

IN THE SUPREME COURT OF THE STATE OF OREGON

JUSTICE, an American Quarter Horse,  
by and through his Guardian, Kim Mosiman,  
Plaintiff-Appellant, Petitioner on Review

v.

GWENDOLYN VERCHER,  
Defendant-Respondent, Respondent on Review.

Washington County Circuit Court No. 18CV17601  
Court of Appeals No. A169933

**Supreme Court No. S069799**

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**AMENDED BRIEF OF *AMICI CURIAE* LEGAL SCHOLARS WITH  
EXPERTISE IN LEGAL PERSONHOOD AND RIGHTS  
in support of PETITION FOR REVIEW**

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## I. STATEMENT OF INTEREST OF AMICI CURIAE

*Amici Curiae* are legal scholars from various countries who teach and research in matters relating to the jurisprudence of legal rights and legal personhood. *Amici* have special expertise on several issues presented by this case, most notably how legal “rights” and “personhood” are and ought to be understood, especially in relation to nonhuman animals. *Amici* have a special interest in guiding the evolution of their field and in assisting the Court in grappling with the foundational jurisprudential issues this case raises. *Amici* respectfully urge the Court to grant the Petitioner-Appellant’s Petition for Review to ensure that the jurisprudence of rights and personhood develops according to rational principles of justice.

## II. SUMMARY OF ARGUMENT

*Amici* believe that *Justice v. Vercher*, 321 Or App 439 (2022) warrants review by this Court because the Court of Appeals failed to substantiate several claims that were central to its holding. First, the Court of Appeals’ opinion claims that nonhuman animals do not have legal rights under Oregon’s anti-cruelty statutes – but in doing so provides no account of what legal rights are. *Id.* at 458. Nor does the Court of Appeals engage with any academic or judicial authorities on the nature of legal rights. *Amici* show that there is widespread academic and judicial support for the view that animals

possess legal rights under anti-cruelty legislation. The Court of Appeals' failure to engage with, let alone refute, these authorities warrants review by this Court.

Second, the Court of Appeals claims "that animals are not 'persons' capable of bearing rights, but 'things' over which persons may exercise qualified rights." *Id.* at 457. *Amici* note that, to the extent that being a "thing" merely means being capable of being owned as property, this status is perfectly compatible – in theory and practice – with being a rights-bearer and a legal person. Corporations are of course both property owned by their shareholders and legal persons with rights. There is no conceptual barrier to nonhuman animals also having this dual status in law. Alternatively, if being a "thing" means being an entity that lacks any legal rights, then this is a false classification of nonhuman animals like Justice, because, as already stated, they possess legal rights under anti-cruelty legislation.

Third, the Court of Appeals' limited survey of accounts of legal personhood belies the fact that there is widespread consensus amongst legal academics and judicial precedent that having legal rights or duties is sufficient for being a legal person. *Id.* at 450-451. If Justice has legal rights, then - on the standard view of legal personhood - he is a legal person at least with respect to the statute or common law rule under which he holds those rights.



A ruling affirming Justice’s personhood for the purposes of the right to sue for negligence *per se* would not entail recognizing his – or any other nonhuman animals’ – personhood for any other purpose.

### III. ARGUMENT

#### 1. Nonhuman animals have numerous legal rights under Oregon and federal law

The Court of Appeals asserts that “[t]he statutory duty to provide minimum care to an animal in the custody and control of a person does not confer substantive or procedural legal rights on the animal.” *Id.* at 458. In making this claim, the Court of Appeals neither provides any definition of what constitutes a “legal right” nor engages with any judicial precedent or scholarly work on the matter. This is especially unfortunate given the Court’s juxtaposition between a “statutory duty” and “legal right”, as these two concepts are widely regarded as two sides of the same coin. “Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed.” *Amberg v Kinley*, 214 NY 531, 535 (1915), quoting *Willy v Mulledy*, 78 NY 310 (1879).

To date, the most influential jurisprudential account of legal rights is that offered by the jurist Wesley Newcomb Hohfeld in the early twentieth century. What Hohfeld calls a “right in the strictest sense” involves the possession of a claim that places another under a duty, either to act or refrain

from acting: “if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place”. Wesley Newcomb Hohfeld, “Some Fundamental Legal Conceptions As Applied in Judicial Reasoning,” 23 *Yale L.J.* 16, 42 (1913).

Of course, there is an important difference between duties merely *regarding* a nonhuman animal – for example the duty of a dog owner to prevent their dog from causing personal injury or damage to property (*see, e.g.,* ORS 609.115(2)) – and duties owed *to* the nonhuman animal “not merely for ulterior reasons, but for [their] own sake, because their well-being is intrinsically valuable.” Saskia Stucki, “Towards a Theory of Legal Animal Rights: Simple and Fundamental Rights,” 40(3), *Oxford Journal of Legal Studies* 533, at 542 (2020). It is only the latter sort of duties that confer correlative rights on nonhuman animals.

Nonhuman animals protected by Oregon’s anti-cruelty laws undoubtedly qualify as rights-holders by this standard. The Oregon legislature have recognized that animals are “sentient beings” who “should be cared for in ways that minimize pain, stress, fear and suffering” (ORS 167.305(1)-(2)). In interpreting the nature and purpose of Oregon’s anti-cruelty laws, this Court has noted:

Although early animal cruelty legislation may have been directed at protecting animals as property of their owners or

as a means of promoting public morality, Oregon's animal cruelty laws have been rooted—for nearly a century—in a different legislative tradition of protecting individual animals themselves from suffering.

*State v. Nix*, 355 Or 777, 796-7 (2014). Accordingly, as nonhuman animals, including Justice, are the intended beneficiaries of the duties imposed on humans by Oregon's animal cruelty laws, they are holders of corresponding legal rights.

The claim that nonhuman animals possess rights under anti-cruelty laws is not new, US courts have long acknowledged this point.<sup>1</sup> Indeed, the Court of Appeals' opinion itself approvingly cited the Ninth Circuit's decision in *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (2004), which states that “[a]nimals have many legal rights, protected under both federal and state laws.” See also *Tilikum v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1264 (S.D. Cal. 2012) (“[a rejection of a 13th amendment challenge on behalf of an orca] is not to say that animals have no legal rights; as there are many state and federal statutes... that ‘punish those who violate statutory

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<sup>1</sup> See e.g. *Grise v. State*, 37 Ark. 456, 458 (1881) (noting an Arkansas anti-cruelty state existed ‘to protect some abstract rights in all that animate creation . . . from the largest and noblest to the smallest and most insignificant’); *Stephens v. State*, 3 So. 458, 459 (Miss. 1888) (“the common law recognized no rights in [domestic animals]... [cruelty] statutes remedy this defect”); *State v. Karstendiek*, 22 So. 845 (La. 1897) (“The [cruelty] statute relating to animals is based on the theory, unknown to the common law, that animals have rights which, like those of human beings, are to be protected.”).

duties that protect animals.”) (quoting *Cetacean Cmty.*, *supra* 386 F.3d at 1175). These views are rooted in the standard understanding of legal rights as the correlatives of legal duties. As Judge Wilson of the New York Court of Appeals recently observed:

Humans can create... [and] have granted animals countless rights... For example, 16 USC § 668 imposes a duty on humans not to capture or kill a bald or golden eagle, enforced by fines and imprisonment; that duty establishes a correlative right of bald and golden eagles to be free from capture by humans (except as authorized by permit). The Endangered Species Act (16 USC § 1531 *et seq.*) gives all animals falling within its purview the right not to be captured, harassed or harmed by humans, and imposes a correlative duty on humans.

*Nonhuman Rights Project, Inc. v. Breheny*, 2022 N.Y. Slip Op. 3859, \*13 (N.Y. 2022) (Wilson, J., dissenting). This view finds ample backing amongst prominent legal scholars with expertise in rights<sup>2</sup> and judicial rulings across the common law world.<sup>3</sup> The Court of Appeals’ failure to engage with these judicial and academic authorities warrants further consideration.

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<sup>2</sup> See, e.g. Joel Feinberg, ‘The Rights of Animals and Unborn Generations’, in Joel Feinberg, *Rights, Justice and the Bounds of Liberty* 130 (1980); Cass R. Sunstein, ‘The Rights of Animals: A Very Short Primer,’ John M. Olin Program in Law and Economics Working Paper No. 157 (2002); Matthew H Kramer, ‘Do Animals and Dead People Have Legal Rights?’ 14 *Canadian Journal of Law and Jurisprudence* 29 (2001).

<sup>3</sup> See, e.g., *R (on the application of Cruelty Free International (formerly the BUAV) v. SSHD and Imperial College London (Interested Party)* [2015] EWHC (Admin) [60] (the High Court of England and Wales describe the Animals (Scientific Procedures) Act 1986 as serving to “protect the rights of

**2. The Court of Appeals’ classification of non-human animals as “things” is either irrelevant to their status as rights-bearers or false.**

The Court of Appeals asserts in its opinion that “animals are not ‘persons’ capable of bearing rights, but ‘things’ over which persons may exercise *qualified* rights.” *Justice v Vercher, supra*, 321 Or App at 457. However, *amici* insist that, under current law, animals can be both persons capable of bearing rights *and* things over which persons may exercise qualified rights.

Citing *Black’s Law Dictionary* 892 (1st Ed 1891), the Court of Appeals offers the definition of a “thing” as “the object over which rights may be exercised”. 321 Or App at 450. But being an object over which rights are exercised is compatible with being a rights-bearing subject. For example, companies are both legal persons with rights and owned as property by their shareholders. See ORS 174.100(7) (“‘Person’ includes individuals, corporations, associations, firms, partnerships, limited liability companies and

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animals”); *Animal Welfare Board of India vs. A Nagaraja and Ors.* (2014 7 SCC 547), para.27 (the Indian Constitutional Court note that the duties in India’s Prevention of Cruelty to Animals Act 1960 “confer corresponding rights on animals”); *Islamabad Wildlife Mgmt. Bd. through its Chairman v. Metropolitan Corp. Islamabad through its Mayor & 4 others* (W.P. No.1155/2019), 25 (Islamabad High Court Judicial Dep’t, Apr. 25, 2020) (Islamabad High Court stating “Do the animals have legal rights? The answer to this question, without any hesitation, is in the affirmative.”).

joint stock companies”); ORS 60.001(29) (“‘Share’ means a unit into which the proprietary interest in a corporation is divided”). In other words, the mere fact that an entity is property or an object over which rights are exercised does not preclude their *also* being rights-bearing subjects.

Likewise, “[t]he legal status of property is consistent not just with animal rights, but with significant legal rights for animals that can severely constrain how people use or treat them”. Jerrold Tannenbaum, “Animals and the Law: Property, Cruelty, Rights” 62(3) *Social Research* 539, 594 (1995). Though animals may be classified as “things” in so far as they are property, they are evidentially property of a “different nature” from inanimate objects. *State v. Newcomb* 359 Or 756, 775 (2016).

Alternatively, if the Court of Appeals means that nonhuman animals’ are “things” because they are not – or cannot be – legal rights-bearers then *Amici* reject this classification. As the New York Court of Appeals recently noted, “nonhuman animals... are not the equivalent of ‘things’ or ‘objects.’” Unquestionably, nonhuman animals are sentient beings that... have been afforded many special protections”. *Nonhuman Rights Project, Inc. v. Breheny*, 2022 N.Y. Slip Op. 3859, \*15. As already indicated in the previous section, these special protections, *Amici* suggest, are best understood as legal rights.

**3. There is a broad consensus amongst jurists that entities with legal rights are legal persons.**

The Court of Appeals’ opinion offers a highly selective engagement with accounts of legal personhood drawn from legal and non-legal dictionaries and various Oregon statutes. *Justice v Vercher* 321 Or App 450-451. What this one-sided overview of personhood misses is that the most common contemporary view of legal personhood – what Visa AJ Kurki calls the ‘orthodox view’ – holds that being a legal person involves the possession of rights or duties. Visa AJ Kurki, *A Theory Of Legal Personhood* at 4 (2019). Developed in Continental Europe, this view of personhood was introduced to the Anglosphere by John Austin in his *Lectures on Jurisprudence*, which argued that ‘persons, as subjects of law’ are determined by ‘certain rights and duties’. *Id.* at 35-47; John Austin, *Lectures On Jurisprudence* 345 (1875).

Since Austin, there has been broad academic consensus among English-speaking jurists that legal personhood relates to the possession of rights and/or duties. In Appendix 1 to this brief we provide twelve quotes from major academic contributions to jurisprudence and the theory of legal personhood that link personhood to rights and duties.

There is some variation in how this standard view of personhood is expressed. Some scholars use the conjunctive formulation “rights *and* duties” while others opt for the disjunctive “rights *or* duties”. Still others refer only

to “rights.” See APPENDIX 1. Little weight should be attached to the distinction between these conjunctive and disjunctive accounts of legal personhood. On closer inspection, scholars who talk of rights *and* duties appear to think the possession of either is sufficient for personhood and none expressly claim that the capacity for legal duties is *necessary* for legal personhood.<sup>4</sup> And with good reason. Evidently, human infants and adult legal incompetents lack the ability to bear duties but are clearly recognized as legal persons. See *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery* 31 N.Y.3d 1054 at 1057 (2018), (Fahey J., concurring) (“Even if... nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults”). For this reason, *Amici* laud the Court of Appeals’ decision not to follow the trial court’s rejection of Justice’s lawsuit on the basis that “non-human animals are incapable of accepting legal responsibilities”. *Justice v Gwendolyn Vercher*, Wash. Co. Circuit Ct. Case No. 18CV17601, Opinion Letter, p. 2 (Aug. 18, 2018).

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<sup>4</sup> For a detailed discussion of scholarly and judicial approaches to duty-bearing and personhood and why duty-bearing is not necessary to be a legal person, see Brief of *Amici Curiae* Joe Wills, *et al.*, UK-based Legal Academics, Barristers and Solicitors 4-10 (Oct. 8, 2021) <https://bit.ly/3q3LtXH>. The brief was filed in *Nonhuman Rights Project, Inc. v. Breheny*, *supra*.



As noted in the previous section, multiple US courts have recognized nonhuman animals as possessing legal rights. On the orthodox view of personhood, these courts are implicitly also recognizing animals as legal persons. Indeed, some courts and judges across the US have also *expressly* recognised nonhuman animals as “persons” in limited contexts.<sup>5</sup> The Court of Appeals itself has interpreted the word “persons” to include “nonhuman animals” on three occasions. *State v. Dicke*, 258 Or App 678 (2013); *State v. Fessenden*, 355 Or App 759, 776 (2014); *State v. Hershey*, 286 Or App 824, 834 (2017). As this Court summarized the Court of Appeals’ rulings in *Fessenden* and *Dicke*: “The [Court of Appeals] concluded that animals were

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<sup>5</sup> See e.g. *People v. Graves*, 163 A.D.3d 16, 21 (NY 4th Dep’t, 2018) (“[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like... animals”); *Nonhuman Rights Project, Inc. v. Breheny* No. 260441/2019, 2020 WL 1670735, at \*3 (Sup. Ct. N.Y. Cty. Feb. 18, 2020) (describing an elephant as possessing “complex cognitive abilities sufficient for common law personhood”); *Anne Arundel County, Maryland and Rodney Price v. Michael H. Reeves*, 252 A.3d 921, 945 (2021) (Hotten, J., dissenting) (“The law should similarly extend a recognition of limited personhood to pets, if only so their human companions can seek recovery for grossly negligent conduct that caused injury or death to that pet”); *Cnty. of Hippopotamuses Living in the Magdalena River*, Case No. 1:21-mc-00023 (S.D. Ohio Oct. 15, 2021) (recognising the legal right of hippopotamuses to compel two witnesses in the United States to testify in a lawsuit in Colombia because the hippos qualified as “interested person[s]” under 28 U.S.C. § 1782(a)); *Nonhuman Rights Project, Inc. v. Breheny*, 2022 N.Y. Slip Op. 3859, at \*8 (N.Y. 2022) (Wilson J., dissenting) (“Just as ‘person’ is used in a juridical sense to refer to any entity, real or fictional, as to which a statute or rule of the common law applies, ‘person’ in CPLR article 70 is irrelevant to whether the writ can extend beyond humans”).

included in the class of ‘persons’ that officers may aid without a warrant”.

*State v. Fessenden / Dicke*, 355 Or 759, 763 (2014).<sup>6</sup>

It is important to stress that recognizing Justice as a person for limited purposes – such as being a rights-bearer under anti-cruelty statutes, or (as the Petitioner-Appellants argue) being able to sue for negligence *per se* – does not imply that he would be a person in any other context. Legal personhood is a “term of art” (*Wartelle v. Women’s & Children’s Hosp.*, 704 So. 2d 778, 781 (La. 1997)) and “it is possible to count as a person in some legal contexts, but to be treated as something more akin to property in others”. Ngaire Naffine, *Law’s Meaning Of Life: Philosophy, Religion, Darwin And The Legal Person* 49 (2009). Thus, “[a] human being or entity which has been said by... the courts to be capable of enforcing a particular right, or owing a particular duty can properly be described as a person *with that particular capacity*” without supposing “a larger set of right-owning, duty-owing capacities.” John Armour, “Companies and other Associations,” in Andrew Burrows (Ed), *English Private Law* 120-121 (2019) (emphasis in original). Accordingly, contrary to the Court of Appeals, recognizing Justice as having the capacity

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<sup>6</sup> In *State v. Fessenden / Dicke*, this Court affirmed the Court of Appeals’ decision on the alternative ground of Oregon’s exigent circumstances exception but expressly left open the question of whether the emergency aid exception—applicable to “persons”—extends to nonhuman animals. 355 Or. at 774-75.

to sue for purposes of negligence *per se* would not necessarily have any “profound implications”. *Justice v Vercher* 321 Or App. at 458.

The right to sue for purposes of negligence *per se* is dependent upon on establishing a breach of a duty imposed by a pre-existing statute. *McApline v. Multnomah Cty.*, 13 Or App 136, 144 (1994). Recognizing the right of Justice and other nonhuman animals to sue under negligence *per se* would not impose any additional substantive duties on individuals residing in Oregon, but merely provide the victims of breaches of existing legal duties with an additional remedy to redress the harm they have suffered. This strikes *Amici* as an incremental, pragmatic and principled development of the common law that would be consistent with and complimentary to the letter and spirit of Oregon’s statutory animal anti-cruelty laws.

#### IV. CONCLUSION

In 2014 this Court observed that “we do not need a mirror to the past or a telescope to the future to recognize that the legal status of animals has changed and is changing still.” *State v. Fessenden / Dicke, supra*, 355 Or at 770 (2014). *Amici* concur and believe that questions concerning the personhood, rights and capacity to sue of nonhuman animals require careful examination of legal doctrine, theory and principles. *Amici* find the Court of Appeals’ opinion wanting in this respect. *Amici* respectfully request that the

Court grant Justice's Petition for Review in light of the important jurisprudential issues raised by this case.

Respectfully submitted,

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## APPENDIX 1: Scholarly Views of Legal Personhood

“[T]he technical legal meaning of a “person” is a subject of legal rights and duties.” John Chipman Gray, *The Nature And Sources Of Law* 27 (1921).

“‘Personhood’ as a legal concept arises not from the humanity of the subject but from the ascription of rights and duties to the subject.” Frederick Pollock, *A First Book On Jurisprudence* 111 (1923).

“To be a legal person is to be the subject of rights and duties. To confer legal rights or to impose legal duties, therefore, is to confer legal persona.” Bryant Smith “Legal Personality” 37(3) *Yale L.J.* 283, 283 (1928).

“The conventional legal explanation of personality is that a person in law is an entity which may be the bearer of rights and duties.” Graham B J Hughes, *Jurisprudence* 442 (1955).

“The significant fortune of legal personality is the capacity for rights.” Roscoe Pound, *Jurisprudence* 197 (1959).

“So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties. Persons are the substances of which rights and duties are the attributes.” Patrick J Fitzgerald, *Salmond On Jurisprudence* 298 (10<sup>th</sup> edn 1966).

“‘To be a person’ or ‘to have legal personality’ is identical with having legal obligations and subjective rights.” Hans Kelsen, *Pure Theory Of Law* 172 (1967).



“[T]he concept of legal personality . . . is an empty slot that can be filled by anything that can have rights or duties.” Richard Tur, ‘The “Person” in Law’, in Arthur Peacocke & Grant Gillett (eds), *Persons And Personality: A Contemporary Inquiry* 121-122 (1987).

“A person is: (a) an individual; (b) an organization or association that has legal capacity to possess rights and incur obligations; (c) a government, political subdivision, or instrumentality or entity created by government; or (d) any other entity that has legal capacity to possess rights and incur obligations” *Restatement (Third) of Agency* (American Law Institute 2006) § 1.04(5).

“The entire topic of persons in law (involves) who or what can and should bear rights and duties”. Ngaire Naffine, *Law's Meaning Of Life: Philosophy, Religion, Darwin And The Legal Person* 9 (2009).

“The word ‘person’ is... used in a technical legal sense, to denote a subject of legal rights and duties.” John Armour, “Companies and other Associations” in Andrew Burrows (ed), *English Private Law* 118 (2019).

“According to the (orthodox) view, legal personhood involves either the holding of rights and bearing of duties or the ‘legal capacity’ to hold rights and bear duties. This definition of legal personhood is not merely a textbook adage... but is also endorsed and employed by jurists with a profound interest in questions relating to legal personhood.” Visa AJ Kurki, *A Theory Of Legal Personhood* 4 (2019).

## APPENDIX 2: US Judicial Views on Legal Personhood

“[U]pon according legal personality to a thing the law affords it the rights and privileges of a legal person.” *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y.2d 194, 201 (N.Y. 1972).

“[T]he classification of ‘person’ is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties. ‘Person’ is a term of art.” *Wartelle v. Women's, Children's Hosp.*, 704 So. 2d 778, 780 (La. 1998).

“[T]he term ‘person’ is commonly understood to have a broader meaning than simply a human being. ‘Indeed, a common dictionary definition of the term ‘person’ includes ‘a body of persons, or a corporation, partnership, *or other legal entity that is recognized by law as the subject of rights and duties.*’” *State v. Zain*, 207 W. Va. 54, 61 (W. Va. 1999) (citing *Webster's Third New International Dictionary of the English Language Unabridged* 1686 (1970) (emphasis added).

“‘Personhood’ as a legal concept arises not from the humanity of the subject but from the ascription of rights and duties to the subject” *Amadio v. Levin*, 509 Pa. 199, 225, 501 A.2d 1085, 1098 (1985) (Zappala, J., concurring).

## CERTIFICATE OF COMPLIANCE

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