

<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 22, 2024 10:56 AM FILING ID: 950CB73B60286 CASE NUMBER: 2024SA21</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Petitioner-Appellant:</p> <p>THE NONHUMAN RIGHTS PROJECT, INC. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo,</p> <p style="text-align: center;">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>Attorney for Amici Curiae:</p> <p>David Lane, Reg. No. 16422 Killmer Lane, LLP 1543 Champa Street, Suite 400 Denver, Colorado. 80202 (303) 571-1000 dlane@killmerlane.com</p>	<p>Case No. 2024SA21</p>
<p>BRIEF OF <i>AMICI CURIAE</i> PHILOSOPHERS</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 4,008 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.

Respectfully submitted,

/s/ David Lane

David Lane, Reg. No. 16422

Killmer Lane, LLP

1543 Champa Street, Suite 400

Denver, Colorado. 80202

(303) 571-1000

dlane@killmerlane.com

Counsel for Amici Curiae Philosophers

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STATEMENT OF INTEREST OF AMICI CURIAE

We submit this brief as philosophers with expertise in animal ethics, political theory, the philosophy of animal cognition and behavior, and the philosophy of biology in support of the Nonhuman Rights Project’s efforts to secure habeas corpus relief for Jambo, Kimba, Loulou, Lucky, and Missy. Collectively, we have long-standing interests in our ethical and legal duties to animals and share a commitment to rejecting arbitrary distinctions that protect humans without also protecting other animals. We submit this brief because of our interest in ensuring that the law is applied and interpreted in a manner that is consistent with the best philosophical standards of rational judgment and ethical standards of justice.

ARGUMENT

I. Summary of the Argument

This case is about whether Jambo, Kimba, Loulou, Lucky, and Missy are entitled to habeas corpus relief. At its core is the question of whether these elephants should be considered persons and, as such, enjoy the legal rights that are due to persons and protected by the courts. We believe that if the courts employ a non-arbitrary and reasonable definition of “personhood,” they will find it necessary to extend writs of habeas corpus to these elephants.

Previously, some courts have considered issues beyond the question of personhood when faced with a habeas corpus petition for a nonhuman animal. The social impact of recognizing the personhood of these elephants has been raised as it concerns human economic, educational, and conservation interests. *See District Court Order*, pp. 8, 18. As such considerations would not be accepted as reasons to deny the personhood of humans, they also should not factor in this case. We believe that once the courts acknowledge the irrelevance of such factors, they will decide in favor of recognizing the liberty rights of Jambo, Kimba, Loulou, Lucky, and Missy, and releasing them to a suitable sanctuary.

In this brief, we argue that while there are several ways of conceptualizing legal ‘personhood,’ there is no reasonable conceptualization that includes all humans while excluding all other animals. To accomplish this, we describe and assess what appear to be two conceptions of “personhood” found in the District Court Order (issued by Judge Eric Bentley).

We also describe two arguments concerning human economic, educational, and conservation interests that have been used to deny Jambo, Kimba, Loulou, Lucky, and Missy what they are due, and show that they are tangential to the heart of the matter and unconvincing grounds on which to decide whether justice requires their release to sanctuary.

II. Species Membership and personhood

Though the District Court emphasized that positive law designates humans (and no other animals) as persons, the presiding judge, Judge Eric Bentley, referred to the common usage of the term “person” in his judgment. *District Court Order*, p. 12. Certainly, there are good reasons to think that more needs to be said on the matter. The U.S. is one of a number of countries with a history of denying personhood or full personhood status to some human beings. Andrews et al 2019. That this was enabled through law speaks to why current law and its restricted view of who qualifies as a person is neither a reliable nor clearly just ground for denying that elephants, such as Jambo, Kimba, Loulou, Lucky, and Missy, are also persons.

The District Court cites a dictionary entry on “person,” presumably to suggest that common usage favors seeing humans and only humans as persons. *District Court Order*, p. 12. This ignores two matters. How courts decide on the question of animal legal personhood, in this or any other case, should inform what qualifies as common usage. As the District Court acknowledges (*see id.* at 7-8), some relevant decisions of other courts around the world already show a change in this regard. Additionally, common usage alone cannot decide the appropriate meaning of the term “person” or what exactly it refers to in ethics, law, or philosophy. After all,

common usage may lag behind substantive issues of justice that call for change when this runs counter to how relevant individuals are treated within the relevant societies.

Common usage notwithstanding, we also maintain that species membership alone – in this case, being a member of our species – cannot reasonably determine who is a person or rights holder. The concept of “personhood,” with all its moral and legal weight, is not a biological concept and cannot be meaningfully derived from, say, the biological category *Homo sapiens*. Andrews et al 2019. Moreover, since the synthesis of Mendelian genetics, the theory of evolution by natural selection, and population biology, the consensus view among evolutionary biologists is that species do not have distinct essential features that all and only members of the species share. Ereshefsky 2022. The gradualism of terrestrial biological evolution suggests that there is no set of properties both necessary and jointly sufficient for an organism to be a member of any particular species. There are three central reasons for this:

1. There is a great deal of similarity across species because all organisms on the planet are more or less closely related to each other. Often, the more closely related two species are, the more similar they tend to be, though there are exceptions.

2. There tends to be a substantial degree of natural variation among organisms within a particular species. This feature of populations makes evolution by natural selection possible.
3. Species change over time – they evolve – so even if all members of a species shared some characteristic at one time, this would probably not be true of all their descendants, and it would definitely not be true of all their ancestors.

Although evolutionary theory facilitates the grouping aspect of classification, offering a principled criterion (shared ancestry) for grouping organisms together, it offers no clear criteria for the level at which to rank them. Whether an ancestral grouping should be considered a variety, subspecies, species, superspecies, subgenus, or genus can be an open question. Mishler and Brandon 1987. Therefore, there is no biological method for determining an underlying, biologically robust, and universal “human nature” upon which moral and legal rights can be thought to rest. Hull 1986.

Finally, any attempt to justify the use of species membership (or any other biological classification) to confer personhood status will inevitably draw on other criteria, in which case it is these other criteria that are doing the work, rendering species membership itself irrelevant. Andrews et al 2019. For example, if “person”

is defined as “beings who possess certain capacities” (e.g., capacities to reason, experience emotions, and/or act autonomously), and humans usually possess those capacities, then an individual’s being human can be used to predict, with some degree of accuracy, that said individual will have the relevant capacities and thereby be a person. However, such a definition would not support the view that all and only humans are persons. After all, if there are other animals who also possess the relevant capacities then they too must be regarded as persons. To conclude otherwise is to do so arbitrarily, which is antithetical to justice.

Judge Bentley, in his decision, states that “I find that neither the habeas statute nor the common-law writ of habeas corpus confers a right to habeas relief on nonhuman animals, no matter how cognitively, psychologically, or socially sophisticated they may be.” *District Court Order*, p. 11. Taken at face value, this means that if another animal were able to clearly communicate their preference to be free or express outrage at their captivity in a language that could be understood by officers of the court, their pleas would be irrelevant to Judge Bentley simply because they came from a nonhuman source. Such a stance would be a clear injustice as it would represent a failure to treat like cases alike. It would be, in short, an abandonment of justice as a standard of good law. If this Court grants that it would not take such a stance with such an animal, however unlikely the scenario, then it

must admit that the non-humanity of an individual is ultimately irrelevant to whether they ought to be regarded as a person.

It is here that the Court must face the differing capacities of members of our greater human community who are regarded as persons under law. Requiring animals to clearly communicate their preference to be free or express outrage at their captivity in order for them to enjoy habeas relief would be tantamount to holding them to a standard that would not and should not be applied in human cases. This, again, would introduce arbitrariness of treatment under law and again perpetuate injustice. The District Court has granted that it “is required to take as true...that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs.” *District Court Order*, p. 23; *see also id.* at 2-3, 25. On the principle that like should be treated alike, this concession supports the recognition of a basic right to liberty and provides an appropriate ground for habeas relief.

III. The Social Contract, personhood, and rights

Judge Bentley makes reference to “the [human] social compact” (or contract), *id.* at 19, as a justification for either limiting rights to humans or holding that humans enjoy special status under law (which could be a way of stating that humans and only humans enjoy personhood status). Neither justification holds up under scrutiny.

Claiming that limiting rights to humans follows from the nature of the social contract is theoretically and factually inaccurate. There is nothing in the idea of the social contract, as it has been historically understood, that precludes emergent laws from extending protections or entitlements to non-contractors (be they humans or nonhumans who either will not or cannot contract with others). Rollin 2009. Infants, young children, and those found not guilty by reason of insanity are examples of humans who cannot enter into a social compact, but who are nonetheless recognized as persons with legal rights. What is more, extant laws in the U.S. and elsewhere already extend protections to some nonhuman animals, for example, protection against being treated cruelly. In a relatively recent case before the State of New York Court of Appeals involving the elephant Happy, both majority and dissenting opinions agree that welfare laws extend protections to some nonhumans, and both dissenting opinions hold these to be rights (an understanding of rights that goes back to the 18th century). See *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 575 (N.Y. 2022) (“nonhuman animals are sentient beings that...have been afforded many special protections by the New York Legislature”); *id.* at 586 (Wilson, J., dissenting) (“the very legislation the majority lists provides numerous rights to animals”); *id.* at 634 (Rivera, J., dissenting) (“the legislature may expand a nonhuman animal’s rights against cruel treatment and inhumane conditions”); Salt 1892. So understood,

animals are already treated as rights holders and the rights they hold need not be limited to welfare considerations.

In the District Court's decision, Judge Bentley acknowledges that "legislatures and courts in such countries as India, Pakistan, Hungary, Finland, Colombia, Costa Rica, Chile, and Argentina...[have passed] laws or issue[d] rulings characterizing animals such as elephants, dolphins and orcas, and orangutans as 'non-human persons' entitled to certain rights and liberty interests under the law." *District Court Order*, p. 7. It matters little that these legislatures and courts are not in the U.S. since the point here is about the compatibility of social contract theory with the rights of nonhuman animals. Clearly, the "social compact" in countries like India, Chile, and Argentina has not precluded extending rights to some nonhuman animals.

It could be that Judge Bentley means to contend that humans, by virtue of being able to enter into a social contract, enjoy special status under law, with legal personhood being one way of codifying that status. So understood, it is the capacity to enter into a social contract that marks humans out as persons, which is to say, as bearers of such basic legal rights as the right to liberty. But this, too, would be erroneous. Historically, social contracts create citizens not persons. Citizens are persons first who, by virtue of the social contract, allow themselves to become

subject to the laws authorized by the contract. Hobbes 1651; Locke 1689; Rousseau 1762. These individuals were persons before they entered the social contract and they would continue to be persons in the event of the social contract's dissolution since their claim to personhood does not depend on the compact itself. Notably, the U.S. Constitution mentions the term "persons" fifty-seven times, but it does not define it. The 14th Amendment, however, distinguishes between persons and citizens. This is consistent with social contract theory, which holds that only persons can bind themselves through a contract and, in so doing, become citizens. While personhood does not depend on a social contract, the social contract depends on persons who are its "signatories." Andrews et al 2019.

It must also be pointed out that social contract theory does not hold that all persons must necessarily be contractors. There can be persons who are not contractors—either because they choose not to contract or because they cannot contract. That these human persons do not or cannot enter into a social compact matters little to their enjoying such basic rights as a right to liberty. Andrews et al 2019.

As persons need not be contractors, and some perhaps cannot be, a capacity to enter into a social contract is not a plausible prerequisite of personhood or, alternatively, of being a rights holder. As noted previously, some nonhuman animals

can and do enjoy protections or rights under law. If law is best understood through a social contract approach, then these protections or rights seem to bring at least some nonhuman animals into the social contract. To return to a point made earlier, the criteria a court uses to defend its recognition of an individual's right to liberty must not be applied arbitrarily. Non-arbitrariness is the foundation of good law; it is the principle of treating like cases alike. The capacities mentioned above – capacities to reason, experience emotions, and/or act autonomously – have been used to support the recognition of the personhood of others. Andrews et al 2019. This seems to be obliquely acknowledged earlier in the District Court's decision. *District Court Order*, p. 7. If other animals also possess these capacities – a point the District Court concedes (pp. 2-3, 23, 25) – then they too should enjoy such rights as a right to liberty or be recognized as persons under law. A social contract approach cannot preclude such recognition.

IV. Issues beyond rights and legal personhood

There are two arguments in the District Court decision that are used to problematize seeking the release of Jambo, Kimba, Loulou, Lucky, and Missy to sanctuary and recognizing their personhood or right to liberty, but that ignore the substance of either issue. The first argument raises human education and conservation interests – supposedly supported by the work of zoos – as a way to

complicate the issue of seeking the release of the elephants at the center of this case. *See* District Court Order, p. 8. The second argument claims, without evidence, that recognizing the rights of Jambo, Kimba, Loulou, Lucky, and Missy would have detrimental effects on society. *See id.* at 17-18. As we have already mentioned, each argument avoids the substantive issues at the heart of this case. Analogous concerns would not, and should not, matter if the liberty rights of humans were under consideration. As a matter of justice, they should not matter for animals who share relevantly similar interests. Nevertheless, sufficient responses can be made to defeat both arguments.

The District Court opines, “it is unfortunate that this case pits two organizations against each other that perhaps ought to be on the same side. As noted above, the role of zoos has evolved, and today zoos, including the Cheyenne Mountain Zoo, play a leading role in wildlife conservation efforts and education. (E.g., <https://wildwelfare.org/the-conservation-mission-of-zoos-nabila-aziz/>). The Zoo is known, in particular, for its work with giraffes, for which it is nationally recognized. (<https://www.cmzoo.org/conservation/giraffe-conservation/>).” *Id.* at 8.

It is difficult to glean how Judge Bentley connects the Zoo’s efforts in the conservation of giraffes as a species to the liberty rights of Jambo, Kimba, Loulou, Lucky, and Missy – five elephants in their care. Furthermore, how much zoos

contribute to conservation or to educating various publics on the animals kept in their “collections” is disputed. *See* Marino et al 2010; Marris 2021. In fact, there is little evidence to support the idea that keeping elephants such as Jambo, Kimba, Loulou, Lucky, and Missy in captivity provides education about elephants or motivation to support conservation efforts in the territories of their free-living kin. If anything, the effect zoos have had in “educating” the public has led to increasing public disapproval of keeping elephants in zoos. As the District Court acknowledges, changing social values in the U.S. have inclined zoos to close their elephant “exhibits.” District Court Order, p. 7. It appears that the main lesson the public has learned from zoos is that denying elephants their liberty rights is something they no longer wish to see.

Some defend zoos as partners in conservation on the grounds that endangered species can be rescued through captive breeding programs. However, when the species in question is as cognitively and socially complex as elephants, the argument breaks down. The existence and importance of traditions, socially learned practices, and culture among such animals as free-living elephants is widely recognized in the conservation sciences. Brakes et al 2019. But zoos are simply not equipped to support the conservation of these crucial aspects of elephant lives as the District Court’s own description of the behavioral, cognitive, and social challenges

experienced by captive elephants suggests. *See District Court Order*, pp. 3-4, 6-7. A suitable elephant sanctuary may not be able to give back *all* of what Jambo, Kimba, Loulou, Lucky, and Missy have been denied in captivity, but it will provide them opportunities to live much more on their own terms and with fellow members of their species with whom they can develop traditions, practices, and cultures of their own.

The District Court also makes much of the possible detrimental effects to society should Jambo, Kimba, Loulou, Lucky, and Missy's rights to liberty or standing as persons be recognized in court. This is a concern that resonates with other U.S. courts but seems to lack any good evidence. As we noted earlier, the District Court mentions moves in "India, Pakistan, Hungary, Finland, Colombia, Costa Rica, Chile, and Argentina" to "[characterize] animals such as elephants, dolphins and orcas, and orangutans as 'non-human persons' entitled to certain rights and liberty interests under the law." *Id.* at 7. These moves have not, to our knowledge, had any detrimental effects on these societies. Indeed, as far as we know, various industries that depend on the use of animals continue unimpeded by the changes in law or court rulings in these countries.

This kind of concern, although without evidence, is not a new one. The British social reformer, Henry Stephens Salt, addressed this kind of worry in his 1892 book, *Animals' Rights Considered in Relation to Social Progress*.

What can be the object, it is said, of entering on the sentimental path of an impossible humanitarianism, which only leads into insurmountable difficulties and dilemmas, inasmuch as the use of these various animal substances is so interwoven with the whole system of society that it can never be discontinued until society itself comes to an end? Salt 1892, pp. 81-82.

There are three possible responses to this worry, one of which we have already given in the previous paragraph (i.e., to date, societies that have responded to the call of justice regarding some nonhuman animals have not precipitated radical social change or a collapse of society). Another response, anticipated by Salt, is to note that any changes with respect to other animals happen quite slowly. *Id* at 80. Indeed, they happen at such a slow pace that society has time to make adjustments to protect the interests of any affected humans.

The District Court itself provides a third reason: “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.” *District Court Order*, p. 8; *see also id.* at 25. We agree with the court that our interests as a species are entangled with the interests of other species, including elephants. We face an existential crisis

of our own making and at a literally global scale, resulting from short-sighted values and superficially understood self-interest, that can only be substantively rectified through a rethinking of how we coexist with other animals on this planet. If our societies (and their laws) do not change in response to this growing crisis, there will be no such societies left to protect.

V. Conclusion

In rejecting habeas relief for Jambo, Kimba, Loulou, Lucky, and Missy, the District Court of El Paso County has rejected the argument that these elephants possess any right to liberty or legal standing as persons. As we have argued, the considerations provided by the court are unpersuasive. We have also considered and rebutted tangential claims made by the court to resist recognizing their rights to liberty or personhood. The District Court has denied its or any court's ability to remedy all the various injustices of the world. *Id.* at 8. We do not ask this of any court. We do ask this Court to remedy the instance of injustice brought before it: send this case back to the District Court to hold a merits hearing on the Nonhuman Rights Project's petition. As philosophers committed to a more just coexistence with the other sentient beings with whom we share this planet, we hope that such a hearing will result in the release of Jambo, Kimba, Loulou, Lucky, and Missy to a suitable

sanctuary where they can live out the remainder of their days on their own terms as elephants.

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Dated: May 22, 2024

/s/ David Lane
David Lane, Reg. No. 16422
Killmer Lane, LLP
1543 Champa Street, Suite 400
Denver, Colorado. 80202
(303) 571-1000
dlane@killmerlane.com

Counsel for Amici Curiae Philosophers

LIST OF AMICI CURIAE

Gary L. Comstock, Ph.D.
Alumni Distinguished Undergraduate Professor
North Carolina State University

Andrew Fenton, Ph.D.
Associate Professor of Philosophy
Dalhousie University

L. Syd M Johnson, Ph.D.
Associate Professor of Bioethics and
Humanities, Center for Bioethics and Humanities,
SUNY Upstate Medical University

Robert C. Jones, Ph.D.
Associate Professor of Philosophy
California State University, Dominguez Hills

Letitia M. Meynell, Ph.D.
Professor of Philosophy and
Gender and Women's Studies
Dalhousie University

Nathan Nobis, Ph.D.
Professor of Philosophy
Morehouse College

David M. Peña-Guzmán, Ph.D.
Associate Professor, Humanities
San Francisco State University

James Rocha, Ph.D.
Associate Professor of Philosophy
California State University, Fresno

Jeff Sebo, Ph.D.
Associate Professor of Environmental Studies
Affiliated Professor of Bioethics,
Medical Ethics, Philosophy, and Law
New York University

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of May 2024, I electronically filed a true and correct copy of the foregoing BRIEF OF AMICI CURIAE PHILOSOPHERS via the Colorado Courts E-Filing System, with a checked copy to be sent to 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 Respondents-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/ David Lane
David Lane