

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 *AMICUS CURIAE* MANEESHA DECKHA
IN SUPPORT OF PETITIONER-APPELLANT**

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Maneesha Deckha is Professor and Lansdowne Chair in Law at the University of Victoria Faculty of Law in Victoria, British Columbia. Professor Deckha has authored numerous works in the fields of animal law and philosophy, focusing on the need for social and legal reform for animals as a matter of justice and ethics. Her body of work has demonstrated why the current legal classification of animals as property or things is ethically deficient when measured against a range of leading social theories about who is entitled to legal personhood and subjecthood in the common law. Specifically, her scholarship has shown how discriminatory attitudes toward animals in the form of anthropocentrism and human exceptionalism support other systemic biases in North America such as sexism and racism.

In her recent monograph *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021), Professor Deckha has proposed a new legal status for animals called “beingness.” Like personhood, beingness is meant to stop the instrumentalization of animals for human or corporate purposes. Although Professor Deckha has argued that legal beingness for animals would be more respectful of animals’ natures as vulnerable, embodied, and relational beings

than legal personhood, the main premise of the monograph and her other work is to explain why the common law must depart from anthropocentric thinking that normalizes animals as property. Professor Deckha has promoted liberty for animals throughout her work. She thus has a heightened interest in juridical consideration of issues integral to this case, namely Petitioner-Appellant's argument that Happy has a right to bodily liberty, the defensibility of continuing the legal property status of animals, and the legal meaning of personhood. *Amicus* respectfully requests that this Court grant the Petitioner-Appellant's request to release Happy to one of the two proposed sanctuaries based on Professor Deckha's interest that the law evolve to properly respond to animal suffering.

II. SUMMARY OF THE ARGUMENT

This brief argues that this case presents an opportunity for the common law to depart from an instrumentalist and insufficient view of animal protection to a robust one more in line with contemporary science and socio-legal thinking based on animals' inherent value as vulnerable, relational and embodied beings. Specifically, the case presents the opportunity to protect Happy as an individual vulnerable, relational, and embodied being and give her a life marked by flourishing rather than suffering. The anthropocentrism of the legal order that presently permits Happy's captivity is poorly justified

and out of step with scientific and progressive scholarly assessments questioning human subordination of animals. The common law must stop regarding animals as “things” or property.

This brief also argues that there is no legal precedent that precludes this outcome. To the contrary, existing legal precedent, legal developments in other jurisdictions, as well as the common law’s abiding interest in the rule of law and achieving justice, all point to the need to eliminate biological species membership as a rationale for whose freedom and liberty the common law will protect.

Taking account of contemporary science and social theory, as well as the existing domestic legal basis and international legal momentum toward recognizing animals as vulnerable beings and not simply things or property, entails releasing Happy from her current solitary zoo confinement. Doing so will permit her to move to a sanctuary where the diverse needs of animal residents are prioritized, and Happy will have a much greater opportunity to flourish.

III. ARGUMENT

A. Policy Reasons to Extend Habeas Corpus to Nonhuman Animals

1. The Current Overarching Classification of Animals as Property is Out of Step with Contemporary Socio-Legal Thinking that Recognizes Animals' Vulnerability and Embodied and Relational Needs.

The common law classification of animals as property reflects instrumentalist assumptions about what animals are, their moral and ethical worth, and how humans should relate to them.¹ Petitioner-Appellant's Brief and multiple *Amici Curiae* Briefs filed in relation to this matter discuss the scientific evidence about elephants, in particular, which highlights the common law's discordant treatment of elephants as property given their scientifically demonstrated capacities and capabilities.² We can also observe that the property status is out of step with contemporary socio-legal theory that emphasizes that the property classification of elephants and other animals situates them in a position of vulnerability.

In the book *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, authored by the *Amicus*, she discusses how animals are: 1) embodied

¹ MANEESHA DECKHA, *ANIMALS AS LEGAL BEINGS: CONTESTING ANTHROPOCENTRIC LEGAL ORDERS* 55 (University of Toronto Press, 2021).

² See, e.g., Brief for Petitioner-Appellant at 1-4, *Nonhuman Rights Project, Inc. on Behalf of Happy v. Breheny*, APL 2021-00087 (filed Jul. 2, 2021); Brief of Professor Martha C. Nussbaum at 3-8, *Nonhuman Rights Project, Inc. on Behalf of Happy v. Breheny*, APL 2021-00087 (filed Aug. 24, 2021).

beings given their sentience but also capacity for life; 2) relational beings given their relationships with their families and larger ecological networks; and 3) vulnerable beings because of their ability to experience injury and loss due to their embodiment and relationality.³ She further discusses how contemporary critical social theory discourse dictates that such features require the extension of robust rights and protections from humans to animals.⁴

The vulnerability of animals and the corresponding need for the law to change is not simply a matter of academic concern. Chief Justice Catherine Fraser of the Alberta Court of Appeal in Canada has recognized animal vulnerability because of animals' sentience and capacity for relationships. In a case also about elephant captivity, Chief Justice Fraser wrote that animals are "highly vulnerable" due to the power humans hold over them and connected this constitutive feature of animals' lives to the question of law reform.⁵ Animals' vulnerability is a condition that the law's present classification of animals as property enables. It is a legal status that is not only outdated, as other *amici curiae* have noted,⁶ but discordant with

³ DECKHA, 124-137. 2021.

⁴ *Id.*

⁵ *Reece v. Edmonton (City)* (2011), 513 A.R. 199, para. 88 (Can. Alta. C.A.) ("Why are the rights of animals important in our society? Animals over whom humans exercise dominion and control are a highly vulnerable group.")

⁶ Brief of Professor Martha C. Nussbaum at 3-4, 27; Brief of Christine M. Korsgaard at 6-7, *Nonhuman Rights Project, Inc. on Behalf of Happy v. Breheny*, APL 2021-00087 (filed Aug. 25, 2021); Brief of Law Professors at 7-9, *Nonhuman Rights Project, Inc. on*

contemporary socio-legal thinking of who should matter in society and in law and why. The time is ripe to reconsider our legal responsibility to respond to animals as embodied, relational, and hence, vulnerable beings.

2. The Current Overarching Classification of Animals as Property Relies on Human Exceptionalism, an Increasingly Discredited Cultural Norm.

The personhood/property divide in the common law that classifies nonhuman animals like Happy as property, rests on an anthropocentric cultural outlook that views humans as superior and exceptional in the natural world. This outlook is called “human exceptionalism.”⁷ Human exceptionalism is ethically indefensible on multiple policy grounds.

First, the rationale underpinning human exceptionalism is logically flawed. As *amici curiae* in this matter have noted, there is no defensible ethical basis for human exceptionalism or the treatment of all animals as categorically different from all humans.⁸

Second, and what may be less obvious, is how human exceptionalism is part of a conceptual and structural matrix that promotes inequality and

Behalf of Happy v. Breheny, APL 2020-02581 (filed Mar. 8, 2021); Brief of Gary Comstock, Ph.D., G.K.D. Crozier, Ph.D., Andrew Fenton, Ph.D., Tyler John, L. Syd M. Johnson, Ph.D., Robert C. Jones, Ph.D., Letitia Meynell, Ph.D., Nathan Nobis, Ph.D., David Peña-Guzmán, Ph.D., James Rocha, Ph.D., Bernard Rollin, Ph.D. and Jeff Sebo, Ph.D. (“Philosophers”) at 17, *Nonhuman Rights Project, Inc. on Behalf of Happy v. Breheny*, APL 2020-02581 (filed Mar. 12, 2021).

⁷ DECKHA, 5-6, 33, 92-93. 2021.

⁸ Philosophers’ Brief at 6-7, 9, 10-11.

discrimination. Animal law and animal studies scholars have demonstrated conceptual linkages between human exceptionalist thinking and intra-human structural discrimination such as sexism, racism, ageism, and ableism.⁹ Psychological studies have also shown why devaluing animals through human exceptionalist thinking reinforces intra-human prejudices and hierarchies.¹⁰

⁹ For discussions of this literature and connections see: DECKHA. 2021; Maneesha Deckha, *Veganism, dairy, and decolonization*, 11 JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT (2020); Maneesha Deckha, *Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood*, 41 JOURNAL OF INTERCULTURAL STUDIES (2020); Maneesha Deckha, *Welfarist and Imperial: The Contributions of Anticruelty Laws to Civilizational Discourse*, 65 AMERICAN QUARTERLY (2013); Maneesha Deckha, *The Subhuman as a Cultural Agent of Violence*, 8 JOURNAL FOR CRITICAL ANIMAL STUDIES (2010); Maneesha Deckha, *Intersectionality and Posthumanist Vision of Equality*, 23 WISCONSIN JOURNAL OF LAW, GENDER AND SOCIETY (2008); Maneesha Deckha, *Disturbing Images: PETA and the Feminist Ethics of Animal Advocacy*, 13 ETHICS AND THE ENVIRONMENT (2008); Maneesha Deckha, *Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals*, 2 J. ANIMAL L. & ETHICS (2007); Maneesha Deckha, *The Saliency of Species Difference for Feminist Theory*, 17 HASTINGS WOMEN'S L.J. (2006); Marie Fox, *What is special about the human body?*, 7 LAW, INNOVATION AND TECHNOLOGY (2015); Marie Fox, *Re-thinking Kinship: Law's Construction of the Animal Body*, 57 CURRENT LEGAL PROBLEMS (2004); Sue Donaldson & Will Kymlicka, *Children and animals*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF CHILDHOOD AND CHILDREN (2018); Will Kymlicka, *Connecting domination contracts*, 41 ETHNIC AND RACIAL STUDIES (2018); CHARLOTTE E. BLATTNER, et al., ANIMAL LABOUR: A NEW FRONTIER OF INTERSPECIES JUSTICE? (Oxford University Press First ed. 2020); CLAIRE JEAN KIM, DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE (Cambridge University Press. 2015).

¹⁰ KRISTOF DHONT, et al., WHY WE LOVE AND EXPLOIT ANIMALS: BRIDGING INSIGHTS FROM ACADEMIA AND ADVOCACY (Routledge. 2019.); Kristof Dhont, et al., *Rethinking human-animal relations: The critical role of social psychology*, 22 GROUP PROCESSES & INTERGROUP RELATIONS (2019).

Third, human exceptionalism is responsible in substantial part for current planetary environmental crises.¹¹ Legal scholars, aware of global environmental crises propelled by human exceptionalist thinking that instrumentalizes nature and results in the legal classification of nonhumans as property, have called for a doctrinal shift away from human exceptionalism toward a valuation of multispecies interdependence and harmony.¹²

Fourth, human exceptionalism justifies the property status of animals that causes them immense harm.¹³ This cultural outlook obscures the reality highlighted in the Petitioner-Appellant's Brief and those of *amici curiae* that animals are vulnerable, living beings that can experience a range of emotions and suffer in captivity under human or corporate control.¹⁴

Restricting the availability of the writ of habeas corpus to human detainees only reinforces an anthropocentric legal culture that promotes human exceptionalism. As the above-noted scholarship and studies

¹¹ Helena Pedersen, *Education, anthropocentrism, and interspecies sustainability: confronting institutional anxieties in omniscidal times*, 16 ETHICS AND EDUCATION (2021).

¹² Anna Grear, *Legal Imaginaries and the Anthropocene: 'Of' and 'For'*, 31 LAW AND CRITIQUE (2020); Deckha, JOURNAL OF INTERCULTURAL STUDIES, (2020); Margaret Davies, *Distributed Cognition, Distributed Being, and the Foundations of Law*, in PERSONHOOD IN THE AGE OF BIOLEGALITY: BRAVE NEW LAW (Marc de Leeuw & Sonja van Wichelen eds., 2020); MICHAEL ASCH, et al., RESURGENCE AND RECONCILIATION: INDIGENOUS-SETTLER RELATIONS AND EARTH TEACHINGS (University of Toronto Press, 2018).

¹³ DECKHA, *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*. 2021.

¹⁴ Brief for Petitioner-Appellant at 1, 3-9, 21; Brief of Professor Martha C. Nussbaum at 2, 3-8; Brief of Christine M. Korsgaard at 12-13, 18-19.

demonstrate, this approach to habeas corpus is ethically unsustainable on multiple grounds.

3. Treating Animals as Property is Poorly Justified Since No Consistent Explanation as to Why Animals Do Not Qualify as Legal Persons or Subjects Exists.

Legal personhood scholars have observed that personhood is a poorly theorized concept in the common law. Different cases have implicitly rested on different versions or theories of personhood, often without justification or even realization (by the decision-maker) of the vision of personhood promoted.¹⁵ Except for corporate rights cases, the parameters of who counts as a legal person are generally thinly justified, even in cases implicating the boundaries of legal personhood where the concept's parameters are specifically adverted to by courts.¹⁶

As a result of this minimal and varying attention, the common law across multiple jurisdictions offers no persuasive explanation of why nonhuman animals are excluded from legal personhood when other nonhumans are able to qualify as persons (i.e. corporations) or when nonhuman animals share what are emphasized as the requisite cognitive capacities of other legal persons (i.e. some humans). The poor rationalization

¹⁵ NGAIRE NAFFINE, *LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON* 235 (Hart 1st ed. 2009).

¹⁶ *Id.* at 235-36.

for the denial of personhood or another type of legal subjectivity for animals merits revisiting. Not only do cardinal legal concepts need a firm foundation, but also the exclusions they draw require justification if we are to perceive the law as just. Presently, the ongoing asymmetries in power that the denial of personhood or another protective legal subjectivity occasions for animals such as Happy is not compellingly justified in jurisprudence and exposes the law as unjust.

B. Doctrinal Reasons to Extend Habeas Corpus to Nonhuman Animals

1. Legal Precedent Supports Recognizing Happy's Fundamental Rights.

The Petitioner-Appellant's submission and briefs of other *amici curiae* filed in relation to this matter review the existing doctrinal precedent that supports extending habeas corpus to nonhuman animals.¹⁷ These submissions further note that the *Lavery* Decisions were wrongly decided due to factual inaccuracies and legal inconsistencies.¹⁸ These submissions collectively indicate that there is no defensible legal precedent against

¹⁷ Brief for Petitioner-Appellant at 13-40; Brief of Professor Martha C. Nussbaum at 24-28; Brief of Christine M. Korsgaard at 12-15; Brief of Law Professors at 7-9.

¹⁸ Brief for Petitioner-Appellant at 17, 43-53; Brief of Professor Martha C. Nussbaum at 8-12; Brief of Christine M. Korsgaard at 15-19; Brief of Law Professors at 9-14; Philosophers' Brief at 1, 5-7, 11-12.

habeas corpus relief for Happy and multiple legal grounds to grant it.¹⁹ Moreover, Petitioner-Appellant's submission and other briefs filed in relation to this matter caution the Court against perfunctory applications of *stare decisis* when decisions are poorly-reasoned (as the *Lavery* Decisions were);²⁰ this caution is especially important to heed when previous decisions are steeped in outdated anthropocentric views on which animals' ethical and legal marginalization rests. These submissions also call the Court's attention to the growing international legal recognition of the unjustness of continuing to classify animals as property.²¹ These submissions provide ample legal grounds for de-classifying Happy as property and providing her habeas corpus relief.

2. The Rule of Law Supports Recognizing Happy's Fundamental Rights.

A further source of doctrinal precedent for granting the habeas corpus relief requested arises from the rule of law itself and what this foundational legal governance principle requires. The rule of law is an elusive concept.²²

¹⁹ Brief for Petitioner-Appellant at 1-3; Brief of Professor Martha C. Nussbaum at 2; Brief of Christine M. Korsgaard at 5-7; Brief of Law Professors at 1-2; Philosophers' Brief at 2-5.

²⁰ Brief for Petitioner-Appellant at 50-52; Brief of Professor Martha C. Nussbaum at 26-28.

²¹ Brief for Petitioner-Appellant at 30-33; Brief of Professor Martha C. Nussbaum at 24-26; Brief of Law Professors at 4-5.

²² Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Allan C. Hutchinson and Patrick Monahan ed. 1987).

Yet, when justice and evolving social norms demand, American and other common law courts have recognized the rule of law as an important reason to expand the conceptual scope of fundamental rights and the category of persons to whom such rights apply.²³ *Obergefell v Hodges* is a recent example where a majority of the United States Supreme Court affirmed the need for a paradigm shift in the law through an extension of rights due to inequality and corresponding injustice.²⁴

These decisions involved fundamental rights for humans. However, there is no precedent established by these judgments that confines the substantive reading of the rule of law only to cases implicating human rights. A substantive vision of the rule of law to expand the scope of fundamental protections can thus be applied to an issue of animal wellbeing and rights. As a recent example, the American Bar Association has adopted a non-anthropocentric reading of the rule of law as one of the legal reasons supporting its recent resolution calling for an international convention to protect animals.²⁵ Moreover, in 2012, the Chief Justice of the Alberta Court

²³ Jodi Lazare, *The Spousal Support Advisory Guidelines, Soft Law, and the Procedural Rule of Law*, 31 CANADIAN JOURNAL OF WOMEN AND THE LAW (2019); SONJA C. GROVER, *JUDICIAL ACTIVISM AND THE DEMOCRATIC RULE OF LAW: SELECTED CASE STUDIES* (Springer International Publishing 1st 2020. ed. 2020).

²⁴ *Obergefell v. Hodges*, 772 F.3d 388 (6th Cir. 2015).

²⁵ International Law Section & Tort Trial & Insurance Practice Section, American Bar Association, Report to the House of Delegates, Resolution 101C (2021) (adopted),

of Appeal in Canada, writing in dissent, connected the rule of law to the question of elephant captivity in zoos, offering the following opening remarks:

An elephant is a social animal. Thus, according to experts and zoo standards, elephants, especially female elephants, should not be kept alone. This appeal involves Lucy, a 36 year old Asian elephant. She arrived at the Edmonton Valley Zoo, owned by the City of Edmonton, when she was only about two years of age. It is alleged that since then, Lucy has been housed at the Valley Zoo by herself at various times, most recently for almost four years. It is also alleged that the size and structure of the shelter in which the City has confined Lucy for years fail to comply with the City's obligations at law. And that these deprivations have caused or aggravated a number of Lucy's long-standing health problems. *Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy's case raises serious issues not only about how society treats sentient animals^[3] – those capable of feeling pain and thereby suffering at human hands – but also about the right of the people in a democracy to ensure that the government itself is not above the law.*²⁶

This Court is authorized to build upon justice-promoting domestic precedent for a substantive rule of law, as well as take guidance from international decisions that have invoked the rule of law in relation to animal wellbeing and promoted a capacious substantive vision for the rule of law in matters regarding fundamental rights. It is thus doctrinally available for this Court to view Happy's ongoing suffering in captivity as an injustice that violates the

<https://www.americanbar.org/content/dam/aba/administrative/news/2021/02/midyear-resolutions/101c.pdf>.

²⁶ *Reece*, 513 A.R. at para. 39 (emphasis added).

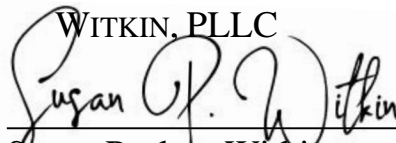
rule of law and, as such, a serious situation in need of immediate redress. The rule of law can be strengthened in this instance by granting the habeas corpus relief sought.

IV. CONCLUSION

Multiple legal and policy grounds exist as to why eligibility for habeas corpus relief and legal protection should not rest on species membership. *Amicus* respectfully requests that the Court recognize Happy's right to bodily liberty as a vulnerable being with embodied and relational needs. *Amicus* further respectfully requests that the Court grant the Petitioner-Appellant's request for Habeas Corpus relief and Happy's transfer to one of the two highly reputable elephant sanctuaries that are ready to receive her.

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**NEW YORK STATE COURT OF APPEALS
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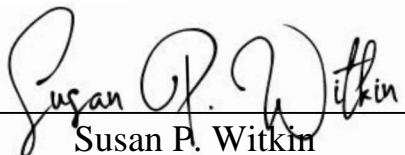
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Dated: April 8, 2022



Susan P. Witkin

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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.

On April 8, 2022

deponent served the within: **Brief for *Amicus Curiae* Maneesha Deckha in Support of Petitioner-Appellant**

upon:

**Elizabeth Stein, Esq.
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– and –

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at the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on
April 8, 2022**



MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026



Job# 310662