

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORLEANS

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

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

Index No. 18-45164

Petitioner,

v.

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

Respondents.

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**REPLY MEMORANDUM OF LAW IN FURTHER  
SUPPORT OF MOTION TO DISMISS OR TRANSFER VENUE AND IN  
OPPOSITION TO PETITIONER'S MOTION FOR PRELIMINARY INJUNCTION**

Respectfully submitted,

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## PRELIMINARY STATEMENT

Notwithstanding hundreds of pages of briefing, new arguments and factual affidavits submitted for the first time upon reply, and eleventh-hour provisional remedy motion practice, Petitioner the Nonhuman Rights Project, Inc. (“NRP”) has failed to do the one thing it must do—establish that Happy the elephant’s living conditions at the Bronx Zoo are in violation of any existing law or legal precedent. NRP’s submissions on reply fail to demonstrate any reason why the Court should depart from the controlling precedent espoused by every Division of the Appellate Department, which holds that animals are not entitled to habeas relief. For the reasons stated below and in Respondents’ previous submissions, NRP’s petition should be denied as a matter of law.

## ARGUMENT

### POINT I

#### **NRP FAILS TO ESTABLISH THAT VENUE IS PROPER IN ORLEANS COUNTY**

On reply, NRP continues to assert that CPLR Article 70 alone controls the proper venue of this proceeding and allows it to engage in blatant forum shopping, notwithstanding clear appellate authority stating that habeas corpus proceedings are also subject to Article 5 of the CPLR. *Greene v. Sup. Ct. Westchester Cty*, 31 A.D.2d 649, 649 (2d Dep’t 1968) (“We think that a habeas corpus proceeding, a special proceeding (CPLR 7001), is subject to the practice provisions governing venue generally (cf. CPLR 506)”).

Article 5 of the CPLR requires that venue be in a county where a party resides or where the material events occurred. CPLR 503(a). Both considerations weigh in favor of transferring this proceeding to Bronx County, as it is undisputed that Respondents reside in Bronx County. The material allegations concern events in Bronx County.

In contrast, this proceeding has no connection to Orleans County other than NRP's misguided decision to "chose to file in a county in the Fourth Department, primarily because of the Fourth Department's recent decision in *Graves*[,]” NRP Reply Memorandum of law, dated December 10, 2018 (“NRP Reply MOL”) at 11. Thus, venue is improper in Orleans County because of the requirements of Article 5 of the CPLR and because of the common law prohibition on forum shopping. *Koschak v. Gates Constr. Corp.*, 225 A.D.2d 315, 316 (1st Dep’t 1996); *accord Walton v. Mercy College*, No. 13259/2006, 2008 WL 3865297, at \*8 (Sup. Ct. Bronx Cty. Aug. 14, 2008); *Garces v. City of New York*, No. 6183/2007, 2008 WL 60093, at \*5 (Sup. Ct. Bronx Cty. Jan. 4, 2008).

*Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc. 3d 746 (Sup. Ct. New York Cty. 2015), does not support NRP's position. The respondent in *Stanley* sought a change of venue pursuant to CPLR 7004(c), claiming it was a “state institution” (NRP Reply MOL at 9), an argument which Respondents do not advance in this proceeding. The analysis by the *Stanley* court is therefore distinguishable. NRP also relies upon *Chaney v. Evans*, No. 16-1-2012-0445.105, 2013 WL 2147533 (May 7, 2013), which is also inapposite because it was based upon the “state institution” provisions under CPLR 7004(c). Here, in contrast, the “substance” of this matter warrants transfer to Bronx County. Respondents are not prisons or any other state institution. Instead, Mr. Breheny and the Bronx Zoo are an individual and a non-profit conservation organization, respectively, residing and located in Bronx County. NRP Verified Petition, sworn to October 2, 2018 (“Ver. Pet.”) ¶¶ 40-41. NRP's own allegations center on the alleged “unlawful” detention of Happy the Elephant in the Bronx Zoo. Ver. Pet. ¶¶ 1-2. Nothing in CPLR 7004 prescribes venue in this case.

Accordingly, CPLR 503(a) controls, and mandates venue in Bronx County. For these reasons, venue should be transferred to Bronx County.

## POINT II

### RESPONDENT'S MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED

On December 12, 2018, at 4:12 P.M., NRP served its motion for preliminary injunction to enjoin Respondents from removing Happy from the State of New York. Affidavit of Joanna J. Chen, sworn to December 13, 2018 ¶ 12. As explained below, NRP's motion is meritless and should be denied.

“A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor.” *Doe v. Axelrod*, 73 N.Y.2d 748, 750, 532 N.E.2d 1272 (1988) (denying preliminary injunction where likelihood of success on merits not established).

It is well-settled that the remedy of preliminary injunction “is a drastic remedy to be sparingly used.” *Town of Porter v. Chem-Trol Pollution Services, Inc.*, 60 A.D.2d 987, 988 (4th Dep't 1978); *see also Merola v. Telonis*, 127 A.D.2d 1007, 1007 (4th Dep't 1987) (“Unless the plaintiff clearly demonstrates a necessity and urgency for relief in advance of a trial including the sustaining in the meantime of irreparable injury, the injunctive remedy will be withheld pending the trial”).

#### A. NRP is unlikely to succeed on the merits of its petition

Rarely does the controlling case law weigh on one side as heavily as it does in this case, where all courts that have considered the issue of whether animals are entitled to



habeas relief have ruled against NRP. See *In re Nonhuman Rights Project v. Lavery*, 152 A.D.3d 73, 75-76 (1st Dep't 2017), *leave to appeal denied* 31 N.Y.3d 1054 (2018); *In re Nonhuman Rights Project ex rel. Kiko v. Presti*, 124 A.D.3d 1334, 1334 (4th Dep't 2015); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 148 (3d Dep't 2014); *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 2014 WL 1318081 at \*1 (2d Dep't Apr. 3, 2014). For the sake of brevity, Respondents rely upon their previously submitted papers and arguments *infra*, which establish that NRP's petition has no merit, and therefore NRP has failed to establish likelihood of success on the merits. NRP's motion for preliminary injunction therefore should be denied.

**B. NRP has not established that Happy would suffer irreparable harm absent the preliminary injunction**

NRP contends that Happy will suffer irreparable injury if she is removed from the State of New York because such removal may moot this action. However, NRP's irreparable harm argument assumes without establishing that NRP has a right to petition for a writ of habeas corpus on behalf of Happy. CPLR 6301 states that "[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action." Because NRP has not and cannot establish that it has a right to pursue the instant petition, any actions by Respondents that may moot this proceeding would not be in violation of NRP's rights and therefore would not cause any harm.

Moreover, "[w]here the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." *New York State Inspection, Sec. and Law Enforcement*

*Employees, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo*, 64 N.Y.2d 233, 240 (1984). In support of its motion for preliminary injunction, NRP relies upon a news article from over a decade ago and other unsubstantiated articles which in no way indicate that the Bronx Zoo is imminently intending to move Happy to another zoo. See Attorney Affirmation of Elizabeth Stein, dated December 12, 2018 ¶¶ 6-10. NRP therefore has not established that the harm it alleges is anything more than pure speculation.

**C. The balance of the equities is in favor of Respondents**

The balance of the equities weigh in favor of Respondents where NRP falls well short of establishing a clear legal right to the relief it seeks, yet would seek to enjoin Respondents from engaging in activities that may be necessary to Happy's welfare and the administration of the Bronx Zoo. NRP therefore fails to establish any of the required elements for a preliminary injunction, and NRP's motion should be denied.

**POINT III**

**RESPONDENTS' MOTION TO DISMISS THE PETITION SHOULD BE GRANTED**

**A. NRP has failed to allege how Happy's conditions at the Bronx Zoo are illegal**

"The purpose of habeas corpus is to test the legality of the detention of the person who is the subject of the writ." *People ex rel. Robertson v. N.Y.S. Div. of Parole*, 67 N.Y.2d 197, 201 (1986); see also *Harrington v. Richter*, 562 U.S. 86, 91 (2011) ("The writ of habeas corpus stands as a safeguard against imprisonment of those held *in violation of the law*") (emphasis added); *Henry v. Henkel*, 35 S.Ct. 54, 56 (1914) ("[w]hen a person under arrest applies for discharge on writ of habeas corpus the issue presented is whether he is *unlawfully restrained* of his liberty") (emphasis added).

As a result, no habeas relief may be obtained where a detention is lawful, and a petition that on its face “does not allege facts showing that petitioner is being illegally detained” should be denied. *People ex rel. Batsford v. State Div. of Parole*, 91 A.D.2d 1112, 1112 (3d Dep’t 1983); *see also People ex rel. Medina v. Senkowski*, 265 A.D.2d 779, 779 (3rd Dep’t 1999) (ruling petition seeking a writ of habeas corpus was properly dismissed for the petition’s failure to detail how the detention at issue was illegal); *Mellor v. Hinkley*, 201 A.D. 619, 620 (2nd Dep’t 1922) (order sustaining writ of habeas corpus reversed where the petition failed to state the illegality of the imprisonment).

NRP asserts that it has stated a cause of action for habeas relief by merely alleging that “the Bronx Zoo is detaining Happy” (NRP Reply MOL at 20). However, notwithstanding hundreds of pages of submissions, NRP has failed to identify how Happy’s current conditions are in violation of any federal or state statute, rule, or regulation, *i.e.*, are in any way unlawful.

In contrast, Respondents’ submissions establish that the Bronx Zoo is in compliance with all applicable federal and state statutes, including the Animal Welfare Act, and standards established by the Association of Zoos and Aquariums. *See* Affidavit of Patrick Thomas, Ph.D., sworn to December 3, 2018, ¶¶ 7-22. NRP’s only rebuttal is that the foregoing is not relevant to its petition (NRP Reply MOL at 18-19), when in fact Respondents’ submissions establish that Happy’s conditions at the Bronx Zoo are lawful.

NRP’s continued reliance upon *Byrn v. N.Y.C. Health & Hosps. Corp.*, 31 N.Y.2d 194, 201 (1972), and *People v. Graves*, 163 A.D.3d 16 (4th Dep’t 2018), is misplaced. As explained in Respondents’ previous submissions, neither case discusses whether animals constitute persons for the purposes of habeas relief, nor even whether animals should be

granted legal rights. NRP's reliance upon these cases, which on their face are irrelevant to the issues at hand, underscore the complete lack of precedent for NRP's position.

Similarly, the New York Pet Trust Statute does not support NRP's argument that "New York's Legislature . . . made a 'policy determination' on 'whether legal personality should attach to' certain nonhuman animals." NRP's Reply MOL at 27. The Sponsor's Memorandum is replete with references to "pet owners," reinforcing the legal reality that animals are not recognized as "persons" with a right to bodily liberty. *See* New York Bill Jacket, 1996 S.B. 5207, Ch. 159.

Thus, NRP's failure to identify how Happy is illegally detained is fatal to its petition for writ of habeas corpus, and should result in the denial of NRP's petition.

**B. NRP fails to establish that it has standing**

Rather than identifying how Happy's current conditions are illegal, NRP argues that Happy's conditions *should* be illegal, and that Happy should be granted "the right to bodily liberty secured by habeas corpus," as a matter of public policy. NRP Reply MOL at 19. NRP's reliance upon "public policy" to support its petition cannot be understated where the phrase is repeated no less than sixteen times in NRP's Reply MOL. *See* NRP Reply MOL at i, 20, 22, 23, 26, 27, 28, 29, 30, 31, 32.

However, NRP fails to address Respondents' arguments that NRP lacks standing because its petition merely alleges a generalized grievance based upon public policy, as opposed to "the existence of an injury in fact—an actual legal stake in the matter being adjudicated." *Soc'y of Plastics Indus., Inc. v. Cty. of Suffolk*, 77 N.Y.2d 761, 769, 772 (1991). The courts have consistently held that the "adjudication of generalized grievances [is] more appropriately addressed by the representative branches." *Id.* at 769, 773. Indeed,

*Byrn*, 31 N.Y.2d at 201, which NRP repeatedly relies upon, states “[w]hether the law should accord legal personality is a policy question which in most instances devolves on the Legislature . . . .”<sup>1</sup>

On reply, NRP does not dispute the foregoing but rather points to two cases as controlling authority for its standing. The first case *assumed* only for the sake of argument that NRP had standing to pursue its previous cases, and neither case addresses the issue of whether NRP’s petition presented an injury in fact. See e.g., *In re Nonhuman Rights Project, Inc. v. Lavery*, 152 A.D.3d 73, 78 (1st Dep’t 2017), *leave to appeal denied* 31 N.Y.3d 1054 (May 8, 2018) (“*Lavery II*”) (“[a]ssuming habeas relief may be sought on behalf of a chimpanzee, petitioner undisputedly has standing”); *In re Nonhuman Rights Project, Inc. ex rel. Hercules v. Stanley*, 49 Misc.3d 746 (Sup. Ct. N.Y. Cty. 2015). Thus, *Soc’y of Plastics Indus.*, 77 N.Y.2d at 769, should control the question of standing, and NRP’s failure to meet its burden of establishing standing based upon an injury in fact also should result in the denial of NRP’s petition.

**C. NRP should not be permitted to submit new arguments and affidavits on reply**

NRP’s reply submissions constitute an improper effort to amend its petition without seeking the Court’s leave to make that amendment. CPLR 405(a); see *People ex rel. Chaney v. Dagostino*, 137 A.D.3d 1436, 1437 (3rd Dep’t 2016). An action for habeas corpus relief is a special proceeding subject to CPLR Article 4. CPLR 7001; CPLR 401. The court “proceed[s] in a summary manner” to address alleged “unlawful imprisonment or restraint of the person by state or citizen.” *People ex rel. Robertson v. N.Y.S. Div. of Parole*, 67 N.Y.2d 197, 200 (1986). In light of the exigent and accelerated nature of the proceeding, upon the

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<sup>1</sup> To the extent NRP argues that its petition now presents an injury in fact because it challenges Happy’s conditions of confinement, such arguments are based on new, contradictory arguments and submissions raised for the first time on reply, and are not properly before this Court. See *infra*, Point III.C.

petitioner's application for relief he is "deemed to have submitted to the court the whole question of his right to a discharge." *People ex rel. Humphries v. Hunt*, 251 A.D. 57, 58 (4th Dep't 1937). Indeed, it is settled law that "in proceedings subject to summary determination no consideration is to be accorded to novel arguments raised in reply papers." *Gonzalez v. City of New York*, 127 A.D.3d 632 (1st Dep't 2015); *People ex rel. Medina v. Senkowski*, 265 A.D.2d 779, 779 (3rd Dep't 1999) (on a summary proceeding for habeas corpus, "the Supreme Court is bound by the papers before it").

In NRP's words, it "painstakingly and specifically made clear in th[e] Petition that the NhRP is seeking Happy's immediate release from her unlawful imprisonment and is not seeking a change in the conditions of her confinement." Ver. Pet. ¶ 58, n.16. NRP stated unequivocally that its "Petition does not allege that Happy is 'illegally confined because she is kept in unsuitable conditions,' nor does it seek improved welfare for Happy." *Id.* ¶ 56. Rather, NRP asserted, "it is the fact that Happy is imprisoned *at all*, rather than the conditions of her imprisonment, that the NhRP claims is unlawful." Ver. Pet. ¶ 56 (emphasis in original). NRP further alleged that it does not challenge whether Respondents are in compliance with "federal, state, or local animal welfare laws." *Id.*

After Respondents served their motion to dismiss the petition, however, NRP's reply raised new allegations challenging the space, temperature, food, company, and medical care that the Bronx Zoo provides to Happy, for example:

- Happy's conditions are "tiny, cold, un-elephant friendly and unnatural," (NRP Reply MOL at 38);
- Happy is kept in "an environment that is utterly unsuitable for her basic social, emotional, behavioral, liberty and autonomy needs," (*Id.* at 40); and

- “Happy is not healthy, though in a way the Bronx Zoo cannot understand,”  
(*Id.*).

Such allegations could have been, but were not, advanced in NRP’s petition, and they flatly contradict NRP’s previous petition. NRP continues to assert on reply that neither Happy’s welfare nor her current living conditions are relevant to its petition, even while addressing those very same issues in other parts of its submissions. *See* NRP Reply MOL at 4 (“a prisoner’s welfare is *never* relevant . . . in determining whether that prisoner is being illegally detained in a habeas corpus case. Thus, the Bronx Zoo’s claim that it is in compliance with animal welfare statutes is irrelevant”).

In addition to new arguments raised for the first time on reply, NRP has introduced and relies upon new affidavits, without any explanation for why these affidavits could not have been submitted in support of its original petition, or why they necessitated a late reply.<sup>2</sup> For example, the Second Supplemental Affidavit of Joyce Poole analyzes a number of unidentified “very short videos,” which are presumably accessible to the public. Second Supp. Poole Aff. ¶ 31; Reply Mem. at 41. Similarly, the affidavit of Lauren Choplin offers a collection of “Google Earth” photographs of the elephant habitat at the Bronx Zoo, information that was at all times available to NRP. Reply Mem. at 39-42.

Thus, NRP’s new and contradictory reply contentions are outside the scope of this proceeding and should not be considered.

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<sup>2</sup> NRP did not comply with this Court’s Order to Show Cause granted November 16, 2018, which required NRP to file its reply papers on or before December 10, 2018. Moreover, NRP admits that its decision not to timely serve its reply papers was made in order to accommodate various affiants, each of whom submitted new affidavits in NRP’s reply. *See* Corrected Notice of Motion for Late Reply at p.2 (“the Petitioner had only seven days to reply; the reply was complex and comprehensive . . . ; the affiants cited and quoted in the Reply Memorandum are located in Norway, Florida, California, and New York; and Petitioner’s attorneys had to coordinate their work from California, Florida, and New York.”). Given that NRP commenced this proceeding, and therefore had an unlimited amount of time to prepare any affidavits in support of its petition for habeas corpus, NRP’s failure to serve its reply papers timely is unreasonable and should not be excused.

**D. NRP fails to rebut Respondents' collateral estoppel argument**

Collateral estoppel should apply to bar NRP from continuing to expend judicial resources on its meritless petitions. Contrary to NRP's characterizations of the law, collateral estoppel may apply to bar habeas corpus proceedings, and "the courts have recognized that some restrictions on successive habeas corpus applications should be imposed to prevent vexatious and harassing repetition of invalid claims already heard and decided." *People ex rel. Leonard HH. v. Nixon*, 148 A.D.2d 75, 80 (3d Dep't 1989) (cited by NRP Reply MOL at 14). CPLR 7003(b) codifies the power of the Court to bar successive petitions:

[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 determine and the court is satisfied that the ends of justice will not be served granting it.

NRP also should be well aware of the application of collateral estoppel to habeas corpus proceedings, as the First Department previously upheld the denial of NRP petitions on behalf of various chimpanzees because "these were successive habeas proceedings which were not warranted or supported by any changed circumstances." *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 (1st Dep't 2017) ("*Lavery II*"). In *Lavery II*, the First Department reasoned that NRP's petitions were successive, notwithstanding that they were brought on behalf of different chimpanzees, because "[e]ach petition was accompanied by virtually the same affidavits, all attesting to the fact that chimpanzees are intelligent . . . exhibit many of the same social cognitive and



linguistic capabilities as humans and therefore should be afforded some of the same fundamental rights as humans.” *Id.* at 76.

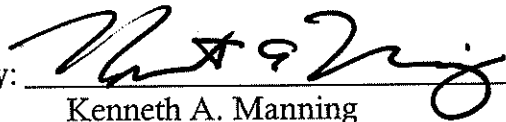
As in *Lavery II*, and other previous cases, NRP submitted in this case affidavits attesting to the cognitive and social capabilities of all elephants, and argues that Happy should be granted habeas relief based upon these characteristics. In substance, this is the same legal argument NRP advanced in its previous cases, and NRP’s petition should be denied for the same reasons, given the overwhelming precedent establishing that animals are not entitled to habeas relief.

### CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court transfer this proceeding to Bronx County, or in the alternative, dismiss or deny NRP’s petition and motion for a preliminary injunction with prejudice.

Dated: Buffalo, New York  
December 13, 2018

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