

*To be Argued by:*  
KENNETH A. MANNING  
(Time Requested: 30 Minutes)

**APL 2021-00087**

Appellate Division—First Department Docket No. 2020-02581  
Bronx County Clerk's Index No. 260441/19

---

---

**Court of Appeals**  
*of the*  
**State of New York**

---

In the Matter of a Proceeding under Article 70 of the CPLR  
for a Writ of Habeas Corpus and Order to Show Cause,  
THE NONHUMAN RIGHTS PROJECT, INC., on behalf of Happy,  
*Petitioner-Appellant,*

— against —

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

*Respondents-Respondents.*

---

---

**BRIEF OF RESPONDENTS-RESPONDENTS IN RESPONSE  
TO *AMICI CURIAE* ANIMAL LEGAL DEFENSE FUND,  
SHANNON MINTER, EVAN WOLFSON, PETER SINGER,  
GARY COMSTOCK, and ADAM LERNER**

---

---

PHILLIPS LYTLE LLP  
Kenneth A. Manning, Esq.  
Joshua Glasgow, Esq.  
William V. Rossi, Esq.  
*Attorneys for Respondents-  
Respondents*  
One Canalside, 125 Main Street  
Buffalo, New York 14203  
Tel.: (716) 847-8400  
Fax: (716) 852-6100  
kmanning@phillipslytle.com  
jglasgow@phillipslytle.com  
wrossi@phillipslytle.com

Dated: May 6, 2022

---

---

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
PRELIMINARY STATEMENT.....	1
ARGUMENT .....	1
A.    The three <i>amici</i> briefs use “facts” that are either absent from or contradicted by the record to support their “moral” arguments.....	1
B.    The <i>amici</i> briefs improperly argue that cases vindicating the constitutional rights of previously marginalized human beings support the claim that an animal who alleges no constitutional violation is entitled to habeas corpus rights. ....	4
C.    The three <i>amici</i> briefs expose the same defect that the NRP and its other supporters have demonstrated: they fail to provide any sensible or coherent standard to evaluate which animals qualify for habeas corpus rights.....	6
D.    The three <i>amici</i> ignore the fact that Happy is protected by a myriad of effective anti-animal cruelty statutes.....	9
CONCLUSION.....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
 <b>Cases</b>	
<i>Art and Antique Dealers League of America, Inc. v. Seggos</i> , 523 F.Supp.3d 641 (S.D.N.Y. 2021) .....	10
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986) .....	4
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003) .....	4
<i>Nonhuman Rights Project, Inc. v. Presti</i> , 124 A.D.3d (4th Dep’t 2015) .....	2
<i>United States v. Crook</i> , 25 F. Cas. 695 (1879) .....	5, 6
 <b>Statutes</b>	
7 U.S.C. §§ 2131 et seq. ....	10
16 U.S.C. § 4201-4246 .....	10
16 U.S. Code § 1531 .....	10
N.Y. Agri. & Mkts. Law § 353 .....	7
N.Y. Agri. & Mkts. Law § 380 .....	10
N.Y. Env’tl. Conserv. L. § 11-0535-a(2) .....	10
 <b>Other Authorities</b>	
50 CFR §17.11(h) .....	10

## PRELIMINARY STATEMENT

Respondents James J. Breheny and the Wildlife Conservation Society (“Respondents”) submit this brief in response to briefs submitted by three separate sets of *amici curiae*: Shannon Minter and Evan Wolfson (“the Minter *amici*”), Peter Singer, Gary Comstock and Adam Lerner (the “Singer *amici*”) and the Animal Legal Defense Fund (the “ALDF *amicus*”).

All three briefs suffer from similar defects: they presume facts that do not exist; apply legal principles from other cases that are inapposite; fail to provide any reasonable criteria by which to assess Happy’s (or any other animal’s) right to petition for habeas corpus relief; and ignore the effectiveness of existing statutory schemes, both state and federal, that are intended to protect animals from cruelty, including the type of cruelty that *amici* allege here without any basis in the record.

## ARGUMENT

### **A. The three *amici* briefs use “facts” that are either absent from or contradicted by the record to support their “moral” arguments**

In a variety of ways, the three *amici* briefs ignore the record or try to rewrite it to suit their purposes. One blatant example is presented in the ALDF *amicus* brief. The record is clear that Respondents have not violated any animal cruelty statute, and NRP has affirmatively disclaimed any such

statutory violation.<sup>1</sup> ALDF understands this: their brief states that NRP’s claims for Happy are “independent of any interplay between habeas corpus jurisprudence and the animal cruelty statute.” ALDF *amicus* brief at p. 12. Nonetheless, the ALDF *amicus* brief insists that Respondents are “violating the animal cruelty statute,” ALDF *amicus* brief at p. 11, even though such a claim is inconsistent with the position taken by NRP in its petition since the outset of this litigation. *See*, A-48-49, para.56. ALDF then claims this un-supported conclusion of its own invention “dismantles” Respondents’ argument that “its treatment of Happy is lawful.” ALDF *amicus* brief, p. 12.

The Singer *amici* ignore the record as well. While acknowledging Respondent’s position that Happy would not be benefitted by moving her at this stage of her life to any place outside of her familiar habitat—a position supported by affidavits of zoo professionals who personally know Happy and have the responsibility to care for her<sup>2</sup>—they chose to accept uncritically the

---

<sup>1</sup> The habeas corpus Petition that initiated this case in October, 2018 makes this point clearly: “*That Respondents may not be in violation of any federal, state, or local animal welfare laws in their detention of Happy is irrelevant to whether or not the detention is lawful. . . . This petition does not allege that Happy ‘is illegally confined because she is kept in unsuitable conditions,’ nor does it seek improved welfare for Happy.*” A. 48, ¶ 56 (emphasis added) (citing *Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d (4th Dep’t 2015).

<sup>2</sup> *See*, Affidavit of Paul P. Calle, D.M.D., Chief Veterinarian and Director of the Zoological Health Program at the Bronx Zoo, A-329; Affidavit of Patrick Thomas, Ph.D., VP and General Curator of the Wildlife Conservation Society and Associate Director of the Bronx Zoo, A-333; Supplemental Affidavit of James J. Breheny, Director of the Wildlife Conservation Society’s Bronx Zoo, A-458.

position espoused by NRP, that Happy would be better off being moved thousands of miles from her familiar habitat and human caregivers, based on a single reference to an affidavit by Dr. Joyce Poole. *See Singer amici* brief at p. 14, n.14.<sup>3</sup> One notable problem with this reference is that Dr. Poole’s affidavit was recycled from another unrelated case, and says nothing about Happy or the Bronx Zoo whatsoever. Like several affidavits in therecord, NRP first filed Dr. Poole’s affidavit in Connecticut Superior Court—in a habeas corpus proceeding about three different elephants—presenting her expertise on *African* elephants, an entirely different species from Asian elephants like Happy.<sup>4</sup> Submitted “on behalf of the Nonhuman Rights Project,” the December 2, 2016 affidavit does not identify *any* one elephant and contains no information about Happy or her habitat at the Bronx Zoo.<sup>5</sup>

---

<sup>3</sup> The *Singer amici* do not even cite to the Poole affidavit that is in the record. Their reference is to the NHP website which contains a copy of the Poole Affidavit, dated December 2, 2016. A-139-164.

<sup>4</sup> *See Nonhuman Rights Project, Inc. ex rel. Beulah*, 2017 WL 7053738, at \*1 n.1 (listing the affidavits as submitted to the Connecticut Superior Court, including Dr. Poole’s). *Compare Nonhuman Rights Project, Inc. v. R.W. Comerford & Sons, Inc.*, LLI-CV17-5009822-S, Conn. Sup. Ct., Docket Entry No. 103.5, filed on November 13, 2017, Affidavit of Joyce Poole, sworn to December 2, 2016, *with* A. 139, Affidavit of Joyce Poole, sworn to December 2, 2016.

<sup>5</sup> While Dr. Poole eventually submitted an affidavit in which she devoted a single paragraph to Happy-specific opinions, she made clear in that affidavit that her entire experience with Happy was watching videos posted by visitors who observed Happy while travelling above Happy’s habitat on the Bronx Zoo’s Wild Asia Monorail. None of these videos are in the record and Dr. Poole makes no mention of which videos she watched or even how many, what date they were taken or any other information about these videos. She herself still had

The Minter *amici* brief suffers from some of the same issues.

Without any factual ground for saying so, they insist that Happy is suffering a “cruel deprivation that is causing her severe emotional suffering and harm.”

Minter *amici* brief at p. 22. There is no reference to any place in the record to support this assertion; it is merely the *ipse dixit* conclusion of these lawyer *amici*.

**B. The *amici* briefs improperly argue that cases vindicating the constitutional rights of previously marginalized human beings support the claim that an animal who alleges no constitutional violation is entitled to habeas corpus rights.**

The Minter *amici* pay lip service to the notion that animals and marginalized human beings are not the same. They claim they do not “seek to make a facile comparison between the subject of this petition and LGBT people or members of other minority groups.” Minter *amici* brief, at p.6. Yet, they spend multiple pages of their brief doing just that, arguing Happy’s case is “reminiscent” of *Lawrence v. Texas*, 539 U.S. 558 (2003), a case that changed Supreme Court jurisprudence regarding the rights of people in the LGBT community in overturning an earlier Supreme Court decision, *Bowers v. Hardwick*, 478 U.S. 186 (1986). They fail to mention that *Lawrence* was a decision based on the Due Process Clause of the Fourteenth Amendment,

---

no direct contact with or made any direct observations of Happy. See Second Supplemental Affidavit of Dr. Joyce Poole, dated December 10, 2018, at A-473, 480, para. 31.

while the present case is devoid of any claim of a Constitutional violation. NRP has not argued that Happy's presence at the Bronx Zoo violates any provision of the United States Constitution but rather asserts that a vague notion of "liberty," untethered to any constitutional provision, is the basis for Happy's habeas corpus claim.

The Singer *amici* spend their time trying to connect Happy's circumstances to that of the petitioner in *United States v. Crook*, 25 F. Cas. 695 (1879). In *Crook*, the habeas corpus claim of Standing Bear, a native American, was challenged on the grounds that he was not a "citizen." The Court denied that citizenship was required under the provisions of the applicable habeas corpus statute. *Id.* at p. 697. This is a far cry from declaring that "person" in the habeas corpus context applies to animals. Indeed, the *Crook* court made clear that the definition of "person" for habeas corpus purposes should follow the understanding of the term "found in general use." *Id.* For this, the Court turned to the Webster dictionary:

Webster describes a 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.*' This is comprehensive enough to include even an Indian."

*Id.* (emphasis added).

Besides defining "person" only in the context of human beings, the *Crook* court also held that a clear statutory violation was required, which it

found in that case in the failure of the military personnel who arrested and detained Standing Bear to bring him promptly to “civil authority of the territory or judicial district in which such person shall be found . . . .” *Id.* at 700. *Crook* provides no support for NRP’s and the Singer *amici*’s efforts to extend habeas corpus rights to an animal not part of the “human race” or to a person not being held in violation of a statute. The Court’s decision certainly did not endorse *amici*’s sense of what the law should be.

**C. The three *amici* briefs expose the same defect that the NRP and its other supporters have demonstrated: they fail to provide any sensible or coherent standard to evaluate which animals qualify for habeas corpus rights.**

The three *amici* briefs criticize the idea that habeas corpus rights should be limited to all human beings, regardless of status, intellect, capabilities or degree of autonomy. However, like the NRP, they fail to articulate any criteria by which animals might be evaluated to assess their qualification to access habeas corpus rights. To the extent they provide any alternative at all, it is a dangerous and unworkable one.

The ALDF posit that all animals that are protected by anti-cruelty statutes should be considered “persons” for habeas corpus purposes. *See*, ALDF *amici* brief at p. 8. (“[T]his Court should consider that animals have legal rights – and therefore also qualify as legal persons – with respect to this state’s animal cruelty statute. *See* N.Y. Agric. & Mkts. Law 353”). Since

virtually all animals qualify for such protection, the functional result of this position is that, under the ALDF analysis, all animals may seek habeas corpus relief. Even if this made any sense in theory, the inability to limit habeas corpus proceedings to something less than the animal kingdom-wide applicant pool is so unwieldy as to render it an impossible standard for this or any other court to apply.

The Minter *amici* take another tack: they do not even pretend to provide this Court with any sort of guidance as to how to determine which animals will have habeas corpus rights under a rule this Court might create, acknowledging that they “do not have all the answers.” Minter *amici* brief, at p. 6. But that confession is not a justification for leaving the Court in the dark about what standards the Court should apply if it is going to expand the definition of “person” for habeas corpus purposes by judicial fiat. Instead, they plead with the court to “take seriously” the NRP’s claim for Happy’s transfer, Minter *amici* brief, at p. 4, as if the lower courts failed to do so, and suggest that failing to grant Happy access to habeas corpus rights now will signal that this Court also will not have taken these issues seriously. Such a claim, whatever the outcome of this case, deserves no response.

While ALDF and Minter *amici* protest the fact that the law places special value on human-life, Singer *amici* illustrate the dystopian consequences

of discarding “humanity” as the sole qualification for asserting habeas corpus rights. They offer instead a “consequentialist” math equation: “the moral value of each of these outcomes is equal to the total value of the benefits to everyone who is benefitted in that outcome minus the total disvalue of the harms to everyone who is harmed in that outcome. The right action is the one whose outcome has the greatest moral value.” Singer *amici* brief at p. 14.

Assuming the validity of an algorithm to decide how much space elephants should have, this would first require every court to assign a “moral value” to every animal-applicant’s current residence, and to the locale proposed by whoever happens to claim standing on its behalf. Although *amici* conclude that the balance of moral value in Happy’s case favors the sanctuary, they do so based upon an affidavit that does not even address Happy’s current circumstances.<sup>6</sup> More importantly, the Singer *amici* provide no guidance as to what criteria courts should apply in order to make such judgments if their proposed academic construct were to be applied in courtrooms across this state.

Second, this sterile calculus for who can assert rights is a literal recipe for disaster. The Singer *amici* allege that there is a danger in adopting the “all human beings” standard for habeas corpus relief, (e.g., Singer *amici*

---

<sup>6</sup> See, footnote 4, *supra*, at p. 3.

brief at p. 24, n.36), but the real danger lies in *amici's* proposal to de-value humanity. Professor Singer makes clear where his “moral” equation can lead:

When the death of a disabled infant will lead to the birth of another infant with better prospects of a happy life, the total amount of happiness will be greater if the disabled infant is killed.

Peter Singer, *Practical Ethics*, Cambridge Univ. Press 1979, p. 134. This is precisely the danger that yet another *amicus* author foreshadowed as a consequence of Singer’s and NRP’s dystopian view of who should count as a “person.” As Professor Lawrence Tribe said, “I needn’t spell it out, but the consequences are horrific and reminiscent of slavery and the holocaust.” L. Tribe, *Ten Lessons*, 7 Animal L. 1, 7 (2000).

**D. The three *amici* ignore the fact that Happy is protected by a myriad of effective anti-animal cruelty statutes.**

While the ALDF *amici* look to animal cruelty statutes as the source of habeas corpus rights for Happy (and all other animals), all three *amici* also dismiss these statutory protections as ineffective. Their position seems to be that, because these statutory protections have not brought about the outcome these *amici* seek, animals have no genuine protections other than habeas corpus rights. Such circular reasoning both unconvincing and factually inaccurate.

Contrary to the contentions of *amici*, there are effective, multilayered statutory protections for animals, and for elephants in particular.

Federally, these protections can be found, among other places, in the African Elephant Conservation Act, the Endangered Species Act, and the Animal Welfare Act.<sup>7</sup>

New York State has its own set of such elephant-specific rules and regulations. *See, e.g.*, NY Agri & Mkts, § 380. *See also*, N.Y. Env'tl. Conserv. L. § 11-0535-a(2). This latter legislation, known as the “State Ivory Law,” imposes criminal penalties for trading in ivory, including ivory from both Asian and African elephants. Moreover, it makes illegal even to display of ivory-containing products. A recent federal court decision upheld the constitutionality of this law against a claim that the law violated the First Amendment rights of dealers in such items. *See Art and Antique Dealers League of America, Inc. v. Seggos*, 523 F.Supp.3d 641 (S.D.N.Y. 2021). And while ALDF *amicus* derides the Wildlife Conservation Society (“WCS”) in its brief with accusations of animal cruelty—without evidence—WCS itself acted on its mission to protect wildlife by intervening in that lawsuit in support of the anti-poaching law. *Id.* at p. 644. That case, and the statutory scheme on which it was based, is an example of effective enforcement of an existing law to protect

---

<sup>7</sup> The African Elephant Conservation Act (16 U.S.C. §4201-4246); the Endangered Species Act (16 U.S. Code § 1531 *et seq.*; and 50 CFR §17.11(h)); The Animal Welfare Act, 7 U.S.C. §§ 2131 *et seq.*

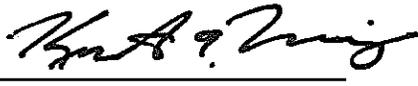
elephants, one that the three *amici* have failed to account for or intentionally ignored.

### CONCLUSION

The three *amici* make the same argument that NRP has promoted throughout this litigation: Happy the Elephant leads a deprived existence based on only the say-so of a single NRP expert, Dr. Joyce Poole, who neither laid hands on, or even directly observed, NRP's "client." The only solution, they claim, is to upend decades if not centuries of habeas corpus jurisprudence and enlarge the concept of "persons" entitled to habeas corpus relief to include animals. They do so without providing the court with any reasonable, coherent criteria by which to evaluate which animals are entitled to this extraordinary relief. To the extent that they want to give all animals this right, this outcome is clearly unworkable. To the extent that they argue that only the smartest, most autonomous, most "human-like" among the animals deserve this right, they fail to acknowledge what that analysis could mean for humans in need of this important right and the slippery path it creates. For these reasons and those more fully articulated in Respondent's primary brief, the best place to fully evaluate and assess the various interests of the multitude of stakeholders in the outcome of this issue is with the legislature.

Dated: Buffalo, New York  
May 6, 2022

PHILLIPS LYTLE 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

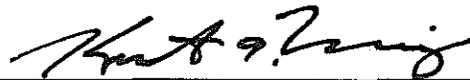
**CERTIFICATION OF COMPLIANCE  
WITH PRINTING SPECIFICATIONS**

I hereby certify pursuant to 22 N.Y.C.R.R. § 500.13(c) that the foregoing brief was prepared on a computer using Microsoft Word.

A proportionally spaced typeface was used, as follows:

Name of typeface: Calisto MT  
Point size: 14 point in body, 12 point in footnotes  
Line spacing: Double-spaced

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the corporate disclosure, counter-statement of questions presented, table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k), is 2,773.



---

Kenneth A. Manning

STATE OF NEW YORK )  
 )  
COUNTY OF MONROE )

ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS DELIVERY**

I, **Jeremy Slyck**, of Rochester, New York, 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.

**On** May 6, 2022

deponent served the within: **BRIEF OF RESPONDENTS-RESPONDENTS IN RESPONSE TO *AMICI CURIAE* ANIMAL LEGAL DEFENSE FUND, SHANNON MINTER, EVAN WOLFSON, PETER SINGER, GARY COMSTOCK, and ADAM LERNER**

**Upon:**

JAY SHOOSTER, ESQ.  
RICHMAN LAW & POLICY  
*Attorney for Amici Curiae  
Peter Singer, Gary Comstock and  
Adam Lerner*  
One Bridge Street, Suite 83  
Irvington, New York 10533  
Tel.: (212) 687-8291

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

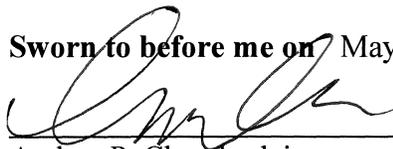
MARC GRECO, ESQ.  
FENWICK & WEST LLP  
*Attorneys for Amici Curiae  
Animal Legal Defense Fund*  
902 Broadway, Suite 14  
New York, NY 10010

STEVEN M. WISE, ESQ.  
NONHUMAN RIGHTS PROJECT, INC.  
*Attorneys for Petitioner-Appellant*  
5195 NW 112th Terrace  
Coral Springs, Florida 33076  
Tel.: (954) 648-9864

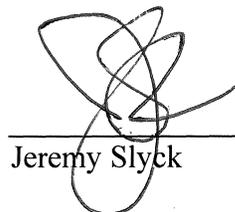
DAVID M. LINDSEY, ESQ.  
CHAFFETZ LINDSEY LLP  
*Attorney for Amici Curiae  
Shannon Minter and Evan Wolfson*  
1700 Broadway, 33rd Floor  
New York, New York 10019  
Tel.: (212) 257-6966

the address(es) designated by said attorney(s) for that purpose by depositing **three (3)** true copies of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on** May 6, 2022



Andrea P. Chamberlain  
Notary Public, State of New York  
No. 01CH6346502  
Qualified in Monroe County  
Commission Expires August 15, 2024



Jeremy Slyck