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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 NEW YORK FARM BUREAU, NORTHEAST DAIRY PRODUCERS ASSOCIATION, AND NORTHEAST AGRIBUSINESS AND FEED ALLIANCE

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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: December 3, 2021

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes & Other Authorities:

The New York Farm Bureau, Northeast Dairy Producers Association, and Northeast Agribusiness and Feed Alliance ("Amici") urge this Court to deny Happy habeas corpus relief based upon their obvious misrepresentation that this case is about nonhuman "animals" in general, particularly farm animals. They claim "it is foreseeable that NRP and similar groups will in the future pursue habeas petitions to 'liberate' livestock," and thereby devastate the agricultural industry. Amicus Br. 16. They claim that if this Court were to rule in Happy's favor, "the writ of habeas corpus would destroy the State's agricultural industry." *Id*. at 9. And, on the basis of these "important public-policy reasons," they urge this Court to reject the "proposal that nonhuman animals be granted the human right to petition for a writ of habeas corpus." *Id*. 17-18. None of these public-policy reasons have anything to do with granting Happy her freedom.

Amici's argument is preposterous. The case before this Court concerns one elephant and the recognition of her single common law right.[1] (A-37, para. 18). It does not concern other nonhuman animals, including pigs, cows, chickens, horses, and hogs. Amicus Br. 12-13, 15. Happy is (obviously) not an agricultural animal. As this Court has recognized, 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). Yet, Amici concede,

[1] *See* NhRP's Br. 17 ("This Court is only being asked to recognize one right for Happy.").

they are the ones making a floodgates argument by stating their argument "is a slippery slope, to be sure." Amicus. 17.

Amici's federal constitutional claims were never raised by the parties and are erroneous.

A. Granting Happy habeas corpus relief will not injure the agricultural industry

This Court should not concern itself with the scenarios posed by Amici that deal with nonhuman animals in general. Instead, it should approach the resolution of Happy's case as it did in *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513 (2021), a common law case the NhRP cited and Amici do not distinguish. NhRP's Br. 17-18. In *Greene*, this Court recognized its single "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 (emphasis added). Under this Court's "circumspect approach," it 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." *Id*. Similarly, this Court's single "task" is "simply" to determine whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus. As in *Greene*, this Court can evolve the common law

by recognizing Happy's one right and leave "unsettled" whether a member of another species may invoke the protections of habeas corpus.[2]

Amici's question as to "where would the line . . . be drawn" with respect to other nonhuman animals is similarly irrelevant. Amicus Br. 16. In *Greene*, this Court rejected the idea that line-drawing is required in a common law case. *See* 36 N.Y.3d at 516 ("[W]e are not asked to fix permanent boundaries of the 'immediate family.'"); *id*. at 518 (noting this Court's prior common law decision in *Bovsun v. Sanperi*, 61 N.Y.2d 219 (1984) "was not an exercise in line-drawing. Although it identified certain relationships that come within the class of 'immediate family members,' *Bovsun* did not establish exhaustive boundaries with respect to the universe of 'immediate family members.'").

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[2] *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*, 81 N.Y.2d 685, 688, 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).

Moreover, contrary to Amici's concern regarding the alleged "wave of habeas petitions . . . that would swamp New York courts," Amicus Br. 17, this Court has long "rejected as a ground for denying a cause of action that there will be a proliferation of claims."[3] *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." *Id*. *See 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."); *Matter of Nonhuman Rights Project, Inc. v. ex rel. Hercules and Leo v. Stanley*, 49 Misc.3d 746, 772 n.2 (Sup. Ct. 2015) (relying upon *Tobin*, rejecting "floodgates argument" in chimpanzee habeas corpus case as not being "a cogent reason for denying relief"); *Greene*, 36 N.Y.3d at 538 n.5 (Rivera, J., concurring) ("Courts are on shaky justificatory ground to begin with when they shape substantive law to avoid an increase in their workloads.") (citing Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1057 (2013)).[4]

[3] 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*, CHI.-KENT L. REV., Vol. 70, No. 2 at 326 (1994).

[4] *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'; and it is a pitiful

Amici's arguments should not distract from the injustice of Happy's imprisonment. Recognizing Happy's "plight" at the Bronx Zoo, the Trial Court found the NhRP's arguments "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).

Amici ask, "[i]f an elephant can be considered a 'person' under the law, why not a pig, a cow, or a chicken?" Amicus Br. 16. But their irrelevant concern about granting habeas corpus relief to other animals in the future must not deter this Court from granting Happy habeas corpus relief now. As Judge Fahey stated regarding whether a chimpanzee is entitled to habeas corpus relief,

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. . . . [T]he answer to that question will depend on our assessment of *the intrinsic nature of chimpanzees as a species*.

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confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do . . . Even if the caseload increases, the 'proper remedy' is an expansion of the judicial machinery, not a decrease in the availability of justice.") (internal quotations and citation omitted); *Sinn v. Burd*, 486 Pa. 146, 163 (1979) ("(T)he fundamental concept of our judicial system (is) that any (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) ("And, of more importance, the 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.*, 8 Storey 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.").

Matter of Nonhuman Rights Project, Inc. v. Lavery, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring) ("*Tommy*") (emphasis added). Thus, if this question arises in the future regarding other "animals," courts will need to assess the intrinsic nature of the particular species in question. The same is true in Happy's case.

The scientific evidence demonstrating the intrinsic nature of elephants is before this Court. 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," the Trial Court found that "elephants are autonomous beings possessed of extraordinarily cognitively complex minds."[5] (A-10, A-16). "Happy is an extraordinary 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).

Similarly, Judge Fahey concluded on the basis of the scientific evidence submitted by the NhRP that chimpanzees are "autonomous, intelligent creatures." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J. concurring). In that case,

> The record . . . contains unrebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities, including being able to remember the past and plan

[5] 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).

> for the future, the capacities of self-awareness and self-control, and the ability to communicate through sign language. Chimpanzees make tools to catch insects; they recognize themselves in mirrors, photographs, and television images; they imitate others; they exhibit compassion and depression when a community member dies; they even display a sense of humor. Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences.

Id. at 1057-58 (citations omitted).[6]

While the Trial Court felt it was "regrettably" bound by prior precedent (A-21), this Court is not. "[T]he common law of this State is not an anachronism."[7] *Millington v. Southeastern El*. Co., 22 N.Y.2d 498, 509 (1968) (quoting *Gallagher*

[6] Similar evidence regarding the extraordinary cognitive complexity of elephants is before this Court. As the NhRP noted in its opening brief, elephants are autonomous beings who possess numerous complex cognitive abilities, including empathy, self-awareness, self-determination, theory of mind (awareness that others have minds), insight, working memory and an extensive long-term memory that allows them to accumulate social knowledge, the ability to act intentionally and in a goal-oriented manner and to detect animacy and goal-directedness in others, imitation including vocal imitation, pointing and understanding pointing, true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do), cooperation and coalition building, cooperative and innovative problem-solving, behavioral flexibility, understanding causation, intentional communication including vocalizations to share knowledge and information with others in a manner similar to humans, ostensive behavior that emphasizes the importance of a particular communication, using a wide variety of gestures, signals, and postures, using specific calls and gestures to plan and discuss a course of action, the ability to adjust plans according to assessment of risk and execute those plans in a coordinated manner, complex learning and categorization abilities, and an awareness of and response to death, including grieving behaviors. NhRP's Br. 4.

[7] *See also Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice."); *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939) ("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."); *People v. Molineux*, 6 Bedell 264, 310 (1901) ("[O]ur own common law . . . is the product of all the wisdom and humanity of all the ages.").

v. St. Raymond's R. C. Church, 21 N.Y.2d 554, 558 (1968)). The long-established principles and standards for updating the common law (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, compel this Court's recognition of Happy's common law right to bodily liberty protected by habeas corpus. NhRP's Br. 21-43.

B. Recognizing Happy's common law right to bodily liberty protected by habeas corpus is based on established notions of personhood

Amici assert the NhRP is employing a "new-fangled theory of 'personhood.'" Amicus Br. 10. But this is not true. As the NhRP made clear to this Court, a "person" has long been understood as "any being whom the law regards as capable of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not." BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).[8] *See also* IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("The significant fortune of legal personality is the capacity for rights."); Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY, 121-22 (Arthur Peacocke & Grant Gillett eds. 1987) ("[L]egal personality can be given to just about anything. . . . It is an empty slot that can be filled by anything that can have rights or duties."); Bryant Smith, *Legal*

[8] In Black's, illustrative quotations from leading scholars such as John Salmond are included to "provide the seminal remark—the *locus classicus*—for an understanding of the term." PREFACE TO THE ELEVENTH EDITION, BLACK'S LAW DICTIONARY xiv (11th ed. 2019).

Personality, 37 YALE L.J. 283, 283 (1928) ("To confer legal rights or to impose legal duties . . . is to confer legal personality."); NhRP Br. 43-44 (same).[9]

Thus, based on the established understanding of personhood, Happy will be a "person" when this Court recognizes her common law right to bodily liberty protected by habeas corpus. The Court of Appeals has made clear that "[w]hat is a legal person is for the law . . . to say, which simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person." *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). Indeed, "whether legal personality should attach" is a "policy question" that requires a "policy determination," and "not a question of biological or 'natural' correspondence." *Id*. As the Fourth Department has recognized, "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals." *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018) (citations omitted).[10]

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[9] *See also* 1 ENGLISH PRIVATE LAW § 3.24, 146 (Peter Birks ed. 2000) ("A human being or entity . . . capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person *with that particular capacity*," though not necessarily "a person *with an unlimited set of capacities* . . . ."); J.-R. Trahan, *The Distinction Between Persons and Things: An Historical Perspective*, 1 J. CIVIL L. STUD. 9, 14 (2008) ("First, the modern theory (re-) defines 'person' as the '*subject* of rights and duties,' in the sense of that which is 'capable' of being 'subjected' to duties and/or of being 'invested' with rights.").

[10] Over a hundred years ago, Professor John Chipman Gray of Harvard Law School stated that "animals may conceivably be legal persons. . . . [L]egal persons because possessing legal rights." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 42 (1909).

Happy's case is not the first time a court has been asked to recognize the right to bodily liberty of a being whose personhood was previously denied. *See Stanley*, 49 Misc.3d at 764 ("[T]he concept of legal personhood, that is, who or what may be deemed a person under the law, and for what purposes, has evolved significantly since the inception of the United States."). In the famous case of *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772) [COMP-160], Lord Manfield and the Court of Kings Bench found that an enslaved Black human was entitled to his bodily liberty pursuant to common law habeas corpus, thereby recognizing his personhood.[11] Similarly, in *United States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695, 697 (C.C. Neb. 1879), an Indigenous American was recognized as a "person" for purposes of habeas corpus for the first time.

Amici acknowledge "habeas corpus has a long and storied place in the evolution of human rights," but claim "it is in the realm of *human* rights that the writ should remain."[12] Amicus Br. 10. However, "[i]f rights were defined by who

[11] *Somerset* has always been part of New York's common law. *See Lemmon v. People*, 20 N.Y. 562, 604-05 (1860) (incorporating the common law into New York State's jurisprudence); N.Y. Const. art. I, § 14 (same). New York courts have used habeas corpus to secure the freedom of slaves. *See, e.g.*, *Lemmon*, 20 N.Y. 562 (seven slaves); *In re Belt*, 2 Edm. Sel. Cas. 93 (N.Y. Sup. Ct. 1848) (slave); *In re Kirk*, 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846) (slave imprisoned on brig).

[12] That habeas corpus has only been exercised by humans doesn't mean it is limited to humans. The Third Department correctly recognized "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not . . . end the inquiry, 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) (quoting *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966)).

exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015). Judge Fahey recognized that "all human beings possess intrinsic dignity and value," but correctly noted that "in elevating our species, we should not lower the status of other highly intelligent species."[13] *Tommy*, 31 N.Y.3d at 1057 (Fahey, J. concurring).

There is no justification for refusing to recognize Happy's common law right to bodily liberty protected by habeas corpus. *See id*. at 1058 (criticizing conclusion "that a chimpanzee cannot be considered a 'person" and is not entitled to habeas relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species."). In discussing the question of whether "an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do" has the right to liberty protected by habeas corpus, Judge Fahey recognized:

> This is . . . a deep dilemma of ethics and policy that demands our attention. 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).

[13] NhRP argues that autonomy is sufficient—though not necessary—for the common law right to bodily liberty protected by habeas corpus. NhRP's Br. 39 n.40.

Id. at 1058. The same applies to Happy.

C. Amici's constitutional claims were never raised and are erroneous

This Court should not entertain Amici's federal constitutional arguments regarding judicial takings, judicial seizures, and impairment of contracts because they were never raised by the parties. *See* 22 NYCRR Part 500.23(a)(4) ("Movant [for amicus curiae relief] shall not present issues not raised before the courts below."); *Mouradian v. Astoria Fed. Sav. and Loan*, 91 N.Y.2d 124, 131 n.4 (1997) ("[Respondent] did not raise below the issue, addressed by *amici curiae*, of plaintiff's status as a copayee. The question whether a copayee may recover the full face value of a converted check is therefore unpreserved for our review.").[14]

Amici's federal constitutional arguments are also irrelevant because state courts may generally evolve the common law without violating constitutional guaranties.[15] If this Court entertains Amici's arguments, it should reject them as erroneous for the following reasons.

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[14] *See also Matter of Alison D. v Virginia M.*, 155 A.D.2d 11, 16 (2d. Dept 1990) ("We have reviewed the constitutional arguments addressed in the briefs by the amici curiae and find them to be unpreserved for appellate review.").

[15] As the United States Supreme Court has long made clear:

> Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties, even though parties may have acted to their prejudice on the faith of the earlier decisions.

Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 682 (1930) (emphasis added).

First, with respect to Amici's Contracts Clause argument, both Amici and the NhRP agree that the Contracts Clause provision does not reach judicial decisions. Amici cite *Fleming v. Fleming*, 264 U.S. 29, 31 (1924), which held that "a judicial impairment of a contract obligation was not within section 10, art. 1, of the Constitution, since the inhibition was directed only against impairment by legislation."[16] Amicus Br. 24.

Second, with respect to Amici's judicial takings argument, they cite only the plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection*, 560 U.S. 702, 715 (2010) (plurality) for the proposition that the Fifth Amendment Takings Clause[17] applies to judicial decisions. Amicus Br. 20. But *Stop the Beach* does not establish "there is such a thing as a judicial taking,"[18] 560 U.S.

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[16] *See also Barrows v. Jackson*, 346 U.S. 249, 260 (1953) ("It has been settled . . . that the provision of section 10, article 1, of the federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts.") (quoting *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451 (1924)).

[17] U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

[18] *Stop the Beach*, by an 8-0 vote, held that as a Florida Supreme Court's decision "did not contravene the established property rights of petitioner's members, Florida has not violated the Fifth and Fourteenth Amendments." 560 U.S. at 733. "[A]ll *Stop the Beach* ultimately stands for is that, whether or not judicial takings can occur, [the Florida Supreme Court's decision at issue] was not one." *Judicial Takings, Judicial Federalism, and Jurisprudence: An* Erie *Problem*, 134 HARV. L. REV. 808, 814 (Dec. 11, 2020). *See Stop the Beach*, 560 U.S. at 733-34 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]his case does not require the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause . . . ."); *id*. at 742 (Breyer, J., concurring in part and concurring in the judgment) (question of judicial takings "unnecessarily" addressed by plurality "better left for another day").

at 716 (plurality), and Amici cite no federal or New York state case that has endorsed a judicial takings theory. Further, Amici's Fourth Amendment judicial seizure argument relies solely on *Stop the Beach*'s plurality opinion, which does not address the Fourth Amendment. Amicus Br. 22.

Stop the Beach's plurality opinion regarding the possibility of judicial takings is not precedential. *See, e.g., Petro-Hunt, L.L.C. v. U.S.*, 862 F.3d 1370, 1386 n.6 (Fed. Cir. 2017) (plurality opinion in *Stop the Beach* "that a cause of action for a judicial taking exists is . . . not a binding judgment"); *TZ Manor, LLC v. Daines*, 815 F.Supp.2d 726, 735 n.5 (S.D.N.Y. 2011), *aff'd*, 503 Appx. 82 (2d Cir. 2012) ("*Stop the Beach*'s [plurality] discussion was not a holding"); *N. Nat. Gas Co. v. ONEOK Field Services Co.*, 296 Kan. 906, 939 (Kan. 2013) (plurality opinion in *Stop the Beach* has "no precedential value"); *Sagarin v. City of Bloomington*, 932 N.E.2d 739, 744 n.2 (Ind. App. 2010) (citations to the "plurality portions of [*Stop the Beach*]" are "without precedential authority").[19]

[19] *See also Petro-Hunt, L.L.C. v. U.S.*, 126 Fed. Cl. 367, 379 (Fed. Cl. 2016), *aff'd*, 862 F.3d 1370 (Fed. Cir. 2017) ("The justices [in *Stop the Beach*] . . . did not agree on the definition of a judicial taking, or even whether judicial takings claims are cognizable in federal court."); *Pavlock v. Holcomb*, 2021 WL 1213525 at *9 (N.D. Ind. Mar. 31, 2021) ("no binding precedent on the concept of judicial takings was established . . . as only four justices endorsed the concept in *Stop the Beach*"); *Burton v. Am. Cyanamid Co.*, 775 F. Supp. 2d 1093, 1099 (E.D. Wisc. 2011) ("Defendants cite no authority for the proposition that there can be a judicial taking. In [*Stop the Beach*], four justices supported this idea, not enough to establish a binding precedent.").

Moreover, the concept of judicial takings has been widely and severely criticized in legal scholarship,[20] including its potential to "challenge our nation's federal structure, improperly freeze the common law, and create a host of potentially insurmountable practical problems." Daniel L. Siegel, *Why We Will Probably Never See A Judicial Takings Doctrine*, 35 VT. L. REV. 459, 460 (2010); Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203, 2011 (2011) ("[T]he reason that judicial takings sits uneasily is because the idea of a 'taking' by a court denies the court's function, competence, and interpretative mission. Judicial decision-making, frozen in time, is a functional oxymoron."); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247, 267 (2011) ("[T]he new judicial takings construct may very well threaten the ability of the law to adapt and evolve in the face of changing economic, environmental, social, and technological developments.").[21]

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[20] *See generally, e.g.*, E. Brantley Webb, Note, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1198 (2011) (arguing that the plurality in *Stop the Beach* "defies a century of deference and poses a serious threat to the development of state property law"); John D. Echeverria, *Stop the Beach Renourishment: Essay Reflections from Amici Curiae*, 35 VT. L. REV. 475, 480 (2010) (arguing that the "proposed takings test [advanced by the plurality in *Stop the Beach*] would upend a good deal of apparently settled law"); J. Peter Byrne, *Stop the* Stop the Beach *Plurality!*, 38 ECOLOGY L.Q. 619, 619 (2011) (article highlighting "the central failings in the *Stop the Beach* plurality's analysis"); Underkuffler, 61 SYRACUSE L. REV. at 2011 ("The idea of judicial takings, as advanced by the plurality in *Stop the Beach Renourishment* employs a series of misconceptions.").

[21] *See also An* Erie *Problem*, 134 HARV. L. REV. at 808 ("The judicial takings doctrine advocated by the *Stop the Beach* plurality poses a serious risk to the autonomy of states and state courts to adhere to their preferred jurisprudential philosophies."); Byrne, 38 ECOLOGY L.Q. at 630 ("Surely

Finally, Amici claim that ruling in Happy's favor "threatens to obliterate the common law principle . . . that *domitae naturae* or *manseuatae naturae—i.e.*, domesticated, tame or captured wild animals—are chattel owned by humans." Amicus Br. 19. However, this is not true. This Court need not address Happy's property status in order to rule in Happy's 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 the Bronx Zoo even though she will be permanently placed in an elephant sanctuary; (c) Happy is property but is not owned; or (d) Happy is not property.[22]

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good-faith differences of legal interpretation by judges trained in their state's common law and charged by their state constitutions with its preservation and adaptation do not give rise to federal constitutional objections."); Echeverria, 35 VT. L. REV. at 480 ("The Supreme Court has long recognized that common law courts have the power, without triggering the Takings Clause, to modify legal rules over time 'in light of changed circumstances, increased knowledge, and general logic and experience.'") (quoting *Rogers v. Tennessee*, 532 U.S. 451, 464 (2001)); Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107, 108 (2011) (judicial takings doctrine poses a "general threat to common-law evolution"); Elizabeth B. Wydra, *Constitutional Problems with Judicial Takings Doctrine and the Supreme Court's Decision in* Stop the Beach Renourishment, 29 UCLA J. ENVTL. L. & POL'Y 109, 121 (2011) ("In addition, federal judicial takings review could chill important state innovations to the common law.").

[22] 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 enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated."). *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.").

The issue before this Court is whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus. Once this Court recognizes Happy's common law right—thereby rendering her imprisonment at the Bronx Zoo unlawful—it must order her immediate release pursuant to CPLR 7010(a). This Court should then remit the case to the Trial Court to determine whether Happy will be transferred to The Elephant Sanctuary in Tennessee or Performing Animal Welfare Society.[23]

Dated: December 3, 2021

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[23] Both elephant sanctuaries have agreed to provide Happy with lifetime care at no cost to Respondents. (A-8; A-10).

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: December 3, 2021

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