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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 On Appeal; 4th Judicial District El Paso County; Hon. Eric Bentley; Case Number: 2023CV31326	
Petitioner-Appellant: THE NONHUMAN RIGHTS PROJECT, INC. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo, v. **Respondents-Appellees:** CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.	**▲ COURT USE ONLY ▲**
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OPENING BRIEF	

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ISSUES ON APPEAL

This appeal by Petitioner-Appellant Nonhuman Rights Project, Inc. ("NhRP"), concerns five female African elephants confined at the Cheyenne Mountain Zoo—Missy, Kimba, Lucky, LouLou, and Jambo. It marks the second time in history that the highest court of an English-speaking jurisdiction will hear a habeas corpus case brought on behalf of a nonhuman animal.

NhRP filed a Verified Petition for a Writ of Habeas Corpus ("Petition") on behalf of the elephants, alleging they are being unlawfully confined by Respondents-Appellees Cheyenne Mountain Zoological Society and Bob Chastain (collectively, "Zoo"), and thus entitled to release to an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries ("GFAS"). The District Court granted the Zoo's motion to dismiss pursuant to C.R.C.P. Rules 12(b)(1) and 12(b)(5). The issues on appeal are:

I. Does the Petition make a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are entitled to release?

II. Did the District Court have subject-matter jurisdiction?

INTRODUCTION

The common law is in constant growth, not static and immutable, adapting to changing conditions, new knowledge, and experience to accord with the demands of justice. *See Tesone v. Sch. Dist. No. Re-2, Boulder Cnty.*, 152 Colo. 596, 602-03 (1963) (Frantz, C.J., dissenting), *overruled by*, *Evans v. Bd. of Cnty. Comm'rs of El Paso Cnty.*, 174 Colo. 97 (1971). This is especially true of the Great Writ of Habeas Corpus, whose very nature "'demands that it be administered with the initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected.'" *Naranjo v. Johnson*, 770 P.2d 784, 786 (Colo. 1989) (citation omitted). In this case of first impression, the Court is presented with a unique opportunity to recognize that the revered common-law writ can be flexibly used to reach and correct a manifest injustice.

This Court is called upon to decide a profound question of judicial responsibility and ethics: "whether the detention of an elephant can ever be so cruel, so antithetical to the essence of an elephant, that the writ of habeas corpus should be made available under the common law." *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 579 (2022) (Wilson, J., dissenting). Affirming the District Court's decision would perpetuate an entrenched and unjust status quo. This Court should instead "affirm our own humanity by committing ourselves to the promise of

freedom" for living beings who, though not human, are like us in all the ways that matter. *Id*. at 628 (Rivera, J., dissenting).

Missy, Kimba, Lucky, LouLou, and Jambo are—as the expert evidence in the record demonstrates—autonomous and extraordinarily cognitively complex beings languishing in a wholly unnatural environment, unable to flourish and have their complex physical and psychological needs met. They are suffering immensely and unnecessarily. Without judicial intervention, they are doomed to suffer day after day, year after year, for the rest of their lives. The District Court acknowledged that as a matter of "pure justice," these individuals are not being "treated with the dignity befitting their species." (CF, 000532).

Yet the court denied them the opportunity to challenge their unjust confinement solely because they are not human, embracing human exceptionalism (a version of might makes right).[1] This denial not only exemplifies arbitrariness and irrationality but "denies and denigrates the human capacity for understanding, empathy and compassion." *Breheny*, 38 N.Y.3d at 626 (Wilson, J., dissenting).

[1] "[H]uman exceptionalism holds that humans possess *a unique moral worth* that endows them alone, among all living creatures, with the right never to be treated merely as means to the ends of others." Angus Taylor, *Review of Wesley J. Smith's A Rat is a Pig is a Dog is a Boy: The Human Cost of the Animal Rights Movement*, BETWEEN THE SPECIES 233 (2010). This is "not a statement of fact, but an assertion of domination." *Id*. at 234.

"[T]he rights we confer on others define who we are as a society." *Id*. "In elevating our species, we should not lower the status of other highly intelligent species." *Nonhuman Rights Project, Inc, on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring).

It is time for Colorado common law to evolve. Having committed no wrong warranting the loss of their liberty, Missy, Kimba, Lucky, LouLou, and Jambo should be allowed to invoke the protections of the Great Writ so they can challenge their inherently harmful confinement.[2]

STATEMENT OF THE CASE

The Petition alleges that Missy, Kimba, Lucky, LouLou, and Jambo are being unlawfully confined at the Cheyenne Mountain Zoo in violation of their common law right to bodily liberty protected by habeas corpus, entitling them to release to a GFAS-accredited elephant sanctuary. (CF, 000017-18).

NhRP filed the Petition on June 29, 2023. (CF, 00001). On June 30, 2023, the District Court ordered the Zoo to address whether "the Petition sets out a prima facie case of entitlement to immediate release." (CF, 000379). The Zoo moved to dismiss

[2] The "moral judge" "embraces his professional life most fully when he is prepared to fight—and be criticized or reversed—in striving for justice." Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 131 (2004).

pursuant to C.R.C.P. Rules 12(b)(1) and 12(b)(5). (CF, 000395). After briefing (CF, 000422, 000467, 000477, 000506), the court granted the Zoo's motion to dismiss, ruling: "(a) Missy, Kimba, Lucky, LouLou, and Jambo, as nonhuman animals, lack standing to bring a habeas petition and (b) even if they had standing, they are not being unlawfully confined." (CF, 000532). The court ruled that because the elephants are not human, they not "persons" and thus do not have the right to bodily liberty protected by habeas corpus. (*Id*., 000517-518, 000530).

STATEMENT OF FACTS

Missy, Kimba, Lucky, LouLou, and Jambo are "autonomous and extraordinarily cognitively and socially complex beings, and they possess complex biological, psychological, and social needs that cannot be met at the Zoo." (*Id*., 000508-509). This is demonstrated "in substantial detail" by scientific declarations from seven of the world's most renowned experts on elephant cognition and behavior. (*Id*., 000509). (*See Petition*, CF, 000020).

A. Elephants are autonomous and extraordinarily cognitively complex beings.

Autonomy is self-determined behavior based on freedom of choice. (*Petition*, CF, 000026). As a psychological concept, autonomy implies the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively. (*Id*., 000026). As autonomous beings,

elephants "share numerous complex cognitive capacities with humans, including self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities." (*Order*, CF, 000509).

"Elephants possess the largest absolute brain of any land animal," with brains that "hold nearly as many cortical neurons (used to control executive functioning) as do human brains." (*Id*.). A large brain allows greater cognitive skill and behavioral flexibility. (*Petition*, CF, 000028).

Elephants "have extensive and long-lasting memories that are used to gather extensive social knowledge that accumulates with age." (*Order*, CF, 000509). They are highly social animals, using "vocalizations to share knowledge and information with others." (*Id*.). "Scientists have identified 47 different call types, as well as more than 300 gestures, signals, and postures to communicate information to their audience." (*Id*.). "Elephants use specific calls and gestures to discuss courses of action and make plans, and they have been observed engaging in highly coordinated group behavior in response to specific calls and gestures from other group members," including "cooperative problem-solving and empathic behaviors." (*Id*., 000510).

Empathy, an important component of autonomy, is only possible if one can adopt or imagine another's perspective and attribute emotions to the other individual.

(*Petition*, CF, 000042). Elephants frequently display empathy in the form of protection, comfort, and consolation. (*Id*., 000043). They actively assist "others who are injured or otherwise in difficulty," have an "understanding of death," and "exhibit group grieving behaviors." (*Order*, CF, 000510).

In short, "[e]lephants are extraordinary creatures, possessed of truly exceptional cognitive, social, and psychological capabilities." (*Id*., 000532).

B. Missy, Kimba, Lucky, LouLou, and Jambo suffer severe physical and psychological harms at the Cheyenne Mountain Zoo.

"Elephants cannot function normally in captivity." (*Id*., 000510). In the wild, elephants "travel tens of kilometers a day, and sometimes more than 100 kilometers, across diverse terrain with a variety of vegetation, in highly organized social groups." (*Id*.) "When deprived of exercise, a varied environment, and the social opportunities that the wild provides, they suffer from chronic frustration, boredom, and stress, resulting over time in physical disabilities, psychological disorders, and, often, brain damage." (*Id*.) "That frustration and stress can manifest in 'stereotypical' non-functional behavior, such as repetitive swaying and rocking," though such behaviors "tend to abate in zoo elephants that are transferred to elephant sanctuaries with much larger and more varied environments." (*Id*.) There is no scientific basis for arguing that captive and wild elephants are fundamentally different as they have the same biology and needs. (*Petition*, CF, 000509).

The Cheyenne Mountain Zoo, located on a "small parcel of land on a steep mountainside next to residential developments, lacks the extensive space and variety of environment that elephants need to flourish." (*Order*, CF, 000510).

Missy, Kimba, Lucky, LouLou, and Jambo "spend at least half of each day, if not more, in a noisy indoor barn subdivided into individual stalls, the floors of which are covered with a rubberized concrete surface that provides inadequate cushioning for their feet and joints." (*Id*., 000510-511). "This involuntary confinement is both physically and psychologically harmful," likely leading to "foot and joint damage as well as psychological damage from the noise and the frustration of prevented choice and movement." (*Id*., 000511).

"When allowed outside, the elephants are commonly unable to walk more than 100 yards in any direction." (*Id*.). "The outdoor exhibit has a total area of 0.83 acres." (*Id*.). The "vacation yard," only two acres in size, is available to the elephants for "only a few days a month," and there is "a walking path with an estimated distance of 0.23 miles." (*Id*.). "In this wholly unnatural environment, the elephants' behavioral repertoire is extremely limited and widely divergent from that of free-ranging elephants." (*Id*.). "Their lives lack variety, freedom of choice, and healthy social interaction," with their movements "controlled directly and exclusively by zoo

staff." (*Id*.). In addition, "the cold winter climate, unnatural to them, further limits their activities." (*Id*.).

"Dr. Jacobs, as well as a subsequent observer, witnessed several of the Zoo's elephants exhibiting stereotypical behavior in the form of rocking, swaying, and head bobbing[.]" (*Id*.). Such behavior, unseen in wild elephants, is a sign of brain damage and represents a coping strategy to mitigate the overwhelming effects of psychosocial stress. (*Petition*, CF, 000060-61). "The cause of their suffering is clear: their psychological and behavioral needs are not being met in the impoverished zoo environment." (*Supplemental Pleading*, CF, 000484) (quoting *Jacobs Supp. Decl.* at ¶7).

Because the Zoo deprives the elephants of "the space and variety of terrain that they need to roam, exercise, and live healthy elephant lives," they "would be better off in an accredited elephant sanctuary." (*Order*, CF, 000530).

ARGUMENT SUMMARY

C.R.C.P. 12(b)(5) ruling

A habeas petition establishing a prima facie case of unlawful confinement and entitlement to release cannot be dismissed without a hearing; instead, a writ of habeas corpus must issue. Grounded in expert scientific evidence, the Petition establishes that Missy, Kimba, Lucky, LouLou, and Jambo's confinement at the Zoo

violates their common law right to bodily liberty protected by habeas corpus by depriving them of the ability to exercise their autonomy and extraordinary cognitive complexity.

The District Court's sole basis for declining to find a prima facie case is that because the elephants are not human, they are not "persons" and thus lack the right to bodily liberty. The court justified limiting habeas corpus to humans because (1) by definition, the term "person" in the habeas statute, C.R.S. §13-45-102, cannot encompass elephants; (2) no on-point precedent supports a nonhuman animal's entitlement to habeas relief; (3) nonhuman animals are not members of the human species; and (4) there are floodgate concerns with extending habeas corpus to nonhuman animals.

The District Court ignored the evolutionary nature of the common law, which is not controlled by an archaic past but evolves to conform with justice. The common-law writ of habeas corpus has long been invoked to challenge the unjust confinement of individuals with few or no rights (e.g., enslaved persons, women, and children).

Consistent with the Great Writ's history, the District Court needed only to assume, without deciding, that the elephants could possess the right to bodily liberty for purposes of issuing the writ. Recognition of Missy, Kimba, Lucky, LouLou, and

Jambo's right to bodily liberty is supported by compelling considerations: science, evolving societal norms, and fundamental common law principles of justice, liberty, and equality. Instead, the court deflected its responsibility to change archaic common law onto the legislature.

C.R.C.P. 12(b)(1) ruling

All district courts have subject-matter jurisdiction to decide habeas corpus cases. NhRP's compliance with the procedural requirements in C.R.S §13-45-102 was sufficient to invoke the District Court's jurisdiction. The court concluded it lacked subject-matter jurisdiction, reasoning the elephants lack standing in the first instance because they are not "persons." But subject-matter jurisdiction was not contingent upon Missy, Kimba, Lucky, LouLou, and Jambo's personhood status. Nothing in the Habeas Corpus Act limits a district court's jurisdiction to hear habeas cases, and the Great Writ has long been invoked on behalf of individuals with few or no rights.

The District Court suggested that even if the elephants are the proper subjects of a habeas petition, NhRP is not the proper representative because NhRP lacks a "significant relationship" with the elephants. Section 13-45-102—providing that a habeas petition may be signed "by the party or some person on his behalf"—contains no language requiring a "significant relationship." The court's position is contrary

to the text of the habeas procedural statute and the fundamental purpose and history of the Great Writ.

ARGUMENT

I. The Petition makes a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are entitled to release from the Cheyenne Mountain Zoo.

A. Standard of review

C.R.C.P. 12(b)(5) motions are disfavored and review is de novo. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). Upon filing, the court "shall issue a writ unless the petition or supporting documents indicate that no relief is available." *People v. Calyer*, 736 P.2d 1204, 1207 (Colo. 1987). A habeas petition establishing a prima facie case of unlawful confinement and entitlement to release cannot be dismissed without a hearing. *Fields v. Suthers*, 984 P.2d 1167, 1169 (Colo. 1999). "A petitioner makes a prima facie showing by producing evidence that, when considered in a light most favorable to the petitioner and when all reasonable inferences therefrom are drawn in the petitioner's favor, would permit the court to find that the petitioner is entitled to release." *Cardiel v. Brittian*, 833 P.2d 748, 752 (Colo. 1992).

The District Court ruled there was no prima facie showing the elephants are unlawfully confined and entitled to immediate release. (CF, 000517). The court's

lone reason being that because they are not human, the elephants lack "the common law right to bodily liberty protected by habeas corpus." (CF, 000530).[3]

B. The District Court erred in concluding that the elephants lack the common law right to bodily liberty protected by habeas corpus.

1. The opinions of Judge Wilson, Judge Rivera, and Judge Fahey of the New York Court of Appeals provide powerful guidance.

"Virtually every issue raised by this case is an issue of first impression in Colorado." (*Id*., 000513). The District Court relied on non-binding authorities denying habeas relief to nonhuman animals, though acknowledged that "several judges have expressed support for NHRP's cause." (*Id*., 000516). The latter includes three judges on New York's highest court: now Chief Judge Rowan Wilson, who found habeas corpus was available for an elephant to challenge her unjust confinement at a zoo; Judge Jenny Rivera, who found habeas relief should be granted to that elephant; and Judge Eugene Fahey, who urged courts to take seriously the notion that the writ is available to autonomous nonhuman animals like chimpanzees. *Breheny*, 38 N.Y.3d at 577-626 (Wilson, J., dissenting); *id*. at 626-42 (Rivera, J., dissenting); *Tommy*, 31 N.Y.3d at 1055-59 (Fahey, J., concurring).

[3] The District Court addressed the right to bodily liberty, the history and scope of habeas corpus, and legal personhood under the heading of standing, but because these substantive issues concern the merits, they are addressed in this section.

This Court should favor the opinions of these judges over contrary authorities because they are "predicated upon sounder logic, and in harmony with higher considerations of justice." *People, to Use of Tritch v. Cramer*, 15 Colo. 155, 161-62 (1890) (finding a dissenting opinion the more persuasive); *Stubert v. Cnty. Court for Jefferson Cnty.*, 163 Colo. 535, 547 (1967) (finding a dissent "better reasoned and its logic more convincing than the majority opinion").

The District Court believed "the overwhelming weight of legal precedent is against the NHRP." (CF, 000516). However, "[t]he weight of authority depends upon the better reasoning, and not upon the number of opinions." *Rupert v. People*, 20 Colo. 424, 436 (1894). "[S]ound reasoning, based upon complete investigation," is what "gives weight to judicial opinions." *Id*.

The court's cited "legal precedent"—cases denying habeas relief to nonhuman animals—should be understood in the context of the entrenched status quo, in which "[f]or four thousand years, a thick and impenetrable legal wall has separated all human[s] from all nonhuman animals." STEVEN WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 4 (2000). Ignored by judges, nonhuman animals have been treated as "legal things." *Id*. However, as the opinions of Judges Wilson, Rivera, and Fahey demonstrate, the legal wall's "intellectual foundations are so unprincipled and arbitrary, so unfair and unjust, that it is crumbling." *Id*. at 5.

2. Habeas corpus is a common-law writ that can be used to challenge unjust confinements in novel situations.

It is "incontestable that the common-law writ of habeas corpus has played an extraordinary role in the legal history of the English-speaking world." (*Order*, CF, 000522). Reverently called the Great Writ, habeas corpus is "'the greatest of all writs'" and "'the precious safeguard of personal liberty.'" *Geer v. Alaniz*, 331 P.2d 260, 261 (Colo. 1958) (citations omitted). Habeas corpus is "'a writ antecedent to statute, . . . throwing its root deep into the genius of our common law.'" *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (citation omitted). "'[T]here is no higher duty than to maintain it unimpaired.'" *Geer*, 331 P.2d at 261 (citation omitted).

The history of the Great Writ is "inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia*, 372 U.S. 391, 401-02 (1963), *overruled on other grounds*, 433 U.S. 72 (1977). It is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Peyton v. Rowe*, 391 U.S. 54, 66 (1968).

"'[O]pen-ended relief accords with the essential purpose of the writ,'" whose very nature "'demands that it be administered with the initiative and flexibility to

insure that miscarriages of justice within its reach are surfaced and corrected.'" *Horton v. Suthers*, 43 P.3d 611, 616 (Colo. 2002) (citation omitted). *See Harris v. Nelson*, 394 U.S. 286, 291 (1969) (the scope and flexibility of habeas corpus is its "capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes").

Enlightened judges have long used habeas corpus "to nudge advances in the law." *Breheny*, 38 N.Y.3d at 589 (Wilson, J., dissenting). *See generally id*. at 588-602 (discussing the history and use of habeas corpus). "Most fundamentally, the writ was used to grant freedom to slaves, who were considered chattel with no legal rights or existence. . . . Similarly, the writ was used to grant freedom to wives and children, who, though not chattel, had few or no legal rights and legally were under the dominion of husbands and fathers." *Id*. at 588-89. The Great Writ's history "demonstrates that courts have used and should use it to enhance liberty when a captivity is unjust, even when the captor has statutory or common law rights authorizing such captivities in general." *Id*. at 580.[4]

[4] For instance, in *Somerset v. Stewart*, 1 Lofft. 1, 19 (K.B. 1772) Lord Mansfield famously ordered an enslaved Black man freed because "[t]he state of slavery is . . . so odious, that nothing can be suffered to support it" under the common law. *Somerset* "stands as an example of just how powerful the common law writ of habeas corpus could be, not only in protecting—but also expanding—liberty." AMANDA TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 27 (2021).

It is "a proper judicial use of the writ to employ it to challenge conventional laws and norms that have become outmoded or recognized to be of dubious or contested ethical soundness." *Id*. at 602. The District Court's refusal to employ the writ to challenge Missy, Kimba, Lucky, LouLou, and Jambo's unjust confinement devalues the Great Writ's history and purpose.

3. The common law—not statutes—determines the substantive scope of habeas corpus.

The District Court's personhood conclusion is rooted in the erroneous notion that the Great Writ's substantive scope is limited by statute. Despite acknowledging the Great Writ's venerable history and its "broad uses . . . in colonial times and before," the District Court viewed habeas corpus in Colorado as "a creature of statute." (CF, 000523). It believed the habeas corpus statute, C.R.S. §13-45-102, dictates the scope of the right of habeas corpus and limits it to humans. These assumptions are wrong.

First, Colorado habeas corpus is not a creature of statute. This Court has long made clear that the habeas statutes are merely procedural, "delineat[ing] the right which may be enforced with the Great Writ of Habeas Corpus, and the procedure which is to be followed." *Ryan v. Cronin*, 553 P.2d 754, 755 (Colo. 1976). While statutory provisions *delineate* (i.e., describe) the right of habeas corpus and the *procedures* to be followed, that right is *enforced* under the common law by the Great

Writ of Habeas Corpus.[5] *See Leonhart v. Dist. Court of Thirteenth Judicial Dist. In & For Sedgwick Cnty.*, 329 P.2d 781, 783 (Colo. 1958) ("Even under the Rules of Civil Procedure the substantive aspects of remedial writs [including habeas corpus] are preserved[.]").[6]

Second, statutes cannot curtail the substantive scope of the Great Writ. The District Court's view that the legislature may do so is contrary to Colorado Constitution Article II, §21, which prohibits the Great Writ's suspension except in cases of rebellion or invasion. *People ex rel. Wyse v. Dist. Court (Twentieth Judicial Dist.)*, 503 P.2d 154, 156 (Colo. 1972). Only "the procedural mechanism for its exercise may change." *Id*. The "procedures set out" in the Habeas Corpus Act "implement"—not determine—"the constitutional right to seek a writ of habeas corpus." *Jones v. Williams*, 2019 CO 61, ¶18. Who may avail themselves of the Great Writ's protections is inherently a common law determination, made by the courts.

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[5] The phrase "habeas corpus" refers to "the common-law writ of habeas corpus Ad subjiciendum, known as the 'Great Writ.'" *Stone v. Powell*, 428 U.S. 465, 474 n.6 (1976)

[6] *See also In re People ex rel. B.C.*, 981 P.2d 145, 149 n.4 (Colo. 1999) (As a general principle, "the rules of civil procedure are procedural and do not attempt 'to abridge, enlarge, nor modify the substantive rights of any litigants.'") (citation omitted).

Even the *Breheny* majority acknowledged that "the courts—not the legislature—ultimately define the scope of the common-law writ of habeas corpus." 38 N.Y.3d at 576-77 (citations omitted). *See People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875) ("This writ cannot be abrogated, or its efficiency curtailed, by legislative action.").

Affirmance of the District Court's decision would render habeas corpus a mere statutory remedy divorced from its celebrated common law history—and thereby strip the judiciary of authority to decide who may avail themselves of the Great Writ. Ultimately, "it is for this Court to decide the contours of the writ based on the qualities of the entity held in captivity and the relief sought," for "the common law is our bailiwick." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting).

4. Legal personhood is not limited to humans.

This Court should reject the District Court's conclusion that Missy, Kimba, Lucky, LouLou, and Jambo are not "persons" (and thus lack the right to bodily liberty) under either Colorado's habeas statute or the common law. (CF, 000518, 000524).

a. Whether the elephants may avail themselves of the Great Writ's protections is a substantive normative question about whether they have the right to bodily liberty.

Most fundamentally, the District Court erred in its approach to the issue of whether the elephants may avail themselves of habeas corpus. The court treated it as a definitional question regarding legal personhood, rather than a substantive normative question to be decided under common law principles—including fundamental principles of justice, liberty, and equality. (*See Petition*, CF, 000069-100). "[T]o whom to grant what rights is a normative determination, one that changes (and has changed) over time." *Breheny*, 38 N.Y.3d at 588 (Wilson, J., dissenting).

This Court must not repeat the District Court's error by formalistically asking whether the elephants fit the definition of "person." The question is whether they have a liberty interest that habeas corpus must protect, which is "not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Tommy*, 31 N.Y.3d. at 1058 (Fahey, J., concurring). As Judge Fahey explained in NhRP's chimpanzee case:

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here.

Id. at 1057.

The same approach applies here. "Whether autonomous, nonhuman animals have rights that ought to be 'recognized by law' is *precisely* the question we are called upon to answer in this appeal." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting).

b. The elephants are "persons" for purposes of habeas corpus.

A "person" is the consequence of being a rightsholder; it is a term that attaches to any individual or entity possessing (or capable of possessing) a legal right. A leading jurisprudential scholar explained, "[a] person is any being whom the law regards as capable of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not." *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).[7] "All that is necessary for the existence of a person is that the lawmaker, be he legislator, judge, or jurist, or even the public at large, should decide to treat it as a subject of rights or other legal relations." F.H. Lawson, *The Creative Use of Legal Concepts*, 32 N.Y.U. L. REV. 909, 915 (1957). *See* IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("The significant fortune of legal personality is the capacity for rights."); Richard Tur, *The*

[7] Black's editor-in-chief explained that quotations from leading scholars "are more than merely illustrative: they are substantive. With each quotation, I have tried to provide the seminal remark—the *locus classicus*—for an understanding of the term." PREFACE, BLACK'S LAW DICTIONARY (11th ed. 2019).

"Person" in Law, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 121-22 (1987) ("[L]egal personality can be given to just about anything. . . . It is an empty slot that can be filled by anything that can have rights or duties.").[8]

Although "person" can refer to humans, the term is not limited to humans. There is even "no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 39 (2d ed. 1963). The same is true for nonhuman animals: "[A]nimals may conceivably be legal persons. . . .[T]here may have been, or indeed, may still be, systems of Law in which animals have legal rights." *Id.* at 42-43. "[T]he law can recognize an autonomous animal's right to judicial consideration of their claim to be released from an unjust captivity." *Breheny*, 38 N.Y.3d at 631 (Rivera, J., dissenting).

Because "persons are the subjects of rights or duties, if animals have legal rights, then they are legal persons." Matthew Liebman, *Animal Plaintiffs*, 108 MINN.

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[8] Being a "person" for one purpose does not entail being a "person" for all other purposes (e.g., possessing the right to bodily liberty does not entail having the right to vote). *See Byrn v. New York City Health & Hosps. Corp*, 31 N.Y.2d. 194, 200 (1972) (explaining that while unborn children have been "recognized as acquiring rights or interests in narrow legal categories," they have "never been recognized as persons in the law in the whole sense"); 1 ENGLISH PRIVATE LAW § 3.24, 146 (Peter Birks ed. 2000) ("A human being or entity . . . capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person *with that particular capacity*," though not necessarily "a person *with an unlimited set of capacities*.").

L. REV. 1707, 1756 (2024). The Petition demonstrates that the fundamental common law principles of justice, liberty, and equality—when applied to the expert scientific evidence—compel the recognition of the elephants' right to bodily liberty. (CF, 000069-100). This recognition necessarily entails that Missy, Kimba, Lucky, LouLou, and Jambo are "persons" for purposes of habeas corpus.

c. The scope of the undefined term "person" in Colorado's habeas statute is not a matter of statutory interpretation.

Section 13-45-102 provides that "any person" confined for non-criminal matters may petition for a writ of habeas corpus. Significantly, "person" is undefined in the procedural statute, which is consistent with the fact that the common-law writ's substantive scope is determined by the courts—not the legislature. *See Breheny*, 38 N.Y.3d at 582 (Wilson, J., dissenting) (undefined term "person" in New York's similar habeas statute "was meant to have no substantive component," and "is irrelevant to whether the writ can extend beyond humans"); *id*. at 633 (Rivera, J., dissenting) ("While CPLR article 70 sets forth the *procedure* to seek habeas relief, it does not create the right to bodily liberty nor determine who may seek such relief.").

Rather than undertake a common law analysis to determine the scope of habeas corpus, the District Court applied Colorado's general definitional provision, C.R.S. §2-4-401(8). It concluded the definition of "person" when used in statutes is

limited to "human beings" and "legal entities created by human beings." (CF, 000518). The court erred in two ways: (1) it should not have applied the general definitional provision at all, and (2) its definitional analysis is wrong.

First, Colorado's general definitional provision "appl[ies] to every statute, *unless the context otherwise requires*." C.R.S. §2-4-401 (emphasis added). The "context otherwise requires" in this case. As discussed, the substantive scope of the Great Writ cannot be curtailed by legislation, not without effecting an unconstitutional suspension. By construing "person" in §2-4-401(8) to definitionally exclude elephants from obtaining habeas relief, the District Court impermissibly placed a *statutory limitation* on the Great Writ's substantive scope. Courts must "avoid a situation where petitions are discouraged to the point where it may be said that, in effect, the writ of habeas corpus has been unconstitutionally suspended." *Williams v. Dist. Court of Eighth Judicial Dist. (Larimer Cnty.)*, 417 P.2d 496, 501 (Colo. 1966).

Second, "person" can plausibly encompass elephants. Section 2-4-401(8) defines "person" to mean, among other things, "any individual." "Individual" is not further defined. The District Court erroneously assumed "individual" is limited to humans, forgetting "words frequently have more than one ordinary meaning." *People v. Opana*, 2017 CO 56, ¶12.

The ordinary meaning of "individual" is not limited to humans; it can also include nonhuman animals. One definition of "individual" is "organism," a term that indisputably encompasses nonhuman animals. *See Burton v. Colorado Access*, 2018 CO 11, ¶29 (citing Webster's New College Dictionary, defining "individual" as "organism"); Dictionary.com, https://bit.ly/3HnUbrv (defining "organism" as "a form of life considered as an entity," including "an animal"). There are numerous examples in common parlance of "individual" being used to refer to nonhuman animals.[9] Even the Zoo refers to nonhuman animals – including elephants – as "individuals."[10] Accordingly, the meaning of "any individual," and thus "person," plausibly includes elephants.

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[9] *E.g.*, Michael Pardo, *Opinion: The elephants at Cheyenne Mountain Zoo deserve more than an acre*, The Denver Post (Nov. 22, 2023), https://bit.ly/49pWZ3A (referring to elephants observed in the wild as "individuals"); Charles Siebert, *The Animal Self*, N.Y. TIMES (Jan. 22, 2006), https://bit.ly/3OSSCFY (referring to various nonhuman animals as "individuals"); Merriam-Webster Online Dictionary, https://bit.ly/49kUxLE (Example of *individual* in a sentence: "The markings on tigers are unique to each *individual*.").

[10] *E.g.*, *Cheyenne Mountain Zoo Responds to Malicious Lawsuit* (June 29, 2023), https://bit.ly/48rBuhw (referring to elephants as "individuals"); *Cheyenne Mountain Zoo Shares Tragic Loss of Mila, 2-Year-Old Amur Tiger* (Aug 29, 2023), https://bit.ly/49Fykbz (referring to Mila, a tiger, as a "beloved individual").

Notwithstanding this plausible inclusion, the salient point is the District Court should *not* have engaged in a definitional analysis at all.[11] Whether Missy, Kimba, Lucky, LouLou, and Jambo are "persons" for purposes of habeas corpus—that is, whether they have the right to bodily liberty—is inherently a substantive normative question, to be decided under the common law.

d. Given the evolutionary nature of the common law, the lack of on-point precedent is no reason to limit the Great Writ's protections to humans.

The District Court limited habeas corpus to humans under the common law because no "English or American court . . . has found a nonhuman animal entitled to habeas relief." (CF, 000524). But the "argument—'this has never been done before'—is an argument against all progress, one that flies in the face of legal history." *Breheny*, 38 N.Y.3d at 584 (Wilson, J., dissenting). "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015). Trapping the Great Writ in the

[11] *Cf. People v. Jones*, 2020 CO 45, ¶57 (general definitional provision "does not aid our interpretation of the term 'person' as it is used in the child abuse statute," regarding whether "person" includes an unborn fetus).

archaic past is antithetical to its revered history and the common law's evolutionary nature.[12]

The common law is not an anachronism. It must evolve "to comport with changing social attitudes as well as to avoid injustice." *Bertrand v. Bd. of Cnty. Comm'rs of Park Cnty.*, 872 P.2d 223, 226 n. 5 (Colo. 1994). Then Chief Justice Albert Frantz explained:

> The common law of America is evolutionary; it is not static and immutable. It is in constant growth, going through mutations in adapting itself to changing conditions and in improving and refining doctrine. By its very nature, it seeks perfection in the achievement of justice.

Tesone, 152 Colo. at 602-03 (Frantz, C.J., dissenting); *E.A. Stephens & Co. v. Albers*, 81 Colo. 488, 496 (1927) (Having "neither statute nor applicable common-law rule governing the case, we must so apply general principles in the light of custom, existing facts, and common knowledge, that justice will be done.").[13]

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[12] "[T]he common law would have atrophied hundreds of years ago if it had continued to deny relief in cases of first impression." *Falzone v. Busch*, 45 N.J. 559, 566 (1965). *See Berger v. Weber*, 411 Mich. 1, 12 (1981) ("Lack of precedent cannot absolve a common-law court from responsibility for adjudicating each claim . . . on its own merits."); *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 376 (1968) ("absence of precedent is a feeble argument" in common law case).

[13] *See City of Denver v. Dunsmore*, 3 P. 705, 711 (Colo. 1884) ("That [the announced rule] ought to be the law is evident from natural reason and the plainest principles of justice.").

Habeas corpus "is a common-law writ and, although different in the respect that the legislature cannot alter its scope, its judicial implementation mirrors the path generally used by courts to adapt the common law and conform it to present times." *Breheny*, 38 N.Y.3d at 613 (Wilson, J., dissenting). Throughout history, courts have flexibly used the Great Writ "to address myriad situations in which liberty was restrained." *Id*. *See* TYLER, *supra* note 4, at 114 ("[T]he judicially created common law writ has long been celebrated for its adaptability and potential to evolve.").

The question on appeal is not governed by on-point precedent, making it novel, but "novel questions merely present opportunities to develop the law." *Breheny*, 38 N.Y.3d at 629 (Rivera, J., dissenting). The issue's novelty "does not doom it to failure":

> [A] novel habeas case freed an enslaved person; a novel habeas case removed a woman from the subjugation of her husband; a novel habeas case removed a child from her father's presumptive dominion and transferred her to the custody of another. More broadly, novel common-law cases—of which habeas is a subset—have advanced the law in countless areas.

Id. at 584 (Wilson, J., dissenting). *See also id*. at 613 ("[T]he law inevitably changes as [society's] values change. Indeed, *to change* is a function of the law: 'Law must be stable, and yet it cannot stand still.'") (citation omitted).[14]

[14] *E.g.*, *Bertrand*, 872 P.2d at 226 ("this court decided a trilogy of cases that fundamentally altered the common law of Colorado regarding the doctrine of

Citing no authority, the District Court erroneously claimed it "lacks the authority to create new rights out of thin air." (CF, 000526). NhRP does not seek "new rights" for Missy, Kimba, Lucky, LouLou, and Jambo, but judicial recognition of their common law right to bodily liberty protected by habeas corpus, a right that *already exists* (for humans). Common law courts may be *compelled* to expand existing rights to individuals who previously did not possess them.[15]

Citing William Blackstone, the District Court irrelevantly stated that "'[u]nder the English common law, only human beings and legal entities created by human beings were considered 'persons' capable of holding and asserting legal rights.'" (CF, 000524) (citation omitted). That nonhuman animals during Blackstone's era had no rights—and thus were not "persons"—does not mean elephants today cannot possess the right to bodily liberty.[16] As then Chief Justice Frantz explained, "[c]ourts should not be averse to molding common law principles to meet the dictates of

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sovereign immunity," prospectively abrogating the doctrine after finding it "unjust and inequitable").

[15] Moreover, the "genius of the common law" lies "in its ability to enunciate rights and to provide remedies for wrongs where previously none had been declared." *Rozell v. Rozell*, 281 N.Y. 106, 112 (1939).

[16] During Blackstone's era, "courts of law" permitted "a husband to restrain a wife of her liberty, in case of any gross misbehaviour." I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 433 (1765).

experience and observation." *Tesone*, 152 Colo. at 603 (Frantz, C.J., dissenting). "[I]t is a sad commentary on the common law if it . . . cannot profit by the experiences and observations of the past and that thus the present shall always and irrevocably be controlled by the past." *Id.*[17]

"The correct approach is not to say, 'this has never been done' and then quit, but to ask, 'should this now be done even though it hasn't before, and why?'" *Breheny*, 38 N.Y.3d at 584 (Wilson, J., dissenting).

e. Limiting the Great Writ's protections to humans—based solely on species membership—is arbitrary and irrational.

In answering the question of why the Great Writ's protections must be limited to humans, the District Court stated "[o]ur legal system is a human-made system" that does not afford rights to other species. (CF, 000526). The court acknowledged this conclusion may be "speciesist," but glibly justified it as "reality." (*Id*.). A common law court—especially this Court—cannot accept this "reality," which is rooted in human exceptionalism, since all it does is perpetuate an unjust status quo.

The District Court recognized the autonomous nature of elephants, and as Colorado courts have made clear, autonomy is a supreme and cherished common

[17] *See also Montgomery v. Stephan*, 359 Mich. 33, 38 (1960) ("Our oath is to do justice, not to perpetuate error").

law value, which lies at the heart of the right to bodily liberty. "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law.'" *People v. Nelson*, 172 Colo. 456, 459 (1970) (citation omitted). *See People v. Medina*, 705 P.2d 961, 968 (Colo. 1985) (citation omitted) (common law recognizes "an individual's interest in personal autonomy and bodily integrity—that is, the right of a person to participate in and make decisions about his own body.").[18]

Habeas corpus is "deeply rooted in our cherished ideas of individual autonomy and free choice." *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 753 (N.Y. Sup. Ct. 2015) (citations omitted). It "serves to protect against unjust captivity and to safeguard the right to bodily liberty," and "those protections are not singular possessions of human beings." *Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting). To exclude elephants from seeking habeas relief despite

[18] *See also Thor v. Superior Court*, 5 Cal.4th 725, 734-35 (1993) (noting "'the long-standing importance in our Anglo–American legal tradition of personal autonomy and the right of self-determination'") (citation omitted); *Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) ("In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.").

recognizing their autonomy is to hold that autonomy does not matter. It is to hold that the fundamental common law principles of justice, liberty, and equality, which command the protection of autonomy, do not matter either. "'Reason is the soul of the law,'" *Rains v. Rains*, 46 P.2d 740, 742 (Colo. 1935) (citation omitted), but the exclusion of autonomous beings from the protections of the Great Writ, based solely on species membership, exemplifies arbitrariness and irrationality.[19]

To argue that species membership matters—simply by asserting that it does—is "question begging in its purest form." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting). Preferring "the comforting incoherence of its circular logic," the District Court's argument "boils down to a claim that animals do not have the right to seek habeas corpus because they are not human beings and that human beings have such a right because they are not animals. . . . And glaringly absent is any explanation of why some kinds of animals—i.e., humans—may seek habeas relief, while others—e.g., elephants—may not." *Id*.[20]

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[19] *See Tommy*, 31 N.Y.3d at 1057 (Fahey, J. concurring) (criticizing "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species").

[20] *See* KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 34 (2019) ("[I]t is arbitrary to utilize species membership alone as a condition of personhood, and it fails to satisfy the basic requirement of justice that we treat like

Adopting the *Breheny* majority's non-sequitur, the District Court wrote: "[T]he great writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law." (CF, 000524) (quoting 38 N.Y.3d at 571). But this is "nothing more than a tautological evasion." 38 N.Y.3d at 633 (Rivera, J., dissenting). Habeas corpus does and should protect the right to liberty of humans, but this is no reason to limit the writ's protections to members of our species. The Great Writ "has always been used to challenge confinement at the boundaries of evolving social norms, even by petitioners with the legal status of chattel (enslaved persons) or no legal identity or capacity to sue on their own (wives and children)." *Id.* at 617-18 (Wilson, J., dissenting).

The District Court irrationally claimed nothing in the Great Writ's history supports extending its protections beyond humans, despite acknowledging the writ's "great flexibility and imagination" to remedy "unjust confinements" in the past. (CF, 000524). This case seeks to remedy an unjust confinement, as in habeas cases involving enslaved humans, wives, and children.

Why should Missy, Kimba, Lucky, LouLou, and Jambo be treated differently for purposes of habeas corpus?

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cases alike. It picks out a single characteristic as one that confers rights without providing any reason for thinking it has any relevance to rights.").

To answer, "they are not human," assumes the validity of human exceptionalism: that there are categorical, fundamental differences between elephants and humans that could justify such profound discrepancies under the law. "Prior to the twentieth century, human understanding of animal intelligence was minimal," with humans regarding "themselves as 'unique in their sociality, individuality, and intelligence.'" *Breheny*, 38 N.Y.3d at 606 (Wilson, J., dissenting) (citation omitted). However, "researchers began to discredit the notion of human exceptionalism" as scientific knowledge progressed in the twentieth century. *Id*.

"Whether an elephant could have petitioned for habeas corpus in the 18th century is a different question from whether an elephant can do so today because we know much more about elephant cognition, social organization, behaviors and needs than we did in past centuries, and our laws and norms have changed in response to our improved knowledge of animals." *Id*. at 603. "[T]he contrast between what we now know and the paucity of information in earlier times must inform our analysis." *Id*. at 607. *See Tesone*, 152 Colo. at 603 (Frantz, C.J., dissenting) (one of the common law's "oldest maxims" is that "where the reason of the rule ceased the rule also ceased," and where "a particular rule had never been founded upon reason," "that

rule likewise ceased") (cleaned up). *Accord Rains*, 46 P.2d at 742 ("'[W]hen the reason of any particular law ceases, so does the law itself.'") (citation omitted).[21]

Today we know "elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs." (*Order*, CF, p. 000530). Accordingly, for this Court to exclude Missy, Kimba, Lucky, LouLou, and Jambo from invoking the protections of the Great Writ—solely because of their species membership—is arbitrary and irrational. Such exclusion would affirm human exceptionalism, undermining the fundamental values and principles of justice, liberty, and equality that courts are duty-bound to uphold.

f. Floodgate concerns do not justify limiting the Great Writ's protections to humans.

Citing the *Breheny* majority, the District Court also claimed recognizing the elephants' right to bodily liberty "would have an enormous destabilizing impact on modern society," including:

> [C]all[ing] into question the very premises underlying pet ownership, the use of service animals, and the enlistment of animals in other forms of work, not to mention the consumption of animals for food, their use in agriculture and in medical research, and their legal status as property. If an elephant today, why not a dog, a pig, a cow, or a chicken tomorrow?

[21] *See also Wilson v. People*, 103 Colo. 150, 162 (1938) ("'I profess no veneration for the rubbish of antiquity, resting on foundations inapplicable to the present state of society.'") (citation omitted).

(CF, 000525; cleaned up). As Judge Wilson noted, "[t]hese scenarios are so facially preposterous that they hardly deserve a response." *Breheny*, 38 N.Y.3d at 620 (Wilson, J., dissenting).

These imagined scenarios wrongly assume ruling in the elephants' favor would require or necessarily result in rights for other nonhuman animals. This case solely concerns the five elephants at the Cheyenne Mountain Zoo, whose autonomy and extraordinary cognitive complexity have been proven by expert scientific evidence; it does *not* concern members of other species. Ruling in the elephants' favor would represent a historic (and much celebrated) evolution in the common law, but the hyperbolic claim that it "would quite likely have the effect of upending much of our legal system" is simply untrue, asserted without any rational support. (CF, 000525).[22] *See Breheny*, 38 N.Y.3d at 621 (Wilson, J., dissenting) ("Whatever rights and interests Happy [the elephant] may have do not tell us anything about the rights my dog has.").

[22] Courts in other countries have recognized the rights of nonhuman animals without "upending" their legal systems. Notable examples include Argentina, where an imprisoned chimpanzee named Cecilia was granted habeas corpus relief; and Pakistan, where an imprisoned Asian elephant named Kaavan was ordered released to a sanctuary. (CF, 000084, 000086); *see generally* Macarena Franceschini, *Animal Personhood: The Quest for Recognition*, 17 ANIMAL & NAT. RESOURCE L. REV. 93, 123-24, 145 (2021) (discussing, *inter alia*, Cecilia's and Kaavan's cases).

"The common law, of which the Great Writ is a part, determines the scope incrementally, on a case-by-case basis." *Id*. at 623. Granting five elephants—"not the whole animal kingdom—the right to a full hearing on a writ of habeas corpus is about as incremental as one can get." *Id.* at 621. *See HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 890 (Colo. 2002) ("[T]he duty to exercise reasonable care should be defined on a case-by-case basis. . . . [O]ur holding that Ogin owed Rodriguez a common law duty of reasonable care is based entirely upon the particular facts and circumstances of this case.").

Misunderstanding the nature of habeas corpus, the District Court stated: "The great writ may be flexible, but '[t]hat flexibility . . . is not limitless.'" (CF, 000524; citation omitted). No one suggested otherwise. The "inherently case-by-case" nature of habeas corpus is such that each case acts "directly only on the particular petitioner seeking relief," as with cases liberating enslaved persons, women, and children. *Breheny*, 38 N.Y.3d at 602 (Wilson, J., dissenting). "[W]hether a being can invoke habeas is highly case-specific." *Id*. at 621. "Each subsequent case would define the contours of the common law, whatever the result—which is the enduring genius of the common law." *Id*. at 623.

Moreover, recognition of Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty could not possibly destabilize modern society, as their captivity

"serves no purpose upon which society depends." *Id*. at 641 n.8 (Rivera, J., dissenting). Elephants have not "evolved to dwell alongside humans"; they "exist wholly apart from human society, save for when human beings upset that natural order through their intervention." *Id*. at 640.

Lacking any rational foundation, floodgate concerns only distract from the injustice at hand.[23]

C. The Petition establishes a prima facie case that the Zoo violates the elephants' common law right to bodily liberty protected by habeas corpus.

A habeas petition may be dismissed without a hearing only if it fails to make a prima face case of unlawful confinement. *Fields*, 984 P.2d at 1169. Considered in the light most favorable to the elephants, the Petition makes a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are unlawfully confined at the Zoo and thus entitled to release. *See Cardiel*, 833 P.2d at 752 (articulating the prima facie standard).

[23] "But if *Sommersett's Case*, the *Lemmon Slave Case* or the cases involving women and children had produced a flood of habeas petitions freeing victims of unjust confinement, would history view them with disapproval?" *Breheny*, 38 N.Y.3d at 624 (Wilson, J., dissenting). "It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation.'" *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 133 (1983) (cleaned up).

Assuming they have the common law right to bodily liberty protected by habeas corpus, the Petition's factual allegations—grounded in expert evidence—establish that the confinement violates their right by depriving the elephants of "the space and variety of terrain that they need to roam, exercise, and live healthy elephant lives." (*Order*, CF, 000530; *see generally Petition* CF, 000063-69). Unable to flourish, they cannot meaningfully exercise their autonomy and extraordinary cognitive complexity, including the freedom to choose where to go, what to do, and with whom to be. They are suffering immensely and unnecessarily.[24]

Notably, the District Court recognized that "[a]s a matter of pure justice" based on the record at this stage, "elephants are *entitled* to be treated with the dignity befitting their species," which "cannot be done . . . if they are confined in zoos that lack the substantial acreage needed to allow them to flourish." (CF, 000532) (emphasis added). This is why the elephants "would be better off in an accredited elephant sanctuary." (*Id.*, 000530).

[24] It is the violation of the elephants' common law right to bodily liberty that renders their confinement unlawful. The question here is not whether the elephants' "detention violates some statute: historically, the Great Writ of habeas corpus was used to challenge detentions that violated no statutory right and were otherwise legal but, in a given case, unjust." *Breheny*, 38 N.Y.3d at 579 (Wilson, J., dissenting). NhRP's "core argument" in *Breheny*, as here, was that "Happy's confinement at the Zoo was a violation of her right to bodily liberty as an autonomous being, regardless of the care she was receiving." *Id*. at 637 (Rivera, J., dissenting).

The court's recognition of their dignity—including their *entitlement* to be treated with dignity—must be accorded legal significance; otherwise, it is nothing more than an empty reference. *See Breheny*, 38 N.Y.3d at 628 (Rivera, J., dissenting) ("We cannot elide the question of Happy's legal rights and the use of the writ by a nonhuman animal with empty references to her 'dignity' and 'intelligen[ce].' . . . [T]here is nothing dignified about her captivity.") (citation omitted). The concept of dignity has a normative function. "It is a form of respect that matters to a moral agent as a guide, even an imperative, for how we ought to act." Melanie Challenger, *Beginning with Dignity*, *in* ANIMAL DIGNITY: PHILOSOPHICAL REFLECTIONS ON NON-HUMAN EXISTENCE 6 (2023). In *Medina*, for example, this Court found that forcibly medicating a patient, solely to alleviate the risk of possible future injury, "would be *irreconcilable* with the personal dignity of the individual and would render the patient's interest in bodily integrity *nothing more than an illusion*." 705 P.2d at 974 (emphasis added).

1. The District Court did not need to recognize the elephants' right to bodily liberty for purposes of issuing the writ.

The District Court did not need to resolve the merits question of whether the elephants have the right to bodily liberty, since throughout history, writs of habeas corpus have been issued for individuals whose right to bodily liberty was previously unrecognized. (*See generally Petition* CF, 000067-69). "[T]he writ has long been

available to those whose humanity was never fully recognized by law," notwithstanding "our country's tortured history of oppression and subjugation based on race, gender, culture, national origin, and citizenship." *Breheny*, 38 N.Y.3d at 631 (Rivera, J., dissenting). Habeas corpus has been "invoked on behalf of chattel (enslaved persons) or persons with negligible rights and no independent legal existence (women and children)." *Id*. at 602 (Wilson, J., dissenting). History should "compel our acknowledgment of the availability of the writ to a nonhuman animal to challenge an alleged unjust confinement." *Id*. at 629 (Rivera, J., dissenting).

Courts have also issued the writ for nonhuman animals. Though constrained by precedent from granting relief, they were sympathetic to the claims of liberty.

In 2015, a historic habeas corpus order to show cause (functionally equivalent to the writ) was issued for two chimpanzees: "[g]iven the important questions raised," the trial court understood it did not need to "'make an initial judicial determination that [the chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.'" *Stanley*, 49 Misc.3d at 748 (citation omitted). At the merits hearing, Justice Barbara Jaffe asked: "Isn't it incumbent on the judiciary

to at least consider whether a class of beings might be granted a right or something short of the right under the habeas corpus law?"[25]

In 2018, the world's first habeas corpus order to show cause for an elephant (Happy) was issued. (*Petition*, CF, 000069). A trial court found NhRP's arguments "extremely persuasive" for transferring Happy from her zoo confinement to an elephant sanctuary. *The Nonhuman Rights Project v. Breheny*, No. 260441/19, 2020 WL 1670735 at *10 (N.Y. Sup. Ct. Feb. 18, 2020) ("*Breheny (Trial Court)*"). Stating it was "[r]egrettably" bound by precedent to deny relief, *id*, at *9, the court went out of its way to recognize that "Happy is more than just a legal thing," but an "intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." *Id*.

The District Court did not need to recognize the elephants' right to bodily liberty for purposes of issuing the writ; it needed only to assume, without deciding, that they *could* have this right. The court appeared to agree. Expressed in the language of personhood, the court asked whether the elephants have "made a *prima facie* case that they fall into the category of 'person[s]' who may utilize the habeas corpus statute"—not whether they do, ultimately, fall into that category. (CF,

[25] James McKinley Jr., *Arguing in Court Whether 2 Chimps Have the Right to 'Bodily Liberty'*, N.Y. TIMES (May 27, 2015), https://bit.ly/3umXQlO.

000517). *See Application for Water Rights of Well Augmentation Subdistrict of Cent. Colorado Water Conservancy Dist.*, 2019 CO 12, ¶22 ("prima facie case" simply means "'a party's obligation to produce sufficient evidence to move the proceeding on to the next stage'") (citation omitted).

2. Compelling considerations support recognition of the elephants' right to bodily liberty.

"At its core, this case is about whether society's norms have evolved such that elephants . . . should be able to file habeas petitions to challenge unjust confinements." *Breheny*, 38 N.Y.3d at 588 (Wilson, J., dissenting). "The idea of a habeas petition on behalf of an elephant would have seemed ludicrous" to seventeenth-century philosopher René Descartes, "who saw animals as inanimate, insentient objects." *Id*. at 609. But "[g]iven what we know today, it would be even more absurd to allow Descartes's views" to factor in this case since "human understanding of elephant cognition, social behavior, capabilities and needs demonstrates the absurdity of those ancient, uninformed views." *Id*.

The Petition demonstrates that recognition of Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty is supported by compelling considerations—including science and evolving societal norms, as well as fundamental common law principles of justice, liberty, and equality. (CF, 000069-92). Accordingly, the District

Court should have at least assumed, without deciding, that the elephants could have the right to bodily liberty for purposes of issuing the writ.

The court even acknowledged "their right to bodily liberty may be supported by the *Breheny* dissents." (CF, 000530). *See Breheny*, 38 N.Y.3d at 624 (Wilson, J., dissenting) ("Happy is entitled to a merits hearing on her habeas corpus petition"); *id*. at 629 (Rivera, J., dissenting) ("[A]n autonomous animal has a right to live free of an involuntary captivity imposed by humans, that serves no purpose other than to degrade life."). Therefore, the court was required to issue the writ. Its refusal to do so—solely because the elephants are not human—constitutes a "refusal to confront a manifest injustice." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

3. The duty to recognize the elephants' right to bodily liberty must not be deflected onto the legislature.

Stewardship of the common law is the responsibility of the judicial branch. Citing no authority, the District Court stated that because NhRP "seeks an expansion of existing legal rights," "its project is appropriately directed to the legislature, not this Court." (CF, 000516). This position not only ignores the evolutionary nature of the common law, but also the fact that common law courts—including this Court—have expanded existing legal rights without waiting for legislative action. *See*, *e.g., Medina*, 705 P.2d at 971 (expanding the qualified common law right to refuse antipsychotic medication to incompetent patients); *Towns v. Anderson*, 579 P.2d

1163, 1164 (Colo. 1978) (expanding the common law right to recover for negligently inflicted emotional distress to those who did not suffer any direct physical injury but where the distress resulted in serious physical manifestations); *Rudnicki v. Bianco*, 2021 CO 80, ¶48 (abandoning "common law rule that allows only parents to recover their injured, unemancipated minor child's pre-majority medical expenses," thus expanding the right to recover such expenses to either the child or their parents).[26]

It is the role and duty of courts to change archaic common law. Deflecting that responsibility onto the legislature is an abdication of judicial duty. *See Lovato v. Dist. Court (Tenth Judicial Dist.)*, 198 Colo. 419, 432 (1979) ("We do not, however, believe that in the absence of legislative action we are precluded from facing and resolving the legal issue of whether irretrievable loss of brain function can be used as a means of detecting the condition of death. . . . [W]e are not only entitled to resolve the question, but *have a duty to do so*. To act otherwise would be to close our eyes to the scientific and medical advances made world wide in the past two or three decades.") (emphasis added).[27]

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[26] *See also Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 509 (1968) (expanding the right to recover for loss of consortium to wives, thereby "terminating an unjust discrimination under New York law").

[27] *See Woods v. Lancet*, 303 N.Y. 349, 355 (1951) ("[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.").

In *Breheny*, Judge Wilson admonished the majority for deflecting the responsibility to change archaic common law onto the legislature:

> The judges . . . who issued writs of habeas corpus freeing enslaved persons, or liberating women and children from households run by abusive men, or ordering the return home of underage soldiers could have said, as the majority does here, 'that's a job for the legislature.' They could have said, 'existing law offers some protections, and we dare not do more.' They could have said, 'we can't be the first.' But they did not. None of those declamations is remotely consistent with our Court's history, role or duty.

38 N.Y.3d at 617 (Wilson, J., dissenting). *See also id*. at 634 (Rivera, J., dissenting) ("the fundamental right to be free . . . does not require legislative enactment").

Recognition of Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty does not depend on legislative action, and the District Court's deflection of responsibility to change archaic common law was an abdication of judicial duty.

II. The District Court had subject-matter jurisdiction.

A. Standard of review

The question of standing is reviewed de novo. *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004). "Standing represents a challenge to the court's subject matter jurisdiction." *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009).

The District Court granted the Zoo's C.R.C.P. 12(b)(1) motion, concluding it lacked subject-matter jurisdiction over the Petition because the elephants "lack standing to bring a habeas petition." (CF, 000532). It addressed the standing issue in

two parts: "First, have Missy, Kimba, Lucky, LouLou, and Jambo made a prima facie case that they fall into the category of 'person[s]' who may utilize the habeas corpus statute; that is, do they have standing 'in the first instance' to bring this action? Second, if they do, may the NHRP properly bring suit on their behalf as their 'next friend?'" (*Id*., 000517).

B. The District Court erred in its jurisdictional analysis.

"[A]ll district courts in this state have subject-matter jurisdiction to entertain and decide habeas corpus cases." *Horton*, 43 P.3d at 615. "[H]abeas corpus jurisdiction is broad when a habeas court is presented with a properly pleaded petition for the writ." *Id*. at 616.

C.R.S §13-45-102 states a habeas corpus petition "shall be in writing, signed by the party or some person on his behalf, setting forth the facts concerning his imprisonment and wherein the illegality of such imprisonment consists, and in whose custody he is detained." NhRP's compliance with these procedural requirements was sufficient to invoke the District Court's jurisdiction. *Cf*. *Jones v. Williams*, at ¶22 (steps taken by habeas petitioner, including filing in the district court and alleging the denial of parole consideration, were "sufficient to invoke the district court's jurisdiction").

Importantly, dismissal of a habeas petition for failing to make a prima facie showing of unlawful confinement "is not the same as dismissal for lack of jurisdiction." *Id.* at ¶21.

1. The District Court's subject-matter jurisdiction was not contingent upon Missy, Kimba, Lucky, LouLou, and Jambo's personhood status (i.e., whether they have "standing in the first instance").

The District Court's conclusion it lacked "subject-matter jurisdiction to hear the case," because the elephants are not "persons," wrongly assumed jurisdiction was contingent upon the elephants' personhood status. (CF, 000526).

Personhood is not—and cannot be—a jurisdictional requirement. While the legislature can make statutory requirements jurisdictional, "the legislature must make the limitation on the court's jurisdiction explicit," *and* "the legislature must also possess the authority to limit the court's jurisdiction." *Jones v. Williams*, at ¶17 (citations omitted). "In the Habeas Corpus Act, we find no language expressly or by necessary implication limiting the court's jurisdiction to hear habeas corpus cases," *id.* at ¶18 (citations omitted), and as discussed, the legislature lacks authority to limit the Great Writ's substantive scope. Therefore, the District Court had subject-matter jurisdiction over the Petition, regardless of the elephants' personhood status.

Habeas corpus has long been invoked on behalf of individuals with few or no rights (e.g., enslaved humans, women, and children). Subject-matter jurisdiction was never an issue in those cases. The same is true here:

> If an enslaved human being with no legal personhood, a Native American tribal leader whom the federal government argued could not be considered a person under law, a married woman who could be abused by her husband with impunity, a resident of Puerto Rico who is a United States citizen deprived of full rights because of Puerto Rico's colonial status, and an enemy combatant as defined by the federal government can all seek habeas corpus relief, so can an autonomous nonhuman animal.

Breheny, 38 N.Y.3d at 631 (Rivera, J., dissenting) (citations omitted).[28]

Whether the elephants "have standing 'in the first instance'" is thus irrelevant to the issue of the District Court's subject-matter jurisdiction. (CF, 000517). This erroneous framing was imported from *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn.App. 36, 41 (2019), where a Connecticut appeals court concluded NhRP lacked standing on behalf of three elephants because "the elephants, not being persons, lacked standing in the first instance."

[28] *See* PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 207-08 (2010) (Cases in England "suggest powerfully that neither free nor slave status, nor apparent place of birth, precluded using habeas corpus. . . . [W]hat modern law would call 'standing' was simply not an issue. [There was an] absence of concern about the legal nature of the detainee using habeas corpus.").

Commerford is in irreconcilable conflict with the Connecticut Supreme Court decision in *Jackson v. Bulloch*, 12 Conn. 38 (1837), where an enslaved person was freed through habeas corpus. As an enslaved person, Nancy Jackson had no legal personhood in the first instance.[29] Yet her status did not deprive the *Jackson* court of subject-matter jurisdiction, and it had no objection to James Mars, an abolitionist and former enslaved person, filing a habeas petition on her behalf.

The District Court incorrectly stated that, aside from the opinions of Judges Wilson, Rivera, and Fahey, "the position of all other courts" is that nonhuman animals "fall outside the category of 'person[s]' who have standing to utilize the habeas corpus statute." (CF, 000520, 000515-516) (citing NhRP's cases). Except for *Commerford*, none of the court's cited habeas cases found a lack of standing based on personhood status.[30] In one of them, a trial court explicitly found NhRP had standing on behalf of two chimpanzees, despite also concluding those chimpanzees

[29] Under Connecticut's Constitution, enslaved individuals were neither members of the "social compact" nor one of the "people" secured from unreasonable searches and seizures. *Jackson*, 12 Conn. at 42-43.

[30] Two of them did not even conclude nonhuman animals lacked personhood. (CF, 000516) (citing *Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (N.Y.App. Div. 2015) and *In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Vusmusi, On Habeas Corpus* (Fresno, CA, Sup. Ct. No. 22CRWR686796, Nov. 15, 2022)).

lacked personhood based on appellate precedent. *Stanley*, 49 Misc.3d at 756; *Breheny (Trial Court)*, 2020 WL 1670735 at *7 ("The NhRP has standing . . . on behalf of Happy," despite also concluding Happy is not a "person.").[31]

The District Court's citation to *Rowley v. City of New Bedford*, 99 Mass.App.Ct. 1104, 2020 WL 7690259 (2020) (unpublished) is also inapposite. (CF, 000520). *Rowley* affirmed the denial of a habeas petition brought on behalf of two elephants (Ruth and Emily) on the ground they are not "persons," but this conclusion was a decision *on the merits*, not on standing. *See id*. at *1 n.2 (although petitioner was engaged in the unauthorized practice of law, "we decline to dismiss the appeal on this basis, and instead reach the merits"). Even though the petitioner could not

[31] The court also cited four non-habeas cases (three federal, one state) where nonhuman animals were found to lack standing. (CF, 000520-521). These cases are irrelevant not only because they are not habeas matters, but also because none of their standing determinations implicate subject-matter jurisdiction. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) (nonhuman animals lack *statutory standing* though they may possess Article III standing; appropriate disposition is dismissal for failure to state a claim, not lack of subject-matter jurisdiction); *Lewis v. Burger King*, 344 Fed. Appx. 470, 472 (10th Cir. 2009) (service dog lacked standing under the ADA, resulting in dismissal for failure to state a claim); *Legal for Cloud v. Yolo Cnty.*, 2:18-cv-09542-JAK-MAA, 2018 WL 11462074, at *3 (C.D. Cal. Dec. 3, 2018) (relying on *Cetacean Cmty* and *Lewis*); *Justice by & through Mosiman v. Vercher*, 518 P.3d 131, n. 1 (Or. App. 2022) ("trial court had jurisdiction to enter the judgment" and "we have jurisdiction to decide the appeal").

litigate the case, the court ruled the relevant procedural statute "arguably does permit Rowley to file th[e] petition on Ruth and Emily's behalf." *Id*.

2. NhRP did not need to allege a "significant relationship" with the elephants to file the Petition under C.R.S §13-45-102.

The District Court suggested that even if the elephants were the proper subjects of a habeas petition, NhRP is not the proper party to represent them because NhRP lacks a "significant relationship" with the elephants. (CF, 000527-528). This suggestion must be rejected.

First and most fundamentally, C.R.S §13-45-102 allows a habeas petition to be signed "by the party or some person on his behalf" and contains no language imposing a "significant relationship" requirement. The District Court cited no Colorado authority for the proposition that the phrase "some person on his behalf" is modified by a "significant relationship" requirement, or that the procedural statute places any restriction on who may bring a habeas corpus petition on behalf of the confined individual. "Just as important as what the statute says is what the statute does not say." *Auman v. People*, 109 P.3d 647, 656 (Colo. 2005). "In assessing the plain language, the court should not read a statute to create an exception that the plain language does not suggest, warrant, or mandate." *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000).

In the absence of any qualifying or limiting language, the habeas statute cannot be construed to include a "significant relationship" requirement. *See Garcia v. People*, 2023 CO 41, ¶14 ("We do not add words to the legislature's chosen text."); *People v. Diaz*, 2015 CO 28, ¶15 ("'[I]n interpreting a statute, we must . . . not add or imply words that simply are not there.'") (citation omitted).

Second, this Court has repeatedly "admonished that '[habeas corpus] is not to be hedged or in anywise circumscribed with technical requirements.'" *Jones v. Williams*, at ¶18 (citation omitted). Reading a "significant relationship" requirement into §13-45-102 as a prerequisite for a court to hear a habeas petition brought by a third party, would do exactly that. Without such a relationship, a third-party challenge to an unlawful denial of freedom could not proceed no matter how well founded, which is an affront to the Great Writ's fundamental purpose as "'the precious safeguard of personal liberty.'" *Geer*, 331 P.2d at 261 (citation omitted).

Third, Section 13-45-102, essentially unchanged since its inception in 1868,[32] should be construed in accord with the Great Writ's history. Unrelated third parties have long been allowed to seek habeas corpus on behalf of individuals alleged to be

[32] Ch. 41 of the Acts of 1868, §2, https://bit.ly/43zYnha (habeas petition may be "signed by the party or some person in his behalf").

illegally restrained of their liberty—including in England,[33] the United States,[34] and other English-speaking jurisdictions.[35] *See* 11 HALSBURY'S LAWS OF ENGLAND, §1476, p. 783 (4th ed. 1976), bit.ly/3X055uu ("Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment[.]"); JUDITH FARBEY ET AL., THE LAW OF HABEAS CORPUS 237-38 (3d ed. 2011) (Where "a prisoner is being held in circumstances which do not allow for resource to the courts," "an application from a third party

[33] *E.g.*, *Case of Hottentot Venus*, 13 East 195 (K.B. 1805), https://bit.ly/3KIJsri (writ obtained on behalf of African woman); *Re Gootoo and Inyokwana*, 35 Sol. Jo. 481 (1891), https://bit.ly/3KxsyvW (writ obtained on behalf of two boys in danger of being sent abroad for slavery).

[34] *E.g.*, *Lemmon v. People*, 20 N.Y. 562 (1860) (writ obtained on behalf of eight slaves); *In re Kirk*, 1 Edm.Sel.Cas. 315 (N.Y. Sup. Ct. 1846) (same, slave child); *Com. v. Aves*, 35 Mass. 193 (1836) (same); *Com. v. Taylor*, 44 Mass. 72 (1841) (same); *Jackson v. Bulloch*, 12 Conn. 38 (1837) (same, slave); *Ex parte The Queen of the Bay*, 1 Cal. 157 (1850) (same, five girls kidnapped and detained on a ship); *Broomhead v. Chisolm*, 47 Ga. 390, 393 (1872) (same, prisoner in a chain-gang; "[a]ny person may petition for the writ of *habeas corpus* in behalf of one imprisoned").

[35] *E.g.*, *Ex Parte West*, 2 Legge. 1475 (Supreme Court, New South Wales 1861), https://bit.ly/3uu9Ek1 (writ obtained on behalf of "aboriginal boy"); *Boudreau v. Thaw*, 13 D.L.R. 712 (Quebec Sup. Ct. 1913), https://bit.ly/3xiATQ9 ("Any person is entitled to institute proceedings to obtain a writ of *habeas corpus* for the purpose of liberating another from illegal imprisonment."); *Truth about Motorways Pty Limited v. Macquarie Infrastructure Investment Management Limited*, HCA 11, ¶¶ 2, 94, 162 (2000) (High Court of Australia) https://bit.ly/3xjAxc0 (strangers may seek habeas corpus).

will be entertained where it is shown . . . that the prisoner is so confined as to be unable to initiate proceedings").[36]

To find a "significant relationship" requirement, the District Court relied on *Whitmore v. Arkansas*, 495 U.S. 149 (1990) and *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018). (CF, 000527-528). These irrelevant non-habeas corpus cases discuss "next friend" standing requirements applicable in federal courts.

In *Whitmore*, after articulating two prerequisites for next friend standing, the Court stated in dicta that "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." 495 U.S. at 163-64.[37] The Ninth Circuit adopted *Whitmore*'s dicta and applied it in *Naruto*, where it held a third party could not sue on behalf of a crested macaque monkey for copyright infringement because it could not claim a "significant relationship" with the monkey. 888 F.3d at 421. Neither *Whitmore* nor *Naruto* has been cited in any published

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[36] *Accord* ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 203 (1876) ("[N]o legal relation is required to exist between the prisoner and the person making the application. It may be made by any one.").

[37] *See Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 90 (1st Cir. 2010) ("[*Whitmore*] did not hold that a significant relationship is a necessary prerequisite for Next Friend status"); *Am. Civil Liberties Union Found. on behalf of Unnamed U.S. Citizen v. Mattis*, 286 F. Supp. 3d 53, 57 (D.D.C. 2017) (*Whitmore*'s "significant relationship" language is dicta).

Colorado decision. The District Court cited no authority for the notion that *Whitmore*'s "significant relationship" dicta (adopted by some courts, though not others)[38] should be read into C.R.S §13-45-102.[39]

The court makes the perverse suggestion that it is the Zoo that "properly speaks for the elephants," given the Zoo's "more significant relationship with [them]." (CF, 000529). Taking the Petition's expert factual allegations as true, its established that the Zoo inflicts tremendous suffering on Missy, Kimba, Lucky, LouLou, and Jambo by confining them "in a wholly unnatural environment," where "their lives lack variety, freedom of choice, and healthy social interaction." (*Id*., 0005111). Thus, the Zoo is the *least qualified* entity to speak for these elephants: its interest in confining them, to display them for paying customers, is fundamentally adverse to the elephants' interest in flourishing. *Cf*. *Potter v. Thieman*, 770 P.2d

[38] *See Carcieri*, 608 F.3d at 92 ("a significant relationship need not be required as a prerequisite to Next Friend status"); *Mattis*, 286 F. Supp. 3d at 59 (third party did "not need to establish a significant or prior relationship with" detainee). Even courts adopting the "significant relationship" requirement have clarified it may not apply in extreme circumstances, such as when a detained individual has no significant relationships. *See Carcieri*, 608 F.3d at 91 (discussing cases from the Fourth, Ninth, and Seventh Circuits).

[39] "[S]tate courts are not bound to adhere to federal standing requirements." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

1348, 1350 (Colo. App. 1989) (Plaintiffs' interest is "adverse to Ridenour's interest, and they cannot, therefore, represent her.).

The District Court stated the Petition "presented no evidence" as to what Missy, Kimba, Lucky, LouLou, and Jambo would elect to do, if given a choice between remaining at the Zoo or moving to an accredited elephant sanctuary. (CF, 000529). This assertion is irreconcilable with the court's acknowledgment of what the Petition's expert evidence demonstrates: that the elephants "would be better off in an accredited elephant sanctuary." (*Id*., 000530).[40] If a human who is unable to communicate has been unjustly imprisoned for decades, would a court seriously entertain the suggestion that the individual should remain in her prison?

Similarly nonsensical is the assertion that, while "elephants in general would be better served in a location where they have more room to roam, more access to natural vegetation, and more opportunities for the kinds of social and other activities that make elephants elephants," this may not be true for the elephants here. (*Id*., 000529). Aside from contradicting the court's acknowledgment just noted, this anti-scientific claim is contrary to the fact that wild and captive elephants have the same

[40] The Petition notes numerous examples of elephants who transformed and flourished after relocating to sanctuaries from zoos. (CF, 000062).

biology and needs, with no basis for arguing they are fundamentally different. (*Poole Decl*., CF, 000199 at ¶67).

Finally, the District Court falsely claimed that NhRP is "dedicated not so much to these specific elephants as to a sustained nationwide campaign (as shown by the [NhRP's cases]) to establish rights for animals at large." (CF, 000528). The ultimate goal of every habeas lawsuit brought by NhRP is to secure the freedom of our nonhuman animal clients, no different than if they were human clients. Thus, NhRP has a standing offer to withdraw the Petition should the Zoo agree to allow the elephants to be transferred to an accredited sanctuary. But the Zoo has rejected this offer. Having refused to do what is morally right and just for the elephants, it is the Zoo that has demonstrated a lack of dedication to Missy, Kimba, Lucky, LouLou, and Jambo, beyond exploiting these extraordinary beings for profit.

CONCLUSION

Nearly a quarter-century ago, NhRP's President and Founder, Steven Wise, urged it was time "judges consider that as the ancient foundations [supporting the legal thinghood of animals] have begun to rot away, so the law of animals that rests upon them should be changed." WISE, *supra*, at 47. That time is now, and the status of nonhuman animals as rightless things must change.

Missy, Kimba, Lucky, LouLou, and Jambo should not be denied the opportunity to pursue and obtain relief by habeas corpus. Excluding these autonomous and extraordinarily cognitively complex beings from the protections of the Great Writ because of their species membership—thereby condemning them to a lifetime of suffering—is no longer tenable in light of science, and is deeply contrary to justice and our humanity.

This Court should reverse the District Court's ruling and remand the case with instructions to issue a writ of habeas corpus, and grant such other and further relief as may be just and proper.

Dated: May 22, 2024

Respectfully submitted,

/s/ Jake Davis
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CERTIFICATE OF SERVICE

I certify that on this 22nd day of May 2024, a copy of the foregoing OPENING BRIEF was filed through the Colorado Courts E-Filing System, with a copy checked to be sent to counsel of record:

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