APL 2021-00087
Bronx County Clerk's Index No. 260441/19
Appellate Division–First Department Case No. 2020-02581

Court of Appeals
of the
State of New York

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

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

Petitioner-Appellant,

– against –

JAMES J. BREHENY, in his official capacity as 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.

MOTION FOR REARGUMENT IN APL 2021-00087

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Date Completed: July 14, 2022

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 500.1(f)

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

Dated: July 14, 2022

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NOTICE OF MOTION FOR REARGUMENT OF APPEAL

PLEASE TAKE NOTICE that Petitioner-Appellant, the Nonhuman Rights Project, Inc., pursuant to Rule 500.24 of the Rules of Practice of the Court of Appeals, will move this Court on July 25, 2022, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, for an order: (1) granting reargument in the appeal of *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 2022 NY Slip Op 03859 (2022), decided by a 5-2 vote on June 14, 2022, upon the ground that the majority misapprehended and overlooked crucial points of law and fact in several areas relevant to its disposition, resulting in an unjust, arbitrary, and irrational decision;

and (2) granting such other and further relief that this Court may deem just, proper, and equitable.

Dated: July 14, 2022

Respectfully submitted,

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR REARGUMENT IN APL 2021-00087

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INTRODUCTION

Pursuant to Rule 500.24 of the Rules of Practice of the Court of Appeals, Petitioner-Appellant, The Nonhuman Rights Project, Inc. ("NhRP"), moves for reargument of this Court's 5-2 decision in *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 2022 NY Slip Op 03859 (2022), which held that the elephant Happy is not a "person" with the right to bodily liberty protected by habeas corpus because she is not human.[1] The majority made this determination despite Happy's undisputed autonomy and extraordinary cognitive complexity, the inherent injustice of her decades-long imprisonment at the Bronx Zoo, and the Great Writ's flexible use throughout history to challenge the unjust confinement of individuals who, like Happy, had few or no rights at the time and no other means to secure their freedom.

Reargument is sought upon the ground that the majority misapprehended and overlooked crucial points of law and fact in several areas relevant to its disposition, resulting in an arbitrary and irrational decision—one that not only sanctions the daily injustice inflicted upon Happy at the Bronx Zoo, but has created instability and confusion in New York law with grave implications for illegally confined human beings.

First, the majority misapprehended the NhRP's position on why Happy's imprisonment is unlawful, the NhRP's requested relief, and whether habeas corpus

[1] In compliance with Rule 500.24(b), the NhRP's motion is served within 30 days after the appeal was decided on June 14, 2022.

relief requires total release from confinement (*infra* at pp. 2-11). Second, the majority overlooked the supreme importance of protecting an individual's autonomy under the common law (*infra* at pp. 11-14). Third, the majority misapprehended the nature of legal personhood, which does not require the capacity to bear duties (*infra* at pp. 14-21). Fourth, the majority misapprehended the "impact" of ruling in Happy's favor, which will not result in a flood of litigation concerning other species (*infra* at pp. 21-26). Fifth, the majority overlooked this Court's duty to evolve the common law in Happy's case when it deflected the responsibility to secure her freedom onto the legislature (*infra* at pp. 26-31).

For these reasons, the NhRP respectfully submits that reargument is warranted.

1. The majority misapprehended the NhRP's position on why Happy's imprisonment is unlawful, the NhRP's requested relief, and whether habeas corpus relief requires total release from confinement

This Court was tasked with deciding whether Happy has the common law right to bodily liberty protected by habeas corpus.[2] NhRP's Br. 3. According to the

[2] The question of the NhRP's standing was not before this Court. *See Breheny*, 2022 NY Slip Op 03859 at *1 (incorrectly stating "[t]he question before us on this appeal is whether [the NhRP] may seek habeas corpus relief on behalf of Happy"). The majority overlooked that the Trial Court found that "the NhRP has standing to bring the habeas corpus proceeding on behalf of Happy" pursuant to CPLR 7002(a). *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *7 (N.Y. Sup. Ct. 2020). *See Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 755-56 (Sup. Ct. 2015) ("As [CPLR 7002(a)] places no restriction on who may bring a petition for habeas corpus on behalf of the person restrained, and absent any authority for the proposition that the statutory phrase 'one acting on his behalf' is modified by a requirement for obtaining standing by a third party, petitioner [NhRP] has met its burden of demonstrating that it has standing [on behalf

majority, the "greatest relief which could be afforded Happy" would be "a transfer between lawful confinements," specifically from "one confinement to another of slightly different form." *Breheny*, 2022 NY Slip Op 03859 at *5. This conclusion is simply not true and underscores the majority's misapprehension of Happy's case. A favorable ruling would result in Happy's release from her *unlawful* imprisonment at the Bronx Zoo, where her right to bodily liberty is being violated, to a radically different environment, where her right to bodily liberty would be respected.

a. Happy's imprisonment violates her common law right to bodily liberty protected by habeas corpus because it deprives her of the ability to meaningfully exercise her autonomy

The majority believes Happy's imprisonment at the Bronx Zoo is lawful because it is "both authorized and . . . compliant with state and federal statutory law and regulations" pertaining to animal welfare. *Breheny*, 2022 NY Slip Op 03859 at *6. The majority further irrelevantly states, "petitioner did not otherwise allege that Happy is subjected to cruel, neglectful, or abusive treatment." *Id*. at *2. But "[t]he question is not whether Happy's detention violates some statute: historically, the Great Writ of habeas corpus was used to challenge detentions that violated no statutory right and were otherwise legal but, in a given case, unjust." *Id*. at *9

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of two chimpanzees]."). Accordingly, the Trial Court's decision to dismiss the NhRP's petition must be construed as granting Respondents' motion to dismiss for failure to state a cause of action, not for lack of standing. Further, the Supreme Court, Orleans County—before transferring the case to the Supreme Court, Bronx County—issued the NhRP's requested order to show cause (equivalent to the issuance of the writ under CPLR 7003(a)). NhRP Br. 9.

(Wilson, J., dissenting). "[T]he question here is about an unjust confinement." *Id*. at *37 (Rivera, J., dissenting).

It was therefore incumbent upon this Court to determine whether Happy's common law right to bodily liberty is being violated, not the irrelevant question of whether various statutory or regulatory enactments are being violated. Habeas corpus is rooted in the protection of an individual's liberty interest regardless of whether that interest is protected by a statute, a constitutional provision, or the common law. While a constitutional or statutory violation can be the predicate of a habeas corpus action in a human case, such violation is not required. The basis for habeas corpus relief can be the violation of a human being's common law right to bodily liberty.[3] Why is the same not true for Happy?

The majority misapprehended the NhRP's position: Happy's imprisonment violates her common law right to bodily liberty protected by habeas corpus and is therefore *unlawful under the common law*, specifically because Happy's imprisonment deprives her of the ability to exercise her autonomy in meaningful ways, including the freedom to choose where to go, what to do, and with whom to

[3] Habeas corpus is characterized by its "great flexibility and vague scope" for good reason. *People ex rel. Keitt v. McMann*, 18 N.Y.2d. 257, 263 (1966). Throughout its history, the Great Writ has been flexibly employed on behalf of individuals such as enslaved persons, women, and children to challenge their unjust detention even when existing law provided no clear substantive basis for doing so. *See generally Breheny*, 2022 NY Slip Op 03859 at *15-22 (Wilson, J., dissenting); Br. of *Amici Curiae* Habeas Corpus Experts 16-21.

be. NhRP's Reply Br. 7-8. The majority acknowledges that nonhuman animals are "without liberty rights" under statutory law. *Breheny*, 2022 NY Slip Op 03859 at *8. Accordingly, whether Respondents are in compliance with any applicable state or federal animal welfare statutes or regulations is irrelevant; none address the violation of Happy's common law right, the basis of her unlawful imprisonment.[4]

Respondents have never alleged or provided evidence that Happy can meaningfully exercise her autonomy at the Bronx Zoo, while the NhRP presented uncontroverted expert evidence that Happy is deprived of that ability, which is why the Trial Court recognized Happy's "plight" and 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.[5] *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *1, *10 (Sup. Ct. 2020) ("*Trial Court Decision*").

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[4] Judge Rivera correctly observed Respondents' failure to address the NhRP's "core argument," namely that "Happy's confinement at the Zoo was a violation of her right to bodily liberty as an autonomous being, regardless of the care she was receiving." *Breheny*, 2022 NY Slip Op 03859 at *39 (Rivera, J., dissenting); *id*. at 41 ("Captivity is anathema to Happy because of her cognitive abilities and behavioral modalities—because she is an autonomous being. Confinement at the Zoo is harmful, not because it violates any particular regulation or statute relating to the care of elephants, but because an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—curtailed.").

[5] The NhRP made clear in its petition that the harm to Happy is the deprivation of her ability to exercise her autonomy in meaningful ways. (A-37, para. 19). During oral argument, attorney for Respondents falsely stated that "there's no harm alleged in the [NhRP's] petition. . . . No one's claiming any harm to this animal. There's been no harm to the animal. And you have three affidavits from the people at the zoo attesting to that." (Oral Argument tr. 27-28).

The majority falsely states that the NhRP's experts "did not . . . comment on Happy's particular circumstances, the adequacy of her environment, or the care she receives at the Zoo." *Breheny*, 2022 NY Slip Op 03859 at *3. In fact, Dr. Joyce Poole did exactly that in her Second Supplemental Affidavit, in responding to Respondents' three affiants.[6] (A-473 – A-482). Dr. Poole detailed the deprivation of Happy's autonomy, writing:

> 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. Elephants need a choice of social partners, and the space to permit them to be with the ones they want, when they want, and to avoid particular individuals, when they want.
>
> …
>
> In forty years at the Bronx Zoo she has only been given a choice of four companions with whom she has been forced to share a space that, for an elephant, is equivalent to the size of a house. Two of these companions she liked and lost, and the other two attacked her. This is hardly a basis for drawing a conclusion that Happy has a "history of not getting on with other elephants". It is rather a confirmation of the zoo's inability to meet Happy's basic needs.
>
> …
>
> In para. 7 Breheny states, "elephants who have lived at zoos for long periods of time are different from elephants in the wild, and the characteristics of one cannot be compared to the other." Coming from

[6] As the NhRP repeatedly emphasized, *none* of Respondents' three affiants are elephant experts; they do not purport to possess any expertise on elephant cognition or behavior by training, education, or experience. Notably, Respondent Wildlife Conservation Society *does* have genuine, bona fide elephant experts, who have done outstanding conservation and research on wild elephants in Africa and Asia, but none contributed affidavits in support of keeping Happy confined at the Bronx Zoo. (A-474, para. 4).

the Director of the Bronx Zoo, this is a shocking acknowledgment of the profound problems that stem from keeping large, social, intelligent, autonomous animals, like Happy, in a space that cannot meet their social and physical needs. . . . There is no scientific basis for arguing that captive and wild animals are fundamentally different. 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.

…

Nowhere in his affidavit does Dr. [Paul] Calle comment that Happy is found to be healthy. Indeed his statement in Para 9 regarding Happy's feet indicates that her feet are not healthy. My own observations from watching a number of videos is that Happy lifts her feet repeatedly, indicating that she is either trying to take weight off of them or is engaging in stereotypic behavior.

…

Dr. Calle's only reference to Happy's psychological well-being is that she becomes "very distressed during short moves from one area of the Bronx Zoo to another." (para. 14) This distress is likely evidence of how traumatic it has been for Happy to be shuffled about at the zoo from confined space to confined space.

I saw no documentation of the "multitude of efforts" that the zoo makes to ensure her psychological well-being. Indeed, since the psychological well-being of elephants is very much dependent on the ability to socialize appropriately with other elephants and this is dependent on having adequate space, the zoo has failed to meet Happy's psychological requirements.

…

It is notable that [Patrick] Thomas' affidavit does not touch on a Bronx Zoo's weak point, the very small space available to Happy.

…

Given that the most species typical behavior of elephants relates to foraging (which is done for her) or social interactions, keeping her in a solitary condition means that she actually has the ability to engage in almost no species typical behavior.

> It is difficult for members of the public, myself included, to obtain much information about Happy's behavior other than viewing very short videos of her captured by people who have ridden on the monorail at the Bronx Zoo. In these videos we see her 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 engaged 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-473-A480, paras. 6, 9, 11, 22, 23, 24, 28, 30, 31).

b. An elephant sanctuary is not another confinement "of slightly different form," but a radically different environment than Happy's imprisonment at the Bronx Zoo

The majority also misapprehended the NhRP's requested relief by stating that an elephant sanctuary is another confinement "of slightly different form" than Happy's one-acre Bronx Zoo prison. *Breheny*, 2022 NY Slip Op 03859 at *5. This mischaracterization is contradicted by the undisputed expert evidence in the record.[7] As Dr. Poole attested, 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 a near natural movement, foraging, and repertoire of behavior." (A-478, para. 19). "[E]xtremely positive transformations . . . have taken place when captive elephants are given the freedom that larger space in sanctuaries . . . offer." (A-476, para. 11). This is because a sanctuary offers elephants

[7] "[W]here the determinations by courts with fact-finding authority are supported by the record they are beyond the further review of this Court." *People v. Sawyer*, 96 N.Y.2d 815, 816 (2001).

"more autonomy and the possibility to choose where to go, what to eat and with whom and when to socialize." *Id*.

Contrary to the majority, the NhRP's requested relief to send Happy to an elephant sanctuary is *not* "an implicit acknowledgement that Happy, as a nonhuman animal, does not have a legally cognizable right to be at liberty under New York Law." *Breheny*, 2022 NY Slip Op 03859 at *5. The *fundamental difference* between the Bronx Zoo's one-acre enclosure and an elephant sanctuary is that the former deprives Happy of the ability to meaningfully exercise her autonomy, while the latter will allow Happy to "flourish in an environment that respects her autonomy to the greatest degree possible, as close to her native Asia as may be found in North America." (A-47, para. 57). In other words, Happy's existence at the Bronx Zoo is *unlawful* because her common law right to bodily liberty is being violated, whereas her life at an elephant sanctuary would be *lawful* because her right would be respected.[8]

c. By holding that habeas corpus relief requires total release, the majority undermines this Court's prior precedents and has therefore created confusion in New York law with grave implications for illegally confined human beings

[8] 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. *Trial Court Decision*, 2020 WL 1670735 at *1, *3.

Until this Court's decision, habeas corpus relief in New York has never required total release from confinement.[9] Under this Court's precedents, habeas corpus can be used to transfer an imprisoned individual from one facility to a different facility:

> The majority's contrary view is based on an erroneous reading of prior case law. In *People ex rel. Dawson v. Smith,* this Court explained that habeas could be used to seek transfer from one facility to another (69 N.Y.2d 689, 691 [1986], citing *People ex rel. Brown v. Johnston,* 9 N.Y.2d 482 [1961]; *see also Lavery,* 31 N.Y.3d at 1058–1059 [Fahey, J., concurring] ["(H)abeas 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'"], quoting *People ex rel. Dawson*, 69 N.Y.2d at 691).

Breheny, 2022 NY Slip Op 03859 at *39-*40 (Rivera, J., dissenting); *Brown*, 9 N.Y.2d at 484 (rejecting Appellate Division's erroneous position that "the *place* of confinement may not be challenged by habeas corpus").[10]

The majority undermines these precedents by holding that Happy is not entitled to habeas corpus relief because the NhRP does not seek her "discharge from confinement altogether," which conflates "immediate release from an unlawful restraint of liberty" with total release from such restraint. *Breheny*, 2022 NY Slip Op

[9] NhRP's Br. 54-56; NhRP's Reply Br. 23-24.

[10] Judge Wilson underscored the Great Writ's flexibility throughout history, detailing, among other things, its use "to transfer custody from one confinement, if determined to be unlawful, to another type of custody; habeas petitions were not required to seek or result in total liberation as the remedy. That aspect of habeas corpus is evident across issues impacting children, women, and enslaved people." *Breheny*, 2022 NY Slip Op 03859 at *19 (Wilson, J., dissenting).

03859 at *5. This conflation has grave implications for illegally confined human beings, arising from the confusion now present in New York law.

Can a human habeas petitioner who is not requesting "discharge from confinement altogether," but transfer to a different facility, still properly employ habeas corpus under *Dawson* and *Brown*, or is that request "an implicit acknowledgment" that the individual "does not have a legally cognizable right to be at liberty under New York law?" What is the principled, non-arbitrary, rational distinction between that form of requested relief and the one made in Happy's case? There is none.

2. The majority overlooked the supreme importance of protecting an individual's autonomy under the common law

It is undeniable 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." *Trial Court Decision*, 2020 WL 1670735 at *10. The majority acknowledged "no one disputes the impressive capabilities of elephants," *Breheny*, 2022 NY Slip Op 03859 at *4, yet overlooked the significance of Happy's proven autonomy and extraordinary cognitive complexity in deciding her case.[11]

[11] "Whether an elephant could have petitioned for habeas corpus in the 18th century is a different question from whether an elephant can do so today because we know much more about elephant

As the NhRP detailed, there is a rich body of jurisprudence recognizing the fundamental importance of protecting an individual's autonomy under the common law—jurisprudence that compels the recognition of Happy's common law right to bodily liberty protected by habeas corpus.[12] *See generally Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891); *Grace Plaza of Great Neck, Inc. v. Elbaum*, 82 N.Y.2d 10, 15 (1993); *Rivers v. Katz*, 67 N.Y.2d 485, 492-93 (1986); *Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226-27 (1990); *Matter of Storar*, 52 N.Y.2d 363, 372, 376-77 (1981). 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. *See, e.g.*, *Matter of Storar*, 52 N.Y.2d at 372, 376-77; *Katz*, 67 N.Y.2d at 493.

As this Court has recognized the relevance of autonomy to the protection of rights in the human context, the majority's failure to do so in Happy's case is arbitrary and irrational. This failure is made manifest by the majority's circular reasoning:

> The selective capacity for autonomy, intelligence, and emotion of a particular nonhuman animal species is not a determinative factor in whether the writ is available as such factors are not what makes a person detained qualified to seek the writ. Rather, the great writ protects the right to liberty of humans *because* they are humans with certain

cognition, social organization, behaviors and needs than we did in past centuries, and our laws and norms have changed in response to our improved knowledge of animals." *Breheny*, 2022 NY Slip Op 03859 at *21 (Wilson, J., dissenting).

[12] NhRP Br. 33-34; NhRP Reply Br. 15-16.

> fundamental liberty rights recognized by law (*see generally Preiser,* 411 US at 485; *Tweed,* 60 N.Y. at 569; *Sisquoc Ranch Co. v. Roth,* 153 F2d 437, 440–441 [9th Cir. 1946]).

Breheny, 2022 NY Slip Op 03859 at *5. As Judge Rivera observed, "[t]his is question begging in its purest form" and "nothing more than a tautological evasion." *Id*. at *37 (Rivera, J., dissenting).[13]

That habeas corpus does and should protect human beings is *no reason* for limiting the writ's protections to our species, just as the fact that rights were once denied to children, women, and enslaved persons was no reason for limiting rights to adults, men, or free people.[14] "The majority's argument boils down to a claim that

[13] "What is patent from the [majority's] glommed-together authorities is that they do not prove anything relevant here. Cases that do not raise an issue cannot be taken to resolve something never at issue. Statutes or cases allowing that humans may own animals do not establish that owned beings can have no justiciable rights. The question here is not governed by any prior decision: it is novel. The novelty of an issue does not doom it to failure: a novel habeas case freed an enslaved person; a novel habeas case removed a woman from the subjugation of her husband; a novel habeas case removed a child from her father's presumptive dominion and transferred her to the custody of another (*see infra* section II). More broadly, novel common law cases—of which habeas is a subset—have advanced the law in countless areas (*see infra* section IV)." *Breheny*, 2022 NY Slip Op 03859 at *11 (Wilson, J., dissenting).

[14] The majority argues that "[n]othing in our precedent or, in fact, that of any other state or federal court, provides support for the notion that the writ of habeas corpus is or should be applicable to nonhuman animals." *Breheny*, 2022 NY Slip Op 03859 at *5. However, "[t]he majority's argument—'this has never been done before'—is an argument against all progress, one that flies in the face of legal history. The correct approach is not to say, 'this has never been done' and then quit, but to ask, 'should this now be done even though it hasn't before, and why?'" *Id*. at *11 (Wilson, J., dissenting). "If rights were defined by who 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). *See* Br. of *Amici Curiae* Shannon Minter and Evan Wolfson in Support of Petitioner-Appellant 12 ("[A]s amici over their careers argued again and again—during which time the LGBT movement gained traction and successes began to come after long and repeated rejection—*rights are not defined by who is denied them*.").

animals do not have the right to seek habeas corpus because they are not human beings and that human beings have such a right because they are not animals. . . . And glaringly absent is any explanation of why some kinds of animals—i.e., humans—may seek habeas relief, while others—e.g., elephants—may not."[15] *Breheny*, 2022 NY Slip Op 03859 at *36 (Rivera, J., dissenting).

This Court undoubtedly possesses the common law authority to protect Happy from the unjust deprivation of her autonomy. Given this Court's recognition of the supreme importance of protecting individual autonomy—as well as its commitment to liberty, equality, justice, fairness, and ethics—what is the principled, non-arbitrary, rational reason for not doing so? There is none.

3. The majority misapprehended the nature of legal personhood, which does not require the capacity to bear duties

The majority's conclusion that Happy is not a "person" is based upon a fundamental misapprehension of legal personhood,[16] uncritically adopting the erroneous view of prior courts:

> As these courts have aptly observed, legal personhood is often connected with the capacity, not just to benefit from the provision of

[15] "As Judge Fahey so eloquently explained, 'in elevating our species, we should not lower the status of other highly intelligent species.'" *Breheny*, 2022 NY Slip Op 03859 at *36 (Rivera, J., dissenting) (citation omitted).

[16] Rather than focusing on whether Happy is a "person," the majority should have focused on the fundamental substantive question in this case: Does Happy have the common law right to bodily liberty protected by habeas corpus? *See generally* Br. of *Amici Curiae* Minter and Wolfson 7-13. The recognition of Happy's right to bodily liberty makes her a "person" for purposes of that right.

> legal rights, but also to assume legal duties and social responsibilities (*see R.W. Commerford and Sons, Inc.,* 192 Conn. App. at 46; *Lavery,* 152 A.D.3d at 78; *Lavery,* 124 A.D.3d at 151; Black's Law Dictionary [11th ed 2019], person). Unlike the human species, which has the capacity to accept social responsibilities and legal duties, nonhuman animals cannot—neither individually nor collectively—be held legally accountable or required to fulfill obligations imposed by law.

Breheny, 2022 NY Slip Op 03859 at *7. As extensively detailed in the NhRP's briefs and those by supporting amici, possessing legal personhood does not require the capacity to bear duties, for any entity capable of bearing rights *or* duties is a legal person.[17] The majority's citations do not support its contrary view.[18]

First, the eleventh edition of Black's Law Dictionary is clear: "So far as legal theory is concerned, a person is any being whom the law regards as *capable of rights or duties*. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man." *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND,

[17] NhRP's Br. 43-53; NhRP's Reply Br. 9-13; NhRP's Response to Br. of *Amicus Curiae* Richard L. Cupp, Jr. 7-13; NhRP's Response to Br. of *Amicus Curiae* National Association For Biomedical Research 5-8; NhRP's Response to Br. of *Amici Curiae* New York Farm Bureau, Northeast Dairy Producers Association, and Northeast Agribusiness and Feed Alliance 8-9; Br. of *Amici Curiae* Joe Wills, et al., UK-based Legal Academics, Barristers and Solicitors 4-10; Br. of *Amici Curiae* Law Professors 4-6; Br. of *Amici Curiae* Laurence H. Tribe, Sherry F. Colb, and Michael C. Dorf 14-16; Br. of *Amici Curiae* Animal Legal Defense Fund 4-6.

[18] In one sense, legal personhood and the capacity to bear duties are "connected" in that possessing a right imposes a duty *on someone else* to respect that right. *See* NhRP's Response to Br. of *Amicus Curiae* Richard L. Cupp, Jr. 11-12. However, this connection between rights and duties does not justify the denial of Happy's right to bodily liberty protected by habeas corpus. In this case, the connection would mean that Respondents have a duty to respect Happy's right.

JURISPRUDENCE 318 (10th ed. 1947)) (emphasis added). Black's inclusion of John Salmond's explanation of legal personhood was not an afterthought. As Black's editor-in-chief explained, quotations from leading scholars "are more than merely illustrative: they are substantive. With each quotation, I have tried to provide the seminal remark—the *locus classicus*—for an understanding of the term."[19] PREFACE TO THE ELEVENTH EDITION, BLACK'S LAW DICTIONARY xiv (11th ed. 2019).

Second, the Third Department in *Lavery I*[20] cited sources directly contradicting its view that legal personhood requires the capacity to bear duties. NhRP's Br. 45-47. For example, *Lavery I* relied upon a misquotation of JURISPRUDENCE made in the seventh edition of Black's Law Dictionary, which had incorrectly quoted the treatise as stating: "So far as legal theory is concerned, a person is any being whom the law regards as *capable of rights and duties*." 124

[19] Black's also quotes Peter Birk's *English Private Law* treatise, which also makes clear:

> 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*. But it can be easy to forget the qualifier, and to assume when the question later arises, whether the individual or entity has the further capacity to enforce some other right, or to owe some other duty, that this must be so because he or it has previously been said to be a person *with an unlimited set of capacities*, or to be a person who possesses the 'powers normally attendant on legal personality'.

1 ENGLISH PRIVATE LAW § 3.24, 146 (Peter Birks ed. 2000); NhRP's Reply Br. 11.

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

A.D.3d at 151 (quoting Black's [7th ed. 1999]) (emphasis added). Professor Salmond wrote "rights *or* duties," not "rights *and* duties." This misquotation error has been corrected in the eleventh edition of Black's after the NhRP brought it to Black's editor-in-chief's attention. NhRP's Br. 47.

Lavery I also relied upon JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (2d ed. 1963) ("*Gray*"), when it 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). However, *Lavery I* ignored the next qualifying 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. Professor Gray also wrote that "animals may conceivably be legal persons" for two independent reasons: *either* (1) "because possessing legal rights," *or* (2) "because subject to legal duties." *Id.* at 42-44.

Indeed, none of the Third Department's sources support conditioning legal personhood on the capacity to bear duties.[21] *Lavery I* also based its understanding of legal personhood upon a fundamental misapprehension of social contract theory,

[21] *See* Br. of *Amici Curiae* Joe Wills, et al., UK-based Legal Academics, Barristers and Solicitors 6-9 (examining the academic commentaries and cases cited in *Lavery I*, and finding that they do not support the claim that an individual must bear legal duties in order to be a legal person).

specifically the idiosyncratic views of a single academic commentator, Richard L. Cupp, Jr., who falsely claims that society extends rights "in exchange for" bearing duties. 124 A.D.3d at 151 (citing two law review articles by Richard L. Cupp, Jr.). The majority inexplicably cites with approval *Lavery I*'s reliance upon Cupp's views, despite the fact that his arguments have been widely subjected to devastating criticisms.[22]

There is simply no basis in social contract theory for the proposition that the possession of certain rights, such as the right to bodily liberty, is contingent upon the ability to bear duties. As amici philosophers explained, influential pioneers of social contract theory such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau "maintain that all persons have 'natural rights' that they possess independently of their willingness or ability to take on social responsibilities." Br. of *Amici Curiae* Philosophers 12 (citations omitted). In other words:

> [I]ndividuals have *natural rights* even *before* they enter into social contracts. They *surrender* some of their rights in order to form stable governments. One cannot surrender what one does not have. It follows that, on the contractualist tradition, people need not enter into an agreement and assume social obligations to have rights.

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[22] *See generally* NhRP's Br. 48-53; NhRP's Response to Br. of *Amicus Curiae* Richard L. Cupp, Jr. 16, 17-22; Br. of *Amici Curiae* Philosophers 12-18; Br. of *Amici Curiae* Peter Singer, Gary Comstock, and Adam Lerner 20-25; Craig Ewasiuk, *Escape Routes: The Possibilities of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48.2 COLUM. HUM. RTS. L. REV. 70, 82-87 (2017); KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 41-55 (2018); Joe Wills, *Animal rights, legal personhood and cognitive capacity: addressing 'leveling-down' concerns*, 11.2 J. OF HUM. RTS. AND THE ENV'T 199, 212-223 (2020).

Br. of *Amici Curiae* Peter Singer, Gary Comstock, and Adam Lerner 21. *See also* Br. of *Amicus Curiae* Christine M. Korsgaard 15-16. (The notion that society grants rights in return for assuming duties "is not in general the view of the social contract tradition. . . . [C]entral social contract theories and others in the tradition accept the idea of natural rights, which are not in the gift of society.").[23]

Third, neither *Lavery II*[24] nor *Commerford*[25] support conditioning legal personhood on the capacity to bear duties. *Lavery II* not only adopted *Lavery I*'s erroneous personhood conclusion, but the First Department inexplicably ignored the misquotation error of JURISPRUDENCE and the fact that the error would be corrected in Black's eleventh edition. NhRP's Br. 47. *Commerford* favorably cited *Lavery I*, and similarly concluded that elephants are not legal persons because they are "incapable of bearing duties and social responsibilities required by [Connecticut's] social compact." 192 Conn.App. at 46. As discussed, social contract theory does not require an individual to bear duties in order to possess rights. Moreover,

[23] "If the proposition that no rights may be awarded to a being who cannot shoulder responsibilities were based on social contract theory, we could not explain why children or profoundly disabled adults—who have no capacity to enter into a social contract—can be granted rights. . . . [W]e can, and constantly do, grant rights to living beings who bear no responsibilities and may never be able to do so." *Breheny*, 2022 NY Slip Op 03859 at *13 (Wilson, J., dissenting). *See id*. at *36 (Rivera, J., dissenting) ("We afford legal protections to those unable to exercise rights or bear responsibilities, such as minors and people with certain cognitive disabilities.") (citations omitted).

[24] *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017).

[25] *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 192 Conn.App. 36 (Conn. App. Ct. 2019).

Commerford directly contradicts *Jackson v. Bulloch*, 12 Conn. 38 (1837), in which an enslaved human, Nancy Jackson, was freed pursuant to habeas corpus even though the Connecticut Supreme Court held that such individuals were neither parties to the "social compact" described in the Connecticut constitution nor "represented in it." *Id*. at 42-43. *Jackson* established the irrelevance of social contract theory to habeas corpus relief, yet *Commerford* made no attempt to distinguish the binding precedent.

Ultimately, the majority's misapprehension of legal personhood as requiring the capacity to bear duties (either individually or collectively as a species) is grounded upon a discredited *philosophical* theory that reflects bias, and is nowhere found in the law.[26] *Cf. Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972) ("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). Obviously "many legal persons lack duties." Br. of *Amici Curiae* Law Professors 4 (citing examples). As Judge Fahey observed in repudiating the *Lavery* decisions, "[e]ven if it is correct . . . that nonhuman animals cannot bear

[26] The majority believes questions of philosophy are not relevant to the allegedly "straightforward" legal issue presented in this case, *Breheny*, 2022 NY Slip Op 03859 at *8, yet endorses a particular philosophical position (i.e., *Lavery I* and Cupp's understanding of social contract theory and legal personhood) in support of its conclusion. The majority overlooks the fact that various courts below have based their personhood conclusions on philosophy—*bad* philosophy. *See generally* Philosophers Br. 3-19.

duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child or a parent suffering from dementia." *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring).

The majority perpetuates *Lavery I* and *Lavery II*'s arbitrary and irrational principle: nonhuman animals *must* have the capacity to bear duties to possess legal personhood, but humans *need not* have that capacity. What is the principled, non-arbitrary, rational reason for imposing a requirement on Happy that has never been––and will never be—a requirement for humans? There is none.

4. The majority misapprehended the "impact" of ruling in Happy's favor, which will not result in a flood of litigation concerning other species

According to the majority, the recognition of Happy's common law right to bodily liberty protected by habeas corpus "would have an enormous destabilizing impact on modern society" resulting from a flood of litigation concerning other species. *Breheny*, 2022 NY Slip Op 03859 at *6. The majority states:

> Granting legal personhood to a nonhuman animal in such a manner would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts. . . . [S]uch a determination would call into question the very premises underlying pet ownership, the use of service animals, and the enlistment of animals in other forms of work. . . .[C]ourts would face grave difficulty resolving the inevitable flood of petitions. Likewise, owners of numerous nonhuman animal species—farmers, pet owners, military and police forces, researchers, and zoos, to name just a few—would be forced to answer and defend those actions.

Id. at *6-*7. However, these "facially preposterous" scenarios, *id.*, at *32 (Wilson, J., dissenting), are based on the fundamental misapprehension that in order to rule in Happy's favor, this Court must also recognize the right to bodily liberty of all or virtually all nonhuman animals. Nothing could be further from the truth.[27]

First, the majority overlooked this Court's common law approach in *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513 (2021), which made clear that this Court should resolve only the issue presented on appeal and not attempt to settle other issues.[28] This Court explained its "task" in *Greene* 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. In evolving the common law by concluding that grandchildren are "immediate family," it left "[u]nsettled" questions regarding other relationships. *Id*.

[27] The majority's concern that ruling in Happy's favor would "displace the carefully devised state and federal statutory frameworks governing animal welfare," *Breheny*, 2022 NY Slip Op 03859 at *7, has no basis. How could freeing Happy to an elephant sanctuary pursuant to habeas corpus possibly impact—let alone "displace"—the laws and regulations governing animal welfare? Those laws and regulations would still continue to apply as they do now.

[28] NhRP's Br. 17-18; NhRP's Reply Br. 20; NhRP's Response to Br. of *Amici Curiae* Association of Zoos & Aquariums and Six AZA-Accredited New York Zoos and Aquariums 17-19; NhRP's Response to Br. of *Amici Curiae* New York Farm Bureau, Northeast Dairy Producers Association, and Northeast Agribusiness and Feed Alliance 2-3; NhRP's Response to Br. of *Amici Curiae* American Veterinary Medical Association, New York State Veterinary Medical Society, and American Association of Veterinary Medical Colleges 8-10; NhRP's Response to Br. of *Amici Curiae* National Association for Biomedical Research 9-14; NhRP's Response to Br. of *Amici Curiae* Protect the Harvest, Alliance of Marine Mammal Parks and Aquariums, Animal Agriculture Alliance, and the Feline Conservation Foundation 8-9.

Relatedly, *Greene* understood that evolving the common law did not require line-drawing, which would have entailed fixing the permanent boundaries of "immediate family" by exhaustively deciding which categories of individuals count as "immediate family members" and which ones do not. *See id*. at 518 (explaining that this Court's prior common law decision in *Bovsun v. Sanperi*, 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.'").

There was no reason for the majority to disregard this Court's common law approach in *Greene*, under which its fundamental task was to decide whether Happy has the common law right to bodily liberty protected by habeas corpus. The majority's "facially preposterous" scenarios concerning dogs, cows, pigs, or chickens—or the entire animal kingdom—should have played no role in resolving this question. This Court was *not* required to fix the permanent boundaries of habeas corpus by exhaustively deciding which nonhuman animals possess the right to bodily liberty and which ones do not. In other words, it was *not* required to decide "labyrinthine issues" concerning "numerous nonhuman animal species," such as those used in the agricultural industry and medical research. *Breheny*, 2022 NY Slip Op 03859 at *7. As in *Greene*, this Court can evolve the common law by recognizing

Happy's right to bodily liberty and appropriately leave unsettled issues concerning other species.[29]

Second, the majority misapprehended the inherently case-by-case nature of habeas corpus. "The writ is a procedural tool with a storied history of opportunity for challenging social norms, but one inherently limited by its necessarily case-by-case approach." *Breheny*, 2022 NY Slip Op 03859 at *16. (Wilson, J., dissenting). This is illustrated by both the English *Sommersett* case and New York's *Lemmon Slave Case*, which "freed only the subjects of the habeas petition before the Court." *Id*. at *17. Similarly, "the cases liberating women and children did not bring an end to those abuses on a wholesale basis. Because of the inherently case-by-case way in which habeas corpus works, each case acted directly only on the particular petitioner seeking relief." *Id*. at *21. These successes of the Great Writ, limited in nature, did

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

not produce a flood of habeas petitions. *Id*. at *32. "There is not a promise of sweeping change, but the reality of case-by-case determinations that can bring redress to individuals who are unjustly confined." Br. of *Amici Curiae* Habeas Corpus Experts 21.

Happy's case is no different. Granting her habeas corpus relief would not automatically entitle any other nonhuman animal—even other elephants—to habeas corpus relief.[30] *See Breheny*, 2022 NY Slip Op 03859 at *32 (Wilson, J., dissenting) ("Even were Supreme Court to determine that the balance favored transferring Happy to a sanctuary, that would not mean, for example, that elephants living in the San Diego Zoo's 1,800-acre safari park, in the company of other elephants and wildlife, would succeed on the merits of a habeas petition . . . . Each subsequent case would define the contours of the common law, whatever the result—which is the enduring genius of the common law.").

Had the majority followed *Greene* and adhered to the inherently case-by-case nature of habeas corpus, it would have realized that concerns regarding the

[30] The majority falsely states that "autonomy" is "a term notably left undefined and which could reasonably be applied to a vast number of species." *Breheny*, 2022 NY Slip Op 03859 at *7. First, world renowned elephant experts have defined autonomy in the record, as self-determined behavior that is based on freedom of choice, and explained it includes complex cognitive capacities such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. *See* NhRP Br. 4-5; (A-105, para. 30; A-108, para. 37); *Breheny*, 2022 NY Slip Op 03859 at *38 (Rivera, J., dissenting). Second, the notion that "a vast number of species" possess autonomy is a purely scientific matter beyond the competence of this Court, and nothing in the record supports it.

"destabilizing impact on modern society" lack any legal, logical, or rational foundation. Such unfounded concerns distract from the injustice at hand. Recognizing Happy's common law right to bodily liberty protected by habeas corpus would not be a "'sweeping pronouncement[]' of nonhuman animal personhood," *Breheny*, 2022 NY Slip Op 03859 at *7, but would establish for a single elephant one common law right to remedy the unjust deprivation of her autonomy. Evolving the common law in such a manner, almost by definition, would be "an incremental step in 'the slow process of decisional accretion' regarding the scope and flexibility of the writ of habeas." *Id*. (citation omitted). This is "about as incremental as one can get." *Id*. at *32 (Wilson, J., dissenting). What is the principled, non-arbitrary, rational reason for not doing so? There is none.[31]

5. The majority overlooked this Court's duty to evolve the common law in Happy's case when it deflected the responsibility to secure her freedom onto the legislature

[31] The majority also overlooked this Court's decision in *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969), which "rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts." *See also Battalla v. State of New York*, 10 N.Y.2d 237, 241-42 (1961) ("[E]ven 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*, 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)).

Overlooking this Court's duty to evolve the common law in Happy's case, the majority states: "Though beyond the purview of the courts, we appreciate that the desire and ability of our community to engage in a continuing dialogue regarding the protection and welfare of nonhuman animals is an essential characteristic of our humanity. Such dialogue, however, should be directed to the legislature."[32] *Breheny*, 2022 NY Slip Op 03859 at *7. The responsibility to secure Happy's freedom is well within this Court's purview and should not be deflected onto the legislature.

The dissenters understand that "[t]he common law is our bailiwick." *Id*. at *37 (Rivera, J., dissenting). "Our Court has a long and distinguished history of adapting the common law to reflect new knowledge, changed beliefs and economic and social transformations." *Id*. at *29 (Wilson, J., dissenting). As Judge Wilson observed:

> "During its first 150 years, the New York Court of Appeals has had more impact on more areas of law than any other court in the United States" (*There Shall Be a Court of Appeals*, *supra*, at 56). We "act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice" (*Woods v Lancet*, 303 NY 349, 355 [1951]). Not all change can or should come from the legislature; we "abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule" (*id.*).

[32] The "dialogue" here does not concern the expansion of animal welfare protections, which is the purview of the legislature, but the recognition of Happy's common law right to bodily liberty protected by habeas corpus, which is the purview of this Court. "Put another way, statutory rights may expand existing rights and protections for nonhuman animals—and humans—but the fundamental right to be free is grounded in the sanctity of the body and the life of autonomous beings and does not require legislative enactment." *Breheny*, 2022 NY Slip Op 03859 at *37 (Rivera, J., dissenting). The majority's conflation further evidences its misapprehension of Happy's case.

Id. *See also* NhRP Br. 16 (citing, *inter alia*, *Battalla v. State of New York*, 10 N.Y.2d 237, 239 (1961), *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957), and *Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 508 (1968)).

Moreover, habeas corpus "is part of the fundamental role of a common-law court to adapt the law as society evolves." *Breheny*, 2022 NY Slip Op 03859 at *31 (Wilson, J., dissenting). Throughout its history, the Great Writ has been "used flexibly to address myriad situations in which liberty was restrained. It is a common law writ and, although different in the respect that the legislature cannot alter its scope, its judicial implementation mirrors the path generally used by courts to adapt the common law and conform it to present times." *Id*. "In that regard, habeas corpus is just one example of how courts alter conduct as societal needs, values and aspirations evolve." *Id*.

The majority, overlooking the nature and history of habeas corpus, relied on *Byrn* in stating that "[t]he use of habeas corpus as a vehicle to extend legal personhood beyond living humans is not a matter for the courts." *Id*. at *7 (citing *Byrn*, 31 N.Y.2d. at 203). However, *Byrn* is a not a habeas corpus case, or even a common law case. Nor does it stand for the proposition that according legal personhood is always a matter for the legislature. *See* 31 N.Y.2d at 201 ("Whether the law should accord legal personality is a policy question which in most

instances"—*not all instances*—"devolves on the Legislature, subject again of course to the Constitution as it has been 'legally' rendered.").

As the majority acknowledges, "the courts—not the legislature—ultimately define the scope of the common law writ of habeas corpus."[33] *Breheny*, 2022 NY Slip Op 03859 at *8 (citing *People ex rel. Sabatino v. Jennings*, 246 NY 258, 260 (1927) and *People ex rel. Tweed v. Liscomb*, 60 NY 559, 565-566 (1875)). "Thus, it is for this Court to decide the contours of the writ based on the qualities of the entity held in captivity and the relief sought. The difficultly of the task—i.e., determining the reach of a substantive common law right whose existence pre-dates *any* legislative enactment on the subject and whose core guarantees are unalterable by the legislature—is no basis to shrink from our judicial obligation by recasting it as the exclusive purview of the legislative branch." *Id.* at *37 (Rivera, J., dissenting).

[33] The Third Department in *Lavery I* also correctly acknowledged that CPLR article 70 "does not purport to define the term 'person,' and for good reason. The 'Legislature did not intend to change the instances in which the writ was available,' which has been determined by 'the slow process of decisional accretion' (*People ex rel. Keitt v McMann*, 18 NY2d 257, 263 [1966]) [citation omitted]). Thus, we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.'" 124 A.D.3d at 150. "Article 70 of the CPLR does not (and cannot) curtail the substance or reach of the writ; it specifies procedure only." *Breheny*, 2022 NY Slip Op 03859 at *9-*10 (Wilson, J., dissenting). As this Court "previously explained, '[a]lthough article 70 governs the procedure of the common-law writ of habeas corpus, relief from illegal imprisonment by means of this remedial writ is not the creature of any statute.'" *Id.* (quoting *People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015)).

The majority's unwillingness to evolve the common law in Happy's case constitutes an indefensible deflection of responsibility, contrary to this Court's duty and the Great Writ's venerable history:

> The judges, Justice Paine among them, who issued writs of habeas corpus freeing enslaved persons, or liberating women and children from households run by abusive men, or ordering the return home of underaged soldiers could have said, as the majority does here, "that's a job for the legislature." They could have said, "existing law offers some protections, and we dare not do more." They could have said, "we can't be the first." But they did not. None of those declamations is remotely consistent with our Court's history, role or duty. Where would we or Judge Cardozo be, had he declined to act for any of those reasons?

Id. at *30 (Wilson, J., dissenting).

Happy is not a human being,[34] but her "captivity is inherently unjust and inhumane. It is an affront to a civilized society, and every day she remains a captive—a spectacle for humans—we, too, are diminished." *Id*. at *40 (Rivera, J., dissenting). In her one-acre prison, on display for paying customers riding the Bronx Zoo's monorail, Happy is deprived of the ability to meaningfully exercise her autonomy:

[34] The majority accuses the dissenters of making "an odious comparison with concerning implications" in their discussion of habeas corpus cases involving enslaved persons, women, and children. *Breheny*, 2022 NY Slip Op 03859 at *5. However, "[t]he majority has profoundly misconstrued the point," for "no one is equating enslaved human beings or women or people with cognitive disabilities with elephants." *Id*. at *37 (Rivera, J., dissenting). Judge Wilson and Judge Rivera "merely highlight a historical truth: Even when those classes of human beings have, by operation of law, been denied legal recognition of their humanity, the writ of habeas corpus was still available to them." *Id*. "The legal and moral point of that [historical] analysis is that the Great Writ serves to protect against unjust captivity and to safeguard the right to bodily liberty, and that those protections are not the singular possessions of human beings." *Id*.

> [She is not] in anything remotely resembling her natural environment. She does not, as she would in the wild, roam free with the other members of her herd—consisting of her mother, sisters, cousins, and potentially grandmothers—in Thailand, where she was born. She cannot—as is the common practice for the herd from which she was taken when she was a baby calf—spend the vast majority of her waking hours traversing significant distances with her family to exercise, forage, and socialize. . . . Any myth that Happy is content in [her] environment is laid bare by the cruel reality of her existence. Day in and day out, Happy is anything but happy. There lies the rub—Happy is an autonomous, if not physically free, being. The law has a mechanism to challenge this inherently harmful confinement, and Happy should not be denied the opportunity to pursue and obtain appropriate relief by writ of habeas corpus.

Id. at *34 (Rivera, J., dissenting). What is the principled, non-arbitrary, rational reason for deflecting the responsibility to remedy this injustice onto the legislature? There is none.

CONCLUSION

For the foregoing reasons, the NhRP respectfully requests that its motion for reargument be granted. If reargument is granted, the NhRP respectfully submits that this Court should reverse its decision, rule in Happy's favor, and remit the case back to the Trial Court to determine whether she should be sent to The Elephant Sanctuary in Tennessee or Performing Animal Welfare Society.

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