To be argued by:
KENNETH A. MANNING
(*Time Requested: Fifteen Minutes*)

New York Supreme Court

Appellate Division — First Department

Appellate Case No.: 2020-02581

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.

BRIEF FOR RESPONDENTS-RESPONDENTS

PHILLIPS LYTLE LLP
Kenneth A. Manning, Esq.
Attorneys for Respondents-Respondents
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-7041
kmanning@phillipslytle.com

Bronx County Clerk's Index No. 260441/19

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

1. Did the Trial Court correctly conclude that well-established precedent precludes the grant of habeas corpus relief to an elephant under CPLR Article 70?

Yes. A. 22. This Court already decided that CPLR Article 70 does not extend to animals. *See Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep't 2017).

2. Did the Trial Court correctly hold that the question of personhood under CPLR Article 70 is a matter for the New York State Legislature ("Legislature")?

Yes. A. 22. Appellant's reliance on common law principles is misplaced, and policy decisions should be the province of the Legislature.

3. Assuming CPLR Article 70 applies, does Appellant's petition state a cognizable claim for habeas corpus relief?

No. The Trial Court did not reach this question directly (A. 21-22) but Appellant does not seek immediate release of the elephant in their Petition, but a mere transfer to a different facility. A. 33-34. As this Court recognized in its prior decision on the same question, this defect dooms Appellant's Petition, even if CPLR Article 70 applies.

PRELIMINARY STATEMENT

Petitioner-Appellant the Nonhuman Rights Project ("NRP") seeks to advance its animal rights campaign through this appeal. Pursuing its self-described mission to change animals into legal "persons" (A. 320, ¶ 5), NRP commenced the proceeding below in Orleans County by filing a Petition for a writ of habeas corpus to "release" an elephant from the Bronx Zoo. A. 32. NRP asserted that Happy—a 49-year old Asian elephant—is a "person" under New York's habeas corpus statute, and therefore, her "detention" at the Bronx Zoo should be deemed unlawful. A. 32-33. To remedy this alleged wrong, NRP demanded that the Court move Happy to a facility chosen by NRP in California. A. 33-34. Upon Respondents' motion to transfer venue, the Bronx County Supreme Court ("Trial Court") followed recent and controlling New York law and dismissed the Petition, holding that elephants are not persons and are not entitled to habeas relief. A. 22.

NRP's argument is extreme, ill-conceived, and contrary to New York law—but it is not new. Just three years ago, NRP sought the same relief, on the same grounds, from this same Court. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep't 2017) *lv. denied*, 31 N.Y.3d 1054 (2018) ("*Lavery II*"). In *Lavery II*, NRP petitioned for a writ of habeas corpus for two chimpanzees. Just as it does here, NRP argued the

animals were intelligent, social, and "autonomous," and therefore should be considered legal "persons." *Id.* at 75-76. This Court—joining the Second, Third, and Fourth Departments of the Appellate Division—denied NRP's appeal. *Id.*; *see Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 at *1 (2d Dep't Apr. 3, 2014) (dismissing appeal); *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); *In re Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep't 2015), *lv. denied*, 26 N.Y.3d 901 (2015). Emphasizing an utter lack of support for holding that an animal is a "person" under New York law, the Court instructed NRP that its animal rights campaign should be directed to the Legislature, not the courts. *Lavery II*, 152 A.D.3d at 79-80.

Lavery II should control the result on this appeal. This Court correctly found "no precedent exists" for NRP's position, and identified crucial reasons against conferring personhood on animals. NRP presents no new facts or applicable law to support a different result here. In fact, the only material change in the three years since this Court decided *Lavery II* is a mounting body of case law adopting its reasoning. Just a few months ago, NRP exhausted its appeals in a series of Connecticut decisions that, following the roadmap this Court provided, resoundingly held elephants are not "persons" and cannot

petition for habeas corpus. *Nonhuman Rights Project, Inc., ex rel. Beulah v. R.W. Commerford & sons, Inc.*, 216 A.3d 839, 844, 846 (Conn. App. Ct. 2019), *cert. denied* 217 A.3d 635 (Conn. 2019) ("*Commerford I*"); *Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford & Sons, Inc.*, 2020 WL 2504955, at *5 (Conn. App. Ct. May 19, 2020), *cert. denied* 335 Conn. 929 (July 7, 2020) ("*Commerford II*").

Lavery II therefore remains directly relevant and correct. This Court should follow its precedent and affirm the decision of the Trial Court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Wildlife Conservation Society and the Bronx Zoo care for endangered and threatened animals like Happy as part of an international mission of conservation and education

Respondent Wildlife Conservation Society ("WCS") is a not-for-profit organization headquartered at the Bronx Zoo. A. 320, ¶ 3. WCS's mission is to safeguard wildlife and wild places worldwide, through science, conservation, education, and inspiring people to value and appreciate wildlife. A. 320, ¶ 3. Today, the Bronx Zoo cares for thousands of endangered or threatened animals, including Happy the elephant. A. 320, ¶ 4. Respondent James Breheny has served as a WCS employee for nearly thirty-nine years, and is currently the Director of the Bronx Zoo. A. 319, ¶ 1.

B. Happy the elephant has lived at the Bronx Zoo for over forty years

Happy is a forty-nine year old Asian elephant. A. 459, ¶ 6. She has lived in her habitat at the Bronx Zoo—an environment including a large natural outdoor space where she swims, forages, and engages in other natural behavior—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 consistently accredited by the AZA. A. 335-37, ¶¶ 13-14, ¶¶ 19-22. In addition, the Bronx Zoo employs several zookeepers dedicated specifically to elephants to ensure Happy's well-

being, each of whom has years of experience working with elephants. A. 334-37, ¶¶ 6, 12-13, 25; A. 460, ¶¶ 10-11; A. 331, ¶¶ 9-13. As part of their continuing education, these elephant professionals must complete the AZA's Principles of Elephant Management courses. A. 335, ¶ 13. Happy's keepers bathe, feed, and examine her every day, and she receives expert medical care from the Bronx Zoo's experienced veterinarians, including preventative care via routine blood-analysis, periodic x-rays, and ongoing husbandry including dental and foot care. A. 337, ¶¶ 25-26; A. 331, ¶¶ 6-9.

C. NRP has filed successive lawsuits in New York and Connecticut seeking to expand rights for animals

The Nonhuman Rights Project, Inc. ("NRP"), is a not-for-profit organization incorporated in Massachusetts. A. 320. NRP presents itself as "the only civil rights organization in the United States dedicated to changing the common-law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty." A. 320, ¶ 5. NRP pursues this agenda, in part, through "grassroots and legislative campaigns." *Id.* NRP also states that it seeks to "secure actual legal rights for nonhuman animals through a state-by-state, country-by-country, long-term litigation campaign." A. 321, ¶ 7.

NRP began this campaign in New York by bringing four habeas corpus proceedings for "imprisoned" chimpanzees, in four different counties, each within a different Department of the Supreme Court, Appellate Division. In each case, the trial court declined habeas corpus relief for the chimpanzees, and NRP appealed each decision. A. 18. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief. *In re Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 at *1 (2d Dep't Apr. 3, 2014) (dismissing appeal); [1] *In re Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep't 2015), *lv. denied*, 26 N.Y.3d 901 (2015); *Lavery I*, 124 A.D.3d 148, 148 (3d Dep't 2014), *lv. denied* 26 N.Y.3d 902 (2015); *Lavery II*, 152 A.D.3d 73, 75-76 (1st Dep't 2017), *lv. denied*, 31 N.Y.3d 1054 (2018). In rejecting NRP's arguments in *Lavery II*, this Court held "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process." 152 A.D.3d at 80.

The Court of Appeals denied leave to appeal from this Court's decision in *Lavery II* (31 N.Y.3d 1054 (2018)), and the Hon. Eugene M. Fahey

[1] 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.

filed a separate concurring opinion. Noting the particular type of "confinement" alleged—*i.e.*, that two chimpanzees were kept in small cages in a warehouse and a cement storefront, respectively—Judge Fahey discussed the ethical question of treating such animals as mere "things." *Id.* at 1056 (Fahey, J., concurring). Ultimately, every judge of the panel agreed in denying NRP leave to appeal. *Id.*

Just five months after this Court decided *Lavery II*, NRP filed a new petition in Connecticut Superior Court seeking habeas relief 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). As in the proceeding below, NRP purported to "challenge[] neither the conditions of their confinement nor Respondents' treatment of the elephants, but rather the fact of their detention itself." *Id.*; *Cf* A. 48-49, ¶ 56. The Superior Court of Connecticut dismissed the petition, emphasizing that NRP presented no legal support, "but instead relies on basic *human* rights of freedom and equality" and "expert averments of similarities between elephants and human beings as evidence that this court must forge new law." 2017 WL 7053738, at *5 (emphasis in original). "Based on the law as it stands today," the court rejected that argument in light of existing animal protection statutes to ensure the well-being of animals. *Id.*, *rearg. denied* 2018 WL 1787370, at *1 (Conn.

Super. Ct. Feb. 27, 2018*)* (finding NRP's petition "wholly frivolous"). The Connecticut Appellate Court affirmed, noting recent New York precedent in *Lavery I*, and deciding with "little difficulty" that elephants cannot seek habeas corpus relief. *Commerford I*, 216 A.3d 839, 844, 846 (Conn. App. Ct. 2019), *cert. denied* 217 A.3d 635 (Conn. 2019).

While the *Commerford I* appeal was still pending, NRP filed another petition in Connecticut Superior Court—seeking the same relief, for the same three elephants, on the same grounds—and the trial court rejected the second 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 Appellate Court held that Connecticut's habeas corpus statute, like New York's, "unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus . . . ." *Commerford II*, 2020 WL 2504955, at *5 (Conn. App. Ct. May 19, 2020) (emphasis in original). Just two months ago, the Connecticut Supreme Court denied NRP's certification to appeal for a second time. 335 Conn. 929 (July 7, 2020).

D. NRP commenced this proceeding in Orleans County in an attempt to avoid the First Department and *Lavery II*

On October 2, 2018, while *Commerford I* was still pending and just one year after *Lavery II* was decided, NRP commenced this habeas corpus proceeding in New York State Supreme Court, Orleans County. A. 31, A. 78-

82. According to NRP, it "chose to file in Orleans County (part of the Fourth Department) because 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. By an Order dated January 18, 2019, the Orleans County Supreme Court granted Respondents' motion to transfer venue to the Trial Court, in Bronx County Supreme Court, and stayed all other motions pending transfer. A. 29-30. The proceeding was assigned to Hon. Alison Y. Tuitt (J.S.C.). A. 6.

E. Following *Lavery I* and *Lavery II*, the Trial Court dismissed NRP's Petition

NRP's Petition sought an Order transferring Happy from the Bronx Zoo in New York City to a Performing Animal Welfare Society ("PAWS") facility near Sacramento, California.[2] A. 33-34. In support, NRP submitted affidavits from several individuals concerning the behavior and cognitive capacity of wild elephants (A. 92-243, 473-82), only one of which

[2] On appeal, NRP now seeks an Order for "Happy's immediate release to The Elephant Sanctuary in Tennessee." App. Br. at 52-53. NRP does not cite to any information in the record before the Court regarding this alternative facility.

mentions Happy (by referencing online videos of her habitat at the Bronx Zoo). A. 480, ¶ 31. NRP also submitted an affidavit from the "President and Co-Founder" of PAWS, Mr. Ed Stewart, stating his willingness to receive Happy at PAWS, and explaining that at the PAWS facility, "elephant habitats are enclosed with steel pipe fencing and pipe and cable fencing" and a "system of gates . . . can be used to control access to particular areas for management purposes." A. 248, ¶ 12.

In response, Respondents submitted affidavits from the Bronx Zoo's General Curator (Patrick Thomas, PhD), Chief Veterinarian and Vice President for Health Programs (Paul P. Calle, DVM), and General Director (Respondent James Breheny). A. 319-22, 326-464. Based on 109 years of collective experience caring for animals, including elephants, WCS's expert staff uniformly attested that Happy receives excellent care, is well-adapted to her surroundings at the Bronx Zoo, and could suffer serious harm if she is uprooted and moved hundreds of miles away after residing in the Bronx Zoo for over forty years. A. 322, 331-32, 338.

On February 18, 2020, after permitting nearly three days of oral argument, the Trial Court 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 in [*Lavery II*], 'the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process.'" A. 22. NRP filed a notice of appeal on February 25, 2020. A. 3.

ARGUMENT

POINT I

NRP'S APPEAL SHOULD BE DENIED BECAUSE THIS COURT'S DECISION IN *LAVERY II* IS CONTROLLING

A. *Lavery II* directly applies and should result in a denial of NRP's appeal

This is the rare appeal where there is direct and recent authority from this Department against Appellant's position. On June 8, 2017, this Court issued *Lavery II*, 152 A.D.3d 73, which affirmed the dismissal of NRP's habeas corpus petitions on behalf of two adult male chimpanzees named Tommy and Kiko. *Id.* at 75. In that case, "[t]he gravamen of petitioner's argument . . . [was] that the human-like characteristics of chimpanzees render them 'persons' for purposes of CPLR article 70." *Id.* at 76-77. Less than three years later, NRP propounds the exact same argument on this appeal—only now on behalf of elephants instead of chimpanzees.

In *Lavery II*, this Court set forth a series of compelling reasons for denying the relief NRP sought, virtually all of which apply in this case. First,

this Court found "the motion court properly declined to sign the orders to show cause [by NRP] since these were successive habeas proceedings which were not warranted or supported by any changed circumstances." 152 A.D.3d at 75.

This Court further found that although "the word 'person' is not defined in the statute [CPLR Article 70], there is no support for the conclusion that the definition includes nonhumans, i.e., chimpanzees." *Id.* at 77. Indeed, "*[n]o precedent exists*, under New York law, or English common law, for a finding that a chimpanzee could be considered a 'person' and entitled to habeas relief." *Id.* at 77-78 (emphasis added).

This Court also rejected the major premise of NRP's argument. Specifically, this Court found 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. Rejecting NRP's argument that "the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief," the Court reasoned that although "infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience," this "argument ignores the fact that these are still human beings, members of the human community." *Id.* Similarly, the Court found

that the doctrine of corporate personhood did not support NRP's position because the doctrine is "referenced to humans or individuals in a human community." *Id.* at 79. The Court also rejected NRP's reliance upon decisions from New Zealand and a pre-independence Indian court, stating that they provided "no guidance to the entitlement of habeas relief by nonhumans in New York." *Id.*

Finally, this Court held that NRP "does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility." *Id.* Accordingly, NRP's petition did not state a cognizable habeas claim, and the Court found "habeas relief was properly denied." *Id.* at 79-80.

NRP's appeal in this matter seeks to re-litigate the same issues decided in *Lavery II*, without any new facts or law to counter or call into question the decision of the Court. *See* Point II, *infra*. Because *Lavery II* was correctly decided and remains so, NRP's appeal should be denied.

B. U.S. courts remain unanimously opposed to recognizing animals as "persons" entitled to habeas corpus relief

Notwithstanding NRP's repeated efforts, the fact remains that "[n]o precedent exists, under New York law, or English common law" to support NRP's Petition. *Lavery II*, 152 A.D.3d at 77-78.

As this Court is well aware, all four Departments of the Appellate Division have rejected NRP's argument. In *Lavery I*, the Third Department

found that "animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law." 124 A.D.3d at 150. The Second and Fourth Departments also rejected attempts by NRP to seek habeas relief on behalf of animals. In *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1335 (4th Dep't 2015), the Fourth Department held that NRP's petition failed because it "does not seek [a chimpanzee's] immediate release, nor does petitioner allege that [the chimpanzee's] continued detention is unlawful." *Id.* at 1335. And the Second Department denied NRP leave to appeal after a trial court refused to sign an *ex parte* order to show cause seeking a writ of habeas corpus for two chimpanzees in *Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081, at *1 (2d Dep't 2014).

Although NRP refers to a number of international decisions[3] allegedly expanding the definition of "persons," App. Br. 35-36, NRP omits the series of recent decisions issued by Connecticut courts against NRP.

[3] NRP should not be permitted to rely upon documents outside the record on appeal, including those uploaded to NRP's own website, *see e.g.,* App. Br. 8, 24, 33, 36-37, 41, 44, 45, 49, because "[d]ocuments or information that were not before the trial court cannot be considered by this Court on appeal." *Xiaoling Shirley He v. Xiaokang Xu*, 130 A.D.3d 1386, 1387 (3d Dep't 2015) (alterations in original) (internal quotation marks and citations omitted).

Shortly after this Court decided *Lavery II*, NRP filed a new habeas petition, naming three different elephants, in Connecticut Superior Court. *Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford & Sons*, 2017 WL 7053738, at *4. NRP identified no applicable authority for the relief sought, but instead relied upon "basic *human* rights of freedom and equality," and "expert averments of similarities between elephants and human beings as evidence that this court must forge new law." *Id.* at *5. The court rejected this premise and dismissed the petition as "wholly frivolous on its face." *Id.* at *1.

The Appellate Court of Connecticut affirmed, explaining its review of "habeas corpus jurisprudence . . . reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics." *Commerford I*, 216 A.3d at 844 (citing *Lavery I*, 124 A.D.3d at 150). And, considering the "profound implications" of holding "an elephant, or any nonhuman animal for that matter, is entitled to assert a claim in a court of law," the court had "little difficulty" in rejecting NRP's radical position. *Id.* at 846.

With its appeal in *Commerford I* still pending, NRP filed a second petition for habeas corpus "in the same jurisdiction," with "exactly the same parties," and raising "the same grounds and issues." *Nonhuman Rights Project v. R.W. Commerford & Sons*, 2019 WL 1399499, at *4 (Sup. Ct. Conn. Feb. 13,

2019). The Superior Court dismissed the petition, and noted NRP's emphasis on cases from "foreign countries" was misplaced, as such decisions have "no binding precedent." *Id.* at *3. Again, NRP appealed, and again, the decision was affirmed. Following *Lavery I* and *Lavery II*, the Appellate Court of Connecticut 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). The Connecticut Supreme Court refused to certify NRP's appeal in *Commerford II* (as it refused in *Commerford I*) just three months ago. 335 Conn. 929 (July 7, 2020).

Federal decisions are also in accord with *Lavery II*. For example, in *Miles v. City Council of Augusta*, 710 F.2d 1542 (11th Cir. 1983), the court ruled an animal "cannot be considered a 'person' and is therefore not protected by the Bill of Rights." *Id.* at 1544 n.5. In *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), the court determined that "[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," in part because "only persons are subject to criminal convictions." *Id.* at 1263. And in *Cetacean*

Cmty. v. Bush, 386 F.3d 1169 (9th Cir. 2004), the court held that animals are not persons under the Administrative Procedure Act and other federal statutes. *Id.* at 1179. The court explained that 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." *Id.* (internal quotation marks and citations omitted).

Against this unanimous and substantial consensus, NRP points to a stray comment from *People v. Graves*, 163 A.D.3d 16, 21 (4th Dep't 2018), a criminal case concerning whether sufficient evidence supported the finding that a car dealership was a "person" for purposes of a mischief statute. *Id.* at 20; *see* App. Br. at 26, 31, 34. Not only is this case wholly unconcerned with animals, but the court also referenced the possibility that animals could be treated as persons solely in dicta. In fact, NRP relied on the same comment from *Graves* to justify its second petition for habeas corpus in Connecticut, and the Superior Court rightly observed that *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." *Nonhuman Rights Project, Inc. v. Comerford*, 2019 WL 1399499, at *3 (Sup. Ct. Conn. Feb. 13, 2019), *aff'd Commerford II,* 197 Conn. App. 353. *Graves* therefore has no bearing upon the present issues.

C. NRP incorrectly dismisses *Lavery II* as dicta

Notwithstanding the foregoing authority, much of which follows the rationale provided in *Lavery II*, NRP repeatedly attempts to dismiss *Lavery II* as dicta (App. Br. 3-4, 29-31), because *Lavery II* observed "the motion court properly declined to sign the orders to show cause [by NRP] since these were successive habeas proceedings which were not warranted or supported by any changed circumstances." 152 A.D.3d at 75.

This ignores the well-established principle that "when two or more points arise and are argued and the appellate court passes upon them all, no branch of the decision is merely incidental, but all the grounds thereof must be taken to be equal in force and together constitute the judgment." *Broderick v. City of New York*, 295 N.Y. 363, 368-69 (1946); *see also O'Brien v. Union Cent. Life Ins. Co.*, 207 N.Y. 180, 187 (1912) ("It cannot be said that a case is not authority on one point, because, although that point was properly presented and decided in the regular course of the consideration of the cause, some other point was also considered and decided which was alone sufficient to dispose of the whole issue."); *Trump Vill. Section 3, Inc. v. N.Y. State Hous. Fin. Agency*, 307 A.D.2d 891, 895 (1st Dep't 2003) (concluding alternative ruling was not dicta because "[e]ven though we also relied on the waiver provision to dismiss plaintiff's contract claims against [defendant], our ruling on the substance of

[defendant's] contractual duties went to the heart of plaintiff's claims and was neither unnecessary nor of secondary importance"); *People v. Simmons*, 173 A.D.3d 646, 646 (1st Dep't 2019) (explaining previous determination was "expressed, not as 'dicta' but as what was intended to be an alternative holding"), *lv denied*, 34 N.Y.3d 954 (2019).

NRP's inappropriate dismissal of *Lavery II* as mere dicta stands in stark contrast to its repeated reliance upon the Hon. Eugene M. Fahey's concurrence in the New York Court of Appeals' denial of leave to appeal in *Lavery II*. App. Br. 1, 2, 12, 13, 15, 16, 23, 34, 36, 38, 39, 49, 51, 52. Because the New York Court of Appeals ultimately denied NRP's request for leave to appeal, 31 N.Y.3d 1054 (May 8, 2018), Judge Fahey's singular concurrence should not be construed as overturning any legal precedent.

D. NRP's appeal does not present the exceptional circumstances necessary to deviate from *Lavery II*

Contrary to NRP's contentions, this Court should adhere to the doctrine of stare decisis and apply *Lavery II* to deny NRP's appeal. Under stare decisis, "a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem." *State Farm Mut. Auto Ins. v. Fitzgerald*, 25 N.Y.3d 799, 819 (2015) (quoting *People v. Peque*, 22 N.Y.3d 168, 194 (2013)); *accord People v. Hobson*, 39 N.Y.2d 479 (1976). This fundamental rule "promotes the evenhanded, predictable, and consistent

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *People v. Taylor*, 9 N.Y.3d 129, 148 (2007). As such, deviating from recent controlling law is a drastic step that requires an "exceptional case." *Id.* at 149; *accord Fitzgerald*, 25 N.Y.3d at 819. This is especially so where precedent is not only controlling, but recent. *Taylor*, 9 N.Y.3d at 149 (refusing to overrule precedent "barely three years old.") Such exceptional circumstances occur when, considering the "lessons of time," an outdated holding "leads to an unworkable rule" or "creates more questions than it resolves." *Id.* (citation omitted).

NRP's appeal in this matter does not present the exceptional circumstances necessary to justify a deviation from *Lavery II*. Like NRP's previous appeals, NRP's current appeal is premised upon the argument that elephants are sufficiently intelligent and cognitively complex (in NRP's parlance, "autonomous"), that they should be granted the right to habeas corpus relief. This rationale has been repeatedly rejected. Furthermore, as explained below in Point II, *Lavery II* was and is a correct decision. Therefore, this Court should follow *Lavery II* and deny NRP's appeal.

POINT II

LAVERY II WAS CORRECT IN HOLDING THAT ANIMALS ARE NOT ENTITLED TO HABEAS CORPUS RELIEF

NRP boldly asserts that "*Lavery I*'s and *Lavery II*'s rejections of legal personhood for chimpanzees are each based on the demonstrable misunderstanding that the right to bodily liberty requires the capacity for duties, *which no other English-speaking court has held and which the New York legislature has rejected.*" App. Br. 31 (emphasis added). As demonstrated below, there is no statutory basis for NRP's argument that an animal constitutes a "person" under CPLR Article 70, and *Lavery II*'s rationale in connecting legal rights with legal duties is deeply rooted in both American and New York jurisprudence.

A. *Lavery II* was correct in holding that there is no statutory basis for extending CPLR Article 70 to animals

The common law writ of habeas corpus is codified under CPLR Article 70, and expressly limits the writ to "persons." CPLR 7002(a). Interpreting the statute, *Lavery II* correctly held "there is no support for the conclusion that the definition [of persons] includes nonhumans," and that there was no authority suggesting that the Legislature intended such an expansive application. 152 A.D.3d at 77. NRP also fails to cite any sources

indicating that the Legislature intended to include animals within the definition of "person," as utilized in CPLR Article 70.

Although NRP asserts otherwise, App. Br. 26-29, 31, the New York Pet Trust Statute falls well short of establishing that the Legislature intended to grant legal personhood to animals. The statute, which provides that a trust for the care of a pet is valid, does not define animals as legal persons. In fact, it does not use the term "person" at all. Est. Powers & Trusts Law § 7-8.1 It also does not grant animals rights or impose duties upon them, but instead relies on human beings to enforce its terms. *Id.* § 7-8.1(a) (the Act "may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee"). The Act's legislative history similarly belies any suggestion that the Legislature intended to grant personhood. The Sponsor's Memorandum includes numerous references to "pet owner[s]," reinforcing the legal reality that animals are not recognized as "persons" with a right to bodily liberty. *See* Sponsor's Mem., Bill Jacket, L. 1996, ch. 159.

The cases cited by NRP that pre-date EPTL § 7-8.1, which note the common law requirement that a beneficiary be capable of receiving property, *see, e.g.*, *Gilman v. McArdle*, 65 How. Pr. 330, 338 (N.Y. Super. Ct. 1883), *rev'd*, 99 N.Y. 451 (1885), merely underscore that the Legislature chose

not to grant personhood to animals when it enacted EPTL § 7-8.1. To address the issue that "a private express trust cannot exist without a beneficiary capable of enforcing it," the statute provided that "the testator or grantor may designate a *person* to be enforcer of the trust terms, and if he does not, the court, on the request of the trustee or any other *person*, may appoint one." McKinney's Practice Commentaries, N.Y. Est. Powers & Trusts Law § 7-8.1 EPTL 7–8.1 (emphasis added). Thus, the Legislature decided that a pet owner could create a valid trust for a pet by designating a human being to enforce it, or permitting the court to make such a designation. Had it intended to confer personhood on animals, the clause permitting enforcement by a designated individual would not have been necessary.

Finally, it is implausible that the Legislature would take the drastic, unprecedented, and enormously consequential step of conferring legal personhood on animals for purposes of CPLR Article 70 simply by enacting the Pet Trust Statute. *See generally Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (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); *Byrn v. N.Y.C. Health & Hosps. Corp.*, 31 N.Y.2d 194, 203 (1972) (the Legislature may validly elect to "provide some protection far short of

conferring legal personality"). NRP therefore has no statutory basis to claim *Lavery II* was incorrectly decided.

B. *Lavery II* was correct in holding that because animals cannot bear legal duties, they are not entitled to legal rights

In claiming that "no English-speaking court" has followed *Lavery II*'s rationale, App. Br. 31, NRP omits the recent decision of the Appellate Court of Connecticut rendered against NRP itself, which 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).

Consistent with both *Lavery I*, 124 A.D.3d at 151, and *Lavery II*, 152 A.D.3d at 79, numerous other courts have recognized that animals are not "persons" as they cannot be subject to liability as defendants. *See Jones v. Fransen*, 857 F.3d 843, 857–58 (11th Cir. 2017) (animal is not "person" subject to suit under state law); *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); *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); *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) ("animals lack capacity to be sued").

The connection between legal rights and duties is well founded. As described in greater detail by proposed *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 duties is deeply embedded in our legal tradition. 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); *see also In re Gault*, 387 U.S. 1, 20 (1967) (noting that "the social compact" both "defines the rights of the individual and delimits the powers which the state may exercise"); *United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995) (stating "our constitutional theory is premised in large measure on the conception that our Constitution is a 'social contract'") (citation omitted).

NRP selectively quotes from historical sources in an effort to sever the traditional connection between rights and duties. For example, it quotes a few snippets of text from John Chipman Gray, *The Nature and Sources of the Law*, for the proposition that "'animals may conceivably be legal persons,' and there may be 'systems of Law in which animals have legal rights.'" App. Br. at 41-42. The original source reveals that Professor Gray made these observations about historical practices, discussing "cats in ancient Egypt, or white elephants in Siam." Gray, *The Nature and Sources of the Law* 43 (2d ed. 1921). The treatise further explains "[i]n the systems of *modern* civilized societies, beasts have no legal rights. It is true there are everywhere statutes for their protection, but these have generally been made, not for the beast's sake, but to protect the interests of men, their masters." *Id.* at 43 (emphasis added).

NRP similarly misquotes John Salmond, *Jurisprudence* (10th ed. 1947). App. Br. at 42. Immediately following the passage quoted by NRP, Salmond states:

> *[t]he only natural persons are human beings. Beasts are not persons, either natural or legal.* They are merely things—often the objects of legal rights and duties, but never the subjects of them. Beasts, like men, are capable of acts and possess interest. Yet their acts are neither lawful nor unlawful; they are not recognised by the law as the appropriate subject-matter either of permission or of prohibition.

Id. at 319 (emphasis added).

Proposed *amici curiae* Justin Marceau and Samuel Wiseman, by analogizing New York's animal control statutes to human criminal codes, argue that animals are already subject to legal obligations and classifications of "guilty" and "innocent," and therefore should be granted habeas relief. However, the legal duties and consequences imposed by the Agriculture and Markets Law fall upon the animal's human owner, not the animal. *See e.g.,* N.Y. Agric. & Mkts Law § 123(6) ("[t]he owner of a dog who . . . negligently permits his or her dog to bite a person, service dog, guide dog or hearing dog causing physical injury shall be subject to a civil penalty"); § 123(9) ("[i]f any dog, which had previously been determined by a judge or justice to be a dangerous dog . . . shall without justification kill or cause the death of any person who is peaceably conducting himself or herself . . . the owner shall be guilty of a class A misdemeanor"); § 123(5) (owner of dog has opportunity to appeal designation of a dog as "dangerous" or an order of humane euthanasia). New York's animal control statutes therefore are just another example of how legal duties are imposed on human beings, not animals.

Finally, NRP incorrectly asserts that "[t]he obvious fact that hundreds of thousands of New Yorkers who lack the capacity for duties indisputably possess numerous rights . . . proves that legal personhood cannot possibly turn upon the capacity for duties." App. Br. 40. As this Court

specifically stated, an infant or a comatose adult might lack the ability to discharge duties, but "are still human beings, members of the human community." *Lavery II*, 152 A.D.3d at 78. The Third Department similarly recognized that "some humans are less able to bear legal duties or responsibilities than others" but explained that "[t]hese differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility." *Lavery I*, 124 A.D.3d at 152 n.3. As further explained below, far from being "irrational and arbitrary," App. Br. 4, 39, U.S. and international law have long recognized that rights *must* be accorded on the basis of an individual's humanity, providing further support for *Lavery II* and its rationale.

POINT III

NRP'S ARGUMENTS TO OVERTURN *LAVERY II* UNDER COMMON LAW SHOULD BE REJECTED

NRP's position directly conflicts with all relevant authority, and NRP's out-of-context references to common law and fundamental constitutional principles do not provide a basis for deviating from such authority.

A. NRP's theory of "autonomy" is so ambiguous that courts cannot reliably determine whether an individual is autonomous

In asking the Court to accept "autonomy" as a basis for granting habeas corpus relief to Happy, NRP advocates for an impossibly ambiguous standard, *i.e.*, animals who demonstrate "autonomy" are "persons" entitled to habeas corpus. *See* App. Br. 11-26; *id.* at 17 ("As Happy is an autonomous being, this Court must recognize her right to bodily liberty protected by habeas corpus and order her freed.").

According to NRP, "autonomous" beings are those who "direct[] their behavior based on some *non-observable*, *internal* cognitive process, rather than simply responding reflexively" (*id.* at 6) (emphasis added) and "exhibit self-determined behavior that is based on their freedom of choice." (*id.*). NRP does not explain how this new test would be applied. But by NRP's own description, a court cannot judge "autonomy" by any "observable" metric. *Id.* Instead, to apply NRP's proposed test of autonomy, a court must ascertain whether an animal (or perhaps a human) demonstrates "self-determined" behavior, based on its intelligence and internal cognitive processes. It is unclear whether NRP envisions an individualized practical examination, or a blanket determination of "autonomy" for an entire animal species. Nor does NRP specify how one determines whether an animal (or human) acts based upon freedom of choice. To put it mildly, this "rule" would "create[] more

questions than it resolves," if it resolves any questions at all. *People v. Taylor*, 9 N.Y.3d 129, 149 (2007).

B. Individuals are provided rights under U.S. and international law because of their humanity, as opposed to their "autonomy"

Not only is "autonomy" an incredibly ill-defined concept, but NRP fails to provide any authority under U.S. or New York law to support its position that an individual is entitled to rights *because* they are autonomous. As this Court and the Third Department recognized, this is because rights are granted to human beings based upon the "collective" qualities of human beings. *Lavery I*, 124 A.D.3d at 152 n.3; *accord Lavery II*, 152 A.D.3d at 78. Indeed, it is a bedrock principle of U.S. and international law that rights are granted to an individual based upon their membership in the human community, as opposed to their individual "autonomy."

The United States Supreme Court has held that "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)). Courts thus rely on the essential characteristic of humanity to protect vulnerable groups in our society. For example, "[p]risoners retain the essence of human dignity inherent in all persons." *Brown v. Plata*, 563 U.S. 493, 510 (2011); *see also United States v. McLaurin*, 731

F.3d 258, 261 (2d Cir. 2013) ("A person, even if convicted of a crime, retains his humanity."). Women cannot be denied "the dignity associated with recognition as a whole human being." *Trammel v. United States*, 445 U.S. 40, 52 (1980). And the Thirteenth Amendment, ending slavery, has been described as a "grand yet simple declaration of the personal freedom of all the human race" that "can only apply to human beings." *Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

These decisions are based upon an individual's membership in the human community, not an individual's intelligence, cognitive abilities, or autonomy. *See e.g., 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 . . . ."). Thus, incompetent patients are entitled to the same rights solely by virtue of their status as humans and "any 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." *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).

International law similarly recognizes that rights are conferred upon individuals based on their membership in the human community, and reinforces the importance of humanity's ability to bear legal duties. The

International Covenant on Civil and Political Rights, to which the United States is a signatory, states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171, 172; *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). Human rights, the document explains, "derive from the inherent dignity of the human person." 999 U.N.T.S. at 173. The Covenant also highlights the reciprocal nature of rights and duties, stating that "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." *Id.*

The United Nations Universal Declaration of Human Rights is also based on "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" and "the dignity and worth of the human person." G.A. Res. 217A (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810, at 71-72, pmbl. (Dec. 10, 1948). The document emphasizes the connection between human rights and duties, noting that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible" and thus humans are subject to the

necessary limitations "for the purpose of securing due recognition and respect for the rights and freedoms of others." *Id.* at 76-77, art. 29.

The cases NRP cites from ignominious episodes in this nation's history demonstrate the need to recognize the inherent dignity of all members of the human community. App. Br. 23-24. Among the cases cited by NRP, only one actually concerns a petition for habeas corpus. In that case, the court granted habeas relief to a Native American petitioner precisely because it recognized that the term "person" referred to any "living human being; a man, woman, or child; an individual of the human race." *See United States v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (internal quotation marks and citations omitted). Because membership in the human community, as opposed to an individual's autonomy, should be the basis for legal rights, this Court should reject NRP's arguments on this appeal.

C. NRP fails to establish that Happy should be granted the right to bodily liberty under the Equal Protection Clauses of the Fourteenth Amendment and the New York Constitution

The Court also should reject NRP's arguments regarding the Equal Protection Clauses of the U.S. and New York Constitutions for at least two independent reasons.

First, NRP did not preserve this argument. Appellate review is limited to arguments presented to the trial court, and arguments "not raised

below" are thus "not preserved for appellate review." *Mendelsohn v. City of New York*, 89 A.D.3d 569, 569-70 (1st Dep't 2011). A search of the record before the Court demonstrates that NRP failed to raise the Equal Protection Clauses of the Fourteenth Amendment and the New York Constitution as grounds for the relief sought in NRP's Petition. Accordingly, this argument is "improperly raised for the first time on appeal," and the Court should summarily reject it. *In re Gabrielle G.*, 168 A.D.3d 589, 590 (1st Dep't 2019) (refusing to consider equal protection argument raised for the first time on appeal).

Second, NRP's position lacks the faintest support from the letter or intent of the Equal Protection Clause. Like CPLR Article 70, the equality protections of both the State and Federal Constitutions are limited to "person[s]." U.S. Const. amend. XIV, § 1 (no State may "deny to any person within its jurisdiction the equal protection of the laws"); N.Y. Const. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof."); *see also Myers v. Schneiderman*, 30 N.Y.3d 1, 13 (2017) ("Our State's equal protection guarantees are coextensive with the rights protected under the Federal Equal Protection Clause."). Just as NRP fails to provide any authority to suggest that the Legislature intended to include animals within the scope of CPLR Article 70, NRP also does not and

cannot point to any source indicating that the New York or Federal constitutions were intended to protect animals.

In fact, the framers of the Fourteenth Amendment demonstrably used the term "person" to refer to human beings. Senator Charles Sumner, discussing the meaning of the word "person" in the Fifth Amendment, explained that "in the eye of the Constitution, every human being within its sphere, whether Caucasian, Indian, or African, from the President to the slave, is a person. Of this there can be no question." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862). Michael Stokes Paulsen, in *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 48-51 (2013), provides additional examples of how the framers of the Fourteenth Amendment utilized the term "persons" to refer to human beings.

Even if those constitutional provisions were extended beyond their plain text, NRP's equality argument is inconsistent with established equal protection jurisprudence. *See Med. Bus. Assocs., Inc. v. Steiner*, 183 A.D.2d 86, 92 (2d Dep't 1992) (applying equal protection principles to classifications in a common law rule). A legal doctrine that "does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack" if the "means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *see also*

Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 320 (1995).[4] Under rational basis review, "the Government has no obligation to produce evidence, or empirical data to sustain the rationality of a statutory classification," but can rely upon "rational speculation" under which "[a]ny reasonably conceivable state of facts will suffice." *Lewis v. Thompson*, 252 F.3d 567, 582 (2d Cir. 2001) (internal quotation marks and citations omitted); *see also Port Jefferson Health Care Facility v. Wing*, 94 N.Y.2d 284, 290 (1999) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)) ("[A] classification must be upheld against an equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification.").

There are many obvious distinctions between humans and elephants that support differential treatment of the two species. As just one example, not even NRP argues that Happy should be permitted to move freely about the streets of New York City like human beings, but instead, asks the Court to transfer Happy from the Bronx Zoo to a different facility. App. Br. 52-53. NRP therefore cannot seriously argue that protecting New York

[4] NRP has not argued that distinguishing between species constitutes a suspect classification or that a fundamental right is at issue. App. Br. 18-25. To qualify as a fundamental right, "a careful description of the asserted fundamental liberty interest" must be "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (internal quotation marks and citations omitted). NRP cannot plausibly contend that there is a deeply rooted tradition of courts ordering the release or transfer of elephants from one facility to another.

citizens and their property from roaming elephants is an illegitimate or irrational governmental interest. *See Sgueglia v. Kelly*, 134 A.D.3d 443, 443 (1st Dep't 2015) (recognizing that public safety is a legitimate government interest for equal protection purposes).

This case also bears no resemblance to the decisions cited by NRP, which involved irrational animus against historically marginalized groups of human beings. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[A] bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (internal quotation marks, ellipses, and citation omitted); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (striking ordinance based "on an irrational prejudice against the mentally retarded"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (quoting *Moreno v. U.S. Dep't of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)) (holding the "purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify" a statute).

Thus, even if the Court were to consider the issue, NRP cannot establish that Happy should be granted the right to bodily liberty under the Equal Protection Clauses of the Fourteenth Amendment and the New York Constitution.

POINT IV

THE DECISION TO GRANT LEGAL PERSONHOOD IS A MATTER OF PUBLIC POLICY THAT IS PROPERLY DETERMINED BY THE LEGISLATURE, NOT THE COURTS

Although NRP heavily relies upon the Court of Appeals' decision in *Byrn v. N.Y.C. Health & Hosps.*, 31 N.Y.2d 194 (1972), the decision in fact stands for the dual propositions that *"*[w]hat is a legal person is for the law . . . to say" and *"[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).

The Court of Appeals has repeatedly recognized 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 policy decisions and value judgments implicated in this matter are no less weighty, and the record before the Court does not adequately represent the many competing interests that may be impacted. New York's agricultural industry is one obvious and significant example, and one which the Legislature regulates—including by imposing legal protections for

animals—through the Agriculture and Markets Law.[5] In enacting that law, state lawmakers recognized the "agricultural industry is basic to the life of our state," thus "[i]t is the policy and duty of the state to promote, foster, and encourage the agricultural industry . . . [and] to design and establish long-range programs for its stabilization and profitable operation." N.Y. Agric. & Mkts Law § 3. Deeming animals to be "legal persons" in a single judicial decision would upend this legislative policy, and many more.

Federal legislation would also be impacted if the Court were to grant NRP's requested relief. For example, the Animal Welfare Act directs the U.S. Secretary of Agriculture to promulgate "standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors." 7 U.S.C. § 2143(a)(1). The statute, and accompanying regulations contained in the Code of Federal Regulations, Title 9, chapter 1, subchapter A, part 3, would be undermined if the Court held that animals are persons entitled to legal rights.

[5] New York Agriculture and Markets Law extends numerous protections to animals. Section 353 makes it a crime to torture or unjustifiably kill an animal, and makes it unlawful to deny an animal necessary sustenance. Section 355 prohibits abandoning an animal in a public place. Under section 356, any confined animal must be provided sufficient food, water, and air. Section 359(1) proscribes the transportation of animals in cruel or inhuman manners. And section 359(2) bans the impoundment of animals and failure to provide them with sustenance.

Finally, if the Court were to agree with NRP's position, which would make "autonomy" the basis for conferring rights as opposed to humanity, the consequences of such a decision would be profound, far-reaching, and potentially devastating. For example, disability rights activists have strongly opposed the writings of Peter Singer, a long-time proponent of the autonomy test urged by NRP, precisely because he has compared individuals with disabilities to animals. *See, e.g.*, Taimie L. Bryant, *Similarity or Difference As A Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 LAW & CONTEMP. PROBS. 207, 222 n.49 (Winter 2007) ("Peter Singer also received tremendous criticism for comparing the value of life for a human with disabilities and a healthy animal."); Mark C. Weber, *Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act*, 63 MD. L. REV. 162, 170 (2004) ("Disability rights activists have felt compelled to array themselves against Peter Singer, the Princeton philosopher who argues that the killing of infants with severe disabilities is consistent with principles of morality."). Mr. Singer, like NRP, has argued we should "change our attitudes to both humans and non-humans so that they come together," but Mr. Singer states that "once we realize the fact that severely and irreparably retarded infants are members of the species *Homo Sapiens* is not in itself relevant to how we should treat them, we should be

ready to reconsider current practices" including "the practice of allowing these infants to die by withholding treatment." Peter Singer, *Unsanctifying Human Life: Essays on Ethics* 224-25 (2003).

Similarly, civil rights groups have rebuffed the type of argument advanced in Appellant's Brief, in which arguments for animal rights are equated with the struggles for racial or gender equality. *See, e.g.*, Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. ANIMAL L. 15, 21 (2009) (describing backlash from civil rights and Jewish community to animal rights activists' use of slavery and Holocaust comparisons); Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 620 (2002) (noting that historically disfavored groups may "feel that their own struggles to obtain legal rights are being demeaned by this comparison, either because they believe that such talk reduces people to the level of animals or because it undermines the importance of the granting of rights to other marginalized groups"). As one scholar explains, "analogizing subordinated human races to subordinated inhuman animals makes for not only counterproductive politics, but also emotional assault." Tucker Culbertson, *Animal Equality, Human Dominion and Fundamental Interdependence*, 5 J. ANIMAL L. 33, 37 (2009).

Even NRP's proposed *amicus curiae* Professor Tribe acknowledged, almost two decades ago, the dangerous potential consequences posed by NRP's position:

> [W]hen we insist that rights depend on the individual's possession of certain measurable traits such as self-awareness or the ability to form complex mental representations or to engage in moral reasoning, and when we treat it as a mere matter of grace or optional beneficence whenever a simulacrum of such rights is awarded as a privilege to human beings who lack all of those qualifying traits (like infants or the severely mentally retarded or the profoundly comatose), then it follows that it would be entirely permissible not to award those basic legal protections to such beings. . . . What other conclusion can you reach, after all, 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? . . . Once we have said that infants and very old people with advanced Alzheimer's and the comatose have no rights unless we choose to grant them, we must decide about people who are three-quarters of the way to such a condition. I needn't spell it all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust.

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). Indeed, if courts had applied NRP's vague standard of "autonomy" rather than humanity to determine eligibility for habeas relief, many of the cases cited in Professor Tribe's proposed amicus brief may have resulted in denials. *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, App. Br. 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. Such a drastic change in law should not be made without the input and deliberation of the Legislature.

POINT V

THE PETITION FAILS TO STATE A COGNIZABLE CLAIM FOR HABEAS RELIEF BECAUSE IT SEEKS TRANSFER RATHER THAN RELEASE

Even if the Court decided that animals are entitled to habeas corpus relief, which it should not, NRP's Petition fails for another dispositive reason. 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). Habeas corpus provides only one remedy: release from confinement. *See id.*; *Nonhuman Rights Project, Inc. ex rel. Kiko*, 124 A.D.3d at 1334; *Lavery II*, 152 A.D.3d at 77. Accordingly, where a petitioner seeks to change the *conditions* of their confinement, rather than

challenge the *fact* of confinement, the petition fails as a matter of law. *Nonhuman Rights Project ex rel. Kiko*, 124 A.D.3d at 1334; *Lavery II*, 152 A.D.3d at 77. For this very reason (among others), this Court agreed with the Third and Fourth Departments and rejected NRP's demand to move chimpanzees to a sanctuary facility in Florida as an improper request for "transfer to a different facility." *Lavery II*, 152 A.D.3d at 79; *accord Lavery I*, 124 A.D.3d 148, *Nonhuman Rights Project ex rel. Kiko*, 124 A.D.3d at 1334.

Although NRP tries to avoid the foregoing precedent by insisting it "does not allege" Happy lives in "unsuitable conditions" (A.48), and "repeatedly allege[s] that Happy is being unlawfully detained" (App. Br. at 52, n. 60), the true relief NRP seeks is unmistakable: "release from Respondents' custody *to an appropriate sanctuary*, preferable PAWS." A. 78 (emphasis added). Moving Happy to this facility would not "release" her from so-called "detention," but simply place her in the conditions of confinement that NRP prefers. This does not state a cognizable claim for relief.

NRP's reliance on *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961) to avoid this result is unavailing. In *Brown*, the petitioner was convicted of rape and sentenced to prison. 9 N.Y.2d at 484. Thereafter, he was transferred to a state hospital for "male prisoners as are declared insane." *Id.* Although he was lawfully sentenced to prison, there was no lawful order or

sentence deeming him "insane," and thus no legal predicate to detain him in a facility exclusively for persons so found. Accordingly, his detention at the state hospital was unlawful, and habeas corpus barred his confinement there without due process finding him insane. *Id.* at 484-85. In contrast, NRP has failed to allege, let alone establish, how Happy's living conditions are in any way unlawful under existing law.

The Court of Appeals further clarified this point twenty-five years later in *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986). There, the Court reaffirmed that habeas corpus *cannot* be used to change the conditions of confinement, and thus it denied a petition to move a prisoner from the "special housing unit" in prison to the general prison population. *Id.* at 691. The Court explained *Brown* did not apply, because in that case, the "confinement . . . was in 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.* (emphasis added). Conversely, the prisoner 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. *Id.* at 691 (emphasis added).

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. Rather, NRP simply asserts that, in their estimation, another facility would provide better conditions than the Bronx Zoo. App. Br. at 50. NRP in fact declares that the Court *cannot* "release" Happy because she is not adapted to a wild environment. App. Br. at 10. *Dawson*, *Kiko*, *Lavery I* and *Lavery II* addressed the same demand, and their holdings preclude the relief sought by NRP.

Aside from seeking a legally barred remedy, moreover, NRP is not even consistent regarding what it considers to be the "best option." App. Br. at 10. NRP petitioned the Trial Court to send Happy from New York City to PAWS, a facility in California, and submitted an affidavit describing that facility. A. 33-34; 246-251. On appeal, however, its preferred destination has changed, as NRP now seeks to move Happy to "The Elephant Sanctuary in Tennessee"—a facility whose capacity, safety, and resources appear nowhere in the factual record. App. Br. at 52-53.

This evidentiary deficiency bespeaks a deeper theme. On this appeal, NRP requests that the Court enact a radical change to New York law, but NRP cannot decide upon the proper remedy in the instant case, whether it

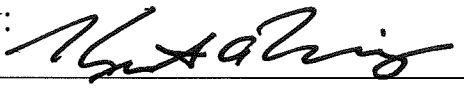
be transporting Happy to Tennessee or some other unspecified facility. NRP does not and cannot specify how the courts should adjudicate the petitions of future "autonomous" animal-litigants, or how courts are to decide whether animals are indeed "autonomous." These and the other unanswered questions raised by NRP's appeal demonstrate the wisdom of *Lavery II*: New York law does not provide animals with the right to habeas corpus relief, and there are good reasons for that limitation. Any initiative to extend this fundamental legal right to animals has no place in the courts, and should be addressed, if at all, through the Legislature.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny Appellant's appeal.

Dated: Buffalo, New York
September 11, 2020

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
jchen@phillipslytle.com
wrossi@phillipslytle.com

Doc #9072390

PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 N.Y.C.R.R. § 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

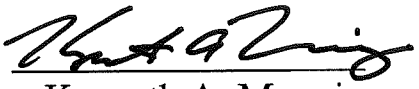
A proportionally spaced typeface was used, as follows:

Name of typeface: Calisto MT
Point size: 14 point in body, 12 point in footnotes
Line spacing: Double-spaced

The total number of words in this brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, proof of service, certificate of compliance, or any addendum authorized pursuant to subdivision (k), is 11,439.

Dated: Buffalo, New York
September 11, 2020

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
jchen@phillipslytle.com
wrossi@phillipslytle.com