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COLORADO SUPREME COURT Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, Colorado 80203 Appeal from: El Paso County District Court Case No. 2023CV31326 Hon. Eric Bentley	
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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BRIEF OF *AMICI CURIAE* UK ANIMAL LAW EXPERTS

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 4,584 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.

Respectfully submitted,

/s/ Lucy Deakins
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTEREST OF AMICI CURIAE

Amici are UK-based legal academics, solicitors, and barristers who variously teach, research, advise, and litigate in the field of animal law. UK Animal Law Experts have special expertise in the issues presented by this case and the significance these issues hold for the broader development of animal law as an academic discipline and legal practice area. *Amici* have a special interest in guiding the evolution of their field and in assisting the Court in grappling with the historical and contemporary legal issues that this case raises. As UK courts regularly look to court decisions in other common law jurisdictions for guidance in novel, developing, and unsettled areas of law,[1] *Amici* have an interest in the Colorado courts giving full consideration to the merits of this case which concerns an emerging area of animal law.[2]

INTRODUCTION

Despite disagreeing with its ultimate conclusions, *Amici* concur with several aspects of the District Court's ruling being appealed by Petitioner-Appellant, Nonhuman Rights Project, Inc. ("NhRP"). In particular, the District Court makes three crucial observations.

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[1] *See generally*, Thomas H. Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* (Cambridge Univ. Press 2010).

[2] *See* Raffael N. Fasel and Sean C. Butler, *Animal Rights Law* 124–34 (Bloomsbury Pub. 2023) (documenting the "numerous jurisdictions" where writs of habeas corpus have been filed for nonhuman animals).

First, it notes that societal attitudes, expectations, and knowledge of animal well-being are rapidly evolving, especially concerning how highly intelligent species such as elephants deserve to be treated. *District Court Order* (Dec. 3, 2023), p. 6. Second, it observes that the reach of the great writ of habeas corpus is broad – covering both public and private forms of confinement – and is historically expansive and anti-formalistic: "[habeas corpus 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." *Id.* at 16 (quoting *Peyton v. Rowe*, 391 U.S. 54, 66 (1968)). Third, and most importantly of all, it finds that the NhRP has made a prima facie case that the confinement of their clients amounts to an unjust restraint on their liberty:

> As a matter of pure justice (although based on an admittedly one-sided record at this stage of the case), the NHRP has made a persuasive case that elephants are entitled to be treated with the dignity befitting their species; and that that cannot be done, no matter how conscientious those who care for them may be, if they are confined in zoos that lack the substantial acreage needed to allow them to flourish.

Id. at 25–26.

Unfortunately, the District Court also makes several erroneous turns. Notwithstanding the great writ's awesome power and historical flexibility to challenge all manner of illegal and unjust restraints on liberty, the court refused to issue a writ of habeas corpus because, supposedly, *inter alia*: (1) the NhRP

lacks standing to initiate habeas proceedings on behalf of their clients, *id.* at 10–22; (2) the elephants' detention is not unlawful under statutory law, *id.* at 23–24; (3) the elephants are not "persons" with rights protected by the "social compact." *Id.* at 18–19. Accordingly, this is a matter best left to the legislature. *Id.* at 20.

Such assertions are unpersuasive as matters of law and reflect precisely the narrow and formalistic approach to the great writ that the District Court correctly rebuffs in more general terms. Were similar lines of reasoning deployed in previous landmark habeas rulings that liberated enslaved humans, abused wives and children, indigenous people, and prisoners of war, the Great Writ would not be the cherished bastion of liberty it is today.

SUMMARY OF ARGUMENT

Amici's argument can be summarised succinctly: (1) the NhRP has made a prima facie case that the detention of Jambo, Kimba, Loulou, Lucky, and Missy is unjust; (2) the common law writ of habeas corpus has historically been used to challenge unjust confinement, even where it has no clear legal remedy under positive (statutory or common) law; (3) the District Court's reasons for granting Respondents-Appellees' motion to dismiss undercut the historically expansive protection of liberty afforded by habeas corpus, especially to marginalised groups and individuals. Accordingly, *Amici* respectfully urge this Court to reverse the District Court ruling and direct it to issue a writ of habeas corpus.

ARGUMENT

A. THE NHRP HAS MADE A PRIMA FACIE CASE THAT THE DETENTION OF JAMBO, KIMBA, LOULOU, LUCKY, AND MISSY IS UNJUST.

The District Court accepts that as a matter of "pure justice," the NhRP has made the prima facie case that "elephants are entitled to be treated with the dignity befitting their species." *District Court Order*, p. 25. Moreover, "that cannot be done, no matter how conscientious those who care for them may be, if they are confined in zoos that lack the substantial acreage needed to allow them to flourish." *Id.* at 25–26.

The NhRP's petition includes six expert scientific declarations from seven of the world's most renowned scientists with expertise in elephant cognition. Between them, these declarations suggest elephants are autonomous and cognitively, emotionally, and socially complex beings who are physically and psychologically harmed by captivity in places like the Cheyenne Mountain Zoo. This expert evidence also suggests that Jambo, Kimba, Loulou, Lucky, and Missy's needs could be better met in an elephant sanctuary. Most disturbingly, one of the experts, Dr. Bob Jacobs, attests that video evidence of stereotypic behaviour displayed by Jambo and LouLou is indicative of "chronic stress" and "brain damage," likely attributed to their conditions in captivity:

> In my professional opinion, the videos of Jambo and LouLou repeatedly swaying back and forth are strong evidence that these elephants are undergoing chronic stress and brain dysregulation

> from being held captive at the Cheyenne Mountain Zoo. The cause of their suffering is clear: their psychological and behavioral needs are not being met in the impoverished zoo environment. As I stated in my Original Declaration, "from a neural perspective, imprisoning large mammals and putting them on display is undeniably cruel." The recent videos showing Jambo and LouLou exhibiting stereotypies, a sign of brain damage, strongly reinforce this conclusion.

NhRP's Supplemental Pleading (Nov. 2, 2023), p. 2 (quoting Supp. Decl. of Dr. Bob Jacobs (Nov. 1, 2023), at ¶ 7). These factual assertions, as acknowledged by the District Court, demonstrate the prima facie unjust nature of the elephants' detention, and accord with determinations of several other courts that have found the detention of elephants unjust.

In the California taxpayer action *Leider v. Lewis*, No. BC375234 at 30 (L.A. Cnty. Sup. Ct. July 23, 2012), the trial court found that "[c]aptivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are." In the same case, the Court of Appeal, Second District affirmed the findings of the trial court, stating "we have no doubt the elephants would do better if they were not captive." *Leider v. Lewis*, 197 Cal. Rptr. 3d 266, 287 (Cal. Ct. App. 2016), *rev'd*, 394 P.3d 1055 (Cal. 2017). The appellate court further recognized "that animal sanctuaries might well provide a better form of captivity." *Id*.

In New York, the NhRP filed a habeas corpus challenge on behalf of an Asian elephant named Happy who is confined in the Bronx Zoo. After a three-day hearing, the Bronx Supreme Court (the state's trial court) found that Happy

possessed "advanced analytic abilities akin to human beings," and that she is "an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *1, *10 (N.Y. Sup. Ct. 2020). Furthermore, the court found that the arguments advanced by the NhRP for transferring Happy, "from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary," were "extremely persuasive." *Id*.

Before the New York Court of Appeals (the state's highest court), Judge Rowan Wilson found that "the evidence tendered by Happy demonstrates that Happy has very substantial cognitive, emotional and social needs and abilities, and that those qualities coupled with the circumstances of her particular confinement establish a prima facie case that her present confinement is unjust." *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 626 (N.Y. 2022) (Wilson, J., dissenting). Judge Jenny Rivera similarly found, "[c]aptivity is anathema to Happy because of her cognitive abilities and behavioral modalities—because she is an autonomous being." *Id*. at 642 (Rivera, J., dissenting).[3]

[3] The majority in *Breheny* did not dispute the NhRP's claim that Happy "is an autonomous and extraordinarily cognitively complex being," 38 N.Y.3d at 569, but arbitrarily, in UK Animal Law Experts' view, found that the writ of habeas corpus had no application to her because it is "intended to protect the liberty right of *human beings*." *Id*. at 565.

Such cases and legal opinions demonstrate an emerging awareness amongst the judiciary – reflecting shifting scientific knowledge and public moral norms – that detaining elephants in zoos will often, if not always, be incompatible with allowing them to have a minimally decent life.[4]

B. THE GREAT WRIT OF HABEAS CORPUS HAS PROVIDED LEGAL RELIEF FOR UNJUST DETENTIONS WHERE THERE ARE NO OTHER REMEDIES IN CODIFIED LAW.

The District Court correctly observes that the Great Writ was "used in centuries past with great flexibility and imagination to release slaves, women, children, and others from unjust confinements." *District Court Order*, p. 17. However, it is precisely these celebrated historical rulings that counsel against the court's reliance on proceduralist and formalistic rationales for dismissing the NhRP's request for a writ of habeas corpus.

For illustration, we discuss four contexts in which English and US courts have used the writ of habeas corpus to review detentions that were buttressed by common law doctrines and were not proscribed by positive law: (1) slavery,

[4] *See also Reece v. Edmonton (City)*, 2011 ABCA 238, ¶103 (Can.), (2011), 513 A.R. 199 (Can. Alta. C.A.) (Fraser CJA dissenting), a Canadian case documenting the "magnitude, gravity and persistence of [zoo elephant] Lucy's on-going health problems and… suffering she continues to endure from the conditions in which she has been confined," but also noting "[i]t would be naive to assume that problems do not arise from the *mere fact of keeping elephants in captivity.*" *Id*. at n.69 (emphasis added). *Amici* are not aware of a single case where a trial court – or even a single judge – has contested the injustice of detaining elephants in zoos.

(2) domestic abuse, (3) child custody disputes, and (4) confinement of non-citizens. To be clear, we draw the Court's attention to these cases not to make a direct comparison between detained humans and detained nonhuman animals but rather to demonstrate how the District Court's reasoning, if applied in past landmark habeas rulings, would have stymied the development of the Great Writ and thereby prevented it from becoming the expansive bastion of liberty that it is today. *See e.g.*, *Breheny*, 38 N.Y.3d at 632, Rivera, J., dissenting ("For purposes of my legal analysis, I refer to humans who were denied full rights under the law to demonstrate the flexibility of the historical uses of the writ, and, in so doing, I do not undermine in any way the dignity of those individuals or diminish their struggles for equality and the right to live free.").

(1) Slavery

Some of the most celebrated historical uses of habeas corpus have been instances where it was used to challenge the detention of enslaved persons.[5] *Somerset v. Stewart*, 98 Eng. Rep. 499, Lofft 1, (K.B. 1772), for example, is considered a legal milestone in the path toward the abolition of slavery. Prior to *Somerset*, Black people living in England were subject "to many incidents

[5] *See, e.g.*, *R. v. Stapylton* (K.B. 1771) (habeas used to retrieve an enslaved person before he set sail for Jamaica); *Knight v. Wedderburn* (Sess. 1775-1778) (Scot.) (releasing an enslaved African man on habeas); *Case of the Hottentot Venus*, 104 Eng. Rep. 344, 344-45 (K.B. 1810) (court examined whether Sarah Baartman—a "native of South Africa" —was confined against her will).

of chattel slavery, such as sales, imprisonment or forcible shipment abroad for discipline or punishment, collaring, chaining, and wageless compelled perpetual service." George van Cleve, *"Somerset's Case" and Its Antecedents in Imperial Perspective*, 24 Law & Hist. Rev., 601, 609 (2006). This "social reality," *id.*, "rested fundamentally on the view that certain groups, including Africans, were properly enslaveable, unlike Britons." *Id.* at 623. Before *Somerset*, "English courts thought that since slaves were a form of property, slavery was based on common law principles." *Id.* at 605. Accordingly, "[t]he law on slavery in England supported these social practices." *Id.* at 623.

However, *Somerset* ruptured the legal system's complicity with that unjust status quo and signified "the *de jure* end of slavery in England." William R. Cotter, *The Somerset Case and the Abolition of Slavery in England History*, 79 History 31, 56 (1994). The case concerned an enslaved African man who was detained in the hull of a ship docked in England and bound for Jamacia. The slave master's lawyers urged the court to dismiss the case, arguing that the "convenience of the public is far better provided for, by this private authority of the master, than if the lawfulness of the command were liable to be litigated every time a servant thought fit to be negligent or troublesome." *Somerset*, 98 Eng. Rep. at 507, Lofft at 14. Chief Justice Mansfield ignored this plea and ordered the release of the enslaved person, noting that slavery is "so odious" it cannot be "allowed or approved by the law of England." *Id*. at 510, Lofft at 19.

The District Court declined to issue a writ of habeas corpus because, *inter alia*, it asserts that recognizing the "right to bodily liberty" of Jambo, Kimba, Loulou, Lucky, and Missy "would have an enormous destabilizing impact on modern society," *District Court Order*, p. 18 (quoting *Breheny*, 38 N.Y.3d at 573), and could challenge "the consumption of animals for food, their use in agriculture and in medical research, and their legal status as property." *Id.* Likewise, in *Somerset*, the slaveholder lawyers urged the King's Bench to dismiss the habeas petition on the basis that it would undermine commercial interests. Ignoring such pleas, Lord Mansfield ruled in favour of liberating James Somerset "[w]hatever inconveniences . . . may follow," 98 Eng. Rep. at 510, Lofft at 19, further proclaiming "let justice be done whatever be the consequence." *Id.* at 509, Lofft at 17. Had the King's Bench prioritized preserving commercial interests over dispensing justice, the dismantling of the grotesque institution of slavery may well have taken longer.[6]

(2) Coverture

From 1671 the King's Bench used habeas corpus to release wives from abusive husbands.[7] At the time, married women were governed by the common law "doctrine of coverture," which entailed that "the very being or legal

[6] *See generally*, Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial That Led to The End of Human Slavery* (Da Capo Press 2006).
[7] Paul D. Halliday, *Habeas Corpus: From England to Empir*e 124 (Belknap Press 2010).

existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband."[8] In effect, the doctrine of coverture treated married women as having no personal freedom, no property rights, no rights to their children, bodies, or wages vis-à-vis their husbands.[9]

One way husbands sought to exert legal dominion over their wives was through "[c]onfinement, either within the home or in private madhouses."[10] Legal disputes relating to these forms of confinement were often adjudicated through habeas proceedings because the writ of habeas corpus was understood to reach "every unjust restraint of personal freedom in private life."[11] For example, in *R. v. Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761), the writ was issued to the keeper of a private "mad-house" to bring into court a woman who had been placed in the asylum by her husband. The woman was discharged following medical evidence that she was sane. Numerous examples abound of habeas proceedings being brought to contest the private confinement of wives by their husbands.[12]

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[8] I William Blackstone, *Commentaries on the Laws of England* *430 (1765).
[9] Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 Harv. Women's L.J. 179, 179 (1998).
[10] Elizabeth Foyster, *At the Limits of Liberty: Married Women and Confinement in Eighteenth-Century England*, 17 Continuity & Change 39, 40 (2002).
[11] *Id.* at 41 (emphasis added).
[12] *See e.g.*, *R. v. Lee*, 83 Eng. Rep. 482 (K.B. 1676) (reviewing husband's treatment of wife); *Lister's Case*, 88 Eng. Rep. 17, 17 (K.B. 1721) (ordering release of wife whose husband "[took] her violently into his custody"). *See also* Paul D. Halliday, *Habeas Corpus* at 121–27.

The District Court found that the NhRP lacks standing to represent Jambo, Kimba, Loulou, Lucky, and Missy because, amongst other things, the NhRP "cannot claim any significant relationship with these elephants, or indeed any relationship at all," and "[i]t appears to be the Zoo, and not the NHRP, that has the more significant relationship with [the elephants]." *District Court Order*, p. 21–22.

Had the King's Bench in *Turlington* applied a similar line of reasoning it would have deferred to the authority of either the keeper of the private madhouse or to the husband who sent the wife there. It scarcely needs pointing out how self-defeating such an approach to habeas corpus would be if courts as a general matter deferred to the jailor to determine whether captivity is unjust. Instead, the King's Bench sought independent medical evidence to determine whether the wife's confinement was unjust. This points to the path that should have been taken by the District Court. Whilst the court is correct that there may be competing forms of evidence concerning what is in the best interests of Jambo, Kimba, Loulou, Lucky, and Missy, this is precisely why a writ of habeas corpus should have been issued, to allow both parties to submit their evidence at a full merits hearing.

(3) Paternal Custody

Until the end of the 19th century, fathers had near-absolute rights to the custody of legitimate children.[13] The courts, for the most part, saw themselves as having "no right to interfere with the sacred right of a father over his own child." *Re Agar-Ellis*, 24 Ch.D. 317, 329 (1883) (Eng.) (per Bacon V.C). Family law primarily concerned protecting the father's pecuniary interest in the child rather than the well-being of the child for their own sake.[14] Habeas corpus proceedings constituted a partial exception to this patriarchal approach.

From the 1670s onwards, child custody disputes formed an important dimension of habeas corpus disputes.[15] Where children were subject to abductions characterised by "outrage, violence, and force," the King's Bench "might grant a habeas corpus to correct the force."[16] Where the court determined that the children were of sufficient maturity, it granted them "self-determination" in choosing whose custody they wished to reside in.[17] In some instances, the court would ignore the father's wishes "despite the common law

[13] *See, e.g.*, *R. v. De Manneville*, 5 East. 221 (1804).
[14] John Eekelaar, *The Emergence of Children's Rights*, 6 Oxf. J. of Leg. Stud. 161, 164 (1986).
[15] Paul D. Halliday, *Habeas Corpus* at 127.
[16] *Id.* at 128.
[17] *Id*.

norm of paternal custody."[18] Habeas corpus was used to settle custody disputes into the nineteenth century.[19]

The child custody cases illustrate another shortcoming with the District Court's reasoning. The court finds that the elephants' confinement at the Zoo cannot be "unlawful" because "the Zoo holds these elephants under a broad framework of laws that permit zoos to hold nonhuman animals for public display in exactly the manner the Zoo is doing." *District Court Order*, p. 24. Had the King's Bench adopted this standard, it could never have made custody rulings in favour of a mother over a father because the common law norm dictated that lawful custody resides with the father. However, as the above historical examples illustrate, "even when positive (statutory or common) law renders a confinement lawful, the writ may be used to challenge a particular confinement as unjust based on the particular circumstances." *Breheny*, 38 N.Y.3d at 602 (Wilson, J., dissenting).

Given the District Court's acknowledgement that the NhRP has made a prima facie case that Jambo, Kimba, Loulou, Lucky, and Missy's confinement

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[18] *Id*. at 130.

[19] *Earl of Westmeath v. Countess of Westmeath*, as set out in a reporter's footnote in *Lyons v. Blenkin*, 1 Jac. 245, 264, 37 Eng. Rep. 842 (1821); *Rex v. Greenhill*, 111 Eng. Rep. 922, 927, 4 Ad. & E. 624 (1836) ("When an infant is brought before the court by habeas corpus . . . the court must make an order for his being placed in proper custody.") (Per Lord Denman CJ); *R v. Maria Clarke (In the Matter of Alicia Race)*, 119 Eng. Rep. 1217, 7 E. & B. 186 (1857); *R v. Howes*, 121 Eng. Rep. 467, 3 El & El 332 (1860).

is unjust, this Court should require the issuance of a writ of habeas corpus so the nature and extent of that injustice can be adjudicated on a full record of evidence.

(4) Non-Citizens

The English Judiciary has long recognised that habeas corpus applies to citizens and non-citizens alike:

> Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law is entitled to its protection. This principle has been in the law at least since Lord Mansfield freed 'the black' in *Sommersett's Case* (1772) 20 St.Tr. 1. There is nothing here to encourage in the case of aliens or non-patrials the implication of words excluding the judicial review our law normally accords to those whose liberty is infringed'.

R v. Home Secretary, Ex parte Khawaja, (1984) A.C. 741 at 111G–112A [per Lord Scarman] (Eng.).

US courts have likewise recognised that habeas applies to non-citizens. In *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879), a writ of habeas corpus was sought for the release of Ponca Indian Chief Standing Bear, whom the United States government had arrested and detained, with the intent of returning him to Indian Territory. The United States argued that the writ did not apply to Standing Bear because the word "person" in the habeas statute meant "citizen." Judge Dundy rejected this argument, noting that "the habeas corpus act describes applicants for the writ as 'persons,' or 'parties,'

who may be entitled thereto. It nowhere describes them as 'citizens.'" *Id*. at 697. "I must hold, then," he continued, "that Indians, and consequently the relators, are 'persons.'" *Id*.

Similarly, in *Boumediene v. Bush*, 553 U.S. 723 (2008), the US Supreme Court found that the detainees classified as "enemy combatants" and held at Guantanamo Bay in Cuba may seek habeas corpus under the Suspension Clause and that the federal government is subject to the Constitution even when it acts outside U.S. borders.

Had UK and US courts followed another strand of the District Court's reasoning, they may well have denied habeas corpus relief to the relators in the above cases. The District Court appeals to "the social compact" set out in the Declaration of Independence and the Constitution to justify the proposition that "our legal system is a human-made system that affords rights and responsibilities to humans and to no other species." *District Court Order*, p. 19.[20] We can imagine parallel arguments being made in past habeas corpus cases to deny protections to immigrants, indigenous people, and prisoners of

[20] The District Court's claim here is legally incorrect. Both federal and Colorado courts have recognised that animals possess legal rights. *See e.g.*, *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (2004) ("Animals have many legal rights, protected under both federal and state laws."); *People v. Harris*, 2016 COA 159, ¶ 49 ("many states had enacted laws that reflected society's acceptance of the idea that animals had an inherent right to be free from unnecessary pain and suffering and that the legal system should recognize that right").

war in overseas territories, on the basis that they are not part of the "social compact" comprising the US and UK citizenry and their respective governments.[21]

CONCLUSION

After surveying "the history and use of the Great Writ" then Associate (and now Chief) Judge Rowan Wilson of the New York Court of Appeals recently made the following four observations:

> first, even when positive (statutory or common) law renders a confinement lawful, the writ may be used to challenge a particular confinement as unjust based on the particular circumstances; second, the writ may be invoked on behalf of chattel (enslaved persons) or persons with negligible rights and no independent legal existence (women and children); third, 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; and finally, the writ may be used to transfer a petitioner from an onerous custody to a less onerous custody.

Breheny, 38 N.Y.3d at 602 (Wilson, J., dissenting).

This present case also concerns individuals who are treated as chattel and who have limited legal rights and independent legal status. The ethics of

[21] Indeed, we need not imagine such arguments; they were made. *See e.g.*, *Boumediene*, 553 U.S. at 848–49 (Scalia J., dissenting) ("The common-law writ, as received into the law of the new constitutional Republic, took on such changes as were demanded by a system in which rule is derived from the consent of the governed, and in which citizens (not 'subjects') are afforded defined protections against the Government.").

confining these individuals in zoos is increasingly being questioned and there is plausible evidence that these individuals would fare better in elephant sanctuaries.

Of course, the relators whose confinement is being challenged in this case are nonhuman animals. But to deny a merits hearing "based on nothing more" than the fact that they are "not . . . member[s] of the human species" amounts "to a refusal to confront a manifest injustice." *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054, 1057, 1059 (2018) (Fahey, J., concurring). Indeed, "history, logic, justice, and our humanity must lead us to recognize that if humans without full rights and responsibilities under the law may invoke the writ to challenge an unjust denial of freedom, so too may any other autonomous being, regardless of species." *Breheny*, 38 N.Y.3d at 628–29. (Rivera, J., dissenting).

The District Court evades these questions of justice by appealing to procedural and formalistic obstacles to securing the elephants' freedom. Yet it is precisely where instances of prima facie unjust confinement lack a clear legal remedy that the writ of habeas is used to "cut through barriers of form and procedural mazes" and "reach all manner of illegal detention." *Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Given that the writ is a tool for judges to review "confinement, construed broadly" and can "document and raise awareness of injustices that may warrant

legislative, policy, or social solutions," *Breheny*, 38 N.Y.3d at 602 (Wilson, J., dissenting), it seems a well-suited procedural vehicle for reviewing instances of the increasingly ethically-fraught question of elephant confinement.

For the aforementioned reasons, *Amici* believe the NhRP has made a prima facie case for habeas corpus relief and respectfully urge this Court to require a writ of habeas corpus to be issued.

Dated: May 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 22, 2024, a copy of the foregoing **BRIEF OF *AMICI CURIAE* UK ANIMAL LAW EXPERTS** was served via the Colorado Courts E-Filing System on all counsel of record who have entered their appearance in this case.

/s/ Suzan Trinh Almony