

IN THE SUPREME COURT OF THE STATE OF HAWAII

NONHUMAN RIGHTS PROJECT, INC., on
behalf of Mari and Vaigai, individuals,

Petitioner/Petitioner-Appellant,

v.

CITY AND COUNTY OF HONOLULU,
DEPARTMENT OF ENTERPRISE
SERVICES and its DIRECTOR, DITA
HOLIFIELD, and the HONOLULU ZOO
DIRECTOR, JOHN BERRY,

Respondents/Respondents-Appellees.

SCWC-24-0000323

CAAP-24-0000323

(Petition for a Common Law Writ of Habeas
Corpus)

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**ON APPLICATION FOR WRIT OF
CERTIORARI TO REVIEW (1)
JUDGMENT ON APPEAL BY
PRESIDING JUDGE HIRAOKA,
FILED FEBRUARY 26, 2026; (2)
OPINION OF THE COURT BY
PRESIDING JUDGE HIRAOKA,
FILED JANUARY 28, 2026**

INTERMEDIATE COURT OF APPEALS

Hon. Keith J. Hiraoka (Presiding Judge)

Hon. Clyde J. Wadsworth (Associate Judge)

Hon. Kimberly T. Guidry (Associate Judge)

**BRIEF OF *AMICUS CURIAE* THE HONORABLE EUGENE M. FAHEY
IN SUPPORT OF PETITIONER-APPELLEANT**

APPENDIX A: RESUME OF THE HONORABLE EUGENE M. FAHEY

CERTIFICATE OF SERVICE

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Hon. Eugene M. Fahey



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INTEREST OF *AMICUS CURIAE*

From 1995 to 2021, I served in various judicial capacities within the New York State court system, including my final seven years on New York State's highest court, the New York Court of Appeals. *See App. A (résumé).*

In 2018, I wrote a concurrence in *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018). That case dealt with many of the same issues you are confronted with here; most importantly, the use of the writ of habeas corpus on behalf of nonhuman animals. New York continued wrestling with the same issues in *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555 (2022). But unlike in *Lavery*, the Court of Appeals granted leave to appeal in *Breheny*. Although the Court ultimately affirmed, Judges Jenny Rivera and Rowan Wilson wrote extensive dissenting opinions.

I retired from the Court on December 30, 2021, having reached the mandatory retirement age of 70. I had voted to grant leave in *Breheny*, but I retired by the time the case was argued. The discussion and vote on the leave grant are both confidential so I will not discuss them as part of this brief.

SUMMARY OF ARGUMENT

The principles underlying my concurrence in *Lavery*, 31 N.Y.3d 1054, and the compelling dissents of my former colleagues, Judges Jenny Rivera and Rowan Wilson, in *Breheny*, 38 N.Y.3d 555, apply with equal force to Mari and Vaigai. Habeas corpus is fundamentally a common law writ whose scope must evolve to meet the demands of justice. Legal personhood is not synonymous with being human, nor does entitlement to a right to bodily liberty necessarily depend on the capacity to bear legal duties. Rather, the Great Writ's

protections should turn on the intrinsic nature of the being seeking relief, particularly their autonomy and capacity for self-determination. The overwhelming, unrebutted scientific evidence establishes that elephants possess these very qualities. Accordingly, Mari and Vaigai should not be categorically excluded from the protection of habeas corpus merely because they are not human. At a minimum, they deserve an opportunity to be heard and to have their claims to bodily liberty considered on the merits.

ARGUMENT

I. Habeas Corpus and the Nonhuman Rights Project at the New York Court of Appeals

A. The NhRP's Initial Habeas Corpus Petitions on Behalf of Tommy and Kiko

Tommy and Kiko were two captive, adult chimpanzees who, according to habeas corpus petitions filed by the Nonhuman Rights Project, Inc. ("NhRP"), had been unlawfully confined by their owners. Tommy was confined to a small cage on a used trailer lot in Gloversville, New York, while Kiko was living in a cage in a cement storefront in a crowded residential area in Niagara Falls, New York.

The habeas petitions sought orders transferring the chimpanzees to a primate sanctuary with more appropriate living conditions. The NhRP argued that chimpanzees are autonomous beings entitled to liberty, or at least a greater degree of liberty, and that their detentions were illegal. In support of its petitions, the NhRP submitted evidence in the form of affidavits from eminent primatologists, detailing the similarities between human beings and chimpanzees in brain development, communication skills, autonomy and sentience.

The NhRP did not allege violations of animal cruelty statutes or otherwise assert that Tommy or Kiko were in any way abused. Notably, the habeas petitions stated that the NhRP did not seek improved welfare for Tommy and Kiko but rather demanded the chimpanzees be recognized as holders of the common law right to bodily liberty protected by the common law of habeas corpus. The NhRP went on to argue it was the fact that the chimpanzees were detained at all, rather than the conditions of said detentions, that was unlawful.

The trial courts denied both Tommy and Kiko’s habeas petitions on the ground that a chimpanzee is not a “person” and only a person can seek a writ of habeas corpus. On appeal, the Appellate Division, Third Department, in Albany, affirmed in Tommy’s case, while the Appellate Division, Fourth Department, based in Rochester, affirmed in Kiko’s case.

The Third Department wrote that nonhuman animals, such as Tommy, “have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law.” *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150 (2014). That court added, “unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions,” and concluded that the “incapability to bear any legal responsibilities and societal duties ... renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.” *Id.* at 152.

The Fourth Department denied Kiko’s habeas petition on a different ground—that

habeas relief was improper because the petition sought only a change to the conditions of confinement (i.e., moving from a storefront cage to a primate sanctuary was still moving from one form of confinement to another), rather than actual release into the wild. *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1335 (2015).

The New York Court of Appeals has certiorari jurisdiction. A party who wishes to appeal to the Court of Appeals, must file a motion seeking permission to appeal. Motions for leave in civil cases are conferenced, and voted on, by all the Judges of the Court. Although most of our decisions on the Court of Appeals require a majority of four Judges, leave to appeal will be granted if at least two Judges vote in favor. *See* CPLR 5602 (a).

The NhRP sought permission to appeal both Tommy and Kiko's cases to the New York Court of Appeals and in September 2015, the Court denied leave. In accordance with our custom, we gave no reason for refusing to take the case. *See Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 26 N.Y.3d 901 (2015) (leave to appeal denied for Kiko); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 26 N.Y.3d 902 (2015) (leave to appeal denied for Tommy).

B. The NhRP's Second Habeas Corpus Petitions on Behalf of Tommy and Kiko

The NhRP subsequently refiled separate habeas corpus petitions on behalf of Tommy and Kiko in a different trial court; this time, in the Supreme Court, New York County, i.e., in Manhattan. The NhRP again sought the transfer of Tommy and Kiko to a primate sanctuary. These petitions included some new affidavits, but essentially repeated the argument that chimpanzees are intelligent, autonomous beings who should not be held captive. Both petitions were denied by the lower court. The NhRP appealed both cases to

the Appellate Division, First Department, which consolidated the appeals and affirmed the denials of relief. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 (2017). The First Department reasoned that the petitions were identical to the previous petitions denied by the Third and Fourth Departments: “the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it.” *Id.* at 76 (quoting CPLR 7003 (b)).

The First Department also erroneously added that the writ of habeas corpus did not lie for Tommy and Kiko because the NhRP did not seek their immediate release, only “their transfer to a different facility,”¹ *id.* at 79, and that Tommy and Kiko were not “persons” for purposes of habeas corpus relief because entitlement to right to liberty vindicated by the Great Writ turns on “capacity or ability . . . to bear legal duties, or to be held legally accountable for their actions.” *Id.*

The NhRP then sought leave to appeal to the New York Court of Appeals to challenge the First Department’s decision. The motion papers included some thought-provoking amicus briefs. There were two sets of amici, a group of law professors (Laurence H. Tribe, Justin Marceau, and Samuel Wiseman), and a group of philosophers with expertise in animal ethics and related areas. Although the Court ultimately denied leave,

¹ It is not a requirement of habeas relief that the petitioner seek immediate release. *See generally Peyton v. Rowe*, 391 U.S. 54 (1968); *see also Hutch v. State*, 107 Haw. 411, 415 (2005) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)). That the NhRP seeks transfer for Mari and Vaigai from a one-acre cage to an accredited elephant sanctuary that is willing to provide the elephants with lifelong care is a remedy that falls squarely within the scope of habeas corpus. The law does not compel us to come up with unreasonable solutions to this predicament.

its decision prompted my concurring opinion. *See generally Lavery*, 31 N.Y.3d at 1054 (Fahey, J., concurring).

C. My Concurring Opinion

As time had passed since we first denied leave to the NhRP and in turn, Tommy and Kiko, I had struggled with whether it had been the right decision. In analyzing the second motion for leave to appeal, I had to acknowledge that the trial court appropriately denied the petitions under CPLR 7003 (b) on the ground that they were successive petitions. Although the legal and philosophical questions posed by the second motion were compelling, the basic question facing the Court of Appeals was the procedural question of whether the trial court properly applied CPLR 7003 (b). This would have been decided on an abuse of discretion standard and would not have allowed the Court of Appeals to reach the profound underlying questions. Accordingly, I agreed with my colleagues that we could not grant leave.

However, in my concurrence, I expressed my views—speaking only for myself—about nonhuman animal habeas corpus rights. My goal was to draw attention to the importance of the underlying issues, and to signal my interest in the points that the Court was unable to reach. *Lavery*, 31 N.Y.3d at 1056 (Fahey, J., concurring) (“I write to underscore that denial of leave to appeal is not a decision on the merits of petitioner’s claims. The question will have to be addressed eventually. Can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?”).

The habeas corpus statute invoked on behalf of the chimpanzees was CPLR 7002 (a), which states: “A person illegally imprisoned or otherwise restrained in his liberty

within the state, or one acting on his behalf . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance.” New York’s habeas corpus statute does not define “person” but dictionaries, including *Black’s Law Dictionary* and the *Oxford English Dictionary*, instruct us that the meaning of the word extends to any entity or individual that is “recognized as having most of the rights and duties of a human being.” *See, e.g., Person*, BLACK’S LAW DICTIONARY (10th ed. 2014). It was on this basis that the First Department reasoned that chimpanzees are not “persons” because they lack the capacity or ability to bear legal duties or to be held legally accountable for their actions.²

Drawing on the work of philosophers in animal ethics such as Tom Regan (1938-2017), I argued that being a “moral agent” who can freely choose to act as morality requires is not a necessary condition for being a “moral patient” who can be wronged and may have the right to redress wrongs. In other words, even if a chimpanzee does not bear legal duties, the chimpanzee may yet have the right to seek legal relief. After all, a human infant does not have legal duties, but it is well established in the law that one may seek a writ of habeas corpus on behalf of one’s infant child. *Lavery*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

The concept of personhood is one that the law will continue to grapple with. In

² It bears mentioning that the 10th edition of *Black’s Law Dictionary* defined “person” through a misquotation of jurist John Salmond’s treatise *Jurisprudence*. The law dictionary defined a “person” as an entity capable of right **and** duties, but after attorneys for the NhRP located a copy of *Jurisprudence*, they discovered that the treatise originally stated that a “person” is an entity capable of rights **or** duties. After contacting *Black’s* editor-in-chief, Bryan A. Garner, the fix was made in the 11th edition, and all subsequent versions of the dictionary have contained the correct understanding of legal personhood. *See, e.g., Person*, BLACK’S LAW DICTIONARY (12th ed. 2024) (a “person is any being whom the law regards as capable of rights or duties,” and “[a]ny being that is so capable is a person, whether a human being or not.”) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).

recent years, advancements in robotics and artificial intelligence have made this clear. Narrow questions about whether a chimpanzee fits the definition of a person or has the same rights and duties as a human being should not determine whether a chimpanzee has the right to liberty protected by habeas corpus. Instead, I proposed, the answer to that question should depend on our assessment of the intrinsic nature of chimpanzees as a species. We, meaning the Court of Appeals and humanity more broadly, “should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.” *Id.* at 1058 (citing Tom Regan, *The Case for Animal Rights* 248-50 (2d ed. 2004)). My concurrence pointed to the record in the motion for leave to appeal. It contained un rebutted evidence from “eminent primatologists” establishing that:

[C]himpanzees have advanced cognitive abilities, including being able to remember the past and plan for the future, the capacities of self-awareness and self-control, and the ability to communicate through sign language. Chimpanzees make tools to catch insects; they recognize themselves in mirrors, photographs, and television images; they imitate others; they exhibit compassion and depression when a community member dies; they even display a sense of humor.

Id. In other words, a chimpanzee is an intelligent, autonomous being who thinks, plans and appreciates life.

In *Boumediene v. Bush*, 553 U.S. 723 (2008), the United States Supreme Court held that the privilege of the writ of habeas corpus contained in Article 1 of the Federal Constitution applies to noncitizens held at Guantanamo Bay. In my concurrence, I applauded this decision, but I wrote as follows:

I agree with the principle that all human beings possess intrinsic dignity and value, and have, in the United States (and territory completely controlled thereby), the constitutional privilege of habeas corpus, regardless of whether they are United States citizens (*see Boumediene v. Bush*, 553 US 723 [2008]),

but, in elevating our species, we should not lower the status of other highly intelligent species. . . .

To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others

The reliance on a paradigm that determines entitlement to a court decision based on whether the party is considered a “person” or relegated to the category of a “thing” amounts to a refusal to confront a manifest injustice. Whether a being has the right to seek freedom from confinement through the writ of habeas corpus should not be treated as a simple either/or proposition.

While it may be arguable that a chimpanzee is not a “person,” there is no doubt that it is not merely a thing.

Lavery, 31 N.Y.3d at 1057-59 (Fahey, J., concurring). I was alone in my concurrence regarding Tommy and Kiko, but that changed when the NhRP sought habeas corpus relief for Happy the elephant.

D. Happy

On May 4, 2021, the New York Court of Appeals granted the NhRP’s third motion for leave to appeal in a nonhuman animal habeas corpus proceeding. *Nonhuman Rights Project, Inc. v. Breheny*, 36 N.Y.3d 912 (2021). The evidence was extensively set out in the majority and dissenting opinions. *See generally Breheny*, 38 N.Y.3d at 565-577 (Opinion of the Court); *id.* at 577-626 (Wilson, J., dissenting); *id.* at 626-642 (Rivera, J., dissenting). Happy, a female Asian elephant, was captured in the wild as a calf. She was first confined and displayed at the Bronx Zoo in 1977, along with another female elephant, Grumpy. In 2002, two other elephants were introduced in the same exhibit, but they attacked Grumpy, who ultimately had to be euthanized. A subsequent companion elephant

was euthanized in 2006 and from then until her death in 2026, Happy lived alone in a one-acre enclosure at the Bronx Zoo.

As in *Lavery*, the habeas corpus petition in *Breheny* did not allege violations of animal cruelty laws but instead asked the Court to recognize Happy's right to bodily liberty protected by the common law of habeas corpus. According to the NhRP, it was the fact that Happy was confined, rather than the conditions of her confinement, that was unlawful.

As I mentioned above, New York CPLR 7002 (a) provides that "[a] person illegally imprisoned or otherwise restrained in [their] liberty within the state or one acting on [their] behalf . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance." The statute does not define or otherwise delimit the scope of "person."

I disagree that the fundamental question of whether a nonhuman animal is a "person" for purposes of habeas corpus relief is best left to the Legislature. Habeas corpus derives from the common law writ of habeas corpus ad subjiciendum, the quintessential writ of the common law, whereby equity steps in to protect the individual from constraints on their liberty. *See generally Schlup v. Delo*, 513 U.S. 298, 319 (1995); *Price v. Johnston*, 334 U.S. 266, 281 (1948); W. Duker, *A Constitutional History of Habeas Corpus* (1980). As the Supreme Court observed, "[u]nless [the legislative branch] acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining th[e] delicate balance of governance." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004). Absent a statutory prohibition, determining the requirements and evolving application of the writ falls squarely within the judiciary's authority. It is the courts, not

the Legislature, that determine the boundaries of habeas corpus.

Moreover, habeas corpus is not “a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.” *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). At common law, habeas corpus “was, above all, an adaptable remedy. Its precise application and scope changed depending upon the circumstances.” *Boumediene*, 553 U.S. at 779-80 (citing 3 William Blackstone, *Commentaries on the Laws of England* 131 (1768) (describing habeas corpus as “the great and efficacious writ, in all manner of illegal confinement”)). Indeed, the writ has historically reached restraints imposed by private individuals as well as governmental authorities. *See Wales v. Whitney*, 114 U.S. 564, 571 (1885) (recognizing that wives restrained by husbands, children withheld from lawful guardians, and individuals confined by private custodians may seek habeas relief). Its application has also extended to challenges involving civil confinement, deportation, extradition, executive detention, military convictions, and parole decisions. This history demonstrates the writ’s breadth and adaptability, undermining the Intermediate Court of Appeals and Appellees City and County of Honolulu’s proposed narrow statutory construction.

The cruelty of holding an elephant, accustomed to inhabiting vast terrains captive in a one-acre enclosure is rooted not only in the animal’s size, but also in its innate intelligence and autonomy. A confinement that is cruel to an elephant would not be cruel to a worm. The differences between species are significant, and the answer to whether an elephant is entitled to seek relief from arbitrary restraint through a writ of habeas corpus should depend on a careful analysis of the intrinsic nature of elephants as a species. Given

her size, intelligence, and natural habitat, the challenged confinement of Happy was a pointless cruelty as it appears to be with Mari and Vaigai as well.

In Happy's case, the NhRP submitted uncontroverted evidence through affidavits from distinguished experts in elephant cognition, including Cynthia J. Moss, Director of the Amboseli Elephant Research Project, who has studied free-living African elephants for 47 years; Dr. Joyce Poole, Co-Director of ElephantVoices and former Research Director of the Amboseli Elephant Research Project, who has studied wild African elephants for over 50 years; Dr. Lucy Bates, who has researched African elephants' social and cognitive abilities for 15 years; and Drs. Richard William Byrne and Karen McComb, leading experts in mammalian cognition.

The affidavits documented elephants' extraordinary cognitive abilities, including autonomy, self-awareness, self-determination, empathy, theory of mind, insight, sophisticated short and long-term memory, intentional and goal-directed behavior, and the capacity to understand others' intentions, abilities, and emotional states. Elephants also demonstrate imitation, teaching, cooperation, coalition-building, innovative problem-solving, behavioral flexibility, causal reasoning, and complex learning. They communicate intentionally through vocalizations, gestures, and postures; coordinate and adjust plans based on perceived risks; and exhibit an awareness of death, including grieving behaviors.

The uncontroverted expert evidence established that elephants are autonomous, highly intelligent beings capable of thought, planning, complex social relationships, and an appreciation of life. The affidavits drew upon extensive scientific research documenting the remarkable intelligence and sophisticated social cultures of free-living African and

Asian elephants. Although elephants' immense size and expansive natural habitats make controlled laboratory experimentation impractical, decades of rigorous field research provide compelling evidence of elephants' impressive cognitive and emotional capacities.

Substantial evidence demonstrated that elephants possess empathy and the ability to cooperate toward shared goals. *See* Richard W. Byrne & Lucy A. Bates, *Elephant Cognition: What We Know About What Elephants Know*, in *THE AMBOSELI ELEPHANTS: A LONG-TERM PERSPECTIVE ON A LONG-LIVED MAMMAL* 179, 180, 182 (Cynthia J. Moss, Harvey Croze & Phyllis C. Lee eds. 2011). The experts explained that elephants' empathetic behavior reflects their capacity to appreciate another's perspective, including attributing intentions and mental states to others. Elephants also engage in conflict mediation, demonstrate empathy toward humans, and exhibit complex behaviors associated with understanding and mourning death. *See* Joyce H. Poole & Petter Granli, *Signals, Gestures, and Behavior of African Elephants*, in *THE AMBOSELI ELEPHANTS*, *supra*, at 113; Cynthia Moss, *Elephant Memories: Thirteen Years in the Life of an Elephant Family* 186-87 (1988).

Elephants also possess long-term memories. Older elephants can recall routes to remote water sources after years or even decades, while free-living African elephants can recognize the vocalizations of as many as 100 other elephants. *See* Byrne & Bates, *supra*, at 179. Their memory of family members' contact calls may persist even after those individuals have died or joined other family groups. *See* Karen McComb, David Reby & Cynthia J. Moss, *Vocal Communication and Social Knowledge in African Elephants*, in *THE AMBOSELI ELEPHANTS*, *supra*, at 163-65. Happy herself demonstrated mirror self-

recognition, a widely used indicator of self-awareness. When researchers placed a visible mark on her head that she could observe only through a mirror, Happy used the mirror to investigate it. According to the experts, this behavior demonstrated an elephant's capacity to form a mental representation of herself as an individual distinct from others.

These cognitive abilities are consistent with elephants' neurobiology. Elephants possess exceptionally large brains, with an encephalization quotient comparable to that of great apes—up to two and a half times the brain size expected for an animal of their body mass. Their brains also exhibit extensive cortical folding, spindle cells, complex neuronal connections, and a large cerebellum. Together, this neurological and behavioral evidence establishes that elephants, like chimpanzees, are highly intelligent, self-aware, and socially sophisticated beings.

Most importantly, there is no evidence pointing against the autonomy and high intelligence of elephants.

E. The Decision in Happy's Case

The Court of Appeals ruled on June 14, 2022. Then-Chief Judge Janet DiFiore authored the majority opinion, which affirmed the Appellate Division's decision and denied habeas corpus relief for Happy. The majority concluded that Happy, as a nonhuman animal, was not a "person" entitled to invoke the writ, reasoning that "autonomy, intelligence, and emotion of a particular nonhuman animal species is not a determinative factor in whether the writ is available as such factors are not what makes a person detained qualified to seek the writ." *Breheny*, 38 N.Y.3d at 571. The majority added that habeas corpus protects fundamental liberty rights recognized by law as belonging to humans, and

that extending legal personhood to Happy was a matter for the Legislature, not the courts.

Judges Jenny Rivera and the now-Chief Judge of the New York Court of Appeals, Rowan Wilson, both wrote compelling and erudite dissents. Their powerful analysis exposed the internal contradictions and complete lack of evidence supporting the majority's opinion. Judges Rivera and Wilson's dissenting opinions are worth reading in full when wrestling with the questions this case presents. A few excerpts are notable:

[T]he evidence tendered by Happy demonstrates that Happy has very substantial cognitive, emotional and social needs and abilities, and that those qualities coupled with the circumstances of her particular confinement establish a *prima facie* case that her present confinement is unjust.

The fullest answer, though, is that we should recognize Happy's right to petition for her liberty not just because she is a wild animal who is not meant to be caged and displayed, but because the rights we confer on others define who we are as a society.

Id. at 626 (Wilson, J., dissenting)

A gilded cage is still a cage. Happy may be a dignified creature, but there is nothing dignified about her captivity In response to the question posed in this appeal and by Judge Fahey, I conclude that history, logic, justice, and our humanity must lead us to recognize that if humans without full rights and responsibilities under the law may invoke the writ to challenge an unjust denial of freedom, so too may any other autonomous being, regardless of species. Such an autonomous animal has a right to live free of an involuntary captivity imposed by humans, that serves no purpose other than to degrade life.

Id. at 628-29 (Rivera, J., dissenting).

II. Why Change Habeas Corpus Common Law in Hawai'i?

The Court has a difficult decision to make. It would clearly be easier to maintain the status quo. The harder question to answer is: what is the right thing to do?

Change is most manageable when made in small steps. Our ongoing quest for a just

world should be ambitious, but not destructive of what is good. It is a delicate balance. Striking that balance is among the judiciary's most solemn responsibilities, but something well-within our ability to do. Here, by granting a hearing, the Court has an opportunity to open the cage door, and potentially free creatures with whom we share this world, without doing harm to ourselves.

The courts are the embodiment of the law, and at their best, they reflect our highest aspirations for justice. Here, you are not being asked to order a predetermined outcome. The NhRP seeks to have Mari and Vaigai recognized for what they are—not mere “things” but sentient, autonomous beings deserving of consideration under Hawai‘i common law.

Above all, however, what they seek is their day in court. A chance to be heard. A chance to present their case.

I hope you will give them that chance.

Your colleague in the judiciary,
/s/ Judge Eugene Fahey

APPENDIX A

HON. EUGENE M. FAHEY
141 Winston
Buffalo, New York 14216
e-mail: faheyem@roadrunner.com

LEGAL EXPERIENCE

Associate Judge

2/15 – 12/21

New York State Court of Appeals

Albany, NY

Nominated by Governor Andrew Cuomo; unanimous confirmation by the New York State Senate.

Sample of Court of Appeals Opinions Written:

- *People v Shanks* (34 NY3d 244 [2021])
- *Greene v Esplanade Venture Partnership* (37 NY3d 513 [2021])
- *Matter of Part 60 Put-Back Litig.* (36 NY3d 342 [2020])
- *People v Stan XuHui Li* (34 NY3d 357 [2019])
- *Deutsche Bank Natl. Trust Co. v Barclays Bank PLC* (34 NY3d 327 [2019])
- *Expressions Hair Design v Schneiderman* (32 NY3d 382 [2018])
- *Deutsche Bank Natl. Trust Co. v Flagstar Capital Mkts.* (32 NY3d 139 [2018])
- *Matter of Nonhuman Rights Project, Inc. v Lavery* (31 NY3d 1054, 1055-1059 [2018] [concurrence])
- *People v Aleynikov* (31 NY3d 383 [2018])
- *Lohan v Take-Two Interactive Software, Inc.* (31 NY3d 111 [2018])
- *People v Wiggins* (31 NY3d 1 [2018])
- *People v Otis Boone* (30 NY3d 521 [2017]) *Desrosiers v Perry Ellis Menswear* (30 NY3d 488 [2017])

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LEGAL EXPERIENCE (Continued)

- *Myers v Schneiderman* (30 NY3d 1 [2017] [concurrency])
- *Matter of Hennel* (29 NY3d 487 [2017])
- *Lend Lease (US) Constr. LMB Inc. v Zurich Am. Ins. Co.* (28 NY3d 675 [2017])
- *Flo & Eddie v Sirius XM Radio, Inc.* (28 NY3d 583 [2016] [concurrency])
- *Turturro v City of New York* (28 NY3d 469 [2016])
- *People v Terrance Mack* (27 NY3d 534 [2016])
- *People v Badalamenti* (27 NY3d 423 [2016])

Sample of Court of Appeals Dissents Written:

- *Estate of Kainer v UBS AG* (37 NY3d 460 [2021])
- *Matter of Adirondack Wild: Friends of the Forest Preserve v New York State* (34 NY3d 184 [2019])
- *Williams v Beemiller, Inc* (33 NY3d 523 [2019])
- *People v Thomas* (33 NY3d 1 [2019])
- *Matter of People v Juarez* (31 NY3d 1186 [2018])
- *Burlington Ins. Co. v NYC Transit Auth.* (29 NY3d 313 [2017])
- *People v Anthony DiPippo* (27 NY3d 127 [2016])
- *People v Jorgensen* (26 NY3d 85 [2015])
- *Doerr v Goldsmith* (25 NY3d 1114, 1142-1157 [2015])

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LEGAL EXPERIENCE (Continued)

Justice Supreme Court

12/06 - 2/15

Appellate Division, Fourth Department

Rochester, NY

Sample of Appellate Division Decisions Written:

- *New Yorkers for Constitutional Freedoms v New York State Senate* (98 AD3d 285 [4th Dept 2012], lv denied 19 NY3d 814)
- *Gabriel v Johnston's L.P. Gas Service, Inc.* (98 AD3d 168 [4th Dept 2012], opinion amended on rearg 104 AD3d 1262)
- *Matter of the State of New York v Company* (77 AD3d 92 [4th Dept 2010], lv denied 15 NY3d 713)
- *Matter of Irwin v Onondaga County Resource Recovery Agency* (72 AD3d 314 [4th Dept 2010])
- *Matter of Barbato v New York State Dept. of Health* (65 AD3d 821 [4th Dept 2009], lv denied 13 NY3d 712)

Listing of Successful Dissents at the Appellate Division:

- *People v Wright* (115 AD3d 1257 [4th Dept 2014], *rev'd* 25 NY3d 1269)
- *Davis v Boenheim* (110 AD3d 1431 [4th Dept 2013], *rev'd* 24 NY3d 262)
- *Schosek v Amherst Paving, Inc.* (53 AD3d 1037 [4th Dept 2008], *rev'd* 11 NY3d 882)
- *People v Buchanan* (53 AD3d 46 [4th Dept 2008], *rev'd* 13 NY3d 1)

Justice Supreme Court

1/97 - 12/06

New York State Supreme Court

Buffalo, NY

Handled civil and criminal cases; assigned to Commercial Division 2005-2006.

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LEGAL EXPERIENCE (Continued)

State Supreme Court Decisions Reported:

- *Buffalo and Fort Erie Public Bridge Authority v. City of Buffalo, et al.*, 182 Misc2d 159, 696 NYS2d 799 (2000)
- *City of Buffalo v. New York State Department of Environmental Conservation, et al.*, 184 Misc2d 243, 707 NYS2d 606 (2000)
- *Wick v. Encompass Insurance Company, et al.*, 191 Misc2d 449, 742 NYS2d 813 (2002)
- *Main Seneca Corporation v. Erie County Industrial Development Agency*, 195 Misc2d 164, 757 NYS2d 696 (2003)
- *Michael C. Ottaviano, et al. v. Genex Cooperative, Inc., et al.*, 3 Misc3d 1024, 775 NYS2d 802 (2004)
- *Dean Overhoff v. Scarp, Inc., et al.*, 12 Misc3d 350, 812 NYS2d 809 (2006)

Buffalo City Court Judge

Handled approximately 3,500 cases per year; heard mainly criminal calendar with some civil matters.

1/95 -12/96

Buffalo, NY

Trial Attorney

Law Office of Richard L. Woll

Specializing in defense negligence and appeals.

8/85 - 4/93

Buffalo, NY

Judicial Law Clerk

NYS Court of Claims Judge Edgar NeMoyer

2/85 - 8/85

Buffalo, NY

ELECTED OFFICES HELD

Council Member at Large

Buffalo Common Council

1/88 -12/94

Buffalo, NY

Majority Leader

Buffalo Common Council

1/90 - 12/93

Buffalo, NY

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ELECTED OFFICES HELD (continued)

Council Member at Large Buffalo Common Council	1/82 -12/83 Buffalo, NY
University District Member Buffalo Common Council	1/78 - 12/81 Buffalo, NY

EDUCATION

State University of New York at Buffalo

1998	Master of Arts in European History
1984	Juris Doctor
1974	Bachelor of Arts in Political Science (Cum Laude)

St. Joseph's Collegiate Institute - Graduated 1969

St. Joseph's Grammar School - Graduated 1965

EDUCATIONAL SEMINARS - PUBLICATIONS

Commercial Litigation in New York Courts Co-Author Chapter 97 "Contracts for Services"	2026
Judge/Speaker Erie County Bar Association. Ethics Seminar - Chair "Our System of Justice on the Precipice"	2026
Judge/Speaker World Moot on International Law and Animal Rights St. Hilda's College, Oxford, England	2025
"The Judicial Career of Justice M. Dolores Denman (1931-2000)" Judicial Notice : A Periodical of New York Court History - Issue 16 Historical Society of the New York Courts	2021
"Inside the Conference Room" (Monroe County Bar Association)	January 21, 2021
<u>"The Angels That Surrounded My Cradle": The History, Evolution, and Application of the Insanity Defense</u> <u>Buffalo Law Review - Volume 68 - No. 3</u>	May 2020

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EDUCATIONAL SEMINARS - PUBLICATIONS (continued)

“Delivering Persuasive Oral Argument” (Erie Institute of Law) <u>Topic</u> - “A Conversation About Oral Argument”	October 4, 2019
“New York Appellate Practice” (New York State Bar Association) <u>Topic</u> - “Behind the Curtain: The Internal Processes of Appellate Courts”	March 22, 2019
“University of Rochester 2018 Charles E. Steinberg Lecture” <u>Topic</u> - “The Angels That Surrounded My Cradle”: The History, Evolution, and Application of the Insanity Defense	September 28, 2018
“New York State-Federal Judicial Council and Its Advisory Group <u>Topic</u> - “Appellate Practice in State and Federal Courts: Practical Considerations and Ethical Concerns”	May 23, 2018
“History of Erie County - Bench and Bar” Historical Society of the New York Courts	March 13, 2018
“The Nuremberg Trials 70 Years Later: Legal Ethics and The Holocaust” (Erie Institute of Law) <u>Topic</u> - “The Judges of the Third Reich”	October 28, 2016
“New York Appellate Practice” (New York State Bar Association) <u>Topic</u> - “Appellate Tips from the Justices of the Fourth Department	October 29, 2013
“New York State Judicial Institute Summer Education Institute Summer Education Broadcast 2013” <u>Topic</u> - “Civil Motions: Discovery and Summary Judgment”	July 25, 2013
“Advice From the Experts: Successful Strategies for Winning Commercial Cases in New York State Courts” <u>Topic</u> - “Appellate Advocacy”	April 25, 2013 and October 26, 2012
“New York State-Federal Judicial Council - Advisory Group Second Circuit CLE Program” <u>Topic</u> - “Ethics Update: Perspectives from the Federal and State Judiciary”	May 9, 2011

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EDUCATIONAL SEMINARS - PUBLICATIONS - continued)

“The New Politics of Judicial Elections” (Partnership for the Public Good)	November 16, 2010
Haig, <i>Commercial Litigation in New York State Courts, Third, Fourth and Fifth Editions</i> “Chapter 71, 79, 96 - Contracts for Services” -	2010, 2015, 2020
“Views from the Bench on Brief Writing and Oral Advocacy” (UB Alumni - GOLD Group)	April 27, 2010
“Inns of Court” (Erie Institute of Law) <u>Topic</u> - “Civility at the Appellate Division, from the Bench and Bar”	March 24, 2010
“Hot Topics and Recent Cases for Commercial Practitioners” (Erie Institute of Law)	October 10, 2008
“A CLE Symposium and Reception to Meet the Justices of the Fourth Department” (New York State Bar Association) <u>Topic</u> - “Perspectives on Brief Writing and Oral Advocacy” - A View from the Bench	May 16, 2007
“Ethics and Professionalism” (New York State Bar Association) <u>Topic</u> - “Judicial Tools to Regulate Discovery”	December 13, 2006
“Legal Nurses Seminar” <u>Topic</u> - 2004 Update on Medical Expert Disclosure In Medical Malpractice Actions	June 18, 2004
“Discovery 2004” (New York State Bar Association) <u>Topic</u> - Ethical Considerations in Disclosure: “The Line Between Aggressive Representation and Sanctionable Conduct”	May 7, 2004
“Practice of Medicine in a Changing Environment: Legal, Regulatory and Payment Issues” (Erie Institute of Law) <u>Topic</u> - Medical Malpractice Litigation: A View from the Bench - “A Judicial Perspective on Frivolous Claims”	September 20, 2003

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EDUCATIONAL SEMINARS - PUBLICATIONS - continued)

“Selection and Use of Experts” (New York State Bar Association) <u>Topic</u> - “A Judicial Perspective on Expert Witnesses”	May, 2003
“A Judicial Perspective on Expert Witnesses” (New York State Bar Association) <u>Topic</u> - “A Complete Review of Expert Testimony”	October 17, 2001
“The Basics of Discovery in New York - Statutes, Case Law and Practical Pointers” (New York State Bar Association) <u>Topic</u> - “Expert Reliability”	October 13, 2000
“A Primer on the Evaluation and Negotiation of a Tort Case” (New York State Bar Association) <u>Topic</u> - “The Give and Take of Negotiation” - An overview of the Negotiation process presented by trial judge.	May 21, 1999

POST- RETIREMENT

Adjunct Teacher – SUNY at Buffalo School of Law “Amicus Brief Seminar”	2022-2024
Chair - NYS Commission on Legislative, Judicial and Executive Compensation	2023-2024
Member - New York State Commission on Judicial Nominations (term 4/26 - 4/30)	Current

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the BRIEF OF *AMICUS CURIAE* THE HONORABLE EUGENE M. FAHEY was served upon all parties, through their respective counsel of record, via electronic filing (JEFS) on October 9, 2026.

DATED: Honolulu, Hawai‘i, this 9th day of October 2026.

/s/ Suzette Hill

Suzette Hill, Esq.

Attorney for *Amicus Curiae*

Hon. Eugene M. Fahey