



**Phillips Lytle** LLP

Via FedEx

July 22, 2021

Clerk of the Court  
John P. Asiello  
New York State Court of Appeals  
20 Eagle Street  
Albany, New York 12207

Re: *Matter of Nonhuman Rights Project v. Breheny* (APL-2021-00087)

Dear Mr. Asiello:

I am an attorney of record for Respondents in the above-referenced matter. I write to respond to the request by Petitioner-Appellant, the Nonhuman Rights Project (“NRP”) for a calendar preference pursuant to Rule 500.17(b) of the Rules of Practice of the Court of Appeals. NRP has not provided any reason supported by fact or law for a preference. For this reason, we declined to agree to seek a calendar preference for this matter and write now to set forth our reasons.

NRP asserts a variety of justifications for its request but each one is either false or misleading. First, NRP asserts that habeas corpus actions must be heard quickly. While this is often the case, in this instance the “delay” in bringing this matter to the attention of the Court of Appeals is only attributable to the strategies and tactics employed by NRP. As made clear in the attached affidavit<sup>1</sup>, NRP has attempted to stifle any opposition to its view points through a variety of means, including initially filing the case in a county that had nothing to do with Happy and was a brazen attempt to circumvent the precedent of the Appellate Division, First Department. Other such tools employed by NRP include at least three different instances in which NRP moved to strike a variety of lawful and proper pleadings submitted by Respondents. None of these motions were granted.

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<sup>1</sup> Affidavit of Kenneth Manning, dated February 19, 2021, submitted in opposition to NRP’s motion to strike Respondent’s brief, and attached hereto (without exhibits).

ATTORNEYS AT LAW

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Second, NRP claims that at a hearing in Bronx County, it presented “uncontroverted expert affidavits” that Happy “suffers terribly every day of her imprisonment.” This is simply not true. Respondents directly controverted this claim through affidavits from Paul Calle, Chief Veterinarian at the Bronx Zoo (A. 329-332), Patrick Thomas, Associate Director of the Bronx Zoo (A. 333-338), and Respondent James Breheny, the Executive Vice President and General Director of the Bronx Zoo (A. 458-464). These affidavits demonstrate that Happy receives excellent care, is well-adapted to her caregivers and surroundings, and that trucking her away from her 40-year home in familiar surroundings to a new facility, thousands of miles away, could inflict lasting physical and psychological harm on Happy. *E.g.*, A. 336-38.

In contrast, the “uncontroverted” affidavits that NRP refers to were not based on any interaction with or study of Happy herself, but for the most part described the traits and behaviors of African elephants observed in the wild. Happy is an Asian elephant; the two species are not even in the same genus. In fact, NRP’s petition states explicitly that it does not “seek improved welfare for Happy” and “does not allege that Happy is illegally confined because she is kept in unsuitable conditions.” A. 48. Therefore, NRP’s description of the record is not only inaccurate but incongruent with its own allegations.

Third, NRP expresses concern that Happy may die at any moment and “the time she has left to live is uncertain.” While not precisely false, it is also not a special condition unique to Happy. Indeed, it is true of all animals. Nonetheless, it is noteworthy that in the face of such alleged mistreatment for the last 40 years at the hands of those charged with Happy’s care at the world-renowned Bronx Zoo, she is healthy at present and has lived to the relatively old age of 50 years. A request for a preference based on the failing health of a litigant is usually accompanied by evidence that a litigant’s demise is imminent. No such evidence has been provided here.<sup>2</sup>

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<sup>2</sup> It is also worth noting that in seeking this preference, NRP contends that the demise of Happy before this matter can be heard by the Court of Appeals “would also leave unresolved issues potentially impacting the reach of habeas corpus for human beings in New York.” We agree that this case could have such an impact and for that reason, among others upon which we will elaborate in our responsive brief, it is suitable for legislative resolution, not by judicial fiat. Time is “of the essence” for many human



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Fourth, NRP acknowledges that while the more typical habeas corpus proceeding is to achieve freedom from an illegal confinement, in this matter, confinement will not change even if NRP is somehow successful; instead, she will simply be transferred to another facility where she will not be "free" but still contained in a facility many miles from her present location that has served as her home for the last 40 years. Thus, unlike the urgency of other habeas petitions where the difference is between confinement and complete freedom, this case does not present the urgency of such a stark choice.

Thank you for your consideration.

Very truly yours,

Phillips Lytle LLP

By

Kenneth A. Manning

ZZZhmk  
Enclosure

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litigants and NRP has provided no evidence that Happy merits any special treatment to accelerate resolution of her case before those of any human beings.