

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p> <p>On Appeal; 4th Judicial District El Paso County; Hon. Eric Bentley; Case Number 2023CV31326</p>	<p>DATE FILED: May 17, 2024 11:17 AM FILING ID: B971A08FCC52E CASE NUMBER: 2024SA21</p>
<p>Petitioner-Appellant:</p> <p>THE NONHUMAN RIGHTS PROJECT, INC. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo,</p> <p>v.</p> <p>Respondents-Appellees:</p> <p>CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Amici Curiae:</p> <p>Fisher Bryrialsen PLLC</p> <p>Jane Fisher-Byrialsen, Esq 4600 S. Syracuse Street 9th Floor Denver, CO 80237 Phone: (202) 256-5664 Email: jane@fblaw.org Attorney Reg. No. 49133</p>	<p>Case No. 2024SA21</p>
<p>BRIEF OF <i>AMICUS CURIAE</i> MANEESHA DECKHA</p>	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2), (3); C.A.R. 32; and, C.A.R. 29.

This brief complies with the word limits outlined in C.A.R. 29(d) (an amicus brief may be no more than one-half the length authorized for a party's principal brief). It contains 2,584 words and thus does not exceed 4,750 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

/s/ Jane Fisher-Byrialsen

Jane Fisher-Byrialsen
Atty. Reg. No. 49133
Fisher Bryrialsen PLLC
4600 S. Syracuse Street
9th Floor
Denver, CO 80237
Phone: (202) 256-5664
Email: jane@fblaw.org

Counsel for Amicus Curiae Maneesha Deckha

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I. INTEREST OF THE AMICUS CURIAE

Amicus curiae Professor Maneesha Deckha is Professor and Lansdowne Chair in Law at the University of Victoria Faculty of Law in Victoria, British Columbia. *Amicus* has authored numerous works in the fields of animal law and philosophy, focusing on the need for social and legal reform for animals as a matter of justice and ethics. *Amicus'* body of work has demonstrated why the current legal classification of animals as property, or “things,” is ethically deficient when measured against a range of leading social theories about who is entitled to legal personality and subjecthood in the common law. Specifically, her scholarship has shown how discriminatory attitudes toward animals in the form of anthropocentrism and human exceptionalism support other systemic biases in North America such as sexism and racism.

In her recent monograph *Animals as Legal Beings: Contesting Anthropocentric Legal Orders* (Toronto: University of Toronto Press, 2021), Professor Deckha has proposed a new legal status for animals called “beingness.” Like legal personhood, beingness is meant to stop the instrumentalization of animals for human or corporate purposes. Although Professor Deckha has argued that legal beingness for animals would be more respectful of animals’ natures as vulnerable, embodied, and relational beings than legal personhood, the main premise of the monograph and her other work is to explain why the common law must depart from

anthropocentric thinking that normalizes animals' property status. Professor Deckha has promoted liberty for animals throughout her work.

She thus has a heightened interest in juridical consideration of issues integral to this case, namely the Petitioner-Appellant's argument that Missy, Kimba, Lucky, LouLou, and Jambo have the right to bodily liberty, the indefensibility of continuing the property status of animals, and the legal meaning of personhood.

II. SUMMARY OF THE ARGUMENT

This brief argues that this appeal presents an opportunity for the common law to depart from an instrumentalist and insufficient view of animal protection to a robust one more in line with contemporary science and socio-legal thinking based on animals' inherent value as vulnerable relational and embodied beings. Specifically, the case presents the opportunity to recognize the possibility that animals can have the right to autonomy and bodily liberty. The anthropocentrism of the legal order that presently permits elephant captivity is poorly justified and out of step with scientific and progressive scholarly assessments questioning human subordination of animals. The common law must stop regarding elephants as property or "things."

This brief also argues that there is no legal precedent that precludes this outcome. On the contrary, existing legal precedent, legal developments in other jurisdictions, as well as the common law's abiding interest in the rule of law and

achieving justice, all point to the need to eliminate biological species membership as a rationale for whose freedom and liberty the common law will protect.

Taking account of contemporary science and social theory, as well as the existing domestic legal basis and international legal momentum toward recognizing animals as vulnerable beings and not simply as property or “things,” entails releasing Missy, Kimba, Lucky, LouLou, and Jambo from their current tragic zoo confinement. Doing so will permit them to move to a sanctuary where their diverse needs are prioritized and where they will have a much greater opportunity to flourish.

III. ARGUMENT

A. Policy Reasons to Extend Habeas Corpus to Missy, Kimba, Lucky, LouLou, and Jambo

1. The Current Overarching Classification of Animals as Property is Out of Step with Contemporary Socio-Legal Thinking that Recognizes Animals’ Vulnerability and Embodied and Relational Needs.

The common law classification of animals as property reflects instrumentalist assumptions about what animals are, their moral and ethical worth, and how humans should relate to them.¹ The District Court’s decision discusses the scientific evidence about elephants, in particular, which highlights the common law’s discordant treatment of elephants as property given their scientifically demonstrated capacities

¹ MANEESHA DECKHA, *ANIMALS AS LEGAL BEINGS: CONTESTING ANTHROPOCENTRIC LEGAL ORDERS* 55 (University of Toronto Press. 2021).

and capabilities.² We can also observe that their property status is out of step with contemporary socio-legal theory that emphasizes that the property classification of elephants and other animals situates them in a position of vulnerability.

In *Animals as Legal Beings: Contesting Anthropocentric Legal Orders*, *Amicus* discusses how animals are: 1) embodied beings given their sentience but also capacity for life; 2) relational beings given their relationships with their families and larger ecological networks; and 3) vulnerable beings because of their ability to experience injury and loss due to their embodiment and relationality.³ *Amicus* further discusses how contemporary critical social theory discourse dictates that such features require the extension of robust rights and protections from humans to animals.⁴

The vulnerability of animals and the corresponding need for the law to change is not simply a matter of academic concern. Chief Justice Catherine Fraser of the Alberta Court of Appeal has recognized animal vulnerability because of animals' sentience and capacity for relationships. In a case also about elephant captivity, Chief Justice Fraser wrote that animals are "highly vulnerable" due to the power humans hold over them and connected this constitutive feature of animals' lives to the

² District Court Order (December 3, 2023), pp. 2-4, 25-26.

³ DECKHA, 124-137 (2021).

⁴ *Id.*

question of law reform.⁵ Animals' vulnerability is a condition enabled by the law's present classification of animals as property. The time is ripe to reconsider our legal responsibility to respond to animals as embodied, relational, and hence, vulnerable beings.

2. The Current Overarching Classification of Animals as Property Relies on Human Exceptionalism, an Increasingly Discredited Cultural Norm.

The legal personhood/property divide in the common law that classifies nonhuman animals like Missy, Kimba, Lucky, LouLou, and Jambo as property, rests on an anthropocentric cultural outlook that views humans as superior and exceptional in the natural world. This outlook is called "human exceptionalism."⁶ Human exceptionalism is ethically indefensible on multiple policy grounds.

First, the rationale underpinning human exceptionalism is logically flawed. There is no defensible ethical basis for human exceptionalism or the treatment of all animals as categorically different from all humans.⁷

Second, and what may be less obvious, is how human exceptionalism is part of a conceptual and structural matrix that promotes inequality and discrimination. Animal law and animal studies scholars have demonstrated conceptual linkages

⁵ *Reece v. Edmonton (City)* (2011), 513 A.R. 199, para. 88 (Can. Alta. C.A.) ("Why are the rights of animals important in our society? Animals over whom humans exercise dominion and control are a highly vulnerable group.").

⁶ DECKHA, 5-6, 33, 92-93 (2021).

⁷ Philosophers' Brief, <https://bit.ly/3sK2w4o>, at 6-7, 9, 10-11.

between human exceptionalist thinking and intra-human structural discrimination such as sexism, racism, ageism, and ableism.⁸ For example, the concept of “civilized” versus “uncivilized” has been used to promote racist and sexist beliefs throughout western colonial history and those “uncivilized” were compared to animals and as “apish” others less deserving of fundamental rights. Human exceptionalism is thus promoted hand-in-hand with racist and sexist ideologies.⁹

⁸ For discussions of this literature and connections see: DECKHA (2021); Maneesha Deckha, *Veganism, dairy, and decolonization*, 11 JOURNAL OF HUMAN RIGHTS AND THE ENVIRONMENT (2020); Maneesha Deckha, *Unsettling Anthropocentric Legal Systems: Reconciliation, Indigenous Laws, and Animal Personhood*, 41 JOURNAL OF INTERCULTURAL STUDIES (2020); Maneesha Deckha, *Welfarist and Imperial: The Contributions of Anticruelty Laws to Civilizational Discourse*, 65 AMERICAN QUARTERLY (2013); Maneesha Deckha, *The Subhuman as a Cultural Agent of Violence*, 8 JOURNAL FOR CRITICAL ANIMAL STUDIES (2010); Maneesha Deckha, *Intersectionality and Posthumanist Vision of Equality*, 23 WISCONSIN JOURNAL OF LAW, GENDER AND SOCIETY (2008); Maneesha Deckha, *Disturbing Images: PETA and the Feminist Ethics of Animal Advocacy*, 13 ETHICS AND THE ENVIRONMENT (2008); Maneesha Deckha, *Animal Justice, Cultural Justice: A Posthumanist Response to Cultural Rights in Animals*, 2 J. ANIMAL L. & ETHICS (2007); Maneesha Deckha, *The Salience of Species Difference for Feminist Theory*, 17 HASTINGS WOMEN'S L.J. (2006); Marie Fox, *What is special about the human body?*, 7 LAW, INNOVATION AND TECHNOLOGY (2015); Marie Fox, *Re-thinking Kinship: Law's Construction of the Animal Body*, 57 CURRENT LEGAL PROBLEMS (2004); Sue Donaldson & Will Kymlicka, *Children and animals*, in THE ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF CHILDHOOD AND CHILDREN (2018); Will Kymlicka, *Connecting domination contracts*, 41 ETHNIC AND RACIAL STUDIES (2018); CHARLOTTE E. BLATTNER, et al., ANIMAL LABOUR: A NEW FRONTIER OF INTERSPECIES JUSTICE? (Oxford University Press First ed. 2020); CLAIRE JEAN KIM, DANGEROUS CROSSINGS: RACE, SPECIES, AND NATURE IN A MULTICULTURAL AGE (Cambridge University Press. 2015).

⁹ Maneesha Deckha, *Intersectionality and Posthumanist Vision of Equality*, 23 Wisconsin Journal of Law, Gender and Society (2008).

Psychological studies have also shown that devaluing animals through human exceptionalist thinking reinforces intra-human prejudices and hierarchies.¹⁰

Third, human exceptionalism is responsible in substantial part for current planetary environmental crises¹¹ The District Court appeared to acknowledge this fact: “Issues of the sort raised by this case, involving mankind’s stewardship of the planet and its living creatures, grow more pressing each year in light of the rapid advance of climate change, habitat loss, and the mass extinction of numerous species.”¹² Legal scholars, aware of global environmental crises propelled by human exceptionalist thinking that instrumentalizes nature and results in the legal classification of nonhumans as property, have called for a doctrinal shift away from human exceptionalism toward a valuation of multispecies interdependence and harmony.¹³

¹⁰ KRISTOF DHONT, et al., *WHY WE LOVE AND EXPLOIT ANIMALS: BRIDGING INSIGHTS FROM ACADEMIA AND ADVOCACY* (Routledge, 2019.); Kristof Dhont, et al., *Rethinking human-animal relations: The critical role of social psychology*, 22 *GROUP PROCESSES & INTERGROUP RELATIONS* (2019).

¹¹ Helena Pedersen, *Education, anthropocentrism, and interspecies sustainability: confronting institutional anxieties in omnicultural times*, 16 *ETHICS AND EDUCATION* (2021).

¹² District Court Order (December 3, 2023), p. 8.

¹³ Anna Grear, *Legal Imaginaries and the Anthropocene: ‘Of’ and ‘For’*, 31 *LAW AND CRITIQUE* (2020); Deckha, *JOURNAL OF INTERCULTURAL STUDIES*, (2020); Margaret Davies, *Distributed Cognition, Distributed Being, and the Foundations of Law*, in *PERSONHOOD IN THE AGE OF BIOLEGALITY: BRAVE NEW LAW* (Marc de Leeuw & Sonja van Wichelen eds., 2020); MICHAEL ASCH, et al., *RESURGENCE AND RECONCILIATION: INDIGENOUS-SETTLER RELATIONS AND EARTH TEACHINGS* (University of Toronto Press, 2018).

Fourth, human exceptionalism justifies the property status of animals that causes them immense harm – such as the harm suffered by Missy, Kimba, Lucky, LouLou, and Jambo in captivity.¹⁴ This cultural outlook obscures the reality highlighted in the District Court decision that elephants are vulnerable, living beings that can experience a range of emotions and suffer in captivity under human or corporate control.¹⁵

Restricting the availability of the writ of habeas corpus to human detainees only reinforces an anthropocentric legal culture that promotes human exceptionalism. As the above-noted scholarship and studies demonstrate, this approach to habeas corpus is ethically unsustainable on multiple grounds.

3. Treating Animals as Property is Poorly Justified since No Consistent Explanation as to Why Animals Do Not Qualify as Legal Persons or Subjects Exists.

Legal personhood scholars have observed that personhood is a poorly theorized concept in the common law. Different cases have implicitly rested on different versions or theories of personhood often without justification or even realization by the decision-maker of the vision of personhood promoted.¹⁶ Even in cases implicating the boundaries of legal personhood where the concept's parameters

¹⁴ DECKHA (2021).

¹⁵ District Court Order (December 3, 2023), pp. 2-4, 25-26.

¹⁶ NGAIRE NAFFINE, LAW'S MEANING OF LIFE: PHILOSOPHY, RELIGION, DARWIN AND THE LEGAL PERSON 235 (Hart 1st ed. 2009).

are specifically adverted to by courts, except for corporate rights cases, the parameters of who counts as a legal person are generally thinly justified.¹⁷ One can see this in the recent case concerning Happy the elephant, in which the New York Court of Appeals denied her habeas corpus relief.¹⁸ The Court largely rested its decision on the fact that elephants are simply not human, rather than engaging in an in-depth analysis of Happy's right to liberty as informed by her autonomy.

As a result of this minimal and varying attention, the common law across multiple jurisdictions offers no persuasive explanation of why elephants are excluded from legal personhood when other nonhumans are able to qualify as persons (i.e. corporations) and elephants share what are emphasized as the cognitive capacities of other legal persons (i.e. the autonomy of some humans). The poor rationalization for the denial of personhood or another type of legal subjectivity for animals merits revisiting. Not only do cardinal legal concepts need a firm foundation, but also the exclusions they draw require justification if we are to perceive the law as just. Presently, the ongoing asymmetries in power that the denial of personhood or another protective legal subjectivity occasions for animals is not compellingly justified in jurisprudence and exposes the law as unjust.

B. Doctrinal Reasons to Extend Habeas Corpus to Nonhuman Animals

¹⁷ *Id.* at 235-36.

¹⁸ *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 565-577 (N.Y. 2022).

1. Legal Precedent Supports Recognizing Missy, Kimba, Lucky, LouLou, and Jambo’s Fundamental Right to Bodily Liberty.

The Petitioner-Appellant’s submissions filed in relation to this matter review the existing doctrinal precedent that supports extending habeas corpus to nonhuman animals.¹⁹ These submissions further note that the *Lavery* Decisions were wrongly decided due to factual inaccuracies and legal inconsistencies.²⁰ Moreover, Petitioner-Appellant’s submission in relation to this matter caution the Court against perfunctory applications of *stare decisis* when decisions are poorly-reasoned (as the *Lavery* Decisions were);²¹ this caution is especially important to heed when previous decisions are steeped in outdated anthropocentric views on which animals’ ethical and legal marginalization rests. Furthermore, Petitioner-Appellant highlights that a favorable ruling would be in line with the history of habeas corpus and fundamental principles of justice,²² and thus, contrary to the District Court, they are emphatically not asking the court to create rights out of thin air.²³

The Petitioner-Appellant also calls the Court’s attention to the importance of the legal principle of equality and highlights that elephants are highly intelligent

¹⁹ Petition for writ of Habeas Corpus (June 29, 2023) at paras. 10, 91-96.

²⁰ Petitioner’s Opposition to Respondents’ motion to dismiss, (October 5, 2023) at 4-5.

²¹ Petition for writ of Habeas Corpus (June 29, 2023) at paras. 153-54.

²² Petitioner’s Opposition to Respondents’ motion to dismiss (October 5, 2023) at 15-16.

²³ District Court Order (December 3, 2023), p. 18.

beings and thus are equally deserving of having their autonomous nature legally protected.²⁴ These submissions provide ample legal grounds for de-classifying Missy, Kimba, Lucky, LouLou, and Jambo as property and providing them with habeas corpus relief.

2. The Rule of Law Supports Recognizing Missy, Kimba, Lucky, LouLou, and Jambos' Fundamental Right to Bodily Liberty.

A further source of doctrinal precedent for granting the habeas corpus relief requested arises from the rule of law itself and what this foundational legal governance principle requires. The rule of law is an elusive concept.²⁵ Yet, when justice and evolving social norms demand, American and other common law courts have recognized the rule of law as an important reason to expand the conceptual scope of fundamental rights and the category of persons to whom such rights apply.²⁶ *Obergefell v Hodges* is a recent example where a majority of the United States Supreme Court affirmed the need for a paradigm shift in the law through an extension of rights due to inequality and corresponding injustice.²⁷

²⁴ Petition for writ of Habeas Corpus (June 29, 2023) paras. 140-42.

²⁵ Judith N. Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Allan C. Hutchinson and Patrick Monahan ed. 1987).

²⁶ Jodi Lazare, *The Spousal Support Advisory Guidelines, Soft Law, and the Procedural Rule of Law*, 31 *CANADIAN JOURNAL OF WOMEN AND THE LAW* (2019); SONJA C. GROVER, *JUDICIAL ACTIVISM AND THE DEMOCRATIC RULE OF LAW: SELECTED CASE STUDIES* (Springer International Publishing 1st 2020. ed. 2020).

²⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

These decisions involved fundamental rights for humans. However, there is no precedent established by these judgments that confines the substantive reading of the rule of law only to cases implicating human rights. A substantive vision of the rule of law to expand the scope of fundamental protections can thus be applied to the issue of an elephant's right to bodily liberty. As a recent example, the American Bar Association has adopted a non-anthropocentric reading of the rule of law as one of the legal reasons supporting its recent resolution calling for an international convention to protect animals.²⁸ Moreover, in 2012, the Chief Justice of the Alberta Court of Appeal in Canada, writing in dissent, connected the rule of law to the question of elephant captivity in zoos, offering the following opening remarks:

An elephant is a social animal. Thus, according to experts and zoo standards, elephants, especially female elephants, should not be kept alone. This appeal involves Lucy, a 36 year old Asian elephant. She arrived at the Edmonton Valley Zoo, owned by the City of Edmonton, when she was only about two years of age. It is alleged that since then, Lucy has been housed at the Valley Zoo by herself at various times, most recently for almost four years. It is also alleged that the size and structure of the shelter in which the City has confined Lucy for years fail to comply with the City's obligations at law. And that these deprivations have caused or aggravated a number of Lucy's long-standing health problems. *Some may consider this appeal and the claims on behalf of Lucy inconsequential, perhaps even frivolous. They would be wrong. Lucy's case raises serious issues not only about how society treats sentient animals^[3] – those capable of feeling pain and thereby suffering at human hands – but also about the right of the*

²⁸ International Law Section & Tort Trial & Insurance Practice Section, American Bar Association, Report to the House of Delegates, Resolution 101C (2021) (adopted), <https://bit.ly/3IBIfmz>.

*people in a democracy to ensure that the government itself is not above the law.*²⁹

This Court is authorized to build upon justice-promoting domestic precedent for a substantive rule of law, as well as take guidance from international decisions that have invoked the rule of law in relation to animal wellbeing and promoted a capacious substantive vision for the rule of law in matters regarding fundamental rights. Furthermore, it is unjust to deny the Petitioner-Appellant's habeas corpus petition based on the lack of precedent, when based on the rule of law and other principles outlined here, it is clear that the common law requires transformation. It is thus doctrinally available for this Court to view Missy, Kimba, Lucky, LouLou, and Jambo's ongoing suffering in captivity as an injustice that violates the rule of law and, as such, a serious situation in need of immediate redress.

IV. CONCLUSION

Multiple legal and policy grounds exist as to why eligibility of habeas corpus relief and legal protection should not rest on species membership. *Amicus* respectfully requests that the Court recognize Missy, Kimba, Lucky, LouLou, and Jambo right to bodily liberty as vulnerable beings with embodied and relational needs, and allow them to challenge their unjust confinement through habeas corpus.

²⁹ *Reece*, 513 A.R. at para. 39 (emphasis added).

Dated: May 17, 2024

Respectfully submitted,

/s/ Jane Fisher-Byrialsen

Jane Fisher-Byrialsen
Atty. Reg. No. 49133
Fisher Bryrialsen PLLC
4600 S. Syracuse Street
9th Floor
Denver, CO 80237
Phone: (202) 256-5664
Email: jane@fblaw.org

Counsel for Amicus Curiae Maneesha Deckha

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of May, 2024, I electronically filed a true and correct copy of the foregoing BRIEF OF *AMICUS CURIAE* MANEESHA DECKHA via the Colorado Courts E-Filing System, which will send a notification of such filing and service upon all counsel of record:

BROWNSTEIN HYATT FARBER SCHRECK, LLP

John W. Suthers, #8492

Christopher O. Murray, #39340

Rosa L. Baum, #56652

675 Fifteenth Street. Suite 2900

Denver, CO 80202

Telephone: (303) 223-1100

Facsimile: (303) 223-1111

Email: cmurray@bhfs.com; rbaum@bhfs.com

Attorneys for Respondent-Appellees

NONHUMAN RIGHTS PROJECT, INC:

Jacob Davis, # 54032

611 Pennsylvania Avenue SE #345

Washington, DC 20003

Phone: (513) 833-5165

jdavis@nonhumanrights.org

Attorney for Petitioner-Appellant

/s/ Jane Fisher-Byrialsen

Jane Fisher-Byrialsen