APL 2021-00087
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Appellate Division–First Department Case No. 2020-02581

Court of Appeals
of the
State of New York

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

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

OPPOSITION TO MOTION FOR REARGUMENT IN APL 2021-00087

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PRELIMINARY STATEMENT

Respondents James J. Breheny and Wildlife Conservation Society respectfully submit this memorandum of law in opposition to Petitioner the Nonhuman Rights Project, Inc.'s ("NRP") motion for leave to reargue.

On the very same day this Court rendered its decision affirming dismissal of NRP's petition, NRP announced its disappointment in a "loss for Happy" on one hand, but on the other hand, they "look forward to citing the[] dissents in our elephant rights case already underway in California."[1] In other words, having exhausted every judicial resource available in New York (and Connecticut),[2] NRP is resigned to using this Court's dissenting opinions as ammunition elsewhere, with California as the next stop on its self-described "state by state, country-by-country, long term litigation campaign." A. 321.

Despite having moved on to a new state, NRP still moves for reargument here. The motion should be denied.

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[1] Nonhuman Rights Project, Inc., "Statement on New York Court of Appeals Decision in Historic Elephant Rights Case," June 14, 2022 (Press Release) (available at: nonhumanrights.org/media-center/statement-court-of-appeals-decision/). *See Nonhuman Rights Project, Inc. v. Fresno's Chaffee Zoo Corporation*, CPF-22-517751 (Cal. Super. Ct., San Francisco Cnty) (the "elephant rights case already underway," in California).

[2] NRP filed petitions in two separate Superior Courts in Connecticut, concerning the same elephants, and pursued appeals unsuccessfully to the point of exhaustion. *Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford & Sons, Inc.*, 2017 WL 7053738, at *1 (Conn. Super. Ct. Dec. 26, 2017), *aff'd* 216 A.3d 839, 844, 846 (Conn. App. Ct. 2019), *cert. denied* 217 A.3d 635 (Conn. 2019); *Nonhuman Rights Project, Inc. ex rel. Beulah v. R.W. Commerford & Sons*, 2019 WL 1399499, at *3 (Conn. Super. Ct. Feb. 13, 2019); *aff'd* 2020 WL 2504955, at *5 (Conn. App. Ct. May 19, 2020); *cert. denied* 335 Conn. 929 (July 7, 2020).

ARGUMENT

Reargument is a narrow remedy. The Court may reconsider its own determination if the movant demonstrates that the Court overlooked a controlling rule of law, or misconstrued a matter of fact. *People v. Tenkleff*, 93 N.Y.2d 1034, 1034 (1999). In contrast, reargument "is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *William . Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992), *lv. denied and dismissed* 80 N.Y.2d 1005, *rearg. denied* 81 N.Y.2d 782.

NRP's motion is in the latter category. Considering the stark legal claim that NRP put forward on this appeal, and the thorough analysis of the Majority opinion, it is clear that the Court did not misapprehend the issue. Nonetheless, to shoe-horn their arguments into the last possible motion available in this state—having invoked virtually every other motion possible during the history of this case—NRP asserts that the Majority failed to grasp "why Happy's imprisonment is unlawful." NRP Mem.[3] p. 1. But having received endless briefing from NRP and the seventeen *amici* that it funded, the Court did not miss the point. The Court understood correctly that NRP's

[3] NRP's Memorandum of Law in Support of its Motion for Reargument, dated July 14, 2022 ("NRP Mem.")

request was not for the Court to find a violation of existing New York law, but to declare that Happy's environment is unlawful, or in NRP's words, grant an "extension" of New York law. A. 32, ¶ 2. The Court rightly rejected that request, because "the writ of habeas corpus is intended to protect the liberty right of human beings to be free of unlawful confinement," and therefore "it has no applicability to Happy, a nonhuman animal who is not a 'person' subjected to illegal detention." *Nonhuman Right Project v. Breheny*, __ N.Y.3d __, 2022 N.Y. Slip Op. 03859, at *1 (June 14, 2022) ("Decision").

Accordingly, NRP's complaint is not that the Court misunderstood NRP's argument, but that its request to change the law was denied. NRP talks past this holding by citing the Court's two dissenting opinions as the primary authority that was "overlooked." Yet this tactic is self-defeating, because a dissenting opinion is not precedent, and the Majority and Dissenting opinions (and NRP's motion papers) cite and analyze the very same authorities.[4] The fact that NRP believes such authorities should lead to different policy outcomes is a difference of opinion, not a mistake of law.

[4] For example, NRP relies on *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973), *Tweed v. Libscomb*, 60 N.Y. 599, 569 (1875), and *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 440-41 (9th Cir. 1946) in its memorandum in support of reargument. But NRP's selective view of these cases was not overlooked by the Majority, insofar as the Majority cited and analyzed each of these cases. These same decisions were cited in the Dissenting opinions, too. The Majority simply rejected NRP's slanted application of these and other decisions. *Compare* Decision, pp., 3-4 (Majority) *with* Decision, pp. 9-10 (Wilson, J., dissenting) *and* NRP Mem. pp. 13, 29.

A. The Court did not misapprehend NRP's position about "unlawfulness" or "autonomy"

NRP complains that the Court "misapprehended [its] position," explaining that its argument, properly understood, is that Happy's presence at the Bronx Zoo is "*unlawful under the common law*, specifically because Happy's imprisonment deprives her of the ability to exercise her autonomy in meaningful ways . . . ." NRP Mem. p. 4 (emphasis in original). The Court did not miss this point. The Majority explained that "the selective capacity for autonomy" is not a recognized or legally sound basis to determine who can or cannot petition for habeas corpus, especially because NRP provides no definition for "autonomy," despite presenting this term as the benchmark of habeas corpus rights. And, as a result, the term "could reasonably be applied to a vast number of species." Decision, p. 6.

Nor did the Court "misapprehend" that habeas corpus is rooted in the common law. NRP Mem. p. 4. After analyzing common law principles, tracing the case law that developed the Great Writ in New York, and emphasizing that habeas corpus is enshrined in the New York Constitution for all people, the Court reaffirmed the simple but grand principle that "the great writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law." Decision, p. 4 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973); *Tweed v. Libscomb*, 60 N.Y. 599,

569 (1875); *Sisquoc Ranch Co. v. Roth*, 153 F.2d 437, 440-41 (9th Cir. 1946)).[5] This holding conflicts only with NRP's opinion, not a principle of law.

Perhaps recognizing this, NRP switches gears, simply calling this reasoning "arbitrary and irrational," and repeats yet again the analogy to historically disenfranchised humans who achieved freedom through habeas corpus. NRP Mem. pp. 12-13. This facile comparison was also not overlooked by the Majority opinion, but rightly rejected. As the Majority pointed out, drawing a "logical progression" from these historically marginalized groups "to granting an elephant the right to bring a habeas corpus proceeding" is "an odious comparison with concerning implications." Decision, p. 4.

B. The Court did not misunderstand the remedy sought by NRP

NRP objects to another alleged misapprehension of their case, in that the Majority (1) observed that an elephant sanctuary is also a confined environment; and (2) held that transferring Happy to a sanctuary would not constitute "release" as provided by habeas corpus. NRP Mem. pp. 8-11.

[5] The Majority is not alone in referencing these cases. Each case was cited in the Dissenting opinions and by NRP in its Memorandum of Law. The Majority cited *Preiser* twice, the Dissent five times, and NRP once. The Marjority cited *People ex rel. Tweed* four times, the Dissent six times and NRP twice. Finally, the Majority cited *Sisquoc Ranch* once, the Dissent twice and NRP once. This certainly does not fit NRP's narrative that the Majority missed some point of law.

First, there is no doubt that the facility that NRP picked for Happy is a confined space—that facility's own director filed an affidavit describing this fact. A. 248 ¶ 12; A. 260. And while NRP argues there remains a "*fundamental difference*" overlooked by the Court (Mem., p. 9 (emphasis in original)) due to an alleged difference in space between a sanctuary and a zoo, that "difference," in NRP's view, is in whether Happy can "meaningfully exercise her autonomy" in one confined space versus another. p. 9. This collapses back into NRP's dystopian proposal of measuring personhood by "autonomy," which the Court rejected, for good reason. Majority, p. 4.

Second, NRP targets the wrong issue by insisting "total release" is not required for habeas corpus. The cases that NRP cites highlight the element of unlawfulness, not of confinement. That is, in *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), the petitioner—a human being—was sentenced to prison. That sentence authorized the state, by law, to hold him in the "Special Housing Unit." Therefore, he could not seek to be transferred out of that housing unit into the general prison population, which was simply another form of confinement that was also authorized by his criminal conviction. *Id.* at 691. Notably, in *Dawson*, this Court distinguished its earlier decision in *People ex rel. Brown v. Johnson*, 9 N.Y.2d 482 (1961), where a human prisoner was held in a State hospital for "male prisoners as are declared insane." *Johnson*, 9

N.Y.2d at 484. Although he was legally convicted for a crime, he was never declared "insane," and therefore, the petition raised "the possibility that he may be illegally confined," and stated a potential claim for habeas corpus as a result. *Id.* at 484-85 (emphasis added). *Cf. Dawson*, 69 N.Y.2d at 691 (distinguishing *Johnson*, explaining the state-hospital "was not within the specific authorization conferred on the Department of Correctional Services by that sentence.") (emphasis added).

Hence, the Majority here was exactly right to emphasize that there is nothing illegal, whatsoever, about Happy's presence in the Bronx Zoo. Decision, p. 5. The element of unlawful confinement is the heart of habeas corpus, and there is no doubt that NRP failed to show that element here. Insofar as NRP asks the Court to assign a new right of "liberty" to Happy, moreover, the Majority aptly observed that moving Happy to an enclosed "sanctuary" would only be "confinement" of a different form, and therefore would not enforce Happy's "right to liberty" even if this Court had decided to create such a right. Decision, p. 4.

With no sense of irony, NRP concludes this point by claiming the Court's rationale concerning "release" will have "grave implications for illegally confined human beings arising from the confusion now present in New York law." NRP Mem. p. 11 (emphasis added). To the contrary, if the

Court had granted the relief NRP sought here—*i.e.*, determine Happy the elephant is a "person" for purposes of habeas corpus, but make no decision about other elephants, let alone other animals—"confusion" would be the least of concerns for human prisoners. More pressing would be whether such humans would still qualify as "persons" themselves, or instead need to demonstrate their own "autonomy" first, with no guidance as to what level of intelligence or other attributes this would require. *See Brown v. Plata*, 563 U.S. 493, 510 (2011) ("prisoners retain the essence of human dignity inherent in all persons"); *accord United States v. McLaurin*, 731 F.3d 258, 261 (2d Cir. 2013) ("A person, even if convicted of a crime, retains his humanity.")

C. The Court did not "misapprehend the nature of legal personhood"

Next, NRP criticizes the Court for failing to grasp the concept of legal personhood. Mem. pp. 14-21. This ignores the actual holding of the Court. As explained above, the Majority stated clearly and correctly that New York law recognizes inherent rights in any and all human beings, without qualification or discrimination, based on fundamental common law and Constitutional principles. Decision, p. 3. The Court did not invent these principles to suit its holding (as NRP invented the formless test of autonomy), but reaffirmed settled New York law. Re-drawing the legal threshold of personhood to include animals would depart from these settled principles.

NRP's Petition admits this much, explaining that NRP is "dedicated to changing the common law status" of certain animals, like elephants, "to persons." A. 43, ¶ 37 (emphasis added) (internal quotation marks omitted). By declining to enact this "change" by judicial Order, the Court did not misapprehend the issue, but instead recognized not only that animals "are not and never have been persons with a right to liberty under New York law," but that creating a new category of "person" would have "an enormous destabilizing impact on modern society." Decision, pp. 4-5 (internal quotation marks omitted).

Similarly, NRP identifies no support for reargument by reciting the various secondary sources it has already cited multiple times in this case,[6] or by criticizing (again) the New York and Connecticut courts of appeal for ruling against NRP in recent years. Mem. pp. 19-21; *Cf.* Decision, p. 5. This is precisely not what re-argument is meant for. *William . Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dep't 1992), *lv. denied and dismissed* 80 N.Y.2d 1005, *rearg. denied* 81 N.Y.2d 782.

[6] For example, NRP repeats its citation to commentary under the third definition of "person" appearing in Black's Law Dictionary. NRP Mem. pp. 15-17. The Majority analyzed this point and found, correctly, that the legal definition of "person" in Black's, and authorities cited therein, actually supports the conclusion that the Majority reached here. Decision, p. 4 ("legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities.") (citing *inter alia*, Black's Law Dictionary, 11th ed., *person*).

D. NRP's subjective disagreement with the Majority about the impact of a ruling in their favor is not a reason to grant re-argument

The Majority also found that deciding Happy the elephant is actually a "person" under habeas corpus would be profoundly disruptive, both to societal interests and legislative enactments. Decision, pp. 6-7. NRP says this, too, was borne of a misunderstanding, because NRP only sought rights for one elephant, and the Court "was not required to decide the 'labyrinthe issues' concerning" any other animals, whether relevant to agricultural industries, researchers, or pet-owners. NRP Mem., p. 23. Of course, the Court of Appeals sets precedent for the entire State of New York, thus it could not pretend such issues do not exist. Especially given the amorphous basis of "autonomy" that NRP set out as the marker of animal "personhood," there is no doubt that a flood of petitions would have followed from a ruling in NRP's favor. Indeed, through just one petitioner—the Nonhuman Rights Project itself—no less than 38 New York judges[7] have given their time and attention to petitions concerning a small handful of chimpanzees, and one elephant. It was eminently reasonable, therefore, for the Court to consider the deluge of

[7] Including the Hon. Alison Tuitt, the five-justice panel of the Appellate Division, First Department below, the seven-judge panel of this honorable Court, and the four successive trial courts and appellate panels of judges involved in NRP's four previous habeas corpus petitions in New York State.

petitions that would result if NRP had succeeded, because the Court received no hint from NRP as to "who has standing to bring such claims on a nonhuman animal's behalf." Decision, p. 5.

E. The Court did not "overlook" its duty to evolve the common law

Finally, NRP chastises this Court for "deflecting" its cause to the legislature, insisting the Court had a "duty" to evolve the common law in the dramatically new direction that NRP suggested. NRP Mem. pp. 26-27. This zealous view misapprehends the responsibilities of courts, which go beyond the interests of any one party, and take due consideration for the legal context and competing interests in which issues appear. As this Court has repeatedly recognized, the legislature "has far greater capabilities to gather relevant data and to elicit expressions of pertinent opinion on the issues at hand," and "is better able to assess all of the policy concerns in [an] area and to limit the applicability of any new rule." *Paladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 152 (2014). This principle is especially apt here, and the Majority honored the fundamental rule of separation of powers by following it.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that NRP failed to demonstrate the required grounds for reargument. The motion should be denied.

Dated: Buffalo, New York
July 22, 2022

PHILLIPS LYTLE LLP

By: _____

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF MONROE	)		**EXPRESS DELIVERY**

I, **Jeremy Slyck**, of Rochester, New York, 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 July 25, 2022

deponent served the within: **RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONER'S MOTION FOR REARGUMENT**

Upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **one (1)** true copy 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 July 25, 2022

Andrea P. Chamberlain
Notary Public, State of New York
No. 01CH6346502
Qualified in Monroe County
Commission Expires August 15, 2024

Jeremy Slyck

Job #511458