

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

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

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

Index No. 18-45164

Petitioner,

v.

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

Respondents.

**MEMORANDUM OF LAW IN OPPOSITION
TO PROPOSED ORDER TO SHOW CAUSE**

Respectfully submitted,

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PRELIMINARY STATEMENT

Petitioner the Nonhuman Rights Project, Inc. (“NRP”) seeks a writ of habeas corpus from this Court to transfer Happy, a 47-year old Asian elephant resident at the Bronx Zoo, to their suggested animal sanctuary Performing Animal Welfare Society near Sacramento, California. NRP seeks this extraordinary relief notwithstanding recent controlling New York law holding that habeas corpus protection under CPLR Article 70 should not be extended to animals. NRP does not and cannot cite to any legal precedent applicable in the State of New York to support its position, and NRP’s submissions do not provide a basis upon which to extend New York law. For the reasons stated below, Respondents Bronx Zoo Director James Breheny and Wildlife Conservation Society respectfully request that the Court deny NRP’s order to show cause and petition for writ of habeas corpus.

FACTUAL BACKGROUND

A. The Wildlife Conservation Society and the Bronx Zoo

Respondent the Wildlife Conservation Society is a not-for-profit corporation whose mission statement is to save wildlife and wild places worldwide through science, conservation action, education, and inspiring people to value nature. Affidavit of James J. Breheny (“Breheny Aff.”) at ¶ 3. Opened in 1899, the Bronx Zoo, a Wildlife Conservation Society 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. *Id.* ¶ 4.

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

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

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

Brehey Aff. Ex. A ¶ 37. Some of NRP’s stated goals are “[t]o develop . . . issue-oriented grassroots and legislative campaigns to promote recognition of nonhuman animals as beings . . . with their own inherent interests in freedom from captivity . . .” and “to build a broad-based coalition of organizations and individuals to secure legally recognized fundamental rights for nonhuman animals.” Brehey Aff. at ¶ 6.

C. NRP’s prior habeas petitions in New York state courts

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

In New York, NRP previously prosecuted numerous unsuccessful lawsuits on behalf of chimpanzees. Beginning on December 5, 2013, NRP sought a writ of habeas corpus on behalf of two chimpanzees by order to show cause in Suffolk County Supreme Court, where the court declined to sign NRP’s order to show cause. *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 2014 WL 1318081 at *1 (2d Dep’t Apr. 3, 2014). Less than a week later, on December 11, 2013, NRP presented a writ of habeas corpus on behalf of a different chimpanzee by order to show cause in Niagara County Supreme Court, which also declined to sign NRP’s order to show cause. *In re Nonhuman Rights Project ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep’t 2015), *leave to appeal denied* 26 N.Y.3d 901 (2015). NRP presented a third writ of habeas corpus on behalf of yet another chimpanzee on December 18, 2013, in Fulton County Supreme Court, which also declined to sign

NRP's order to show cause. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep't 2014), *leave to appeal denied* 26 N.Y.3d 902 (2015).

NRP appealed from each of the foregoing courts' declination to sign NRP's orders to show cause, resulting in decisions from the Second, Third, and Fourth Departments affirming the trial courts' decisions. *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo*, 2014 WL 1318081, at *1; *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 124 A.D.3d at 153; *In re Nonhuman Rights Project ex rel. Kiko*, 124 A.D.3d at 1335. The Court of Appeals refused to grant leave to appeal in both of the cases in which NRP sought leave. *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 26 N.Y.3d 902 (2015); *People ex rel. Nonhuman Rights Project v. Presti*, 26 N.Y.3d 901 (2015).

Before the foregoing appeals had concluded, NRP sought in New York County Supreme Court successive writs of habeas corpus for the chimpanzees involved in the foregoing matters. *In re Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep't 2017), *leave to appeal denied* 31 N.Y.3d 1054 (2018). New York County Supreme Court declined to sign two of the proposed orders to show cause, and the First Department affirmed. *Id.* New York County Supreme Court signed a third proposed order to show cause, and denied the petition for habeas corpus after the parties submitted briefing and held oral argument. *In re Nonhuman Rights Project, Inc. ex rel. Hercules and Another v. Stanley*, 49 Misc.3d 746, 773 (Sup Ct. N.Y. Cty. 2015).

D. Petitioner openly admits to forum shopping

On October 2, 2018, NRP announced via its blog that it had filed a petition in Orleans County Supreme Court on behalf of Happy, a 47-year old Asian elephant at the Bronx Zoo. Breheny Aff. ¶ 8. NRP states that although it "can file suit in any county [it]

chose to file in Orleans County (part of the Fourth Department) because the First Department, which oversees the county where the Bronx Zoo is located, ‘has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human.’” *Id.* ¶ 9.

ARGUMENT

POINT I

THE PROPOSED ORDER TO SHOW CAUSE SHOULD NOT BE GRANTED

A. Controlling New York precedent provides that animals are not entitled to habeas corpus protection under CPLR Article 70

Due in no small part to NRP’s efforts, New York law is now clear that habeas corpus protection under CPLR Article 70 does not extend to animals. “A person illegally imprisoned or otherwise restrained in his liberty within the state, or one acting on his [or her] behalf . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance.” CPLR 7002. The common law writ of habeas corpus, codified at CPLR Article 70, has been described as “the greatest of all writs” and is intended to effectuate the constitutional protection that “no person shall be deprived of his [or her] liberty ‘without due process of law.’” N.Y. Const., art. 1, § 4; *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875); *In re Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d at 753 (the writ of habeas corpus “is deeply rooted in our cherished ideas of individual autonomy and free choice”).

However, “the ascription of rights has historically been connected with the imposition of societal obligations and duties, and “the core of our system of government” is based upon the concept that “society extends rights in exchange for an express or implied

agreement from its members to submit to social responsibilities.” *People ex rel. Nonhuman Rights Project*, 124 A.D.3d 148, 151 (3d Dep’t 2014) (collecting authorities).

Persons are unique from animals in that they are “animate beings which possess a capacity to own legal rights and to owe legal duties.” PERSON, *Black’s Law Dictionary* (10th ed. 2014) (citing 1 *English Private Law* § 3.18, at 142–43 (Peter Birks ed., 2000)).¹ In considering a prior petition for habeas corpus that NRP brought on behalf of a chimpanzee, the Third Department reasoned:

[U]nlike human beings, [animals] cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. . . [I]t is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon [animals] . . . the fundamental right to liberty protected by the writ of habeas corpus. . .

People ex rel. Nonhuman Rights Project, 124 A.D.3d at 152. The First Department cited the foregoing rationale with approval and found that “there is no support for the conclusion” that CPLR Article 70 applies to animals. *In re Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 77-78 (1st Dep’t 2017), *leave to appeal denied* 31 N.Y.3d 1054 (May 8, 2018) (“[t]he 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”).

As discussed in Point I.B, the Fourth Department, along with the Second Department, similarly has rejected NRP’s previous bids to apply CPLR Article 70 to animals. *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley et al.*, 2014 WL 1318081 at *1; *In re Nonhuman Rights Project ex rel. Kiko v. Presti*, 124 A.D.3d at 1334. Thus,

¹ Contrary to NRP’s assertions (Breheny Aff. Ex. A ¶ 24 n. 8), the Black’s Law Dictionary definition of a “person” as a being that has the capacity both to own legal rights and to owe legal responsibilities is not based “solely” upon a misquotation of *John Salmond, Jurisprudence*, 318 (Glanville L. Williams ed., 10th ed. 1947). Perhaps even more unhelpful to NRP’s position is Black’s Law Dictionary’s first definition of “person” as “A human being. — Also termed natural person.” PERSON, *Black’s Law Dictionary* (10th ed. 2014).

all four of the Departments of the Appellate Division previously have considered and denied the precise relief requested by NRP in this proceeding.

In its current submissions, NRP also does not and cannot “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.” *In re Nonhuman Rights Project, Inc. ex rel. Tommy*, 152 A.D.3d at 77. Simply put, “[n]o precedent exists, under New York law, or English common law” for applying habeas relief to any animal. *Id.* at 78 (collecting cases); *People ex rel. Nonhuman Rights Project, Inc.*, 124 A.D.3d at 149 (collecting cases).

To overturn the foregoing unanimous precedent, NRP relies heavily upon the Hon. Eugene M. Fahey’s decision to deny leave to appeal. *In re Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d at 1058. Although intended to be thought provoking, the concurring opinion does not overturn *In re Nonhuman Rights Project, Inc. ex rel. Tommy*, 124 A.D.3d at 149, as NRP contends. Breheny Aff. Ex. A ¶ 25. See *People ex rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm’rs.*, 174 N.Y. 417, 447 (1903) (“Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision”); *Robinson Motor Xpress, Inc. v. HSBC Bank, USA*, 37 A.D.3d 117, 124 (2d Dep’t 2006) (“Dicta, while not without importance, is not required to be followed”); *People v. Bourne*, 139 A.D.2d 210, 216 (1st Dep’t 1988) (“A case . . . is precedent only as to those questions presented, considered and squarely decided”).

NRP also relies heavily upon a single sentence from the Fourth Department decision in *People v. Graves*, 163 A.D.3d 16 (4th Dep't 2018), wherein the Fourth Department noted "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals." *Id.* at 21. However, the *Graves* decision addressed whether an auto dealership constituted a "person" under New York Penal Law, and thus analyzed a statutory framework separate and different from CPLR Article 70. *Graves*, 163 A.D.3d at 20. The *Graves* decision therefore does not address the question of whether animals constitute as "persons" under CPLR 7002.²

Because none of the authorities submitted by NRP necessitates a divergence from established precedent, Respondents respectfully request that the Court decline to sign NRP's proposed order to show cause.

B. Habeas corpus relief is not available because NRP seeks only a change of conditions

Notwithstanding the question of whether habeas corpus protection should be extended to animals, NRP's use of the writ of habeas corpus is also procedurally improper because it seeks only to change the conditions of confinement for Happy. *Brehey Aff. Ex. A* ¶ 8. NRP does not seek the release of Happy into the wild, contending that "[f]or elephants in captivity . . . going back to the 'wild' is unfortunately not an option." *Id.* ¶ 8 n.4. NRP instead seeks to transfer Happy to another facility, presumably one from which Happy would not be able to leave and where Happy's conditions would continue to be regulated in many ways.

² Similarly, NRP's reference to New York Estates, Powers and Trusts Law Section 7-8.1 is misplaced as it merely provides that "[a] trust for the care of a designated domestic or pet *animal* is valid" EPTL, sec. 7-8.1 (emphasis added), rather than addressing the legal personhood of animals.

Generally, the writ of habeas corpus may not be used to change the conditions of confinement except “where the manner and circumstances of the detention are such as to extend beyond that which is authorized by the judgment and commitment order.” *People ex rel. Jacobson v. Warden of Brooklyn House of Detention*, 77 A.D.2d 937, 937 (2d Dep’t 1980) (citing *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961)); cf. *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986) (denying writ of habeas corpus where petitioner only challenged “a particular type of confinement within the facility which the Department of Correctional Services is expressly authorized to impose on lawfully sentenced prisoners committed to its custody”). Because NRP neither seeks the immediate release of Happy nor alleges that Happy’s current living conditions are in any way unlawful, NRP’s use of the writ of habeas corpus is improper. *In the Matter of Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d at 1335 (holding that the habeas corpus relief sought by NRP on behalf of a chimpanzee was unavailable based upon the same rationale). Based upon the foregoing, the Court therefore should decline to sign NRP’s proposed order to show cause.

C. Significant statutory protections for animals exist

Denial of NRP’s petition for writ of habeas corpus does not render animals unprotected under the law. Indeed, numerous federal, state, and local laws and regulations exist to ensure the protection and well-being of animals. For example, the New York Agriculture and Markets Law Section 353 prohibits the torture or unjustifiable killing of animals; Section 355 prohibits the abandonment of animals in a public place; Section 359(1) prohibits the transportation of animals in cruel or inhuman manners; and Section 359(2) prohibits the impounding of animals and then failing to provide them with sustenance. *See also* the Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (administered by the

Animal and Plant Health Inspection Service, United States Department of Agriculture); the Association of Zoos and Aquariums (“AZA”) Accreditation Standards & Related Policies (2018) (detailed standards applicable to AZA-accredited institutions such as the Bronx Zoo available at <https://www.aza.org/what-is-accreditation>).

Moreover, NRP’s efforts to add habeas corpus protection to the list of statutory protections for animals may be better directed to the New York State Legislature than the courts. As the New York Court of Appeals recognized in a matter involving the legal rights of fetuses, “[w]hether the law should accord legal personality is a policy question which in most instances devolves on the Legislature, subject . . . to the Constitution.” *Byrn v. N.Y.C. Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972). As Judge Fahey suggests in his concurrence, this issue is a “deep dilemma of ethics and policy,” *In re Nonhuman Rights Project, Inc.*, 31 N.Y.3d at 1058, one that would surely benefit from the participatory nature of the legislative process and the input of stakeholders. Based upon the foregoing, Respondents respectfully request that the Court deny NRP’s petition for writ of habeas corpus.

POINT II

IF THE ORDER TO SHOW CAUSE IS GRANTED, VENUE SHOULD BE TRANSFERRED TO BRONX COUNTY

NRP contends that a writ of habeas corpus may be made to “any justice of the supreme court.” *Brehey Aff. Ex. A* ¶ 42. However, habeas proceedings remain subject to the practice provisions generally governing venue. *Greene v. Sup. Ct. Westchester Cty., Special Term, Part 1*, 31 A.D.2d 649, 649 (2d Dep’t 1968).

CPLR 506 states

[a] proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located.

See, e.g., Hawkins v. Coughlin, 132 Misc.2d 45, 47 (Sup. Ct. Queens Cty. 1986) (proper venue for petitioner's challenge to sentence credit was the county in which he was sentenced and resentenced).

Here, the material events addressed in NRP's petition, namely the current living conditions of Happy, occurred in Bronx County. *Breheny Aff.* ¶ 13. Happy also is currently located in Bronx County, and should the Court or NRP require the presence of Happy at any hearing, the difficulty and expense associated with transporting Happy to Orleans County would be inordinate. *Id.* ¶ 15. Indeed, Happy's well-being could be significantly compromised if Happy is transported from her current habitat to this Court, which would require a multi-day trip extending over approximately 385 miles. *Id.* ¶ 16.

In contrast, NRP has not alleged any specific circumstances necessitating that this matter be venued in Orleans County. NRP's decision to commence this matter in Orleans County is, by NRP's own admission, entirely based upon a notion that the courts in the Fourth Department would be more likely to grant the relief sought by NRP than those in the First Department. *Id.* ¶ 10 ("The NhRP chose to file in Orleans County (part of the Fourth Department) because the First Department, which oversees the county where the Bronx Zoo is located, 'has demonstrated that it is willing to ignore powerful legal arguments.'"). Weighed against NRP's blatant forum-shopping, the considerations raised by

Respondents support a finding that venue be transferred to Bronx County, if the Court grants NRP's proposed order to show cause.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court decline to sign the Petitioner's proposed order to show cause, or in the alternative, transfer venue to Bronx County.

Dated: Buffalo, New York
October 9, 2018

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