

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.

**RESPONDENTS' RESPONSE TO AMICI BRIEFS
OF LAURENCE H. TRIBE, SHERRY F. COLB,
MICHAEL C. DORF AND BUDDHIST SCHOLARS**

PHILLIPS LYTLE LLP
One Canalside
125 Main Street
Buffalo, New York 14203
Tel.: (716) 847-8400
Fax: (716) 852-6100
kmaning@phillipslytle.com
jglasgow@phillipslytle.com
wrossi@phillipslytle.com

Attorneys for Respondents-Respondents

TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| PRELIMINARY STATEMENT..... | 1 |
| ARGUMENT | 2 |
| POINT I..... | 2 |
| A. <i>Amici</i> misstate precedent to support their arguments for rejecting precedent..... | 2 |
| B. <i>Amici</i> fail to present any viable framework for deeming any animal a “legal person” | 7 |
| 1. Tribe <i>amici</i> allude to constitutional jurisprudence but fail to identify any specific constitutional provision that supports granting habeas corpus rights to animals | 8 |
| 2. Buddhist <i>amici</i> present a religious justification for granting habeas corpus to animals without any reference to New York law or any legal principle | 10 |
| CONCLUSION..... | 12 |

TABLE OF AUTHORITIES

| | <u>Page</u> |
|---|-------------|
| Cases | |
| <i>Lawrence v. Texas</i> , 539 U.S. 558 (2003) | 8 |
| <i>Nonhuman Rights Project, Inc. v. Breheny</i> , 189 A.D.3d 583 (1st Dep’t 2020) | 7 |
| <i>Nonhuman Rights Project, Inc. v. Commerford & Sons</i> , 192 Conn. App. 36 (App. Ct. Conn. 2019), <i>cert. denied</i> 333 Conn. 920 (2019)..... | 12 |
| <i>Nonhuman Rights Project, Inc. v. Lavery</i> 124 A.D.3d 148 (3d Dep’t 2014)..... | 3, 4, 9 |
| <i>Nonhuman Rights Project, Inc. v. Lavery</i> 152 A.D.3d 73 (1st Dep’t 2017)..... | 9 |
| <i>Romer v. Evans</i> , 517 U.S. 620 (1996) | 8 |
| <i>Slaughterhouse Cases</i> , 83 U.S. 36 (1872) | 5 |
| <i>Tilikum ex rel. PETA, Inc. v. Sea World Parks & Enter.</i> , 842 F. Supp. 2d 1259 (S.D. Cal. 2012)..... | 5 |
| Other Authorities | |
| 22 N.Y.C.R.R. § 500.13(c) | 14 |
| Laurence H. Tribe, <i>Ten Lessons Our Constitutional Experience Can Teach us About the Puzzle of Animal Rights: The Work of Steven M. Wise</i> , 7 Animal L. 1, 7 (2001)..... | 4, 6 |

PRELIMINARY STATEMENT

Respondents James J. Breheny and Wildlife Conservation Society (“Respondents”) submit this brief in opposition to the briefs submitted by *amici curiae* Laurence H. Tribe, Sherry F. Colb, and Michael C. Dorf (collectively, “Tribe *amici*”) and Vens. Mahinda Deegalle, Aluthgama Chandananda, and Bhante Soorakkulame Pamaratana (collectively, “Buddhist *amici*”).¹

These two *amici* groups voicing support for NRP follow the pattern set by the first eight. Neither group has a vested interest in the issue of “animal personhood,” but merely share their personal disapproval of how New York law works. Based on moral objections, Tribe *amici* claim that denying the right of habeas corpus to animals “merely” because they are not human is a “shameful” reminder of racial and gender discrimination, yet make no attempt to connect the radical notion of “animal personhood” to the Constitutional doctrines that vindicated the rights of women, abolished slavery, and guaranteed equal protection for every person under the law. Tribe Br. pp. 9, 19-20. The result is a free-floating opinion unmoored from any basis in positive law. It is nothing more than a legislative proposal.

¹ The amicus briefs of Tribe *amici* (dated October 22, 2021) and Buddhist *amici* (dated October 7, 2021) are cited as “Tribe Br., p. ___” and “Buddhist Br., p. __,” respectively.

Buddhist *amici* also present no law, no standard, and no legal basis for using habeas corpus as an animal resettlement device. In fact, they acknowledge that Buddhism “does not differentiate between human and non-human beings” at all, and charge the Court with a “moral obligation” to act accordingly on this appeal. Buddhist Br. pp. 8-9. Again, the subjective moral or religious convictions of any one group are not grounds to reject settled law, particularly when that law reflects the most basic distinction between “person” and “animal.”

These ill-defined “interests” predict the arguments that follow. Abandoning humanity for the invisible threshold for “autonomous animals”—or all “sentient beings” as the Buddhist amici would have it—would amount to a legal free-for-all. Yet these *amici* groups present only their dissatisfaction with the way our legal system works, without a coherent proposal for how it should. They provide a profound confirmation that this appeal presents a legislative proposal that has no place in Court.

ARGUMENT

POINT I

A. *Amici* misstate precedent to support their arguments for rejecting precedent

Tribe *amici* argue this Court should “reject recent precedent” because the decision of the Appellate Division, Third Department in *Lavery I*—

which held chimpanzees cannot petition for a writ of habeas corpus—“was wrong.” Tribe Br. p. 2. In support, *amici* argue the Third Department “counterfactually” held that legal rights require the capacity for “social duties and responsibilities,” and that “only humans and all humans possess” that capacity. *Id.*, p. 2 (citing *Lavery I*, 124 A.D.3d 148, 150-53) (emphasis added) (internal quotation marks omitted). According to *amici*, this must be wrong because disabled humans have diminished capacity for legal responsibility, but are still “persons” under law. *Id.*, p. 5.

But the Third Department did not say what *amici* condemn. On the contrary, the Third Department was quite clear on this point, stating that while “some humans are less able to bear legal duties or responsibilities than others,” this fact “do[es] not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility.” *Lavery I*, 124 A.D.3d 148, 152 n.3 (3d Dep’t 2014) (emphasis added). Tribe *amici* reimagine this holding to suit their argument, claiming that under *Lavery I*, Respondents “would exclude” from personhood “those whom our culture universally regards as legal persons,” such as “infants, young children, and adults suffering from dementia.” Tribe Br., p. 14. The Appellate Division repudiated that notion (124 A.D.3d at 152 n.3), because courts do not review “candidates for personhood” (Tribe Br., p. 4) on a case-

by-case basis, or dole out rights by judging individual virtue. Rather, the fundamental fact of humanity alone entitles any person to petition for habeas corpus relief, regardless of their “present capacity.”² *Id.*, p. 5. Rejecting the simple threshold of “humanity” for “autonomy,” as NRP proposes, would jeopardize the very lives of the most vulnerable human populations.

In fact, in an analysis of the Constitution as applied to animal rights, *amicus* author Lawrence Tribe criticized NRP for this exact reason. He observed, “if your theory is that simply being human cannot entitle you to basic rights . . . I think you are on an awfully steep and slippery slope that we would do well to avoid,” as “the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.” Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 *Animal L.* 1, 7 (2001). Tribe *amici* only exacerbate this danger by standing with NRP on that slope—which is as steep and slick as ever—without offering a fix for NRP’s dystopian measure of a person.

As Respondents’ initial brief³ analyzed at length, human dignity is central in American law. Resp. Br., pp. 6, 26-28. Tribe *amici* do not confront

² Tribe *amici* misstate the holding in *Lavery I* again by describing its “fundamentally flawed definition of personhood, which turns on an entity’s present capacity to bear ‘both rights and duties.’” Tribe Br., p. 5 (citing *Lavery I*, 124 A.D.3d at 151-52) (emphasis added)

³ Brief for Respondents-Respondents James J. Breheny and Wildlife Conservation Society, dated August 20, 2021 (“Resp. Br.”).

this settled principle or address the authority in Respondents' brief.

Nonetheless, they wave-off "mere" humanity as an "arbitrary" distinction, and suggest that denying elephants the right to habeas corpus "solely because" they are animals is a "stark and sad reminder" of human racial discrimination.

Tribe Br., p. 19. This comparison literally dehumanizes the populations who NRP has tried to align itself with, and is completely detached from the constitutional amendments that erased slavery from American law. For example, when an animal rights group sued Sea World for "enslaving" orca whales, the federal district Court explained that the Thirteenth Amendment was "a grand yet simple declaration of personal freedom of all the human race." *Tilikum ex rel. PETA, Inc. v. Sea World Parks & Enter.*, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012) (emphasis added) (quoting *Slaughterhouse Cases*, 83 U.S. 36, 69 (1872)). As such, the Court concluded the Thirteenth Amendment "applies only to humans and therefore affords no redress for Plaintiffs' grievances." *Tilikum*, 842 F. Supp. 2d at 1262.

Indeed, as Professor Tribe himself explained, basing legal personhood on humanity is not "some form of species megalomania or of group think. That's the way our legal system works," and "to break through that barrier and argue that rights shouldn't stop there, I think we need a better reason than the proposition that deciding things based on the group you belong

to automatically violates a basic axiom of our legal system.” Tribe, *Ten Lessons*, 7 Animal L. at 7 (emphasis added). Yet no “better reason” is given in *amici*’s brief. Rather, Tribe *amici* address this contradiction only by claiming that “all three amici, and the NhRP, have always argued that autonomy is sufficient but by no means necessary” to petition for a writ of habeas corpus. Tribe Br. p. 10, n.16. But it was precisely this fragile, outcome-based logic—*i.e.*, to “treat [the granting of rights] as a mere matter of grace or optional beneficence whenever a simulacrum of such rights is awarded as a privilege to human beings . . . like infants or the severely mentally retarded”—that Professor Tribe explained would make it “entirely permissible *not* to award those basic legal protections” to such humans. *Ten Lessons*, 7 Animal L. at 7 (emphasis in original). There is no such frailty in the simple but firm principle that a person is nothing more or less than a human, period.⁴

Buddhist *amici* also present a purely subjective argument. In their view, “all beings are equal and indistinguishable in their essential nature,” and therefore, they believe elephants should not be in zoos. Buddhist Br. pp. 3, 7-

⁴ Equally untenable is the notion that non-human animals which do not possess “autonomy” might also be entitled to habeas corpus rights. Such an outcome is not specifically promoted by NRP or by the Tribe *amici* but it follows from their logic that if such rights belong to non-autonomous humans, then the same rights should be accorded to non-autonomous non-humans. This brings NRP and the Tribe *amici* fully in line with the Buddhist *amici*. that *all* sentient beings are entitled to habeas corpus rights.

9. But the same does not follow here. New York law does treat humans and animals differently, and the Buddhist authors rightly acknowledge that their view of literal equality for all beings is an outlier. *Id.*, pp. 7-8. Again, this highlights the many viewpoints not before this Court, all of which should be considered if this State redefines what a person is.⁵ For this reason among others, “whether and how to integrate other species into legal constructs designed for humans is a matter better suited to the legislative process.”

Nonhuman Rights Project, Inc. v. Breheny, 189 A.D.3d 583 (1st Dep’t 2020).

B. *Amici* fail to present any viable framework for deeming any animal a “legal person”

Between them, *amici* claim that constitutional law provides a “useful window” for the Court on this appeal (Tribe Br., p. 20), and that “Buddhist teachings” should guide the Court’s analysis (Buddhist Br., p. 9). But neither brief explains how this Court should judge whether an elephant is “autonomous,” let alone the standard for future animal-litigants who might petition for less restrictive living conditions. Once again, this underscores a complete failure by NRP—and the ten *amici* it has now supported

⁵ This point is reinforced by the reference to Jainism in the Buddhist *amici* brief. Jainism, the authors acknowledge, shares some ideas similar to Buddhism but offers an even more extreme view of the moral order of the universe. As the Buddhist *amici* explain, adherents of Jainism hold that even plants should be treated as sentient beings, making no distinction between humans, non-human animals and plants. Buddhist Br., p. 3.

financially—to present any coherent framework to replace the legal system they criticize so vigorously.

1. Tribe *amici* allude to constitutional jurisprudence but fail to identify any specific constitutional provision that supports granting habeas corpus rights to animals

The Tribe *amici* suggest that constitutional jurisprudence provides a “useful window” here. Tribe Br., p. 20. They do not claim any constitutional right has been violated, however, nor do they suggest that the Bill of Rights applies to any animal. Instead, just as NRP did, Tribe *amici* incant the words “equality” and “liberty,” but are careful not to invoke the doctrines that enshrine those principles in positive law. This is because NRP’s petition would fail under equal protection and substantive due process,⁶ *i.e.*, the explicit grounds applied by the Courts in the decisions that *amici* cite. Tribe Br., pp. 20-22 (citing *Romer v. Evans*, 517 U.S. 620 (1996) and *Lawrence v. Texas*, 539 U.S. 558 (2003)).

Tribe *amici* suggest the “spirit” of those decisions still supports NRP’s appeal, claiming “species” is no less arbitrary a distinction than “race” or “gender.” Again, the Supreme Court did not invent constitutional doctrines

⁶ Respondents’ brief addressed these issues, explaining that NRP’s petition does not assert a claim under the Constitution, and that settled Constitutional jurisprudence would defeat any alleged violation of the equal protection clause or substantive due process rights under the Fourteenth Amendment. *See* Respondents’ Brief, pp. 47-49, nn.13-14.

ad-hoc to vindicate the rights of these groups, but enforced the constitutional rights of human litigants under settled principles of law. *Amici* add “species” to the narrow list of “race, gender, national origin, [and] religion” as though it were interchangeable, without the Constitutional anchor that was decisive in the cases they cite to. Tribe Br. pp. 20-22. This is legally fatal.

The First Department decision in *Lavery II* is consistent with these constitutional principles, as it reaffirmed the inherent right to habeas corpus for all “members of the human community.” 152 A.D.3d 73. The Tribe *amici* claim this is untenable because it is a “wholly question-begging non-test test.” Tribe Br. p. 17. First, the essential dignity of all human beings is a core principle that does not “beg questions;” it leaves no doubt of who can petition for habeas corpus: any person illegally detained. NRP would shatter that principle by declaring that being a “person” actually has nothing to do with being human, yet *amici* offer no answers to the many questions that ruling would raise. And while they complain that the Court applied a “non-test” in *Lavery II*, Tribe *amici* are silent on what standard this Court should apply, whether to decide which animals are “autonomous” enough to be persons, if that determination would apply to a single animal or an entire species, or if just NRP, appointed guardians, or any person could petition in the name of any animal who is not, in their view, fulfilling its potential for an autonomous life.

2. Buddhist *amici* present a religious justification for granting habeas corpus to animals without any reference to New York law or any legal principle

The Buddhist authors take a more direct route by ignoring New York law completely, explaining that under teachings of reincarnation and non-violence, the Buddhist philosophy “equates all animal life, whether human or non-human, as sentient life.” Buddhist Br., p. 5. Therefore, the authors posit a “moral responsibility” to remove Happy from the Bronx Zoo. *Id.* p. 9. This answers one question that NRP has been careful to avoid: if an elephant is a legal “person,” where do you draw the line for other animals? Buddhist *amici* answer simply: you do not. In their view, no animal should be in a zoo (or presumably, on a farm), and these authors see a moral imperative to make it so. But even if one accepted religious doctrine as a sufficient “why,” Buddhist *amici* say nothing whatsoever of “how.” That is, like all *amici* supporting NRP (and NRP itself), the authors voice personal disapproval for treating animals differently than humans, without so much as a guess at how we might administer their hypothetical world of habeas corpus for all “sentient beings,” let alone the implications for those who are not devout Buddhists.

In contrast, the *amici* supporting Respondents’ position do not have the luxury of ignoring consequences. Unlike NRP’s coalition, these *amici* represent farmers, zoos, aquariums, universities, conservationists, and

veterinarians,⁷ all of whom serve the public and provide benefits to the health, education and nutritional well-being of humans. In this way, they have a discrete interest in the outcome of this appeal and are not merely trumpeting their own view of right and wrong. They share the fundamental assumption that they are, and will remain, responsible for the humane treatment of the animals in their custody. And they understandably fear that assumption would not be safe if NRP (or anyone else) could bring them to Court for restricting the autonomy of the animals in their care.

These stakeholders bespeak countless others who will not be heard on this appeal yet do not share *amici's* view that there is nothing particularly important about being human. The contrast reveals once again that this Court is not, as NRP argues, “only being asked to recognize one right for Happy.” NRP App. Br. p. 17. Rather, as the Appellate Court of Connecticut observed, this case “is more than what [NRP] purports it to be. Not only would this case require us to recognize elephants as legal ‘persons’ for purposes of habeas corpus, this recognition would essentially require us to upend this state’s legal

⁷ See Brief of Protect the Harvest, Alliance of Marine Mammal Parks & Aquariums, Animal Agricultural Alliance, and the Feline Conservation Society, dated July 26, 2021, pp. 1-4; Brief of American Veterinary Medical Association, New York State Veterinary Medical Society, and American Association of Veterinary Medical Colleges, dated September 24, 2021, pp. 1-4; Brief of the New York Farm Bureau, Northeast Dairy Producers Association, Northeast Agribusiness and Feed Alliance, dated October 29, 2021, pp. 7-9.

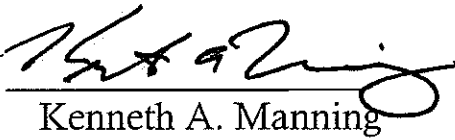
system to allow highly intelligent, if not all, nonhuman animals to bring suit in a court of law.” *Nonhuman Rights Project, Inc. v. Commerford & Sons*, 192 Conn. App. 36, 44 (App. Ct. Conn. 2019), *cert. denied* 333 Conn. 920 (2019). For the same reasons, the First and Third Departments directed NRP to move its efforts to the legislative branch of government, and the First Department rightly did so again by affirming dismissal of NRP’s petition. *Amici’s* unbounded polemic against New York law confirms these decisions were correct.

CONCLUSION

The Tribe and Buddhist *amici* groups follow the same tracks laid by the NRP-funded *amici* who came before them. The opinions they express are just that—opinions, arising from subjective viewpoints, detached from the law that this Court must apply. Respondents respectfully submit that these submissions reinforce the diversity of such viewpoints on the spectrum of New York constituents represented by this State’s political branches of government. NRP’s lobbying effort—and those of *amici* supporting their effort—should be directed to those branches, not to this Court.

Dated: Buffalo, New York
December 2, 2021

PHILLIPS LYTTLE LLP

By: 

Kenneth A. Manning

Joshua Glasgow

William V. Rossi

Attorneys for Respondents

James J. Breheny and

Wildlife Conservation Society

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Telephone No. (716) 847-8400

kmanning@phillipslytle.com

jglasgow@phillipslytle.com

wrossi@phillipslytle.com

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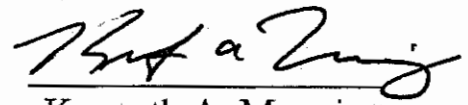
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Kenneth A. Manning

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

**AFFIDAVIT OF SERVICE
BY OVERNIGHT EXPRESS
MAIL**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

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deponent served the within: **RESPONDENTS' RESPONSE TO AMICI BRIEFS OF
LAURENCE H. TRIBE, SHERRY F. COLB, MICHAEL C. DORF
AND BUDDHIST SCHOLARS**

upon:

ELIZABETH STEIN, ESQ.
NONHUMAN RIGHTS PROJECT, INC.
5 Dunhill Road
New Hyde Park, New York 11040
Tel.: (516) 747-4726
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

the address(es) designated by said attorney(s) for that purpose by depositing **3** true copy(ies) of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Overnight Express Mail Depository, under the exclusive custody and care of the United States Postal Service, within the State of New York.

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MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022



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STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

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AND BUDDHIST SCHOLARS**

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MARIANA BRAYLOVSKIY
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2022



Job# 309379

TO:

Attorney: Ana L. McMonigle Esq.

Party Name: *Amici Curiae Gary L. Comstock, Laurence H. Tribe, Sheery F. Cold and Michael C. Dorf*

Address: 28 High Street, Apartment 506
Hartford, CT 06103

Phone: (860) 690-1182

Attorney: R Tamara de Silva Esq.

Firm: Law Offices of R Tamara de Silva, LLC

Party Name: *Amici Curiae Buddhist Scholars*

Address: 980 N. Michigan Avenue., Suite 1400
Chicago, IL 60611

Phone: (312) 810-8100

Attorney: Lan Cao Esq.

Party Name: *Amicus Curiae Edwin Cameron*

Address: One University Drive
Orange, CA 92866

Phone: (757) 559-8188

Attorney: David M. Lindsey Esq.

Firm: Chaffetz Lindsey LLP

Party Name: *Amicus Curiae John Berkman*

Address: 1700 Broadway, 33rd Floor
New York, NY 10019-5905

Phone: (212) 257-6966

Attorney: Jane H. Fisher-Byrialsen Esq.

Firm: Fisher & Byrialsen, PLLC

Party Name: *Amicus Curiae Jane H. Fisher-Byrialsen*

Address: 99 Park Avenue, PH Floor
New York, NY 10016-1601

Phone: (202) 256-5664

Attorney: Paul Beard Esq.

Firm: FisherBroyles LLP

Party Name: *Amicus Curiae New York Farm Bureau*

Address: 4470 W. Sunset Boulevard, Suite 93165
Los Angeles, NY 90027

Phone: (818) 216-3988

Attorney: Bezalel Stern Esq.
Firm: Kelley Drye & Warren LLP
Party Name: Amicus Curiae Protect the Harvest
Address: 3050 K Street, NW, Suite 400
Washington, DC 20007-5100
Phone: (202) 342-8422

Attorney: Susan P. Witkin Esq.
Firm: Pryor Cashman LLP
Party Name: *Amicus Curiae Joe Wills*
Address: 7 Times Square, 40th Floor
New York, NY 10036-6569
Phone: (212) 326-0113

Attorney: Kathleen M. Sullivan Esq.
Firm: Quinn Emanuel Urquhart & Sullivan, LLP
Party Name: *Amicus Curiae National Association for Biomedical Research*
Address: 51 Madison Avenue, 22nd Floor
New York, NY 10010-1603
Phone: (212) 849-7000

Attorney: Jay Shooster Esq.
Firm: Richman Law & Policy
Party Name: *Amici Christine M. Korsgaard, Matthew Liebman*
Address: 1 Bridge Street, Suite 83
Irvington, NY 10533

Attorney: Scott A. Chesin Esq.
Firm: Shook Hardy & Bacon L.L.P.
Party Name: *Amicus Curiae American Veterinary Medical Association*
Address: 1325 Avenue of the Americas, 28th Floor
New York, NY 10019
Phone: (212) 779-6106

Attorney: Reed Super Esq
Firm: Super Law Group, LLC
Party Name: *Amicus Curiae Martha C. Nussbaum*
Address: 110 Wall Street
New York, NY 10005
Phone: (212) 242-2355 ext: 1