To be argued by:
KENNETH A. MANNING
(Time Requested: 30 minutes)

APL-2021-00087
Appellate Division-First Department Case No. 2020-02581
Bronx County Clerk's Index No. 260441/19

Court of Appeals
of the
State of New York

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

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

Petitioner-Appellant,

– against –

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

Respondents-Respondents.

BRIEF FOR RESPONDENTS-RESPONDENTS

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CORPORATE DISCLOSURE

Respondent-Respondent Wildlife Conservation Society ("WCS") has no corporate parent.

WCS's subsidiaries and affiliates are: 182 Flight Corp.; Conservation Flight LLC; Conservation Livelihoods International LLC; Makira Carbon Company LLC; Professional Housing Corporation; Seima Carbon Company LLC; Tierras LLC; Tierra De Guanacos LLC; Tierra De Truchas LLC; Tierra de Guanacos LLC Uno Limitada; Tierra de Guanacos LLC Dos Limitada; WCS Conservation Enterprises LLC; SVC Sam Veasna Conservation Tours Co., Ltd.; WCS Global Conservation UK; WCS Wildlife Conservation Society Canada; Wild Lands Conservation Society; Autonomous Noncommercial Organization Wildlife Conservation Society; Bagatur Co., Ltd.; Ibis Rice Conservation Co., Ltd.; Sansom Mlup Prey; WCS-Associacao Conservacao da Vida Silvestre; WCS EU; Wildlife Conservation Society India; Wildlife Conservation and Science (Malaysia) Bhd; and Yayasan Celebica.

COUNTERSTATEMENT OF QUESTIONS PRESENTED AND ANSWERS OF THE TRIAL COURT AND APPELLATE DIVISION

1. Should the court deem a nonhuman animal a "person" for the purposes of a habeas corpus petition, in the absence of any specific legislative expansion of the meaning of "person" in this context?

The Trial Court and the Appellate Division properly answered, "No."

2. Is habeas corpus relief available when petitioner fails to assert that confinement violates any provision of the United States Constitution, or any federal, state, or local law, or any regulation?

The Trial Court agreed that Happy the Elephant "is not being illegally imprisoned" and, while the Appellate Division did not specifically reach this issue, the proper answer as determined by the Trial Court, is "No."

3. Is transfer of a nonhuman animal from one facility to another a proper remedy under established habeas corpus jurisprudence?

The Trial Court and the Appellate Division did not specifically reach this issue but the proper answer is "No."

4. Should the court deem a nonhuman animal a "person" for the purposes of a habeas corpus petition in the absence of a workable standard by which to evaluate the qualities of "personhood" asserted by Petitioner?

The Trial Court and the Appellate Division did not specifically reach this issue but the proper answer is "No."

PRELIMINARY STATEMENT

There is no dispute that the Bronx Zoo, the home for Happy the Elephant ("Happy") for the last 40 years, is one of the most highly regarded zoos in the world. There is no dispute that Happy is cared for there by well-trained large animal veterinarians (A. 331, ¶¶ 9-13) and by animal keepers who treat Happy with respect and kindness (A. 331, ¶¶ 7, 10; A. 337, ¶¶ 23-25). Indeed, there is no dispute that Happy is not a "thing" and is not treated as such at the Bronx Zoo, but instead is an ambassador for her species who is respected and cared for by a knowledgeable and skilled staff.

If either side is treating Happy as a "thing," it is the Nonhuman Rights Project ("NRP"). That is, NRP is using Happy the same way they have used other animal "clients"—none of whom asked for NRP's intervention—to try to upend centuries of habeas corpus law and impose its own world view that certain (or perhaps all) animals should not be cared for in zoos.[1] Having unilaterally determined that Happy must be transferred to another facility

[1] NRP's "Frequently asked questions" page on its website also makes clear its goals: "Who are your clients? Currently, chimpanzees and elephants. Our other potential clients include orangutans, gorillas, bonobos, dolphins and whales." "What specific rights are you seeking for them? The right to bodily liberty, i.e. not to be imprisoned, and (where relevant) the right to bodily integrity, i.e. not to be experimented on. *Once these rights are recognized, we seek their release to sanctuaries where their rights will be respected*." *Frequently Asked Questions*, NONHUMAN RIGHTS PROJECT, https://www.nonhumanrights.org/frequently-asked-questions/. (last visited on August 2, 2021) (emphasis added). A-320-21 (identifying NRP's website and its content concerning habeas corpus proceedings filed by NRP, including the proceeding below).

simply because the other facility purportedly has more space than the Bronx Zoo, without studying Happy herself, and without any complaint informed by actual knowledge of Happy's physical or psychological condition, age, preferences, or personality, NRP filed the underlying petition based on textbook generalities primarily regarding African elephants (a different species). What NRP actually seeks is judicial endorsement of its philosophical view that nonhuman animals have a fundamental right to certain welfare provisions different from those contained in the numerous laws and regulations that govern. They are attempting to weaponize the writ of habeas corpus to achieve this policy endpoint.

Habeas corpus is well-established as a remedy for human beings. It has never been applied to nonhuman animals in New York or anywhere else in the United States, and to change this through a judicial decision would immediately and profoundly impact countless stakeholders, most of whom will not have had an opportunity to be heard on the issue. It is just such an issue that merits careful consideration of all concerns by the elected officials of the State.

Stakeholders include every human being in the state who may want or need to access the judicial system, including poor and disadvantaged communities, whose access to the judicial system is already impaired. A

recent report commissioned by Chief Judge Janet DiFiore and published in 2020 documented this fact in stark terms, observing an "under-resourced, overburdened" court system and "the dehumanizing effect it has on litigants." Jeh Charles Johnson et al., *Report from the Special Advisor on Equal Justice in the New York State Courts*, N.Y. STATE UNIFIED CT. SYS., 2, 54 (Oct. 1, 2020).[2] Inviting animals to court can only aggravate this existing injustice.

Indeed, the fundamental distinction between animals and humans under law did not arise by accident. There are categorical, class-wide differences between humans and elephants. The law enshrines fundamental rights for humans based on human dignity, and the unique, collective human capacity to cooperate within an ordered legal system. This bright-line rule is a sound one. Basing rights on the concept of "autonomy" rather than humanity, as NRP proposes, threatens the most vulnerable human populations. And drawing comparisons between "animal rights" and the hard-won civil rights of historically marginalized populations is a facile and short-sighted analogy

[2] For an online version of the report, see https://nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf. This Court may take judicial notice of this report because it is an official publication of the New York Court System commissioned by the Chief Administrative Judge. *Musco v. United Surety Co.*, 196 N.Y. 459, 465 (1909) ("We doubtless may take judicial notice of the public report made by the commission of immigration recently appointed by the Governor to inquire into the condition and welfare of aliens in this state . . . ."); *accord Albano v. Kirby*, 36 N.Y.2d 526, 532-33 (1975) (holding court could take judicial notice of memorandum published by Department of Civil Service on appeal addressing proper construction of the memorandum).

showing little regard for the Constitutional source of such rights and no respect for the legal equality that those populations duly demanded and achieved.

Setting aside the extremity of NRP's position, expanding the notion of a "person" to include animals is, categorically, a policy question. Changing this most fundamental of legal concepts has implications not just for zoos, but for pet owners, farmers, academic and hospital-based researchers and, most critically, every human who might seek or need access to the judicial system. For all of these reasons, such policy questions should be (and, indeed, are) left for elected representatives to consider, because legislative investigations, research, and hearings give notice to, and gather input from, *all* stakeholders. Here, NRP has self-selected the animal, the parties, the venue, the procedural vehicle, and the "best" facility for Happy. This process cannot provide the full, objective record that this issue, if considered, deserves.

Moreover, habeas corpus is not the proper remedy for NRP's complaint. NRP's selected relief is simply the transfer of Happy to a facility allegedly with more room. Habeas corpus is a summary proceeding with one remedy: release from illegal confinement. It is not, and should not be, an animal resettlement device. Petitioner does not claim that Happy's living environment at the Bronx Zoo is illegal under any law, regulation, or decision, nor does NRP claim that "she is kept in unsuitable conditions." A. 10.

Rather, the basis for the petition is that there is a facility NRP would prefer. Putting aside whether NRP's preferred California facility thousands of miles from the only home Happy has known for 40 years is indeed superior to the Bronx Zoo, transfer to a "better" facility is simply not a habeas corpus remedy.

NRP also fails to provide a workable standard by which animals can be evaluated to decide whether to accord them "person" status for Article 70 purposes. Petitioner claims that "autonomy," plus some undefined level of intelligence, is the standard this Court should adopt for New York State. But exactly how this standard would apply across a range of cases, whether an individual or an entire species should be granted "personhood" under this "standard," and what degree of autonomy and intelligence is sufficient to be a "person," remains frustratingly absent from NRP's submissions. NRP points to selective experimental data that suggest African elephants have some level of intelligence and other emotional qualities.[3] However, these qualities are impossible to quantify or otherwise set forth in a standard of personhood that would allow this Court to provide clear guidelines to lower courts whenever a

[3] It is worth noting that the affidavits of NRP's experts, aside from biographical information, are all the same, virtually verbatim. Compare, for example, the Affidavit of Lucy Bates, A. 148, ¶ 24 through A. 164, ¶ 55, with the Affidavit of Karen McComb, A. 187, ¶ 26 through A. 199, ¶ 55; and the Affidavit of Cynthia J. Moss, A. 223, ¶ 20 through A. 235, ¶ 49. Moreover, they all primarily address qualities of African elephants which they acknowledge are different from Asian elephants like Happy. *See for example*, A. 106, ¶ 31; A. 148, ¶ 23; A. 187, ¶ 25; A. 223, ¶ 19.

nonhuman animal might petition for habeas corpus relief. Moreover, NRP presents no evidentiary basis whatsoever to show that "autonomy" alone is all that is required for "personhood" under habeas corpus jurisprudence.

Respondents have never doubted that Happy is not a "thing," or that she deserves to be "treated with respect." *See*, *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1058 (Fahey, J., concurring). But NRP conflates those fundamental aspects of how animals should be treated by humans with the idea that such animals have achieved personhood under the law. Granting legal personhood is not a fickle exercise and this Court should not make it one.

COUNTER STATEMENT OF FACTS

A. The Wildlife Conservation Society and the Bronx Zoo care for endangered and threatened animals like Happy as part of an international mission of conservation and education

Respondent Wildlife Conservation Society ("WCS") is a not-for-profit organization headquartered at the Bronx Zoo. A. 320, ¶ 3. WCS opened the Bronx Zoo in 1899, and has since expanded its mission worldwide to safeguard wildlife and wild places through science, conservation, education, and inspiring people to value and appreciate wildlife. A. 320, ¶ 3. Today, the Bronx Zoo cares for thousands of animals from a diverse group of species, many of which are endangered or threatened, including Happy, an Asian elephant who has resided in the Bronx Zoo for over 40 years. A. 320, ¶ 4. Respondent James Breheny has worked at the Bronx Zoo for nearly as long, having joined the WCS staff forty years ago. Mr. Breheny became Director of the Bronx Zoo in 2005, and still serves in that role today. A. 319, ¶ 1.

As with all wildlife at the Bronx Zoo, Happy's living conditions are regulated by the Animal Welfare Act (7 U.S.C. §§ 2131-2159), which is overseen and enforced by the United States Department of Agriculture. A. 336, ¶¶ 16-19. In addition, the Association of Zoos and Aquariums ("AZA") administers accreditation standards for zoos, which include the AZA Standards for Elephant Management and Care. A. 334-35, ¶¶ 6-14. These

regulations are the primary benchmark for elephant care at accredited zoos in the United States. A. 334, ¶ 6. Under this detailed regulatory regime, responsible institutions must provide a habitat consistent with elephant needs and behaviors like foraging and swimming, ensure quality medical care, pass routine inspections by the United States Department of Agriculture, and, weather permitting, provide regular access to water sources for bathing and cooling. A. 335. All elephant care professionals at the Bronx Zoo must complete the AZA's Principles of Elephant Management courses. A. 335.

Happy's living conditions meet these standards. A. 336. Her environment at the Bronx Zoo includes large natural outdoor space that allows her to swim, forage, and engage in other natural behavior. A. 335-37, ¶¶ 9-10, 15, 27; A. 459, ¶ 6. The Bronx Zoo also employs a dedicated team of zookeepers and veterinary staff, who bathe, feed, and attend to Happy's health every day. A. 337, ¶¶ 25-26; A. 330-31, ¶¶ 6-9; A. 460, ¶¶ 10-11. Not surprisingly, it is undisputed that the Bronx Zoo is consistently accredited by the AZA. A. 336, ¶15. Such compliance is not only confirmed by unannounced inspections, but annual reports submitted to the AZA. A. 335-37, ¶¶ 13-14, ¶¶ 19-22. Under the Bronx Zoo's care and attention, Happy has adapted well to her outdoor habitat, has contact with the zoo's other elephant

(A. 460, ¶ 13), is closely bonded with her caregivers, and has reached approximately fifty years of age. A. 332, ¶ 17; A. 331, ¶ 13.[4]

B. NRP files habeas corpus petitions as part of its self-described "long-term litigation campaign" to change American law

NRP describes itself as "the only civil rights organization in the United States dedicated to changing the common-law status of at least some nonhuman animals from mere 'things,' which lack the capacity to possess any legal rights, to 'persons,' who possess such fundamental rights as bodily integrity and bodily liberty." A. 320, ¶ 5. NRP pursues this end through "grassroots and legislative campaigns." *Id.* But NRP also lobbies the courts, through what it calls "a state-by-state, country-by-country, long-term litigation campaign." A. 321, ¶ 7.

NRP started the New York chapter of this effort several years ago through four separate habeas corpus petitions for "imprisoned" chimpanzees, 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 on appeal, all four Departments of the Appellate Division affirmed the decisions of the trial courts to decline habeas

[4] NRP's submissions to the Trial Court included an estimate that "the natural life span of an elephant ranges from 60-70 years," while citing a study finding that the "median life span" is "under 19 years for captive-born Asian females." A. 249, ¶ 16.

corpus relief. This Court denied leave to appeal on each occasion it was sought. A. 18-21.[5]

Rather than appeal to the Legislature, as the First and Third Departments suggested, NRP moved on to Connecticut, seeking a writ of habeas corpus for three elephants, through two separate (but identical) petitions, pursued on simultaneous parallel tracks. The trial courts dismissed the successive petitions, the Appellate Court of Connecticut twice affirmed dismissal, and the Supreme Court of Connecticut twice denied leave to appeal. The second appellate court decision concluded emphatically that Connecticut's habeas corpus statute, like New York's, "unequivocally authorizes a *person*, not an animal, to file an application for a writ of habeas corpus . . . ." *Nonhuman Rights Project, Inc. v. R. W. Commerford & Sons, Inc.*, 231 A.3d 1171, 1176 (Conn. App. Ct. 2020), *cert. denied* 235 A.3d 525 (Conn. 2020) *("Commerford II")* (emphasis in original).

Next, following NRP's lead, a *pro se* litigant filed a habeas corpus petition in Massachusetts, claiming two elephants at the Buttonwood Park Zoo in New Bedford were "persons under the law" and thus illegally "imprisoned." The trial court dismissed the petition, and on appeal, NRP submitted a brief as

[5] These decisions, and the following referenced decisions from the trial and appellate courts of Connecticut and Massachusetts in which NRP was involved, are discussed and cited *infra*, Point I.A.

amicus curiae, agreeing with the idea of "recogniz[ing] these nonhuman animals' liberty," but claiming the petitioner (in that case) was "singularly unqualified to present either the facts or the law necessary for a full and favorable determination."[6] The Appeals Court of Massachusetts affirmed dismissal.

C. NRP continued its lobbying effort by filing the underlying petition in Albion, New York, in Orleans County Supreme Court

NRP commenced the habeas corpus proceeding below in October, 2018, *ex parte*, asking the Orleans County Supreme Court in Albion, New York to remove Happy from the Bronx Zoo, and move her to the Performing Animal Welfare Society ("PAWS") in California. A. 33-34. According to NRP, it "chose to file in Orleans County (part of the Fourth Department) because the First Department, which oversees the county where the Bronx Zoo is located, has demonstrated that it is willing to ignore powerful legal arguments and deprive an autonomous being such as Happy of any and all of her rights, just because she is not a human." A. 321, ¶ 9.

Respondents moved to change venue to Bronx County, and alternatively, to dismiss the petition. A. 326-28. The Orleans County

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[6] *Rowley v. City of New Bedford*, 159 N.E.3d 1085, 2020 WL 7690259 (Mass. App. Ct. Dec. 28, 2020) (table decision) (No. 2020-P-0257), Brief for *Amicus Curiae* the Nonhuman Rights Project, Inc., in Support of Neither Party, 2020 WL 7329375, at *11, *14-15 (Aug. 24, 2020).

Supreme Court granted Respondents' motion to transfer venue on January 18, 2019, sending the case to the Bronx County Supreme Court ("Trial Court"). A. 29-30. The proceeding was assigned to Hon. Alison Y. Tuitt (J.S.C.). A. 6.

In support of the petition, NRP submitted expert affidavits discussing the behavior and cognition of elephants. A. 92-243, 473-82. Notably, these were the very same affidavits, verbatim, that NRP used in the Connecticut proceeding—concerning three different elephants, in a different zoo.[7] None of the experts observed Happy personally, and only one mentions Happy at all, through a "supplemental" submission, which refers to videos posted online taken from above Happy's habitat on the zoo's monorail. A. 480, ¶ 31. NRP also submitted an affidavit from the president of PAWS, Ed Stewart, stating his willingness to receive Happy at PAWS, and explaining, among other things, that at the PAWS facility, "elephant habitats are enclosed with steel pipe fencing and pipe and cable fencing" and a "system of gates . . . can be used to control access to particular areas for management purposes." A. 248, ¶ 12.

[7] *E.g., Compare Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, No. LLI-CV 17-5009822-S, (Conn. Super. Ct., filed Nov. 13, 2017), Docket Entry No. 103.5, filed on Nov.13, 2017, Affidavit of Joyce Poole, sworn to December 2, 2016, *with* A. 139, Affidavit of Joyce Poole, sworn to December 2, 2016.

In response, Respondents submitted affidavits from the Bronx Zoo's General Curator (Patrick Thomas, PhD), Chief Veterinarian and Vice President for Health Programs (Paul P. Calle, DVM), and General Director (Respondent James Breheny). A. 319-22, 326-464. WCS's expert staff, based on personal experience and observations, uniformly attested that Happy receives excellent care, is well-adapted to her surroundings at the Bronx Zoo, and could suffer serious harm if she is uprooted and moved thousands of miles away after residing in the Bronx Zoo for over forty years. A. 322, 331-32, 338.

Following three days of oral argument, on February 18, 2020, the Trial Court issued a Decision and Order granting Respondents' motion to dismiss the Petition, concluding Happy "is not a 'person' and is not being illegally imprisoned." A. 22. The Trial Court further held, "[a]s stated by the First Department in [*Lavery II*], 'the according of any fundamental legal rights to animals, including entitlement to habeas relief, is an issue better suited to the legislative process.'" A. 22.

D. The Appellate Division, First Department, affirmed dismissal advising NRP again that this is a legislative question

NRP appealed to the Appellate Division, First Department on February 25, 2020. The First Department affirmed, informing NRP for the second time in three years that a writ of habeas corpus is not available for an animal, and that granting fundamental rights to an animal through such means

"would lead to a labyrinth of questions that common law processes are ill-equipped to answer." *Nonhuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583 (1st Dep't 2020).

NRP then sought leave to appeal to this Court. A. 491. In its brief on this appeal, NRP added another facility (in addition to PAWS), claiming the Court should consider moving Happy to the "Elephant Sanctuary in Tennessee." Brief for Petitioner-Appellant ("App. Br."), p. 9 (citing A. 8, 10). NRP asks this Court to pick between PAWS and this vaguely-described Tennessee location as the right place for Happy, and "order her transfer" there, even while there is nothing in the record concerning the location, ownership, veterinary personnel, or accreditation of the Tennessee facility.

The foregoing is consistent with NRP's self-described mission to wage a long-term litigation campaign. A. 320, ¶ 5. NRP has made good on this promise, undeterred by five separate appellate courts across three different states directing it unequivocally to bring its policy proposal to the legislatures. The courts did so because settled law in all those states, including New York, distinguishes humans from animals and charges humans to safeguard animal welfare. The Bronx Zoo abides by that charge, and NRP does not claim otherwise. Still, NRP invokes the writ of habeas corpus to ask this Court to

make it unlawful for the Bronx Zoo to have custody of an elephant. That is not what habeas corpus is for, and this Court should rule accordingly.

ARGUMENT

POINT I

THERE IS NO AMERICAN OR ENGLISH COMMON LAW PRECEDENT SUPPORTING NRP'S PROPOSAL TO EXPAND "PERSON" TO INCLUDE NON-HUMAN ANIMALS

A. Every Court in New York and Every Court in the United States presented with NRP's position has rejected it

NRP fails to identify any decision from this State, elsewhere in the United States, or in English common law to support its position. Indeed, NRP's habeas cases were unanimously rejected by all four Departments of New York's Appellate Division. Those decisions are consistent with rulings from state and federal courts in other states based on sound distinctions between humans and nonhuman animals.

NRP first sought habeas relief on behalf of chimpanzees in each of the four Departments, and was unsuccessful in each attempt. *See Nonhuman Rights Project, Inc. v. Stanley*, 2014 WL 1318081 at *1 (2d Dep't Apr. 3, 2014) (dismissing appeal);[8] *Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124

[8] The Second Department *sua sponte* dismissed NRP's attempted appeal from a decision of the Supreme Court, Suffolk County, refusing to sign an *ex parte* order to show cause because no appeal was available. 2014 WL 1318081 at *1.

A.D.3d 1334, 1334 (4th Dep't 2015), *lv. denied*, 26 N.Y.3d 901 (2015);[9] *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep't 2014) ("*Lavery I*"), *lv. denied* 26 N.Y.3d 902 (2015); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep't 2017) ("*Lavery II*"), *lv. denied*, 31 N.Y.3d 1054 (2018).

As the Third Department noted, and as is true in this proceeding, NRP did "not allege that respondents are in violation of any state or federal statutes" but instead demanded "that this Court enlarge the common-law definition of 'person' in order to afford legal rights to an animal." *Lavery I*, 124 A.D.3d at 149-50. The court declined to do so, explaining that "animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law." *Id.* at 150. Further, NRP did "not cite any precedent—and there appears to be none—in state law, or under English common law, that an animal could be considered a 'person' for the purposes of common-law habeas corpus relief." *Id.*

[9] The Fourth Department correctly held that because NRP "does not seek Kiko's immediate release, nor does petitioner allege that Kiko's continued detention is unlawful" habeas relief was unavailable regardless of its arguments as to nonhuman animals. *Presti*, 124 A.D.3d at 1335. The First Department reached the same conclusion in *Lavery II*, 152 A.D.3d at 79-80. That issue is addressed in greater detail at Point III.B, *infra*.

Despite this complete lack of support, the Third Department considered NRP's arguments in detail, concluding that expansion of the writ to non-human animals would be improper because "the ascription of rights has historically been connected with the imposition of societal obligations and duties." *Id.* at 152. Unlike associations of human beings—like corporations, which "may be considered legal persons, because they too bear legal duties in exchange for their legal rights"—animals "cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions." *Id.* at 151, 152. The court noted that "some humans are less able to bear legal duties or responsibilities than others" but "[t]hese differences do not alter our analysis, as it is undeniable that, collectively, human beings possess the unique ability to bear legal responsibility." *Id.* at 152 n.3. After describing the myriad animal welfare protections afforded by statute, the Third Department concluded that NRP "is fully able to importune the Legislature to extend further legal protections to chimpanzees." *Id.* at 153.

The First Department followed a similar analytical path in *Lavery II*. There, the court held that although "the word 'person' is not defined in the statute [CPLR Article 70], there is no support for the conclusion that the definition includes nonhumans." *Lavery II*, 152 A.D.3d at 77. Specifically, "*[n]o precedent exists*, under New York law, or English common law, for a

finding that a chimpanzee could be considered a 'person' and entitled to habeas relief." *Id.* at 77-78 (emphasis added).

As in *Lavery I*, the court explained that "[t]he asserted cognitive and linguistic capabilities of chimpanzees do not translate to a chimpanzee's capacity or ability, like humans, to bear legal duties, or to be held legally accountable for their actions." *Id.* at 78. It rejected NRP's arguments that the capacity for legal duties cannot be determinative because some humans lack that capacity, holding that although "infants cannot comprehend that they owe duties or responsibilities and a comatose person lacks sentience," they "are still human beings, members of the human community." *Id.* "[T]he according of any fundamental legal rights to animals," the court determined, "is an issue better suited to the legislative process." *Id.* at 80.[10]

After failing in its attempts to use chimpanzees to alter the fundamental nature of habeas corpus, NRP moved on to elephants. The Trial Court dismissed the petition, holding "Happy is not a 'person' and is not being illegally imprisoned" (A. 22), and the First Department adhered to its prior

[10] This Court denied leave to appeal from *Lavery II*, 31 N.Y.3d 1054 (2018). The Hon. Eugene M. Fahey filed a separate concurring opinion noting the particular type of "confinement" alleged—that two chimpanzees were kept in small cages in a warehouse and a cement storefront—and discussing the ethical questions of treating animals as mere "thing[s]." *Id.* at 1056 (Fahey, J., concurring). However, every judge agreed to deny NRP leave to appeal. *Id.*

reasoning as to chimpanzees in affirming dismissal. It held that "[a] judicial determination that species other than homo sapiens are 'persons' for some juridical purposes, and therefore have certain rights, would lead to a labyrinth of questions that common-law processes are ill-equipped to answer" and thus "the decisions of whether and how to integrate other species into legal constructs designed for humans is a matter 'better suited to the legislative process.'" *NonHuman Rights Project, Inc. v. Breheny*, 189 A.D.3d 583, 583 (1st Dep't 2020) (quoting *Lavery II*, 152 A.D.3d at 80).

Connecticut courts, like those in this State, have also rebuffed NRP's attempts to redefine the legal status of nonhuman animals. In *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839 (Conn. App. Ct. 2019), *cert. denied* 217 A.3d 635 (Conn. 2019) ("*Commerford I*"), the Appellate Court of Connecticut affirmed the trial court's dismissal of NRP's habeas petition, brought on behalf of an elephant, as "wholly frivolous." *Id.* at 840. The court held that NRP's proposition "would require us to upend this state's legal system to allow highly intelligent, if not all, nonhuman animals the right to bring suit in a court of law." *Id.* at 44. Yet the court's "examination of our habeas corpus jurisprudence, which is in accord with the federal habeas statutes and English common law; reveals no indication that habeas corpus relief was ever intended to apply to a nonhuman

animal, irrespective of the animal's purported autonomous characteristics." *Id.* at 45.

Like the decisions from our Appellate Division, the Connecticut court noted that "it is inescapable that an elephant, or any nonhuman animal for that matter, is incapable of bearing duties and social responsibilities." *Id.* at 46. It also noted a complete lack of evidence suggesting that the Connecticut General Assembly intended the term "person" in their habeas statute to refer to nonhuman animals. *Id.* at 48. The court advised NRP to "advocate[e] for added protections for elephants or other nonhuman animals at the legislature." *Id.* at 48 n.9. Undeterred, NRP re-appeared soon thereafter on a second petition (for the same relief, naming the same elephants) before another panel of the same court, which again rejected NRP's position, reiterating that nonhuman animals cannot bear legal duties and noting the lack of statutory or jurisprudential support for NRP's theory. *Commerford II*, 231 A.3d at 1176-77.

The courts of Massachusetts have also rejected the theory that elephants are "persons" for purposes of habeas relief. *Rowley v. City of New Bedford*, 159 N.E.3d 1085, 2020 WL 7690259 (Mass. App. Ct. 2020) (table decision), *review denied*, 165 N.E.3d 159 (Mass. 2021). In *Rowley*, the Appeals Court of Massachusetts explained that the Massachusetts habeas statute was limited to "persons," which "has ordinarily and consistently referred solely to

human beings." 2020 WL 7690259, at *1. It found no support for the theory that elephants "ought to be considered 'persons' under the law" and "emphasize[d] the need to exercise judicial restraint, so as to refrain from substituting [our] notions of correct policy for that of a popularly elected Legislature." *Id.* at *2 (second alteration in original).

Courts have repeatedly rejected similar claims of personhood in other contexts. In *Miles v. City Council of Augusta*, 710 F.2d 1542 (11th Cir. 1983), the Eleventh Circuit held that a nonhuman animal "cannot be considered a 'person' and is therefore not protected by the Bill of Rights." *Id.* at 1544 n.5. In *Cetacean Community. v. Bush*, 386 F.3d 1169 (9th Cir. 2004), the Ninth Circuit concluded that nonhuman animals cannot qualify as persons under the Administrative Procedure Act and other federal statutes, reasoning that if lawmakers "intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly." *Id.* at 1179 (citation omitted). And in *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entertainment, Inc.*, 842 F. Supp. 2d 1259, 1263 (S.D. Cal. 2012), a federal district court concluded that "[t]he only reasonable interpretation of the Thirteenth Amendment's plain language is that it applies to persons, and not to non-persons such as orcas." *Id.* at 1263. As with the Appellate Division cases that

analyzed whether a nonhuman animal can bear legal duties, the court noted that "only persons are subject to criminal convictions." *Id.* at 1263.[11]

B. New York and United States Courts correctly recognize that the characteristic of humanity, not undefined notions of autonomy, serve as the basis for rights and duties

As the foregoing decisions recognize, our legal system—and habeas corpus doctrine in particular—has good reason to distinguish between humans and nonhuman animals. Although it is true that certain individuals, like infants and impaired adults, may not be capable of undertaking duties and yet undoubtedly possess certain rights, it is a mistake to ignore the importance of humanity as a core characteristic upon which rights are based. Both the First Department and the Third Department recognized that rights are based upon the "collective" qualities of human beings. *Lavery I*, 124 A.D.3d at 152 n.3; *accord Lavery II*, 152 A.D.3d at 77. The *Rowley* court similarly dismissed analogies between animals and disabled humans, as the legal treatment of such

[11] Although NRP does not appear to contest the obvious fact that nonhuman animals cannot bear legal duties, that proposition is confirmed by courts throughout the country. *See Jones v. Fransen*, 857 F.3d 843, 857–58 (11th Cir. 2017) (a nonhuman animal is not a "person" subject to suit under state law); *Dye v. Wargo*, 253 F.3d 296, 299-300 (7th Cir. 2001) (nonhuman animal is not a "person" subject to suit under 42 U.S.C. § 1983); *Haynes v. E. Baton Rouge Sheriff's Office*, 2020 WL 798254, at *1 (M.D. La. Feb. 18, 2020) (animal is not a "person" under § 1983 or state law); *Bustamante v. Gonzales*, 2008 WL 4323505, at *6 (D. Ariz. Sept. 19, 2008) (conclusion that animal is not a proper defendant "is obvious, but perhaps so obvious that authority bothering to state it is evasive"); *Fitzgerald v. McKenna*, 1996 WL 715531, at *7 (S.D.N.Y. Dec. 11, 1996) (holding "animals lack capacity to be sued").

persons recognizes only "the mere fact that a person becomes incompetent does not diminish his or her rights as a human being[.]" 2020 WL 7690259, at *2 (emphasis in original).

Both United States and international law hold that rights are granted to individuals based on their membership in the human community, not on the basis of individual "autonomy." "[O]ur basic concept of the essential dignity and worth of every human being" is "a concept at the root of any decent system of ordered liberty." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)). The characteristic of simply being human, regardless of any concerns regarding autonomy, thus ensures the full panoply of human rights. Recognition of that core aspect of human dignity also permits courts to protect vulnerable groups. For example, "[p]risoners retain the essence of human dignity inherent in all persons." *Brown v. Plata*, 563 U.S. 493, 510 (2011); *see also United States v. McLaurin*, 731 F.3d 258, 261 (2d Cir. 2013) ("A person, even if convicted of a crime, retains his humanity."). Women cannot be denied "the dignity associated with recognition as a whole human being." *Trammel v. United States*, 445 U.S. 40, 52 (1980). And the Thirteenth Amendment, which ended slavery, was a "grand yet simple declaration of the

personal freedom of all the human race" that "can only apply to human beings." *Slaughter-House Cases*, 83 U.S. 36, 69 (1872).

These decisions, and many others, recognize that human rights are based on membership in the human community, not intelligence or "autonomy." Thus, "the 'value of human dignity' extends to both competent and incompetent patients." *Delio v. Westchester Cty. Med. Ctr.*, 129 A.D.2d 1, 15 (2d Dep't 1987). Incompetent patients are entitled to the same rights as fully autonomous individuals solely by virtue of their status as humans, and "any State scheme which irrationally denies to the terminally ill incompetent that which it grants to the terminally ill competent patient is plainly subject to constitutional attack." *Eichner v. Dillon*, 73 A.D.2d 431, 465 (2d Dep't 1980), *modified sub nom. In re Storar*, 52 N.Y.2d 363 (1981). Under NRP's vague standard of "autonomy" rather than humanity to determine eligibility for habeas relief, many humans would be denied access to the writ. *See, e.g.*, *Brevorka ex rel. Wittle v. Schuse*, 227 A.D.2d 969, 969 (4th Dep't 1996) (noting habeas petitioner was "elderly and showing signs of dementia"); *People ex rel. Ledwith v. Bd. of Trs.*, 238 N.Y. 403, 408 (1924) (noting habeas petitioner had been determined insane by hospital authorities).

As with New York and federal law, the fundamental connection between humanity and legal rights is manifest in international law sources.

The International Covenant on Civil and Political Rights, to which the United States is a signatory, recognizes "the equal and inalienable rights of all members of the human family," and that "these rights derive from the inherent dignity of the human person." Int'l Covenant on Civil & Polit. Rts., Dec. 16, 1966, S. Treaty Doc. No. 95- 20, 999 U.N.T.S. 171, 172-73; *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). The Covenant also highlights the reciprocal nature of rights and duties: "the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant." 999 U.N.T.S at 173.

The United Nations Universal Declaration of Human Rights similarly enshrines the "inalienable rights of all members of the human family" and "the dignity and worth of the human person." G.A. Res. 217 (III) A, Univ. Decl. Human Rts., U.N. Doc. A/810, at 71-72, pmbl. (Dec. 10, 1948). It too emphasizes the connection between human rights and duties, holding that "[e]veryone has duties to the community in which alone the free and full development of his personality is possible" and thus humans are subject to the necessary limitations "for the purpose of securing due recognition and respect for the rights and freedoms of others." *Id.* at 76-77, art. 29.

NRP cites to certain ignominious episodes in this nation's history to shoe-horn elephants into this uniquely human regime of rights. Indeed, cases from those eras underscore the need to recognize the inherent dignity of all members of the human community. Among the cases cited by NRP, only one actually concerns a petition for habeas corpus. App. Br., pp. 42-43. In that case, the court granted habeas relief to a Native American petitioner precisely *because* it recognized that the term "person" referred to any "living human being; a man, woman, or child; an individual of the human race" and was thus "intended to apply to all mankind." *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879).

NRP's call for a system of rights based on autonomy, and their comparison of animals to historically marginalized groups of humans, have long been criticized by those very same groups. Disability rights advocates have opposed the writings of Peter Singer, a prominent proponent of the autonomy test urged by NRP, precisely because he has compared individuals with disabilities to animals. *See, e.g.*, Taimie L. Bryant, *Similarity or Difference As A Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 Law & Contemp. Probs. 207, 222 n.49 (Winter 2007) ("Peter Singer also received tremendous criticism for comparing the value of life for a human with disabilities and a healthy animal.")

Similarly, civil rights groups have repeatedly chastised those, like NRP here, comparing animal welfare advocacy with historical struggles for human rights. *See, e.g.*, Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. Animal L. 15, 21 (2009) (describing backlash to animal rights activists' use of slavery and Holocaust comparisons); Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 Va. J. Soc. Pol'y & L. 587, 620 (Spring 2002) (noting that historically marginalized groups may "feel that their own struggles to obtain legal rights are being demeaned by this comparison"). As one scholar explains, "analogizing subordinated human races to subordinated inhuman animals makes for not only counterproductive politics, but also emotional assault." Tucker Culbertson, *Animal Equality, Human Dominion and Fundamental Interdependence*, 5 J. Animal L. 33, 37 (2009).

Indeed, even Professor Laurence Tribe, who filed an *amicus curiae* brief in support of NRP below, has acknowledged the dangerous consequences posed by NRP's position: "when we insist that rights depend on the individual's possession of certain measurable traits such as self-awareness or the ability to form complex mental representations or to engage in moral reasoning . . . then it follows that it would be entirely permissible not to award those basic legal protections to" individuals "who lack all of those qualifying

traits (like infants or the severely mentally retarded or the profoundly comatose)." Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 Animal L. 1, 7 (2001). Professor Tribe continues: "I needn't spell it all out, but the possibilities are genocidal and horrific and reminiscent of slavery and of the holocaust." *Id.*

POINT II

NRP'S ATTEMPT TO EXPAND THE DEFINITION OF "PERSON" TO INCLUDE NONHUMAN ANIMALS FOR HABEAS CORPUS PURPOSES SHOULD BE DENIED AND LEFT FOR CONSIDERATION BY THE LEGISLATURE

A. Policy issues generally are the province of the legislature

Unless there exists a violation of an existing law or the constitution of the United States or the New York State Constitution, policy initiatives are inherently legislative. This Court has frequently recognized the importance of keeping such issues, in the first instance, before the legislative bodies of the state. These sound holdings reflect that the legislature is a superior forum to resolve conflicting points of view about policy.

In *Byrn v. New York City Health & Hospitals Corp.*, 31 N.Y. 2d 194 (1972), a case upholding the constitutionality of an abortion statute, this Court (Breitel, J.) declined to recognize "children in embryo [as] . . . legal persons or

entities entitled under the State and Federal Constitutions to a right to life." *Id*. at 199. This decision did not purport to declare the "rights" and/or "duties" of the "children in embryo." Instead, this Court simply explained that the issues there were not for the Court to decide. *Id.* at 203. As this Court wrote:

> There are . . . real issues in this litigation, but they are not legal or justiciable. *They are issues outside the law unless the Legislature should provide otherwise*. The Constitution does not confer or require legal personality for the unborn; the Legislature may, or it may do something less, as it does in limited abortion statutes, and provide some protection far short of conferring legal personality.

Id. (emphasis added). As discussed further below, this is exactly the circumstance here: the legislature has provided a host of various protections for animals but has never gone so far as to grant "personhood" to any animal in any context, including for habeas corpus purposes.

Similarly, in *Matter of New York State Inspection, Security & Law Enforcement Employees v. Cuomo,* 64 N.Y.2d 233 (1984), petitioners challenged the Governor's decision to close a Long Island prison. This Court held the dispute simply had no place in the courts, emphasizing the practical realities of the relief sought. That is, "petitioners call[ed] for a remedy which would embroil the judiciary in the management and operation of the State correctional system[,]" while authority for such management already resides

with the Commissioner of Correctional Services under New York's Correction Law. *Id.* at 239. Accordingly, the Court held there was no basis for the Court to take a different look at the issue, insofar as "the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government." *Id.* at 240.

This Court has repeatedly recognized in other instances that the legislature is better equipped to undertake weighty policy decisions because it "has far greater capabilities to gather relevant data and to elicit expressions of pertinent opinion on the issues at hand" and "is better able to assess all of the policy concerns in [an] area and to limit the applicability of any new rule." *Paladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 152 (2014) (citing *In re Higby v. Mahoney*, 48 N.Y.2d 15, 18-19 (1979)); *see also Byrn*, 31 N.Y.2d at 201 ("[P]ersonality is a policy question which in most instances devolves on the Legislature, subject again . . . to the Constitution as it has been 'legally' rendered."). The same is true here. The political branches have exercised rightful authority over animal welfare legislation and regulation for centuries. NRP provides no basis to end their careful balancing of interests and remove questions of proper animal care from the legislative sphere.

B. New York's legislative branch already has weighed in on the proper care and protection of animals—including specific protections for elephants—thereby eliminating any basis for judicial intervention

New York has committed the protection and regulation of animals to the legislative branch. New York's Agriculture and Markets Law regulates (among other things) animal care, sustenance, and shelter (N.Y. Agric. & Mkts. L. §§ 353-B, 359-a, 356), the sale of domestic pets (*id.*, §§ 400-408), animal disease and vaccinations (*id.* §§ 72, 76, 89), and the sale, ownership, and licensing of animals (*id.* §§ 175-M-175-R (sale of baby chicks) 109 (licensing of dogs) 112 (change of dog owner). This statutory regime imposes monetary and criminal penalties for violating these provisions (§§ 32 (investigations and proceedings) 39 (penalties for violations), including misdemeanor and felony charges for animal cruelty, abuse, and neglect (*id.* §§ 353, 353-a, 356).

Indeed, just months before NRP commenced this proceeding, the New York State Legislature introduced further protections specifically for elephants, grounded partly in the legislative finding that "elephants are complex, highly intuitive and intelligent animals" (N.Y. Senate Supp. Mem., Bill Jacket, L. 2017, ch. 333 at 8 ("Supp. Mem.")), *i.e.*, the very basis cited by NRP for the extraordinary relief sought on this appeal. A. 37. In recognition of that finding, effective October 1, 2019, the state imposed a ban on "elephant

entertainment acts." N.Y. Agric. & Mkts. L. § 380; Envt'l. Conserv. L. § 11-0540. As explained in sponsoring memoranda, the prohibition intends "to safeguard all elephants from the physical and psychological harm inflicted upon them by living conditions, treatment, and cruel methods that are necessary to train elephants to perform in entertainment acts." Supp Mem., p. 2. The provision expressly exempts institutions accredited by the American Zoological Association, which the Bronx Zoo undisputedly is. A. 335-37.

Federal law likewise entrusts humans with the duty of "humane care and treatment" of animals, among the many provisions of the Animal Welfare Act. 7 U.S.C. § 2131(1), (3). The bedrock distinction between humans and animals is inherent in all such legislation. Declaring any animal a "person" via judicial decision would amount to this Court substituting the extensive protections described above for a case-by-case decision on proper animal treatment. Contemporary decisions from this Court counsel against such judicially crafted remedies where the legislature has already acted to protect animal welfare.

For example, in *Hammer v. American Kennel Club*, 1 N.Y.3d 294 (2003), the plaintiff was a dog-owner who sued the American Kennel Club ("AKC") over the judging standards in AKC's dog breeding competitions. Specifically, AKC penalized spaniels with tails longer than four inches, thus

pushing owners to "dock" their dogs' tails. 1 N.Y.3d at 297. Plaintiff claimed this practice was abusive, and therefore unlawful under the Agriculture and Markets Law, section 353, which criminalizes cruelty to animals as a misdemeanor. *Id.* at 299.

The Court of Appeals affirmed dismissal of plaintiff's claim, explaining that the Agriculture and Markets Law "regulates the treatment of animals," and the legislature "explicitly addressed the enforcement of animal protection statutes in two provisions," *i.e.*, sections 371 (requiring police enforcement of animal cruelty law) and 372 (allowing judges to issue warrants for that purpose). *Id.* at 299-300. In other words, by enacting these provisions, "the Legislature established that enforcement authority lies with police and societies for the prevention of cruelty to animals and violations would be handled in criminal proceedings." *Id.* at 300. "In light of the comprehensive statutory enforcement scheme, recognition of a private civil right of action is incompatible with the mechanisms chosen by the Legislature." *Id.*

The Court observed: "[t]his is not a criminal proceeding and plaintiff is not asking law enforcement officials to charge defendants with violations of the law subject to criminal penalties. Indeed, plaintiff has not alleged that these organizations are cruelly or unjustifiably injuring or maiming any dogs . . . . Therefore, neither plaintiff nor defendants have engaged in any

conduct that violates the law as plaintiff interprets it." *Hammer,* 1 N.Y.3d at 300.

Of course, *Hammer* was not a habeas corpus case. But neither is this. That the writ of habeas corpus is NRP's vehicle of choice does not change the fundamental nature of its claim, *i.e.*, Happy should have more space. As described below, this result-oriented view of zoological policy is categorically distinct from the singular aim of habeas corpus, which gives every person the right to challenge unlawful imprisonment. Happy is an elephant, not a person. She is not "imprisoned," as are the incarcerated litigants waiting behind NRP in the line to the courthouse. And her conditions at the Bronx Zoo are not unlawful. Rather, the Bronx Zoo adheres to state law, federal regulations, and industry standards—including the detailed AZA Standards for Elephant Management and Care (A. 377-409)—without exception.

The New York State Legislature has demonstrated that it is fully capable of investigating, studying, and deliberating upon the ethical treatment of elephants, as well as adopting appropriate legislation reflecting New York State policy. Its most recent legislative action on point—which took effect just 2 years ago—reflects that accredited zoological institutions are lawfully entrusted with the care of elephants. This Court should not usurp the legislature's function by charting a different course. *See Xiang Fu He v. Troon*

Management, Inc., 34 N.Y.3d 167, 172 (2019) ("We are not at liberty to second-guess the legislature's determination, or to disregard—or rewrite—its statutory text").

Finally, NRP is demonstrably wrong to suggest the legislature already *has* decided animals are "persons" through New York's "pet trust" statute. App. Br. pp. 20, 29 (citing N.Y. Est. Powers & Trusts L. § 7.8.1). The "pet trust" section of the EPTL merely provides that a trust for the care of a pet is valid. And, of course, this is a legislative enactment—it was the legislature that weighed competing interests to decide pets could be beneficiaries of monetary trusts. And in doing so, it expressly re-affirmed the fundamentally human concept of "person," insofar as it permits "the testator or grantor [to] designate a *person* to be enforcer of the trust terms, and if he does not, the court, on the request of the trustee or any other *person*, may appoint one." M.V. Turano, McKinney's Practice Commentaries, EPTL § 7–8.1 (emphasis added). The EPTL expressly defines "person" as "a natural person, an association, board, any corporation, whether municipal, stock or non-stock, court, government agency, agency or subdivision, partnership or other firm and the state." EPTL § 1-2.12.

In short, the legislature would not (and did not) reshape the law of habeas corpus in a pet trust statute. Indeed, as the Supreme Court has

explained, lawmakers do "not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001).

C. NRP misconstrues several decisions and other authorities to support its position that this Court should accord animals "personhood"

NRP also insists that *People v. Graves*, 163 A.D.3d 16 (4th Dep't 2018), demonstrates "shifting societal norms" in support of animal-personhood. App. Br., p. 28. The actual decision does nothing close. In *Graves*, the court upheld a conviction for a crime in which a corporation was the victim. The Court made clear that its decision turned on the definition of "person" set forth in the Penal Code, a definition established by the legislature, which specifically included corporations:

> For these purposes, "[p]erson" means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality" (§ 10.00 [7]).

Graves, 163 A.D.3d at 20 (citing N.Y. Penal Law § 10.00 (7)). NRP omits this aspect of the *Graves* decision, *i.e.*, its actual holding. Instead, it focuses on *dicta* where the court either cited cases from other jurisdictions in which animals

were mentioned,[12] or NRP's own unsuccessful appeal in *Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d at 1335.

The *Presti* decision stands only for the proposition that habeas corpus relief is not available when a petitioner seeks transfer rather than release from confinement. The Fourth Department has never held that animals are persons for habeas corpus purposes.

In another interpretive sleight-of-hand, NRP cites *Byrn v. New York City Health & Hospitals Corp.* for the proposition that the capacity for rights alone can convey "personhood." But this Court specifically declined to declare the "rights" and/or "duties" of the "children in embryo" in that case. Instead, this Court held that the issues it was asked to decide—including whether an un-born human is a legal "person"—were simply "not legal or justiciable," and, as noted above, best left to the legislature. *Byrn*, 31 N.Y.2d at 203.

NRP's reliance on *Lemmon v. People*, 20 N.Y. 562 (1860)—citing the case as proof that habeas corpus is the right way to change policy—is also

[12] For example, the decision cited *Palila v Hawaii Dept. of Land & Natural Res*ources, 852 F.2d 1106, 1107 (9th Cir 1988) for the proposition that nonhuman animals are sometimes treated as persons. *Graves*, 163 A.D.3d at 21. But the Ninth Circuit later confirmed that the passages at issue (describing an endangered species as a party) "were little more than rhetorical flourishes" and that nonhuman animals cannot sue under the Endangered Species Act. *Cetacean Cmty.*, 386 F.3d at 1174.

misplaced. *Lemmon* held that a Virginian slave who was temporarily within the borders of New York state was free based on a New York statute. *Id.* at 615 ("[T]here is nothing in the National Constitution or the laws of Congress to preclude the state judicial authorities from declaring these slaves thus introduced into the territory of this State, free, and setting them at liberty, *according to the direction of the statute referred to*.") (emphasis added). Not only does NRP draw a coarse comparison between animals and enslaved humans, it does so using a case that demonstrates the need for legislative action rather than the purportedly limitless power of common law habeas corpus.

NRP goes so far as to cite the dictionary definition of "person" to support its argument, slicing off certain secondary-source quotes that inform the entry in Black's Law Dictionary (11th ed. 2019) ("Black's"). NRP implies that, by correcting a prior misquote of legal scholar John Salmond, Black's now agrees with NRP's concept of "person" as an entity capable of either rights *or* duties. This misstates the way Black's actually defines "personhood." Of course, the primary definition of "person" set forth in Black's provides a clear, bright-line definition: "person" means "a human being. --Also termed *natural person.*" *Person*, Black's. NRP skips this definition in favor of a partial quote from Salmond, a secondary source for the third definition of "person": "An entity (such as a corporation) that is recognized by law as having most of

the rights *and* duties of a human being." *Id.,* definition 3 (emphasis added). In fact, Black's expounds the contemporary meaning of "person" in terms that utterly repudiate NRP's premise of shifting norms toward animal "personhood": "The word 'person' is now generally used in English to *denote a human being*, but the word is also used in a technical legal sense, to denote a subject of legal rights *and* duties." *Id.* (emphasis added). Nonhuman animals have many wonderful qualities but the capacity to owe legal duties is not one of them.

In another misleading cite, NRP refers to a 1928 law review article to claim that personhood is established when society acts to "confer rights *or* to impose legal duties." (emphasis added). App. Br., p. 44. Again, the full quote reveals a more nuanced point:

> To be a legal person is to be the subject of rights *and* duties. To confer legal rights or to impose legal duties, therefore, is to confer legal personality. If society by effective sanctions and through its agents will coerce A to act or to forbear in favor of B, B has a right and A owes a duty. Predictability of societal action, therefore, determines rights *and* duties and rights *and* duties determine legal personality.

Bryant Smith, *Legal Personality*, 37 Yale L.J. 283, 283 (Jan. 1928) (emphasis added).

Smith's opinion demonstrates that the concept of personhood must be viewed in the context of legal relations among human beings:

> Among definitions to be found in discussions of the subject, perhaps the most satisfactory is that *legal personality is the capacity for legal relations*. But there is, nevertheless, an objection to the word "capacity" which seems of some importance. It suggests the possibility that the subject may have a capacity for legal relations without yet having become a party to such relations. A minor with capacity to marry is not necessarily married, whereas, when legal personality is conferred, the subject by that very act is made a party to legal relations. It would seem preferable, therefore, to define legal personality either as an abstraction of which legal relations are predicated, or as a name for the condition of being a party to legal relations.

Id. at 283 (emphasis added).

None of this is intended to suggest that Mr. Smith, Mr. Salmond, Black's Law Dictionary, or any individual legal philosopher should dictate to this Court how to define a legal person. Nor do any of these various legal philosophers endorse expanding the common law right of habeas corpus to include nonhuman animals. Indeed, the multitude of views of "personhood" supports Respondent's contention that the issue is best handled by the legislature.

These authorities make clear, however, that defining personhood on the basis of either "rights" or "duties" is not the "long understood" or "well-established" definition of "person" that NRP asserts. *See*, App. Br., pp. 43, 44. On the contrary, such a position is wholly circular. Petitioners argue that this Court should create a new right of free movement to nonhuman animals (without regard for the content of the State and Federal Constitutions

or applicable legislation), and that the very act of doing so would make those nonhuman animals "persons" under the habeas statute. As described above, it is the combination of rights and duties, and the fundamental dignity of human beings, upon which personhood is grounded.

POINT III

COMMON LAW DOES NOT PERMIT THIS COURT TO MODIFY THE TRADITIONAL WRIT OF HABEAS CORPUS WHEN THE CONDITIONS OF CONFINEMENT ARE NOT ILLEGAL, THE RELIEF SOUGHT IS NOT RELEASE, OR WHEN PETITIONER IS A NON-HUMAN ANIMAL

For centuries, a writ of habeas corpus has been the appropriate relief for a petitioner seeking his or her freedom from unlawful custody. It has never been the mechanism for seeking transfer to a purportedly more spacious facility, nor does its constitutional enshrinement guarantee rights the constitution never contemplated. It is an important and even dramatic form of relief, but one that is limited in scope.

When confinement is unlawful in some way, release is the only relief that may be sought through a habeas petition. In the absence of unlawful confinement, or, when a prisoner seeks anything less than outright release, a habeas corpus petition must be denied. *People ex rel. Robertson v. N.Y.S. Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (holding the purpose of habeas corpus is to "test the legality of the detention of the person who is the subject of the writ.").

See also, Nonhuman Rights Project, Inc. ex rel. Kiko, 124 A.D.3d at 1334; *Lavery II*, 152 A.D.3d at 77. The ancient writ provides no other remedy. And it certainly does not permit NRP an end-run around the legislature, nor does it provide an opportunity for NRP to pick a new facility for Happy to live in.

A. NRP has not identified any illegality with respect to Happy's care and has not asserted any plausible constitutional claim

The writ of habeas corpus has one purpose under both historic and modern practice: providing for release from illegal detention. *See People ex rel. DeLia v. Munsey*, 26 N.Y.3d 124, 127-28 (2015); *People ex rel. Pruyne v. Walts*, 122 N.Y. 238, 241 (1890) ("The common-law writ of habeas corpus was a writ in behalf of liberty, and its purpose was to deliver a prisoner from unjust imprisonment, and illegal and improper restraint."); *People ex rel. Hubert v. Kaiser*, 150 A.D. 541, 550 (1st Dep't), *aff'd*, 206 N.Y. 46 (1912) ("Its sole function is to relieve from unlawful imprisonment."). Indeed, the habeas corpus statute requires that a petition include "the nature of the illegality" of the detention at issue. CPLR 7002(c)(4). NRP has failed to explain the basis upon which Happy's care at the Bronx Zoo is illegal.

NRP has not argued that the Bronx Zoo is in violation of any state or federal law, regulation, or industry standard—including the detailed AZA Standards for Elephant Management and Care. Indeed, NRP affirmatively

concedes that it is not challenging any of the conditions of Happy's care at the Bronx Zoo:

> This Petition does not allege that Happy "is illegally confined because [she] is kept in unsuitable conditions[,]" nor does it seek improved welfare for Happy. *Presti*, 124 A.D.3d at 1335. Rather, this Petition demands that this Court recognize Happy's common law right to bodily liberty and order her immediate release from Respondents' current and continued unlawful detention so that her liberty and autonomy may be realized. It is the fact Happy is imprisoned at all, rather than the conditions of her imprisonment, that the NhRP claims is unlawful.

A. 48-49, Petition, ¶ 56. On this basis, NRP seeks an "extension" of New York law (A. 32, Petition, ¶ 2), effectively asserting that Happy's presence at the Bronx Zoo is not unlawful now, but it *should be*. As explained above, however, habeas corpus is a remedy for unlawful imprisonment, not a means to create violations of new law.

NRP cannot circumvent this principle by invoking the right to habeas corpus "as a matter of liberty" and "equality." App. Br. 33-42. These concepts are enshrined in both the State and Federal Constitutions, but NRP makes no effort to connect its claims to those constitutional provisions or the centuries of jurisprudence interpreting them. And it cannot present constitutional claims to this Court that were not preserved for review. *See, e.g.*, *Di Bella v. Di Bella*, 47 N.Y.2d 828, 829 (1979) (holding equal protection

argument raised for first time on appeal was not preserved for review by Court of Appeals).

NRP urges this Court to craft a new, free-floating right of bodily liberty for elephants, wholly unmoored from the State Constitution. But it fails to acknowledge that the common law cannot be divorced from constitutional doctrine. Both the State and Federal Constitutions prohibit the denial of liberty "without due process of law." U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, § 6, cl. 2. And the very case law cited by NRP (App. Br. pp. 33-34) explains that the "right to determine what shall be done with his own body" is "coextensive with the [individual]'s liberty interest protected by the due process clause of our State Constitution." *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) (citations omitted). NRP has not advanced any claims under the Due Process Clause because such a claim would be entirely frivolous.[13]

[13] NRP has never suggested that any procedural violations have occurred with respect to Happy's care. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (distinguishing between substantive and procedural due process protections). Instead, it asserts that the alleged confinement itself should be made unlawful. (A. 48-49, Petition, ¶ 56). If such a due process claim had been preserved, it would be cognizable only under a substantive due process theory under which some actions are prohibited "regardless of the fairness of the procedures used to implement them." *See Glucksberg*, 521 U.S. at 719. A substantive due process claim requires "a careful description of the asserted fundamental liberty interest," and the litigant must show that it is "objectively, deeply rooted in this Nation's history and tradition." *Id.* at 720-21 (internal quotation marks omitted). NRP has not attempted to articulate any such foundation for an asserted right of free movement for elephants, and none exists. On the contrary, "at common law the owner of animals was bound to restrain them." *Donegan v. Erhardt*, 119 N.Y. 468, 474 (1890).

NRP also references the general concept of equality, but avoids analyzing the constitutional provisions that would apply to an equal protection claim. Like New York's habeas corpus statute, both the State and Federal Constitutions refer to equality among "person[s]." U.S. Const. amend. XIV, § 1; N.Y. Const. art. I, § 11. As with due process protections, any unpreserved constitutional equal protection claim would lack even arguable merit. Nonetheless, had NRP attempted to assert this argument, it would have failed for many reasons not the least of which is its inability to identify any authority suggesting that these provisions were intended to embrace nonhuman animals.[14]

[14] The equal protection claim would also fail since a law that "does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack" if the "means are rationally related to a legitimate governmental purpose." *Hodel v. Indiana*, 452 U.S. 314, 331 (1981); *see also Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 320 (1995). NRP has not suggested that a distinction between elephants and humans employs a constitutionally suspect classification, and as described above, it cannot demonstrate a fundamental right of free elephant movement. There are countless rational reasons for the law to distinguish between elephants and humans. Indeed, not even NRP argues that Happy should be permitted to move freely about the streets of New York City as human beings do (instead seeking to confine Happy in a different facility). (A. 49, ¶ 58); *see Sgueglia v. Kelly*, 134 A.D.3d 443, 443 (1st Dep't 2015) (recognizing that public safety is a legitimate government interest for equal protection purposes). NRP cites cases involving irrational hatred directed against historically marginalized groups of human beings. *See Romer v. Evans*, 517 U.S. 620, 634 (1996) (holding, in the context of sexual orientation discrimination, that "a bare desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.") (internal quotation marks, ellipses, and citation omitted). But it cannot cite any evidence to support its outlandish claim that habeas corpus law is motivated by anti-elephant animus.

NRP has failed to articulate any basis upon which Happy's care at the Bronx zoo is illegal except its own belief that this Court should make it so. But this belief finds no support in statute, regulation, common law, or the State or Federal Constitutions. The Court should affirm dismissal for this reason.

B. NRP cannot invoke habeas corpus to transfer Happy from one enclosed environment to another

In addition to being limited in scope to the issue of unlawful confinement, the habeas corpus process provides for only a single remedy: release from illegal detention. *See Paddock v. Eager*, 10 N.Y.S. 710, 711 (2d Dep't 1890), aff'd sub nom. *In re Paddock*, 128 N.Y. 616 (1891) (holding "we find no room in this case for the operation of the writ of habeas corpus, whose office is to release persons improperly restrained and deprived of their liberty"). That rule continues in full force. *See, e.g.*, *People ex rel. Brown v. New York State Div. of Parole*, 70 N.Y.2d 391, 398 (1987) ("Because success on the merits in this proceeding would not entitle him to immediate release from custody, the remedy of habeas corpus is unavailable."); *People ex rel. Hall v. LeFevre*, 60 N.Y.2d 579, 580 (1983) ("Where the only remedy sought is a new trial or appeal and not immediate release from custody, habeas corpus is an improper remedy."); *People ex rel Douglas v. Vincent*, 50 N.Y.2d 901, 903 (1980) (petitioner "would not be entitled to habeas corpus relief because the only remedy he seeks would provide him a new trial or new appeal, and not a direction that he

be immediately released from custody"); *People ex rel. Mendolia v. Superintendent, Green Haven Corr. Facility*, 47 N.Y.2d 779, 779 (1979) ("[T]he petition dismissed upon the ground that the remedy of habeas corpus is not available since relator will not be entitled to immediate release").

Contrary to the foregoing authorities, NRP claims the habeas remedy includes transfer between facilities. It relies primarily on *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482 (1961), which does not support this claim. In that case, the petitioner was convicted of rape, and sentenced to prison. 9 N.Y.2d at 484. He was later transferred to a state hospital for "male prisoners as are declared insane." *Id.* This Court explained that although he had been lawfully sentenced to prison, there was no lawful order declaring him insane, thus the petition raised "the possibility that he may be *illegally confined*" in the state hospital. *Id.* at 484-85 (emphasis added). This distinction between lawful and unlawful confinement—not any qualitative differences between the facilities—was the basis for the remedy.[15]

[15] NRP also cites dicta from *McGraw v. Wack*, 220 A.D.2d 291, 292 (1st Dep't 1995). In that case, the court dismissed an appeal challenging a non-final order after entry of final judgment. *Id.* at 292. In dicta, the court suggested that petitioner seeking release from a mental health facility could pursue habeas relief on the ground that detention at a secure facility (as opposed to a non-secure facility) might be unlawful as "violative of due process." *Id.* NRP, unlike that petitioner, has not advanced a constitutional claim suggesting unlawful confinement.

This Court confirmed that reading in *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986), in which it reaffirmed that habeas corpus is not available to change conditions of confinement, and thus denied a petition seeking transfer from the "special housing unit" to the general prison population. *Id.* at 691. The Court explained that *Brown* concerned a petitioner "seeking his release from an allegedly illegal confinement in Dannemora State Hospital" which "was *not* within the specific authorization conferred on the Department of Correctional Services by that sentence." *Id.* at 691 (emphasis added). In contrast, the petitioner in *Dawson* was challenging conditions the State *was* "authorized to impose on lawfully sentenced prisoners" and thus habeas corpus was an improper vehicle for his challenge. *Id.*

The question of whether a habeas remedy will lie is not based on the degree of difference between potential conditions of confinement. Instead, it is a binary analysis: Is the challenged confinement lawful, or not. NRP has not alleged, let alone established, that Happy's living conditions are in any way unlawful. Instead, it asserts that "[i]t is the fact Happy is imprisoned at all, rather than the conditions of her imprisonment, that the NhRP claims is unlawful." A. 49, ¶ 56. Yet NRP does not request Happy's release; it asks that the court order Happy to be confined in a different facility with gates, steel-pipe fencing, and an "escaped elephant protocol." A. 248, ¶ 12; A. 294. In

fact, NRP submitted written standards for the facility it picked for Happy, including that, except for transport or medical reasons, "elephants are kept at all times in secure enclosures or other appropriate areas." A. 260 (at H-2, "Containment"). If *any* form of elephant confinement is unlawful, as NRP alleges, such a transfer would not remedy the "unlawful" circumstance NRP objects to. Accordingly, regardless of NRP's claims regarding nonhuman animals, the habeas corpus petition necessarily fails.

This principle is demonstrated even among the hand-picked international decisions that NRP appended to its brief. In a decision from January, 2020, the Constitutional Court of Colombia held that habeas corpus was a "manifestly inappropriate means" of resolving petitioner's complaint. That is, "it is clear that habeas corpus seeks the freedom of people, while in this case, the debate is about the permanence and the living conditions of a spectacled bear named Chucho living at the Barranquilla Zoo." Comp. 78. Habeas corpus is similarly inappropriate here. Further, NRP's failure to demonstrate any form of consensus on its viewpoint—even when self-selecting the universe of decisions on the issue—only underscores that this Court should not endorse NRP's extreme policy initiative.

In short, NRP misconstrues the limited nature of the writ of habeas corpus. Putting aside "personhood," by seeking to transfer Happy

rather than demand her unconditional release (App. Br., p. 2), and by conceding that Happy's confinement does not violate any law (A. 48 ¶ 56), NRP takes this case completely out of habeas corpus doctrine.

POINT IV

NRP'S SUGGESTION THAT THE COMMON LAW REQUIRES UPDATING IS UNPRINCIPLED AND WITHOUT LEGAL SUPPORT

The mere fact that habeas corpus traces its origins to the common law does not give NRP *carte blanche* to use the writ as a supra-legislative, supra-constitutional means of creating new rights or upending settled expectations. *See* App. Br., p. 13. On the contrary, the common law "evolves slowly and incrementally, eschewing sudden or sweeping changes." *Flo & Eddie, Inc. v. Sirius XM Radio, Inc.*, 28 N.Y.3d 583, 594 (2016) (citing *Norcon Power Parts. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 467-68 (1998)). While "the legislature may step in and make drastic changes to the law . . . courts cannot do so," and instead, "when addressing a legal question for the first time, courts must be mindful of the effect on future litigation and the development of the law." *Id.* at 595 (citation omitted).

For example, in *Flo & Eddie*, this Court analyzed whether the creator of a sound-recording possesses a common-law right of "public performance" under New York copyright law. 28 N.Y.3d at 589. The Court

reviewed the Federal Copyright Act (*id*. at 590-94), New York common law (*id*. at 594-603), and the "societal expectations" that developed under these regimes (*id*. 603-07), before concluding that a right to "public performance" was not recognized under codified state or federal law, nor had the right been accepted by society at large. *Id*. at 607. Given the disruption of "settled expectations," "significant economic consequences," and the "many competing interests at stake, which we are not equipped to address," this Court "decline[d] to create such a right for the first time now." *Id.* at 606. Instead, "the recognition of such a right should be left to the legislature." *Id.*

The "extensive and far-reaching consequences" that stayed this Court's hand in *Flo & Eddie* are even more profound here. Recognizing even the potential for an animal to seek a writ of habeas corpus would upend the settled rights of countless New York citizens. As described above, the legislature is well-equipped to enact protections for animals, with due-regard for the many competing interests at stake. Whether to go much, much further by deeming elephants legal "persons" is not a justiciable question, and should be left to the legislature if it is considered at all.

Nonetheless, NRP invokes the common law roots of habeas corpus to argue this appeal "is not a matter for the legislature" (App. Br. 13), asserting repeatedly that the writ "*cannot be abrogated, or its efficiency curtailed, by*

legislative action." App. Br., p. 15 (emphasis in original) (quoting *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875). But "abrogating" or "curtailing" the writ—which has never applied to any animal under traditional or contemporary common law—is not the issue. NRP asks this Court to *expand* habeas corpus, dramatically, and there is no doubt the legislature may expand the protections of habeas corpus if it so chooses. For example, in *In re Leggat*, 162 N.Y. 437 (1900), this Court observed that while "the privilege of the writ is protected from suspension by the national and state constitutions, nevertheless, since the Revised Statutes, the law respecting it has been *statutory* in form" and as long as "the provisions of the Revised Statutes were in full accord with the common law," they are entirely permissible. *Id.* at 441 (emphasis added). The federal and state legislatures have consistently reaffirmed the bright-line distinction between humans and animals, and this court should not usurp that decision.

Next, NRP suggests the Court should apply eight principles to radically depart from existing common law, including wisdom, justice, right, ethics, fairness, policy, "shifting societal norms" and the "surging reality of changed conditions." App. Br., pp 21-22 (citations omitted). Yet NRP assumes without basis that the common law needs updating. If anything, the idea that there has been a "shifting of societal norms" and "surging reality of

changed conditions" are points that suggest legislative action is likely to resolve any potential problem. Indeed, the legislature has already responded to these changing norms and intervened to regulate human/animal interactions, and recently passed legislation specific to elephant treatment. *See* Point II.B, *supra*. In developments NRP would like to ignore, animals have been granted all manner of significant protections, including state and federal statutory protections, as well as regulations adopted by the AZA, including those specific to the care and management of elephants, which entities like the Bronx Zoo are required to respect. A-339-457.[16]

Further, the suggestion that considerations of justice, right, ethics, and fairness require modification of the common law ignores all the ways in which the dramatic change in habeas jurisprudence sought by NRP would adversely impact others. In the "Report from the Special Adviser on Equal Justice in the New York State Courts," Jeh Johnson, former Chair of the Judiciary Committee of the New York City Bar Association (as well as former U.S. Secretary of Homeland Security) reported to Chief Judge DiFiore about

[16] It is worth noting that one of the sanctuaries to which NRP wants to ship Happy touts its accreditation by the AZA. It also notes that it is licensed by the U.S. Department of Agriculture and the Tennessee Wildlife Resources Agency, further highlighting the state and federal legislative involvement in the oversight of elephant well-being. The Elephant Sanctuary in Tennessee, *Mission*, https://www.elephants.com/mission (last visited on July 27, 2021).

the significantly "under-resourced, overburdened" court system" and "the dehumanizing effect it has on litigants." Jeh Charles Johnson, et al., *Report from the Special Adviser on Equal Justice in the New York State Courts*, N.Y. STATE UNIFIED CT. SYS., at 2, 54 (Oct. 1, 2020). Inviting animals to court would only aggravate this existing injustice. And in NRP's view, any individual or organization may pursue relief for any animal—even those to which it has no connection whatsoever. Principles of justice, ethics, and fairness do not suggest that access to the judicial system, already overburdened and inaccessible to many humans, should be expanded to include elephants or any other nonhuman animal.

Laid bare, NRP's argument is that any animal that exhibits any form of "autonomy" can no longer be kept in a zoo, any zoo, regardless of the facts. According to NRP's "wisdom," Happy's "imprisonment" at the Bronx Zoo reflects a view that Happy is merely a "thing." App. Br., p. 21. Nothing is further from the truth. Happy is treated with care and compassion by the Bronx Zoo staff as the affidavits of zoo personnel make clear. She is cared for in a manner consistent with both statutory requirements and AZA regulations. A. 329-464. She is not treated as if she were a person, but is respected as the magnificent creature she is, and treated as an individual with her own distinct personality. A. 338, ¶¶ 28-30; A. 460-62, ¶¶ 9-11, 18-20. If courts follow

NRP's demand to grant animals personhood for habeas corpus purposes, elephants as well as other animals at every modern zoo in this country would have to be turned loose or transferred to the facility of NRP's choosing.

POINT V

NRP'S PETITION SHOULD BE DENIED BECAUSE IT FAILS TO SET FORTH A WORKABLE STANDARD THAT WOULD PROVIDE COURTS CLEAR GUIDANCE AS TO WHEN TO TREAT A NONHUMAN ANIMAL AS A "PERSON"

NRP argues that Happy is entitled to "personhood" because she is an "autonomous being" who possesses "complex cognitive abilities." App. Br. at p. 4. These vague references to autonomy and cognitive ability fail to provide the Court with a standard by which to determine whether an animal should be considered a "person" for habeas corpus purposes. NRP has yet to offer any guidelines as to the level of autonomy or the degree of cognitive ability required to qualify for "personhood." Such failures are fatal to their efforts.

Neither "autonomy" nor "advanced cognitive abilities" are binary characteristics; even NRP's own experts agree that "autonomy" is a "psychological concept [that] implies that the individual is directing their behavior based on some non-observable internal cognitive process, rather than simply responding reflexively." *E.g.*, A. 58. Indeed, the expert affidavits go to

great lengths to demonstrate that, on the spectrum of qualities that they contend are markers of "autonomy," such as "awareness of self and others," "communication and social learning," and "memory and categorization," elephants—particularly African elephants as opposed to the *genus* of Asian elephants to which Happy belongs—are high achievers. A. 158-59. But they provide no guidance at all as to what level of achievement by these measures is sufficient for "personhood." They all merely conclude that African elephants "share key traits of autonomy with humans and are also autonomous beings." (*See*, *e.g.*, A-119).[17]

NRP's own case law makes the point that courts cannot adopt new rights without applicable standards. In *Leider v. Lewis*, No. BC375234 (Super. Ct. Cal., 2012), presented in NRP's Compendium of Unreported Authorities (Comp-304), the court noted that conduct may be enjoined only if there is "a legal standard by which defendants' conduct can be tested" Comp-311.[18] The same is true in New York. For example, in *People v. Taylor*, this Court explained the importance of *stare decisis*, precisely because of the "evenhanded,

[17] It is also worth pointing out that, other than individualized biographical information, the affidavits of all the experts are virtually the same, *verbatim*. Aside from questions that this raises about who actually wrote the affidavits and the credibility of the experts, the point for present purposes is simply that none of the affidavits make clear what degree of autonomy and intelligence is necessary to achieve "personhood."

[18] The decision in *Leider* cited by NRP, as NRP acknowledges, was reversed on appeal "on legal grounds." *See* App. Br., p. 27, n.24 (citing *Leider v. Lewis*, 2 Cal. 5th 1121 (2017).

predictable, and consistent development of legal principles" that guide lower courts and the whole of society. 9 N.Y.3d 129, 148 (2007). In fact, the Court emphasized that settled law should only be changed in "exceptional" circumstances, such as where, over time, the law has become "unworkable" or a rule of law "creates more questions than it resolves." *Id.* at 149.

Here, NRP proposes a standard that creates hardly anything but questions, and resolves none of them. The ambiguity in NRP's proposed standard would inevitably give way to an unworkable application of the rule regarding when a nonhuman animal should be granted personhood, and would introduce uncertainty into the habeas corpus process, potentially destabilizing settled law. This lack of clarity alone warrants dismissal of NRP's Petition.

When a term is used in a statute but is left undefined, it should be given it's "ordinary and commonly understood meaning." *Myers v. Schneiderman*, 30 N.Y.3d 1, 12 (2017) (quoting *People v. Ocasio*, 28 N.Y.3d 178, 181 (2016) (internal quotation marks omitted). Here, Article 70 uses the term "person" which is commonly understood to mean "human beings." *See, e.g.*, *Person*, Black's Law Dictionary (11th ed. 2019). NRP asserts a more convoluted definition should be adopted, using a vague concept of "autonomy," which it defines as behavior based on some "*non-observable,*

internal cognitive process." App. Br., p. 4 (internal references omitted) (emphasis added). This definition, vague as it is, was created out of whole cloth by NRP, with no basis in constitutional, statutory, or common law.

This Court should adhere to the bedrock principle that only human beings (or their legal creations such as corporations) are capable of both rights and duties. It is one of several important ways in which we are distinguished from nonhuman animals, one of the reasons "person" as a legal construct is considered to refer only to human beings, and why the reasoning of the court below denying an animal the status of "person" was proper.

Perhaps most importantly, nothing in NRP's conception of "autonomy" inherently makes it synonymous with "personhood," the *sine qua non* of the right to bring a habeas corpus petition. Even if humans and animals may share some degree of autonomy, it does not follow that autonomy alone qualifies any being for personhood, or that the concept of personhood requires only rights but not the ability to take on duties—a duty to other individuals or to the larger community or as part of the social order. This is what makes humans human—and *only* humans "persons"—for habeas corpus purposes.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should affirm the decisions below dismissing NRP's petition.

Dated: Buffalo, New York
August 20, 2021

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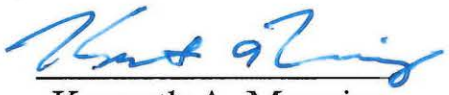

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