

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)**

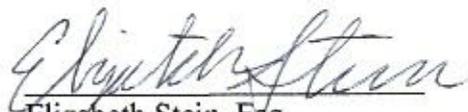
**NOTICE OF MOTION
TO STRIKE
RESPONDENTS'
VERIFIED ANSWER**

PLEASE TAKE NOTICE, that upon the annexed affirmation of Elizabeth Stein, Esq., an attorney of record for Petitioner, the Nonhuman Rights Project, Inc., dated August 2, 2019, and all exhibits attached thereto, the Memorandum of Law dated August 2, 2019 in support of this Notice of Motion to Strike Respondents' Verified Answer, and all prior pleadings, memoranda, demands, affidavits, exhibits, and attachments filed in this matter, Petitioner will make a motion at the Civil Term, Bronx County Supreme Court to be held at the courthouse thereof (Room 217), located at 851 Grand Concourse, Bronx, NY 10451, on the 12th day of August, 2019, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order striking Respondents' Verified Answer, on the grounds that it: (1) is untimely under the November 16, 2018 Order to Show Cause issued by the Supreme Court, Orleans County and therefore under CPLR 7008(a), and (2) was filed without court permission as

required by CPLR 404(a). Petitioner further requests such other and further relief that the Court may deem just, proper, and equitable.

PLEASE TAKE FURTHER NOTICE that, under the Part 5 Court Rules for Justice Alison Y. Tuitt, oral argument is required on this non-disclosure motion, and the motion procedure rules of this Court provide that the “motion shall be adjourned for oral argument before the I.A. Judge on the second Monday following the week of the return date of the motion” (August 26, 2019).

Dated: August 2, 2019



Elizabeth Stein, Esq.
Attorney for Petitioner
5 Dunhill Road
New Hyde Park, New York 11040
516-747-4726
lizsteinlaw@gmail.com

NOTICE TO:

Civil Branch Clerk's Office
Bronx County Supreme Court, Room 217
851 Grand Concourse
Bronx, NY 10451
By Overnight Mail

PHILLIPS LYTLE LLP
Kenneth A. Manning, Esq.
Joanna J. Chen, Esq.
Attorneys for Respondents *James J. Breheny* and *Wildlife Conservation Society*
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Tel: (716) 847-8400
By Email, by agreement of the parties, to kmanning@phillipslytle.com, jchen@phillipslytle.com

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of a Proceeding under Article 70 of the CPLR
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Index No.: 260441/2019

**MEMORANDUM OF
LAW IN SUPPORT
OF PETITIONER'S
MOTION TO STRIKE
RESPONDENTS'
VERIFIED ANSWER**

Elizabeth Stein, Esq.
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New Hyde Park, NY 11040
Email: lizsteinlaw@gmail.com
Phone: (516) 747-4726

Steven M. Wise, Esq.
Of the Bar of the State of Massachusetts
Appearing *pro hac vice*¹
5195 NW 112th Terrace
Coral Springs, FL 33076
Email: swise@nonhumanrights.org
Phone: (954) 648-9864

Attorneys for Petitioner

August 2, 2019

¹ On October 2, 2018, Petitioner made a motion to admit Steven M. Wise, Esq. *pro hac vice* to brief and argue the above-captioned action. Justice Tracey A. Bannister subsequently permitted Attorney Wise to argue in all three hearings before the Supreme Court, Orleans County.

I. Introduction and procedural history

On October 2, 2018, Petitioner, the Nonhuman Rights Project, Inc. (“NhRP”), filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause (“Petition”) in the Supreme Court, Orleans County (“Orleans Court”) on behalf of an Asian elephant named Happy, alleging that she is being unlawfully imprisoned at the Bronx Zoo by Respondents James J. Breheny and the Wildlife Conservation Society (collectively “Bronx Zoo” or “Respondents”). On November 16, 2018, the Orleans Court issued an Order to Show Cause² (attached as “Exhibit 1” to the annexed Affirmation of Elizabeth Stein) and made it returnable on December 14, 2018, when a hearing was held in Albion.³

On December 3, 2018, the Bronx Zoo filed a Notice of Motion (attached as “Exhibit 3” to the annexed Affirmation of Elizabeth Stein) that requested the Orleans Court to (1) transfer this proceeding to the Supreme Court, Bronx County; or “*in the alternative*,” to (2) dismiss the Petition pursuant to CPLR 3211(a) “for failure to state a cause of action on which relief can be granted, for lack of standing, and pursuant to the doctrine of collateral estoppel” or, in the event the Orleans Court did not dismiss the Petition, to allow “Respondents five days to answer to the Verified Petition pursuant to CPLR 404(a).” Exh. 3 (emphasis added).

On January 18, 2019, the Orleans Court granted Respondents’ motion to transfer venue to Bronx County over the NhRP’s objections. On April 8, 2019, the New York State Supreme Court Appellate Division, Fourth Judicial Department denied the NhRP’s request for leave to appeal the transfer order.

² The only difference between a writ of habeas corpus and an order to show cause under Article 70 is that the “former requires production of the prisoner for the hearing on the writ, whereas the latter dispenses with such presence.” Vincent C. Alexander, Practice Commentaries, McKinney’s CPLR 7001.

³ During that hearing the Orleans Court heard arguments on the merits of the NhRP’s Petition from both parties—most significantly on whether Happy is a legal person entitled to habeas corpus relief. See Transcript of Dec. 14, 2018 Hearing (attached as “Exhibit 2” to the annexed Affirmation of Elizabeth Stein).

On July 8, 2019, the Bronx Zoo filed its Verified Answer (“Answer”) in the Supreme Court, Bronx County and served it upon the NhRP on July 10, 2019 (attached as “Exhibit 4” to the annexed Affirmation of Elizabeth Stein). The NhRP submits this Memorandum of Law in support of its Notice of Motion to Strike Respondents’ Verified Answer (“Motion to Strike”).⁴

II. The Bronx Zoo’s Answer should be stricken as it was filed over seven months after the court-ordered deadline and without required court permission.

This Court should grant the NhRP’s Motion to Strike for two reasons.

First, the Bronx Zoo’s Answer was filed over seven months after the court-ordered deadline. A return⁵ to a habeas corpus petition must be “filed at the time and place specified in the writ.” CPLR 7008(a). The Order to Show Cause specified that any “answering affidavits” must be received by Elizabeth Stein, Esq., the counsel of record for the NhRP, no later than December 3, 2018, and set the return date for December 14, 2018. *See* Exh. 1

The Bronx Zoo neither served nor filed a return to the Petition by either the December 3, 2018 deadline or the December 14, 2018 hearing. Instead, as noted above, the Bronx Zoo filed its Notice of Motion.

Accordingly, as the Bronx Zoo did not serve or file a return to the Petition by the December 3, 2018 deadline prescribed by the Order to Show Cause as required under CPLR 7008(a), or even by the December 14, 2018 hearing on the merits of the Petition, the Bronx Zoo’s Answer must be stricken as untimely.

⁴ The NhRP incorporates by reference all the arguments, evidence, exhibits, memoranda, testimony, transcripts, and authorities previously filed in this case, including all prior proceedings in Orleans County.

⁵ In a habeas corpus proceeding, the “return” is “an affidavit that answers the allegations of the petition.” Vincent C. Alexander, *Practice Commentaries, McKinney’s CPLR 7008*. CPLR 7008(b) provides the substantive requirements of the return, requiring that: “[t]he affidavit shall fully and explicitly state whether the person detained is or has been in the custody of the person to whom the writ is directed, the authority and cause of the detention, whether custody has been transferred to another, and the facts of and authority for any such transfer.” CPLR 7008(b).

Second, the Bronx Zoo's July 8, 2019 Answer was filed without required court permission. In its Notice of Motion, the Bronx Zoo explicitly recognized the need for court permission to file a return under CPLR 404(a) when it requested five days to do so in the event the Petition was not dismissed. *See* Exh. 3

CPLR 404(a) provides that “[t]he respondent may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition,” and that “[i]f the motion is denied, *the court may permit the respondent to answer*, upon such terms as may be just.”⁶ (Emphasis added). Thus, when a respondent raises an objection in point of law in a pre-answer motion to dismiss, court permission to answer the petition is required. *See Matter of Foley*, 140 A.D.2d 892, 893 (3d Dept. 1988) (“The right to submit an answer following denial of a motion to dismiss in a special proceeding is discretionary”) (citing CPLR 404(a)); *Targee Street Internal Medicine Group PC Profit Sharing Trust v. Nationwide Assoc*, 300 A.D.2d 497, 498 (2d Dept. 2002).

Significantly, as the Bronx Zoo's motion to dismiss and motion to answer were made “in the alternative” to transferring this case to Bronx County, they are no longer pending since the Orleans Court granted the Bronx Zoo's request to transfer venue. But pending or not, the Orleans Court did not grant the Bronx Zoo permission to answer the Petition.

⁶ An “objection in point of law” to a petition “is treated as similar to a CPLR 3211 motion to dismiss in an action.” *Orange County Publications Division of Ottaway Newspapers-Radio Inc v. White*, 55 Misc.2d 42, 44 (Sup. Ct. 1967); *Langella v. Front Door Associates Inc*, 34 Misc.3d 1212(A) (Sup. Ct. 2012) (objections in point of law “should be limited to the assertion of one or more of defenses in bar of the type contemplated by CPLR 3211(a)”) (citations omitted).

Accordingly, as neither the Orleans Court nor this Court ruled on the Bronx Zoo's motion to dismiss⁷ or granted the Bronx Zoo permission to answer the Petition,⁸ the Bronx Zoo's Answer should be stricken.

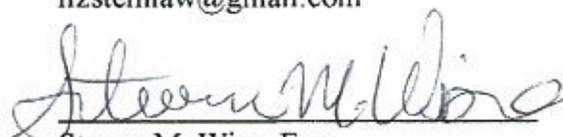
III. Conclusion

For the reasons stated, the Bronx Zoo's Answer should be stricken because it was filed over seven months after the court-ordered deadline and without required court permission. Accordingly, this Court should grant the NhRP's Motion to Strike, together with such other and further relief that the Court may deem just, proper, and equitable.

Dated: August 2, 2019



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Steven M. Wise, Esq.
Attorney for Petitioner
Of the Bar of the State of Massachusetts

⁷ Assuming, *arguendo*, that the Bronx Zoo's motion to dismiss is still pending, this Court should deny it for the reasons stated in the NhRP's Reply Memorandum of Law (dated December 10, 2018), at 13 – 20.

⁸ Assuming, *arguendo*, that the Bronx Zoo's motion to answer the Petition is still pending, this Court should not now permit the Bronx Zoo to file an answer for the reasons stated in the NhRP's Reply Memorandum of Law (dated December 10, 2018), at 5 – 7. The Bronx Zoo had previously filed affidavits and memoranda of law, including those in support of its motion to dismiss, that adequately fulfilled the substantive requirements of CPLR 7008(b), and therefore filing an answer at this juncture would serve no useful purpose—except cause further unnecessary delay in the proceedings. See *Matter of Dodge*, 25 N.Y.2d 273, 286-287 (1969) (“Special Term properly determined that ‘no useful purpose can be served by any answer interposed. . .’”) (emphasis added); see also *People ex rel Gittens v. Coughlin*, 143 Misc.2d 748 (Sup. Ct. 1989) (“Preliminarily, the court deems respondents’ submissions in this proceeding to constitute a return, in accordance with CPLR 7008. The writ of habeas corpus is meant to be an expeditious summary proceeding that tolerates no delay except of necessity. . . . The court must summarily dispose of the proceeding as justice requires”) (citations omitted). Moreover, even without a formal return, the Orleans Court held a hearing on December 14, 2018 at which both parties argued the merits of the Petition, thus further evidencing its unnecessary. See *People ex rel Pray v. Allen*, 63 A.D.2d 1056 (3d Dept. 1978), 143 Misc.2d 748 (3d Dept. 1978) (“absence of a formal return was an irregularity and not a defect” as “the requirements of CPLR 7008 (subd [b]) were met at the outset of the appearance on behalf of the respondent on the return date”).

Appearing *pro hac vice*
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SUPREME COURT OF THE STATE OF NEW YORK
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In the Matter of a Proceeding under Article 70 of the CPLR
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THE NONHUMAN RIGHTS PROJECT, INC., on behalf
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CONSERVATION SOCIETY,

Respondents.

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

**ATTORNEY AFFIRMATION
OF ELIZABETH STEIN**

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

1. I am an attorney of record 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 support of the within Notice of Motion to Strike Respondents' Verified Answer ("Motion to Strike").

BACKGROUND

3. On October 2, 2018, the NhRP filed a Verified Petition for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") pursuant to CPLR Article 70 on behalf of an Asian elephant named Happy, alleging that she is being unlawfully imprisoned at the Bronx

Zoo by Respondents James J. Breheny and the Wildlife Conservation Society (collectively “Bronx Zoo” or “Respondents”).

4. On November 16, 2018, the Supreme Court, Orleans County (“Orleans Court”) issued an Order to Show Cause (attached hereto as **Exhibit 1**) and made it returnable on December 14, 2018, when a hearing was held in Albion. (Attached hereto as **Exhibit 2** is the transcript of the December 14, 2018 hearing).
5. The Order to Show Cause specified, among other things, that any answering affidavits must be received by Elizabeth Stein, Esq. no later than December 3, 2018.
6. On December 3, 2018, in lieu of serving or filing a return in accordance with CPLR 7008, the Bronx Zoo filed a Notice of Motion that requested the Orleans Court to (1) transfer this proceeding to the Supreme Court, Bronx County; or “*in the alternative*,” to (2) dismiss the Petition pursuant to CPLR 3211(a) “for failure to state a cause of action on which relief can be granted, for lack of standing, and pursuant to the doctrine of collateral estoppel” or, in the event the Orleans Court did not dismiss the Petition, to allow “Respondents five days to answer to the Verified Petition pursuant to CPLR 404(a).” (Attached hereto as **Exhibit 3** is the Bronx Zoo’s Notice of Motion) (emphasis added).
7. During the December 14, 2018 hearing, the Orleans Court heard arguments on the merits of the Petition from both parties.
8. On January 18, 2019, the Orleans Court granted the Bronx Zoo’s motion to transfer venue to Bronx County over the NhRP’s objections.
9. On July 8, 2019, the Bronx Zoo filed its Verified Answer (“Answer”) in the Supreme Court, Bronx County and served it upon the NhRP on July 10, 2019. (Attached hereto as **Exhibit 4** is the Bronx Zoo’s Answer).

THE BRONX ZOO'S ANSWER SHOULD BE STRICKEN

10. As fully explained in the accompanying Memorandum of Law, this Court should grant the NhRP's Motion to Strike for two reasons.
11. First, the Bronx Zoo's Answer was filed over seven months after the December 3, 2018 court-ordered deadline prescribed by the Order to Show Cause and is therefore untimely. *See* CPLR 7008(a) ("The return shall consist of an affidavit to be served in the same manner as an answer in a special proceeding and *filed at the time and place specified in the writ*") (emphasis added).
12. Second, the Bronx Zoo's Answer was filed without required court permission. As the Bronx Zoo initially filed a motion to dismiss rather than a return, court permission to answer the Petition is required in the event the motion to dismiss is denied. *See* CPLR 404(a) ("If the motion is denied, *the court may permit the respondent to answer*, upon such terms as may be just") (emphasis added).
13. Significantly, as the Bronx Zoo's motion to dismiss and motion to answer were made "in the alternative" to transferring this case to Bronx County, they are no longer pending since the Orleans Court granted the Bronx Zoo's request to transfer venue.
14. But pending or not, neither the Orleans Court nor this Court has ruled on the Bronx Zoo's motion to dismiss or granted the Bronx Zoo permission to answer the Petition.
15. Further, the Bronx Zoo explicitly recognized and requested permission to answer the Petition in its Notice of Motion (*see* paragraph 6 above).
16. No similar relief has been sought.
17. Pursuant to 22 NYCRR 130-1.1, I affirm that this motion is not frivolous.

WHEREFORE, I respectfully request that this Court grant the NhRP's Motion to Strike, together with such other and further relief as the Court may deem just, proper, and equitable.

Dated: August 2, 2019

A handwritten signature in cursive script, reading "Elizabeth Stein", written in black ink. The signature is positioned above a horizontal line.

Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
(516) 747-4726
lizsteinlaw@gmail.com
Attorney for Petitioner

EXHIBIT 1

At I.A.S Part of the
Supreme Court of the State of
New York, held in and for the
County of Orleans, at the
Courthouse thereof, 1 South Main
Street, Suite 3, Albion, NY on the
16th day of ~~October~~, 2018
November

PRESENT: HON. Tracey A. Bannister
Justice of the Supreme Court

COPY

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,

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.

TAB
~~PROPOSED~~ ORDER TO
SHOW CAUSE

Index No.: 18-45164

TO THE ABOVE-NAMED RESPONDENTS:

PLEASE TAKE NOTICE, That upon the annexed Verified Petition for a Common Law
Writ of Habeas Corpus and Order to Show Cause of Elizabeth Stein, Esq. and Steven M. Wise,
Esq. (subject to *pro hac vice* admission), filed the second day of October, 2018, the exhibits and

affidavits attached thereto, the Memorandum of Law in support thereof, and upon all pleadings and proceedings herein, the Respondents 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, or their attorneys, are hereby ORDERED to SHOW CAUSE at I.A.S. Part , Room , of this Court to be held at the Courthouse located at Courthouse Square, 1 South Main Street Suite 3, Albion, New York 14411-1497, on the 14th day of December, 2018 at 11:30 o'clock in the fore of that day, or as soon thereafter as counsel can be heard, why an Order should not be entered granting the Nonhuman Rights Project, Inc. ("Petitioner"), the following relief:

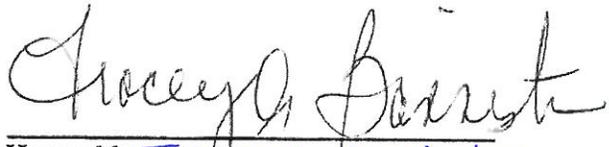
- A. Upon a determination that Happy is being unlawfully imprisoned order her immediate release from Respondents' custody to an appropriate sanctuary, preferably the Performing Animal Welfare Society;
- B. Awarding Petitioner the costs and disbursements of this action; and
- C. Such other and further relief as this Court deems just and proper.

It is THEREFORE:

ORDERED THAT, Sufficient cause appearing therefore, let service of a copy of this Order and all other papers upon which it is granted upon 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, by personal delivery, on or before the 20th day of November, 2018, be deemed good and sufficient. An affidavit or other proof of service shall be presented to this Court on the return date fixed above.

IT IS FURTHER ORDERED, that answering affidavits, if any, must be received by Elizabeth Stein, Esq., 5 Dunhill Road, New Hyde Park, New York 11040, no later than the 3rd day of December, 2018. Reply papers, if any, must be served on or before the 10th day of December, 2018.

Dated: 11/16, 2018
Albion, New York


Honorable Tracey A. Bannister

ENTER:

EXHIBIT 2

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STATE OF NEW YORK

COUNTY OF ORLEANS : SUPREME COURT

NONHUMAN RIGHTS PROJECT, INC., ON BEHALF OF HAPPY,

Plaintiff,

- vs -

File No. 45164

JAMES J. BREHENY,

Proceedings

Defendant.

1 South Main Street
Albion, New York
December 14, 2018

B E F O R E:

HON. TRACEY A. BANNISTER,
Supreme Court Justice

A P P E A R A N C E S:

STEVEN M. WISE, ESQ.,
ELIZABETH STEIN, ESQ.,
KEVIN R. SCHNEIDER, ESQ.,
Appearing on Behalf of the Plaintiff.

KENNETH A. MANNING, ESQ.,
JOANNA J. CHEN, ESQ.,
CHRISTOPHER J. MCKENZIE, ESQ.,
Appearing on Behalf of the Defendant.

NRP v. James J. Breheny

1 THE COURT: Good morning, everybody.
2 Welcome to Albion. For those of you who aren't
3 local, what a beautiful it is, isn't it?

4 So we are here this morning. I read a
5 forest full of papers with regard to all of your
6 positions, and it's my understanding that the
7 cameras will only focus on the attorneys and what
8 they have to say; is that right? We are all good
9 with that? We'll go from there.

10 Counsel and I have agreed to a time limit
11 schedule, which no one will get shot for violating
12 it, but I'm hoping to try to make it a reasonable
13 amount of time on each side with time for rebuttal.

14 In that regard, folks representing the
15 subject of these proceedings, Happy, the elephant,
16 you may proceed.

17 MR. WISE: Thank you, Your Honor, and thank
18 you for allowing me to argue.

19 Your Honor, the Nonhuman Rights Project is
20 bringing -- seeking a common-law writ of habeas
21 corpus on behalf of Happy, a forty-seven-year-old
22 elephant who is detained in the Bronx Zoo.

23 We are seeking a habeas corpus -- not only
24 under the common-law, but also under the CPLR that
25 actually governs the procedure.

COLLEEN L. LOUNSBURY
OFFICIAL COURT REPORTER

NRP v. James J. Breheny

1 So one of the things that we have to
2 persuade the Court is that Happy is a person under
3 Article 70.

4 Now, a person is an entity who has the
5 capacity for rights. Oftentimes, people don't
6 understand what a person is, but a person is not
7 necessarily a rights holder, but it's a person under
8 the common-law, and under the Article 70 who has the
9 capacity for rights.

10 So if I may quickly give a short
11 demonstration. So, for example, this bottle of
12 water -- each drop in it has a legal right. If I
13 pour it onto the floor, nobody has legal rights.
14 What happens is you have to have a place to pour the
15 rights in -- in other words, a rights container, and
16 at that point, the container has rights and law. We
17 call the container a person. So a person is a
18 container only. However, then the question is what
19 rights do they have.

20 Now, it's important to understand that when
21 you're looking at a personhood -- at a person who is
22 a container, being a person does not necessarily
23 mean that one has any rights at all. It just means
24 that you have a capacity for rights.

25 So the Nonhuman Rights Project here -- the

NRP v. James J. Breheny

1 pet trust statute that we spoke to made certain
2 animals -- nonhuman animals -- domestic animals and
3 made them beneficiaries of trust, and for New York
4 to be a beneficiary of trust, you have to be a
5 person. So the legislature has already made certain
6 nonhuman animals within the State of New York
7 domestic animals persons for a single right.

8 So the legislature, in essence, created the
9 personhood and poured in the single right. The
10 Nonhuman Rights Project now comes to you on behalf
11 of Happy, saying -- assuming that Happy has that one
12 right already, but other nonhuman animals.

13 We ask you pour in the second rights so
14 that Happy would have the right not only to be the
15 beneficiary of a person, but now to have the common
16 right of liberty that is protected by a common-law
17 writ of habeas corpus.

18 So we must show that Happy is a person.
19 The way we show Happy is a person is by implicating
20 the Court of Appeals case from Byrn from 1972. Byrn
21 made it clear that being a person and being a human
22 being are not synonymous.

23 In that case, it had to do with a person --
24 with if it was a human being who was a fetus, the
25 Court said that while she was still a human, a fetus

NRP v. James J. Breheny

1 was not a person. It made it clear that personhood
2 is an issue not of biology, but it has to be a
3 matter of public policy.

4 So a lot of what the Nonhuman Rights
5 Project has put in its petition and memorandum is
6 what we argue as appropriate public policy for this
7 Court to determine whether Happy is a person solely
8 for the purpose of common-law writ of habeas corpus.

9 Now, you have the fact part and you have
10 the law part. The law part we argue is both as a
11 matter of common-law liberty and as a matter of
12 common-law equality.

13 We argue that that's the public policy that
14 would allow this Court and require this Court to
15 find that Happy is a person.

16 By liberty, what we do is we focus on the
17 fact that Happy is an autonomous being, and we have
18 one of our experts define autonomy as a being who is
19 able to freely choose how to live her life. You and
20 I are almost automatically autonomous. Happy also
21 is autonomous.

22 So I'll say Rivers versus Katz. I'll cite
23 the Storar case. These have to do with showing what
24 the Court of Appeals -- showing the fact that what
25 judges do -- an important part of being a judge in

COLLEEN L. LOUNSBURY
OFFICIAL COURT REPORTER

NRP v. James J. Breheny

1 State of New York and elsewhere in the common-law
2 world is to protect the autonomy of those who are
3 coming to the Court, because they are autonomous,
4 and the autonomy is not being protected, whether
5 it's like Rivers versus Katz in the context of a --
6 someone who has to make a medical decision or it's
7 in the context of a writ of habeas corpus, because
8 what else is the major purpose throughout the seven
9 hundred years there has been a writ of habeas corpus
10 of autonomy, except to protect -- I'm sorry -- a
11 writ of habeas corpus -- except to protect autonomy.

12 Because when one is being detained
13 illegally against her will, then what is the
14 fundamental wrong that's being done is that her
15 autonomy is being trespassed upon. She is
16 essentially forced to live as a slave. She cannot
17 decide -- Happy, for example, cannot decide where to
18 go. She can't decide who to go with. In fact,
19 Happy is unable to do anything except live on a
20 postage size piece of land approximately one acre.

21 The Nonhuman Rights Project is asking
22 actually for a two-step process, because in habeas
23 corpus involving a competent versus incompetent
24 person who is being detained, there's a one-step
25 process sometimes, and there's a two-step process

COLLEEN L. LOUNSBURY
OFFICIAL COURT REPORTER

NRP v. James J. Breheny

1 sometimes.

2 The one-step process means if I was being
3 detained, then I would simply -- once I want a writ
4 of habeas corpus, I would simply be ordered free and
5 walk out.

6 If you have a detainee who is
7 incompetent -- for example, throughout the history
8 of New York, there have been slave children.
9 There's child oppression and minors who are wrongly
10 being held in a mental hospital or in a jail. When
11 they are free of a writ of habeas corpus, then you
12 then have to move into a two-step process, because
13 the Court will then order Happy free, but Happy is
14 incompetent.

15 Then you have to take the second step of
16 making a decision as to where Happy would go. The
17 Nonhuman Rights Project said, "We suggest there are
18 three elephant sanctuaries in the United States. We
19 suggest, Performing Animal Welfare Society, which is
20 twenty-three hundred acres large compared to where
21 Happy has been confined for forty years on one acre.

22 So just to reiterate real quickly what I
23 said in the brief, the difference between one acre
24 at the Bronx Zoo and twenty-three hundred acres in
25 PAWS is the same difference between -- the same

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1 ratio as the City of Albion and the State of
2 Illinois.

3 THE COURT: Are you saying that maybe Happy
4 is unhappy in the Bronx Zoo?

5 MR. WISE: Happy is -- yes, I am saying
6 Happy is unhappy. However, we are definitely not
7 attacking the conditions of confinement, which we
8 have said over and over again.

9 We learned our lesson in the Kiko case,
10 where the Court believed for reasons which we didn't
11 understand at the time -- but we realized we must
12 have caused confusion and that we were attacking the
13 conditions of confinement. We are not.

14 For example, if this Court was kidnapped
15 and brought to some place and sought a writ of
16 habeas corpus, the subject of the writ of habeas
17 corpus wouldn't be whether this Court was being fed
18 properly or whether getting medical care. That
19 wouldn't be the issue. The question wouldn't be a
20 matter of your welfare or your conditions of
21 confinement.

22 The question would be whether or not you
23 have a right not to be there at all. It's the exact
24 same thing with Happy, the elephant. The question
25 is not whether the Bronx Zoo is treating her well,

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1 or whether its not treating her well, or whether
2 they are giving her medical care, or they are not.
3 The question is whether or not Happy should be
4 confined there at all.

5 So the Nonhuman Rights Project is also
6 making it clear that her confinement is illegal, and
7 the reason that it is illegal is -- again, we go
8 back to Byrn, and we talk about the issue of public
9 policy.

10 Now, there's two grounds for public policy.
11 One is we argue that as a matter of common-law
12 liberty, she is being deprived of that. Again,
13 that's because she is autonomous, and the purpose of
14 habeas corpus is to protect that like in cases like
15 Rivers versus Katz. Rivers versus Katz says that's
16 an extremely important job for this Court.

17 The second one is the idea of common-law
18 equality. Now, there's not much law on that,
19 because once the Fourteenth Amendment came in,
20 people stopped filing common-laws equality suits,
21 and again, filing Fourteenth Amendment ones.

22 We went back to a 1992 law review article
23 by Chief Justice Kaye, who talked about the fact
24 that the common-law and Constitutional law have
25 become a two-way street, and the common-law was

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1 essentially being in certain ways
2 constitutionalized.

3 We said then with respect to equality that
4 we'd look to the case of Romer versus Evans in the
5 U.S. Supreme Court, saying that like the New York
6 courts -- if a court is looking at the
7 constitutionality of a statute, it requires that it
8 be a rational means to a legitimate end.

9 This Court itself, when it makes a
10 decision, would do no less. This Court would want
11 to then make sure that what it is ordering or
12 overseeing is whether or not its order is a rational
13 means to a legitimate end.

14 Now, we argue that the State has no --
15 absolutely no legitimate interest in seeing the
16 arbitrary confinement of an autonomous being. It
17 doesn't matter whether the autonomous being is a
18 human or an elephant, because the issue is not the
19 species. Judge Fahey made it clear that -- that's
20 what he was saying. The issue is not the species.

21 In the Fourth Department -- in the Graves
22 case, it also made it clear that it's common
23 knowledge that animals can be persons. The Byrn
24 case made clear that it's not a matter of species.
25 It's a matter of -- a second matter of biology.

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1 It's a matter of public policy.

2 The second prong of the equality argument
3 is that when the Court said that you cannot look --
4 the U.S. Supreme Court said that you can't look at a
5 single characteristic and deprive an entity of all
6 of the rights because of a single characteristic.

7 In some ways and other ways, it's saying
8 that I'm looking at it as a matter of species. If
9 you say -- if Happy was a human being, it would be
10 absolutely clear because of who she is, the autonomy
11 of her species that she would have to be loose. She
12 would have to be freed. However, the only reason
13 that she might not get a writ of habeas corpus
14 according to my brother would be because she is an
15 elephant.

16 That's so fundamentally unfair. It just
17 simply points to the fact she's an elephant when
18 what the courts are trying to protect is autonomy --
19 not a species, but autonomy.

20 Now, I want to make sure -- I also hit the
21 fact that we, indeed, are seeking immediate release.
22 Again, we are sorry we confused the Fourth
23 Department when we went in front of the Kiko case.
24 We indeed are seeking immediate release. That's the
25 only relief we are seeking as part of the habeas

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1 corpus case.

2 If you look at, for example, the slave
3 cases we cited -- you have cases in Massachusetts
4 and you have cases in New York where the Courts
5 freed slave children from slavery. That is what the
6 whole case is about. Then at the end, we say, "We
7 are going to have to figure out what we are going do
8 with her." That's the step two.

9 But that's not really part of the habeas
10 corpus case. That's after you prevailed in the
11 habeas corpus case. The question is what is the
12 remedy. Where are you going to put this
13 incompetent, because Happy unlikely can't go back
14 into the wild, so Happy is going to have to go
15 somewhere, and that somewhere is going to have to be
16 some kind of an elephant sanctuary.

17 The elephant sanctuaries that we'd ask the
18 Court to send her to would be one of three. By the
19 way, one is the Performing Animal Welfare Society in
20 California. A second one is the Elephant Sanctuary
21 of Tennessee, which is not only a sanctuary, but
22 it's an AZA accredited zoo. I have seen that place.
23 We would be happy if Happy went to either PAWS or
24 the Elephant Sanctuary of Tennessee, which is an AZA
25 accredited zoo. I don't know how long I've been

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1 talking.

2 THE COURT: More than ten minutes.

3 MR. WISE: I'm sorry, Your Honor. Thank
4 you.

5 MR. MANNING: Your Honor, Ken Manning from
6 Phillips Lytle on behalf of Respondent, James
7 Breheny and the Wildlife Conservation Society. With
8 me is Chris McKenzie of general counsel from the
9 Wildlife Conservation Society.

10 One thing we do agree on is that Happy is
11 an elephant. We have three affidavits from the
12 people at the Bronx Zoo, a veterinarian, and people
13 with a biology background, indicating the good care
14 and treatment afforded to Happy, and we contend
15 Happy is happy where she is.

16 During the recitation from NRP, there
17 wasn't a peep about the controlling precedent from
18 all four Appellate Divisions from this Court
19 indicating that elephants, or chimps, or any animal
20 for that matter is simply not the beneficiary of a
21 habeas corpus petition, because they are simply not
22 a person.

23 The position of NRP, in essence, isn't that
24 Happy is being unlawful detained. They are
25 contending that her being at the zoo should be

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1 unlawful as a matter of public policy.

2 While the public policy position was
3 articulated well by NRP on their behalf, that's a
4 legislative initiative and not a matter for a Court.

5 What NRP is trying to do is hijack the
6 judicial system to present the public policy
7 position against all species. It's clear to us that
8 NRP will go species to species, animal to animal,
9 courthouse to courthouse, until they find someone to
10 agree with their position. So far, they are
11 unsuccessful.

12 At some point, our judicial system has a
13 number of documents to prevent the repetitive
14 litigation of the same issue. I've never had a case
15 from all four departments. This is a first for me.

16 They haven't even addressed those
17 decisions, because there's no place for them to go
18 as a matter of Appellate authority. The authority
19 relies upon the people, and the only authority they
20 rely upon is dicta, as we indicated in our papers,
21 or a concurring opinion on the denial to the Court
22 of Appeals by the esteemed Judge Fahey.

23 Before you get to any of that, the question
24 is why are we in this county. I mean, we agree that
25 the CPLR controls the procedure here. The Court

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1 raised the issue in the first conference on the
2 order to show cause. CPLR Article 5 indicates that
3 this matter should be held in the Bronx. You don't
4 have to take my word for it. You can take the word
5 of the Second Department in the Greene Case, where
6 it's decided Article 5 has been a habeas corpus
7 proceeding.

8 Orleans County is a beautiful place. This
9 courthouse is spectacular, but it has nothing to do
10 with the Bronx Zoo. It has nothing to do with
11 Happy, and it doesn't have anything to do with
12 anything in this case any more than any other
13 county.

14 You may recall counsel offered to stipulate
15 if the Court changed venue to any other county
16 within the Fourth Department. We certainly don't
17 accept the offer. It underscores that all this is
18 about is trying to shop the case to find a judge who
19 will agree with their position.

20 Our Appellate Division -- each of them --
21 discouraged this form of forum shopping in an effort
22 to prevent the judiciary from being used basically
23 as a series of motions for reconsideration based on
24 what other courts have done. We think the Appellate
25 Division's decision -- particularly the Lavery

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1 case -- is right on point.

2 The Fourth Department, less than five years
3 ago, decided the case involving NRP involving a
4 chimpanzee. Counsel referenced to it as the Kiko
5 case. In the Appellate Division -- I don't think
6 the Appellate Division misunderstood that case at
7 all. I think they looked through the two-step
8 transaction to find that all this is really about is
9 changing the conditions in captivity of the
10 elephant.

11 We try to drill through this, because
12 discovery isn't available in this proceeding, and we
13 didn't serve an order. We served some requests for
14 admissions. The motion is also pending before the
15 Court, but we won't spend the time on the oral
16 argument.

17 We tried to pin down -- in our request for
18 admissions, we asked NRP to admit that NRP doesn't
19 allege that Happy's living conditions at the Bronx
20 Zoo are unsuitable, and we also asked them to admit
21 that NRP doesn't seek improved welfare for Happy.

22 They refused to answer. They raised an
23 objection. The only objection raised was the
24 objection on the grounds that the admission sought
25 constitutes the very dispute of this lawsuit. Well,

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1 of course, it does. What they are seeking to do is
2 take Happy from an environment where she has been
3 for forty years --

4 THE COURT: Forty-seven.

5 MR. MANNING: She has been at the Bronx Zoo
6 for forty out of forty-seven years, Your Honor. She
7 is comfortable there. They are trying to move Happy
8 to some place they would rather see her be.

9 The Appellate Division Fourth Department in
10 Kiko decided the changes and conditions are simply
11 not the proper subject of a habeas corpus
12 proceeding. We suggest the Appellate Division got
13 it right, and that's for another day. We think it
14 controls the decision in this case.

15 From our perspective, this case should be
16 heard in the Bronx and not in Orleans County. In
17 any event, the petition should be barred under a
18 number of documents based on the Appellate Division
19 saying in all four departments collateral estoppel.

20 It's obvious that what we talked about
21 today is the position of NRP insofar that they seek
22 to make persons out of animals in a variety of
23 species, and it really has very little to do with
24 Happy's own circumstances. That type of
25 policy-based opportunity should be directed to the

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1 legislature and not the Court in a habeas corpus
2 proceeding.

3 In the limited time we've had to respond to
4 the petition, Your Honor, we directed our efforts
5 towards the Bronx Zoo and Happy, and we raised all
6 of those issues.

7 There also has been an amicus filing by a
8 number of interested groups that deal with the
9 impact unprecedented and unsupported decision,
10 granting what habeas corpus would have on the rest
11 of the world.

12 We adopt those positions as this brief is a
13 subject of a motion of a file, which we support, and
14 we note that counsel has basically already put in
15 opposition papers on the brief. We would ask the
16 Court accept both their papers and the amicus papers
17 to flesh out the impact that this decision would
18 have on other people, other animals, and other
19 industries for that matter.

20 Lastly, we'd note that among the last
21 minute motions made is a motions for preliminary
22 junction. All we would say is there is no basis
23 right now. There's no intention on the part of the
24 Bronx Zoo to move Happy anywhere.

25 In order for us to have the opportunity to

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1 handle the animal properly, we are not willing to
2 consent to have any control on behalf of NRP over
3 where the animal is or where the animal goes.

4 In order to support preliminary injunction,
5 they have to show a meritorious petition for the
6 reasons we just went through. The petition has no
7 merit if the Court chooses to reach the merits.
8 That's our position, Your Honor.

9 THE COURT: Do you have rebuttal?

10 MR. WISE: Yes, Your Honor. Number one, if
11 they move Happy out of the State of New York, this
12 Court likely loses subject matter jurisdiction. The
13 courts are very jealous of the subject matter
14 jurisdiction.

15 What we didn't say is that we had a similar
16 problem in the Third Department with respect to
17 Tommy, the chimpanzee, and that the Third Department
18 did issue a preliminary injunction ordering that
19 Tommy not be moved. It was for that reason that the
20 Court didn't wish to lose subject matter
21 jurisdiction while it was ruling. That's one.

22 Second of all, it doesn't matter whether my
23 brother's expert -- I guess they aren't really
24 experts. They are employees of the Wildlife
25 Conservation Society. It doesn't matter whether

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1 Happy -- they think Happy is happy.

2 The issue is whether or not Happy is being
3 detained against -- without respect -- to honoring
4 her common-law right to liberty as a matter of
5 liberty and equality, which my brother didn't even
6 address.

7 I cite several cases involving the 1840s
8 involving slave children, involving Sojourner
9 Truth -- Sojourner Truth Child. In the State of New
10 York and also in Massachusetts where you had a slave
11 child who was five years old or seven years old who
12 would actually be holding the legs of their master
13 and saying, "I don't want to go. I don't want to
14 go," and the Court would say, "You don't really
15 understand what slavery is about," or "You don't
16 understand what your life will be. We'll remove you
17 from slavery," and you couldn't expect them to
18 understand.

19 Happy has been in prison in the Bronx Zoo
20 for forty years. Everything about her evolution --
21 everything about who she is as an elephant is being
22 impinged by that every single day. She has no idea
23 what it would be like to move to a place that's
24 twenty-three hundred acres where she would be able
25 to be part of a herd and live with other elephants

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1 and make choices that she has no way of fathoming.

2 Right now, as you can see, instead of
3 checking her feces and checking her blood and
4 checking her teeth every day -- and they are right.
5 They ought to be worried about her, because she is
6 being kept in a bizarre way on one acre of land
7 which she shares with another elephant who hates
8 her. That is not the way for an elephant to be.
9 The elephant killed her only companion ten years
10 ago. That's one thing.

11 The second thing is this isn't a matter for
12 the legislature. Habeas corpus in New York is
13 entirely a matter for common-law. In fact, these
14 kinds of cases began with the Somerset case, which
15 we talked about in 1772, which is actually part of
16 New York Common-law. It was part of the common-law
17 in New York in April 1775. That is where you began
18 the entire idea of writ of habeas corpus on behalf
19 of a slave.

20 Indeed, as Lord Mansfield said, "If you
21 don't like what I did, then go to Parliament." They
22 went to Parliament and they couldn't overturn it.

23 What happened is he said that slavery was
24 so odious that the common-law wouldn't support it.
25 Slavery is still odious. No matter which autonomous

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1 thing is being displayed, it's still odious to the
2 autonomous being.

3 If the legislature would step in and try,
4 under Tweed versus Liscomb, in the suspension
5 clause, it's not clear how much the legislature even
6 can try to step in and narrow who is a person or cut
7 back on some other common-law issue.

8 Also, of course, I mentioned all of the
9 other cases involved. First of all, the Second
10 Department case and the Fourth Department case were
11 not on the merits. You have the two Lavery cases in
12 the Third Department and in the First Department.

13 Now, if the Court relies upon either of the
14 Lavery cases -- one is saying you have to be able to
15 bear rights and duties in order to be a person --
16 not for purpose of habeas corpus, but a person for
17 any purpose, or you look at the First Department
18 saying that you don't have to have a matter to be
19 able to bear rights and do these. You have to be a
20 human being.

21 That is what was foreclosed by the Byrn
22 case. The Byrn case said that a person -- that's
23 not a matter of biology. It's a matter of public
24 policy.

25 Neither the Third Department nor the First

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1 Department ever got into the issue of the public
2 policy, and I guarantee you -- well, as much as
3 lawyers can -- no Court is going to follow the Third
4 Department. It's the only English-speaking case in
5 the history of the world that ever said that only
6 entities who can bear duties can ever be persons.

7 As the First Department even noted, there
8 are millions of New Yorkers who can't bear duties,
9 but they are a person. They understand the
10 fragility and the weakness of the Third Department's
11 decision themselves.

12 They said, "What is really important is the
13 fact that the chimpanzee wasn't a human being."
14 Well, that, again, has already been disposed of
15 thirty years or forty years before by the Brown
16 case.

17 Then when the pet trust came in, the
18 legislature made it clear there are all kinds of
19 nonhuman animals. They have personhood. They have
20 the capacity for rights, and the one right they had
21 there was to be a beneficiary of the trust. But
22 neither the First or the Third Department seemed to
23 grasp that.

24 However, since that time Judge Fahey -- we
25 understand he is only a single judge, but he's the

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1 only high court judge in the United States who ever
2 opined on this.

3 Also, I believe that his decision is much
4 more persuasive than either the First or Third. For
5 one thing, he's the only one that actually made
6 public policy arguments or tried to justify what he
7 said.

8 In the Third Department, all they have is a
9 one-sentence footnote, footnote three. In the First
10 Department, they said that you had to be a human as
11 part of a phrase in one sentence. There is a
12 difference between making a reasoned argument based
13 on public policy and simply stating something.

14 Then -- and I don't think it's a
15 coincidence -- one month after Judge Fahey makes his
16 decision, then the Fourth Department -- which, of
17 course, binds this Court -- says that it's a
18 commonplace, a nonhuman matter. A corporation that
19 is a nonhuman animal can be persons.

20 That automatically means that this Court
21 cannot rely upon either the Third Department or the
22 First Department, because both of them said that a
23 nonhuman animal can't under any circumstances be
24 persons.

25 So they may ultimately be held right, which

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1 I hope not, but they may be. That's not what it is
2 today. Today it's the law of the Fourth Department.
3 The Fourth Department made it clear that this is a
4 commonplace that nonhumans can be persons, and the
5 only issue is under what circumstance. That
6 requires not a biological explanation, but a mature
7 reflection upon public policy.

8 My last thing or two is the issue of
9 standing. The issue of standing is absolutely clear
10 under 7002(a). Anyone can go in on behalf of anyone
11 as being imprisoned, and the First Department said
12 that the Nonhuman Rights Project undisputedly has
13 standing.

14 Also, Justice Jaffe in the New York County
15 Supreme Court said that the Nonhuman Rights Project
16 did have standing to sue on behalf of the
17 chimpanzee.

18 So the First and Third Departments are
19 simply outliers -- not just -- and the reason the
20 First Department -- well, they are both outliers,
21 and it's unlikely that everyone is going to follow
22 them, because they are so extraordinary.

23 The First Department is especially
24 troubling by the fact they simply say, "Only humans
25 can be persons." We say we have so been there

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1 before, because at one time, only white people could
2 be a person. Only men could be a person. Chinese
3 people couldn't be persons. Native Americans
4 couldn't be persons. We have been there before. We
5 don't need to go there again.

6 My very last thing is one second on venue.
7 Venue is completely clear. 7002(b)(3) says that
8 anyone seeking a writ of habeas corpus can file suit
9 before any justice anywhere they want. There's no
10 privilege for any Supreme Court.

11 We didn't make any bones about the reason
12 we wanted to file in the Fourth Department, because
13 the Graves case is not only favorable to us, but
14 it's actually morally correct and legally correct,
15 and why would we want to file suit.

16 The fact is that when you say that you may
17 file in front of any justice of the Supreme Court,
18 it's forum shopping, and it's forum shopping that
19 the legislature says, "Well, you're welcome to it.
20 You choose whatever Supreme Court Justice you want
21 to go in front of." That's all right. Indeed, that
22 draws its roots deep into the common-law of habeas
23 corpus, which -- habeas corpus is just not like
24 anything else. It's a generous cause of action.

25 THE COURT: Your time is up.

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1 MR. WISE: Thank you very much.

2 THE COURT: Mr. Manning?

3 MR. MANNING: Thank you, Your Honor. What
4 we just heard is that the Third Department got it
5 wrong. The First Department had it wrong. The
6 Fourth Department had it wrong, and the Second
7 Department had it wrong.

8 All of these issues have been decided at
9 the Appellate level previously. While I admire the
10 strength of the dispute over the rulings, the
11 rulings nevertheless are direct and they are on
12 point.

13 All the decisions relied upon for the
14 argument today are indirect cases involving human
15 beings, and they cite to the Graves case, the Fourth
16 Department decision, which dealt with auto
17 dealership. None of those cases are on point.

18 Judge Fahey's decision, which was a
19 concurring opinion on a denial of leave to appeal to
20 the Court of Appeals, is not authoritative on any of
21 these issues.

22 From our standpoint, Your Honor, the
23 Appellate courts and the State already dealt with
24 each of the issues. We think the Appellate Division
25 on the First, Second, Third, and Fourth Department

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1 got it right on each occasion, and we think the
2 decisions are quite that way for this Court.

3 If the Court reaches the merits for the
4 petition of habeas corpus, we ask the petition be
5 denied, and Happy remain where Happy is right now.

6 THE COURT: I can say this is probably the
7 most unusual case that I've sat on in my ten years
8 on Supreme Court and the twenty years prior to that
9 working for the Court.

10 I've always enjoyed elephants. My biggest
11 worry here is -- let's put it this way: I certainly
12 agree. Your 7002(b)(3) does permit you to bring a
13 writ for habeas corpus before any judge, but I think
14 then 7004(c) basically says the writ is returnable,
15 and it tells you where it's returnable.

16 I believe that you could have asked any
17 judge in the Supreme Court to sign your papers to
18 start off your writ of habeas corpus proceeding, but
19 it needed to be made returnable before some county
20 that had any -- some nexus to this elephant and his
21 condition -- his conditions of captivity.

22 I'll just read this part. It says, "It
23 shall be made returnable before a justice of the
24 Supreme Court or a county court judge being or
25 residing within the county where the person is

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1 detained."

2 If we accept your belief that an animal --
3 or this animal is a person within the meaning of the
4 law, that animal is being detained in the Bronx
5 County. I don't think it's even questionable that
6 this proceeding should be there. I did mention to
7 you on the phone, just so that I didn't surprise you
8 all, that it was my thought that this belonged
9 there.

10 I have to say, though, that after I read
11 all of your paperwork, I more strongly believe that
12 this case belongs in the Bronx and that has to do
13 with all of the paperwork that I received from both
14 sides, which I found quite interesting.

15 The experts that were -- or the learned
16 opinions that I got on behalf of Happy to move or
17 change his conditions indicated that there were
18 certain facts that they relied upon, and the experts
19 or learned information that I got with regards to
20 the Bronx Zoo and the folks on the other side
21 indicated that, in fact, Happy is happy where he is
22 at, and that there, in fact, would be impacts on
23 Happy if changes were to be made to his conditions
24 that he is currently being held in.

25 So I definitely believe that regardless of

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1 any of the big underlying issues, that it's going to
2 come down to at some point for a judge of the
3 Supreme Court to decide whether or not Happy needs
4 to be moved and where, and those decisions will
5 require, in my opinion, adhering.

6 It will require experts to testify on both
7 sides, and I probably can't imagine a more
8 inconvenient place for this case to be than in
9 Albion New York. I might be able to think of a
10 couple, but this would be among the most
11 inconvenient places for the parties to actually have
12 any kind of a hearing. I certainly am not going to
13 be bringing up employees and experts and having them
14 fly to cities in New York and drive an hour to get
15 there.

16 The Bronx is a convenient place. The
17 witnesses of the conditions of Happy's confinement
18 are there, and I would say that any experts that you
19 would bring in or alert folks to contest that --
20 they would also find it much easier to get to the
21 Bronx than to Albion, New York.

22 I think that's why there are rules. That's
23 what CPLR says. To the extent that there are any
24 issues that you're asking this Court to decide that
25 transcend venue, I do not want -- realizing that

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1 another Supreme Court judge is on the same level as
2 me, I wouldn't want to have that judge in a position
3 that he disagreed with me and is stuck, in fact,
4 with any of my determinations where the same level
5 of judge -- and therefore, I'm going to reserve for
6 the judge in the Bronx County, where I'm sending
7 this case, on any of the decisions on any of the
8 important issues that you all raise so that he is
9 not put in a position -- he or she is not put in the
10 position of feeling like they have to act as an
11 Appellate Court to any of my decisions on this case,
12 except for change of venue, which I'm granting the
13 defendant's motion to change venue and will be
14 sending this to Bronx County.

15 MR. WISE: Your Honor?

16 THE COURT: Yes.

17 MR. WISE: If I just may make one attempt
18 to change your mind?

19 THE COURT: One attempt, and I'll give
20 Counsel an attempt to change it back.

21 MR. WISE: Thank you. I greatly appreciate
22 this. With the greatest respect, I believe that is
23 an improper decision. Number one, not only so
24 that --

25 THE COURT: Just so you know, I'm not going

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1 to act as my own Appellate Court either. Go ahead.

2 MR. WISE: Under 7002(b)(3), the case can
3 be filed in any -- before any judge. If the Court
4 notes --

5 THE COURT: No, it doesn't say --

6 MR. WISE: Any Supreme Court Justice.

7 THE COURT: It says you can get a writ from
8 any --

9 MR. WISE: Any Supreme Court Justice.
10 7000(b)(1), (2), and (4) all specifically talk about
11 the county of detention. So now we have been
12 brought up to the place where this Court -- we
13 brought the case to the Court.

14 The Court then can then issue the order to
15 show cause and at that point, 7004 kicks in --
16 7004(c) kicks in. At this point, this Court may
17 then make it returnable to the county of issuance or
18 the county of detention. So this Court made it --
19 already made it returnable to the county of
20 issuance. I don't believe that the Court has the
21 power to change the venue, again.

22 THE COURT: I've never addressed that, but
23 I think just by signing the order to show cause --
24 as you can recall, I was hesitant to sign the order
25 to show cause, but I didn't want to deprive you of

NRP v. James J. Breheny

1 your ability to make a record that you asked this
2 Court to entertain these issues. That's really the
3 sole reason that I did issue the order to show cause
4 and had you all here today.

5 MR. WISE: If I may, in order to change the
6 venue under CPLR 511(b) or 510(1), I believe, which
7 we cite, the burden is on the respondent to show
8 that the venue is in the wrong place.

9 THE COURT: They actually made that motion
10 to change the venue.

11 MR. WISE: No, but then they have to show
12 that the venue -- the present venue is wrong, but
13 the present venue is not wrong. The present venue
14 is correct. So they have not even tried to carry
15 their burden of showing that -- which they must do
16 in order to change venue.

17 You just can't change venue because they
18 want venue changed. You have to show that the place
19 for the venue is wrong. The place where the venue
20 is right now is not wrong. It's correct. The
21 reason it's correct is both under 7002 and also
22 because this Court ordered the return to be made in
23 the county of issuance.

24 So the Court didn't have to, but it did,
25 and at that point, where we are today is a correct

NRP v. James J. Breheny

1 venue. That means my brother has to show that it's
2 not a correct venue, but it can't do that.
3 Therefore, the venue may not be changed at this
4 point to another county.

5 THE COURT: Mr. Manning?

6 MR. MANNING: I will, Your Honor. If I
7 could treat that for a motion of reargument, I'll
8 keep it brief. The Court's decision to transfer the
9 case to the Bronx not only comports to the statute
10 the Court read to us, but it also comports to the
11 Greene case in the Second Department, which
12 specifically indicates Article 5 applies to the
13 habeas corpus proceedings.

14 Not only have we met our burden -- I can't
15 imagine what else we could do. The animal is in the
16 Bronx. None of the witnesses are here. Orleans
17 County doesn't have a thing to do with this case --
18 nothing -- nothing at all, except that's where we
19 approached the Court to sign the initial order to
20 show cause.

21 Even if we're wrong and it's perfectly
22 proper to put it in Orleans County, the Court has
23 the discretion -- which we also would move for -- to
24 have the matter transferred to the Bronx on the
25 theory that it makes the most sense, and it's an

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appropriate place under Article 5.

So either way, frankly, the case belongs in the Bronx. To the extent it's a motion for reargument, we'd ask the Court to adhere to its original ruling.

THE COURT: I put my reasons on the record, and I'll stand by them. I do want to thank Counsel for certainly an aluminating argument. It's a very interesting issue, and I hope that it gets decided to your satisfaction.

MR MANNING: Thank you.

THE COURT: Thank you.

MR. WISE: Thank you, Your Honor.

* * * * *

Certified to be a true and accurate transcript.



COLLEEN L. LOUNSBURY
OFFICIAL COURT REPORTER

COLLEEN L. LOUNSBURY
OFFICIAL COURT REPORTER

EXHIBIT 3

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORLEANS

COPY

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

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

Petitioner,

v.

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

Respondents.

NOTICE OF MOTION

Index No. 18-45164

PLEASE TAKE NOTICE that, upon the attached affidavit of Kenneth A. Manning, Esq., sworn to December 3, 2018, with exhibits; the affidavit of James J. Breheny, sworn to December 3, 2018, the affidavit of Paul Calle, VMD, sworn to December 3, 2018, the affidavit of Patrick Thomas, PhD, with exhibit, sworn to December 3, 2018, and all papers and proceedings herein, Respondents James J. Breheny and Wildlife Conservation Society, by and through their attorneys, Phillips Lytle LLP, will move this Court at the Supreme Court, Orleans County, located at 1 South Main Street, Suite 3, Albion, New York 14411, on December 14, 2018 at 11:30 a.m., or as soon thereafter as counsel may be heard, for an order:

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2018 DEC 3 PM4:02

1. Pursuant to CPLR 511 and 7004(c), transferring this proceeding to the New York State Supreme Court in Bronx County; or in the alternative,

2. Pursuant to CPLR 3211(a),

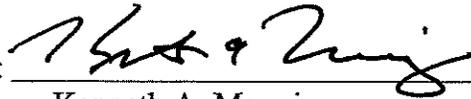
- a. dismissing the Verified Petition of Nonhuman Rights Project Inc., made on behalf of Happy the elephant, for a writ of habeas corpus, with prejudice, for failure to state a cause of action on which relief can be granted, for lack of standing, and pursuant to the doctrine of collateral estoppel; or
- b. in the event the Court does not dismiss the Verified Petition, allowing Respondents five days to answer to the Verified Petition pursuant to CPLR 404(a); and

3. Awarding Respondents' such other and further relief as the Court deems just and proper, including costs and attorneys' fees.

Answering papers and notices of cross-motion, if any, must be served upon attorneys for Respondents in accordance with the Order of this Court dated November 16, 2018, and otherwise in accordance with CPLR. Respondents agree to accept service of the same via electronic transmission to the e-mail addresses stated below.

Dated: Buffalo, New York
December 3, 2018

PHILLIPS LYTTLE LLP

By: 

Kenneth A. Manning
Joanna J. Chen
William V. Rossi

Attorneys for Respondents

James J. Breheny and

Wildlife Conservation Society

One Canalside

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Buffalo, New York 14203-2887

Telephone No. (716) 847-8400

kmanning@phillipslytle.com

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wrossi@phillipslytle.com

TO: Elizabeth Stein, Esq.
5 Dunhill Road
New Hyde Park, New York 11040
lizsteinlaw@gmail.com

Doc #01-3068745.1

EXHIBIT 4

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,

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.

VERIFIED ANSWER

Index No. 18-45164

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BRONX COUNTY

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Respondents James J. Breheny and the Wildlife Conservation Society

(collectively, "Respondents"), by their attorneys, Phillips Lytle LLP, answer the Verified
Petition ("Petition") of the Non-Human Rights Project, Inc. ("NRP") in this special
proceeding as follows:

1. Paragraphs 1 and 2 characterize the relief sought by NRP in this special proceeding, and state legal conclusions concerning the same, to which no response is required. To the extent a response is required, Respondents deny these allegations.
2. Respondents deny paragraph 3 of the Petition.
3. Paragraphs 4, 5, and 6 purport to summarize *In re Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) (Fahey, J. concurring), and Respondents refer to that opinion for its complete and accurate content, and otherwise deny the allegations in Paragraphs 4, 5, and 6 of the Petition.

4. Paragraphs 7, 8, 9, 10, and 11 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

5. Paragraph 12 purports to summarize *In re Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) (Fahey, J. concurring), and *People v. Graves*, 163 A.D.3d 16 (4th Dep't 2018), and Respondents refer to those opinions for their complete and accurate content, and otherwise deny the allegations in Paragraph 12 of the Petition.

6. Paragraph 13 purports to summarize *In re Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) (Fahey, J. concurring), *Byrn v. New York City Health and Hospitals Corp.*, 31 N.Y.2d 194 (1972), and *People v. Graves*, 163 A.D.3d 16 (4th Dep't 2018), and Respondents refer to those opinions for their complete and accurate content, and otherwise deny the allegations in Paragraph 13 of the Petition.

7. Paragraph 14 characterizes the relief sought by NRP in this special proceeding, and state legal conclusions concerning the same, to which no response is required. To the extent a response is required, Respondents deny these allegations.

8. Paragraphs 15, 16, and 17 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

9. Respondents deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 18, and therefore deny these allegations.

10. The first and second sentences in paragraph 19 state legal conclusions that do not require a response. Admit only that elephants are intelligent and social animals, and otherwise deny the allegations in paragraph 19 of the Petition.

11. Paragraphs 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

12. Respondents deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 37 and therefore deny these allegations.

13. The first sentence in paragraph 38 is a legal conclusion that does not require a response. To the extent a response is required, Respondents deny the allegation. In response to the balance of paragraph 38, upon information and belief admit only that (i) Happy is an approximately 48 year-old female Asian elephant who "was captured in the wild and imported to the United States" when she was young; (ii) Happy was purchased by the Lion Country Safari, Inc. and lived elsewhere until approximately 1977; (iii) Happy, and a second elephant known as "Grumpy," arrived at the Bronx Zoo in or around 1977; (iv) Happy previously participated in events and gave rides but has not done so in decades; (v) Grumpy died in or around 2002, after she was attacked by two other elephants known as "Patty" and "Maxine"; (vi) in or around 2002, a female Asian elephant known as "Sammy" was introduced into Happy's environment at the Bronx Zoo; and (vii) Sammy died in or around 2006. Respondents deny knowledge or information sufficient to form a belief as to the truth of the allegation "[i]n 2005, Happy became the *first* elephant to pass the mirror self-recognition test, considered to be a true indicator of an animal's self-awareness and "[t]hought to correlate with higher form of empathy and altruistic behavior,'" and therefore, Respondents deny these allegations. Respondents deny the remaining allegations in paragraph 38.

14. Respondents deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 39 and therefore deny these allegations.

15. Respondents admit the allegations in paragraphs 40 and 41.

16. Paragraphs 42, 43, 44, 45, and 46 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

17. Respondents deny the allegations in paragraph 47.

18. Paragraphs 48 and 49 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

19. Regarding paragraph 50, Respondents deny that an order to show cause must be issued on behalf of Happy. The remainder of the allegations in paragraph 50 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

20. Paragraph 51 states legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

21. Respondents deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 52 and therefore deny these allegations.

22. Paragraph 53 states legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

23. Regarding paragraph 54, Respondents deny that Happy's current living conditions are in any way unlawful. The remainder of the allegations in paragraph 54 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

24. Paragraphs 55 and 56 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

25. Regarding paragraph 57, Respondents deny that they may be compelled to transfer Happy to the PAWS sanctuary. The remainder of the allegations in paragraph 57 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

26. Paragraphs 58, 59, and 60 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

27. Paragraph 61 purports to summarize *In re Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) (Fahey, J. concurring), and Respondents refer to that opinion for its complete and accurate content, and otherwise deny the allegations in paragraph 61 of the Petition.

28. Paragraphs 62 and 63 state legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

29. Respondents deny knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 64, 65, 66, 67, 68, and 69, and therefore deny these allegations.

30. Paragraphs 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, and 117 are summaries of affidavits submitted by NRP in support of its Petition, and Respondents refer to them for their complete and accurate content. To the extent NRP purports to allege specific factual findings or observations made in the studies described in these paragraphs, Respondents deny

knowledge or information sufficient to form a belief as to the truth of such allegations, and therefore deny any such allegations.

31. Paragraph 118 states legal conclusions to which no response is required. To the extent a response is required, Respondents deny these allegations.

FIRST DEFENSE

32. Happy's living conditions are in all ways lawful.

SECOND DEFENSE

33. The Petition should be dismissed because it does not concern an imprisoned person.

THIRD DEFENSE

34. The Petition should be dismissed because it seeks to change the conditions of Happy's confinement and does not seek her immediate release from confinement.

FOURTH DEFENSE

35. NRP is barred from seeking the relief demanded in the Petition under the doctrine of collateral estoppel because the issues raised in the Petition were necessarily decided in prior litigation in which NRP had a full and fair opportunity to address them.

FIFTH DEFENSE

36. The Petition should be dismissed under CPLR 7003(b) as a successive petition for a writ of habeas corpus.

SIXTH DEFENSE

37. NRP lacks standing to bring the Petition.

SEVENTH DEFENSE

38. The Petition seeks relief that is barred by the United States Constitution and the New York State Constitution, including without limitation the fundamental principles of due process under the laws of the State of New York and the United States.

EIGHTH DEFENSE

39. The Petition fails to satisfy a condition precedent to the grant of a writ of habeas corpus, including without limitation: (i) a petitioner who is a person; (ii) a violation of due process; and (iii) circumstances rendering continued restrictions on bodily liberty unlawful.

NINTH DEFENSE

40. The Petition seeks relief that is barred by illegality.

TENTH DEFENSE

41. The Court lacks subject-matter jurisdiction over NRP's Petition because Happy is not a person.

ELEVENTH DEFENSE

42. The Court lacks personal jurisdiction over Happy because Happy is not a person.

TWELFTH DEFENSE

43. The Petition asks the Court to render an advisory opinion concerning a legislative and/or political question, and thus it does not identify a justiciable controversy.

THIRTEENTH DEFENSE

44. The Petition violates the doctrine of separation of powers because NRP seeks relief that should be requested from the New York State Legislature.

FOURTEENTH DEFENSE

45. The relief sought in the Petition is barred by the applicable statutes of limitation and/or repose.

FIFTEENTH DEFENSE

46. NRP does not have a legitimate legal interest in the relief sought in the Petition and cannot establish an injury-in-fact.

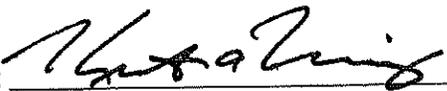
SIXTEENTH DEFENSE

47. To the extent it states any viable grounds for relief, the Petition seeks relief that would not serve Happy's best interests.

WHEREFORE, Respondents James J. Breheny and the Wildlife Conservation Society respectfully request that the Court enter judgment for them and against Petitioner the Nonhuman Rights Project, Inc.

Dated: Buffalo, New York
July 1, 2019

PHILLIPS LYTTLE LLP

By: 

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