Claim*, 64 Stan. L. Rev. 255, 266 n.63.

CONCLUSION

As the Supreme Court has made clear, an illegal taking, even by courts, is prohibited by the United States Constitution. For that reason, in addition to the others previously advanced in the *amici* briefs below, this Court must deny NRP's request that Happy be transferred from the Bronx Zoo to a sanctuary. Nothing less will assure all people who possess animals that their property rights will not be impaired by the likes of NRP.

Dated: July 26, 2021

Respectfully submitted,

IRA T. KASDAN*
BEZALEL A. STERN
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, DC 20007
Tel: (202) 342-8400
Fax: (202) 342-8451
ikasdan@kelleydrye.com
bstern@kelleydrye.com

Counsel for Amici Curiae
* (*Pro Hac Vice* admission pending)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals in the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief, exclusive of the material omitted under Rule 500.13(c)(3), is 3092 words.

The brief was prepared with Microsoft Word 2016 using Times New Roman proportionally spaced typeface in 14-point font.

Dated: July 26, 2021

BEZALEL A. STERN
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, DC 20007
Tel: (202) 342-8400
Fax: (202) 342-8451
bstern@kelleydrye.com

Counsel for Amici Curiae

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

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,

-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.

Index No. 45164/2018

***AMICUS CURIAE* BRIEF OF PROTECT THE HARVEST, ALLIANCE OF MARINE MAMMAL PARKS AND AQUARIUMS, AND THE ZOOLOGICAL ASSOCIATION OF AMERICA**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTEREST OF AMICUS CURIAE

Amici are national associations and organizations whose members and stakeholders work with and care for animals in their respective vocations, businesses, industries and fields. As such, *amici* and their members and stakeholders have a keen interest in protecting and caring for the animals they own and love. This case is important to *amici* because the ramifications of a grant of habeas corpus in this case would be harmful to *amici*, their members, and other similarly situated people and entities who own and care for animals.

The Alliance of Marine Mammal Parks & Aquariums ("AMMPA") is a 501(c)(4) nonprofit international association and accrediting body for marine parks, aquariums, and zoos dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine mammal conservation through public display, education, research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild.

Protect the Harvest is a nonprofit organization that works with stakeholders to educate the general public about agriculture and promote favorable food security policies.

The Zoological Association of America ("ZAA"), the second largest zoological trade association in the United States, has more than 60 accredited members, with accreditation predicated on the promotion of the highest standards of animal welfare as well as public and staff safety. ZAA's work includes animal ambassador programs, classroom education and, with wildlife management professionals around the globe, the conduct and support of research in behavioral sciences and genetics and the exchange of information and training on husbandry, nutrition, best management practices and veterinary care.

ARGUMENT

"[H]abeas relief has never been found applicable to any animal." *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 54 N.Y.S.3d 392, 396 (1st Dep't 2017), *leave to appeal denied sub nom. Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018). There is a reason this is so. Animals, like Happy the elephant, are not people. This Court, therefore, is bound by *Lavery* and simply cannot grant habeas relief.[1]

But even assuming *arguendo* that the law to date is not totally dispositive (which in reality it is), the Court should still deny the habeas corpus petition of The Nonhuman Rights Project, Inc. ("NRP"). NRP states that the Court must do the "right thing." Memorandum of Law in Support of Petition for Habeas Corpus ("NRP Memo"), 11. But it is only "right" and for the public good that this Court continue to deny Happy "personhood" under long-standing common law which treats animals as property. In these regards, *amici* are compelled to inform the Court of the far-

---

[1] Although *Lavery* was decided by the First Department, this Court is still bound by its precedent to deny habeas corpus to animals such as Happy, where there is no opinion in the Fourth Department to the contrary. *See In The Matter Of A Proceeding Under Article 70 Of The Cplr For A Writ Of Habeas Corpus, The Nonhuman Rights Project, Inc., On Behalf Of Hercules And Leo,* 16 N.Y.S.3d 898, 916 (Sup. Ct. 2015) ("lower court is bound by an apposite decision of an Appellate Division not within its judicial department when there is no decision on point from the Court of Appeals or the Appellate Division within its judicial department, but not where apposite decisions of other Appellate Divisions conflict"). Contrary to The Nonhuman Rights Project, Inc. ("NRP"), Memorandum of Law in Support of Petition for Habeas Corpus ("NRP Memo"), 16, *Matter of Nonhuman Rights Project, Inc. v Presti,* 124 A.D.3d 1334 (4th Dep't 2015) is not apposite. Neither is *People v. Graves*, 78 N.Y.S.3d 613 (4th Dep't 2018), upon which they also rely. NRP Memo, 1.

Presti nowhere states that animals are persons. Instead, *Presti* denied NRP's appeal, and debunks NRP's position even assuming "*arguendo*" that animals would be persons for purposes of habeas relief. *Id.* at 1334 ("even assuming, arguendo, that we agreed with petitioner that Kiko [the chimpanzee] should be deemed a person for the purpose of [a writ of habeas corpus] . . . ."). Indeed, only earlier this year the Fourth Department made it clear that the centuries-old law in New York remains that "*animals are property.*" *Matter of Ruth H.*, 159 A.D.3d 1487, 1490 (4th Dep't 2018) (emphasis added) (citing *Mullaly v People*, 86 NY 365, 368 (1881)). And *Graves*, which deals with a criminal proceeding for vandalism at a car dealership, has nothing at all to do with habeas corpus.

reaching effects the grant of a habeas corpus petition to Happy the elephant would bring to *amici*, their industries, and, in particular, New York State and its people.

I. THE GRANT OF HABEAS CORPUS TO ANIMALS WOULD DISRUPT THE LEGAL, SOCIAL AND ECONOMIC ORDER

NRP blatantly touts that it is using Happy in its drive to provide habeas corpus rights to *virtually all* nonhuman animals.

In its press release hyping the petition it brought – purportedly on Happy the elephant's behalf – in this Court, NRP was clear that this is only one of a line of cases NRP has brought and will continue to bring in its ongoing attempts to provide human rights to a wide swath of animals. *See* Lauren Choplin, *New Elephant Rights Lawsuit Demands Liberty, Sanctuary for Elephant Confined Alone at the Bronx Zoo*, https://www.nonhumanrights.org/blog/lawsuit-happy-bronx-zoo/ (NRP seeks "recognition of the personhood and rights of self-aware, autonomous nonhuman animals.") (Last accessed November 30, 2018). For example, NRP and its founder are on record that they seek human rights for, among other animals, "gorillas, orangutans, bonobos, Atlantic bottlenose dolphins, African gray parrots, African elephants, dogs and honeybees." *Id.* Indeed, the Founder and President of NRP equates humans and animals, having stated: "I don't see a difference between a chimpanzee and my 4 1/2- year-old son." *Beastly Behavior?*, The Washington Post, June 5, 2002, https://www.washingtonpost.com/archive/lifestyle/2002/06/05/beastly-behavior/63991f5b-2603-4c11-a024-9759a5f2680f/?utm_term=.70abd46b070c (last accessed November 30, 2018).[2]

---

[2] This radical philosophy is on par with that of the founder of People for the Ethical Treatment of Animals – PETA – who unabashedly proclaims: "A rat is a pig is a dog is a boy. They're all animals." *See* https://en.wikiquote.org/wiki/Ingrid_Newkirk (citing *Washingtonian* magazine, 1986 August 1) (last accessed December 1, 2018).

Transposing a *question* posed by Judge Fahey in his concurrence in the Court of Appeals' denial of leave to appeal in *Lavery – see* 31 N.Y.3d 1054 (2018)[3] – to its *own affirmative position*, NRP posits that "[a]n 'intelligent nonhuman animal who thinks and plans and appreciates life as human beings do' should have at least the same basic 'right to the protection of the law against arbitrary cruelties and enforced detentions.'" *See* NRP Memo at 16.[4] This position is disarming. It may lead one to believe that only animal "clients" of NRP who possess human-like intelligence should be entitled to the right of habeas corpus.[5] In theory, this may sound like a modest proposal; in practice, it would lead to devastating results.

Many animals have been deemed "intelligent."[6] If an "intelligent" elephant like Happy were to obtain habeas corpus rights, to whom else would those rights extend? What intelligence

---

[3] Judge Fahey posed the *question*: "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?" 31 N.Y.3d at 1059.

[4] The fact remains that Judge Fahey joined a unanimous Court of Appeals in denying NRP's motion for leave to appeal. 31 N.Y.3d at 1059. The remainder of the Court of Appeals summarily denied the appeal. That summary denial – and not Judge Fahey's lone concurrence – is what matters in the end.

[5] *Amici*, who take care of animals for a living, of course agree that all animals should not be subjected to "cruelty" as regulated by the law.

[6] For example, the following animals have been described as "smart" or "intelligent":

Cows: *See* Newsweek, *Cow Science: Cattle Are Intelligent, Emotional And They Have Eureka Moments—So Should We Be Killing Them?*, https://www.newsweek.com/cow-cattle-animal-intelligence-science-personalities-emotion-697979, November 1, 2017 (last accessed December 2, 2018).

Pigs: *See* Raise Vegan, *Heroic Pig Risks Life To Save Friend From Slaughter*, https://raisevegan.com/heroic-pig-risks-life-to-save-friend-from-slaughter-video/, December 1, 2018 (". . . pigs are more intelligent that dogs, an animal we keep as a companion . . . .) (last accessed December 2, 2018).

Sharks: *See* Smithsonian Magazine, *Forget Jaws, Now it's . . . Brains!*, June 2008 https://www.smithsonianmag.com/science-nature/forget-jaws-now-its-brains-48249580/ ("Great white sharks are typecast, say experts. The creatures are socially sophisticated and, yes, smart") (last accessed December 2, 2018).

"counts" as enough intelligence to provide habeas corpus rights to any particular animal? A cow's? A pig's? A shark's? A rat's? A bee's?

These are questions the law is unequipped to decide. Indeed, Judge Fahey himself acknowledges "[t]he inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter." *Lavery*, 31 N.Y.3d at 1055 (Fahey, concurring). In making such decisions, courts would be forced to engage in impracticable, if not impossible, moral judgments as to how cognitive capabilities relate to any particular animal's "personhood." To determine which animals are deserving of habeas corpus protection would be an entirely subjective exercise resulting in widely disparate case law.

Amici AMMPA and ZAA jointly represent over 100 zoos, aquaria and animal parks around the country. Should Happy be provided with habeas corpus rights, those institutions would be at risk to a plethora of similar lawsuits purportedly made on behalf of the animals residing in their facilities. And the risk would not be limited to institutions that keep and own animals. Pet owners would no longer be able to be certain that they will be able to keep caring for the dogs, cats or fish that they own. In providing animals with habeas corpus rights, NRP seeks nothing less than to uproot and overturn the social order with regard to property rights.

NRP contends that animals such as Happy are entitled to "liberty" and "equality." NRP Memo, 13. At bottom, this means that there is no distinction between animals and people for purposes of habeas corpus. They all should be equal under the law.

Rats: *See* Harvard Business Review, *Rats Can Be Smarter Than People*, January-February 2015, https://hbr.org/2015/01/rats-can-be-smarter-than-people (last accessed December 2, 2018).

Bees: *See* Ars Technica, *Bees are Even Smarter Than We Realized*, February 24, 2017, https://arstechnica.com/science/2017/02/bees-can-train-each-other-to-use-tools/ (last accessed December 2, 2018).

Nevertheless, New York law *allows* animals to be bought and sold, and clearly treats animals as property. *See, e.g.,* N.Y. Gen. Bus. Law §§ 751, *et seq.* ("Sale of Dogs and Cats"); *Matter of Ruth H.,* 159 A.D.3d at 1490 ("animals are property"). Humans are protected from being bought and sold as slaves under the Thirteenth Amendment to the United States Constitution. Animals are not. *See, e.g., Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

As "proof" of New York's public policy that animals are considered "persons" for purposes of habeas corpus, NRP points to the State's law allowing trusts to be set up for animals. *See* NRP Memo, 2 citing Section 7-8.1 of the Estates, Powers & Trusts law of New York. Yet, nowhere in the statute does it state that the animal beneficiary is a "person" – let alone for purposes of the writ of habeas corpus. To the contrary, Section 7-8.1 repeatedly uses the term "animal" in reference to the beneficiary, not "person."

A clearer "public policy" regarding the status of animals is found in New York State's funding, to the tune of over $1 million, of a new state of the art penguin habitat this year. *See Governor Cuomo Announces Grand Opening of Humboldt Penguin Exhibit at Aquarium of Niagara*, March 14, 2018 ("Governor Andrew M. Cuomo today announced the grand opening of the $3.5 million Penguin Coast exhibit at the Aquarium of Niagara in Western New York") https://www.governor.ny.gov/news/governor-cuomo-announces-grand-opening-humboldt-penguin-exhibit-aquarium-niagara (last accessed December 2, 2018). Penguins also have been called "intelligent." *See, e.g.*, Aquaviews, Online Scuba Magazine, (listing penguins as one of the five "Most Intelligent Marine Animals), https://www.leisurepro.com/blog/editors-picks/5-intelligent-marine-animals/ (last accessed December 2, 2018). If the public policy of the State of New York was to consider "intelligent" animals like penguins (and elephants) "persons" in need

of "liberty" and "equality" as NRP asserts, would it have financially supported the Aquarium of Niagara in "enslaving" its penguins?

Not only would the social consequences of providing animals with "freedom" via habeas corpus legal rights be vast, the economic consequences also would be far-reaching. Take, for example, the agricultural interests represented by *amicus* Protect the Harvest. "Freeing" animals from their human ownership would decimate the agricultural economy of jurisdictions in which habeas corpus would be found to apply to animals. Northwest New York would be especially hit hard.

In New York,

> [m]ilk is by far the state's largest agricultural commodity, with $2.7 billion in sales in 2017, more than half of the total for all agricultural products. The state's production of milk and other dairy products relied on approximately 620,000 milk cows in 2017. Five counties were home to nearly 30 percent of the state's milk cows, with Wyoming County leading the way, followed by Cayuga, St. Lawrence, Genesee and Jefferson counties.

DiNapoli: Farms Generate $4.8 Billion for New York's Economy, September 20, 2018, https://www.osc.state.ny.us/press/releases/sept18/092018.htm (last accessed November 30, 2018). Indeed, as of 2017, New Yorkers operating in the agricultural industry owned and made use of 1,480,000 cows and calves, 85,000 sheep and lambs, and 48,000 hogs. *See* 2017 State Agricultural Review, https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=NEW%20YORK (last accessed November 30, 2018).

Should the Pandora's Box of habeas corpus be opened on behalf of animals, New York's multibillion dollar agricultural industry would be at risk. Even the prospect of success of a habeas corpus petition being brought by NRP or a similar group on behalf of an "intelligent" cow, sheep, or hog, would cause untoward economic consequences to the State of New York, and could lead

farmers and businesses to flee the State for more friendly confines and jurisdictions. This certainly is not the "right" result.

On this point, the non-U.S. "precedents" cited by NRP are particularly of note. NRP makes much of the fact that a single jurisdiction outside of the United States has found that a chimpanzee has human-like rights, NRP Memo, 2, and that some non-American jurisdictions have provided nonhuman entities with personhood. *Id.*, 4-7 (citing foreign jurisdictions such as Argentina and India which have (in NRP's telling) provided "personhood" to such "entities" as rivers and idols). But this position ignores the fact that **no** jurisdiction within the United States – and certainly no court in New York – has ever provided nonhuman animals with habeas corpus rights.

Public policy reasons alone (much less the upending of precedent) support this reality. Giving animals habeas corpus rights – and allowing third-party entities that have no relationship to those animals or who manufacture ones by creating "trusts" to petition for habeas corpus "on their behalf" – would subvert property ownership law and the economics of New York State, or of any jurisdiction in which such habeas "rights" were provided. Undoubtedly, these are reasons why no court in this country has ever considered an animal to be a "person" for purposes of habeas corpus relief. It is certainly why no court should do so.

II. IF HABEAS CORPUS WERE GRANTED TO ANIMALS, WHERE WOULD THE FREED ANIMALS GO?

While NRP purports to speak for the animals who have no human "voice," it is important to recognize that NRP is not advocating the *actual* freedom of Happy the elephant or of any other animal. Indeed, NRP has resolved, purportedly on Happy's behalf, that "Happy should not be released to the wild or onto the streets of New York . . . ." NRP Memo, 25-26.

But why not? NRP's voluminous briefing evades the question *why* Happy the elephant should not be freed to roam the streets of Manhattan, the Bronx, Rochester or Buffalo. If, as NRP

vociferously claims, Happy the elephant has habeas corpus rights, and if animals such as Happy are everywhere (figuratively) in chains, why does NRP not admit that animals such as Happy be allowed to roam freely?

The answer is obvious. Animals, unlike people, cannot and should not be left unattended. Unlike children, animals do not grow up and learn to take care of themselves. One can imagine the absurd – indeed, the disastrous – consequences of "freeing" every captive animal, including each dog, horse, cow, cat, chicken, sheep, elephant, monkey, lion and tiger in the world to live in a manner of their choosing.

Animals need attention, care and maintenance. Unless their owners are breaking the law – which certainly is not the case with respect to WCS and Happy – they are best left under the supervision of those who have provided for their welfare all along. If zoos and aquaria who lovingly and legally maintained their animals have to worry that they could be dragged into court at any given moment by the likes of NRP, they will be disincentivized from acquiring and maintaining them from the start. The same can be said of farmers and their animals and pet owners and their companion pets. Animals will live on, no doubt, but their own welfare and conservation will suffer, and their multi-faceted contributions to an orderly society will be greatly diminished. That is not a result that any court should allow by opening the gates to human rights such as habeas corpus to animals.

CONCLUSION

Animals do not have habeas corpus rights. That is settled law. It is also good public policy. NRP's petition should be denied.

DATED: December 3, 2018

Respectfully submitted,

Bezalel A. Stern
Ira T. Kasdan (of counsel, not admitted in New York)
Kelley Drye & Warren, LLP
3050 K Street N.W., Suite 400
Washington, D.C. 20007
bstern@kelleydrye.com
ikasdan@kelleydrye.com
Tel.: (202) 342-8400
Fax: (202) 342-8451
Counsel for Amici Protect the Harvest, Alliance of Marine Mammal Parks and Aquariums and Zoological Association of America

EXHIBIT C

New York Supreme Court

Appellate Division—First Department

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.

Appellate Case No.: 2020-02581

BRIEF FOR *AMICI CURIAE* PROJECT THE HARVEST AND ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS IN SUPPORT OF RESPONDENTS-RESPONDENTS

BEZALEL A. STERN
IRA T. KASDAN *(Not Admitted in New York)*
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8400
Bstern@kelleydrye.com
Ikasdan@kelleydrye.com

Attorneys for Amici Curiae

Bronx County Clerk's Index No. 260441/19

TABLE OF CONTENTS

Page

TABLE OF CASES

Page(s)

Cases

Introduction

Three short years ago, this Court declined to issue a writ of habeas corpus to a chimpanzee. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 54 N.Y.S.3d 392 (1st Dep't 2017), *leave to appeal denied sub nom. Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018). In doing so, the Court acknowledged and affirmed that "habeas relief has never been found applicable to any animal." 54 N.Y.S.3d at 396 (1st Dep't 2017). There is a reason for this. Animals like Tommy the chimpanzee and Happy the elephant are not people. This Court should adhere to its own recent precedent, declining to grant habeas relief to a non-human.

It is undeniable that there are inherent differences between humans and non-humans. The Nonhuman Rights Project, Inc. ("NhRP") itself acknowledges that animals and people are inherently different. The name of the organization itself—the ***Nonhuman*** Rights Project—emphasizes that its concern is not with all creatures, but only with those who are not human. Nonetheless, NhRP equates the treatment of Happy, an elephant, with the treatment of Blacks, Chinese, Native Americans and women. *See* Brief For Petitioner-Appellant ("NhRP Brief"), 24-25. NhRP asks this Court to find that elephants are "equal" to these human beings. *See id*. at 25 (Happy is "equally entitled to this right and it is irrational and arbitrary to deprive her of it."). That is insidious.

NhRP effectively accuses those who do not believe animals are equal to humans of speciesism.[1] But there *are* obvious distinctions between animals and humans and they should be treated differently. The rectifications of historical discrimination and wrongs against Blacks, Chinese, Native Americans and women does not speak at all to providing habeas corpus to elephants.

Even assuming *arguendo* that this Court's recent precedent is not totally dispositive (as it is and should be), the Court should still affirm the Supreme Court's denial of the NhRP's habeas corpus petition.

NhRP argues that this Court should reverse its recent precedent, and the precedent of its sister Departments, because an elephant's "entitlement to habeas corpus is a constituent part of the process of 'mak[ing] the law conform to right.'" NhRP Brief, 13 (quoting *Woods v. Lancet*, 303 N.Y. 349, 351 (1951)). Similarly, Amicus Professor Laurence Tribe supposes that liberating Happy from her home would "produce common-sense justice." Amicus Brief of Professor Laurence Tribe ("Tribe Brief"), 23 (also quoting *Woods*, 303 N.Y. at 355).

[1] Speciesism is 1 : prejudice or discrimination based on species especially : discrimination against animals; 2 : the assumption of human superiority on which speciesism is based. *See* https://www.merriam-webster.com/dictionary/speciesism.

In evaluating NhRP's arguments, this Court should question and probe these premises. Would allowing elephants—and by extension, all other animals—to go free, "make the law conform to right"? Would it produce "common sense justice?" *Woods*, relied on by both NhRP and Professor Tribe, was a case about the rights of a human infant. Amici herein believe that common sense and practicality maintain that there is an innate difference between humans and elephants, and bestowing human rights on an elephant such as Happy would lead to societal upheaval.

The trial court in this case, while affirming the settled law that animals do not have legal "personhood" when it comes to habeas corpus rights, noted that Happy "should be treated with respect and dignity." *The NonHuman Rights Project v. Breheny*, No. 260441/19, 2020 WL 1670735, at *10 (N.Y. Sup. Ct. Feb. 18, 2020). Amici do not disagree with that conclusion. All creatures should be treated with respect and dignity. That does not, however, mean that all creatures should be provided the privilege and burden of human rights, including the privilege to habeas corpus protection. Elephants should not be given this right.

I. Granting Habeas Corpus to Animals Would Lead to Massive Societal and Economic Disruption

While this habeas petition is facially limited to one elephant, Happy, the ramifications are far greater. In fact, on its website discussing this appeal, NhRP blatantly touts that it is using Happy as a blunt tool in its drive to provide habeas corpus rights to all "autonomous nonhuman animals." *See*

https://www.nonhumanrights.org/blog/tuitt-decision-in-happys-elephant-rights-case-faq/ ("Justice Tuitt's decision is a sign of tremendous progress in the fight for fundamental rights for Happy and other autonomous nonhuman animals, and this fight doesn't end here—far from it.").

If this Court were to rule that Happy, an elephant, should be provided the right to habeas corpus, the NhRP (and those others even more radical) would immediately set out to apply that wrongheaded precedent in an attempt to "free" not only all other elephants, but all other animals from their confines in zoos, farms, and homes throughout New York, and, indeed, across America.

This is not a pipe dream. NhRP and its founder Steven Wise are "on the record" stating their goal to seek human rights for, among other animals, "gorillas, orangutans, bonobos, Atlantic bottlenose dolphins, African gray parrots, African elephants, dogs and honeybees." "Beastly Behavior?," *The Washington Post* (June 5, 2002, https://www.washingtonpost.com/archive/lifestyle/2002/06/05/beastly-behavior/63991f5b-2603-4c11-a024-9759a5f2680f/.

In a 2015 interview, Mr. Wise and Natalie Prosin who at that time was NhRP's Executive Director, made clear to their interviewer who recorded that "NhRP is trying to change the legal paradigm . . . ***They do intend to extend their argument to as many nonhuman species as they can*** and understand this is a long-term struggle." *Animal Charity Evaluators*, (Aug. 12, 2015)

https://animalcharityevaluators.org/charity-reviews/charity-conversations/steven-wise-and-natalie-prosin/ ("Conversation with Steven Wise and Natalie Prosin") (emphasis added). In a 2012 interview, Mr. Wise further elaborated on his and NhRP's strategy: "When you litigate in a novel area, you want to begin with your strongest suits in the most favorable jurisdictions. The rule for the Nonhuman Rights Project is: Win big and, if we must lose, lose small." "Peta v. SeaWorld – The Aftermath," *Earth in Transition*, (Feb. 9, 2012) https://www.earthintransition.org/2012/02/peta-v-seaworld-the-aftermath/. Mr. Wise explained that: *"*The Nonhuman Rights Project will have to establish in a state court, not a federal court, that any animals on whose behalf we file suit are common law persons with the capacity to possess legal rights. *Then we will have to fight for each right*. Until that time comes, every nonhuman will continue to be regarded as a legal 'thing' that we can buy, sell, eat, hunt, ride, trap, vivisect, and kill almost at whim." *Id.* (emphasis added).

Already NhRP has brought and continues to bring parallel cases in courts throughout New York and in other parts of the country NhRP views as potentially friendly to its paradigm-changing arguments. *See*, *e.g.*, *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334, N.Y.S.2d 652 (2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 998 N.Y.S.2d 248

(2014); *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36, 48, 216 A.3d 839, 846, *cert. denied*, 333 Conn. 920, 217 A.3d 635 (2019). To date, NhRP has lost every single case it has purportedly brought on behalf of the elephants and chimpanzees it claims to speak for.

NhRP is undeterred. It knows it needs but one win for the floodgates to open. If this Court or *any* court finds that Happy or any other non-human animal is entitled to habeas corpus rights, the NhRP will redouble its efforts to create a new common law, one that would allow virtually *all* animals to be freed, thereby irrevocably upsetting the social balance.

While NhRP attempts to focus the Court's attention solely on Happy, the Court should not be fooled. If this Court opens the door to habeas corpus for one elephant, it will not easily be closed.

A. Providing Animals Habeas Corpus Rights Would Weaken the Social Construct and Be Economically Destructive

Should Happy be provided with habeas corpus rights, farms, zoos, and aquaria would be at risk to a plethora of similar lawsuits purportedly made on behalf of the animals residing in their facilities under their care. And the risk would not be limited to institutions that maintain and own animals. Pet owners would no longer be able to be certain that they will be able to keep caring for the dogs, cats or fish that they possess. In providing animals with habeas corpus rights, NhRP seeks nothing less than to uproot and overturn the social order.

NhRP alleges that "public policy" favors its position. *See* NhRP Brief, 26 ("In considering Happy's personhood, this Court should look to [] public policy . . . ."). Yet, much clearer "public policy" regarding the status of animals and allowing them to remain in is zoos and aquariums is found in New York State's recently increased funding by $1 million to New York's Zoos, Botanical Gardens, and Aquariums (ZBGA) Program. *See* "WCS Commends New York State Leaders for Historic Funding for Zoos, Botanical Gardens, Aquariums and Parks in New Budget," located at https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/12144/WCS-Commends-New-York-State-Leaders-for-Historic-Funding-for-Zoos-Botanical-Gardens-Aquariums-and-Parks-in-New-Budget.aspx ("New York's zoos, botanical gardens, aquariums and parks are a gateway for untold millions of New Yorkers to become stewards of wildlife and wild places. Having these important facilities properly funded enriches us all.").

New York State also recently helped support, to the tune of over $2 million, a new state of the art penguin habitat at the Aquarium of Niagara. *See* https://www.governor.ny.gov/news/governor-cuomo-announces-grand-opening-humboldt-penguin-exhibit-aquarium-niagara ("Governor Andrew M. Cuomo today announced the grand opening of the $3.5 million Penguin Coast exhibit at the Aquarium of Niagara in Western New York"). If the public policy of the State of

New York was to consider animals like elephants persons, as NhRP asserts, New York would not continue to provide financial support to the zoos and aquariums in the State.

Moreover, were NhRP to succeed here in opening the gates to the release of Happy and ultimately other animals, the very existence of zoos and aquaria – including members of Amicus Alliance of Marine Mammal Parks & Aquariums ("AMMPA") – would be threatened. That, in turn, would endanger the vital educational, scientific research and conservation work of these institutions that only *furthers public policy for the public good*. *See, e.g.,* https://www.ammpa.org/about/who-we-are ("[AMPPA]-accredited facilities dedicate their lives to the well-being of the animals in their care and to the rescue and rehabilitation of marine animals such as sea lions, dolphins, manatees, and sea turtles in need of help, [and] reach millions of guests each year . . . that inspire people to take action for marine mammals and our oceans.").

The economic consequences of providing animals with "freedom" via habeas corpus also would be far-reaching. Take, for example, the agricultural interests represented by Amicus Protect the Harvest. "Emancipating" animals from their human ownership would decimate the agricultural economy of jurisdictions in which habeas corpus would be found to apply to animals.

According to the USDA, as of 2019, New Yorkers operating in the agricultural industry owned and made use of over 2,000,000 cows and calves, 87,000 sheep, and 53,000 hogs. https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=NEW%20YORK. Indeed, farms using animals—especially dairy farms—are some of the primary economic engines covering much of the State. According to a 2019 report released by State Comptroller Thomas P. DiNapoli, "New York State farms generated $5.7 billion in revenue in 2017." "DiNapoli: Farms Generate $5.7 Billion for New York's Economy," (Aug. 22, 2019) https://www.osc.state.ny.us/press/releases/2019/08/dinapoli-farms-generated-57-billion-new-york-economy. Dinapoli emphasized that "[a]griculture is an essential part of New York's economy . . . employing more than 55,000 workers in 2017." *Id.* (quotation omitted). The vast majority of these workers work in New York's milk industry: "Milk is the state's largest commodity, ranking third for sales nationwide in 2017, with sales of over $2.5 billion. The state leads the nation in the production of yogurt, cottage cheese and sour cream." *Id*.

Should the Pandora's Box of habeas corpus be opened on behalf of animals, New York's multibillion dollar agricultural industry would be at risk. Even the prospect of success of a habeas corpus petition being brought by NhRP or a similar group on behalf of a cow, sheep, or hog, would cause untoward economic

consequences to the State of New York, and could lead farmers and businesses to flee the State for more friendly confines and jurisdictions. This certainly is neither a "right" or "commonsensical" result.

On this point, the non-U.S. "precedents" cited by NhRP are particularly of note. NhRP makes much of the few far-flung jurisdictions outside of the United States providing "rights" to animals and, in one case, to a river. NhRP Brief, 35-37. NhRP's position is notable for what it does *not* say. NhRP's emphasis on foreign decisions providing rights to animals—a number of which were overturned on appeal, as Professor Tribe's Amicus Brief honestly points out, Tribe Brief, 5-6—confirms the fact that no court in New York or in the greater United States has *ever* provided such rights to a non-human animal.

Giving animals habeas corpus rights, and allowing third-party entities that have no relationship to those animals or who manufacture ones by creating "trusts" to petition for habeas corpus "on their behalf," would subvert property ownership law and the economics of New York State, or of any jurisdiction in which such habeas "rights" are provided. Undoubtedly, these are reasons why no court in *this* country has ever considered an animal to be a "person" for purposes of habeas corpus relief. This Court should not do so now.

B. If NhRP Were Successful, Where Would the Freed Animals Go?

While NhRP purports to speak for the animals who have no human "voice," it is important to recognize that the group is not advocating the *actual* freedom of Happy the elephant or of any other particular animal. In fact, NhRP's proposed remedy is the simple transfer of Happy from one confined location to another, albeit larger, confined location. NhRP brief, 3; 52-53.

Thus, NhRP contends that it does not want the Court to grant Happy the same rights that humans have, *e.g.*, to roam about freely. NhRP asserts "[t]hat Happy cannot be released into the wild or onto the streets of New York." NhRP Brief, 50. *See also id.* at 3 (requesting the Court "order [Happy's] immediate release to an appropriate elephant sanctuary[.]"). But, conceptually, why not? Depriving Happy of that "right" is discriminatory and contra to NhRP's own arguments regarding equal protection under the law. *Id.* at 18-25.

Moreover, certain animals outside the United States have the right to roam free and unencumbered. *See*, *e.g.*, Annie Gowen, "Why India has 5 million stray cows roaming the country," *Washington Post* (July 16, 2018), https://www.washingtonpost.com/world/2018/07/16/amp-stories/why-india-has-million-stray-cows-roaming-country/. If, as NhRP vociferously claims, Happy the elephant has habeas corpus rights, and if animals such as Happy are everywhere

(figuratively) in chains, why does NhRP not admit that animals such as Happy be allowed to roam freely?

The answer is obvious and undermines NhRP's entire stance: Animals simply cannot be equated to people or treated the same under the law.

Animals need attention, care and maintenance. Unless their owners are breaking the law—which certainly is not the case with respect to WCS and Happy—they are best left under the supervision of those who have provided for their welfare all along. If zoos and aquaria who lovingly and legally maintain their animals have to worry that they could be dragged into court at any given moment by the likes of NhRP, they will be disincentivized from acquiring and maintaining them from the start. The same can be said of farmers and their animals and pet owners and their companion pets. Animals will live on, no doubt, but their own welfare and conservation will suffer, and their multi-faceted contributions to an orderly society will be greatly diminished. That is not a result that any court should allow by opening the gates to human rights such as habeas corpus to animals.

II. The Legislative Process is the Appropriate Avenue to Advocate for Animal Rights

Throughout its brief, NhRP makes much of Judge Fahey's concurrence in the Court of Appeals' denial of leave to appeal in *Lavery*. 31 N.Y.3d 1054 (2018). Nevertheless, the fact remains that Judge Fahey joined a unanimous Court of Appeals in denying NhRP's motion for leave to appeal. 31 N.Y.3d at 1059. Judge

Fahey could have dissented. He chose not to. The full Court found that Tommy the chimpanzee did not have habeas corpus rights. And a precedential majority of the Court denied NhRP's leave to appeal without comment.

Judge Fahey hinted at a potential reason for his affirmance when he wrote that the question presented was "a deep dilemma of ethics ***and policy*** that demands our attention." 31 N.Y.3d at 1058 (emphasis added). Such a policy question—with arguments and supporters on both sides—is best left to the Legislature. It is of course "the legislative branch of government [that has the] fundamental policy-making responsibility." *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). *See also Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 823 (2003) ("fundamental policy choices [] epitomize 'legislative power.'")).

In Amici's view, there is a probable reason NhRP has not adopted this logical approach to change New York State's existing public policy. *See, e.g.,* pages 7-8, *supra.* NhRP is aware that the vast majority of New Yorkers likely believe removing animals from zoos, farms, and homes is *bad* public policy. Most New Yorkers *commonsensically* believe elephants can live happily in well-provisioned zoos, where they can at the same time serve as educational resources and cultural ambassadors to the people of New York. It is those *people* of New York for whom New York laws are made. *See*, *e.g.*, N.Y. Const. Preamble ("We, ***the People of the State of New York***, grateful to Almighty God for our Freedom, in order to secure its

blessings, do establish this Constitution.") (emphasis added). New York laws should be and, ideally, are, adopted by the New York Assembly with those people in mind.

CONCLUSION

It is settled law that animals such as elephants and chimpanzees do not have habeas corpus rights. Overturning this settled law would not conform with *stare decisis* and would also endanger the social contract. If NhRP really believes freeing animals from zoos, farms, and homes is good public policy, the proper forum for it to advocate such massive change in the law is the State Assembly. While the public policy of freeing elephants is questionable, this Court's recent precedent is clear. The Court should affirm the lower court and its own precedent, denying NhRP's petition.

DATED: September 14, 2020

Respectfully submitted,

Bezalel A. Stern
Ira T. Kasdan (not admitted in New York)
Kelley Drye & Warren, LLP
3050 K Street N.W., Suite 400
Washington, D.C. 20007
bstern@kelleydrye.com
ikasdan@kelleydrye.com
Tel: (202) 342-8400
Fax: (202) 342-8451
Counsel for Amici Curiae Protect the Harvest and Alliance of Marine Mammal Parks & Aquariums

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW)		**EXPRESS NEXT DAY AIR**
YORK		

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 July 26, 2021

deponent served the within: Motion for Leave to File an Amicus Curiae Brief

upon:

See attached Service List

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on July 26, 2021

Mariana Braylovskiy

MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022

T. Heath

Job# 306168

Service List:

Elizabeth S. Stein Esq.
Attorney for Appellant - Nonhuman Rights Project, Inc.
5 Dunhill Road
New Hyde Park NY 11040-2216
Phone: (516) 747-4726

David M. Lindsey Esq.
Chaffetz Lindsey LLP
Attorney for Amicus Curiae - John Berkman
1700 Broadway, 33rd Floor
New York NY 10019-5905
Phone: (212) 257-6966

Kenneth A. Manning Esq
Phillips Lytle LLP
Attorney for Respondent - James J. Breheny
125 Main Street
Buffalo NY 14203-2887
Phone: (716) 847-7041

Jay Shooster Esq.
Richman Law & Policy
Attorney for Amicus Curiae - Matthew Liebman
1 Bridge Street, Suite 83
Irvington NY 10533