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Court of Appeals

of the

State of New York

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

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

RESPONSE TO *AMICI CURIAE* BRIEF OF ASSOCIATION OF ZOOS & AQUARIUMS AND SIX AZA-ACCREDITED NEW YORK ZOOS AND AQUARIUMS

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Date Completed: February 25, 2022

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court of Appeals, counsel for Petitioner-Appellant, Nonhuman Rights Project, Inc. ("NhRP"), certifies that the NhRP has no corporate parents, subsidiaries or affiliates.

Dated: February 25, 2022

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INTRODUCTION

In 2013, the NhRP filed the first habeas corpus petition in United States history on behalf of an imprisoned nonhuman animal.[1] In 2015, the NhRP secured the world's first habeas corpus order to show cause on behalf of a nonhuman animal,[2] and did so again on behalf of Happy in 2018.[3] In a separate habeas corpus action, Judge Eugene M. Fahey authored a concurring opinion on this Court's denial of the NhRP's motion for leave to appeal, writing:

> Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention.

Matter of Nonhuman Rights Project, Inc. v. Lavery, 31 N.Y.3d 1054, 1057-58 (2018) (Fahey, J., concurring) ("*Tommy*").

Historically, not all humans could invoke habeas corpus. The common law writ's protections were extended over time to remedy injustices in cases involving enslaved humans, women, children, and the infirm. The injustice of Happy's imprisonment at the Bronx Zoo requires this Court to extend the writ's protections and grant her habeas relief.

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[1] *See People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d. Dept 2014).

[2] *See Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 748 (Sup. Ct. 2015).

[3] (A-323-25).

Amici Curiae[4] would have this Court freeze habeas corpus and ignore the profound role it has played in remedying past injustices. Amici would have this Court disregard Judge Fahey's concurring opinion. Amici would have this Court believe Happy's case concerns nonhuman animals in general, when it only concerns one elephant's common law right to bodily liberty protected by habeas corpus. Moreover, Amici would have this Court ignore the uncontroverted expert scientific evidence establishing that elephants are autonomous and extraordinarily cognitively complex beings whose freedom is as important to them as it is to us,[5] the uncontroverted expert scientific evidence establishing that Happy suffers terribly at the AZA-accredited Bronx Zoo,[6] and the Trial Court's recognition of Happy's

[4] They are the Association of Zoos & Aquariums ("AZA"), an accrediting organization for zoos and aquariums, and six AZA-accredited New York zoos and aquariums (Aquarium of Niagara, Buffalo Zoo, Rosamond Gifford Zoo, Seneca Park Zoo, Staten Island Zoo, and Utica Zoo). Amicus Br. x-xii.

[5] A California court recognized that "[c]aptivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking zoo employees appear to believe, is delusional." *Leider v. Lewis*, Case No. BC375234 at 30 (L.A. Cnty. Sup. Ct. July 23, 2012), *rev'd on other grounds by* 2 Cal.5th 1121. COMP-335.

[6] Dr. Joyce Poole attested that the Bronx Zoo is unable to "meet Happy's basic needs." (A-475, para. 9). Videos showing Happy lifting her feet repeatedly indicate she is either trying to "take weight off painful, diseased feet or again engaging in stereotypic behavior." (A-480, para. 31; *see also* A-478, para. 22). "[S]ince the psychological well-being of elephants is very much dependent on the ability to socialize appropriately with other elephants and this is dependent on having adequate space, the zoo has failed to meet Happy's psychological requirements." (A-479, para. 24). Unlike zoos, the "orders of magnitude of greater space" offered at sanctuaries "permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior." (A-478, para. 19).

"plight" and its finding that the NhRP's arguments are "extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit . . . to an elephant sanctuary on a 2300 acre lot." *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *10 (N.Y. Sup. Ct. 2020) (A-22).[7]

Amici express the baseless concern that "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."[8] Amicus Br. 18. Based on "more than four decades long study of free living elephants," Dr. Poole stated that "the AZA specifications [for Elephant Management and Care] are woefully inadequate for meeting the needs of elephants."[9] (A-479, para. 27). Two magnificent elephant sanctuaries have agreed to provide Happy with lifetime care at no cost to Respondents.[10]

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[7] Happy only lost was because, "[r]egrettably," the Trial Court felt bound by Appellate Division precedent to rule in Respondents' favor. (A-21). That precedent is erroneous. *See* NhRP's Br. 43-53.

[8] In Defense of Animals ("IDA") placed amici curiae Rosamond Gifford Zoo and Seneca Park Zoo on its list of ten worst zoos for elephants in North America. *See generally 10 Worst Zoos for Elephants*, IDA, https://bit.ly/34O6lcW. IDA listed the Bronx Zoo in its "Hall of Shame," a "special dishonor reserved for the worst repeat offenders that have made little or no progress improving conditions for elephants." *Id.*

[9] Amici claim to have a "strong interest in the continued well-being" of elephants in AZA-accredited zoos. Amicus Br. x. Yet, they incorrectly state there are "three elephants at the Bronx Zoo" when there are only two. *Id.* at 4. Maxine died in 2018.

[10] They are The Elephant Sanctuary in Tennessee and Performing Animal Welfare Society. (A-8; A-10).

Amici's arguments attempt to distract from the injustice of Happy's imprisonment. First, Amici claim there is no common law authority to support granting Happy habeas relief, and that social contract theory supports denying relief. Amicus Br. 1-3. Second, Amici claim ruling in Happy's favor "would wreak havoc on society." *Id*. at 15. Finally, Amici claim "the Legislature is far better suited than this Court" to grant Happy habeas relief. *Id*. at 21. These arguments must be rejected.

A. This Court has the duty under the common law to rule in Happy's favor

1. Habeas corpus has been used in novel situations to remedy unjust imprisonment

Amici assert there is no authority in common law habeas corpus for ruling in Happy's favor. Amicus Br. 3. This is not true. While no nonhuman animal in the United States has yet been granted habeas relief,[11] "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not . . . end the inquiry,

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[11] An Argentinian court granted habeas relief to an imprisoned chimpanzee. *See* NhRP's Br. 31. In a habeas action brought on behalf of a monkey, the Constitutional Court of Ecuador ruled 7-2:

> [T]he rights of a wild animal must be protected objectively, taking its life, freedom and integrity as their own inherent rights, and not based on the claims, desires or intentions of third parties. In these cases, if the judges prove that the deprivation or restriction of the freedom of a wild animal is unlawful, they must provide the most suitable alternative for the preservation of the life, freedom, integrity and other related rights of the victim; they may order, without being restrictive, its reinsertion in its natural ecosystem, its translocation to shelters, sanctuaries, aquariums, eco zoos, or its treatment in animal rehabilitation centers.

Judgment No. 253-20-JH/22 *Rights of Nature and animals as subjects of rights, 'Estrellita Monkey' Case*, ¶ 183, p. 53 (Constitutional Court of Ecuador, 2022) [English translation], https://bit.ly/3seY1fK.

as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 150-51 (3d. Dept 2014) ("*Lavery I*") (quoting *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966)).

Amici acknowledge this Court "must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach." Amicus Br. 1 (quoting *Lavery I*, 124 A.D.3d at 150). *Lavery I* explained that CPLR article 70 "does not purport to define the term 'person,' and for good reason. The 'Legislature did not intend to change the instances in which the writ was available,' which has been determined by 'the slow process of decisional accretion.'" 124 A.D.3d at 150 (citation omitted).

"The very history of habeas corpus is one of providing a mechanism for challenging the status quo and litigating the meaning of fundamental liberty and autonomy rights." Br. of *Amici Curiae* Habeas Corpus Experts 26, https://bit.ly/3q4RsLN. It has been used in situations "where no precise legal solution existed under codified law, but where leaving the status quo unchallenged would be unjust." *Id.* at 16 (citing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 133 (2010)).

Amici ignore this history, which "includes a strain of precedent reflecting flexibility and an evolving doctrine that can be shaped by judges."[12] *Id*. at 24. One of the most celebrated examples is the landmark decision of *Somerset v. Stewart*, 1 Lofft. 1 (KB 1772) [COMP-160], in which habeas corpus was used to challenge the detention of James Somerset, an enslaved human whose right to bodily liberty had not yet been recognized. Lord Mansfield famously ruled that "[t]he state of slavery is . . . so odious, that nothing can be suffered to support it" under the common law, and ordered Somerset freed. *Id*. at 19. *Somerset* is part of New York common law (N.Y. Const. art. I, § 14), and in *Lemmon v. People*, 20 N.Y. 562, 604-06, 618, 623, 631 (1860), this Court relied upon *Somerset* to free enslaved humans pursuant to habeas corpus.[13]

Similarly, in seventeenth- and eighteenth-century England, the "flexibility of the writ . . . allowed wives and children to challenge their confinement or mistreatment." Habeas Corpus Experts at 18. The King's Bench "issued the first writ for a wife confined by her husband" in 1671. Halliday at 43. "[I]mportant

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[12] Amici's historical analysis of habeas corpus includes the writings of William Blackstone and Alexander Hamilton. Amicus Br. 7-8. Blackstone believed a man could legally restrain his wife's liberty, while Alexander Hamilton enslaved. *See* I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433 (1765) ("[T]he courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehaviour."); Jessie Serfilippi, *"As Odious and Immoral Thing"–Alexander Hamilton's Hidden History as Enslaver* 28 (2020) (Hamilton "purchased multiple enslaved people for his own family and did not leave instructions for them to be freed upon his death.").

[13] Other New York courts have freed enslaved humans pursuant to habeas corpus. *E.g.*, *In re Belt*, 2 Edm.Sel.Cas. 93 (N.Y. Sup. Ct. 1848); *In re Kirk*, 1 Edm.Sel.Cas. 315 (N.Y. Sup. Ct. 1846).

opportunities for creativity in using the writ were apparent in [Sir Matthew] Hale's judgments: to protect women from violent husbands; to permit women, even minors, to determine custody disputes for themselves; and even to investigate allegations of lunacy that had led to confinement. . . . In short, we see a court using habeas corpus to respond to old forms of confinement as well as to new forms generated by cultural change." *Id*. at 133. Habeas corpus was able to "pierce the cultural wall" of the time with "striking innovation." *Id*. 125.

These examples show that the Great Writ's "history is inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia*, 372 U.S. 391, 401-02 (1963), *overruled in part on other grounds*, 433 U.S. 72 (1977). The historical understanding and application of habeas corpus support this Court using the writ to free Happy from her unjust imprisonment.

2. This Court must update the common law in appropriate circumstances, such as Happy's case

Amici assert "no common-law authority whatsoever supports extending habeas relief" to nonhuman animals. Amicus Br. 1-2. However, the fact that the common law has historically "treated arbitrary imprisonment of animals quite differently from arbitrary imprisonment of humans" is irrelevant to whether the common law must change in Happy's case. *Id*. at 9. This Court made clear that "'the

common law of this State is not an anachronism.'" *Millington v. Southeastern El. Co.*, 22 N.Y.2d 498, 509 (1968) (citation omitted). "[I]t is the duty of the court to bring the law into accordance with present day standards of wisdom and justice . . . . We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951). Indeed, the "genius of the common law lies in its flexibility and . . . in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared." *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939) (citation omitted).[14]

This Court updates the common law based on wisdom, justice, right, ethics, fairness, policy, shifting societal norms, and the surging reality of changed conditions, as well as the fundamental common law principles of liberty and equality. NhRP's Br. 21-43. When these principles and standards are applied to the uncontroverted scientific evidence before this Court, it must recognize Happy's common law right to bodily liberty protected by habeas corpus.[15]

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[14] *See also Millington*, 22 N.Y.2d at 508 ("[T]his court will continually seek to keep the common law of this State abreast of the needs and requirements of our age.") (citation omitted); *People v. Molineux*, 168 N.Y. 264, 310 (1901) ("[O]ur own common law . . . is the product of all the wisdom and humanity of all the ages.").

[15] *See also Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 460 (2013) (Lippman, J., dissenting, Rivera, J. joining in dissent) ("The common law must evolve with advances in scientific understanding to fashion relief and provide redress for wrongs newly understood . . . .").

Judge Fahey recognized the importance of scientific evidence to the question of whether a nonhuman animal is entitled to habeas relief. *Tommy*, 31 N.Y.3d 1057-58 (Fahey, J., concurring). On whether a chimpanzee has the right to liberty protected by habeas corpus, Judge Fahey stated the answer "will depend on our assessment of the *intrinsic nature of chimpanzees as a species*." *Id.* at 1057 (emphasis added). He then presented a detailed summary of the present-day understanding of chimpanzees' "advanced cognitive abilities," and referenced "recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences."[16] *Id*. at 1058.

Amici ignore the scientific evidence that demonstrates the intrinsic nature of elephants. Based on the NhRP's six uncontroverted "expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants" (A-10), the Trial Court found that "elephants are autonomous beings possessed of extraordinarily cognitively complex minds."[17] (A-16). "Happy is an extraordinary

[16] Judge Fahey relied upon the NhRP's unrebutted expert affidavits "from eminent primatologists" and evidence cited by "amici philosophers with expertise in animal ethics and related areas." *Id*. at 1058.

[17] The Trial Court noted that the NhRP "placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world." (A-16). By contrast, Respondents' three affiants are not elephant scientists and do not purport to possess any expertise on elephant cognition or behavior by training, education, or experience. (A-319; A-329; A-333).

animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. . . . She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." (A-22).

Amici claim the Book of Genesis "cements" a sharp "differentiation between humans and animals," whereby God gave the former "dominion" over the latter and thus bestowed upon humans the right to use nonhuman animals as mere resources. Amicus Br. 4-5. This understanding is indefensible.[18] In an amicus brief submitted by five distinguished Catholic Theologians, they explain:

> Nearly all theologians now agree that the Biblical dominion God has given human beings over creation is not a license to use and dominate, but rather a command to be caretakers and stewards. . . . God, who is sovereign of the universe, reveals through Scripture a design for what theologians call a "Peaceable Kingdom", one which includes non-violent relationships between human beings and non-human animals.

Br. of *Amici Curiae* Catholic Theologians 2-3, https://bit.ly/3zvtZpU.[19]

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[18] Appeals to religion should not be considered unless they accord with enlightened contemporary values of morality and justice. The Bible was once used to justify the enslavement of Black humans. *See, e.g.*, Elizabeth Fox Genovese and Eugene D. Genovese, THE MIND OF THE MASTER CLASS 526 (2005) ("The proslavery protagonists proved so strong in their appeal to Scripture as to make it comprehensible the readiness with which southern whites satisfied themselves that God sanctioned slavery."); COLIN KIDD, THE FORGING OF RACES 139 (2006) ("The story of Ham [in Genesis]. . . seemed to offer Southerners a divine sanction for race slavery.").

[19] *See also* ANDREW LINZEY, ANIMAL THEOLOGY 147 (1995) ("[M]ost theologians conclude that we misunderstand dominion if we think of it simply in terms of domination. What dominion now means . . . is that humans have a divine-like responsibility to look after the world and to care for its creatures."); Carol Adams, *What about Dominion in Genesis?*, *in* A FAITH EMBRACING ALL CREATURES: ADDRESSING COMMONLY ASKED QUESTIONS ABOUT CHRISTIAN CARE FOR ANIMALS

Moreover, Amici's position that Happy is nothing more than a mere resource for human use is contrary to Judge Fahey's concurring opinion:

> To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect (*see generally* Regan, The Case for Animal Rights 248-250).

Id. at 1058.

Finally, contrary to Amici, the property status of nonhuman animals is irrelevant to whether this Court should recognize Happy's common law right to bodily liberty protected by habeas corpus. Amicus Br. 4-7. This Court need not address Happy's property status in order to rule in her favor. If this Court chooses to address her property status, it can decide: (a) Happy is the property of the elephant sanctuary to which she will be transferred; (b) Happy is the property of Respondent Wildlife Conservation Society even though she will be permanently placed in an elephant sanctuary; (c) Happy is property but is not owned; (d) Happy is property but owns herself; or (e) Happy is not property.[20]

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9 (2012) ("[T]here is no possible way to read the dominion in Genesis 1:26 and 1:28 as divine authorization for contemporary treatment of nonhuman animals . . . .").

[20] The Trial Court found that "Happy is more than just a legal thing, or property." (A22). This Court may evolve the common law and change Happy's property status by invoking the "historic common-law doctrine" of "retroactivity." *People v. Morales*, 37 N.Y.2d 262, 267-68 (1975) ("The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been

3. Social contract theory does not support denying Happy habeas corpus relief

In a gross distortion of social contract theory, Amici argue the ability to participate in the social contract is required for the possession of the fundamental right to bodily liberty protected by habeas corpus. They argue it is "logical" to deny Happy habeas relief "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."[21] Amicus Br. 3-4. However, this argument is not "logical" but arbitrary and wrong.[22]

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enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated.") (citation omitted). *See People v. De Renzzio*, 19 N.Y.2d 45, 49 (1966) ("[T]he pronouncement of the common-law court is deemed retroactively to have been the rule of the past. A decision states the law as it ought rightly to have been understood from the beginning.").

[21] The "State of Nature" envisioned in social contract theory is "purely hypothetical." Celeste Friend, *Social Contract Theory*, INTERNET ENCYCLOPEDIA OF PHIL., https://bit.ly/3v6nBFi. "The social contract is a legal or theoretical fiction—a metaphoric or symbolic idea connoting a sense of connectedness and unity in purpose and belief among members of a society." Martha Albertson Fineman, *The Social Foundations of Law*, 54.5 EMORY L.J. 54, 201, 202 (2005).

[22] Amici's invocation of social contract theory is reminiscent of justifications for slavery. "Slavery is antithetical in contemporary ideals of liberal social contract theory," yet "nineteenth-century judges were able to deploy the apparatus of social contract theory to lend support to slavery in the United States." Anita L. Allen and Thaddeus Pope, *Social Contract Theory, Slavery, and the Antebellum Courts*, *in* A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY 132 (2006). For example, one contractarian argument justified permitting slavery on the ground that "the U.S. Constitution is a white-only social contract under which blacks are not free and equal." *Id*. at 126. *See also* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 13 (1999). ("[J]udges' reliance on social contractarianism has served the interests of injustice—even extremes of injustice. Past errors of inadequate rationalization and injustice are easily repeated, so long as the myths and metaphors of social contract theory retain force.").

Obviously, numerous individuals (e.g., infants, children, and the infirm) lack the ability to participate in the social contract yet possess the fundamental right to bodily liberty protected by habeas corpus. Amici's position would strip vulnerable humans of this right. In *Jackson v. Bulloch*, 12 Conn. 38 (1837), the Connecticut Supreme Court made clear the irrelevance of social contract theory to habeas relief. It held that enslaved humans, like Nancy Jackson, were neither parties to the "social compact" described in the Connecticut constitution nor "represented in it." *Id*. at 42-43. Yet, the court ordered Jackson freed pursuant to habeas corpus. *Id*. at 54.

Amici claim "legal duties and legal rights go together under the social contract theory," and therefore nonhuman animals cannot have rights because they "'lack moral agency' and 'cannot submit to societal responsibilities.'" Amicus Br. 13 (citation omitted). This argument is wrong for two reasons.

First, the capacity to bear duties is not required for possessing rights. *See* NhRP's Br. 43-53. Amici philosophers explained that the quid pro quo notion of "persons" receiving rights in exchange for bearing duties "is not how political philosophers have understood the meaning of the social contract historically or in contemporary times." Br. of *Amici Curiae* Philosophers 13, https://bit.ly/3JMSDaa. Moreover, when criticizing the conclusion that only humans are "persons" entitled to habeas relief, Judge Fahey explained:

> Even if it is correct, however, 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. In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs (*see generally* Tom Regan, The Case for Animal Rights 151-156 [2d ed 2004]).

Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring) (cleaned up). *See also* Philosophers at 16 ("Infants, children and those found not guilty by reason of insanity cannot be held accountable and cannot bear legal or societal duties. They are, nonetheless, persons with legal rights."); Br. of *Amici Curiae* Laurence H. Tribe, Sherry F. Colb, and Michael C. Dorf 14, https://bit.ly/3qGOgWV ("[I]nfants, young children, and adults suffering from dementia are unquestionably legal persons.").

Second, natural rights, such as the right to bodily liberty, cannot depend on a social contract. Amici philosophers explained that influential pioneers of social contract theory such as Thomas Hobbes,[23] John Locke, and Jean-Jacques Rousseau "maintain that all persons have 'natural rights' that they possess independently of their willingness or ability to take on social responsibilities." Philosophers at 12. The

[23] Amici cite Hobbes' belief that nonhuman animals cannot participate in the social contract to suggest nonhuman animals cannot have rights under a Hobbesian system. Amicus Br. 10-11. This is incorrect, since "[a]n entity may have rights in a Hobbesian system even though it lacks the capacity to contract. For example, Hobbes writes, 'Likewise, children, fools, and madmen that have no use of reason may be personated by guardians or curators. . . .' (L, XVI, 10, 103)." Shane D. Courtland, *Hobbesian Justification for Animal Rights*, 8.2 ENV'T PHIL. 23, 25 (2011). *See also* Craig Ewasiuk, *Escape Routes: The Possibilities of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48.2 COLUM. HUM. RTS. L. REV. 70, 87 (2017) (The view that "animals can never be granted rights under a Hobbesian social contract . . . is wrong. For after the establishment of a sovereign to whose authority individuals are said to have consented, the sovereign alone . . . has the absolute power to grant legal personhood—and hence rights—to whatever entities it chooses.").

Connecticut Supreme Court similarly explained: "The social compact theory posits that *all individuals are born with certain natural rights* and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain individual liberties in exchange 'for the mutual preservation of their lives, liberties, and estates.'" *Moore v. Ganim*, 233 Conn. 557, 598 (1995) (citing, inter alia, II JOHN LOCKE, TWO TREATISES OF GOVERNMENT 184, ¶ 123 (Hafner Library of Classics ed. 1961)) (emphasis added).

The only sources Amici cite for the notion that social contract theory precludes rights for nonhuman animals are a law review article by Richard L. Cupp[24] and a deeply flawed Connecticut Appellate Court decision.[25] Scholarship has shown

[24] Amici cite Cupp for their assertion that nonhuman animals cannot have rights since they cannot bear duties. Amicus Br. 13 (citing Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 SAN DIEGO L. REV. 27, 66 (2009)). Cupp's assertions regarding social contract theory do not withstand critical scrutiny. *See generally* KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 54-55 (2018); Ewasiuk at 82-87; Philosophers at 12-17; NhRP's Br. 48-53. His argument that only humans have rights is "arbitrary and inconsistent with justice," amounting to "little more than the assertion that 'humans are persons because humans are humans.'" ANDREWS ET AL. at 55. Moreover, Cupp's articles "do not provide support from primary source materials. On most occasions, Cupp cites unsupportive passages in secondary sources. On rarer occasions, when locating support, he cites a secondary source which in turn cites another secondary source, which in turn either provides no evidence from primary source material or inaccurately interprets the primary source materials." Ewasiuk at 78.

[25] Amici cite *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 192 Conn.App. 36, 46 (2019), which concluded that elephants are not legal persons because they are "incapable of bearing duties and social responsibilities required by [Connecticut's] social compact." Amicus Br. 13. This decision directly conflicts with *Jackson*, in which the Connecticut Supreme Court made clear that entitlement to habeas relief does not depend on being part of the social compact (*supra* p. 13). *Commerford* is also grounded upon *Lavery I*'s errors. *See* NhRP's Br. 43-53 (discussing *Lavery I*'s errors).

that social contract theory is compatible with, and can support, rights for nonhuman animals. *See, e.g.*, Craig Ewasiuk, *Escape Routes: The Possibilities of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48.2 COLUM. HUM. RTS. L. REV. 70, 105 (2017) (the social contract theories of Hobbes, Locke, and John Rawls do not "preclude animal rights by insisting on the reciprocity of rights and duties," and "another aspect of social contract theory, tacit consent, can provide alternative yet immanent support for animal rights by emphasizing the shared lot of humans and animals alike"); Shane D. Courtland, *Hobbesian Justification for Animal Rights*, 8.2 ENV'T PHIL. 23, 24 (2011) (defending "the possibility of a Hobbesian justification for animal rights"); Mark Rowlands, *Contractarianism and Animal Rights*, 14.3 J. OF APPLIED PHIL. 246 (1997) ("a contractarian approach to morality based on the sort of position developed by Rawls can provide a sound theoretical foundation for the attribution of rights to non-human animals").[26]

Finally, Amici cite federal constitutional decisions on the importance of protecting human dignity and human rights. Amicus Br. 13. Yet Amici fail to demonstrate why protecting human dignity precludes recognizing Happy's common

[26] *See also* ANDREWS ET AL. at 59 (social contract theory can "*support* the idea of nonhuman personhood and rights"); Jennifer Swanson, *Contractualism and the Moral Status of Animals*, 14.1 BETWEEN THE SPECIES 1, 2 (2011) ("contractualism does, in fact, allow for animals to be afforded full moral standing"); Mark Bernstein, *Contractualism and Animals*, 86.1 PHIL. STUD.: AN INT'L. J. FOR PHIL. IN THE ANALYTIC TRADITION 66 (1997) ("contractualism is compatible with according full moral standing to non-human animals").

law right to bodily liberty protected by habeas corpus. As Judge Fahey correctly recognized, while "all humans beings possess intrinsic dignity and value . . ., in elevating our species, we should not lower the status of other highly intelligent species."[27] *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

B. Ruling in Happy's favor would not wreak havoc on society

A "floodgates . . . . argument is often advanced when precedent and analysis are unpersuasive." *Matter of Johannesen v. New York City Dept. of Hous. Preserv. & Dev.*, 84 N.Y.2d 129, 138 (1994). Amici make a floodgates argument. They absurdly contend that ruling in Happy's favor would "wreak havoc on society" by subjecting New York institutions such as farms, slaughterhouses, police departments, research laboratories, and public schools—as well as any child "who owns an ant farm or traps flies in an empty soda bottle"—to habeas corpus litigation. Amicus Br. 15-20.

This case does not concern farm animals, police dogs, research animals, frogs, ants, or flies. This case concerns just one elephant and a single common law right. Contrary to Amici, Amicus Br. 14, ruling in Happy's favor accords with *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583, 594 (2016) as it would

[27] Amici cite no authority for the proposition that only humans possess dignity and ignore the Trial Court's recognition that Happy is "an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." (A-22). Moreover, the notion that at least certain nonhuman animals possess dignity is well grounded in scholarship. *See* NhRP's Reply Br. 22 (citing scholarship on animal dignity).

exemplify an incremental and slow evolution of the common law. The evolution would be incremental because it concerns the recognition of a single elephant's common law right to bodily liberty protected by habeas corpus. The evolution would be slow because it would be based on expert affidavits reflecting decades of research:

> [T]he [NhRP's expert] affidavits represent, in part, the body of knowledge acquired over 46 years of study of regular group sightings, family censuses, scan and focal samples, that amount to hundreds of thousands of data points of several thousand individually known free-living elephants in Amboseli, Kenya, quite a number of whom have been alive throughout these four and a half decades. In sum, the affidavits are a true representation of an elephant's life. . . . [Dr. Joyce Poole's] affidavit included over 70 references to scientific research of which 25 were based on the study of these elephants.

(A-474, para. 5). Amici's assertion that the "sky is truly the limit for habeas claims should this Court rule in Appellant's favor" is nothing more than baseless speculation.[28] Amicus Br. 17.

This Court should approach Happy's case as it did *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513 (2021), a common law case the NhRP cited and Amici did not distinguish. NhRP Br. 17-18. In *Greene*, this Court recognized its "task" was "simply . . . to determine whether a grandchild may come within the limits of her grandparent's 'immediate family,' as that phrase is used in zone of danger jurisprudence." *Id.* at 516. Using a "circumspect approach," this Court

[28] Amici suggest ruling in a single elephant's favor would potentially close "33,438 farms" and "over 45 slaughterhouses and processors," and leave "55,363 people" unemployed. Amicus Br. 18.

evolved the common law by concluding that a grandchild does come within those limits and had no problem leaving "[u]nsettled" whether other categories of individuals also qualify as "immediate family."[29] *Id.* Similarly, this Court's "task" is "simply" to determine whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus. Using a "circumspect approach," this Court can evolve the common law by recognizing Happy's right and leave "unsettled" whether a member of another species may invoke the protections of habeas corpus.[30]

Moreover, even in situations where this Court is being asked to create a new cause of action, it has long "rejected as a ground for denying a cause of action that

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[29] *See also Bovsun v. Sanperi*, 61 N.Y.2d 219, 233 n.13 (1984) (evolving the common law to allow a plaintiff to recover for emotional distress caused by observing serious physical injury or death negligently inflicted upon an "immediate family" member, but stating it need not decide "the outer limits of 'the immediate family'"); *Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 293 (2007) (evolving the common law to protect certain electronic records stored on a computer under a claim of conversion, but stating that, "[b]ecause this is the only type of intangible property at issue in this case, we do not consider whether any of the myriad other forms of virtual information should be protected by the tort"); *Norcon Power Partners v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 468 (1998) (evolving the common law by extending "the doctrine of demand for adequate assurance, as a common-law analogue," but stating "[t]his Court needs to go no further in its promulgation of the legal standard as this suffices to declare a dispositive and proportioned answer to the certified question"); *Rooney v. Tyson*, 91 N.Y.2d 685, 693, 694 (1998) (evolving the common law by recognizing that an oral contract to train a boxer "for as long as the boxer fights professionally" is one for a "definite duration," but stating "[w]e narrowly answer the core question as posed," and "with a full appreciation of our heralded common-law interstitial developmental process") (internal quotations and citations omitted).

[30] Amici make the unsupported assertion that this Court "cannot" make such a narrow ruling, yet concede that the application of a favorable ruling would depend on its "scope and reasoning." Amicus Br. 17.

there will be a proliferation of claims."[31] *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969). "It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts."[32] *Id. See also Battalla v. State of New York*, 10 N.Y.2d 237, 241- 42 (1961) ("even if a flood of litigation were realized by abolition of the exception [prohibiting recovery for injuries incurred by fright negligently induced], it is the duty of the courts to willingly accept the opportunity to settle these disputes."); *Greene*, 36 N.Y.3d at 538 n.5 (Rivera, J., concurring, Wilson, J., joining in concurrence) ("Courts are on shaky justificatory ground to begin with when they shape substantive law to avoid an increase in their workloads.") (citation omitted); *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 772 n.2 (Sup. Ct. 2015) (relying upon *Tobin*, rejected "floodgates

[31] Contrary to Amici, this Court is not being asked to create "a new cause of action." Amicus Br. 14. This Court is being asked to extend the protections of common law habeas corpus to Happy, just as those protections have been extended in other novel situations (*supra* p. 6-7). *Cf. Bovsun*, 61 N.Y.2d at 233 ("We are not today creating a new cause of action which has not heretofore existed under the tort law of New York; rather we are recognizing the right of a plaintiff . . . to recover as an element of his or her damages, those damages attributable to emotional distress caused by contemporaneous observation of injury or death of a member of the immediate family caused by the same conduct of the defendant."). Moreover, Amici erroneously suggest *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994) stands for the proposition that a "'proliferation of claims' is indeed a factor that counsels against recognizing a new cause of action," and is therefore contrary to *Tobin*. Amicus Br. 15. However, *Palka* did not concern the issue of whether to recognize a new cause of action. Instead, it concerned whether the defendant owed plaintiff a duty of reasonable care and was therefore negligent in failing to act.

[32] Lord Manfield famously stated in *Somerset v. Stewart*, 1 Lofft. 1, 17 (KB 1772), "fiat justitia, ruat ccelum" (let justice be done though the heavens may fall). COMP-170. "The heavens did not fall, but certainly the chains of bondage did for many slaves in England." Paul Finkelman, *Let Justice Be Done, Though the Heavens May Fall: The Law of Freedom*, 70 CHI.-KENT L. REV., 325, 326 (1994).

argument" in chimpanzee habeas corpus case as not being "a cogent reason for denying relief").[33]

C. This Court, not the Legislature, has the duty under the common law to rule in Happy's favor

Amici claim "the Legislature is far better suited than this Court" to grant Happy habeas relief. Amicus Br. 21. Their claim is based on the same floodgates argument, refuted above, that "extending habeas corpus relief to animals could have devastating consequences for the economic and social fabric of New York State." *Id*. at 22. Granting Happy her freedom will not have negative consequences for New York's economy and will actually have a positive effect on the social fabric of the state. As an Argentinian court observed in granting habeas relief to an imprisoned chimpanzee, "it is not Cecilia who will owe us; it is us who will have to thank her for giving us the opportunity to grow as a group and to feel a little more human." COMP-15.

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[33] *See also Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 133 (1983) ("It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation.'") (internal quotations and citation omitted); *Sinn v. Burd*, 486 Pa. 146, 163 (1979) ("[A]ny (caseload) increase should not be determinative or relevant to the availability of a judicial forum for the adjudication of impartial individual rights.") (internal quotations and citation omitted); *Falzone v. Busch,* 45 N.J. 559, 567 (1965) ("[T]he fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."); *Robb v. Pennsylvania R. Co.,* 58 Del. 454, 463 (1965) ("It is the duty of the courts to afford a remedy and redress for every substantial wrong. . . . Neither volume of cases, nor danger of fraudulent claims, nor difficulty of proof, will relieve the courts of their obligation in this regard.").

Amici cite decisions dealing with statutory and constitutional interpretation, which are inapposite as this is a common law case.[34] *Id*. at 21-23. This Court has generally rejected the argument that changes to the common law "should come from the Legislature, not the courts," for "we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Woods*, 303 N.Y. at 355; NhRP's Br. 16-17 (citing cases).

Amici claim "[e]xtending 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." Amicus Br. 22 (quoting *Klostermann v. Cuomo*, 61 N.Y.2d 525, 535 (1984)).[35] However, this Court *can* rule in such a manner. All the relevant data and expert advice led the Trial Court to conclude, "[t]he arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot." (A-22).

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[34] The only common law case Amici cite, *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439 (2013), is inapposite for two reasons. Amicus Br. 22. First, this Court in *Caronia* was asked to recognize a new tort cause of action (for medical monitoring). Second, it declined to do so based on the practical concern that courts lack the "'technical expertise necessary to effectively administer a program heavily dependent on scientific disciplines such as medicine, chemistry, and environmental science.'" 22 N.Y.3d at 452 (citation omitted). Happy's case does not seek the recognition of a new cause of action (*supra*, n.31), and there are no analogous practical concerns with ruling in her favor.

[35] *Cuomo* is irrelevant since it is not a common law case, and Amici misleadingly omit the phrase "formulate broad programs" when quoting the decision. *Cuomo*, 61 N.Y.2d at 535. The NhRP does not urge this Court to "formulate broad programs" or anything analogous.

This Court has a duty to "make the law conform to right." *Woods,* 303 N.Y. at 351. Amici ignore that habeas corpus is a "summary proceeding to secure personal liberty" that "strikes at unlawful imprisonment or restraint," and "tolerates no delay except of necessity." *People ex rel. Robertson v. New York State Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (internal quotations and citation omitted). Deflecting the responsibility to secure Happy's freedom onto the Legislature will "cause delay and prolong the injustice" of her imprisonment. *Id.*

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NEW YORK STATE COURT OF APPEALS
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