SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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

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

Petitioner,

-against-

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

Respondents.

Index No.: 260441/2019 (Bronx County)

REPLY MEMORANDUM IN SUPPORT OF SUPPLEMENTAL MEMORANDUM OF LAW UPON TRANSFER

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September 13, 2019

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

I. INTRODUCTION[1]

As discussed in the NhRP's August 15, 2019 supplemental memorandum ("Pet. Supp. Mem."),[2] this Court is not bound by, and should not follow, the Third Department's decision in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 152 (3d Dept. 2014) ("*Lavery I*")[3] and the First Department's decision in *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 76-79 (1st Dept. 2017) ("*Lavery II*"). The NhRP demonstrated that: (1) *Lavery II*'s statements regarding personhood and habeas corpus relief are dicta (Pet. Supp. Mem. at 3-5), and (2) because *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief are based on demonstrable misunderstandings of the law, stare decisis does not apply to them (Pet. Supp. Mem. at 9-24).

As explained below (II and III), the Bronx Zoo's supplemental memorandum ("Resp. Supp. Mem.") fails to address virtually any of the arguments in Petitioner's supplemental memorandum demonstrating that *Lavery I* and *Lavery II* are contrary to the law in New York, and merely advances the same meritless arguments in support of dismissing the NhRP's Petition.[4]

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[1] All abbreviations in Petitioner's prior filings, including party abbreviations, are incorporated herein by reference. *See* Aug. 15 Mem. at 1.

[2] Supplemental Memorandum of Law Upon Transfer.

[3] Contrary to the Bronx Zoo's mischaracterization of *Lavery I*, the Third Department did *not* base its decision on the "lack of precedent," even "in part." Resp. Supp. Mem at 3. In fact, *Lavery I* stated that "[t]he lack of precedent for treating animals as persons for habeas corpus purposes *does not, however, end the inquiry*, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" 124 A.D.3d at 150-151 (citation omitted; emphasis added). The Bronx Zoo ignores that *Lavery I* actually explained the entire basis of its decision: "In our view, *it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights*—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings." *Id*. at 152 (emphasis added).

[4] The Bronx Zoo also improperly attempts to "expressly incorporate" the proposed *amicus curiae* brief of Richard L. Cupp. Resp. Supp. Mem. at 9. This is improper as this Court has not granted the movant leave to file the proposed brief, and the NhRP is opposing Cupp's improper motion. Therefore, the NhRP opposes the attempted incorporation.

As an initial matter, the Bronx Zoo incorrectly claims that its motion to dismiss is pending. Resp. Supp. Mem. at 4. As noted in the NhRP's Motion to Strike Respondents' Verified Answer (dated August 2, 2019), the Bronx Zoo explicitly made its December 3, 2018 motion to dismiss "in the alternative" to its motion to transfer venue, which was granted. Attorney Affirmation of Elizabeth Stein ¶¶ 6, 13. By granting the Bronx Zoo's motion to transfer venue, the Orleans Court implicitly denied the motion to dismiss.[5] *See Cole v. Tat-Sum Lee*, 309 A.D.2d 1165, 1166 (4th Dept. 2003) ("By granting leave to amend the summons and complaint and directing the filing and serving of the amended summons and complaint, the court *implicitly denied plaintiffs' alternative request* for leave to file and serve a supplemental summons and amended complaint upon defendant.") (emphasis added). Notwithstanding language in the January 18, 2019 Transfer Order that "all motions and issues. . . not expressly decided" are stayed, the Orleans Court had no authority, and the Bronx Zoo cites none, to stay a motion that is no longer pending.[6]

II. The Bronx Zoo fails to demonstrate that this Court is bound by, or should follow, *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief.

A. The Bronx Zoo fails to demonstrate that *Lavery II*'s statements regarding legal personhood and habeas corpus relief are not dicta.

[5] The same is also true of the Bronx Zoo's alternative request, made in the *same* motion, for "five days to answer the Verified Petition pursuant to CPLR 404(a)" in the event the Petition was not dismissed. Attorney Affirmation of Elizabeth Stein (dated August 2, 2019) ¶ 6. Yet curiously, the Bronx Zoo does not claim its request to answer the Petition is pending, even though, by its own logic, the Transfer Order stayed that motion because the Orleans Court did not "expressly" decide it. *See* Respondents' Memorandum of Law in Opposition to Petitioner's Motion to Strike, dated August 7, 2019, at 5. In fact, the Bronx Zoo *cannot* claim its request to answer the Petition is pending because it *already filed* its Verified Answer on July 8, 2019. But if the Bronx Zoo's request to answer the Petition is *not* pending, then neither is its motion to dismiss.

[6] It was, of course, entirely up to the Bronx Zoo to make its motion to dismiss "in the alternative" rather than request dismissal of the Petition as the primary relief. Having made that choice, and having had its requested relief granted by the Orleans Court, the Bronx Zoo should be estopped from reviving the motion at this stage.

In its supplemental memorandum, the NhRP established that when a court decides a case on procedural grounds, any discussion of the merits is dicta. *See Whale Telecom Ltd. v. Qualcomm Inc.*, 839 N.Y.S.2d 726, 727 (1st Dept. 2007); Pet. Supp. Mem. at 3. The Bronx Zoo ignores this and similar precedents, *see* Pet. Supp. Mem. at 3 n.2 (citing cases), and fails to provide any contrary precedent.[7] Accordingly, the Bronx Zoo's reliance on the fact that *Lavery II* opined on the merits and discussed *Lavery I* (Resp. Supp. Mem. at 6) in support of its assertion that the First Department's personhood statements are not dicta is erroneous, as *Lavery II* affirmed the trial court's ruling on a *procedural ground* (CPLR 7003(b)).[8] Pet. Supp. Mem. at 3–4.

As the First Department itself acknowledged, its discussion of the merits in *Lavery II* was unnecessary to its holding: "*Without even addressing the merits of petitioner's arguments,* we find that the motion court properly declined to sign the orders to show cause since these were successive habeas proceedings which were not warranted or supported by any changed circumstances." 152 A.D.3d at 75-76 (emphasis added; citations omitted). This acknowledgment is decisive; when *Lavery II* proceeded to "address[] the merits of petitioner's arguments," 152 A.D.3d at 76–78, its discussion was indisputably dicta.

[7] Neither *People v. Bourne*, 139 A.D.2d 210, 216 (1st Dept. 1988) nor *Matter of Keanu S*, 167 A.D.3d 27 (2d Dept. 2018), which the Bronx Zoo cites, is contrary precedent. Resp. Supp. Mem. at 6. *Bourne* merely states the general proposition that a case is "precedent only as to those questions presented, considered and squarely decided." 139 A.D.2d at 216. Similarly, *Matter of Keanu S* merely states that it was following "the disposition and instruction delineated in" *Matter of Hei Ting C*,109 A.D.3d 100 (2d Dept. 2013), which was not a decision on procedural grounds. 167 A.D.3d at 34.

[8] *See also* Vincent C. Alexander, *Supplemental Practice Commentaries*, McKinney's CPLR 7001 (noting that "[*Lavery II*], *on a point of procedure*, also denied habeas because the petitions were not based on any new ground not previously considered in the Third and Fourth Department cases.") (emphasis added).

As dicta from any court is not binding on any other court, *Lavery II*'s statements regarding legal personhood and habeas corpus relief do not bind this Court.[9] The Bronx Zoo has failed to show otherwise.

B. The Bronx Zoo fails to demonstrate that stare decisis applies to *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief.

Stare decisis "does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." *Rumsey v. New York & N.E. R.R. Co.*, 88 Sickels 79, 85 (1892); *Matter of Eckart*, 39 N.Y.2d 493, 499 (1976); *see also* Pet. Supp. Mem at 5–9. Because the NhRP has demonstrated that *Lavery I* and *Lavery II*'s statements regarding legal personhood and habeas corpus relief are based on demonstrable misunderstandings of the law, a conclusion that the Bronx Zoo does not refute, stare decisis does not apply to them, and they do not bind this Court. Nor are they persuasive. *See* Pet. Supp. Mem. at 9–24.

1. The Bronx Zoo fails to rebut the argument that *Lavery I* and *Lavery II*'s legal personhood statements are based on the demonstrable misunderstanding that the recognition of legal personhood requires the capacity for legal duties.

a. The Bronx Zoo misunderstands *Byrn v. New York City Health & Hosps. Corp*, while ignoring that the New York pet trust statute (EPTL 7-8.1) established that certain nonhuman animals can be legal persons irrespective of their capacity for legal duties, and the obvious fact that hundreds of thousands of New Yorkers who lack the capacity for legal duties nevertheless have rights.

As discussed in the NhRP's supplemental memorandum, *Lavery I* and *Lavery II*'s misunderstanding that legal personhood requires the capacity to bear duties is neither binding on

[9] Contrary to the Zoo's mischaracterization of the NhRP's supplemental memorandum, Resp. Supp. Mem. at 6, the NhRP did not argue that the Third Department's decision in *Lavery I* is dicta. *See* Pet. Supp. Mem. at 3–5.

this Court nor persuasive, as it contradicts: (1) *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194 (1972), (2) the two-decade old public policy established in New York's pet trust statute (EPTL 7-8.1) that certain nonhuman animals can be trust beneficiaries and therefore legal persons, and (3) the obvious fact that hundreds of thousands of New Yorkers who lack the capacity for legal duties have legal rights. *See* Pet. Supp. Mem. at 9–13. The Bronx Zoo fails to disprove any of these points.

The Bronx Zoo claims that "*Lavery I* and *Lavery II* were correctly decided under *Byrn*," Resp. Supp. Mem. at 8, but doesn't attempt to meet the NhRP's arguments that *Lavery I* and *Lavery II* actually contradict *Byrn.*[10] Pet. Supp. Mem. at 10–11. As explained in the NhRP's supplemental memorandum, *Byrn* said that a "legal person . . . simply means that upon according legal personality to a thing the law affords it the rights and privileges of a legal person," and that "whether legal personality should attach" is "not a question of biological or 'natural' correspondence," but a "policy determination." *Byrn,* 31 N.Y.2d at 201; Pet. Supp. Mem. at 10.

These holdings conflict with the claim in *Lavery I* and *Lavery II* that the recognition of legal personhood requires the capacity to bear legal duties, 124 A.D.3d at 152, 152 A.D.3d at 78, and the claim that, since chimpanzees cannot bear legal duties, they cannot possess any legal rights. 124 A.D.3d at 152, 152 A.D.3d at 76–78. Moreover, because both courts recognize that hundreds of thousands of New Yorkers cannot bear legal duties yet have legal rights, their statements actually ground legal personhood on nothing more than membership in the human species, 124 A.D.3d at 152 n.3, 152 A.D.3d at 78, which further contradicts *Byrn*, *see* 31 N.Y. 2d. at 201, and is a position that Judge Fahey strongly criticized. *See Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery* 31 N.Y.3d 1054, 1057 (2018) ("*Tommy*") (Fahey, J., concurring) ("The

Appellate Division's conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species."). Pet. Supp. Mem. at 12–13. This Court however is bound by *Byrn*, and not by the unsupported notion that "legal duties and obligations. . . are connected to the granting of rights." Resp. Supp. Mem. at 9.

The Bronx Zoo claims that, in seeking an extension of the New York common law of habeas corpus to Happy, the NhRP "contradicts the principles stated in *Byrn*," and in particular *Byrn*'s holding that whether "the law should accord. . .personality is a policy question which in *most instances* devolves on the Legislature." 31 N.Y.2d at 201 (emphasis added). Resp. Supp. Mem. at 8.

But as *Byrn* did not hold that the determination of legal personhood is matter for the legislature in *all instances*, but simply stated what has historically been true, there is no contradiction. In New York, habeas corpus habeas is not "the creature of any statute . . . and exists as a part of the common law of the State." *People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 565 (1875). The Court of Appeals has long rejected the claim that common law "change should come from the Legislature, not the courts." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("we abdicate our own function, *in a field peculiarly nonstatutory*, when we refuse to reconsider an old and unsatisfactory court-made rule.") (emphasis added); *see also Flanagan v. Mount Eden General Hospital*, 24 N.Y. 2d 427, 434 (1969). Accordingly, and completely consistent with *Byrn*, New York courts have "not only the right, but the duty to re-examine a question where justice demands it," and "to bring the law into accordance with present day standards of wisdom and justice." 303 N.Y. at 354-55.

The Bronx Zoo's statement regarding New York's pet trust statute, that "[n]owhere in the sponsors' letters is there any mention of the intention to establish legal personhood for animals," Resp. Supp. Mem. at 8–9, is irrelevant. The fact is that EPTL 7.81(a) necessarily recognizes the legal personhood of certain nonhuman animals by explicitly referring to them as "the living *animal beneficiary or beneficiaries*,"[11] as only legal persons may be trust beneficiaries.[12] (Emphasis added.) Accordingly, in harmony with *Byrn*, the Legislature determined that the "rights and privileges" of trust beneficiaries should be afforded to "domestic or pet animals" irrespective of their biology and capacity for legal duties, thus directly contradicting *Lavery I* and *Lavery II*.[13]

In addition, the Bronx Zoo ignores Judge Fahey's concurrence in *Tommy, see* Pet. Supp. Mem. at 12, which demonstrates *Lavery I* and *Lavery II*'s misunderstanding of legal personhood:

> Even if it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child (*see People ex rel. Wehle v Weissenbach*, 60 NY 385 [1875]) or a parent suffering from dementia (*see e.g. Matter of Brevorka ex rel. Wittle v Schuse*, 227 AD2d 969 [4th Dept 1996]).

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[11] The Sponsor's Memorandum attached to the bill that became New York's EPTL § 7-6.1 (now § 7-8-1) stated that the statute's purpose was "to allow animals to be made the beneficiary of a trust." Sponsor's Mem. NY Bill Jacket, 1996 S.B. 5207, Ch. 159. *See also* Mem. of Senate, NY Bill Jacket, 1996 S.B. 5207, Ch. 159 (same).

[12] *See* Resp. Supp. Mem. at 11–12; Black's Law Dictionary (11th ed. 2019) (defining beneficiary as "a person for whose benefit property is held in trust"). The Bronx Zoo also ignores the cited cases in Petitioner's supplemental memorandum, including *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 901 (Sup. Ct. 2015), which referred to "this state's recognition of legal personhood for some nonhuman animals under the [EPTL]." *See* Pet. Supp. Mem. at 14.

[13] Moreover, contrary to the Bronx Zoo's suggestion, Resp. Supp. Mem. at 8, the property status of nonhuman animals is entirely consistent with the establishment of their legal personhood for purposes of granting them the rights of trust beneficiaries, as an individual may be a legal person for certain purposes but not others. As *Byrn* noted, unborn children have some rights but not others. 31 N.Y.2d at 200. *See also* 1 English Private Law, § 3.24 (Peter Birks ed. 2000) (a human being or entity "which has been said by . . . the courts to be capable of enforcing a particular right, or of owning a particular duty, can properly be described as a person *with that particular capacity*," and "it can be easy to forget the qualifier") (emphasis original).

Tommy, 31 N.Y.3d at 1057.

In short, as hundreds of thousands of New Yorkers lack the capacity for legal duties yet indisputably possess legal rights, and nonhuman animals have trust beneficiary rights under the pet trust statute, it is obvious that legal personhood and individual rights do not turn on the capacity for legal duties. *See* Pet. Supp. Mem. at 12.

Finally, as noted in Petitioner's supplemental memorandum and ignored by the Bronx Zoo, shortly after Judge Fahey's concurrence in *Tommy*, the Fourth Department issued its decision in *People v. Graves*, 163 A.D.3d 16, 21 (4th Dept. 2018), which recognized that "it is common knowledge that personhood can and sometimes does attach to nonhuman entities like . . . animals."[14] (Citations omitted.) Pet. Supp. Mem. at 13 n. 15.

b. The Bronx Zoo fails to demonstrate that legal personhood, as a matter of definition, requires the capacity for legal duties.

When opining on the legal meaning of "person," *Lavery I* misunderstood its own cited sources, including the teachings of Professor John Chipman Gray found in *The Nature and Sources of the Law*, Chapter II (2d ed. 1963), which was correctly cited by the Court of Appeals in *Byrn*, 31 N.Y.2d at 201–02, and Judge John Salmond's *Jurisprudence* 318 (10th ed. 1947). Pet. Supp.

[14] The Bronx Zoo notes the recent Connecticut Appellate Court decision in *Nonhuman Rights Project, Inc. v. RW Commerford and Sons, Inc.*, 192 Conn. App. 36, 46 (2019), where the court held that the NhRP lacked standing to litigate on behalf of three elephants because they are not "persons," and explicitly adopts *Lavery I*'s personhood analysis to conclude that the elephants' inability to bear "duties and social responsibilities" precludes granting them rights. As the *Commerford* trial court noted, New York habeas corpus standing law is broader than Connecticut habeas corpus standing law. *See Nonhuman Rights Project Inc ex rel Beulah v. RW Commerford And Sons Inc*, 2017 WL 7053738 at *2 (Conn. Super. December 26, 2017). Moreover, the decision conflicts with controlling Connecticut Supreme Court habeas corpus standing precedent. On August 30, 2019, the NhRP filed a motion for *en banc* reconsideration detailing *Commerford*'s legal errors. *See* https://www.nonhumanrights.org/content/uploads/2019-08-30-Motion-for-Reconsideration-En-Banc.pdf. That motion was denied on September 12, 2019, and the NhRP will seek further review from the Connecticut Supreme Court.

Mem. at 14–16. Rather than defend *Lavery I*'s misinterpretation of legal personhood and specifically counter the arguments raised by the NhRP, the Bronx Zoo falsely claims that the NhRP "selectively quotes from historical sources." Resp. Supp. Mem. at 9.

In truth, it was the Third Department that "selectively quote[d]" its sources and thereby demonstrated its misunderstanding of them. *Lavery I* quoted Professor Gray's statement that "the legal meaning of a 'person' is a 'subject of legal rights and duties,'" 124 A.D.3d at 152, then *omitted* Professor Gray's next sentence in which he made clear that "one who has rights but not duties, or who has duties but no rights, is . . . a person," and also that "*if there is any one who has rights though no duties, or duties though no rights, he is . . . a person* in the eye of the Law." *The Nature and Sources of the Law*, Ch. II at 27 (emphasis added). One important consequence of this is that "animals may conceivably be legal persons," and there may be "systems of Law in which animals have legal rights." *Id*. at 42-43.

The Bronx Zoo similarly ignores *Lavery I*'s error in regards to Black's Law Dictionary and Judge John Salmond's *Jurisprudence*. As explained in Petitioner's supplemental memorandum, at 15-16, *Lavery I* relied upon the 7th edition of Black's Law Dictionary for a purported quotation from *Jurisprudence* that allegedly stated: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *and* duties." 124 A.D.3d at 151 (emphasis added) (quoting Black's Law Dictionary 1162 [7th ed. 1999]). In reality, Black's Law Dictionary *misquoted* Salmond's *Jurisprudence,* which *actually* says, "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *or* duties." John Salmond, *Jurisprudence* 318 (10th ed. 1947) (emphasis added). The next sentence then makes clear that "[a]ny being that is so capable [of rights or duties] is a person, whether a human being or not." *Id*.

Given that the NhRP quoted *Jurisprudence* accurately (unlike *Lavery I*), the NhRP did *not*, as the Bronx Zoo falsely claims, "misquote[]" Judge Salmond's treatise.[15] Resp. Supp. Mem. at 10. Further, contrary to what the Bronx Zoo assumes, the NhRP did not cite *Nature and Sources of the Law* and *Jurisprudence* to suggest that Professor Gray and Judge Salmond believed that nonhuman animals are legal persons and entitled to habeas corpus rights. Rather, the NhRP cited those authorities to demonstrate one of the sources of *Lavery I*'s misunderstanding of legal personhood. When the NhRP brought the misquotation error to the attention of the editor-in-chief of Black's Law Dictionary, he agreed to correct it in the eleventh edition, and he did. *See* Black's Law Dictionary (11th ed. 2019) ("So far as legal theory is concerned, a person is any being whom the law regards as capable of rights *or* duties. Any being that is so capable is a person, whether a human being or not. . . .") (correctly quoting John Salmond, *Jurisprudence* 318 (10th ed. 1947)) (emphasis added).

c. The Bronx Zoo fails to address *Lavery I* and *Lavery II*'s clear misunderstanding that legal personhood somehow derives from the social contract.

The Bronx Zoo fails to address *Lavery I*'s and *Lavery II's* misunderstanding that legal personhood somehow derives in large part from the social contract. Pet. Supp. Mem. at 17–22. The Third Department said that

> the ascription of rights has historically been connected with the imposition of societal obligations and duties. Reciprocity between rights and responsibilities stems from principles of social contract, which inspired the ideals of freedom and democracy at the core of our system of government (*see* Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 12-14 [2013]; Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69-70 [2009]; *see also In re Gault*, 387 US 1, 20-21 [1967]; *United States v Barona*, 56 F3d 1087, 1093-1094

[15] The Bronx Zoo does not even attempt to substantiate its false charge that the NhRP "similarly misquotes" *Jurisprudence* or *The Nature and Sources of the Law* by actually noting any inaccurate quotations of those sources.

> [9th Cir 1995], *cert denied* 516 US 1092 [1996]). Under this view, society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, "rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights" (Richard L. Cupp, Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz St LJ 1, 13 [2013]; *see* Richard L. Cupp, Jr., *Moving Beyond Animal Rights: A Legal/Contractualist Critique*, 46 San Diego L Rev 27, 69 [2009]).

124 A.D.3d at 151.

In its supplemental memorandum, the NhRP demonstrated that the authorities cited by the Third Department in *Lavery I* offered no support for the proposition that rights are dependent upon duties. Pet. Supp. Mem. at 18–22. The Bronx Zoo did not bother to contradict the NhRP and baldly claims that "the reciprocity between legal rights and duties is deeply embedded" in documents such as "the Declaration of Independence and the United States Constitution," Resp. Supp. Mem. at 9, again without bothering to show us how and where. That is unsurprising, as even such social contract philosophers as John Locke and Thomas Hobbes do not support Cupp's idiosyncratic claim that legal rights are received in exchange for societal duties in a social contract. Pet. Supp. Mem. at 19–20. Neither do the two federal cases cited by *Lavery I*, *In re Gault* and *United States v. Barona*. *Id*. at 20–21.

Instead, the Bronx Zoo embraces Cupp's cluelessness about the political science, history, philosophy, and jurisprudence of social contract theory, and in particular his bizarre assertion that social contract requires reciprocity between rights and duties. Resp. Supp. Mem. at 9. All one needs to do is look upon the thousands of New Yorkers who lack the capacity for duties yet have numerous legal rights to realize the notion's obvious absurdity. That *Lavery I* naively embraced Cupp's ignorance and falsehoods, and then *Lavery II* simply adopted *Lavery I*, does not make them any more true or any less absurd.

The Bronx Zoo also ignores the 17 "amici philosophers with expertise in animal ethics and related areas."[16] *Tommy*, 31 N.Y.3d at 1058 (Fahey, J., concurring). Philosophers' Brief[17]; Pet. Supp. Mem. at 19-20. As those philosophers explain, the notion that "persons take up societal duties and responsibilities, receiving rights in exchange," is "not how political philosophers have understood the meaning of the social contract historically or in contemporary times." Philosophers' Brief at 15-16. Rather,

> social contracts create citizens, not persons. Citizens are individuals who are subject to the laws authorized by the contract. . . .The 14th Amendment. . .distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While persons do not depend on a social contract, the social contract depends on persons who will be its 'signatories.'
>
> [. . .]
>
> Social contract philosophers have never claimed—not now, not in the 17th century—that the social contract can endow personhood on any being. The contract can only endow citizenship on persons who exist prior to the contract and agree to it. If persons did not exist before the contract, there would be no contract at all since only persons contract. Personhood, therefore, must be presupposed as a characteristic of contractors in social contract theories.

Philosophers' Brief at 17, 18-19.[18]

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[16] They are: Kristin Andrews (York University); Gary Comstock (North Carolina State University); G.K.D. Crozier (Laurentian University); Sue Donaldson (Queen's University); Andrew Fenton (Dalhousie University); Tyler M. John (Rutgers University); L. Syd M Johnson (Michigan Technological University); Robert Jones (California State University, Chico); Will Kymlicka (Queen's University); Letitia Meynell (Dalhousie University); Nathan Nobis (Morehouse College); David Peña-Guzmán (California State University, San Francisco); James Rocha (California State University, Fresno); Bernard Rollin (Colorado State); Jeffrey Sebo (New York University); Adam Shriver (University of British Columbia); Rebecca L. Walker (University of North Carolina at Chapel Hill).

[17] https://bit.ly/2RqAUL5 (last visited August 11, 2019).

[18] *See also* Craig Ewasiuk, *Escape Routes: The Possibility Of Habeas Corpus Protection For Animals Under Modern Social Contract Theory*, 48 Colum. Human Rights L. Rev. 69, 87-100, 105 (2017) (explaining the social contract theories of Hobbes and Locke and why, contrary to Cupp, contractualism does not preclude granting rights to nonhuman animals).

2. **The Bronx Zoo continues to seriously misconstrue the nature of habeas corpus relief and rely on the erroneous statements in *Lavery II* that such relief is limited to unconditional release.**

As discussed in the NhRP's supplemental memorandum, *Lavery II*'s misunderstanding regarding the availability of habeas corpus relief is neither binding on this Court nor persuasive, as it (1) directly conflicts with binding Court of Appeals and First Department precedents, and (2) is based upon an embarrassingly obvious misunderstanding of *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986) and *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482 (1961).[19] Pet. Supp. Mem. at 22–24. The Bronx Zoo relies on *Lavery II* to support its assertion that the NhRP's Petition fails to state a claim, Resp. Supp. Mem. at 10–12, but in the process, it ignores and misrepresents the allegations in the Petition, ignores the binding precedents cited in Petitioner's supplemental memorandum, and ignores *Lavery II*'s indefensible misreading of *Dawson*. Pet. Supp. Mem. at 23.

a. The Bronx Zoo fails to demonstrate that Happy is not unlawfully imprisoned.

Throughout its Petition and Supporting Memorandum, the NhRP repeatedly alleges, often in several different ways, that Happy is being unlawfully imprisoned by the Bronx Zoo. *See* Pet. at ¶ 1 ("This Verified Petition is for a Common Law Writ of Habeas Corpus and Order to Show Cause ("Petition") filed by the NhRP pursuant to New York Civil Practice Law and Rules ("CPLR") Article 70 on behalf of an elephant named Happy. . . *who is being unlawfully imprisoned by Respondents at the Bronx Zoo*.") (emphasis added); Pet. at ¶¶ 2, 3, 8, 14, 18, 19, 38, 42, 54, 56, 118; Supporting Mem. at 3, 4, 10, 11, 13, 20, 21, 24, 25.

[19] *Lavery II* relied on and essentially adopted the erroneous analysis in *Nonhuman Rights Project Inc ex rel Kiko v. Presti*, 124 A.D.3d 1334, 1335 (4th Dept. 2015). Accordingly, the errors discussed here, as well as in Petitioner's supplemental memorandum, equally apply to *Presti*.

Yet, the Bronx Zoo asserts that the NhRP does not demonstrate a "cognizable claim for habeas corpus relief" because it "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." Resp. Supp. Mem. at 12. However, the lawfulness of the *conditions* of Happy's confinement is irrelevant to the lawfulness of her *confinement*, which is solely a matter of New York common law. If the Respondent, James Breheny, were being detained by the Bronx Zoo and brought a habeas corpus action before this Court, he would not concede the legality of his detention just because the Bronx Zoo demonstrated he was being given adequate food, water, and medical care. The same is true for Happy; her imprisonment by the Bronx Zoo itself violates her bodily liberty and is thus *per se* unlawful.

b. The Bronx Zoo fails to demonstrate that the NhRP is not seeking Happy's immediate release.

The Bronx Zoo claims that the NhRP's Petition "does not request Happy's release but rather her transfer to a facility of NRP's choosing," Resp. Supp. Mem. at 12, which erroneously assumes—as *Lavery II* did—that only *absolute release* is available under habeas corpus. *See* Pet. Supp. Mem. at 22—23 (citing cases showing that habeas corpus relief is not limited to unconditional release). Accordingly, in requesting that Happy be immediately released to an appropriate elephant sanctuary such as PAWS,[20] the NhRP's Petition *does* request "Happy's release" and seeks appropriate habeas corpus relief.[21]

[20] *See* Pet. ¶¶ 8, 57, 58, 118.

[21] Contrary to the Bronx Zoo's mischaracterization, Resp. Supp. Mem. at 12, the Petition merely *suggests* that Happy be released to PAWS, but there are other appropriate elephant sanctuaries, such as The Elephant Sanctuary in Tennessee. The choice of sanctuary will ultimately be a matter of the Court's discretion.

As Judge Fahey observed in *Tommy*, *Lavery II* entirely misread *People ex rel. Dawson v. Smith*, 69 N.Y.2d 689 (1986) and failed to recognize that "the chimpanzees' predicament [was] analogous" to the situation in *People ex rel. Brown v. Johnston*, 9 N.Y.2d 482 (1961). 31 N.Y.3d at 1059. Pet. Supp. Mem. at 23. In *Johnston*, the Court of Appeals made clear that habeas corpus could be used when the detainee sought a transfer from one place to an entirely different place. 69 N.Y.2d at 691. In *Dawson*, the Court of Appeals made clear that the relief sought in *Johnston* was unavailable to a detainee who sought a transfer from one section of an institution to another section within the same institution. *Id*.

Just as in *Lavery II*, the NhRP's requested relief in this case is also *not* "analogous to the situation [in *Dawson*]," as the request does not seek a transfer from confinement *within the Bronx Zoo*, but Happy's release from the Bronx Zoo to an appropriate elephant sanctuary, an *institution that is wholly separate and completely different in nature*.

III. Assuming, *arguendo*, that Respondents' motion to dismiss is pending, the Bronx Zoo fails to demonstrate that the Petition should be dismissed on the basis of collateral estoppel.

As explained above, the Bronx Zoo's motion to dismiss is no longer pending. But assuming, *arguendo*, that the motion is pending, it should be denied as the Bronx Zoo's arguments are demonstrably meritless.[22] The NhRP addresses the Bronx Zoo's remaining claim that the Petition should be dismissed on the basis of collateral estoppel. Resp. Supp. Mem at 6.

It has been long established that collateral estoppel and res judicata are generally inapplicable to habeas corpus cases. *People ex rel. Lawrence v. Brady*, 56 NY 182, 191-92 (1874). *See People ex rel Woodard v. Berry*, 163 A.D.2d 759, 760 (3d Dept. 1990) ("res judicata principles

[22] The reasons for denying the motion are also detailed in NhRP's Reply Memorandum of Law (dated December 10, 2018).

do not bar successive petitions for a writ of habeas corpus on the same ground") (citing CPLR 7003(b)); *People ex rel. Leonard HH v. Nixon,* 148 A.D.2d 75, 8 (3d Dept.1989) ("traditional and historic position" that "res judicata does not apply to habeas corpus. . .continues to be extant and covers both the claim preclusion and issue preclusion branches of res judicata"); *Losaw v. Smith,* 109 A.D. 754, 756 (3d Dept. 1905) ("It is settled law that with the exception of a narrow class of cases, such as the custody of infants, a decision on habeas corpus itself does not create an estoppel, even on renewals of the writ") (quoting *In Matter of Quinn*, 2 A.D. 103, 104 (2d Dept. 1896)); *Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, 909-10 (Sup. Ct. 2015) ("*Stanley*"). *See also* Advisory Committee Notes to CPLR 7003(b) (the statute "continues the common law and present position in New York that res judicata has no application to the writ.").

Even in the extremely limited circumstances where collateral estoppel may apply in the habeas corpus context,[23] which do not exist here, the doctrine is applicable only when there is "an *identity of issue* which has necessarily been decided in the prior action and is decisive of the present action." *Buechel v. Bain*, 97 N.Y.2d 295, 303-04 (2001) (emphasis added); *Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003) ("proponent of collateral estoppel must show identity of the issue"); *City of New York v. Welsbach Elec Corp*, 9 N.Y.3d 124, 128 (2007) (collateral estoppel "applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action'") (citation omitted).

[23] *See People ex rel Spaulding v. Wood*, 63 A.D. 3d 1456, 1457 (3d Dept. 2009) (petitioner precluded from relitigating jurisdictional claim decided in his fourth application for habeas corpus relief).

The sole issue in this case is the legality of Happy's imprisonment at the Bronx Zoo. That issue has never been decided in any prior proceeding, as this is the *first case, ever*, to challenge the legality of her imprisonment. *See* Pet. ¶ 52 ("This is the first petition filed on behalf of Happy.").

The Bronx Zoo ignores the "identity of issue" requirement by citing the NhRP's prior litigation on behalf of *other* imprisoned nonhuman animals, but in none of those cases was *the issue of Happy's imprisonment* ever decided—for the simple reason that that issue was never before any court. Accordingly, the fact that the NhRP has litigated similar cases in the past is simply irrelevant.[24] If it were relevant, the first time the NAACP Legal Defense Fund challenged *Plessy v. Ferguson*, 163 U.S. 537 (1896) on behalf of one client, it would have been the last, and there would never have been *Brown v. Board of Education*, 347 U.S. 483 (1954). The Bronx Zoo's argument, of course, is obvious nonsense.

Nor does collateral estoppel bar relitigation even on behalf of the same detainee under CPLR 7003(b).[25] *See People ex rel Woodard v. Berry*, 163 A.D.2d 759 (3d Dept. 1990) ("res judicata principles do not bar successive petitions for a writ of habeas corpus on the same ground") (citing CPLR 7003(b)); *Stanley*, at 16 N.Y.S.3d at 909-10 ("the Legislature apparently found it necessary to include within [CPLR 7003(b)] a provision permitting, but not requiring, a court to decline to issue a writ under certain circumstances, *thereby permitting successive writs*")

[24] The claim that somehow the NhRP, and not Happy, is the real party in interest (Resp. Supp. Mem. at 7) is fatally undermined by the fact that, on November 26, 2018, the NhRP sent a letter to the Bronx Zoo's counsel—as it does on behalf of any detained nonhuman animal it represents—offering to drop the lawsuit if the Bronx Zoo agreed to send Happy to sanctuary. The Bronx Zoo refused that offer in a letter dated November 28, 2018. *See* Exhibits #2 and #3 to Affidavit of Steven M. Wise (dated December 10, 2018).

[25] CPLR 7003(b) provides that "[a] court is not required to issue a writ of habeas corpus if the legality of the detention has been determined by a court of the state on a prior proceeding for a writ of habeas corpus and the petition presents no ground not theretofore presented and determined and the court is satisfied that the ends of justice will not be served by granting it."

(emphasis added). Therefore, if the NhRP's Petition were a successive petition, which it is not, collateral estoppel would still be inapplicable. *Id.* at 910 ("because successive writs are permitted, petitioner is not estopped from raising the same issues here.").

IV. CONCLUSION

Habeas corpus is a "summary proceeding" that "strikes at unlawful imprisonment," and "tolerates no delay except of necessity." *People ex rel. Robertson v. N.Y. State Div. of Parole*, 67 N.Y.2d 197, 201 (1986) (quoting *People ex rel. Duryee v. Duryee*, 26 Bedell 440, 445 (1907)). Yet this proceeding, commenced nearly a year ago last October in Orleans County, has not reached resolution. As a result, the unlawful deprivation of an extraordinary and autonomous being's liberty continues. This Court can and should now put an end to the injustice of Happy's decades-long imprisonment at the Bronx Zoo and grant her freedom.

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