

To be Argued by:
STEVEN M. WISE
(Time Requested: 30 Minutes)

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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.

REPLY BRIEF FOR PETITIONER-APPELLANT

ELIZABETH STEIN, ESQ.
NONHUMAN RIGHTS PROJECT, INC.
5 Dunhill Road
New Hyde Park, New York 11040
Tel.: (917) 846-5451
Fax: (516) 294-1094
lizsteinlaw@gmail.com

— and —

STEVEN M. WISE, ESQ.
(Of the Bar of the State of
Massachusetts)
5195 NW 112th Terrace
Coral Springs, Florida 33076
Tel.: (954) 648-9864
wiseboston@aol.com

Attorneys for Petitioner-Appellant

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INTRODUCTION¹

On the first page of their Preliminary Statement—and for the first time in the history of this litigation—Respondents state, “there is no dispute that Happy is not a ‘thing’ and is not treated as such at the Bronx Zoo.” Resp’t Br. 4. They further state they “have never doubted that Happy is not a ‘thing.’” *Id.* at 9. Respondents allege “[i]f either side is treating Happy as a ‘thing,’ it is the Nonhuman Rights Project.” *Id.* at 4. Contrary to Respondents’ allegation, the NhRP has asked every court in this litigation to change Happy’s status from a rightless “thing” to an individual with the common law right to bodily liberty protected by habeas corpus. NhRP’s Br. 21. *See* Petition (A-43, para. 37). The Trial Court “agree[d] that Happy is more than just a legal thing.” *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *10 (N.Y. Sup. Ct. 2020). (A-22).

The difference between a “thing” and a “person” is vital. “For purposes of establishing rights, the law presently categorizes entities in a simple, binary, ‘all-or-nothing’ fashion.” *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc. 3d 746, 765 (Sup. Ct. 2015). A “person” is “any being whom the law regards as capable of rights or duties,” and “[a]ny being that is so capable is a person, whether a human being or not.” *Person*, BLACK’S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)). NhRP’s Br. 43-44, 46.

¹ In this reply, the NhRP adopts the abbreviations from its opening brief.

All nonhuman animals for centuries were once 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). However, for more than a hundred years, it has been acknowledged that “animals may conceivably be legal persons. . . . [L]egal persons because possessing legal rights.” JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 42 (1909). Certain nonhuman animals in New York were granted trust beneficiary rights under EPTL § 7-8.1 and have therefore been “persons” since 1996. The Fourth Department recently 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).

As Respondents agree that Happy is not a “thing,” they concede that Happy is a “person,” because one is either a “person” or a “thing.” Their arguments against Happy’s personhood are therefore moot. The answer to the question of whether this Court must recognize Happy’s common law right to bodily liberty protected by habeas corpus will depend on the intrinsic nature of elephants as a species. *See Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) (Fahey, J., concurring) (“*Tommy*”) (The question is “not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by

habeas corpus. . . . [T]he answer to that question will depend on . . . the intrinsic nature of chimpanzees as a species.”). Based on the factual determinations made by the Trial Court, this Court must resolve that question in Happy’s favor.

A. Respondents omit the Trial Court’s factual determinations regarding Happy’s autonomy and extraordinary cognitive complexity which compel this Court’s recognition of her common law right to bodily liberty protected by habeas corpus

Absent from Respondents’ brief is the Trial Court’s determination that the NhRP’s arguments are “extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot.” (A-22). Based on the NhRP’s six uncontroverted “expert scientific affidavits from five of the world’s most renowned experts on the cognitive abilities of elephants” (A-10),² the Trial Court, after thirteen hours of oral argument, made the factual determinations that “elephants are autonomous beings possessed of extraordinarily cognitively complex minds” (A-16), that “Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings,” and that “[s]he is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” (A-22).

² “The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world.” (A-16).

Instead, Respondents erroneously try to rewrite the record with “facts” that are not before this Court.³ For example, Respondents mischaracterize Happy’s “environment at the Bronx Zoo”⁴ as including a “large natural outdoor space that allows her to swim, forage, and engage in other natural behavior,” Resp’t Br. 11, contrary to the Trial Court’s finding that Happy’s “plight” is a “solitary, lonely one-acre exhibit.”⁵ (A-22). Respondents falsely imply that Happy, an Asian elephant, may not be autonomous since Asian elephants are a different species than African elephants, Resp’t Br. 5, 8, 59, contrary to the Trial Court’s finding that Happy is indeed “an intelligent, autonomous being.”⁶ (A-22). Respondents also falsely claim that the NhRP “added” The Elephant Sanctuary in Tennessee (“TES”) in its brief on

³ “[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).

⁴ Respondents make the unsubstantiated claim that the Bronx Zoo is “one of the most highly regarded zoos in the world.” Resp’t Br. 4. However, as recently as 2018, the Bronx Zoo was ranked the #1 worst zoo for elephants in North America. *10 Worst Zoos for Elephants 2018*, In Defense of Animals, <https://bit.ly/3mPzqLW>. This is not a unique ranking as the Bronx Zoo has been included in the annual list of the *10 Worst Zoos for Elephants* nine separate times. *10 Worst Zoos for Elephants*, In Defense of Animals, <https://bit.ly/3jxwjGB>. Moreover, the Bronx Zoo’s decision to imprison Happy has long drawn severe public criticism. Tracy Tullis, *The Bronx Zoo’s Loneliest Elephant*, N.Y. Times (June 26, 2015), <https://nyti.ms/3gPGnJ9>.

⁵ Dr. Poole attested that Happy’s behavior suggests she is suffering from a painful foot condition, and that Happy—being alone in a small space—is unable to engage in most natural behaviors. (A-478, para. 22; A-480, para. 31). Moreover, Respondents absurdly claim that a 2300 acre elephant sanctuary, compared to Happy’s one-acre exhibit, only has “*purportedly* has more space,” is “a facility *allegedly* with more room,” and is “a *purportedly* more spacious facility.” Resp’t Br. 5, 7, 44 (emphases added).

⁶ Five of the world’s most renowned elephant experts concluded that both Asian and African elephants are autonomous beings. (A-119, para. 60; A-164, para. 55; A-198-99, para. 54; A-235, para. 48).

this appeal, Resp't Br. 17, contrary to the Trial Court's explicit recognition that TES is one of two elephant sanctuaries that "agreed to take Happy."⁷ (A-10).

Respondents omit that the reason why the Trial Court granted their motion to dismiss was because it was "*constrained by the caselaw* to find that Happy is not a 'person' and is not being illegally imprisoned." (A-22) (emphasis added). "Regrettably," the Trial Court believed it was "bound by the legal precedent set by the Appellate Division" (A-21). Thus, if not for prior Appellate Division precedent, the Trial Court would have been free to recognize Happy's common law right to bodily liberty by habeas corpus based on its compelling factual determinations.

B. Respondents misrepresent the NhRP's position on autonomy

Respondents falsely claim that "[u]nder NRP's vague standard of 'autonomy' . . . many humans would be denied access to the writ." Resp't Br. 27. Contrary to this misrepresentation, the NhRP has always made clear that, as applied to both humans and nonhuman animals, "autonomy is *sufficient—though not necessary—*

⁷ Page 38 of NhRP's December 10, 2018 Reply Memorandum of Law notes the "2,700 acre Tennessee Elephant Sanctuary in Hohenwald, Tennessee," and provides a link to their website in footnote 21. See The Elephant Sanctuary in Tennessee, <https://www.elephants.com>. In an affidavit dated that same day, Dr. Poole discusses TES when providing examples of elephants similar to Happy who have undergone extremely positive transformations after being sent to sanctuaries. (A-477, paras. 15, 16). During each of the three days of oral argument before the Trial Court, NhRP requested that Happy be sent to either PAWS or TES.

for the common law right to bodily liberty protected by habeas corpus.” NhRP’s Br. 39 n.40 (emphasis added). *See* Petition (A-37, para. 19).

Further, Respondents inappropriately use statements from a 20-year-old article of Professor Laurence Tribe to suggest that he “has acknowledged the dangerous consequences posed by NRP’s position.” Resp’t Br. 30. But in that article, Professor Tribe wrote, “I hope I’m wrong in inferring” that Attorney Steven M. Wise’s writings meant that autonomy is necessary for the entitlement of “basic rights.” Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Works of Steven M. Wise*, 7 *Animal L.* 1, 7 (2001). Professor Tribe has since recognized that this inference was wrong. Since 2015, Professor Tribe has submitted six amicus curiae briefs in support of the NhRP’s habeas corpus litigation: three amicus briefs in the NhRP’s New York chimpanzee cases,⁸ an amicus brief in the NhRP’s Connecticut elephant case, an amicus brief below in Happy’s case (as Respondents acknowledge), and a joint amicus brief with 50 law professors urging this Court to grant leave in Happy’s case.⁹

⁸ Two of these briefs were submitted in this Court in support of NhRP’s motion for leave to appeal. *See, e.g., Tommy*, 31 N.Y.3d at 1057. (Fahey, J., concurring).

⁹ Respondents’ position that “personhood requires . . . the ability to take on duties,” Resp’t Br. 61, would mean that vulnerable humans who lack that ability could not be “persons” but only “things.”

C. Contrary to Respondents’ assertion, this is a habeas corpus case and not an “animal welfare” case

This is not an “animal welfare” case. Resp’t Br. 33, 35. It is a proceeding in which this Court is being asked to recognize Happy’s common law right to bodily liberty protected by habeas corpus. Respondents’ contrary assertions are therefore erroneous and their entire discussion regarding state and federal animal welfare statutes is irrelevant. Resp’t Br. 33-38. None of the animal welfare statutes cited by Respondents have anything to do with the right to bodily liberty, including their reference to N.Y. Agric. & Mkts. L. § 380 and N.Y. Env’t Conserv. L. § 11-0540.

Contrary to Respondents’ assertion, the NhRP has never conceded that “Happy’s confinement does not violate any law.” Resp’t Br. 53; *id.* at 45 (falsely claiming that the NhRP “has not argued that the Bronx Zoo is in violation of *any state . . . law*, regulation, or industry standard—including the detailed AZA Standards for Elephant Management and Care.”) (emphasis added).¹⁰ The common law of New York is “law,” *see, e.g.*, N.Y. Const. Art. I, § 14, and the NhRP has consistently maintained that Happy’s imprisonment at the Bronx Zoo violates her common law right to bodily liberty protected by habeas corpus. (A-48, para. 54). NhRP’s Br. 9. It is therefore irrelevant whether Respondents are in compliance with

¹⁰ Dr. Poole attested that her “more than four decades long study of free living elephants shows that the AZA specifications are woefully inadequate for meeting the needs of elephants,” and underscores “the very small space available to Happy.” (A-479, paras. 27, 28).

any applicable local, state, or federal animal welfare statutes or regulations; what is relevant is their violation of Happy's common law right to bodily liberty.

Contrary to Respondents' further assertion, the "fundamental nature" of the NhRP's claim is not that "Happy should have more space," Resp't Br. 37, but that Happy's common law right to bodily liberty is being violated. The NhRP's Petition seeks to remedy the deprivation of Happy's ability to "exercise her autonomy in meaningful ways, including the freedom to choose where to go, what to do, and with whom to be" (A-37, para. 19), by placing her 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-49, para. 57). *See Stanley*, 49 Misc.3d at 753 ("The great writ of habeas corpus lies at the heart of our liberty, and is deeply rooted in our cherished ideas of individual autonomy and free choice.") (internal quotations and citations omitted). As Happy cannot be released into the wild, an elephant sanctuary, not her one-acre prison at the Bronx Zoo, is the only environment where Happy can realize her autonomy to the greatest extent possible.¹¹

¹¹ Dr. Poole attested that the "orders of magnitude of greater space" offered in 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).

D. Respondents fail to rebut the NhRP’s criticisms of *Lavery I*, *Lavery II*, and *Breheny*

The personhood conclusions of *Lavery I*, *Lavery II*, and *Breheny* are based on the two major errors that a “person” (1) must have the capacity to bear duties and (2) must be human.¹² NhRP’s Br. 11-12, 44. This Court in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972), Judge Fahey’s concurrence in *Tommy*, legal scholars including Professors John Chipman Gray and John Salmond, New York’s pet trust statute (EPTL § 7-8.1), and the Fourth Department in *Graves* all demonstrate that personhood does not require the capacity to bear duties and is not synonymous with being human. NhRP’s Br. 43-48. Respondents largely ignore these arguments and falsely claim that the NhRP “misconstrues several decisions and other authorities.” Resp’t Br. 39.

First, Respondents ignore *Byrn*’s holdings that the capacity for rights alone is sufficient for personhood and that determining personhood is a policy question not reducible to one of mere biology.¹³ 31 N.Y.2d at 201. NhRP’s Br. 44-45. *Lavery I*, *Lavery II*, and *Breheny* are in stark conflict with these determinations.

¹² *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (“*Lavery I*”); *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (“*Lavery II*”); *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583 (1st Dept. 2020) (“*Breheny*”).

¹³ In *Byrn*, this Court was asked to decide “whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life.” 31 N.Y.2d at 199. Respondents falsely claim this personhood issue was ruled not “legal or justiciable,” Resp’t Br. 40, but *Byrn* explicitly resolved that question in the negative. 31 N.Y.2d at 203.

Second, Respondents ignore Judge Fahey’s harsh criticisms of *Lavery I* and *Lavery II*’s conclusions that chimpanzees are not “persons” because they lack the capacity to bear duties and are not members of the human species. *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). Respondents endorse the inherent contradiction in *Lavery I* and *Lavery II* that the capacity to bear duties is *necessary* for chimpanzee personhood but *not necessary* for human personhood. As Judge Fahey correctly reasoned, the capacity to bear duties is irrelevant to the recognition of personhood as there are obviously numerous human beings incapable of bearing duties who are “persons” regardless of that inability. *Id.* Judge Fahey also criticized *Lavery II*’s conclusion as being “based on nothing more than the premise that a chimpanzee is not a member of the human species.” *Id.*

Third, Respondents ignore the authoritative writings of Professors Gray and Salmond on personhood (both of whom *Lavery I* cited) and minimize the significance of Black’s Law Dictionary’s misquotation of Professor Salmond’s treatise as well as the import of Black’s correction of that error. NhRP’s Br. 45-47. Instead, to support the position that a “person” must have the capacity to bear duties, Respondents quote a treatise by Peter Birks (quoted in Black’s) which states: “The word ‘person’ . . . is also used in a technical legal sense, to denote a subject of legal rights and duties.” *Person*, BLACK’S LAW DICTIONARY (11th. Ed. 2019) (quoting 1

ENGLISH PRIVATE LAW § 3.18, 142-43 (Peter Birks ed. 2000)). Resp't Br. 42.

However, Peter Birks' treatise makes clear that:

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).¹⁴

Professor Salmond's treatise, quoted in Black's, makes clear that "a person is any being whom the law regards as capable of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not." JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947). Similarly, Professor Gray wrote: "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." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (2d ed. 1963). 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.

¹⁴ Respondents state that Black's defines "person" as "a human being." Resp't Br. 41. However, Black's definition of "person" is not limited to human beings, nor is it limited to individuals who possess the capacity to bear both rights and duties. *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Fourth, contrary to the plain language of New York’s pet trust statute (EPTL § 7-8.1), which allows certain nonhuman animals to be “beneficiaries” of legally enforceable trusts, Respondents falsely claim that the legislature “has never gone so far as to grant ‘personhood’ to any animal in any context.” Resp’t Br. 32. As only “persons” can be beneficiaries, the legislature necessarily recognized these nonhuman animal beneficiaries as “persons” regardless of their nonhuman biology or capacity to bear duties.¹⁵ NhRP’s Br. 20-21, 29-30, 48.

Moreover, EPTL § 1-2.18 defines “testamentary beneficiary” as “a person in whose favor a disposition of property is made by will.” And it is beyond question that the pet trust statute was enacted “to enable New Yorkers to create testamentary or lifetime trusts to care for their pets.” Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013). *See Matter of Abels*, 44 Misc.3d 485, 486 (Sur. Ct. 2014) (proceeding involving “a testamentary pet trust established under the decedent's will”).

Fifth, the Fourth Department in *Graves* recognized “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals.” 163 A.D.3d at 21 (citing, *inter alia*, *Presti*, 124 A.D.3d at 1335 and *State*

¹⁵ Respondents ludicrously argue that because pet trusts require human enforcers, Resp’t Br. 38, the intended “animal beneficiary or beneficiaries” are not “persons” under the statute. The practical necessity of human enforcers merely reflects the reality that nonhuman animals, like human incompetents, are unable to enforce their own rights.

v. Fessenden, 258 Or.App. 639, 640 (2013)). Respondents’ mischaracterization of this statement as “dicta,” Resp’t Br. 39, ignores that it formed part of the court’s reasoning in rejecting the argument that personhood is synonymous with being human.

Finally, Respondents do not even attempt to defend *Lavery I*’s indefensible misunderstanding of social contract theory.¹⁶ NhRP’s Br. 48-53.

E. Respondents fail to rebut the NhRP’s arguments for recognizing Happy’s common law right to bodily liberty protected by habeas corpus

The NhRP established that this Court must recognize Happy’s common law right to bodily liberty protected by habeas corpus in three different ways: (1) based on eight principles and standards for updating the common law (wisdom, justice, right, ethics, fairness, policy, shifting societal norms, and the surging reality of changed conditions); (2) as a matter of liberty; and/or (3) as a matter of equality.

NhRP Br. 21-43. Respondents fail to rebut any of these arguments.

¹⁶ Respondents’ reliance on the Connecticut Commerford cases, Resp’t Br. 22-23, is wholly misplaced as those decisions are grounded upon *Lavery I*’s errors. In addition, Commerford’s misunderstanding of social compact theory is contrary to the Connecticut Supreme Court, which has made clear that the social compact does not require individuals to have the capacity to bear duties, and also that the social compact is irrelevant to habeas corpus. *See di v. Ganim*, 233 Conn. 557, 598 (1995) (“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.’”) (quoting J. Locke, “Two Treatises of Government,” book II (Hafner Library of Classics Ed.1961) ¶ 123, p. 184) (emphasis added); *Jackson v. Bulloch*, 12 Conn. 38, 43 (1837) (slave ordered freed pursuant to habeas corpus notwithstanding that slaves were not members of the social compact).

Contrary to Respondents' false claim that the NhRP "assumes without basis that the common law needs updating," Resp't Br. 55, the NhRP demonstrated why this Court must rule in Happy's favor based on the above eight principles and standards. NhRP's Br. 21-33. This Court always has the duty to determine whether the common law should change because the "common law . . . is not an anachronism." *Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 509 (1968) (internal quotations and citation omitted). Respondents cite no authority for their assertion that the "common law does not permit this Court to modify the traditional writ of habeas corpus . . . when [the] petitioner is a non-human animal." Resp't Br. 44. In *Tommy*, Judge Fahey recognized that 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 is a "deep dilemma of ethics and policy that *demands our attention*." 31 N.Y.3d at 1058 (Fahey, J., concurring) (emphasis added).

Notwithstanding the above, Respondents assert that the NhRP has not provided "a standard by which to determine whether an animal should be considered a 'person' for habeas corpus purposes." Resp't Br. 58. However, utilizing "the immutable principles of our common law," *Greene v. Knox*, 13 Bedell 432, 440 (1903), this Court can and must decide whether Happy's proven autonomy and

extraordinary cognitive complexity is sufficient for the recognition of her common law right to bodily liberty protected by habeas corpus.¹⁷

1. Respondents fail to rebut the NhRP’s common law liberty and equality arguments

This Court recognizes the supreme importance of protecting an individual’s autonomy under the common law. *See, e.g., Matter of Storar*, 52 N.Y.2d 363, 372, 376-77 (1981); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986); NhRP’s Br. 33-34 (citing cases recognizing the fundamental importance of protecting autonomy).¹⁸ Respondents, however, ignore the relevance of autonomy in the protection of rights. Because Happy is an autonomous and extraordinarily cognitively complex being, as the Trial Court found, this Court must recognize her common law right to bodily liberty protected by habeas corpus based on the fundamental principles of liberty and equality.

Respondents claim that “the common law cannot be divorced from constitutional doctrine.” Resp’t Br. 47. Citing no authority, Respondents argue that

¹⁷ Respondents’ citations to *Leider v. Lewis*, Case No. BC375234 (L.A. County Superior Ct.) (July 23, 2012) and *People v. Taylor*, 9 N.Y.3d 129 (2007) are irrelevant as they deal with a taxpayer action for a statutory animal welfare claim and a jury deadlock instruction in violation of the New York Constitution, respectively.

¹⁸ *See also TD v. New York State Office of Mental Health*, 228 A.D.2d 95, 98 (1st Dept. 1996) (challenged regulations “violate . . . the common-law right to personal autonomy” of patients at psychiatric facilities); *In re Adam S.*, 285 A.D.2d 175, 178 (2d Dept. 2001) (rejecting argument that ignored “the principles of autonomy and free choice broadly construed by the Court of Appeals in *Rivers v. Katz*”).

liberty and equality principles are solely constitutional precepts, and as such, the NhRP was required to assert constitutional claims which have not been “preserved for review.” Resp’t Br. 46.

The common law is separate from constitutional law, and the principles of liberty and equality are unquestionably protected under the common law. NhRP’s Brief 33-34, 35-38, 41. Constitutional values can indeed inform common law adjudication,¹⁹ but there is no basis for Respondents’ bizarre suggestion that constitutional claims must be asserted in a common law case. *See Matter of Fosmire v. Nicoleau*, 75 N.Y.2d 218, 226 (1990) (“[*Rivers v. Katz* held] that this ‘fundamental common-law right is coextensive with the patient’s liberty interest protected by the due process clause of our State Constitution’ [W]e need not reach the constitutional question here where no statute or regulation is involved and . . . the patient’s right to refuse the transfusions may be sustained on the basis of the common-law and statutory rules alone.”).

Happy’s imprisonment violates common law equality principles because she is similarly situated to humans for purposes of habeas corpus and because her imprisonment lacks a legitimate or moral end. NhRP’s Br. 35-43. Contrary to Respondents’ suggestion, public safety is not the reason for Happy’s imprisonment.

¹⁹ See 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) (“constitutional values . . . can enrich the common law”). NhRP’s Br. 38.

Resp't Br. 48. Nor is a legitimate "rational reason" for refusing to recognize Happy's common law right to bodily liberty protected by habeas corpus, *id.*, as no one is suggesting that Happy be released onto the streets of New York. And clearly, transferring Happy to an elephant sanctuary would not endanger public safety. Happy is imprisoned for an illegitimate and immoral end: because she is seen "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).

2. Respondents fail to rebut the NhRP's argument that this habeas corpus case is not a matter for the legislature

This Court must decide the substantive common law question of whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus. NhRP's Br. 13-21. Respondents fail to rebut the NhRP's demonstration that this case is not a matter for the legislature and ignore the difference between a common law case and one of statutory or constitutional interpretation.

Habeas corpus is unique in the common law in that it "cannot be abrogated, or its efficiency curtailed, by legislative action." *People ex Rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875). As *Lavery I* correctly observed, CPLR article 70 "does not purport to define the term 'person,' and for good reason. The 'Legislature did not intend to change the instances in which the writ was available,' which has been determined by 'the slow process of decisional accretion.'" 124 A.D.3d at 150. This

Court must therefore “look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach,” *id.*, and apply the well-established common law principles discussed above.²⁰

Respondents ignore this Court’s decision in *Woods v. Lancet*, 303 N.Y. 349, 355 (1951) which, as a general rule, rejected the argument that changes to the common law “should come from the legislature, not the courts.” *See id.* (“we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule”). NhRP’s Br. 16-17 (citing cases). Even in novel cases, “[t]he 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. *Lavery I* correctly recognized that “[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not, however, end the inquiry, as the writ has over time gained increasing use given its ‘great flexibility and vague scope.’” 124 A.D.3d at 150-51 (citation omitted).

Respondents falsely assert that this case requires the legislature’s “far greater capabilities to gather relevant data and to elicit expressions of pertinent opinion on the issues at hand.” Resp’t Br. 33 (quoting *Paladino v. CNY Centro, Inc.*, 23 N.Y.3d

²⁰ Respondents’ citations to federal statutory and constitutional law decisions that have rejected animal personhood “in other contexts,” are entirely irrelevant. Resp’t Br. 24. So is the unpublished opinion of *Rowley v. City of New Bedford*, 2020 WL 7690259 (Mass. App. Ct. 2020), brought by a non-lawyer who engaged in “the unauthorized practice of law,” and in which the Massachusetts Appeals Court based its opinion on a statutory interpretation of that state’s habeas corpus statute.

140, 152 (2014)). Just as the Trial Court was well-equipped to make its factual determination that Happy is “an intelligent, autonomous being” (A-22),²¹ this Court is well-equipped to recognize her common law right to bodily liberty protected by habeas corpus.

Respondents contend there are “countless stakeholders” in this habeas corpus proceeding who have not had “an opportunity to be heard on the issue,”²² including “every human being in the state who may want or need to access the judicial system.”²³ Resp’t Br. 5. They absurdly claim that “[r]ecognizing even the potential for an animal to seek a writ of habeas corpus would upend the settled rights of countless New York citizens.” *Id.* at 54. The only relevant “stakeholders” in this habeas corpus case are Happy, the NhRP, and Respondents. As the NhRP seeks only the recognition of Happy’s common law right to bodily liberty protected by habeas corpus, NhRP’s Br. 17, there would be no disruption of “settled expectations” or

²¹ See *Tommy*, 31 N.Y.3d 1054, 1058 (Fahey, J. concurring) (recognizing chimpanzees as “autonomous, intelligent creatures” based on unrebutted, scientific evidence from eminent primatologists).

²² Any nonparty seeking “an opportunity to be heard on the issue” can request leave to submit an amicus curiae brief. In the courts below, four amicus curiae briefs were submitted supporting Respondents.

²³ Respondents point to the “existing injustice” of an overburdened court system. Resp’t Br. 56-57. The solution is not to ignore the injustice of Happy’s imprisonment, and the “extensive and systemic” problems with New York’s court system “can only be addressed by a new wholesale investment in resources, technology, people and infrastructure.” Jeh Charles Johnson, *Report from the Special Adviser on Equal Justice in the New York State Courts*, N.Y. STATE UNIFIED CT. SYS., at 3 (Oct. 1, 2020).

“significant economic consequences,” nor “many competing interests at stake, which [this Court is] not equipped to address.” Resp’t Br. 54 (quoting *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583, 606 (2016)).

This Court can recognize Happy’s common law right to bodily liberty protected by habeas corpus and appropriately leave unsettled whether other species of nonhuman animals may invoke the protections of habeas corpus. *See Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513, 516 (2021). NhRP’s Br. 18-19. It is irrelevant whether other nonhuman animals in the future may or may not be entitled to the protections of habeas corpus.²⁴

Finally, Respondents cite *Byrn*’s observation that personhood “is a policy question which in most instances devolves on the Legislature,” Resp’t Br. 33 (quoting 31 N.Y.2d at 201), but this was not a statement of law but legal history. And “most” does not mean “all.” *See Mertz v. Mertz*, 271 N.Y. 466, 472 (1936) (“when we speak of public policy of the State, we mean the law of the State, whether found in the Constitution, the statutes or judicial records.”). Moreover, the personhood issue in *Byrn* concerned a claim under the federal and state constitutions, not New York common law. Respondents’ reliance upon *Paladino, Matter of New York State Inspection, Security & Law Enforcement Employees v. Cuomo*, 64 N.Y.2d

²⁴ This Court has long “rejected as a ground for denying a cause of action that there will be a proliferation of claims.” *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969). NhRP’s Br. 18-19.

233 (1984), and *Hammer v. American Kennel Club*, 1 N.Y.3d 294 (2003) are similarly inapposite, Resp't Br. 32, 33, 35, as those cases involved interpretations of statutory law.

F. Respondents fail to establish that protecting the rights and dignity of humans precludes the recognition of Happy's common law right to bodily liberty protected by habeas corpus

The NhRP is not seeking any rights for humans. It is seeking the recognition of a common law right for an elephant. NhRP's Br. 17. Ignoring Judge Fahey, Respondents falsely claim that being human and possessing human dignity are necessary for rights. Resp't Br. 25-29. Judge Fahey recognized that "all human beings possess intrinsic dignity and value," but correctly noted that "in elevating our species, we should not lower the status of other highly intelligent species." *Tommy*, 31 N.Y.3d at 1057. NhRP's Br. 39. Respondents must demonstrate why "the inherent dignity of all members of the human community" precludes the recognition of Happy's common law right to bodily liberty protected by habeas corpus.²⁵ Resp't Br. 29. They have failed to do so. Recognizing Happy's common law right would not devalue the dignity in humans.

²⁵ Respondents cite *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) for the erroneous proposition that a "person" must be a human being. Resp't Br. 29. In fact, the court quotes Webster's definition of "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.*" *Standing Bear*, 25 F. Cas. at 697 (emphasis added). Respondents misleadingly quote only the part that refers to human beings.

Contrary to the Trial Court’s recognition that Happy “is an intelligent, autonomous being who should be treated with respect and dignity” (A-22), Respondents cite no authority for the proposition that only humans possess dignity.

In fact,

[d]ignity can be shared across species. There is no logical rule against this. . . . [T]alk about human dignity is simply talk about the kind of dignity attributable to human beings; it need not make any assumptions, positive or negative, about the dignity attributable to other animals. This is not a trivial point. . . . [I]t would be a ‘cruel irony’ if human dignity, a foundational moral idea of our time if anything is, turned out to be an inextricably speciesist concept.

Adam Etinson, “What’s So Special About Human Dignity?,” *Philosophy & Public Affairs* Vol. 48, 354 (2020) (citation omitted).²⁶

²⁶ The notion that at least certain nonhuman animals possess dignity is well grounded in scholarship. See generally, e.g., Eva Berner Kempers, *Animal Dignity and the Law: Potential, Problems and Possible Implications*, *Liverpool Law Review* 41 (2020); Jane Kotzman and Cassandra Seery, *Dignity in International Human Rights Law: Potential Applicability in Relation to International Recognition of Animal Rights*, 26 *Mich. St. Int'l L. Rev.* 1 (2017); Reed Elizabeth Loder, *Animal Dignity*, 23 *Animal L.* 1 (2016); Charvi Kumar, *The Concept of Human Dignity and Its Applicability to Non-Human Animals*, *The Rights*, Vol-1: Issue-II (2015); Peter Schaber, *Dignity only for humans? On the dignity and inherent value of non-human beings*, in *THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES* (2014); David Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood And Dignity Of Non-Human Animals*, *South African Journal on Human Rights*, 25:1 (2009); Suzanne Laba Cataldi, *Animals and the Concept of Dignity: Critical Reflections on a Circus Performance*, *Ethics and the Environment*, Autumn, 2002, Vol. 7, No. 2 (2002); Steven M. Wise, *Hardly a Revolution - The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 *VT. L. REV.* 793 (1998).

G. Respondents fail to rebut the NhRP’s argument that habeas corpus can be used to secure Happy’s immediate release and transfer to an elephant sanctuary

This Court’s precedents in *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986) and *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) establish that habeas corpus can be used to transfer an imprisoned individual from one facility to a different facility. NhRP’s Br. 54-56. Respondents rely on a misinterpretation of those decisions for the proposition that the NhRP “cannot invoke habeas corpus to transfer Happy from one enclosed environment to another.” Resp’t Br. 49.

In fact, *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*, 69 N.Y.2d at 691). *Brown* rejected the erroneous notion that “the *place of* confinement may not be challenged by habeas corpus,” reversing the Appellate Division in that case. 9 N.Y.2d at 484. It is incontestable that an elephant sanctuary is “an institution separate and different in nature” than Happy’s one-acre prison at the Bronx Zoo. Both *Brown* and *Dawson* are therefore directly contrary to Respondents’ false assertions that habeas corpus relief cannot include “transfer

between facilities,” and that seeking a transfer rather than “unconditional release” takes a case “completely out of habeas corpus doctrine.”²⁷ Resp’t Br. 52, 53.

In an attempt to distinguish *Dawson* and *Brown*, Respondents mischaracterize the issue before this Court as one pertaining to the lawfulness of “Happy’s living conditions.” Resp’t Br. 51. As the NhRP has consistently maintained, this is not a “conditions of confinement” case. (A-49, para. 56). Whether Happy’s temperature is being taken, what her blood panel is, or what she has eaten for breakfast, *see, e.g.*, (A-331, paras. 7-11), is irrelevant to whether her common law right to bodily liberty protected by habeas corpus is being violated. It is the fact that Happy is imprisoned at all, rather than the conditions of her imprisonment, that is unlawful.²⁸

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Respectfully submitted,



Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
(917) 846-5451
Fax: (516) 294-1094
lizsteinlaw@gmail.com

Steven M. Wise, Esq.

²⁷ The authorities cited on page 49 of Respondents’ brief are not “[c]ontrary” to the proposition that “habeas remedy includes transfer between facilities.” Resp’t Br. 50.

²⁸ In another gross misrepresentation, Respondents claim the NhRP alleges that “*any* form of elephant confinement is unlawful.” Resp’t Br. 52. This is obviously untrue.

*(of the Bar of the State of
Massachusetts)*
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com
Attorneys for Petitioner-Appellant

**NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE**

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

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 September 7, 2021