To be argued by:
KENNETH A. MANNING
(Time Requested: 30 minutes)

APL-2021-00087
Appellate Division-First Department Case No. 2020-02581
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Court of Appeals
of the
State of New York

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

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

Petitioner-Appellant,

– against –

JAMES J. BREHENY, in his official capacity as Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

BRIEF FOR RESPONDENTS-RESPONDENTS IN RESPONSE TO BRIEFS FILED BY *AMICI CURIAE*

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PRELIMINARY STATEMENT

Respondents James J. Breheny and Wildlife Conservation Society ("Respondents") respectfully submit this brief in opposition to the briefs submitted by *amici curiae* Edwin Cameron; David Comstock et al. (aka "Philosophers"); Justin Marceau et al. (aka "Habeas Corpus Experts"); Joe Wills et al. (aka "UK Scholars"); Christine M. Korsgaard; and Catholic Theologians (together, "NRP *amici*").[1]

New York protects animal welfare through civil and criminal law. *E.g.*, N.Y. Ag. & Mkts. L. §§ 32, 39, 353, 353-a, 353-B, 359-a, 356, 400 et seq. The distinction between "person" and "animal" prevails in this legal framework just as it does elsewhere under law and in plain English: "animal" means "every living creature except a human being." *Id.* § 350(1). Redefining "person" to include animals would disrupt established institutions and impact many stakeholders, including the groups that submitted amicus briefs in support of Respondents.[2] Those groups articulated clear, distinct reasons why the Court should not redefine "person" to also mean "elephant" and why the

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[1] This opposition refers to the briefs of NRP *amici* as follows: Edwin Cameron ("EC Br."); Philosophers ("Philosopher Br."); Habeas Corpus Experts ("HE Br."); UK Scholars ("UK Br."); Christine M. Korsgaard ("Korsgaard Br."); and Catholic Theologians ("CT Br.").

[2] The American Veterinary Medical Association; New York State Veterinary Medical Society; American Association of Veterinary Medical Colleges; Protect the Harvest; Alliance of Marine Mammal Parks and Aquariums, the Animal Agriculture Alliance; the Feline Conservation Foundation; and the National Association for Biomedical Research.

legal framework of habeas corpus should not be reimagined as an animal-rights tool. For example, the American Veterinary Medical Association and the New York State Veterinary Medical Society point out the vested interests of animal owners and veterinary professionals, who are duly entrusted by law to determine appropriate care for animals in their custody. And they explain that those interests rest on a fundamental assumption that such care will be free from unsolicited third-party intervention. Protect the Harvest and the Animal Agricultural Alliance also identify discrete interests in agricultural animal stewardship that would be jeopardized if the Court held a writ of habeas corpus were even theoretically available here.

In contrast, NRP *amici* are virtually indistinguishable from NRP itself: a quixotic group of interlopers without any concrete interest in the legal issues on which they campaign. As curious bystanders, NRP *amici* present opinion pieces informed by personal beliefs and subjective notions of ethics rather than practical consequences. They parrot the same short-sighted arguments as NRP and crash headlong into the same barriers; an utter failure to identify anything unlawful about Happy's living conditions is a notable example. The result is an emphatic confirmation that this appeal, arising from NRP's "long term litigation campaign" (A 321 ¶ 7), should not be the vehicle by which regulations governing elephant care are promulgated. Nor should it

be used to distort the ancient writ of habeas corpus, which is and has always been available only to humans.

Those conclusions are emphasized by NRP having funded all of the NRP *amici* briefs, apparently seeking strength in numbers over substance. This handful of non-parties who merely duplicate the arguments already proffered by NRP (and add nothing more than their names to the record) is a stark reminder of the multitude of interests that have no voice here. All such interests should be balanced in regulating human relationships with animals through the political branches. And under current law, they are. Erasing and re-drawing the gridlines of this legal framework is a cause for the Legislature.

ARGUMENT

A. *Amici*'s subjective arguments reinforce the conclusion that NRP presents a legislative question

The "Philosophers" coalition presents a shapeless argument typical of NRP *amici*. They urge this Court—"in keeping with the best philosophical standards of rational judgment and ethical standards of justice"—to rule that Happy the elephant is a "nonhuman person." Philosopher Br. p. 2. But the standards of New York law are no mystery to this Court; they are found in the New York and United States Constitutions, statutes, regulations and jurisprudence. When current law does not provide a clear answer to a question—which is not the case here—judges are well-

equipped with the "rational judgment" and "ethical standards of justice" to bridge the gap. Indeed, these are the very criteria by which judges are qualified. *Amici's* metaphysical critique of New York law simply posits their subjective view as a substitute for the legal reasoning of this Court. Besides being categorically improper, the resulting brief yields no more clarity than NRP's did in arguing the same point.

More specifically, the philosophers reject the core characteristic of humanity—or, in their words, "species membership"—as "arbitrary."[3] *Id.* at 11. Although they first argue that "to be a person, one must have multiple personhood-making capacities, although which ones cannot be non-arbitrarily specified," they later contradict themselves and urge rights be determined based on "one particular capacity—autonomy." *Id.* at 25, 27. In their opinion, "autonomous" behavior is that which is (1) "intentional" (2) "adequately informed" and (3) "free of controlling influences." *Id.* at 28. But as to what the Court should do with this opinion (aside from assume Happy displays these behaviors and therefore is a person), or what its practical implications would be for New York State, *amici* have little to say. Indeed, these non-parties fail to address such questions as whether a ruling in NRP's

[3] Respondents' brief addressed this short-sighted argument at length in its Opposition Brief to this Court dated August 20, 2021, pp. 6-7, 25-31.

favor should be for Happy only, for all elephants, or for all nonhuman animals with similar attributes of autonomy. And if their point is that all "autonomous" animals should qualify for access to habeas corpus rights, they fail to articulate what level of "autonomy" qualifies for such access and leave the Court, as did NRP, without any meaningful way to apply this standard.

Indeed, carried to its logical conclusion, these *amici* seem to take the position that the Court must first evaluate every petitioner to determine if he or she (or it) has the requisite characteristics to justify judicial intervention, a position anathema to the very foundational principles of habeas corpus jurisprudence: "The summary remedy of a writ of habeas corpus . . . is open to every person detained in custody." *People ex rel. Hubert v. Kaiser*, 206 N.Y. 46, 52 (1912) (emphasis added). Under its plain and common-sense meaning, this guarantee applies to every human, regardless of autonomy or other capacities. Indeed, this bright line permits the utility of the Great Writ, which is not a sprawling evidentiary exposition but a "summary proceeding to secure personal liberty." *People ex rel. Robertson v. N.Y.S. Div. Parole*, 67 N.Y.2d 197, 201 (1986).

The self-styled "Habeas Corpus Experts" fall into a similar trap. While arguing that "the time has come to consider the writ's application to other cognitively complex beings," HE Br. p.4, they are unable to provide any

guidance as to what level of cognitive complexity should qualify an animal for habeas corpus relief. These authors seem to rely on the proposal of yet another amicus brief, one submitted by Professor Martha Nussbaum, who proposes what she has termed her "Capabilities Approach" to personhood, which requires that "society should examine the capacities of each creature . . . ." HE Br. p. 5 (emphasis added). Yet neither Professor Nussbaum's proposal nor the Habeas Experts' brief can say how this approach should be applied. In fact, Professor Nussbaum herself acknowledged that her own theory could potentially encompass species such as sponges and perhaps even plants.[4] The Habeas Experts ignore the extreme boundaries of the philosophical construct they champion.

The "Catholic Theologians" also voice support for NRP's appeal, citing the book of *Genesis* to argue animals are "not made for human beings," and that there is a "basic biblical teaching" of non-violence between humans

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[4] *See* Humanities Day 2020: Celebrating Our 40th Anniversary, "Animals: Expanding the Humanities," by Martha C. Nussbaum, October 17, 2020 ("2020 lecture"). In this lecture Professor Nussbaum makes several points that further highlight why this issue is best left to the legislative branch of government. She acknowledges that her theory raises "difficult questions" such as "shouldn't humans come first?" and suggests that we should "pause and deliberate . . . and hesitate" while considering this question. (*Id.* at 1:00:34-1:02:00). She also raises questions about whether animals such as sponges or anemones merit "ethical standing" under her philosophical scheme (*id.* at 1:11:27-1:12:00), and even notes that some have argued that her theory could be applied to plants. (*Id.*, at 1:12:00-1:12:34). While she apparently does not agree with the latter notion, she does admit "I may be wrong" and that "we need a lot more debate" about these issues. (*Id.* at 1:12:19-1:12:22). The Court of Appeals is not the proper forum for such debate.

and animals. CT Br., pp. 2-3. On the other hand, *Genesis* also teaches mankind to "have dominion over the fish of the sea and over the fowl of the air and over every living thing that moveth upon the Earth." *Genesis*, 1:27-28 (King James). This is not to suggest that the Bible be taken literally, or that its teachings inform the judgment of this Court. But *amici* cannot credibly put the weight of Catholicism behind NRP's misdirected lobbying effort. Indeed, the five signatories to this brief simply posit one interpretation of their religious faith and present it as legal authority. The same type of argument could (and historically did) justify any number of repulsive arguments. To note one example, interracial marriage bans were justified on the ground that God "did not intend for the races to mix."[5]

In fact, the Theologians' fellow *amicus* Professor Korsgaard overtly rejects citing the book of *Genesis* insofar as it can be read to "limit rights to human beings." Korsgaard Br. p. 14 (emphasis added). Although Korsgaard would read the Biblical text differently, she explains "the more important problem, of course, is that theological considerations belonging to specific religions have no place in American law." *Id.* p. 14. Yet in place of the

[5]*Loving v. Virginia*, 388 U.S. 1, 2-3, 12 (1963) (overturning conviction for violation of Virginia statute banning interracial marriage, noting trial court's comment that "Almighty God . . . did not intend for the races to mix," and holding anti-miscegenation laws are unconstitutional).

religious justifications that she rebuffs, Professor Korsgaard proffers admittedly "controversial" philosophical views as a purported ground for this Court to radically transform animal welfare law and habeas corpus jurisprudence. *Id.* p. 21. Ultimately, both briefs share profound uncertainty: neither author even hints at a predictable basis by which an animal's moral, theological, or metaphysical credentials for legal personhood can be assessed.

The "UK-Based" scholars take a different tack. Although they do not provide the Court with any meaningful information regarding the legal status of animals in the UK, they contend that animals are "already rights-holders in New York State." UK Br. p. 16. In support, they cite New York's Elephant Protection Act ("EPA"). Of course, the EPA is a legislative act, based in part on the finding that elephants "are complex, highly intuitive and intelligent animals." N.Y. Senate Supp. Mem., Bill Jacket, L. 2017, ch. 333, p. 8. These are the very traits that NRP *amici* (and NRP itself) cite as proof that Happy is a legal "person." But even after making that determination, the Legislature did not redefine elephants as legal persons. While banning "elephant entertainment acts," the EPA provides that accredited zoological institutions governed by the standards of the American Zoological Association ("AZA")—like the Bronx Zoo—remain authorized to care for elephants. *See* Ag. & Mkts. L. § 380. In other words, the EPA reflects a legislative choice to

entrust the care of these creatures to accredited institutions under the multi-layered regulations that govern them.[6] That certain UK-Based scholars prefer a different model has absolutely no bearing on this appeal.

Retired Judge Edwin Cameron's brief is even further afield. As a former Judge of the Constitutional Court of South Africa, Judge Cameron focuses overtly on South African Law, which he acknowledges has "mixed origins" of English, Roman-Dutch, and indigenous law, "overlaid" with the South African constitution. EC Br. p. 2. Setting aside this notable distinction from New York law, the brief admits that South Africa, too, does not recognize "personhood" in animals. *Id.* But Judge Cameron still proffers the following: "it is in my view not inconceivable that South African Law may develop to include a proscription of discrimination . . . between humans and other sentient beings (speciesism)." *Id.* p. 13. Again, this speculative thought on what reforms might take place in the future, in a foreign jurisdiction, only underscores the utter lack of support for changing the law of this State. The Court need not guess at what South Africa might do to decide whether to upend New York law at NRP's request.

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[6] As explained in Respondents' Brief to this Court, the AZA promulgates regulations that zoos must satisfy to earn the accreditation, and these standards include the detailed AZA Standards for Elephant Management and Care reproduced in the appendix-record (A. 377-409). There is no dispute that the Bronx Zoo is consistently accredited by the AZA and therefore permitted to care for elephants under the EPA. A. 336.

By branding themselves "philosophers" or "scholars" or "theologians," NRP *amici* do not elevate their views over any one of the millions of New York citizens who are not before this Court. Nor does their general curiosity in this appeal represent a vested interest in the outcome. That is one of many reasons why, as this Court has long observed, "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government." *N.Y.S. Inspec. Sec. & Law Enforcement v. Cuomo*, 64 N.Y.2d 233, 240 (1984).

B. The NRP *amici* fail to demonstrate that Happy's "confinement" is unlawful

Although the NRP *amici* assert that the habeas corpus remedy is a flexible one, they cannot escape the fact that habeas corpus strikes at only one circumstance: unlawful confinement. *People ex rel. Robertson v. N.Y.S. Div. Parole*, 67 N.Y.2d 197, 201 (1986). To ensure no person is denied the right to this remedy, this Court has acknowledged that "cases may arise where the right to invoke habeas corpus may take precedence over 'procedural orderliness and conformity.'" *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 262 (1966) (quoting *People v. Schildhaus*, 8 N Y 2d 33, 36 (1960)). But the Court expressly did not rule "that habeas corpus is either the only or the preferred means of vindicating fundamental constitutional or statutory rights," adding the important caveat that abandoning traditional proceedings "should be

permitted only when dictated, as here, by reason of practicality and necessity." *Id.*[7] That type of flexibility, needed to avoid denying fundamental human rights on a technical error, is a far cry from rewriting the habeas statutes and abandoning centuries of case law, as the NRP *amici* ask the Court to do.

The NRP *amici* wrongly assume that Happy's confinement is "unlawful" without ever identifying any constitutional provision, federal or state statute, local ordinance, or regulation that has been violated. For example, the Habeas Experts' brief spends many pages arguing—as did NRP—that "Happy should be classified as a legal person . . . ." HE Br., p. 6 et seq. Merely by virtue of this new classification, they argue, her "confinement" at the Bronx Zoo would become unlawful. Even for human beings, however, confinement alone is not a sufficient justification for release under habeas corpus jurisprudence. Human beings seeking habeas corpus relief must demonstrate that their confinement is illegal for some specific reason. CPLR 7003(a), 7010(a).

Professor Korsgaard similarly asserts that Happy "has a right to live her own life in her own way." Korsgaard Br., p. 21. But beyond this

[7] In *McMann*, the petitioner alleged he was convicted after his constitutional privilege against self-incrimination was violated despite his failure to preserve that error. The Court held "if the claim is substantiated, his imprisonment would be illegal" and thus "habeas corpus is the proper remedy in these circumstances." *Id.* at 263.

circular assignment of rights and a follow-on declaration that those rights are being violated, she does not explain how Happy's presence at the Bronx Zoo is unlawful. In fact, none of the NRP *amici*'s briefs articulate why Happy's presence at the Bronx Zoo is illegal. Instead, the NRP *amici* would have the Court collapse habeas corpus into an unlimited and unrecognizable all-in-one remedy for any animate being in any enclosed environment. By their logic, one could just as easily petition to release Happy from the steel-gated facility in California where NRP proposes to move her. A. 248 ¶ 12. The NRP *amici* have done nothing to remedy a central defect in NRP's position: because Happy's continued care at the Bronx Zoo is in no way unlawful, the habeas corpus remedy is unavailable.

C. By financially supporting the submissions of all six NRP *amici*, NRP attempts an improper expansion of its own briefing

As required by the rules of this Court, all six *amici* disclosed receiving financial support from the appellant, NRP. The number climbs to seven if we include the now-withdrawn brief of Professor Garrett Broad, who collaborates with NRP outside the context of this appeal and went so far as to stuff his brief with polling data gathered through his own NRP-funded surveys.[8] These briefs merely re-hash NRP's ill-conceived arguments (or

[8] *See* Mot. for lv. to appear as *Amicus Curiae*, Professor Garrett Broad, Ex. A, Proposed Brief, pp. 6-7. Professor Broad's brief cites a survey-report authored by Professor Broad "in

repeat them verbatim). *See, e.g.*, UK Br. pp. 20, 22-23, 27. Rather than offer any sound independent rationale for NRP's radical position, the NRP *amici* represent the bounty of NRP's (apparently worldwide) search for those willing to add their names to a brief, as though the merit of its position could be tallied rather than judged.

The UK-based scholars present the most glaring example of this improper repetition. This brief touts the signatories' status as legal specialists in a "sister common law country." UK Br. p. 1. Yet they provide almost no authority from the English legal system, and instead cite the same authorities that NRP did. *Compare* UK Br. pp. ii-vii *with* NRP App. Br. pp. iv-xii. The few international cases they do cite are the very same foreign decisions that NRP submitted in its compendium. *See* UK Br. pp. 21-22; *Cf.* NRP App. Br., Comp. And the substance of the amicus brief repeats NRP's argument from top to bottom, hitting everything from NRP's tortured analysis of "rights and duties," UK Br. pp. 10-14, to its superficial discussion of this Court's decision in *Byrn*,[9] *id.* at 18-19, to its vague allusion to concepts of "equality" and

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Consultation with the Nonhuman Rights Project," and the report itself states "the survey was commissioned by the Nonhuman Rights Project, a 501(c)(3) nonprofit that works through litigation, public policy advocacy, and education to secure fundamental rights for nonhuman animals." Garrett M. Broad, *Investigating Public Support for the Legal Rights of Nonhuman Animals: Research Brief*, https://fordham.academia.edu/GarrettBroad (scroll to the article, then click "Download") (last visited Oct. 21, 2021).

[9] *Byrn v. N.Y.C. Health & Hosp.* 31 N.Y.2d 194 (1972).

"liberty" principles, *id.* pp. 27-28. This is nothing more than an auxiliary appellant's brief.

Similarly, just as NRP did, the so-called "Habeas Corpus Experts" cite historical examples of abused women and enslaved Africans as "novel" situations where habeas corpus was invoked. HE Br. pp. 16-20. This callous analogy is no more persuasive here than it was when NRP raised it. NRP App. Br. pp. 14-20. By extending legal protection to all persons based on their humanity rather than any measure of autonomy, courts and legislatures alike recognized the inherent dignity of all humans. *See* Respondents' Br., pp. 35-30. The equality achieved through that process should not be manipulated to suggest humanity is an arbitrary category, whether it is NRP or self-appointed experts who so assert.

CONCLUSION

If nothing else, *amici curiae* should be "of assistance to the Court." 500.23(a)(4)(i). Here, NRP *amici* have no particular stake in this appeal and muster no unique insight for this Court to consider. Rather, the NRP *amici* are conduits for repetition of the same unsound and unsupportable argument in six additional briefs. Like NRP, they may provide labels such as "autonomous" or "cognitively complex," but not one of them explains how these labels should be applied in the habeas corpus context or how this Court should

decide what, if not humanity, makes a "person." Equally telling, none identify anything unlawful about Happy's environment at the Bronx Zoo. Thus, the NRP *amici* provide no assistance to the Court, except to confirm that the time has come for NRP's mission to enact "animal personhood" through habeas corpus petitions should be brought to an end, reserving that powerful remedy for the human prisoners for whom it was intended.

Dated: Buffalo, New York
October 22, 2021

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Kenneth A. Manning

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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Mariana Braylovskiy

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