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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 FOR *AMICI CURIAE* LAW PROFESSORS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are 27 law professors from across the United States and Canada who teach and research in the rapidly evolving field of animal law. *Amici* have a special expertise in the issues presented by this case and a special interest in assisting the Court in grappling with the foundational jurisprudential issues that this case raises.[1] Based on their interest in ensuring the field of animal law develops according to rational principles of justice that are consistent with our legal system's commitment to equality and liberty, *Amici* write to situate this case in the broader legal landscape. *Amici* respectfully urge the Court to reverse the First Department and remand to the trial court with instructions to grant Happy's petition for a writ of habeas corpus.[2]

II. SUMMARY OF THE ARGUMENT

This brief argues that developments in law, ethics, and science warrant the inclusion of at least some nonhuman animals, including Happy, in the community of legal rights-holders who are entitled to justice. As such, this brief argues that the Court should overrule the *Lavery* cases, *People ex rel. Nonhuman Rights Project v.*

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[1] Pursuant to Rule 500.23 of the Rules of Practice of this Court, the proposed *Amici Curiae* brief has identified arguments that might otherwise escape the Court's consideration and would be of assistance to the Court.

[2] No party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. No person or entity, other than movants or movants' counsel, contributed money that was intended to fund preparation or submission of the brief.

Lavery, 124 A.D.3d 148 (3d Dept. 2014) (*Lavery I*) and *Matter of Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (*Lavery II*), which are inconsistent with existing law, in that they link legal personhood with the imposition of legal duties, a rule that would exclude children and some people with disabilities. To the extent that the decisions recognize this shortcoming, they revert back to a simple biological prejudice that incorrectly equates personhood with humanness. The *Lavery* cases should also be overruled because they rely on a narrow version of the social contract theory that is exclusionary and reproduces numerous forms of prejudice, including discrimination on the basis of race, gender, and ability.

This brief argues that instead of grounding our legal community in biological prejudice or a restrictive and ahistorical social contract, the proper approach is to recognize rights as legal protections stemming from both positive law (such as legislative grants of rights) and the fundamental values of the common law (such as liberty and equality).

Once this Court sweeps away the unsupportable framework of *Lavery*, it should recognize that nonhuman animals are in fact legal persons, because they have legal rights both as a matter of positive law and based on the common law values of liberty and equality. Consistent with recent developments in law, this brief urges the Court to recognize animals as legal persons who are consequently entitled to challenge their illegal confinement as other legal persons can.

III. ARGUMENT

This case asks whether at least some nonhuman animals – including Happy, a 50-year-old Asian elephant captured from the wild in Thailand and held in lonely confinement at the Bronx Zoo – are legal persons entitled to writs of habeas corpus when they are unlawfully detained. It begins by arguing why the Court should overrule the *Lavery* cases. It then argues that animals are legal persons who are entitled to challenge their wrongful confinement.

1. The *Lavery* Cases Were Wrongly Decided and Should Be Overruled.

The holdings of *People ex rel. Nonhuman Rights Project v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (*Lavery I*) and *Matter of Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (*Lavery II*) are legally and philosophically untenable. Although they purport to provide a principled basis for deciding who falls within the community of legal rights-holders, the decisions ultimately collapse back into basic anthropocentrism, speciesism, and biological absolutism. Moreover, their reliance on the social contract theory as the basis of moral and legal inclusion is premised on philosophical assumptions that are exclusionary of both humans and nonhumans. Instead, *Amici* propose an alternative explanation for the inclusion and exclusion of beings from the community of legal rights-holders, one that is both more principled and more inclusive. This view posits that our community of legally-

protected persons includes all those beings who have rights – either legislatively-conferred rights or those rights to which they are entitled as the kinds of beings who have interests that the common law protects.

a. The *Lavery* Decisions Are Based on Simple Biological Prejudice.

Taken together, the *Lavery* decisions hold that nonhumans are categorically excluded from legal personhood because they do not have legal duties. *Lavery I*, 124 A.D.3d at 152*; Lavery II*, 152 A.D.3d at 78. Under this rule, legal rights and legal responsibilities are inseparably linked with one another, such that one who lacks legal duties cannot qualify as a legal person. In other words, "the ascription of rights has historically been connected with the imposition of societal obligations and duties." *Lavery I*, 124 A.D.3d at 151.

Such a view is patently incorrect, however, because many legal persons lack legal duties. For example, in New York, "a person less than eighteen years old is not criminally responsible for conduct." N.Y. Penal Law § 30.00.[3] Persons under the age of eighteen may also disaffirm contracts without civil liability in New York. N.Y. Gen. Oblig. Law § 3-101. Most significantly, children under the age of four are *non sui juris* – that is, they cannot be held civilly liable for their actions in New York. *Meyer v. Inguaggiato*, 258 A.D. 331, 332 (2nd Dept. 1940); *Verni v. Johnson*,

[3] In some circumstances, persons over the age of 13 may be criminally responsible for murder or certain felonies, but under no circumstance is a person younger than 13 criminally responsible for their actions. N.Y. Penal Law § 30.00.

295 N.Y. 436, 437 (1946) ("In every reported case where the question has been squarely raised, this court has held that a three-year-old child is conclusively presumed to be incapable of negligence."); *M.F. ex rel. Flowers v. Delaney*, 37 A.D.3d 1103, 1105 (4th Dept. 2007).

Yet no one would argue that a three-year-old child, incapable of civil or criminal liability, lacks legal personhood or the capacity to have rights. "While an infant under a specified age may be considered as lacking legal capacity, infants are, however, possessed of certain rights." 43 C.J.S. Infants § 220. An infant who cannot be held civilly liable for the harms she causes may nevertheless sue someone who harms her. The same is true of persons with cognitive disabilities that inhibit their capacity for criminal or civil culpability. *See, e.g.*, N.Y. Penal Law § 40.15 ("In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect."). A person who is not criminally liable by reason of insanity nevertheless has basic rights, such as the right to humane conditions if she is civilly confined. It is simply not the rule in New York (or anywhere else) that "society extends rights in exchange for implied agreement from its members to submit to social responsibilities," as *Lavery I* put it. *Lavery I*, 124 A.D.3d at 152. To be a three-year old child or a person with a severe cognitive disability in New York is to be that which the *Lavery* decisions suggests cannot exist: a person without legal

responsibilities.

For this reason, Judge Fahey repudiated the reasoning in *Lavery I*, arguing that an animal's inability to accept legal responsibility does not undermine her possession of legal rights: "Even if it is correct . . . that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child [ ] or a parent suffering from dementia[.]" *Nonhuman Rts. Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey J., concurring).

Faced with the difficult implications of a rule that excludes infants and some people with disabilities, both *Lavery I* and *Lavery II* abandoned the principle they had just established (that personhood requires responsibilities) and collapsed back into a simple biological prejudice (*all* humans and *only* humans are persons) – thus presuming the answer to the question they were asked to decide. In *Lavery I*, the Third Department acknowledged, "[t]o be sure, some humans are less able to bear legal duties or responsibilities than others." *Lavery I*, 124 A.D.3d at 152 n.3. But, the court argued, "it is undeniable that *collectively* human beings possess the unique ability to bear legal responsibility. Accordingly, nothing in this decision should be read as limiting the rights of human beings . . . ." *Id.* (emphasis added). Similarly, the First Department in *Lavery II* acknowledged the argument that "infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks

sentience, yet both have legal rights." *Lavery II*, 152 A.D.3d at 78. But the court rejected the argument by simply pointing to "the fact that these are *still human beings*, members of the human *community*." *Id* (emphasis added).

Neither decision explains why such lines should be drawn "collectively" at the species-level, especially when the liberty interests and well-being of an unquestionably complex individual – Tommy, a chimpanzee – were at stake.

As Judge Fahey observed, these holdings are "in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Lavery*, 31 N.Y.3d at 1057 (Fahey J., concurring). The *Lavery* courts thus reduced the question of personhood to the species membership of the litigant, contrary to both the rule they had just established (requiring "[r]eciprocity between rights and responsibilities"), *Lavery I*, 124 A.D.3d at 151, and the well-established jurisprudential recognition that "a person is *any being* whom the law regards as capable of rights or duties…*whether a human being or not*[.]" Sir John William Salmond, *Salmond on Jurisprudence* § 61 (P.J. Fitzgerald ed. 12th ed 1966) (emphasis added).

As animal law professors, many of the *Amici* teach the *Lavery* decisions in their animal law classes and struggle to articulate a coherent and principled holding from the case. This difficulty stems from the fact that the cases create a rule (personhood requires legal duties), then create an exception that swallows the rule

(but *really* personhood is coextensive with species membership, even in the absence of legal duties). *Amici* and their students cannot help but read the *Lavery* decisions as results-driven, avoiding the jurisprudential challenge of finding consistent criteria for legal personhood in order to uphold interspecies inequity and retain a biological/juridical equivalency between humanness and personhood.

b. The Social Contract Theory Upon Which the *Lavery* Decisions Are Based is Exclusionary and Incomplete.

The rule articulated by the *Lavery* cases conditions legal personhood on membership in the human species, due to the purported capacity of "normal" humans to participate in the social contract and bear legal duties. *Lavery I*, 124 A.D.3d at 151; *Lavery II*, 152 A.D.3d at 78. The social contract theory posits that moral, political, and legal inclusion are a consequence of a fictitious moment when humans contractually agreed to leave the "state of nature" and allow themselves to be governed by mutually agreed upon rules. *See Contractarianism*, Stanford Encyclopedia of Philosophy, (Sep. 30, 2021) https://plato.stanford.edu/entries/contractarianism/; Thomas Hobbes, *Leviathan: Or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil* (1651); John Locke, *Second Treatise of Government* (1690); Jean-Jacques Rousseau, *On the Social Contract* (1762). *Amici* do not dispute that the social contract theory describes one plausible theoretical basis for the legitimacy of government: consent of at least

some humans, ahistorical and counterfactual as it may be. However, the use of the social contract theory as a basis for excluding individuals from the moral, political, and legal community, as the *Lavery* decisions do, should be troubling. Legal scholar Anita L. Allen warns that "judges' reliance on social contractarianism has served the interests of injustice—even extremes of injustice." Anita L. Allen, *Social Contract Theory in American Case Law*, 51 Fla. L. Rev. 1, 13 (1999).

As the late philosopher Charles W. Mills observes, the development of the social contract theory through the writings of Hobbes, Locke, Rousseau, and Kant, from the mid-17th century through the early 19th century, coincides almost exactly with the era of European expansionism, colonialism, and imperialism and often served as a rationalization for such projects. Charles W. Mills, *Blackness Visible: Essays on Philosophy and Race* (1998); *see also* Charles W. Mills, *The Racial Contract* (1997). While the social contract theory purported to describe a basis for political equality, it drew sharp distinctions between those who were considered participants in the formation of such a contract, viewing property-owning, white men as the archetypal social contractors. As Mills writes, "[t]he racialization of the contractarian apparatus thus manifests itself in . . . the instantiation of a governmental and legal system that either is necessarily white, for they are the only ones who can be political men [], or is at least the superior one that others need to emulate." Mills, *Blackness Visible*, *supra*, at 129.

Similarly, feminist political theorists and disability scholars have critiqued the social contract theory as premised on exclusionary presumptions about who is best situated to make the rules that govern society. Social contract theory's ahistorical myth of autonomous agents entering into arms-length contractual relationships ignores the reality of connectedness, dependency, and vulnerability that characterizes our existence (and that of animals). Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J.L. & Feminism 1 (2008); Ani Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 Animal L. 1 (2009) (applying Fineman's vulnerability approach to animals). Disability scholar Sunaura Taylor argues that "the physical vulnerability of disabled individuals and animals is immensely problematic under a social contract tradition of justice, because even in a 'state of nature' an asymmetry in power exists between these groups and able-bodied human beings." Sunaura Taylor, *Beasts of Burden: Disability Studies and Animal Rights*, 19 Qui Parle 191, 199 (2011); *see also* Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (2007) (critiquing the social contract theory and advocating justice for persons with disabilities and animals based on their capabilities and right to flourish). Social contract theory also overlooks the unequal bargaining powers between men and women and the fact that the presumed autonomy of the archetypal male social contractors was made possible only because

of the domestic labor of women and their historical relegation to the private sphere. *See generally* Carole Pateman, *The Sexual Contract* (1988).

Although social contract proponents have sought to expand the theory to be more inclusive, it retains problematic philosophical assumptions and has been used in ways that marginalize those beings – human and nonhuman – who fail to meet its ideal of a rational, detached, autonomous contractor who deals with others only on his own negotiated terms. The *Lavery* cases seem to recognize this exclusionary element of the theory, stretching it to extend rights and personhood to duty-less humans. But merely extending legal personhood to humans who lack contracting capacities, as if "by courtesy or by proxy," is insufficient, because it continues to derogate those who fail to fit the ideal of a "real" person. *See, e.g.*, Kristin Andrews et al., *Chimpanzee Rights: The Philosophers' Brief* 63 (2019) ("[The personhood-by-proxy] view has been widely criticized by disability advocates and theorists, among others, for setting up a hierarchy of so-called real, normal, or 'charter' persons, whose personhood is tied to their individual capacities and those who are given the protections of personhood 'by courtesy or by proxy.'").

Of course, judges are not called upon to resolve complicated philosophical debates, but to decide discrete legal cases. Nevertheless, as the amicus briefs filed by philosophers in this case demonstrate, judges must wade into philosophical waters in cases that unavoidably raise such questions, as this one does. The Court

need not reject the social contract theory in its entirety, but it should be wary of relying on it to justify the exclusion of animals from the community of legal rights-holders, as the Appellate Division did in the *Lavery* cases. As Professor Allen cautions, "[p]ast errors of inadequate rationalization and injustice are easily repeated, so long as the myths and metaphors of social contract theory retain force." Allen, *supra*, at 13. It would be a mistake for this Court to reiterate the *Lavery* decisions' reliance on social contract theory to exclude nonhumans from the community of legal rights-holders.

c. Rights are Legal Protections Stemming from Legislative Enactments and Common Law Values.

Rather than linking membership in the legal community with one's ability to participate in the social contract, *Amici* suggest an alternative account: rights are legal protections that stem from the positive enactment of legislation or from the extension of common law values to new cases in order to meet changing social norms. Where society, either through the democratic process of positive law *or* the judicial process of the common law, extends legal protections to others, it has conferred a legal right and thus recognized the legal personhood of those it protects.[4]

[4] That legal personhood may stem from the enactment of legislation does not mean that the issues raised in this case are "legislative," as the Appellate Division claimed below. *Nonhuman Rts. Project, Inc. v. Breheny*, 189 A.D.3d 583 (2020). While it is true that animals' personhood stems in part from their status as the holders of legislatively-granted rights (such as the state anticruelty law or the federal

This perspective is consistent with the jurisprudential consensus that "a person is any being whom the law regards as capable of rights or duties…whether a human being or not[.]" Sir John William Salmond, *Salmond on Jurisprudence* § 61 (P.J. Fitzgerald ed. 12th ed 1966). *See also* Bryant Smith, *Legal Personality*, 37 Yale L.J. 283, 283 (1928) ("To confer legal rights or to impose legal duties . . . is to confer legal personality."). It also more accurately describes the legal reality of New York and American law generally, which, as discussed above, recognize the existence of legal rights even in the absence of the ability to hold legal duties or participate in the social contract. In our legal system, children, people with cognitive disabilities, and nonhumans have legal rights because (1) legislatures have passed statutes to protect them and (2) they hold the kinds of interests that the common law protects, including interests in liberty and equality.

2. Animals are Legal Persons and Should Be Entitled to Challenge Their Unlawful Confinement.

The previous section described the flawed logic of the *Lavery* cases and describes an alternative basis for membership in the legal community. This section applies that alternative basis to the case of nonhuman animals, arguing that animals

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Endangered Species Act, both of which grant rights to Happy), the contours and consequences of that personhood can be augmented and elaborated by common law judges.

are *already* legal persons, *descriptively-speaking*, based on the legislative conferral of numerous protections (such as anticruelty laws and trust laws). In the alternative, animals *should* be considered legal persons, *normatively-speaking*, based on their possession of those interests that the common law protects.

a. Animals Are Already Legal Persons Because They Have Legal Rights.

Personhood is the label the legal system attaches to those entities who have legal rights (or duties). Animals fit that description. As the Ninth Circuit noted in *Cetacean Community v. Bush*, "[a]nimals have many legal rights, protected under both federal and state laws." *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (9th Cir 2004). Constitutional scholar Cass Sunstein echoes that observation, stating "it is entirely clear that animals have legal rights, at least of a certain kind." Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1335 (2000). In New York in particular, animals have a negative right to be free from the infliction of unjustifiable pain and suffering and a positive right to the provision of adequate food, water, and sustenance. N.Y. Agric. & Mkts. Law §§ 350(2), 353.

There have been significant shifts in how the legal system conceptualizes animals and their legal rights. These transformations have been most obvious in the development of anticruelty laws in states across the country. Early iterations of the

anticruelty laws were clearly human-centered. They paid virtually no regard to the inherent value of animals, their entitlement to legal rights, or animal suffering as a moral harm. To the contrary, these early statutes were primarily concerned with the property rights of animals' human owners or, slightly more altruistically, with the need to safeguard public morals from the coarsening effects of public displays of animal cruelty. Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 Law & Soc. Inquiry 136 (2019); David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 Det. C.L. Rev. 1 (1993). Early anticruelty laws hewed closely to the Kantian idea that our duties to animals are only indirect – that is, we should avoid cruelty to animals not because of anything we owe to the animals themselves, but because cruelty to animals may lead us to be cruel to other humans, to whom we *do* owe direct duties. Immanuel Kant, *Lectures on Ethics* 239 (Louis Infield trans., Harper & Row 1978) (1930).

As legislatures amended anticruelty laws, typically in response to advocacy from the animal protection movement, the statutes became more concerned with animal suffering and cruelty as moral wrongs in and of themselves. For example, in the late 19th century and early 20th century, many states began to eliminate the requirement that animals be the property of another to receive the protections of the statutes. By applying anticruelty laws to cruelty committed against one's own animals, state legislatures recognized the wrong of animal cruelty not as a property

crime against the owner of the animal, but rather an invasion of the legally recognized interests of the animal herself.

In *State v. Nix*, the Oregon Supreme Court noted the significance of this development, recognizing animals themselves as the beneficiaries of Oregon's anticruelty statute. *State v. Nix*, 334 P.3d 437 (2014), *vacated on procedural grounds*, 345 P.3d 416 (2015). *Nix* called upon the Oregon Supreme Court to determine whether each animal who is subjected to cruelty constitutes a separate "victim" under a sentencing statute. To answer that interpretive question, the court was required to assess "who suffers [the] harm that is an element of the offense." *Nix*, 334 P.3d at 442-43 (quoting *State v. Glaspey*, 100 P.3d 730, 733 (2004)). The court traced the historical development of anticruelty laws from the "view of animals as the property of their owners, and subject to protection only as such" to the enactment of "legislation targeting cruelty to animals for the sake of preventing the animals themselves from suffering, not merely as property to be protected or as a way of improving public morality." *Id*. at 444, 445. Indeed, the Oregon court credits New York's 1867 law as the genesis of this landmark transformation of animal law. *Id*. at 445. After surveying these trends, the *Nix* court concluded that "[a]lthough early animal cruelty legislation may have been directed at protecting animals as property of their owners or as a means of promoting public morality, Oregon's animal cruelty laws have been rooted—for nearly a century—in a different

legislative tradition of protecting individual animals themselves from suffering." *Id*. at 447. Given that the anticruelty laws were passed to protect animals themselves, animals are properly considered "victims" for sentencing purposes. *Id*. at 448.

This "legislative tradition of protecting individual animals themselves from suffering," *id*. at 447, constitutes the conferral of legal rights (albeit relatively weak ones) and thus personhood, as a "person" is simply an entity who holds legal rights. Given animals' legal personhood, they ought to enjoy not only those rights that have been legislatively conferred, as in the anticruelty law, but also those that may be judicially elaborated through the common law, as in the writ of habeas corpus.

This expansion of rights is happening on other fronts as well, such as in family law matters. Historically, when a couple divorced, their companion animals were allocated like any other piece of property – one partner might get the TV, the other might get the dog. Since 2013, New York courts have explicitly rejected this standard for determining pet custody disputes, instead including the animals' interests when considering which member of a separating couple should keep a companion animal. *Travis v. Murray*, 42 Misc. 3d 447 (N.Y. Sup. Ct. 2013). A recently enacted statute codifies this rule, requiring the court to "consider the best interest of [a companion] animal" when awarding possession. N.Y. Dom. Rel. Law § 236. This is consistent with the broader national trend of state courts and legislatures considering the well-being of animals in determining where they should

live. *See, e.g.*, Alaska Stat. Ann. § 25.24.160(a)(5); 750 Ill. Comp. Stat. Ann. 5/501(f); Cal. Fam. Code § 2605; *Placey v. Placey*, 51 So.3d 374 (Ala. Ct. Civ. App. 2010).

Another key legal development is the extension of the right to own property to animals. Dozens of state legislatures, including New York, have enacted laws allowing nonhuman animals to inherit and own property in recent years. Karen Bradshaw, *Wildlife as Property Owners: A New Conception of Animal Rights* (2020); N.Y. Est. Powers & Trusts Law § 7-8.1. As property owners, animals—represented by human trustees—may sue and be sued for property interests.

Another indicator of animals' changing legal status is the fact that the Ninth Circuit recognizes that nonhuman animals have Article III standing, though it has not yet found a statute under which animals can sue in federal court. In *Cetacean Community v. Bush*, the court saw "no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents." *Cetacean Community*, 386 F.3d at 1176; *see also Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (reiterating the holding of *Cetacean Community*, but disagreeing with its reasoning). Although the court held that the plaintiff animals lacked statutory standing under the federal laws at issue in the case, it nevertheless

recognized that animals have the capacity to hold rights and to be litigants under the right circumstances.

Moreover, under many Indigenous legal orders, animals have always been legal persons in the United States. From precolonial times to present, many Indigenous legal systems and cultural practices view animal interests as co-equal with human interests. Sarah Deer & Liz Murphy, *"Animals May Take Pity on Us": Using Traditional Tribal Beliefs to Address Animal Abuse and Family Violence Within Tribal Nations*, 43 Mitchell Hamline L. Rev. 703, 712 (2017) ("In a vast number of tribal cultures, animals were not viewed or treated as inferior to the human species; rather, animals were seen as 'people,' too. For example, bison were often conceived of as people by different Plains tribes, and salmon were considered people to Northwest Coast Indians. Dakota theologian Vine Deloria Jr. once wrote, in regard to equality for both animals and people in tribal communities, 'Equality is thus not simply a human attribute but a recognition of the creatureness of all creation.'").

To state the obvious, North American Indigenous law preexisted the imposition of English common law in North America and has continued uninterrupted since that time. Pre-colonial America was a rich network of several hundred stable, well-established Indigenous governments with robust systems of law and trade. Although the laws and cultural practices were variable among the many

distinct Indigenous governments, legal traditions contained in traditional ecological knowledge and oral histories reflect a worldview that incorporates intergenerational and interspecies interests in a way that English common law does not.

Contemporary Indigenous law also supports legal personhood for nonhuman entities as part of a broader trend of animal rights. Indigenous governments have joined state and federal governments in rapid legal innovation with respect to animals in the past decade. For example, The Navajo Nation Code and Ho-Chunk Constitution recognize existence rights of nonhuman animals; The Yurok Tribe has granted legal personhood to the Klamath River and the White Earth Band of Ojibwe recognize the existence right of wild rice. Bradshaw, *supra*. Indigenous groups are leading innovation and expansion of the legal status of animals, contributing an important strand to the multifaceted rights expansion occurring nationally and internationally.

Taken together, these trends establish that animals can no longer be seen as rights-less things, but rather as the holders of legal rights, and consequently legal persons. As entities who "have many legal rights[] protected under both federal and state laws," *Cetacean Community*, 386 F.3d at 1175, animals are already legal persons, because "[t]o confer legal rights or to impose legal duties . . . is to confer legal personality." Smith, *supra*, at 283.

b. In the Alternative, Animals Should Be Considered Legal Persons, Because They Hold the Kinds of Interests that the Common Law Protects.

Should this Court disagree with the *descriptive* claim that animals are already legal persons by virtue of their possession of legal rights, *Amici* agree with the *normative* claim made by the Nonhuman Rights Project and other amici in this case that animals should be recognized as member of the legal community because of their possession of those interests that the common law protects, namely interests in liberty and equality. To avoid redundancy with those briefs, *Amici* will not repeat those arguments here. Simply put, *Amici* emphasize their agreement with the contention that animals have a substantive interest in liberty and are entitled to equal treatment under the law when like cases arise. Because animals have the very interests that the common law protects, they are normatively entitled to consideration as legal persons. As a legal person, Happy is entitled to a writ of habeas corpus to require the Bronx Zoo to justify her detention.[5]

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[5] One issue in this case is whether Happy's detention is wrongful. One could take the position, as NHRP appears to, that Happy's confinement is *per se* wrongful, so long as Happy has an interest in liberty. A narrower rule, available to the Court, would be to hold that animals *are* legal persons who may invoke the writ, but that the writ may be granted only when the animal's detention is *unlawful*, analogous to when a human prisoner wins a habeas writ by showing the violation of one of her constitutional rights. In such cases, habeas corpus is the *procedural* vehicle for defending the petitioner's *substantive* rights. Thus, if Happy's captivity violates some other substantive law, such as the Endangered Species Act (which prohibits

IV. CONCLUSION

Because the *Lavery* cases rely on an inaccurate and overly restrictive criterion for inclusion within the moral, political, and legal community, they should be overruled and replaced with a more inclusive approach, one that recognizes the legal personhood of nonhuman animals. Legal belonging extends not only to the archetypal humans of social contract theory, but also to those entities – human and nonhuman – who have secured the protection of their liberties through the enactment of legal protections *or* who are entitled to such protections by virtue of who they are. *Amici* respectfully request that the Court overrule the *Lavery* cases and remand to the trial court with instructions to grant a writ of habeas corpus for Happy.

Dated: March 18, 2022

Respectfully submitted,

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harming and harassing elephants) or the New York anticruelty law (which prohibits causing unjustifiable suffering), she should be able to enforce those substantive rights by procedurally challenging the unlawfulness of her detention through the writ of habeas corpus. *Amici* urge the Court to adopt the broader view – that captivity is a *per se* violation of the common law right to liberty. But should this Court disagree, it should consider remanding to the trial court for a determination of whether Happy's detention is unlawful under existing substantive law, thus entitling her to release under the writ.

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

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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Dated: March 18, 2022

David Karopkin

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	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

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

On April 22, 2022

deponent served the within: **Brief for *Amici Curiae* Law Professors**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **2** 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 22, 2022

Mariana Braylovskiy

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

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