

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.

MOTION FOR PERMISSION TO APPEAL

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COURT OF APPEALS OF THE STATE OF NEW YORK

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Index No.:
0260441/2019
(Bronx County)

**NOTICE OF
MOTION FOR
PERMISSION
TO APPEAL TO
THE COURT OF
APPEALS**

PLEASE TAKE NOTICE that Petitioner-Appellant, The Nonhuman Rights Project, Inc., will move this Court, pursuant to CPLR § 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the appendix of the prior appeal in this case to the Appellant Division, First Department, and upon the papers submitted herewith, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on February 1, 2021, at 9:30 am., for an order granting permission to appeal to this Court from the Decision and Order of the Appellant Division, First Department, entered on December 17, 2020.

Dated: January 19, 2021

Respectfully submitted,

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Petitioner-Appellant,

**CORPORATE
DISCLOSURE
STATEMENT
PURSUANT TO
RULE 500.1(f)**

-against-

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Executive Vice President and General Director of Zoos and
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Director of the Bronx Zoo, and WILDLIFE
CONSERVATION SOCIETY,

Respondents-Respondents.

Pursuant to Section 500.1(f) of the Rules of Practice of the New York Court
of Appeals, counsel for Petitioner-Appellant, The Nonhuman Rights Project, Inc.
("NhRP"), certifies that the NhRP has no corporate parents, subsidiaries or affiliates.

Dated: January 19, 2021

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
LIST OF EXHIBITS	viii
I. PRELIMINARY STATEMENT	1
II. TIMELINESS OF MOTION.....	2
III. BACKGROUND	2
A. Procedural history.....	2
B. The three Appellate Division decisions upon which the <i>First Department Decision</i> is based.....	4
1. The Third Department Decision in <i>Lavery I</i>	5
2. The Fourth Department Decision in <i>Presti</i>	5
3. The First Department Decision in <i>Lavery II</i>	6
IV. JURISDICTIONAL STATEMENT	7
V. QUESTIONS PRESENTED	7
VI. REASONS FOR GRANTING PERMISSION TO APPEAL.....	8
A. The recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus is a novel and important issue that requires review by this Court.....	9
1. The recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus presents a novel issue of local, statewide, national, and international importance	9
2. This Court’s failure to examine the issue of whether Happy has the common law right to bodily liberty protected by common law habeas corpus would perpetuate a substantial injustice	18
3. The recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus is not a legislative matter	22

4.	This Court’s recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus would not extend to her any other right	29
B.	The <i>First Department Decision</i> conflicts with prior decisions of this Court.....	32
1.	<i>Byrn v. New York City Health & Hosps. Corp</i>	32
2.	<i>Woods v. Lancet</i> and its progeny	34
3.	<i>People ex rel. Dawson v. Smith</i>	35
C.	The <i>First Department Decision</i> conflicts with the Fourth and First Departments	36
1.	<i>People v. Graves</i>	36
2.	<i>McGraw v. Wack</i>	38
D.	The personhood conclusions in <i>the First Department Decision, Lavery I, and Lavery II</i> are erroneous for reasons apart from their conflict with <i>Byrn, Woods, and Graves</i>	38
1.	An individual need not be human or have the capacity to bear duties in order to be a “person”	39
2.	Judge Fahey’s concurrence rejected the erroneous views that an individual must be human or have the capacity to bear duties in order to be a “person”	41
3.	EPTL § 7-8.1 demonstrates that an individual need not be human or have the capacity to bear duties in order to be a “person”	43
4.	Social contract theory does not support the erroneous views that an individual must be human or have the capacity to bear duties in order to be a “person”	45
a.	<i>Lavery I</i> erroneously relied upon <i>Gault</i> and <i>Barona</i>	46
b.	<i>Lavery I</i> relied upon the erroneous social contract claims of Richard Cupp	47
c.	Social contracts create citizens not “persons”	49
E.	Conclusion.....	50

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Battalla v. State</i> , 10 N.Y.2d 237 (1961).....	23, 34
<i>Bing v. Thunig</i> , 2 N.Y.2d 656 (1957).....	23
<i>Brevorka ex rel. Wittle v. Schuse</i> , 227 A.D.2d 969 (4th Dept. 1996).....	42
<i>Buckley v. City of New York</i> , 56 N.Y.2d 300 (1982).....	24, 34
<i>Byrn v. New York City Health & Hosps. Corp.</i> , 31 N.Y.2d 194 (1972).....	30, 32, 33
<i>Endresz v. Friedberg</i> , 24 N.Y.2d 478 (1969).....	34
<i>Flanagan v. Mount Eden General Hospital</i> , 24 N.Y.2d 427 (1969).....	24
<i>Gilman v. McArdle</i> , 65 How. Pr. 330 (N.Y. Super. 1883), <i>rev'd on other grounds</i> , 99 N.Y. 451 (1885).....	31
<i>Hoff v. State of New York</i> , 279 N.Y. 490 (1939).....	25
<i>Hymowitz v. Eli Lilly and Co</i> , 73 N.Y.2d 487 (1989).....	34
<i>Hynes v. Tomei</i> , 666 N.Y.S.2d 687 (2d Dept. 1997).....	19
<i>In re Belt</i> , 2 Edm. Sel. Cas. 93 (N.Y. Sup. Ct. 1848).....	28
<i>In re Kirk</i> , 1 Edm. Sel. Cas. 315 (N.Y. Sup. Ct. 1846).....	29
<i>In re New York City Asbestos Litig.</i> , 148 A.D.3d 233 (1st Dept. 2017).....	19

<i>Kershaw v. Hospital for Special Surgery</i> , 114 A.D.3d 75 (1st Dept. 2013)	6
<i>Lemmon v. People</i> , 20 N.Y. 562 (1860).....	28, 29
<i>Lenzner v. Falk</i> , 68 N.Y.S.2d 699 (Sup. Ct. 1947).....	31
<i>Matter of Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)	45, 46
<i>Matter of Isaiah M. (Nicole M.)</i> , 144 A.D.3d 1450 (3d Dept. 2016).....	6
<i>Matter of MHLS v. Wack</i> , 75 N.Y.2d 751, 551 N.Y.S.2d 894, 551 N.E.2d 95 (1989)	38
<i>Matter of Nonhuman Rights Project, Inc. v. Lavery</i> , 31 N.Y.3d 1054 (2018).....	<i>passim</i>
<i>Matter of Nonhuman Rights Project, Inc. v. Lavery</i> , 152 A.D.3d 73 (1st Dept. 2017)	<i>passim</i>
<i>Matter of Nonhuman Rights Project, Inc. v. Presti</i> , 124 A.D.3d 1334 (2015).....	<i>passim</i>
<i>Matter of Nonhuman Rights Project, Inc. v. Stanley</i> , 16 N.Y.S.3d 898 (Sup. Ct. 2015).....	<i>passim</i>
<i>McGraw v. Wack</i> , 220 A.D.2d 291 (1st Dept. 1995)	38
<i>Mental Hygiene Legal Servs. ex rel. Cruz v. Wack</i> , 148 A.D.2d 341 (1st Dept. 1989)	38
<i>Millington v. S.E. Elevator Co.</i> , 22 N.Y.2d 498 (1968).....	23, 24, 34
<i>Moore v. Ganim</i> , 233 Conn. 557 (1995).....	49
<i>People ex rel Sabatino v. Jennings</i> , 246 N.Y. 258 (1927).....	25
<i>People ex rel. Brown v. Johnston</i> , 9 N.Y.2d 482 (1961).....	35, 36

<i>People ex rel. Dawson v. Smith,</i> 69 N.Y.2d 689 (1986).....	35, 36
<i>People ex rel. DeLia v. Munsey,</i> 26 N.Y.3d 124 (2015).....	25
<i>People ex rel. Keitt v. McMann,</i> 18 N.Y.2d 257 (1966).....	21, 25
<i>People ex rel. Nonhuman Rights Project, Inc. v. Lavery,</i> 124 A.D.3d 148 (3d Dept. 2014).....	<i>passim</i>
<i>People ex rel. Robertson v. N.Y. State Div. of Parole,</i> 67 N.Y.2d 197 (1986).....	28
<i>People ex rel. Tweed v. Liscomb,</i> 60 N.Y. 559 (1875).....	25
<i>People ex rel. Wehle v. Weissenbach,</i> 60 N.Y. 385 (1875).....	42
<i>People v. Graves,</i> 163 A.D. 3d 16 (4th Dept. 2018).....	36, 37
<i>People v. Hall,</i> 4 Cal. 399 (1854).....	43
<i>People v. Wesley,</i> 83 N.Y.2d 417 (1994).....	48
<i>Rozell v. Rozell,</i> 281 N.Y. 106 (1939).....	26
<i>Sherb v. Monticello Cent. Sch. Dist.,</i> 163 A.D.3d 1130 (3d Dept. 2018).....	6
<i>Silver v. Great Am. Ins. Co.,</i> 29 N.Y.2d 356 (1972).....	24
<i>State v. Donald DD.,</i> 24 N.Y.3d 174 (2014).....	48
<i>State v. Fessenden,</i> 355 Ore. 759 (2014).....	14
<i>Tobin v. Grossman,</i> 24 N.Y.2d 609 (1969).....	23

<i>United States v. Barona</i> , 56 F.3d 1087 (9th Cir.1995)	45, 46, 47
<i>United States v. Verdugo-Urquidez</i> , 856 F.2d 1214 (9th Cir. 1988), <i>rev'd</i> , by 494 U.S. 259 (1990).....	47
<i>Whale Telecom Ltd. v. Qualcomm Inc.</i> , 41 A.D.3d 348 (1st Dept. 2007)	6
<i>Woods v. Lancet</i> , 303 N.Y. 349 (1951).....	<i>passim</i>

Statutes & Other Authorities:

22 NYCRR § 500.22(b)(4)	8
CPLR 404(a)	3
CPLR 3211(a)	3
CPLR 5513(b).....	2
CPLR 5602(a)(1)(i).....	7
CPLR 7002(a)	3
CPLR 7003(b).....	6, 10
CPLR 7010(a)	28
EPTL § 7-8.1	31, 44
EPTL § 7-8.1(a)	44
General Construction Law § 20	2
General Construction Law § 24	2
General Construction Law § 25	2
Mem. of Senate, N.Y. Bill Jacket, 1996 S.B. 5207, Ch. 159.....	44
N.Y. Const., art. 35 (1777).....	29
N.Y. Const., art. I, § 14.....	29
N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).....	44
Sponsor’s Mem. N.Y. Bill Jacket, 1996 S.B. 5207, Ch. 159.....	44

1 English Private Law § 3.14 (Peter Birks ed. 2000)	30, 31, 39
<i>Animal Welfare Board v. Nagaraja</i> , MANU/SC/0426/2014 (Supreme Court of India 2014).....	32
<i>Association of Officers and Lawyers for Animal Rights v. Writ of Protection</i> , No. A 2174-2015/0 (Judicial Branch, Buenos Aires Argentina October 21, 2015)	14
<i>Association of Officials and Attorneys for Animal Rights et al. vs. The Government of the City of Buenos Aires (gcb), re: Constitutional Protection</i> , case file no. a2174-2015/0 (Appellate Court, Buenos Aires Argentina June 14, 2016).....	14
Black’s Law Dictionary (7th ed. 1999)	40
Black’s Law Dictionary (11th ed. 2019)	39, 41, 44
Byrant Smith, <i>Legal Personality</i> , 37 Yale LJ 283, 283 (1928)	39
Craig Ewasiuk, <i>Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory</i> , 48 Colum. Human Rights L. Rev. 69 (2017)	46, 47, 48, 49
Edgar J. McManus, <i>A History of Negro Slavery in New York</i> (1966).....	31
<i>Islamabad Wildlife Mmgt. Bd. v. Metropolitan Corp. Islamabad</i> , W.P. No. 1155/2019 (H.C., Islamabad, Pakistan May 5, 2020)	11, 17, 18
John Chipman Gray, <i>The Nature and Sources of the Law</i> (2d ed. 1921).....	40
John Salmond, <i>Jurisprudence</i> (Glanville L. Williams ed., 10th ed.1947) .	39, 40, 41
Judge Leon R. Yankovich, <i>Social Attitudes as Reflected in Early California Law</i> , 10 Hastings L. J. 250 (1959).....	43
<i>Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas</i> , AHC4806-2017 (Supreme Court of Colombia, July 26, 2017)	12
Margert Turano, <i>Practice Commentaries</i> , N.Y. Est. Powers & Trusts Law 7-8.1 (2013)	44
Official Press Release of the Constitutional Court of Colombia, CASE FILE T-6.480.577 - SENTENCE SU-016/20 (January 23, 2020)	13
Paul Finkleman, <i>Slavery in the Courtroom</i> (1985).....	29

Petition of Magistrate of the Constitutional Court of Colombia, Antonio Jose Lizarazo Ocampo T6.480.577 (January 22, 2018)	12-13
<i>Presented by A.F.A.D.A. About the Chimpanzee “Cecilia” – Nonhuman Individual, File No. P.72.254/15 (Third Court of Guarantees Mendoza, Argentina November 3, 2016)</i>	1, 13
Richard L. Cupp Jr., <i>Children, Chimps, and Rights: Arguments From “Marginal” Cases</i> , 45 Ariz. St. L.J. 1 (2013).....	45, 47, 48
Richard L. Cupp Jr., <i>Moving Beyond Animal Rights: A Legal/ Contractualist Critique</i> , 46 San Diego L. Rev. 27 (2009)	45, 47, 49
Richard Tur, <i>The “Person” in Law</i> , in <i>Persons and Personality: A Contemporary Inquiry</i> (Arthur Peacocke & Grant Gillett eds. 1987).....	39
Robert M. Cover, <i>Justice Accused – Antislavery and the Judicial Process (1975)</i>	29
Roscoe Pound, <i>Jurisprudence</i> vol. IV (1959).....	30, 39
Selection Court of the Constitutional Court of Ecuador re: Case No.253-20-JH (December 22, 2020)	11
<i>Somerset v. Stewart</i> , 1 Lofft 1 (K.B. 1772)	27, 29
Tom Regan, <i>The Case for Animal Rights</i> (2d ed. 2004).....	42
Vincent Alexander, <i>Practice Commentaries</i> , Mckinney’s CPLR 7001	25

LIST OF EXHIBITS

Decision and Order of the Appellate Division, First Department, dated December 17, 2020 with Notice of Entry (“*First Department Decision*”) **Exhibit A**

Decision and Order of the Supreme Court, Bronx County, dated February 18, 2020 with Notice of Entry (“*Trial Court Decision*”) .. **Exhibit B**

Signed Order to Show Cause of the Supreme Court, Orleans County, dated November 16, 2018 (“*Order to Show Cause*”) **Exhibit C**

Order of the Supreme Court, Orleans County, dated January 23, 2019 (“*Transfer Order*”)..... **Exhibit D**

I. PRELIMINARY STATEMENT

By this motion Happy, a 50 year old Asian female elephant, begs this Court to extend to her the protection of the common law of New York against the imprisonment and inhumanities that have for decades been routinely visited upon her. Kidnapped as a baby from the community of elephants in which she was evolved to thrive, she has been imprisoned ever since in an unnatural and unhealthy environment for the sole purpose of human profit. An “involuntary actor in the theater of human law,”¹ she has been stripped bare by that law of her autonomy, her social relationships, her emotional well-being, and every other thing that makes the life of this extraordinarily cognitively complex being worth living.

In 2018, the Honorable Judge Eugene Fahey wrote:

Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention. . . . Can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing? . . . The question will have to be addressed eventually.

Matter of Nonhuman Rights Project, Inc. v. Lavery, 31 N.Y.3d 1054, 1058, 1056 (2018) (Fahey, J., concurring) (“*Tommy*”).

¹ Presented by A.F.A.D.A. *About the Chimpanzee “Cecilia” – Nonhuman Individual*, File No. P.72.254/15 at 29 (Tercer Juzgada de Garantias Mencoza, Argentina November 3, 2016). ADD-29.

The Nonhuman Rights Project respectfully submits that the time to address this question has arrived.

II. TIMELINESS OF MOTION

Respondents-Respondents, the Wildlife Conservation Society and James J. Breheny (collectively “Respondents”), served the Petitioner-Appellant, The Nonhuman Rights Project, Inc. (“NhRP”), the First Department’s Decision and Order with notice of entry via email on December 17, 2020. *First Department Decision* (Ex. A). This motion for permission to appeal is timely as it is made within thirty days pursuant to CPLR 5513(b) and General Construction Law §§ 20, 24, and 25.

III. BACKGROUND

A. Procedural history

On October 2, 2018, the NhRP filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause (“Petition”) in the Supreme Court, Orleans County, demanding that the court recognize Happy’s “common law right to bodily liberty protected by common law habeas corpus” (A-37, para. 18), conclude she is being unlawfully imprisoned, and order her immediate release to an appropriate elephant sanctuary (A-78, para. 118) where she would be able to realize her autonomy to the fullest extent possible. Judicial recognition of Happy’s common law right to bodily liberty is the sole legal right sought in the Petition. A-37, para. 18.

On November 16, 2018, the Supreme Court, Orleans County issued an Order to Show Cause and made it returnable on December 14, 2018, when a hearing on the Petition was held in Albion, New York. *Order to Show Cause* (Ex. C).

In a notice of motion dated December 3, 2018, Respondents moved to transfer the proceeding to the Supreme Court, Bronx County (“Trial Court”) or, in the alternative, to dismiss the Petition pursuant to CPLR 3211(a) or for permission to file an answer pursuant to CPLR 404(a).² A-326 – A-328. The Supreme Court, Orleans Court granted Respondents’ motion to transfer venue on January 18, 2019, ordering that “all motions and issues submitted to this Court” be stayed pending transfer to the Trial Court. *Transfer Order* (Ex. D), at 6.

Following transfer, the Trial Court heard extensive oral argument on the merits of the Petition, Respondents’ motion to dismiss, and other motions not relevant to this motion for permission to appeal. *Trial Court Decision* (Ex. B), at 2. On February 18, 2020, Justice Alison Y. Tuitt issued her *Trial Court Decision* granting Respondents’ motion to dismiss the Petition on the ground that Happy is not a “person.”³ *Id.* at 16.

² Respondents’ grounds for dismissing the Petition were: (1) failure to state a cause of action, (2) lack of standing, and (3) collateral estoppel. A-327.

³ The Trial Court did not grant Respondents’ motion to dismiss on either standing or collateral estoppel grounds, as it found that the NhRP had “standing to bring the habeas corpus proceeding on behalf of Happy” pursuant to CPLR 7002(a). *Trial Court Decision* (Ex. B), at 12. The remaining motions were denied as academic or moot. *Id.* at 16.

The NhRP timely filed its notice of appeal. On December 17, 2020, following completed briefing and oral argument, the First Department issued its Decision and Order affirming the dismissal of the Petition, holding that “the common-law writ of habeas corpus does not lie on behalf of Happy.” *First Department Decision* (Ex. A), at 2.

B. The three Appellate Division decisions upon which the *First Department Decision* is based

The Trial Court believed it was bound by the Third Department decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (“*Lavery I*”), when it ruled that Happy is not a “person” entitled to habeas corpus relief. *Trial Court Decision* (Ex. B), at 16. The First Department affirmed based on its decision in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (“*Lavery II*”), which adopted the reasoning in *Lavery I* as well as the Fourth Department decision in *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334 (2015) (“*Presti*”).⁴

Accordingly, *Lavery I*, *Lavery II*, and *Presti* form the substantive basis of the *Decision*. Judge Fahey strongly criticized all three decisions in his concurring opinion in *Tommy*. 31 N.Y.3d at 1056-59.

⁴ Upon this Court’s recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus, she is a “person” for purposes of CPLR Article 70 as an individual or entity granted a legal right is implicitly a legal person for purposes of bearing that right.

1. The Third Department Decision in *Lavery I*

In *Lavery I*, the NhRP filed a habeas corpus petition on behalf of a chimpanzee named Tommy seeking his immediate release from the cage in which he was being privately imprisoned and his transfer to a Florida chimpanzee sanctuary. In affirming the dismissal of the petition, the Third Department concluded that “a chimpanzee is not a ‘person’ entitled to the rights and protections afforded by the writ of habeas corpus.” 152 A.D.3d at 150.

The Third Department based its decision on the unprecedented holding that the possession of any legal right requires the capacity to bear legal duties, which, according to the court, only humans possess. *Id.* at 152. Because there are many humans who obviously possess legal rights but are unable to bear legal duties, *id.* at 152 n.3, the court implicitly held that chimpanzees are not entitled to legal rights *merely* because they are not members of the human species.

2. The Fourth Department Decision in *Presti*

Shortly after *Lavery I*, the Fourth Department decided *Presti*, in which the NhRP had filed a habeas corpus petition on behalf of a chimpanzee named Kiko seeking his immediate release from the cage in which he was being privately imprisoned and his transfer to a Florida sanctuary. In affirming the dismissal of the petition, the Fourth Department did not address Kiko’s personhood other than to twice assume without deciding that a chimpanzee could be a “person.” 124 A.D.3d

at 1335. Instead, it held that the requested relief was unavailable under habeas corpus because the NhRP sought “only to change the conditions of confinement rather than the confinement itself.” *Id.*

3. The First Department Decision in *Lavery II*

The NhRP then filed second habeas corpus petitions on behalf of Tommy and Kiko in New York County, both of which were dismissed. The First Department affirmed the trial court’s dismissal on the procedural ground that the petitions were impermissibly successive under CPLR 7003(b). 125 A.D.3d at 75-76. It then opined on their merits in dicta.⁵ Perpetuating the erroneous assertions of *Lavery I*, the First Department concluded that chimpanzees are not “persons” with legal rights because they cannot bear legal duties and because they are not members of the human species. *Id.* at 78.

⁵ The First Department maintained that *Lavery II*’s statements on the merits constituted “alternative holdings” and not dicta. *First Department Decision* (Ex. A), at 2. But as *Lavery II* merely affirmed the trial court’s dismissal on the procedural ground that the habeas corpus petitions were impermissibly successive, its discussion of the merits was necessarily dicta. *See, e.g., Whale Telecom Ltd. v. Qualcomm Inc.*, 41 A.D.3d 348, 349 (1st Dept. 2007) (“the motion court properly recognized that its dismissal on timeliness grounds rendered those alternative grounds academic. It is unnecessary to address the court’s dicta.”); *Matter of Isaiah M. (Nicole M.)*, 144 A.D.3d 1450, 1453 n.3 (3d Dept. 2016) (“The appeal . . . was dismissed upon procedural grounds and, therefore, the resulting discussion of the merits is dictum.”); *Kershaw v. Hospital for Special Surgery*, 114 A.D.3d 75, 81 (1st Dept. 2013) (motion court denied late cross motion then “went on to comment in dicta” on the merits); *Sherb v. Monticello Cent. Sch. Dist.*, 163 A.D.3d 1130, 1132 (3d Dept. 2018) (where improper service of process resulted in denial of motion to file a late notice of claim, “[t]he court’s ensuing comments on the merits . . . were dicta”).

It further concluded that habeas corpus relief was unavailable even if Tommy and Kiko were “persons” because the remedy of sending them to a chimpanzee sanctuary “merely seeks their transfer to a different facility.” *Id.* at 79.

IV. JURISDICTIONAL STATEMENT

The NhRP filed its Petition in the Supreme Court, Orleans County, which transferred the case to the Trial Court. The *First Department Decision* is a final determination that completely disposes of the matter below. Accordingly, this Court has jurisdiction over the NhRP’s motion for permission to appeal pursuant to CPLR 5602(a)(1)(i).

V. QUESTIONS PRESENTED

The First Department held that the “common-law writ of habeas corpus does not lie on behalf of Happy.” *First Department Decision* (Ex. A), at 2. The court “decline[d] to overrule any of our alternative holdings in [*Lavery II*],” and stated that “the writ of habeas corpus is limited to human beings” under *Lavery II*. *Id.* Thus the questions presented for review are:

1. Does Happy have the common law right to bodily liberty protected by common law habeas corpus?
2. Is sending Happy to an elephant sanctuary an available remedy under common law habeas corpus?

These questions were preserved below. *First Department Decision* (Ex. A), at 2-3; *Trial Court Decision* (Ex. B), at 15-16; First Department oral argument,

available at: <https://www.youtube.com/watch?v=vDyN8iaIgYc> (starting around 2:01:40); Brief for Petitioner-Appellant, dated July 10, 2020, at 1, 11-29, 29-52; Petition (A-37, para. 18; A-78, para. 118).

VI. REASONS FOR GRANTING PERMISSION TO APPEAL

This Court reviews issues that are novel, of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division. 22 NYCRR § 500.22(b)(4). On important legal issues, this Court grants leave to “cure substantial injustice,” “[d]evelop emerging areas of common law,” and correct “incorrect statements of law.” *The New York Court of Appeals Civil Jurisdiction and Practice Outline*, at 17, available at: <https://www.nycourts.gov/ctapps/forms/civiloutline.pdf>.

The NhRP respectfully submits that all these factors weigh heavily in favor of granting its motion. The novel and important issue of Happy’s entitlement to habeas corpus relief is of great public concern, and involves the ongoing infliction of a substantial injustice as well as fundamental questions about the nature of the common law, legal personhood, and the purpose and reach of the Great Writ of Habeas Corpus. The *First Department Decision* and the prior decisions upon which it is grounded—*Lavery I*, *Lavery II*, and *Presti*—also involve conflicts with prior decisions of this Court, conflicts with the Fourth and First Departments, and are erroneous for other reasons that require review by this Court.

A. The recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus is a novel and important issue that requires review by this Court.

1. The recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus presents a novel issue of local, statewide, national, and international importance.

Especially as this case concerns entitlement to the most important common law right that has ever existed, the Great Writ of Habeas Corpus, the NhRP respectfully suggests that the time has arrived for this Court to grapple with the novel and “profound” issue of “whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

With the singular exception of Judge Fahey’s concurring opinion in *Tommy*, this Court has never grappled with the novel and important issue of whether it is *possible* for an imprisoned, autonomous, self-determining, extraordinarily cognitively complex nonhuman animal—such as an elephant or a great ape—to possess the common law right to bodily liberty protected by common law habeas corpus. Judge Fahey wrote:

In the interval since we first denied leave to the Nonhuman Rights Project [in a 2015 chimpanzee habeas corpus case] I have struggled with whether this was the right decision. Although I concur in the Court’s decision to deny leave to appeal now [on procedural grounds], I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and

far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it.

31 N.Y.3d at 1059 (Fahey, J., concurring).⁶

The Third Department recognized that a common law habeas corpus action brought on behalf of an imprisoned chimpanzee prisoner “presents the *novel question* of whether a chimpanzee is a ‘person’ entitled to the rights and protections afforded by the writ of habeas corpus.” *Lavery I*, 124 A.D.3d at 149 (emphasis added); *see also Matter of Nonhuman Rights Project, Inc. v. Stanley*, 16 N.Y.S.3d 898, 917-18 (Sup. Ct. 2015) (“*Stanley*”) (“Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed. . . . As Justice Kennedy aptly observed in *Lawrence v. Texas*, albeit in a different context, ‘times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.’ The pace may now be accelerating.”) (citation omitted).

Courts outside New York, and around the world, have recognized the novelty and importance of the broader issue of whether it is *possible* for *any* nonhuman animal to possess any legal right under *any* circumstance.

⁶ Judge Fahey concurred with *Lavery II* that it was proper for the lower court to dismiss the habeas corpus petitions as impermissibly successive under CPLR 7003(b). 31 N.Y.3d at 1056 (Fahey, J., concurring). However, he “underscore[d] that denial of leave to appeal is not a decision on the merits of petitioner’s claims.” *Id.*

In December 2020, the Selection Court of Ecuador’s highest court, the Constitutional Court of Ecuador, ruled that the Constitutional Court will hear an appeal from the denial of a writ of habeas corpus for a monkey because of the “novelty [of the issue] and the non-existence of precedents,” stating:

8. [The] selection parameters [are]: a) seriousness of the matter; b) novel nature of the case and non-existence of judicial precedents; c) denial of judicial precedents set by the Constitutional Court; and d) national relevance or significance of the matter ruled upon in the sentence.

9. The matter of the case deals with a motion for *habeas corpus* filed on behalf of an animal, which submits to debate the fact as to whether an animal can be considered a subject entitled to rights or not. In this regard, the Constitutional Court has not issued any opinion and, therefore, the matter meets the parameter of a novelty and non-existence of precedents. Thus, this Court may develop case law determining the scope of a motion for *habeas corpus* with respect to the protection of other living beings, and if these can be considered as subjects entitled to rights covered by the laws of nature.

SELECTION COURT OF THE CONSTITUTIONAL COURT OF ECUADOR re:
Case No.253-20-JH (December 22, 2020) [English translation]. ADD-96.

In April 2020, the Islamabad High Court issued a writ of mandamus that ordered the release of a long imprisoned Asian elephant named Kaavan from the Islamabad Zoo to a Cambodian sanctuary. *Islamabad Wildlife Mmgt. Bd. v. Metropolitan Corp. Islamabad*, W.P. No. 1155/2019 at 62 (H.C., Islamabad, Pakistan May 5, 2020). ADD-215. Making clear the public importance of the case, the court wrote:

The petitions in hand, besides raising questions of *public importance*, have a nexus with the threat to human existence highlighted by the current pandemic crisis. It has highlighted the interdependence of living beings on each other. . . . The questions raised in these petitions are definitely in the context of the relationship of one form of life with another i.e. humans and the other living creatures called ‘animals’.

Id. at 3-4 (emphasis added). ADD-156 – 57.

In 2017, the Colombia Supreme Court ordered the release of the Spectacled Bear named Chucho from the Barranquilla City Zoo to a Protected Forest Preserve *pursuant to habeas corpus*, explaining that its decision assists in

the creation of a deep awareness of the necessity of protecting the vital environment for the survival of mankind, as well as of bluntly fighting the irrationality that prevails in our relationship with nature. Ours is an effort to sensitize the public to the environment, to design national and global public and institutional policies that discourage all forms of discrimination and destruction of the ecosystem and of the future of humanity.

Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas, AHC4806-2017 at 13 (Supreme Court of Colombia, July 26, 2017) [English translation]. ADD-76.

Thereafter, in 2018, a Magistrate of the Constitutional Court of Colombia (Colombia’s highest court) petitioned the full court to decide the question of whether Chucho had the right to *habeas corpus* on the ground that the matter was *novel* and because the court should determine how the case fits into its existing jurisprudence. *See* Petition of Magistrate of the Constitutional Court of Colombia, Antonio Jose

Lizarazo Ocampo, T6.480.577 at 5-6 (January 22, 2018) [English translation]. ADD-85 – 86. The Constitutional Court of Colombia then accepted the case.⁷

In 2016, an Argentinian court ordered the release of an imprisoned chimpanzee named Cecilia from the Mendoza Zoo to a sanctuary in Brazil, *pursuant to habeas corpus*, stating that the community

will feel the satisfaction of knowing that acting collectively as a society we have been able to give Cecilia the life she deserves. Cecilia’s present situation moves us. If we take care of her wellbeing, it is not Cecilia who will owe us; it is us who will have to thank her for giving us the opportunity to grow as a group and to feel a little more human.

Presented by A.F.A.D.A. About the Chimpanzee “Cecilia” – Nonhuman Individual, File No. P.72.254/15 at 15 (Tercer Juzgada de Garantias Mencoza, Argentina November 3, 2016). ADD-15.

In 2015, an Argentinian court addressed the issue of whether an orangutan named Sandra imprisoned at the Buenos Aires Zoo was “a subject of law or just a mere object,” and stated that:

Understanding and realizing that the ways to categorize and classify contain specific power relations, which in turn can lead to relations of inequality, domination and subjugation of living beings, allow us the ability to change certain ways of seeing and acting on our daily lives and about the life of other human and nonhuman.

⁷ In an official court press release issued in January 2020, the Constitutional Court announced that it reversed the Supreme Court’s ruling by a vote of 7-2. Official Press Release of the Constitutional Court of Colombia, CASE FILE T-6.480.577 - SENTENCE SU-016/20 (January 23, 2020) [English translation]. ADD-88. The official decision has not yet been issued and is subject to clarification.

Association of Officers and Lawyers for Animal Rights v. Writ of Protection, No. A 2174-2015/0 at 6, 11 (Judicial Branch, Buenos Aires Argentina October 21, 2015) [English translation]. ADD-39, 44. The court concluded Sandra was a “non-human person . . . and therefore subject to rights and consequent duties to her [by] human persons.”⁸ *Id.* at 6. ADD-39.

In 2014, the Supreme Court of Oregon, referring to the “ongoing litigation” brought by the NhRP that “seeks to establish legal personhood for chimpanzees,” noted 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*, 355 Ore. 759, 769-70 (2014).

With respect to Happy, the “profound” issue of whether she should be freed from her long imprisonment at the Bronx Zoo and sent to a sanctuary has garnered enormous interest among legal scholars, philosophers, and the general public.

Happy was first introduced to the public at large in 2006 when she obtained international fame for being the first elephant to “pass” the mirror self-recognition test, thereby demonstrating her self-awareness.⁹ Nearly a decade later, the New York

⁸ The appellate court on appeal reversed in part and affirmed in part. *Association of Officials and Attorneys for Animal Rights et al. vs. The Government of the City of Buenos Aires (gcba), re: Constitutional Protection*, case file no. a2174-2015/0 at para. XV (Appellate Court, Buenos Aires Argentina June 14, 2016) [English translation]. ADD-63.

⁹ See Joshua M. Plotnik, Frans B.M. de Waal, and Diana Reiss, *Self-recognition in an Asian elephant*, 103 PNAS 17053 (Nov. 7, 2006), available at: <https://www.pnas.org/content/103/45/17053>; Henry Fountain, “The Elephant in the Mirror,” New

Times in 2015 dubbed Happy “The Bronx Zoo’s Loneliest Elephant”¹⁰ following years of public outcry about her solitary existence.¹¹ Since late 2018 alone, when this case began, there have been hundreds of items of media coverage in diverse local, state, national, and international media outlets about Happy and the NhRP’s efforts to free her.¹²

York Times (Oct. 31 2006), available at: <https://www.nytimes.com/2006/10/31/science/31observ.html>; All Things Considered, “Elephants Have a Concept of Self, Study Suggests,” NPR (Oct. 31 2006), available at: <https://www.npr.org/templates/story/story.php?storyId=6412620>; BBC News, “Elephants’ jumbo mirror ability” (Oct. 31, 2006), available at: <http://news.bbc.co.uk/2/hi/science/nature/6100430.stm>.

¹⁰ Tracy Tullis, “The Bronx Zoo’s Loneliest Elephant,” *The New York Times* (June 26, 2015), available at: <https://www.nytimes.com/2015/06/28/nyregion/the-bronx-zoos-loneliest-elephant.html>.

¹¹ Brad Hamilton, “Happy the elephant’s sad life alone at the Bronx Zoo,” *New York Post* (September 30, 2020), available at: <https://nypost.com/2012/09/30/happy-the-elephants-sad-life-alone-at-the-bronx-zoo/>.

¹² *E.g.*, Michael Gold, “Is Happy the Elephant Lonely? Free Her, the Bronx Zoo Is Urged,” *New York Times* (Oct. 3, 2018), available at: <https://www.nytimes.com/2018/10/03/nyregion/bronx-zoo-elephant-lawsuit-happy.html>; Melanie Grayce West, “Bronx Zoo’s Happy the Elephant Has Day in Court,” *The Wall Street Journal* (Oct. 21, 2019), available at: <https://www.wsj.com/articles/bronx-zoos-happy-the-elephant-has-day-in-court-11571701359>; Elizabeth Elizalde, “Animal rights group urges court to recognize Bronx Zoo elephant as a person,” *New York Post* (Nov. 19, 2020), available at: <https://nypost.com/2020/11/19/animal-rights-group-urges-court-to-recognize-bronx-zoo-elephant-as-person/>; Robert Gavin, “‘Personhood’ of elephant debated in New York court,” *Albany Times Union* (Nov. 19, 2020), available at: <https://www.timesunion.com/news/article/Personhood-of-elephant-to-be-debated-in-court-15739611.php>; Mack Rosenberg, “Happy the elephant to stay at Bronx Zoo after animal rights group loses court challenge,” *WCBS Newsradio 880* (Dec. 17, 2020), available at: <https://www.radio.com/wcbs880/news/local/appeals-court-sides-with-bronx-zoo-over-happy-the-elephant>; Randy Gorbman, “Elephant ‘personhood’ case heard in Orleans County,” *WBFO NPR* (Dec. 17, 2018), available at: <https://news.wbfo.org/post/elephant-personhood-case-heard-orleans-county>; Stacey Delikat, “Animal rights supporters fighting to get Bronx Zoo elephant released,” *FOX 5 New York* (Sept. 24, 2019), available at: <https://www.fox5ny.com/news/animal-rights-supporters-fighting-to-get-bronx-zoo-elephant-released>; Corey Crockett, “Happy the Elephant denied personhood in court, Bronx Zoo says,” *PIX 11* (Feb. 19, 2020), available at:

New York City public officials have commented on Happy’s plight and the efforts to secure her freedom, including the Speaker of the New York City Council Corey Johnson, who publicly endorsed sending Happy to a sanctuary,¹³ Congresswoman Alexandria Ocasio-Cortez,¹⁴ and Mayor Bill de Blasio.¹⁵ As of the date of this motion, the oral argument before the First Department has been viewed on YouTube almost 2,000 times.¹⁶ A Change.org petition to free Happy has gathered

<https://www.pix11.com/news/local-news/bronx/happy-the-elephant-denied-personhood-in-court-bronx-zoo-says>; June Grasso, “Happy the Elephant Stuck in ‘Solitary’ at the Zoo,” Bloomberg (Feb. 27, 2020), available at: <https://www.bloomberg.com/news/audio/2020-02-27/happy-the-elephant-stuck-in-solitary-at-the-zoo>; Jake Offenhartz, “Bronx Zoo’s Happy The Elephant Is Actually Really Sad And Lonely, Lawsuit Alleges,” Gothamist (Oct. 3, 2018), available at: <https://gothamist.com/news/bronx-zoos-happy-the-elephant-is-actually-really-sad-and-lonely-lawsuit-alleges>; Brandon Keim, “An Elephant’s Personhood on Trial,” The Atlantic (Dec. 28, 2018), available at: <https://www.theatlantic.com/science/archive/2018/12/happy-elephant-personhood/578818/>; Oliver Milman, “Lawyers argue Happy the elephant should have right to freedom,” The Guardian (Oct. 22, 2019), available at: <https://www.theguardian.com/us-news/2019/oct/22/lawyers-argue-happy-the-elephant-should-have-the-same-rights-as-humans>; Beth Daley, “Happy the elephant was denied rights designed for humans – but the legal definition of ‘person’ is still evolving,” The Conversation (Jan. 6, 2021), available at: <https://theconversation.com/happy-the-elephant-was-denied-rights-designed-for-humans-but-the-legal-definition-of-person-is-still-evolving-152410>; David Allen Green, “Should animals have legal personality?,” Financial Times (Oct. 25, 2020), available at: <https://www.ft.com/content/b6f0b022-2c70-42c3-b850-ab6b48841fcf>.

¹³ NhRP’s Media Release, “NYC Council Speaker Urges Bronx Zoo to Release Happy and Patty to a Sanctuary” (July 10, 2019). Available at: <https://www.nonhumanrights.org/media-center/07-10-19-media-release-nyc-city-council-speaker-urges-sanctuary/>.

¹⁴ Nikki Schwab, “Ocasio-Cortez offers to help Bronx Zoo’s Happy the elephant,” New York Post (June 6, 2019). Available at: <https://nypost.com/2019/06/06/ocasio-cortez-offers-to-help-bronx-zoos-happy-the-elephant/>.

¹⁵ Julia Marsh, “De Blasio sympathizes with Happy the elephant, but ‘doesn’t know the details,’” New York Post (Oct. 4, 2019). Available at: <https://nypost.com/2019/10/04/de-blasio-sympathizes-with-happy-the-elephant-but-doesnt-know-the-details/>.

¹⁶ Available at: <https://www.youtube.com/watch?v=vDyN8iaIgYc> (starting around 2:01:40).

nearly 1.4 million signatures, of which almost 1 million have been added since the NhRP filed its Petition.¹⁷

In support of Happy's freedom, notable scholars of American jurisprudence as well as a distinguished group of twelve philosophers submitted briefs as *amicus curiae* in the First Department. They are: constitutional law expert Professor Laurence Tribe;¹⁸ habeas corpus experts Justin Marceau and Samuel Wiseman;¹⁹ and philosophers Gary Comstock, G.K.D. Crozier, Andrew Fenton, Tyler John, L. Syd M Johnson, Robert C. Jones, Letitia Meynell, Nathan Nobis, David Peña-Guzmán, James Rocha, Bernard Rollin, and Jeff Sebo.²⁰

Finally, in the Islamabad High Court case discussed above, the court referenced the NhRP's litigation on behalf of Happy, mentioning her by name nine

¹⁷ Available at: <https://www.change.org/p/end-happy-the-elephant-s-10-years-of-solitary-confinement>.

¹⁸ The *amicus curiae* brief of Professor Tribe is available at: https://www.nonhumanrights.org/content/uploads/2020-02581_Proposed-Brief-of-Laurence-H.-Tribe-as-Amicus-Curiae.pdf.

¹⁹ The *amicus curiae* brief of professors Marceau and Wiseman is available at: <https://www.nonhumanrights.org/content/uploads/Marceau-and-Wiseman-Brief.pdf>.

²⁰ The *amicus curiae* brief of the philosophers is available at: <https://www.nonhumanrights.org/content/uploads/Philosophers-Brief.pdf>. In *Tommy*, Judge Fahey cited these amici philosophers who were granted leave to submit an *amicus curiae* brief in that case, noting that they “[drew] our attention to recent evidence that chimpanzees demonstrate autonomy by self-Initiating, intentional, adequately informed actions, free of controlling influences.” 31 N.Y.3d at 1058 (Fahey, J., concurring).

times. It characterized Happy as “an inmate of the Bronx zoo,” and noted that she possesses mirror-self recognition, and that the trial court “was sympathetic to [her] plight” but had “regretfully denied . . . habeas corpus relief.”²¹ *Islamabad Wildlife Mgmt. Bd*, W.P. No. 1155/2019 at 12, 41-42, 58. ADD-165, 194 – 95, 211.

The question before this Court “will have to be addressed eventually. Can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring). The NhRP respectfully submits that the time to address the question is now.

2. This Court’s failure to examine the issue of whether Happy has the common law right to bodily liberty protected by common law habeas corpus would perpetuate a substantial injustice.

Referring to the common law, this Court recognized in *Woods v. Lancet*, 303 N.Y. 349, 355 (1951) that it has “the *duty* . . . to bring the law into accordance with present day standards of wisdom and justice.” (internal citation and quotation omitted; emphasis added). *See id.* at 354 (“Our court said, long ago, that it had not only the right, but the *duty* to re-examine a question where justice demands it.”) (emphasis added). As “New York State’s court of last resort,” this Court “should

²¹ The court also cited Judge Fahey’s concurring opinion in *Tommy. Islamabad Wildlife Mgmt. Bd*, W.P. No. 1155/2019 at 40. ADD-193.

make the law conform to right” by bringing “the common law . . . into accord with justice[.]”²² *Id.* at 351.

This Court therefore has the *duty* to examine the “profound” common law issue of whether Happy remains a common law rightless thing or whether she has “the fundamental right to liberty protected by the writ of habeas corpus.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring). “Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on . . . her?” *Id.* at 1058. As Judge Fahey recognized, “[t]his is not merely a definitional question, but a deep dilemma of ethics and policy that *demand[s] our attention.*” *Id.* (emphasis added). “While it may be arguable that” Happy, like a chimpanzee, “is not a ‘person,’ there is no doubt that [she] is not merely a thing.” *Id.* at 1059. *See Trial Court Decision* (Ex. B), at 16 (“This Court agrees that Happy is more than just a legal thing”).

Accordingly, this Court “should consider” whether Happy is “an individual with inherent value who has the right to be treated with respect.” *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). The Trial Court found that Happy “is an intelligent,

²² *See also Hynes v. Tomei*, 666 N.Y.S.2d 687, 692 (2d Dept. 1997), *rev'd on other grounds*, 92 N.Y.2d 613 (1998) (Court of Appeals is “the state’s policy making tribunal”) (citation omitted); *In re New York City Asbestos Litig.*, 148 A.D.3d 233, 242 (1st Dept. 2017) (Kahn, J., concurring) (recognizing “the singular role of the Court of Appeals in advancing policy changes in the common law”).

autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” *Trial Court Decision* (Ex. B), at 16. But by ruling that Happy has no right to liberty protected by habeas corpus merely because she is not human, the First Department anachronistically regarded her as “entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others.” *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Its decision therefore inflicts a substantial injustice.

The Trial Court recognized the injustice of Happy’s imprisonment when it found that “[t]he arguments advanced by the NhRP are *extremely persuasive* for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot.” *Trial Court Decision* (Ex. B), at 16 (emphasis added).

These arguments were based upon the uncontroverted scientific evidence from five of the world’s most respected elephant behavior and cognition experts,²³ including Dr. Joyce Poole, who stated that: (1) Happy’s enclosure is “a space that, for an elephant, is equivalent to the size of a house.” Second Supplemental Aff. of Dr. Poole (A-475, para. 9); (2) “[e]lephants have evolved to move” and, in free-

²³ These experts submitted six affidavits in support of Happy. They are: Joint Aff. of Lucy Bates, Ph.D and Richard M. Byrne, Ph.D (A-92 – A-122); Aff. of Joyce Poole, Ph.D. (A-139 – A-164); Aff. of Karen McComb, Ph.D (A-179 – A-200); Aff. of Cynthia Moss (A-218 – A-235); Supplemental Aff. of Joyce Poole, Ph.D (A-243 – A-245); and Second Supplemental Aff. of Joyce Poole, Ph.D (A-437 – A-482).

living elephant societies, are active more than 20 hours each day, moving “many miles across landscapes to locate resources to maintain their large bodies, to connect with friends and to search for mates.” Supplemental Aff. of Dr. Poole (A-243, para. 4); (3) captivity and confinement “prevents [elephants] from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom and stereotypical behavior.” Supplemental Aff. of Dr. Poole (A-243, para. 4); and (4) “[h]uman caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.” Supplemental Aff. of Dr. Poole (A-243, para. 4).

This Court should not perpetuate the injustice of Happy’s imprisonment by allowing it to stand. Instead, this Court should grant leave in order to employ habeas corpus’s “great flexibility and vague scope,” *People ex rel. Keitt v. McMann*, 18 N.Y.2d 257, 263 (1966) (citation omitted), “bring the common law . . . into accord with justice,” *Woods*, 303 N.Y. at 351, and order Happy’s immediate release. *See id.* at 355 (The Court acts “in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.”).

Treating Happy as an individual with “inherent value,” as opposed to merely a “thing,” requires nothing less. Although Happy cannot be released back into the wild, the best option is to transfer her to a sanctuary where, unlike traditional zoos,

she will be provided with “orders of magnitude of greater space.” Second Supplemental Aff. of Poole (A-478, para. 19). Such space “permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior.” *Id.*

3. The recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus is not a legislative matter.

In *Lavery II*, the First Department stated that “the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process.” 152 A.D.3d at 80. It then reaffirmed this erroneous view: “As we said in [*Lavery II*], the decisions of whether and how to integrate other species into legal constructs designed for humans is a matter ‘better suited to the legislative process.’” *First Department Decision* (Ex. A), at 3 (quoting *Lavery II*, 152 A.D.3d at 80).

These statements, however, are based on fundamental misunderstandings about Happy’s case, the nature of the common law, and the purpose of habeas corpus.

First, this case seeks judicial recognition of just one right—the common law right to bodily liberty protected by common law habeas corpus—on behalf of just one nonhuman animal: Happy. Thus, the First Department’s concern that “[a] judicial determination that species other than homo sapiens are ‘persons’ for some juridical purposes, and therefore have certain rights, would lead to a labyrinth of

questions that common-law processes are ill-equipped to answer,” *First Department Decision* (Ex. A), at 2-3, is simply untrue in the case at bar. Similarly misguided is Hon. Justice Manzanet-Daniels’ suggestion, made during oral argument,²⁴ that a ruling in Happy’s favor would require deciding which other nonhuman animals—among the one million animal species in existence—have rights, as well as which rights they have and don’t have.²⁵

Second, this Court has long rejected the argument that common law change “should come from the Legislature, not the courts,” for “we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.”²⁶ *Woods*, 303 N.Y. at 355. *Accord Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 508 (1968); *Battalla v. State*, 10 N.Y.2d 237, 239 (1961); *Bing v. Thunig*, 2 N.Y.2d 656, 667 (1957).

Addressing the argument that common law change should come from the legislature, this Court was clear that in the area of tort law, for example, it “has not

²⁴ Available at: <https://www.youtube.com/watch?v=vDyN8iaIgYc> (starting around 2:01:40).

²⁵ Moreover, this Court in *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969) “has rejected as a ground for denying a cause of action that there will be a proliferation of claims. It suffices that if a cognizable wrong has been committed that there must be a remedy, whatever the burden of the courts.” *See also Stanley*, 16 N.Y.S.3d at 917 n.2 (rejecting “floodgates argument” in chimpanzee habeas case as not being “a cogent reason for denying relief.”).

²⁶ During oral argument, Respondents’ counsel argued that this case is better suited to the legislature so all interested parties can have an opportunity to be heard. This is absurd, as the only interested parties in this habeas corpus action are the NhRP, Happy, and her jailors. Any non-party that wishes to be heard has the opportunity to request leave to submit *amicus curiae* briefs, as some have done both before the Trial Court and the First Department.

been backward in overturning unsound precedent.” *Millington*, 22 N.Y.2d at 508. This is because the common law “is not an anachronism, but is a living law which responds to the surging reality of changed conditions,” *id.* at 509 (internal quotation and citation omitted), which led this Court in *Millington* “to reject [prior precedent] and to recognize a cause of action for consortium in the wife, thereby terminating an unjust discrimination under New York law.” *Id.* at 509. *See also Silver v. Great Am. Ins. Co.*, 29 N.Y.2d 356, 363 (1972) (“Having concluded that reason and substantial justice call for modifying our prior decisions and relaxing our inflexible rule, there is nothing to deter this court from so doing. Certainly, we need not wait on legislative action. . . . Stare decisis does not compel us to follow blindly a court-created rule . . . once we are persuaded that reason and a right sense of justice recommend its change.”).²⁷

Moreover, this Court’s duty to “make the law conform to right,” *Woods*, 303 N.Y. at 351, is *uniquely powerful* in the field of habeas corpus, as it “is not the creature of any statute” but “exists as part of the common law of the State,” is “the great bulwark of liberty,” and “cannot be abrogated, or its efficiency curtailed, by

²⁷ *E.g.*, *Flanagan v. Mount Eden General Hospital*, 24 N.Y.2d 427, 434 (1969) (“Granted, the Legislature could have acted to change our rule; however, we would surrender our own function if we were to refuse to deliberate upon unsatisfactory court-made rules simply because a period of time has elapsed and the Legislature has not seen fit to act.”); *Buckley v. City of New York*, 56 N.Y.2d 300, 305 (1982) (“Furthermore, we make it abundantly clear that we do not subscribe to the view that the abolition of the fellow-servant rule is strictly a matter for legislative attention. The fellow-servant rule originated as a matter of decisional law, and it remains subject to judicial re-examination.”).

legislative action.” *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565-66 (1875). “The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion.” *Id.* at 566-67; *Hoff v. State of New York*, 279 N.Y. 490, 492 (1939); *People ex rel Sabatino v. Jennings*, 246 N.Y. 258, 261 (1927). *See also People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 130 (2015) (“Although article 70 governs the procedure of the common-law writ of habeas corpus, ‘[r]elief from illegal imprisonment by means of this remedial writ is not the creature of any statute.’”) (quoting *Tweed*, 60 N.Y. at 565).

Those few habeas corpus statutes that have been enacted “in England from the time of Charles II (31 Car. 2, C. 2), and in this State from the time of its first organization, have not been intended to detract from its force, but rather to add to its efficiency.” *Tweed*, 60 N.Y. at 566. And “by the slow process of decisional accretion,” this Court has “made increasing use of [the writ’s] ‘great flexibility and vague scope.’”²⁸ *McMann*, 18 N.Y.2d at 263 (citation omitted).

Third, the First Department severely underestimated “[t]he genius of the common law,” which “lies in its flexibility and in its adaptability to the changing nature of human affairs and in its ability to enunciate rights and to provide remedies

²⁸ *See also* Vincent Alexander, *Practice Commentaries*, McKinney’s CPLR 7001 (“The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law.”).

for wrongs where previously none had been declared.” *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939). The common law “is not a compendium of mechanical rules written in fixed and indelible characters, but a living organism which grows and moves in response to the larger and fuller development of the nation.” *Id.* (internal citation and quotation omitted).

This Court in *Woods* noted that “[p]erhaps, some kinds of changes in the common law could not safely be made without the kind of factual investigation which the Legislature and not the courts, is equipped for.” 303 N.Y. at 355. *See id.* at 355-56 (“Other proposed changes require elaborate research and consideration of a variety of possible remedies”). However, this is not one of those cases.

After reading many hundreds of pages of submissions and listening to 13 hours of oral argument, the Trial Court was quite well-equipped to make the factual finding necessary to fulfill its duty to make the “law conform to right” by bringing the common law into accord with justice and in harmony with New York’s fundamental principles of liberty, equality, and respect for autonomy. The Trial Court found that “Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. . . . [S]he is an intelligent autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” *Trial Court Decision* (Ex. B), at 16. It was well-

equipped to do so because the Trial Court was presented with overwhelming and *uncontroverted* scientific evidence:

The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds.

Trial Court Decision (Ex. B), at 10.²⁹

Who would dispute that Lord Mansfield and the Court of Kings Bench were quite well-equipped to find that the Black slave, James Somerset, was entitled to his bodily liberty pursuant to his novel common law claim of habeas corpus, in which Lord Mansfield concluded: “[t]he state of [human] slavery is . . . so odious, that nothing can be suffered to support it, but positive law”? *Somerset v. Stewart*, 1 Lofft 1, 19 (K.B. 1772). ADD-110. There was no need for a factual investigation so complex that it was outside that court’s competence. As in the case at bar, the facts were undisputed and the sole question was whether James Somerset’s demand for liberty harmonized with the fundamental values of English law.

It seems likely that the Trial Court would have released Happy from her long and lonely imprisonment at the Bronx Zoo and sent her to a sanctuary pursuant to

²⁹ The NhRP pointed out that “none of [Respondents’] affiants present[ed] any evidence that they have studied any wild elephant, or know about an elephant’s basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.” *Trial Court Decision* (Ex. B), at 10.

her novel common law claim of habeas corpus, had it not believed that its hands were tied by *Lavery I*. The court noted that although “[it] is extremely sympathetic to Happy’s plight and the NhRP’s mission on her behalf,” *Trial Court Decision* (Ex. B), at 16, it was “[r]egrettably... bound by the legal precedent set by the Appellate Division.” *Id.* at 15. It is now this Court’s *duty* to at least *consider* untying them.

Fourth, because this case concerns the *immediate* and *ongoing* deprivation of Happy’s fundamental common law right to bodily liberty protected by common law habeas corpus, the issue of her entitlement to habeas relief *cannot* possibly be a matter for the legislature. Time is of the essence since Happy’s freedom is at stake. *See People ex rel. Robertson v. N.Y. State Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (Habeas corpus is a “summary proceeding” that “strikes at unlawful imprisonment or restraint,” and “tolerates no delay except of necessity.”); CPLR 7010(a) (“If the person is illegally detained a final judgment shall be directed discharging him *forthwith.*”) (emphasis added). It was therefore grossly inappropriate for the First Department to attempt to deflect onto the legislature its responsibility to bring the common law into accord with justice solely because Happy is an elephant.

Indeed, the First Department’s persistently expressed desire to shift its responsibility to the legislature deviates from and undermines the long and proud history of New York courts using habeas corpus to free enslaved humans. *E.g.*, *Lemmon v. People*, 20 N.Y. 562 (1860) (seven slaves); *In re Belt*, 2 Edm.Sel.Cas.

93 (N.Y. Sup. Ct. 1848) (slave); *In re Kirk*, 1 Edm.Sel.Cas. 315 (N.Y. Sup. Ct. 1846) (slave imprisoned on brig). *See also Somerset* (slave imprisoned on ship set to sail to Jamaica) (adopted as New York’s common law, N.Y. Const., art. I, § 14; N.Y. Const., art. 35 (1777), and approved in *Lemmon*, 20 N.Y. at 604–5), ADD-99; Paul Finkleman, *Slavery in the Courtroom* 57 (1985) (“The *Lemmon* case is one of the most extreme examples of hostility to slavery in Northern courts.”).

This deflection is first cousin to the frequent appeal of antebellum Northern judges *outside of New York* to a separation of powers rationale when ruling against slaves, which “provided political and moral justifications for the helplessness of the judge to affect certain situations,” while “externalizing responsibility for unwanted consequences.” Robert M. Cover, *Justice Accused – Antislavery and the Judicial Process* 236 (1975).

4. This Court’s recognition of Happy’s common law right to bodily liberty protected by common law habeas corpus would not extend to her any other right.

Contrary to the Hon. Justice Gesmer’s suggestion during oral argument, it is *untrue* that an entity recognized as a “person” for one legal purpose must be treated as a “person” for all legal purposes. Justice Gesmer specifically suggested that ruling in Happy’s favor would mean extending to her “all the rights of personhood in our country,” including “the right to vote.” However, this was based upon a serious misunderstanding about the nature of personhood, which is merely the capacity for

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

This Court made clear in *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194 (1972) that the recognition of an entity as a “person” for one purpose – or the recognition of an entity’s single right – does *not* mean that that entity is a “person” for other purposes or has *other* rights. Thus, a “person” can have some rights, or one right, but no others; for example, children are “persons” with the right to liberty protected by habeas corpus but do not have the right to vote. As *Byrn* explained,

unborn children have been recognized as acquiring rights or interests in narrow legal categories involving the inheritance or devolution of Property. Fetuses, if they are born alive, have been entitled in modern times to recover in tort for injuries sustained through the host mother. Indeed, unconceived children have been represented in proceedings affecting property by guardians ad litem. *But unborn children have never been recognized as persons in the law in the whole sense.*

Id. at 200 (emphasis added). See *id.* at 203 (unborn humans have rights “in narrow legal categories,” but are not Fourteenth Amendment “persons”); see also 1 *English Private Law* § 3.14, at 145 (Peter Birks ed. 2000) (“A human being or entity which has been said by Parliament or the courts to be capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person *with that particular capacity*. But it can be easy to forget the qualifier, and to assume that when the question later arises [of whether the individual or entity has the further

capacity to enforce some other right, or to owe some other duty]. . .this must be so because he or it has previously been said to be a person *with an unlimited set of capacities*, or to be a person whose possesses ‘the powers normally attendant on legal personality’.”) (emphases in original).

Similarly, in the early nineteenth century Black slaves in New York were “persons” as they possessed a small number of statutory rights, including the right to a jury trial, to own and transfer property by will, to marry, and to bear legitimate children.³⁰ But they were *never* “persons” in “the whole sense” until New York abolished slavery in 1827.

The same is true of nonhuman animals. Under EPTL § 7-8.1, certain nonhuman animals can be trust “beneficiaries” with the statutory right to the corpus of a trust. These nonhuman animals are “persons” as only “persons” can be beneficiaries.³¹ See *Stanley*, 16 N.Y.S.3d at 901 (referring to “this state’s recognition of *legal personhood* for some nonhuman animals under [EPTL § 7-8.1]”) (emphasis added). However, while these nonhuman animals are “persons” with trust

³⁰ Edgar J. McManus, *A History of Negro Slavery in New York* 63, 65, 177–78 (1966).

³¹ *E.g.*, *Lenzner v. Falk*, 68 N.Y.S.2d 699, 703 (Sup. Ct. 1947) (“‘Beneficiary’ is defined as ‘a person having enjoyment of property of which a trustee and executor, etc. has legal possession.’”) (quoting Black’s Law Dictionary); *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. 1883) (“Beneficiaries . . . must be persons[.]”), *rev’d on other grounds*, 99 N.Y. 451 (1885).

beneficiary rights, they presently have no other rights either by statute or at common law and remain property.

Another example is the pathbreaking 2014 decision of the Indian Supreme Court in *Animal Welfare Board v. Nagaraja*, MANU/SC/0426/2014 at paras. 32, 54, 56, 62 (Supreme Court of India 2014), in which that court held that all nonhuman animals had certain statutory and constitutional rights that protect some of their interests. ADD-138, 145-46, 147-48. Those rights are subject to “just exceptions, out of human necessity,” *id.* at para. 12, while the property status of nonhuman animals remains unaffected. *Id.* at para. 55. ADD-145.

B. The *First Department Decision* conflicts with prior decisions of this Court.

The *First Department Decision*, grounded upon the decisions in *Lavery I*, *Lavery II*, and *Presti* (*see supra*, at 4 – 7), conflicts with the following Court of Appeals precedent.

1. *Byrn v. New York City Health & Hosps. Corp.*

The *First Department Decision* perpetuated the erroneous views of personhood invented in *Lavery I* and *Lavery II* that (1) a “person” must have the capacity to bear legal duties, 124 A.D.3 at 151-52; 152 A.D.3d at 78, and (2) a “person” must be a human being. 124 A.D.3d at 152 n.3; 152 A.D.3d at 78. However, these misconceptions directly contradict *Byrn*, where this Court made clear that

personhood does *not* require the capacity to bear legal duties and is *not* limited to humans.

First, *Byrn* established that a “legal person . . . simply means that upon according legal personality to a thing the law affords it the *rights and privileges* of a legal person.” 31 N.Y.2d at 201 (emphasis added). *Byrn* never mentioned duties. Contrary to the misconception in *Lavery I* and *Lavery II*—and perpetuated in the *First Department Decision*—this Court made clear that the capacity for rights alone is sufficient for personhood.

Second, *Byrn* established that “whether legal personality should attach” is a “policy question” that requires a “policy determination,” and “*not* a question of biological or natural correspondence.” 31 N.Y.2d at 201 (emphasis added). Yet the personhood conclusions in *Lavery I* and *Lavery II* were not at all based upon policy; instead, they were wholly based upon the obvious biological fact that chimpanzees are not human beings.

As Judge Fahey noted, *Lavery II*’s “conclusion that a chimpanzee cannot be a ‘person’ and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of human species.” *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). Perpetuating this conflict with *Byrn*, the First Department now holds that “the writ of habeas corpus is limited to human beings”

under *Lavery II*, *First Department Decision* (Ex. A), at 2, thereby erroneously reducing the question of Happy’s personhood to one of mere biology.

2. *Woods v. Lancet* and its progeny

This Court made clear in *Woods* and its progeny that the common law is grounded upon what is *just and morally right*. *Woods*, 303 N.Y. at 351 (“we should make the law conform to right” by bringing “the common law of this State . . . into accord with justice”). *See, e.g., Hymowitz v. Eli Lilly and Co*, 73 N.Y.2d 487, 507 (1989) (“the ever-evolving dictates of justice and fairness . . . are the heart of our common-law system”); *Buckley v. City of New York*, 56 N.Y.2d 300, 305 (1982) (“The continued vitality of a rule of law [created under the common law] should depend heavily upon its continuing practicality and the demands of justice, rather than upon its mere tradition.”); *Endresz v. Friedberg*, 24 N.Y.2d 478, 483 (1969) (noting that *Woods* brought the “common law of this State into accord with the demand of natural justice”); *Millington*, 22 N.Y.2d at 508, 509 (updating the common law, “on the basis of policy and fairness,” in order to terminate “an unjust discrimination under New York law”); *Battalla*, 10 N.Y.2d at 239 (overruling prior common law decision as a “rigorous application of its rule would be unjust, as well as opposed to experience and logic”).

Thus, the courts in *Lavery I*, *Lavery II*, and the *First Department Decision*, faced with purely common law issues, had a duty to resolve them based upon what

is just and morally right. Instead, the courts entirely avoided the policy arguments raised by the NhRP and erroneously based their personhood determinations on mere biology, in stark conflict with *Woods* and its progeny.

3. People ex rel. Dawson v. Smith

The *First Department Decision* perpetuates *Presti and Lavery II*'s gross misreading of *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), 152 A.D.3d at 80; 124 A.D.3d at 1335, that seeking the release of an imprisoned individual from one facility and transfer of that individual to a different facility is unavailable under habeas corpus. The First Department in *Lavery II*, relying upon *Presti*, claimed that the requested relief there—sending the chimpanzees Tommy and Kiko, who were being privately imprisoned in cages, to a sanctuary—was “analogous to the situation” prohibited in *Dawson*. 152 A.D.3d at 80. However, Judge Fahey explained that “the Appellate Division *erred* in this matter, by *misreading the case it relied on* [*Dawson*].” *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring) (emphases added).

In *Dawson*, this Court explained that the petitioner in *People ex rel. Brown v. Johnston*, 9 N.Y. 2d 482 (1961) properly employed habeas corpus to seek release from his facility of confinement to “an institution separate and different in nature.” 69 N.Y.2d at 691. By contrast, the petitioner in *Dawson* improperly employed habeas corpus to seek release from his confinement in the special housing unit to another part of the very same facility. *Id.*

Dawson thus “stands for the proposition that habeas corpus *can* be used to seek a transfer to ‘an institution separate and different in nature from the. . . facility to which petitioner had been committed,’ as opposed to a transfer ‘within the facility.’” *Tommy*, 31 N.Y. 3d at 1058–59 (Fahey, J., concurring) (emphasis in original; quoting *Dawson*).

As the NhRP seeks Happy’s immediate release from her imprisonment at the Bronx Zoo and transfer to “an institution separate and different in nature”—an elephant sanctuary—its requested relief is analogous to the situation in *Brown* and not *Dawson*. See *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring) (criticizing *Lavery II* and *Presti*, noting that “[t]he chimpanzees’ predicament is analogous to the former situation [in *Brown*], not the latter [in *Dawson*].”).

C. The *First Department Decision* conflicts with the Fourth and First Departments.

1. *People v. Graves*

The personhood conclusions in *Lavery I* and *Lavery II*, perpetuated by the *First Department Decision*, that an autonomous, self-determining, extraordinarily cognitively complex nonhuman animal—such as a chimpanzee or an elephant—cannot *possibly* possess any legal right, including the common law right to bodily liberty protected by common law habeas corpus, conflicts with the Fourth Department decision in *People v. Graves*, 163 A.D. 3d 16 (4th Dept. 2018).

In *Graves*, the defendant was convicted of crimes for vandalizing cars owned by the victim “Bill Cram Chevrolet,” a car dealership, where at trial the People were required to prove that “Bill Cram Chevrolet” was a “person” for purposes of the criminal mischief statute. The defendant argued on appeal that, because the term “person” was not defined for the jury, the People needed to prove the victim was a human being.

Rejecting this logic and affirming the defendant’s conviction, the Fourth Department stated that “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or *animals*,” citing, *inter alia*, *Presti*. *Id.* at 21 (emphasis added). The court further cited this Court’s statement in *Byrn* “that personhood is ‘not a question of biological or ‘natural’ correspondence.’” *Id.* (citation omitted).

The Fourth Department and the First Department therefore conflict. Although Respondents have claimed *Graves*’s statement on nonhuman animals was “a stray comment,” Resp’t Br. 18, it formed part of the court’s reasoning and analysis in rejecting the claim that personhood is limited to human beings. *See* 163 A.D.3d at 21 (“In short, defendant’s personhood argument effectively transforms an *undefined* but commonly understood term into an *incorrectly defined* term, and we decline to follow him down that path.”) (emphases in original).

2. *McGraw v. Wack*

The First Department Decision perpetuated *Lavery II* and *Presti*'s conclusion that the release and transfer of an imprisoned individual from one facility to a different facility is not an available remedy under habeas corpus. This directly conflicts with the First Department's precedent in *McGraw v. Wack*, 220 A.D.2d 291 (1st Dept. 1995).

The conflict was highlighted by the *Stanley* court. In *Stanley*, decided before *Lavery II*, the trial court held that it was *not* bound by *Presti* given its conflict with *McGraw*:

Respondents also maintain that as petitioner does not seek the release of the chimpanzees from the University, but their transfer to a chimpanzee sanctuary, it has no legal recourse to habeas corpus. . . . There is, however, authority to the contrary in the First Department. (See *McGraw v. Wack*, 220 A.D.2d 291, 292, 632 N.Y.S.2d 135 [1st Dept.1995] [observing that Court of Appeals approved, sub silentio, use of writ of habeas corpus to secure transfer of mentally ill individual to another institution], citing *Matter of MHLS v. Wack*, 75 N.Y.2d 751, 551 N.Y.S.2d 894, 551 N.E.2d 95 [1989]). Consequently, I am not bound by the decision of the Fourth Department in [*Presti*].

16 N.Y.S.3d at 917 n.2. See *Mental Hygiene Legal Servs. ex rel. Cruz v. Wack*, 148 A.D.2d 341, 343 (1st Dept. 1989) (order granting habeas petitioner's transfer from a secure facility to a non-secure facility).

D. The personhood conclusions in the *First Department Decision*, *Lavery I*, and *Lavery II* are erroneous for reasons apart from their conflict with *Byrn*, *Woods*, and *Graves*.

1. An individual need not be human or have the capacity to bear duties in order to be a “person.”

The jurisprudential literature on personhood universally establishes that an individual need not be human or have the capacity to bear duties in order to be a “person.” A “person” has long been understood as “any being whom the law regards as capable of rights *or* duties,” and “[a]ny being that is so capable is a person, *whether a human being or not.*” Black’s Law Dictionary [Person] (11th ed. 2019) (quoting John Salmond, *Jurisprudence* 318 (Glanville L. Williams ed., 10th ed. 1947)) (emphases added). *See* Roscoe Pound, *Jurisprudence* vol. IV 197 (1959) (“The significant fortune of legal personality is the capacity for rights.”); Byrant Smith, *Legal Personality*, 37 *Yale LJ* 283, 283 (1928) (“To confer legal rights or to impose legal duties . . . is to confer legal personality.”); Richard Tur, *The “Person” in Law*, in *Persons and Personality: A Contemporary Inquiry*, 121-22 (Arthur Peacocke & Grant Gillett eds. 1987) (legal personality “can be given to just about anything It is an empty slot that can be filled by anything that can have rights or duties.”); 1 *English Private Law* § 3.14, at 145 (Peter Birks ed. 2000) (“A human being or entity which has been said by Parliament or the courts to be capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person *with that particular capacity.*”) (emphasis in original).

Two of *Lavery I*'s own sources—erroneously cited for the proposition that personhood requires the capacity to bear *both* rights and duties—make clear that the capacity for rights alone is sufficient for personhood.

First, quoting John Chipman Gray's *The Nature and Sources of the Law* 27 (2d ed. 1921) ("*Gray*"), the Third Department stated that "the legal meaning of a 'person' is a 'subject of legal rights *and* duties.'" 124 A.D.3d at 152 (quoting *Gray*, at 27; emphasis added). But *Lavery I* ignored the next qualifying sentence, in which *Gray* made clear that "one who has rights but not duties, or who has duties but no rights, is . . . a person," and that "if there is any one who has rights though no duties, or duties though no rights, he is . . . a person in the eye of the Law." *Gray*, at 27. Professor Gray further wrote that "animals may conceivably be legal persons" for two independent reasons: "*First*, legal persons because possessing legal rights. . . . *Secondly*, animals as legal persons, because subject to legal duties." *Id.* at 42-44.

Second, the Third Department relied upon the 7th edition of Black's Law Dictionary for a quotation from Judge John Salmond's *Jurisprudence*, which allegedly stated: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *and* duties." 124 A.D.3d at 151 (quoting Black's Law Dictionary [7th ed. 1999]; emphasis added). But as the NhRP later discovered, Black's Law Dictionary misquoted *Jurisprudence*; Judge Salmond had actually written "rights *or* duties," not "rights *and* duties." Moreover, similar to *Gray*, the

very next sentence states that “[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not.” *Jurisprudence*, at 318.

While *Lavery II* was pending, the NhRP brought the misquotation error to the attention of Bryan A. Garner, Esq., editor-in-chief of Black’s Law Dictionary, who promptly conceded the error and agreed to correct it in the eleventh edition (A-465 – A-472), and then did.³² The NhRP also notified the First Department about the error, both in a letter and by a motion seeking leave to file the NhRP’s correspondence with Mr. Garner. However, the First Department in *Lavery II* denied the motion and, affirming *Lavery I*, perpetuated the misconceptions that personhood requires the capacity to bear duties and is limited to human beings. 152 A.D.3d at 76-78. By reaffirming *Lavery II*—even after Black’s Law Dictionary corrected its error—the First Department has perpetuated those misconceptions again.

2. Judge Fahey’s concurrence rejected the erroneous views that an individual must be human or have the capacity to bear duties in order to be a “person.”

Judge Fahey specifically criticized the personhood conclusions in *Lavery I* and *Lavery II*, in which those courts reasoned that chimpanzees are not “persons” because they lack the capacity to bear duties. As Judge Fahey demonstrated, this reasoning suffers from an obvious defect:

³² The corrected sentence now reads: “So far as legal theory is concerned, a person is any being whom the law regards as capable of rights or duties.” Black’s Law Dictionary [Person] (11th ed. 2019) (quoting *Jurisprudence*).

Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child (*see People ex rel. Wehle v Weissenbach*, 60 NY 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v Schuse*, 227 AD2d 969 [4th Dept 1996]). In short, being a "moral agent" who can freely choose to act as morality requires is not a necessary condition of being a "moral patient" who can be wronged and may have the right to redress wrongs (*see generally* Tom Regan, *The Case for Animal Rights* 151-156 [2d ed 2004]).

Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring). Indeed, hundreds of thousands of New Yorkers who lack the capacity to bear duties indisputably possess numerous legal rights, including the fundamental common law right to bodily liberty protected by common law habeas corpus.

Judge Fahey also affirmed "the principle that all human beings possess intrinsic dignity and value," 31 N.Y.3d at 1057, but stated that, "in elevating our species, we should not lower the status of other highly intelligent species." *Id.* He thus criticized the First Department's "conclusion [in *Lavery II*] that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" as being "based on *nothing more than the premise* that a chimpanzee is not a member of the human species." *Id.* at 1057 (emphasis added).

Yet completely ignoring Judge Fahey's cogent criticisms, the First Department has now ruled that Happy is not a "person" on the basis of *Lavery II*.

First Department Decision (Ex. A), at 2.³³ Its decision is irrational, arbitrary, and contrary to the fundamental common law values of liberty, equality, and autonomy embraced by New York courts. Petitioner-Appellant’s Brief, at 15-26.

As Judge Fahey wrote, the “better approach . . . is to ask not whether a chimpanzee fits the definition of a person or . . . has the same rights and duties as a human being, but instead *whether he or she has the right to liberty protected by habeas corpus.*” *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (emphasis added). “That question, one of precise moral and legal status, is the one that matters here,” and “will depend on our assessment of the intrinsic nature of chimpanzees as a species.” *Id.* This Court should follow this approach with Happy. As noted, the overwhelming and uncontroverted scientific evidence presented in this case “demonstrate that elephants,” like chimpanzees, “are autonomous beings possessed of extraordinarily cognitively complex minds.” *Trial Court Decision* (Ex. B), at 10.

3. EPTL § 7-8.1 demonstrates that an individual need not be human or have the capacity to bear duties in order to be a “person.”

³³ Especially in light of the NhRP’s demonstration that *Lavery I*—upon which the First Department relied in *Lavery II*—was *objectively wrongly decided*, the fact that the First Department has outright ignored Judge Fahey may subject that court to the reasonable suspicion that it was enacting “prejudice in the form of law.” Judge Leon R. Yankovich, *Social Attitudes as Reflected in Early California Law*, 10 *Hastings L. J.* 250, 257-261(1959) (referring to the anti-Chinese holding in *People v. Hall*, 4 Cal. 399, 403 (1854)), thereby undermining public confidence in the judiciary.).

EPTL § 7-8.1 allows for the creation of trusts for certain nonhuman animal “beneficiaries.”³⁴ In 2010, the legislature removed “Honorary” from the statute’s title and amended section 7-8.1 (a) to read, in part, “[s]uch trust shall terminate when the living *animal beneficiary or beneficiaries* of such trust are no longer alive,” EPTL § 7-8.1(a) (emphasis added), thereby dispelling any doubt that certain nonhuman animals have trust beneficiary rights.³⁵

As trust beneficiaries, these nonhuman animals possess rights and are necessarily “persons” regardless of their nonhuman biology or capacity to bear duties.³⁶ *See, e.g., Stanley*, 16 N.Y.S.3d at 901 (referring to “this state’s recognition of legal personhood for some nonhuman animals under [EPTL § 7-8.1]”); Black’s Law Dictionary (11th ed. 2019) (“beneficiary” is “[a] person to whom another is in a fiduciary relation, whether the relation is one of agency, guardianship, or trust; esp., a person for whose benefit property is held in trust.”).

³⁴ “Before this statute, trusts for animals were void, because a private express trust cannot exist without a beneficiary capable of enforcing it, and because nonhuman lives cannot be used to measure the perpetuities period.” Margaret Turano, *Practice Commentaries*, N.Y. Est. Powers & Trusts Law 7-8.1 (2013). The Sponsor’s Memorandum stated that the statute’s purpose was “to allow animals to be made the beneficiary of a trust.” Sponsor’s Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. *See also* Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

³⁵ The Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York’s report to the legislature proclaimed: “[W]e recommend that the statute be titled ‘Trusts for Pets’ instead of ‘Honorary Trusts for Pets,’ as honorary means unenforceable, and pet trusts are presently enforceable under subparagraph (a) of the statute.” N.Y. Bill Jacket, 2010 A.B. 5985, Ch. 70 (2010).

³⁶ Happy is the beneficiary of a trust created by the NhRP pursuant to EPTL § 7-8.1. A-83 – A-91.

4. Social contract theory does not support the erroneous views that an individual must be human or have the capacity to bear duties in order to be a “person.”

The Third Department in *Lavery I* primarily grounded its personhood conclusion in social contract theory, stating:

the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (see Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments From “Marginal” Cases*, 45 Ariz. St. L.J. 1, 12–14 [2013]; Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27, 69–70 [2009]; see also *Matter of Gault*, 387 U.S. 1, 20–21, 87 S.Ct. 1428, 18 L.Ed.2d 527 [1967]; *United States v. Barona*, 56 F.3d 1087, 1093–1094 [9th Cir.1995], cert. denied 516 U.S. 1092, 116 S.Ct. 813, 133 L.Ed.2d 759 [1996]). Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, “rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights” (Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments From “Marginal” Cases*, 45 Ariz. St. L.J. 1, 13 [2013]; see Richard L. Cupp Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L. Rev. 27, 69 [2009]).

124 A.D.3d at 151. The First Department in *Lavery II* similarly stated that “nonhumans lack sufficient responsibility to have any legal standing,” citing an amicus brief submitted by Richard Cupp, in which the latter made a vague reference to “John Locke’s contractualist assertions” in connection with the notion of “requiring legal accountability to each other.” *Cupp Brief*, at 8.³⁷

³⁷ Available at: <https://www.nonhumanrights.org/content/uploads/CuppAmicus.pdf>.

These statements regarding social contract theory are erroneous because (1) the federal cases *Lavery I* cited do not support them, (2) Cupp’s idiosyncratic idea of social contract theory has no support and is wrong, and (3) social contracts create *citizens*, not “persons.” In other words, social contract theory has no relevance to the question of Happy’s personhood and whether she possesses the common law right to bodily liberty protected by common law habeas corpus.

a. *Lavery I* erroneously relied upon *Gault* and *Barona*.

Neither *Application of Gault*, 387 U.S. 1, 20–21 (1967) nor *United States v. Barona*, 56 F.3d 1087, 1093–94 (9th Cir. 1995) provides any support for the Third Department’s assertions. *Gault* merely states that “[d]ue process ... is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.” 387 U.S. at 20. As one scholar noted, *Gault* “addresses neither the relationship between rights and duties nor the limitations of the meaning of legal personhood for the purposes of habeas corpus.” Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 78 (2017).

The 9th Circuit in *Barona* stated in dicta that because the U.S. Constitution “is a social contract,” “the scope of an alien's rights depends intimately on the extent to which he has chosen to shoulder the burdens that citizens must bear.” 56 F.3d at

1093-94 (quoting from the dissenting opinion in *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), *rev. 'd* by 494 U.S. 259 (1990)). On reversal, the United States Supreme Court made an entirely different argument than the one made in *Lavery I* which:

argued that if one has rights, then one must have duties, and if you do not have duties, then you do not have rights. The Supreme Court suggested that if you have duties, then you must have rights, and if you do not have rights, then you must not have duties. These are different arguments.

Escape Routes, 48 Colum. Human Rights L. Rev. at 82.

b. *Lavery I* relied upon the erroneous social contract claims of Richard Cupp.

To support its literally unprecedented claim that the capacity for duties is required for the ascription of any rights at all, *Lavery I* relied heavily upon two law review articles by an obscure writer, Richard Cupp: (1) *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 12-14 (2013), and (2) *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69-70 (2009). 124 A.D.3d at 151.

But Cupp grossly misdescribed social contract theory, claiming without justification that it requires reciprocity between rights and duties. *Lavery II*, in turn, uncritically embraced Cupp's uniquely false views despite the fact that they are junk

political science, junk philosophy, and junk history that Cupp devised for the purpose of preventing any nonhuman animal from obtaining a legal right.³⁸

In *Children, Chimps, and Rights*, Cupp claims that in a social contract “societally imposed responsibilities are accepted in exchange for individual rights owed by society,” where “rights [are] connected to moral agency and the ability to accept responsibility in exchange for rights.” 45 Ariz. St. L.J. at 13. Cupp’s sole source for these assertions is an article by Peter de Marneffe. *Id.* at 13 & nn. 49-51 (citing de Marneffe’s *Contractualism, Liberty, and Democracy*, 104 *Ethics* 764 (1994)). However:

It is strange for Cupp to rely on this work, since ... de Marneffe [does not] even once claim in this piece that individual rights are exchanged for responsibilities. Indeed, throughout the entire piece, the author never once uses the words duty, responsibility, reciprocate, exchange, or synonymous terms.

Escape Routes, 48 Colum. Human Rights L. Rev. at 83. In fact, de Marneffe’s article actually “*contradicts* Cupp’s claim,” for it “states that the establishment of animal

³⁸ See *State v. Donald DD*, 24 N.Y. 3d 174, 186 (2014) (“In the dissent in *Shannon S.*, three members of this Court who are now in the majority stated our view that the paraphilia NOS diagnosis presented by Dr. Kirschner and another expert witness in that case ‘amount[ed] to junk science devised for the purpose of locking up dangerous criminals’”). In deciding whether to accept an expert scientific opinion or reject it as junk science, courts utilize the Frye test to determine “whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally.” *People v. Wesley*, 83 N.Y. 2d 417 (1994). Cupp’s opinions are idiosyncratic and not generally accepted.

rights is . . . compatible with modern social contract theory.” *Id.* at 84 (emphasis added).

In *Moving Beyond Animal Rights*, Cupp falsely claims that “general reciprocity between rights and responsibilities is a basic tenet” of social contract theory. 46 *San Diego L. Rev.* at 66. But as amici philosophers have explained, the notion that “persons” receive rights in exchange for bearing duties “is not how political philosophers have understood the meaning of the social contract historically or in contemporary times.” *Philosophers Brief*, at 12-13.³⁹ This includes Thomas Hobbes, John Locke, and Jean-Jacques Rousseau, influential social contract philosophers “who maintain that all persons have ‘natural rights’ that they possess independently of their willingness or ability to take on social responsibilities.” *Id.* at 12. *See also Escape Routes*, 48 *Colum. Human Rights L. Rev.* at 75 (arguing that the social contract theories of Thomas Hobbes, John Locke, and John Rawls “do not preclude animal rights by insisting on the reciprocity of rights and duties”).

c. Social contracts create citizens not “persons.”

In *Moore v. Ganim*, 233 Conn. 557, 598 (1995), the Connecticut Supreme Court explained that “social compact theory posits that *all individuals are born with certain natural rights* and that people, in freely consenting to be governed, enter a social compact with their government by virtue of which they relinquish certain

³⁹ Available at: <https://www.nonhumanrights.org/content/uploads/Philosophers-Brief.pdf>.

individual liberties in exchange ‘for the mutual preservation of their lives, liberties, and estates.’” (citing, inter alia, J. Locke, “Two Treatises of Government,” book II (Hafner Library of Classics Ed.1961) ¶ 123, p. 184) (emphasis added).

Since “all individuals are born with certain natural rights,” “persons” must necessarily exist prior to entering social contracts; social contracts therefore do not create “persons.” Instead, they create citizens:

It follows from social contract theory that all contractors must be persons, but not that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract (e.g., adults who opt for life in the state of nature) or because they cannot contract (e.g., infants and some individuals with cognitive disabilities). Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow any being with personhood. *The contract can only endow citizenship on persons who exist prior to the contract and agree to it.* If persons did not exist before the contract, there would be no contract at all since only persons can contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

Philosophers Brief, at 15-16 (emphasis added).

E. Conclusion

This Court should grant the NhRP’s motion for permission to appeal.

Dated: January 19, 2021

Respectfully submitted,

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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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,

v.

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.

NOTICE OF ENTRY

Index No.: 260441/2019

Case No.: 2020-02581

PLEASE TAKE NOTICE that the accompanying Decision and Order was
filed and entered in the Office of the Clerk of the Appellate Division, First Department, on
December 17, 2020.

Dated: Buffalo, New York
December 17, 2020

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Appellate Division, First Judicial Department

Manzanet-Daniels, J.P., Gesmer, Kern, Oing, Moulton, JJ.

12680

In re NONHUMAN RIGHTS PROJECT, INC., on
Behalf of HAPPY,
Petitioner-Appellant,

Index No. 260441/19
Case No. 2020-02581

-against-

JAMES J. BREHENY, etc., et al.,
Respondents-Respondents.

PROTECT THE HARVEST AND ALLIANCE OF MARINE
MAMMAL PARKS & AQUARIUMS, PROFESSOR
RICHARD L. CUPP, JR., GARY COMSTOCK, PH.D.,
G.K.D. CROZIER, PH.D., ANDREW FENTON, PH.D.,
TYLER JOHN, L. SYD M. JOHNSON PH.D., ROBERT
C. JONES, PH.D., LETITIA MEYNELL, PH.D.
NATHAN NOBIS, PH.D., DAVID PEÑA-GUZMÁN,
PH.D., JAMES ROCHA, PH.D., BERNARD ROLLIN,
PH.D., JEFF SEBO, PH.D., JUSTIN MARCEAU,
SAMUEL WISEMAN AND PROFESSOR LAURENCE H.
TRIBE,
Amici Curiae.

Elizabeth Stein, New Hyde Park, and Steven M. Wise, Carol Springs, FL of the bar of the State of Massachusetts, admitted pro hac vice, of counsel, for appellant.

Phillips Lytle LLP, Buffalo (Kenneth A. Manning of counsel), for respondents.

Kelley Drye & Warren, LLP, New York (Bezalel A. Stern of counsel), for Protect the Harvest and Alliance of Marine Mammal Parks & Aquariums, amici curiae.

Jessica A. Kulpit, Buffalo, for Richard L. Cupp, Jr., amicus curiae.

Amy Trakinski, New York, for Gary Comstock, Ph.D., G.K.D. Crozier, Ph.D., Andrew Fenton, Ph.D., Tyler John, L. Syd M. Johnson Ph.D., Robert C. Jones, Ph.D., Letitia Meynell, Ph.D. Nathan Nobis, Ph.D., David Peña-Guzmán, Ph.D., James Rocha, Ph.D., Bernard Rollin, Ph.D., Jeff Sebo, Ph.D., amici curiae.

Chaffetz Lindsey LLP, New York (David M. Lindsey of counsel), for Justin Marceau, Samuel Wiseman, amici curiae.

Richman Law Group, New York (Jay Shooster of counsel), for Professor Laurence H. Tribe, amicus curiae.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about February 19, 2020, which granted respondents' motion to dismiss the petition for a writ of habeas corpus on behalf of Happy, an elephant, unanimously affirmed, without costs. The Clerk is directed to enter judgment dismissing the proceeding brought pursuant to CPLR article 70.

The common-law writ of habeas corpus does not lie on behalf of Happy, the elephant at issue in this proceeding (see *Matter of Nonhuman Rights Project, Inc. v Lavery*, 152 AD3d 73 [1st Dept 2017], *lv denied* 31 NY3d 1054 [2018]). We decline to overrule any of our alternative holdings in *Lavery*, which petitioner erroneously refers to as “dicta.” Under *Lavery*, the writ of habeas corpus is limited to human beings (*see id.* at 76-78). A judicial determination that species other than homo sapiens are “persons” for some juridical purposes, and therefore have certain rights, would lead to a labyrinth

of questions that common-law processes are ill-equipped to answer. As we said in *Lavery*, the decisions of whether and how to integrate other species into legal constructs designed for humans is a matter “better suited to the legislative process.” (*id at 80*).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: December 17, 2020



Susanna Molina Rojas
Clerk of the Court

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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,

v.

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.


NOTICE OF ENTRY

Index No.: 260441/2019

PLEASE TAKE NOTICE that the accompanying Memorandum Decision
and Order was signed on February 18, 2020, and entered in the Office of the Bronx County
Clerk on February 19, 2020.

Dated: Buffalo, New York
February 19, 2020

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Joanna J. Chen

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX, PART 5

The NonHuman Rights Project
 on behalf of HAPPY -against-

Index No. 260441/19

Hon. Alison Y. Tuitt

Justice Supreme Court

Brekens, James J.

The following papers numbered 1 to 16 were read on ^{these} ~~this~~ motions (Seq. No. 1, 2, 4-12)
 for Miscellaneous Reliefs noticed on various dates 9/13/19

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that ~~this motion is~~ ^{these motions and} order to show causes, Verified Petition, and related motions are decided in accordance with the annexed memorandum decision.

Motion is Respectfully Referred to Justice:
 Dated: _____

Dated: 2/18/20

Hon. A. Y. Tuitt

J.S.C.

Allison Y. Tuitt, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

C

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause,

INDEX NUMBER: 260441/2019

THE NONHUMAN RIGHTS PROJECT, INC.,
on behalf of HAPPY,

Petitioner,

-against-

Present:
HON. ALISON Y. TUITT
Justice

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.

On Calendar of 1/6/2020

The following papers, numbered as follows:

Read on these:

<u>Order to Show Cause, Verified Petition, related papers</u>	<u>1-14</u>
<u>Order to Show Cause with Temporary Restraining Order</u>	<u>15</u>
<u>Motion to Dismiss or Change Venue, related papers</u>	<u>16-21</u>
<u>Motion for a Protective Order, related papers</u>	<u>22-26</u>
<u>Motion for Leave to File Late Papers</u>	<u>27</u>
<u>Motion for Preliminary Injunction, related papers</u>	<u>28-32</u>
<u>Motion to Strike Respondents' Verified Answer, related papers</u>	<u>33-38</u>
<u>Motion for an Order Granting Amici Leave to File an Amicus Curiae Brief</u>	<u>39-46</u>

Upon the foregoing papers, the Order to Show Cause and Verified Petition for Writ of Habeas Corpus and Respondent's motion to dismiss the Petition are consolidated for purposes of this decision. For the reasons set forth herein, the motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the related motions are denied as moot.

Procedural History

This is a habeas corpus proceeding brought by Petitioner, the NhRP on behalf of Happy, a 48 year old Asian elephant situated in the Bronx Zoo, New York. Petitioner commenced the proceeding on October 2, 2018 in Supreme Court, Orleans County by filing a Verified Petition or a Common Law Writ of Habeas Corpus and Order to Show Cause pursuant to CPLR Article 70 on behalf of Happy. The NhRP alleges that Happy is being unlawfully imprisoned in the Bronx Zoo and demands her immediate release to an appropriate elephant sanctuary of which there are two in the United States, both which have agreed to provide lifetime care at no cost to the Bronx Zoo. In lieu of serving an answer to the Petition, the Bronx Zoo moved to change the venue of these proceedings from Orleans County to Bronx County or, in the alternative, to dismiss the proceedings with prejudice. On January 18, 2019, the Orleans County Court granted the branch of the motion to change venue, and the matter was transferred to Bronx County. The parties brought several other motions that were not decided by the Orleans County Court, and were transferred to this Court. Among the motions that the NhRP filed in Orleans County was a preliminary injunction requesting that the Orleans County Court enjoin the Bronx Zoo from removing Happy from the State of New York pending the outcome of this proceeding. Respondents' moved to dismiss the Petition on the grounds that controlling New York law holds that habeas corpus protection under CPLR Article 70 should not be extended to animals as the NhRP fails to cite any legal precedent applicable in the State of New York to support its position. Additionally, the NhRP brought motions to strike Respondents' opposition to Petitioner's proposed Order to Show Cause, to allow the filing of late reply papers, and, for a protective order. There was also a motion of *Amici* to File Brief *Amicus Curiae*. This Court heard oral arguments on these proceedings on August 12, 2019, September 23, 2019, October 21, 2019 and January 6, 2020.

The NhRP seeks the issuance of the Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis of their imprisonment of Happy; upon a determination that

Happy is being unlawfully imprisoned, an Order directing her immediate release from the Respondents' custody to an appropriate sanctuary; and, an award for the NhRP for the costs and disbursements of this action.

The Parties

The NhRP is a not-for-profit corporation, a civil rights organization dedicated to changing “the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal rights, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.” <https://www.nonhumanrights.org/who-we-are/>. For the past 20 years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP has filed similar cases in several other New York Courts with the goal of obtaining legal rights for chimpanzees, elephants, and ultimately for other animals.

Respondent the Wildlife Conservation Society (“WCS”) is a not-for-profit corporation, headquartered at the Bronx Zoo, whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education and inspiring people to value nature. Opened in 1899, the Bronx Zoo, a WCS park, cares for thousands of endangered or threatened animals and provides experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos. Respondent James Breheny is WCS’ Executive Vice President and General Director of Zoos and Aquariums, and is the Director of the Bronx Zoo.

Happy the Elephant

Happy is a 48 year old female Asian elephant who was captured in the wild and brought to the United States when she was one year old. In 1977, Happy and another elephant named Grumpy arrived at the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas”. For the next 25 years, Happy and Grumpy lived together. The Bronx Zoo had other elephants, and they were kept two by two. In 2002, the Bronx Zoo paired Happy and Grumpy with two other elephants, Patty and Maxine in the same elephant exhibit. Patty and Maxine attacked Grumpy who tumbled and fell, and was seriously injured. Grumpy never recovered from her injuries and was euthanized. Thereafter, the Bronx

Zoo separated Happy from them, and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. Sammie suffered from severe liver disease and was euthanized in 2006. The Bronx Zoo announced after the death of Sammie that it would not acquire any new elephants. Since 2006, Happy has been living alone at the Bronx Zoo. The NhRP argues, in essence, that Happy has been imprisoned in solitary confinement, notwithstanding the uncontroverted scientific evidence that Happy is an autonomous, intelligent being with advanced cognitive abilities akin to human beings.

The NhRP's arguments

The NhRP brings the instant proceeding alleging that Happy is being unlawfully imprisoned by Respondents in the Bronx Zoo. Happy has been living alone in an one-acre enclosure within the Bronx Zoo since Sammie's death in 2006. The NhRP argues that Happy has been, and continues to be, denied direct social contact with any other elephants, and spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies. The NhRP argues that whether Respondents are in violation of any federal, state or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. The NhRP further contends that this habeas corpus case is neither an animal protection, nor animal welfare case. The Petition does not allege that Happy is illegally confined because she is kept in unsuitable conditions, nor does it seek improved welfare for Happy. Rather, this Petition seeks that this Court recognize Happy's alleged common law right to bodily liberty, and order her immediate release from Respondents' current and continued alleged unlawful detention so that her liberty and autonomy may be realized. NhRP argues that it is the fact that Happy is imprisoned at all, rather than her conditions of her imprisonment, that is unlawful.

The NhRP seeks Happy's immediate release from her imprisonment to a permanent elephant sanctuary, two of which have agreed to take Happy: the Professional Animal Welfare Society ("PAWS") in California, and The Elephant Sanctuary in Tennessee. In support of its application, the NhRP submits expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants: the affidavit of Joyce Pool; the supplemental affidavit of Joyce Pool; the joint affidavit of Lucy Bates and Richard W. Byrne; the affidavit of Karen McComb; and, the affidavit of Cynthia J. Moss. The NhRP also submits the affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In his affidavit, Ed

Stewart, President and Co-Founder of PAWS, states that PAWS has agreed to provide permanent sanctuary to Happy should she be released.

The NhRP submits its expert affidavits which demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of particular communication; wide variety of gestures, signals and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.

The NhRP's experts state that African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each is a component of autonomy. The experts opine that African and Asian elephants are autonomous, as they exhibit self-determination behavior that is based on a freedom of choice. As a psychological concept, it implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness. The NhRP further alleges that Happy is the first elephant to pass the mirror self-recognition-test ("MSR"), considered to be an indicator of an animal's self-awareness and is thought to correlate with higher forms of empathy and altruistic behavior. As do humans, Asian elephants exhibit MSR, which is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror. If the individual

uses the mirror to investigate the mark, the individual must recognize the reflection of herself. The NhRP experts argue that MSR is significant because it is a key identifier of self-awareness, which is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. By demonstrating they can recognize themselves in a mirror, the experts claim that elephants must be holding a mental representation of themselves from another perspective, and thus must be aware that they are a separate entity from others.

Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members. Having a mental representation of the self, which is a pre-requisite for MSR, likely confers an ability to comprehend death. Wild African elephants have been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead elephants. Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead, they engage in more "mournful" or "grief stricken" behavior, such as standing guard over the body with a dejected demeanor and protecting it from predators. They have been observed covering the bodies of their dead with dirt and vegetation. Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf. The general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations. These behaviors are akin to human responses to the death of a close relative or friend, and demonstrate that elephants possess some understanding of life and the permanence of death. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, assisting injured ones to stand and walk, or helping calves out of rivers or ditches with steep banks. In an analysis of behavioral data collected from wild African elephants over a 40 year continuous field study, the experts concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand physical competence and emotional state of others, and attribute goals and mental states to other.

The Bronx/WCS' arguments

Respondents move to dismiss the Petition on the grounds that the NhRP, to no avail, has previously prosecuted several unsuccessful lawsuits on behalf of chimpanzees. Controlling New York precedent provides that animals are not entitled to habeas corpus protection under CPLR Article 70. Respondents argue

that contrary to the NhRP allegations, Happy is not unlawfully imprisoned at the Bronx Zoo. The AZA Standards for Elephant Management and Care and the Animal Welfare Act are the two primary standards for the care and management of elephants in AZA-accredited institutions in the United States. Respondents argue that the Bronx Zoo's compliance with these standards ensures that Happy is provided with excellent care focused on her well-being. The AZA Standards require that "[o]utdoor habitats must provide sufficient space and environmental complexity to both allow for and stimulate natural behavioral activities and social interactions resulting in healthy and well-adapted elephants." The Standards include requirements for variation in an elephant's environment including varied terrain to allow for exercise and "foraging, wallowing, bathing, digging, and resting." "While outdoors and weather permitting, elephants must have regular access to water sources, such as a [sic] pools, waterfalls, misters/sprinklers, or wallows that provide enrichment and allow the elephants to cool and/or bathe themselves." Additional standards are included for subjects such as elephant diet, exercise, medical management, foot care, and skin care. Daily behavioral assessments of elephants must be conducted and recorded in a daily log. Elephant care professionals, managers, and directors who work for the Bronx Zoo are also required to complete AZA's Principles of Elephant Management courses. To remain an AZA-accredited zoo, the Bronx Zoo submits annual reports regarding its elephant program, and is regularly inspected by AZA representatives and individuals from peer institutions. An elephant specialist is included in every AZA accreditation inspection of the Bronx Zoo. On April 27, 2018, in response to the Bronx Zoo's most recent report, the AZA confirmed that the Bronx Zoo is in compliance with the AZA Standards for elephants.

In addition, the Bronx Zoo is regulated under the Animal Welfare Act and Animal Welfare Regulations. Although the Animal Welfare Act does not contain any elephant-specific requirements, the Act's standards and regulations ensure that animals receive humane care and treatment at regulated facilities. Among its requirements, the Animal Welfare Act requires the Bronx Zoo to employ an attending veterinarian who shall provide adequate care, and maintain compliance with standards for "the humane handling, care, treatment, housing, and transportation of animals. Compliance with the Animal Welfare Act is overseen by the U.S. Department of Agriculture ("USDA") Animal Care. USDA inspectors make routine, unannounced inspections of facilities like the Bronx Zoo at least once a year. Respondents argue that Happy's living conditions are therefore not "unlawful" according to applicable standards.

Happy's routine care program incorporates the AZA Standards and requirements under the

Animal Welfare Act. On a daily basis, Happy's appetite, food intake, stool appearance and quantity, overall activity, and responsiveness to keepers are monitored. Happy also receives baths on a daily basis. Everyday Happy's keepers assess her body condition, provide her with various forms of enrichment that encourage mental and physical stimulation, and engage in positive reinforcement training sessions that help to maintain behaviors used to facilitate Happy's care. On a regular basis, the Bronx Zoo conducts voluntary blood draws and trunk washes, as well as weigh-ins to monitor Happy's health. Weather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming and engage in other species-typical behavior, and also has regular overnight access to a large outdoor space. Patrick Thomas, PhD, Vice President and General Curator of WCS and Associate Director of the Bronx Zoo, states that Happy has developed a familiarity and comfort with her keepers, and she recognizes her surroundings as her familiar, longstanding environment. It is his opinion that suddenly taking her away from this environment and introducing entirely new surroundings without the support of her keepers could inflict long-term damage on Happy's welfare. Mr. Thomas states that Happy has also shown in past experiences that she does not respond well to even temporary, short moves within the Bronx Zoo. He believes that transporting Happy the long distance from the Bronx Zoo across the country to the sanctuary in California would cause severe stress and potentially inflict long-term physical harm. Based on his 40 years of experience and responsibilities in supervising the care of animals at the Bronx Zoo, including Happy, to the best of his knowledge, Mr. Thomas opines that Happy is currently healthy and well-adapted to her surrounding in the Bronx Zoo.

Paul P. Calle, WCS's Vice President for Health Programs, Chief Veterinarian and Director of the Zoological Health Program based at the Bronx Zoo, states that the Bronx Zoo undertakes a multitude of efforts to ensure Happy's continued physical and psychological well-being and health. Happy is given visual checks by the care staff several times each day and, on occasion when an issue is identified, the veterinary staff responds appropriately to any concern that is noted. The veterinary staff conducts regular health assessments of Happy through body condition evaluations, oral, dental and foot examinations. Baseline toe x-rays of Happy's feet were completed, and are repeated for comparative analysis, on an as-needed basis to address particular areas of concern as they arise. Veterinary staff are consulted by keepers regarding nail and pad conditions, with veterinary participation in trims, evaluations, or treatments as necessary. Veterinary staff participate in development and maintenance of medical behaviors (trunk wash, oral/dental evaluation, blood sampling, foot

work, presentation for injections or x-rays) in conjunction with Happy's animal keeper staff. Happy's health care is recorded and documented in her individual medical record, and documented in the Bronx Zoo's annual AZA Elephant Program Annual Report. Mr. Calle states that based upon his responsibilities in providing veterinary care for almost 30 years to animals at the Bronx Zoo, including Happy, and to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. During his experience with Happy, she has become very distressed during short moves from one area of the Zoo to another. Mr. Calle opines that given Happy's age and longstanding familiarity and attachment to her surroundings, a long-distance move, such as that proposed by the NhRP to California, would cause substantial stress to Happy. Imposing this move on Happy would create a serious risk to her long-term health that Mr. Calle does not believe is justified. In his professional opinion, Happy's health and well-being would not be best served by moving her to an animal sanctuary such as the facility operated by the PAWS Sanctuary.

James J. Breheny, Director of WCS, argues that the NhRP's expert affidavits provide little to no relevant information regarding whether Happy is "unlawfully imprisoned" at the Bronx Zoo. In substance, the affidavits are almost verbatim duplicates of each other and barely address Happy. The affidavits the NhRP relies upon only provide generalized, anecdotal discussions of African and Asian elephants as observed in the wild. Mr. Breheny argues that the affidavits posit that elephants are generally better suited to the company of other elephants, without accounting for the particular needs, wants, and temperament of any one elephant. None of the expert affidavits submitted in support of the NhRP's Petition make any reference to Happy, her current state of well-being, or her needs as a 48 year old Asian elephant who has lived for over 40 years at the Bronx Zoo. Mr. Breheny argues that elephants who have lived at zoos for long periods of time are significantly different from elephants in the wild, and the characteristics of one cannot generally be attributed to the other, therefore, the NhRP's supporting expert affidavits have limited applicability to Happy and her specific needs. In contrast, the Bronx Zoo employees, including Mr. Breheny himself, have been caring for Happy's interest and well-being, knowing her individually for over 40 years.

The Bronx Zoo has significant resources for the care and well-being of Happy, including a large number of highly trained and experienced staff that provides excellent care and medical attention for Happy, as well as the sustained financial resources of a major institution. Happy also has longstanding relationships and familiarity with her caregivers and surroundings at the Bronx Zoo, where she has lived for nearly all of her life.

Mr. Breheny alleges that the NhRP does not take into consideration Happy's unique characteristics, personality and needs. For example, there is Happy's history of not interacting well with other elephants at the Bronx Zoo, which is why she is housed separately since her companion died. The NhRP also fails to consider that Happy may not socialize well with the elephants in the sanctuary due to her alleged acrimonious behavior. Based upon past experiences with Happy, the Bronx Zoo knows that she becomes particularly distressed by even short moves within the Zoo. Based upon his expertise and decades-long experience with Happy, Mr. Breheny states his professional opinion that Happy's interest would not be best served by moving her to an animal sanctuary.

The NhRP Counter-Arguments

In response, the NhRP argues that the Bronx Zoo imprisons Happy in a tiny, cold, lonely, "un-elephant-friendly", an unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary. They argue that the Bronx Zoo's unlawful imprisonment of Happy, an autonomous, extraordinarily cognitively-complex being, violates her common law right to bodily liberty. The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds. The NhRP specifically demands that this Court determine that Happy possesses the common law right to bodily liberty and immediate release from her unlawful imprisonment so that her autonomy may be realized. The NhRP argues that the notion that living on a 2,300 acre sanctuary, such as PAWS is comparable to being imprisoned in the Bronx Zoo's approximately one acre elephant exhibit is absurd. The NhRP contends that the purported experts on behalf of the Bronx Zoo have not published or submitted for publication any peer-reviewed articles about elephants, nor have they studied or examined any elephants in the wild or in any other zoo. Similarly, none of the Bronx Zoo's affiants present any evidence that they have studied any wild elephant, or know about an elephant's basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.

The NhRP also takes issue with Mr. Calle's statement that to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. Mr. Calle fails to properly address the very

small space available to Happy at the Bronx Zoo. There are three possible locations for elephants at the Zoo: an indoor “holding area” or elephant barn; a barren cemented walled outdoor elephant yard that appears to be 0.05 of an acre; and, a Zoo exhibit, listed as being only 1.15 acres. Since the Bronx Zoo elephants are incompatible, the naturalistic exhibit area has to be shared on a rotational basis. At night, Happy is usually in a small pen in the barn or in the barren outdoor yard. During most days, weather permitting, she is also in the barren outdoor elephant yard. Dr. Poole notes that it is difficult for members of the public to obtain much information about Happy’s behavior other than viewing short videos of her captured by visitors to the Zoo. Dr. Poole states that in these videos, Happy is engaged in only five activities/behavior: standing facing the fence/gate; dusting, swinging her trunk in stereotypical behavior; standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior; and once, eating grass. According to Dr. Poole, only two of these activities are natural, dusting and eating grass, and being alone in a small place, there is little else for her to do.

Dr. Poole found that Happy has no general problem getting along with other elephants, and opines that Happy is not anti-social, per se, but the historical information indicates that Happy was once attacked by Maxine and Patty and there was a risk that it could happen again. The NhRP argues that in the 40 years that she has been at the Bronx Zoo, Happy has only been given a choice of four companions, with whom she was forced to share a space that for an elephant is the equivalent of the size of a house. Two of these companions she liked and lost, and the other two attacked her. Dr. Poole opines that this is a confirmation of the Bronx Zoo’s inability to meet Happy’s basic needs. Moreover, Dr. Poole notes that the claims that Happy does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she does not know how to socialize; and, that her unique personality is problematic, have often been disproven. Dr. Poole states that elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS. Dr. Poole then provides examples of elephants similar to Happy who, when moved from a zoo to a sanctuary, almost immediately blossomed into happy, successful, autonomous, and socially and emotionally fulfilled beings. Dr. Poole opines that such space permits autonomy and allows elephants to develop healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior.

The Law

New York Courts have addressed the question of “personhood” with respect to chimpanzees. The NhRP has brought four identical, separate habeas corpus proceedings on behalf of “imprisoned chimpanzees” in four different counties, each within a different department of the Supreme Court, Appellate Division. The NhRP argued that chimpanzees are entitled to habeas corpus relief as their human-like characteristics render them “persons”. In each case, the trial court declined habeas corpus relief for the chimpanzees, and the NhRP appealed each decision. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief.

The NhRP has standing to file the Petition for habeas corpus on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf..., may petition without notice for a writ of habeas corpus...”. “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, ... petitioner [NhRP] has met its burden of demonstrating that it has standing.” The Nonhuman Rights Project, Inc. v. Stanley Jr. M.D., 2015 WL 1804007 (N.Y. Sup. Ct. 2015), amended in part, The Nonhuman Rights Project, Inc. v. Stanley, 2015 WL 1812988 (N.Y. Sup. 2015). Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, the Courts found that NhRP had standing. See, Id.; People ex rel Nonhuman Rights Project Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014); Nonhuman Rights Project, Inc. ex rel Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015); Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), leave to appeal den., 31 N.Y.3d 1054 (2018); Nonhuman Rights Project on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054 (2018); Nonhuman on Behalf of Tommy v. Lavery, 31 N.Y.3d 1065 (2018). Thus, this Court finds that the NhRP has standing to bring the habeas corpus proceeding on behalf of Happy.

However, on the question of whether an animal may be a “person”, the Courts have held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. In People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014), the appeal presented the novel question of whether a chimpanzee is a “person” entitled to the rights and protections afforded by the writ of habeas corpus. In Lavery, like here, the NhRP did not allege that respondents were in violation of any state or federal statutes respecting the domestic possession of wild animals. Instead it argued that a chimpanzee is a

“person” entitled to fundamental rights.

According to petitioner, while respondents are in compliance with state and federal statutes, the statutes themselves are inappropriate. Yet, rather than challenging any such statutes, petitioner requests that this Court enlarge the common-law definition of “person” in order to afford legal rights to an animal. We decline to do so, and conclude that a chimpanzee is not a “person” entitled to the rights and protections afforded by the writ of habeas corpus. Id. at 249

* * *

Not surprisingly, animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law... Petitioner does not cite any precedent—and there appears to be none—in state law, or under English common law, that an animal could be considered a “person” for the purposes of common-law habeas corpus relief. In fact, habeas corpus relief has never been provided to any nonhuman entity. Id. at 249-250

* * *

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings. Id. at 251

(Internal citations omitted).

In The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015), the NhRP brought an Article 70 proceeding under the common law for a writ of habeas corpus, on behalf of Hercules and Leo, two chimpanzees in the custody of respondent State University of New York at Stony Brook, seeking an Order directing their release and transfer to a sanctuary in Florida. The conditions under which Hercules and Leo were confined were not challenged by NhRP and it did not allege that respondents are violating any laws. While the Court was extremely sympathetic to the plight of the NhRP, on behalf of Hercules and Leo, it nonetheless held that given the Third Department precedent to which it is bound, the chimpanzees are not “persons” entitled to rights and protections afforded by the writ of habeas corpus, and the petition was denied, and the proceeding was dismissed.

In Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015), *lv. denied* 26 N.Y.3d 901 (2015), the NhRP sought a writ of habeas corpus on behalf of another chimpanzee, Kiko, arguing that he was illegally confined because he was kept in unsuitable conditions, and sought to have him

placed in a sanctuary. The Court did not address the question of whether a chimpanzee was deemed a person for habeas corpus purposes, or whether the NhRP had standing to seek habeas corpus on the chimpanzee's behalf. The Fourth Department affirmed the dismissal of the petition, holding that habeas corpus did not lie where the NhRP sought only to change the conditions of confinement rather than the confinement itself. In this matter, the NhRP sought to transfer Kiko to a different facility, a sanctuary, that it deemed more appropriate. The Court held that even if a chimpanzee was deemed a person for habeas corpus purposes, and even if the NhRP had standing to seek habeas corpus relief on Kiko's behalf, habeas corpus did not lie as it is well-settled that habeas corpus relief must be denied where the subject of the petition is not entitled to immediate release. Since the NhRP did not seek the immediate release of Kiko, but sought to transfer him to a sanctuary, habeas corpus does not lie. Here, the trial court declined to sign the order to show cause seeking habeas corpus relief, and the Fourth Department affirmed.

While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal. Id. at 395-396.

The asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense". Id. at 396.

* * *

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community. Id.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no

adequate facilities to house [them] in proximity to the [c]ourt.” Instead, petitioner requests that respondents be ordered to show “why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary... Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court. Id. at 397.

(Internal citations omitted).

In Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), lv denied 31 N.Y.3d 1054 (2018), the NhRP filed two petitions for habeas corpus on behalf of two chimpanzees, Tommy and Kiko. Supreme Court declined to extend habeas corpus relief to the chimpanzees. The NhRP appealed and the Appellate Division, First Department affirmed, holding that the human-like characteristics of chimpanzees did not render them “persons” for purposes of habeas corpus relief. The Court noted that any position to the contrary is without legal support or legal precedent. The asserted cognitive and linguistic capabilities of chimpanzees did not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. The Court further held that even if habeas corpus was potentially available to chimpanzees, writ of habeas corpus did not lie on behalf of the chimpanzees where the NhRP did not challenge the legality of the detention, but merely sought their transfer to a different and more appropriate facility.

Analysis

Regrettably, in the instant matter, this Court is bound by the legal precedent set by the Appellate Division when it held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. Lavery, 54 N.Y.S.3d at 392. The First and Fourth Departments did not address the question of personhood for chimpanzees. For purposes of the decisions, both Appellate Departments noted that even if the NhRP had standing to bring the habeas corpus proceeding, and habeas corpus was potentially available to chimpanzees, the NhRP did not meet its burden for habeas corpus relief because it did not challenge the legality of the chimpanzees' detention, but merely sought transfer of the chimpanzees to sanctuaries. Thus, both Courts assumed, for purposes of the argument, that the NhRP had standing and that habeas corpus was available to the chimpanzee. However, the Third Department squarely addressed the question and held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus.

This Court is extremely sympathetic to Happy's plight and the NhRP's mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. Notwithstanding, in light of the Appellate Division, Third Department's holding that animals are not "persons", this Court is also constrained to find that Happy is not a "person" entitled to the writ of habeas corpus. In Lavery, 31 N.Y.3d 1054 (2018), the NhRP motion for leave to appeal the Third Department decision to the Court of Appeals was denied. However, in a concurring opinion, Justice Fahey noted that the denial of leave to appeal was not a decision on the merits of the NhRP claim. He stated that "[t]he question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?" Id. at 1057. Justice Fahey further noted that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." Id. at 1059.

Conclusion

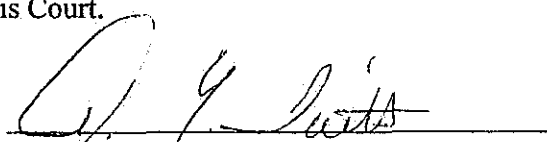
This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a "person" and is not being illegally imprisoned. As stated by the First Department in Lavery, 54 N.Y.S.3d at 397, "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process". The arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot. Nevertheless, in order to do so, this Court would have to find that Happy is a "person" and, as already stated, we are bound by this State's legal precedent.

Accordingly, Respondents' motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the motions are denied as academic or moot.

This constitutes the decision and Order of this Court.

Dated:

February 18, 2020



Hon. Alison Y. Tuitt

EXHIBIT C

At I.A.S Part of the
Supreme Court of the State of
New York, held in and for the
County of Orleans, at the
Courthouse thereof, 1 South Main
Street, Suite 3, Albion, NY on the
16th day of ~~October~~, 2018
November

PRESENT: HON. Tracey A. Bannister
Justice of the Supreme Court

19

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-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.

TAB
~~PROPOSED~~ ORDER TO
SHOW CAUSE

Index No.: 18-45164

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law
Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise,
Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents 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, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part , Room , of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the 14th day of December, 2018 at 11:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

- A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;
- B. Awarding Petitioner the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon 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, by personal delivery, on or before the 20th day of November, 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by

Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than the 3rd day of

December, 2018. Reply papers, if any, must be served on or before the 10th day of December

2018.

Dated: 11/16, 2018
Albion, New York

Tracey A. Bannister
Honorable Tracey A. Bannister

ENTER:

GRANTED
November 19, 2018
Kristin E. Nicholson
KRISTIN E. NICHOLSON
Chief Clerk

Rec'd and Entered
ORLEANS CO CLERK NY
2018 NOV 19 PM 3:39
Karen Lake May

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus,

THE NONHUMAN RIGHTS PROJECT, INC., on
behalf of HAPPY,

Petitioner,

-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.

PLEASE TAKE NOTICE, that the within is a true copy of the Order of the Supreme Court,
Orleans County, signed by the Honorable Tracey A. Bannister, Justice of the Supreme Court, and
entered by the Chief Clerk of the Orleans County Supreme Court on January 18, 2019, granting
Respondents' motion to transfer venue from Orleans County to Bronx County.

Dated: January 23, 2019



Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com

NOTICE TO:

Karen Lake-Maynard
County Clerk, Orleans County

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At a Term of the Supreme Court, of the State of New York, held in and for the County of Orleans at the Orleans County Courthouse, 1 South Main Street, in the Town of Albion, New York, on the 14th of December, 2018.

PRESENT: HON. TRACEY A. BANNISTER, J.S.C.
Justice Presiding

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

In the Matter of a Proceeding under Article 70 of the CPLR for a Writ of Habeas Corpus and Order to Show Cause,

~~PROPOSED~~ TAB
ORDER

THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Index No. 18-45164

Petitioner,

v.

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.

Petitioner The NonHuman Rights Project, Inc., ("Petitioner") having filed a Verified Petition for a Writ of Habeas Corpus on behalf of Happy the elephant by order to show cause, and having moved for the admission of Steven M. Wise, Esq. pro hac vice; and having moved the Court to rule on its Petition for a Writ of Habeas Corpus, and having moved to strike Respondents James Breheny and the Wildlife Conservation Society's

("Respondents") opposition to Petitioner's proposed order to show cause; and having moved for a preliminary injunction pursuant to CPLR 6301, and having moved for a protective order as to Respondents' Notice to Admit served pursuant to CPLR 408 and 3123; and

Respondents having opposed the Petition and Petitioner's proposed order to show cause, and having moved to change venue pursuant to CPLR 511 and 7004(c), or alternatively, to dismiss the Petition with prejudice pursuant to CPLR 3211(a), and having opposed Petitioner's motion for a preliminary injunction, and having opposed Petitioner's motion for a protective order; and

Putative *Amici* Alliance of Marine Mammal Parks and Aquariums, Protect the Harvest, and the Zoological Association of America ("*Amici*") having moved to appear *amicus curiae* in this proceeding; and

Petitioner having opposed *Amici*'s motion;

NOW, upon reading Petitioner's Verified Petition for a Writ of Habeas Corpus, sworn to October 2, 2018, with exhibits, the Joint Affidavit of Lucy Bates and Richard M. Byrne, sworn to December 5, 2016, with exhibits, the Affidavit of Karen McComb, sworn to December 22, 2016, with exhibits, the Affidavit of Cynthia J. Moss, sworn to May 6, 2017, with exhibits, the Affidavit of Joyce Poole, Ph.D., sworn to December 2, 2016, with exhibits, the Supplemental Affidavit of Joyce Poole, Ph.D., dated October 1, 2018, the Affidavit of Ed Stewart, sworn to September 26, 2018, with exhibit, and Petitioner's supporting memorandum of law, dated October 2, 2018, all filed in support of Petitioner's proposed order to show cause and in support of its Petition for a Writ of Habeas Corpus; and

The Affidavit of James Breheny in opposition to Petitioner's proposed order to show cause, sworn to October 9, 2018, and Respondents' supporting memorandum of law, dated October 9, 2018, both filed in opposition to Petitioner's proposed order to show cause; and

Petitioner's Notice of Motion to Strike Respondents' opposition to Petitioner's proposed order to show cause, dated October 10, 2018, and the Affirmation of Elizabeth Stein, dated October 10, 2018, both filed in support of Petitioner's Motion to Strike; and

Petitioner's Notice of Motion to Rule on Petitioner's Habeas Corpus Petition, dated October 25, 2018, the Affirmation of Elizabeth Stein, dated October 25, 2018, and Petitioner's supporting memorandum of law, dated October 25, 2018, all in support of Petitioner's Motion to Rule; and

The Affidavit of Joanna J. Chen, Esq. in Opposition to Petitioner's Motion to Strike and Motion to Rule, sworn to November 14, 2018, with exhibits, and Respondents' supporting memorandum of law, dated November 14, 2018, both in opposition to Petitioner's Motion to Strike and Motion to Rule; and

Respondents' Demand for Change of Venue, dated November 21, 2018, and the Affirmation in Opposition to Respondents' Demand to Change Venue, dated November 27, 2018; and

Respondents' Notice of Motion to Change Venue or alternatively to Dismiss Petitioner's Petition, dated December 3, 2018, the Affidavit of Kenneth A. Manning, Esq., sworn to December 3, 2018, with exhibits, the Supplemental Affidavit of James J. Breheny, sworn to December 3, 2018, the Affidavit of Paul P. Calle, sworn to December 3, 2018, the

Affidavit of Patrick Thomas, Ph.D., sworn to December 3, 2018, with exhibit, and Respondents' supporting memorandum of law, dated December 3, 2018, all in support of Respondents' Motion to Change Venue or alternatively to Dismiss and in Opposition to Petitioner's Petition for a Writ of Habeas Corpus; and

The Reply Affirmation of Elizabeth Stein, Esq., dated December 10, 2018, the Reply Affidavit of Steven Wise, sworn to December 10, 2018, the Reply Affirmation of Kevin Schneider, dated December 10, 2018, with exhibits, the Reply Affidavit of Lauren Choplin, sworn to December 10, 2018, with exhibits, the Reply Second Supplemental Affidavit of Joyce Poole, Ph.D., sworn to December 10, 2018, and Petitioner's Reply Memorandum of Law, dated December 10, 2018, all in opposition to Respondents' Motion to Change Venue or alternatively to Dismiss and in further support of Petitioner's Petition for a Writ of Habeas Corpus; and

Petitioner's Notice of Motion to File Late Reply Papers, dated December 11, 2018 (corrected on December 11, 2018, and further corrected on December 12, 2018), and the Affirmation of Elizabeth Stein, Esq., in Support of Petitioner's Motion to File a Late Reply, dated December 11, 2018; and

Petitioner's Notice of Motion for a Preliminary Injunction, dated December 12, 2018, the Affirmation of Elizabeth Stein, Esq. in Support of Petitioner's Motion for Preliminary Injunction, dated December 12, 2018, and Petitioner's supporting memorandum of law, dated December 12, 2018, all in support of Petitioner's Motion for a Preliminary Injunction; and

The Reply Affidavit of Joanna J. Chen, Esq. sworn to December 13, 2018, and Respondents' Reply Memorandum of Law in further Support of its Motion to Change

Venue or alternatively to Dismiss and in opposition to Petitioner's Motion for a Preliminary Injunction, both in further support of Respondents' Motion to Change Venue or alternatively to Dismiss and in Opposition to Petitioner's Motion for a Preliminary Injunction; and

Petitioner's Notice of Motion for a Protective Order, dated December 12, 2018, the two Affirmations of Kevin Schneider, Esq., both dated December 12, 2018, and the Affirmation of Elizabeth Stein, Esq., dated December 12, 2018, all in support of Petitioner's Motion for a Protective Order; and

The Affirmation of Kenneth A. Manning, Esq. in Opposition to Petitioner's Motion for a Protective Order, dated December 13, 2018, with exhibits; and

The Notice of Motion of *Amici* to File Brief *Amicus Curiae*, the Affirmation of Bezalel A. Stern, dated December 3, 2018, and the proposed Brief of *Amicus Curiae*, all in support of *Amici's* motion to File Brief *Amicus Curiae*; and Petitioner's Memorandum of Law in Opposition to *Amici's* Motion to File Brief *Amicus Curiae*, dated December 11, 2018; and all the papers and proceedings herein (and proof of service of the foregoing papers having been made); and having heard Petitioner The NonHuman Rights Project (Steven M. Wise, Esq., and Elizabeth Stein, Esq., of counsel) and Phillips Lytle LLP (Kenneth A. Manning, Esq. and Joanna J. Chen, Esq., of counsel), attorneys for Respondents, and after due deliberation thereon, and upon the attached transcript of the decision of this Court; it is hereby:

ORDERED that Respondents' motion to change venue is GRANTED; and it is further

ORDERED that

(i) the above-captioned proceeding, with all pleadings, motions, and papers submitted herein, shall be and hereby is transferred to the New York State Supreme Court, Bronx County; and

(ii) the Clerk of the Court is directed to transfer this proceeding forthwith upon the entry of this Order to the New York State Supreme Court for the County of the Bronx; and it is further

ORDERED that all motions and issues submitted to this Court and not expressly decided herein are hereby stayed, pending transfer of this proceeding to Bronx County; and it is further

ORDERED, that the Clerk of the Court may enter this Order without further notice.

Dated: Buffalo, New York
January 18, 2019

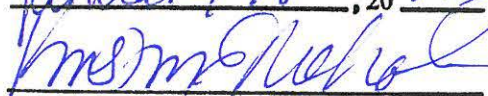


HON. TRACEY A. BANNISTER, J.S.C.

ENTER:

Doc #01-3169290

GRANTED

January 18, 2019


KRISTIN E. NICHOLSON
Chief Clerk