

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,

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

Petitioner,

-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.

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

**AFFIRMATION OF KEVIN
SCHNEIDER IN
OPPOSITION TO MOTION
OF RICHARD L. CUPP FOR
LEAVE TO FILE *AMICUS
CURIAE* BRIEF**

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

1. I am counsel for Petitioner, the Nonhuman Rights Project, Inc. ("NhRP"), in the above-captioned matter and am not a party in this action.
2. I am fully familiar with the pleadings and proceedings in this matter, have read and know the contents thereof, and submit this affirmation in opposition to the motion of Professor Richard L. Cupp, Jr. ("Cupp"), dated September 4, 2019, for leave to file a proposed *amicus curiae* brief.
3. As an initial matter, this Court should not even consider Cupp's motion as he is not an attorney admitted to practice in New York and therefore, based on the papers he has filed, cannot appear before this Court to argue it.

4. Further, Cupp's motion was served on the NhRP by Respondents' counsel *by email* on September 6, 2019 without the NhRP's prior consent to email service from a non-party. As such, service of Cupp's motion was ineffective.
5. If, however, the Court considers Cupp's motion, the Court should deny it for the reasons stated below.

CUPP'S PROPOSED BRIEF WILL PROVIDE NO ASSISTANCE TO THIS COURT.

6. In deciding whether to permit the filing of a proposed *amicus curiae* brief, courts consider whether the proposed brief identifies "law or arguments that might otherwise escape the court's consideration or would otherwise be of assistance to the court." *Anschutz Exploration Corp v. Town of Dryden*, 35 Misc.3d 450, 454 (Sup. Ct. 2012); *New York State Senator Kruger v. Bloomberg*, 1 Misc.3d 192, 198 (Sup. Ct. 2003).
7. Cupp's proposed brief will provide no assistance to this Court as it fails to provide any helpful analysis or arguments on any legal issue relevant to the proceeding. Not only is it patently wrong on the law but its underlying assertions are misleading.
8. Cupp states in his affirmation that his proposed brief "focuses primarily on responding to questions and concerns raised by Justice Fahey's concurring opinion in" *Nonhuman Rights Project Inc on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054 (2018) ("*Tommy*") (Fahey, J., concurring). Aff. of Cupp at 1.
9. Cupp's proposed brief begins with a series of blatant misrepresentations of Judge Fahey's statement that "[t]he inadequacy of the law as a vehicle to address some of our most difficult ethical dilemmas is on display in this matter," *Tommy*, at 1055, first by claiming that Judge Fahey was "opining that there is not a viable legal solution to the concerns he raises," and then

suggesting his statement “seems to assert that. . .there is no good legal answer to the problems he perceives.” Proposed Brief at 4.

10. It is clear from the context in the opinion, however, that Judge Fahey was in no way suggesting that there is no “viable legal solution” or “no good legal answer” to the profound issue of whether certain nonhuman animals have the fundamental right to bodily liberty protected by habeas corpus, but that it is a difficult, complex question that must be confronted. *See Tommy*, at 1058-1059 (the issue “is a deep dilemma of ethics and policy that *demand[s] our attention*”; “we have to recognize its complexity and *confront it*”; and “[u]ltimately, *we will not be able to ignore it.*”) (emphases added).
11. Nor was Judge Fahey suggesting, as Cupp asserts, that granting legal personhood to certain nonhuman animals such as chimpanzees and elephants “would be *highly problematic*,” Proposed Brief at 4 (emphasis added), as Judge Fahey made clear that, “in elevating our species, we should not lower the status of other highly intelligent species.” *Tommy*, at 1057.
12. Cupp’s proposed brief proceeds to analyze Judge Fahey’s statement that a chimpanzee is not “merely a thing,” *Tommy*, at 1058, arguing that the quoted phrase lacks “nuance” since animals are protected by “animal cruelty and neglect laws” and are thus not “mere” things. Proposed Brief at 4–7.
13. But as compliance with “animal cruelty and neglect laws” is irrelevant to this or any habeas corpus action, Cupp’s observations regarding such laws are wholly irrelevant and unenlightening.
14. Cupp’s affirmation also states that his proposed brief will “focus on the danger to humans with significant cognitive limitations inherent in what has been called ‘the argument from marginal cases.’” Aff. of Cupp. at 2.

15. Citing no evidence whatsoever, Cupp suggests in his proposed brief that Judge Fahey's criticism of the reasoning in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dept. 2014) ("*Lavery I*") and *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 76-79 (1st Dept. 2017) ("*Lavery II*") poses a "grave danger to the most vulnerable humans," in the form of erosion of their rights. Proposed Brief at 9–11.
16. Cupp's suggestion that recognizing even a single fundamental right for a nonhuman animal will cause humans to lose fundamental rights has no basis in fact, logic, reason, or history, and merely resembles the repugnant rationale used for centuries to justify the continued oppression and mistreatment of vulnerable groups. *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015) ("If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."). It is a preposterous and dangerous notion that merely seeks to impede progress by baseless fearmongering.
17. Accordingly, the "damaging consequences" that Cupp imagines, Proposed Brief at 13, and which he only vaguely articulates, have no possible bearing on the central legal issue in this case: whether this Court should recognize Happy's right to bodily liberty protected by habeas corpus.
18. Finally, Cupp's affirmation identifies several articles he has written including the two that *Lavery I* heavily relied on: *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz. St. L.J. 1 (2013), and *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69-70 (2009). Aff. of Cupp at 3.
19. As discussed in detail in the NhRP's Supplemental Memorandum of Law Upon Transfer (dated August 15, 2019), an examination of the sources in those two articles does not support Cupp's

assertions cited in *Lavery I* that legal rights are received in exchange for societal duties in a social contract. Pet. Supp. Mem. at 17–20.

20. Rather than address the NhRP’s criticisms, which go to the heart of *Lavery I*’s personhood analysis, Cupp’s proposed brief virtually ignores them, and devotes merely a single, inadequate footnote defending his article *Children, Chimps, and Rights*. Proposed Brief at 15 n. 15.
21. In *Children, Chimps, and Rights*, Cupp claims that the notion of a social contract is one where “societally imposed responsibilities are accepted in exchange for individual rights owed by society,” 45 Ariz. St. L.J. at 13, though Cupp’s only source for this assertion is a “see generally” citation to an article by Peter De Marneffe which does not support the assertion at all, since the article did not once claim that individual rights are exchanged for responsibilities. Pet. Supp. Mem. at 17; Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 82-83 (2017).
22. Cupp’s response merely notes that De Marneffe’s article uses language such as “limitations on liberties,” Proposed Brief at 15 n.15, which implies, in Cupp’s view, the creation of responsibilities, but nothing in the language or the article supports his claim that *individual rights are exchanged for responsibilities*.
23. Cupp’s proposed brief also does not provide any helpful analysis or defense of the assertions made in *Lavery I* or *Lavery II* that personhood requires the capacity to bear legal duties, nor does it even attempt to rebut the NhRP’s arguments against this erroneous and absurd notion. See Pet. Supp. Mem. at 9–22.
24. For example, Cupp asserts that “the only appropriate assessment regarding chimpanzees, elephants, and other animals relates to their inability. . . to bear the legal responsibilities to bear

the legal responsibilities that our society imposes as a norm on persons,” but grounds this claim on the vague notion of “the foundations of our society and its legal system” rather than any actual legal authority. Proposed Brief at 13.

25. Further, in support of the position that Happy should be denied the fundamental right to liberty protected by habeas corpus, Cupp believes it somehow relevant—but without explaining why—that humans are the only beings “who, as a norm, possess sufficient moral agency to be held accountable under our legal system.” Proposed Brief at 12.
26. The relevance of the “norm of sufficient moral agency” to the possession of fundamental legal rights is not only unexplained, but wholly unsupported by Cupp’s own sources, including *The Declaration of Independence*. Proposed Brief at 16.
27. Because Cupp’s proposed brief is full of assertions that are erroneous, irrelevant, preposterous, and unsupported, it cannot possibly provide any assistance to this Court.

CUPP’S MOTION WILL CAUSE FURTHER INTOLERABLE DELAY.

28. Habeas corpus is a “summary proceeding” that “strikes at unlawful imprisonment,” and “tolerates no delay except of necessity.” *People ex rel. Robertson v. N.Y. State Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (quoting *People ex rel. Duryee v. Duryee*, 26 Bedell 440, 445 (1907)).
29. Yet this proceeding, commenced nearly a year ago last October in Orleans County, has not reached resolution, and the Court must already consider numerous motions and hundreds of pages of documents submitted by both parties.
30. As Cupp’s proposed brief will provide no assistance to this Court, consideration of his motion will only cause further intolerable delay and “puts an unnecessary and unwarranted burden on the Court, as such application must be read and addressed, if only to be rejected.” *Price v. New*

York City Bd of Educ, 16 Misc.3d 543, 553 (Sup. Ct. 2007).

31. Based on the foregoing, Cupp's motion for leave to file his proposed *amicus curiae* brief should be denied.

Dated: September 18, 2019

A handwritten signature in black ink, appearing to read 'Kevin Schneider', is written over a horizontal line.

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