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Appellate Division–First Department Case No. 2020-02581

Court of Appeals

of the

State of New York

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

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

BRIEF OF ASSOCIATION OF ZOOS & AQUARIUMS AND ACCREDITED NEW YORK ZOOS AND AQUARIUMS AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS-RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 500.1(f) of the Rules of Practice of the New York State Court of Appeals, *amici* state that they have no corporate parents, subsidiaries or affiliates.

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INTEREST OF *AMICI CURIAE*

Amici comprise the one leading non-profit organization dedicated to the advancement of zoos and aquariums across the country, and six accredited New York zoos and aquariums. *Amici* have a strong interest in the continued well-being of the elephants, chimpanzees, and thousands of other animals under their care. The welfare of these animals could be severely jeopardized should this Court rule in Appellant's favor.

The Association of Zoos & Aquariums ("AZA") is a Section 501(c)(3) non-profit organization, founded in 1924, dedicated to the advancement of zoos and aquariums in the areas of conservation, education, science, and recreation. AZA is the independent accrediting organization for the best zoos and the best aquariums, principally in America, Canada, and Mexico. AZA has 238 accredited members, including the Bronx Zoo, where Happy resides. (The Bronx Zoo is a longtime accredited member in good standing.) Sixty-two AZA-accredited members, in addition to the Bronx Zoo, have elephants in their facilities. In total, as of June 1, 2021, AZA-accredited members care for 324 elephants.

Aquarium of Niagara is a not-for-profit AZA-accredited institution at 701 Whirlpool Street, Niagara Falls, NY. It serves New York residents in the surrounding Buffalo/Niagara region plus Rochester, with frequent visitors from southern Ohio, eastern Pennsylvania, and southern Ontario. Its 35 full-time

employees received 306,000 annual visits in 2019 and the Aquarium made a positive and substantial impact on the regional economy that continues today. The Aquarium completed more than $10 million in capital improvements since 2018, including a $3.6 million renovation of its penguin exhibit.

Buffalo Zoo is an AZA-accredited institution at 300 Parkside Avenue, Buffalo, NY. It is one of the most popular attractions in Western New York. The zoo received 459,613 visits in 2019 and at that pre-Covid time had 80 full-time and 31 part-time employees. Buffalo Zoo receives public funding from the City of Buffalo and is operated by the non-profit Zoological Society of Buffalo. Its stated mission is to provide New York residents and visitors with an educationally, culturally, and recreationally significant community resource. Buffalo Zoo is the third oldest zoo in the United States, having been founded in 1875. It is home to hundreds of species including giraffes, gorillas, lions, and zebras. In 1912, Buffalo Zoo completed initial construction of an Elephant House for its first elephant; it was later renovated in 1958. Daily summer visitors in those days peaked between 20,000 and 30,000. With continued improvements at Buffalo Zoo in the following decades, annual attendance by 1966 exceeded one million visitors.

Rosamond Gifford Zoo is an AZA-accredited institution at One Conservation Place, Syracuse, NY. In 2019, the zoo had approximately two million visits. At that pre-Covid time, it had 61 full-time employees and one part-time

employee. It has elephants in New York that could be affected by this Court's decision about the availability *vel non* of habeas corpus relief for one of three elephants at the Bronx Zoo.

Seneca Park Zoo is an AZA-accredited institution at 2222 St. Paul Street, Rochester, NY. In 2019, it had 377,449 visits. At that pre-Covid time, it had 62 full-time and 145 part-time employees. The Seneca Park Zoo has elephants that could be affected by the Court's decision in this case.

Staten Island Zoo is an AZA-accredited institution on the north shore of Staten Island at 705 Clove Road, Staten Island, NY. In 2019, the zoo had 187,230 visits. At that pre-Covid time, it had 30 full-time and 16 part-time employees.

Utica Zoo is an AZA-accredited institution at Utica Zoo Way, Utica, NY. It is home to over 200 animals representing 99 species. In 2019, it had approximately 102,000 visits. At that pre-Covid time, it had 31 full-time and 10 part-time employees.

INTRODUCTION AND SUMMARY OF ARGUMENT

The writ of habeas corpus allows "*persons*, deprived of liberty, to challenge in the courts the legality of their detention." *Hoff v. State*, 279 N.Y. 490, 492 (1939) (emphasis added); *see also* N.Y. C.P.L.R. 7002(a) (allowing any "*person* illegally imprisoned or otherwise restrained in his liberty within the state," to "petition . . . for a writ of habeas corpus." (emphasis added)). The question in this case is whether an elephant is a "person" for purposes of habeas corpus relief.

A court in New York applies a two-step process in deciding whether to apply habeas in a particular context. *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 998 N.Y.S.2d 248, 249–50 (N.Y. App. Div. 3d Dept. 2014) ("*Lavery I*"). *First*, a court "must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach." *Id.* at 249; *see also People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875) (noting that habeas corpus "exists as a part of the common law of th[is] State"). *Second*, if there is no precedent, the court must decide whether it should use its common-law authority to expand the habeas writ. *Lavery I*, 998 N.Y.S.2d at 250.

Appellant's argument for applying habeas to an elephant fails at each step. At the first step, no common-law authority whatsoever supports extending habeas relief

to non-humans.[1] At common law, animals were property. The law not only *allowed* people to detain wild animals at will, but also *encouraged* it by rewarding the captor with ownership. The writ of habeas corpus, by contrast, is designed to *prevent* arbitrary detention. This distinction between humans and animals for purposes of arbitrary detention makes sense, because humans—unlike animals—have the capacity to participate in the social contract (i.e., the capacity to give up some freedom in exchange for a package of rights and duties that protects us and allows us to participate in government).

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[1] Appellant cites a decision by an Argentinian court granting habeas relief to a chimpanzee, *see* Appellant's Br. 31, but Argentina is a civil law—rather than common law—jurisdiction, *see, e.g.*, *Pegasus Aviation IV, Inc. v. Aerolineas Austral Chile, S.A.*, No. 08 Civ. 11371 NRB, 2012 WL 967301, at *6 n.11 (S.D.N.Y. Mar. 20, 2012). Moreover, the Argentinian court's decision does not cite any English or American common-law sources. *See* COMP-1 to COMP-33. In addition, some news reports have recently erroneously stated that the U.S. District Court for the Southern District of Ohio has designated hippopotamuses to be "people," *see, e.g.*, David Moye, *Court Rules Pablo Escobar's Cocaine Hippos Are Legally People*, Huffington Post (Oct. 21, 2021), https://www.huffpost.com/entry/pablo-escobar-cocaine-hippos-legal-standing-as-people_n_6171cee3e4b010d9330e81c8. In fact, the court issued a cursory order authorizing hippopotamuses located in Colombia that were, under Colombian law, proper parties to ongoing litigation in that country to take discovery in the United States under 28 U.S.C. § 1782 (presumably through counsel) as a matter of comity and deference to Colombian law. *See* Application, *Community of Hippopotamuses Living in the Magdalena River, Applicant, To Issue Subpoenas For The Taking Of Depositions Pursuant To 28 U.S.C. s 1782*, No. 1:21-mc-00023-TSB-KLL (S.D. Ohio Oct. 15, 2021), ECF No. 1. Colombia—like Argentina—is a civil law jurisdiction, *see, e.g.*, *Lopez-Imitalo v. United States*, No. 10 CIV 3228 RPP, 2010 WL 5298823, at *6 n.6 (S.D.N.Y. Dec. 23, 2010), and the Ohio court did not hold or even suggest that hippopotamuses were people under American law or any common-law doctrine.

At the second step, this Court weighs "judicial and social policy concerns in determining whether to recognize" a new "cause[] of action." *Ortega v. City of New York*, 9 N.Y.3d 69, 79 (2007). Here, expanding habeas relief to animals would have extraordinarily deleterious effects. Apart from its potential effect on zoos and aquariums in New York, the writ potentially could also be asserted against any pet owner, beekeeper, dairy farmer, or myriad others in this State. The Legislature is far better suited than this Court to weigh the delicate policy considerations at stake.

This Court should affirm the decision below.

ARGUMENT

I. HABEAS CORPUS APPLIED ONLY TO HUMANS AT COMMON LAW, BECAUSE ONLY HUMANS CAN PARTICIPATE IN THE SOCIAL CONTRACT THAT SERVES AS THE FOUNDATION OF OUR GOVERNMENT

There is no authority in "the common law surrounding the historic writ of habeas corpus" for applying habeas relief to animals. *See Lavery I*, 998 N.Y.S.2d at 249–50. At common law, wild animals could be trapped and detained at will. But the Western legal tradition understood that allowing the government to arbitrarily detain *humans* could lead to tyranny. The notion that the law should treat detention of animals differently than detention of humans is logical, because animals lack the ability to participate in the social contract—i.e., the ability to voluntarily relinquish the freedom that exists in a state of nature in exchange for security and the capability

to determine the leadership that rules over us. The very logic of the historic habeas writ therefore counsels *against* extending habeas to animals.

A. The Common Law Distinguished Between Animals (Which Could Be Detained Arbitrarily) and Humans (Who Could Not)

1. Animals Were a Form of Property at Common Law, and People Could Therefore Detain Wild Animals at Will

The notion that animals are property dates back (at least) to the Code of Hammurabi. *See* Thomas G. Kelch, *A Short History of (Mostly) Western Animal Law: Part I*, 19 Animal L. 23, 32 (2012) (citing *The Code of Hammurabi King of Babylon: About 2250 B.C.* § 7 (Robert Francis Harper ed., Wm. W. Gaunt & Sons, Inc. 1994)). Although the Code contains "rules relating to payment for injuries to oxen or other animals," those rules "are not the result of any humane feelings or sentiment, but rather are for the protection of the owner's economic value in the animal." *Id.* at 32–33.

The very first chapter of the Hebrew Bible cements this differentiation between humans and animals. The Book of Genesis recounts that God created humans—and only humans—"in [God's] own image." *Genesis* 1:27. God then tells humans to "subdue" the earth, "and 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* 1:28. In his *Commentaries on the Laws of England*, William Blackstone declared that Genesis 1:28 was "the only true and solid foundation of man's dominion over

external things . . . . The earth, therefore, and all things therein, are the general property of all mankind, *exclusive of other beings*, from the immediate gift of the Creator." 2 William Blackstone, *Commentaries* *2-*3 (emphasis added).[2]

In line with the Biblical idea that God gave the entire world—including the animals within it—for the possession of humanity, the Western legal tradition is filled with discussions about the detention of wild animals, which had no right to bodily liberty whatsoever. Justinian (circa 533 C.E.), for example, declared that "[w]ild beasts, birds, fish, that is, all animals, which live either in the sea, the air, or on the earth, so soon as they are taken by anyone, immediately become . . . the property of the captor; for natural reason gives to the first occupant that which had no previous owner." *The Institutes of Justinian* 95 (Thomas Collett Sandars trans., 1917). Henry de Bracton (circa 1235 CE) similarly wrote in his *Laws and Customs of England* that an individual can "tak[e] possession of things that are owned by no one . . . [such] as wild beasts, birds and fish": "[w]hen they are captured they begin to be mine, because they are forcibly kept in my custody." Henri De Bracton,

[2] "[A]ll of our formative documents—the Declaration of Independence, the Constitution, the Federalist Papers, and the seminal decisions of the Supreme Court under John Marshall—were drafted by attorneys steeped in [Blackstone's Commentaries]." Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. Pa. L. Rev. 1, 2 (1996) (quoting Robert A. Ferguson, *Law and Letters in American Culture* 11 (1984)).

Bracton on the Laws and Customs of England 42 (Samuel E. Thorne trans., 1968). And Blackstone similarly explained that

> [w]ith regard . . . to animals *ferae naturae*, all mankind had by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitants of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country.

2 William Blackstone, *Commentaries* *403.

This issue famously came to the fore in *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), perhaps the "most celebrated of all property law cases," John William Nelson, *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are A Bad Idea*, 41 McGeorge L. Rev. 281, 291 (2010). Lodowick Post, a hunter, was chasing a fox with his hounds on a beach in Long Island when Jesse Pierson—fully aware that Post was hunting the fox—"intercepted the fox, killed it, and carried it away." Josh Blackman, *Outfoxed:* Pierson v. Post *and the Natural Law*, 51 Am. J. Legal Hist. 417, 420 (2011). Post sued Pierson for interfering with his property right in the fox. *Id.* The New York Supreme Court ruled against Post. *Pierson*, 3 Cai. R. at 179. Citing, among others, Justinian, Bracton, and Blackstone, the court held that a hunter has no property right in an "animal *ferae naturae*" like a fox until he "wound[s], circumvent[s] or ensnare[s]" the fox, "so as to deprive" the fox "of [its] natural liberty." *Id.* at 177–79. Over 200 years after it was decided, *Pierson v. Post* remains

"the seminal case used to teach [first-year] law students about the acquisition of property." Blackman, *supra*, at 417. Needless to say, no one in *Pierson* believed that humans were forbidden from detaining the fox; the only question was whether Post's pursuit of the fox gave him a property interest in it.

2. Habeas Was Designed to Prevent Government from Arbitrarily Detaining Humans

Habeas corpus has its roots in the Assize of Clarendon, an 1166 C.E. legislative enactment of King Henry II. Michael O'Neill, *On Reforming the Federal Writ of Habeas Corpus*, 26 Seton Hall L. Rev. 1493, 1495–96 (1996). The writ developed and gained strength over time, such that by 1628, the writ of habeas corpus became "the highest remedy in law, for any *man* that is imprisoned." 3 Howell's State Trials 95 (1628) (emphasis added), *cited in Smith v. Bennett*, 365 U.S. 708, 712 (1961).

In contrast to his views about the arbitrary detention of animals, Blackstone considered arbitrary detention of *humans* to be incredibly grave and dangerous:

> To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom; *but confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government*.

1 William Blackstone, *Commentaries* *136 (emphasis added). For this reason, the habeas writ is both "great and efficacious," 3 William Blackstone, *Commentaries*

*131, because it preserves "personal liberty; for if . . . it were left in the power of . . . the highest magistrate to imprison arbitrarily whomever he or his officers thought proper, . . . there would soon be an end of all other rights and immunities," 1 William Blackstone, *Commentaries* *135.

All states recognized the common-law writ of habeas corpus at independence. O'Neill, *supra*, at 1502. And in defending the Constitution's Suspension Clause (Art. I, Sec. 9, Cl. 2), Alexander Hamilton in *The Federalist Papers* insisted that the writ of habeas corpus protects against "the practice of arbitrary imprisonments," which "have been, in all ages, the favorite and most formidable instruments of tyranny." *The Federalist* No. 84 (Alexander Hamilton); *see also id.* (citing Blackstone). It goes without saying that Hamilton was not discussing "imprisonments" of animals—which, as noted above, could be detained at will at common law. Indeed, Appellant cites no authority indicating that any judge or legal scholar at the time of the Founding thought that habeas could extend to animals.

Today, both this Court and the U.S. Supreme Court have recognized the critical role that the writ of habeas corpus plays in securing our liberty. *See, e.g.*, *Hoff*, 279 N.Y. at 492 ("[The writ of habeas corpus] has been cherished by generations of free men who had learned by experience that it furnished the only reliable protection of their freedom."); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental

precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."). And although both Courts have issued innumerable decisions concerning habeas corpus, not once has either Court ever remotely suggested that habeas could apply to non-humans. To the contrary, both Courts have issued opinions explaining that animals *lack* a common-law right to bodily liberty. *See, e.g.*, *Dieterich v. Fargo*, 194 N.Y. 359, 364 (N.Y. 1909) ("Deer, though strictly speaking ferae naturae, if reclaimed and kept in inclosed ground, are the subject of property, pass to the executors, and are liable to be taken in distress." (quoting 1 Halsbury's Laws of England, § 799)); *Sentell v. New Orleans & C.R. Co.*, 166 U.S. 698, 700–01 (1897) (noting that "cats, monkeys, parrots, singing birds, and similar animals" can be "kept for pleasure, curiosity, or caprice").[3]

In short, then, the common law—as traced through the Western legal tradition and ultimately embraced by the Founders, this Court, and the U.S. Supreme Court—treated arbitrary imprisonment of animals quite differently from arbitrary imprisonment of humans.

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[3] At the same time, of course, both Courts have issued opinions interpreting animal welfare statutes passed by legislatures. *See, e.g.*, *Hammer v. Am. Kennel Club*, 1 N.Y.3d 294, 300 (2003) (interpreting Agriculture and Markets Law § 353, which prohibits mutilating or maiming an animal); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 690, 696–97 (1995) (interpreting the federal Endangered Species Act's prohibition on "'tak[ing]' any endangered or threatened species"). As noted in Section II.C, *infra*, the Legislature is always free to modify the common law, and—in this case—is far better suited to do so than this Court.

B. Animals Cannot Take Part in the Social Contract That Serves as the Foundation of Our Government

The notion that humanity devolves into a brutal "state of nature" in the absence of government dates back to (at least) the Hebrew Bible. *See, e.g.*, *Judges* 17:6 ("In those days Israel had no king; everyone did as they saw fit.").[4] Thus, the "social contract theory" states that "we enter into a societal agreement that requires that we surrender some of our freedoms enjoyed in the state of nature. In return, we receive political rights and government services that supposedly make us safer and better able to function interdependently." David E. Murley, *Private Enforcement of the Social Contract:* DeShaney *and the Second Amendment Right to Own Firearms*, 36 Duq. L. Rev. 827, 853–54 (1998).

Thomas Hobbes famously discussed this social contract in *Leviathan*. *See* 2 Thomas Hobbes, *Leviathan* 120 (A.R. Waller, ed., 1904) (1651). According to Hobbes, government—supported by the social contract—prevents humans from treating one another like animals in a state of nature, where "every man is enemy to every man" and life is "nasty, brutish, and short." *Id.* at 84. Importantly, then, Hobbes did not believe that animals could take part in this social contract. *See id.* at 93 ("To make Covenants with [brute] Beasts, is impossible; because not

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[4] *See also, e.g.*, Ethics of the Fathers 3:2, https://www.sefaria.org/Pirkei_Avot.3.2?lang=bi&with=all&lang2=en (Rabbi Hanina, Jewish sage circa 1st century C.E., exhorting his followers to "pray for the welfare of the government, for were it not for the fear it inspires, every man would swallow his neighbor alive").

understanding our speech, they understand not, nor accept of any translation of Right; nor can translate any Right to another . . . .").

John Locke further developed this notion of the social contract. *See* John Locke, *Two Treatises of Government* 269 (1821 ed.) (1681) ("The only way whereby any one divests himself of his natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community . . . ." (emphasis removed)). Similar to Hobbes, Locke considered animals not to be humanity's equals in this contract but rather humanity's "*property*," "founded upon the [Divine] right [man] ha[s] to make use of those things that were necessary or useful to his being." *Id.* at 99 (emphasis in original).

It was social-contract theory—i.e., the idea that government must reflect an express or implied agreement among human beings—"that led the revolutionary colonists to believe that they had the authority and personal autonomy to rebel against what they considered to be an illegitimate (tyrannical) governing force: the King of England." Jaren Wilkerson, *Disappearing Together? American Federalism and Social Contract Theory*, 17 U. Pa. J. Const. L. 569, 569–70 (2014). The Declaration of Independence is premised on this notion: "[g]overnments are instituted among Men" to secure rights, and these governments "deriv[e] their just powers from the consent of the governed." The Declaration of Independence para. 2 (U.S. 1776). And when a government like the British Crown commits "a long

train of abuses and usurpations"—like "imposing Taxes on us without our Consent"—then the subjects of the government are "Absolved from all Allegiance" and have both the "right" and "duty" to declare independence. *Id.* paras. 2, 5.[5]

The Supreme Court has imported the social-contract theory into its jurisprudence. In *M'Culloch v. Maryland*, 17 U.S. 316 (1819), for example, Chief Justice Marshall insisted that "[t]he government of the Union . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." *Id.* at 404–05. In that vein, when asked in the *Slaughter-House Cases*, 83 U.S. 36 (1872), whether the Thirteenth Amendment's prohibition on "involuntary servitude" applied to servitudes on property, the Supreme Court declared that the Thirteenth Amendment "only appl[ies] to human beings," because the Thirteenth Amendment is a "declaration of the personal freedom of *all the human race* within the jurisdiction of this government." *Id.* at 69 (emphasis added).[6] The Supreme

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[5] Or, put a bit more lyrically, "Essentially, they tax us relentlessly/ Then King George turns around, runs a spendin' spree / He ain't ever gonna set his descendants free / So there will be a revolution in this century." Lin Manuel-Miranda & Jeremy McCarter, *Hamilton: The Revolution* 26 (2016).

[6] *See also Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent., Inc.*, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012) ("The only reasonable interpretation of the Thirteenth Amendment's plain language is that it applies to persons, and not to non-persons such as orcas.").

Court's modern jurisprudence similarly—and routinely—notes that the Bill of Rights is designed to protect "*human* dignity." *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 510 (2011) ("Prisoners retain the essence of *human* dignity inherent in all *persons*." (emphasis added)); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (noting that the Constitution's "broad provisions to secure individual freedom and preserve *human* dignity" are "central to the American experience" (emphasis added)); *Gregg v. Georgia*, 428 U.S. 153, 182 (1976) (referencing "the basic concept of *human* dignity at the core of the [Eighth] Amendment" (emphasis added)).

It is logical for the Supreme Court to conclude that Constitutional provisions do not apply to animals. As the Connecticut Appellate Court has recognized, the social contract theory is "based on the ideal of moral agents coming together to create a system of rules," and "it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities." *Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36, 46 (2019) (quoting Richard L. Cupp, Jr., *Focusing on Human Responsibility Rather Than Legal Personhood for Nonhuman Animals*, 33 Pace Envtl. L. Rev. 517, 527 (2016)). In other words, legal duties and legal rights go together under the social contract theory—and because animals "lack moral agency" and "cannot submit to societal responsibilities," they do not automatically receive legal rights. Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San

Diego L. Rev. 27, 66 (2009). In fact, as noted above, social contract theory was designed to *prevent* humans from treating each other like animals and devolving into a feral-like "state of nature" where life is "nasty, brutish, and short." Hobbes, *supra*, at 84. Simply put, then, only humans can participate in the social contract that serves as the justification for our system of government, and only humans therefore have Constitutional rights under that system. The same logic should apply to habeas relief.

II. THE COURT SHOULD NOT USE ITS COMMON-LAW AUTHORITY TO EXTEND HABEAS RELIEF TO ANIMALS

A. This Court Considers Both Legal and Practical Consequences in Deciding Whether to Extend the Common Law

As this Court stated just five years ago, "[t]he common law . . . evolves slowly and incrementally, eschewing sudden or sweeping changes," and "when addressing a legal question for the first time, courts must be mindful of the effect on future litigation and the development of the law." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583, 594 (2016). As a result, while this Court can certainly use its common-law authority to create a new cause of action, "that authority must be exercised responsibly, keeping in mind that a new cause of action will have both 'foreseeable and unforeseeable consequences, *most especially the potential for vast, uncircumscribed liability*.'" *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 450 (2013) (emphasis added) (quoting *Madden v. Creative Servs., Inc.*, 84 N.Y.2d

738, 746 (1995)); *see also Ortega*, 9 N.Y.3d at 78–79 ("While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. . . . New York courts therefore weigh other judicial and social policy concerns in determining whether to recognize new . . . causes of action." (quoting *Trombetta v. Conkling*, 82 N.Y.2d 549, 554 (1993))). Thus, although Appellant cites a 1969 decision from this Court declaring that a "cause of action" should not be "den[ied]" simply because recognizing the cause of action will lead to a "proliferation of claims," Appellant's Br. at 18 (quoting *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969)), this Court's more recent case law makes clear that the potential for a "proliferation of claims" is indeed a factor that counsels against recognizing a new cause of action, *see, e.g.*, *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994).

As outlined in the following section, it would be difficult to overstate the legal and practical consequences of the seismic shift that Appellant is asking this Court to dictate.

B. Extending Habeas Relief to Animals Would Wreak Havoc on Society

To fully understand the harmful effects of extending habeas relief to animals in New York, it is important to remember that ruling in Appellant's favor would not just affect animals in state custody, as New York does not appear to have a "state

action" habeas pleading requirement.[7] An individual seeking habeas relief in New York must allege that he is "illegally imprisoned *or* otherwise restrained in his liberty," N.Y. C.P.L.R. 7002(a) (emphasis added), which means that the petitioner must demonstrate that he is being restrained by *either* the "state" *or* a "citizen," *see People ex rel. Robertson v. New York State Div. of Parole*, 67 N.Y.2d 197, 201 (1986). Thus, for example, the Appellant in *Nonhuman Rts. Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (2017) brought habeas petitions to free two chimpanzees that were held by private corporations, *see id.* at 75. And courts in New York routinely allow individuals to bring habeas petitions against private entities. *See, e.g.*, *Alan D.M. v. Nassau Cty. Dep't of Soc. Servs.*, 58 A.D.2d 111, 116 (1977) ("The courts of this State have repeatedly recognized the availability of a writ of habeas corpus as a proper means of determining the custody of children."); *Application of Siveke*, 110 Misc. 2d 4, 11 (Sup. Ct. 1981) (allowing an individual to bring a habeas writ on behalf of her ill husband against her daughter and her daughter's husband).

[7] Notably, there is no allegation—in either the Appellant's habeas petition, *see* A-31 to A-92, or elsewhere—that Happy is being held in state custody.

Because a New York habeas petitioner does not need to allege that the detained is being held in government custody, the sky is truly the limit for habeas claims should this Court rule in Appellant's favor.[8] To take just a few examples:

- All twelve AZA-accredited New York zoos and aquariums (including the five Wildlife Conservation Society facilities) could face the uncertain future of species-by-species litigation and potential involuntary transfer of

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[8] Contrary to Appellant's assertion, this Court cannot simply "recognize Happy's common law right to bodily liberty protected by habeas corpus and . . . leave unsettled whether other species of nonhuman animals may invoke [habeas] protections." Appellant's Reply Br. at 20. Appellant's core argument is that Happy is entitled to habeas relief because she is "an autonomous being with advanced cognitive abilities." Appellant's Br. at 39. Depending on the scope and reasoning of a potential ruling in Appellant's favor, creative lawyers would of course potentially seek to expand the scope of the writ, as counsel in this case seeks to do, arguing that innumerable other species qualify as having a right to bodily liberty under Appellant's amorphous and ill-defined standard. As the president and co-founder of People for the Ethical Treatment of Animals has noted:

> [H]undreds of studies have . . . demonstrated animals' logical, mathematical, linguistic, and emotional intelligence. For years we blithely believed that humans were the only species to use tools, until researchers documented that wasps were using pebbles as hammers, octopuses were carrying coconut shells as portable hiding places, [and] crows were using sticks to dig in the ground for grubs . . . . The mathematical abilities of fish have proved to be on a par with those of monkeys, dolphins and bright young human children. . . . [C]hicks are able to cluck back and forth with their mothers from inside their shells before they are even hatched. . . . [B]irds can learn meaningful English, count and identify colors, objects and shapes.

Ingrid Newkirk, *Top Scientific Minds Declare That We Are Just One Among Many Animals*, The Huffington Post (Aug. 28, 2012), https://www.huffpost.com/entry/one-of-many-animals_b_1836537. And so on.

their thousands of animals. This could not only deprive tens of thousands of New Yorkers of the opportunity to see and learn about these animals, but could also potentially harm the animals themselves. The animals could be transferred from confinement in the superlative care of AZA-accredited institutions to unknown future institutions, not accredited, and of unknown quality of care.

- There are 33,438 farms and over 45 slaughterhouses and processors in New York State.[9] Farms in New York employ 55,363 people, and "[d]airy and milk production" alone "accounts for nearly 26,000 jobs in New York State."[10] All of these institutions could be dragged into court and potentially shuttered, all of these careers could dissipate, and all of these facets of the food supply could disappear or become scarce should the Court rule in Appellant's favor.

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[9] New York Farm Bureau, *New York Agriculture* (2021), https://www.nyfb.org/about/about-ny-ag (farms); Cornell Cooperative Extension, *Looking for a Slaughterhouse?* (Aug. 14, 2020), http://cceschoharie-otsego.org/agriculture/livestock/looking-for-a-slaughterhouse (slaughterhouses and processors).

[10] New York Farm Bureau, *supra*.

- Almost 48% of New York households own a pet,[11] with approximately 1.1 million cats and dogs living in New York City households alone.[12] Every single one of these pets could become the subject of a habeas suit should Appellant prevail. The same logic would also apply to the 200,000 service animals nationwide that could potentially become eligible for habeas relief the moment they set foot on New York soil.[13]
- Any child in New York who owns an ant farm[14] or traps flies in an empty soda bottle[15] could face the culpability of a prison warden illegally maintaining custody over his or her wards.

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[11] John Crudele, *There Are Enough Pets for Almost Everyone in the U.S.*, N.Y. Post (Feb. 26, 2020), https://nypost.com/2020/02/26/there-are-enough-pets-for-almost-everyone-in-the-us/.

[12] Julie Zeveloff, *Here's Where To Find The 600,000 Dogs That Live In New York City*, Bus. Insider (Feb. 14, 2012), https://www.businessinsider.com/heres-where-to-find-the-600000-dogs-that-live-in-new-york-city-2012-2.

[13] *See* Farah Stockman, *People Are Taking Emotional Support Animals Everywhere. States Are Cracking Down*, N.Y. Times (June 18, 2019), https://www.nytimes.com/2019/06/18/us/emotional-support-animal.html.

[14] *See generally* Brett Dvoretz, *The Best Ant Farm*, News 10 ABC (June 11, 2021), https://www.news10.com/reviews/br/toys-games-br/outdoor-toys-br/the-best-ant-farm/.

[15] *See generally* Erin Huffstetler, *How to Make a Fly Trap From an Empty Soda Bottle*, The Spruce (Jan. 3, 2021), https://www.thespruce.com/how-to-make-a-fly-trap-1389066.

Moreover, the consequences could be enormous *even if* habeas relief in New York had a "state action" requirement. The New York City Police Department relies on numerous dogs[16] and horses[17] to aid with law enforcement. There are also many New York state-funded research laboratories that work with animals; these laboratories possessed approximately 5,568 dogs and 2,673 cats in 2010.[18] And, of course, there are innumerable classroom pets in public schools across New York State—with one public school in Manhattan alone possessing "hundreds of creepy crawlies" to delight its kindergarteners.[19]

In short, there is more than enough evidence—to put it mildly—that a ruling in Appellant's favor could create "the potential for vast, uncircumscribed liability."

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[16] Forty-four dogs serve in the NYPD's emergency service canine unit as of October 2020. Dean Meminger, *Paw Patrol: How NYPD Elite Officers and K-9s Train in Brooklyn*, NY1 News (Oct. 23, 2020), https://www.ny1.com/nyc/all-boroughs/news/2020/10/23/nypd-elite-officers-and-k-9s-train-in-brooklyn.

[17] The NYPD's "Mounted Unit," which included 55 horses in October 2017, serves as a "crucial [tool] to counter-terrorism." Dana Tyler, *Behind The Scenes With The NYPD's Elite Mounted Unit*, CBS New York (Oct. 8, 2017), https://newyork.cbslocal.com/2017/10/08/behind-the-scenes-with-the-nypds-elite-mounted-unit/.

[18] New York Bill Jacket, 2016 S.B. 98, Ch. 240, at 110 n.3, https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/57974.

[19] Andy Newman, *School's Out for the Animals, Too*, N.Y. Times (June 24, 2016), https://www.nytimes.com/2016/06/26/nyregion/summer-is-here-and-schools-out-for-the-animals-too.html.

See Caronia, 22 N.Y.3d at 450 (quoting *Madden*, 84 N.Y.2d at 746). This Court should therefore decline Appellant's invitation to extend habeas relief to animals.

C. The Legislature Is Far Better Suited than This Court to Create New Animal Rights

1. Our System of Government Entrusts the Legislature—Not the Judiciary—with Deciding Critical Policy Questions

Under the New York Constitution, "[t]he legislative power of this state" is "vested in the senate and assembly." N.Y. Const. art. III, § 1. This provision "traditionally requires that the *Legislature*"—not the Judiciary—"make the critical policy decisions." *Cohen v. State*, 94 N.Y.2d 1, 11 (1999) (emphasis added) (quoting *Bourquin v. Cuomo*, 85 N.Y.2d 781, 784 (1995)). "Fundamental policy choices . . . epitomize legislative power, as balancing of differing interests is a task the multimember, representative Legislature is entrusted to perform under our constitutional structure." *People v. Francis*, 30 N.Y.3d 737, 751 (2018) (internal brackets and quotation marks omitted) (quoting *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 823 (2003)). In other words, "[w]hen an issue involves a host of considerations that must be weighed and appraised, [the issue] should be committed to those who write the laws rather than those who interpret them." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (internal quotation marks omitted) (quoting *Bush v. Lucas*, 462 U.S. 367, 380 (1983)).

Here, as noted above, extending habeas relief to animals could have devastating consequences for the economic and social fabric of New York State. The question of whether the people of New York will suffer those consequences should be left to the Legislature—i.e., the people's democratically elected representatives. This Court is not accountable to the citizens of this State, and therefore cannot make such momentous policy decisions on the public's behalf. *See, e.g.*, *The Federalist* No. 47 (James Madison) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for THE JUDGE would then be THE LEGISLATOR." (citing Montesquieu)); *The Federalist* No. 78 (Alexander Hamilton) ("[T]here is no liberty[] if the power of judging be not separated from the legislative and executive powers." (citing Montesquieu)).

2. <u>The Legislature Is Better Equipped than the Judiciary to Create New Animal Rights</u>

Extending habeas relief to animals in a thoughtful, limited, and judicious manner (if at all) requires "[a]cquiring data and applying expert advice"—a task that "cannot be economically done by the courts." *Klostermann v Cuomo*, 61 N.Y.2d 525, 535 (1984). "The [L]egislature is plainly in the better position to study the impact and consequences of" extending legal personhood to animals like Happy, "including the costs of implementation and the burden on the courts in adjudicating such claims." *Caronia*, 22 N.Y.3d at 452. For this reason, "the court may not

substitute itself for the Legislature merely because the Legislature has failed to act." *Spillane v. Katz*, 25 N.Y.2d 34, 37 (1969).

Allowing the Legislature to extend habeas relief to animals would also accord with the historical tradition regarding animal rights. "At common law[,] no protection was afforded to animals against the cruelty of man." *People v. Bunt*, 462 N.Y.S.2d 142, 143 (Just. Ct. 1983). "[A]ll animals were property belonging absolutely to the human owner and therefore subject to his slightest whim. They could be exploited, used, abused, or dispatched at his pleasure." Charles E. Friend, *Animal Cruelty Laws: The Case for Reform*, 8 U. Rich. L. Rev. 201, 201 (1974). Legislatures played a critical role in changing that dynamic, ever since the Puritans of the Massachusetts Bay Colony enacted "the world's first animal protection laws" in 1641. Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 539 (1996). The New York State Legislature has played a pioneering role in this regard, passing "one of the most influential animal cruelty statutes in the United States" in 1829 that "became one of the first models for animal cruelty laws and served as the starting point for many states." Stephen Iannacone, *Felony Animal Cruelty Laws in New York*, 31 Pace L. Rev. 748, 751 (2011); *see also* N.Y. Rev. Stat of 1827–1828, part IV, ch. 1, tit. 6, § 26 at 695.

Today, all fifty states have felony animal cruelty laws.[20] And Congress has passed multiple animal welfare statutes, including the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*; the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*; and, in 2019, the Preventing Animal Cruelty and Torture Act, Pub. L. No. 116-72, 133 Stat. 1151 (2019).[21] If New York is to extend habeas relief to animals, the body most directly accountable to the people—the Legislature, not the Judiciary—must be the body to enact such a fundamental and unprecedented revision of the basic organizing principles of society.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

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[20] *See* Animal Legal Defense Fund, *Laws That Protect Animals* (2021), https://aldf.org/article/laws-that-protect-animals/.

[21] *See* Hannah Knowles & Katie Mettler, *Trump Signs a Sweeping Federal Ban on Animal Cruelty*, Wash. Post (Nov. 25, 2019), https://www.washingtonpost.com/science/2019/11/25/most-animal-cruelty-isnt-federal-crime-that-changes-monday-when-bipartisan-bill-becomes-law/.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 500.13(c)(1) of the Rules of Practice of the Court of Appeals of the State of New York, I hereby certify that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief, exclusive of the material omitted under Rule 500.13(c)(3), is 6,583 words.

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