

COURT OF APPEALS OF THE STATE OF NEW YORK

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

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

Petitioner-Appellant,

-against-

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

Respondents-Respondents.

APL-2021-00087

Case No.: 2020-02581

Index No.: 260441/2019
(Bronx County)

**AFFIRMATION OF
PATRICK ANDRIOLA
IN SUPPORT OF
MOTION OF ANIMAL
THEOLOGY EXPERTS
FOR LEAVE TO FILE
BRIEF AS *AMICI
CURIAE* IN SUPPORT
OF PETITIONER-
APPELLANT**

I, Patrick Andriola, hereby affirm under penalty of perjury:

1. I am an attorney duly admitted to practice in the courts of the State of New York. I submit this affirmation on behalf of Reverend and Professor Andrew Linzey, Ph.D., D.D., Hon.D.D. (“Dr. A. Linzey”) and Professor Clair Linzey, Ph.D. (“Dr. C. Linzey”) in support of their motion for leave to submit the attached brief as *Amici Curiae* in support of the Petitioner-Appellant Nonhuman Rights Project, Inc. in the above-captioned proceedings. I am not a party to this proceeding nor do I represent any of the parties to it.
2. Dr. A. Linzey is the director of the Oxford Centre for Animal Ethics and has been a member of the Faculty of Theology at the University of Oxford for

nearly three decades. Dr. A. Linzey is also a visiting professor of animal theology at the University of Winchester, professor of animal ethics at the Graduate Theological Foundation and Special Professor at Saint Xavier University, Chicago.

3. Dr. C. Linzey is the deputy director of the Oxford Centre for Animal Ethics and is a professor of animal theology at the Graduate Theological Foundation. She obtained her doctorate degree in theology from the University of St. Andrews.
4. Amici are familiar with the issues involved in the above-captioned case and are qualified and competent in the matters therein. Their proposed brief addresses the issue of whether we have a moral duty rooted in Christian theology to legally recognize Happy, the Asian elephant at the center of this case, as a “person” entitled to habeas corpus relief.
5. The issues before this Court are of great public importance with regard to society’s treatment of nonhuman animals.
6. Pursuant to Rule 500.23 of the Rules of Practice of this Court, Amici have identified arguments in their brief that might otherwise escape the Court’s consideration and would be of assistance to the Court.
7. Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, Amici state that no party’s counsel contributed content to this brief or participated in the preparation of this brief

in any other manner. No person or entity, other than movants or movants' counsel, contributed money intended to fund the preparation or submission of this brief.

8. Amici's proposed brief is attached hereto as Exhibit A.

WHEREFORE, I respectfully request that this Court enter an order: (i) granting the motion of Amici for leave to file the annexed brief; (ii) accepting the brief that has been filed and served along with this motion, and; (iii) granting such other and further relief as this Court deems just and proper.

Dated: April 7, 2022

Respectfully submitted,

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EXHIBIT A

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

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THE NONHUMAN RIGHTS PROJECT, INC., ON
BEHALF OF HAPPY,

Petitioner-Appellant,

—against—

JAMES J. BREHENY, IN HIS OFFICIAL CAPACITY AS THE
EXECUTIVE VICE PRESIDENT AND GENERAL DIRECTOR OF ZOOS
AND AQUARIUMS OF THE WILDLIFE CONSERVATION SOCIETY AND
DIRECTOR OF THE BRONX ZOO, AND WILDLIFE
CONSERVATION SOCIETY,

Respondents-Respondents.

**BRIEF OF *AMICI CURIAE* ANIMAL THEOLOGY EXPERTS & FOR
PLAINTIFFS-APPELLANTS**

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I. INTEREST OF AMICI CURIAE

Amici are professors of animal theology with extensive backgrounds and expertise in the study of animal ethics. Reverend and Professor Andrew Linzey, Ph.D., D.D., Hon.D.D. (“Dr. A. Linzey”), is the director of the Oxford Centre for Animal Ethics and has been a member of the Faculty of Theology at the University of Oxford for nearly three decades. Dr. A. Linzey is also a visiting professor of animal theology at the University of Winchester, a professor of animal ethics at the Graduate Theological Foundation, and a special professor at Saint Xavier University, Chicago. He has authored and/or edited more than thirty books, including *Animal Theology*, SCM Press, University of Illinois Press (1994); *Why Animal Suffering Matters: Philosophy, Theology, and Practical Ethics*, Oxford University Press (2009); *The Global Guide to Animal Protection*, University of Illinois Press (2013); and *The Palgrave Handbook of Practical Animal Ethics*, Palgrave Macmillan (2018). In 2001, Dr. A. Linzey was awarded a Doctor of Divinity by the Archbishop of Canterbury – the highest award an Archbishop can bestow upon a theologian – in recognition of his animal-related work.

Professor Clair Linzey, Ph.D. (“Dr. C. Linzey”) is the deputy director of the Oxford Centre for Animal Ethics and is a professor of animal theology at the Graduate Theological Foundation. Dr. C. Linzey obtained her doctorate degree in theology from the University of St. Andrews. She authored *Developing Animal*

Theology, Routledge (1st ed. 2020) and is co-editor of the Journal of Animal Ethics and the Palgrave Macmillan Animal Ethics Series. Additionally, Dr. C. Linzey and Dr. A. Linzey are co-editors of *Animal Ethics for Veterinarians*, University of Illinois Press (2017); *The Ethical Case Against Animal Experiments*, University of Illinois Press (2018); *The Routledge Handbook of Religion and Animal Ethics*, Routledge (2018); *The Palgrave Handbook of Practical Animal Ethics*, Palgrave Macmillan (2018); and *Ethical Vegetarianism and Veganism*, Routledge (2018).

Amici submit this brief in support of the Nonhuman Rights Project, Inc.’s (“NhRP”) appeal to this Court to grant Happy the elephant legal personhood status under New York’s habeas corpus statute on the grounds that doing so is a moral necessity grounded in Christian theology.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

There are various examples of the legal system rectifying grave injustices throughout history, and while the basis for doing so is often substantiated by precedent or analytic reasoning, it is indisputable that morality has also played an important role in shaping many of our ethically groundbreaking legal outcomes. “[L]aw cannot be divorced from morality in so far as it clearly contains . . . the notion of the right to which the moral quality of justice corresponds.” Brief for Petitioner-Appellant in *The Nonhuman Rights Project, Inc. v. Breheny*, APL 2021-00087, 25 [(2021) (quoting Black’s Law Dictionary (11th ed. 2019), quoting Paul Vinogradoff,

Common Sense in Law, 19-20 (H.G. Hanbury ed., 2d ed. 1946)). Common law is not inflexible; principles including justice, ethics, and fairness are often contemplated to reform antiquated legal precedent. *See* Petitioner-Appellant Brief at 21-22.

As society continues to progress with respect to the civil rights of historically disadvantaged groups, so should our deliberations regarding the moral obstacles we have yet to overcome. As Justice Kennedy articulated: “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 US 644, 671 (2015) (holding that same-sex couples have a fundamental right to marry, and that any such marriage shall be recognized by all states)). *See also Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) (extending protections under Title VII of the Civil Rights Act to gay and transgender persons); *Loving v. Virginia*, 388 US 1 (1967) (striking down Virginia miscegenation statutes). These landmark decisions, among many others, demonstrate a societal moral advancement whereby we reevaluated our treatment of a historically disadvantaged group to reject unjust legal precedent.

Christianity has a longstanding history of influencing not only American jurisprudence and the foundation of American law, but also ethical positions of the public. *See, e.g., Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892)

(noting the historical and cultural significance in the United States of “Christianity with liberty of conscience to all men,” as opposed to “an established church and tithes and spiritual courts”). And that influence extends to this Court. As Chancellor Kent noted: “Christianity, in its enlarged sense, as a religion revealed and taught in the Bible, is not unknown to our law.” *People v. Ruggles*, 8 Johns 290 (N.Y. Sup. Ct. 1811) (noting Christianity’s influence on law and morality in New York, including that Christianity was a “parcel of the law, and to cast contumelious reproaches upon it, tend[s] to weaken the foundation of moral obligation”). It is therefore imperative that we contemplate a theological approach to morality in relation to our treatment of the vulnerable. Here, we must consider such an approach with regard to nonhuman animals – in the instant case Happy, a female Asian elephant who has been forced to endure a demonstrably neglected and undignified existence in her longstanding confinement at the Bronx Zoo. This brief seeks to provide an ethical perspective grounded in Christian theology to argue that recognizing Happy as a person for the limited scope purpose of relief under New York’s habeas corpus statute is a moral necessity and the next logical step in the ethical advancement of our society.

III. BACKGROUND: HAPPY’S CONFINEMENT

Asian elephants are extremely social animals known for forming and traveling within groups of six or seven, often designating one elephant as the matriarch.

Happy, contrarily, has lived in captivity at the Bronx Zoo since 1977 and has been in solitary confinement since 2006 (*i.e.*, with no elephant companions). While Asian elephants typically walk up to fifty miles per day, Happy lives in an enclosure consisting of less than one acre and spends much of the year kept in an even smaller windowless cement structure due to cold northeastern weather.

As this Court is aware, the extent of Happy's suffering has led to multiple elephant sanctuaries – one in California and one in Tennessee – offering to rescue her and subsidize her transport out of the Bronx Zoo. Either sanctuary would provide Happy living conditions far more comparable to that of an Asian elephant in the wild; she would have elephant companions and have an abundance of land on which to travel. Further, she would no longer be confined indoors for much of the year, as the sanctuaries are located in climates much more habitable for elephants.

IV. WE HAVE A MORAL DUTY ROOTED IN CHRISTIAN THEOLOGY TO PROTECT NONHUMAN ANIMALS

As humans we often behave as though the dominion we have over nonhuman animals sanctions us to treat them as commodities with no individual rights – a notion wholly unsupportable by Christian theology. The God-given dominance conferred upon humans over nonhuman animals should instead be interpreted through Christ himself, who exercised his influence in the form of service to others. Christ's selflessness, generosity and altruism should frame our own models of behavior, especially with regard to sentient beings capable of experiencing fear,

loneliness, stress and other complex emotions too often mistakenly considered uniquely human. We are the sole species created by God to represent divine love and compassion through service to others, and thus, God has tasked us with the role of caring for the world – a duty that should not be taken lightly. As Anglican theologian and writer C. S. Lewis argued, “we ought to prove ourselves better than the beasts precisely by the fact of acknowledging duties to them, which they do not acknowledge to us.” C.S. Lewis, ‘Vivisection’ in *Undeceptions: Essays on Theology and Ethics*, 182-86 (1952). By treating nonhuman animals as though their suffering is immaterial, we are actively opposing God’s desire for us to protect and care for all beings.

Dr. Robert Runcie, former Archbishop of Canterbury, argued that humans have an obligation to act in the best interest of all creatures rather than to solely benefit themselves. “He [man] must therefore exercise his ‘dominion’ in conformity with God’s will and purposes, not only in relation to himself, but to the whole area of created life. Man is not an absolute owner of the earth which he inhabits.” Robert Runcie, *Statement by the Archbishop of Canterbury on Animal Welfare Matters*, 2 (1981). He later argued that we too often mistakenly interpret our dominion as a license to exclusively consider our own interests with respect to nonhuman animals:

The temptation is that we will usurp God’s place as Creator and exercise a *tyrannical* dominion over creation. ... At the present time, when we are beginning to appreciate the wholeness and interrelatedness of all that is in the cosmos, preoccupation with humanity will seem

distinctly parochial. ... Too often our theology of creation, especially, here in the so called “developed” world, has been distorted by being too man-centered. We need to maintain the value, the preciousness of the human by affirming the preciousness of the nonhuman also – of all that is.

Robert Runcie, *Address to the Global Forum of Spirituality and Parliamentary Leaders on Human Survival* (1988). Dr. Michael Ramsey, former Archbishop of Canterbury, commissioned a report expressing a similar sentiment:

Although it cannot be denied that man is very much at the centre of biblical teaching on creation, this teaching does not hold that nature has been created simply for man’s sake. It exists for God’s glory, that is to say, it has a meaning and worth beyond its meaning and worth as seen from the point of view of human utility. It is in this sense that we can say that it has intrinsic value. To imagine that God has created the whole universe solely for man’s use and pleasure is a mark of folly.

H. Montefiore, *Man and Nature*, 67, London: Collins (1975). Believing God created all beings yet only has an interest in the welfare of one species – our own – is the pinnacle of human hubris.

Former Archbishop Desmond Tutu similarly argued that humans inaccurately interpret our conferred dominion as a license to ignore or participate in the suffering of nonhuman animals:

If it is true that we [humans] are the most exalted species in creation, it is equally true that we can be the most debased and sinful. This realisation should give us pause. So much of our maltreatment of animals stems from a kind of spiritual blindness, a kind of hubris, in which we foolishly suppose that our own welfare is God’s sole concern. *In fact, God’s creation is entrusted to our care and under our*

protection. There is something Christ-like about caring for suffering creatures, whether they are humans or animals.

D. Desmond Tutu, *Extending Justice and Compassion*, Foreword to Andrew Linzey, *Global Guide to Animal Protection*, xv (2013) (emphasis added). Instead of overlooking the suffering of nonhuman animals to suit our own objectives derived from financial gain, convenience or otherwise, we must refuse to abandon our God-given duty to protect and care for all of God’s creatures.

V. HAPPY’S PERSONHOOD UNDER NEW YORK’S HABEAS CORPUS STATUTE

Perhaps the solemnest aspect of Happy’s confinement is that she has spent her entire life as a prisoner, yet has committed no crime. Happy has consistently been failed by humans; we as a species have ignored or participated in her suffering time and again for decades. Happy became the first elephant to recognize herself in a mirror, and a plethora of scientific research emerged ubiquitously demonstrating that elephants have complex cognitive and emotional capacities, yet we still ignore her sentience and overlook our God-given duty to protect her from suffering. This fact was recognized by the trial court, which conceded that the NhRP’s “five deeply educated, independent, expert opinions [are] all firmly grounded in decades of education, observation, and experience” and that such experts “carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds.” Petitioner-Appellant Brief at 23 (quoting *The*

Nonhuman Rights Project, Inc. v. Breheny, 2020 WL 1670735, *16, (Sup Ct., Bronx County, Feb. 18, 2020), Tuitt, J., Index No. 260441/19, *aff'd* 189 A.D. 3d 583 (1st Dep't 2020)). By confining Happy in an unnatural and distressing environment, all the while and despite fully understanding she is capable of emotions such as loneliness, frustration, sadness, boredom, and fear, we have betrayed trust God has bestowed upon us.

Thus, we must use any means necessary to redeem ourselves before God and liberate Happy from her suffering. There is no valid rationale, especially knowing what we know about elephants and their capacity to experience extreme psychological distress in confinement, that Happy should not be granted personhood status for the limited purpose of petitioning for habeas corpus. Every disadvantaged group in our history has, at one time, been granted a legal liberty that was previously unprecedented, and we now view advocates of such legal victories as heroic, morally astute agents of change. *See generally Obergefell, Bostock and Loving*, cited *supra*. We must continue to use the legal system as a vehicle for the advancement of moral rights for nonhuman animals, a notion wholly supported by shifting societal norms that are increasingly sympathetic to the plight of beings like Happy. Petitioner-Appellant Brief at 27. As one court in 2012 acknowledged, “[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.” Petitioner-Appellant Brief at 27 (quoting *Leider v. Lewis*, Case No. BC375234 at 30 (L.A. County Superior Ct. July 23, 2012)).

If Happy wins her appeal to this Court and is granted personhood status under New York’s habeas corpus statute, her victory would demonstrate our continued progression as an ethical society through compliance with our God-given moral duties to nonhuman animals. We must conform to the established notion that nonhuman animals are deserving of dignity and autonomy; we can no longer regard them as “merely things—often the objects of legal rights and duties, but never the subjects of them.” Petitioner-Appellant Brief at 21 (quoting John Salmond, *Jurisprudence*, 319 (10th ed. 1947)). A refusal to grant Happy status as a legal person would constitute a grave dereliction of our moral obligation to God.

VI. CONCLUSION

For Happy’s entire life, we have failed to recognize her as a sentient being worthy of respect. Instead, we have treated her as if her most basic right to liberty as a creation of God is of no significance. Yet we now are faced with a chance to redeem ourselves. The fact that Happy’s suffering could so easily be remedied by granting her the right to petition for habeas corpus relief further supports our contention that recognizing Happy’s personhood in this context is a moral necessity. We urge this Court to accept Happy’s appeal and remedy the decades of injustice she has so undeservedly endured.

Dated: April 7, 2022

Respectfully submitted,

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