

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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,

-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.

Case No.: 2020-02581

**Index No. 260441/2019
(Bronx County)**

**NOTICE OF MOTION OF
PROTECT THE HARVEST
AND ALLIANCE OF
MARINE MAMMAL
PARKS & AQUARIUMS
FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE***

PLEASE TAKE NOTICE that, upon the annexed affirmation of Bezalel Stern, Esq., dated September 14, 2020, the undersigned will move this Court, at a term of the Appellate Division of the Supreme Court, First Judicial Department, at the Courthouse located at 27 Madison Avenue, New York, New York, for an order granting leave to file the annexed brief of Protect the Harvest and Alliance of Marine Mammal Parks and Aquariums as Amici Curiae in support of the Respondents-

Appellees James J. Breheny and the Wildlife Conservation Society in the above-captioned action.

PLEASE TAKE FURTHER NOTICE that the Motion is returnable at 10 o'clock in the forenoon on September 25, 2020, which is at least 9 days from the date of service of these papers. Arguments will be on the papers and no appearance is required or permitted.

DATED: September 14, 2020

Respectfully submitted,



Bezalel A. Stern
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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SOCIETY,

Respondents.

Case No.: 2020-02581

**Index No. 260441/2019
(Bronx County)**

**AFFIRMATION OF
BEZALEL STERN, ESQ. IN
SUPPORT OF MOTION OF
PROTECT THE HARVEST
AND ALLIANCE OF
MARINE MAMMAL
PARKS & AQUARIUMS
FOR LEAVE TO FILE
BRIEF AS *AMICI CURIAE***

I, Bezalel Stern, Esq., hereby affirm under penalty of perjury:

1. I am an attorney duly admitted to practice in the courts of the State of New York. I am not a party to this proceeding nor do I represent any of the parties to it. I submit this affirmation in support of the Motion of Protect the Harvest and Alliance of Marine Mammal Parks & Aquariums (“AMMPA”) to submit the attached Brief as *Amici Curiae* in support of the Respondents-Appellees James J. Beheny and the Wildlife Conservation Society (“WCS”) in the above-captioned

proceedings. Exhibit A attached hereto is the Order appealed from. Exhibit B attached hereto is the Notice of Appeal.

2. Protect The Harvest, a non-profit organization, was created to defend and preserve American freedoms and to support farmers, ranchers, outdoor enthusiasts, and animal owners. Protect the Harvest informs and educates Americans about the activities of purported animal rights groups, anti-agriculture groups and similar organizations that threaten agriculture and animal welfare. Protect the Harvest supports agriculture, land use, hunting and fishing, animal ownership, and animal welfare.

3. AMMPA is a 501(c)(4) nonprofit association and accrediting body for marine parks, aquariums, and zoos located in the United States and internationally, dedicated to the highest standards of care for marine mammals and their conservation in the wild. AMMPA's approximately 65 members, which include both for-profit and nonprofit entities, advance the objectives of marine mammal conservation through public display, education, research, and the rescue and rehabilitation of injured, orphaned, and distressed animals in the wild. One of AMMPA's current members is Long Island Aquarium, located in Riverhead, New York. Aquarium of Niagara, located in Upstate New York, is a provisional member of AMMPA. In the past, AMMPA has had other members who are located in the State of New York.

4. Protect the Harvest and AMMPA's proposed Brief addresses the issue of whether Happy, the Asian elephant at the center of this case, is a "person" entitled to habeas corpus relief.

5. Both Protect the Harvest and AMMPA are familiar with the legal issues in the above-captioned case, as they already filed an amicus brief before the trial court when this case was situated in Orleans County. Protect the Harvest and AMMPA are qualified and competent in the matters found in its Brief.

6. The issues before the Court are of great importance. Protect the Harvest and AMMPA's proposed Brief contains arguments that might otherwise escape this Court's consideration, and their proposed Brief will be of special assistance to this Court.

7. Protect the Harvest and AMMPA's proposed Brief is attached hereto as Exhibit C.

WHEREFORE, I respectfully request that this Court enter an Order: (i) granting Protect the Harvest and AMMPA's Motion For Leave to file the proposed Brief as Amici Curiae; (ii) accepting the Brief that has been filed and served along with the Motion, and; (iii) granting such other and further relief as this Court deems just and proper.

DATED: September 14, 2020

Respectfully submitted,



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EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5

The Northman Rights Project
on behalf of HAPPY -against-

Index No. 260441/19

Hon. Allison Y. Tullt

Justice Supreme Court

Brekens, James J.

The following papers numbered 1 to 16 were read on ^{these} ~~this~~ motions (Seq. No. 1, 2, 4-12)
for Miscellaneous Reliefs noticed on various dates 9/13/19

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that ^{these motions and} ~~this motion is~~ order to show

causes, Verified Petition, and related
motions are decided in accordance with the
annexed memorandum decision

Motion is Respectfully Referred to Justice:

Dated:

Dated: 2/18/20

Hon. A. Y. Tullt

Allison Y. Tullt, J.S.C.

J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
- ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

C

NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

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

INDEX NUMBER: 260441/2019

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

Petitioner,

-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,

Present:
HON. ALISON Y. TUITT
Justice

Respondents.

On Calendar of 1/6/2020

The following papers, numbered as follows:

Read on these:

<u>Order to Show Cause, Verified Petition, related papers</u>	<u>1-14</u>
<u>Order to Show Cause with Temporary Restraining Order</u>	<u>15</u>
<u>Motion to Dismiss or Change Venue, related papers</u>	<u>16-21</u>
<u>Motion for a Protective Order, related papers</u>	<u>22-26</u>
<u>Motion for Leave to File Late Papers</u>	<u>27</u>
<u>Motion for Preliminary Injunction, related papers</u>	<u>28-32</u>
<u>Motion to Strike Respondents' Verified Answer, related papers</u>	<u>33-38</u>
<u>Motion for an Order Granting Amici Leave to File an Amicus Curiae Brief</u>	<u>39-46</u>

Upon the foregoing papers, the Order to Show Cause and Verified Petition for Writ of Habeas Corpus and Respondent's motion to dismiss the Petition are consolidated for purposes of this decision. For the reasons set forth herein, the motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the related motions are denied as moot.

Procedural History

This is a habeas corpus proceeding brought by Petitioner, the NhRP on behalf of Happy, a 48 year old Asian elephant situated in the Bronx Zoo, New York. Petitioner commenced the proceeding on October 2, 2018 in Supreme Court, Orleans County by filing a Verified Petition or a Common Law Writ of Habeas Corpus and Order to Show Cause pursuant to CPLR Article 70 on behalf of Happy. The NhRP alleges that Happy is being unlawfully imprisoned in the Bronx Zoo and demands her immediate release to an appropriate elephant sanctuary of which there are two in the United States, both which have agreed to provide lifetime care at no cost to the Bronx Zoo. In lieu of serving an answer to the Petition, the Bronx Zoo moved to change the venue of these proceedings from Orleans County to Bronx County or, in the alternative, to dismiss the proceedings with prejudice. On January 18, 2019, the Orleans County Court granted the branch of the motion to change venue, and the matter was transferred to Bronx County. The parties brought several other motions that were not decided by the Orleans County Court, and were transferred to this Court. Among the motions that the NhRP filed in Orleans County was a preliminary injunction requesting that the Orleans County Court enjoin the Bronx Zoo from removing Happy from the State of New York pending the outcome of this proceeding. Respondents' moved to dismiss the Petition on the grounds that controlling New York law holds that habeas corpus protection under CPLR Article 70 should not be extended to animals as the NhRP fails to cite any legal precedent applicable in the State of New York to support its position. Additionally, the NhRP brought motions to strike Respondents' opposition to Petitioner's proposed Order to Show Cause, to allow the filing of late reply papers, and, for a protective order. There was also a motion of *Amici* to File Brief *Amicus Curiae*. This Court heard oral arguments on these proceedings on August 12, 2019, September 23, 2019, October 21, 2019 and January 6, 2020.

The NhRP seeks the issuance of the Writ of Habeas Corpus and Order to Show Cause demanding that Respondents demonstrate forthwith the basis of their imprisonment of Happy; upon a determination that

Happy is being unlawfully imprisoned, an Order directing her immediate release from the Respondents' custody to an appropriate sanctuary; and, an award for the NhRP for the costs and disbursements of this action.

The Parties

The NhRP is a not-for-profit corporation, a civil rights organization 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, and those other legal rights to which evolving standards of morality, scientific discovery, and human experience entitle them.” <https://www.nonhumanrights.org/who-we-are/>. For the past 20 years, the NhRP has worked to change the status of such nonhuman animals as chimpanzees and elephants from legal things to legal persons. The NhRP has filed similar cases in several other New York Courts with the goal of obtaining legal rights for chimpanzees, elephants, and ultimately for other animals.

Respondent the Wildlife Conservation Society (“WCS”) is a not-for-profit corporation, headquartered at the Bronx Zoo, whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education and inspiring people to value nature. Opened in 1899, the Bronx Zoo, a WCS park, 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. WCS manages the Bronx Zoo along with other New York City wildlife parks and zoos. Respondent James Breheny is WCS’ Executive Vice President and General Director of Zoos and Aquariums, and is the Director of the Bronx Zoo.

Happy the Elephant

Happy is a 48 year old female Asian elephant who was captured in the wild and brought to the United States when she was one year old. In 1977, Happy and another elephant named Grumpy arrived at the Bronx Zoo. There, in addition to being on display, Happy gave rides and participated in “elephant extravaganzas”. For the next 25 years, Happy and Grumpy lived together. The Bronx Zoo had other elephants, and they were kept two by two. In 2002, the Bronx Zoo paired Happy and Grumpy with two other elephants, Patty and Maxine in the same elephant exhibit. Patty and Maxine attacked Grumpy who tumbled and fell, and was seriously injured. Grumpy never recovered from her injuries and was euthanized. Thereafter, the Bronx

Zoo separated Happy from them, and introduced a younger female Asian elephant named Sammie into her portion of the exhibit. Sammie suffered from severe liver disease and was euthanized in 2006. The Bronx Zoo announced after the death of Sammie that it would not acquire any new elephants. Since 2006, Happy has been living alone at the Bronx Zoo. The NhRP argues, in essence, that Happy has been imprisoned in solitary confinement, notwithstanding the uncontroverted scientific evidence that Happy is an autonomous, intelligent being with advanced cognitive abilities akin to human beings.

The NhRP's arguments

The NhRP brings the instant proceeding alleging that Happy is being unlawfully imprisoned by Respondents in the Bronx Zoo. Happy has been living alone in an one-acre enclosure within the Bronx Zoo since Sammie's death in 2006. The NhRP argues that Happy has been, and continues to be, denied direct social contact with any other elephants, and spends most of her time indoors in a large holding facility lined with elephant cages, which are about twice the length of the animals' bodies. The NhRP argues that whether Respondents are in violation of any federal, state or local animal welfare laws in their detention of Happy is irrelevant as to whether or not the detention is lawful. The NhRP further contends that this habeas corpus case is neither an animal protection, nor animal welfare case. The Petition does not allege that Happy is illegally confined because she is kept in unsuitable conditions, nor does it seek improved welfare for Happy. Rather, this Petition seeks that this Court recognize Happy's alleged common law right to bodily liberty, and order her immediate release from Respondents' current and continued alleged unlawful detention so that her liberty and autonomy may be realized. NhRP argues that it is the fact that Happy is imprisoned at all, rather than her conditions of her imprisonment, that is unlawful.

The NhRP seeks Happy's immediate release from her imprisonment to a permanent elephant sanctuary, two of which have agreed to take Happy: the Professional Animal Welfare Society ("PAWS") in California, and The Elephant Sanctuary in Tennessee. In support of its application, the NhRP submits expert scientific affidavits from five of the world's most renowned experts on the cognitive abilities of elephants: the affidavit of Joyce Pool; the supplemental affidavit of Joyce Pool; the joint affidavit of Lucy Bates and Richard W. Byrne; the affidavit of Karen McComb; and, the affidavit of Cynthia J. Moss. The NhRP also submits the affidavit from an expert in the care and rehabilitation of captive elephants in sanctuary. In his affidavit, Ed

Stewart, President and Co-Founder of PAWS, states that PAWS has agreed to provide permanent sanctuary to Happy should she be released.

The NhRP submits its expert affidavits which demonstrate that Happy possesses complex cognitive abilities sufficient for common law personhood and the common law right to bodily liberty. These include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; an extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; to understand the physical competence and emotional state of others; imitate, including vocal imitation; point and understand pointing; engage in true teaching (taking the pupil's lack of knowledge into account and actively showing them what to do); cooperate and build coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understand causation; intentional communication, including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of particular communication; wide variety of gestures, signals and postures; use of specific calls and gestures to plan and discuss a course of action, adjust their plan according to their assessment of risk, and execute the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.

The NhRP's experts state that African and Asian elephants share numerous complex cognitive abilities with humans, such as self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities. Each is a component of autonomy. The experts opine that African and Asian elephants are autonomous, as they exhibit self-determination behavior that is based on a freedom of choice. As a psychological concept, it implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively. Physical similarities between human and elephant brains occur in areas that link to the capacities necessary for autonomy and self-awareness. The NhRP further alleges that Happy is the first elephant to pass the mirror self-recognition-test ("MSR"), considered to be an indicator of an animal's self-awareness and is thought to correlate with higher forms of empathy and altruistic behavior. As do humans, Asian elephants exhibit MSR, which is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual's forehead that she cannot see or be aware of without the aid of a mirror. If the individual

uses the mirror to investigate the mark, the individual must recognize the reflection of herself. The NhRP experts argue that MSR is significant because it is a key identifier of self-awareness, which is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one's own behavior to achieve personal goals and desires. By demonstrating they can recognize themselves in a mirror, the experts claim that elephants must be holding a mental representation of themselves from another perspective, and thus must be aware that they are a separate entity from others.

Both chimpanzees and elephants demonstrate an awareness of death by reacting to dead family or group members. Having a mental representation of the self, which is a pre-requisite for MSR, likely confers an ability to comprehend death. Wild African elephants have been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead elephants. Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead, they engage in more "mournful" or "grief stricken" behavior, such as standing guard over the body with a dejected demeanor and protecting it from predators. They have been observed covering the bodies of their dead with dirt and vegetation. Mothers who lose a calf may remain with the calf's body for an extended period, but do not behave towards the body as they would a live calf. The general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations. These behaviors are akin to human responses to the death of a close relative or friend, and demonstrate that elephants possess some understanding of life and the permanence of death. Elephants frequently display empathy in the form of protection, comfort and consolation, as well as by actively helping those in difficulty, assisting injured ones to stand and walk, or helping calves out of rivers or ditches with steep banks. In an analysis of behavioral data collected from wild African elephants over a 40 year continuous field study, the experts concluded that as well as possessing their own intentions, elephants can diagnose animacy and goal directedness in others, understand physical competence and emotional state of others, and attribute goals and mental states to other.

The Bronx/WCS' arguments

Respondents move to dismiss the Petition on the grounds that the NhRP, to no avail, has previously prosecuted several unsuccessful lawsuits on behalf of chimpanzees. Controlling New York precedent provides that animals are not entitled to habeas corpus protection under CPLR Article 70. Respondents argue

that contrary to the NhRP allegations, Happy is not unlawfully imprisoned at the Bronx Zoo. The AZA Standards for Elephant Management and Care and the Animal Welfare Act are the two primary standards for the care and management of elephants in AZA-accredited institutions in the United States. Respondents argue that the Bronx Zoo's compliance with these standards ensures that Happy is provided with excellent care focused on her well-being. The AZA Standards require that "[o]utdoor habitats must provide sufficient space and environmental complexity to both allow for and stimulate natural behavioral activities and social interactions resulting in healthy and well-adapted elephants." The Standards include requirements for variation in an elephant's environment including varied terrain to allow for exercise and "foraging, wallowing, bathing, digging, and resting." "While outdoors and weather permitting, elephants must have regular access to water sources, such as a [sic] pools, waterfalls, misters/sprinklers, or wallows that provide enrichment and allow the elephants to cool and/or bathe themselves." Additional standards are included for subjects such as elephant diet, exercise, medical management, foot care, and skin care. Daily behavioral assessments of elephants must be conducted and recorded in a daily log. Elephant care professionals, managers, and directors who work for the Bronx Zoo are also required to complete AZA's Principles of Elephant Management courses. To remain an AZA-accredited zoo, the Bronx Zoo submits annual reports regarding its elephant program, and is regularly inspected by AZA representatives and individuals from peer institutions. An elephant specialist is included in every AZA accreditation inspection of the Bronx Zoo. On April 27, 2018, in response to the Bronx Zoo's most recent report, the AZA confirmed that the Bronx Zoo is in compliance with the AZA Standards for elephants.

In addition, the Bronx Zoo is regulated under the Animal Welfare Act and Animal Welfare Regulations. Although the Animal Welfare Act does not contain any elephant-specific requirements, the Act's standards and regulations ensure that animals receive humane care and treatment at regulated facilities. Among its requirements, the Animal Welfare Act requires the Bronx Zoo to employ an attending veterinarian who shall provide adequate care, and maintain compliance with standards for "the humane handling, care, treatment, housing, and transportation of animals. Compliance with the Animal Welfare Act is overseen by the U.S. Department of Agriculture ("USDA") Animal Care. USDA inspectors make routine, unannounced inspections of facilities like the Bronx Zoo at least once a year. Respondents argue that Happy's living conditions are therefore not "unlawful" according to applicable standards.

Happy's routine care program incorporates the AZA Standards and requirements under the

Animal Welfare Act. On a daily basis, Happy's appetite, food intake, stool appearance and quantity, overall activity, and responsiveness to keepers are monitored. Happy also receives baths on a daily basis. Everyday Happy's keepers assess her body condition, provide her with various forms of enrichment that encourage mental and physical stimulation, and engage in positive reinforcement training sessions that help to maintain behaviors used to facilitate Happy's care. On a regular basis, the Bronx Zoo conducts voluntary blood draws and trunk washes, as well as weigh-ins to monitor Happy's health. Weather permitting, Happy has regular, year-round access to a large, naturalistic outdoor exhibit in which she may go swimming and engage in other species-typical behavior, and also has regular overnight access to a large outdoor space. Patrick Thomas, PhD, Vice President and General Curator of WCS and Associate Director of the Bronx Zoo, states that Happy has developed a familiarity and comfort with her keepers, and she recognizes her surroundings as her familiar, longstanding environment. It is his opinion that suddenly taking her away from this environment and introducing entirely new surroundings without the support of her keepers could inflict long-term damage on Happy's welfare. Mr. Thomas states that Happy has also shown in past experiences that she does not respond well to even temporary, short moves within the Bronx Zoo. He believes that transporting Happy the long distance from the Bronx Zoo across the country to the sanctuary in California would cause severe stress and potentially inflict long-term physical harm. Based on his 40 years of experience and responsibilities in supervising the care of animals at the Bronx Zoo, including Happy, to the best of his knowledge, Mr. Thomas opines that Happy is currently healthy and well-adapted to her surrounding in the Bronx Zoo.

Paul P. Calle, WCS's Vice President for Health Programs, Chief Veterinarian and Director of the Zoological Health Program based at the Bronx Zoo, states that the Bronx Zoo undertakes a multitude of efforts to ensure Happy's continued physical and psychological well-being and health. Happy is given visual checks by the care staff several times each day and, on occasion when an issue is identified, the veterinary staff responds appropriately to any concern that is noted. The veterinary staff conducts regular health assessments of Happy through body condition evaluations, oral, dental and foot examinations. Baseline toe x-rays of Happy's feet were completed, and are repeated for comparative analysis, on an as-needed basis to address particular areas of concern as they arise. Veterinary staff are consulted by keepers regarding nail and pad conditions, with veterinary participation in trims, evaluations, or treatments as necessary. Veterinary staff participate in development and maintenance of medical behaviors (trunk wash, oral/dental evaluation, blood sampling, foot

work, presentation for injections or x-rays) in conjunction with Happy's animal keeper staff. Happy's health care is recorded and documented in her individual medical record, and documented in the Bronx Zoo's annual AZA Elephant Program Annual Report. Mr. Calle states that based upon his responsibilities in providing veterinary care for almost 30 years to animals at the Bronx Zoo, including Happy, and to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. During his experience with Happy, she has become very distressed during short moves from one area of the Zoo to another. Mr. Calle opines that given Happy's age and longstanding familiarity and attachment to her surroundings, a long-distance move, such as that proposed by the NhRP to California, would cause substantial stress to Happy. Imposing this move on Happy would create a serious risk to her long-term health that Mr. Calle does not believe is justified. In his professional opinion, Happy's health and well-being would not be best served by moving her to an animal sanctuary such as the facility operated by the PAWS Sanctuary.

James J. Breheny, Director of WCS, argues that the NhRP's expert affidavits provide little to no relevant information regarding whether Happy is "unlawfully imprisoned" at the Bronx Zoo. In substance, the affidavits are almost verbatim duplicates of each other and barely address Happy. The affidavits the NhRP relies upon only provide generalized, anecdotal discussions of African and Asian elephants as observed in the wild. Mr. Breheny argues that the affidavits posit that elephants are generally better suited to the company of other elephants, without accounting for the particular needs, wants, and temperament of any one elephant. None of the expert affidavits submitted in support of the NhRP's Petition make any reference to Happy, her current state of well-being, or her needs as a 48 year old Asian elephant who has lived for over 40 years at the Bronx Zoo. Mr. Breheny argues that elephants who have lived at zoos for long periods of time are significantly different from elephants in the wild, and the characteristics of one cannot generally be attributed to the other, therefore, the NhRP's supporting expert affidavits have limited applicability to Happy and her specific needs. In contrast, the Bronx Zoo employees, including Mr. Breheny himself, have been caring for Happy's interest and well-being, knowing her individually for over 40 years.

The Bronx Zoo has significant resources for the care and well-being of Happy, including a large number of highly trained and experienced staff that provides excellent care and medical attention for Happy, as well as the sustained financial resources of a major institution. Happy also has longstanding relationships and familiarity with her caregivers and surroundings at the Bronx Zoo, where she has lived for nearly all of her life.

Mr. Breheny alleges that the NhRP does not take into consideration Happy's unique characteristics, personality and needs. For example, there is Happy's history of not interacting well with other elephants at the Bronx Zoo, which is why she is housed separately since her companion died. The NhRP also fails to consider that Happy may not socialize well with the elephants in the sanctuary due to her alleged acrimonious behavior. Based upon past experiences with Happy, the Bronx Zoo knows that she becomes particularly distressed by even short moves within the Zoo. Based upon his expertise and decades-long experience with Happy, Mr. Breheny states his professional opinion that Happy's interest would not be best served by moving her to an animal sanctuary.

The NhRP Counter-Arguments

In response, the NhRP argues that the Bronx Zoo imprisons Happy in a tiny, cold, lonely, "un-elephant-friendly", an unnatural place that ignores her autonomy as well as her social, emotional, and bodily liberty needs, while daily inflicting further injury upon her that would be remedied by transferring her to any American elephant sanctuary. They argue that the Bronx Zoo's unlawful imprisonment of Happy, an autonomous, extraordinarily cognitively-complex being, violates her common law right to bodily liberty. The NhRP has placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds. The NhRP specifically demands that this Court determine that Happy possesses the common law right to bodily liberty and immediate release from her unlawful imprisonment so that her autonomy may be realized. The NhRP argues that the notion that living on a 2,300 acre sanctuary, such as PAWS is comparable to being imprisoned in the Bronx Zoo's approximately one acre elephant exhibit is absurd. The NhRP contends that the purported experts on behalf of the Bronx Zoo have not published or submitted for publication any peer-reviewed articles about elephants, nor have they studied or examined any elephants in the wild or in any other zoo. Similarly, none of the Bronx Zoo's affiants present any evidence that they have studied any wild elephant, or know about an elephant's basic social, emotional, behavioral, liberty, and autonomy needs, whether captive or wild.

The NhRP also takes issue with Mr. Calle's statement that to the best of his knowledge, Happy is currently healthy and well-adapted to her present surroundings. Mr. Calle fails to properly address the very

small space available to Happy at the Bronx Zoo. There are three possible locations for elephants at the Zoo: an indoor "holding area" or elephant barn; a barren cemented walled outdoor elephant yard that appears to be 0.05 of an acre; and, a Zoo exhibit, listed as being only 1.15 acres. Since the Bronx Zoo elephants are incompatible, the naturalistic exhibit area has to be shared on a rotational basis. At night, Happy is usually in a small pen in the barn or in the barren outdoor yard. During most days, weather permitting, she is also in the barren outdoor elephant yard. Dr. Poole notes that it is difficult for members of the public to obtain much information about Happy's behavior other than viewing short videos of her captured by visitors to the Zoo. Dr. Poole states that in these videos, Happy is engaged in only five activities/behavior: standing facing the fence/gate; dusting, swinging her trunk in stereotypical behavior; standing with one or two legs lifted off the ground, either to take weight off painful, diseased feet or again engaging in stereotypic behavior; and once, eating grass. According to Dr. Poole, only two of these activities are natural, dusting and eating grass, and being alone in a small place, there is little else for her to do.

Dr. Poole found that Happy has no general problem getting along with other elephants, and opines that Happy is not anti-social, per se, but the historical information indicates that Happy was once attacked by Maxine and Patty and there was a risk that it could happen again. The NhRP argues that in the 40 years that she has been at the Bronx Zoo, Happy has only been given a choice of four companions, with whom she was forced to share a space that for an elephant is the equivalent of the size of a house. Two of these companions she liked and lost, and the other two attacked her. Dr. Poole opines that this is a confirmation of the Bronx Zoo's inability to meet Happy's basic needs. Moreover, Dr. Poole notes that the claims that Happy does not do well with change; that she will not survive the transport; that a transfer to a sanctuary will be too stressful; that she does not know how to socialize; and, that her unique personality is problematic, have often been disproven. Dr. Poole states that elephants with serious physical or psychological problems in zoos have usually become more normal functioning elephants when given more appropriate space in a sanctuary such as PAWS. Dr. Poole then provides examples of elephants similar to Happy who, when moved from a zoo to a sanctuary, almost immediately blossomed into happy, successful, autonomous, and socially and emotionally fulfilled beings. Dr. Poole opines that such space permits autonomy and allows elephants to develop healthy social relationships and to engage in a near natural movement, foraging, and repertoire of behavior.

The Law

New York Courts have addressed the question of “personhood” with respect to chimpanzees. The NhRP has brought four identical, separate habeas corpus proceedings on behalf of “imprisoned chimpanzees” in four different counties, each within a different department of the Supreme Court, Appellate Division. The NhRP argued that chimpanzees are entitled to habeas corpus relief as their human-like characteristics render them “persons”. In each case, the trial court declined habeas corpus relief for the chimpanzees, and the NhRP appealed each decision. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief.

The NhRP has standing to file the Petition for habeas corpus on behalf of Happy. Pursuant to CPLR 7002(a), a petition may be brought by “[a] person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his behalf..., may petition without notice for a writ of habeas corpus...”. “As the statute places no restriction on who may bring a petition for habeas on behalf of the person restrained, ... petitioner [NhRP] has met its burden of demonstrating that it has standing.” The Nonhuman Rights Project, Inc. v. Stanley Jr. M.D., 2015 WL 1804007 (N.Y. Sup. Ct. 2015), amended in part, The Nonhuman Rights Project, Inc. v. Stanley, 2015 WL 1812988 (N.Y. Sup. 2015). Indeed, in the six habeas corpus cases that the NhRP has filed on behalf of chimpanzees in New York, the Courts found that NhRP had standing. See, Id.; People ex rel Nonhuman Rights Project Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014); Nonhuman Rights Project, Inc. ex rel Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015); Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), leave to appeal den., 31 N.Y.3d 1054 (2018); Nonhuman Rights Project on Behalf of Tommy v. Lavery, 31 N.Y.3d 1054 (2018); Nonhuman on Behalf of Tommy v. Lavery, 31 N.Y.3d 1065 (2018). Thus, this Court finds that the NhRP has standing to bring the habeas corpus proceeding on behalf of Happy.

However, on the question of whether an animal may be a “person”, the Courts have held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. In People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 998 N.Y.S.2d 248 (3d Dept. 2014), the appeal presented the novel question of whether a chimpanzee is a “person” entitled to the rights and protections afforded by the writ of habeas corpus. In Lavery, like here, the NhRP did not allege that respondents were in violation of any state or federal statutes respecting the domestic possession of wild animals. Instead it argued that a chimpanzee is a

“person” entitled to fundamental rights.

According to petitioner, while respondents are in compliance with state and federal statutes, the statutes themselves are inappropriate. Yet, rather than challenging any such statutes, petitioner requests that this Court enlarge the common-law definition of “person” in order to afford legal rights to an animal. We decline to do so, and conclude that a chimpanzee is not a “person” entitled to the rights and protections afforded by the writ of habeas corpus. Id. at 249

* * *

Not surprisingly, 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... Petitioner does not cite any precedent-and there appears to be none-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. In fact, habeas corpus relief has never been provided to any nonhuman entity. Id. at 249-250

* * *

Needless to say, unlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees 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 251

(Internal citations omitted).

In The Nonhuman Rights Project, Inc. ex rel. Hercules and Leo v. Stanley, 16 N.Y.S.3d 898 (N.Y. Sup. Ct. 2015), the NhRP brought an Article 70 proceeding under the common law for a writ of habeas corpus, on behalf of Hercules and Leo, two chimpanzees in the custody of respondent State University of New York at Stony Brook, seeking an Order directing their release and transfer to a sanctuary in Florida. The conditions under which Hercules and Leo were confined were not challenged by NhRP and it did not allege that respondents are violating any laws. While the Court was extremely sympathetic to the plight of the NhRP, on behalf of Hercules and Leo, it nonetheless held that given the Third Department precedent to which it is bound, the chimpanzees are not “persons” entitled to rights and protections afforded by the writ of habeas corpus, and the petition was denied, and the proceeding was dismissed.

In Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti, 999 N.Y.S.2d 652 (4th Dept. 2015), *lv. denied* 26 N.Y.3d 901 (2015), the NhRP sought a writ of habeas corpus on behalf of another chimpanzee, Kiko, arguing that he was illegally confined because he was kept in unsuitable conditions, and sought to have him

placed in a sanctuary. The Court did not address the question of whether a chimpanzee was deemed a person for habeas corpus purposes, or whether the NhRP had standing to seek habeas corpus on the chimpanzee's behalf. The Fourth Department affirmed the dismissal of the petition, holding that habeas corpus did not lie where the NhRP sought only to change the conditions of confinement rather than the confinement itself. In this matter, the NhRP sought to transfer Kiko to a different facility, a sanctuary, that it deemed more appropriate. The Court held that even if a chimpanzee was deemed a person for habeas corpus purposes, and even if the NhRP had standing to seek habeas corpus relief on Kiko's behalf, habeas corpus did not lie as it is well-settled that habeas corpus relief must be denied where the subject of the petition is not entitled to immediate release. Since the NhRP did not seek the immediate release of Kiko, but sought to transfer him to a sanctuary, habeas corpus does not lie. Here, the trial court declined to sign the order to show cause seeking habeas corpus relief, and the Fourth Department affirmed.

While petitioner's cited studies attest to the intelligence and social capabilities of chimpanzees, petitioner does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty, or that the Legislature intended the term "person" in CPLR article 70 to expand the availability of habeas protection beyond humans. No precedent exists, under New York law, or English common law, for a finding that a chimpanzee could be considered a "person" and entitled to habeas relief. In fact, habeas relief has never been found applicable to any animal. Id. at 395-396.

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. Petitioner does not suggest that any chimpanzee charged with a crime in New York could be deemed fit to proceed, i.e., to have the "capacity to understand the proceedings against him or to assist in his own defense". Id. at 396.

* * *

Petitioner argues that the ability to acknowledge a legal duty or legal responsibility should not be determinative of entitlement to habeas relief, since, for example, infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience, yet both have legal rights. This argument ignores the fact that these are still human beings, members of the human community. Id.

Even assuming, however, that habeas relief is potentially available to chimpanzees, the common-law writ of habeas corpus does not lie on behalf of the two chimpanzees at issue in these proceedings. Petitioner does not seek the immediate production of Kiko and Tommy to the court or their placement in a temporary home, since petitioner contends that "there are no

adequate facilities to house [them] in proximity to the [c]ourt.” Instead, petitioner requests that respondents be ordered to show “why [the chimpanzees] should not be discharged, and thereafter, [the court] make a determination that [their] detention is unlawful and order [their] immediate release to an appropriate primate sanctuary... Since petitioner does not challenge the legality of the chimpanzees' detention, but merely seeks their transfer to a different facility, habeas relief was properly denied by the motion court. Id. at 397.

(Internal citations omitted).

In Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery, 54 N.Y.S.3d 392 (1st Dept. 2017), lv denied 31 N.Y.3d 1054 (2018), the NhRP filed two petitions for habeas corpus on behalf of two chimpanzees, Tommy and Kiko. Supreme Court declined to extend habeas corpus relief to the chimpanzees. The NhRP appealed and the Appellate Division, First Department affirmed, holding that the human-like characteristics of chimpanzees did not render them “persons” for purposes of habeas corpus relief. The Court noted that any position to the contrary is without legal support or legal precedent. The asserted cognitive and linguistic capabilities of chimpanzees did not translate to a chimpanzee’s capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions. The Court further held that even if habeas corpus was potentially available to chimpanzees, writ of habeas corpus did not lie on behalf of the chimpanzees where the NhRP did not challenge the legality of the detention, but merely sought their transfer to a different and more appropriate facility.

Analysis

Regrettably, in the instant matter, this Court is bound by the legal precedent set by the Appellate Division when it held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus. Lavery, 54 N.Y.S.3d at 392. The First and Fourth Departments did not address the question of personhood for chimpanzees. For purposes of the decisions, both Appellate Departments noted that even if the NhRP had standing to bring the habeas corpus proceeding, and habeas corpus was potentially available to chimpanzees, the NhRP did not meet its burden for habeas corpus relief because it did not challenge the legality of the chimpanzees' detention, but merely sought transfer of the chimpanzees to sanctuaries. Thus, both Courts assumed, for purposes of the argument, that the NhRP had standing and that habeas corpus was available to the chimpanzee. However, the Third Department squarely addressed the question and held that animals are not “persons” entitled to rights and protections afforded by the writ of habeas corpus.

This Court is extremely sympathetic to Happy's plight and the NhRP's mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. Notwithstanding, in light of the Appellate Division, Third Department's holding that animals are not "persons", this Court is also constrained to find that Happy is not a "person" entitled to the writ of habeas corpus. In Lavery, 31 N.Y.3d 1054 (2018), the NhRP motion for leave to appeal the Third Department decision to the Court of Appeals was denied. However, in a concurring opinion, Justice Fahey noted that the denial of leave to appeal was not a decision on the merits of the NhRP claim. He stated that "[t]he question will have to be addressed eventually. Can a non-human animal be entitled to release from confinement through the writ of habeas corpus? Should such a being be treated as a person or as property, in essence a thing?" Id. at 1057. Justice Fahey further noted that "[t]he issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." Id. at 1059.

Conclusion

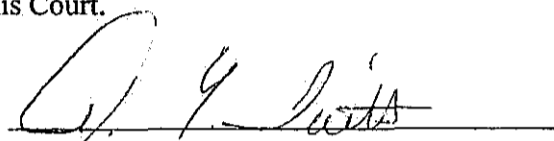
This Court agrees that Happy is more than just a legal thing, or property. She is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty. Nonetheless, we are constrained by the caselaw to find that Happy is not a "person" and is not being illegally imprisoned. As stated by the First Department in Lavery, 54 N.Y.S.3d at 397, "the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process". The arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot. Nevertheless, in order to do so, this Court would have to find that Happy is a "person" and, as already stated, we are bound by this State's legal precedent.

Accordingly, Respondents' motion to dismiss the Petition is granted and the Petition is dismissed. The remainder of the motions are denied as academic or moot.

This constitutes the decision and Order of this Court.

Dated:

February 18, 2020



Hon. Alison Y. Tuitt

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

**Index No.: 260441/2019
(Bronx County)**

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

NOTICE OF APPEAL

Petitioner,

Hon. Justice Alison Y. Tuitt
Justice Supreme Court
Bronx County

-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.

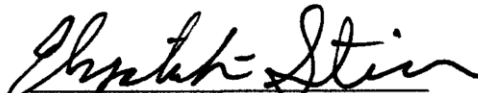
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COUNTY CLERK
BRONX COUNTY

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PLEASE TAKE NOTICE that the Petitioner, The Nonhuman Rights Project, Inc. ("NhRP"), on behalf of an elephant named Happy, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, for the First Judicial Department, from the decision and Order of the Supreme Court of the State of New York, County of Bronx (Hon. Justice Tuitt), dated February 18, 2020 and entered in the office of the Clerk of the County of Bronx on February 19, 2020, which granted Respondents' motion to dismiss the NhRP's Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause. Petitioner appeals from each and every part of that decision and Order.

Respectfully submitted,

Dated: 2/25/2020


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EXHIBIT C

New York Supreme Court

Appellate Division—First Department

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.

BRIEF FOR *AMICI CURIAE* PROJECT THE HARVEST AND ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS IN SUPPORT OF RESPONDENTS- RESPONDENTS

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**Appellate
Case No.:
2020-02581**

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Introduction

Three short years ago, this Court declined to issue a writ of habeas corpus to a chimpanzee. *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 54 N.Y.S.3d 392 (1st Dep’t 2017), *leave to appeal denied sub nom. Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018). In doing so, the Court acknowledged and affirmed that “habeas relief has never been found applicable to any animal.” 54 N.Y.S.3d at 396 (1st Dep’t 2017). There is a reason for this. Animals like Tommy the chimpanzee and Happy the elephant are not people. This Court should adhere to its own recent precedent, declining to grant habeas relief to a non-human.

It is undeniable that there are inherent differences between humans and non-humans. The Nonhuman Rights Project, Inc. (“NhRP”) itself acknowledges that animals and people are inherently different. The name of the organization itself—the *Nonhuman* Rights Project—emphasizes that its concern is not with all creatures, but only with those who are not human. Nonetheless, NhRP equates the treatment of Happy, an elephant, with the treatment of Blacks, Chinese, Native Americans and women. *See* Brief For Petitioner-Appellant (“NhRP Brief”), 24-25. NhRP asks this Court to find that elephants are “equal” to these human beings. *See id.* at 25 (Happy is “equally entitled to this right and it is irrational and arbitrary to deprive her of it.”). That is insidious.

NhRP effectively accuses those who do not believe animals are equal to humans of speciesism.¹ But there *are* obvious distinctions between animals and humans and they should be treated differently. The rectifications of historical discrimination and wrongs against Blacks, Chinese, Native Americans and women does not speak at all to providing habeas corpus to elephants.

Even assuming *arguendo* that this Court's recent precedent is not totally dispositive (as it is and should be), the Court should still affirm the Supreme Court's denial of the NhRP's habeas corpus petition.

NhRP argues that this Court should reverse its recent precedent, and the precedent of its sister Departments, because an elephant's "entitlement to habeas corpus is a constituent part of the process of 'mak[ing] the law conform to right.'" NhRP Brief, 13 (quoting *Woods v. Lancet*, 303 N.Y. 349, 351 (1951)). Similarly, Amicus Professor Laurence Tribe supposes that liberating Happy from her home would "produce common-sense justice." Amicus Brief of Professor Laurence Tribe ("Tribe Brief"), 23 (also quoting *Woods*, 303 N.Y. at 355).

¹ Speciesism is 1 : prejudice or discrimination based on species especially : discrimination against animals; 2 : the assumption of human superiority on which speciesism is based. See <https://www.merriam-webster.com/dictionary/speciesism>.

In evaluating NhRP’s arguments, this Court should question and probe these premises. Would allowing elephants—and by extension, all other animals—to go free, “make the law conform to right”? Would it produce “common sense justice?” *Woods*, relied on by both NhRP and Professor Tribe, was a case about the rights of a human infant. Amici herein believe that common sense and practicality maintain that there is an innate difference between humans and elephants, and bestowing human rights on an elephant such as Happy would lead to societal upheaval.

The trial court in this case, while affirming the settled law that animals do not have legal “personhood” when it comes to habeas corpus rights, noted that Happy “should be treated with respect and dignity.” *The NonHuman Rights Project v. Breheny*, No. 260441/19, 2020 WL 1670735, at *10 (N.Y. Sup. Ct. Feb. 18, 2020). Amici do not disagree with that conclusion. All creatures should be treated with respect and dignity. That does not, however, mean that all creatures should be provided the privilege and burden of human rights, including the privilege to habeas corpus protection. Elephants should not be given this right.

I. Granting Habeas Corpus to Animals Would Lead to Massive Societal and Economic Disruption

While this habeas petition is facially limited to one elephant, Happy, the ramifications are far greater. In fact, on its website discussing this appeal, NhRP blatantly touts that it is using Happy as a blunt tool in its drive to provide habeas corpus rights to all “autonomous nonhuman animals.” *See*

<https://www.nonhumanrights.org/blog/tuitt-decision-in-happys-elephant-rights-case-faq/> (“Justice Tuitt’s decision is a sign of tremendous progress in the fight for fundamental rights for Happy and other autonomous nonhuman animals, and this fight doesn’t end here—far from it.”).

If this Court were to rule that Happy, an elephant, should be provided the right to habeas corpus, the NhRP (and those others even more radical) would immediately set out to apply that wrongheaded precedent in an attempt to “free” not only all other elephants, but all other animals from their confines in zoos, farms, and homes throughout New York, and, indeed, across America.

This is not a pipe dream. NhRP and its founder Steven Wise are “on the record” stating their goal to seek human rights for, among other animals, “gorillas, orangutans, bonobos, Atlantic bottlenose dolphins, African gray parrots, African elephants, dogs and honeybees.” “Beastly Behavior?,” *The Washington Post* (June 5, 2002, <https://www.washingtonpost.com/archive/lifestyle/2002/06/05/beastly-behavior/63991f5b-2603-4c11-a024-9759a5f2680f/>).

In a 2015 interview, Mr. Wise and Natalie Prosin who at that time was NhRP’s Executive Director, made clear to their interviewer who recorded that “NhRP is trying to change the legal paradigm . . . *They do intend to extend their argument to as many nonhuman species as they can* and understand this is a long-term struggle.”

Animal Charity Evaluators, (Aug. 12, 2015)

<https://animalcharityevaluators.org/charity-reviews/charity-conversations/steven-wise-and-natalie-prosin/> (“Conversation with Steven Wise and Natalie Prosin”) (emphasis added). In a 2012 interview, Mr. Wise further elaborated on his and NhRP’s strategy: “When you litigate in a novel area, you want to begin with your strongest suits in the most favorable jurisdictions. The rule for the Nonhuman Rights Project is: Win big and, if we must lose, lose small.” “Peta v. SeaWorld – The Aftermath,” *Earth in Transition*, (Feb. 9, 2012) <https://www.earthintransition.org/2012/02/peta-v-seaworld-the-aftermath/>. Mr. Wise explained that: “The Nonhuman Rights Project will have to establish in a state court, not a federal court, that any animals on whose behalf we file suit are common law persons with the capacity to possess legal rights. *Then we will have to fight for each right.* Until that time comes, every nonhuman will continue to be regarded as a legal ‘thing’ that we can buy, sell, eat, hunt, ride, trap, vivisect, and kill almost at whim.” *Id.* (emphasis added).

Already NhRP has brought and continues to bring parallel cases in courts throughout New York and in other parts of the country NhRP views as potentially friendly to its paradigm-changing arguments. *See, e.g., Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334, N.Y.S.2d 652 (2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 998 N.Y.S.2d 248

(2014); *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36, 48, 216 A.3d 839, 846, *cert. denied*, 333 Conn. 920, 217 A.3d 635 (2019). To date, NhRP has lost every single case it has purportedly brought on behalf of the elephants and chimpanzees it claims to speak for.

NhRP is undeterred. It knows it needs but one win for the floodgates to open. If this Court or *any* court finds that Happy or any other non-human animal is entitled to habeas corpus rights, the NhRP will redouble its efforts to create a new common law, one that would allow virtually *all* animals to be freed, thereby irrevocably upsetting the social balance.

While NhRP attempts to focus the Court's attention solely on Happy, the Court should not be fooled. If this Court opens the door to habeas corpus for one elephant, it will not easily be closed.

A. Providing Animals Habeas Corpus Rights Would Weaken the Social Construct and Be Economically Destructive

Should Happy be provided with habeas corpus rights, farms, zoos, and aquaria would be at risk to a plethora of similar lawsuits purportedly made on behalf of the animals residing in their facilities under their care. And the risk would not be limited to institutions that maintain and own animals. Pet owners would no longer be able to be certain that they will be able to keep caring for the dogs, cats or fish that they possess. In providing animals with habeas corpus rights, NhRP seeks nothing less than to uproot and overturn the social order.

NhRP alleges that “public policy” favors its position. *See* NhRP Brief, 26 (“In considering Happy’s personhood, this Court should look to [] public policy”). Yet, much clearer “public policy” regarding the status of animals and allowing them to remain in zoos and aquariums is found in New York State’s recently increased funding by \$1 million to New York’s Zoos, Botanical Gardens, and Aquariums (ZBGA) Program. *See* “WCS Commends New York State Leaders for Historic Funding for Zoos, Botanical Gardens, Aquariums and Parks in New Budget,” located at <https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/12144/WCS-Commends-New-York-State-Leaders-for-Historic-Funding-for-Zoos-Botanical-Gardens-Aquariums-and-Parks-in-New-Budget.aspx> (“New York’s zoos, botanical gardens, aquariums and parks are a gateway for untold millions of New Yorkers to become stewards of wildlife and wild places. Having these important facilities properly funded enriches us all.”).

New York State also recently helped support, to the tune of over \$2 million, a new state of the art penguin habitat at the Aquarium of Niagara. *See* <https://www.governor.ny.gov/news/governor-cuomo-announces-grand-opening-humboldt-penguin-exhibit-aquarium-niagara> (“Governor Andrew M. Cuomo today announced the grand opening of the \$3.5 million Penguin Coast exhibit at the Aquarium of Niagara in Western New York”). If the public policy of the State of

New York was to consider animals like elephants persons, as NhRP asserts, New York would not continue to provide financial support to the zoos and aquariums in the State.

Moreover, were NhRP to succeed here in opening the gates to the release of Happy and ultimately other animals, the very existence of zoos and aquaria – including members of Amicus Alliance of Marine Mammal Parks & Aquariums (“AMMPA”) – would be threatened. That, in turn, would endanger the vital educational, scientific research and conservation work of these institutions that only *further public policy for the public good. See, e.g.,* <https://www.ammppa.org/about/who-we-are> (“[AMPPA]-accredited facilities dedicate their lives to the well-being of the animals in their care and to the rescue and rehabilitation of marine animals such as sea lions, dolphins, manatees, and sea turtles in need of help, [and] reach millions of guests each year . . . that inspire people to take action for marine mammals and our oceans.”).

The economic consequences of providing animals with “freedom” via habeas corpus also would be far-reaching. Take, for example, the agricultural interests represented by Amicus Protect the Harvest. “Emancipating” animals from their human ownership would decimate the agricultural economy of jurisdictions in which habeas corpus would be found to apply to animals.

According to the USDA, as of 2019, New Yorkers operating in the agricultural industry owned and made use of over 2,000,000 cows and calves, 87,000 sheep, and 53,000 hogs.

https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=NEW%20YORK. Indeed, farms using animals—especially dairy farms—are some of the primary economic engines covering much of the State. According to a 2019 report released by State Comptroller Thomas P. DiNapoli, “New York State farms generated \$5.7 billion in revenue in 2017.” “DiNapoli: Farms Generate \$5.7 Billion for New York’s Economy,” (Aug. 22, 2019) <https://www.osc.state.ny.us/press/releases/2019/08/dinapoli-farms-generated-57-billion-new-york-economy>. DiNapoli emphasized that “[a]griculture is an essential part of New York’s economy . . . employing more than 55,000 workers in 2017.” *Id.* (quotation omitted). The vast majority of these workers work in New York’s milk industry: “Milk is the state’s largest commodity, ranking third for sales nationwide in 2017, with sales of over \$2.5 billion. The state leads the nation in the production of yogurt, cottage cheese and sour cream.” *Id.*

Should the Pandora’s Box of habeas corpus be opened on behalf of animals, New York’s multibillion dollar agricultural industry would be at risk. Even the prospect of success of a habeas corpus petition being brought by NhRP or a similar group on behalf of a cow, sheep, or hog, would cause untoward economic

consequences to the State of New York, and could lead farmers and businesses to flee the State for more friendly confines and jurisdictions. This certainly is neither a “right” or “commonsensical” result.

On this point, the non-U.S. “precedents” cited by NhRP are particularly of note. NhRP makes much of the few far-flung jurisdictions outside of the United States providing “rights” to animals and, in one case, to a river. NhRP Brief, 35-37. NhRP’s position is notable for what it does *not* say. NhRP’s emphasis on foreign decisions providing rights to animals—a number of which were overturned on appeal, as Professor Tribe’s Amicus Brief honestly points out, Tribe Brief, 5-6—confirms the fact that no court in New York or in the greater United States has *ever* provided such rights to a non-human animal.

Giving animals habeas corpus rights, and allowing third-party entities that have no relationship to those animals or who manufacture ones by creating “trusts” to petition for habeas corpus “on their behalf,” would subvert property ownership law and the economics of New York State, or of any jurisdiction in which such habeas “rights” are provided. Undoubtedly, these are reasons why no court in *this* country has ever considered an animal to be a “person” for purposes of habeas corpus relief. This Court should not do so now.

B. If NhRP Were Successful, Where Would the Freed Animals Go?

While NhRP purports to speak for the animals who have no human “voice,” it is important to recognize that the group is not advocating the *actual* freedom of Happy the elephant or of any other particular animal. In fact, NhRP’s proposed remedy is the simple transfer of Happy from one confined location to another, albeit larger, confined location. NhRP brief, 3; 52-53.

Thus, NhRP contends that it does not want the Court to grant Happy the same rights that humans have, *e.g.*, to roam about freely. NhRP asserts “[t]hat Happy cannot be released into the wild or onto the streets of New York.” NhRP Brief, 50. *See also id.* at 3 (requesting the Court “order [Happy’s] immediate release to an appropriate elephant sanctuary[.]”). But, conceptually, why not? Depriving Happy of that “right” is discriminatory and contra to NhRP’s own arguments regarding equal protection under the law. *Id.* at 18-25.

Moreover, certain animals outside the United States have the right to roam free and unencumbered. *See, e.g.*, Annie Gowen, “Why India has 5 million stray cows roaming the country,” *Washington Post* (July 16, 2018), <https://www.washingtonpost.com/world/2018/07/16/amp-stories/why-india-has-million-stray-cows-roaming-country/>. If, as NhRP vociferously claims, Happy the elephant has habeas corpus rights, and if animals such as Happy are everywhere

(figuratively) in chains, why does NhRP not admit that animals such as Happy be allowed to roam freely?

The answer is obvious and undermines NhRP's entire stance: Animals simply cannot be equated to people or treated the same under the law.

Animals need attention, care and maintenance. Unless their owners are breaking the law—which certainly is not the case with respect to WCS and Happy—they are best left under the supervision of those who have provided for their welfare all along. If zoos and aquaria who lovingly and legally maintain their animals have to worry that they could be dragged into court at any given moment by the likes of NhRP, they will be disincentivized from acquiring and maintaining them from the start. The same can be said of farmers and their animals and pet owners and their companion pets. Animals will live on, no doubt, but their own welfare and conservation will suffer, and their multi-faceted contributions to an orderly society will be greatly diminished. That is not a result that any court should allow by opening the gates to human rights such as habeas corpus to animals.

II. The Legislative Process is the Appropriate Avenue to Advocate for Animal Rights

Throughout its brief, NhRP makes much of Judge Fahey's concurrence in the Court of Appeals' denial of leave to appeal in *Lavery*. 31 N.Y.3d 1054 (2018). Nevertheless, the fact remains that Judge Fahey joined a unanimous Court of Appeals in denying NhRP's motion for leave to appeal. 31 N.Y.3d at 1059. Judge

Fahey could have dissented. He chose not to. The full Court found that Tommy the chimpanzee did not have habeas corpus rights. And a precedential majority of the Court denied NhRP's leave to appeal without comment.

Judge Fahey hinted at a potential reason for his affirmance when he wrote that the question presented was “a deep dilemma of ethics *and policy* that demands our attention.” 31 N.Y.3d at 1058 (emphasis added). Such a policy question—with arguments and supporters on both sides—is best left to the Legislature. It is of course “the legislative branch of government [that has the] fundamental policy-making responsibility.” *Boreali v. Axelrod*, 71 N.Y.2d 1, 9 (1987). *See also Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 823 (2003) (“fundamental policy choices [] epitomize ‘legislative power.’”).

In Amici's view, there is a probable reason NhRP has not adopted this logical approach to change New York State's existing public policy. *See, e.g.*, pages 7-8, *supra*. NhRP is aware that the vast majority of New Yorkers likely believe removing animals from zoos, farms, and homes is *bad* public policy. Most New Yorkers *commonsensically* believe elephants can live happily in well-provisioned zoos, where they can at the same time serve as educational resources and cultural ambassadors to the people of New York. It is those *people* of New York for whom New York laws are made. *See, e.g.*, N.Y. Const. Preamble (“We, *the People of the State of New York*, grateful to Almighty God for our Freedom, in order to secure its

blessings, do establish this Constitution.”) (emphasis added). New York laws should be and, ideally, are, adopted by the New York Assembly with those people in mind.

CONCLUSION

It is settled law that animals such as elephants and chimpanzees do not have habeas corpus rights. Overturning this settled law would not conform with *stare decisis* and would also endanger the social contract. If NhRP really believes freeing animals from zoos, farms, and homes is good public policy, the proper forum for it to advocate such massive change in the law is the State Assembly. While the public policy of freeing elephants is questionable, this Court’s recent precedent is clear. The Court should affirm the lower court and its own precedent, denying NhRP’s petition.

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Respectfully submitted,



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