

**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.*

---

---

**OPPOSITION TO MOTION FOR PERMISSION TO APPEAL**

---

---

Kenneth A. Manning  
Joanna J. Chen  
William V. Rossi  
Phillips Lytle LLP  
One Canalside  
125 Main Street  
Buffalo, New York 14203  
(716) 847-8400  
kmanning@phillipslytle.com  
jchen@phillipslytle.com  
wrossi@phillipslytle.com

*Attorneys for Respondents-Respondents*

---

---

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,

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.

---

**CORPORATE  
DISCLOSURE UNDER  
RULE 500.1**

Index No.: 260441/2019

Case No.: 2020-02581

Respondent Wildlife Conservation Society (“WCS”) has no  
corporate parents.

WCS’s subsidiaries and affiliates are: 182 Flight Corp.;  
Conservation Flight LLC; Conservation Livelihoods International LLC;  
Makira Carbon Company LLC; Professional Housing Corporation; Seima  
Carbon Company LLC; Tierras LLC; Tierra De Guanacos LLC; Tierra De  
Truchas LLC; Tierra de Guanacos LLC Uno Limitada; Tierra de Guanacos  
LLC Dos Limitada; WCS Conservation Enterprises LLC; SVC Sam Veasna

Conservation Tours Co., Ltd.; WCS Global Conservation UK; WCS Wildlife Conservation Society Canada; Wild Lands Conservation Society; Autonomous Noncommercial Organization Wildlife Conservation Society; Bagatur Co., Ltd.; Ibis Rice Conservation Co., Ltd.; Sansom Mlup Prey; WCS-Associacao Conservacao da Vida Silvestre; WCS EU; Wildlife Conservation Society India; Wildlife Conservation and Science (Malaysia) Bhd; and Yayasan Celebica.

Dated: Buffalo, New York  
February 1, 2021

Kenneth A. Manning  
Joanna J. Chen  
William V. Rossi  
Attorneys for Respondents  
*James J. Breheny and  
Wildlife Conservation Society*  
One Canalside  
125 Main Street  
Buffalo, New York 14203-2887  
Telephone No. (716) 847-8400  
kmanning@phillipslytle.com  
jchen@phillipslytle.com  
wrossi@phillipslytle.com

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	v
PRELIMINARY STATEMENT.....	1
BACKGROUND AND PROCEDURAL HISTORY .....	2
A.    Wildlife Conservation Society and the Bronx Zoo’s Mission is to Care for Endangered and Threatened Animals like Happy .....	2
B.    Procedural History.....	3
ARGUMENT.....	5
POINT I    NRP’S MOTION SHOULD BE DENIED BECAUSE IT DOES NOT RAISE A NOVEL OR DIFFICULT ISSUE OF LAW .....	5
A.    All Four Departments of the Appellate Division Have Rejected NRP’s Position.....	5
B.    Courts in Other Jurisdictions Have Reached the Same Conclusion.....	9
C.    The First Department’s Decision Below is Consistent with All Relevant Jurisprudence .....	13
POINT II    NRP’S MOTION SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED IS ILL-SUITED FOR RESOLUTION BY THIS COURT.....	17
A.    NRP’s Appeal Raises Predominately Legislative Issues .....	17
B.    NRP’s Proposed “Autonomy” Standard is Unmanageable .....	21
POINT III    NRP’S MOTION SHOULD BE DENIED BECAUSE ITS ARGUMENTS LACK MERIT .....	22

A.	Individuals are Provided Rights under U.S. and International Law Because of their Humanity, as Opposed to their “Autonomy” .....	23
B.	The First Department was Correct in Maintaining that Because Animals Cannot Bear Legal Duties, They are Not Entitled to Legal Rights .....	25
C.	The Petition Fails to State a Cognizable Claim for Habeas Relief .....	28
	CONCLUSION .....	30

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Albano v. Kirby</i> , 36 N.Y.2d 526 (1975) .....	21
<i>Brevorka ex rel. Wittle v. Schuse</i> , 227 A.D.2d 969 (4th Dep't 1996) .....	24
<i>Bustamante v. Gonzales</i> , 2008 WL 4323505 (D. Ariz. Sept. 19, 2008) .....	12
<i>Byrn v. N.Y.C. Health &amp; Hosps.</i> , 31 N.Y.2d 194 (1972) .....	13, 18, 19
<i>Cetacean Cmty. v. Bush</i> , 386 F.3d 1169 (9th Cir. 2004).....	11, 20
<i>Delio v. Westchester Cty. Med. Ctr.</i> , 129 A.D.2d 1 (2d Dep't 1987) .....	23
<i>Dye v. Wargo</i> , 253 F.3d 296, 299-300 (7th Cir. 2001).....	12
<i>Eichner v. Dillon</i> , 73 A.D.2d 431 (2d Dep't 1980), <i>modified sub nom. Matter of Storar</i> , 52 N.Y.2d 363 (1981) .....	23
<i>Fitzgerald v. McKenna</i> , 1996 WL 715531 (S.D.N.Y. Dec. 11, 1996).....	12, 27
<i>In re Gault</i> , 387 U.S. 1 (1967).....	26, 27
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974) .....	23
<i>Hasbrouck by Phillips v. City of Gloversville</i> , 63 N.Y.2d 916 (1984) .....	12

<i>Haynes v. E. Baton Rouge Sheriff's Office</i> , 2020 WL 798254 (M.D. La. Feb. 18, 2020) .....	12
<i>In re Higby v. Mahoney</i> , 48 N.Y.2d 15 (1979) .....	19
<i>In re Nonhuman Rights Project, Inc. ex rel. Hercules and Another v. Stanley</i> , 49 Misc.3d 746, 773 (Sup Ct. N.Y. Cty. 2015) .....	7
<i>In re Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti</i> , 124 A.D.3d 1334, 1334 (4th Dep't 2015) (" <i>Presti</i> "), <i>lv. denied</i> , 26 N.Y.3d 901 (2015).....	6, 9, 28
<i>Jones v. Fransen</i> , 857 F.3d 843 (11th Cir. 2017).....	11
<i>McGraw v. Wack</i> , 220 A.D.2d 291 (1st Dep't 1995) .....	16
<i>Miles v. City Council of Augusta</i> , 710 F.2d 1542 (11th Cir. 1983).....	12
<i>Milliken v. Meyer</i> , 311 U.S. 457 (1940) .....	26
<i>Musco v. United Surety Co.</i> , 196 N.Y. 459 (1909) .....	21
<i>Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford &amp; Sons</i> , 2019 WL 1399499 (Conn. Super. Ct. Feb. 13, 2019) .....	10
<i>Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford &amp; Sons, Inc.</i> , 2017 WL 7053738 (Conn. Super. Ct. Dec. 26, 2017).....	7, 9, 10
<i>Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery</i> , 152 A.D.3d 73 (1st Dep't 2017), <i>lv. denied</i> , 31 N.Y.3d 1054 (2018).....	<i>passim</i>
<i>Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery</i> , 31 N.Y.3d 1054 (2018).....	7

<i>In re NonHuman Rights Project, Inc. v. Breheny</i> (“Breheny”), 189 A.D.3d 583 (1st Dep’t 2020) .....	2, 4, 5, 9, 17
<i>Nonhuman Rights Project, Inc. v. R. W. Commerford &amp; Sons, Inc.</i> , 216 A.3d 839, <i>cert. denied</i> , 217 A.3d 635 (2019) .....	10, 16
<i>Nonhuman Rights Project, Inc. v. R. W. Commerford &amp; Sons, Inc.</i> , 231 A.3d 1171, <i>cert. denied</i> , 235 A.3d 525 (2020) .....	10, 11
<i>In re Nonhuman Rights Project, Inc. v. Stanley</i> , 2014 WL 1318081 (2d Dep’t Apr. 3, 2014) .....	5, 6
<i>Paladino v. CNY Centro, Inc.</i> , 23 N.Y.3d 140 (2015) .....	19
<i>People ex rel Brown v. Johnston</i> , 9 N.Y.2d 482 (2017) .....	15, 16
<i>People ex rel. Dawson v. Smith</i> , 69 N.Y.2d 689 (1986) .....	15, 16
<i>People ex rel. Ledwith v. Bd. of Tr. of Bellevue &amp; Allied Hosps.</i> , 238 N.Y. 403 (1924) .....	25
<i>People ex rel. Nonhuman Rights Project, Inc. v. Lavery</i> , 124 A.D.3d 148 (3d Dep’t 2014), <i>lv. denied</i> 26 N.Y.3d 902 (2015) .....	6, 7, 8, 10, 25, 26
<i>People ex rel. Nonhuman Rights Project, Inc. v. Lavery</i> , 26 N.Y.3d 902 (2015) .....	7
<i>People ex rel. Nonhuman Rights Project v. Presti</i> , 26 N.Y.3d 901 (2015) .....	7
<i>People ex rel. Robertson v. N.Y.S. Div. of Parole</i> , 67 N.Y.2d 197 (1986) .....	28
<i>People v. Graves</i> , 163 A.D.3d 16 (4th Dep’t 2018) .....	16
<i>People v. Taylor</i> , 9 N.Y.3d 129 (2007) .....	22



<i>Rosenblatt v. Baer</i> , 383 U.S. 75 (1966) .....	23
<i>Rowley v. City of New Bedford</i> , 159 N.E.3d 1085, 2020 WL 7690259 (Mass. Ct. App. 2020) .....	11, 13
<i>Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks &amp; Entm't, Inc.</i> , 842 F. Supp. 2d 1259 (S.D. Cal. 2012) .....	12
<i>U.S. v. Barona</i> , 56 F.3d 1087 (9th Cir. 1995) .....	27
<i>United States v. McLaurin</i> , 731 F.3d 258 (2d Cir. 2013).....	23
<i>Woods v. Lancet</i> , 303 N.Y. 349 (1951) .....	14, 15
<i>Xiang Fu He v. Troon Management, Inc.</i> , 34 N.Y.3d 167 (2019) .....	21
<b>Statutes</b>	
7 U.S.C. § 2131(1) .....	19
7 U.S.C. § 2131(3) .....	19
42 U.S.C. § 1983 .....	12
Elephant Protection Act, 2017 N.Y. B.S. 2098, 2017 Sess. Law N.Y. Ch. 333, § 2 .....	19, 20, 28
<b>Other Authorities</b>	
Arthur Karger, <i>The Powers of the Court of Appeals</i> §1:1 (revised 3d ed. 2005) .....	23
Conn. Gen. Stat. § 52-466(a)(1) .....	10
CPLR 7002(a) .....	14
CPLR Article 70 .....	1, 5, 14, 21, 24

Laurence H. Tribe, <i>Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise</i> , 7 <i>Animal L.</i> 1, 7 (2001) .....	24
N.Y. Ag. & Mkts. L. § 350(1) .....	19
N.Y. Ag. & Mkts. L. § 380 .....	20, 28
N.Y. Ag. & Mkts. L. § 353-B .....	19
Richard L. Cupp Jr., <i>A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals' Property Status</i> , 60 <i>SMU. L. Rev.</i> 3 (2007) .....	26
Richard L. Cupp Jr., <i>Animals as More than "Mere Things," but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm</i> , 84 <i>U. Cin. L. Rev.</i> 1023 (2016) .....	26
Richard L. Cupp Jr., <i>Children, Chimps, and Rights: Arguments from Marginal Cases</i> , 45 <i>Ariz. St. L. J.</i> 1 (2013) .....	26
Richard L. Cupp Jr., <i>Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood</i> , 69 <i>Fla. L. Rev.</i> 465 (2017) .....	26
Richard L. Cupp Jr., <i>Edgy Animal Welfare</i> , 95 <i>Denv. L. Rev.</i> 865 (2018) .....	26
Richard L. Cupp Jr., <i>Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals</i> , 33 <i>Pace Envtl. L. Rev.</i> 517 (2016) .....	26
Richard L. Cupp Jr., <i>Litigating Nonhuman Animal Legal Personhood</i> , 50 <i>Tex. Tech. L. Rev.</i> 573 (2018) .....	26
Richard L. Cupp. Jr., <i>Moving beyond Animal Rights: A Legalist/Contractualist Critique</i> , 46 <i>San Diego L. Rev.</i> 27 (2009) .....	26

## **PRELIMINARY STATEMENT**

Respondents Wildlife Conservation Society and James J. Breheny respectfully request that the Court deny leave to appeal. Notwithstanding their protestations to the contrary, Petitioner-Appellant the Nonhuman Rights Project (“NRP”) cannot establish that it raises any novel or difficult issues of law appropriate for resolution by this Court.

All four of New York’s Departments of the Appellate Division have repeatedly rejected NRP’s position that animals qualify as “persons” under CPLR Article 70. State courts in Connecticut and Massachusetts have similarly denied NRP’s habeas corpus petitions filed on behalf of other animals. Federal courts have repeatedly held that animals do not qualify as “persons” under state and federal law. These decisions provide several sound bases for holding that animals are not “persons” eligible for habeas relief: (1) common law does not support NRP’s theory; (2) policy changes relating to animal welfare are best left to the Legislature; and (3) a habeas petition fails if it does not seek the remedy of immediate release.

Accepting NRP’s radical argument would have far-reaching effects. As the First Department unanimously recognized below, “[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.” *In re NonHuman Rights Project, Inc. v. Breheny* (“*Breheny*”), 189 A.D.3d 583, 583 (1st Dep’t 2020). In addition to upending centuries of settled expectations, NRP’s position, if accepted, has the potential to disrupt agricultural, pharmaceutical, and numerous other industries in the State. Perhaps most concerning, NRP seeks to implement the poorly defined construct of “autonomy” as a basis for determining the scope of rights afforded to an individual, posing dangerous consequences for the most vulnerable members of our society.

### **BACKGROUND AND PROCEDURAL HISTORY**

#### **A. Wildlife Conservation Society and the Bronx Zoo’s Mission is to Care for Endangered and Threatened Animals like Happy**

Respondent Wildlife Conservation Society (“WCS”) is a not-for-profit organization headquartered at the Bronx Zoo. A. 320, ¶ 3. Its mission is to safeguard wildlife and wild places worldwide, through science, conservation, education, and by inspiring people to value and appreciate wildlife. *Id.* Today, the Bronx Zoo cares for thousands of endangered or threatened animals, including Happy the elephant. A. 320, ¶ 4.

Happy is a forty-nine year old Asian elephant. A. 459, ¶ 6. She has lived in her habitat at the Bronx Zoo for over forty years. A. 335-37 ¶¶ 9-10, 15, 27; A. 459, ¶ 6. As with all wildlife at the Bronx Zoo, Happy’s living conditions are regulated by the Animal Welfare Act, which is overseen and

enforced by the United States Department of Agriculture. A. 336, ¶¶ 16-19. In addition, the Association of Zoos and Aquariums (“AZA”) administers accreditation standards for zoos, which include the AZA Standards for Elephant Management and Care. A. 334-35, ¶¶ 6-14. Under these standards, outdoor elephant habitats must provide sufficient space and environmental complexity, varied terrain for exercising and foraging, and, weather permitting, regular access to water sources for bathing and cooling. A. 335, ¶ 10.

The Animal Welfare Act and AZA Standards for Elephant Management and Care are the primary standards of care for elephants at accredited zoos in the United States. A. 334, ¶ 6. It is undisputed that the Bronx Zoo complies with these standards and is accredited by the AZA. A. 335-37, ¶¶ 13-14, ¶¶ 19-22.

## **B. Procedural History**

NRP initially commenced this habeas corpus proceeding in New York State Supreme Court, Orleans County, A. 31, A. 78-82, alleging that “the First Department, which oversees the county where the Bronx Zoo is located, has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human.” A. 321, ¶ 9.

Respondents moved to change venue to Bronx County, and alternatively, to dismiss the petition. A. 326-28. Orleans County Supreme Court granted Respondents' motion to transfer venue to Bronx County. A. 29-30.

The Trial Court, after nearly three days of oral argument, issued a Decision and Order granting Respondents' motion to dismiss the Petition, concluding under binding precedent that Happy "is not a 'person' and is not being illegally imprisoned." A. 22. The trial court further held, "[a]s stated by the First Department . . . , 'the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process.'" *Id.*

NRP appealed to the First Department, which unanimously affirmed the Trial Court's dismissal of NRP's Petition. The First Department held that "[t]he common-law writ of habeas corpus does not lie on behalf of Happy, the elephant at issue in this proceeding" because "the writ of habeas corpus is limited to human beings." *Breheny*, 189 A.D.3d at 583. It reasoned that "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" as "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.” *Id.* (internal quotation marks and citation omitted).

## ARGUMENT

### POINT I

#### **NRP’S MOTION SHOULD BE DENIED BECAUSE IT DOES NOT RAISE A NOVEL OR DIFFICULT ISSUE OF LAW**

The theory NRP advances in this case is not a novel one—it is simply an unsupported one. On thirteen prior occasions, New York courts have considered and rejected NRP’s argument that CPLR Article 70 applies to animals. Courts in other states have similarly concluded that animals are not eligible for habeas relief eight times. Federal courts have repeatedly held that animals do not qualify as “persons” in a variety of contexts. The legal question NRP seeks to raise therefore is neither novel nor difficult, and has been correctly resolved below, consistent with the unanimous rulings of other domestic courts.

#### **A. All Four Departments of the Appellate Division Have Rejected NRP’s Position**

All four Departments of the Appellate Division have unanimously rejected habeas petitions filed by NRP on behalf of animals. *See In re Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 at \*1 (2d Dep’t Apr.

3, 2014) (“*Stanley*”) (dismissing appeal);<sup>1</sup> *In re Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep’t 2015) (“*Presti*”), *lv. denied*, 26 N.Y.3d 901 (2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep’t 2014) (“*Lavery I*”), *lv. denied* 26 N.Y.3d 902 (2015); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep’t 2017) (“*Lavery II*”), *lv. denied*, 31 N.Y.3d 1054 (2018). In light of these decisions, the issue presented in this case cannot be considered novel. Further, these unanimous rulings demonstrate that the question is not a difficult one.

NRP began its campaign in New York courts by filing petitions on behalf of chimpanzees. The Suffolk County Supreme Court, Niagara County Supreme Court, and Fulton County Supreme Court each declined to sign NRP’s orders to show cause for a petition for writ of habeas corpus for the chimpanzees. *Stanley*, 2014 WL 1318081 at \*1; *Presti*, 124 A.D.3d at 1334; *Lavery I*, 124 A.D.3d at 148. NRP unsuccessfully appealed from each of those rulings, resulting in decisions from the Second, Third, and Fourth Departments. *Stanley*, 2014 WL 1318081 at \*1; *Presti*, 124 A.D.3d at 1334; *Lavery I*, 124 A.D.3d at 148. This Court denied leave to appeal in both of the

---

<sup>1</sup> On NRP’s attempted appeal from the decision of the Supreme Court, Suffolk County, which refused to sign NRP’s *ex parte* order to show cause seeking a writ of habeas corpus, the Appellate Division, Second Department dismissed NRP’s appeal *sua sponte* because no appeal was available. 2014 WL 1318081 at \*1.



cases in which NRP sought leave. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 26 N.Y.3d 902 (2015); *People ex rel. Nonhuman Rights Project v. Presti*, 26 N.Y.3d 901 (2015).

Before the foregoing appeals had concluded, NRP sought in New York County Supreme Court successive writs of habeas corpus for the chimpanzees involved. *Lavery II*, 152 A.D.3d 73, 75-76. New York County Supreme Court declined to sign two of the proposed orders to show cause, and the First Department affirmed. *Id.*<sup>2</sup> This Court again denied leave to appeal. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 31 N.Y.3d 1054 (2018). The Hon. Eugene M. Fahey filed a separate concurring opinion. Noting that two chimpanzees were allegedly kept in small cages in a warehouse and a cement storefront, Judge Fahey discussed the ethical question of treating such animals as mere “things.” *Id.* at 1056 (Fahey, J., concurring). The Order of this Court denying leave to appeal was unanimous. *Id.*

In rejecting NRP’s claims, the Appellate Division’s decisions provided numerous reasons for rejecting NRP’s claims. The Third Department held that “animals have never been considered persons for the

---

<sup>2</sup> New York County Supreme Court signed a third proposed order to show cause, and denied the petition for habeas corpus after the parties submitted briefing and held oral argument. *In re Nonhuman Rights Project, Inc. ex rel. Hercules and Another v. Stanley*, 49 Misc.3d 746, 773 (Sup Ct. N.Y. Cty. 2015).

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” and noted there was no support “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.” *Lavery I*, 124 A.D.3d at 150. Instead, “the ascription of rights has historically been connected with the imposition of societal obligations and duties.” *Id.* at 151. Finally, the court noted that “[t]he Legislature has extended significant protections to animals,” and NRP “is fully able to importune the Legislature to extend further legal protections to chimpanzees.” *Id.* at 152-53.

In a prior decision, the First Department similarly concluded that NRP’s “position is without legal support or legal precedent.” *Lavery II*, 152 A.D.3d at 77. It too noted that “[t]he 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.” *Id.* at 78. The court rejected NRP’s argument that infants or the comatose lack duties but possess rights, stating it “ignores the fact that these are still human beings, members of the human community.” *Id.* “[T]he according of any fundamental legal rights to animals, including entitlement to

habeas relief,” the court determined, “is an issue better suited to the legislative process.” *Id.* at 80.

In addition, the First Department held that NRP’s petitions failed for an independent reason: “petitioner does not challenge the legality of the chimpanzees’ detention, but merely seeks their transfer to a different facility.” *Id.* at 79. The Fourth Department has likewise held that “[r]egardless of whether we agree with petitioner’s claim that [a chimpanzee] is a person within the statutory and common-law definition of the writ, habeas corpus relief nonetheless is unavailable as that claim, even if meritorious, would not entitle [the chimpanzee] to immediate release.” *Presti*, 124 A.D.3d at 1335. In the decision below, the First Department “decline[d] to overrule any of [its] alternative holdings in” *Lavery II. Breheny*, 189 A.D.3d at 583.

All four Departments of the Appellate Division have thus rejected the legal theory advanced in NRP’s motion, and this Court has denied leave to appeal three of those rulings. These decisions reflect a powerful consensus on the invalidity of NRP’s position.

## **B. Courts in Other Jurisdictions Have Reached the Same Conclusion**

In addition to its failed petitions in New York, NRP’s arguments have been rejected in other states. In 2017, NRP sought habeas relief in Connecticut Superior Court for three elephants. *Nonhuman Rights Project, Inc.*

*ex rel. Beulah v. R.W. Commerford & Sons, Inc.*, 2017 WL 7053738, at \*1 (Conn. Super. Ct. Dec. 26, 2017). Like New York, the Connecticut habeas statute applies only to “persons.” *Id.* at \*4 (citing Conn. Gen. Stat. § 52-466(a)(1)). The trial court dismissed NRP’s petition, and the Connecticut Appellate Court affirmed, holding that its examination of common law habeas corpus jurisprudence “reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman animal.” *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839, 844, *cert. denied*, 217 A.3d 635 (2019) (“*Commerford I*”). It also pointed to *Lavery I* in explaining that “it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities.” *Id.* at 46. Deciding with “little difficulty” that elephants cannot seek habeas relief, the court stated that NRP would be better served “advocating for added protections for elephants or other nonhuman animals at the legislature.” *Id.* at 846 & n.9.

Alleging that the first assigned judge lacked “sufficient knowledge of or experience in habeas corpus matters,” NRP filed a second petition—naming the same elephants and seeking the same relief—in a different Connecticut court. *Comerford II*, 231 A.3d at 1173 n.5. The second trial court rejected NRP’s petition as “wholly unsupported.” *Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford & Sons*, 2019 WL 1399499, at \*3 (Conn.

Super. Ct. Feb. 13, 2019). On appeal, the Connecticut Appellate Court again held that Connecticut’s habeas statute, like New York’s, “unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus.” *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 231 A.3d 1171, 1176, *cert. denied*, 235 A.3d 525 (2020) (“*Commerford II*”).

Massachusetts courts have likewise rejected the theory that elephants qualify as “persons” that may pursue a habeas petition. In *Rowley v. City of New Bedford*, 159 N.E.3d 1085, 2020 WL 7690259 (Mass. Ct. App. 2020) (table decision), the Appeals Court of Massachusetts upheld the denial of habeas relief for two elephants, finding no support for the theory that elephants “ought to be considered ‘persons’ under the law.” *Id.* at \*2. The court “emphasize[d] the need to exercise judicial restraint, so as to refrain from substituting [our] notions of correct policy for that of a popularly elected Legislature.” *Id.* at \*2.

In addition to cases directly addressing state habeas petitions brought on behalf of animals, numerous federal courts have held that animals are not “persons” in other contexts. *See Jones v. Fransen*, 857 F.3d 843, 857-58 (11th Cir. 2017) (animal is not “person” subject to suit under state law); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (animals are not persons under the Administrative Procedure Act and other federal statutes);

*Dye v. Wargo*, 253 F.3d 296, 299-300 (7th Cir. 2001) (animals are not persons subject to suit under 42 U.S.C. § 1983); *Miles v. City Council of Augusta*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) (an animal “cannot be considered a ‘person’ and is therefore not protected by the Bill of Rights”); *Haynes v. E. Baton Rouge Sheriff's Office*, 2020 WL 798254, at \*1 (M.D. La. Feb. 18, 2020) (animal is not a “person” under § 1983 or state law); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012) (concluding “[t]he only reasonable interpretation of the Thirteenth Amendment’s plain language is that it applies to persons, and not to non-persons such as orcas”); *Bustamante v. Gonzales*, 2008 WL 4323505, at \*6 (D. Ariz. Sept. 19, 2008) (conclusion that animal is not a proper defendant “is obvious, but perhaps so obvious that authority bothering to state it is evasive”); *Fitzgerald v. McKenna*, 1996 WL 715531, at \*7 (S.D.N.Y. Dec. 11, 1996) (stating “animals lack capacity to be sued”). NRP does not cite, let alone address, these decisions in its motion.

NRP seeks to rely instead upon a number of documents outside the record on appeal, including international decisions uploaded to NRP’s own website. Such documents “which [were] not before the courts below cannot be considered.” *Hasbrouck by Phillips v. City of Gloversville*, 63 N.Y.2d 916, 918 (1984). Moreover, these international decisions are “not relevant to the

definition of ‘person’ here in the United States and certainly [are] of no guidance to the entitlement of habeas relief by nonhumans in New York.” *Lavery II*, 152 A.D.3d at 79; *see also Rowley*, 2020 WL 7690259, at \* 2 (finding that the international decisions highlighted by NRP “offer no precedential value and we are not persuaded by foreign authority in this matter”).

**C. The First Department’s Decision Below is Consistent with All Relevant Jurisprudence**

To bolster its contention that this matter presents novel and difficult legal questions, NRP attempts to manufacture conflicts between the lower court’s decision and prior decisions of this Court. This Court’s decisions in fact support the First Department’s decision below.

NRP contends that the First Department’s decision conflicts with *Byrn v. N.Y.C. Health & Hosps.*, 31 N.Y.2d 194 (1972), which concerned “whether a human entity, conceived but not yet born, is and must be recognized as a person in the law.” *Id.* Yet this Court did not hold in *Byrn*, as NRP suggests, that rights and duties are somehow unrelated, or that courts are precluded from recognizing the intrinsic value of humanity (issues discussed in greater detail *infra*). Instead, this Court held that “[w]hether the law should accord legal personality is a policy question *which in most cases devolves on the Legislature.*” *Id.* at 201 (emphasis added). While NRP chooses to ignore the most important holding by this Court in *Byrn*, the First Department’s decision

is entirely consistent with this Court's holding. *See Lavery II*, 152 A.D.3d at 80 (“[T]he according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process.”).

NRP cites *Woods v. Lancet*, 303 N.Y. 349 (1951), in which this Court held that a child may pursue a negligence action for prenatal injuries inflicted on a viable fetus. Contrary to NRP's contentions, *Woods* does not stand for the blanket proposition that courts should ignore past precedent and the proper role of the Legislature. Instead, this Court offered several reasons for its decision to overrule an older case: since its prior decision “numerous and impressive affirmative precedents have been developed,” *id.* at 354; the Court could find no “sound reason for the old rule,” *id.*; and the area of tort law is “a field peculiarly nonstatutory,” *id.* at 355. None of those considerations apply here. As described above, all New York courts have unanimously refused to extend the habeas remedy to animals and have provided sound bases for their decisions. Further, unlike tort law, the habeas field is codified in CPLR Article 70 and specifically limits the remedy to “persons.” CPLR 7002(a). Notably, the *Woods* decision expressly acknowledges that some changes “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.

NRP argues that the First Department contravened *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), by recognizing that the habeas remedy is not available if a petitioner does not seek release from custody. In *Dawson*, this Court reaffirmed the rule that a habeas petition seeking to change the conditions of confinement necessarily fails. *Id.* at 691. It distinguished a prior case, explaining that the rule does not apply when a petitioner seeks release from “an institution separate and different in nature from the correctional facility to which petitioner had been committed pursuant to the sentence of the court, and was *not within the specific authorization conferred on the Department of Correctional Services by that sentence.*” *Id.* (citing *People ex rel Brown v. Johnston*, 9 N.Y.2d 482, 485 (2017) (emphasis added). Because the petitioner in *Dawson* sought a transfer from one housing unit in prison to another part of the prison, both of which were “expressly authorized” by his criminal sentence, his claim failed. *Id.* at 691. As *Lavery II* explained, *Dawson* is “analogous to the situation here.” 152 A.D.3d at 80. Respondents’ custody of Happy complies with all federal, state, and local animal welfare law, and NRP does not claim otherwise. A. 48, ¶ 56.

NRP also cites *McGraw v. Wack*, 220 A.D.2d 291 (1st Dep't 1995), which dismissed an appeal challenging the trial court's decision to convert a habeas petition into an Article 78 proceeding. *Id.* at 292. The Appellate Division observed in *McGraw* that "restraint in excess of that permitted by the judgment or constitutional guarantees" may be challenged. *Id.* at 293 (quoting *Brown*, 9 N.Y.2d at 485). As with *Dawson*, this statement has no bearing on the present case because NRP does not – and cannot – allege that Happy is being held in violation of any applicable law or constitutional guarantee.

Finally, NRP contends that the decision below is inconsistent with *People v. Graves*, 163 A.D.3d 16 (4th Dep't 2018), a case holding that a car dealership qualified as "another person" under a criminal mischief statute. *Id.* at 20. After concluding that the car dealership was "was either a 'private corporation' or a 'partnership,'" the court stated in dicta that animals may sometimes be treated as persons. *Id.* at 20, 21. As noted in a decision dismissing one of NRP's other habeas cases, *Graves* "had nothing to do with habeas corpus or an attempt to judicially designate elephants, or any other animal, as 'persons' for the purpose of giving them legal rights available to a human being." *Comerford*, 2019 WL 1399499, at \*3.

In sum, every relevant court decision from this State and other states holds that the habeas remedy does not extend to animals. Despite

NRP's best efforts to create some conflict in the relevant jurisprudence, its position has been unanimously rejected. NRP's Petition therefore presents neither novel nor difficult issues of law, and NRP's motion for leave to appeal should be denied.

## POINT II

### **NRP'S MOTION SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED IS ILL-SUITED FOR RESOLUTION BY THIS COURT**

#### **A. NRP's Appeal Raises Predominately Legislative Issues**

This Court should also deny leave because the Legislature is the proper forum to consider NRP's proposed reforms. As the First and Third Departments stated, NRP's efforts are better directed at the Legislature because "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." *Breheny*, 189 A.D.3d at 583 (citing *Lavery II*, 152 A.D.3d at 80). Apparently recognizing the wisdom of the foregoing, NRP touts its ongoing "grassroots and legislative campaigns" to "chang[e] the common law status of at least some nonhuman animals" into legal "persons." A. 320, ¶ 5.

Notwithstanding participation in the legislative process, NRP accuses this Court of shirking its duties if it does not consider NRP's appeal. NRP Mem. at 28-29 (equating lower court's decision to "antebellum Northern

judges” and their “separation of powers rationale when ruling against slaves”). In fact, this Court’s precedent weighs heavily in favor of the Legislature considering the issues raised by NRP, especially where the Legislature has recently demonstrated that it is capable of enacting specific legislation to protect elephants.

For example, although NRP relies heavily upon this Court’s decision in *Byrn*, this Court stated that “personhood” is a “policy question which in most instances devolves on the Legislature,” and whether “the legislative action may be wise or unwise, even unjust and violative of principles beyond the law, does not change the legal issue of how it is to be resolved.” *Byrn*, 31 N.Y.2d at 201. The Court denied plaintiff’s request to expand “legal personhood” to an unborn human, concluding that while there were certainly “real issues” presented, they nonetheless remain “issues outside the law unless the Legislature should provide otherwise.” *Id.* at 203.

This Court has repeatedly recognized in other instances that the Legislature is better equipped to undertake weighty policy decisions because it “has far greater capabilities to gather relevant data and to elicit expressions of pertinent opinion on the issues at hand” and “is better able to assess all of the policy concerns in [an] area and to limit the applicability of any new rule.”

*Paladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 152 (2015) (citing *In re Higby v. Mahoney*, 48 N.Y.2d 15, 18-19 (1979)); *see also* *Byrn*, 31 N.Y.2d at 201.

The Legislature has promulgated numerous statutes that would be upended if the Court were to consider and adopt NRP's position. New York and federal laws regulate virtually every aspect of human and animal relationships. For example, the Agriculture and Markets Law broadly defines "animals" as "every living creature except a human being," Ag. & Mkts. L. § 350(1), and imposes responsibilities on humans to protect animal welfare. *See, e.g.* Ag. & Mkts L §§ 353-B (outdoor dog shelters) 359-a (transportation of horses); 356 (animal sustenance); 353-a (making aggravated animal abuse a felony). The Federal Animal Welfare Act likewise prescribes a litany of regulations for the "humane care and treatment" of animals and to "protect the owners of animals from the theft of their animals." 7 U.S.C. § 2131(1), (3). The bedrock distinction between humans and animals is inherent in all such legislation. Declaring any animal a "person" via judicial decision would disrupt and interfere with these extensive statutory enactments.

Beyond these existing protections, the New York Legislature recently approved specific legislation to protect elephants. Months before NRP commenced this proceeding, the Assembly determined that "elephants are complex, highly intuitive and intelligent animals," 2017 N.Y. B.S. 2098,

and that preventing the abuse of elephants is a significant state concern. 2017 Sess. Law N.Y. Ch. 333, § 2. Accordingly, effective October 2019, New York implemented the “Elephant Protection Act,” *id.*, S. 2098-B, § 1, prohibiting the use of elephants in “entertainment acts.” N.Y. Ag. & Mkts. L. § 380.

Notably, the Legislature expressly excluded “institutions accredited by the Association of Zoos and Aquariums” like the Bronx Zoo. *Id.*; *see* A. 335-37.

In light of the foregoing, and contrary to NRP’s contentions, the New York Pet Trust Statute falls well short of establishing that the Legislature intended to grant legal personhood or habeas rights to animals when it enacted that statute. NRP Mem. at 44. Had the Legislature intended to enact a fundamental change in the legal framework governing persons and animals, it could and would have done so expressly. *See generally Cetacean Cmty.*, 386 F.3d at 1179 (if lawmakers “intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly”) (internal quotation marks and citations omitted).

The Legislature thus has demonstrated that it is fully capable of investigating, studying, and deliberating upon the ethical treatment of elephants, as well as adopting appropriate legislation reflecting New York State policy. This legislative action—which is only 18 months old—reflects that accredited zoological institutions are lawfully entrusted with the care of

elephants. This Court should not usurp the Legislature’s function by charting a different course. *See Xiang Fu He v. Troon Management, Inc.*, 34 N.Y.3d 167, 172 (2019) (“we are not at liberty to second-guess the legislature’s determination, or to disregard—or rewrite—its statutory text”).

**B. NRP’s Proposed “Autonomy” Standard is Unmanageable**

Granting NRP leave to appeal also would be impractical. A recent report commissioned by New York State Chief Judge, Hon. Justice DiFiore, summarized the “big-picture observation” of an “under-resourced, over-burdened New York State court system” and “the dehumanizing effect it has on litigants.”<sup>3</sup> This Court should decline to consider NRP’s position, which could further increase New York courts’ burden by making them the arbiter of whether individuals are sufficiently “autonomous” to receive habeas relief.

Indeed, practical application of the “autonomy” standard proposed by NRP may prove to be an impossible task. Unsatisfied with the current habeas corpus procedure codified in CPLR Article 70, NRP asks this

---

<sup>3</sup> Report from the Special Adviser on Equal Justice in New York State Courts, Oct. 1, 2020. Available at <http://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>. This Court may take judicial notice of this report because it is an official publication of the New York Court System commissioned by the Chief Administrative Judge. *Musco v. United Surety Co.*, 196 N.Y. 459, 465 (1909) (“We doubtless may take judicial notice of the public report made by the commission of immigration recently appointed by the governor to inquire into the condition and welfare of aliens in this state . . . .”); *accord Albano v. Kirby*, 36 N.Y.2d 526, 532-33 (1975) (holding court could take judicial notice of memorandum published by Department of Civil Service on appeal addressing proper construction of same).

Court to extend habeas relief to all “autonomous” individuals (human or animal), which NRP defines as individuals who “direct[] their behavior based on some *non-observable, internal* cognitive process, rather than simply responding reflexively” and “exhibit self-determined behavior that is based on their freedom of choice.” NRP’s Mem. at 6 (emphasis added).

Accordingly, NRP asks this Court to adopt a new standard under which “autonomy” must be determined without reference to any “observable” metric. *Id.* NRP does not explain whether it proposes an individualized examination or a blanket determination of “autonomy” for entire species. Nor does NRP specify how courts might determine whether an animal acts based upon freedom of choice. NRP’s proposed standard would “create[] more questions than it resolves,” if it resolves any questions at all. *People v. Taylor*, 9 N.Y.3d 129, 149 (2007). For this additional reason, the Court should deny NRP’s motion for leave to appeal.

### **POINT III**

#### **NRP’S MOTION SHOULD BE DENIED BECAUSE ITS ARGUMENTS LACK MERIT**

NRP’s position does not merit review by this Court. Sound policy demands that “the limitations on the Court’s jurisdiction [are] geared to the objective, not merely of limiting the size of the Court’s case load, but also of assuring that the appeals brought before it are worthy of its consideration.”



Arthur Karger, *The Powers of the Court of Appeals* §1:1 (revised 3d ed. 2005).

**A. Individuals are Provided Rights under U.S. and International Law Because of their Humanity, as Opposed to their “Autonomy”**

While NRP invokes the great writ of habeas corpus—and its historic ability to liberate disadvantaged humans—to advance its cause, NRP has failed to articulate a meritorious case for abandoning humanity as a pillar of U.S. and international law.

“Our basic concept of the essential dignity and worth of every human being” is “a concept at the root of any decent system of ordered liberty.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). Humanity thus guarantees fundamental rights to any person, whether a convicted criminal, terminally ill, or mentally incompetent person. *United States v. McLaurin*, 731 F.3d 258, 261 (2d Cir. 2013) (“A person, even if convicted of a crime, retains his humanity.”); *Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1, 15 (2d Dep’t 1987) (“[T]he ‘value of human dignity’ extends to both competent and incompetent patients . . . .”); *Eichner v. Dillon*, 73 A.D.2d 431, 465 (2d Dep’t 1980), *modified sub nom. Matter of Storar*, 52 N.Y.2d 363 (1981) (“[A]ny state scheme which irrationally denies to the terminally ill incompetent that which it grants to the terminally ill competent patient is plainly subject to

constitutional attack.”). Hence New York’s habeas corpus statute is available to any person. CPLR Art. 70.

NRP seeks to drastically alter this paradigm in favor of granting rights based on “autonomy.” While keen to invoke the example of incompetent, disabled, or comatose humans as “right holders” where it suits their position, *see* A. 38, NRP’s Mem. at 29, NRP avoids discussing the potentially devastating consequences that their test could cause, especially to these same historically marginalized individuals. Even Professor Lawrence Tribe, amicus for NRP in the Appellate Division, previously observed that “if your theory of who is entitled to rights is entirely a function of the supposedly scientific question of who has autonomy and who may therefore make a rational plea for dignity,” one imperils those persons whose “autonomy” is ambiguous, and “the possibilities are genocidal and horrific . . . .” Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 *Animal L.* 1, 7 (2001).

Just as an example, if courts had applied NRP’s vague standard of “autonomy” rather than humanity to determine eligibility for habeas relief, the rights of many prior successful habeas litigants may well have been extinguished. *See, e.g., Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 969 (4th Dep’t 1996) (noting petitioner “is elderly and showing signs of dementia”);

*People ex rel. Ledwith v. Bd. of Tr. of Bellevue & Allied Hosps.*, 238 N.Y. 403, 408 (1924) (noting petitioner had been determined insane by hospital authorities).

Basing rights on the characteristic of humanity is therefore not an “arbitrary, irrational, [and] inequitable” choice (NRP’s Mem. at 4), but a key bulwark in the protection of vulnerable individuals. Redrawing that line could endanger legal safeguards for vulnerable human beings, in addition to wreaking havoc upon legislative policies governing the myriad relationships between humans and animals.

**B. The First Department was Correct in Maintaining that Because Animals Cannot Bear Legal Duties, They are Not Entitled to Legal Rights**

NRP contends that the First and Third Departments’ prior decisions were erroneous in finding that “nonhumans lack sufficient responsibility to have any legal standing.” *Lavery II*, 152 A.D.3d at 79; *see also Lavery I*, 124 A.D.3d at 151. The connection between legal rights and duties, however, is well founded.

As described in greater detail in the brief accepted by the First Department from *amicus curiae* Professor Richard L. Cupp, Jr., John W. Wade Professor of Law at Pepperdine University, Caruso School of Law, the reciprocal nature of legal rights and a norm of legal accountability is deeply

embedded in our legal tradition.<sup>4</sup> Indeed, the United States Supreme Court has clearly recognized the connection between rights and duties, explaining:

The state which accords [a citizen] privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the various incidences of state citizenship.

*Milliken v. Meyer*, 311 U.S. 457, 463 (1940) (internal quotation marks and citation omitted).

Although NRP attempts to distinguish the U.S. Supreme Court decision *In re Gault*, 387 U.S. 1, 20 (1967), wherein the Court stated that “the social compact” both “defines the rights of the individual and delimits the powers which the state may exercise,” *Gault* in fact relevantly addressed a

---

<sup>4</sup> Although NRP alleges that *Lavery I* was incorrectly decided because it relied in part upon Professor Cupp’s “idiosyncratic idea of social contract theory,” (NRP Mem. at 45-50), Professor Cupp’s position is supported by numerous scholars and judges, as cited in his publications. See Richard L. Cupp Jr., *Cognitively Impaired Humans, Intelligent Animals, and Legal Personhood*, 69 Fla. L. Rev. 465 (2017); Richard L. Cupp Jr., *Edgy Animal Welfare*, 95 Denv. L. Rev. 865 (2018); Richard L. Cupp Jr., *Litigating Nonhuman Animal Legal Personhood*, 50 Tex. Tech. L. Rev. 573 (2018); Richard L. Cupp Jr., *Animals as More than “Mere Things,” but Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm*, 84 U. Cin. L. Rev. 1023 (2016); Richard L. Cupp Jr., *Focusing on Human Responsibility Rather than Legal Personhood for Nonhuman Animals*, 33 Pace Env’tl. L. Rev. 517 (2016); Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from Marginal Cases*, 45 Ariz. St. L. J. 1 (2013); Richard L. Cupp Jr., *Moving beyond Animal Rights: A Legalist/Contractualist Critique*, 46 San Diego L. Rev. 27 (2009); Richard L. Cupp Jr., *A Dubious Grail: Seeking Tort Law Expansion and Limited Personhood as Stepping Stones toward Abolishing Animals’ Property Status*, 60 SMU. L. Rev. 3 (2007).

petition for writ of habeas corpus by a juvenile defendant and the due process that should be afforded to the defendant. *Id.* Similarly, the Ninth Circuit in *U.S. v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995), stated that “our constitutional theory is premised in large measure on the conception that our Constitution is a ‘social contract,’” in the context of considering whether lawful resident aliens should be considered “persons” under the Fourth Amendment of the U.S. Constitution. *Id.*

NRP also fails to address the recent decision of the Appellate Court of Connecticut, which recently held that “elephants—who are incapable of bearing legal duties, submitting to social responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities,” may not petition the court for a writ of habeas corpus. *Commerford II*, 197 Conn. App. 353, 362 (App. Ct. Conn, May 19, 2020); *see also Fitzgerald v. McKenna*, 1996 WL 715531, at \*7 (S.D.N.Y. Dec. 11, 1996) (“animals lack capacity to be sued”).

Thus, contrary to NRP’s contentions, all relevant authority supports the First Department’s decision to adhere to *Lavery II*, and its finding that “nonhumans lack sufficient responsibility to have any legal standing.” *Lavery II*, 152 A.D.3d at 79.

### C. The Petition Fails to State a Cognizable Claim for Habeas Relief

Finally, the relief NRP seeks in its Petition is not a cognizable habeas claim. The sole purpose of habeas corpus is to “test the legality of the detention of the person who is the subject of the writ,” *People ex rel. Robertson v. N.Y.S. Div. of Parole*, 67 N.Y.2d 197, 201 (1986), and the sole remedy is release. As the First and Fourth Departments rightly observed, moving Happy to a “sanctuary” would not amount to “release,” but would simply change the conditions of Happy’s “confinement” from one enclosed setting to another. *Presti*, 124 A.D.3d at 1334; *Lavery II*, 152 A.D.3d at 77. NRP seeks the same relief here. A. 78. Accordingly, the purported aim of actual “bodily liberty” is not at issue on this appeal, and in NRP’s own words, is “not an option.” A. 34, n.4.<sup>5</sup>

Neither can NRP establish that Happy’s current living conditions are unlawful. All relevant legislation and case law confirm that both Happy’s current environment (a lawfully accredited zoo) and NRP’s preferred environment (an animal sanctuary) are permissible. *See* Point I.A, I.B, II.A, *supra*. *E.g.*, Ag. & Mkts. L. § 380. NRP’s Petition simply seeks to have the

---

<sup>5</sup> NRP’s Verified Petition asked the Court to move Happy from the Bronx Zoo to the “Performing Animal Wildlife Sanctuary” near Sacramento, California, noting her release “back to the ‘wild’” is unfortunately not an option.” A. 34, n.4. On appeal to the Appellate Division, First Department, NRP changed its preferred destination from the “PAWS” facility in California to “The Elephant Sanctuary in Tennessee.” NRP’s Mem. at p. 52.

Court effectuate its preference for one of these environments. Habeas corpus does not exist to enforce such preferences, regardless of the petitioner.

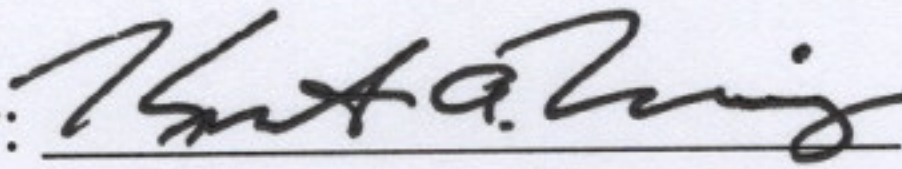
Therefore, there is no legal harm and no legal remedy for this Court to provide, and NRP's motion for leave should be denied as a result.

**CONCLUSION**

For the foregoing reasons, Respondents respectfully request that the Court deny NRP's motion for leave to appeal.

Dated: Buffalo, New York  
February 1, 2021

PHILLIPS LYTLE LLP

By: 

Kenneth A. Manning

Joanna J. Chen

William V. Rossi

Attorneys for Respondents

*James J. Breheny and*

*Wildlife Conservation Society*

One Canalside

125 Main Street

Buffalo, New York 14203-2887

Telephone No. (716) 847-8400

[kmanning@phillipslytle.com](mailto:kmanning@phillipslytle.com)

[jchen@phillipslytle.com](mailto:jchen@phillipslytle.com)

[wrossi@phillipslytle.com](mailto:wrossi@phillipslytle.com)



STATE OF NEW YORK )  
 )  
COUNTY OF NEW YORK )

ss.:

**AFFIDAVIT OF SERVICE  
BY OVERNIGHT FEDERAL  
EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

**On February 1, 2021**

deponent served the within: **Opposition to Motion for Permission to Appeal**

**upon:**

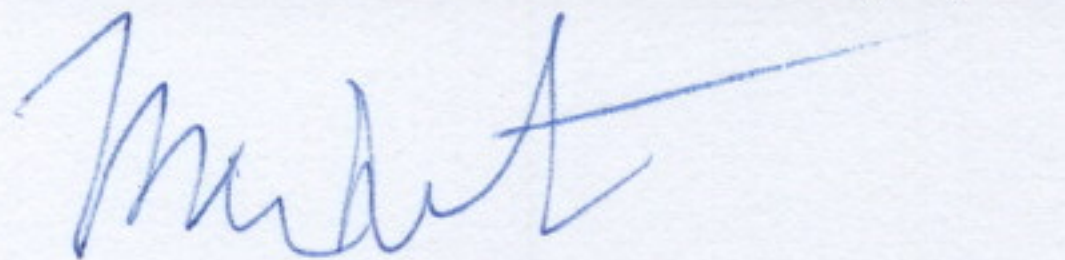
**Elizabeth Stein, Esq.**  
**Nonhuman Rights Project, Inc.**  
**5 Dunhill Road**  
**New Hyde Park, New York 11040**  
**(516) 747-4726**  
**(516) 294-1094 (fax)**

**-and-**

**Steven M. Wise, Esq.**  
**(Of the Bar of the State of Massachusetts)**  
**5195 NW 112<sup>th</sup> Terrace**  
**Coral Springs, Florida 33076**  
**(954) 648-9864**  
***Attorneys for Petitioner-Appellant***

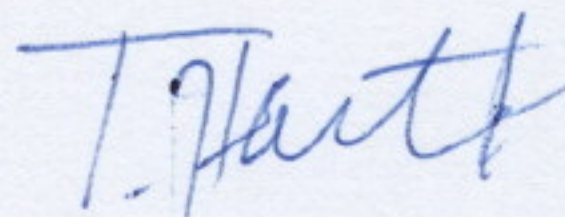
the address(es) designated by said attorney(s) for that purpose by depositing 1 true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

**Sworn to before me on February 1, 2021**



---

**MARIA MAISONET**  
Notary Public State of New York  
No. 01MA6204360  
Qualified in Queens County  
Commission Expires Apr. 20, 2021



---

**Tyrone Heath**  
**Print Shop Associate**

**Job# 301698**