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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF NONHUMAN RIGHTS PROJECT,

Appellant,

-against-

BREHENY,

Respondent.

NO. 52

20 Eagle Street
Albany, New York
May 18, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 52, in the Matter of
2 the Nonhuman Rights Project against James J. Breheny,
3 director of the Bronx Zoo and the Wildlife Conservation
4 Society.

5 Counsel?

6 MS. MILLER: Yes. Good afternoon, Your Honors,
7 and may it please the court, Madam Chief Judge. I
8 represent the petitioner, the Nonhuman Rights Project and
9 Happy, a solitary female elephant who has been imprisoned
10 at the Bronx Zoo since 1977.

11 May I please reserve two minutes for rebuttal?

12 CHIEF JUDGE DIFIORE: Two minutes, counsel?

13 MS. MILLER: Yes, please.

14 CHIEF JUDGE DIFIORE: You may.

15 MS. MILLER: Thank you.

16 If she hadn't been kidnapped from Thailand as a
17 baby, Happy could be a matriarch herself. But instead of
18 leading her sisters, and cousins, and grandchildren
19 hundreds of miles through ancient migratory roots - - -

20 JUDGE RIVERA: So, Counsel? Counsel? I'm on the
21 screen.

22 MS. MILLER: Yes.

23 JUDGE RIVERA: Good afternoon. So how - - -
24 let's say we accept your argument that habeas turns on the
25 autonomy of the petitioner. So how do we define autonomy



1 for purposes of habeas when it's a nonhuman, for - - - when
2 it's a member of the animal kingdom?

3 MS. MILLER: Thank you so much - - -

4 JUDGE RIVERA: Is that going to be a fact-
5 specific analysis, do we need consensus in the scientific
6 community; how do - - - how do we get to that?

7 MS. MILLER: Thank you, Your Honor. I'm really
8 glad you asked me that. The scientific understanding of
9 autonomy is - - - is basically the same as our general
10 understanding of it, but it's a little bit more complex in
11 that it includes complex cognitive abilities as well as
12 empathetic and, like, emotional capabilities.

13 The experts on this case are unrebutted. There's
14 five of the world's most renowned elephant scientists that
15 are in consensus, five of them about Happy's autonomy, as
16 well as the fact that elephants are autonomous. And so as
17 far as what kind of standard to go for - - - going forward,
18 I mean, I think some sort of consensus in the same way you
19 would apply scientific evidence in a human case would - - -
20 would be the standard.

21 And again, in - - - in a case like this where the
22 - - - where the evidence is undisputed, I think it's really
23 quite remarkable, which actually was my sort of next point,
24 which is that the scientists are unanimous that elephants
25 aren't just autonomous but they're also cognitively



1 complex, emotionally intelligent, altruistic, highly
2 communicative, and, of course, autonomous.

3 The - - -

4 JUDGE RIVERA: So, Counsel, let me ask you this.
5 Given that you're not requesting what an incarcerated human
6 might otherwise request, which is sort of release. You
7 want to be released from bondage, released from the
8 unlawful captivity. What you're actually seeking is a
9 different type of captivity, one which you argue, and you
10 have your experts to support that, is better for Happy.
11 But how does habeas apply when what you're simply seeking
12 is a transfer into a different type of captivity under
13 human control?

14 MS. MILLER: Yes, Your Honor. Three things.
15 First of all, these sanctuaries are basically, like, as if
16 she were being released into the wild. PAWS and the
17 Tennessee Elephant Sanctuary are like 2,000 acres. It's
18 hard - - - sort of hard to conceptualize that. But I live
19 out in Northern California and you look out and you see
20 hills and hills and hills. The elephants can go anywhere
21 they want to. They obviously can't be released into the
22 wild because that's just not feasible and that - - - that's
23 what the experts are telling us.

24 But habeas corpus has long been used by
25 individuals to either transfer custody, it's used often in



1 child custody cases. The King's Bench issued the first
2 writ of habeas corpus on behalf of a wife who at the time
3 was considered chattel property to change her custody to a
4 - - - a different non-abusive household. And children were
5 also able to do that under the ancient common law.

6 Also, there is a - - - a rich body of precedent
7 for using the writ of habeas corpus in novel situations
8 that go beyond codified laws' reach in order to free those
9 who would not have any other remedy at law. So example - -
10 - the examples being wives, children, as well as slaves.
11 There was the famous Lord Somerset - - - Lord Mansfield
12 case, Somerset versus Stewart, where Lord Mansfield - - -
13 Lord Mansfield famously issued the writ of habeas corpus on
14 behalf of James Somerset and freed him pursuant to the writ
15 despite their - - -

16 JUDGE RIVERA: But even in those examples,
17 they're all human beings. And I - - - I - - - your point
18 is well taken. I will ask it of your adversary about sort
19 of the status of chattel even when one is human. But at
20 the end of the day, the court is recognizing the humanity
21 in each of those cases. How can the court apply habeas
22 when we're not talking about a human? How - - - how do we
23 make that move from one point of the spectrum to this other
24 point that you're arguing for?

25 MS. MILLER: Yes. Thank you.



1 Well, the - - - Judge Fahey recognized - - - a
2 member of this court recognized that - - - a former member
3 - - - that - - - that using species membership, especially
4 in - - - in the instance of habeas corpus where we're
5 seeking one right to bodily liberty under the common law,
6 no other right would flow from that. That using species
7 membership is arbitrary, and there's two strains of common
8 law jurisprudence that render it so.

9 One, is the right to bodily liberty jurisprudence
10 which is broader than just habeas corpus jurisprudence.
11 But habeas corpus is of course a subset of bodily liberty
12 rights. And so we have the autonomy cases like Storar, and
13 Rivers versus Katz, where the court recognizes autonomy is
14 at the heart of the right to bodily liberty. So we're
15 protecting autonomy. And to say that a being that's like
16 Happy, who is scientifically proven to be as autonomous to
17 us - - - and we're not talking making basic choices, like,
18 make a noise, or don't make a noise, or this food, or that
19 food. We're talking extensive communication.

20 Dr. Joyce Poole has identified, I think,
21 something like 200 different words that they're using. I
22 mean, they can have up to forty-five minute long kind of
23 like conversations about where we should go. They
24 communicate to convey information to one another. Which
25 was kind of news to me because I've sort of - - - didn't



1 really understand that when they were talking - - - like,
2 they talk to each other, oh, maybe we should go this way,
3 or this way, so - - -

4 JUDGE SINGAS: Counsel?

5 MS. MILLER: Yes?

6 JUDGE SINGAS: Is it your position that any third
7 party can bring a habeas demanding the release of any
8 animal that has such autonomy or cognitive abilities, and
9 demand release to any location of their choosing; is that
10 your position?

11 MS. MILLER: No, Your Honor. To clarify, we are
12 basing our recommendations off of unrefuted scientific
13 experts saying that these are two sanctuaries that Happy
14 would thrive in. There's evidence that other elephants
15 that have been released to these sanctuaries, that were
16 considered antisocial and dangerous and, you know, all
17 these things, that the second - - - like, within months of
18 - - - of being released were able to flourish as elephants
19 should.

20 JUDGE WILSON: Well, if there's not - - - there's
21 not a - - - I'm sorry, over here. There's not a finding
22 below - - - there's evidence below, but there's not a
23 factual finding below, and there is contradictory evidence,
24 right? So at - - - at most it seems to me, if we were to
25 rule in your favor, we'd need to send this back for factual



1 determinations, no?

2 MS. MILLER: I - - - I believe that the trial
3 court did make findings, but of course, was bound by the
4 Lavery rulings above so she was - - -

5 JUDGE WILSON: And was - - - was there a finding
6 in the trial court that Happy, in fact, would be better off
7 in the sanctuary?

8 MS. MILLER: Well, the trial court's testimony -
9 - - yes. I mean, she - - - well, I don't know if you would
10 call it a finding of fact or not, but she definitely said
11 that based off of the unrefuted scientific evidence that
12 the, you know, that it was - - - we made a - - - extremely
13 persuasive was her phrase - - - case for Happy's release
14 from her lonely one-acre pen to a 2,300 acre sanctuary.
15 And she continually quoted the scientific record as noting
16 that elephants are - - - have - - - share a lot of traits
17 that are relevant to habeas corpus; not to other laws, but
18 to habeas corpus for the purpose of the right to bodily
19 liberty.

20 JUDGE CANNATARO: This line of questioning,
21 Counsel, sort of gets back to Judge Rivera's initial
22 question or - - -

23 MS. MILLER: Yeah.

24 JUDGE CANNATARO: - - - maybe her second
25 question, which is, it sounds like we're trading one type



1 of confinement for an arguably better type of confinement.
2 But you - - - you've also spent a lot of time talking about
3 liberty. And this doesn't seem exactly like liberty to me.
4 It's - - - it's just different confinement.

5 MS. MILLER: Two things. There's still the - - -
6 there's also the prisoner cases. There's Dawson and
7 Johnson where Judge Fahey also recognized that the cases
8 that Lavery had relied on to say that trans - - - so there
9 was another case that we filed called Presti, and it was on
10 behalf of a chimpanzee. And in that case, the court said,
11 you know, we actually don't have any issue with the
12 personhood problem. We actually just don't think that
13 there's - - - you know, that the transfer can be allowed.
14 And so Judge Fahey commented on that and said, that this -
15 - - our case where we're seeking almost - - - short of
16 complete release because, again, the situation wouldn't be
17 safe for the animals or for humans, to be in an environment
18 that's so close to their natural environment. He said that
19 that situation is analogous to the situation in Johnson,
20 where an inmate was allowed to use the writ of habeas
21 corpus to seek something other than complete release - - -

22 JUDGE GARCIA: But Counsel, that case - - - I'm
23 sorry, yeah.

24 MS. MILLER: Yes.

25 JUDGE GARCIA: That case, Brown, it - - - that



1 was a case where somebody was committed to a penal
2 facility, I think it was Attica, and they were transferred
3 to a facility that treated criminally insane at the time -
4 - -

5 MS. MILLER: Um-hum.

6 JUDGE GARCIA: - - - Dannemora. And really the
7 issue there was could they be held in Dannemora. It really
8 almost didn't matter where they were otherwise, right? The
9 question was, could you commit them. And also
10 subsequently, the Mental Hygiene Law was changed so they
11 have their own habeas section. So I - - - I - - - I think
12 the analogy to the Mental Hygiene Law habeas is a difficult
13 one for you.

14 MS. MILLER: Oh, I understand, Your Honor, about
15 the difference between the statutory common law - - - or
16 the statutory habeas. This is still - - - there's still
17 the whole wealth of child custody cases that use habeas
18 corpus regularly to - - - to move children from one place
19 to another where they wouldn't be offered complete release.

20 But in the - - -

21 JUDGE TROUTMAN: But is it based on an illegality
22 of the one custody versus another?

23 MS. MILLER: Yes, Your Honor, because it goes to
24 the nature of bodily liberty and whether - - - the - - -
25 the person who has the autonomy that's, again, like, on par



1 with - - - with human beings, and I'm not talking Happy is
2 on par with a young child. I mean, the scientists are - -
3 - are showing that they are extraordinarily cognitively
4 complex. And so the deprivation of the bodily liberty is
5 being confined and alone and in a one-acre pen, and we
6 think she's also detained in a barn for a lot of the times
7 when it's cold because elephants don't - - - they're not
8 cold animal - - - you know, cold-weathered species. So,
9 she spends a lot of her time in a barren sort of cell or in
10 a one-acre pen without another elephant.

11 And even the Bronx Zoo recognized that it's not
12 right to detain an elephant alone. They've decided that
13 they were going to phase out their elephants after, you
14 know, there were less remaining and then maybe when they
15 were down to one or two, I think they said - - -

16 JUDGE RIVERA: Well then is it - - - is it more
17 like - - - I'm on the screen. So then is it more like - -
18 - or - - - or it begins to sound like the incarcerated
19 individual who's held in the special housing unit, and
20 wants to be in the general population.

21 MS. MILLER: No, Your Honor, because this is
22 still - - - first of all, Happy's innocent. And she didn't
23 commit any crime. But also, again, the habeas - - - there
24 is the precedent for using the habeas corpus - - - you
25 know, it goes back to antiquity. And it's - - - it's a



1 unique remedy that provides a - - - a - - - relief for
2 someone whose bodily autonomy is being infringed upon. And
3 there's no question, at least based on the five unrebutted
4 scientific expert reports, that this is no place for an
5 elephant, and these two sanctuaries would be as close to
6 freeing her as possible.

7 And so from a legal standpoint, if - - - if it -
8 - - if it would make a difference if she was completely set
9 free or not - - -

10 JUDGE RIVERA: So - - - so - - - so does that
11 mean that I couldn't keep a dog? I mean, dogs can memorize
12 words. And I think most people who have dogs or any kind
13 of domesticated pet in that way would say that they feel
14 there's a special connection and a bond, they're like their
15 family, as I think you pointed out in the brief. If I had
16 a dog, I could leave property to them.

17 So why - - - why isn't then what you're arguing
18 for endangering these kinds of human animal relationships?

19 MS. MILLER: Well, we don't have the evidence
20 about dogs that we have about elephants right now. And I
21 don't know when or if we ever will. What we have about
22 elephants right here, right now, is an extraordinary
23 consensus among the scientific community. We also have
24 experts from law, and philosophy, and religion, and ethics,
25 all remarkably on the side of Happy's freedom. Including,



1 again, like lawyers who understand - - -

2 JUDGE TROUTMAN: So are you - - -

3 MS. MILLER: - - - that this is - - -

4 JUDGE TROUTMAN: So, are you arguing that
5 deciding this case strictly based upon Happy, and not
6 consideration of other different animals, is what's
7 appropriate here?

8 MS. MILLER: Absolutely, Your Honor. I think
9 that that is exactly what the common law requires, as this
10 court recently ruled in the Greene case, that the court can
11 take a case-by-case approach using the common law. That's
12 actually the point of the common law; it's flexible,
13 adaptable, and grows with the changing needs of society.

14 JUDGE CANNATARO: As a follow up to that, is - -
15 - is this case about Happy, one exceptionally autonomous
16 and intelligent creature? Or is this about all Asian
17 elephants, or all elephants, or - - - what's the scope of
18 the - - - the population we're talking about here?

19 MS. MILLER: Well, it would be disingenuous to
20 not think that this would, you know, be precedent for
21 another elephant. It certainly wouldn't automatically free
22 other elephants. But the science is clear about elephants
23 having this autonomy.

24 And it's not just Asian elephants, that - - -
25 they're both African and Asian elephants the science is



1 proving that they're extraordinarily cognitively complex
2 with advanced analytic abilities that, I'm sorry, I don't
3 know if dogs have these analytic abilities. I love dogs.
4 But there - - - this is extraordinary science.

5 So, I - - - I wouldn't say that it's for Happy
6 specifically. But certainly, Happy's situation, and the
7 deprivation of her unique bodily liberty, being alone in
8 that - - - in - - - in upstate New York, or in New York, in
9 general, is no place for an elephant and so - - -

10 JUDGE CANNATARO: What about primates? You know,
11 that - - - that's a - - - that's a group that you've
12 represented before.

13 MS. MILLER: Um-hum.

14 JUDGE CANNATARO: Would they be covered under
15 this decision, or is that another future case?

16 MS. MILLER: Every case would be a future case
17 because the common law, again, especially with habeas
18 corpus is case by case by case. With respect - - - with -
19 - - with respect to the science of chimpanzees, I think
20 that they would probably fit this scientific - - - you
21 know, unrebutted scientific comprehensive understanding of
22 - - - of autonomy which includes these cognitively complex
23 components.

24 But as far as we know, I think it's only
25 chimpanzees and elephants that, for instance, mourn and do,



1 you know, grieving behaviors that are akin to humans. So,
2 if you look at the science, which I think is actually
3 really just unique and exciting kind of in its own right,
4 like, elephants do, like, high five each other after they
5 drive off a - - - a, you know, enemy. Or they do like a
6 half-time football kind of dance. I mean, they're - - -
7 they're just really special unique species.

8 JUDGE RIVERA: But - - - but Counsel, it does
9 seem - - - back on the screen. It does seem - - - now with
10 what you were just saying, that in part you're arguing it's
11 - - - it's - - - the scientific consensus around these
12 qualities as you've defined them about autonomy, that can
13 be scientifically established through a factfinding
14 process, and your argument is Happy, and perhaps all other
15 elephants, fit that. But at a minimum, Happy. But it
16 sounds like you're saying and then of course it's the
17 nature of the confinement because you're looking for one
18 human-controlled environment to another, although I
19 understand your point that the other, the sanctuary, is one
20 that is as close as - - - it seems to me, you're arguing is
21 as close as humanly possible in this moment to the wild
22 versus the zoo is clearly not.

23 So it sounds to me like you're saying it's - - -
24 it's a combination. Whereas let's say if the zoo, you
25 know, maybe had an environment that was a closer call about



1 whether or not Happy - - - let's say Happy isn't isolated.
2 Let's say there's much more land for Happy to travel or - -
3 - or something else. It sounds to me like you think that
4 that is also what - - - I'm just thinking of how these
5 habeas petitions would work and what a court would have to
6 do, right, the - - - the mental exercise.

7 But it sounds like the court would have to figure
8 out this autonomy piece and the nature of the confinement
9 because it's not pure release in that sense.

10 MS. MILLER: Perhaps so, Your Honor. But I want
11 to re - - - reiterate that Judge Alison Tuitt, of the court
12 below, had no difficulty understanding the science. It's
13 throughout her opinion. And also that she felt pretty much
14 prepared to rule in our favor but for the two Lavery
15 decisions that clearly need to be overturned, by the way,
16 because they establish that to have rights, you need to
17 have duties and to be human. And that's not even the
18 sources that Lavery - - - the Lavery cases relied upon were
19 not even supporting the - - - the conclusion. For
20 instance, they rely on John Salmond's Jurisprudence that
21 says rights - - - like, to be a person, you have rights or
22 duties, and they said "and". So, we actually had Black's
23 Law Dictionary change the typo so we could maybe not have
24 our case get thrown out again.

25 But the more important point is that the lower



1 courts, the - - - the Lavery courts started at the wrong
2 place which was at personhood. And article 70 is a
3 procedural statute only, the CPLR. So, the legislature
4 intended to leave it to the courts to decide substantive
5 habeas corpus matters. And so, the proper place, as Judge
6 Fahey recognized, isn't with the definition of person,
7 which is a backwards looking, you know, statutory
8 interpretation device, but to look at forward-thinking
9 common law principles, and focusing on the right at issue.

10 And when we look at the right at issue which is
11 the right to bodily liberty which protects autonomy, and
12 Happy is autonomous, by scientific proof, she should at a
13 minimum have the same right as a similarly situated
14 individual that also has autonomy because to do it - - -

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MS. MILLER: Thank you. Thank you.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. MANNING: Thank you, Your Honor. May it
19 please the court, Ken Manning, on behalf of the Wildlife
20 Conservation Society, the Bronx Zoo, and Mr. James Breheny.

21 This oral argument bears little relationship to
22 the arguments in the court below, in the trial court or in
23 the Appellate Division. If I could suggest, the petition
24 says that the petitioner's relief requested turns on
25 whether Happy is determined to be a legal person entitled



1 to invoke the habeas corpus remedy.

2 You've listened now to argument that doesn't even
3 address that point. Whether or not Happy is a person was
4 decided in some respects by the Elephant Protection Act
5 which was enacted - - - it was approved before Judge
6 Fahey's concurring opinion, but effective after his
7 opinion. And it deals specifically with elephants.

8 JUDGE RIVERA: Well, but Counsel, if I could
9 interrupt you here.

10 MR. MANNING: Your Honor?

11 JUDGE RIVERA: I understand that you've referred
12 to this certainly in the briefing about some of the
13 legislature stepping in to protect. No - - - no one is
14 going to disagree with some legislative power to be able to
15 make those kinds of policy decisions.

16 The question is whether or not the great writ - -
17 - the writ as a common law writ, which is separate and
18 apart from what the legislature may do, could be - - -
19 because it's flexible, given the values behind the great
20 writ, could be now applied to Happy's situation. And I - -
21 - they've argued it's autonomy. I think it's - - - I
22 disagree with what you've started out with, I do think that
23 they're very clear, but they say the reason that Happy can
24 proceed, and be considered for habeas relief, is because
25 Happy is autonomous. You may - - - you may see it



1 differently, but that's their argument.

2 But why don't you address why, given that habeas
3 is, and has been used and applied, to chattel, and - - -
4 and to those who do not have full rights and - - - and
5 duties under our system of law, why Happy shouldn't be able
6 to seek a remedy through the vehicle of the habeas writ.

7 MR. MANNING: Well, there's two things I would
8 say, Your Honor, and thank you for - - - for the question.

9 First of all, the definition of autonomy that we
10 heard today at oral argument is different from anything
11 we've seen before, first of all. Autonomy doesn't mean
12 whatever someone thinks it should mean. It - - - there
13 should be some form of definition or a determination in
14 terms of what standard we're looking at.

15 This case came up on a motion to dismiss the
16 petition. There was no evidentiary hearing. The court
17 below found two things. One is that Happy was not a
18 person. And secondly, there was no illegal detainment.

19 And if I could address, Judge Rivera, your point
20 on the - - - the habeas remedy, there's got to be an
21 illegal detainment in order for the remedy to even apply at
22 all whether it be a chattel, a child, or a person. And
23 here there's been no illegal detainment. The Elephant
24 Protection Act, in particular, specifically by its terms,
25 defines elephants as elephants part of the species, and it



1 defines persons subject to the Elephant Protection Act as -
2 - - as individuals, human beings. If the legislature had
3 determined something else, it simply would have done so.

4 So from an - - - a standpoint of the Bronx Zoo,
5 there's absolutely no illegality whatsoever. And in fact,
6 if I could go back to the - - -

7 JUDGE RIVERA: Yeah, but if I could interrupt you
8 there. Of course, their - - - their argument, which is
9 backed up by their experts - - - again, you may disagree,
10 it - - - it's just the nature of - - - of the factual
11 record that they attempted to develop even on the motion.
12 But their argument is that the current detainment is
13 absolutely contrary and unnatural to Happy's - - - to who
14 Happy is, to this species. And that that's what makes it
15 an unlawful detainment.

16 MR. MANNING: Your Honor, the petition - - - I'm
17 quoting from paragraph 56 of the petition, says this
18 petition does not allege that Happy is illegally confined
19 because she is kept in unsuitable conditions, nor does it
20 seek improved welfare for Happy. If that's the case, why
21 would - - - why would the habeas corpus remedy apply in the
22 first place? She's perfectly legally detained where she is
23 now, authorized by the legislature. There's no illegal
24 detainment. And they're not seeking either better welfare
25 for the elephant, at least according to the pleadings, or -



1 - -

2 JUDGE RIVERA: Well, I - - - I don't see how that
3 it's - - - or I'll ask her, I don't see how that's the
4 argument. The whole argument is that Happy is in an
5 environment that is unnatural to her and harmful to her,
6 and she can't be released given - - - I wanted to ask you
7 about that - - - given the nature of this custody that
8 she's been under for decades, that she can't go back to the
9 wild. So, the next best thing is this sanctuary.

10 MR. MANNING: Well, if I could address the
11 sanctuary and then I'll take the first part of your
12 question, Your Honor.

13 JUDGE RIVERA: Yeah. Yeah.

14 MR. MANNING: Essentially, there's two choices
15 here. Basically, the - - - the habeas petition here says,
16 let us decide what to do with this elephant. We got a
17 place in California we like, and we got a place in
18 Tennessee we like. You can search the record for any
19 indication in terms of what the Tennessee facility is
20 comprised of or information. It's simply not there. So
21 one of the two picks isn't even supported in the record.

22 So I - - - from our perspective, the - - - the
23 court shouldn't be in a position to simply take that on.

24 JUDGE RIVERA: Um-hum.

25 MR. MANNING: You know, this - - - this is an



1 area, the animals that are kept in zoos are highly
2 regulated. You know, the Association of Zoos and Aquariums
3 has a chapter on elephant care, it's all in the record.
4 It's - - - I - - - I forget how many pages, it's forty or
5 fifty pages. It's so detailed as to deal with footcare.

6 And I - - - to - - - to take a case that
7 basically, as I mentioned from paragraph 56, had nothing to
8 do with improved welfare for Happy, and now turn it into
9 basically a best interest case like we might for a child in
10 a family court proceeding, is well beyond a habeas corpus
11 remedy at this point.

12 So from - - - from my - - -

13 JUDGE RIVERA: But - - - yeah, doesn't habeas
14 apply? I mean, even a gilded cage is still a cage, right?
15 Wouldn't the habeas apply? It - - - let's say someone is
16 incarcerated. If they're incarcerated wrongfully so, no
17 matter how lovely the setting.

18 MR. MANNING: I'm sorry, Judge, could - - - could
19 you repeat that? I didn't hear the whole thing.

20 JUDGE RIVERA: I'm sorry, I - - - I - - - I was
21 saying, no matter how comfortable the setting, if one is
22 wrongfully detained, right, my question was about someone
23 who's incarcerated, is wrongfully detained, no matter how
24 wonderful the - - - the setting, the conditions, it's
25 still, as I was saying, a gilded cage. You're still - - -



1 your liberty is being restrained.

2 MR. MANNING: The assumption in your question
3 that we take issue with, Your Honor, is whether they're
4 illegally detained. There's absolutely no - - -

5 JUDGE RIVERA: No, no, I understand that. That
6 was your first point. But - - -

7 MR. MANNING: Right.

8 JUDGE RIVERA: - - - do you agree with me that -
9 - - that - - - to this extent - - - we'll ask her when she
10 gets back up on her rebuttal - - - to the extent that
11 there's an argument that it's an unlawful detention for
12 whatever basis she's arguing, the fact that the Bronx Zoo
13 and - - - and - - - you all may believe that you've
14 provided a wonderful environment for Happy, is beside the
15 point?

16 MR. MANNING: Well, we have three affidavits,
17 Your Honor, from the chief veterinarian, from the curator,
18 and from the director of the zoo attesting based on
19 personal knowledge to the conditions of Happy, the
20 elephant.

21 I think it's significant in this case that the
22 so-called experts that have offered opinions have never
23 even been to see Happy. They didn't ask to see her. They
24 didn't ask to examine her. They didn't ask to come look at
25 her. They didn't seek a court order granting discovery.



1 They submitted affidavits that were used in another case in
2 Connecticut, cookie cutter, to support this application.
3 It was only when we challenged that, that there was a
4 supplemental affidavit judge - - - making certain judgments
5 about the animal based on a - - - a ride on the - - - the
6 tram that goes through the zoo.

7 So there was taken - - - no interest was taken in
8 this particular animal.

9 JUDGE RIVERA: Well, do you - - - do you disagree
10 that Happy is isolated by herself in whatever it is, half
11 an acre, an acre, you - - - do - - - you don't disagree
12 with that?

13 MR. MANNING: I do. She's not isolated. There
14 are two elephants there. The reason they're separated is
15 because they didn't get along.

16 JUDGE WILSON: So - - - so let - - - let me ask
17 you this. Sorry, over here.

18 MR. MANNING: Yes, Judge.

19 JUDGE WILSON: In the case of Tommy and Kiko,
20 which I realize is behind us and it's not your case, would
21 you also say there that habeas would not have been
22 available because the chimpanzees were not illegally
23 detained?

24 MR. MANNING: I didn't - - - I didn't - - -
25 forgive me, Your Honor, I don't think I heard the whole



1 question.

2 JUDGE WILSON: Sure. In - - - in - - - are you -
3 - - you're familiar I think a little bit at least with the
4 case involving Tommy and Kiko, the - - -

5 MR. MANNING: Oh, yeah, of course.

6 JUDGE WILSON: - - - chimpanzees?

7 MR. MANNING: Of course.

8 JUDGE WILSON: Right. So, would you say that
9 habeas was not available to them there because they were
10 not being illegally detained?

11 MR. MANNING: If they were not being illegally
12 detained - - -

13 JUDGE WILSON: No, I'm asking you whether your
14 view is they were being illegally detained or not?

15 MR. MANNING: Well, I think the Tommy and Kiko
16 case, there was questions about the suitability of their
17 conditions.

18 JUDGE WILSON: Correct.

19 MR. MANNING: I - - - I don't remember well
20 enough from the record in that case whether there was a
21 finding of illegality or not, but if they were kept in
22 unsuitable conditions, and it violated the Animal Welfare
23 Act, or the state statute involving animal cruelty, then
24 they would be being illegally detained at that point.

25 JUDGE WILSON: And therefore, you would conclude



1 in that circumstance habeas could reach them?

2 MR. MANNING: At least that element of habeas,
3 Your Honor.

4 But our - - - our premise is fundamentally a very
5 simple one. And that is that historically animals have not
6 been the subject of habeas corpus relief. All the
7 definitional requirements that exist, including the
8 Agriculture and Markets Law, the Penal Law, the Elephant
9 Protection Act, and also the Estates, Powers and Trusts
10 Law, all of them have definitional phrases dealing with
11 animals and people that would be completely inconsistent
12 with labeling an elephant a person for habeas corpus
13 relief.

14 And if the court were to grant a petition like
15 this, the impact this would have, on - - - on other
16 statutes and other rights of other people would be
17 tremendous. And it's outlined in the amicus briefs from
18 Protect the Harvest, the researchers, the Farm Bureau, all
19 the amicus show the - - - the dramatic impact this could
20 have on our society. And if there's going to be an entire
21 rewrite, and a granting of animals to rights that they've
22 never had before, shouldn't that be done by the legislature
23 as the Appellate Division - - -

24 JUDGE RIVERA: But wasn't - - - wasn't that also
25 - - - Counsel, wasn't that also the case for the examples



1 your adversary has used where there were chattel, whether
2 it's women or slaves or - - - or indentured servants. I
3 mean - - - or children. I mean, isn't - - - isn't a
4 decision from the court about an expansion of something
5 like the great writ always going to have ripple effects
6 moving forward?

7 MR. MANNING: I wouldn't call this a ripple, Your
8 Honor. To - - - to take animals that have never been
9 subject to rights of people, given the social compact that
10 forms the basis for our federal and state constitutions,
11 and all the laws that we - - - we promulgate to effectuate
12 those two documents, it - - - it puts them in the same
13 category as people, which we oppose.

14 JUDGE RIVERA: Well, I don't - - - I don't think
15 she was saying that she said they're not - - - Happy was
16 not equated with a child. I don't think they're saying
17 that the elephants, and Happy in particular, are the same
18 as human beings. It's simply what - - - to what extent
19 there are rights that can be protected and recognized
20 through the remedy of the writ, right? It's sort of the -
21 - - they claim there's an injustice, there's a harm caused
22 by human action, and that the only remedy available to
23 Happy is through habeas. And they simply wish to have
24 their case heard in that way.

25 MR. MANNING: There - - - there's no harm alleged



1 in the petition, Your Honor. We've referenced paragraph 56
2 of the petition. No one's claiming any harm to this
3 animal. There's been no harm to the animal. And you have
4 three affidavits from the people at the zoo attesting to
5 that.

6 JUDGE RIVERA: Um-hum.

7 MR. MANNING: The animal is treated well. She's
8 adapted well to her surroundings. And for - - - at this
9 stage, to try to compare this to a state where there - - -
10 a case where there's been some form of animal welfare
11 violation would be completely outside the record and
12 inconsistent with this record.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. MANNING: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 Counsel, what about the potential impact your
17 colleague referenced here to the other industries, the
18 agricultural, market, and industry, the biomedical
19 researchers, even pet ownership?

20 MS. MILLER: Thank you, Your Honor.

21 Yeah, there's no connection between those
22 industries and Happy's illegal detention. Again, with the
23 science being unrefuted, they - - - we don't have that
24 evidence. I mean, there's no - - - there's no purpose for
25 Happy to just sit there. They don't even want to keep the



1 elephants there. Notably, the - - - the Bronx Zoo has
2 highly accredited elephant scientists. Joyce Poole, Dr.
3 Joyce Poole, testified that they actually have elephant
4 scientists that are real scientists - - -

5 JUDGE WILSON: So your - - -

6 MS. MILLER: - - - and they didn't provide any
7 testimony of - - -

8 JUDGE WILSON: - - - your mention of purpose I
9 think raises - - - it - - - it goes back to the Chief's
10 question. Are you admitting that there could be purposes,
11 not for Happy, but for other sorts of animals, that have to
12 be weighed against whatever the liberty interest we might
13 recognize is?

14 MS. MILLER: Your Honor, I - - - it's difficult
15 for me to, you know, assign certain, you know, values to -
16 - - to these things. But I - - -

17 JUDGE WILSON: Well, it would be difficult - - -

18 MS. MILLER: - - - because they're so outside of
19 our case - - -

20 JUDGE WILSON: - - - difficult for anybody to
21 assign values.

22 MS. MILLER: Yeah.

23 JUDGE WILSON: My question is whether you're - -
24 - whether you're arguing about the recognition of rights of
25 animals allows for some balancing of those rights against



1 some other societal values. So, for a simple example,
2 somebody uses a horse for transportation. If we - - - if
3 the horse - - - if we - - - crosses the autonomy threshold,
4 under your theory, we recognize the right of that horse to
5 some form of liberty, is that absolute, inviolate, or can
6 it be balanced against the person's need for
7 transportation?

8 MS. MILLER: I think - - - I would refer the
9 court, perhaps, to like one of their amicus briefs. The
10 religious amicus briefs were really great. The Jewish
11 brief talked about how Torah Law, for instance - - - I know
12 that the court shouldn't - - - you know, I'm actually a
13 church state litigator, so don't take the religion into the
14 law, but - - -

15 JUDGE WILSON: But how about - - -

16 MS. MILLER: - - - I feel that - - -

17 JUDGE WILSON: - - - how about Professor Singer's
18 brief instead which sort of proposes utilitarian view of
19 this, he calls it consequentialist?

20 MS. MILLER: That's a - - - that could be a good
21 example. The common law allows for some flexibility, and
22 for some balancing of the different factors. And here, the
23 balance is just so heavily skewed on our side.

24 The illegality, I need to point out, is the
25 common law. In Somerset's case - - - in Lemmon, this Court

1 relied and adopted Somerset, it was a pure common law, the
2 illegality was the absence of positive law. And the
3 examples I gave of the King's Bench issuing writs for
4 women, those were all just pure common law. There was - -
5 - the violation was the common law, which is an independent
6 body of law that the court is duty bound to upkeep with the
7 wisdom, ethics, and you know, science of the time.

8 And all of that, again, points in favor of Happy
9 because there's no basis to treat her differently from
10 another being that's similarly situated.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 JUDGE RIVERA: He says there's no harm. He says
13 you haven't argued any harm. And if there was, that - - -
14 that falls under the rubric of the animal welfare
15 legislative structure.

16 MS. MILLER: We - - - we never conceded that
17 there isn't any harm. In fact, the whole - - - all of this
18 evidence is showing she - - - there's an immense amount of
19 suffering and harm. But we are not bringing a welfare case
20 because we don't want Happy - - - it's not about improving
21 the conditions at the Bronx Zoo. They're not - - - it's
22 not - - - that's not possible because you can't fit another
23 elephant in there. The reason why the elephants attacked
24 each other is because you put four elephants into a - - - a
25 pen. And Happy and Patty do not get along right now, but



1 maybe they could at a sanctuary. There's evidence in the
2 record of Joyce Poole talking about how this is just too
3 small a space for elephants. So, it wouldn't be reasonable
4 to put two people in a too small of a space and expect them
5 to get along.

6 But they also attacked her - - - her family.
7 Grumpy was an elephant that was attacked by Patty and
8 Maxine, and so now they're both - - - they're separated by
9 a fence, they are both alone. And they both deserve
10 better.

11 And the common law would allow for it. The court
12 has the authority and the power to grant Happy the freedom
13 that she really deserves.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MS. MILLER: Thank you, very much.

16 CHIEF JUDGE DIFIORE: You're welcome.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Nonhuman Rights Project v. Breheny, No. 52 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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