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Appellate Division–First Department Docket 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 the Executive
Vice President and General Director of Zoos and Aquariums of the
Wildlife Conservation Society and Director of the Bronx Zoo,
and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

BRIEF OF *AMICI CURIAE* JEWISH SCHOLARS IN SUPPORT OF PETITIONER-APPELLANT

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I. Interest of Amici Curiae

We the undersigned submit this brief as Jewish studies scholars and rabbis with broad expertise in Jewish traditions—including biblical studies, the study of rabbinic texts, Jewish thought and theology, Jewish ethics, animal ethics, and bioethics—in support of the Nonhuman Rights Projects (NhRP's) efforts to see the elephant named Happy released from her present confinement in the Bronx Zoo and transferred to an appropriate elephant sanctuary, pursuant to habeas corpus. The undersigned have long-standing, active interests in animals, in human duties to them, and in the way that ethical stances towards animals are a constitutive part of any system of ethics and justice. The court has already determined that, per Hon. Allison Y. Tuitt in her February 2020 ruling on the case now being appealed, "uncontroverted scientific evidence" has proven that Happy is "an autonomous, intelligent being with advanced cognitive abilities akin to human beings." *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 (Sup. Ct. 2020) at *2. For the court to further maintain that Happy is somehow simultaneously a thing is, per Hon. J. Fahey in his concurring opinion on a previous case brought by NhRP, a "manifest injustice." *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) (Fahey, J., concurring) ("*Tommy*"). Such incoherence and injustice in the legal system threatens not only our ability to treat nonhuman animals justly, but the ethical basis of the law itself. For the court to establish that

autonomous, intelligent beings like Happy can be treated as things with impunity is a precedent that concerns us not only for the sake of animals, but for the sake of humanity.

II. Summary of Argument

In our view, the essential challenge before the court in Happy's case is how to manage changing social values about our relationship with the nonhuman world in general, and other animals with significant similarities to humans in particular. Before the court is not only a question of animal ethics, but a question about how important animal ethics should be—about how much our human obligations to animals should drive legal innovation. We therefore wish to emphasize first and foremost the extent to which Jewish traditions provide strong warrant for legal innovation on the basis of (changed) human moral intuitions about the suffering of other animals. As we will explain, Jewish traditions have long seen the question of our treatment of animals as a kind of ultimate concern; it is therefore appropriate that changing attitudes towards animals are ramifying in new legal understandings, like new understandings of the scope of habeas corpus.

In addition, we also note that American Jews, like Americans in general, are showing more concern for animals than ever before. If the court does not address the issues that NhRP is raising and continues to treat social mammals like elephants as things, it risks undermining its claims to legal integrity and moral authority.

Finally, we note that Jewish traditions have long argued that how human individuals are allowed by the law to treat animals can have important effects on how they treat other human beings. To acknowledge a being's emotional life, intelligence, and autonomy, and then to designate that being the legal equivalent of an inanimate object is not just incoherent, but a threat to justice.

III. Argument

a. Obligations to nonhuman animals are a foundational ethical issue sufficiently serious to merit challenges to previous interpretations of habeas corpus.

The issue before the court in Happy's case cuts to the very foundations of our civil society and legal institutions. In the words of Hon. J. Fahey in his concurring opinion on another case brought by NhRP, "The issue of whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it." *Tommy*, at 1059. Ultimately, we cannot ignore it, but the courts are doing a fairly good job of ignoring it for the moment. We urge the court to avoid the trap of evading ultimate issues, for we ignore them at great cost. The famous twentieth-century Jewish thinker, Rabbi Abraham Joshua Heschel, wrote in an essay on the interdependence of the world's religious traditions, "No Religion is an Island," that "[t]he supreme issue is today not the *halacha* [law] for the Jew or the Church for the Christian—but the premise underlying both

religions." Similarly, at stake in this case is a basic premise of our legal system. Will the court attempt to engage or evade the fundamental legal question of our duties to nonhuman animals, or at least autonomous, emotional, and intelligent ones? We urge that the court address this issue.

Part of the weightiness of Happy's case is that the court is being asked to challenge earlier thinking that did not envision applying habeas corpus to nonhumans. The question arises of whether the obligations of humans to prevent nonhuman suffering is sufficiently fundamental a moral-legal issue to challenge other values and precedents. We urge that it is.

Jewish traditions, despite their diversity of conclusions about the nature of our obligations to animals, have almost always argued that the primary Jewish legal principle that teaches compassion for animals, known as *tzaar baalei chayim* (literally "the suffering of living beings"), is a "Torah law" rather than a "rabbinic law"—which is to say that it is a principle established in the most authoritative strata of Jewish law. If a particular concern has the status of a Torah law then it trumps any concern with lesser status (for example, the laws enacted by the rabbis). What this means is that one of the only positions about animals that ancient and subsequent Jewish traditions have generally agreed upon is that how we treat animals is a matter of ultimate importance, a direct concern of God. It is certainly, therefore, sufficient

to drive consequential changes in the details of how the writ of habeas corpus is applied.

Several court justices in Happy's and related cases have expressed sympathy with the goals of the NhRP but failed to rule in their favor, indicating that they have felt "bound by precedent." Really, this has amounted to a failure to actually make a decision on the issue NhRP is trying to raise in the courts. As Hon. J. Fahey observed in the concurring opinion cited earlier, that case did not result in "a decision on the merits of petitioner's claims. The question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?" *Tommy*, at 1059. Given the current state of scientific and social understanding of elephants, and our knowledge of Happy as an individual, it is rather obvious she is not a thing. Things do not have emotions, intelligence, and autonomy; things do not suffer. The Jewish legal-ethical principle of *tzaar baalei chayim* prohibits humans from causing *tzaar* (suffering) to *baalei chayim* (any being possessing life) unless there is some kind of human necessity. Happy's case is, for the undersigned, an uncomplicated case of suffering being inflicted without justification. It is the court's obligation to provide a remedy through habeas corpus.

b. Jewish Americans, like Americans in general, have been expressing greater concern for animals than in the past, and these changed values warrant greater legal protections for animals.

Jewish traditions past and present are united in agreeing that the law requires nonhuman animals be protected from suffering unless there is some overriding human benefit. In different times and places Jews have applied this legal protection differently. In the context of the contemporary U.S., Happy's case, in the view of the undersigned, is exceptionally simple as there is both abundant scientific testimony to great suffering and no persuasive argument that human interests are compromised by remedying her situation through habeas corpus. The barrier to remedying Happy's situation is simply the fact that habeas corpus has previously only been applied to members of the species homo sapiens. Jewish law does not stress species membership as the crucial criteria for deserving protection from cruelty. As the court has agreed that Happy is emotional, intelligent, and autonomous, and expert testimony has established the extent of her suffering and the remedy to it (release to a sanctuary), Jewish ethical principles as understood by the undersigned experts would mitigate in favor of remedying her situation. While individual Jewish persons or institutions may of course draw different conclusions, the undersigned testify that in our expert opinion, not only do Jewish ethical reasonings favor releasing Happy to a sanctuary, but this is a conclusion that most Jewish American individuals would support were the court to adopt it.

Without suggesting the court should use any particular legal reasoning, we believe that the court has a duty to bring the law in line with our current social and scientific understanding of the lives of animals, which would include the right of liberty in Happy's case. Relevant scientific expertise has made abundantly clear that Happy's current state of confinement in the Bronx Zoo is incompatible with her basic health and thriving, and that releasing her to an animal sanctuary would remedy this situation. Whatever human interest may be claimed to exist in continuing Happy's confinement do not supersede the duty to relieve her suffering. Indeed, in the Bronx Zoo's arguments for continuing to keep Happy in confinement they attempted to argue that they, too, were acting in Happy's best interests; these claims, however, were not substantiated by independent scientific experts with a relevant record of peer-reviewed publication. Though the Bronx Zoo, like some other Zoos, has attempted to present the exhibition of elephants like Happy as aligned with educational efforts, these claims are doubtful and contradicted by several studies. For example, one study of 206 Zoos that analyzed more than 6,000 statements by Zoo visitors noted that: "In all the statements collected, no one volunteered information that would lead us to believe that they had an intention to advocate for protection of the animal or an intention to change their own behavior" (as quoted in a recent New York Times opinion piece, https://www.nytimes.com/2021/06/11/opinion/zoos-animal-cruelty.html; full study

available here: https://onlinelibrary.wiley.com/doi/epdf/10.1002/zoo.20186). Moreover, the undersigned doubt that any prosocial learning could be associated with witnessing Happy's confinement in particular; seeing an intelligent, social mammal confined in circumstances that a clear scientific consensus suggests are harmful to that animal's wellbeing is not educational. With no compelling human interests that could justify Happy's confinement as a "necessity," Jewish ethics would seem to require her release to a sanctuary.

We also note that despite the massive diversity of Jewish views towards animal life, this much is clear: the direction of concern is increasing. This is reflected in society at large but easily witnessed in the Jewish context in terms of increased community programming on issues related to animal protection, the formation of new organizations specifically addressing animal protection from a Jewish perspective, time given to animal ethics at Jewish ethics conferences, and an expansion of Jewish publication about animal ethics. The ancient Rabbis required us to respect and to celebrate the differences between ourselves, elephants, and all animals: "The Sages taught: One who sees an elephant, monkey, or owl says, 'Blessed [are you, Lord] who makes creatures different'" (Talmud, Berachot 58b). We urge the court to bring the law closer in line with the commonsense understanding that beings that possess emotion, intelligence, and autonomy, as the court has established in Happy's case, also deserve liberty.

c. Failing to remedy Happy's confinement threatens the moral foundation of the legal system and ethics more generally. Allowing emotional, intelligent, and autonomous beings to be treated by the court as things is ethically dangerous.

Longstanding Jewish traditions have consistently argued that violence to animals can be problematic not only because of a potential violation of the law and principle of *tzaar baalei chayim,* but because of the potential harm that participating in violence can pose to humans' ability to act with sensitivity and compassion. Thus, for example, rabbinic texts for the training of *schochtim* (individuals trained in the practice of traditional Jewish animal slaughter) warn of the importance of finding a morally upstanding individual lest the inherent involvement in causing suffering that is essential to the profession lead to insensitivity to even human misery. This reasonable concern is quite intelligible to contemporary Jews and no less an expert in animal welfare than Dr. Temple Grandin (Colorado State University) has argued that still today the problem of sadistic personalities finding their way into slaughterhouse work remains a real concern that managers need to guard against. The deeper Jewish principle we invoke here is a sentiment that allowing cruelty to animals is not only a wrong to them, to the animals, but a threat to our own compassion, to a treasured aspect of our humanity. For the court to acknowledge that Happy is an emotional, intelligent, and autonomous being and then functionally put her in the legal category of "thing" threatens the law with incoherence and absurdity. We urge the court to hear both the simple call for justice in NhRP's arguments to

release Happy to a sanctuary and to recognize that expanding the application of habeas corpus is essential to preserving the moral coherence of the law. For if the law truly owes not even the foundational protection of habeas corpus to beings acknowledged to possess rich emotional lives, intelligence that is similar to humans, and autonomy, the law has abandoned a fundamental commitment to justice.

Dated: April 4, 2022

Respectfully submitted,

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NEW YORK STATE COURT OF APPEALS
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Pursuant to the Rules of the Court of Appeals (22 NYCRR) §§ 500.1 (j), 500.13 (c) (1) and (3), and 500.23 (a) (1) (i), I hereby certify that:

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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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