

SUPREME COURT OF THE STATE OF NEW YORK
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,

Case No.: 2020-02581

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

Index No.: 260441/2019
(Bronx County)

Petitioner-Appellant,

-against-

JAMES J. BREHENY, in his official capacity as the
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,

**NOTICE OF
MOTION OF JUSTIN
MARCEAU AND
SAMUEL WISEMAN
FOR LEAVE TO
FILE BRIEF AS
*AMICI CURIAE***

Respondents-Respondents.

PLEASE TAKE NOTICE that, upon the annexed affirmation of David M. Lindsey, dated July 20, 2020, the undersigned will move this Court, at a term of the Appellate Division of the Supreme Court, First Judicial Department, at the Courthouse located at 27 Madison Avenue, New York, New York, for an order granting leave to file the annexed brief of Justin Marceau and Samuel Wiseman as *Amici Curiae* in support of the Petitioner-Appellant, the Nonhuman Rights Project, Inc., in the above-captioned action.

PLEASE TAKE FURTHER NOTICE, that the motion is returnable at 10 o'clock in the forenoon on August 3, 2020, which is at least 9 days from the date of

service of these papers. Parties are hereby advised that arguments will be on the papers only and no appearance is required or permitted.

Dated: July 20, 2020

By:



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only.

NOTICE (via NYSCEF) TO:

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Appellate Division – First Department

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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CONSERVATION SOCIETY,

**AFFIRMATION OF
DAVID M. LINDSEY
IN SUPPORT OF
MOTION OF JUSTIN
MARCEAU AND
SAMUEL WISEMAN
FOR LEAVE TO
FILE BRIEF AS
*AMICI CURIAE***

Respondents-Respondents.

I, David M. Lindsey, hereby affirm under penalty of perjury:

1. I am an attorney duly admitted to practice in the courts of the State of New York. I submit this affirmation on behalf of Justin Marceau and Samuel Wiseman in support of their motion for leave to submit the attached brief as *Amici Curiae* in support of the Petitioner-Appellant Nonhuman Rights Project, Inc. (“NhRP”) in the above-captioned proceedings. I am not a party to this proceeding nor do I represent any of the parties to it. Attached hereto as Exhibit 1 is the Order appealed from. Attached hereto as Exhibit 2 is the Notice of Appeal.

2. Justin Marceau and Samuel Wiseman are habeas corpus scholars and professors at University of Denver, Sturm College of Law (Justin Marceau) and Penn State, University Park (Samuel Wiseman).
3. Professors Marceau and Wiseman are familiar with the legal issues involved in the above-captioned case and are qualified and competent in the matters therein, particularly with respect to the field of habeas corpus. Their 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.
4. The issues before this Court are of great public importance. Professor Marceau and Professor Wiseman’s proposed brief contains arguments that might otherwise escape this Court’s consideration, and it will be of special assistance to this Court.
5. Professors Marceau and Wiseman seek to submit their brief as *Amici Curiae* because of their interest in ensuring courts apply habeas corpus fairly and in keeping with its rich and noble heritage of advancing the novel rights claims of deserving beings.
6. Professors Marceau and Wiseman were granted leave to file briefs as *Amici Curiae* in this Court and the Court of Appeals in a similar case.
7. Professor Justin Marceau is a habeas corpus scholar and the Brooks Institute Research Scholar at the University of Denver, Sturm College of Law. He has

been a full-time law professor at the University of Denver, Sturm College of Law for eight years, and was awarded tenure in 2012. During the Spring of 2020, he was a visiting professor at Harvard Law School where he taught both criminal procedure and animal law. He specializes in constitutional and criminal law with an emphasis on habeas corpus procedures and regularly teaches habeas corpus courses in addition to criminal law and advanced criminal procedure. He regularly researches and writes in the field of habeas corpus. He co-authored the book *Federal Habeas Corpus*, Lyon, Andrea D., Hughes, Emily, Prosser, Mary & Marceau, Justin, Federal Habeas Corpus Carolina Academic Press, (2d ed. 2011), and has written approximately 15 scholarly papers dealing with issues related to habeas corpus. His publications have been cited by numerous courts, including the U.S. Supreme Court and state supreme courts. His work has also been cited by more than 400 scholarly works, including leading treatises such as *Federal Habeas Corpus Practice and Procedure and Criminal Procedure*. Randy Hertz & James S. Liebman, Federal Habeas Corpus Practice and Procedure (6th ed. 2011); Wayne R. LaFave et al., Criminal Procedure (3d ed. 2014). His habeas corpus publications have appeared in the Yale Law Journal, the William & Mary Law Review, the Hastings Law Journal, and many others. A copy of Professor Marceau's CV is attached hereto as Exhibit 3.

8. Samuel Wiseman is Professor of Law at Penn State Law, University Park. After graduating from law school, he served as a law clerk to Chief Justice Wallace B. Jefferson of the Supreme Court of Texas and to Judge Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit. Between 2009 and 2010, Professor Wiseman served as a Fellow in the Texas Solicitor General's Office, focusing on post-conviction litigation before the Fifth Circuit. From 2011-2020 he was the McConnaughay and Rissman Professor at Florida State University College of Law. He has written numerous articles on habeas corpus and post-conviction remedies, and his works on these topics have appeared in the *Minnesota Law Review*, the *Boston College Law Review*, and the *Florida Law Review*. A copy of Professor Wiseman's CV is attached hereto as Exhibit 4.
9. Professor Marceau is a member in good standing of the bar of the State of California, and is admitted to practice before the following federal courts: the United States Supreme Court, the Northern District of California, the District of Arizona, the Ninth Circuit Court of Appeals, the Sixth Circuit Court of Appeals, and the Tenth Circuit Court of Appeals.
10. Professor Wiseman is a member in good standing of the bar of the State of Texas and is admitted to practice before the federal court of the Western District of Texas.

11. University and other affiliations are noted for identification purposes only.

Professors Marceau and Wiseman's brief reflects their own views as scholars only, not the views of any institution. Professors Marceau and Wiseman have not received compensation for their proposed *Amicus Curiae* brief and neither works for, consults, owns shares in, or currently receives funding from any corporation or organization that would benefit from it. They were assisted by counsel for Petitioner-Appellant in mechanical aspects of preparing their proposed brief. Their proposed brief is attached hereto as Exhibit 5.

WHEREFORE, I respectfully request that this Court enter an order: (i) granting the motion of Professors Marceau and Wiseman for leave to file the annexed brief as *Amici Curiae*; (ii) accepting the brief that has been filed and served along with this motion, and; (iii) granting such other and further relief as this Court deems just and proper.

Dated: July 20, 2020

By:

Respectfully submitted,



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*Attorney for Amici Curiae Justin Marceau
and Samuel Wiseman*

EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5

The NonHuman Rights Project
on behalf of HAPPY -against-

Index No. 260441/19

Hon. Alison Y. Tullt

Justice Supreme Court

Brekens, James J.

The following papers numbered 1 to 16 were read on ^{these} ~~this~~ motions Seq. No. 1, 2, 4-12
for Miscellaneous Reliefs noticed on various dates 9/13/19

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that ~~this motion is~~ ^{these motions and} order to show causes, Verified Petition, and related motions are decided in accordance with the Annexed memorandum decision.

Motion is Respectfully Referred to Justice:
Dated:

Dated: 2/18/20

Hon. A. Y. Tullt

J.S.C.

Allison Y. Tullt, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
- ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

C

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

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

INDEX NUMBER: 260441/2019

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,

Present:
HON. ALISON Y. TUITT
Justice

Respondents.

On Calendar of 1/6/2020

The following papers, numbered as follows:

Read on these:

<u>Order to Show Cause, Verified Petition, related papers</u>	<u>1-14</u>
<u>Order to Show Cause with Temporary Restraining Order</u>	<u>15</u>
<u>Motion to Dismiss or Change Venue, related papers</u>	<u>16-21</u>
<u>Motion for a Protective Order, related papers</u>	<u>22-26</u>
<u>Motion for Leave to File Late Papers</u>	<u>27</u>
<u>Motion for Preliminary Injunction, related papers</u>	<u>28-32</u>
<u>Motion to Strike Respondents' Verified Answer, related papers</u>	<u>33-38</u>
<u>Motion for an Order Granting Amici Leave to File an Amicus Curiae Brief</u>	<u>39-46</u>

Upon the foregoing papers, the Order to Show Cause and Verified Petition for Writ of Habeas Corpus and Respondent's motion to dismiss the Petition are consolidated for purposes of this decision. For the reasons set forth herein, the motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the related motions are denied as moot.

Procedural History

This is a habeas corpus proceeding brought by Petitioner, the NhRP on behalf of Happy, a 48 year old Asian elephant situated in the Bronx Zoo, New York. Petitioner commenced the proceeding on October 2, 2018 in Supreme Court, Orleans County by filing a Verified Petition or a Common Law Writ of Habeas Corpus and Order to Show Cause pursuant to CPLR Article 70 on behalf of Happy. The NhRP alleges that Happy is being unlawfully imprisoned in the Bronx Zoo and demands her immediate release to an appropriate elephant sanctuary of which there are two in the United States, both which have agreed to provide lifetime care at no cost to the Bronx Zoo. In lieu of serving an answer to the Petition, the Bronx Zoo moved to change the venue of these proceedings from Orleans County to Bronx County or, in the alternative, to dismiss the proceedings with prejudice. On January 18, 2019, the Orleans County Court granted the branch of the motion to change venue, and the matter was transferred to Bronx County. The parties brought several other motions that were not decided by the Orleans County Court, and were transferred to this Court. Among the motions that the NhRP filed in Orleans County was a preliminary injunction requesting that the Orleans County Court enjoin the Bronx Zoo from removing Happy from the State of New York pending the outcome of this proceeding. Respondents' moved to dismiss the Petition on the grounds that controlling New York law holds that habeas corpus protection under CPLR Article 70 should not be extended to animals as the NhRP fails to cite any legal precedent applicable in the State of New York to support its position. Additionally, the NhRP brought motions to strike Respondents' opposition to Petitioner's proposed Order to Show Cause, to allow the filing of late reply papers, and, for a protective order. There was also a motion of *Amici* to File Brief *Amicus Curiae*. This Court heard oral arguments on these proceedings on August 12, 2019, September 23, 2019, October 21, 2019 and January 6, 2020.

The NhRP seeks the issuance of the Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis of their imprisonment of Happy; upon a determination that

Happy is being unlawfully imprisoned, an Order directing her immediate release from the Respondents' custody to an appropriate sanctuary; and, an award for the NhRP for the costs and disbursements of this action.

The Parties

The NhRP is a not-for-profit corporation, a civil rights organization dedicated to changing “the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal rights, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.” <https://www.nonhumanrights.org/who-we-are/>. For the past 20 years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP has filed similar cases in several other New York Courts with the goal of obtaining legal rights for chimpanzees, elephants, and ultimately for other animals.

Respondent the Wildlife Conservation Society (“WCS”) is a not-for-profit corporation, headquartered at the Bronx Zoo, whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education and inspiring people to value nature. Opened in 1899, the Bronx Zoo, a WCS park, cares for thousands of endangered or threatened animals and provides experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos. Respondent James Breheny is WCS’ Executive Vice President and General Director of Zoos and Aquariums, and is the Director of the Bronx Zoo.

Happy the Elephant

Happy is a 48 year old female Asian elephant who was captured in the wild and brought to the United States when she was one year old. In 1977, Happy and another elephant named Grumpy arrived at the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas”. For the next 25 years, Happy and Grumpy lived together. The Bronx Zoo had other elephants, and they were kept two by two. In 2002, the Bronx Zoo paired Happy and Grumpy with two other elephants, Patty and Maxine in the same elephant exhibit. Patty and Maxine attacked Grumpy who tumbled and fell, and was seriously injured. Grumpy never recovered from her injuries and was euthanized. Thereafter, the Bronx

Zoo separated Happy from them, and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. Sammie suffered from severe liver disease and was euthanized in 2006. The Bronx Zoo announced after the death of Sammie that it would not acquire any new elephants. Since 2006, Happy has been living alone at the Bronx Zoo. The NhRP argues, in essence, that Happy has been imprisoned in solitary confinement, notwithstanding the uncontroverted scientific evidence that Happy is an autonomous, intelligent being with advanced cognitive abilities akin to human beings.

The NhRP's arguments

The NhRP brings the instant proceeding alleging that Happy is being unlawfully imprisoned by Respondents in the Bronx Zoo. Happy has been living alone in an one-acre enclosure within the Bronx Zoo since Sammie's death in 2006. The NhRP argues that Happy has been, and continues to be, denied direct social contact with any other elephants, and spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies. The NhRP argues that whether Respondents are in violation of any federal, state or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. The NhRP further contends that this habeas corpus case is neither an animal protection, nor animal welfare case. The Petition does not allege that Happy is illegally confined because she is kept in unsuitable conditions, nor does it seek improved welfare for Happy. Rather, this Petition seeks that this Court recognize Happy's alleged common law right to bodily liberty, and order her immediate release from Respondents' current and continued alleged unlawful detention so that her liberty and autonomy may be realized. NhRP argues that it is the fact that Happy is imprisoned at all, rather than her conditions of her imprisonment, that is unlawful.

The NhRP seeks Happy's immediate release from her imprisonment to a permanent elephant sanctuary, two of which have agreed to take Happy: the Professional Animal Welfare Society ("PAWS") in California, and The Elephant Sanctuary in Tennessee. In support of its application, the NhRP submits expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants: the affidavit of Joyce Pool; the supplemental affidavit of Joyce Pool; the joint affidavit of Lucy Bates and Richard W. Byrne; the affidavit of Karen McComb; and, the affidavit of Cynthia J. Moss. The NhRP also submits the affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In his affidavit, Ed

Stewart, President and Co-Founder of PAWS, states that PAWS has agreed to provide permanent sanctuary to Happy should she be released.

The NhRP submits its expert affidavits which demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of particular communication; wide variety of gestures, signals and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.

The NhRP's experts state that African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each is a component of autonomy. The experts opine that African and Asian elephants are autonomous, as they exhibit self-determination behavior that is based on a freedom of choice. As a psychological concept, it implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness. The NhRP further alleges that Happy is the first elephant to pass the mirror self-recognition-test ("MSR"), considered to be an indicator of an animal's self-awareness and is thought to correlate with higher forms of empathy and altruistic behavior. As do humans, Asian elephants exhibit MSR, which is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror. If the individual

uses the mirror to investigate the mark, the individual must recognize the reflection of herself. The NhRP experts argue that MSR is significant because it is a key identifier of self-awareness, which is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. By demonstrating they can recognize themselves in a mirror, the experts claim that elephants must be holding a mental representation of themselves from another perspective, and thus must be aware that they are a separate entity from others.

Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members. Having a mental representation of the self, which is a pre-requisite for MSR, likely confers an ability to comprehend death. Wild African elephants have been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead elephants. Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead, they engage in more "mournful" or "grief stricken" behavior, such as standing guard over the body with a dejected demeanor and protecting it from predators. They have been observed covering the bodies of their dead with dirt and vegetation. Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf. The general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations. These behaviors are akin to human responses to the death of a close relative or friend, and demonstrate that elephants possess some understanding of life and the permanence of death. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, assisting injured ones to stand and walk, or helping calves out of rivers or ditches with steep banks. In an analysis of behavioral data collected from wild African elephants over a 40 year continuous field study, the experts concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand physical competence and emotional state of others, and attribute goals and mental states to other.

The Bronx/WCS' arguments

Respondents move to dismiss the Petition on the grounds that the NhRP, to no avail, has previously prosecuted several unsuccessful lawsuits on behalf of chimpanzees. Controlling New York precedent provides that animals are not entitled to habeas corpus protection under CPLR Article 70. Respondents argue

that contrary to the NhRP allegations, Happy is not unlawfully imprisoned at the Bronx Zoo. The AZA Standards for Elephant Management and Care and the Animal Welfare Act are the two primary standards for the care and management of elephants in AZA-accredited institutions in the United States. Respondents argue that the Bronx Zoo's compliance with these standards ensures that Happy is provided with excellent care focused on her well-being. The AZA Standards require that "[o]utdoor habitats must provide sufficient space and environmental complexity to both allow for and stimulate natural behavioral activities and social interactions resulting in healthy and well-adapted elephants." The Standards include requirements for variation in an elephant's environment including varied terrain to allow for exercise and "foraging, wallowing, bathing, digging, and resting." "While outdoors and weather permitting, elephants must have regular access to water sources, such as a [sic] pools, waterfalls, misters/sprinklers, or wallows that provide enrichment and allow the elephants to cool and/or bathe themselves." Additional standards are included for subjects such as elephant diet, exercise, medical management, foot care, and skin care. Daily behavioral assessments of elephants must be conducted and recorded in a daily log. Elephant care professionals, managers, and directors who work for the Bronx Zoo are also required to complete AZA's Principles of Elephant Management courses. To remain an AZA-accredited zoo, the Bronx Zoo submits annual reports regarding its elephant program, and is regularly inspected by AZA representatives and individuals from peer institutions. An elephant specialist is included in every AZA accreditation inspection of the Bronx Zoo. On April 27, 2018, in response to the Bronx Zoo's most recent report, the AZA confirmed that the Bronx Zoo is in compliance with the AZA Standards for elephants.

In addition, the Bronx Zoo is regulated under the Animal Welfare Act and Animal Welfare Regulations. Although the Animal Welfare Act does not contain any elephant-specific requirements, the Act's standards and regulations ensure that animals receive humane care and treatment at regulated facilities. Among its requirements, the Animal Welfare Act requires the Bronx Zoo to employ an attending veterinarian who shall provide adequate care, and maintain compliance with standards for "the humane handling, care, treatment, housing, and transportation of animals. Compliance with the Animal Welfare Act is overseen by the U.S. Department of Agriculture ("USDA") Animal Care. USDA inspectors make routine, unannounced inspections of facilities like the Bronx Zoo at least once a year. Respondents argue that Happy's living conditions are therefore not "unlawful" according to applicable standards.

Happy's routine care program incorporates the AZA Standards and requirements under the

Animal Welfare Act. On a daily basis, Happy's appetite, food intake, stool appearance and quantity, overall activity, and responsiveness to keepers are monitored. Happy also receives baths on a daily basis. Everyday Happy's keepers assess her body condition, provide her with various forms of enrichment that encourage mental and physical stimulation, and engage in positive reinforcement training sessions that help to maintain behaviors used to facilitate Happy's care. On a regular basis, the Bronx Zoo conducts voluntary blood draws and trunk washes, as well as weigh-ins to monitor Happy's health. Weather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming and engage in other species-typical behavior, and also has regular overnight access to a large outdoor space. Patrick Thomas, PhD, Vice President and General Curator of WCS and Associate Director of the Bronx Zoo, states that Happy has developed a familiarity and comfort with her keepers, and she recognizes her surroundings as her familiar, longstanding environment. It is his opinion that suddenly taking her away from this environment and introducing entirely new surroundings without the support of her keepers could inflict long-term damage on Happy's welfare. Mr. Thomas states that Happy has also shown in past experiences that she does not respond well to even temporary, short moves within the Bronx Zoo. He believes that transporting Happy the long distance from the Bronx Zoo across the country to the sanctuary in California would cause severe stress and potentially inflict long-term physical harm. Based on his 40 years of experience and responsibilities in supervising the care of animals at the Bronx Zoo, including Happy, to the best of his knowledge, Mr. Thomas opines that Happy is currently healthy and well-adapted to her surrounding in the Bronx Zoo.

Paul P. Calle, WCS's Vice President for Health Programs, Chief Veterinarian and Director of the Zoological Health Program based at the Bronx Zoo, states that the Bronx Zoo undertakes a multitude of efforts to ensure Happy's continued physical and psychological well-being and health. Happy is given visual checks by the care staff several times each day and, on occasion when an issue is identified, the veterinary staff responds appropriately to any concern that is noted. The veterinary staff conducts regular health assessments of Happy through body condition evaluations, oral, dental and foot examinations. Baseline toe x-rays of Happy's feet were completed, and are repeated for comparative analysis, on an as-needed basis to address particular areas of concern as they arise. Veterinary staff are consulted by keepers regarding nail and pad conditions, with veterinary participation in trims, evaluations, or treatments as necessary. Veterinary staff participate in development and maintenance of medical behaviors (trunk wash, oral/dental evaluation, blood sampling, foot

work, presentation for injections or x-rays) in conjunction with Happy's animal keeper staff. Happy's health care is recorded and documented in her individual medical record, and documented in the Bronx Zoo's annual AZA Elephant Program Annual Report. Mr. Calle states that based upon his responsibilities in providing veterinary care for almost 30 years to animals at the Bronx Zoo, including Happy, and to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. During his experience with Happy, she has become very distressed during short moves from one area of the Zoo to another. Mr. Calle opines that given Happy's age and longstanding familiarity and attachment to her surroundings, a long-distance move, such as that proposed by the NhRP to California, would cause substantial stress to Happy. Imposing this move on Happy would create a serious risk to her long-term health that Mr. Calle does not believe is justified. In his professional opinion, Happy's health and well-being would not be best served by moving her to an animal sanctuary such as the facility operated by the PAWS Sanctuary.

James J. Breheny, Director of WCS, argues that the NhRP's expert affidavits provide little to no relevant information regarding whether Happy is "unlawfully imprisoned" at the Bronx Zoo. In substance, the affidavits are almost verbatim duplicates of each other and barely address Happy. The affidavits the NhRP relies upon only provide generalized, anecdotal discussions of African and Asian elephants as observed in the wild. Mr. Breheny argues that the affidavits posit that elephants are generally better suited to the company of other elephants, without accounting for the particular needs, wants, and temperament of any one elephant. None of the expert affidavits submitted in support of the NhRP's Petition make any reference to Happy, her current state of well-being, or her needs as a 48 year old Asian elephant who has lived for over 40 years at the Bronx Zoo. Mr. Breheny argues that elephants who have lived at zoos for long periods of time are significantly different from elephants in the wild, and the characteristics of one cannot generally be attributed to the other, therefore, the NhRP's supporting expert affidavits have limited applicability to Happy and her specific needs. In contrast, the Bronx Zoo employees, including Mr. Breheny himself, have been caring for Happy's interest and well-being, knowing her individually for over 40 years.

The Bronx Zoo has significant resources for the care and well-being of Happy, including a large number of highly trained and experienced staff that provides excellent care and medical attention for Happy, as well as the sustained financial resources of a major institution. Happy also has longstanding relationships and familiarity with her caregivers and surroundings at the Bronx Zoo, where she has lived for nearly all of her life.

Mr. Breheny alleges that the NhRP does not take into consideration Happy's unique characteristics, personality and needs. For example, there is Happy's history of not interacting well with other elephants at the Bronx Zoo, which is why she is housed separately since her companion died. The NhRP also fails to consider that Happy may not socialize well with the elephants in the sanctuary due to her alleged acrimonious behavior. Based upon past experiences with Happy, the Bronx Zoo knows that she becomes particularly distressed by even short moves within the Zoo. Based upon his expertise and decades-long experience with Happy, Mr. Breheny states his professional opinion that Happy's interest would not be best served by moving her to an animal sanctuary.

The NhRP Counter-Arguments

In response, the NhRP argues that the Bronx Zoo imprisons Happy in a tiny, cold, lonely, "un-elephant-friendly", an unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary. They argue that the Bronx Zoo's unlawful imprisonment of Happy, an autonomous, extraordinarily cognitively-complex being, violates her common law right to bodily liberty. The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds. The NhRP specifically demands that this Court determine that Happy possesses the common law right to bodily liberty and immediate release from her unlawful imprisonment so that her autonomy may be realized. The NhRP argues that the notion that living on a 2,300 acre sanctuary, such as PAWS is comparable to being imprisoned in the Bronx Zoo's approximately one acre elephant exhibit is absurd. The NhRP contends that the purported experts on behalf of the Bronx Zoo have not published or submitted for publication any peer-reviewed articles about elephants, nor have they studied or examined any elephants in the wild or in any other zoo. Similarly, none of the Bronx Zoo's affiants present any evidence that they have studied any wild elephant, or know about an elephant's basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.

The NhRP also takes issue with Mr. Calle's statement that to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. Mr. Calle fails to properly address the very

small space available to Happy at the Bronx Zoo. There are three possible locations for elephants at the Zoo: an indoor “holding area” or elephant barn; a barren cemented walled outdoor elephant yard that appears to be 0.05 of an acre; and, a Zoo exhibit, listed as being only 1.15 acres. Since the Bronx Zoo elephants are incompatible, the naturalistic exhibit area has to be shared on a rotational basis. At night, Happy is usually in a small pen in the barn or in the barren outdoor yard. During most days, weather permitting, she is also in the barren outdoor elephant yard. Dr. Poole notes that it is difficult for members of the public to obtain much information about Happy’s behavior other than viewing short videos of her captured by visitors to the Zoo. Dr. Poole states that in these videos, Happy is engaged in only five activities/behavior: standing facing the fence/gate; dusting, swinging her trunk in stereotypical behavior; standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior; and once, eating grass. According to Dr. Poole, only two of these activities are natural, dusting and eating grass, and being alone in a small place, there is little else for her to do.

Dr. Poole found that Happy has no general problem getting along with other elephants, and opines that Happy is not anti-social, per se, but the historical information indicates that Happy was once attacked by Maxine and Patty and there was a risk that it could happen again. The NhRP argues that in the 40 years that she has been at the Bronx Zoo, Happy has only been given a choice of four companions, with whom she was forced to share a space that for an elephant is the equivalent of the size of a house. Two of these companions she liked and lost, and the other two attacked her. Dr. Poole opines that this is a confirmation of the Bronx Zoo’s inability to meet Happy’s basic needs. Moreover, Dr. Poole notes that the claims that Happy does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she does not know how to socialize; and, that her unique personality is problematic, have often been disproven. Dr. Poole states that elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS. Dr. Poole then provides examples of elephants similar to Happy who, when moved from a zoo to a sanctuary, almost immediately blossomed into happy, successful, autonomous, and socially and emotionally fulfilled beings. Dr. Poole opines that such space permits autonomy and allows elephants to develop healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior.

The Law

New York Courts have addressed the question of “personhood” with respect to chimpanzees. The NhRP has brought four identical, separate habeas corpus proceedings on behalf of “imprisoned chimpanzees” in four different counties, each within a different department of the Supreme Court, Appellate Division. The NhRP argued that chimpanzees are entitled to habeas corpus relief as their human-like characteristics render them “persons”. In each case, the trial court declined habeas corpus relief for the chimpanzees, and the NhRP appealed each decision. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief.

The NhRP has standing to file the Petition for habeas corpus on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “[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...”. “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, ... petitioner [NhRP] has met its burden of demonstrating that it has standing.” The Nonhuman Rights Project, Inc. v. Stanley Jr. M.D., 2015 WL 1804007 (N.Y. Sup. Ct. 2015), amended in part, The Nonhuman Rights Project, Inc. v. Stanley, 2015 WL 1812988 (N.Y. Sup. 2015). Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, the Courts found that NhRP had standing. See, Id.; People ex rel Nonhuman Rights Project Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014); Nonhuman Rights Project, Inc. ex rel Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015); Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), leave to appeal den., 31 N.Y.3d 1054 (2018); Nonhuman Rights Project on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054 (2018); Nonhuman on Behalf of Tommy v. Lavery, 31 N.Y.3d 1065 (2018). Thus, this Court finds that the NhRP has standing to bring the habeas corpus proceeding on behalf of Happy.

However, on the question of whether an animal may be a “person”, the Courts have held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. In People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014), the appeal presented the novel question of whether a chimpanzee is a “person” entitled to the rights and protections afforded by the writ of habeas corpus. In Lavery, like here, the NhRP did not allege that respondents were in violation of any state or federal statutes respecting the domestic possession of wild animals. Instead it argued that a chimpanzee is a

“person” entitled to fundamental rights.

According to petitioner, while respondents are in compliance with state and federal statutes, the statutes themselves are inappropriate. Yet, rather than challenging any such statutes, petitioner requests that this Court enlarge the common-law definition of “person” in order to afford legal rights to an animal. We decline to do so, and conclude that a chimpanzee is not a “person” entitled to the rights and protections afforded by the writ of habeas corpus. Id. at 249

* * *

Not surprisingly, animals 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... Petitioner does not cite any precedent-and there appears to be none-in state law, or under English common law, that an animal could be considered a “person” for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity. Id. at 249-250

* * *

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that 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 251

(Internal citations omitted).

In The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015), the NhRP brought an Article 70 proceeding under the common law for a writ of habeas corpus, on behalf of Hercules and Leo, two chimpanzees in the custody of respondent State University of New York at Stony Brook, seeking an Order directing their release and transfer to a sanctuary in Florida. The conditions under which Hercules and Leo were confined were not challenged by NhRP and it did not allege that respondents are violating any laws. While the Court was extremely sympathetic to the plight of the NhRP, on behalf of Hercules and Leo, it nonetheless held that given the Third Department precedent to which it is bound, the chimpanzees are not “persons” entitled to rights and protections afforded by the writ of habeas corpus, and the petition was denied, and the proceeding was dismissed.

In Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015), *lv. denied* 26 N.Y.3d 901 (2015), the NhRP sought a writ of habeas corpus on behalf of another chimpanzee, Kiko, arguing that he was illegally confined because he was kept in unsuitable conditions, and sought to have him

placed in a sanctuary. The Court did not address the question of whether a chimpanzee was deemed a person for habeas corpus purposes, or whether the NhRP had standing to seek habeas corpus on the chimpanzee's behalf. The Fourth Department affirmed the dismissal of the petition, holding that habeas corpus did not lie where the NhRP sought only to change the conditions of confinement rather than the confinement itself. In this matter, the NhRP sought to transfer Kiko to a different facility, a sanctuary, that it deemed more appropriate. The Court held that even if a chimpanzee was deemed a person for habeas corpus purposes, and even if the NhRP had standing to seek habeas corpus relief on Kiko's behalf, habeas corpus did not lie as it is well-settled that habeas corpus relief must be denied where the subject of the petition is not entitled to immediate release. Since the NhRP did not seek the immediate release of Kiko, but sought to transfer him to a sanctuary, habeas corpus does not lie. Here, the trial court declined to sign the order to show cause seeking habeas corpus relief, and the Fourth Department affirmed.

While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal. Id. at 395-396.

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense". Id. at 396.

* * *

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community. Id.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no

adequate facilities to house [them] in proximity to the [c]ourt.” Instead, petitioner requests that respondents be ordered to show “why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary... Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court. Id. at 397.

(Internal citations omitted).

In Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), lv denied 31 N.Y.3d 1054 (2018), the NhRP filed two petitions for habeas corpus on behalf of two chimpanzees, Tommy and Kiko. Supreme Court declined to extend habeas corpus relief to the chimpanzees. The NhRP appealed and the Appellate Division, First Department affirmed, holding that the human-like characteristics of chimpanzees did not render them “persons” for purposes of habeas corpus relief. The Court noted that any position to the contrary is without legal support or legal precedent. The asserted cognitive and linguistic capabilities of chimpanzees did not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. The Court further held that even if habeas corpus was potentially available to chimpanzees, writ of habeas corpus did not lie on behalf of the chimpanzees where the NhRP did not challenge the legality of the detention, but merely sought their transfer to a different and more appropriate facility.

Analysis

Regrettably, in the instant matter, this Court is bound by the legal precedent set by the Appellate Division when it held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. Lavery, 54 N.Y.S.3d at 392. The First and Fourth Departments did not address the question of personhood for chimpanzees. For purposes of the decisions, both Appellate Departments noted that even if the NhRP had standing to bring the habeas corpus proceeding, and habeas corpus was potentially available to chimpanzees, the NhRP did not meet its burden for habeas corpus relief because it did not challenge the legality of the chimpanzees' detention, but merely sought transfer of the chimpanzees to sanctuaries. Thus, both Courts assumed, for purposes of the argument, that the NhRP had standing and that habeas corpus was available to the chimpanzee. However, the Third Department squarely addressed the question and held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus.

This Court is extremely sympathetic to Happy's plight and the NhRP's mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. Notwithstanding, in light of the Appellate Division, Third Department's holding that animals are not "persons", this Court is also constrained to find that Happy is not a "person" entitled to the writ of habeas corpus. In Lavery, 31 N.Y.3d 1054 (2018), the NhRP motion for leave to appeal the Third Department decision to the Court of Appeals was denied. However, in a concurring opinion, Justice Fahey noted that the denial of leave to appeal was not a decision on the merits of the NhRP claim. He stated that "[t]he question will have to be addressed eventually. Can a non-human 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?" Id. at 1057. Justice Fahey further noted that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." Id. at 1059.

Conclusion

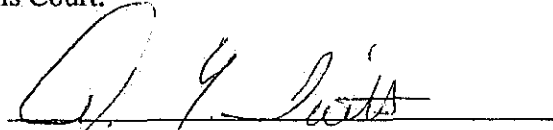
This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a "person" and is not being illegally imprisoned. As stated by the First Department in Lavery, 54 N.Y.S.3d at 397, "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process". The arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot. Nevertheless, in order to do so, this Court would have to find that Happy is a "person" and, as already stated, we are bound by this State's legal precedent.

Accordingly, Respondents' motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the motions are denied as academic or moot.

This constitutes the decision and Order of this Court.

Dated:

February 18, 2020



Hon. Alison Y. Tuitt

EXHIBIT 2

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

**Index No.: 260441/2019
(Bronx County)**

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

NOTICE OF APPEAL

Petitioner,

Hon. Justice Alison Y. Tuitt
Justice Supreme Court
Bronx County

-against-

JAMES J. BREHENY, in his official capacity as the
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,

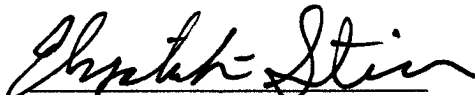
Respondents.

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PLEASE TAKE NOTICE that the Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of an elephant named Happy, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from the decision and Order of the Supreme Court of the State of New York, County of Bronx (Hon. Justice Tuitt), dated February 18, 2020 and entered in the office of the Clerk of the County of Bronx on February 19, 2020, which granted Respondents' motion to dismiss the NhRP's Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause. Petitioner appeals from each and every part of that decision and Order.

Respectfully submitted,

Dated: 2/25/2020


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Attorneys for Respondents James J. Breheny and Wildlife Conservation Society

EXHIBIT 3

Justin F. Marceau

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2255 E. Evans Avenue, Denver 80208

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(617) 256-9073

ACADEMIC APPOINTMENTS

University of Denver, Sturm College of Law

<i>Brooks Institute Faculty Research Scholar</i>	2019- present
<i>Animal Legal Defense Fund Professor of Law</i>	2015 - 2019
<i>Professor</i>	2015 - present
<i>Associate Professor</i>	2012 - 2015
<i>Assistant Professor</i>	2008 - 2012

Courses: Animal Law; Criminal Law; Criminal Procedure (Advanced and Basic); Habeas Corpus; Death Penalty; Constitutional Litigation.

Harvard Law School

Visiting Professor Spring 2020

Courses: Criminal Procedure; Animal Law.

EDUCATION

Harvard Law School June 2004
J.D. cum laude

Boston College May 2000
B.A. summa cum laude, Class rank: 1 in class of approximately 2,200
Bapst Medal recipient as the outstanding student in philosophy

PUBLICATIONS

Monographs

- BEYOND CAGES: ANIMAL PROTECTION AND CRIMINAL PUNISHMENT (Cambridge 2019).
- UNDERCOVER INVESTIGATIONS, DEMOCRACY, AND FREE SPEECH (Cambridge 2020), with Alan Chen.

- CARCERAL LOGICS (Cambridge 2021), with Lori Gruen.

Textbooks & Course Materials

- CASES AND MATERIALS ON THE DEATH PENALTY, FOURTH EDITION (Thomson/West) (2016) (with three co-authors).
- DEATH PENALTY IN A NUTSHELL, FIFTH EDITION (THOMSON/WEST) (2016) (with two co-authors).
- FEDERAL HABEAS CORPUS: CASES AND MATERIALS, SECOND EDITION (Carolina Academic Press 2011) (with two co-authors).

Book Chapters

- *Non-Human Habeas*, WRONGFUL CONVICTIONS AND THE DNA REVOLUTION: REFLECTIONS ON TWENTY-FIVE YEARS OF FREEING THE INNOCENT (Cambridge University Press 2017) (co-authored with Steve Wise).
- *FREE SPEECH AND FUR*, (Palgrave 2020 (forthcoming) (co-authored with Chloe Gleichman and Kate Stanford).

Articles

- *Whom the State Kills*, HARV. C.R.-C.L. L. REV. (forthcoming 2020).
- *A Quantitative Analysis of Denver's Pit-Bull Ban*, ____ Animal L. Rev. ____ (forthcoming 2020) (co-authored).
- *Friends of Every Friendless Beast: Carceral Animal Law and the Funding of Prosecutors*, CANADIAN JOURNAL OF COMPARATIVE AND CONTEMPORARY LAW 5(1) (2019) (peer reviewed).
- *How the Animal Welfare Act Harms Animals*, 69 HASTINGS L.J. 925 (2018).
- *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 695 (2018) (co-authored).
- *Free Speech and Democracy in the Video Age*, 116 COLUMBIA LAW REVIEW 991 (2016) (co-authored).

- *Disquieting Discretion*, 92 DENV. U. L. REV. 431 (2016) (co-authored).
- *High Value Lies*, 69 VANDERBILT L. REV. 435 (2016) (co-authored).
- *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981 (2015) (co-authored).
- *Killing for your Dog*, 83 GEO. WASH. L. REV. 943 (2015).
- *Is Guilt Dispositive? Federal Habeas After Martinez*, 55 WM. & MARY L. REV. 2071 (2014).
- *Gideon's Shadow* 122 YALE L.J. 2482 (2013).
- *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545 (2013) (co-authored).
- *Many are Eligible Few are Chosen*: 84 U. COLO. L. REV. 1069 (2013) (co-authored).
- *Vicarious Aggravators*, 65 FLA. L. REV. 769 (2013) (co-authored).
- *Plurality Decisions*, 45 CONN. L. REV. 933 (2013).
- *The Ring-Cycle: An Empirical Study of Remands under Ring*, 44 ARIZ. ST. L. J. 1061 (2012).
- *Embracing a New Era of Ineffective Assistance Counsel*, 14 U. PENN. J. CONST. L 1161 (2012).
- *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH. L. REV. 277 (2012).
- *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85 (2012).
- *The Facts About Ring v. Arizona*, 13 U. PENN. J. CONST. L. 529 (2011).
- *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687 (2011).
- *Don't Forget Due Process*, 61 HASTINGS L.J. 1 (2010).
- *The Facts About Ring v. Arizona*, 13 U. PENN. J. CONST. L 529 (2010) (co-authored).
- *Lifting the Haze on Baze*, 41 ARIZ. ST. L. J. 159 (2009).
- *Un-Incorporating the Bill of Rights*, 98 J. CRIM. L. & CRIMINOLOGY 1231 (2008).
- *Deference and Doubt: The Interaction of AEDPA §§ 2254(d)(2) & (e)(1)*, 82 TUL. L. REV. 385 (2007).

Essays & Other Publications

- *Friend of Every Friendless Beast*, 5 *Canadian Journal of Comparative Contemporary Law*, 234 (2019).
- *The Truth Hurts: A Response to George Brauchler and Rich Orman*, 94 *DENV. U. L. REV.* 363 (2017).
- *Truth and Nothing but the Truth About Colorado's Death Penalty*, 93 *DENV. U. L. REV.* 715 (2016) (co-authored).
- *Remember Not to Forget Furman*, 100 *IOWA LAW BULLETIN* 117 (2015) (co-authored).
- *Ag Gag Past, Present and Future*, 38 *SEATTLE U. L. REV.* 1317 (2015).
- *Ag Gag Laws Are Unconstitutional*, *Law360* (August 28, 2015).
- *Double Reasonableness and the Fourth Amendment*, 68 *U. MIAMI L. REV.* 589 (2014).
- *The Cost of Colorado's Death Penalty*, 3 *DENV. CRIM. L. REV.* 153 (2013) (co-authored).
- *The Colorado Counsel Conundrum: Misdemeanors, Plea Bargaining and the Right to Counsel*, 89 *DENV. U. L. REV.* 327 (2012).
- *The Freezing of the Fourth Amendment*, *SEARCH & SEIZURE LAW REPORT* (2012).
- *In Memorium: Erik Bluemel*, 87 *DENV. U. L. REV.* I (2009).
- *A Little Less Conversation, A Little More Action: Exploring And Forecasting The Trend Of More Frequent And Severe Prosecutions Under The FCPA*, 12 *FORDHAM J. CORP. & FIN. L.* 285 (2007).
- Book Review, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA*, 54 *JUL. FED. LAW.* 43 (2007).
- *Exploring the Intersection of Effectiveness & Autonomy*, 42 *CAL. W. L. REV.* 183 (2006).

OTHER PROFESSIONAL EXPERIENCE

Federal Public Defender, District of Arizona

2006 - 2008

Assistant Federal Public Defender, Capital Habeas Unit

- Argued and briefed cases in federal district court, the Ninth Circuit and Sixth Circuit Court of Appeals

- Co-counsel on a case argued before the U.S. Supreme Court regarding ineffective assistance of counsel
- Presenter at the annual capital habeas corpus conference for all federal defender offices

Heller Ehrman LLP, San Francisco

2005 - 2006

Associate

- Represented *pro bono* a Liberian family in asylum proceedings; Represented clients in the firm's white collar defense and securities law practice

Ninth Circuit Court of Appeals, The Honorable Sidney R. Thomas

2004 - 2005

Law Clerk

Federal Bureau of Investigation, Washington D.C.

2002

Honors Intern

- Worked in the Civil Rights Division and the Office of General Counsel

College de la Sainte Famille, Cairo, Egypt

2000 - 2001

English Teacher (volunteer)

SELECTED PRESENTATIONS

- March 2020, Harvard Law School, Civil-Rights-Civil Liberties Law Review Symposium, *Updating the Baldus Data: Race and Executions*.
- March 2020, New York University *Beyond Cages*.
- March 2020, Harvard Law School, Animal Law Program, *Animal Rights and the Criminal Process*.
- February 2020, Boston College Law School, Faculty Colloquium, *Beyond Cages*.
- November 2019, *Carceral Logics*, hosted a workshop at the University of Denver.
- May 2019, Stanford Inn, Mendocino California, panelist and moderator, Brooks Institute Animal Law and Animal Studies Summit.

- April 2019, DePaul University College of Law, Keynote, Animal Law Symposium.
- March 2019, Lewis & Clark Law School, Animal Law Symposium.
- February 2019, University of Toronto Animal Law Speaker Series, *Beyond Cages*.
- February 2019, Faculty Colloquium University of Oklahoma College of Law, *Beyond Cages*.
- January 2019, Legislative Testimony to the Colorado Judiciary Committee.
- November 2018, National Association of Canadian Prosecutors Annual Conference.
- September 2018, UN Environment Animal Welfare Conference, Panel Chair for discussion on factory farming.
- July 2018, Oxford Center for Animal Ethics, Oxford University, Carceral Animal Law.
- February 2018, Beyond Cages, a workshop hosted by Harvard Law School for my manuscript.
- January 2018, Social Justice and Social Movements, Denver Law Review Symposium.
- July 2017, Oxford Center for Animal Ethics, Oxford University, Fur and Free Speech.
- June 2017, Northwestern University, Carceral Animal Law, Searle Center Roundtable.
- December 2017, Harvard Law School Roundtable on the 50th Anniversary of the Animal Welfare Act, How the Animal Welfare Act Harms Animals.
- November 2017, Animal Law Conference, Animals as Art and the First Amendment.
- February 2017, Faculty Colloquium Speaker, Distinguished Lecture Series, McGeorge Law School, Lies and Free Speech.
- January 2017, Sundance Film Festival, Free Speech and Animal Protection.
- November 2016, The AWA at 50 Workshop, Harvard Law School, Animal Law Program.
- October 2016, Art, Animals and the First Amendment, Animal Law Conference.
- March 2016, Animals, Law, and Religion Conference, Harvard Law School.
- July 2015, Northwestern University, Free Speech and Animal Law, Searle Center Roundtable.
- July 2015, Litigating Ag-Gag Cases, Arizona State Bar Convention.
- July 2015, Invited Speaker for National Federal Habeas Training and CLE.

- March 2015, *Ag Gag 2.0*, Seattle University Law Review Symposium.
- January 2015, *Killing for Your Dog*, AALS section on Animal Law.
- November 2014, *Killing for Your Dog*, University of Toronto, Critical Analysis of Law.
- October 2014, *Ag Gag Litigation*, Lewis & Clark Law School, Animal Law Conference.
- October 2014, *Right to Counsel*, Faculty of Federal Advocates (Jackson Hole, WY).
- September 2014, *Confined Agricultural Feeding Operations Conference*, Loyola Law School.
- August 2014, *Right to Counsel in Federal Courts*, Faculty of Federal Advocates (Denver).
- May 2014, *Whales in the Courtroom*, University of Denver International Law Panel discussion.
- January 2014, *Defense of Animals*, SMU Dedman School of Law Criminal Law Symposium.
- September 2013, *Fourth Amendment Reasonableness*, University of California, Davis Southwest Criminal Law Conference.
- September 2013, *Ag Gag Laws*, Stanford Law School, Animal law Conference.
- March 2013, *Gideon's Shadow*, Yale Law School conference commemorating the 50th Anniversary of *Gideon v. Wainwright*.
- September 2012, Delivered prepared comments on another professor's Fourth Amendment article, Southwest Criminal Law Conference, University of Nevada, Las Vegas.
- March 2012, *Right to Counsel Without Remedy*, Texas Tech. Law School, Annual Criminal Law Symposium.
- March 2012, *The Ring-Cycle*, Arizona State University Symposium.
- October 2011, *Upward Flowing Precedent: Pluralities as Precedent without Precedential Value*, Faculty Colloquium Phoenix School of Law.
- October 2011, *Plurality Decisions and the Constitution*, Presented to a conference of Arizona Judges and Attorneys.
- September 2011, *Challenging Habeas Processes Rather than Results*, Southwest Criminal Law Conference, University of California Irvine.

- April 2011, Moderator, Law and Neuroscience Conference hosted by the University of Denver Law Review.
- March 2011, *Remedying Pretrial Ineffective Assistance of Counsel*, informal work in progress, University of Denver Sturm College of Law.
- September 2010, *The Slow Procedural Death of the Fourth Amendment*, Rocky Mountain Junior Scholars Forum, University of Utah.
- September 2010, Constitution Day Presentation hosted at the Korbel School of International Studies.
- October 2009, *Don't Forget Due Process: The Path Not (yet) Taken in §2254 Adjudications*, Junior Federal Courts Conference, Michigan State University.
- September, 2009, *The Ring Cycle: What Do We Know About Juries, Weighing and Death?* Southwest Criminal Law Conference University of Arizona. (presented with Sam Kamin).

Court Admissions

- California
- Northern District of California
- District of Arizona
- Ninth Circuit Court of Appeals
- Sixth Circuit Court of Appeals
- Tenth Circuit Court of Appeals
- U.S. Supreme Court

Honors and Awards

Named by a proclamation of Governor Jared Polis, Colorado, to serve as an inaugural member of the People for Animal Welfare Committee (PAW). (2019)

President, Animal Law Section of the Association of American Law Schools (AALS) (2018).

Justice for Animals Award (*People for the Ethical Treatment of Animals*) (2018)

Appointed as Reporter for the U.S. Court of Appeals for the Tenth Circuit's criminal jury instruction committee (2017)

Vermont Law School, Distinguished Scholar in Residence (Summer 2016)

Gideon Award (*Colorado Criminal Defense Bar*) (2014)

Awarded Research Professorship (2012-13)

AALS Teacher of the Year (2011)

Outstanding Professor (2010)

Mentorship Award (2010)

Additional Legal Experience & Other Community Engagement

Significant Academic Service

Chair, Promotion and Tenure Committee, (2017-2018); Chair of Faculty Appointments (2013-14); Faculty Executive Committee; Lateral Appointments Committee; Strategic Planning Committee.

Litigation

Served as the attorney of record or primary lawyer in more than a dozen cases since joining the legal academy. The cases have ranged from trial court proceedings, to federal appellate briefing and arguments, to amicus briefs. My last federal appellate argument was in March of 2019.

Expert Witness and Consulting

Retained in both criminal and civil cases, including as a testifying expert.

Animal Legal Defense Fund

Of Counsel (2012- 2018).

Angel Covers

Board of Directors for an international non-profit organization based in Colorado that builds and supports orphanages. (2010-2013).

Emergency Medical Technician (EMT), Wilderness-EMT (W-EMT).

EXHIBIT 4

Samuel R. Wiseman

Professor of Law, Penn State Law - University Park
Lewis Katz Building
University Park, PA 16802
swiseman@psu.edu
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EDUCATION

Yale Law School, New Haven, Connecticut
J.D., June 2007

Yale University, New Haven, Connecticut
B.A., History, *summa cum laude*, May 2003

AREAS OF ACADEMIC SPECIALTY

Criminal Procedure, Criminal Law, Constitutional Law, Food Law

ARTICLES

Federalism for the Worst Case, IOWA. L. REV., forthcoming (with David Landau and Hannah Jacobs Wiseman)

Food Labeling and the Environment, 34 J. Envtl. L. & Litig. 1 (2019) (with Hannah Jacobs Wiseman)

Bail and Mass Incarceration, 53 GA. L. REV. 235 (2018)

The Criminal Justice Black Box, 78 OHIO ST. L. J. 349 (2017)

Fixing Bail, 84 GEO. WASH.. L. REV. 417 (2016)

What is Federal Habeas Worth? 67 FLA. L. REV. 1157 (2015)

Pretrial Detention and the Right to be Monitored, 123 YALE L. J. 1344 (2014)

Habeas After Pinholster, 53 B.C. L. REV. 953 (2012)

Waiving Innocence, 96 MINN. L. REV. 952 (2012)

McDonald's Other Right, 97 VA. L. REV. IN BRIEF 23 (2011)

Innocence After Death, 60 CASE W. RES. L. REV. 687 (2010)

Discrimination, Coercion, and the Bail Reform Act of 1984: The Loss of the Core Constitutional Protections of the Excessive Bail Clause, 36 FORDHAM URB. L. J. 121 (2009) (cited in *U.S. v. Poluizzi*, 697 F. Supp. 2d 381 (E.D. N.Y. 2010) (Weinstein, J.))

SYMPOSIUM PUBLICATIONS

Localism, Labels, and Animal Welfare, 13 NW. J. L. & SOC. POL'Y 66 (2018)

The Food Safety Modernization Act and the Power of the Sustainable Agriculture Movement, 41 AM. J. LAW & MED.259 (2015)

The Dangerous Right to Food Choice, 38 SEATTLE U. L.R. 1299 (2015)

With Michael T. Roberts, Kim Kessler, Sean B. Hecht, Diana Winters, Denis Stearns, *A Series of Reflections on “Food Fight: An Examination of Recent Trends in Food Litigation and Where We Go From Here,”* FDLI’s Food and Drug Law Policy Forum, Vol. 5, Issue 3 (Apr. 3, 2015)

Fraud in the Market, 26 REGENT L. REV. 367 (2014)

Liberty of Palate, 65 MAINE L. REV. 738 (2013)

Brady, Trust, and Error, 13 LOYOLA J. PUB. INT. L. 447 (2012)

BOOK CHAPTER

Excessive Deference—The Eighth Amendment Bail Clause, in THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Cambridge University Press, forthcoming)

TEACHING EXPERIENCE

Penn State Law, University Park, PA
Professor July 2020–Present

Florida State University College of Law, Tallahassee, Florida
McConaughay and Rissman Professor, November 2014–May 2020; *Professor*, August 2019–May 2020; *Associate Professor with tenure*, August 2015–August 2019; *Assistant Professor*, January 2012–October 2014

University of Tulsa College of Law, Tulsa, Oklahoma
Assistant Professor Fall 2010–December 2011

Yale University, New Haven, Connecticut
Teaching Assistant Spring 2007

SELECTED COURSES TAUGHT

Criminal Law, Criminal Procedure – Police, White Collar Crime, Federal Criminal Law, Non-Punitive Detention, Constitutional Law II, Environmental Crimes, Gratuitous Transfers

PROFESSIONAL EXPERIENCE

Texas Solicitor General’s Office, Austin, Texas
Fellow 2009–2010

Judge Fortunato Benavides, U.S. 5th Circuit Ct. of Appeals, Austin, Texas
Law Clerk 2008–2009

Chief Justice Wallace Jefferson, Supreme Court of Texas, Austin, Texas
Law Clerk 2007–2008

PRESENTATIONS AND WORKSHOPS

Northwestern School of Law, Searle Center on Law, Regulation, and Economic Growth, Third Annual Research Roundtable on Animal Law and Regulation: Local Food Law, Animal Welfare, and Sustainability, *Localism, Labels, and Animal Welfare* (July 2017)

Vanderbilt Law School, Panelist, Practicing Public Interest Law in the South (September 2016)

American Association of Law Schools, Annual Meeting, Panelist: Hot Topic Program: *Responding to the Money Bail Crisis* (January 2016)

University of North Carolina School of Law, *Fixing Bail* (October 2015)

Seattle University, Seattle University Law Review Symposium—Re-Tooling Food Law, *The Dangerous Right to Food Choice* (March 2015)

Boston University, American Journal of Law and Medicine Symposium—The Iron Triangle of Food Policy, *Safety, Sustainability, and the Continuing Struggle over Small-Farm Exemptions in the FSMA* (January 2015)

Georgetown University, O'Neill Institute for National and Global Health, O'Neill Institute Summer Program on Emerging Issues in Food and Drug Law, *The FDA and Food Labeling: Current Issues*, invited presenter (July 2014)

UCLA, Resnick Program for Food Law and Policy, 2014 Food Litigation Conference, Is “Food Court” Helping Consumers? The Historical Context of Food Labeling Litigation and the Role of Litigation in System Reform, invited panelist (April 2014)

University of Houston Law Center, Faculty Workshop, *Selling Habeas*, invited workshop presenter (February 2014)

Regent University School of Law, Law Review Symposium, Emerging Issues in Food Law, *Enforcing Localism at the Market*, invited symposium panelist (September 2013)

University of Maine School of Law, 2013 Food Law Colloquium, *The Future of Food Choice*, invited symposium panelist (February 2013)

Tulane University Law School, Junior-Senior Scholars Conference, *Privacy, Technology, and Bail* (October 2012)

Florida State University College of Law, Works in Progress Summer Workshop, *Fixing Bail*, workshop presenter (June 2012)

Loyola University New Orleans School of Law, Loyola University New Orleans Journal of Public Interest Law *Connick v. Thompson* Symposium, invited panelist (November 2011)

The University of Tulsa College of Law, Tulsa, OK, Faculty Showcase Series, *Brady, Trust, and Error* (May 2011)

The University of Tulsa College of Law, Tulsa, OK, Faculty Summer Research Colloquy Series, *Waiving Innocence*, workshop presenter (April 2011)

Sandra Day O'Connor College of Law, ASU Legal Scholars Conference for Junior Faculty, Tempe, AZ, *Waiving Innocence*, workshop presenter (March 2011)

SELECTED SERVICE

Appointments Committee, Florida State University College of Law (2016-2017)

Member

Admissions Committee, Florida State University College of Law (2016-2017)

Chair

Admissions Committee, Florida State University College of Law (2014-2016)

Member

Curriculum Committee, Florida State University College of Law (2013-2014; 2015-2016; 2017-2018)

Member

Executive Committee, Food Law Section, American Association of Law Schools (2014)

Member

ABA Smart Justice Roundtable on Pretrial Detention, held at the Florida State University College of Law (January 2013)

Co-organizer

Judicial Clerkships Committee, Florida State University College of Law (2012-2013; 2017-2018)

Member

Academic Enrichment Committee, Florida State University College of Law (2012-2013)

Member

Ad Hoc Legal Writing Committee, Florida State University College of Law (summer 2012)

Member

Punishment & Society

Peer Reviewer

Theoretical Criminology

Peer Reviewer

Cambridge University Press

Outside reviewer

New York University Press

Outside reviewer

BAR ADMISSIONS

Texas (2008)

Western District of Texas (2009)

EXHIBIT 5

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.

BRIEF OF HABEAS CORPUS SCHOLARS JUSTIN MARCEAU AND SAMUEL WISEMAN *AS AMICI CURIAE*

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CHAFFETZ LINDSEY LLP
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**Appellate
Case No.:
2020-02581**

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Bush, Jonathan, <i>Free to Enslave: The Foundations of Colonial American Slave Law</i> , 5 Yale J.L & Human 413 (1993)	16
Dubber, Markus, <i>Victims in the War on Crime: The Use and Abuse of Victims’ Rights</i> (2006)	10, 11

<i>Emprise Pardon Rejected</i> , Dayton Beach Morn. J. (Sept. 28, 1977)	9
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Everett, Ronald, and Deborah Periman, “ <i>The Governor’s Court of Last Resort:</i> ” <i>An Introduction to Executive Clemency in Alaska</i> , 28 Alaska L. Rev. 57 (2011).....	9
Freedman, Eric, <i>Habeas by Any Other Name</i> , 38 Hofstra L. Rev. 275 (2009).....	16
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Justin Marceau, <i>Beyond Cages</i> (Cambridge 2019).....	20
Krajicek, David, ‘ <i>Fed Up</i> ’ <i>Circus Elephant Big Mary Lynched for ‘Murder’ In 1916</i> , New York Daily News (Mar. 14, 2015).....	12
Lori Alward, <i>Elephants and Ethics</i> (2008).....	4
Lori Gruen, <i>The Ethics of Captivity</i> (Oxford 2014)	4
National Archives Microfilm Publication M434, <i>Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia</i> , 1820–1863. M433	16
Peter Singer, <i>Animal Liberation</i> , first published 1975, 2nd ed., 1990 (Ecco, New York).....	13
Sarah Schindler, <i>Pardoning Dogs</i> , __ Nevada Law Journal __ (Forthcoming 2020)	9
<i>White House Rejects Emprise Pardon</i> , Chi. Trib. (Sept. 29, 1977)	9
Wise, Steven M., <i>Legal Personhood and the Nonhuman Rights Project</i> , 17 Animal L. 1 (2010)	15
Wise, Steven M., <i>Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery</i> (Da Capo Press 2005)	14, 15

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INTEREST OF AMICI CURIAE

Professor Justin Marceau is a habeas corpus scholar and the Brooks Institute Research Scholar at the University of Denver, Sturm College of Law. He has been a full-time law professor at the University of Denver, Sturm College of Law for eight years, and was awarded tenure in 2012. During the Spring of 2020, he was a visiting professor at Harvard Law School where he taught both criminal procedure and animal law. He specializes in constitutional and criminal law with an emphasis on habeas corpus procedures and regularly teaches habeas corpus courses in addition to criminal law and advanced criminal procedure. He regularly researches and writes in the field of habeas corpus. He co-authored the book *Federal Habeas Corpus*, Lyon, Andrea D., Hughes, Emily, Prosser, Mary & Marceau, Justin, Federal Habeas Corpus Carolina Academic Press, (2d ed. 2011), and has written approximately 15 scholarly papers dealing with issues related to habeas corpus. His publications have been cited by numerous courts, including the U.S. Supreme Court and state supreme courts. His work has also been cited by more than 400 scholarly works, including leading treatises such as *Federal Habeas Corpus Practice and Procedure and Criminal Procedure*. Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* (6th ed. 2011); Wayne R. LaFave et al., *Criminal Procedure* (3d ed. 2014). His habeas corpus publications

have appeared in the Yale Law Journal, the William & Mary Law Review, the Hastings Law Journal, and many others.

Samuel Wiseman is a Professor of Law at Penn State Law in University Park. After graduating from law school, he served as a law clerk to Chief Justice Wallace B. Jefferson of the Supreme Court of Texas and to Judge Fortunato P. Benavides of the United States Court of Appeals for the Fifth Circuit. Between 2009 and 2010, Professor Wiseman served as a Fellow in the Texas Solicitor General's Office, focusing on post-conviction litigation before the Fifth Circuit. He has written numerous articles on habeas corpus and post-conviction remedies, and his works on these topics have appeared in the Minnesota Law Review, the Boston College Law Review, and the Florida Law Review.

Professors Marceau and Wiseman submit this brief as habeas corpus scholars and practitioners in support of the Nonhuman Rights Project, Inc.'s ("NhRP") appeal to this Court and to attest that the case brought by the NhRP on behalf of an elephant named Happy is of significant importance to the meaning and development of habeas corpus as an equitable doctrine. The previous courts' that have addressed the matter have issued decisions that are in tension with our understanding of the core tenets of the historical Writ of habeas corpus. *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery*"); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d

73 (1st Dept. 2017) (“*Lavery II*”). Specifically, there is nothing in the common law that confines the habeas procedures available to challenge one’s confinement to humans alone.

With respect to the particular questions raised here, Justin Marceau has long taken an active scholarly and practitioner interest in the law’s treatment of disadvantaged humans and nonhuman animals. Justin Marceau and Samuel Wiseman submit this brief because of their interest in ensuring that the law is applied consistently and equally to those who deserve its protection. Justin Marceau and Samuel Wiseman strongly urge this Court, in keeping with the long-established use of habeas corpus, and the policies motivating those long-settled legal standards, to recognize Happy as a legal person for purposes of habeas corpus, and thus eligible to be considered for release to a sanctuary.

INTRODUCTION AND SUMMARY OF ARGUMENT

One of the greatest blemishes on our justice system is the wrongful detention of persons. The Writ of Habeas Corpus is one of the tools available to correct injustices by requiring a person’s captors to justify the person’s imprisonment to the courts. While the Writ has provided a procedural vehicle for vindicating the right of thousands of humans to not be unlawfully detained, this brief argues that the time has come to consider the Writ’s application to other cognitively complex beings who are unjustly detained. The non-humans at issue are unquestionably

innocent. Their confinement, at least in some cases, is uniquely depraved—and their sentience and cognitive functioning, and the cognitive harm resulting from this imprisonment, is similar to that of human beings.¹

Happy is an innocent being who is being actively and unjustly confined. Unless this Court recognizes Happy as a legal person for purposes of habeas corpus relief and orders her freed, she will be unjustly confined for the remainder of her life. While Happy’s claim is admittedly novel, this novelty should not prevent her from seeking habeas corpus relief. *See Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d 1054, 1058-59 (2018) (Fahey, J., concurring) (“The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it.”).

There are three primary reasons that this Court should recognize Happy as a legal person and allow her to benefit from the procedural mechanisms afforded by

¹ There is an emerging literature that demonstrates that the sort of suffering experienced by confined humans is in many ways mirrored by cognitively complex animals who are confined. *See, e.g.*, Lori Gruen, *The Ethics of Captivity* (Oxford 2014) (devoting several chapters, including one on elephants, to the impact of confinement on physical and psychological well-being); *Id.* at 50 (including a chapter by Catherine Doyle who notes that “Elephants in Zoos face a variety of problems that are linked to the conditions of captivity, including obesity, abnormal repetitive behaviors . . . and deadly foot and joint diseases.”). *See also* Lori Alward, *Elephants and Ethics*, at 216 (2008) (“It is not sufficient to show that, say, an elephant has enough to eat and is free of disease . . . [instead the question is] whether they are able to live fully elephantine lives.”).

the common law Writ of habeas corpus. First, Happy should be classified as a legal person, and thus entitled to habeas corpus, given the overwhelming amount of scientific evidence showing how cognitively complex and cognitively similar to humans elephants are. Second, throughout this nation's history, habeas corpus has had a symbolic and practical role in bringing about an end to social practices that are outdated or unjust. The Writ has repeatedly been used in novel ways to bring about social change that would seem unlikely based on controlling legal principles at the time, including within the realms of family law, slavery, and detainees being held in Guantanamo Bay. Finally, applying habeas corpus to non-human animals like Happy is consistent with the Writ's historical uses.

To summarize the procedural history of this case, on October 2, 2018, the NhRP filed a Petition for Common Law Writ of Habeas Corpus on behalf of Happy in the Supreme Court, Orleans County. On November 16, 2018, the Orleans Court issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held in Albion, New York. In a notice of motion dated December 3, 2018, Respondents moved to transfer the proceeding to the Supreme Court, Bronx County or, in the alternative, to dismiss the Petition. On January 18, 2019, the Orleans Court granted Respondent's motion to transfer venue. On February 18, 2020, Justice Alison Y. Tuitt of the Supreme Court, Bronx County issued her Decision and Order granting Respondents' motion to dismiss the

Petition, and did so solely on the basis of the Appellate Division, Third Department's holding that nonhuman animals are not "persons" for purposes of habeas corpus in New York because they lack the capacity to bear legal duties. *Lavery*, 124 A.D.3d 148 (3d Dept. 2014).

ARGUMENT

I. Happy Should be Classified as a Legal Person and Entitled to Habeas Corpus.

A "legal person" is any entity capable of possessing a legal right. There is no principled reason that elephants, such as Happy, should be deprived of legal personhood in the context of habeas corpus. As an elephant, Happy is an intelligent being who understands her surroundings and experiences suffering much like a human being would in circumstances of unjust confinement. Moreover, the notions of guilt and innocence underlying the habeas corpus doctrine apply equally to nonhuman animals like Happy. Happy—as an autonomous and self-determining being, innocent and unjustly confined—should be recognized as a legal person who is entitled to the common law right to bodily liberty protected by habeas corpus, as historically used by persons imprisoned under similar unjust circumstances.

A. Captive Nonhuman Animals are Intelligent and Experience Suffering.

In just the past decade, advances in the scientific community's understanding of DNA has played a transformative role in our justice system. It

has allowed us to exonerate and liberate innocent persons that were previously found under the highest standard of proof known to law—proof beyond a reasonable doubt—to be guilty. Science of a similarly profound and powerful character is beginning to change our understanding of the effects of confinement on nonhuman animals.

DNA and other scientific advances have allowed the scientific community to coalesce around a recognition that the cognitive function of certain cognitively complex nonhuman animal species, including Asian and African elephants, rivals that of humans.² Even beyond the sequencing of DNA, there is a growing consensus that nonhuman animals have sentience, consciousness, emotions, autonomy, and other brain functioning that is remarkably similar to that of humans. In 2013, a group of leading scientists signed the “Cambridge Declaration on Consciousness,” which explained that “non-human animals have the neuroanatomical, neurochemical, and neurophysiological substrates of conscious states along with the capacity to exhibit intentional behaviors.” It went on to

² It is virtually unchallenged in the scientific community that the DNA of humans and certain nonhuman animals are remarkably similar. *See* American Museum of Natural History, DNA: Collecting Humans and Chimps (“Humans and chimps share a surprising 98.8 percent of their DNA.”). A recent article in *Scientific American* clarifies: “In 1871 Charles Darwin surmised that humans were evolutionarily closer to the African apes than to any other species alive. The recent sequencing of the gorilla, chimpanzee and bonobo genomes confirms that supposition and provides a clearer view of how we are connected: chimps and bonobos in particular take pride of place as our nearest living relatives, sharing approximately 99 percent of our DNA, with gorillas trailing at 98 percent.” Wong, Kate, Tiny Genetic Differences between Humans and Other Primates Pervade the Genome, *Sci. Am.* (Aug. 19, 2014).

explain that “the weight of evidence indicates that humans are not unique in possessing the neurological substrates that generate consciousness.”

The research is increasingly conclusive: nonhuman animals can feel, and suffer, and in fact have brains that function very similarly to our own. Bekoff, Marc, *Scientists Conclude Nonhuman Animals are Conscious Beings*, Psychology Today (Aug. 10, 2012). Elephants in particular are known for their mental aptitude and deep emotional capacities, both of which are strikingly similar to human cognition. Jabr, Ferris, *The Science Is In: Elephants Are Even Smarter Than We Realized*, Sci. Am. (Feb. 26, 2014). Indeed, Judge Tuitt even recognized that “Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings.” *The Nonhuman Rights Project, Inc. v. Breheny*, Index No. 260441/2019, Decision and Order (Feb. 8, 2020). Because elephants have complex emotional and cognitive experiences, they are vulnerable to mental and physical suffering in unjust and cruel confinement, just as a human would be.

Judge Tuitt also remarked, “Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” *Id.* It is because of the intense and concrete suffering associated with unjust imprisonment that habeas

corpus developed in the first place—if unjustly confined elephants suffer in the way a human would, the same remedy should protect elephants, too.

B. Exonerations and Notions of Innocence are Equally Applicable to Humans and Nonhumans.

There is a fundamental obligation to obey laws. This obligation classifies individuals who break laws as guilty, and individuals who do not as innocent. Writs of habeas corpus first and foremost allow those who are innocent, yet incarcerated, to be released from their unjust confinement and exonerated from their initial guilt. These fundamental principles of guilt and innocence or wrongful confinement are equally relevant to nonhuman animals and Happy’s current confinement.

Nonhumans can likewise be guilty or innocent. Indeed, nonhumans have previously been pardoned or granted clemency. *Emprise Pardon Rejected*, Dayton Beach Morn. J. (Sept. 28, 1977), (discussing a corporation’s request for a formal pardon to President Carter); *White House Rejects Emprise Pardon*, Chi. Trib. (Sept. 29, 1977); *see also* Everett, Ronald, and Deborah Periman, “*The Governor’s Court of Last Resort: An Introduction to Executive Clemency in Alaska*, 28 Alaska L. Rev. 57, 89 (2011) (discussing a governor’s grant of such a pardon); Sarah Schindler, *Pardoning Dogs*, __ Nevada Law Journal __ (Forthcoming 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3551251.

Additionally, at least one federal court has granted a corporation’s request for a

writ of *coram nobis* (or a writ of error). *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995).

While nonhuman animals are not indicted for crimes, that does not necessarily mean they cannot be exonerated or deemed innocent. While exoneration is generally thought of as a criminal conviction being reversed, the actual meaning of exoneration is much broader, meaning “[t]he removal of a burden, charge, responsibility, or duty.” Black’s Law Dictionary (10th ed. 2014). Under this definition, being released from unwanted and cruel confinement would constitute exoneration. Since habeas corpus is historically used to secure exonerations, it has application in this context.

Additionally, the law allows certain defenses for nonhuman animals when they conduct “criminal” behavior, indicating that the law more broadly does recognize some form of “guilt” or “innocence” for animals. For example, leading criminal law theorist Markus Dubber has observed that animal control statutes often function in ways that are very similar to human criminal codes. Not only are the definitions of “offenses familiar from criminal codes,” the animal control codes “lay out defenses to an allegation of dangerousness analogous to the defenses recognized in criminal law.” Dubber, Markus, *Victims in the War on Crime: The Use and Abuse of Victims’ Rights* 44 (2006).

Examining the New York animal control code, Dubber noted that an otherwise (criminally) dangerous dog has several available defenses including “defense of others,” a “defense of property,” “self-defense,” and even an “extreme emotional disturbance” or provocation defense. *Id.* at 44-45 (quoting NY Agric. & Mkts. § 123(4) (2011)); *see also* Colo. R. Stat. § 18-9-204.5 (applying defenses to “dangerous dogs”). In other words, although nonhuman animals may not be subjected to criminal prosecution in a formal sense, when an animal’s actions are subject to review by the state for their propriety, it is taken for granted that some defenses available to humans may also justify the acts of a nonhuman animal. Dubber, *Victims in the War on Crime*, at 45 (“If anything the canine versions of these defenses are more generous than the human ones.”). Therefore, some nonhuman animals are already exonerated in a sense through codified state procedures providing relief from unwanted incarceration or execution.

Moreover, animals—and elephants in particular—have certainly been deemed guilty, and they have even been executed as a response to unwanted, or even criminal, action or behavior. In 1903, for example, Topsy the elephant was executed by electrocution after killing a human. Eschner, Kat, *Topsy the Elephant was a Victim of Her Captors, Not Thomas Edison*, *Smithsonian Magazine* (Jan. 4, 2017). In 1916, the elephant Big Mary was hung, twice—the first rope broke and she slammed into the ground, where she writhed for hours before a second chain

was found—after killing a trainer. Krajicek, David, *'Fed Up' Circus Elephant Big Mary Lynched for 'Murder' In 1916*, New York Daily News (Mar. 14, 2015).

If nonhuman animals can bear guilt and innocence, it is a plausible logical extension that nonhuman animals should also be able to avail themselves of the mechanisms to secure an exoneration. Though not indicted for a crime, Happy is undoubtedly innocent. In other contexts, the law recognizes the concept of an innocent nonhuman entity, including corporations and nonhuman animals. Happy's innocence should weigh in favor of allowing her to benefit from the Writ of habeas corpus.

Moreover, without this type of procedural vehicle, Happy has no possible remedy to secure relief from the cruel confinement conditions, and her treatment could become even worse—potentially leading to her death. If even the most sentient animals confined in the worst conditions, like Happy, are never entitled to habeas relief, humans could continue to cruelly confine animals, and even execute sentient, emotionally and cognitively complex individuals. Such a result seems unjust, and unnecessary as a matter of habeas history and practice.

II. The Writ of Habeas Corpus has Historically Been Used in Novel Situations to Bring About Social Change.

Habeas corpus has been used throughout history in situations where no precise legal solution existed under codified law, but where leaving the status quo

unchallenged would be unjust. Halliday, Paul D., *Habeas Corpus: From England to Empire* 133 (2010).

A. Family Law

In the seventeenth century, the King's Bench in England utilized habeas corpus to grant relief to women and children in novel family law situations. *Id.* at 121-32. At that time, women were considered the property of their husbands. *Id.* at 124. As such, women subjected to abusive situations had absolutely no legal vehicle to seek relief. *Id.* Similarly, children in abusive environments had no legal means of escaping abusive environments. Since women and children were deemed by the law to be less than full legal persons, many courts would have certainly scoffed at the idea that habeas corpus would be available to such parties.³

Yet time and again, despite the formalistic barrier presented by the lack of legal personhood, habeas corpus offered a unique and powerful way to seek and achieve justice. Habeas corpus provided the procedures to realize reform that was out in front of statutorily mandated protections.

³ Peter Singer has eloquently retold the history of mocking the ascension of beings deemed less than human. "The idea of "The Rights of Animals" actually was once used to parody the case for women's rights. When Mary Wollstonecraft published her *Vindication of the Rights of Women* in 1792, her views were widely regarded as absurd, and before long, an anonymous publication appeared entitled *A Vindication of the Rights of Brutes*. The author of this satirical work (now known to have been Thomas Taylor, a distinguished Cambridge philosopher) tried to refute Mary Wollstonecraft's arguments by showing that they could be carried one stage further. If the argument for equality was sound when applied to women, why should it not be applied to dogs, cats, and horses?" Peter Singer, *Animal Liberation*, first published 1975, 2nd ed., 1990 (Ecco, New York), pp.1.

For example, instead of letting the women and children suffer, the King's Bench, under the leadership of Sir Matthew Hale, used the Writ of habeas corpus to protect women and children from their abusive, often politically powerful, husbands and fathers. *Id.* at 122-32. Habeas corpus was the only way those women and children could seek protection from their "captors". *Id.* at 124. Importantly, habeas corpus was not used simply as a tool to secure freedom from abusive "captors," but rather was also used to "assign custody"—women and children could be transferred to a different, non-abusive household. *Id.* at 129. This use of the Writ demonstrates that it can be used for more than simply seeking release from custody, but rather includes transfer to a safer environment, even if the end result was not utter liberation. *Id.*

B. Slavery

The King's Bench also used habeas corpus to give relief to slaves in England when none was available as a matter of statutory right. For example, eighteenth-century slave James Somerset was able to become legally visible by seeking habeas corpus relief despite being deemed a legal "thing," not a "person." Wise, Steven M., *Though the Heavens May Fall: The Landmark Trial That Led to the End of Human Slavery* IX (Da Capo Press 2005). He was a legal "thing" when he landed in England in 1769, having been captured as a boy in Africa, then sold to a

merchant in Virginia, Charles Steuart, for whom he slaved for two decades. *Id.* at XIII, 1-2.

James Somerset's owner was attempting to remove him from England when Somerset filed for habeas corpus relief in the King's Bench. *Id.* Surprisingly, though no clear procedural or substantive basis existed for doing so, the Bench granted James Somerset's requested habeas corpus relief. James Somerset, previously designated as a legal "thing," had existed in law only in relation to his owner; legal "things," both living and inanimate, exist under the law solely for the sakes of legal persons, invisible to civil judges in their own rights. *Id.* at IX. Yet habeas corpus offered a flexible and powerful tool for ending an instance of unjust captivity, despite—or perhaps because of—the legal designation of the entity seeking relief. James Somerset's legal transubstantiation from "thing" to "person" at the hands of Lord Mansfield of the King's Bench in 1772 indeed marked the beginning of the end of human slavery. Wise, Steven M., *Legal Personhood and the Nonhuman Rights Project*, 17 Animal L. 1, 1-2 (2010).

In addition to providing a mechanism for a clear legal transition from "thing" to "person," the doctrine of habeas corpus offered additional unique ways to challenge the legal status quo of slavery. In America, in 1839, for example, a free black man named Ralph Gould was being held, wrongfully charged as a runaway slave. Gould had served in the U.S. Navy and had evidence of his military

discharge and his freedom in his possession. Gould petitioned Chief Judge William Cranch for a Writ of habeas corpus to avoid being sold as a slave. Despite Gould's apparent status as a legal "thing," the Chief Judge ordered Gould's release from prison. National Archives Microfilm Publication M434, *Habeas Corpus Case Records of the U.S. Circuit Court for the District of Columbia*, 1820–1863. M433.

These two cases are illustrative of an important part of the history of habeas corpus. While they did not directly cause the end of slavery, cases such as these served as a symbolic demonstration that slaves, traditionally treated as legal things, nevertheless had the ability to challenge a previously unchallenged class of legal persons: slaveholders. Freedman, Eric M., *Habeas by Any Other Name*, 38 Hofstra L. Rev. 275, 277 (2009). Habeas corpus not only provided a powerful legal tool for preventing unjust confinement of particular individuals, but it also allowed for deeper challenges to slavery as an unjust institution.

The issues posed by chattelized humans—cognitive, emotive beings diminished to mere legal property—could often not be accommodated within ordinary legal categories. Bush, Jonathan, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 Yale J.L. & Human 413 (1993). In spite of, or perhaps because of the lack of alternative legal avenues or frameworks, habeas provided a procedural vehicle to challenge confinement when no other legal recourse was available.

C. Guantanamo Bay

Habeas corpus has also been used to provide non-citizen detainees relief, despite their incarceration outside of the United States. The United States' efforts to combat terrorism after September 11, 2001 led to legislative action regarding the habeas corpus rights of aliens designated by military authorities as enemy combatants. Specifically, the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 statutorily eliminated habeas rights for enemy combatants detained at Guantanamo Bay, Cuba. The location of the Guantanamo Detainee Center was chosen not only for its large land availability and distance from known terrorist cells, but because it was thought that the statutory and constitutional rights of non-citizen detainees could be limited if they were not physically present in the United States itself. However, the United States Supreme Court in *Rasul v. Bush* held that a district court does have jurisdiction to hear habeas corpus petitions by alien detainees at Guantanamo concerning the legality of their detentions. 542 U.S. 466, 483-84 (2004).

Additionally, in 2008, the Court ruled that Guantanamo detainees possessed habeas rights because the United States exercised some sovereignty over that territory. In *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause had full effect at Guantanamo Bay, even though Congress had attempted through legislation to strip federal courts of jurisdiction to hear habeas claims. 553

U.S. 723, 771 (2008). Therefore, detainees are entitled to the privilege of habeas corpus to challenge the legality of their detention. *Id.* In holding that the Suspension Clause applied at Guantanamo Bay, the Court noted that “at the absolute minimum” the Clause protects the Writ as it existed when the Constitution was ratified. *Id.* at 746-47. Moreover, the Court held that Guantanamo detainees were entitled to habeas corpus despite the fact that the Court had previously “never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution.” *Id.* at 771.

III. Applying Habeas Corpus to Nonhuman Animals, like Happy, is Consistent with the Writ’s Historical Uses.

Happy is not a human being; however, without intending to dehumanize the marginalized humans whose recourse to habeas is discussed in this brief, it is important to note that Happy does share critical and relevant similarities with unjustly confined humans in terms of sentience, cognition, and emotion. Allowing Happy the right to petition for habeas corpus is consistent with the history of the Writ’s functioning in novel situations of evident injustice.

Like the abused women and children in England, Happy is not seeking to be released into the public, but transferred to a facility that will allow the greatest possible autonomy. Similarly, the abused women and children were allowed to seek habeas relief, though the women would not be “freed” from their marriages

and the children would not be emancipated, but placed in different living situations where they were guaranteed better treatment. Therefore, one does not necessarily have to seek a complete and total release from confinement in order to receive habeas relief—contrary to the opinion of the First Department and Fourth Department. *See Nonhuman Rights Project, Inc. on Behalf of Tommy v. Lavery*, 31 N.Y. 3d at 1058-59 (Fahey, J., concurring) (affirming that habeas corpus can be used to an individual’s release from one facility to a completely different facility).

Additionally, as with the indignity suffered upon human slaves, Happy is considered to be property and a legal thing. However, property status did not stop the King’s Bench from allowing James Somerset to seek habeas relief, nor did the property status of humans prevent Chief Judge Cranch from allowing slaves to petition to seek habeas corpus relief. Allowing James Somerset to seek relief did not end slavery, and granting Happy the right to petition for habeas corpus will not result in all nonhuman animals being declared persons or necessarily freed from confinement. However, it would serve as an important step, possibly paving the way for certain individual nonhuman animals to be free from particularly cruel and unjust confinement.

Finally, like the Guantanamo detainees, Happy has no other legal vehicle to challenge her confinement. Certainly, animal cruelty statutes, which provide remedies including criminal punishment for humans who harm nonhuman animals,

exist. However, this type of statute provides no substantive basis for nonhuman animals to challenge their confinement per se. Indeed, courts have rejected efforts to rely on anti-cruelty statutes as a basis for securing many forms of civil relief for the animal. Put differently, these statutes simply provide a mechanism for punishing humans for their cruel treatment of nonhuman animals, rather than substantively ensuring the wellbeing of the harmed animals.⁴ As such, habeas corpus is the only substantive legal basis Happy has to challenge and be released from her confinement.

Habeas corpus has often been a vehicle for prompting social change, applying to discrete, obviously unjust instances of confinement despite formalistic legal doctrines that might otherwise bar relief. The Writ is especially powerful where, as for Happy, there is no other viable legal opportunity or avenue to seek relief. Therefore, consistent with the Writ's novel historical uses, this Court should recognize Happy as a "person" for purposes of habeas corpus relief.

⁴ It is worth noting that a non-trivial amount of animal protection litigation is focused on a carceral solution to the problem of animal suffering. It is often argued that advancing the status of animals as victims in the service of human incarceration is the best way to protect the rights of animals. The Nonhuman Rights Project, by contrast, pursues litigation that opposes carceral logics and has more in common with traditional civil rights and movement lawyering. In this historical moment when the country is searching for alternatives to tough-on-crime solutions to social problems, litigation seeking access to habeas corpus relief should be recognized as a unique approach to protecting the dignity of animals. See Justin Marceau, *Beyond Cages* (Cambridge 2019).

CONCLUSION

While habeas corpus has not yet been applied to a nonhuman animal in New York or the United States, its application in this context is justified. The very history of habeas corpus is one of radical change, protecting fundamental liberty and autonomy rights from unjust situations. Habeas corpus has historically been used in novel factual situations where no other legal vehicle exists.

We respectfully request that this Court recognize an expanded – but still limited – universe of legal personhood that affords the possibility of providing relief to some nonhuman animals in particularly egregious conditions. For the reasons above, Happy should be classified as a legal person and granted a Writ of habeas corpus.

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