

# **EXHIBIT 1**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

---

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

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

Petitioner,

v.

**DEMAND FOR  
CHANGE OF VENUE**

Index No. 18-45164

JAMES J. BREHENY, in his official capacity as Executive  
Vice President and General Director of Zoos and  
Aquariums of the Wildlife Conservation Society and  
Director of the Bronx Zoo, and WILDLIFE  
CONSERVATION SOCIETY,

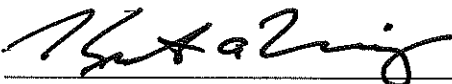
Respondents.

---

PLEASE TAKE NOTICE that Respondents James J. Breheny and Wildlife  
Conservation Society, by and through their attorneys, Phillips Lytle LLP, hereby demand,  
pursuant to CPLR Rule 511, that the venue of the above-captioned proceeding be changed  
from the County of Orleans, where it has been improperly placed, to the County of Bronx,  
where venue would be proper, as provided by CPLR 503, 510(1), and 7004(c).

Dated: Buffalo, New York  
November 21, 2018

PHILLIPS LYTLE LLP

By: 

Kenneth A. Manning

Joanna J. Chen

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

TO: Elizabeth Stein, Esq.  
Attorneys for Petitioner  
*The Nonhuman Rights Project, Inc.,*  
*on behalf of Happy*  
5 Dunhill Road  
New Hyde Park, New York 11040

Doc #01-3163118

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

---

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

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

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as Executive  
Vice President and General Director of Zoos and Aquariums of  
the Wildlife Conservation Society and Director of the Bronx  
Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

---

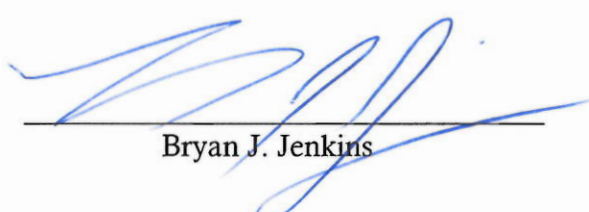
STATE OF NEW YORK     )  
                                  ) SS.:  
COUNTY OF ERIE        )

BRYAN J. JENKINS, being duly sworn, deposes and says:

I am an employee of Phillips Lytle LLP, attorneys for Respondents  
*James J. Breheny and Wildlife Conservation Society*, and not a party to the action, and am over the  
age of 18 years. On November 21, 2018, I served Respondents' Demand to Change Venue on  
the following individual at the address indicated:

Elizabeth Stein, Esq.  
Attorneys for Petitioner  
5 Dunhill Road  
New Hyde Park, New York 11040

by depositing a true copy of same enclosed in a properly addressed wrapper, into the custody of  
Federal Express Corporation for overnight delivery, prior to the latest time designated by Federal  
Express Corporation for overnight delivery.

  
Bryan J. Jenkins

Sworn to before me this  
21<sup>st</sup> day of November, 2018

  
Notary Public

SHERRI A. BEALS  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires February 13, 2022

Doc #01-3163167.1

# **EXHIBIT 2**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

---

COPY

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

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

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as  
Executive Vice President and General Director of Zoos  
and Aquariums of the Wildlife Conservation Society and  
Director of the Bronx Zoo, and WILDLIFE  
CONSERVATION SOCIETY,

Respondents.

---

NOTICE OF MOTION

Index No. 18-45164

PLEASE TAKE NOTICE that, upon the attached affidavit of Kenneth A.

Manning, Esq., sworn to December 3, 2018, with exhibits; the affidavit of James J.

Breheny, sworn to December 3, 2018, the affidavit of Paul Calle, VMD, sworn to December

3, 2018, the affidavit of Patrick Thomas, PhD, with exhibit, sworn to December 3, 2018,

and all papers and proceedings herein, Respondents James J. Breheny and Wildlife

Conservation Society, by and through their attorneys, Phillips Lytle LLP, will move this

Court at the Supreme Court, Orleans County, located at 1 South Main Street, Suite 3,

Albion, New York 14411, on December 14, 2018 at 11:30 a.m., or as soon thereafter as

counsel may be heard, for an order:

ORLEANS CO CLERK NY  
2018 DEC 3 PM4:02

1. Pursuant to CPLR 511 and 7004(c), transferring this proceeding to the New York State Supreme Court in Bronx County; or in the alternative,

2. Pursuant to CPLR 3211(a),

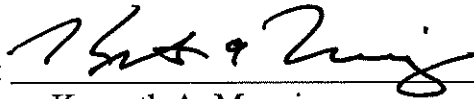
- a. dismissing the Verified Petition of Nonhuman Rights Project Inc., made on behalf of Happy the elephant, for a writ of habeas corpus, with prejudice, for failure to state a cause of action on which relief can be granted, for lack of standing, and pursuant to the doctrine of collateral estoppel; or
- b. in the event the Court does not dismiss the Verified Petition, allowing Respondents five days to answer to the Verified Petition pursuant to CPLR 404(a); and

3. Awarding Respondents' such other and further relief as the Court deems just and proper, including costs and attorneys' fees.

Answering papers and notices of cross-motion, if any, must be served upon attorneys for Respondents in accordance with the Order of this Court dated November 16, 2018, and otherwise in accordance with CPLR. Respondents agree to accept service of the same via electronic transmission to the e-mail addresses stated below.

Dated: Buffalo, New York  
December 3, 2018

PHILLIPS LYTTLE 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

TO: Elizabeth Stein, Esq.  
5 Dunhill Road  
New Hyde Park, New York 11040  
lizsteinlaw@gmail.com

Doc #01-3068745.1



# **EXHIBIT 3**

STATE OF NEW YORK

COUNTY OF ORLEANS : SUPREME COURT

\*\*\*\*\*

NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF HAPPY,

Plaintiff,

- vs -

File No. 45164

JAMES J. BREHENY,

**Proceedings**

Defendant.

\*\*\*\*\*

1 South Main Street

Albion, New York

December 14, 2018

B E F O R E:

HON. TRACEY A. BANNISTER,

Supreme Court Justice

A P P E A R A N C E S:

STEVEN M. WISE, ESQ.,

ELIZABETH STEIN, ESQ.,

KEVIN R. SCHNEIDER, ESQ.,

Appearing on Behalf of the Plaintiff.

KENNETH A. MANNING, ESQ.,

JOANNA J. CHEN, ESQ.,

CHRISTOPHER J. MCKENZIE, ESQ.,

Appearing on Behalf of the Defendant.

*COLLEEN L. LOUNSBURY*  
*OFFICIAL COURT REPORTER*

***NRP v. James J. Breheny***

1           THE COURT: Good morning, everybody.  
2           Welcome to Albion. For those of you who aren't  
3           local, what a beautiful it is, isn't it?

4           So we are here this morning. I read a  
5           forest full of papers with regard to all of your  
6           positions, and it's my understanding that the  
7           cameras will only focus on the attorneys and what  
8           they have to say; is that right? We are all good  
9           with that? We'll go from there.

10          Counsel and I have agreed to a time limit  
11          schedule, which no one will get shot for violating  
12          it, but I'm hoping to try to make it a reasonable  
13          amount of time on each side with time for rebuttal.

14          In that regard, folks representing the  
15          subject of these proceedings, Happy, the elephant,  
16          you may proceed.

17          MR. WISE: Thank you, Your Honor, and thank  
18          you for allowing me to argue.

19          Your Honor, the Nonhuman Rights Project is  
20          bringing -- seeking a common-law writ of habeas  
21          corpus on behalf of Happy, a forty-seven-year-old  
22          elephant who is detained in the Bronx Zoo.

23          We are seeking a habeas corpus -- not only  
24          under the common-law, but also under the CPLR that  
25          actually governs the procedure.

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1           So one of the things that we have to  
2 persuade the Court is that Happy is a person under  
3 Article 70.

4           Now, a person is an entity who has the  
5 capacity for rights. Oftentimes, people don't  
6 understand what a person is, but a person is not  
7 necessarily a rights holder, but it's a person under  
8 the common-law, and under the Article 70 who has the  
9 capacity for rights.

10           So if I may quickly give a short  
11 demonstration. So, for example, this bottle of  
12 water -- each drop in it has a legal right. If I  
13 pour it onto the floor, nobody has legal rights.  
14 What happens is you have to have a place to pour the  
15 rights in -- in other words, a rights container, and  
16 at that point, the container has rights and law. We  
17 call the container a person. So a person is a  
18 container only. However, then the question is what  
19 rights do they have.

20           Now, it's important to understand that when  
21 you're looking at a personhood -- at a person who is  
22 a container, being a person does not necessarily  
23 mean that one has any rights at all. It just means  
24 that you have a capacity for rights.

25           So the Nonhuman Rights Project here -- the

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 pet trust statute that we spoke to made certain  
2 animals -- nonhuman animals -- domestic animals and  
3 made them beneficiaries of trust, and for New York  
4 to be a beneficiary of trust, you have to be a  
5 person. So the legislature has already made certain  
6 nonhuman animals within the State of New York  
7 domestic animals persons for a single right.

8 So the legislature, in essence, created the  
9 personhood and poured in the single right. The  
10 Nonhuman Rights Project now comes to you on behalf  
11 of Happy, saying -- assuming that Happy has that one  
12 right already, but other nonhuman animals.

13 We ask you pour in the second rights so  
14 that Happy would have the right not only to be the  
15 beneficiary of a person, but now to have the common  
16 right of liberty that is protected by a common-law  
17 writ of habeas corpus.

18 So we must show that Happy is a person.  
19 The way we show Happy is a person is by implicating  
20 the Court of Appeals case from Byrn from 1972. Byrn  
21 made it clear that being a person and being a human  
22 being are not synonymous.

23 In that case, it had to do with a person --  
24 with if it was a human being who was a fetus, the  
25 Court said that while she was still a human, a fetus

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 was not a person. It made it clear that personhood  
2 is an issue not of biology, but it has to be a  
3 matter of public policy.

4 So a lot of what the Nonhuman Rights  
5 Project has put in its petition and memorandum is  
6 what we argue as appropriate public policy for this  
7 Court to determine whether Happy is a person solely  
8 for the purpose of common-law writ of habeas corpus.

9 Now, you have the fact part and you have  
10 the law part. The law part we argue is both as a  
11 matter of common-law liberty and as a matter of  
12 common-law equality.

13 We argue that that's the public policy that  
14 would allow this Court and require this Court to  
15 find that Happy is a person.

16 By liberty, what we do is we focus on the  
17 fact that Happy is an autonomous being, and we have  
18 one of our experts define autonomy as a being who is  
19 able to freely choose how to live her life. You and  
20 I are almost automatically autonomous. Happy also  
21 is autonomous.

22 So I'll say *Rivers versus Katz*. I'll cite  
23 the *Storar* case. These have to do with showing what  
24 the Court of Appeals -- showing the fact that what  
25 judges do -- an important part of being a judge in

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 State of New York and elsewhere in the common-law  
2 world is to protect the autonomy of those who are  
3 coming to the Court, because they are autonomous,  
4 and the autonomy is not being protected, whether  
5 it's like Rivers versus Katz in the context of a --  
6 someone who has to make a medical decision or it's  
7 in the context of a writ of habeas corpus, because  
8 what else is the major purpose throughout the seven  
9 hundred years there has been a writ of habeas corpus  
10 of autonomy, except to protect -- I'm sorry -- a  
11 writ of habeas corpus -- except to protect autonomy.

12 Because when one is being detained  
13 illegally against her will, then what is the  
14 fundamental wrong that's being done is that her  
15 autonomy is being trespassed upon. She is  
16 essentially forced to live as a slave. She cannot  
17 decide -- Happy, for example, cannot decide where to  
18 go. She can't decide who to go with. In fact,  
19 Happy is unable to do anything except live on a  
20 postage size piece of land approximately one acre.

21 The Nonhuman Rights Project is asking  
22 actually for a two-step process, because in habeas  
23 corpus involving a competent versus incompetent  
24 person who is being detained, there's a one-step  
25 process sometimes, and there's a two-step process

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 sometimes.

2 The one-step process means if I was being  
3 detained, then I would simply -- once I want a writ  
4 of habeas corpus, I would simply be ordered free and  
5 walk out.

6 If you have a detainee who is  
7 incompetent -- for example, throughout the history  
8 of New York, there have been slave children.  
9 There's child oppression and minors who are wrongly  
10 being held in a mental hospital or in a jail. When  
11 they are free of a writ of habeas corpus, then you  
12 then have to move into a two-step process, because  
13 the Court will then order Happy free, but Happy is  
14 incompetent.

15 Then you have to take the second step of  
16 making a decision as to where Happy would go. The  
17 Nonhuman Rights Project said, "We suggest there are  
18 three elephant sanctuaries in the United States. We  
19 suggest, Performing Animal Welfare Society, which is  
20 twenty-three hundred acres large compared to where  
21 Happy has been confined for forty years on one acre.

22 So just to reiterate real quickly what I  
23 said in the brief, the difference between one acre  
24 at the Bronx Zoo and twenty-three hundred acres in  
25 PAWS is the same difference between -- the same

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***



***NRP v. James J. Breheny***

1 ratio as the City of Albion and the State of  
2 Illinois.

3 THE COURT: Are you saying that maybe Happy  
4 is unhappy in the Bronx Zoo?

5 MR. WISE: Happy is -- yes, I am saying  
6 Happy is unhappy. However, we are definitely not  
7 attacking the conditions of confinement, which we  
8 have said over and over again.

9 We learned our lesson in the Kiko case,  
10 where the Court believed for reasons which we didn't  
11 understand at the time -- but we realized we must  
12 have caused confusion and that we were attacking the  
13 conditions of confinement. We are not.

14 For example, if this Court was kidnapped  
15 and brought to some place and sought a writ of  
16 habeas corpus, the subject of the writ of habeas  
17 corpus wouldn't be whether this Court was being fed  
18 properly or whether getting medical care. That  
19 wouldn't be the issue. The question wouldn't be a  
20 matter of your welfare or your conditions of  
21 confinement.

22 The question would be whether or not you  
23 have a right not to be there at all. It's the exact  
24 same thing with Happy, the elephant. The question  
25 is not whether the Bronx Zoo is treating her well,

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1           or whether its not treating her well, or whether  
2           they are giving her medical care, or they are not.  
3           The question is whether or not Happy should be  
4           confined there at all.

5                       So the Nonhuman Rights Project is also  
6           making it clear that her confinement is illegal, and  
7           the reason that it is illegal is -- again, we go  
8           back to Byrn, and we talk about the issue of public  
9           policy.

10                      Now, there's two grounds for public policy.  
11           One is we argue that as a matter of common-law  
12           liberty, she is being deprived of that. Again,  
13           that's because she is autonomous, and the purpose of  
14           habeas corpus is to protect that like in cases like  
15           Rivers versus Katz. Rivers versus Katz says that's  
16           an extremely important job for this Court.

17                      The second one is the idea of common-law  
18           equality. Now, there's not much law on that,  
19           because once the Fourteenth Amendment came in,  
20           people stopped filing common-laws equality suits,  
21           and again, filing Fourteenth Amendment ones.

22                      We went back to a 1992 law review article  
23           by Chief Justice Kaye, who talked about the fact  
24           that the common-law and Constitutional law have  
25           become a two-way street, and the common-law was

***NRP v. James J. Breheny***

1           essentially being in certain ways  
2           constitutionalized.

3                       We said then with respect to equality that  
4           we'd look to the case of Romer versus Evans in the  
5           U.S. Supreme Court, saying that like the New York  
6           courts -- if a court is looking at the  
7           constitutionality of a statute, it requires that it  
8           be a rational means to a legitimate end.

9                       This Court itself, when it makes a  
10          decision, would do no less. This Court would want  
11          to then make sure that what it is ordering or  
12          overseeing is whether or not its order is a rational  
13          means to a legitimate end.

14                      Now, we argue that the State has no --  
15          absolutely no legitimate interest in seeing the  
16          arbitrary confinement of an autonomous being. It  
17          doesn't matter whether the autonomous being is a  
18          human or an elephant, because the issue is not the  
19          species. Judge Fahey made it clear that -- that's  
20          what he was saying. The issue is not the species.

21                      In the Fourth Department -- in the Graves  
22          case, it also made it clear that it's common  
23          knowledge that animals can be persons. The Byrn  
24          case made clear that it's not a matter of species.  
25          It's a matter of -- a second matter of biology.

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1           It's a matter of public policy.

2                     The second prong of the equality argument  
3           is that when the Court said that you cannot look --  
4           the U.S. Supreme Court said that you can't look at a  
5           single characteristic and deprive an entity of all  
6           of the rights because of a single characteristic.

7                     In some ways and other ways, it's saying  
8           that I'm looking at it as a matter of species. If  
9           you say -- if Happy was a human being, it would be  
10          absolutely clear because of who she is, the autonomy  
11          of her species that she would have to be loose. She  
12          would have to be freed. However, the only reason  
13          that she might not get a writ of habeas corpus  
14          according to my brother would be because she is an  
15          elephant.

16                    That's so fundamentally unfair. It just  
17          simply points to the fact she's an elephant when  
18          what the courts are trying to protect is autonomy --  
19          not a species, but autonomy.

20                    Now, I want to make sure -- I also hit the  
21          fact that we, indeed, are seeking immediate release.  
22          Again, we are sorry we confused the Fourth  
23          Department when we went in front of the Kiko case.  
24          We indeed are seeking immediate release. That's the  
25          only relief we are seeking as part of the habeas

*NRP v. James J. Breheny*

1 corpus case.

2 If you look at, for example, the slave  
3 cases we cited -- you have cases in Massachusetts  
4 and you have cases in New York where the Courts  
5 freed slave children from slavery. That is what the  
6 whole case is about. Then at the end, we say, "We  
7 are going to have to figure out what we are going do  
8 with her." That's the step two.

9 But that's not really part of the habeas  
10 corpus case. That's after you prevailed in the  
11 habeas corpus case. The question is what is the  
12 remedy. Where are you going to put this  
13 incompetent, because Happy unlikely can't go back  
14 into the wild, so Happy is going to have to go  
15 somewhere, and that somewhere is going to have to be  
16 some kind of an elephant sanctuary.

17 The elephant sanctuaries that we'd ask the  
18 Court to send her to would be one of three. By the  
19 way, one is the Performing Animal Welfare Society in  
20 California. A second one is the Elephant Sanctuary  
21 of Tennessee, which is not only a sanctuary, but  
22 it's an AZA accredited zoo. I have seen that place.  
23 We would be happy if Happy went to either PAWS or  
24 the Elephant Sanctuary of Tennessee, which is an AZA  
25 accredited zoo. I don't know how long I've been

*COLLEEN L. LOUNSBURY*  
*OFFICIAL COURT REPORTER*

***NRP v. James J. Breheny***

1           talking.

2                   THE COURT:   More than ten minutes.

3                   MR. WISE:    I'm sorry, Your Honor.   Thank  
4           you.

5                   MR. MANNING:   Your Honor, Ken Manning from  
6           Phillips Lytle on behalf of Respondent, James  
7           Breheny and the Wildlife Conservation Society.   With  
8           me is Chris McKenzie of general counsel from the  
9           Wildlife Conservation Society.

10                   One thing we do agree on is that Happy is  
11           an elephant.   We have three affidavits from the  
12           people at the Bronx Zoo, a veterinarian, and people  
13           with a biology background, indicating the good care  
14           and treatment afforded to Happy, and we contend  
15           Happy is happy where she is.

16                   During the recitation from NRP, there  
17           wasn't a peep about the controlling precedent from  
18           all four Appellate Divisions from this Court  
19           indicating that elephants, or chimps, or any animal  
20           for that matter is simply not the beneficiary of a  
21           habeas corpus petition, because they are simply not  
22           a person.

23                   The position of NRP, in essence, isn't that  
24           Happy is being unlawful detained.   They are  
25           contending that her being at the zoo should be

***NRP v. James J. Breheny***

1 unlawful as a matter of public policy.

2 While the public policy position was  
3 articulated well by NRP on their behalf, that's a  
4 legislative initiative and not a matter for a Court.

5 What NRP is trying to do is hijack the  
6 judicial system to present the public policy  
7 position against all species. It's clear to us that  
8 NRP will go species to species, animal to animal,  
9 courthouse to courthouse, until they find someone to  
10 agree with their position. So far, they are  
11 unsuccessful.

12 At some point, our judicial system has a  
13 number of documents to prevent the repetitive  
14 litigation of the same issue. I've never had a case  
15 from all four departments. This is a first for me.

16 They haven't even addressed those  
17 decisions, because there's no place for them to go  
18 as a matter of Appellate authority. The authority  
19 relies upon the people, and the only authority they  
20 rely upon is dicta, as we indicated in our papers,  
21 or a concurring opinion on the denial to the Court  
22 of Appeals by the esteemed Judge Fahey.

23 Before you get to any of that, the question  
24 is why are we in this county. I mean, we agree that  
25 the CPLR controls the procedure here. The Court

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 raised the issue in the first conference on the  
2 order to show cause. CPLR Article 5 indicates that  
3 this matter should be held in the Bronx. You don't  
4 have to take my word for it. You can take the word  
5 of the Second Department in the Greene Case, where  
6 it's decided Article 5 has been a habeas corpus  
7 proceeding.

8 Orleans County is a beautiful place. This  
9 courthouse is spectacular, but it has nothing to do  
10 with the Bronx Zoo. It has nothing to do with  
11 Happy, and it doesn't have anything to do with  
12 anything in this case any more than any other  
13 county.

14 You may recall counsel offered to stipulate  
15 if the Court changed venue to any other county  
16 within the Fourth Department. We certainly don't  
17 accept the offer. It underscores that all this is  
18 about is trying to shop the case to find a judge who  
19 will agree with their position.

20 Our Appellate Division -- each of them --  
21 discouraged this form of forum shopping in an effort  
22 to prevent the judiciary from being used basically  
23 as a series of motions for reconsideration based on  
24 what other courts have done. We think the Appellate  
25 Division's decision -- particularly the Lavery

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***



***NRP v. James J. Breheny***

1 case -- is right on point.

2 The Fourth Department, less than five years  
3 ago, decided the case involving NRP involving a  
4 chimpanzee. Counsel referenced to it as the Kiko  
5 case. In the Appellate Division -- I don't think  
6 the Appellate Division misunderstood that case at  
7 all. I think they looked through the two-step  
8 transaction to find that all this is really about is  
9 changing the conditions in captivity of the  
10 elephant.

11 We try to drill through this, because  
12 discovery isn't available in this proceeding, and we  
13 didn't serve an order. We served some requests for  
14 admissions. The motion is also pending before the  
15 Court, but we won't spend the time on the oral  
16 argument.

17 We tried to pin down -- in our request for  
18 admissions, we asked NRP to admit that NRP doesn't  
19 allege that Happy's living conditions at the Bronx  
20 Zoo are unsuitable, and we also asked them to admit  
21 that NRP doesn't seek improved welfare for Happy.

22 They refused to answer. They raised an  
23 objection. The only objection raised was the  
24 objection on the grounds that the admission sought  
25 constitutes the very dispute of this lawsuit. Well,

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 of course, it does. What they are seeking to do is  
2 take Happy from an environment where she has been  
3 for forty years --

4 THE COURT: Forty-seven.

5 MR. MANNING: She has been at the Bronx Zoo  
6 for forty out of forty-seven years, Your Honor. She  
7 is comfortable there. They are trying to move Happy  
8 to some place they would rather see her be.

9 The Appellate Division Fourth Department in  
10 Kiko decided the changes and conditions are simply  
11 not the proper subject of a habeas corpus  
12 proceeding. We suggest the Appellate Division got  
13 it right, and that's for another day. We think it  
14 controls the decision in this case.

15 From our perspective, this case should be  
16 heard in the Bronx and not in Orleans County. In  
17 any event, the petition should be barred under a  
18 number of documents based on the Appellate Division  
19 saying in all four departments collateral estoppel.

20 It's obvious that what we talked about  
21 today is the position of NRP insofar that they seek  
22 to make persons out of animals in a variety of  
23 species, and it really has very little to do with  
24 Happy's own circumstances. That type of  
25 policy-based opportunity should be directed to the

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 legislature and not the Court in a habeas corpus  
2 proceeding.

3 In the limited time we've had to respond to  
4 the petition, Your Honor, we directed our efforts  
5 towards the Bronx Zoo and Happy, and we raised all  
6 of those issues.

7 There also has been an amicus filing by a  
8 number of interested groups that deal with the  
9 impact unprecedented and unsupported decision,  
10 granting what habeas corpus would have on the rest  
11 of the world.

12 We adopt those positions as this brief is a  
13 subject of a motion of a file, which we support, and  
14 we note that counsel has basically already put in  
15 opposition papers on the brief. We would ask the  
16 Court accept both their papers and the amicus papers  
17 to flesh out the impact that this decision would  
18 have on other people, other animals, and other  
19 industries for that matter.

20 Lastly, we'd note that among the last  
21 minute motions made is a motions for preliminary  
22 junction. All we would say is there is no basis  
23 right now. There's no intention on the part of the  
24 Bronx Zoo to move Happy anywhere.

25 In order for us to have the opportunity to

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 handle the animal properly, we are not willing to  
2 consent to have any control on behalf of NRP over  
3 where the animal is or where the animal goes.

4 In order to support preliminary injunction,  
5 they have to show a meritorious petition for the  
6 reasons we just went through. The petition has no  
7 merit if the Court chooses to reach the merits.  
8 That's our position, Your Honor.

9 THE COURT: Do you have rebuttal?

10 MR. WISE: Yes, Your Honor. Number one, if  
11 they move Happy out of the State of New York, this  
12 Court likely loses subject matter jurisdiction. The  
13 courts are very jealous of the subject matter  
14 jurisdiction.

15 What we didn't say is that we had a similar  
16 problem in the Third Department with respect to  
17 Tommy, the chimpanzee, and that the Third Department  
18 did issue a preliminary injunction ordering that  
19 Tommy not be moved. It was for that reason that the  
20 Court didn't wish to lose subject matter  
21 jurisdiction while it was ruling. That's one.

22 Second of all, it doesn't matter whether my  
23 brother's expert -- I guess they aren't really  
24 experts. They are employees of the Wildlife  
25 Conservation Society. It doesn't matter whether

***NRP v. James J. Breheny***

1 Happy -- they think Happy is happy.

2 The issue is whether or not Happy is being  
3 detained against -- without respect -- to honoring  
4 her common-law right to liberty as a matter of  
5 liberty and equality, which my brother didn't even  
6 address.

7 I cite several cases involving the 1840s  
8 involving slave children, involving Sojourner  
9 Truth -- Sojourner Truth Child. In the State of New  
10 York and also in Massachusetts where you had a slave  
11 child who was five years old or seven years old who  
12 would actually be holding the legs of their master  
13 and saying, "I don't want to go. I don't want to  
14 go," and the Court would say, "You don't really  
15 understand what slavery is about," or "You don't  
16 understand what your life will be. We'll remove you  
17 from slavery," and you couldn't expect them to  
18 understand.

19 Happy has been in prison in the Bronx Zoo  
20 for forty years. Everything about her evolution --  
21 everything about who she is as an elephant is being  
22 impinged by that every single day. She has no idea  
23 what it would be like to move to a place that's  
24 twenty-three hundred acres where she would be able  
25 to be part of a herd and live with other elephants

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 and make choices that she has no way of fathoming.

2 Right now, as you can see, instead of  
3 checking her feces and checking her blood and  
4 checking her teeth every day -- and they are right.  
5 They ought to be worried about her, because she is  
6 being kept in a bizarre way on one acre of land  
7 which she shares with another elephant who hates  
8 her. That is not the way for an elephant to be.  
9 The elephant killed her only companion ten years  
10 ago. That's one thing.

11 The second thing is this isn't a matter for  
12 the legislature. Habeas corpus in New York is  
13 entirely a matter for common-law. In fact, these  
14 kinds of cases began with the Somerset case, which  
15 we talked about in 1772, which is actually part of  
16 New York Common-law. It was part of the common-law  
17 in New York in April 1775. That is where you began  
18 the entire idea of writ of habeas corpus on behalf  
19 of a slave.

20 Indeed, as Lord Mansfield said, "If you  
21 don't like what I did, then go to Parliament." They  
22 went to Parliament and they couldn't overturn it.

23 What happened is he said that slavery was  
24 so odious that the common-law wouldn't support it.  
25 Slavery is still odious. No matter which autonomous

***NRP v. James J. Breheny***

1           thing is being displayed, it's still odious to the  
2           autonomous being.

3                       If the legislature would step in and try,  
4           under Tweed versus Liscomb, in the suspension  
5           clause, it's not clear how much the legislature even  
6           can try to step in and narrow who is a person or cut  
7           back on some other common-law issue.

8                       Also, of course, I mentioned all of the  
9           other cases involved. First of all, the Second  
10          Department case and the Fourth Department case were  
11          not on the merits. You have the two Lavery cases in  
12          the Third Department and in the First Department.

13                      Now, if the Court relies upon either of the  
14          Lavery cases -- one is saying you have to be able to  
15          bear rights and duties in order to be a person --  
16          not for purpose of habeas corpus, but a person for  
17          any purpose, or you look at the First Department  
18          saying that you don't have to have a matter to be  
19          able to bear rights and do these. You have to be a  
20          human being.

21                      That is what was foreclosed by the Byrn  
22          case. The Byrn case said that a person -- that's  
23          not a matter of biology. It's a matter of public  
24          policy.

25                      Neither the Third Department nor the First

*NRP v. James J. Breheny*

1 Department ever got into the issue of the public  
2 policy, and I guarantee you -- well, as much as  
3 lawyers can -- no Court is going to follow the Third  
4 Department. It's the only English-speaking case in  
5 the history of the world that ever said that only  
6 entities who can bear duties can ever be persons.

7 As the First Department even noted, there  
8 are millions of New Yorkers who can't bear duties,  
9 but they are a person. They understand the  
10 fragility and the weakness of the Third Department's  
11 decision themselves.

12 They said, "What is really important is the  
13 fact that the chimpanzee wasn't a human being."  
14 Well, that, again, has already been disposed of  
15 thirty years or forty years before by the Brown  
16 case.

17 Then when the pet trust came in, the  
18 legislature made it clear there are all kinds of  
19 nonhuman animals. They have personhood. They have  
20 the capacity for rights, and the one right they had  
21 there was to be a beneficiary of the trust. But  
22 neither the First or the Third Department seemed to  
23 grasp that.

24 However, since that time Judge Fahey -- we  
25 understand he is only a single judge, but he's the



***NRP v. James J. Breheny***

1           only high court judge in the United States who ever  
2           opined on this.

3                       Also, I believe that his decision is much  
4           more persuasive than either the First or Third. For  
5           one thing, he's the only one that actually made  
6           public policy arguments or tried to justify what he  
7           said.

8                       In the Third Department, all they have is a  
9           one-sentence footnote, footnote three. In the First  
10          Department, they said that you had to be a human as  
11          part of a phrase in one sentence. There is a  
12          difference between making a reasoned argument based  
13          on public policy and simply stating something.

14                      Then -- and I don't think it's a  
15          coincidence -- one month after Judge Fahey makes his  
16          decision, then the Fourth Department -- which, of  
17          course, binds this Court -- says that it's a  
18          commonplace, a nonhuman matter. A corporation that  
19          is a nonhuman animal can be persons.

20                      That automatically means that this Court  
21          cannot rely upon either the Third Department or the  
22          First Department, because both of them said that a  
23          nonhuman animal can't under any circumstances be  
24          persons.

25                      So they may ultimately be held right, which

*NRP v. James J. Breheny*

1 I hope not, but they may be. That's not what it is  
2 today. Today it's the law of the Fourth Department.  
3 The Fourth Department made it clear that this is a  
4 commonplace that nonhumans can be persons, and the  
5 only issue is under what circumstance. That  
6 requires not a biological explanation, but a mature  
7 reflection upon public policy.

8 My last thing or two is the issue of  
9 standing. The issue of standing is absolutely clear  
10 under 7002(a). Anyone can go in on behalf of anyone  
11 as being imprisoned, and the First Department said  
12 that the Nonhuman Rights Project undisputedly has  
13 standing.

14 Also, Justice Jaffe in the New York County  
15 Supreme Court said that the Nonhuman Rights Project  
16 did have standing to sue on behalf of the  
17 chimpanzee.

18 So the First and Third Departments are  
19 simply outliers -- not just -- and the reason the  
20 First Department -- well, they are both outliers,  
21 and it's unlikely that everyone is going to follow  
22 them, because they are so extraordinary.

23 The First Department is especially  
24 troubling by the fact they simply say, "Only humans  
25 can be persons." We say we have so been there

*COLLEEN L. LOUNSBURY*  
*OFFICIAL COURT REPORTER*

*NRP v. James J. Breheny*

1 before, because at one time, only white people could  
2 be a person. Only men could be a person. Chinese  
3 people couldn't be persons. Native Americans  
4 couldn't be persons. We have been there before. We  
5 don't need to go there again.

6 My very last thing is one second on venue.  
7 Venue is completely clear. 7002(b)(3) says that  
8 anyone seeking a writ of habeas corpus can file suit  
9 before any justice anywhere they want. There's no  
10 privilege for any Supreme Court.

11 We didn't make any bones about the reason  
12 we wanted to file in the Fourth Department, because  
13 the Graves case is not only favorable to us, but  
14 it's actually morally correct and legally correct,  
15 and why would we want to file suit.

16 The fact is that when you say that you may  
17 file in front of any justice of the Supreme Court,  
18 it's forum shopping, and it's forum shopping that  
19 the legislature says, "Well, you're welcome to it.  
20 You choose whatever Supreme Court Justice you want  
21 to go in front of." That's all right. Indeed, that  
22 draws its roots deep into the common-law of habeas  
23 corpus, which -- habeas corpus is just not like  
24 anything else. It's a generous cause of action.

25 THE COURT: Your time is up.

*COLLEEN L. LOUNSBURY*  
*OFFICIAL COURT REPORTER*

***NRP v. James J. Breheny***

1 MR. WISE: Thank you very much.

2 THE COURT: Mr. Manning?

3 MR. MANNING: Thank you, Your Honor. What  
4 we just heard is that the Third Department got it  
5 wrong. The First Department had it wrong. The  
6 Fourth Department had it wrong, and the Second  
7 Department had it wrong.

8 All of these issues have been decided at  
9 the Appellate level previously. While I admire the  
10 strength of the dispute over the rulings, the  
11 rulings nevertheless are direct and they are on  
12 point.

13 All the decisions relied upon for the  
14 argument today are indirect cases involving human  
15 beings, and they cite to the Graves case, the Fourth  
16 Department decision, which dealt with auto  
17 dealership. None of those cases are on point.

18 Judge Fahey's decision, which was a  
19 concurring opinion on a denial of leave to appeal to  
20 the Court of Appeals, is not authoritative on any of  
21 these issues.

22 From our standpoint, Your Honor, the  
23 Appellate courts and the State already dealt with  
24 each of the issues. We think the Appellate Division  
25 on the First, Second, Third, and Fourth Department

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 got it right on each occasion, and we think the  
2 decisions are quite that way for this Court.

3 If the Court reaches the merits for the  
4 petition of habeas corpus, we ask the petition be  
5 denied, and Happy remain where Happy is right now.

6 THE COURT: I can say this is probably the  
7 most unusual case that I've sat on in my ten years  
8 on Supreme Court and the twenty years prior to that  
9 working for the Court.

10 I've always enjoyed elephants. My biggest  
11 worry here is -- let's put it this way: I certainly  
12 agree. Your 7002(b)(3) does permit you to bring a  
13 writ for habeas corpus before any judge, but I think  
14 then 7004(c) basically says the writ is returnable,  
15 and it tells you where it's returnable.

16 I believe that you could have asked any  
17 judge in the Supreme Court to sign your papers to  
18 start off your writ of habeas corpus proceeding, but  
19 it needed to be made returnable before some county  
20 that had any -- some nexus to this elephant and his  
21 condition -- his conditions of captivity.

22 I'll just read this part. It says, "It  
23 shall be made returnable before a justice of the  
24 Supreme Court or a county court judge being or  
25 residing in the county where the person is

***NRP v. James J. Breheny***

1           detained."

2                     If we accept your belief that an animal --  
3           or this animal is a person within the meaning of the  
4           law, that animal is being detained in the Bronx  
5           County. I don't think it's even questionable that  
6           this proceeding should be there. I did mention to  
7           you on the phone, just so that I didn't surprise you  
8           all, that it was my thought that this belonged  
9           there.

10                    I have to say, though, that after I read  
11           all of your paperwork, I more strongly believe that  
12           this case belongs in the Bronx and that has to do  
13           with all of the paperwork that I received from both  
14           sides, which I found quite interesting.

15                    The experts that were -- or the learned  
16           opinions that I got on behalf of Happy to move or  
17           change his conditions indicated that there were  
18           certain facts that they relied upon, and the experts  
19           or learned information that I got with regards to  
20           the Bronx Zoo and the folks on the other side  
21           indicated that, in fact, Happy is happy where he is  
22           at, and that there, in fact, would be impacts on  
23           Happy if changes were to be made to his conditions  
24           that he is currently being held in.

25                    So I definitely believe that regardless of

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 any of the big underlying issues, that it's going to  
2 come down to at some point for a judge of the  
3 Supreme Court to decide whether or not Happy needs  
4 to be moved and where, and those decisions will  
5 require, in my opinion, adhering.

6 It will require experts to testify on both  
7 sides, and I probably can't imagine a more  
8 inconvenient place for this case to be than in  
9 Albion New York. I might be able to think of a  
10 couple, but this would be among the most  
11 inconvenient places for the parties to actually have  
12 any kind of a hearing. I certainly am not going to  
13 be bringing up employees and experts and having them  
14 fly to cities in New York and drive an hour to get  
15 there.

16 The Bronx is a convenient place. The  
17 witnesses of the conditions of Happy's confinement  
18 are there, and I would say that any experts that you  
19 would bring in or alert folks to contest that --  
20 they would also find it much easier to get to the  
21 Bronx than to Albion, New York.

22 I think that's why there are rules. That's  
23 what CPLR says. To the extent that there are any  
24 issues that you're asking this Court to decide that  
25 transcend venue, I do not want -- realizing that

***COLLEEN L. LOUNSBURY***  
***OFFICIAL COURT REPORTER***

***NRP v. James J. Breheny***

1 another Supreme Court judge is on the same level as  
2 me, I wouldn't want to have that judge in a position  
3 that he disagreed with me and is stuck, in fact,  
4 with any of my determinations where the same level  
5 of judge -- and therefore, I'm going to reserve for  
6 the judge in the Bronx County, where I'm sending  
7 this case, on any of the decisions on any of the  
8 important issues that you all raise so that he is  
9 not put in a position -- he or she is not put in the  
10 position of feeling like they have to act as an  
11 Appellate Court to any of my decisions on this case,  
12 except for change of venue, which I'm granting the  
13 defendant's motion to change venue and will be  
14 sending this to Bronx County.

15 MR. WISE: Your Honor?

16 THE COURT: Yes.

17 MR. WISE: If I just may make one attempt  
18 to change your mind?

19 THE COURT: One attempt, and I'll give  
20 Counsel an attempt to change it back.

21 MR. WISE: Thank you. I greatly appreciate  
22 this. With the greatest respect, I believe that is  
23 an improper decision. Number one, not only so  
24 that --

25 THE COURT: Just so you know, I'm not going



***NRP v. James J. Breheny***

1 to act as my own Appellate Court either. Go ahead.

2 MR. WISE: Under 7002(b)(3), the case can  
3 be filed in any -- before any judge. If the Court  
4 notes --

5 THE COURT: No, it doesn't say --

6 MR. WISE: Any Supreme Court Justice.

7 THE COURT: It says you can get a writ from  
8 any --

9 MR. WISE: Any Supreme Court Justice.  
10 7000(b)(1), (2), and (4) all specifically talk about  
11 the county of detention. So now we have been  
12 brought up to the place where this Court -- we  
13 brought the case to the Court.

14 The Court then can then issue the order to  
15 show cause and at that point, 7004 kicks in --  
16 7004(c) kicks in. At this point, this Court may  
17 then make it returnable to the county of issuance or  
18 the county of detention. So this Court made it --  
19 already made it returnable to the county of  
20 issuance. I don't believe that the Court has the  
21 power to change the venue, again.

22 THE COURT: I've never addressed that, but  
23 I think just by signing the order to show cause --  
24 as you can recall, I was hesitant to sign the order  
25 to show cause, but I didn't want to deprive you of

***NRP v. James J. Breheny***

1           your ability to make a record that you asked this  
2           Court to entertain these issues. That's really the  
3           sole reason that I did issue the order to show cause  
4           and had you all here today.

5                     MR. WISE: If I may, in order to change the  
6           venue under CPLR 511(b) or 510(1), I believe, which  
7           we cite, the burden is on the respondent to show  
8           that the venue is in the wrong place.

9                     THE COURT: They actually made that motion  
10          to change the venue.

11                    MR. WISE: No, but then they have to show  
12          that the venue -- the present venue is wrong, but  
13          the present venue is not wrong. The present venue  
14          is correct. So they have not even tried to carry  
15          their burden of showing that -- which they must do  
16          in order to change venue.

17                    You just can't change venue because they  
18          want venue changed. You have to show that the place  
19          for the venue is wrong. The place where the venue  
20          is right now is not wrong. It's correct. The  
21          reason it's correct is both under 7002 and also  
22          because this Court ordered the return to be made in  
23          the county of issuance.

24                    So the Court didn't have to, but it did,  
25          and at that point, where we are today is a correct

***NRP v. James J. Breheny***

1 venue. That means my brother has to show that it's  
2 not a correct venue, but it can't do that.  
3 Therefore, the venue may not be changed at this  
4 point to another county.

5 THE COURT: Mr. Manning?

6 MR. MANNING: I will, Your Honor. If I  
7 could treat that for a motion of reargument, I'll  
8 keep it brief. The Court's decision to transfer the  
9 case to the Bronx not only comports to the statute  
10 the Court read to us, but it also comports to the  
11 Greene case in the Second Department, which  
12 specifically indicates Article 5 applies to the  
13 habeas corpus proceedings.

14 Not only have we met our burden -- I can't  
15 imagine what else we could do. The animal is in the  
16 Bronx. None of the witnesses are here. Orleans  
17 County doesn't have a thing to do with this case --  
18 nothing -- nothing at all, except that's where we  
19 approached the Court to sign the initial order to  
20 show cause.

21 Even if we're wrong and it's perfectly  
22 proper to put it in Orleans County, the Court has  
23 the discretion -- which we also would move for -- to  
24 have the matter transferred to the Bronx on the  
25 theory that it makes the most sense, and it's an

1 appropriate place under Article 5.

2 So either way, frankly, the case belongs in  
3 the Bronx. To the extent it's a motion for  
4 reargument, we'd ask the Court to adhere to its  
5 original ruling.

6 THE COURT: I put my reasons on the record,  
7 and I'll stand by them. I do want to thank Counsel  
8 for certainly an aluminating argument. It's a very  
9 interesting issue, and I hope that it gets decided  
10 to your satisfaction.

11 MR MANNING: Thank you.

12 THE COURT: Thank you.

13 MR. WISE: Thank you, Your Honor.

14 \* \* \* \* \*

15  
16 Certified to be a true and accurate transcript.

17  
18   
19

20 COLLEEN L. LOUNSBURY  
21 OFFICIAL COURT REPORTER  
22  
23  
24  
25

COLLEEN L. LOUNSBURY  
OFFICIAL COURT REPORTER

# **EXHIBIT 4**

The Supreme Court of  
the State of New York,  
held in and for the County  
of Orleans, at the  
Courthouse thereof, 1  
South Main Street, Suite 3,  
Albion, NY on the \_\_\_\_ day  
of January, 2019.

PRESENT: HON. \_\_\_\_\_  
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

---

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

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

Petitioner

**Index No.: 18-45164**  
**ORDER TO SHOW**  
**CAUSE**

-against-

JAMES J. BREHENY, in his official capacity as Executive  
Vice President and General Director of Zoos and Aquariums  
of the Wildlife Conservation Society and Director of the Bronx  
Zoo, and WILDLIFE CONSERVATION SOCIETY,

Respondents.

---

**PLEASE TAKE NOTICE**, that upon the annexed affirmation of Elizabeth  
Stein, Esq., an attorney of record for Petitioner, THE NONHUMAN RIGHTS

PROJECT, INC., dated January 8, 2019, Petitioner's Memorandum of Law in Support of granting the Order to Show Cause, dated January 8, 2019, and all other affidavits, exhibits, and attachments filed therewith, and all prior petitions, pleadings, memoranda, demands, affidavits, exhibits, and attachments filed in this matter, the Respondents, JAMES J. BREHENY and WILDLIFE CONSERVATION SOCIETY, or their attorneys, are hereby, **ORDERED TO SHOW CAUSE** at the Courthouse located at Courthouse Square, 1 South Main Street, Suite 3, Albion, NY 14411, on the \_\_\_\_\_ day of January, 2019, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ of that date, why an order should not be made and entered pursuant to New York Civil Practice Law and Rules ("CPLR") Rule 2201 and Rule 2214(d) staying the transfer of the above-captioned proceeding from the County of Orleans to the County of the Bronx upon entry of this Court's order to transfer venue so that the Petitioner may file a motion seeking leave to reargue this Court's order to transfer venue within the time permitted under CPLR Rule 2221(d)(3), until final resolution of said motion by this Court, together with such further relief as the Court may deem just and proper.

It is THEREFORE:

**ORDERED** that, sufficient cause appearing therefore, service of a copy of this Order to Show Cause, and the papers upon which it was granted, upon Respondents' attorneys by email, as previously agreed upon by the parties, on or before January

\_\_\_\_\_, 2019 shall be deemed sufficient service thereof. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

**IT IS FURTHER ORDERED** that opposition papers, if any, must be served upon Elizabeth Stein, Esq. and Steven M. Wise, Esq. by email at the addresses listed below no later than January \_\_\_\_\_, 2019.

Dated: Albion, New York  
January \_\_\_\_, 2019

HON. \_\_\_\_\_  
Justice of the Supreme Court

ENTER:

NOTICE TO:

Karen Lake-Maynard  
County Clerk, Orleans County  
3 South Main St.  
Albion, NY 14411  
Email: Karen.Lake-Maynard@orleanscountyny.gov  
By overnight mail

Supreme & County Court, Orleans County  
Kristin E. Nicholson, Chief Clerk  
1 South Main St.  
Albion, NY 14411  
Phone: (585) 283-6657  
By email to knichols@nycourts.gov

Elizabeth Stein, Esq.



Attorney for Petitioner The Nonhuman Rights Project, Inc. on behalf of Happy  
5 Dunhill Road  
New Hyde Park, New York 11040  
Tel: (516) 747-4726  
By email to lizsteinlaw@gmail.com

Steven M. Wise, Esq.  
Attorney for Petitioner The Nonhuman Rights Project, Inc. on behalf of Happy  
5195 NW 112<sup>th</sup> Terrace  
Coral Springs, FL 33076  
Tel: (954) 648-9864  
By email to wiseboston@aol.com

PHILLIPS LYTLE LLP  
Kenneth A. Manning, Esq.  
Joanna J. Chen, Esq.  
Attorneys for Respondents James J. Breheny and Wildlife Conservation Society  
One Canalside  
125 Main Street  
Buffalo, New York 14203-2887  
Tel: (716) 847-8400  
By email to kmanning@phillipslytle.com, jchen@phillipslytle.com

# **EXHIBIT 5**

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

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

---

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

~~PROPOSED~~ *TAB*  
ORDER

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

Index No. 18-45164

Petitioner,

v.

JAMES J. BREHENY, in his official capacity as  
Executive Vice President and General Director of Zoos  
and Aquariums of the Wildlife Conservation Society and  
Director of the Bronx Zoo, and WILDLIFE  
CONSERVATION SOCIETY,

Respondents.

---

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

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

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

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

Petitioner having opposed *Amici*'s motion;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

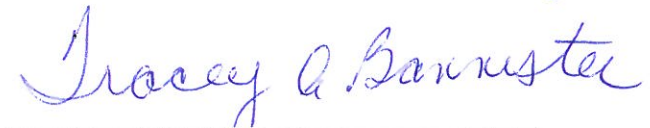
**ORDERED** that

- (i) the above-captioned proceeding, with all pleadings, motions, and papers submitted herein, shall be and hereby is transferred to the New York State Supreme Court, Bronx County; and
- (ii) the Clerk of the Court is directed to transfer this proceeding forthwith upon the entry of this Order to the New York State Supreme Court for the County of the Bronx; and it is further

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

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

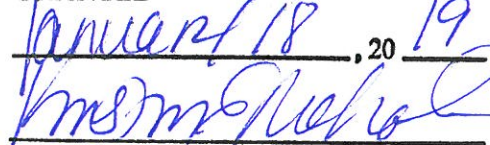
Dated: Buffalo, New York  
January 18, 2019

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

**ENTER:**

Doc #01-3169290

GRANTED

  
\_\_\_\_\_, 20 19

KRISTINE E. NICHOLSON  
Chief Clerk