SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Appeal from: El Paso County District Court District Court Judge: Honorable Eric Bentley District Court Case Number: 2023CV313269	
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** ▲
Attorneys for Appellee: Names: John W. Suthers, #8492 Rosa L. Baum #56652 Address: BROWNSTEIN HYATT FARBER SCHRECK, LLP 675 Fifteenth Street, Suite 2900 Denver, Colorado 80202 (303) 223.1100 Phone: (303) 223.1111 E-mail: jsuthers@bhfs.com; rbaum@bhfs.com	Case No.: 24SA21

ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains 8,279 words (answer brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rules 28(a)(7)(A) and 28(b).

In response to each issue raised, Appellee provides under a separate heading before the discussion of the issue, a statement indicating whether Appellee agrees with Appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/John W. Suthers
John W. Suthers

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does the Petition for the writ of habeas corpus 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

For a decade Petitioner Nonhuman Rights Project ("NHRP" or "Petitioner") has filed groundless petitions for writs of habeas corpus against zoos in courts across the United States. Each and every time it has lost. Because the writ of habeas corpus can only vindicate the right of a human being against unlawful detention, it is necessarily unavailable to nonhuman animals or those who would purport to sue in these animals' interests. This is not a lawsuit pioneering a just cause or even a quixotic attempt to change Colorado law. (*See* CF, 000515 ("This is not NHRP's first rodeo . . . .")). Rather this case presents a theory, unsuited for adjudication in our court system, which has been repeatedly and emphatically rejected in every other state—from New York to California, to Connecticut to Hawaii—in which it has been

brought. (*See* CF, 000515–16); *see also In re Nonhuman Rights Project*, S281614, 2023 Cal. LEXIS 6969 (Cal. Dec. 13, 2023) (summarily denying NHRP's petition for certiorari); *Nonhuman Rights Project, Inc. v. City & Cnty of Honolulu, et al.*, No. 1CCV-23-0001418 (Jan. 16, 2024). By filing this claim, Petitioner intimidates zoos and burdens judicial resources, while fundraising for its continued operation.

Petitioner appeals the district court's extensive and well-reasoned opinion in which Judge Bentley dismissed NHRP's petition not because any party disputes that elephants are magnificent creatures, but because the court determined that (a) the five elephants at the Cheyenne Mountain Zoo (the "CMZ" or the "Zoo"), because of the fundamental fact that they are nonhuman animals, lack standing to bring a claim under the great writ of habeas corpus, (b) even if the elephants did have standing, NHRP is not the proper "next friend" to bring the present petition, and (c) even if NHRP does have standing, the CMZ elephants are not unlawfully confined. (*See, e.g.,* CF, 000532). Petitioner's proper forum for the relief it seeks is not the Colorado courts, but rather the Colorado legislature, and therefore Respondents

respectfully request that this Court affirm the trial court's order and dismiss NHRP's petition.

STATEMENT OF THE CASE

I. Nature of the Case

NHRP cloaks its policy goals in this appeal. Petitioner asks this Court to be the first to adopt a position that would—by divorcing the great writ from legal personhood—open Colorado's courts to suits seeking to vindicate the "liberty rights" of nonhuman animals. As the trial court recognized, "[t]his case does not concern just 'five elephants,' as the NHRP asserts. (If it did, the NHRP would not be in business.)" (CF, 000524). The fact that NHRP does not avail itself—nor could it—of any local, state, or federal laws providing for the humane treatment of these five elephants underscores this understanding. At its core, NHRP attempts to advance through our courts a policy question that is properly suited for the legislative branch.

CMZ prioritizes the well-being of all of its animals, including the five female African elephants who are supposedly the subject of NHRP's concern. Indeed, accreditation inspections by the Association of Zoos

and Aquariums (the "AZA") demonstrate that CMZ is the gold standard for humane treatment of animals at zoos. Not only does CMZ's elephant care team monitor the nutritional needs of the elephants, caregivers routinely and systematically observe the elephants' behavior to maintain a dynamic program responding to their needs. As highly intelligent animals, the CMZ elephants need diversity and stimulation. Therefore, CMZ's elephant care program includes 3-5 daily stimulating training sessions for each elephant, opportunities to move from yard to yard, daily medical screenings, and even daily elephant yoga sessions. And because of the mutual trust between the elephants and their caregivers built up as a result of CMZ's positive reinforcement approach, the elephants actively participate in their own healthcare, including voluntary oral medications; body, tusks, teeth, eyes, ears, feet, and mouth exams; and x-rays. Its remarkable care of elephants, as well as all other animals at the Zoo, has led to CMZ consistently receiving glowing accreditation inspection reports from the AZA. In fact, CMZ's most recent inspection resulted in a completely clean report—one of only four in AZA history. CMZ does not contest NHRP's description of

elephants' autonomy and extraordinary capacity. It is precisely this awe and love of these animals that leads CMZ to assure such meaningful care for these creatures.

Disregarding these particularized facts about CMZ and its care team, NHRP brings these proceedings—as it has done across the country—to pursue its organization's policy objectives. Rather than advance the well-being of the animals who it claims to represent, NHRP's legal antics siphon resources from zoos and distracts zoos from their mission of animal care and wildlife conservation.

II. Procedural Background

On or about June 29, 2023, NHRP filed a Verified Petition for Writ of Habeas Corpus (the "Petition"). In the almost 400 pages NHRP originally filed, it did not—and indeed cannot—point to a single case in American jurisprudence that supports its position that nonhuman animals are entitled to habeas corpus protections.

Respondents moved the trial court to dismiss the Petition on or about August 31, 2023. And, on December 3, 2023, in an extensive and well-reasoned Order, the El Paso County District Court did just that.

Indeed, the district court extensively demonstrated that it was construing NHRP's allegations in the most favorable light—as required at this point in the proceedings. However, even under such a standard, the district court concluded that "what NHRP is seeking is not the enforcement of existing legal rights but an expansion of those rights." (CF, 000515). Taking note that "the overwhelming weight of legal precedent is against the NHRP," (CF, 000516), the trial court determined (1) that the CMZ elephants did not fall into the category of persons protected by habeas corpus and thus lacked standing to initiate the instant proceeds, (*See* CF, 000526); (2) even if the elephants did have standing, NHRP was not the proper entity to file on the elephants' behalf, (*See* CF, 000529); and (3) even if the elephants did have standing and NHRP could file on their behalf, NHRP did not make a prima facie showing that the elephants were entitled to immediate release, (*See* CF, 000532).

SUMMARY OF THE ARGUMENT

Respondents, the Trial Court, and Petitioner all agree that the question of animal care and treatment "raises profound issues of ethics,

justice, and public policy. Those issues, however, merely serve as a backdrop to the legal issues presented to the Court." (CF, 000515). The proper forum for NHRP's policy arguments is the Colorado Legislature.

Petitioner asks this Court to create a Colorado common law right to habeas corpus for nonhuman animals. However this request is not based anywhere in statute or in common law. Instead, habeas corpus protections, whether statutory or at common law, are reserved for human beings who are unlawfully detained. Habeas corpus extends from human accountability to the law—that humans may be held to respond to the consequences of their actions under the law and therefore have corresponding rights. We embrace habeas corpus protections for human beings not once they pass some sort of autonomous capacity test, as Petitioner argues, but because they are human beings.

In an effort to more clearly organize the questions before the Court, and recognizing that standing is a threshold issue, Respondents address the issues NHRP raises in its Opening Brief in reverse order, paralleling the trial court's approach. (*See, e.g.*, CF, 000521–22 ("the

standing inquiry, properly considered, addresses who has the right to file a habeas petition, and the merits inquiry . . . addresses whether the petitioner is being detained unlawfully")).

The trial court correctly determined that it did not have subject matter jurisdiction over these proceedings because the CMZ elephants lacked standing to bring the Petition in the first place. The liberty interests protected by habeas corpus do not extend to nonhuman animals. NHRP relies on an odious comparison between enslaved persons and animals—conflating delineations of personhood based on race and mere social constructions, as opposed to a founded biological basis—to argue that the district court's standing analysis was misguided. But the Colorado Habeas Corpus Act and this Court's precedent interpreting both the statutory language and the common law writ are clear: habeas corpus is for human beings.

But even if this Court was inclined to further engage with the analysis, NHRP is not the proper actor to bring suit on the elephants' behalf. NHRP has not established a relationship with these particular five elephants. Rather, this suit is one in a series of fundraising efforts

for NHRP, in which it recycles not only arguments that have been repeatedly rejected by courts across the country but also expert declarations. NHRP seeks to advance its own policy agenda, not protect the health and safety of these five elephants.

And while the Court need not proceed to the merits of this matter, NHRP has not established a *prima facie* showing that the CMZ elephants are unlawfully detained and thus entitled to immediate release. Instead, NHRP waxes about its policy goals. It argues that the Court should disregard precedent and the reasoned analysis of high courts in other states on this very issue, to instead adopt an amorphous view of the writ of habeas corpus. This would require the Court to ignore the guardrails the Colorado legislature has provided for the application of the writ to assure its proper and powerful application. In this section of its brief, the NHRP delves into a philosophical dispute to disavow "human exceptionalism," argues that the elephants are "persons," and urges the Court to pay little attention to any upheaval—whether to humans' access to justice or to societal order—that its perspective advances. And even though NHRP admits, as the trial court

found, that NHRP seeks the expansion of rights, (*see* Opening Brief at 20; *see also* CF, 000515), it refuses to take its policy arguments to the Colorado Legislature.

Therefore, because the elephants do not have standing to demand habeas corpus protections, because NHRP is not the proper party to request such relief on the elephants' behalf, and because the elephants are not confined unlawfully nor entitled to immediate release, Respondents respectfully request that the Court affirm the trial court's dismissal of the instant proceedings.

ARGUMENT

I. Because the five elephants do not fall into the class of "persons" who may assert a right to habeas corpus, the trial court properly determined that NHRP did not have standing to sue on the elephants' behalf and therefore the court did not have subject matter jurisdiction.

A. Standard of Review and Preservation.

Respondents agree that NHRP preserved its challenge on standing, but expand upon NHRP's recitation of the standard of review.

This Court reviews de novo whether a plaintiff has standing to sue. *Barber v. Ritter*, 196 P.3d 238, 245 (Colo. 2008). As this Court has recognized, "[s]tanding is a jurisdictional prerequisite" for matters

before the courts. *Hickenlooper v. Freedom from Religion Found., Inc.*, 338 P.3d 1002, 1006 (Colo. 2014). And "[b]ecause 'standing involves a consideration of whether a plaintiff has asserted a legal basis on which a claim for relief can be predicated,' the question of standing must be determined prior to a decision on the merits." *Id.* (quoting *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1052 (Colo. 1992)). Therefore, it is appropriate for a court to first determine "whether the plaintiff suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Anson v. Trujillo*, 56 P.3d 114, 117 (Colo. App. 2002). "If a plaintiff suffered no injury in fact, or suffered injury in fact, but not from the violation of a legal right, the claim should be dismissed for lack of standing." *Id.* (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977)).

B. Discussion

1. Habeas corpus does not extend to nonhuman animals.

NHRP lacks standing to bring the present litigation because fundamentally, "elephants, not being persons, lack[] standing in the first instance." *Nonhuman Rights Project, Inc. v. R.W. Commerford &*

Sons, Inc., 216 A.3d 839, 842 (Conn. App. 2019).

Colorado's Habeas Corpus Act (the "Act") confers the right to seek relief to human beings, not animals. *See* C.R.S. §§ 13-45-101–119. Indeed, "whether animals have standing depends on the content of positive law. If [the legislature] has not given standing to animals, the issue is at an end." Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1359 (2000); *see also Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir. 2004) (quoting *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993)) ("[I]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly."). In other words, nonhuman animals' standing depends on "enacted law – codes, statutes, and regulations that are applied and enforced in the courts." *Positive Law*, Black's Law Dictionary (11th ed. 2019). Colorado's statutory provisions on habeas corpus do not provide for NHRP's expansive interpretation of the application of the great writ.

This Court has repeatedly explained that the Colorado Habeas Corpus Act shapes the use of the great writ. In one of the very cases that NHRP contends supports its position, this Court explained that the "power to hear habeas corpus petitions derives from constitutional *and* statutory grants of authority." *Jones v. Williams*, 443 P.3d 56, 59 (Colo. 2019) (emphasis added). The state constitution "grants the right to seek a writ of habeas corpus" and the Act "makes it 'lawful . . . to apply to the . . . district courts for a writ of habeas corpus.'" *Id.* (quoting C.R.S. § 13-45-101(1)). Stated differently, the "Habeas Corpus Act and the rules of this [C]ourt delineate 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); *see also White v. Rickets*, 684 P.2d 239, 241 (Colo. 1984) ("The Colorado Habeas Corpus Act . . . defines rights judicially enforceable by means of the venerable writ of habeas corpus."). And whether the term "delineate" means, as the NHRP posits, that the legislature is "describing" the right, (Opening Brief at 12), or "to mark the outline of," *Delineate*, Merriam Webster, *available at* https://www.merriam-webster.com/dictionary/delineate,

this Court has recognized the legislature's role in directing the application of the writ. The Court has expressly observed that it is the Act that "carefully defines the circumstances under which the relief authorized thereby may be granted. The intervention by the judiciary . . . is reserved for [the] most serious violations of fundamental rights . . . ." *White*, 684 P.2d at 241; *see also R.W. Commerford*, 216 A.3d at 845 (quoting *Kaddah v. Comm'r of Correction*, 153 A.3d 1233, 1243 (Conn. 2017)) ("[A]lthough the writ of habeas corpus has a long common-law history, the legislature has enacted numerous statutes shaping its use . . . .").

This Court's precedents reflect the recognized guardrails the Act places on the deployment of the great writ. For example, the Court determined that "the Act permits prisoners to seek judicial relief from alleged violations of liberty interests only in narrowly defined circumstances." *Reece v. Johnson*, 793 P.2d 1152, 1153 (Colo. 1990). In *Reece*, this Court explained that "[w]hile the historic vitality of the writ as a remedy for redressing governmental deprivations of fundamental constitutional rights has not been diminished, efforts to appropriate

this venerable remedy in circumstances not constituting significant infringements of fundamental rights have been rejected." *Id.*; *see also White*, 684 P.2d at 242 (petitioner alleged "only that the place of his confinement should be altered"). Therefore, contrary to NHRP's dramatized pronunciation that this Court's consideration of the Act would "strip the judiciary of authority" of the application of habeas corpus, (Opening Brief at 13), the Court has already determined that it looks to this statutory language in applying these protections.

Like each of the statutes to which Petitioner has cited in its litigation over the years, Colorado's statutory provision of habeas corpus is expressly directed to any "person," meaning any human being. *See* C.R.S. § 13-45-101 ("If any *person* is committed or detained for any criminal or supposed criminal matter, it is lawful for him to apply to the supreme court or district courts for a writ of habeas corpus . . . .") (emphasis added); *see also* § 13-45-102 ("When any *person* . . . is confined or restrained of his liberty under any color or pretense whatever, he may proceed by appropriate action . . . in the nature of habeas corpus . . . .") (emphasis added). And Colorado statute defines

"person" as "any individual" or human-created legal entity. C.R.S. § 2-4-401(8) (including in the definition of person, for example, individuals as well as "corporation, government or governmental subdivision or agency, business trust, . . . or other legal entity"); *see also Culver v. Samuels*, 37 P.3d 535, 536 (Colo. App. 2001) (quoting *Webster's Third New International Dictionary* 1686 (1968)) ("The word 'person' means an 'individual human being.'"); *accord People v. Grosko*, 491 P.3d 484, 489 (Colo. App. 2021) (observing that the term "person" means a human being); *see also R.W. Commerford*, 216 A.3d at 844 (concluding jurisprudence contained "no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal's purported autonomous characteristics"); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D. 3d 148, 150 (3d Dept. 2014), *leave to appeal denied*, 38 N.E.3d 828 (N.Y. 2015) ("animals have never been considered persons for the purposes of habeas corpus relief, nor have they been explicitly considered as persons or entities capable of asserting rights for the purpose of state or federal law"). Petitioner's statement that the context of this case

requires that the Colorado statutory definition of "person" not apply is circular and conclusory. (*See* Opening Br. at 24). Applying the statutory definition of "person" does not "unconstitutionally suspend" habeas corpus protections, (*see id.*), because these protections are not available, in the first place, to nonhuman animals.

This Court need not humor Petitioner's attempt to create ambiguity in the law where none exists. Habeas corpus protections are intended for human beings. *See Rowley v. City of New Bedford*, No. 20-P-257, 2020 WL 7690259, at *2 (App. Ct. Mass. Dec. 28, 2020) (citing *Commonwealth v. Cass*, 467 N.E. 2d 1324, 1325 (Mass. 1984)) ("the word 'person' is synonymous with the term 'human being.'"); *see also Person*, Black's Law Dictionary (11th ed. 2019) (defining person as a "human being"). Therefore, the text of the Act plainly shows that nonhuman animals do not fall under the class of persons protected by habeas corpus.

NHRP appears to argue that habeas corpus is based on a being's autonomous capacity, rather than it being a fundamental right of a human being. (*See* Opening Brief at 15). But habeas protections stem

from the mere status of being a person, not from the results of a test. As the Court of Appeals of New York explained:

> The selective capacity for autonomy, intelligence, and emotion of a particular nonhuman animal species is not the determinative factor in whether the writ is available as such factors are not what makes a person detained qualified to seek the writ. Rather, the great writ protects the right to liberty of humans *because they are humans* with certain fundamental liberty rights recognized by law.

Nonhuman Rights Project, Inc. v. Breheny, 197 N.E.3d. 921, 927 (N.Y. 2022) (emphasis added). Access to habeas corpus does not depend on emotional capacity or intelligence; it depends, as it should, on the mere fact that the subject of the writ is a human being.

2. This Court should reject Petitioner's attempt to expand legal personhood to nonhuman animals.

Even if the Court were to go beyond the legislature's clear statutory direction, American jurisprudence leads to the conclusion that the liberty interest guaranteed by the writ of habeas corpus does not extend to nonhuman animals. As the trial court determined, "neither the habeas statute nor the common-law writ of habeas corpus confers a right to habeas relief on nonhuman animals." (CF, 000518).

Accepting Petitioner's argument not only requires that the Court recognize elephants as "persons," but "this recognition essentially would require [the court] to upend this state's legal system to allow highly intelligent, if not all, nonhuman animals the right to bring suit in a court of law." *R.W. Commerford*, 216 A.3d at 844. Courts have repeatedly rejected the argument that nonhuman animals have standing to sue. *See, e.g.*, *Lewis v. Burger King*, 344 Fed. Appx. 470, 472 (10th Cir. 2009) ("Lady Brown Dog, as a dog and putative co-plaintiff, lacks standing to sue under the ADA (or any other civil rights statute)."), *cert. denied*, 558 U.S. 1125 (2010); *Legal for Cloud v. Yolo Cnty.*, No. 2:18-cv-09542, 2018 WL 11462074, at * 3 (C.D. Cal. Dec. 3, 2018) ("the cats have no standing by reason of their species"); *Justice by and through Mosiman v. Vercher*, 518 P.3d 131, 137 (Or. Ct. App. 2022) ("[I]t has long been the rule that only a natural or artificial person may bring a legal action to redress violation of rights.").

Non-human animals, like the elephants at CMZ, are incapable of bearing the responsibilities of personhood and therefore are not entitled

to the rights of personhood.[1] Courts have repeatedly observed that "legal personhood has consistently been defined in terms of both rights *and duties*." *Lavery*, 124 A.D. 3d at 151 (emphasis in original); *Person*, Black's Law Dictionary (11th ed. 2019) (defining person as a "human being" or an "entity" having "the rights and duties of a human being"); *see also* Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments from "Marginal" Cases*, 45 Ariz. St. L.J. 1, 13 (2013) ("rights are connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights"); *Vercher*, 518 P.3d at 136 (citing William Blackstone, 1 *Commentaries on the Laws of England* 123 (1771)) ("Under the English common law, only human beings and legal entities created by human beings were considered 'persons' capable of holding and asserting legal rights."). Therefore, the human

[1] Respondents agree with the District Court that a proper analysis "need not engage too deeply . . . with this challenging philosophical dispute. The reality is much simpler. . . . Our legal system is a human-made system that affords rights and responsibilities to humans and to no other species." (CF, 000525–26). However, in order to avoid waiving any arguments thereon, Respondents submit to the Court their arguments on the matter.

right to liberty is saddled with the obligations and responsibilities required of each of us to be part of a free and functioning society.

The law necessarily recognizes a fundamental distinction between human beings—who have a right to bodily liberty that can only be alienated on a showing that they have violated a responsibility inherent in the exercise of that right—and animals—whose protections, insofar as human institutions are called upon to secure them, are the subject of legislatively-enacted human law that accounts for animals' inability to exercise human responsibility. The writ of habeas corpus—which vindicates a right fundamental to personhood—is a specific remedy provided to humans that is thus inextricably intertwined with the rights and responsibilities human beings hold within the societal order. *Breheny*, 197 N.E.3d at 927 ("the great writ protects the right to liberty of humans *because* they are humans") (emphasis in original).

NHRP's attempt to expand the definition of "person" in this context is unavailing. In fact, the *Breheny* dissenting opinions on which Petitioner stakes its argument advance offensive policy arguments that Colorado courts should be loath to adopt. As the *Breheny* majority notes,

"the dissents are long on historical discourse but woefully short of any cogent legal analysis identifying any recognizable source of a proclaimed liberty right or so-called fundamental right to be free that they seek to bestow upon autonomous nonhuman animals." *Id.*, at 928. From a subjective perspective of where policy *ought* to proceed,

> the [*Breheny*] dissenters conclude that the logical progression of our common law runs from extending habeas to 'abused women and children and enslaved persons' to granting an elephant the right to bring a habeas proceeding, an odious comparison with concerning implications—as both dissenters acknowledge but one on which they nevertheless rely.

Id. (internal citations omitted). The extension of personhood and the great writ to all races, sexes, and genders, has a logical foundation that courts are equipped to recognize: biology. Such a scientific distinction is clearly not, as Petitioner claims, "arbitrary and irrational." (Opening Brief at 21). The despicable treatment of women, children, and enslaved persons was a vile social construction the courts were correct to shed. Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. Rev. 1, 27 (1994). Equating these groups' laudable fights to that of a

nonhuman animal is not only offensive but illogical and unfounded. While legislative bodies are empowered to take the novel step to extend the writ of habeas corpus beyond human beings, that is not the role of the courts.

Undoubtedly, "the writ of habeas corpus is flexible and has long existed as a mechanism to secure recognition of the liberty interests of *human beings*—even those whose rights had not yet been properly acknowledged through established law." *Breheny*, 197 N.E.3d at 928. However, "[t]hat flexibility . . . is not limitless." *Id.*; (*see also* CF, 000524).

3. Even if the CMZ elephants do have standing, NHRP does not have standing to bring the instant proceeding on the elephants' behalf.

Should the Court determine that habeas corpus does not extend to the CMZ elephants, it need proceed no further. But should it choose to continue its analysis, as the trial court found, NHRP is not the proper party to advance this petition. NHRP does not have standing to bring these claims as the elephants' "next friend."

"Colorado's habeas statute contains a liberal next-friend provision:

it provides that a habeas petition my be signed 'by the party or someone on [their] behalf." (CF, 000527 (quoting § 13-45-102)). However, this "'next friend' standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another." *Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990). The doctrine "should be narrowly tailored in light of public policy concerns" because "however worthy and high minded the motive of 'next friends' may be, they inevitably run the risk of making the actual [party] a pawn to be manipulated on a chessboard larger than his own case." *Vercher*, 518 P.3d at 135 (quoting *Naruto v. Slater*, 888 F.3d 418, 431 (9th Cir. 2018) (Smith, J., concurring)). Thus, this requirement should not be denigrated as a mere "technical requirement." (*Compare* Opening Brief at 39, *with* CF, 000529 ("This is not just a technicality. There is a legitimate question in this case as to who properly speaks for the elephants . . . .")). In fact, courts have expressly denied next friend standing to those seeking to bring suits on behalf of nonhuman animals, absent express authorization from Congress. *See Naruto*, 888 F.3d at 422.

Yet again assuming the Court entertains the idea that the CMZ elephants have standing to sue and that next friend standing to act on these elephants' behalf might therefore be available to Petitioner, Petitioner—even after the hundreds of pages of briefing on these proceedings—has not established the requisite elements to assert such standing. In matters involving habeas corpus, next friend standing—whereby a nonparty in interest can bring a matter in lieu of the injured party—has "at least two firmly rooted prerequisites." *See Fleming ex rel. Clark v. LeMaster*, 28 Fed. Appx. 797, 798–99 (10th Cir. 2001). First, the next friend "must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on [their] own behalf to prosecute the action," and second, the next friend "must be truly dedicated to the best interests of the person on whose behalf [they] seek[] to litigate." *Id.*, at 799 (citing *Whitmore*, 495 U.S. at 163–64). Additionally, "it has been further suggested that a 'next friend' must have some significant relationship with the real party in interest." *Whitmore*, 495 U.S. at 163–

64; *accord Franklin v. Dep't of Homeland Security*, No. 19-cv-00314, 2019 WL 2183411, at *2 (D. Colo. 2019).

Putting aside the repeated references to *persons*, Petitioner does not satisfy the required elements of next friend standing. The Petition does not allege sufficient facts to establish standing. *See Naruto*, 888 F.3d at 421. Additionally, Petitioner is not dedicated to the best interest of the CMZ elephants, nor does it have a significant relationship with them. The CMZ expert elephant care team—a team with a combined 65 years of experience in elephant care—knows the unique needs and preferences of each of the elephants at CMZ. For example, trainers at the CMZ know that Kimba and Lucky, who have been with CMZ since 1981, have a particularly close bond. Kimba will specifically rely on Lucky to explore new spaces and interact with new elephants or humans before she feels comfortable to do so. And while Kimba and Lucky prefer to sleep on sandy hills, Missy's preferred resting spots are always flat ground. And rather than have treats handed to her trunk, Missy likes it when the CMZ team members throw food into her mouth.

In contrast, it appears that various of the expert declarations attached to the Petition are recycled from Petitioner's prior litigation, and that only Dr. Bob Jacobs actually visited CMZ, observing the CMZ elephants for a mere two hours. (*See* CF, 000057 ¶ 70; *see also* CF, 000528–29 (NHRP "cannot claim any significant relationship with these elephants, or indeed any relationship at all . . . .")). As the trial court clearly found, "even taking its affidavits as true, NHRP has failed to establish that it is in a better position to speak for these elephants than the Zoo is." (CF, 000529).

Additionally, as the trial court astutely observed, "[t]his case does not concern just 'five elephants,' as the NHRP claims. (If it did, the NHRP would not be in business.) It concerns, as the NHRP well knows and intends, an opening of a heretofore-unopened legal door . . . ." (CF, 000524). Allowing Petitioner to proceed as the 'next friend' of the CMZ elephants on this basis would be to allow the elephants to be used as pawns in Petitioner's fundraising, at the expense of their well-being. *See Vercher*, 518 P.3d at 135.

The trial court correctly found that "NHRP failed to establish that it is in a better position to speak for these elephants than the Zoo is" and thus did not satisfy next friend standing. (CF, 000529; *see also id.* (noting it "appears to be the Zoo, not the NHRP, that has the most significant relationship with Missy, Kimba, Lucky, LouLou and Jambo")). Because the standing analysis is dispositive of this matter, the Court need proceed no further.

II. The Petition does not make a prima facie case that the five elephants are entitled to release.

A. Standard of Review and Preservation

As above, Respondents agree that NHRP preserved this challenge for appeal, but provide further clarification of the Court's precedent on the standard of review.

This Court has clearly stated that when considering the appropriate application of relief under the great writ of habeas corpus, "[u]nless a petition for habeas corpus makes a *prima facie* showing of invalid confinement and entitlement to immediate release or demonstrates a serious infringement of a fundamental constitutional right, it is 'insufficient on its face' and should be dismissed without a

hearing." *Christensen v. People*, 869 P.2d 1256, 1259 (Colo. 1994) (quoting C.R.S. § 13-45-101). "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). In other words, a petitioner must show that their detainment is unlawful. *Fields v. Suthers*, 984 P.2d 1167, 1169 (Colo. 1999).

B. Discussion

1. Elephants at CMZ are not unlawfully confined and thus are not entitled to immediate release.

Should the Court determine it proper to apply the writ of habeas corpus to the CMZ elephants, the question becomes whether these elephants are "detained" *unlawfully* and therefore must be *released*. *See Breheny*, 197 N.E.3d. at 926–27 ("The common law writ of habeas corpus therefore provides a means of redress for persons alleging detention . . . in violation of various statutory or constitutional rights and, on the merits, the question presented in a habeas proceeding is

whether the relator's confinement is contrary to law."). They are not. (*See* CF, 000531). Indeed, as the district court observed, the "NHRP does not—and cannot—contend that the Zoo is holding these five elephants in violation of any existing law." (*Id.*). Rather, as the trial court continued, "it is beyond dispute that 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." (*Id.*).

While Petitioner clings to the dissenting opinions in *Breheny*, the majority deals decisive blows to those opinions and notes their scant legal analysis. *See* 197 N.E.3d at 928–31. Here, as the *Breheny* court acknowledged, Respondents do not dispute the impressive capabilities of elephants nor the awesome power of the writ of habeas corpus. But the question for this Court is whether the writ is the appropriate vehicle to challenge the proper treatment of nonhuman animals. Simply stated, it is not. No federal or state court has *ever* held the writ applicable to a nonhuman animal, and no state or federal precedent provides support for the notion that the writ should be applied to nonhuman animals. *Breheny*, 197 N.E.3d at 928. The elephants are not

being held at the CMZ in violation of any law and they are not entitled to immediate release.

Colorado, like many other jurisdictions, recognizes that the writ of habeas corpus is designed to "determine whether a *person* is being detained *unlawfully* and therefore should be *immediately released* from custody." *Fields*, 984 P.2d at 1169 (emphases added); *see also Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D. 3d 1334, 1335 (N.Y. 4th Dept. 2015) ("It is well settled that a habeas corpus proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody" as "habeas corpus does not lie where a petitioner seeks only to change the conditions of confinement rather than the confinement itself."). Respondents address each element in turn.

Not Unlawful. First, the CMZ elephants are not unlawfully confined. (CF, 000532 ("[T]he record before the Court – even when considered in the light most favorable to NHRP – fails to demonstrate that the Zoo's confinement of Missy, Kimba, Lucky, LouLou, and Jambo is unlawful.")). Colorado law expressly provides for the lawful sheltering

of elephants in zoos.

The Law Professors' Amicus Brief—amici that support NHRP—highlights a recently passed Colorado statute that speaks to this very question. In 2021, the Colorado Legislature passed the Traveling Animal Protection Act, which provides certain protections for animals, including elephants. *See* C.R.S. § 33-1-126 (including elephants under subsection (3)(h), listed as "proboscidea"). This act prohibits the inclusion of certain animals in traveling shows, like circuses. However, the Traveling Animal Protection Act creates a critical safe harbor. Recognizing the care with which institutions like CMZ treat their elephants, it expressly exempts any "[n]onmobile, permanent institution, facility, zoo, or aquarium accredited by the Association of Zoos and Aquariums." § 33-1-126(4)(a)(II). CMZ has been continually accredited by the AZA for over 35 years and has received glowing commendations from AZA for every year that the AZA has monitored the wellbeing of animals in its care. Therefore, the Colorado legislature has explicitly condoned the precise conduct that the NHRP now challenges as unlawful. Simply stated, NHRP does not satisfy this

elemental prong of establishing a *prima facie* showing of entitlement to habeas corpus relief.

Additionally, it is notable that the Petition did not ask the trial court to evaluate the living conditions for Missy, Kimba, Lucky, LouLou, and Jambo, as they measure against state or federal statutes respecting the domestic possession of wild animals. *See, e.g.*, *Breheny*, 197 N.Y. 3d at 927 ("Persons seeking a writ of habeas corpus must establish more than just confinement to justify its issuance; they must show that their confinement is illegal."); *see also Jones v. Zavaras*, 926 P.2d 579, 581–82 (Colo. 1996). The Petition's failure in this regard is telling: Colorado has demanding animal protection laws. The 2023 U.S. State Animal Protection Laws Ranking Report published by the Animal Legal Defense Fund, the nation's preeminent legal advocacy organization for animals, slotted Colorado as the fifth best state in the nation for animal protection laws.[2]

---

[2] *Colorado Ranked Fifth-Best State for Animal Protection Laws*, ALDF (Feb. 20, 2024) *available at* bit.ly/3yVVsVy. When NHRP originally filed its Petition, Colorado ranked fourth. *See* Colorado Ranked Fourth Best State for Animal Protection Laws by Animal Legal Defense Fund, ALDF (Feb. 1, 2023), *available at* https://aldf.org/article/colorado-

Colorado criminalizes cruelty to animals, defined as knowingly, recklessly, or with criminal negligence overdriving; overloading; overworking; tormenting; depriving of necessary sustenance; unnecessarily or cruelly beating; allowing to be confined in a manner resulting in chronic or repeated harm; engaging in sexual acts; or otherwise failing to provide proper food, drink or protection to an animal. *See* C.R.S. § 18-9-202. This sweeping definition provides ample basis for securing the humane treatment of animals. As noted in previous litigation to which Petitioner was a party, "[habeas] corpus is not . . . the primary remedy for statutory or constitutional violation that result in unlawful restraint. Resort to habeas and '[d]eparture from traditional and orderly proceedings'—such as the appellate process—is 'permitted only when dictated . . . by reason of practicality and necessity.'" *Breheny*, 197 N.E. 3d at 927 (quoting *People ex. Rel. Keitt v. McMann*, 220 N.E.2d 653 (N.Y. 1966)). If Petitioner's true concern was the well-being of the five CMZ elephants, it would not need to turn to a petition for a writ of habeas corpus because of the extensive animal

---

ranked-fourth-best-state-for-animal-protection-laws-2022/.

protection laws at its disposal. *See Vreeland v. Weaver*, 193 P.3d 836, 837–38 (Colo. 2008) (quoting *Blevins v. Tihonovich*, 728 P.2d 732, 733 (Colo. 1986)) ("We have consistently held that 'habeas corpus relief is generally not available unless other relief is unavailable.'").

Petitioner also chooses not to employ the federal Animal Welfare Act to advance an argument that CMZ's elephants are unlawfully confined. *See* 7 U.S.C.A. §§ 2131–59; 4 Am. Jr. 2d Animals § 31. Congress expressly stated that it seeks "to insure that animals intended for . . . exhibition purposes . . . are provided humane care and treatment." 7 U.S.C.A. § 2131. Thus, Petitioner was not confronted with a dearth of legal protections for animals against alleged mistreatment. Petitioner's choice to instead bring its unfounded claims trivializes the importance of animal protection laws and thereby does a disservice to the very animals on whose behalf they claim to bring this case.

A challenge on statutory grounds may better demonstrate at least the potential for true concern for the elephants' wellbeing. But, it is likely that the absence of a statutory claim is a result of Petitioner's understanding that such a claim would be futile. As noted above, CMZ's

treatment of its animals is exemplary. CMZ does not dispute the impressive capacities for intelligence and emotion elephants display; that is precisely why CMZ places such importance in its compliance with AZA requirements and federal and Colorado law.

Not Requesting Release. Second, Petitioner does not seek the immediate *release* of the elephants at CMZ; it seeks the elephants' *transfer* to an alternative confinement. Colorado courts recognize only limited circumstances where habeas corpus relief may be available where complete discharge does not result and these limited circumstances are not applicable here. *See Fields*, 984 P.2d at 1169. As in *White v. Rickets*, "Petitioner alleges only that the place of [the] confinement should be altered." 684 P.2d at 242. Failure to transfer an individual—even when ordered by the Colorado Parole Board—"does not in and of itself furnish any basis for [habeas corpus] relief." *Id.* And, as in *Breheny*,

> [t]he fact that greatest relief which could be afforded [the CMZ elephants] is a transfer between lawful confinements demonstrates the incompatibility of habeas relief in the nonhuman contest inasmuch as . . . the writ may be sustained only when a person is entitled to immediate release from an unlawful restraint of liberty.

197 N.E. 3d at 928.

2. Petitioner's argument presents no articulable standard by which to resolve the myriad questions its argument presents.

NHRP seeks this Court's approval of an unworkable legal determination. Absent from NHRP's arguments is any principle on which species are entitled to habeas protections, which parties might be able to bring claims on a nonhuman animal's behalf, or how to analyze whether confinement is unlawful. *See id.*, at 929. As the *Breheny* majority plainly stated: "Tellingly, neither of our dissenting colleagues identify any intelligible standard upon which to resolve these labyrinthine issues, which buttresses our conclusion that habeas corpus—which exists to protect liberty interests—is not the appropriate forum to resolve disputes concerning the confinement of nonhuman animals." *Id.*, at 930. And yet these are the dissenting opinions Petitioner embraces.

For example, Judge Wilson in dissent posits that "courts should engage in 'a normative analysis that weighs the value of keeping the [nonhuman animal] confined with the value of releasing the [nonhuman

animal] from confinement,' taking into consideration '[t]he value of the confinement' to the nonhuman animal as well as the 'value of the confinement to the captor and society.'" *Id.* (quoting *Breheny*, 197 N.E.3d at 965 (Wilson, J. dissenting)). But this undertaking "bears no relationship to the merits analysis properly undertaken in a habeas corpus proceeding, which asks whether the confinement—i.e., the curtailment of liberty—is legal." *Id.* Instead, as the *Breheny* majority points out, "relief would be dependent, not on the legality of detention, but on a judge's subjective determination of where the relator would be 'better off.'" *Id.* (quoting *Breheny*, 197 N.E.3d at 933–34 (Wilson, J. dissenting)). "Such a balancing test would transform the great writ of habeas into a morass of case-by-case inquiries apparently to be determined by some subjective, amorphous, and evolving 'normative value system regarding the treatment of nonhuman animals to which [the Colorado] legislature has not subscribed." *Id.* The *Breheny* dissenters' position, and that of Petitioner here, would thus transform the great writ of habeas corpus into an unrecognizable judicial creation.

Similarly, New York Judge Rivera "suggests that liberty rights spring from 'autonomy'—a term that is notably left undefined and which could reasonably be applied to a vast number of species." *Id.*, at 930. Basing this right on "autonomy" rather than humanity threatens the most vulnerable human populations. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)) ("[O]ur basic concept of the essential dignity and worth of every human being" is "a concept at the root of any decent system of ordered liberty.").

Indeed, the *Breheny* "dissenters' wholly unsatisfactory attempts" at re-writing the contours of the writ of habeas corpus—contentions on which Petitioner here relies—are "divorced from practical reality, devoid of support, and demonstrate[] the internally contradictory foundation on which their analyses are built. Such arbitrary distinctions stand in clear contrast to our recognition that habeas is, and always has been, the bulwark of *human* liberty rights." *Breheny*, 197 N.E.3d at 930. (emphasis in original). Petitioner's argument thus

relies on untenable premises and unworkable standards. This Court should therefore affirm the trial court's dismissal of the Petition.

3. Petitioner's proper forum is the General Assembly.

Petitioner is free to make its arguments before the Colorado General Assembly. That body may be able to confer some of the rights of personhood on nonhuman animals—at least constructively. But that task is for the legislative branch of government. As the trial court plainly stated, NHRP's "project is appropriately directed to the legislature, not this Court. Existing law, which it is this Court's responsibility to interpret and apply, compels dismissal." (CF, 000516). A trespass by this Court upon those powers delegated to the legislature would violate basic principles of separation of powers.

Separation of Powers. Petitioner's argument blatantly disregards the separation of powers.

> It is an ingrained principle in our government that the three departments of government are coordinate and shall co-operate with and complement, and at the same time act as checks and balances against one another but shall not interfere with or encroach on the authority or within the province of the other.

Pena v. Dist. Court, 681 P.2d 953, 956 (Colo. 1984) (quoting *Smith v.*

Miller, 384 P.2d 738, 741 (1963)). The requested remedy here is one a legislature is built to fashion, not the courts. In effect, Petitioner seeks the judicial endorsement of its philosophical view that elephants have a fundamental right to certain welfare provisions different from those contained in the numerous governing laws and regulations. Petitioner is attempting to weaponize the writ of habeas corpus in the courts to achieve a *policy* endpoint.

In addition to the work before the Colorado legislature by similar groups as NHRP to pass the Traveling Animal Protection Act as discussed above, last year, the Ojai City Council, in Ojai, California, passed an ordinance ostensibly granting elephants the right to bodily liberty. *See* Ojai, Cal., *Ordinance Adding the Right to Bodily Liberty for Elephants to Chapt. 4, Title 5 of the Ojai Mun. Code* (Sept. 26, 2023).[3]

[3] Respondents note that while the Ordinance proclaims to bestow the right to bodily liberty on elephants, it still allows for the animals to be held in captivity, without due process of law, under certain circumstances—a flavor of liberty that would be unacceptable under a pure application of habeas corpus to a *human being*. Thus, in practice, the Ordinance recognizes the critical distinction between elephants and humans. And a mere internet search reveals that at Global Federation of Animal Sanctuary locations—like at the Cheyenne Mountain Zoo—animals are accessible to the public to inspire awe and encourage

Indeed, NHRP participated in the Ojai legislative process. That was a proper exercise of governmental power, specifically legislatively power; it is not for our court system to advance these positions. Instead, Petitioner should turn to the legislative branches of government where, admittedly, it has had success. *See id.*

This would not be the first court, nor the first state high court, to direct NHRP to the relevant legislative body. As the Court of Appeals of New York recognized,

> while this litigation may invite consideration by others of questions that are the appropriate subject of ethical, moral, religious, and philosophical debate, the *legal* issue presented is straightforward. The use of habeas corpus as a vehicle to extend legal personhood beyond living humans is not a matter for the courts.

Breheny, 197 N.E.3d at 931 (emphasis added). Undoubtedly, the "desire and ability of our community to engage in a continuing dialogue regarding the protection and welfare of nonhuman animals is an essential characteristic of our humanity. Such dialogue, however,

---

environmental efforts to save these majestic creatures. *See What is a Sanctuary*, Global Federation of Animal Sanctuaries (2023), https://sanctuaryfederation.org/about-gfas/what-is-a-sanctuary/. At its core, the Ojai Ordinance is an animal protection provision.

should be directed to the legislature." *Id.*, at 932. Petitioner is in the wrong forum.

Societal Consequences. Any decision to grant non-human animals habeas corpus protection—one that would contradict current statutes authorizing the lawful keeping of and care for animals—"would have an enormous destabilizing impact on modern society." *Id.*, at 929.

> Granting legal personhood to a nonhuman animal in such a manner would have significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts. Indeed, followed to its logical conclusion, such a determination would call into question the very premises of pet ownership, the use of service animals, and the enlistment of animals in other forms of work.

Id. "It is not this Court's role to make such a determination." *Id.* Hence, the extension of the legal rights of human beings to nonhuman animals, to the extent possible or desirable, is an issue necessarily committed to the legislative process. *See Lewis*, 344 Fed. Appx. at 472; *accord Nonhuman Rights Project, ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 80 (1st Dept. 2017) ("[T]he according of any fundamental legal rights to

animals, including entitlement to habeas relief, is an issue better suited to the legislative process.").

CONCLUSION

Respondents respectfully request this Court AFFIRM the District Court's decision.

Dated: June 26, 2024

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: */s/ John W. Suthers*
John W. Suthers, #8492
Rosa L. Baum, #56652

Attorneys for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2024 I electronically filed the foregoing **ANSWER BRIEF** with the Clerk of the Colorado Supreme Court via the Colorado Courts E-Filing system which will send notification of such filing and service upon the following:

Jacob Davis, Esq. #54032
Nonhuman Rights Project, Inc.
611 Pennsylvania Avenue SE, #345
Washington, DC 20003
Telephone: 513.833.5165
Email: jdavis@nonhumanrights.org

Counsel for Appellant

s/Paulette M. Chesson
Paulette M. Chesson, Paralegal