

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

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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,

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.

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS OR TRANSFER VENUE  
AND IN OPPOSITION TO PETITION FOR HABEAS CORPUS**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
FACTUAL BACKGROUND .....	2
A. Happy the Elephant .....	2
B. The Wildlife Conservation Society and the Bronx Zoo .....	2
C. The Nonhuman Rights Project, Inc. ("NRP") .....	3
D. NRP's self-described mission is to change the law through long-term litigation .....	4
E. Petitioner filed a petition for a writ of habeas corpus in Orleans County, claiming Happy the elephant should be released from the Bronx Zoo .....	5
ARGUMENT .....	6
POINT I VENUE SHOULD BE TRANSFERRED TO BRONX COUNTY .....	6
POINT II ALTERNATIVELY, NRP'S PETITION SHOULD BE DISMISSED AS A MATTER OF LAW .....	8
A. NRP's petition should be dismissed for lack of standing .....	8
B. NRP's petition is insufficient to raise any legal question regarding the legality of Happy's circumstances .....	9
C. Collateral estoppel should preclude NRP from reviving litigation regarding whether animals are entitled to obtain habeas relief .....	12
D. NRP's petition fails to raise a legal question regarding whether Happy is unlawfully detained .....	14
POINT III IF NOT DISMISSED AS A MATTER OF LAW, NRP'S PETITION SHOULD BE DENIED .....	15
A. The PAWS facility is an environment of confinement .....	15
B. The writ of habeas corpus may not be used to alter conditions of confinement .....	16

C.	NRP's petition should be denied because the relief sought is not in Happy's best interests.....	17
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CONCLUSION.....	19
-----------------	----

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Altegra Credit Co. v. Tin Chu</i> , 29 A.D.3d 718 (2d Dep’t 2006) .....	13
<i>Beuchel v. Bain</i> , 97 N.Y.2d 295 (2001) .....	12, 13
<i>Fusco v. Kraumlap Realty Corp.</i> , 1 A.D.3d 189 (1st Dep’t 2003) .....	12
<i>Garces v. City of New York</i> , No. 6183/2007, 2008 WL 60093 (Sup. Ct. Bronx Cty. Jan. 4, 2008).....	7
<i>Greene v. Sup. Ct. Westchester Cty., Special Term, Part 1</i> , 31 A.D.2d 649 (2d Dep’t 1968) .....	7
<i>In re Nonhuman Rights Project ex rel. Kiko v. Presti</i> , 124 A.D.3d 1334 (4th Dep’t 2015), <i>leave to appeal denied</i> , 26 N.Y.3d 901 (2015).....	4, 9, 10, 16, 17
<i>In re Nonhuman Rights Project, Inc. ex rel. Hercules &amp; Leo v. Stanley</i> , 2014 WL 1318081 (2d Dep’t Apr. 3, 2014) .....	4, 9
<i>In re Nonhuman Rights Project, Inc. ex rel. Hercules v. Stanley</i> , 49 Misc.3d 746 (Sup Ct. N.Y. Cty. 2015) .....	5, 12, 17
<i>Matter of Juan C. v. Cortines</i> , 89 N.Y.2d 659 (1997) .....	13
<i>Koschak v. Gates Constr. Corp.</i> , 225 A.D.2d 315 (1st Dep’t 1996) .....	7
<i>Nonhuman Rights Project, Inc. ex rel. Beluah v. R.W. Comerford &amp; Sons, Inc.</i> , 2017 WL 7053738 (Super. Ct. Conn. Dec. 26, 2017) .....	18
<i>Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery</i> , 124 A.D.3d 148 (3d Dep’t 2014), <i>leave to appeal denied</i> 26 N.Y.3d 902 (2015).....	4, 9, 10, 11, 13
<i>In re Nonhuman Rights Project, Inc. v. Lavery</i> , 152 A.D.2d 73 (1st Dep’t 2017), <i>leave to appeal denied</i> 31 N.Y.3d 1054 (May 8, 2018).....	4, 5

<i>In re Nonhuman Rights Project, Inc. v. Lavery</i> , 152 A.D.3d 73 (1st Dep’t 2017), leave to appeal denied 31 N.Y.3d 1054 (May 8, 2018).....	9, 10, 11, 12, 17
<i>People ex rel. Dawson v. Smith</i> , 69 N.Y.2d 689 (1986) .....	16
<i>People ex rel. Eich v. Wilkins</i> , 17 N.Y.2d 621 (1966) .....	9
<i>People ex rel. Hatzman v. Kuhlman</i> , 191 A.D.2d 976 (4th Dep’t 1993).....	12
<i>People ex rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm’rs.</i> , 174 N.Y. 417 (1903) .....	11
<i>People ex rel. Robertson v. N.Y.S. Div. of Parole</i> , 67 N.Y.2d 197 (1986) .....	9, 14
<i>People ex rel. Rosario v. La Vallee</i> , 55 A.D.2d 771 (3rd Dep’t 1976).....	9
<i>People ex rel. Spaulding v. Woods</i> , 63 A.D.3d 1456 (3rd Dep’t 2009).....	12
<i>People ex rel. Tweed v. Liscomb</i> , 60 N.Y. 559 (1875) .....	16
<i>People v. Bourne</i> , 139 A.D.2d 210 (1st Dep’t 1988) .....	11
<i>People v. Garvin</i> , 30 N.Y.3d 174 (2017) .....	14
<i>People v. Graves</i> , 163 A.D.3d 16 (4th Dep’t 2018).....	11
<i>People v. Peque</i> , 22 N.Y.3d 168 (2013) .....	14
<i>Robinson Motor Xpress, Inc. v. HSBC Bank, USA</i> , 37 A.D.3d 117 (2d Dep’t 2006) .....	11
<i>Matter of Ruth H.</i> , 159 A.D.3d 1487 (4th Dep’t 2018).....	11
<i>Soc’y of Plastics Indus., Inc. v. Cty. of Suffolk</i> , 77 N.Y.2d 761 (1991) .....	8

<i>Walton v. Mercy College</i> , No. 13259/2006, 2008 WL 3865297 (Sup. Ct. Bronx Cty. Aug. 14, 2008) .....	7
---	---

#### **Statutes**

N.Y. Const., art. 1, § 4 .....	16
CPLR 503(a) .....	6
CPLR 511 .....	6
CPLR 7002(b)(3) .....	7
CPLR 7004(c) .....	7
CPLR 7009(c) .....	17
CPLR Article 5 .....	6
CPLR Article 70 .....	6
N.Y. Family Law § 651 .....	17

## **PRELIMINARY STATEMENT**

To further its mission to obtain legal rights on behalf of animals, Petitioner the Nonhuman Rights Project, Inc. ("NRP") seeks an unprecedented writ of habeas corpus on behalf of Happy, an Asian elephant resident at the Bronx Zoo. NRP's petition should be summarily dismissed or denied.

NRP's petition fails to establish an injury in fact. NRP's petition does not challenge Respondents' compliance with applicable animal welfare laws, does not allege that Happy's current conditions are unsuitable, and does not bring this petition to improve Happy's welfare. The petition's only apparent goal is to further NRP's legal agenda. Given these admissions, NRP's petition constitutes an improper attempt to utilize the writ of habeas corpus to alter public policy, rather than to adjudicate an actual legal dispute.

Furthermore, NRP's previous attempts to seek writs of habeas corpus on behalf of other animals have generated controlling and directly applicable legal precedent, which unanimously holds that animals are not entitled to seek habeas relief. Because NRP is and has been the true party in interest in all of these proceedings, collateral estoppel should apply to bar NRP from continuing to deplete judicial resources with its repetitive, unmeritorious petitions.

NRP's petition for writ of habeas corpus is also defective because NRP's petition does not in fact seek bodily liberty for Happy, but rather to transfer Happy to a facility of NRP's choosing. Absent any allegation that Happy's current living conditions are unlawful, NRP's petition to change the conditions of Happy's "confinement" should be denied.

Finally, although brought on behalf of Happy, NRP's petition fails to discuss Happy's circumstances, her needs, or her best interests. NRP's request to transfer Happy over a long distance to an unfamiliar facility is fraught with risk and could pose significant danger to Happy's well-being. In contrast, Respondents' trained and experienced professionals establish that Happy is currently healthy and well-adapted to her surroundings, and that NRP's requested relief would not serve Happy's best interests.

### **FACTUAL BACKGROUND**

#### **A. Happy the Elephant**

Happy is a forty-seven year old Asian elephant. Supplemental Affidavit of James Breheny, sworn to December 3, 2018 ("Breheny Sup. Aff.") ¶ 6. She has lived in her habitat at the Bronx Zoo—an environment including a large, natural outdoor space where she can swim, forage, and engage in other species-specific behavior—for more than forty years. Affidavit of Patrick Thomas, sworn to December 3, 2018 ("Thomas Aff.") ¶¶ 9-10, 15, 27; Breheny Sup. Aff. ¶ 6. The Bronx Zoo employs several keepers dedicated to elephants, each of whom has years of experience in caring for them. Thomas Aff. ¶¶ 6, 12, 25; Breheny Sup. Aff. ¶¶ 10-11; Affidavit of Paul P. Calle, sworn to December 3, 2018 ("Calle Aff."), ¶¶ 9-13. The keepers bathe, feed, and examine Happy every day. Thomas Aff., ¶¶ 23-25. She receives expert medical care from the Bronx Zoo's experienced veterinarians, including preventative care through regular blood-analysis, periodic x-rays, and ongoing husbandry including dental and foot care. *Id.* ¶¶ 25-26; Calle Aff., ¶¶ 6-9.

#### **B. The Wildlife Conservation Society and the Bronx Zoo**

Respondent Wildlife Conservation Society is a not-for-profit corporation whose mission is to save wildlife and wild places worldwide through science, conservation



action, education, and inspiring people to value nature. Affidavit of James J. Breheny, sworn to October 9, 2018 (“Breheny Aff.”) at ¶ 3. The Wildlife Conservation Society opened the Bronx Zoo in 1899 on New York City parkland. *Id.* ¶ 4. WCS cares for thousands of endangered or threatened animals, and provides experiences to visitors that may spark a lifelong passion to protect animals and their natural habitats. *Id.* The Bronx Zoo’s general admission ranges from \$28.95 to \$20.95 for adults and children, respectively, and every Wednesday, admission is free. Affidavit of Kenneth A. Manning, sworn to December 3, 2018 (“Manning Aff.”) ¶ 21.

**C. The Nonhuman Rights Project, Inc. (“NRP”)**

NRP “is a not-for-profit corporation organized pursuant to the laws of the State of Massachusetts” and presents itself as

the only civil rights organization in the United States dedicated to changing ‘the common law status of at least some nonhuman animals from mere ‘things,’ which lack the capacity to possess any legal rights, to ‘persons,’ who possess such fundamental rights as bodily integrity and bodily liberty.’

NRP’s Verified Petition, sworn to October 2, 2018 (“Ver. Pet.”), ¶ 37. Some of NRP’s stated goals are “[t]o develop . . . issue-oriented grassroots and legislative campaigns to promote recognition of nonhuman animals as beings . . . with their own inherent interests in freedom from captivity . . . .” and “to build a broad-based coalition of organizations and individuals to secure legally recognized fundamental rights for nonhuman animals.”

Breheny Aff., ¶ 6.

**D. NRP's self-described mission is to change the law through long-term litigation**

NRP vows on its website to lead “the fight to secure actual legal rights for nonhuman animals through a state-by-state, country-by-country, long-term litigation campaign.” Breheny Aff., ¶ 7.

NRP began its New York litigation campaign by bringing cases 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. *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 2014 WL 1318081 at \*1 (2d Dep't Apr. 3, 2014); *In re Nonhuman Rights Project ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep't 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep't 2014).

NRP appealed from each of the foregoing courts' declinations to sign its orders to show cause, resulting in decisions from the Second, Third, and Fourth Departments affirming the trial courts' decisions. *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo*, 2014 WL 1318081, at \*1; *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 124 A.D.3d at 153; *In re Nonhuman Rights Project ex rel. Kiko*, 124 A.D.3d at 1335. The Court of Appeals refused to grant leave to appeal in both of the 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 in the foregoing matters. *In re Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep't 2017), *leave to appeal denied* 31 N.Y.3d 1054 (2018). New York County Supreme

Court declined to sign two of the proposed orders to show cause, and the First Department affirmed. *Id.* 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).

**E. Petitioner filed a petition for a writ of habeas corpus in Orleans County, claiming Happy the elephant should be released from the Bronx Zoo**

On October 2, 2018, NRP announced that it had filed a petition for a writ of habeas corpus in Orleans County Supreme Court on behalf of Happy. Breheny Aff. ¶ 8. NRP explained that it “chose to file in Orleans County (part of the Fourth Department) because the First Department, which oversees the county where the Bronx Zoo is located, ‘has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human.’” *Id.* ¶ 9.

Respondents opposed NRP’s proposed order to show cause by filing and serving a memorandum of law in opposition, and the affidavit of Mr. Breheny. Manning Aff. ¶ 5; Ex. 3. The following day, NRP filed a motion to strike Respondents’ opposition, asserting that Respondents had no right to participate in the proceeding. *Id.* ¶ 6; Ex. 4. On October 25, 2018, NRP also filed a motion to rule on its petition for habeas corpus, asking the Court to “rule on the Petition on November 30.” *Id.* ¶ 7; Ex. 5.

Respondents served their opposition to NRP’s motion to strike and motion to rule on November 14, 2018. *Id.* ¶ 8; Ex. 6. The Court subsequently held a teleconference on November 16, 2018, and signed NRP’s order to show cause for the petition for writ of

habeas corpus. *Id.* ¶¶ 9-10. Respondents submit the following arguments in support of their motion to dismiss the petition, or in the alternative, to change venue to the Bronx County, and in opposition to the petition.

## ARGUMENT

### POINT I

#### VENUE SHOULD BE TRANSFERRED TO BRONX COUNTY

To the extent that further proceedings are required, Respondents seek to transfer venue because pursuant to CPLR Articles 5 and 70, the proper venue for this action is Bronx County. “[T]he place of trial shall be in the county in which one of the parties resided when it was commenced; [or] the county in which a substantial part of the events or omissions giving rise to the claim occurred . . . .” CPLR 503(a). Here, Respondent Wildlife Conservation Society is located in Bronx County, and Respondent James Breheny works in Bronx County. Ver. Pet. ¶¶ 40-41. Happy, the subject of the petition, is located in the Bronx County, and the material events, *i.e.*, Happy’s alleged “unlawful imprisonment,” occurred in Bronx County. *Id.* ¶¶ 1, 40-42.

On November 21, 2018, Respondents served NRP with a CPLR 511 demand to change the venue of this action from Orleans County to Bronx County. Manning Aff., Ex. 8. Respondents’ instant motion is thus proper and timely under CPLR 511. NRP opposed Respondents’ demand by affirmation dated November 27, 2018 and sent via regular mail. Manning Aff., ¶ 14.

Respondents’ motion to transfer venue should be granted because NRP has not and cannot identify any nexus between this litigation and Orleans County. Manning Aff., ¶¶ 16-17. Rather, NRP states that it purposefully commenced litigation before this

Court because the First Department “has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human.” *Breheny Aff.* ¶ 9.

However, New York courts have repeatedly refused to endorse such forum-shopping by reversing its ill-gotten results, even when venue comports “with the letter of the law,” thus “eschew[ing] literal application of venue rules to preclude forum shopping.” *Koschak v. Gates Constr. Corp.*, 225 A.D.2d 315, 316 (1st Dep’t 1996); *accord Walton v. Mercy College*, No. 13259/2006, 2008 WL 3865297, at \*8 (Sup. Ct. Bronx Cty. Aug. 14, 2008); *Garces v. City of New York*, No. 6183/2007, 2008 WL 60093, at \*5 (Sup. Ct. Bronx Cty. Jan. 4, 2008).

NRP also contends that venue is proper in Orleans County because a habeas petition can be presented to “any justice of the supreme court.” Ver. Pet. ¶ 42; CPLR 7002(b)(3). Under New York law, however, “a habeas corpus proceeding . . . is subject to the practice provisions governing venue generally.” *Greene v. Sup. Ct. Westchester Cty., Special Term, Part 1*, 31 A.D.2d 649, 649 (2d Dep’t 1968).

Finally, CPLR 7004(c) supports moving this proceeding to Bronx County. CPLR 7004(c) states, in pertinent part: “where the petition was made to the supreme court or to a supreme court justice outside the county in which the person is detained, such court or justice may make the writ returnable before any judge authorized to issue it in the county of detention.” Because Happy is the alleged “detained person” and is currently located in Bronx County (Ver. Pet. ¶ 1), CPLR 7004(c) supports a change of venue to Bronx County. Respondents respectfully request that venue be changed to Bronx County.

## POINT II

### **ALTERNATIVELY, NRP'S PETITION SHOULD BE DISMISSED AS A MATTER OF LAW**

#### **A. NRP's petition should be dismissed for lack of standing**

NRP lacks standing because it improperly seeks to effectuate policy changes through this proceeding, as opposed to adjudicating a particular legal dispute.

Standing is a “threshold determination . . . that a person should be allowed access to the courts to adjudicate the merits of a particular dispute . . . .” and is only established by “the existence of an injury in fact—an actual legal stake in the matter being adjudicated.” *Soc’y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769, 772 (1991). “That an issue may be one of ‘vital public concern’” does not by itself confer standing, and standing is “essential” to enforce “a ban on adjudication of generalized grievances more appropriately addressed by the representative branches.” *Id.* at 769, 773. “The burden of establishing standing to raise that claim is on the party seeking review.” *Id.* at 769.

The generalized nature of this proceeding—and the lack of an injury in fact—is established by NRP's admissions. NRP states in its petition that it does not challenge whether Respondents are in compliance with “federal, state, or local animal welfare laws.” Ver. Pet. ¶ 56. NRP further concedes that “[t]his Petition does not allege that Happy ‘is illegally confined because [she] is kept in unsuitable conditions,’ *nor does it seek improved welfare for Happy.*” *Id.* (emphasis added). Instead, NRP's stated goal, and the only apparent goal for this action, is to “change the legal status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons.” Ver. Pet. ¶ 37.

NRP asserts it has standing because “in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, not a single court found that the

NhRP lacked standing.” Ver. Pet. ¶ 45. However, none of the previous courts in fact reached the question of standing. *See e.g., In re Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78 (1st Dep’t 2017), *leave to appeal denied* 31 N.Y.3d 1054 (May 8, 2018) (“*Lavery II*”) (“[a]ssuming habeas relief may be sought on behalf of a chimpanzee, petitioner undisputedly has standing”); *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1335 (4th Dep’t 2015) (“[A]ssuming, arguendo, that petitioner had standing to commence this proceeding on behalf of Kiko . . . . habeas corpus does not lie . . . .”). Indeed, the courts that considered NRP’s previous petitions noted that NRP’s efforts to extend legal protections to animals would be better directed to the Legislature, rather than the continued prosecution of petitions for writ of habeas corpus. *See e.g., People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dep’t 2014) (“*Lavery I*”). Thus, because NRP’s petition presents nothing more than a generalized grievance more appropriately addressed by the Legislature, NRP lacks standing to bring this proceeding, and the petition should be dismissed.

**B. NRP’s petition is insufficient to raise any legal question regarding the legality of Happy’s circumstances**

“The purpose of habeas corpus is to test the legality of the detention of the person who is the subject of the writ.” *People ex rel. Robertson v. N.Y.S. Div. of Parole*, 67 N.Y.2d 197, 201 (1986). Therefore, when allegations are “insufficient to raise any legal question which could possibly affect the legality of . . . detention,” there is “no basis . . . [for] habeas corpus as a remedy.” *People ex rel. Rosario v. La Vallee*, 55 A.D.2d 771, 772 (3rd Dep’t 1976); *accord People ex rel. Eich v. Wilkins*, 17 N.Y.2d 621, 622 (1966).

As explained in Respondents’ previously submitted memorandum of law dated October 9, 2018, which is expressly incorporated herein, all four Departments of the

New York Appellate Division recently considered—and rejected—NRP’s petitions to extend habeas corpus rights to animals. *See In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley et al.*, 2014 WL 1318081 at \*1 (2d Dep’t 2014); *In re Nonhuman Rights Project ex rel. Kiko v. Presti*, 124 A.D.3d at 1334 (4th Dep’t 2015); *Lavery I*, 124 A.D.3d 148 (3d Dep’t 2014); *Lavery II*, 152 A.D.3d 73, 77-78 (1st Dep’t 2017), *leave to appeal denied* 31 N.Y.3d 1054 (May 8, 2018).

As explained by the Third Department in *Lavery I*, “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 152. In all of the petitions brought by NRP, including the present petition, NRP fails to “cite any precedent—and there appears to be none—in state law, or under English common law, that an animal should be considered a ‘person’ for the purposes of common-law habeas corpus relief.” *Id.* Accordingly, it is “inappropriate to confer upon [animals] the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.” *Id.* at 152, *leave to appeal denied* 26 N.Y.3d 902 (2015).

NRP’s submissions regarding the intelligence of elephants in the wild do not support a departure from the foregoing precedent. The First Department in *Lavery II* explained that “the 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 purported “human-like characteristics” of chimpanzees, therefore, do not render them “persons” entitled to habeas relief and the petition failed as a matter of law. *Id.* Indeed, the court expressly found that



“capabilities” such as “recognizing themselves in reflections,” setting goals, understanding time, and accounting for the lives of other animals, all of which were emphasized as evidence of “autonomy” in expert affidavits in support of the petition, were unavailing for the same reason. *Id.* at 77-78, *leave to appeal denied* 31 N.Y.3d 1054 (May 8, 2018).

Contrary to NRP’s contentions, the Hon. Eugene M. Fahey’s concurrence in the Court of Appeals’ denial of leave to appeal *Lavery II* does not overturn the foregoing precedent. “Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision.” *People ex rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm’rs.*, 174 N.Y. 417, 447 (1903); *Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117, 124 (2d Dep’t 2006) (“Dicta, while not without importance, is not required to be followed”); *People v. Bourne*, 139 A.D.2d 210, 216 (1st Dep’t 1988) (“A case . . . is precedent only as to those questions presented, considered and squarely decided”). The Court of Appeals’ denial of leave to appeal *Lavery II* should not be construed as anything else, let alone as a basis for fundamentally altering the writ of habeas corpus and establishing the legal rights of animals.

*People v. Graves*, 163 A.D.3d 16 (4th Dep’t 2018), also does not raise a sufficient legal question regarding the legality of Happy’s conditions. *Graves* determined whether a car dealership constituted a “person” under New York’s criminal mischief statute, a holding that has no bearing upon whether an animal has the legal right to habeas relief. Moreover, the Fourth Department recently reaffirmed the legal status of animals as “property” in *Matter of Ruth H.*, 159 A.D.3d 1487, 1490 (4th Dep’t 2018), leaving no question that the *Graves* dicta provides no support for NRP’s petition.

Based upon the foregoing authority, NRP's petition fails to raise a sufficient legal question regarding the legality of Happy's conditions, and the petition should be denied.

**C. Collateral estoppel should preclude NRP from reviving litigation regarding whether animals are entitled to obtain habeas relief**

Collateral estoppel bars a party from re-litigating issues "raised in a prior action or proceeding and decided against that party or those in privity." *Beuchel v. Bain*, 97 N.Y.2d 295, 305 (2001). Also known as "issue preclusion," collateral estoppel requires (i) identity of issues necessarily decided before and decisive in the present action; and (ii) a full and fair opportunity to contest the earlier decision. *Id.*; *Fusco v. Kraumlap Realty Corp.*, 1 A.D.3d 189, 194 (1st Dep't 2003). The doctrine bars issues already decided in earlier habeas corpus proceedings. *People ex rel. Hatzman v. Kuhlman*, 191 A.D.2d 976, 977 (4th Dep't 1993); *People ex rel. Spaulding v. Woods*, 63 A.D.3d 1456, 1457 (3rd Dep't 2009).

As previously explained, all four Departments of the Appellate Division previously considered and rejected NRP's attempts to obtain habeas relief on behalf of animals. For example, NRP argued to New York County Supreme Court, as it does here, that allegedly "autonomous" animals are "persons" entitled to habeas corpus. *See In re Nonhuman Rights Project, Inc. ex rel. Hercules and Another v. Stanley*, 49 Misc.3d 746, 773 (Sup Ct. N.Y. Cty. 2015). After signing NRP's order to show cause and hearing arguments on its habeas corpus petition, New York County Supreme Court analyzed NRP's arguments concerning "Legal Personhood" and "Stare Decisis" and denied the petition under the precedent set forth in *Lavery I. Id.* at 763-73. The First Department affirmed, holding that "human-like" characteristics of non-human animals do not render them "persons" entitled to habeas corpus relief. *Nonhuman Rights Project, ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st

Dep't 2017). The New York Court of Appeals denied NRP's motion for leave to appeal this final order. 31 N.Y.3d 1054 (2018). NRP therefore had multiple opportunities to fully and fairly litigate the question of whether animals are entitled to habeas relief, and in each instance, a decision on the merits was issued to deny NRP's petitions.

Collateral estoppel applies even though NRP brought petitions on behalf of different animals in the foregoing cases. The doctrine of collateral estoppel is "flexible," and "the fundamental inquiry is whether relitigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interest in consistent and accurate results." *Beuchel*, 97 N.Y.2d at 305. To promote this purpose, even non-parties may be estopped from relitigating the issues where they "control a [prior] action although not formal parties to it," or are parties "whose interests are represented by a party to the action." *Id.* at 304 (quoting *Matter of Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (1997)). In other words, when a party "had a stake" in the earlier action, or "controlled" the litigating entity in the prior action, estoppel precludes that party from raising the issue again. *Id.*; *Altegra Credit Co. v. Tin Chu*, 29 A.D.3d 718, 720 (2d Dep't 2006).

Collateral estoppel should apply because NRP was the true party in interest in the previous litigations, just as NRP is the true party in interest in this proceeding. NRP confirms that its petition in this proceeding is not about Happy: "[t]his Petition does not allege that Happy 'is illegally confined because [she] is kept in unsuitable conditions,' nor does it seek improved welfare for Happy." Ver. Pet. ¶ 56. Instead, NRP's petition is solely concerned with NRP's efforts to "change the legal status of such nonhuman animals . . . from legal things to legal persons." Ver. Pet. ¶ 37; Breheny Aff. ¶ 5. To prevent NRP from

continuing to assert successive litigation on legal issues already decided, collateral estoppel should apply to bar NRP's petition.

Even if collateral estoppel did not apply, moreover, *stare decisis* compels dismissal in light of this binding and applicable precedent. *Stare decisis* embodies the settled principle that “a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem.” *People v. Garvin*, 30 N.Y.3d 174, 185 (2017). Indeed, “even under the most flexible” interpretation of the doctrine, decisions should not diverge from precedent without compelling justifications, such as to retire a rule which has proved “unworkable” or “created more questions than it resolves.” *Id.* (quoting *People v. Peque*, 22 N.Y.3d 168, 194 (2013)). Such justifications are entirely absent in this case and, in fact, compel adherence to precedent in light of the radical divergence from settled law that NRP proposes.

**D. NRP's petition fails to raise a legal question regarding whether Happy is unlawfully detained**

In addition to the foregoing reasons, NRP's petition should be dismissed as a matter of law because it does not and cannot allege that Happy is unlawfully detained. “The purpose of habeas corpus is to test the legality of the detention of the person who is the subject of the writ.” *People ex rel. Robertson v. N.Y.S. Div. of Parole*, 67 N.Y.2d 197, 201 (1986). However, NRP expressly states in its petition that it does not seek to challenge whether Respondents are in compliance with “federal, state, or local animal welfare laws,”<sup>1</sup> nor does NRP allege that Happy's current living conditions are unsuitable. Ver. Pet. ¶ 56.

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<sup>1</sup> In the event this Court determines that NRP's submissions create an issue of fact as to whether Happy is unlawfully detained, Respondents respectfully request the opportunity to present expert testimony—and other clear and convincing evidence—concerning this issue.

NRP therefore has not alleged—and cannot allege—that Happy’s current living conditions are in any way unlawful, and as a result, no habeas relief is available as a matter of law.

### **POINT III**

#### **IF NOT DISMISSED AS A MATTER OF LAW, NRP’S PETITION SHOULD BE DENIED**

##### **A. The PAWS facility is an environment of confinement**

NRP “demands that this Court recognize Happy’s common law right to bodily liberty and order her immediate release from Respondents’ current and continued unlawful detention so that her liberty and autonomy may be realized.” Ver. Pet. ¶ 56. However, NRP’s petition in fact requests that the Court move Happy to a “captive wildlife sanctuary” in Northern California operated by the Performing Animal Welfare Society (“PAWS”), which would still confine and limit Happy’s “liberty and autonomy”. Affidavit of Ed Stewart, sworn to September 26, 2018 (“Stewart Aff.”) ¶ 4; Ver. Pet. ¶ 118.B.

According to Mr. Stewart, who formerly worked in the entertainment industry, “[t]he elephant habitats [at the PAWS facility] are enclosed with steel pipe fencing and pipe-and-cable fencing,” and the “African elephant habitat includes a system of gates that can be used to control access to particular areas for management purposes.” Stewart Aff. ¶¶ 7, 12. Although most elephants at the PAWS facility “have indoor-outdoor access during the night,” older elephants, such as Happy, “may be kept indoors overnight” in elephant barns. *Id.* ¶ 13. The elephant barns at the PAWS facility have “hydraulic gates” and “restraint devices for veterinary procedures.” *Id.* PAWS further limits the behaviors of its animals in many ways, such as by implementing (i) measures to prevent breeding; (*id.*, ¶12); (ii) electric fencing (*id.*, Ex. A, § PF-6); and (iii) “a detailed written escaped elephant protocol . . . addressing situations in which elephants escape from their enclosures.” *Id.*,

Ex. A, § S-9. Although PAWS asserts that its organizational values include “[a] commitment to never breed, sell, rent, exploit, or force any animal to perform in any way,” (Stewart Aff. ¶ 10), PAWS patrons have the opportunity to pay hundreds of dollars for tickets to “getaways” and “winetastings” with the captive elephants. *See* Manning Aff., ¶ 20, n.2.

Thus, NRP’s petition does not in fact seek to obtain bodily liberty for Happy, but rather would transfer Happy to an environment of confinement where her behaviors would be controlled by humans.

**B. The writ of habeas corpus may not be used to alter conditions of confinement**

Because NRP seeks to transfer Happy to the PAWS facility, which is an environment of confinement, NRP’s petition should be construed as a request to change the conditions of Happy’s confinement, and such relief is not available through the writ of habeas corpus.

Habeas corpus embodies the constitutional protection that “no person shall be deprived of his [or her] liberty ‘without due process of law.’” N.Y. Const., art. 1, § 4; *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875). When a person is imprisoned in violation of due process protections, habeas corpus entitles that person to “immediate release.” *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986). As a corollary, a person in lawful custody cannot use the writ of habeas corpus to challenge the “particular type of confinement” he or she is subject to. *Id.*

NRP’s previous attempts to transfer animals to sanctuaries have failed on this basis. In *Presti*, NRP filed a habeas corpus petition on behalf of a chimpanzee named “Kiko.” *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1335 (4th Dep’t

2015). As here, NRP did not demand that Kiko be “released,” but instead asked to have his “confinement transferred to a different facility selected by the North American Primate Sanctuary Alliance.” *Id.* The Fourth Department held NRP’s petition was properly dismissed because “habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement, rather than the confinement itself.” *Id.*

NRP filed another petition for a writ of habeas corpus on behalf of Kiko and another chimpanzee in New York County, again seeking their “immediate release to an appropriate primate sanctuary,” and NRP’s petition was denied. *Nonhuman Rights Project ex rel. Hercules & Leo v. Stanley*, 49 Misc. 3d 746 (Sup. Ct. N.Y. Cty. 2015). On appeal, the First Department affirmed and held that “seeking transfer of Kiko and Tommy to a facility petitioner asserts is more suited to chimpanzees as opposed to challenging the illegal detention of Kiko and Tommy does not state a cognizable habeas claim.” *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 79 (1st Dep’t 2017) (emphasis added), *leave to appeal denied*, 31 N.Y.3d 1054.

Thus, because NRP’s petition does not request Happy’s release but rather her transfer to a facility of NRP’s choosing, NRP’s use of the writ of habeas corpus is improper, and NRP’s petition should be denied.

**C. NRP’s petition should be denied because the relief sought is not in Happy’s best interests**

CPLR 7009(c) states “[t]he court shall proceed in a summary manner . . . and to dispose of the proceeding as justice requires.” In civil habeas corpus proceedings, the court may be called upon to consider the best interests of the alleged detainee in rendering a decision. *See e.g.* N.Y. Family Law § 651; *In re Welch*, 29 Sickels 299, 299-300 (1878) (dismissing writ of habeas corpus based upon “considerations affecting the health and

welfare of the child”). Here, although NRP initiated this proceeding on behalf of Happy, NRP’s submissions notably lack any discussion of Happy, her current living conditions, or what would serve Happy’s best interests.<sup>2</sup>

In contrast, the Bronx Zoo and its professional staff have extensive experience in caring for Happy, are cognizant of Happy’s needs, and agree that Happy’s best interests are not served by transferring her to the PAWS facility. Thomas Aff. ¶¶ 23-28; Calle Aff. ¶¶ 14-15; Breheny Sup. Aff. ¶¶ 9-10, 29. Happy has a history of not interacting well with other elephants at the Bronx Zoo, and NRP’s petition fails to take into consideration the distinct possibility that Happy would not choose to socialize well with any of the elephants at the PAWS facility. Breheny Sup. Aff. ¶¶ 13-16. NRP’s submissions admit that “it is unnatural for unrelated elephants to live together, as they do in captivity, and social interactions can range from harmonious to acrimonious” (Stewart Aff. ¶ 15), yet NRP’s submissions lack any analysis of the impact of placing Happy amongst unfamiliar animals, in unfamiliar territory.

NRP’s petition also fails to take into consideration the impact of moving Happy from the Bronx Zoo to the PAWS facility in San Andreas, California. Breheny Sup. Aff. ¶ 17-20. Based upon past experiences with Happy, the Bronx Zoo knows that Happy becomes particularly distressed by even short moves within the zoo. *Id.* ¶ 18; Thomas Aff. ¶ 29; Calle Aff. ¶ 14. If Happy were to be moved from the Bronx Zoo to the PAWS facility

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<sup>2</sup> In fact, as to the expert affidavits submitted in support of NRP’s Verified Petition, NRP submitted the very same affidavits in support of a different habeas corpus petition, for different elephants, to the Superior Court of Connecticut in 2017. *Nonhuman Rights Project, Inc. ex rel. Beluah v. R.W. Comerford & Sons, Inc.*, 2017 WL 7053738, at \*1, n.1 (Super. Ct. Conn. Dec. 26, 2017). The court denied that petition, holding that NRP’s habeas petition was “wholly frivolous on its face,” (*id.* at \*1), and upon NRP’s “motion for clarification” of that ruling, the court explained that it had “determined that the petitioner failed to show that the issues presented are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are adequate to deserve encouragement to proceed further and failed to show that the petition merits a legal victory.” 2018 WL 3014069, at \*2 (Super. Ct. Conn. May 23, 2018). NRP’s stale proof should fare no better here.



in California, such move would be highly stressful and potentially detrimental to Happy's well-being. Breheny Sup. Aff. ¶ 17-19; Thomas Aff. ¶¶ 29-30; Calle Aff. ¶¶ 14-16. None of these considerations are discussed in NRP's submissions.

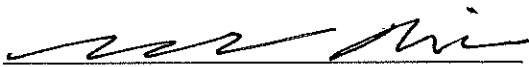
In short, NRP's legislative agenda should not be allowed to supersede Happy's best interests (Breheny Sup. Aff. ¶ 20), and Respondents respectfully request that the Court deny NRP's petition on this additional basis.

### CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court transfer this proceeding to Bronx County, or in the alternative, dismiss or deny NRP's petition with prejudice.

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