APL 2021-00087
Bronx County Clerk's Index No. 260441/19
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.

BRIEF *AMICUS CURIAE* OF NEW YORK FARM BUREAU, ET AL., IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

Paul Beard II
(*Pro Hac Vice*, *Admission Pending*)
FISHERBROYLES LLP
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
Tel.: 818-216-3988
Email: paul.beard@fisherbroyles.com

Attorneys for Amici Curiae
New York Farm Bureau, et al.

Date Completed: October 29, 2021

STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Amici Curiae state that, as of the date of the completion of this brief, there is no related litigation pending before any court.

STATEMENT OF AMICI CURIAE

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, Amici state that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. No party or party's counsel contributed money that was intended to fund preparation of submission of the brief. And no person or entity, other than Amici, their members, and their counsel, contributed money that was intended to fund preparation of submission of the brief.

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are prominent state and regional agricultural organizations whose members stand to be significantly affected by the outcome of this appeal. They are united in respectfully urging the Court to reject the call of Petitioner-Appellant The Nonhuman Rights Project, Inc. ("NRP") to treat nonhuman animals as "persons" and thereby grant such animals habeas corpus relief. Granting the relief that NRP seeks would upend entire industries dedicated to providing this State and millions across the country with animal products, including food.

Amicus New York Farm Bureau ("NYFB") began with the mission of solving problems for Farmers and rural New Yorkers. In 1911, times were tough in Broome County, New York. Farmers did not have money to spend, Binghamton merchants were feeling the loss, and the Lackawanna Railroad saw lower freight shipments to the area. So the local chamber of commerce and the railroad worked with the United States Department of Agriculture and the New York State College of Agriculture to establish the first county Farm Bureau, the building block of the Farm Bureau organization.

The organization's original mission was to improve the income of farmers, and, by extension, the economy of the region. Today, NYFB's mission statement is: "Supporting today's agricultural needs and creating member opportunities for tomorrow through advocacy and education." Since its founding, NYFB has been in the business of providing the resources that support and enrich the rural way of life. Through the efforts of the organization, farmers have learned to work together to promote more efficient production, better marketing, fair legislation, and a safe

food supply and work environment. NYFB plays an important role among the six million members from the United States and Puerto Rico, as represented by the American Farm Bureau Federation—the largest voluntary general farm organization in the world. NYFB's current membership stands in excess of 14,000 members.

Amicus Northeast Dairy Producers Association ("NEDPA") is an organization of dairy producers and industry partners committed to an economically viable, consumer-conscious dairy industry dedicated to the care and well-being of the region's communities, environment, employees and cows. NEDPA was established in 1993 to give Northeast dairy producers a united voice in the formulation of environmental regulations impacting its members. Environmental and permitting regulations governing Concentrated Animal Feeding Operations ("CAFOs") continue to be a priority for NEDPA. However, the organization has broadened its focus to include other important issues that have emerged on the dairy horizon, as well as helping member farms with specific regulatory and compliance challenges on their own farms. Animal care is a priority for member farms. NEDPA member farms range in size from 200 cows to over 6,000. In total, they represent over 216,000 cows, and a major economic impact for the region and its food supply.

Amicus Northeast Agribusiness and Feed Alliance ("NEAFA") was founded in 2004 as a result of a merger between the Eastern Federation of Feed Merchants and the New England Feed and Grain Association. The organization serves the animal agriculture industry throughout New England and New York. NEAFA's

membership is comprised of the full spectrum of agribusiness companies and organizations including feed manufacturers, dealers, and feed supplier companies; agricultural lenders; agronomic services organizations; animal nutritionists; and animal scientists. NEAFA's mission is to support and grow a sustainable agribusiness industry in the Northeast.

II. SUMMARY OF THE ARGUMENT

NRP's claim that nonhuman animals are "persons" entitled to habeas protection raises serious policy and constitutional problems.

First, if judicially extended to allow the "liberation" of an elephant, the writ of habeas corpus would destroy the State's agricultural industry, which feeds people in New York and across the country. That is because the *theory* underlying NRP's claim, if accepted, would extend habeas protection to animals other than elephants. Indeed, extending "personhood" and the legal rights associated therewith to all nonhuman animals appears to be NRP's express goal.

NRP seeks to "liberate" *all* nonhuman animals who show capacity for self-awareness and autonomy. Recent scientific research, including by scientists who have supported NRP's habeas petitions in the past, suggests that pigs, chickens, cows, and other farm animals have more self-awareness and autonomy than previously believed. Thus, adopting the flexible test for "personhood" that NRP proposes would open the door to "liberating" all kinds of nonhuman animals, including farm animals, through the writ of habeas corpus. As Respondents' brief recognizes, "[c]hanging this most fundamental of legal concepts has implications not just for zoos, but for . . . farmers." *See* Resp. Br. at 7. Pigs, cows, chicken, and

other farm animals would be swept into NRP's new-fangled theory of "personhood." NRP's own statements and lawsuits show that such a threat to New York livestock farmers and their suppliers is real. Enabling animal rights groups to bring habeas petitions for the release of nonhuman animals would have a disastrous economic, social, and emotional impact on Amici, their members, and the general population who rely on animal products for their sustenance.

Second, under New York law, nonhuman animals are chattel subject to ownership. Agricultural operators, among others, have constitutionally protected property rights in their chattel, including their animals. Further, many agricultural concerns operate on the basis of contractual arrangements for the purchase and sale of animals and their products. A judicial declaration that such chattel are "persons" entitled to habeas corpus rights would threaten an unconstitutional judicial taking or seizure of private property, and would nullify a maze of private contracts, as strictly protected by the Federal Constitution. The wisdom of avoiding such thorny constitutional issues militates against NRP's appeal.

The writ of habeas corpus has a long and storied place in the evolution of human rights, and it is in the realm of *human* rights that the writ should remain. The extraordinary policy and constitutional implications of extending the writ to nonhuman animals make NRP's proposal a question more appropriate for the people's representatives in the State Legislature to resolve. Courts are not equipped to resolve such a political—and fundamentally philosophical—question. The Court should affirm the lower court's decision.

III. ARGUMENT

A. Extending the Writ of Habeas Corpus to Nonhuman Animals Will Devastate the Agricultural Industry

NRP's stated mission is to secure rights for nonhuman animals. *See* Nonhuman Rights Project, "Frequently Asked Questions," https://www.nonhumanrights.org/frequently-asked-questions/ (last visited on October 29, 2021). Currently, NRP's "clients" include "chimpanzees and elephants," but its list of "potential clients" is much broader:

> [O]ur potential clients include individual great apes, elephants, dolphins, and whales living in captivity across the US. They are members of species for whom there is ample, robust scientific evidence of self-awareness and autonomy—qualities the common law already purports to value where humans are concerned. We view these qualities as sufficient, but not necessary, for recognition of common law personhood and fundamental rights. In other words, self-awareness and autonomy are a starting point for our long-term litigation campaign: the most effective starting point, in our view.

Id.; *see also* Nonhuman Rights Project, "Litigation," https://www.nonhumanrights.org/litigation/ (last visited on October 29, 2021).

NRP's "animal liberation" mission does not end with apes, pachyderms, and cetaceans:

> [G]reat apes, elephants, dolphins, and whales surely aren't the only nonhuman animals whom scientists will be able to demonstrate are self-aware and autonomous; and while self-awareness and autonomy are sufficient for recognition of rights, they're not necessary, either. It's certainly possible that powerful legal arguments can be made based on other criteria, though this is not something we're working on at the moment. We'll continue to follow the science and the law wherever they

> lead us and develop and refine our arguments accordingly.

Id.

In short, NRP's stated goal is to "liberate" all nonhuman animals that exhibit any level of self-awareness or autonomy, and its habeas petitions concerning chimpanzees and elephants are only the start.

Scientific research has revealed evidence that many animals possess some level of what NRP considers "self-awareness" and "autonomy"—*i.e.*, the "capacity to recognize yourself as an individual separate from the environment and other individuals" and "the capacity to make choices about how to spend your days and live your life." Nonhuman Rights Project, "Frequently Asked Questions," *supra*.

Farm animals have recently been the subject of self-awareness testing. One commonly used method for identifying self-awareness is the "mirror test" or MSR. *See* NRP Br. at 7; Gordon G. Gallup, Jr., "Chimpanzees: Self Recognition," *Science*, Vol. 167, Issue 3914, pp. 86-87 (Jan. 2, 1970). There is evidence to suggest that horses may be capable of mirror self-recognition. *See* Paolo Baragli, Elisa Demuru, Chiara Scopa, Elisabetta Palagi, "Are horses capable of mirror self-recognition? A pilot study," *PLoS ONE* 12(5), pp. 1-2 (May 16, 2017). Findings from other studies show that horses can solve complex problems, use long-term memory, read facial cues, communicate emotions, and reconcile conflicts. *Id.* These tests "indicate that horses, like other highly cognitive social animals, show some degree of awareness, which implies the ability to assess and deduce the significance of a situation according to both the social environment and the self." *Id.* Does that mean that "Mr. Ed" can file a habeas petition?

Scientists have found evidence that pigs may regard themselves in a mirror and can use a mirror to locate food hidden behind a barrier. *See* Donald M. Broom, Hilana Sena, & Kiera L. Moynihan, "Pigs learn what a mirror image represents and use it to obtain information," *Animal Behavior,* Vol. 78, Issue 5, pp. 1037-41 (Nov. 2009). A recent scientific paper concluded that "pigs are cognitively complex and share many traits with animals [that] we consider intelligent." Lori Marino & Christina M. Colvin, "Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in Sus domesticus," *International Journal of Comparative Psychology,* Vol. 28 (2015). It turns out that, like Napoleon in *Animal Farm*, the eponymous *Babe*, and Wilbur in *Charlotte's Web*, pigs are in fact quite intelligent and highly social animals.

Domesticated chickens, some argue, "are just as cognitively, emotionally and socially complex as most other birds and mammals in many areas." *See* Lori Marino, "Thinking chickens: a review of cognition, emotion, and behavior in the domestic chicken," *Animal Cognition*, Vol. 20, pp. 127-47 (2017). Chickens demonstrate some level of self-awareness: both self-control and self-assessment. *See id.* And, as everyone knows, chickens have complex social hierarchies—hence the term "pecking order." *See id.* at 134. Even cows, as some researchers have posited, possess "more complex cognitive, emotional and social characteristics" than previously thought. *See* Lori Marino & Kristin Allen, "The Psychology of Cows," *Animal Behavior and Cognition*, Vol. 4(4), p. 474 (2017).

Future research doubtlessly will reveal further evidence from which animal-rights groups like NRP could argue that farm animals are, at some level, self-aware

and autonomous and thus entitled to habeas relief. But those characteristics alone should not—and cannot—be legally sufficient for a Court to decree nonhuman animals to be "persons" entitled to historically and uniquely *human* protections. If nonhuman animals are deemed by judicial decree to be "persons," it will have a devastating impact on the agricultural industry.

More than twenty percent (20%) of the New York's land area is farmland. *See* Office of the New York State Comptroller, A Profile of Agriculture in New York State, at 1 (Aug. 2019).[1] As of 2017, New York had over 33,000 farms, covering nearly seven million acres of the state. *See* United States Department of Agriculture ("USDA"), 2017 Census of Agriculture, State Profile, New York.[2] Of those farms, ninety-six percent (96%) are family owned. *Id.* More than a quarter of New York's farms provide jobs for farm laborers. *Id.* The USDA's 2017 Agriculture Census reports those farms employ over 55,000 people, around 26,000 of whom work in dairy and milk production. New York farms likely employ tens of thousands of migrant workers as well.

The dairy industry in New York is its largest agricultural sector, with around 4,000 dairy farms that produce over 15 billion pounds of milk annually. *See* New York State Department of Agriculture and Markets, Division of Milk Control and

[1] Available at https://www.osc.state.ny.us/files/reports/special-topics/pdf/agriculture-report-2019.pdf (last visited on October 29, 2021).
[2] Available at https://www.nass.usda.gov/Publications/AgCensus/2017/Online_Resources/County_Profiles/New_York/cp99036.pdf (last visited on October 29, 2021).

Dairy Services, 2019 New York State Dairy Statistics Report, at ii (2019).[3] It is no surprise, then, that New York consistently ranks at the top of all states for the production and sale of dairy products. *Id.* (New York ranked 3rd cow milk sales in 2017); *see also* USDA, National Agricultural Statistics Service, 2019 Northeastern Agriculture Rankings (in 2019, New York ranked fourth in milk production, third in butter production, and first in yogurt production).

New York farms are profitable, providing a livelihood for countless residents. *See* USDA, 2017 Census of Agriculture, *supra*. The products they sold in 2017 alone had a market value of over $5 billion. *See id.* The vast majority of those sales (61%) was generated by livestock, poultry, and related products. *See id*. In addition, a large share of the state's crop sales goes to feeding the more than 8 million chickens, nearly 1 million cows, 50,000 hogs and pigs, and other animals that are raised for food and byproducts. *See id.* New York ranks fourth among U.S. states in producing corn for silage and eventual feed. *See* USDA, 2019 Northeastern Agriculture Rankings, *supra.*

New York farms do not just feed New Yorkers and Americans; they feed the world. The USDA estimates that more than $1 billion, over twenty-seven percent (27%), of New York's total receipts from agricultural products were exported abroad in 2017. *See* A Profile of Agriculture in New York State, *supra*, at 11. New York's top exports include dairy, beef and veal, other livestock products, and feeds. *See id.* at 11-12. Overall, "[f]arming remains a critically important industry

[3] Available at https://agriculture.ny.gov/system/files/documents/2020/09/2019dairystatisticsannualsummary.pdf

for New York." *Id.* at 12. Farm animals, in particular, are essential to New York's economy.

There are some scientists who argue that farm animals should be legally recognized as persons. *See* Virginia Morell, "Lori Marino: Leader of a Revolution in How We Perceive Animals," National Geographic, Innovators Project (May 29, 2014).[4] Lori Marino, who published the studies of farm animal psychology cited above, supported NRP's push to accord habeas corpus rights to a chimpanzee in another New York court action. *See id.* Armed with Marino's research discussed above, and future developments in biopsychology, it is foreseeable that NRP and similar groups will in the future pursue habeas petitions to "liberate" livestock. This is not a stretch, as NRP's manifesto shows. Farm animals not only are consumed, but also are exhibited across the state as part of fairs and agritourism, just like elephants in a zoo. If an elephant can be considered a "person" under the law, why not a pig, a cow, or a chicken? *See* NRP Br. at 27 (arguing that "captivity is a terrible existence for any intelligent, self-aware species").

After all, if a nonhuman animal is permitted to sue for its release into the wild or to a sanctuary, where would the line on the "continuum" be drawn? *See id.* at 24. How does one decide what animals have "intrinsic value?" *Id.* at 32. Would courts hold a "Scopes Monkey Trial" for every nonhuman animal to determine if it is an "autonomous being[] with advanced cognitive abilities?" *Id.* at 38. Or would "personhood" depend on the individual animal, such that every cow or pig would

[4] Available at https://www.nationalgeographic.com/animals/article/140528-lori-marino-dolphins-animals-personhood-blackfish-taiji-science-world (last visited on October 29, 2021).

receive its own day in court like the elephant here? Would every farmer or agricultural operator have to spend exorbitant funds defending against a barrage of lawsuits seeking to "liberate" every animal in its stock? Would this Court have to revisit the concept of "personhood" every time a scientist discovers new evidence of a chicken's emotions or a pig's intelligence? NRP's lawsuit raises all of these mind-boggling questions, yet offers no satisfying answers.

The agricultural industry should not be exposed to the wave of habeas petitions that NRP invites and that would swamp New York courts. Worse, if any of those habeas petitions succeed in securing the release or transfer of livestock, the livelihoods of agriculturalists and their suppliers would be destroyed. The downstream effects also would be serious. If NRP has its way, the livestock on which people in New York, in the United States, and around the world depend for sustenance, would be released from their alleged "imprisonment" and could no longer be raised for food in New York. Yet, the demand for animal products would not evaporate, and New York consumers would have to obtain their beef, eggs, poultry, and dairy products from Pennsylvania, Texas, and abroad. New York and its citizens would suffer from a double whammy as a result: decreased income and tax revenue from agricultural activity, and increased prices resulting from the need to import food, feed, and other animal products.

It is a slippery slope, to be sure. But make no mistake: As shown by its ambiguous definition of "personhood," that is precisely the kind of slope on which NRP wants to put this Court—and New York's economy. Amici urge the Court to reject NRP's proposal that nonhuman animals be granted the human right to

petition for a writ of habeas corpus for these important public-policy reasons.

B. Extending the Writ of Habeas Corpus to Nonhuman Animals Raises Serious Constitutional Questions

` If successful, NRP's claim that certain human animals are "persons" entitled to the writ of habeas corpus would implicate *actual* persons' federal constitutional rights. Among those are the right against unlawful takings, seizures, and impairment of contracts.

1. A Judicial Declaration That Nonhuman Animals Are "Persons" Subject to "Liberation" May Result in a Judicial Taking

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property unless (a) it is for a "public use" and (b) "just compensation" is paid. U.S. Const. amend. V, XIV (making Takings Clause applicable to state and local governments); *see also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003) (underscoring the Takings Clause's two separate requirements). The Takings Clause was enshrined in the Constitution so that the government would not "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

If the government "fails to meet the 'public use' requirement," then "that is the end of the inquiry," and "[n]o amount of compensation can authorize such action." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005). A government taking of property for a private use or purpose is barred. As the United States

Supreme Court has explained: "it has long been accepted that the sovereign" (*i.e.*, the government) "may not take the property of A for the sole purpose of transferring it to B." *Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *Calder v. Bull*, 3 U.S. 386 (1798). (holding that "[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B")). "Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478. If a taking is designed simply "to benefit a particular class of identifiable individuals," then the taking is not for a "public use" consistent with the Public Use Clause and is therefore unconstitutional. *Id.* Significantly, takings with only an "incidental" public benefit "are forbidden by the Public Use Clause." *Id.* at 490 (Kennedy, J., concurring); *see also Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982) (holding that a "taking" under the Takings Clause occurs even when, under the authority of law, "a stranger directly invades and occupies the owner's property" and does not pass to or through the government's hands).

NRP's request that the Court confer habeas protection on certain nonhuman animals on the basis of their alleged "personhood" threatens to obliterate the common law principle, long recognized by the United States Supreme Court and this Court, that *domitae natura*e or *manseuatae naturae—i.e.*, domesticated, tame or captured wild animals—are chattel owned by humans. *See Sentell v. New Orleans & Carrollton R. Co.*, 166 U.S. 698 (1897); *Pierson v. Post*, 3 Cai. R. 175, 177, 1805 N.Y. LEXIS 311 (N.Y. 1805), *superseded by statute on other grounds*

(same); *Van Leuven v. Lyke*, 1 N.Y. 515 (1848) (same); *People v. Sandgren*, 302 N.Y. 331 (1951) (same). This distinction also is recognized in the State Legislature's regulation of "farm animals" that are owned by "human beings." *See* N.Y. Agric. & Mkts. Law § 350. Applying the concept of a *human* right of liberty to nonhuman animals would trump all of those laws, and permit organizations like NRP to bring lawsuits to "free" farm animals that Amici's members own and raise.

The consequence would be a gross interference in owners' property rights in their animals, made possible only by a judicial decision. As a plurality of the United States Supreme Court has held, courts, just as much as other government actors, are capable of effecting a taking of private property. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 715 (2010) (plurality). The plurality in that case made clear that "the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking"—even if it is the *judiciary*. In concurrence, two more Justices—Justices Kennedy and Sotomayor—reached essentially the same conclusion by a different constitutional route:

> The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is arbitrary or irrational under the Due Process Clause. Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat.

Id. at 737 (JJ. Kennedy & Sotomayor, concurring) (internal citations and quotation marks omitted).

A judicial decision transforming certain animal chattels into "persons" with

liberty rights would effectively strip owners of what the law has long declared to be their private property. And it would do so for no apparent public use or purpose, and without compensation. As Respondents point out, the purpose of a habeas petition is to release a prisoner, but NRP is asking for an elephant to be transferred from one private party (a zoo) to another (a sanctuary). And there would be no mechanism for compensating the zoo for the loss of its elephant. The Takings Clause bars private such uncompensated private takings. *Kelo*, 545 U.S. at 477; *Calder*, 3 U.S. 386.

2. A Judicial Declaration That Nonhuman Animals Are "Persons" Subject to "Liberation" May Result in a Judicial Seizure

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see id.*, amend. XIV. The Fourth Amendment's protections against unreasonable seizures extend to "domestic animals," which are "effects." *See, e.g., Viilo v. Eyre*, 547 F.3d 707, 711 (7th Cir. 2008); *Altman v. City of High Point*, 330 F.3d 194, 204 (4th Cir. 2003) (dogs are "effects"). A seizure of property occurs "when there is some meaningful interference with an individual's possessory interests in that property" and may be found "even though no search . . . has taken place." *Soldal v. Cook County*, 506 U.S. 56, 61, 68 (1992). Whether a seizure is "reasonable" depends "on all of the circumstances surrounding the . . . seizure and the nature of the . . . seizure itself." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). This test requires "balancing [the] intrusion on the individual's Fourth Amendment interests

against [the] promotion of legitimate governmental interests." *Id.*

A judicial decree that nonhuman animals are "persons" with liberty rights would substantially interfere with their owners' possessory rights. In fact, the very purpose behind the writ as proposed by NRP is to *dispossess* an owner of his animal. While the animal itself may, according to NRP, have an interest in its own liberation, there is no readily apparent, legitimate government interest to support a judicial decree effectuating such "liberation." Even if there were a legitimate government interest in freeing animals from confinement, that interest would not be advanced, as the only result of applying the writ to nonhuman animals like the elephant here is to effectuate its transfer from one confined space to another.

Like the Takings Clause, the Fourth Amendment prohibits an act irrespective of the government actor perpetrating the seizure. Indeed, like the Takings Clause, the Fourth Amendment does not specify that only one kind of government actor is prohibited from engaging in the unconstitutional act. *Stop the Beach,* 560 U.S. at 713-14 (plurality). As the *Stop the Beach* plurality explained:

> The Takings Clause [like the "seizure" clause] is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . . There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat.

The same logic applies to the "seizure" clause of the Fourth Amendment. It applies equally to executive, legislative, and judicial actors. Here, NRP invites the Court to effectuate a judicial seizure of animal chattel, including—ultimately—

Amici's farm animals, which the Constitution plainly prohibits.

3. A Judicial Declaration That Nonhuman Animals Are "Persons" Subject to "Liberation" Implicates the Constitutional Bar Against Impairment of Contracts

The Contracts Clause of the United States Constitution prohibits governments from passing "any . . . Law impairing the Obligation of Contracts." U.S. Const., Art. I, § 10, cl. 1. Contracts Clause violations are actionable under 42 U.S.C. § 1983. *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 887 (9th Cir. 2003) ("The right of a party not to have a State, or a political subdivision thereof, impair its obligations of contract is a right secured by the first article of the United States Constitution. A deprivation of that right may therefore give rise to a cause of action under section 1983."). Whether a law substantially impairs a contractual relationship depends upon "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018).

First, the court will determine whether the law "operate[s] as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822. Second, the court considers "whether the [challenged] law is drawn in an 'appropriate' and 'reasonable' way to

advance 'a significant and legitimate public purpose.'" *Sveen*, 138 S. Ct. at 1822 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-412 (1983)).

Very recently, the Second Circuit Court of Appeals issued a decision systematically reviewing the Supreme Court's Contracts Clause jurisprudence in the context of a challenge to a COVID-19-inspired city law rendering permanently unenforceable personal liability guaranties of commercial lease obligations arising between Marcy 7, 2020 and June 30, 2021. *Melendez v. City of New York*, 2021 U.S. App. LEXIS 32327, **3-4 (2d Cir. Oct. 28, 2021). In finding the law implicated the Contracts Clause, the court explained:

> "[T]he Clause continues to afford individuals the right to use contracts to order their affairs and to rely thereon except as warranted by a significant and legitimate public purpose pursued through reasonable and appropriate means. That standard is more demanding than the rational basis review that applies when legislation is challenged under the Due Process Clause.

Id. at **76-77.

Strictly construed, the Contracts Clause does not appear to reach *judicial* decisions that impair contracts, but only legislative acts—*i.e.*, "law[s]." That has been the historic interpretation of the Contracts Clause. *See, e.g., Fleming v. Fleming*, 264 U.S. 29, 31 (1924) (holding that "a judicial impairment of a contract obligation was not within § 10, Article I, of the Constitution, since the inhibition was directed only against impairment by legislation"). However, *Fleming* was decided in 1924, before the United States Supreme Court began interpreting constitutional restrictions as applying to all branches of government. Consider, for

example the First Amendment, which expressly directs its prohibition at "Congress." By the 1940s, the Court began interpreting the First Amendment's prohibition to *judicial* acts. *See, e.g., Bridges v. California*, 314 U.S. 252 (1941) (applying First Amendment protections against judicial contempt citations); *see also New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964) (holding that the First Amendment prohibits common law actions of defamation (which are not congressional acts) against public officials unless "actual malice" is proved").

Fleming also came down long before courts began (what many constitutional scholars deem to be) legislating from the bench. Indeed, cases like *Bridges* and *Sullivan* are based on the principle that "where judicial action is a close substitute for legislation, a prohibition against the latter must reach the former." Richard A. Epstein, "Toward a Revitalization of the Contract Clause," 51 U. Chi. L. Rev. 703, 748 (1984). As constitutional scholar Richard Epstein has observed, "[i]n light of the behavior of modern courts, for whom the nullification of contracts is a commonplace event, the abuses so feared [in the framing of the Contracts Clause] are not limited to legislation." *Id.*

At bottom, NRP asks this Court to rewrite state statutory law to transform certain nonhuman animals into "persons" entitled to a writ of habeas corpus—and, ultimately, "liberation" from their owners. Rewriting state law is a quintessentially legislative act. And, as a quasi-legislative act, it is susceptible to the prohibition contained in the Contracts Clause.

A decree declaring certain nonhuman animals to be "persons" entitled to habeas protection would operate a substantial impairment of countless contractual

relationships. Amici's members, who operate in diverse areas of the agricultural industry, run their businesses on the basis of agreements that presuppose their rights to acquire, raise, and maintain animals. They have agreements for the development and delivery of animal products, such as meat and dairy. If the Court entitles farm animals—the linchpin of all those contracts—to "liberation" by way of a writ of habeas corpus, then the contracts themselves are effectively nullified. *Sveen*, 138 S. Ct. at 1822 (discussing substantial impairment prong of the Contracts Clause test).

Further, a judicial decree of the kind sought by NRP could not possibly be appropriately and reasonably "drawn" to advance a "significant and legitimate public purpose." *Id.* at 1822. The exact opposite is true. Such a decree would upend an entire industry, and leave many without a reliable and affordable source of animal food products. The public interest would not be served by NRP's demand.

IV. CONCLUSION

For the above stated reasons, and those stated in Respondents' brief, the Court should reject NRP's call to declare any nonhuman animal a "person" entitled to the writ of habeas corpus. The decision below should be affirmed.

Dated: October 29, 2021 FISHERBROYLES LLP

By:_____
Paul J. Beard II
Attorneys for Amici Curiae
New York Farm Bureau, et al.

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 Word.

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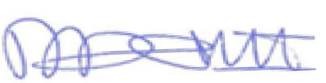

By:_____

Paul J. Beard II
FISHERBROYLE LLP
4470 W. Sunset Blvd.
Suite 93165
Los Angeles, CA 90027
818-216-3988