

Court of Appeals
of the
State of New York

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

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

Petitioner-Appellant,

— against —

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

Respondents-Respondents.

**MOTION TO STRIKE MATERIALLY FALSE
STATEMENTS IN RESPONDENTS-RESPONDENTS'
OPPOSITION**

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— and —

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COURT OF APPEALS OF THE STATE OF NEW YORK

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

App. Div. Case No.: 2020-
02581

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

Index No.: 260441/2019
(Bronx County)

Petitioner-Appellant,

-against-

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

Respondents-Respondents.

**NOTICE OF MOTION
TO STRIKE
RESPONDENTS-
RESPONDENTS'
MATERIALLY FALSE
STATEMENTS**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, dated February 11, 2021, and the exhibits attached thereto, Petitioner-Appellant, the Nonhuman Rights Project, Inc. ("NhRP"), will move this Court, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on February 22, 2021, at 9:30 am., for an order:

- (i) striking the three materially false statements in Respondents-Respondents' Opposition to Motion for Permission to Appeal, dated February 1, 2021, detailed in the annexed affirmation, upon the grounds that those statements were made in violation of Rule 3.3(a)(1) of the Rules of Professional Conduct; and

- (ii) granting such other and further relief that this Court may deem just, proper, and equitable.

PLEASE TAKE FURTHER NOTICE, Respondents-Respondents are hereby advised that arguments will be on the papers and no appearance is required or permitted.

Dated: February 11, 2021

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF NEW YORK

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CONSERVATION SOCIETY,

Respondents-Respondents.

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

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

Dated: February 11, 2021

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COURT OF APPEALS OF THE STATE OF NEW YORK

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App. Div. Case No.: 2020-
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Petitioner-Appellant,

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

**ATTORNEY
AFFIRMATION OF
ELIZABETH STEIN IN
SUPPORT OF MOTION
TO STRIKE
RESPONDENTS-
RESPONDENTS'
MATERIALLY FALSE
STATEMENTS**

Respondents-Respondents.

I, ELIZABETH STEIN, an attorney duly admitted to practice law in the State of
New York, hereby affirm the following under penalty of perjury:

1. I am an attorney of record for Petitioner-Appellant, the Nonhuman Rights
Project, Inc. ("NhRP"), in the above-captioned matter and am not a party in this
action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read
and know the contents thereof, and submit this affirmation in support of the
within Motion to Strike Respondents-Respondents' Materially False Statements.

BACKGROUND

3. In a filing dated January 19, 2021 (Mo. No. 2021-136), the NhRP filed a Notice of Motion for Permission to Appeal to the Court of Appeals (“Motion”) with a return date of February 1, 2021.
4. Respondents-Respondents, James J. Breheny and the Wildlife Conservation Society, served and filed their Opposition to Motion for Permission to Appeal (“Opposition”) on February 1, 2021.
5. The Opposition contains three materially false statements that violate Rule 3.3(a)(1) of the Rules of Professional Conduct, which states that “[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.” The three materially false statements prejudice the NhRP.
6. In two of the three material statements, which are related, Respondents-Respondents knowingly and falsely represented New York case law. *See* Comment [4] to Rule 3.3 (“Although a lawyer is not required to make a disinterested exposition of the law, legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal.”).
7. The third statement knowingly and falsely stated that the NhRP had lost a case in Massachusetts similar to the case at bar.

**THE FIRST TWO MATERIALLY FALSE STATEMENTS MADE IN
VIOLATION OF RULE 3.3(a)(1) OF THE RULES OF PROFESSIONAL
CONDUCT**

8. The first materially false statement is found on the very first page of the Opposition in the “Preliminary Statement,” where Respondents-Respondents write: “All four of New York’s Departments of the Appellate Division have repeatedly rejected NRP’s position that animals qualify as ‘persons’ under CPLR Article 70.” Attached as **Exhibit 1** is a true and accurate copy of page 1 of the Opposition.
9. This material statement refers to four Appellate Division decisions in the NhRP’s prior habeas corpus cases on behalf of chimpanzees, specifically:
- *In the Matter of Nonhuman Rights Project, Inc. v. Samuel L Stanley*, 2014 WL 1318081 (2d Dept. 2014) (“*Stanley*”);
 - *Matter of Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015) (“*Presti*”);
 - *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014) (“*Lavery I*”); and
 - *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73 (1st Dept. 2017) (“*Lavery II*”).

Attached hereto as **Exhibit 2** are true and accurate copies of pages 5 – 9 of the Opposition, in which Respondents-Respondents cite and describe the four decisions.

10. The statement is material since it is the basis of Respondents-Respondents’ legal argument that the NhRP’s Motion “does not raise a novel or difficult issue of law.” **Exhibit 2**, at 5. In a section titled, “All Four Departments of the Appellate Division Have Rejected NRP’s Position,” Respondents-Respondents argue that “[i]n light of these decisions, the issue presented in this case cannot be considered novel.” *Id.* at 5 – 6.
11. The second materially false statement, related to the first, is found on page 6 of the Opposition, where Respondents-Respondents write that “these *unanimous rulings* demonstrate that the question is not a difficult one.” **Exhibit 2**, at 6 (emphasis added). It is material for the same reason as the first statement.
12. Both statements are false since neither the Second nor Fourth Departments have *ever*—let alone “repeatedly”—rejected the NhRP’s position that certain nonhuman “animals qualify as ‘persons’ under CPLR Article 70.”
13. In *Stanley*, the Second Department dismissed the NhRP’s appeal *sua sponte* without briefing and without argument, “on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice.” 2014 WL 1318081 at *1. As the court did not even consider the NhRP’s appeal, it did not—and could not—rule or opine on the merits of the case. Neither the word “person” nor CPLR Article 70 is mentioned or referenced in the court’s Decision & Order on Motion.

14. Respondents-Respondents know their two statements are false as they state in a footnote on page 6 of the Opposition that the “Second Department [in *Stanley*] dismissed NRP’s appeal *sua sponte* because no appeal was available.” See **Exhibit 2**, at 6.

15. In *Presti*, the Fourth Department made clear that it was *not* ruling on the issue of whether chimpanzees—or any nonhuman animal—were “persons” within the meaning of CPLR Article 70. To the contrary the court *twice* assumed without deciding that they could be “persons”:

Regardless of whether we agree with petitioner’s claim that Kiko is a person within the statutory and common-law definition of the writ, habeas corpus relief nonetheless is unavailable as [that] claim[], even if meritorious, would not entitle [Kiko] to immediate release.

[. . .]

Consequently, even assuming, arguendo, that we agreed with petitioner that Kiko should be deemed a person for the purpose of this application . . . this matter is governed by the line of cases standing for the proposition that habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself.

124 A.D.3d at 1335 (internal quotations and citations omitted).

16. Respondents-Respondents know their two statements are false as they state on page 9 of the Opposition: “The Fourth Department has likewise held that ‘[r]egardless of whether we agree with petitioner’s claim that [a chimpanzee] is a person within the statutory and common-law definition of the writ, habeas

corpus relief nonetheless is unavailable as that claim, even if meritorious, would not entitle [the chimpanzee] to immediate release.” (quoting *Presti*, 124 A.D.3d at 1335). **Exhibit 2**, at 9.

17. Throughout this litigation, Respondents-Respondents have persistently repeated their materially false statement that all four Appellate Division Departments have rejected the NhRP’s position on personhood, even though the NhRP has repeatedly pointed out that this assertion is false.

18. In their brief to the First Department below, Respondents-Respondents falsely stated that “all four Departments of the Appellate Division have rejected NRP’s argument,” in a section titled: “U.S. courts remain unanimously opposed to recognizing animals as ‘persons’ entitled to habeas corpus relief.” Resp’t Br. at 14. Attached as **Exhibit 3** are true and accurate copies of pages 14 – 15 of Respondents-Respondents’ Brief.

19. The NhRP contradicted this statement by pointing out in its Reply Brief that the statement was false. Attached as **Exhibit 4** is a true and accurate copy of page 10 of the NhRP’s Reply Brief, in which the NhRP stated the following in footnote 9:

The Zoo falsely claims that “all four Departments of the Appellate Division have rejected NRP’s argument.” Resp’t Br. 13-14. Only *Lavery I* and *Lavery II* (in dicta) discussed whether chimpanzees are “persons” for purposes for habeas corpus. The Fourth Department in *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (4th Dept. 2015) (“*Presti*”) denied relief on the ground that seeking a

chimpanzee's release to a sanctuary was not available under habeas corpus. The Second Department dismissed NhRP's appeal without briefing or argument. *Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 (2d Dept. 2014).

20. At oral argument before the Supreme Court, Bronx County on September 23, 2019, counsel for Respondents-Respondents similarly stated: "And we moved to dismiss the petition based upon not one but four Appellate Division decisions, one from each Judicial Department, establishing that habeas corpus proceedings are not available for animals." Attached as **Exhibit 5** is a true and accurate copy of page 4 of the September 23, 2019 transcript.
21. Counsel for the NhRP then contradicted this statement by pointing out that it was false: "Your Honor, my brother gave you a narrative in which he would have you believe that all Four Appellate Division Departments have ruled against our arguments on the merits. I'm sure it's slipped his mind as to what is actually going on." Attached as **Exhibit 6** are true and accurate copies of pages 25 – 27 of the September 23, 2019 transcript, in which NhRP counsel explained that the Second and Fourth Departments did not rule on the merits question of personhood.
22. At oral argument before the Supreme Court, Orleans County, on December 14, 2018, prior to this case's transfer to Bronx County, counsel for Respondents-Respondents also stated:

During the recitation from NRP, there wasn't a peep about the controlling precedent from all four Appellate Divisions . . . indicating that elephants, or chimps, or any animal for that matter is simply not

the beneficiary of a habeas corpus petition, because they are simply not a person.

Attached as **Exhibit 7** is a true and accurate copy of page 13 of the December 14, 2018 transcript.

23. In rebuttal, counsel for the NhRP again contradicted this statement by pointing out that the statement was false: “First of all, the Second Department case and the Fourth Department case were not on the merits. You have the two Lavery cases in the Third Department and in the First Department.” Attached as **Exhibit 8** is a true and accurate copy of page 22 of the December 14, 2018 transcript.

**THE THIRD MATERIALLY FALSE STATEMENT MADE IN
VIOLATION OF RULE 3.3(a)(1) OF THE RULES OF PROFESSIONAL
CONDUCT**

24. In the sentence immediately following their first materially false statement, on the very first page of the Opposition in the “Preliminary Statement,” Respondents-Respondents write: “State courts in Connecticut and *Massachusetts* have similarly denied *NRP’s habeas corpus petitions* filed on behalf of other animals.” **Exhibit 1** (emphases added).
25. The case in Massachusetts refers to a recent unpublished opinion decided by the Appeals Court of Massachusetts regarding a habeas corpus petition filed on behalf of two Asian elephants: *Rowley v. City of New Bedford*, 2020 WL 7690259 (Mass. Ct. App. 2020). Attached as **Exhibit 9** are true and accurate copies of

pages 11 – 13 of the Opposition, in which Respondents-Respondents discuss and cite *Rowley* specifically on pages 11 and 13.

26. The statement is material as it forms a basis of Respondents-Respondents’ legal argument for denying the NhRP’s Motion (*see* paragraph 10).
27. The statement is false because the NhRP did not file the habeas corpus petition in *Rowley* and has never filed any case of any kind in Massachusetts.
28. As the case name makes clear, the habeas corpus petition in *Rowley* was filed by a petitioner named Joyce Rowley, not the NhRP. *See* 2020 WL 7690259 at *1 (“Joyce Rowley filed a petition for a writ of habeas corpus on behalf of two Asian elephants, Ruth and Emily, seeking their immediate release from Buttonwood Park Zoo in New Bedford.”). Rowley is not an attorney, was “not properly acting pro se,” and her actions in litigating the petition “constitute[d] the unauthorized practice of law.” *Id.* at *1 n.2.
29. Moreover, the NhRP in *Rowley* sought leave to file an amicus brief on behalf of *neither party* in order to bring to the court’s attention the fact that Joyce Rowley was not an attorney, had failed to place the necessary expert opinions before the trial court, was incapable of making a competent legal argument, and to ask that the court therefore not reach the broader issue of whether elephants or nonhuman animals were “persons.” Attached hereto as **Exhibit 10** are true and accurate copies of pages 10 – 12 of the NhRP’s amicus brief, in which the NhRP urged

that, if the Appeals Court chose to affirm the lower court, “it should restrict any ruling to the ‘four corners’ of the petition solely as it relates to Ruth and Emily and not reach the broader issue of whether elephants or nonhuman animals are ‘persons’ in Massachusetts.” *Id.* at 11 – 12. The amicus brief noted that “Ms. Rowley was singularly unqualified to present either the facts or the law necessary for a full and favorable determination,” as she was a “pro se non-lawyer with no expertise in elephant cognition or behavior.” *Id.* at 11.

30. However, the Appeals Court never ruled on the NhRP’s motion for leave to file its amicus brief, and there is no indication that the brief was considered in the court’s unpublished opinion.

31. Having cited *Rowley* twice in the Opposition, *see Exhibit 9*, at 11 and 13, it is obvious that Respondents-Respondents know their statement is false.

**RESPONDENTS-RESPONDENTS DECLINE PETITIONER-
APPELLANT’S REQUEST TO CORRECT TWO OF THEIR
MATERIALLY FALSE STATEMENTS**

32. On February 3, 2021, NhRP counsel and President Steven M. Wise, Esq. informed counsel for Respondents-Respondents via email that their materially false statements violate Rule 3.3(a)(1) of the Rules of Professional Conduct and of their duty to correct them. Attached hereto as **Exhibit 11** is a true and accurate copy of Attorney Wise’s email to Kenneth Manning, Esq., Joanna Chen, Esq.,

and William Rossi, Esq., of the law firm Phillips Lytle LLP, who are the attorneys of record for Respondents-Respondents.

33. In that email, Attorney Wise wrote:

We just received your Opposition to our Motion for Permission to Appeal. We bring two false statements of material facts and/or law to your attention.

First, on the first page of your Opposition you write that “All four of New York’s Departments of the Appellate Division have repeatedly rejected NRP’s position that animals qualify as ‘persons’ under CPLR Article 70.” As you know only the First and Third Departments have rejected this position and only the First Department has rejected it more than once.

Second, on that same page you stated that “State courts in ... Massachusetts have similarly denied NRP's habeas corpus petitions filed on behalf of other animals.”

As you know the NhRP has never filed a habeas corpus petition in Massachusetts.

[...]

Pursuant to Rule 3.3(a)(1) you have the duty to correct both false statements. If you fail to comply with your duty under Rule 3.3(a)(1) by close of business on Friday, February 5, 2021, we will take whatever actions we deem necessary.

34. On February 5, 2021, Attorney Manning responded to Attorney Wise’s email in a letter in which he “decline[d] to make any further clarifications,” but notably did not deny that the two statements are false. Rather, Attorney Manning tried to excuse or justify Respondents-Respondents’ materially false statements by referring to other parts of the Opposition. But the truth of those *other* statements

does not excuse or justify the fact that Respondents-Respondents made materially false statements. Instead, it strongly demonstrates Respondents-Respondents' knowledge that the statements at issue are indeed false. Attached hereto as **Exhibit 12** is a true and accurate copy of Attorney Manning's letter.

35. With respect to the first materially false statement, Attorney Manning writes:

Regarding the first identified statement, and as explained in our opposition to NhRP's motion for leave to appeal, NhRP previously appealed to each of the department of the Appellate Division following an unsuccessful petition for habeas corpus on behalf of an animal, and each appeal was unsuccessful. All of these decisions are cited and described in our opposition in detail, including the legal grounds and procedural posture of each appeal. Opp. Brief, pp. 5-9.

36. By referencing the descriptions on pages 6 and 9 in the Opposition (discussed above in paragraphs 14 and 16), Attorney Manning confirmed Respondents-Respondents' knowledge that the Second and Fourth Departments did *not* reject the NhRP's position that certain nonhuman "animals qualify as 'persons' under CPLR Article 70."

37. With respect to the third materially false statement, Attorney Manning writes:

Regarding the second identified statement, our introduction refers to state court decisions in both Connecticut and Massachusetts. . . . The Appeals Court of Massachusetts affirmed dismissal of a petition seeking the same relief shortly thereafter, after NhRP also submitted a brief to the court. Again, our opposition discusses these decisions in detail, and identifies the named petitioner in each case. Opp. Brief, pp. 9-11.

38. Again, by referencing page 11 in the Opposition (discussed above in paragraphs 25 and 31), Attorney Manning confirmed Respondents-Respondents' knowledge that the NhRP did *not* file the Massachusetts habeas corpus petition at issue in *Rowley*.

39. Attorney Manning also referenced the amicus curiae brief that the NhRP sought leave to file with the Massachusetts Appeals Court (in support of *neither party*), thus further confirming Respondents-Respondents' knowledge that the NhRP did not file the petition in *Rowley*.

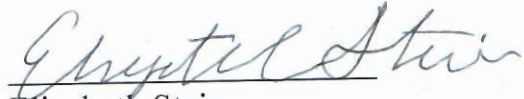
40. As Respondent-Respondents have refused to correct the materially false statements as required by Rule 3.3(a)(1) of the Rules of Professional Conduct, which the NhRP brought to their attention, and as the NhRP is not permitted to file a reply to Respondents-Respondents' Opposition, the NhRP respectfully submits this motion to ensure that the papers before this Court bear the truth and do not prejudice the NhRP.

41. Pursuant to 22 NYCRR 130-1.1a(b), I certify that this motion is not frivolous.

WHEREFORE, I respectfully request that this Court enter an order granting the NhRP's Motion to Strike Respondents-Respondents' Materially False Statements, together with such other and further relief as the Court may deem just, proper, and equitable.

Dated: February 11, 2021

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Elizabeth Stein", written in dark ink.

Elizabeth Stein

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EXHIBIT 1

PRELIMINARY STATEMENT

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

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

Accepting NRP’s radical argument would have far-reaching effects. As the First Department unanimously recognized below, “[a] judicial determination that species other than homo sapiens are ‘persons’ for some juridical purposes, and therefore have certain rights, would lead to a labyrinth

EXHIBIT 2

lead to a labyrinth of questions that common-law processes are ill-equipped to answer.” *Id.* (internal quotation marks and citation omitted).

ARGUMENT

POINT I

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

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

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

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

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

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

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.

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

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

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

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

purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law” and noted there was no support “in state law, or under English common law, that an animal could be considered a ‘person’ for the purposes of common-law habeas corpus relief.” *Lavery I*, 124 A.D.3d at 150. Instead, “the ascription of rights has historically been connected with the imposition of societal obligations and duties.” *Id.* at 151. Finally, the court noted that “[t]he Legislature has extended significant protections to animals,” and NRP “is fully able to importune the Legislature to extend further legal protections to chimpanzees.” *Id.* at 152-53.

In a prior decision, the First Department similarly concluded that NRP’s “position is without legal support or legal precedent.” *Lavery II*, 152 A.D.3d at 77. It too noted that “[t]he asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions.” *Id.* at 78. The court rejected NRP’s argument that infants or the comatose lack duties but possess rights, stating it “ignores the fact that these are still human beings, members of the human community.” *Id.* “[T]he according of any fundamental legal rights to animals, including entitlement to

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

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

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

B. Courts in Other Jurisdictions Have Reached the Same Conclusion

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

EXHIBIT 3

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 decisions³ 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).

EXHIBIT 4

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

Lavery I and *Lavery II*’s personhood determinations are neither binding nor persuasive as they were based on demonstrable misunderstandings of the law and are evidently contrary to reason.⁹ Appellant Br. 31-52. The Zoo, ignoring or mischaracterizing NhRP’s arguments, embraced *Lavery I* and *Lavery II*’s misunderstandings that: (1) a “person” must have the capacity to bear duties, 124 A.D.3d at 151-52; 152 A.D.3d at 78, and (2) a “person” must be a human being. 124 A.D.3d at 152.n.3; 152 A.D.3d at 78. Resp’t Br. 13-14; 22-23; 25-29; 31-34¹⁰

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

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

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1 MR. MANNING: I will.

2 THE COURT: Okay, Mr. Manning.

3 MR. MANNING: Okay, Your Honor, if I may.

4 This habeas corpus proceeding has been brought by
5 the petitioner on behalf of a forty-eight year old Asian
6 Elephant situated in the Bronx Zoo. The proceeding was
7 brought approximately a year ago. It will be celebrating
8 its first birthday on October 2nd. When we received the
9 petition for habeas corpus we made a motion. It was brought
10 in Orleans County. We made a motion to transfer venue to
11 the Bronx, where Happy the Elephant resides. And we moved
12 to dismiss the petition based upon not one but four
13 Appellate Division decisions, one from each Judicial
14 Department, establishing that habeas corpus proceedings are
15 not available for animals. And we made that motion to
16 dismiss. In the alternative, Judge Tracey Bannister
17 transferred the case here, pursuant to an order, and when
18 she did --

19 THE COURT: Right.

20 MR. MANNING: -- she transferred any orders she
21 didn't expressly decide, she transferred to this Court for a
22 decision. And that's why we are here today on a motion to
23 dismiss.

24 Our argument will be briefer than the
25 petitioner's, Your Honor. We rely on the decision from the

EXHIBIT 6

1 and sisters. We are very comradely there. So I
2 automatically do it.

3 I just want to make clear I am not related to them
4 by blood, but when I refer to them I automatically refer to
5 them as my "brother" and "sister."

6 THE COURT: Thank you for clarifying.

7 Okay, Mr. Wise.

8 MR. WISE: Your Honor, my brother gave you a
9 narrative in which he would have you believe that all Four
10 Appellate Division Departments have ruled against our
11 arguments on the merits. I'm sure it's slipped his mind as
12 to what is actually going on.

13 THE COURT: Okay. And you can tell me which
14 department and which case --

15 MR. WISE: I am about to --

16 THE COURT: -- was not --

17 MR. WISE: -- list them from east to, from east to
18 west.

19 THE COURT: Okay, I'm ready.

20 MR. WISE: So, the Second Department --

21 THE COURT: Okay.

22 MR. WISE: -- in 2015, The Nonhuman Rights Project
23 sought an order to show cause on behalf of certain
24 chimpanzees. The judge refused to issue the order to show
25 cause, and when we appealed to the Second Department, the

1 Second Department, without having us brief the case, simply
2 sua sponte dismissed our appeal on grounds that we didn't
3 have a right to appeal.

4 Even the commentary in Article 70 in the CPLR
5 notes that they made a mistake. It is obvious that we have
6 a right to appeal. But we decided at that point not to go
7 up to the Court of Appeals on it because we also knew that,
8 that res judicata and estoppel don't apply in habeas corpus
9 cases, and we would then re-file that case in some other
10 court, which we eventually did.

11 THE COURT: And the name of that case was?

12 MR. WISE: It was The Nonhuman Rights Project
13 versus Stanley, who is the President of the Stony Brook
14 University.

15 THE COURT: Okay.

16 MR. WISE: It is an unreported case because the
17 Second Department simply sent us a one paragraph decision
18 saying that we sua sponte dismissed your case because you
19 don't have a right to appeal. We were confident that we
20 did. I think it is clear that that we did and we since then
21 have appealed several times and no other court has ever told
22 us that, whether it is the Court of Appeals or whether it is
23 another Appellate department that we don't have a right to
24 appeal.

25 THE COURT: But -- so that's solely the --

1 MR. WISE: Appeal.

2 THE COURT: -- that's the Second Department.

3 MR. WISE: Now I will get to the other
4 departments.

5 THE COURT: Okay.

6 MR. WISE: I will skip over to the west. We also
7 filed it on behalf of a chimpanzee, that was called The
8 Nonhuman Right Project versus Presti, P-r-e-s-t-i.

9 That court again did not reach the merits of the case,
10 affirmed the refusal of the Supreme Court Justice to issue
11 it on the grounds that the Court said for reasons which will
12 have to remain with the Court, that The Nonhuman Rights
13 Project had not asked that the chimpanzee be released, but
14 only asked that we remove the chimpanzee from the cage in
15 which he was in to an island in Florida where it would, a
16 sanctuary, and you were not allowed to do that in New York,
17 I will get into why, that decision.

18 THE COURT: That was?

19 MR. WISE: That was the Fourth Department.

20 THE COURT: Okay, Fourth.

21 MR. WISE: Not only was that decision just as
22 wrong as the Second Department, but I will talk about in
23 when we talk about, go up to the Court of Appeals on our
24 third time, Judge Fahey, in which specifically points out
25 that it is wrong.

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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

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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

EXHIBIT 9

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

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

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

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

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

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

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

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

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

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ARGUMENT

I. Introduction

The issue of whether Ruth and Emily are “persons” for purposes of securing habeas corpus relief is novel, highly complex, and profound. Its proper judicial determination requires the careful consideration of numerous scientific facts attested to by qualified experts on elephant cognition and behavior, as well as rigorous argument regarding law, public policy, ethics, and history.

Ms. Rowley raised the issue of Ruth and Emily’s personhood before the Bristol Superior Court when she filed a Petition for a Writ of Habeas Corpus pursuant to G.L. c. 248 § 36 seeking to free them from their long imprisonment at the Buttonwood Park Zoo (“Zoo”)⁴ to an elephant sanctuary.⁵ Because elephants, such as Ruth and Emily, are extraordinarily cognitively complex, autonomous, and self-determining beings, who would normally engage in numerous and complex social relationships and have evolved to move twenty miles a day, Amicus believes that any elephant detained in a cramped and lonely place like the Zoo should be

⁴ Defendant-Appellee, The City of New Bedford (“City”), owns and operates the Zoo.

⁵ The Petition was denied on the grounds that: “1) the Court does not adopt petitioner's argument that Ruth and Emily are “persons”; and 2) in any event, the Federal Court has already determined that the elephants are lawfully held in captivity, negating the right to a writ. See G. L. c. 248, § 1; Rowley v. City of New Bedford, 2019 U.S. Dist. Lexis 16389 @ 20-21 (Young, J).” Appellant’s Brief, Addendum p. 18.

immediately moved to a sanctuary, unless there is a compelling medical reason against doing so. Unfortunately, however, as a pro se non-lawyer⁶ with no expertise in elephant cognition or behavior,⁷ Ms. Rowley was singularly unqualified to present either the facts or the law necessary for a full and favorable determination.⁸

Amicus submits this Brief to inform the Court on the depth, complexity, and gravity of the issues involved and to urge the Court to reach a narrow determination based solely upon Ms. Rowley's petition which does not foreclose future, properly prepared, and well-pled habeas corpus petitions on behalf of one or more nonhuman animals in Massachusetts.

Specifically, if this Court chooses to affirm the Superior Court's denial, it should restrict any ruling to the "four corners" of the petition solely as it relates to Ruth and Emily and not reach the broader issue of whether elephants or nonhuman

⁶ Ms. Rowley has a Bachelor of Science degree in geology, a Masters degree in community planning and "worked for the USDA Soil Conservation Service as a construction supervisor and as a community planner for twenty-three years." Appellee Brief at 8-9.

⁷ As noted by the City, "[a]lthough [Ms. Rowley] has read articles regarding elephant care and has personally observed the living conditions of Ruth and Emily, [she] has no specialized training in zoology or veterinary techniques, relating to elephants." Appellee Brief at 9. As also noted by the City, Ms. Rowley submitted no expert testimony in support of her petition to the Superior Court. *Id.* at 30.

⁸ While Ms. Rowley is afforded some leniency as a pro se litigant, "[p]leadings must stand or fall on their own." *Mmoe v. Commonwealth*, 393 Mass. 617, 620 (1985) (Superior Court "should not have gone beyond the complaint" when ruling on defendant's motion to dismiss).

animals are “persons” in Massachusetts.⁹ To do otherwise would work a deep injustice on nonhuman animals in the Commonwealth and could cripple an area of the law undergoing rapid positive development in other jurisdictions.

II. If this Court chooses to affirm the Superior Court’s denial of Ms. Rowley’s petition, it should do so solely as it relates to Ruth and Emily in this case.

Presented with proper facts and legal argument, courts are beginning to analyze the issue of nonhuman personhood with respect and respond thoughtfully.¹⁰ In 2018, Judge Eugene M. Fahey of the New York Court of Appeals recognized that the issue of “whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far reaching.” Tommy, 31 N.Y.3d at 1059 (Fahey, J., concurring) (Tommy is reproduced in Appellant’s Brief, Addendum at pp. 75-80).¹¹ Grappling with the question of whether a chimpanzee has the right to liberty protected by habeas corpus, Judge Fahey wrote:

⁹ Significantly and contrary to the City’s assertion, the Superior Court’s denial of the petition was not made on the ground that “elephants are not ‘persons’ for purposes of G.L. c. 248.” Appellee Brief at 23. In fact, the Superior Court limited its denial solely to Ruth and Emily, stating: “the Court does not adopt petitioner’s argument that Ruth and Emily are ‘persons.’” Addendum to Appellant’s Brief, p. 18.

¹⁰ See Stanley, 16 N.Y.S.3d at 917 (“The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed.”). Relying in part upon Presti, the Appellate Division, Fourth Judicial Department later stated that “it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals.” People v. Graves, 163 A.D. 3d 16, 21 (4th Dept. 2018).

¹¹ In Tommy, Judge Fahey concurred in the decision to deny Amicus’ motion for leave to appeal on a procedural ground, but wrote “to underscore that denial of leave

EXHIBIT 11



Spencer Lo <slo@nonhumanrights.org>

From Steven Wise

elizabeth stein posner <lizsteinlaw@gmail.com>
To: Spencer Lo <slo@nonhumanrights.org>

Thu, Feb 4, 2021 at 2:35 PM

----- Forwarded message -----

From: **Steven Wise** <wiseboston@aol.com>

Date: Wed, Feb 3, 2021 at 10:41 AM

Subject: Re: From Steven Wise

To: kmanning@phillipslytle.com <kmanning@phillipslytle.com>, jchen@phillipslytle.com <jchen@phillipslytle.com>, wrossi@phillipslytle.com <wrossi@phillipslytle.com>, lizsteinlaw@gmail.com <lizsteinlaw@gmail.com>

Dear Ken, Joanna, and William:

I trust that you and yours are safe and healthy.

We just received your Opposition to our Motion for Permission to Appeal. We bring two false statements of material facts and/or law to your attention.

First, on the first page of your Opposition you write that "All four of New York's Departments of the Appellate Division have repeatedly rejected NRP's position that animals qualify as 'persons' under CPLR Article 70." As you know only the First and Third Departments have rejected this position and only the First Department has rejected it more than once.

Second, on that same page you stated that "State courts in ... Massachusetts have similarly denied NRP's habeas corpus petitions filed on behalf of other animals."

As you know the NhRP has never filed a habeas corpus petition in Massachusetts.

New York Rules of Professional Conduct 3.3(a)(1) states that:

"A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

Both statements violate this rule.

Pursuant to Rule 3.3(a)(1) you have the duty to correct both false statements. If you fail to comply with your duty under Rule 3.3(a)(1) by close of business on Friday, February 5, 2021, we will take whatever actions we deem necessary.

Thank you.

Steve

EXHIBIT 12



Phillips Lytle LLP

Via E-Mail and U.S. Mail

February 5, 2021

Steven M. Wise, Esq.
5195 NW 112th Terrace
Coral Springs, Florida 33076
wiseboston@aol.com

Re: *The Nonhuman Rights Project, Inc., on behalf of Happy v. James J. Breheny, et al.*
Docket Nos.: CA 2020-02581; Index No. 260441/19

Dear Steve,

After reviewing in context the statements you identified, we decline to make any further clarifications. Regarding the first identified statement, and as explained in our opposition to NhRP's motion for leave to appeal, NhRP previously appealed to each department of the Appellate Division following an unsuccessful petition for habeas corpus on behalf of an animal, and each appeal was unsuccessful. All of these decisions are cited and described in our opposition in detail, including the legal grounds and procedural posture of each appeal. Opp. Brief, pp. 5-9.

Regarding the second identified statement, our introduction refers to state court decisions in both Connecticut and Massachusetts. The opposition further describes that in two successive appeals, the Appellate Court of Connecticut affirmed dismissal of petitions brought by NhRP seeking habeas corpus relief for elephants. The Appeals Court of Massachusetts affirmed dismissal of a petition seeking the same relief shortly thereafter, after NhRP also submitted a brief to the court. Again, our opposition discusses these decisions in detail, and identifies the named petitioner in each case. Opp. Brief, pp. 9-11.

We trust that the foregoing resolves your concerns. If NhRP nevertheless decides to contact the Court regarding the identified statements, we request that a copy of our correspondence herein be included.

ATTORNEYS AT LAW

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Steven M. Wise, Esq.
Page 2

February 5, 2021

Very truly yours,

Phillips Lytle LLP

By

Kenneth A. Manning

Doc #9456007.1

cc (via email):

Elizabeth Stein, Esq.
lizsteinlaw@gmail.com

STATE OF NEW YORK)
)
COUNTY OF NEW YORK)

ss.:

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

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

On February 11, 2021

deponent served the within: **Motion to Strike Materially False Statement in
Respondent's Opposition**

upon:

**Kenneth A. Manning
Joanna J. Chen
William V. Rossi
Phillips Lytle LLP
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the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on February 11, 2021



MARIA MAISONET

Notary Public State of New York

No. 01MA6204360

Qualified in Queens County

Commission Expires Apr. 20, 2021



Job# 302102