No. 22-282

IN THE

Supreme Court of the United States

RANDALL PAVLOCK, *et al.*,

Petitioners,

v.

ERIC J. HOLCOMB, GOVERNOR OF INDIANA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* PROTECT THE HARVEST IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a "judicial taking" under the Fifth and Fourteenth Amendments is a cognizable cause of action.

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INTEREST OF *AMICUS CURIAE*[1]

Protect the Harvest ("PTH") is a nonprofit organization that promotes agriculture, animal welfare, animal ownership, and favorable food security policies in the United States. As part of its mission, PTH educates the public about animal extremists and anti-agriculture groups working to promote laws, regulations, and misinformation that negatively impact the agriculture industry. PTH has a history of filing *amicus* briefs in cases that affect animal-related legal issues, including in this Court in *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019) and in *National Pork Producers Council v. Ross*, No. 21-468 (2022).

PTH is a staunch defender of the private property rights that animal owners possess, but which are under attack by animal rights activists seeking to change, by judicial fiat, well-established law that classifies animals as personal property. Specifically, these groups have relentlessly requested state courts to reclassify certain animals as "nonhuman persons" subject to being "freed" under common law habeas corpus. Should these groups succeed in their endeavors, the only recourse left to

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1. Pursuant to Supreme Court Rule 37.2, all parties have received notice of *amicus's* intent to file and have consented to the filing of this brief.

Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

animal owners will be to challenge such actions as judicial takings.

Similarly, activists argue that the "Public Trust Doctrine" should be expanded by the judiciary as another vehicle to dispossess owners of their private property rights over animals. To combat such improvident judicial action, owners will also need to be able to succeed under a valid cause of action for judicial takings. For these reasons, PTH supports Petitioners' request to have this Court clarify that takings claims against the judiciary are appropriate.

SUMMARY OF THE ARGUMENT

The judicial takings theory has equal application to unconstitutional takings of personal property as it does for real property. Common law has long regarded animals as personal property of their owners, and many states have codified this doctrine. However, animal rights activists seek to disrupt this well-established rule of law by requesting state courts to bestow "legal personhood" on lawfully-owned animals and grant them "freedom" via the common law writ of habeas corpus. Such action would constitute an unlawful taking of personal property without just compensation if performed by the legislative or executive branches, and should constitute the same if accomplished by the judiciary.

Further, although this Court's precedent dictates that governmental ownership of wild animals is a "19th-century legal fiction," there has been a movement to markedly expand the "Public Trust Doctrine" to usurp ownership rights in privately-held wildlife in favor of the government.

Bereft of a judicial takings cause of action, animal owners are without a potential remedy to defend their historical property rights. Thus, *amicus* respectfully requests that this Court grant Petitioners' writ of certiorari to validate a judicial takings cause of action.

ARGUMENT

I. The Court Should Grant Certiorari To Clarify That A Cause Of Action For Judicial Takings Is Cognizable – Not Only For The Protection Of Owners Of Real Property, Such As Petitioners, But Also For The Owners Of Personal Property, Such As Animal Owners

As Petitioners correctly aver, the judicial takings theory existed long before this Court's four-justice plurality decision in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. 702 (2010), but which has since been questioned. *See generally* Pet. Br. at 14-17. Like the case at bar, many judicial takings claims have historically concerned interests in real property. *Id.* The Court should grant Petitioners' writ of certiorari to clarify the application of a judicial takings cause of action with respect to their real property.

However, the Constitution's Takings Clause applies as much to personal property as it does to real property. *See Horne v. Dep't of Agriculture*, 576 U.S. 350, 358 (2015) (Takings Clause protects "'private property' without any distinction between different types."). Animals have always been legally treated as personal property. Nonetheless, activists are attempting to uproot well-

established property law and have courts consider animals as "nonhuman persons." Such judicial action amounts to an unlawful take. This Court, therefore, should settle the issue left open in *Stop the Beach* and confirm the existence of a judicial takings claim to allow animal owners to protect their personal property rights.

A. Well-Established Animal Ownership Rights Are Currently Under Siege

For nearly a decade, the Nonhuman Rights Project ("NhRP") has brought lawsuits seeking to apply the common law writ of habeas corpus to lawfully-owned animals. *See, e.g., Nonhuman Rights Project, Inc. v. Breheny,* 2022 WL 2122141 (N.Y. June 14, 2022); *Rowley v. City of New Bedford*, 99 Mass. App. Ct. 1104 (Mass. App. Ct. 2020), *review denied* 486 Mass. 1115 (Mass. 2021); *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 192 Conn. App. 36 (Conn. App. 2019), *cert denied* 333 Conn. 920 (Conn. 2019); *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (N.Y. App. Div. 1st Dep't 2017), *lv denied* 31 N.Y.3d 1054 (N.Y. 2018); *Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334 (N.Y. App. Div. 4th Dep't 2015), *lv denied* 26 N.Y.3d 901 (N.Y. 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (N.Y. App. Div. 3d Dep't 2014), *lv denied* 26 N.Y.3d 902 (N.Y. 2015); *Matter of Matter of Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 (N.Y. App. Div. 2d Dep't 2014). These cases have focused on animals owned by zoos, exhibitors, and research facilities. In nearly every case, NhRP has admitted that the animals at issue were well-kept, free from abuse, and otherwise maintained according

to applicable animal welfare statutes and regulations.[2] Instead, NhRP has repeatedly alleged that these animals are prisoners being held against their will, and has sought judicial declarations to acknowledge these animals as "'legal persons' entitled to fundamental rights, including 'bodily integrity and bodily liberty.'" *Breheny*, 2022 WL 2122141 at *1.[3]

In June 2022, NhRP's claims reached New York State's highest court in a case concerning the Asian elephant "Happy," which has resided at the Bronx Zoo for over forty years. *Breheny*, 2022 WL 2122141 at *8. Protect the Harvest submitted an *amicus* brief on behalf of the Bronx Zoo arguing that application of habeas corpus to "free" Happy would constitute a judicial taking of the Zoo's personal property without just compensation. While acknowledging that animals are undoubtedly more than mere "things," *amicus* argued that the real issue was whether animals constitute "property" under the law, thus prohibiting any potential application of habeas corpus. *See, e.g., People ex rel. Tatra v. McNeill*, 244 N.Y.S.2d 463, 463 (N.Y. App. Div. 2d Dep't 1963) (A "habeas corpus

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2. *See, e.g., Breheny*, 2022 WL 2122141 at *2 ("In seeking habeas relief, petitioner did not dispute that [the animal]'s residence at the Zoo—which is accredited by the Association of Zoos and Aquariums and regulated by the federal Animal Welfare Act—complies with all applicable federal and state statutes and regulations governing elephant care. Further, . . . petitioner did not otherwise allege that [the animal] is subjected to cruel, neglectful, or abusive treatment."). *See also R.W. Commerford and Sons*, 192 Conn.App. at 39; *Lavery*, 124 A.D.3d at 149; *Presti*, 124 A.D.3d at 1335.

3. *See also Rowley*, 99 Mass.App.Ct. at *1; *R.W. Commerford and Sons*, 192 Conn.App. at 44; *Lavery*, 152 A.D.3d at 74.

proceeding . . . cannot seek a release of property. The sole purpose of a habeas corpus proceeding is to inquire into the cause of imprisonment or restraint of the person.").

New York law has long held that animals are personal, private property. *See, e.g., Matter of Ruth H*, 159 A.D.3d 1487, 1490 (App. Div. 4th Dep't 2018) (citing *Mullaly v. People*, 86 N.Y. 365, 368 (1881)); *State of New York v. Trustees of Freeholders and Commonalty of the Town of Southhampton*, 472 N.Y.S.2d 394, 396 (N.Y. App. Div. 2d Dep't 1984) (legally acquired wild animals are held in private ownership) (citing N.Y. ECL 11-0105). Therefore, any order to physically transfer Happy away from the Zoo and out of its possession would constitute a taking, which the Fifth Amendment requires to be for a "public purpose" and for which "just compensation" must be paid. With regard to Happy's case, no public purpose exists. Instead, the court would be unconstitutionally taking the Zoo's personal property for the benefit of another private entity. *See Hawaii Housing Authority v. Midkiff*, 67 U.S. 229, 241 (1984) ("To be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though just compensation be paid.'") (citations omitted). Moreover, even assuming *arguendo* that a "public purpose" existed in this instance, no "just compensation" could be awarded by the court, as only the legislature has the authority to authorize any such compensation. *See Stop the Beach*, 560 U.S. at 723-24 (power to award compensation resides in the legislature, not judiciary).

Although the New York Court of Appeals did not reach the issue of a taking in issuing its 5-2 ruling in favor of

the Zoo, the case is now up for reconsideration. Notably, Chief Judge DiFiore, who delivered the majority opinion for the court, has since resigned, while the two dissenting judges in the case remain. Should the Court of Appeals reverse itself, the only recourse left for the Bronx Zoo would be to seek emergency injunctive relief and then reversal in this Court on the basis of an unconstitutional judicial takings claim.

The Bronx Zoo is not the only entity facing the "freeing" of its lawfully-owned personal property. Fresno Chaffee Zoo in California is facing a similar habeas corpus claim by NhRP, filed in May of this year, with regard to three African elephants. *Nonhuman Rights Project, Inc. v. Fresno's Chaffee Zoo Corp.*, 2022 WL 1394920 (Cal. Super. May 3, 2022) (Petition for a Common Law Writ of Habeas Corpus). Judicial takings is an issue in this case as well in light of California law that has historically regarded domestic animals and wild animals "taken and held in possession" as personal property. *See* Cal. Civ. Code §§ 655 (domestic animals) and 656 (wild animals) (1872). *See also* Cal. Civ. Code § 3340 (concerning wrongful injuries to "animals being subjects of property") (1872).

NhRP has already attempted to take nearly a dozen animals from lawful owners via judicial fiat. To date, their cases have concerned primates and elephants due to their demonstrations of "self-awareness and autonomy"; however, NhRP also publicly states on their website that "these qualities [are] sufficient, but not necessary, for recognition of common law personhood and fundamental rights." *See "Our Work: Litigation – How We Select Our Clients*," Nonhuman Rights Project Website, available at https://www.nonhumanrights.org/litigation/ (last accessed

on October 19, 2022). Rather, in NhRP's estimate [*id.*], these qualities merely form "a starting point for our long-term litigation campaign" – one that will surely include more animals subject to historical ownership rights such as dogs, cattle, and horses.[4] Indeed, all animal owners' personal property rights are threatened without some form of adequate redressability via a judicial takings cause of action.

B. This Court Should Validate A Judicial Takings Cause Of Action To Help Protect Animal Ownership Rights

Advocates for dismissing the *Stop the Beach* plurality – and the concept of judicial takings altogether – argue that "common law courts have the power, without triggering the Takings Clause, to modify legal rules over time 'in light of changed circumstances, increased knowledge, and general logic and experience.'" John D. Echeverria, *Stop the Beach Renourishment: Essay Reflections from Amici Curiae*, 35 Vt. L. Rev. 475, 480 (2010) (quoting *Rogers v. Tennessee*, 532 U.S. 451, 464 (2001)). But there is a "crucial difference between simply applying a law to a new set of circumstances and *changing* the law that has previously been applied to the very circumstances before the court."[5] *Rogers*, 532 U.S. at 471 (J. Scalia dissenting

4. For example, Professor Steven Wise, the founder of NhRP, is on record as promoting personhood rights for dogs, among other animals. *See "Beastly Behavior?,"* The Washington Post (June 5, 2002), available at https://www.washingtonpost.com/archive/lifestyle/2002/06/05/beastly-behavior/63991f5b-2603-4c11-a024-9759a5f2680f/ (last accessed on October 19, 2022).

5. Or as Chief Justice Roberts once remarked during his nomination process, "it's my job to call balls and strikes, and not

opinion) (emphasis added). It is not the role of judges to create law.[6] Rather, that role is indisputably delegated to the legislature.

It is well-established under common law that animals constitute personal property of their owner or keeper. *See* Thomas G. Kelch, *Toward A Non-Property Status For Animals*, 6 N.Y.U. Envt'l L. J. 531, 532 (1997) ("That animals are property and, thus, do not have rights is a concept of ancient lineage that is expressed in our common law."). Moreover, "animals are still property under the law of all fifty states." Bruce A. Wagman *et al.*, Animal Law: Cases and Materials, 6th ed. (2019), at p. 134. Thus, under the context described above, a reviewing court that grants NhRP's petition would need to change not only the historical common law application of habeas corpus, but also the long-standing common – and, often, statutory – law bestowing property rights in privately-held animals. Yet if no cause of action exists for judicial takings, animal owners like the Bronx and Fresno Zoos (among others) will lose their established private property rights without any just compensation.

Uncompensated takings by the legislative or executive branches violate the Fifth Amendment. The same should

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to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearings before the Committee on the Judiciary, United States Senate, 109th Congress, U.S. Government Printing Office, 2005, at 56.

6. As Justice Scalia's dissent in *Rogers* explained: "At the time of the framing, common-law jurists believed (in the words of Sir Francis Bacon) that the judge's 'office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.'" *Id.* (quoting Bacon, Essays, Civil and Moral, in 3 Harvard Classics 130 (C. Eliot ed. 1909) (1625)).

be true for takings by the judiciary given, as noted above, its inability to offer compensation. *See Stop the Beach*, 560 U.S. at 713-14 ("The Takings 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.") and at 723-24 ("The power to effect a compensated taking would . . . reside, where it has always resided, not in the Florida Supreme Court but in the Florida Legislature . . ..").

Animal rights activists like NhRP have been relentless in their pursuit to change common law and upend historical, well-established property rights in legally-owned animals.[7] But "[t]he government may not decline to recognize long-established interests in property as a device to take them." *Hall v. Meisner*, ___ F.4th ___, 2022 WL 7366694 at *1 (6th Cir. 2022) (Kethledge, J.). Because lower courts are unwilling to consider judicial takings claims, *see* Pet. Br. at 20-21, animal owners across the country stand to lose their established property rights in their animals without access to just compensation. For this reason, as well as all those contained in the Petition, this Court should grant certiorari to validate a judicial takings cause of action.

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7. *See, e.g.,* Wagman *et al.*, Animal Law: Cases and Materials, at p. 143 ("Commentators, advocates, and activists continue to take a variety of approaches to suggest changes to the dominant paradigm of animals as property. For example, In Defense of Animals (IDA), a California non-profit group, launched a campaign called 'They Are Not Our Property, We Are Not Their Owners.'").

II. Certiorari Should Be Granted Also To Clarify The Limits Of The Public Trust Doctrine

Petitioners decry the expansion of the "Public Trust Doctrine"[8] in connection with the taking of private real property. *See* Pet. Br. at 22-25. Expansion of the Public Trust Doctrine also affects animal owners' private property rights. Specifically, there have been attempts to use this Doctrine to eliminate the private property rights of owners over their animals. For example, in 2005, the U.S. Fish and Wildlife Service published a proposed rule to assert that particular species of "wild-caught and captive-bred raptors . . . are always under the stewardship of the U.S. Fish and Wildlife Service. They are not private property." *See* 70 Fed. Reg. 60052, 60055 (Oct. 14, 2005).

Yet, over forty years ago, this Court declared governmental ownership of wild animals a "19th-century legal fiction." *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). Quoting Justice Field's dissenting opinion in *Geer v. Connecticut*, the majority acknowledged that:

> A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of 'owning' wild fish, birds, or animals. ***Neither the States nor the Federal Government***, any more than a hopeful fisherman or hunter, ***has title to these creatures until they are reduced to possession by skillful capture***. . . .

8. The Public Trust Doctrine is "the common-law tradition that the state, as sovereign, acts as trustee of public rights in natural resources . . .." *Pavlock v. Holcomb*, 532 F.Supp.3d 685, 696 (N.D. Ind. 2021) (citing *Ill. Cent. R. Co. v. Ill.*, 146 U.S. 387, 436-37 (1892)).

Hughes, 441 U.S. at 334 (quoting *Geer*, 161 U.S. 519, 539-540 (1896)) (emphasis added). Indeed, the common law has long held that wildlife is considered *res nullius* (that is, unowned until it is captured and reduced to private possession), and it is left to the states (and the federal government) only to "conserv[e] and protect[] wild animals" for the benefit of its citizens. *Hughes*, 441 U.S. at 336.

Notwithstanding *Hughes'* clarity regarding ownership rights over animals reduced to private possession and its overturning of *Geer*, courts are beginning to rely on the Public Trust Doctrine to usurp the ownership rights of privately-held animals.

For example, in a recent case before the Texas Court of Appeals for Austin, a private breeder of whitetail deer sought to establish his private property rights in the deer and invalidate Texas Parks and Wildlife Department rules requiring breeders to test for a neurodegenerative disease. *Bailey v. Smith*, 581 S.W.3d 374 (2019). Rather than declaring an overriding public interest in subjecting the deer to disease testing protocols – a decision that would have satisfied *Hughes'* acknowledgment of states' rights to conserve and protect wildlife resources – the court went a step further, citing the overridden decision in *Geer* to expand Texas's Public Trust Doctrine and declare that it does not "allow[] common law property rights to arise in breeder deer" residing on enclosed private property. *Id.* at 390-93.

Notably, and similar to Petitioners in the case at bar with respect to real property, the court's decision in this instance overturned decades of established property law

regarding private ownership of captured wild animals. *See Bailey*, 581 S.W.3d at 399-400 ("Our common law tradition – stemming from early English common law and with roots in Roman law – provides that individuals, through the sweat of their brow, may acquire ownership and property rights in wild animals by legally removing them from their natural liberty and making them subject to man's dominion.") (Goodwin J. dissenting in part). *See also Jones v. State*, 119 Tex.Crim. 126, 129 (Tex. Crim. App. 1931) ("'Deer, though strictly speaking *feræ naturæ*, if reclaimed and kept in inclosed ground, are the subject of property, pass to the executors, and are liable to be taken in distress.'") (citing 1 Halsbury's Laws of England, § 799); *State v. Bartee*, 894 S.W.3d 34, 41 (Tx. Ct. App. 1994) ("'Whether one has secured a property right to an animal *feræ naturæ* will be determined by whether the animal has been reduced to possession, and not by its habits.'") (quoting 3A C.J.S. *Animals* § 8 at 478-79 (1973)).

Judicial expansion of the Public Trust Doctrine creates significant concern for animal owners across the country. Farmers, zoo keepers, private ranch managers, and animal exhibitors typically incur significant costs associated with the feeding, watering, and sheltering of their animals, and many of them constitute major assets that are reflected on the owner's financial statements. For now, these financial commitments are made under the common law premise that one may obtain property rights in animals "by reducing them to possession." *U.S. v. Long Cove Seafood, Inc.*, 582 F.2d 159, 163 (2d Cir. 1978) (citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977) (additional citations omitted). However, expansion of the Public Trust Doctrine – for increased public access or, perhaps, a novel intent to "liberate" both

domestic animals and wildlife from their lawful owners – could result in the loss of what traditionally constitutes private property. Thus, without this Court's recognition of a judicial takings cause of action, "property owners are left without access to the federal courts, much less a remedy." Pet. Br. at 25.

CONCLUSION

This Court should grant Petitioners a writ for certiorari to review the validity of a judicial takings claim.

Respectfully submitted,

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