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.

Index No. 260441/2019

RESPONDENTS' MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS AND IN RESPONSE TO PETITIONER'S SUPPLEMENTAL MEMORANDUM UPON TRANSFER

Respectfully submitted,
PHILLIPS LYTLE LLP
Attorneys for Respondents
James J. Breheny and The Wildlife Conservation Society,
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400

Kenneth A. Manning
Joanna J. Chen
William V. Rossi
– Of Counsel –

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

In this unusual habeas corpus proceeding commenced on behalf of Happy, an Asian elephant at the Bronx Zoo, the Nonhuman Rights Project, Inc. ("NRP") has made repeated and extended efforts to avoid the jurisdiction of the Appellate Division, First Department. NRP's avowed rationale was to avoid precedent set by the First Department's decision in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73 (1st Dep't 2017), which conclusively held that animals are not entitled to habeas relief.[1]

Now that the proceeding has been transferred to the correct venue, NRP should not be allowed to continue its efforts to circumvent the law of the First Department, which compels the dismissal of NRP's petition. Contrary to NRP's assertions, the First Department's decision in *Lavery* is directly applicable to the facts at hand and based firmly upon New York law—every Appellate Division has already considered and rejected the arguments NRP raises here. NRP, on the other hand, fails to provide any precedent whatsoever to support its radical interpretation of the writ of habeas corpus.

For the reasons stated in this supplemental memorandum of law in response to NRP's supplemental memorandum upon transfer, and those stated in Respondents' previously submitted motion to dismiss, NRP's petition should be dismissed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Happy is an Asian elephant at the Bronx Zoo under the care of Respondents

Happy is a female Asian elephant and has lived in her habitat at the Bronx Zoo for more than forty years. Supplemental Affidavit of James Breheny, sworn to

[1] Affidavit of Kenneth A. Manning, sworn to August 7, 2019 ("Manning Aff."), Ex. B, p. 5 (NRP's memorandum of law in support of its motion to stay the transfer of this proceeding to Bronx County pending its appeal to the Appellate Division, Fourth Department)

December 3, 2018 ("Breheny Sup. Aff.") ¶ 6; Affidavit of Patrick Thomas, sworn to December 3, 2018 ("Thomas Aff.") ¶¶ 9-10, 15, 27. Respondent Wildlife Conservation Society ("WCS") is a not-for-profit corporation whose mission is to save wildlife and wild places worldwide. WCS opened the Bronx Zoo in 1899 on New York City parkland. Respondent James Breheny is General Director of both WCS and the Bronx Zoo. Breheny Sup. Aff. ¶ 1.

B. NRP previously attempted to establish legal personhood for chimpanzees in multiple unsuccessful lawsuits

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."[2] In New York, NRP began its campaign by bringing habeas corpus cases for "imprisoned" chimpanzees, in four separate proceedings in four different counties, each within a different department of the Supreme Court, Appellate Division. In each case, the trial court declined habeas corpus relief for the chimpanzees, and NRP appealed each decision. On appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas corpus relief. *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 2014 WL 1318081 at *1 (2d Dep't Apr. 3, 2014) (dismissing appeal)[3]; *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); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep't 2014) ("*Lavery I*"); *In re Nonhuman Rights Project v.*

[2] Non-Human Rights Project, *Litigation: Overview*, https://www.nonhumanrights.org/litigation/ (last visited August 28, 2019).

[3] On NRP's attempted appeal from the decision of the Supreme Court, Suffolk County, which refused to sign NRP's *ex parte* order to show cause seeking a writ of habeas corpus, the Appellate Division, Second Department dismissed NRP's appeal *sua sponte* because no appeal lied therefrom.

Lavery, 152 A.D.3d 73, 75-76 (1st Dep't 2017) ("*Lavery II*"), *leave to appeal denied* 31 N.Y.3d 1054 (2018).

In *Lavery I*, the Third Department based its decision in part upon the complete lack of precedent for a writ of habeas corpus for animals. *Id.* at 150. The Third Department also reasoned that animals cannot and do not bear legal duties or social responsibilities, and thus cannot be granted the reciprocal legal right to seek habeas relief. *Id.* at 152. Before that appeal concluded, NRP filed an "identical" petition in New York County, and on appeal from its dismissal, the First Department rejected NRP's petition based upon the rationale in *Lavery I*. *Lavery II*, 152 A.D.3d at 73-76.

C. NRP filed a petition for a writ of habeas corpus in Orleans County, claiming Happy the elephant is illegally imprisoned at the Bronx Zoo

With the chimpanzee cases having run their course, NRP started commencing habeas corpus proceedings for elephants. In the Superior Court of Connecticut, for example, NRP petitioned for a writ of habeas corpus for three elephants. *See Nonhuman Rights Project, Inc. ex rel. Beulah, Minnie & Karen*, 2018 WL 1787370, at *1 (Conn. Sup. Ct., Feb. 27, 2018). After the trial court dismissed the petition as "wholly frivolous on its face," NRP appealed to the Appellate Court of Connecticut. On August 22, 2019, the Appellate Court affirmed the dismissal, relying upon substantially the same rationale as *Lavery I* and *Lavery II*:

> [W]e have little difficulty concluding that the elephants—who are incapable of bearing legal duties, submitting to social responsibilities, or being held legally accountable for failing to uphold those duties and responsibilities—do not have standing to file a petition for a writ of

> habeas corpus because they have no legally protected interest that can possibly be adversely affected.

Nonhuman Rights Project, Inc. v. R.W. Comerford & Sons, Inc., 2019 WL 3886852, at *6 (Conn. App. Ct. Aug. 22, 2019) (citing *Lavery I*, 124 A.D.3d at 150-52).

On October 2, 2018, NRP announced the instant proceeding for a "good faith and well-supported extension of the New York common law of habeas corpus to Happy, who is autonomous, and being unlawfully imprisoned solely because she is an elephant." Verified Petition, Oct. 2, 2018 ("Pet."), ¶¶ 1-2. NRP explicitly stated that it chose *not* to file its petition within the jurisdiction of the Appellate Division, First Department, "because that court '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.'" NRP's Reply Mem. of Law Opp. Resp.'s Mot. to Change Venue, dated Dec. 10, 2018, at 11.

Respondents moved to change venue to Bronx County and to dismiss the petition for failure to state a valid habeas corpus claim. The Orleans County Supreme Court (Hon. Tracey Bannister, J.S.C.) granted Respondents' motion to transfer venue, and stayed all other motions, holding their disposition in abeyance pending transfer to this Court, including Respondents' motion to dismiss. Manning Aff., Ex. A. For the reasons stated in Respondents' pending motion to dismiss, and as further explained below, this Court should grant Respondents' motion to dismiss NRP's petition.

POINT I

THE COURT SHOULD DISMISS NRP'S PETITION BECAUSE WELL-SETTLED PRECEDENT BARS THE RELIEF SOUGHT BY NRP

A. NRP's petition should be dismissed based upon binding precedent

Stare decisis holds that "a rule of law once decided by a court, will generally be followed in subsequent cases presenting the same legal problem." *State Farm Mut. Auto Ins. v. Fitzgerald*, 25 N.Y.3d 799, 810 (2015); *accord People v. Hobson*, 39 N.Y.2d 479 (1976). Even under the most flexible interpretation, moreover, courts will not overturn prior decisions "unless a compelling justification exists for such a drastic step." *Fitzgerald*, N.Y.3d at 819-20.

NRP offers no valid justification for deviating from *Lavery I* and *Lavery II*, which considered the same legal arguments raised in this proceeding, only on behalf of chimpanzees instead of elephants. The crux of NRP's argument is that elephants are highly intelligent animals and demonstrate "autonomy" in the wild, and therefore should be deemed "legal persons." Pet. ¶¶ 19-20. However, both the First and Third Departments previously rejected this argument when advanced on behalf of chimpanzees, not only because there is no precedent to support it, but because the "human-like" traits of chimpanzees, and the "cognitive and linguistic capabilities" they possess, "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." *Lavery II*, 152 A.D.3d at 78; *accord Lavery I*, 124 A.D.3d at 149, 152. Likewise, cognitive abilities aside, neither Happy nor any other animal has the capacity to comprehend or undertake the social or legal responsibilities attributed to humans, and NRP does not suggest to the contrary.

Obviously cognizant of this negative precedent, NRP tries to avoid *Lavery I* and *Lavery II* by dismissing the decisions as "dicta." NRP Supp. Mem. at 3-4. The label "dicta," however, only accurately applies to judicial statements that do not directly address the issue before the court and thus are unnecessary to its holding. *People v. Bourne*, 139 A.D.2d 210, 216 (1st Dep't 1988). In contrast, where a court decides and discusses the precise question at issue in an earlier decision—as the First Department did in *Lavery II*—the "disposition and instruction" in that case *must* be followed as binding precedent. *In re Keanu S.*, 167 A.D.3d 27, 34 (2d Dep't 2018) (refusing to disregard precedent as "dicta") (citing *People v. Garvin*, 30 N.Y.3d 174 (2017)).

Even under a cursory review, the *Lavery II* decision squarely rejects the arguments NRP raises in this matter. In *Lavery II*, the First Department held NRP's habeas corpus petition was an improper successive petition under CPLR 7003(b), *i.e.*, "the legality of the detention ha[d] been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition present[ed] no ground not theretofore presented." In support of that disposition, the court necessarily conducted a thorough analysis of the existing New York court determination, *i.e.*, *Lavery I*, and provided sound rationale for its adoption of, and refusal to deviate from, that decision. *Lavery II*, 152 A.D.3d at 78. *Lavery II* therefore directly addressed the arguments raised by NRP in this proceeding, and should not be dismissed as mere dicta.

B. NRP's petition should be dismissed based upon collateral estoppel

Because New York courts have previously considered and rejected NRP's arguments, collateral estoppel also should bar NRP's current petition. The rule bars a party from re-litigating issues "raised in a prior action or proceeding and decided against that

party or those in privity," *Beuchel v. Bain*, 97 N.Y.2d 295, 305 (2001), and applies to habeas corpus proceedings. *People ex rel. Spaulding v. Woods*, 63 A.D.3d 1456, 1457 (3rd Dep't 2009). As illustrated above, NRP raises the same issues here as in *Lavery I* and *II*, and through its exhaustive appellate efforts, NRP had a "full and fair opportunity" to contest the earlier decisions.

That NRP purported to "represent" different animals in prior proceedings should not shield NRP from this practical rule. Indeed, collateral estoppel is "flexible," and to that end, even *non*-parties may be estopped from re-litigation when they "control a [prior] action" or are parties "whose interests are represented by a party to the action." *Id.* at 304 (quoting *Matter of Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (1997)). This flexibility is crucial, because "the fundamental inquiry is whether re-litigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the courts and the litigants, and the societal interest in consistent and accurate results." *Beuchel*, 97 N.Y.2d at 305. Because New York's appellate courts have already ruled on the precise legal issues NRP advances in this proceeding, no additional judicial resources should be expended, and NRP's petition should be dismissed accordingly.

POINT II

NRP'S ARGUMENTS DO NOT COMPEL A DEVIATION FROM WELL-SETTLED PRECEDENT

A. *Lavery I* and *Lavery II* were correctly decided under New York law

Although the soundness of the *Lavery* decisions is clear, NRP claims the First and Third Department of the Appellate Division committed a "demonstrable misunderstanding of the law" in light of *Byrn v. N.Y.C. Health & Hosps.*, 31 N.Y.2d 194 (1972). NRP's reliance upon *Byrn* to support its position is mistaken.

Fundamentally, *Byrn* stands for the dual propositions that "[w]hat is a legal person is for the law . . . to say" and "[w]hether the law should accord legal personality is a policy question which in most cases devolves on the Legislature." *Id.* at 201. The *Byrn* court held that the New York State Legislature was entitled to determine the rights accorded to a human fetus and to enact the statute at issue, which permitted abortion under stated circumstances. *Id.* at 194, 203. In concurrence, the *Byrn* court emphasized that "the extent to which fetal life should be protected is a value judgment not committed to the discretion of judges, but reposing instead in the representative branch of government." *Id.* at 205 (internal citation omitted). NRP, in seeking to utilize the courts to achieve a radical expansion of the concept of legal personhood, contradicts the principles stated in *Byrn*, whereas the First and Third Department correctly recognized that NRP's attempt to establish legal personhood for animals was and is "better suited to the legislative process." *Lavery II*, 152 A.D.3d at 80; *accord Lavery I*, 124 A.D.3d at 152-53. Accordingly, *Lavery I* and *Lavery II* were correctly decided under *Byrn*.

B. *Lavery I* and *Lavery II* do not contradict New York Estates, Powers and Trusts Law Section 7-8.1

NRP also incorrectly argues that *Lavery I* and *Lavery II* contradict New York Estates, Powers, and Trusts Law ("EPTL") Section 7-8.1, which NRP contends establishes legal rights, and therefore personhood, for animals. NRP's argument glosses over the fact that EPTL Section 7-8.1(a) refers only to "*domestic* or *pet* animals" (emphasis added), and the sponsors of the original statute stated that the purpose of the statute was to "enable a pet *owner* to provide for the animal's care after the owner dies." N.Y. Bill Jacket, 1996 S.B. 5207, Ch. 159 (emphasis added). Such language reinforces the traditional treatment of animals under the law as property, not persons with rights. Nowhere in the sponsors' letters

is there any mention of the intention to establish legal personhood for animals. EPTL Section 7-8.1 therefore does not provide any support for NRP's argument that animals are entitled to habeas relief.

C. *Lavery I* and *Lavery II* were correct in connecting legal rights with the imposition of legal duties

NRP further challenges *Lavery I* and *Lavery II*'s rationale that animals should not be granted legal personhood because animals lack the ability to assume legal duties and obligations, which are connected to the granting of rights. *Lavery I*, 124 A.D.3d at 151; *Lavery II*, 152 A.D.3d at 78. However, as more fully explained in the proposed *amicus curiae* brief submitted by Professor Richard L. Cupp, Jr., John W. Wade Professor of Law of Pepperdine University School of Law,[4] the reciprocity between legal rights and duties is deeply embedded in the founding principles of our government and is evidenced by seminal documents such as the Declaration of Independence and the United States Constitution. Professor Cupp further explains that even though legal rights and duties are connected, the law may grant rights to children and human beings with cognitive limitations because they are still human beings, while declining to grant rights to animals.

In its attempt to circumvent these well-established legal principles, NRP selectively quotes from historical sources. For example, NRP quotes sections from John Chipman Gray, *The Nature and Sources of the Law* (2d ed. 1963), for the proposition that "'animals may conceivably be legal persons,' and there may be 'systems of Law in which animals have legal rights,'" NRP Supp. Mem. at 15, yet upon examination of the original source, one finds that Professor Gray made these observations in reference to historical

[4] To avoid duplication, Respondents expressly incorporate in this brief Professor Cupp's proposed *amicus curiae* brief.

societies, such as "cats in ancient Egypt, or white elephants in Siam." John Chipman Gray, *The Nature and Sources of the Law* 43 (1921). The treatise further explains "[i]n the systems of *modern* civilized societies, beasts have no legal rights. It is true there are everywhere statutes for their protection, but these have generally been made, not for the beasts' sake, but to protect the interests of men, their masters." *Id.* at 42 (emphasis added).

NRP similarly misquotes John Salmond, *Jurisprudence* (10th ed. 1947) to support its cause. On the pages immediately following the phrases quoted by NRP, Salmond states

> [t]he only natural persons are human beings. Beasts are not persons, either natural or legal. They are merely things—often the objects of legal rights and duties, but never the subjects of them. Beasts, like men, are capable of acts and possess interest. Yet their acts are neither lawful nor unlawful; they are not recognised by the law as the appropriate subject-matter either of permission or of prohibition.

Id. at 319.

Thus, just as *Lavery I* and *Lavery II* found, NRP "does not cite any sources indicating that the United States or New York Constitutions were intended to protect nonhuman animals' rights to liberty or that the legislature intended the term 'person' in CPLR Article 70 to expand the availability of habeas protection beyond humans." *Lavery II*, 152 A.D.3d at 77-78; *accord Lavery I*, 124 A.D.3d at 150. The Court should follow the well-established and soundly reasoned decisions of the First and Third Departments, which compel a dismissal of NRP's petition.

POINT III

THE PETITION SHOULD BE DENIED BECAUSE IT FAILS TO STATE A COGNIZABLE CLAIM FOR HABEAS RELIEF

It is worth noting in this habeas corpus proceeding that NRP does not allege that Happy's conditions at the Bronx Zoo violate any federal, state, or local law or

regulation. NRP also does not seek to have the Bronx Zoo release Happy into the wild, but rather requests that the Court move Happy to a "captive wildlife sanctuary" in Northern California operated by the Performing Animal Welfare Society ("PAWS"). Affidavit of Ed Stewart, sworn to September 26, 2018 ("Stewart Aff.") ¶ 4; Pet. ¶ 118.B.

Habeas corpus, however, embodies 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). When a person is imprisoned in violation of due process protections, habeas corpus entitles that person to "immediate release." *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689, 691 (1986). As a corollary, a person in lawful custody cannot use the writ of habeas corpus to challenge the "particular type of confinement" he or she is subject to, if that confinement is lawful. *Id.*; *In re Berrian v. Duncan*, 289 A.D.2d 655, 655 (3d Dep't 2001); *People ex rel. Torres v. Scully*, 154 A.D.2d 725, 725 (2d Dep't 1989); *People ex rel. Catapano v. Smith*, 143 A.D.2d 538, 538 (4th Dep't 1988).

The First Department in *Lavery II* held that, even assuming that habeas relief was available for animals, the trial court properly denied habeas relief because NRP "does not challenge the chimpanzees' detention, but merely seeks their transfer to a different facility," namely a primate sanctuary operated by Save the Chimps in southern Florida. 152 A.D.3d at 79; *accord In re Nonhuman Rights Project, Inc. v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep't 2015). NRP seeks essentially the same relief in this matter on behalf of Happy, and just as in *Lavery II*, NRP's claim should be denied.

Moreover, as *Lavery II* explains, *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482, 485 (1961), does not compel a different result because the case stands only for the proposition that a writ of habeas corpus may challenge a condition of confinement where such condition constitutes a "*further* restraint *in excess* of that permitted by the [criminal] judgment or constitutional guarantees." *Id.*; *Lavery II*, 152 A.D.3d at 79-80. Here, NRP does not assert that Happy's current living conditions at the Bronx Zoo violate any federal or state laws, and therefore NRP cannot assert that such conditions are in any way unlawful. Because NRP's petition does not request Happy's release but rather her transfer to a facility of NRP's choosing, NRP's use of the writ of habeas corpus is improper, and NRP's petition should be denied

CONCLUSION

For the reasons stated in Respondents' previously submitted memorandum of law in support of their motion to dismiss, and for the foregoing reasons, Respondents respectfully request that the Court dismiss and/or deny NRP's petition.

Dated: Buffalo, New York
September 5, 2019

PHILLIPS LYTLE LLP

By: _____

Kenneth A. Manning
Joanna J. Chen
William V. Rossi
Attorneys for Respondents
James J. Breheny and
Wildlife Conservation Society
One Canalside
125 Main Street
Buffalo, New York 14203-2887
Telephone No. (716) 847-8400
kmanning@phillipslytle.com
jchen@phillipslytle.com
wrossi@phillipslytle.com