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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.

BRIEF FOR PETITIONER-APPELLANT

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COURT OF APPEALS OF THE STATE OF NEW YORK

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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: July 2, 2021

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PRELIMINARY STATEMENT

At the common law habeas corpus hearing held on behalf of Happy, an Asian elephant kidnapped as a baby from Thailand half a century ago, the Supreme Court, Bronx County ("Trial Court") found that Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), presented powerful uncontroverted evidence from the world's five most renowned experts on elephant cognition. Based on this evidence, it concluded that Happy is an extraordinarily intelligent and autonomous being who possesses advanced analytic abilities akin to human beings, who has been forced to miserably live upon a solitary and lonely Bronx Zoo acre for more than four decades, and who should be treated with respect and dignity and may be entitled to liberty. The Trial Court found the NhRP's arguments extremely persuasive for transferring Happy from her tiny Bronx Zoo prison to a 2300-acre elephant sanctuary. However, the Trial Court held that it regrettably could not recognize Happy as a "person" for purposes of habeas corpus because it was bound by negative decisions from the Third and First Departments, which concluded that nonhuman animals are not "persons" because they cannot bear duties, they are not human, and according rights to nonhuman animals is an issue better left to the legislature. The First Department below affirmed these erroneous conclusions.

The NhRP will carefully explain why each appellate decision was unsupported by reason, failed to appropriately apply New York's common law,

misunderstood the nature of habeas corpus, and was sometimes contrary to New York's Constitution. The NhRP will explain that personhood is not synonymous with being human and does not require the capacity to bear duties, that numerous nonhuman animals are "persons" with trust beneficiary rights under New York's pet trust statute (EPTL § 7-8.1), and that social contracts—which create citizens, not "persons"—are irrelevant.

The NhRP will explain how this Court generally applies eight relevant principles and standards when determining how and when to update the common law—wisdom, justice, right, ethics, fairness, policy, shifting societal norms, and the surging reality of changed conditions—and why their application in Happy's case will ensure her freedom. It will explain why this case is not a matter for the legislature and why this Court must recognize Happy's common law right to bodily liberty protected by habeas corpus based on principles of common law liberty and equality. Finally, the NhRP will explain why a Fourth Department decision, adopted by the First Department, erred in holding that an individual, even a human being, cannot be transferred from one facility to another under habeas corpus.

The NhRP respectfully requests that this Court order Happy's immediate release and transfer to one of the two most renowned elephant sanctuaries in the world, both of which have agreed to provide her a lifetime of free care. At these sanctuaries, Happy will be treated in a way that respects her inherent value, dignity,

and autonomy, all of which have been stripped from her by Respondents-Respondents, James J. Breheny and Wildlife Conservation Society (collectively, "Respondents").

QUESTIONS PRESENTED

1. Does Happy have the common law right to bodily liberty protected by habeas corpus?
2. If Happy's common law right to bodily protected by habeas corpus is recognized, does habeas corpus permit sending her to an elephant sanctuary?

JURISDICTIONAL STATEMENT

This Court has jurisdiction to entertain this appeal and to review the questions raised herein by virtue of this Court's Order, dated May 4, 2021, in which the Court of Appeals granted the NhRP's motion for leave to appeal. (A-491). The questions raised were preserved below. (A-489; A-8-9; A-21-22; Petitioner-Appellant's brief (July 10, 2020) at 1; A-37, para. 18; A-78, para. 118).

STATEMENT OF FACTS

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"[1](A-

[1] *See* Joint Aff. of Lucy Bates, Ph.D and Richard W. Byrne, Ph.D (A-92); Aff. of Joyce Poole, Ph.D. (A-139); Aff. of Karen McComb, Ph.D (A-179); Aff. of Cynthia Moss (A-218); Supplemental Aff. of Joyce Poole, Ph.D (A-243); and Second Supplemental Aff. of Joyce Poole, Ph.D (A-437).

10), the Trial Court concluded that 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).

As a psychological concept, autonomy "implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively." (A-11; A-105, para. 30; A-148, para. 22; A-187, para. 24; A-223, para. 18). Elephants are autonomous beings because "they exhibit [self-determined] behavior that is based on freedom of choice." *Id*.

In addition to autonomy, elephants possess 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. (A-11; A-56-57, para. 70; A-105, para. 30; A-107, para. 34; A-108-19, paras. 37-60; A-148, para. 22; A-149-50, para. 26; A-150-64, paras. 29-55; A-189-99, paras. 31-54; A-224, para. 22; A-225-35, paras. 25-48).

These "numerous complex cognitive abilities [are shared] with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each is a component of autonomy." (A-11; A-108, para. 37; A-150, para. 29; A-189, para. 31; A-225, para. 25). "Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness." (A-11; A-107, para. 34; A-149-50, para. 26; A-188, para. 28; A-224, para. 22).

"Elephants have evolved to move." (A-243, para. 4). Free-living elephants are "[a]ctive more than 20 hours each day," moving "many miles across landscapes to locate resources to maintain their large bodies, to connect with friends and to search for mates." *Id*.

"There is no scientific basis for arguing that captive and wild elephants are fundamentally different." (A-476, para. 11). "They have the same biology and needs, but the failure of captivity to meet these needs results in physical and psychological problems in captive elephants." *Id*. Captivity and confinement "prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior." (A-243, para. 4). "When elephants are forced to live in insufficient space for their biological, social and psychological needs to be met, over time, they develop physical and emotional problems." (A-478, para. 19). Moreover, when held in isolation, "elephants become bored, depressed, aggressive, catatonic and fail to thrive." (A-243, para. 4). "Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants." *Id*.

Happy has been imprisoned at the Bronx Zoo since 1977 where, in addition to being kept on display, she was forced to give rides and participate in "elephant extravaganzas," including tug-of-war contests. (A-9; A-43, para. 38). For 25 years, Happy lived with Grumpy, another elephant, who in 2002 was euthanized after being attacked by two other elephants at the Bronx Zoo (Patty and Maxine).[2] *Id*. Happy

[2] "Elephants in captivity, including Happy, often do not get on with the elephants their captors select to put them with. Being fenced into areas too small to permit them to select between different companions and when to be with them, they have no autonomy." (A-474, para. 6).

then lived with a younger elephant named Sammie, who, in 2006, was also euthanized. (A-10). Ever since, Happy has lived alone in a one-acre enclosure with "an indoor 'holding area' or elephant barn" and "a barren cemented walled outdoor elephant yard that appears to be 0.05 of an acre."[3] (A-9-10; A-17; A-479-80, para. 28). Respondent Breheny has confirmed that Happy and Patty (the Bronx Zoo's two remaining elephants) are kept separated from each other.[4]

In a 2005 study conducted at the Bronx Zoo,[5] Happy was found to possess mirror self-recognition (MSR). (A-11). Exhibiting "MSR is significant because it is a key identifier of self-awareness, which is intimately linked to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires." (A-12; A-109, para. 38; A-151, para. 30; A-190, para. 32; A-226, para. 26).

Happy cannot exercise her autonomy while imprisoned alone in "a space that, for an elephant, is equivalent to the size of a house." (A-475, para. 9; A-17). "At night Happy is usually in a small pen in the barn or in the barren outdoor yard; during most days, weather permitting, she is also in the barren outdoor elephant yard." (A-480, para. 29; A-17). "Given that the most species typical behavior of elephants

[3] Maxine was euthanized after the NhRP filed Happy's habeas corpus petition.

[4] *See* https://www.nonhumanrights.org/content/uploads/Breheny-email-statement.pdf.

[5] Joshua M. Plotnik et al., *Self-recognition in an Asian elephant*, 103 PNAS 17053 (Nov. 7, 2006), https://www.pnas.org/content/103/45/17053.

relates to foraging (which is done for her) or social interactions, keeping [Happy] in a solitary condition means" she has almost no ability to engage in species typical behavior.[6] (A-480, para. 30). Dr. Joyce Poole observed:

> [Happy is] engaged in only five activities/behaviors: Standing facing the fence/gate, dusting, swinging her trunk in stereotypic behavior, standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior, and once, eating grass. Only two, dusting and eating grass, are natural. Alone, in a small space, there is little else for her to do.

(A-480, para. 31; A-17).

As Happy cannot exercise her autonomy while imprisoned at the Bronx Zoo, sending her to an elephant sanctuary is "the best option" since "going back to the 'wild' is unfortunately not an option." (A-244, para. 5). "[E]xtremely positive transformations . . . have taken place when captive elephants are given the freedom that larger space in sanctuaries . . . offer." (A-476, para. 11). 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; A-17). A sanctuary offers elephants "more autonomy and the possibility to choose where to go, what to eat and with whom and when to socialize." (A-476, para. 11). It is a place where elephants with histories similar to Happy's have "almost immediately

[6] The Bronx Zoo announced in 2006 that it planned to end its elephant program. Tracy Tullis, *The Bronx Zoo's Loneliest Elephant*, N.Y. Times (June 26, 2015), https://www.nytimes.com/2015/06/28/nyregion/the-bronx-zoos-loneliest-elephant.html.

blossomed into happy, successful, autonomous, and socially and emotionally fulfilled beings." (A-17; A-476-77, paras. 12-18).

Two renowned elephant sanctuaries in the United States—The Elephant Sanctuary in Tennessee and Performing Animal Welfare Society (in California)—have agreed to provide Happy with lifetime care at no cost to Respondents. (A-8; A-10).

BACKGROUND

A. Procedural history

On October 2, 2018, the NhRP filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") in the Supreme Court, Orleans County, demanding that the court recognize Happy's common law right to bodily liberty protected by habeas corpus—thereby rendering her imprisonment unlawful—and order her immediate release and transfer to an appropriate elephant sanctuary where she would be able to realize her autonomy to the greatest extent possible. (A-34, para. 8; A-37, para. 18; A-32, para. 3; A-45, para. 54; A-78, para. 118).

On November 16, 2018, the Supreme Court, Orleans County (Tracey Bannister, J.) issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held. (A-323-25). Respondents moved to transfer the proceeding to the Trial Court or, in the alternative, to dismiss the

Petition pursuant to CPLR 3211(a) or for permission to file an answer pursuant to CPLR 404(a). (A-326-28). On January 18, 2019, the Supreme Court, Orleans County granted Respondents' motion to transfer. (A-30).

The Trial Court held three days of hearings. (A-8). On February 18, 2020, it issued its Decision and Order (Alison Y. Tuitt, J.) granting Respondents' motion to dismiss on the ground that Happy is not a "person." (A-22). On December 17, 2020, the First Department entered its Decision and Order ("*Breheny*") affirming the dismissal of the Petition. (A-489).

B. Decisions of the First, Third, and Fourth Departments form the substantive basis of this appeal

Based on *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) ("*Lavery II*"), *Breheny* held that "the common-law writ of habeas corpus does not lie on behalf of Happy" because "habeas corpus is limited to human beings." (A-489). *Lavery II* adopted the reasoning of both *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*") and *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015) ("*Presti*"). *See Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057-59 (2018) (Fahey, J., concurring) ("*Tommy*") (criticizing *Lavery I*, *Lavery II*, and *Presti*).

1. *Lavery I*

In *Lavery I*, the NhRP filed a habeas corpus petition on behalf of a chimpanzee named Tommy seeking his immediate release from private imprisonment and transfer to a Florida chimpanzee sanctuary. The Third Department concluded that "a chimpanzee is not a 'person' entitled to the rights and protections afforded by the writ of habeas corpus." 124 A.D.3d at 150. This was based on two major errors.

The first error was that a "person" must have the capacity to bear duties in order to have rights. *Id*. at 152. ("In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.").

The second was that chimpanzees are not entitled to rights because they are not human. *Id*. at 152 n.3. ("[S]ome humans are less able to bear legal duties or responsibilities than others. . . . [But] it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility.").

2. *Presti*

In *Presti*, the NhRP filed a nearly identical petition on behalf of a chimpanzee named Kiko. The Fourth Department assumed without deciding that Kiko could be a "person" for purposes of CPLR article 70. 124 A.D.3d at 1335. However, it erroneously held that the requested relief was unavailable because the NhRP

allegedly sought "only to change the conditions of confinement rather than the confinement itself." *Id*.

3. *Lavery II*

The NhRP filed individual second petitions on behalf of Tommy and Kiko in New York County. "Without even addressing the merits of petitioner's arguments," *Lavery II* found that "the motion court properly declined to sign the orders to show cause" because the petitions were successive under CPLR 7003(b). 152 A.D.3d at 75. It then discussed the merits in dicta.[7]

Perpetuating the errors in *Lavery I* and *Presti*, the First Department concluded: (1) chimpanzees are not "persons" with rights because they cannot bear duties and because they are not human, *id*. at 78, and (2) habeas corpus relief was unavailable since sending Tommy and Kiko to a chimpanzee sanctuary "merely seeks their transfer to a different facility."[8] *Id*. at 79.

[7] *See, e.g.*, *Matter of Isaiah M. (Nicole M.)*, 144 A.D.3d 1450, 1453 n.3 (3d Dept. 2016) ("The appeal . . . was dismissed upon procedural grounds and, therefore, the resulting discussion of the merits is dictum.").

[8] Respondents falsely claim that all four Appellate Divisions have rejected NhRP's position on personhood. Opposition Br. (Feb. 1, 2021) at 1, 6; Resp't Br. (Sept. 11, 2020) at 14. Only the First and Third Departments ruled on the issue of nonhuman animal personhood for purposes of habeas corpus.

ARGUMENT

A. This Court must recognize Happy's common law right to bodily liberty protected by habeas corpus

1. This common law habeas corpus case is not a matter for the legislature

The genesis of habeas corpus is rooted in the common law. Habeas corpus is "'a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.'" *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting) (citation omitted). The writ appeared in English law several centuries ago and became "an integral part of our common-law heritage" by the time the Colonies achieved independence. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973); *Rasul v. Bush*, 542 U.S. 466, 473-74 (2004) (same). Described as "the great bulwark of liberty," *People ex Rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875), this Court has made clear that "[t]he history of the writ is lost in antiquity. It was in use before *magna charta,* and came to us as a part of our inheritance from the mother country, and exists as a part of the common law of the State." *Id.* at 565.

By the seventeenth century, English common law habeas corpus evolved into the only procedure by which one could challenge "illegal imprisonment, whether claimed under public or private authority." WILLIAMS CHURCH, A TREATISE ON THE WRIT OF HABEAS CORPUS 4 (2nd ed. 1893). Neither the first habeas corpus statute

enacted by Parliament in 1641 (16 Car. 1, C. 10) nor the famous Habeas Corpus Act of 1679 (31 Car. 2, C. 2) was intended to reach a private detention. COMP-172, 178.

In 1758, after the House of Commons voted to amend the 1679 Act to allow challenges to private detentions, among other things, the House of Lords sent questions about the proposed statute to all twelve common law Royal Judges who agreed both that the 1679 Act did not apply to non-criminal matters and that the common law already reached private detentions. 15 T. C. HANSARD, PARLIAMENTARY HISTORY OF ENGLAND 900-26 (1813). No English habeas corpus statute that reached private detentions would be enacted for another fifty-eight years. *See* 56 Geo. III, C. 100 (1816). COMP-188.

Meanwhile, the famous common law habeas corpus case of *Somerset v. Stewart*, 1 Lofft. 1, 98 Eng. Rep. 499 (KB 1772) was successfully brought by the slave, James Somerset, who was being privately detained by his master Charles Stewart. COMP-160. *Somerset* became part of New York's common law when New York adopted English common law as it existed prior to April 19, 1775. *Lemmon v. People*, 20 N.Y. 562, 604-05 (1860); N.Y. Const. Art. 1, § 14. This Court in *Lemmon* specifically relied upon *Somerset* to free slaves, 20 N.Y. at 604-06, 623, and other New York courts often used common law habeas corpus to recognize a slave's right to bodily liberty and secure their freedom. *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).

The famous habeas corpus case of *Tweed* further makes clear that New York's Constitution (N.Y. Const. Art. 1, § 4) severely curtails the legislature in habeas corpus matters:

> The statutes which have been passed in England from the time of Charles II (31 Car. 2, C. 2), and in this State from the time of its first organization, have not been intended to detract from its force, but rather to add to its efficiency. They have been intended to prevent the writ being rendered inoperative . . . . *This writ cannot be abrogated, or its efficiency curtailed, by legislative action*. . . . The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when public safety requires, in either of the two emergencies named in the Constitution.

Tweed, 60 N.Y. at 566-67 (emphasis added).

This Court remains totally committed to *Tweed*'s powerful determinations:

> Although article 70 governs the procedure of the common-law writ of habeas corpus, "[r]elief from illegal imprisonment by means of this remedial writ is not the creature of any statute" (*People ex rel. Tweed v. Liscombe*, 60 NY 559, 565 [1875]). As we have long emphasized, "the right to invoke habeas corpus, 'the historic writ of liberty', 'the greatest of all writs'," is a "primary and fundamental" one [citations omitted]. Due to its constitutional roots, "*[t]his writ cannot be abrogated, or its efficiency curtailed, by legislative action*," except in certain emergency situations (*People ex rel. Tweed*, 60 NY at 566 [citations omitted]). Moreover, statutes pertaining to the writ of habeas corpus must be "construed in favor of, and not against, the liberty of the subject and the citizen" (*People ex rel. Tweed*, 60 NY at 569 [citations omitted]).

People ex rel. DeLia v. Munsey, 26 N.Y.3d 124, 130 (2015) (emphasis added).

The procedural statute CPLR article 70 "does not purport to define the term 'person,' and for good reason." *Lavery I*, 124 A.D.3d at 150. "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,'"[9] *id*. (citation omitted), and its ability to do so is severely limited by the New York Constitution. Thus, whether an individual is a "person" who may invoke the protections of habeas corpus is a substantive common law question for this Court to decide, not the legislature. Happy will become a "person" for purposes of CPLR article 70 when this Court recognizes her common law right to bodily liberty protected by habeas corpus.

As a general rule, this Court has long *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 v. Lancet*, 303 N.Y. 349, 355 (1951).[10] *Accord Battalla v. State of New York*, 10 N.Y.2d 237, 239 (1961); *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957). *See Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 508 (1968) (this Court "has not been backward in overturning unsound precedent" rather than let change come from the legislature).[11]

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[9] *See* Vincent Alexander, *Practice Commentaries*, McKinney's CPLR 7001 ("The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.").

[10] "The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power." *Woods*, 303 N.Y. at 356 (citation and internal quotations omitted).

[11] *E.g.*, *Flanagan v. Mount Eden Gen. Hospital*, 24 N.Y.2d 427, 434 (1969) ("[W]e would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules

Contrary to this Court's precedent and the New York Constitution, *Lavery II* stated that "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process." 152 A.D.3d at 80. *Breheny* wrongly defends *Lavery II*, stating: "A judicial determination that species other than homo sapiens are 'persons' for some juridical purposes, and therefore have certain rights, would lead to a labyrinth of questions that common-law processes are ill-equipped to answer." (A-489-90). During oral argument, Justice Ellen Gesmer wrongly suggested that ruling in Happy's favor would mean extending to her "all the rights of personhood in our country," including "the right to vote."[12]

These statements are based on the following fundamental misunderstandings about Happy's case, the common law, habeas corpus, and legal personhood.

First, this Court is only being asked to recognize one right for Happy. (A-37, para. 18). Thus, the concern that recognizing Happy's common law right to bodily liberty protected by habeas corpus would lead to a "labyrinth" of unanswered questions is irrelevant. In *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513, 516 (2021), this Court rejected a similar concern when, after concluding that a

simply because a period of time has elapsed and the Legislature has not seen fit to act."); *Buckley v. City of New York*, 56 N.Y.2d 300, 305 (1982) ("[W]e do not subscribe to the view that the abolition of the fellow-servant rule is strictly a matter for legislative attention. The fellow-servant rule originated as a matter of decisional law, and it remains subject to judicial re-examination.").

[12] *Available at*: https://www.youtube.com/watch?v=vDyN8iaIgYc (around 2:13:30).

grandchild is the "immediate family" of a grandparent for "the zone of danger rule," it left "[u]nsettled" under the common law whether other categories of individuals also qualify as "immediate family." It is therefore appropriate for this Court to leave unsettled whether other species of nonhuman animals may invoke the protections of habeas corpus.

This Court has also long "rejected as a ground for denying a cause of action that there will be a proliferation of claims."[13] *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969). "It suffices that if a cognizable wrong has been committed . . . there must be a remedy, whatever the burden of the courts." *Id*. *See Battalla*, 10 N.Y.2d at 241-42 ("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. Stanley*, 49 Misc.3d 746, 772 n.2 (Sup. Ct. 2015) (relying upon *Tobin*, court rejected "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

[13] Lord Manfield famously stated, "fiat justitia, ruat ccelum" (let justice be done though the heavens fall). 1 Lofft. at 17, 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*, Chicago-Kent Law Review, Vol. 70, No. 2 at 326 (1994).

to begin with when they shape substantive law to avoid an increase in their workloads.").

Second, this Court is well-equipped to recognize Happy's common law right to bodily liberty protected by habeas corpus. Based on the overwhelming and uncontroverted scientific evidence, the Trial Court concluded after reading hundreds of pages of submissions and holding 13 hours of oral argument that "Happy is an extraordinary animal" who is cognitively complex, intelligent, and autonomous. (A-22). Hon. Eugene M. Fahey similarly relied upon "unrebutted evidence . . . from eminent primatologists" submitted by the NhRP and evidence cited by "amici philosophers with expertise in animal ethics and related areas" in concluding that chimpanzees are "autonomous, intelligent creatures." *Tommy*, 31 N.Y.3d at 1058, 1059 (Fahey, J., concurring).

Third, 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. N.Y. State Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (citation and internal quotations omitted). Deflecting the responsibility to secure Happy's freedom onto the legislature will unnecessarily "cause delay and prolong the injustice." *Id*.

Fourth, ruling in Happy's favor will not—as Justice Gesmer suggested—extend to Happy "all the rights of personhood in our country," including "the right

to vote." This is because a "person" can have only one or any number of rights; for example, children have some rights, including the right to bodily liberty protected by habeas corpus, but not the right to vote.

Thus, in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 200 (1972), this Court explained that while "unborn children" have rights "in narrow legal categories" they "have never been recognized as persons in the law in the whole sense."[14] Similarly, in the early nineteenth century Black slaves in New York only had statutory rights to a jury trial, to own and transfer property by will, to marry, and to bear legitimate children.[15] They were not "persons" in "the whole sense" because they lacked every other right. And women were "persons" under the Fourteenth Amendment but lacked the right to vote. *Minor v. Happersett*, 88 U.S. 162, 165, 178 (1874).[16]

Today, "domestic or pet animals" have trust beneficiary rights under New York's pet trust statute (EPTL § 7-8.1) and are therefore "persons" as only "persons" can be beneficiaries. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) ("beneficiary"

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[14] *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* . . . .").

[15] EDGAR J. MCMANUS, A HISTORY OF NEGRO SLAVERY IN NEW YORK 63, 65, 177-78 (1966).

[16] *See generally* Saru M. Matambanadzo, *Embodying Vulnerability: A Feminist Theory of the Person*, 20 Duke J. Gender L. & Policy 45, 49 (2012) ("Women . . . were excluded from the full privileges and benefits of legal personhood.").

is "[a] person to whom another is in a fiduciary relation . . . ; esp., a person for whose benefit property is held in trust.").[17] These nonhuman animals have no other rights.[18]

2. This Court must update the common law on the long-established bases of wisdom, justice, right, ethics, fairness, policy, shifting societal norms, and the surging reality of changed conditions

For centuries, humans wrongly believed that all nonhuman animals were unable to think, believe, remember, reason, and experience emotion.[19] Nonhuman animals have long been regarded as "merely things—often the objects of legal rights and duties, but never the subjects of them." JOHN SALMOND, JURISPRUDENCE 319 (10th ed. 1947). This Court is being asked to change Happy's status from a rightless "thing" to an individual with the common law right to bodily liberty protected by habeas corpus. The Trial Court echoed Judge Fahey's statement in *Tommy* that "[w]hile it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." (A-22) (citation and internal quotations omitted).

Because the "common law . . . is not an anachronism," *Millington*, 22 N.Y.2d at 509 (citation and internal quotations omitted), this Court has consistently applied

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[17] *See also Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947) ("'Beneficiary' is defined as 'a person having enjoyment of property of which a trustee and executor, etc. has legal possession.' (Black's Law Dictionary)."); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) ("Beneficiaries . . . must be persons . . . ."), *rev'd on other grounds*, 99 N.Y. 451 (1885).

[18] Happy is the beneficiary of a trust created by the NhRP. (A-83-91).

[19] RICHARD SORABJI, ANIMAL MINDS & HUMAN MORALS: THE ORIGINS OF THE WESTERN DEBATE 1-96 (1993).

the following eight relevant principles and standards when updating the common law.

The first is wisdom. This Court has "the duty . . . to bring the law into accordance with present day standards of wisdom and justice rather than with some outworn and antiquated rule of the past." *Woods*, 303 N.Y. at 355 (citation and internal quotations omitted). *See also Doerr v. Goldsmith*, 25 N.Y.3d 1114, 1154 (2015) (Fahey, J., dissenting) (precedent may be overruled by "'lessons of experience and the force of better reasoning'"; "patent judicial mistake" need not be allowed to "age" before being corrected) (citations omitted).

The second through sixth are justice, right, ethics, fairness, and policy. It is this Court's responsibility to "bring the common law of this State . . . into accord with justice" by "mak[ing] the law conform to right." *Woods*, 303 N.Y. at 351. "[T]he ever-evolving dictates of justice and fairness . . . are the heart of our common-law system . . . ." *Hymowitz v. Eli Lilly and Co*, 73 N.Y.2d 487, 507 (1989); *Millington*, 22 N.Y.2d at 508, 509 (updating the common law "on the basis of policy and fairness" in order to terminate "an unjust discrimination under New York law").[20] In *Tommy*, Judge Fahey recognized that whether a chimpanzee has the "right

[20] *See also Greene v. Esplanade Venture Partnership*, 172 A.D.3d 1013, 1016 (2d Dept. 2019) (Miller, J., dissenting), *rev'd*, 36 N.Y.3d 513 (2021) ("[W]here, as here, a court is asked to mechanically apply a court-made rule that lacks justification in theory, and which, in practice, produces arbitrary and disparate results, it is the duty of the court to inquire into its continued viability and, if appropriate, reformulate the rule or abolish it completely.").

to liberty protected by habeas corpus" is "a deep dilemma of ethics and policy." 31 N.Y.3d at 1057, 1058 (Fahey, J., concurring). The same is true in this case.

The seventh and eighth are "shifting societal norms," *Greene*, 36 N.Y.3d at 516, and the "surging reality of changed conditions." *Millington*, 22 N.Y.2d at 509 (quoting *Gallagher v. St. Raymond's R.C. Church*, 21 N.Y.2d 554, 558 (1968)).

a. Present-day standards of wisdom require this Court to recognize Happy's common law right to bodily liberty protected by habeas corpus

Happy's imprisonment at the Bronx Zoo reflects an "outworn and antiquated rule of the past." *Woods*, 303 N.Y. at 355 (citation and internal quotations omitted). Our present-day knowledge about the intrinsic nature of elephants, powerfully set forth "by some of the most prominent elephant scientists in the world" (A-16), reflects a dramatic shift in our understanding of elephant autonomy and cognition.

The Trial Court found that the NhRP's "five deeply educated, independent, expert opinions [are] all firmly grounded in decades of education, observation, and experience . . . ." (A-16). "In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds."[21] *Id*. Happy is an "extraordinary animal with complex cognitive abilities, an

[21] Dr. Poole noted that none of Respondent Wildlife Conservation Society's own elephant scientists, who have done outstanding research on wild elephants, contributed affidavits in support of keeping Happy confined at the Bronx Zoo. (A-474, para. 4). 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.

intelligent being with advanced analytic abilities. . . . She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." (A-22). After characterizing Happy's terrible life at the Bronx Zoo as her "plight," the Trial Court found NhRP's arguments "extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit . . . to an elephant sanctuary on a 2300 acre lot." *Id*. "Regrettably," the Trial Court believed it was bound by prior decisions. (A-21).

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

Recognizing the similarities between chimpanzees and humans, Judge Fahey concluded "[t]he evolving nature of life makes clear that [they] exist on a continuum of living beings." *Id.* at 1059. The same is true of elephants and humans. The time has come for this Court to update the common law to reflect what we know about the intrinsic nature of elephants.

b. Justice, right, ethics, fairness, and policy require this Court to recognize Happy's common law right to bodily liberty protected by habeas corpus

"Justice" is "[t]he quality of being fair or reasonable." BLACK'S LAW DICTIONARY (11th ed. 2019). "[L]aw cannot be divorced from morality in so far as it clearly contains . . . the notion of right to which the moral quality of justice corresponds."[22] *Id*. (quoting PAUL VINOGRADOFF, COMMON SENSE IN LAW 19-20 (H.G. Hanbury ed., 2d ed. 1946)).

By imprisoning Happy at the Bronx Zoo, Respondents deprive her of the ability to travel, forage, communicate, socialize, plan, live, choose, and thrive as elephants should—in other words, to be autonomous. Happy's imprisonment is therefore unjust, unethical, and unfair. The First Department has allowed her imprisonment to continue solely because Happy is not human, which violates the court's common law duty to protect her autonomy under principles of liberty (*infra*, 33-35) and equality (*infra*, 36-43).

[22] *See* BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921) ("I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice . . . there should be less hesitation in frank avowal and full abandonment."); Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 Fordham Urb. L.J. 131, 131 (2004) (The "moral judge" "embraces his professional life most fully when he is prepared to fight—and be criticized or reversed—in striving for justice.").

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).

Tommy, 31 N.Y.3d at 1058 (Fahey, J., concurring). The same applies to Happy.

On the basis of justice, right, ethics, fairness, and policy—which underpin *Woods*, *Hymowitz*, and *Millington*—this Court has the duty to update the common law so that Happy spends the rest of her life as an autonomous elephant in a sanctuary where her "inherent value" is respected, rather than "as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others."[23] *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring).

[23] "When these ghosts of the past stand in the path of justice clanking their mediæval chains the proper course for the judge is to pass through them undeterred." *Woods*, 303 N.Y. at 355 (citation and internal quotations omitted).

c. Shifting societal norms and the surging reality of changed conditions require this Court to recognize Happy's common law right to bodily liberty protected by habeas corpus

The enormous interest in and sympathy for Happy's plight among legal scholars, philosophers, theologians, law professors, elected officials, and the general public demonstrate that her imprisonment no longer comports with the way society views the practice of keeping elephants in captivity. The common law must evolve accordingly.

A court in 2012 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. County Superior Ct. July 23, 2012) (emphasis added).[24] COMP-335. The years of public outcry about Happy's solitary existence reflects this growing societal recognition.[25]

Notable scholars of American jurisprudence and a distinguished group of twelve philosophers submitted amicus briefs in *Breheny* in support of Happy's freedom. (A-486-87). Fifty law professors from across the country and around the world urged this Court in an amicus brief to hear Happy's case (A-493), as did five

[24] The California Supreme Court reversed on legal grounds because "the Legislature did not intend to overturn the long-established law governing equitable relief for violations of penal law . . . ." *Leider v. Lewis*, 2 Cal 5th 1121, 1137 (2017).

[25] *E.g.*, Tracy Tullis, *The Bronx Zoo's Loneliest Elephant*, N.Y. Times (June 26, 2015), https://www.nytimes.com/2015/06/28/nyregion/the-bronx-zoos-loneliest-elephant.html.

distinguished Catholic theologians. (A-492). New York City public officials have commented on Happy's plight and the efforts to secure her freedom, including New York City Council Speaker Corey Johnson, who publicly endorsed sending Happy to a sanctuary,[26] Congresswoman Alexandria Ocasio-Cortez,[27] and Mayor Bill de Blasio.[28] A Change.org petition to free Happy has gathered nearly 1.4 million signatures, of which almost 1 million have been added since the NhRP filed its Petition.[29] The oral argument in *Breheny* has over 2,200 views on YouTube.[30]

As further evidence of shifting societal norms and changed conditions, the Fourth Department 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). "[W]e do not need a mirror

[26] NhRP's Media Release, *NYC Council Speaker Urges Bronx Zoo to Release Happy and Patty to a Sanctuary* (July 10, 2019), https://www.nonhumanrights.org/media-center/07-10-19-media-release-nyc-city-council-speaker-urges-sanctuary/.

[27] Nikki Schwab, *Ocasio-Cortez offers to help Bronx Zoo's Happy the elephant*, N.Y. Post (June 6, 2019), https://nypost.com/2019/06/06/ocasio-cortez-offers-to-help-bronx-zoos-happy-the-elephant/.

[28] Julia Marsh, *De Blasio sympathizes with Happy the elephant, but 'doesn't know the details*,' N.Y. Post (Oct. 4, 2019), https://nypost.com/2019/10/04/de-blasio-sympathizes-with-happy-the-elephant-but-doesnt-know-the-details/.

[29] *Available at*: https://www.change.org/p/end-happy-the-elephant-s-10-years-of-solitary-confinement.

[30] *Available at*: https://www.youtube.com/watch?v=vDyN8iaIgYc (around 2:01:40).

to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still . . . ." *State v. Fessenden*, 355 Ore. 759, 770 (2014).

For example, the legislative history of EPTL § 7-8.1 makes clear that the statute was enacted to allow legally enforceable trusts to be created for certain nonhuman animals, thereby granting them the rights of a trust beneficiary and making them "persons" for purposes of those rights.[31] "Before [EPTL § 7-8.1], trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period." Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013).[32]

In 1996, the New York legislature enacted EPTL § 7-6 (now § 7-8.1) and created enforceable pet trusts based on an express legislative finding "to allow animals to be made the beneficiary of a trust."[33] In 2010, the legislature removed "Honorary" from the statute's title and amended § 7-8.1(a) to read, in part, "[s]uch

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[31] "[S]tatutes can serve as an appropriate and seminal source of public policy to which common law courts can refer." *Reno v. D'Javid*, 379 N.Y.S.2d 290, 294 (Sup. Ct. 1976) (citing, *inter alia*, *Muller v. Oregon*, 208 U.S. 412 (1908)). *E.g., Greene*, 36 N.Y.3d at 524 (common law case noting the importance of "the legislative recognition of the changing nature of society's understanding of family and the special relationship between grandparents and grandchildren").

[32] *See In re Mills' Estate*, 111 N.Y.S.2d 622, 625 (Sur. Ct. 1952) (Since nonhuman animals are not "persons," "income or rents and profits trusts may only be measured by the life or lives of human beings.").

[33] Sponsor's Mem. N.Y. Bill Jacket, 1996 S.B. 5207, Ch. 159; *see also* Mem. of Senate, N.Y. Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive," thereby dispelling any doubt that certain nonhuman animals have trust beneficiary rights and are thus "persons."[34] *See Feger v. Warwick Animal Shelter*, 59 A.D.3d 68, 72 (2d Dept. 2008) ("The reach of our laws has been extended to animals in areas which were once reserved only for people. For example, the law now recognizes the creation of trusts for the care of designated domestic or pet animals upon the death or incapacitation of their owner."); *Matter of Fouts*, 176 Misc.2d 521, 522 (Sur. Ct. 1998) (recognizing five chimpanzees as "income and principal beneficiaries of [a] trust").

Courts around the world are seriously considering and, in some cases, recognizing the rights of some nonhuman animals.[35] *See Millington*, 22 N.Y.2d at 505 (favorably citing sister jurisdictions that rejected an anachronistic common law rule).

In May 2014, the Supreme Court of India held that all nonhuman animals possess certain constitutional and statutory rights. *Animal Welfare Board v.*

[34] The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York's report to the legislature proclaimed: "[W]e recommend that the statute be titled 'Trusts for Pets' instead of 'Honorary Trusts for Pets,' as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute." N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).

[35] Courts in South America and South Asia have cited Judge Fahey's concurrence in *Tommy* with approval (*infra*).

Nagaraja, MANU/SC/0426/2014 at paras. 32, 54, 56, 62, 77 (Supreme Court of India, July 5, 2014). COMP-219, 226-27, 228-29, 223.

In November 2016, an Argentinian court granted habeas corpus relief to an imprisoned chimpanzee named Cecilia, declared her a "nonhuman legal person," and ordered her transferred from the Mendoza Zoo to a Brazilian sanctuary. *Presented by A.F.A.D.A. About the Chimpanzee "Cecilia" – Nonhuman Individual*, File No. P.72.254/15 at 32 (Third Court of Guarantees, Mendoza Argentina, November 3, 2016) [English translation]. COMP-32.

In July 2017, the Civil Cassation Chamber of the Colombia Supreme Court granted habeas corpus relief to an imprisoned spectacled bear named Chucho and ordered him transferred from the Barranquilla City Zoo to the Río Blanco Natural Reserve. *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 at 17 (Supreme Court of Colombia, Civil Cassation Chamber, July 26, 2017) [English translation]. COMP-50. Although the decision was reversed and its reversal confirmed by the Colombian Constitutional Court in a 7-2 decision, Magistrate Diana Fajardo Rivera powerfully dissented on the basis of the Great Writ's history, concluding that Chucho is "the holder of the right to animal freedom, understood as conditions in which he is better able to

express his vital behavioral patterns," and possesses "intrinsic value."[36] *Tutela Action filed by the Botanical and Zoological Foundation of Barranquilla (FUNDAZOO) against the Supreme Court of Justice*, SU016/20 at paras. 117, 118, 121 (Constitutional Court of Colombia, January 23, 2020) [English translation]. COMP-107.

In May 2020, the Islamabad High Court ordered the release of an imprisoned Asian elephant named Kaavan from the Islamabad Zoo to an elephant sanctuary, stating "without any hesitation" that he is the subject of legal rights. *Islamabad Wildlife Mmgt. Bd. v. Metropolitan Corp. Islamabad*, W.P. No. 1155/2019 at 59, 62 (H.C. Islamabad, Pakistan May 21, 2020).[37] COMP-293, 296.

In December 2020, the Selection Court of Ecuador's highest court—the Constitutional Court of Ecuador—ruled that the Constitutional Court will hear an appeal from the denial of a writ of habeas corpus for a monkey, stating that it "may develop case law determining the scope of a motion for *habeas corpus* with respect to the protection of other living beings, and if these can be considered as subjects

[36] Magistrate Rivera cited with approval Judge Fahey's concurrence in *Tommy*. *Id*. at paras. 75, 79 and fn. 163, 168. COMP-98, 99, 144-45.

[37] The court recognized the "exceptional abilities" of elephants and cited with approval Judge Fahey's concurrence in *Tommy* as well as the NhRP's litigation on behalf of Happy, whom the court characterized as "an inmate at the Bronx [Z]oo." *Id*. at 12, 40, 41-42, 58. COMP-246, 274, 275-76, 292.

entitled to rights covered by the laws of nature."[38] Selection Court of the Constitutional Court of Ecuador re: Case No.253-20-JH at para. 9 (December 22, 2020) [English translation]. COMP-158.

3. As a matter of liberty, this Court must recognize Happy's common law right to bodily liberty protected by habeas corpus because she is autonomous and extraordinarily cognitively complex

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. . . .'The right to one's person may be said to be a right of complete immunity; to be let alone.'" *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (citation omitted). *See Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993) (The "right of competent individuals to decide what happens to their bodies" is a "right to personal autonomy" rooted in the common law.).

The deprivation of an autonomous individual's bodily liberty constitutes a serious violation of the fundamental principle of liberty that judges stoutly defend:

> In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.

[38] The Constitutional Court has agreed to receive a joint amicus brief from the NhRP and Harvard Law School's Animal Law & Policy Program.

Rivers v. Katz, 67 N.Y.2d 485, 493 (1986) (citing, *inter alia*, *Botsford*, 141 U.S. at 251). *See id.* at 492 ("It is a firmly established principle of the common law of New York that every individual 'of adult years and sound mind has a right to determine what shall be done with his own body.'") (citation omitted); *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 227 (1990) ("primary function of the State to preserve and promote liberty and the personal autonomy of the individual") (citation omitted).

Indeed, the protection given to one's autonomy under the common law is of such supreme importance that a competent individual may choose to reject lifesaving medical treatment and die. *See, e.g., Matter of Storar*, 52 N.Y.2d 363, 372, 376-77 (1981); *Katz*, 67 N.Y.2d at 493.

"The great writ of habeas corpus lies at the heart of our liberty," *Stanley*, 49 Misc.3d at 753 (citation and internal quotations omitted), "and is deeply rooted in our cherished ideas of individual autonomy and free choice." *Id*. (citing, *inter alia*, *Katz*, 67 N.Y.2d at 493). Judge Fahey recognized the importance of autonomy to the question of whether a chimpanzee "has the right to liberty protected by habeas corpus" when he stated that chimpanzees "are autonomous, intelligent creatures." *Tommy*, 31 N.Y.3d at 1057-58, 1059 (Fahey, J., concurring). The same holds true in this case.

"[E]lephants are autonomous beings possessed of extraordinarily cognitively complex minds." (A-16). While elephants, like many human beings, may not be

capable of certain complex decisions (e.g., whether to refuse medical treatment), they are capable of making decisions relevant to habeas corpus. For example, they can "plan and discuss a course of action" and choose what they want to do, where they wish to go, and when, and with whom. (A-11; A-158-61, paras. 44-46). Accordingly, because Happy is "an intelligent, autonomous being who should be treated with respect and dignity" (A-22), this Court as a matter of liberty must recognize her common law right to bodily liberty protected by habeas corpus and order her freed.

4. As a matter of equality, this Court must recognize Happy's common law right to bodily liberty protected by habeas corpus because she is autonomous and extraordinarily cognitively complex

"Our whole system of law is predicated on the general fundamental principle of equality of application of the law." *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). Our "institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943), and equality is deeply embedded in the common law. *E*.g., *Lough v. Outerbridge*, 143 N.Y. 271, 280 (1894) (the principle that "requires equal justice to all" derives from the common law) (citation and internal quotations omitted); *Sullivan v. Minneapolis & R. R. Ry. Co.*, 121 Minn. 488, 492 (1913) ("the general principle of equality is a principle of the common law") (internal quotations and citation omitted); *Simrall v. City of Covington*, 14 S.W. 369, 370 (Ky. App. 1890) ("Perhaps the most distinguishing feature of the common law

is its regard for the protection and equality of individual right."); *James v. Com.*, 12 Serg. & Rawle 220, 230 (Pa. 1825) ("the common law . . . stamps freedom and equality upon all who are subject to it").

Equality has both a comparative component, in which one's entitlement to a right is determined by comparing one's situation to the situation of another who has that right, and a noncomparative component, in which one's entitlement to a right is determined by making a normative judgment. The comparative component is violated when individuals similarly situated in relevant respects are treated in dissimilar ways, while the noncomparative component is violated when the treatment lacks a legitimate or moral end. Happy's imprisonment violates both equality principles.

a. Happy's imprisonment violates the comparative component of equality because elephants and humans are similarly situated for purposes of habeas corpus

"Since the earliest conscious evolution of justice in western society, the dominating principle has been that of equality of treatment of like persons similarly situated, a principle at the root of any rational system of justice." *People v. Jones*, 39 N.Y.2d 694, 698 (1976) (Breitel, C.J., dissenting) (citing, *inter alia*, ARISTOTLE, ETHICA NICOMACHEA bk. V, at 916 pars. 1129a, 1131a (Ross ed.)).

Both equal protection clauses of the Fourteenth Amendment and the New York Constitution require that similarly situated individuals be treated alike. *Walton*

v. New York State Dept of Correctional Services, 13 N.Y.3d 475, 492 (2009). This classic comparative component of equality is also part of New York common law. *E.g.*, *Enright by Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 388 (1991) (It is "a fundamental principle of justice" under the common law that "like cases should be treated alike.") (quotations and citation omitted); *Root v. Long Is. R.R. Co.*, 114 N.Y. 300, 305 (1889) (at common law a common carrier should, so far as is reasonable, treat everyone alike); *New York Tel. Co. v. Siegel-Cooper Co.*, 202 N.Y. 502, 511 (1911) (In common carrier and public utility corporation cases, "unreasonable discrimination" is forbidden under the common law because "all should be treated alike under like circumstances."); *New York State Pub. Empls. Fedn., AFL-CIO v. City of Albany*, 72 N.Y.2d 96, 102 (1988) (common law prohibits "discrimination between residents and nonresidents").[39]

In *Millington*, this Court overruled precedent "to recognize a cause of action for consortium in the wife, thereby terminating an unjust discrimination under New York law." 22 N.Y.2d at 509. Since the "'wife's interest in the undisturbed relation with her consort is no less worthy of protection than that of the husband,'" *id*. at 504

[39] *See also Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 214 (1996) ("This trend furthers one of the most basic principles of the common law: like cases will be treated alike."); *De Ayala v. Florida Farm Bureau Cas. Ins. Co*., 543 So. 2d 204, 206 (Fla.1989) ("Under . . . our common law heritage, all similarly situated persons are equal before the law.").

(citation omitted), wives have an "equal right" to damages resulting from the loss of consortium. *Id*. at 505.

In determining whether Happy's imprisonment violates the comparative component of equality under the common law, this Court must decide whether elephants and humans are similarly situated in *relevant* respects for purposes of habeas corpus. *See Matter of 303 W. 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 695 (1979) (in an equal protection analysis, the "similarly situated" requirement refers to "others similarly situated in *all relevant respects* save for that which furnishes the basis of the claimed discrimination") (emphasis added). While Happy's case is not an equal protection case, former Chief Judge Judith Kaye once reminded us that "constitutional values . . . can enrich the common law." Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 Rutgers L. J. 727, 743 (1992). The two-way street that exists between common law and constitutional adjudication can result in "common law decisionmaking infused with constitutional values . . . ." *Id*. at 747.

The NhRP contends that, for purposes of habeas corpus, elephants and humans are similarly situated in relevant respects because both are autonomous beings with advanced cognitive abilities. Respondents contend that elephants are not similarly situated to humans *solely* because elephants are not human. To rationally choose between these competing arguments, this Court must embrace the one that

harmonizes best with the most essential values and principles embraced by New York courts.

The assertion that only species membership matters deeply conflicts with the supreme importance of protecting an individual's autonomy under the common law (*supra*, 33-34), and perpetuates an unreasonable and unjust discrimination. In *Tommy*, Judge Fahey recognized that chimpanzees are autonomous beings with advanced cognitive abilities, and rejected *Lavery II*'s "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." 31 N.Y.3d at 1057 (Fahey, J., concurring). While "all human beings possess intrinsic dignity and value, . . . in elevating our species, we should not lower the status of other highly intelligent species."[40] *Id*. This criticism applies equally to *Breheny*, which completely ignored Judge Fahey's concurrence.

Happy is an autonomous being with advanced cognitive abilities and, as such, is similarly situated to humans for purposes of habeas corpus. Her imprisonment at the Bronx Zoo therefore violates the comparative component of equality. It would be an unreasonable and unjust discrimination to refuse to recognize Happy as an

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

"individual with inherent value who has the right to be treated with respect." *Id*. at 1058.

b. Happy's imprisonment violates the noncomparative component of equality because it lacks a legitimate or moral end

Distinctions among classes that lack a legitimate or moral end violate the noncomparative component of equality, for "a classification which results in unequal treatment" must "rationally further 'some *legitimate, articulated state purpose*.'" *Matter of Doe v. Coughlin*, 71 N.Y.2d 48, 56 (1987) (citation omitted) (emphasis added). A classification can lack a legitimate or moral end in two relevant ways.

First, distinctions grounded upon a single, irrelevant trait are illegitimate and/or immoral. In *Romer v. Evans*, 517 U.S. 620, 633 (1996), the U.S. Supreme Court struck down on equal protection grounds a provision in Colorado's Constitution (Amendment 2) that prohibited the protection of gay men and lesbians from discrimination because the law "identif[ied] persons by a single trait [sexual orientation] and then deni[ed] them protection across the board."[41] *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (noting that *Romer* found Amendment 2 "so obviously and fundamentally

[41] *Cf.*, *Buck v. Davis*, 137 S. Ct. 759, 778 (2017) ("Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.").

inequitable, arbitrary, and oppressive that it literally violated basic equal protection values").

Similarly, *Millington* terminated "an unjust discrimination under New York law" that distinguished wives and husbands solely on the basis of the irrelevant trait of sex. 22 N.Y.2d at 509. It cited with approval the Fourteenth Amendment decision in *Levy v. Louisiana*, 391 U.S. 68, 72 (1968), which held that a wrongful death statute prohibiting "illegitimate children" from recovering damages constituted invidious discrimination, as their status had no possible relevance "to the harm that was done the mother." *See* 22 N.Y.2d at 508 (finding *Levy*'s reasoning applicable "since it is concluded that there is no basis for the existing discrimination").[42]

Second, distinctions rooted in animus are illegitimate and/or immoral. In *Romer*, Amendment 2 also violated the Equal Protection Clause because its "sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed]." 517 U.S. at 632. "Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id*. at 635. *See Klein*, 46 N.Y.2d at 695 ("When officials acknowledge uneven enforcement against a class

[42] *See also People v. King*, 110 N.Y. 418, 427 (1888) ("By the common law, innkeepers and common carriers are bound to furnish equal facilities to all without discrimination, because public policy requires them so to do."); *James v. Marinship Corp.*, 25 Cal.2d 721, 740 (1944) (in violation of common law, labor union treated qualified Black workers unequally solely on the basis of their race, contrary to a "national policy against discrimination because of race or color" evidenced in equal protection jurisprudence).

that has been selected for some reason apart from effective regulation, an impermissible animus has been shown.").[43]

Happy's imprisonment lacks a legitimate or moral end and therefore violates the noncomparative component of equality. It is grounded upon a single, irrelevant trait—being an elephant—and rooted in an animus that regards her "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." *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Accordingly, this Court must recognize Happy's common law right to bodily liberty protected by habeas corpus.

Refusing to do so undermines this Court's fundamental common law duty to protect autonomy and echoes a long and deeply regrettable history of naked biases. This is not a history to emulate.[44]

For example, the U.S. Supreme Court stated that all Black people, slave and free, "had no rights which the white man was bound to respect"—merely because they were Black. *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857). The California

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[43] *See also City of Cleburne*, 473 U.S. 432, 450 (1985) ("irrational prejudice against the mentally retarded" not a legitimate governmental interest); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("'[E]qual protection of the laws' . . . mean[s] that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

[44] Antebellum Northern judges *outside of New York* frequently appealed to a separation of powers rationale when ruling against slaves, which "provided political and moral justifications for the helplessness of the judge to affect certain situations," while "externalizing responsibility for unwanted consequences." ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 236 (1975).

Supreme Court held that Chinese people—merely because they were Chinese—could not testify against a white man in court, for they are "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point, as their history has shown . . . ."[45] *People v. Hall*, 4 Cal. 399, 405 (1854). A U.S. Attorney argued that Ponca Chief Standing Bear—merely because he was Indigenous American—was not a "person" for purposes of habeas corpus. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C. Neb. 1879).[46] *See* STEPHEN DANDO-COLLINS, STANDING BEAR IS A PERSON 117 (2004) (U.S. Attorney's argument was essentially that "Indians had no more rights in a court of law than beasts of the field."). The Wisconsin Supreme Court refused to allow Ms. Lavinia Goodell to practice law merely because she was a woman. *In re Goodell*, 39 Wis. 232 (1875).

5. This Court must reject the erroneous conclusions of *Lavery I*, *Lavery II*, and *Breheny* that nonhuman animals are not "persons"

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*

[45] Judge Leon R. Yankovich observed that *People v. Hall* enacted "prejudice in the form of law." Leon R. Yankovich, *Social Attitudes as Reflected in Early California Law*, 10 Hastings L. J. 250, 257-261 (1959).

[46] In rejecting the U.S. Attorney's position, the court relied upon Webster's definition of "person," which "describes a person as '*a living soul; a self-conscious being; a moral agent*; especially a living human being; a man, woman, or child; an individual of the human race.'" 25 F. Cas. at 697 (emphasis added). Happy satisfies this definition.

a human being or not." BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)) (emphases added). *See* 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 Personality*, 37 Yale L.J. 283, 283 (1928) ("To confer legal rights or to impose legal duties . . . is to confer legal personality.").

Contrary to this well-established understanding of personhood, *Breheny* affirmed *Lavery I*'s and *Lavery II*'s erroneous conclusions that a "person" (1) must have the capacity to bear duties, and (2) must be human. 124 A.D.3 at 151-52, 152 n.3; 152 A.D.3d at 78.

a. *Byrn* establishes that personhood is not synonymous with being human and does not require the capacity to bear duties

Lavery I, *Lavery II*, and *Breheny* conflict with this Court's decision in *Byrn*, which makes clear that the capacity for rights is sufficient for personhood. *See* 31 N.Y.2d at 201 ("legal person . . . simply means that upon according legal personality to a thing the law affords it the *rights and privileges* of a legal person") (emphasis added). The issue in *Byrn* was whether human fetuses were "persons" with the right to life. *Byrn* never suggested that fetuses cannot be "persons" given their lack of

capacity to bear duties. It never mentioned duties, as rights and duties are independent of each other. Thus, whether chimpanzees possess the capacity to bear duties should have been irrelevant in *Lavery I* and *Lavery II*. Happy's capacity to bear duties is likewise irrelevant.

Byrn further established that "whether legal personality should attach" is a "policy question" that requires a "policy determination," and "not a question of biological or 'natural' correspondence." 31 N.Y.2d at 201. Yet *Lavery I* and *Lavery II*'s personhood conclusions were not based upon policy, but upon the mistake that personhood requires the capacity to bear duties as well as the biological fact that chimpanzees are not human. Similarly, *Breheny* erroneously reduced the question of Happy's personhood to one of mere biology. (A-489).

b. Professors Gray and Salmond, both of whom *Lavery I* cited, established that personhood is not synonymous with being human and does not require the capacity to bear duties

Lavery I erroneously cited JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (2d ed. 1963) ("*Gray*") and JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947) ("*Jurisprudence*") in support of its personhood conclusions. Both sources refute *Lavery I*, *Lavery II*, and *Breheny* because they make clear, like in *Byrn*, that personhood is not synonymous with being human and does not require the capacity to bear duties.

First, *Lavery I* quoted Professor Gray's statement that "the legal meaning of a 'person' is a subject of legal rights *and* duties," 124 A.D.3d at 152 (quoting *Gray*, at 27; emphasis added), but ignored his next sentences: "One who has rights but not duties, or who has duties but no rights, is . . . a person. . . . [I]f there is anyone who has rights though no duties, or duties though no rights, he is . . . a person in the eye of the Law." *Gray*, at 27. Thus, "animals may conceivably be legal persons" for two independent reasons: *either* (1) "because [of] possessing legal rights," *or* (2) "because [they are] subject to legal duties." *Id.* at 42-44.

Second, *Lavery I* cited Black's Law Dictionary ("Black's") for a quotation of Professor Salmond's *Jurisprudence*, which allegedly stated: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *and* duties." 124 A.D.3d at 151 (quoting Black's [7th ed. 1999]) (emphasis added). However, Black's misquoted *Jurisprudence*; Professor Salmond wrote "rights *or* duties," not "rights *and* duties." *Jurisprudence*, at 318. Salmond's next sentence states that "[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not."[47] *Id.*

[47] *See also Wartelle v. Women's & Children's Hospital Inc.*, 704 So.2d 778, 780 (La. 1997) (cited with approval in *Lavery I*, 124 A.D.3d at 152, the Louisiana Supreme Court quoted with approval a secondary source stating that a "'person in a technical sense . . . signif[ies] a subject of rights or duties.'") (citation omitted).

While *Lavery II* was pending, the NhRP brought Black's error to the attention of its editor-in-chief, Bryan A. Garner, who agreed to correct the error in the eleventh edition.[48] (A-465-72). The NhRP filed a motion with the First Department seeking leave to submit its correspondence with Mr. Garner,[49] but the court denied the motion and ignored the error in reaching its decision. By reaffirming *Lavery II*—even after Black's corrected its error—*Breheny* perpetuates the mistaken conclusions that personhood requires the capacity to bear duties and is limited to human beings.

c. Judge Fahey's concurrence makes clear that personhood is not synonymous with being human and does not require the capacity to bear duties

Judge Fahey criticized the erroneous conclusion that only humans are "persons" entitled to habeas corpus relief, *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring), and also repudiated *Lavery I*'s and *Lavery II*'s erroneous conclusions that chimpanzees are not "persons" because they lack the capacity to bear duties:

> 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 (*see People ex rel. Wehle v Weissenbach*, 60 NY 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v Schuse*, 227 AD2d 969 [4th Dept 1996]). In

[48] The corrected sentence reads: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties." Black's (11th ed. 2019) (quoting *Jurisprudence*).

[49] *See* https://www.nonhumanrights.org/content/uploads/162358_15_The-Nonhuman-Rights-Project-Inc.-v.-Patrick-C.-Lavery_Motion-4.11.17.pdf.

> 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]).

Id. at 1057. Hundreds of thousands of New Yorkers who lack the capacity to bear duties possess numerous rights, including the common law right to bodily liberty protected by habeas corpus.

d. EPTL § 7-8.1 and *People v. Graves* make clear that nonhuman animals can be "persons"

EPTL § 7-8.1 created trust beneficiary rights for "domestic or pet animals," thereby making them "persons" regardless of their nonhuman biology or capacity to bear duties. *Supra*, 20-21, 29-30. In *Graves*, the Fourth Department rejected the argument that "person" and "human" are synonymous because "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals." 163 A.D.3d at 21 (citing, *inter alia*, *Presti*, 124 A.D.3d at 1335, and *State v. Fessenden*, 258 Or.App. 639, 640 (2013)). The court then cited *Byrn*'s statement "that personhood is 'not a question of biological or 'natural' correspondence.'" *Id.* (citation omitted).

e. Social contract theory does not support the conclusions that personhood is synonymous with being human and requires the capacity to bear duties

Lavery I grounded its personhood conclusion in part on a misunderstanding of social contract theory:

> [T]he ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (*see* Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 12-14 [2013]; Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69-70 [2009]; *see also In re Gault*, 387 US 1, 20-21 [1967]; *United States v Barona*, 56 F3d 1087, 1093-1094 [9th Cir 1995], *cert denied* 516 US 1092 [1996]). Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights" (Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 13 [2013]; *see* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69 [2009]).

124 A.D.3d at 151. *Lavery II* similarly stated that "nonhumans lack sufficient responsibility to have any legal standing . . . ." 152 A.D.3d at 78.

These statements regarding social contract theory are wrong because (1) the two federal cases *Lavery I* cited do not support them, (2) Cupp's two law review articles are wrong about social contract theory, and (3) social contracts create citizens, not "persons."

First, neither *Gault* nor *Barona* support *Lavery I*'s assertions. As one scholar noted, "*Gault* does not even provide facial support for the [Third Department's] claim: it addresses neither the relationship between rights and duties nor the

limitations of the meaning of legal personhood for the purposes of habeas corpus." Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 78 (2017).

Barona concerned an interpretation of the Fourth Amendment, not the New York common law of habeas corpus or even habeas corpus jurisprudence generally.[50] In dicta, the 9th Circuit quoted from the dissenting opinion in *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev.'d by* 494 U.S 259 (1990), opining that:

> Because our constitutional theory is premised in large measure on the conception that our Constitution is a "social contract," [. . .] "the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear." [. . .] "Not until an alien has assumed the complete range of obligations that we impose on the citizenry may he be considered one of 'the people of the United States' entitled to the full panoply of rights guaranteed by our Constitution."

Barona, 56 F.3d at 1093-94.

The *Verdugo-Urquidez* decision was reversed by the U.S. Supreme Court, which suggested that "if you have duties, then you must have rights, and if you do not have rights, then you must not have duties." *Escape Routes*, 48 Colum. Human

[50] In *Boumediene v. Bush*, 553 U.S. 723, 771 (2008), the Supreme Court held that even non-citizen enemy combatants at Guantanamo Bay—who have not fulfilled any duties to the United States—"are entitled to the privilege of habeas corpus to challenge the legality of their detention."

Rights L. Rev. at 82. But this is an entirely different argument than the erroneous one in *Lavery I*, "that if one has rights, then one must have duties, and if you do not have duties, then you do not have rights." *Id*.

Second, Cupp's two law review articles falsely claim that social contract theory requires rightsholders to also possess duties. *Lavery I*, then *Lavery II*, embraced Cupp's false claim despite it being "junk" political science, "junk" philosophy, and "junk" history "devised for the purpose of" preventing any nonhuman animal from obtaining a legal right. *State v. Donald DD*. 24 N.Y.3d 174, 186 (2014) (expert testimony "'amount[ed] to junk science devised for the purpose of locking up dangerous criminals'") (citation omitted).[51]

In *Children, Chimps, and Rights*, Cupp falsely asserted that in a social contract "societally imposed responsibilities are accepted in exchange for individual rights owed by society," where "rights [are] connected to moral agency and the ability to accept responsibility in exchange for rights." 45 Ariz. St. L.J. at 13. Cupp's sole source for these assertions is an article by Peter de Marneffe. *Id.* at 13 & fn. 49-51 (citing de Marneffe's *Contractualism, Liberty, and Democracy*, 104 *Ethics* 764 (1994)). However, that article does not support Cupp:

> It is strange for Cupp to rely on this work, since . . . de Marneffe [does not] even once claim in this piece that individual rights are exchanged

[51] In deciding whether to accept an expert opinion or reject it as junk, a court should utilize a *Frye*-type test. *See People v. Wesley*, 83 N.Y.2d 417, 422 (1994).

> for responsibilities. Indeed, throughout the entire piece, the author never once uses the words duty, responsibility, reciprocate, exchange, or synonymous terms.

Escape Routes, 48 Colum. Human Rights L. Rev. at 83. In fact, "de Marneffe's work contradicts Cupp's claim," for it "states that the establishment of animal rights is . . . compatible with modern social contract theory." *Id.* at 84.[52]

In *Moving Beyond Animal Rights*, Cupp falsely asserted that "general reciprocity between rights and responsibilities is a basic tenet" of social contract theory. 46 San Diego L. Rev. at 66. The origin of this assertion is a secondary reading of Thomas Hobbes in a book that "cites no particular passage in Hobbes's writings, but rather eight chapters of *Leviathan*." 48 *Colum. Human Rights L. Rev.* at 86.

Natural rights such as the right to bodily liberty do not depend on the existence of a social contract. Amici philosophers in *Breheny* explained that the 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." Philosophers Brief, at 12-13.[53] This includes influential pioneers of social contract theory such as philosophers Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, "who maintain that all persons have 'natural rights' that

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[52] *See id*. at 84-85 (critiquing Cupp's citation to Mark Bernstein's article *Contractualism and Animals*, 86 Phil. Stud. 49, 49 (1997), which argues, at 66, that "contractualism is compatible with according full moral standing to non-human animals.").

[53] *Available at*: https://www.nonhumanrights.org/content/uploads/Philosophers-Brief.pdf.

they possess independently of their willingness or ability to take on social responsibilities."[54] *Id.* at 12.

Similarly, the Connecticut Supreme Court correctly understood that "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) (quoting J. Locke, "Two Treatises of Government," book II (Hafner Library of Classics Ed.1961) ¶ 123, p. 184) (emphasis added).

Third, social contracts create citizens, not "persons":

> It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities). Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow any being with personhood. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there would be no contract at all since only persons can contract.

Philosophers Brief, at 15-16.

[54] Judge Fahey relied upon a substantially similar amicus brief by "amici philosophers with expertise in animal ethics and related areas . . . ." *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring).

B. Once this Court recognizes Happy's common law right to bodily liberty protected by habeas corpus, it must order her immediate release and should send her to an elephant sanctuary

All natural "persons" have the common law right to bodily liberty. *See People ex. rel Caldwell v. Kelly*, 33 Barb. 444, 457-58 (Sup Ct. 1862) (Potter, J.) ("Liberty and freedom are man's natural conditions; presumptions should be in favor of this construction."); *Oatfield v. Waring*, 14 Johns. 188, 193 (Sup. Ct. 1817) ("all presumptions in favor of personal liberty and freedom ought to be made"). When this Court recognizes Happy's common law right to bodily liberty protected by habeas corpus, she will be a "person" for that purpose, thereby rendering her imprisonment unlawful. This Court must therefore order Happy's immediate release pursuant to CPLR 7010(a).

That Happy cannot be released into the wild or onto the streets of New York does not preclude this Court from ordering her immediate release to an appropriate elephant sanctuary, for habeas corpus can be used to transfer an imprisoned individual from one facility to a different facility. *See People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986); *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961); *Tommy*, 31 N.Y.3d at 1058-59 (Fahey, J., concurring); *McGraw v. Wack*, 220 A.D.2d 291, 293 (1st Dept. 1995); *Stanley*, 49 Misc.3d at 772 n.2.

Breheny perpetuated the erroneous conclusions in *Lavery II*, 152 A.D.3d at 80, and *Presti*, 124 A.D.3d at 1335, that habeas corpus cannot be used to seek such

a transfer. *Lavery II* claimed that sending privately imprisoned chimpanzees to a chimpanzee sanctuary is "analogous to the situation" prohibited in *Dawson*. 152 A.D.3d at 80. However, Judge Fahey made clear that "the Appellate Division erred in this matter, by misreading the case it relied on . . . ." *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring).

In *Dawson*, this Court explained that the *Brown* petitioner properly employed habeas corpus in seeking release from his facility of confinement to "an institution separate and different in nature . . . ."[55] 69 N.Y.2d at 691. By contrast, the *Dawson* petitioner improperly employed habeas corpus in seeking release from his confinement in the special housing unit to another part of the very same facility. *Id*. *Dawson* "stands for the proposition that habeas corpus *can* be used to seek a transfer to 'an institution separate and different in nature from the . . . facility to which petitioner had been committed,' as opposed to a transfer 'within the facility.'" *Tommy*, 31 N.Y.3d at 1058-59 (Fahey, J., concurring) (quoting *Dawson*).

Judge Fahey noted that "[t]he chimpanzees' predicament [in *Lavery II* and *Presti* was] analogous to the former situation [*Brown*], not the latter [*Dawson*]." *Id*. at 1059. *See Stanley*, 49 Misc.3d at 772 n.2 (rejecting *Presti* as contrary to the First Department's precedent in *McGraw*).

[55] *Brown* specifically rejected the erroneous notion that "the *place of* confinement may not be challenged by habeas corpus." 9 N.Y.2d at 484.

The NhRP does not seek Happy's transfer from one section of the Bronx Zoo to another section. It seeks her immediate release and transfer to an elephant sanctuary, which is "an institution separate and different in nature" from the Bronx Zoo. The requested relief is therefore permissible as it is analogous to *Brown* and not *Dawson*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court must reverse the court below, recognize Happy's common law right to bodily liberty protected by habeas corpus—thereby rendering her imprisonment at the Bronx Zoo unlawful—and order her immediate release. It should then order her transfer to The Elephant Sanctuary in Tennessee or Performing Animal Welfare Society, where her autonomy may be realized to the fullest extent possible.

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NEW YORK STATE COURT OF APPEALS
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