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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

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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.

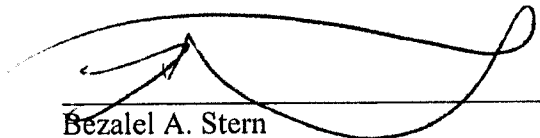
**NOTICE OF MOTION TO FILE
BRIEF *AMICUS CURIAE***

Index No. 45164/2018

PLEASE TAKE NOTICE, that upon the annexed affirmation of Bezalel A. Stern, Esq., attorney for *amici* Alliance of Marine Mammal Parks & Aquariums, Protect the Harvest and the Zoological Association of America (collectively, "*amici*"), dated December 3, 2018, the undersigned will move this Court for an Order granting *amici* leave to file the brief *amicus curiae* attached hereto in the above-captioned proceeding and further relief as this court may deem just and proper, on the following grounds: (a) the Petition for Habeas Corpus filed by the Nonhuman Rights Project, Inc., purportedly on behalf of an elephant named Happy, raises issues of statewide importance, (b) the movant will invite the court's attention to law and arguments which might not otherwise be brought to the attention of the court by the parties, and (c) the movant's brief will be of special assistance to the court.

DATED: December 3, 2018

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'Bezalel A. Stern', is written over a horizontal line.

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**ATTORNEY'S AFFIRMATION
IN SUPPORT OF MOTION TO
FILE BRIEF *AMICUS CURIAE***

Index No. 45164/2018

BEZALEL A. STERN, an attorney admitted to practice before the Courts of this State,
affirms under penalties of perjury that:

1. Ira T. Kasdan and I are counsel to the Alliance of Marine Mammal Parks & Aquariums, Protect the Harvest, and the Zoological Association of America (collectively, "*amici*").

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, 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.

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 Zoological Association of America ("ZAA") 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.

5. *Amici* move to submit a brief of *amicus curiae* in the instant proceeding on the grounds that, in addition to their significance to the instant parties, the issues involved in this proceeding are of statewide significance.

6. Through its brief of *amicus curiae*, *amici* and its counsel would provide the Court with more of a largescale perspective on the issues presented in the Petition for Habeas Corpus filed by the Nonhuman Rights Project, Inc. ("NRP"), purportedly on behalf of an elephant named Happy. In doing so, the brief of *amicus curiae* would invite the Court's attention to facts, laws and arguments that might otherwise escape its consideration and that will be of special assistance to the court.

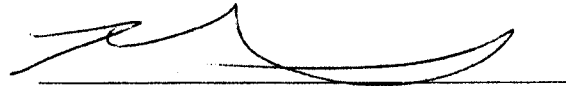
7. The core issues before the Court are whether NRP may pursue a petition for habeas corpus on behalf of an elephant, and whether animals in general may be entitled to habeas corpus.

8. The proposed brief of *amicus curiae* will argue that the grant of habeas corpus to Happy the elephant would disrupt the legal, social and economic order in New York State and elsewhere.

9. For the aforesaid reasons, I respectfully request that the Court grant *amici* permission to file a brief of *amicus curiae*.

DATED: December 3, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Bezalel A. Stern', written over a horizontal line.

Bezalel A. Stern

SUPREME COURT OF THE STATE OF NEW YORK
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Index No. 45164/2018

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

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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 than 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

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New York)

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DATED: December 3, 2018

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