*To be Argued by:*
STEVEN M. WISE
*(Of the Bar of the State of Massachusetts)*
*By Permission of the Court*
*(Time Requested: 15 Minutes)*

# New York Supreme Court

## 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,*

– 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.*

**Appellate Case No.: 2020-02581**

## REPLY BRIEF FOR PETITIONER-APPELLANT

ELIZABETH STEIN, ESQ.
NONHUMAN RIGHTS PROJECT, INC.
Five Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
lizsteinlaw@gmail.com

– and –

STEVEN M. WISE, ESQ.
(*Of the Bar of the State of Massachusetts*)
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com

*Attorneys for Petitioner-Appellant*

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> "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."
>
> - Justice Alison Y. Tuitt (A-22).

## I. INTRODUCTION

In 1906, Respondent Wildlife Conservation Society ("WCS") imprisoned a Black African pygmy named Ota Benga in the Bronx Zoo's Primate House for exhibition and profit.[1] It took until 2020 for WCS belatedly to confess its terrible wrong and promise "to never look away whenever and wherever injustice occurs."[2]

After thirteen hours of oral argument, the trial court "recognized 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." (A-22). Happy may not deserve the same rights as a human. The injustice Respondents (collectively "Zoo") inflict upon Happy may not be the same magnitude as the injustice WCS inflicted upon Ota Benga, but it is an injustice nevertheless. As Sojourner Truth argued, "if my cup won't hold but a pint, and yours

[1] Pamela Newkirk, *Spectacle – The Astonishing Life of Ota Benga* (2016). Benga's exhibition drew "record crowds." *Id* at 26.

[2] "Reckoning With our Past, Present, and Future," (July 29, 2020). https://www.wcs.org/reckoning-with-our-past-present-and-future-at-wcs.

holds a quart, wouldn't you be mean not to let me have my little half measure full?"[3] Happy deserves her little half measure full.

In this Reply, Petitioner-Appellant ("NhRP") focuses on erroneous themes the Zoo weaves into its Brief to distract from the injustices it inflicts upon Happy.

First, it would have this Court believe this case is about "all animals." But the kingdom Animalia contains more than a million species, all of which are irrelevant to this case, but one.

Second, it would have this Court believe this habeas corpus action is a matter for the legislature and not a matter exclusively for it to decide under the common law.

Third, it would have this Court believe it must ignore its common law duty to "make the law conform to right," *Woods v. Lancet*, 303 N.Y. 349, 351 (1951), and blindly follow the anachronistic principle that autonomous nonhuman beings have no rights a human being is bound to respect.

Fourth, it would have this Court believe NhRP argues that autonomy is necessary for rights when NhRP only argues that autonomy is sufficient.

[3] Sojourner Truth, "Ain't I am woman," (May 29, 1851). https://www.nps.gov/articles/sojourner-truth.htm.

Fifth, it would have this Court believe that being human is necessary and sufficient for any right when being human is merely sufficient.

Sixth, it would have this Court believe an individual must have the capacity to bear duties in order to be a "person."

Finally, as WCS then claimed about Ota Benga, the Zoo would now have this Court believe Happy is content with her imprisonment.[4] But "captivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking zoo employees appear to believe, is delusional." *Leider v. Lewis*, Case No. BC375234 at 30 (Los Angeles County Superior Ct. July 23, 2012) (concerning how the Los Angeles Zoo treated its elephants), *reversed on legal grounds*, 2 Cal 5th 1121 (2017).

## II. ARGUMENT

### A. This is a common law case.

#### 1. Happy's personhood is neither a matter of legislative intent nor statutory interpretation.

Happy's right to bodily liberty protected by habeas corpus, which exists as part of New York's common law, is a common law question; CPLR Article 70 is

[4] William Temple Hornaday, Director of the Bronx Zoo, assured that Ota Benga was "quite pleased" with his accommodations and "ha[d] one of the best rooms in the primate house." Newkirk, *supra* note 1, at 18, 22.

merely procedural. Appellant Br. 11-15. The Zoo repeats the error of *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) ("*Lavery I*") and *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) ("*Lavery II*") that "habeas corpus is codified under CPLR Article 70," and falsely suggests that determining whether Happy is a "person" for purposes of habeas corpus is a matter of legislative intent. Resp't Br. 22-23. Article 70 did not "codify" the common law of habeas corpus, as a statute cannot curtail substantive entitlement to the writ. Appellant Br. 14-15. Legislative intent is therefore irrelevant.

*Lavery I* correctly observed that Article 70 "does not purport to define the term 'person,' and for good reason. The 'Legislature did not intend to change the instances in which the writ was available,' which has been determined by 'the slow process of decisional accretion.'" 124 A.D. 3d at 150 (citation omitted). Thus, the question is neither how the Legislature intended to define "person" or how "person" has been defined in the U.S. Constitution and various statutes. Resp't Br. 17-18, 22-23, 25-26. Instead, this Court "must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach."[5] 124 A.D. 3d at 150.

[5] *Lavery I* correctly held that "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not . . . end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 124 A.D. 3d at 150-51 (citation omitted).

### 2. Happy's personhood is a policy determination for this Court to make.

The Court of Appeals has long made clear that the question of "whether legal personality should attach" requires a "policy determination." *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). This Court, not the Legislature, must make the policy determination on whether to recognize Happy's common law right to bodily liberty. Appellant Br. 11-14. The Zoo's contrary claim, Resp't Br. 39, ignores the difference between a common law and a statutory case.

The Court of Appeals rejected the claim that common law change "should come from the Legislature." *Woods*, 303 N.Y. at 355 ("we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."). This is uniquely true with habeas corpus as the writ "cannot be abrogated, or its efficiency curtailed, by legislative action." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875). Common law courts have "the duty to re-examine a question where justice demands it," *Woods,* 303 N.Y. at 354, and to "make the law conform to right." *Id*. at 351.

Contrary to the Zoo's assertion, Resp't Br. 39, *Byrn*'s observation that personhood "is a policy question which in most instances devolves on the Legislature," 31 N.Y.2d at 201, was not a statement of law but legal history. And "most" does not mean "all." *See Mertz v. Mertz*, 271 N.Y. 466, 472 (1936) ("'when

we speak of the public policy of the State, we mean the law of the State, whether found in the Constitution, the statutes or judicial records.'") (citation omitted). *Palladino v. CNY Centro Inc*, 23 N.Y.3d 140 (2014) is inapposite for, unlike the instant case, it involved statutory interpretation. *See id.* at 150-51. It is therefore unsurprising that the policy considerations implicated there were better suited to the Legislature.

Contrary to the Zoo's assertion, Resp't Br. 39-40, agricultural interests cannot be "impacted" by a ruling in Happy's favor since she is not an agricultural animal.[6] Proposed Amici Protect the Harvest, *et al*., Br. 6-12, advances a similarly baseless and speculative "floodgates" argument. But "[the Court of Appeals] 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." *Tobin v. Grossman*, 24 N.Y.2d 609, 615 (1969); *see also Matter of Nonhuman Rights Project Inc. ex rel Hercules and Leo v. Stanley*, 49 Misc.3d 746, 772 n.2 (Sup. Ct. 2015) (rejecting "floodgates argument" in a habeas case brought on behalf of chimpanzees).

[6] Nor could the Animal Welfare Act be "undermined" as the Act would continue to apply to elephant sanctuaries.

### B. *Lavery II*'s personhood and habeas corpus relief determinations are dicta.

The Zoo's dicta analysis is demonstrably wrong. Resp't Br. 19-20. The law is clear: when a case is decided on procedural grounds, any merits discussion is dicta. Appellant Br. 30 (citing cases). *See*, *e.g.*, *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); *Morgenthau v. Crane*, 113 A.D.2d 20, 21 (1st Dept. 1985) (discussion of merits of motion denied on jurisdictional ground was dicta); *Board of Educ Shoreham-Wading River Cent School Dist Suffolk County v. State*, 111 A.D.2d 505, 508 (3d Dept. 1985) (comment upon merits was dicta after dismissal of complaint on standing).

When this Court in *Lavery II* affirmed the trial court on the procedural ground that the habeas petitions were successive under CPLR 7003(b), its merits discussion regarding personhood and habeas relief was dicta.[7] This Court acknowledged its merits discussion was unnecessary: "Without even addressing the merits of petitioner's arguments, we find that the motion court properly declined to sign the

[7] The Zoo falsely implies that the instant Petition is successive under CPLR 7003(b). Resp't Br. 12-13. It is not. The Orleans County Supreme Court issued the Order to Show Cause (A-323-325), and this is the only Petition ever brought on behalf of Happy.

orders to show cause since these were successive habeas proceedings. . . .” 152 A.D.3d at 75-76 (citations omitted).[8]

The Zoo’s reliance on *Matter of Broderick v. City of New York*, 295 N.Y. 363 (1946), *O’Brien v. Union Cent. Life Ins. Co*., 207 N.Y. 180 (1912) and *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891 (1st Dept. 2003) are misplaced as none involved a court opining on the merits after disposing of the case on procedural grounds. Thus, the merits discussion was not dicta. Notably, *Trump* contrasted its ruling with *Pollicino v. Roemer & Featherstonhaugh*, 277 A.D.2d 666 (3d Dept. 2000), which found that comments made on the merits of a claim dismissed on procedural grounds were dicta. 307 A.D.2d at 895.

*People v. Simmons*, 173 A.D.3d 646 (1st Dept. 2019) is distinguishable both because the NhRP was never given the opportunity to argue the merits before the *Lavery II* trial court and because *Simmons* is an outlier. *See Schechter v. 3320 Holding LLC*, 64 A.D.3d 446, 451 (1st Dept. 2009) (Court addressed a claim in dicta after rejecting it as unpreserved); *Kao v. Kao*, 165 A.D.3d 944, 946 (2d Dept. 2018) (“alternate holding constituted dicta”).

[8] The Zoo does not dispute either the principle stated above or the fact that *Lavery II* affirmed the trial court on a procedural ground. *See also* Vincent C. Alexander, *Supplemental Practice Commentaries*, McKinney’s CPLR 7001 (noting *Lavery II* was decided “on a point of procedure.”).

### C. Stare decisis does not apply to *Lavery I* and *Lavery II's* personhood determinations because a "person" need not have the capacity to bear duties or be human.

This Court must reject *Lavery I* and *Lavery II*'s personhood determinations to "bring the law into accordance with present day standards of wisdom and justice." *Woods*, 303 N.Y. at 355 ("We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice.").

In *People v. Hobson*, 39 N.Y.2d 479, 488 (1976), the Court recognized the importance of "'certainty, stability, equality, and knowability'" in the law, but stated that "'[r]eason and the power to advance justice must always be its chief essentials.'" (citation omitted). Stare decisis must spring from "precedents which reflect principle and doctrine rationally evolved." *Id*. at 488.

The Zoo falsely suggests that this Court must apply stare decisis rigidly and inflexibly and may only depart from *Lavery II* under "exceptional circumstances," Resp't Br. 21, citing *Matter of State Farm Mut Auto Ins Co v. Fitzgerald*, 25 N.Y.3d 799 (2015) and *People v. Taylor*, 9 N.Y.3d 129 (2007). However, *Fitzgerald* explained that overturning decisions involving constitutional interpretation requires a "compelling justification," while overturning decisions involving statutory interpretation requires "an even more extraordinary and compelling justification." 25 N.Y.3d at 819. *Taylor* is in accord with *Fitzgerald*. 9 N.Y.3d at 149. Neither case

involves overturning common law decisions and *Hobson* observed that in common law tort cases, "courts will, if necessary, more readily re-examine established precedent to achieve the ends of justice in a more modern context." 39 N.Y.2d at 489.

*Lavery I* and *Lavery II's* personhood determinations are neither binding nor persuasive as they were based on demonstrable misunderstandings of the law and are evidently contrary to reason.[9] Appellant Br. 31-52. The Zoo, ignoring or mischaracterizing NhRP's arguments, embraced *Lavery I* and *Lavery II*'s misunderstandings that: (1) a "person" must have the capacity to bear duties, 124 A.D.3d 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. Resp't Br. 13-14; 22-23; 25-29; 31-34 [10]

[9] The Zoo falsely claims that "all four Departments of the Appellate Division have rejected NRP's argument." Resp't Br. 13-14. Only *Lavery I* and *Lavery II* (in dicta) discussed whether chimpanzees are "persons" for purposes for habeas corpus. The Fourth Department in *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015) ("*Presti*") denied relief on the ground that seeking a chimpanzee's release to a sanctuary was not available under habeas corpus. The Second Department dismissed NhRP's appeal without briefing or argument. *Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 (2d Dept. 2014).

[10] As the Connecticut Commerford decisions are grounded upon *Lavery I*'s and *Lavery II*'s errors, they must be ignored.

### 1. *Byrn* establishes that a "person" need not have the capacity to bear duties or be human.

*Byrn* makes clear that personhood does not require the capacity to bear duties and is not limited to humans. Appellant Br. 32. Personhood merely requires the capacity for rights.[11] *Id*. 32-37, 39, 41.[12] *Lavery I* and *Lavery II* directly contradict *Bryn* in multiple ways, none of which the Zoo attempted to refute.

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. *Byrn* never mentioned duties and makes clear that the capacity for rights alone is sufficient for personhood.

Second, *Byrn* states that "whether legal personality should attach" requires a "policy determination." 31 N.Y.2d at 201. *See also Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1058 (2018) (Fahey, J., concurring) ("*Fahey Concurrence*") (question of personhood in chimpanzee habeas case a "deep dilemma

[11] A "person" can possess some rights, but not others. *See Byrn*, 31 N.Y.2d at 201, 203 (unborn humans have rights "in narrow legal categories," but are not Fourteenth Amendment "persons"). Appellant Br. 33. Happy can be a "person" with the right to bodily liberty for purposes of habeas corpus though nonhuman animals lack rights under certain federal laws. (Resp't Br. 17-18, 25-26).

[12] The jurisprudential literature accords with *Byrn*. Appellant Br. 32, 41-43. *See also* 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.").

of ethics and policy").[13] *Lavery I* and *Lavery II's* personhood determinations were not based on policy, but on the misconception that personhood requires the capacity to bear both rights and duties, as well upon the obvious biological fact that chimpanzees are not human.[14]

Third, *Byrn* establishes a "person" need not be human as personhood is "not a question of biological or natural correspondence." 31 N.Y.2d at 201; *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018). Yet the personhood determinations in *Lavery I* and *Lavery II* turned on biology.

**2. *Lavery I*'s own sources establish that a "person" need not have the capacity to bear duties or be human.**

*Lavery I*'s sources—including John Chipman Gray's *The Nature and Sources of the Law* (2d ed. 1921) ("*Gray*") and John Salmond's *Jurisprudence* (Glanville L. Williams ed. 10th ed. 1947) ("*Jurisprudence*")—undermine *Lavery I*'s and *Lavery II*'s personhood determinations. Appellant Br. 40-44. Both *Gray* and *Jurisprudence* accord with *Byrn* that a "person" need not have the capacity to bear duties or be human. *Id*.

[13] Judge Fahey's concurrence carries considerable weight. Appellant Br. 2.

[14] The personhood determinations conflict with *Woods*, 303 N.Y. at 351, as they were not based on moral principle and justice. Appellant Br. 39.

The Zoo falsely claims NhRP "selectively quote[d]" *Gray*. Resp't Br. 27. But it was *Lavery I* that "selectively quoted" *Gray's* statement that "the legal meaning of a 'person' is a 'subject of legal rights and duties,'" 124 A.D.3d at 152, then omitted the next sentence stating that one who possesses either rights or duties is a "person." Appellant Br. 41-42. Thus nonhuman animals "may conceivably be legal persons" for two independent reasons: either (1) "because possessing legal rights," or (2) "because subject to legal duties." *Gray*, at 42-44.

The Zoo falsely claims that NhRP "misquote[d]" *Jurisprudence*. Resp't Br. 27. But it was *Lavery I*, in reliance upon Black's Law Dictionary, that "misquoted" *Jurisprudence* as stating that a person is any being capable of "rights and duties," when the treatise states that a person is any being capable of "rights or duties." *See Jurisprudence* at 318 ("a person is any being whom the law regards as capable of rights or duties").[15] By relying on Black's, *Lavery I* perpetuated the error that personhood requires the capacity to bear duties. 124 A.D.3d at 151. This Court further perpetuated it in *Lavery II*. Appellant Br. 42-44.[16]

[15] Similar to *Gray*, the next sentence in *Jurisprudence* states "[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not[.]"

[16] While *Lavery II* was pending, NhRP filed a motion asking this Court to review the correspondence between NhRP and Black's editor-in-chief in which the latter acknowledged the

### 3. Judge Fahey's concurrence rejected *Lavery I* and *Lavery II's* misunderstandings that a "person" must have the capacity to bear duties or be human.

In accord with *Byrn*, *Gray*, and *Jurisprudence*, Judge Fahey's concurrence rejected *Lavery I* and *Lavery II*'s misunderstandings that a "person" must have the capacity to bear duties or be human. The Zoo claims nonhuman animals are not entitled to rights because they cannot bear duties, Resp't Br. 25-26, but does not attempt to answer Judge Fahey:

> Even if it is correct . . . 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. 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.

31 N.Y.3d at 1057 (citations omitted).

Instead, the Zoo makes vague general assertions about the "connection between legal rights and duties," Resp't Br. 26, that ignore the difference between claim rights and immunity rights; immunity rights (including the right to bodily liberty) do not correlate with duties. Appellant Br. 37-40. The cases referencing the

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misquotation error. This Court denied the motion. Black's corrected the error in its eleventh edition. Appellant Br. 43-44.

"social contract" do not support any such requirement, as social contracts create citizens, not persons.[17] Appellant Br. 44-50.

The Zoo ignores Judge Fahey's criticism of *Lavery II*'s misunderstanding that a "person" must be human. *See* 31 N.Y.3d at 1057 (criticizing this Court's conclusion that "a chimpanzee cannot be considered a 'person' and is not entitled to habeas corpus relief" as "based on nothing more than the premise that a chimpanzee is not a member of the human species."). Not only is this misunderstanding contrary to law, it is arbitrary, oppressive, unjust, and irrational. Appellant Br. 17-26.

The Zoo claims that U.S. and international law authorities affirming the importance of Human Rights and human dignity demonstrate that rights are based on membership in the human community. Resp't Br. 31-34. But authorities suggesting that Human Rights derive from "human dignity" or something similar do not support limiting rights to humans.

Happy's right to bodily liberty is not a Human Right but a right that derives from the autonomous nature of elephants.[18] Thus Judge Fahey's answer to the

[17] *See also* Amici Curiae Brief of Philosophers at 4, 14, 15, 17.

[18] The Zoo erroneously conflates Human Rights with the rights of humans. The former refers to those civil and political rights that derive from European Eighteenth Century natural rights philosophy, D.J. Harris, *et al*., *Law of the European Convention on Human Rights* 3 (1996), and "are inherent to [all human beings], regardless of nationality, sex, national or ethnic origin, color, religion, language, or any other status." https://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx. Only a tiny fraction of the

question of whether a chimpanzee has the right to liberty protected by habeas corpus "will depend on our assessment of the intrinsic nature of chimpanzees as a species." 31 N.Y.3d at 1057.

The Zoo fails to demonstrate why the "need to recognize the inherent dignity" of human beings requires denying rights to autonomous beings of other species.[19] The Zoo would have this Court believe that NhRP argues autonomy is necessary for rights, Resp't Br. 41-44, when NhRP argues only that autonomy is sufficient – never necessary – for rights.[20] (A-37, para. 19). Judge Fahey affirmed "the principle that all human beings possess intrinsic dignity and value," 31 N.Y.3d at 1057, but noted that elevating humanity does not require courts to "lower the status of other highly intelligent species." *Id*.

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rights of humans are Human Rights, as the vast majority are common law or statutory rights, such as the rights of tenants or the right to sue for breach of contract or negligence.

[19] In its discussion of *United States v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879), Resp't Br. 34, the Zoo omits the first part of Webster's dictionary definition of "person": "Webster describes a person as 'a living soul; a self-conscious being; a moral agent. . . .'" Happy satisfies this definition.

[20] The Zoo's false claim that Peter Singer is "a long-time proponent of the autonomy test urged by the NRP" (Resp't Br. 41-42) reveals its ignorance not just of NhRP's arguments, but the field of normative ethics and specifically Singer's utilitarianism, which has nothing to do with autonomy or rights. Thus Judge Fahey cites not Singer but the rights philosopher Tom Regan (*The Case for Animal Rights*) in support of the position that "we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect." 31 N.Y.3d at 1058.

Far from having the "potentially devastating" consequences the Zoo imagines—which, ironically, flow from its own position[21]—social science demonstrates the opposite:

> The type of legal recognition that the NhRP are pushing for clearly brings humans and some animals within the same paradigm of legal consideration. The research discussed [on the effect of NhRP's actual position] would suggest that it is precisely because the recognition of certain nonhumans as persons would bridge the gap between them and humans that it would have *more potential* to reduce prejudicial and dehumanizing attitudes and behaviours towards marginalized human groups.

Joe Wills, *Animal rights, legal personhood and cognitive capacity: addressing 'levelling-down concerns*, Journal of Human Rights and the Environment, Vol. 11 No.2 199, 222 (2020) (emphasis original); *see id*. at 218-222.[22] *See also* Charlie Crimston, *et al*., *Moral Expansiveness: Examining Variability in the Extension of the Moral World*, 111(4) Journal of Personality and Social Psychology 636 (2016) ("Study 6 [involving arguments made by NhRP] showed that the extent to which people are expansive on their moral concern can predict actual behavioral responses relating to moral decision-making and concern for the well-being of other entities.");

[21] If a "person" must have the capacity to bear duties, then individuals who lack that capacity would be "things" rather than "persons."

[22] The author specifically rebuts Proposed Amicus Cupp's idiosyncratic claim that NhRP's arguments would endanger humans with profound cognitive impairments.

*id*. at 649 (finding a "significant positive relationship" between NhRP's arguments and the expansion of moral concern).[23]

**4. EPTL § 7-8.1 and *Graves* establish that a "person" need not have the capacity to bear duties or be human.**

In harmony with *Byrn*, *Gray*, *Jurisprudence*, and Judge Fahey's concurrence, the Legislature established that a "person" need not have the capacity to bear duties or be human by designating certain animals as "beneficiaries" under EPTL § 7-8.1 with rights to the corpus of a trust. As beneficiaries, the animals are "persons" as only "persons" can be beneficiaries. Appellant Br. 26-29. *See, e.g.*, 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."). In arguing the contrary, Resp't Br. 23-24, the Zoo further illustrates its misunderstandings of personhood.

The Zoo argues that the Legislature did not intend to grant personhood to animals because "person" does not appear in the statute. But an individual with a

[23] The Zoo makes the unsupported claim that "civil rights groups have rebuffed the type of argument advanced in Appellants brief, in which arguments for animal rights are equated with the struggle for racial or gender equality." Resp't Br. 42. NhRP makes no general argument for "animal rights," only that Happy, as an autonomous being, possesses the right to bodily liberty. Harris does not criticize NhRP's arguments, as the Zoo falsely suggests, but argues that people of color should support animal rights "rooted in a deep understanding of the linkages between all forms of subordination." Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. Animal L. 15, 17. The Zoo's other citations are irrelevant.

right is, by definition, a "person" (*see* discussion, *supra*). Because EPTL § 7-8.1 grants rights to certain animals, the Legislature necessarily recognized their personhood for purposes of that statute.[24]

Absurdly, the Zoo claims that the Legislature did not grant personhood because the statute permits pet trusts to be enforced by a designated individual.[25] That pet trusts require human enforcers in no way suggests that the intended "animal beneficiary or beneficiaries" are not "persons," but the opposite, and reflects the reality that animals, like human incompetents, are unable to enforce their own rights.[26]

EPTL § 7-8.1 is significant because it embodies a public policy that animals in New York can be "persons" regardless of their ability to bear duties or their nonhuman biology. Citing, *inter alia*, *Presti*, the Fourth Department recently observed that "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals." *Graves*, 163 A.D.3d at 21 (citations

[24] Contrary to the Zoo's mischaracterization, Resp't Br. 24, NhRP does not argue that EPTL § 7-8.1 confers personhood on animals "for purposes of CPLR Article 70."

[25] The quoted enforcement language in the Zoo's brief, Resp't Br. 24, comes from a practice commentary, not the statute, which uses the term "individual."

[26] The Zoo suggests that animals cannot be "persons" because they are property, but one may be both a person and property. Appellant Br. 33-35 (e.g., slaves were sometimes "persons" for limited purposes because they had certain rights).

omitted). EPTL § 7-8.1 and *Graves* therefore further undermine the personhood determinations in *Lavery I* and *Lavery II*.[27]

**5. The amicus brief of Richard Cupp should be disregarded.**

Proposed Amicus Cupp seeks to persuade this Court of the justice of deeply immoral and unjust acts. Happy was kidnapped as a baby from her family and transported to the United States where the Zoo has exploited her for almost half a century. Cupp argues that Happy cannot have the immunity right to bodily liberty that will free and enable her, at long last, to live in a sanctuary the autonomous life that evolution programmed for her, just because she is not human.

But Happy did not ask to come here. She did not want to come here. She has no desire to participate in our political and social life, or to function within our society's system of rights and responsibilities. She wants to be left alone to live out her days as an autonomous elephant amongst other autonomous elephants, participating in their social and political life.

Cupp cites Carl Cohen, Br. 4, who believes that rights are "necessarily human" only because of his mistaken belief that rights "are in every case claims or potential claims, within a community of moral agents . . . [and rights-bearers] must

[27] Far from being a "stray comment," Resp't Br. 18, the Fourth Department's statement was part of the court's personhood analysis, specifically made in the context of rejecting the misunderstanding that personhood is limited to human beings.

be capable of grasping the generality of an ethical premise in a practical syllogism." Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 *NEJM* 865, 867 (1986). Cohen's unjust penalty for an autonomous being unable to grasp the generality of an ethical premise in a practical syllogism is life imprisonment in solitary.

In his influential article, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 16, 20 (1913), Wesley Hohfeld noted "the main purpose of the writer is to emphasize certain oft-neglected matters that may aid in the understanding and in the solution of practical, every-day problems of the law." Hohfeldian rights describe categories of rights to assist lawyers and judges in understanding what sort of rights one is dealing with (*i.e.*, liberties, claims, immunities, or powers). An understanding that bodily liberty and freedom from enslavement are not claim-rights, but immunity-rights, even in humans, would have forestalled Cohen's confusion.

Cupp gets no support from Harvard Philosophy Professor Christine M. Korsgaard, for he fails to cite her most relevant article, *The Claims of Animals and the Needs of Strangers*, 6(1) Journal of Practical Ethics 19 (2018), in which she, in a manner reminiscent of NhRP's arguments, argues "for a conception of the natural rights of non-human animals grounded in Kant's explanation of the foundation of

human rights." On her view, animals must be "treated in ways that are consistent with what is good for them." *Id*. at 21. "[T]he natural rights of animals against humanity collectively speaking arise from a circumstance that has developed gradually: the human takeover of the world." *Id.* at 50.

Much of the balance of Cupp's amicus brief, Br. 4-14, deals with the rights and the duties of humans living in a human society, none of which justify depriving Happy of her immunity right to bodily liberty and imprisoning her for life. Cupp believes "Justice (sic) Fahey's concurrence misses the significance of *Lavery II*'s emphasis on humans with cognitive limitations being part of the human *community*." Br. 19 (emphasis original). But Judge Fahey did not miss this. He soundly rejected it.

Cupp cites Professor Margaret Foster Riley's statement that "[w]e cannot tell the tiger that it is morally wrong to eat us and expect the tiger to comply," Br. 10, which neatly frames the irrationality of his argument. This Court can tell the Zoo to stop imprisoning Happy and this Court can expect the Zoo to comply, even if Happy cannot.

### D. This Court must recognize Happy's common law right to bodily liberty because she is autonomous.

#### 1. The Zoo fails to rebut the NhRP's liberty and equality arguments.

This Court must recognize Happy's common law right to bodily liberty because she is autonomous, as a matter of liberty, equality, or both. Appellant Br. 15-26. But the Zoo fails to rebut NhRP's arguments while denigrating the centrality of autonomy in New York by incorrectly suggesting that autonomy is irrelevant to rights. *See Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) ("'law recognizes the right of an individual to make decisions about life out of respect for the dignity and autonomy of the individual'") (citation omitted); *TD v. New York State Office of Mental Health*, 228 A.D.2d 95, 98 (1st Dept. 1996) (challenged regulations "violate . . . the common-law right to personal autonomy" of patients at psychiatric facilities).

As the Zoo concedes, NhRP never argued before the trial court that "Happy should be granted the right to bodily liberty under the Equal Protection Clauses of the Fourteenth Amendment and the New York Constitution." Resp't Br. 34. Nor did it make that argument in its brief. Accordingly, there was no argument to preserve.

Rather, NhRP argued in its Petition and brief that the two constitutional clauses share values with New York common law equality. Equality's comparative and noncomparative components are violated by Happy's imprisonment. Appellant

Br. 18-25. When making the common law decision of whether it should recognize Happy's common law right to bodily liberty protected by habeas corpus, this Court may embrace the constitutional equality values as a matter of common law equality. Appellant Br. 18-25.

The NhRP argued that Happy, as an autonomous being, should be treated similarly to an autonomous human for purposes of obtaining habeas corpus relief from arbitrary imprisonment. That Happy can be arbitrarily imprisoned, but not a human, violates the comparative component of equality. Appellant Br. 17-22. The Zoo does not contest this in its brief.

The NhRP agrees that, on public safety grounds, Happy cannot be allowed to roam the streets of New York. Resp't Br. 37-38. But public safety is not the reason for Happy's imprisonment. Exhibition is. That is a normatively unacceptable illegitimate end grounded upon a single, irrelevant trait – her species – and rooted in an irrational prejudice or bias towards her that ignores the relevant traits of her autonomy and extraordinary cognitive complexity. Her imprisonment therefore violates the noncomparative component of equality. Appellant Br. 25-26.

### 2. The Zoo cannot dispute the factual finding that Happy is autonomous and that she suffers from the deprivation of her bodily liberty.

The Zoo asserts that "courts cannot reliably determine whether an individual is autonomous" because internal cognitive processes are unobservable. Resp't Br. 30. However, NhRP's Expert Affidavits refute this false unscientific claim; autonomy in both human and nonhuman animals can be investigated by observing, recording, and analyzing behavior. (A-105, para. 30; A-148, para. 22; A-187, para. 24; A-223, para. 18).

The trial court's finding that Happy "is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty" (A-22), was based on the overwhelming uncontroverted scientific evidence in the record. It recognized:

> 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.

A-16.

The Zoo failed to rebut any of NhRP's Expert Affidavits and failed to place into evidence any expert opinion concerning elephants. Notwithstanding the Zoo's

attempt for the first time on appeal to dispute the trial court's factual findings, it is well established that "great deference must be paid to the findings of fact and determinations of credibility by a hearing court." *People v. Rivera*, 213 A.D.2d 281, 281-82 (1st Dept. 1995).

Rather than contest the findings of the Expert Affidavits or the opinion of the trial court, the Zoo inflates the qualifications of its three affiants, all employees of Respondent WCS, none of whom claim any specialized education, knowledge, or expertise regarding elephant cognition and behavior. Resp't Br. 10.[28] The trial court recognized the superiority of NhRP's Expert Affidavits by referring ten times in its decision to NhRP's "experts" (A-10-12, A-16), while once using the word "expertise" merely to describe Respondent Breheny's experience as a high-ranking administrative Zoo employee (A-16).

### 3. The Zoo cannot dispute the factual finding that Happy could thrive at a sanctuary.

The Zoo argues, without expert support, that Happy is not suited to being moved to a sanctuary, Resp't Br. 11, but cannot dispute the finding that Happy could

[28] The Zoo's affidavits are deficient even when referring in general terms to the "foot care" and other efforts of the Zoo's "elephant professionals," Resp't Br. 5-6, none of whom are named and none of whom are relevant to the question of Happy's entitlement to habeas corpus. Dr. Poole's Second Supplemental Affidavit stated, and the trial court recited, that Happy's behavior suggests she is suffering a painful foot condition likely caused by her sedentary and unnatural captivity at the Zoo (A-478, A-17) and that she is unable to engage in most natural behaviors (A-480, A-17).

thrive at a sanctuary. It also misrepresents the record regarding The Elephant Sanctuary in Tennessee ("TES"). Resp't Br. 10, 47.

First, the Zoo falsely suggests that NhRP is, for the first time on appeal, seeking Happy's release to TES. But the trial court stated that NhRP "demands [Happy's] 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." (A-10). Those sanctuaries are the Performing Animal Welfare Society ("PAWS") and TES, with the latter referenced three times in the Decision and Order, once by name.[29] (A-8; A-10; A-16).

Second, the Zoo falsely suggests there is no information in the record regarding TES. Resp't Br. 10, 47. In addition to the trial court's references, Dr. Poole discusses TES in her Second Supplemental Affidavit. (A-477, paras. 15 and 16). There, as the trial court noted, Dr. Poole "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." (A-17).

[29] During each of the three days of oral argument before the trial court, NhRP requested that Happy be sent to either PAWS or TES.

The Zoo also misrepresents PAWS by cherry-picking Stewart's affidavit to describe the sanctuary as "closed with steel pipe fencing and pipe and cable fencing" and a "system of gates . . . [which] can be used to control access to particular areas for management purposes." Resp't Br. 11. But the Zoo neglects to say that PAWS sits on a 2300 acre lot that allows the elephant residents to exercise their autonomy to the maximum extent possible.

### E. Stare decisis does not apply to the habeas corpus relief determinations in *Lavery II* and *Presti* because sending Happy to an elephant sanctuary is an appropriate remedy.

Once this Court recognizes Happy's right to bodily liberty, it must recognize that her imprisonment is per se unlawful and order her immediate release. Appellant Br. 50-52. That NhRP seeks Happy's immediate release to an elephant sanctuary, rather than onto the streets of New York, does not preclude relief, as habeas corpus can be used to seek an imprisoned individual's release from one facility to a different facility. The Zoo's contrary claim, Resp't Br. 44-48, rests upon the gross misreading of *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986) that Judge Fahey rejected.

As explained in *Dawson*, the petitioner in *People ex rel. Brown v. Johnston*, 9 N.Y. 2d 482 (1961) properly employed habeas 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 to seek release

from his confinement in the special housing unit to another part of the very same facility. *Id*. *See Fahey Concurrence*, 31 N.Y. 3d at 1058-59 (noting that *Dawson* "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'") (emphasis original; quoting *Dawson*).

As NhRP seeks Happy's immediate release from her imprisonment at the Bronx Zoo to a sanctuary, "an institution separate and different in nature," its requested relief is analogous to *Brown* and not *Dawson*. Appellant Br. 51-52.

The Zoo's attempt to distinguish *Brown* mischaracterizes the issue before this Court as one pertaining to "Happy's living conditions." Resp't Br. 46. *Brown* concerned the lawfulness of the prisoner's confinement, not the conditions at a particular facility. The Court specifically rejected the claim that "the *place* of confinement may not be challenged by habeas corpus." 9 N.Y. 2d at 484 (emphasis original). Like *Brown*, NhRP challenges the lawfulness of Happy's imprisonment, not the conditions at the Bronx Zoo. Appellant Br. 52.

Since this is not a "conditions of confinement" case, the fact that the Bronx Zoo may be in compliance with various animal welfare laws is wholly irrelevant. This case does not turn on whether Happy's temperature is being taken, what her

blood panel is, or what she has eaten for breakfast. Rather, like all common law habeas corpus cases, it turns on whether Happy's imprisonment violates her common law right to bodily liberty.

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Respectfully submitted,

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

Steven M. Wise, Esq.
*(of the Bar of the State of Massachusetts)*
*by permission of the Court*
5195 NW 112th Terrace
Coral Springs, Florida 33076
(954) 648-9864
wiseboston@aol.com
*Attorneys for Petitioner-Appellant*

## PRINTING SPECIFICATIONS STATEMENT

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