

COURT OF APPEALS OF THE STATE OF NEW YORK

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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,

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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**AFFIDAVIT IN  
OPPOSITION TO  
MOTION TO STRIKE**

Index No.: 260441/2019

CA No.: 2020-02581

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

Kenneth A. Manning, Esq., being duly sworn, deposes and says:

1. I am a partner with Phillips Lytle LLP, attorneys for Respondents-  
Respondents James J. Breheny and the Wildlife Conservation Society (collectively,  
“Respondents”). In that capacity, I am knowledgeable about the facts stated herein.

2. I submit this affidavit in opposition to Petitioner-Appellant the  
Nonhuman Rights Project, Inc.’s (“NRP”) motion to strike allegedly “materially false  
statements” from Respondents’ introduction section of their brief in opposition to NRP’s  
motion for leave to appeal (“Respondents’ Brief”).

3. I have practiced law in New York as a trial lawyer for 41 years, I participated in the preparation of Respondents' Brief, and I signed the Brief.

4. NRP asserts Respondents misstated case law by stating that the four Departments of New York's Appellate Division "repeatedly rejected NRP's position that animals qualify as persons under CPLR Article 70." NRP further alleges that Respondents misstated the law in Massachusetts by asserting "State courts in Connecticut and Massachusetts have similarly denied NRP's habeas corpus petitions filed on behalf of other animals."<sup>1</sup> As explained both in Respondents' Brief and in a letter to NRP's counsel (exhibit 12 to NRP's motion), these statements are accurate, and the Court should deny the motion.

**A. Respondents' Brief is accurate and does not contain any materially false statement**

5. Respondents' Brief accurately describes the law applicable to this matter. With respect to the New York cases, NRP in fact filed four separate petitions for a writ of habeas corpus, in four different counties in New York, all seeking a judgment that an animal is a "person." *See* Resp. Br.<sup>2</sup> pp. 5-9. The trial court in each instance refused to issue the writ, and NRP appealed to each Department of the Appellate Division. Every Department denied relief to NRP, and the specific grounds for each of the Departments' decisions—including the reasons expressed by the Second, Third and Fourth Departments—are described in Respondents' Brief. *Id.*

6. The same is true concerning the case law in Connecticut and Massachusetts. As Respondents' Brief explains in detail, NRP filed two petitions for habeas

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<sup>1</sup> Affirmation of Elizabeth Stein, dated February 11, 2021 ("Stein Aff."), ¶¶ 8, 11, 24.

<sup>2</sup> "Resp. Br." refers to Respondents' Brief.

corpus in two separate Connecticut proceedings, both seeking habeas relief for elephants. Both petitions were denied, and the Appellate Court of Connecticut affirmed unanimously on both appeals. Resp. Br. pp. 9-11.

7. Months after the second Connecticut appellate decision, the Massachusetts Appellate Court decided *Rowley v. City of New Bedford*, 159 N.E.3d 1085 (Mass. App. Ct., Dec. 28, 2020). The Court upheld dismissal of a petition for habeas corpus for two elephants, finding no support for the claim that elephants “ought to be considered ‘persons’ under the law.” Resp. Br. p. 11.

8. This is precisely the same relief NRP sought in this proceeding, and the same relief it sought in the New York and Connecticut courts. As NRP admits, it submitted a brief to the Massachusetts appellate court as *amicus curiae* in *Rowley*, urging “courts to recognize these nonhuman animals’ right to liberty,” but also criticizing the *pro se* petitioner as being “singularly unqualified to present either the facts or the law necessary for a full and favorable determination.”<sup>3</sup> NRP participated in and advocated for its position in the Massachusetts case, despite not being the named petitioner, and the Massachusetts court denied the relief sought both by the petitioner and by NRP. The *Rowley* case is described in Respondents’ Brief, including the name of the petitioner and the specific holding of the court. Resp. Br. pp. 9-11. Contrary to NRP’s assertions, Respondents’ Brief accurately describes the results of the case and the parties involved.

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<sup>3</sup> *Rowley v. City of New Bedford*, Brief on behalf of *Amicus Curiae* the Nonhuman Rights Project, Inc., in Support of Neither Party, 2020 WL 7329375, Aug. 24, 2020, \*11, 14.

9. Accordingly, Respondents' Brief fairly and accurately describes the law, with supporting discussion, and is well within the bounds of proper advocacy. NRP's motion to strike should be denied. *See* Stein Aff. Ex. 12.

**B. NRP's current motion is another step in a campaign to undermine viewpoints other than those adopted by NRP**

10. Just as single sentences extracted from Respondents' Brief should be read in the context of the full discussion, NRP's newest motion to strike should be considered in the context of this proceeding. NRP's motion does not raise any legitimate ethical concern, but merely continues an attempt to undermine efforts—whether by Respondents, academic scholars, or the courts themselves—to challenge NRP's views.

11. NRP adopted its approach from day one. NRP brought this proceeding in Orleans County—over 300 miles from Bronx County—for the admitted purpose of circumventing the First Department's decision in *Lavery II*. According to NRP, 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 her rights, just because she is not a human." A. 321, ¶ 9.

12. After commencing this proceeding *ex parte*, then NRP moved to strike Respondents' opposition papers (first motion to strike), asserting Respondents were not entitled to either notice or an opportunity to be heard, and that by opposing the petition, Respondents were making "an effort to meddle with the decision of [the] Court as to whether it should issue the requested order to show cause and where the order should be returned." **Exhibit 1** is a true copy of NRP's Notice of Motion to Strike, dated October 10, 2018.

13. Before the first motion to strike was decided, NRP also moved the Court “to rule on the Petition,” and advised Respondents “the motion will be submitted on the papers and their personal appearance in opposition is neither required nor permitted.” **Exhibit 2** is a true copy of NRP’s Notice of Motion to Rule, dated October 25, 2018.

14. Notwithstanding NRP’s objections and position, the trial court transferred the proceeding to Bronx County. A. 29-30.

15. Respondents then filed and served a Verified Answer, which NRP moved to strike as well (second motion to strike), even though it was served **earlier** than required, because of the pendency of Respondents’ motion to dismiss the petition under CPLR 404(a). **Exhibit 3** is a true copy of NRP’s Notice of Motion to Strike, dated August 2, 2019.

16. NRP’s current motion (third motion to strike) cites excerpts from the oral argument before the Bronx County Trial Court (Hon. J. Tuitt) to present Respondents’ allegedly “false” description of New York case law. During that same argument, NRP also described the Appellate Division, Third Department’s conclusions as “obviously and demonstrably false,” and argued the First and Fourth Departments “misunderstood” the law.<sup>4</sup> To highlight the extremity of NRP’s position, Respondents submitted court exhibits in Bronx County showing the number of judges who have previously considered and rejected NRP’s arguments. **Exhibit 4** contains true copies of Respondents’ Court Exhibits A through C, dated January 6, 2020.

17. NRP’s same theme continued on appeal to the Appellate Division, First Department. In its main brief, NRP asserted the Third Department decision in *Lavery*

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<sup>4</sup> See Exhibit 4, p. 2, Resp. Court Ex. B, Jan. 6, 2020.

*I*, the First Department decision in *Lavery II*, and the Fourth Department decision in *Presti* are all “based on demonstrable misunderstandings of the law and are evidently contrary to reason.” Pet. App. Br., p. 5.

18. NRP denounced the publications of *Amicus* Professor Richard L. Cupp of Pepperdine Caruso School of Law—cited with approval by both the First and Third Departments—as “junk political science, junk philosophy, and junk history.” *Id.* p. 47.

19. NRP even challenged the First Department’s analysis of habeas corpus and legal “personhood” in *Lavery II* as mere “dicta,” and not controlling precedent. *Id.* at 29-30.

20. The Appellate Division, First Department corrected this misperception: “We decline to overrule any of our alternative holdings in *Lavery*, which petitioner erroneously refers to as ‘dicta.’” *Nonhuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583 (1st Dep’t 2020).

21. NRP’s single-minded focus on its own view of animal rights—to the exclusion of others—only highlights the myriad viewpoints that are *not* before this Court. Countless individuals, industries, and interests would be impacted by reforming the fundamental legal framework governing humans and animals, and not all of them agree with the Non-Human Rights Project. It is for this very reason that “the decisions of whether and how to integrate other species into legal constructs designed for humans is a matter ‘better suited to the legislative process.’” *Breheny*, 189 A.D.3d 583.

22. This Court should deny NRP's third motion to strike and decline NRP's invitation to revisit an issue that is now well settled, based on NRP's series of meritless habeas corpus petitions.

  
Kenneth A. Manning, Esq.

Sworn to before me this  
19<sup>th</sup> day of February, 2021

  
Notary Public

Doc #9486897.1

**WILLIAM V. ROSSI**  
No. 02RO6358875  
Notary Public, State of New York  
Qualified in Erie County  
My Commission Expires 05/15/20 21