Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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S281614

August 30, 2023

The Honorable Jorge E. Navarrete
Clerk and Executive Officer
Supreme Court of California, 350 McAllister Street
San Francisco, California 94102

Re: Letter of Amicus Curiae, UK Animal Law Experts, Supporting Verified Petition for a Common Law Writ of Habeas Corpus and Issuance of an Order to Show Cause in *In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus* (No. S281614)

Dear Mr. Navarette:

Pursuant to California Rules of Court, rule 8.500(g), UK Animal Law Experts submit this letter in support of the Petition for Writ of Habeas Corpus in the above-captioned case. Please transmit this letter to the justices for their consideration.

As set forth below, UK Animal Law Experts believe that Petitioner Nonhuman Rights Project, Inc. (hereafter the NhRP) has made a prima facie showing that Amahle, Nolwazi, and Mabu—three elephants confined at the Fresno Chaffee Zoo—are entitled to habeas corpus relief, and that the Fresno Superior Court's grounds for dismissal dangerously narrow the scope and reach of the Great Writ of habeas corpus in ways that have deleterious implications for both human and nonhuman animals. Accordingly, we respectfully urge the Court to issue an order to show cause in this matter. See *People v. Duvall* (1995) 9 Cal.4th 464, 475 ("If . . . the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC.").

INTEREST OF AMICI CURIAE

UK Animal Law Experts are a collection of 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. UK Animal Law Experts 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] UK Animal Law Experts have an interest in the California courts

[1] See generally, Thomas H. Bingham, WIDENING HORIZONS: THE INFLUENCE OF COMPARATIVE LAW AND INTERNATIONAL ON DOMESTIC LAW (2010).

giving full consideration to the merits of the NhRP's case which concerns an emerging area of animal law.[2]

ARGUMENT

A. Introduction

The NhRP seeks a writ of habeas corpus regarding three African elephants named Amahle, Nolwazi, and Mabu who are alleged to be unlawfully imprisoned and restrained of their liberty at the Fresno Chaffee Zoo. In *In re Nonhuman Rights Project, Inc., on behalf of Amahle, Nolwazi, and Vusmusi, On Habeas Corpus* (Fresno Sup. Ct. No. 22CECG02471) (hereafter *In re NhRP*), the Fresno Superior Court found that the NhRP had not stated a prima facie case for habeas corpus relief because it "failed to establish that any of the three elephants were in the actual or constructive custody of the State of California at the time the instant habeas corpus petition was filed."[3] *Id*. at 3. Because the elephants were held in a private facility, the petition for habeas corpus was denied because it did not "meet the habeas corpus jurisdictional requirements of California law." *Id*. (quoting *In re Williams* (2015) 241 Cal.App.4th 738, 845).

The NhRP's habeas corpus petition filed in this Court argues that the Fresno Superior Court erred in insisting that a detainee must be in state custody to satisfy the jurisdictional requirements for a petition for a writ of habeas corpus under California law. The NhRP avers that the authorities cited by the Fresno Superior Court only require an allegation of actual or constructive state custody for habeas corpus petitions "in the criminal context." NhRP Petition at 35. The legal dispute in play here thus involves two interpretations of the jurisdictional requirements for a petition for a writ of habeas corpus under California law. The Fresno Superior Court holds that *all* habeas corpus petitions require an allegation that an individual is in actual or constructive state custody. The NhRP, by contrast, claims that this jurisdictional requirement applies only to habeas corpus petitions in the criminal context.

UK Animal Law Experts note that the Fresno Superior Court's interpretation is entirely contrary to the historically expansive nature of the English common law writ of habeas corpus, which California habeas corpus is rooted in,[4] and represents a dangerous

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[2] See Raffael N. Fasel and Sean C. Butler, ANIMAL RIGHTS LAW 124-34 (2023) (documenting the "numerous jurisdictions" where writs of habeas corpus have been filed for nonhuman animals).

[3] The NhRP's habeas petition before the Fresno Superior Court was filed on behalf of Amahle, Nolwazi, and Vusmusi. During the pendency of the proceedings, Vusmusi was transferred out of the Fresno Chaffee Zoo and replaced by Mabu.

[4] California's reception statute provides that "[t]he common law of England… is the rule of decision in all the courts of this State." Constitution of Civ. Code, § 22.2. Although UK

denudement of a historically flexible legal remedy revered for protecting liberty against "*all* manner of illegal confinement."[5]

This amicus letter makes two key points. First, the Fresno Superior Court's restrictive interpretation of the habeas corpus jurisdictional requirements of California law represents a radical and regrettable departure from the English common law writ of habeas corpus. Second, in the present case, this restrictive interpretation unjustly forecloses legal consideration of the "profound and far-reaching" question of whether a privately held, cognitively complex "nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus." *Matter of Nonhuman Rights Project, Inc. v. Lavery* (2018) 31 N.Y.3d 1054, 1059 (Fahey., J., concurring) (hereafter *Lavery*).

B. The English common law writ of habeas corpus without question reaches private detention

Whilst there is a well-established association between habeas corpus and criminal confinement, "the writ was available at common law to challenge a range of noncriminal confinement, both public and *private*."[6] One of the ancient writ's early purposes was to contest detention by the King,[7] but "[f]rom the late seventeenth century onward, [the] King's Bench [Divisional Court] in England combined the existing forms of the writ [of habeas corpus] in creative ways to deal with issues raised by *private restraints* in such contexts as slavery, apprenticeship and domestic relations."[8]

Although statutory habeas was not extended to non-criminal detentions until 1816,[9] the "right to the writ of habeas corpus is a common law right existing independently of statute."[10] Accordingly, whilst the earlier Habeas Corpus Act of 1679 applied only to matters of criminal confinement, it did so "without in any way infringing on the common

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Animal Law Experts are not well acquainted with the jurisdictional intricacies of California habeas corpus, we would be alarmed to discover that the authorities cited in *In re NhRP* represent an implicit overturning of centuries of English common law.

[5] William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 1765-1769 VOLUME 3 131 (1902) (emphasis added).

[6] Christopher Ogolla, *Non-criminal Habeas Corpus for Quarantine and Isolation Detainees: Serving the Private Right or Violating Public Policy?*, 14 DePaul J. Health Care L. 135, 137 (2011) (emphasis added).

[7] Jonathan Shaw, *The War and the Writ. Habeas Corpus and Security in an Age of Terrorism*, HARV. MAGAZINE, Jan. 2009, at 24-25.

[8] Eric M. Freedman, MAKING HABEAS WORK: A LEGAL HISTORY 128 n.6 (2018) (emphasis added).

[9] Habeas Corpus Act 1816, 56 Geo. 3, ch. 100, s.1.

[10] Halsbury's Laws of England, *Civil Procedure Volume 11* (2020) § 205.

law jurisdiction of the Courts or judges."[11] As such, it has long been an article of faith that the English common law writ of habeas corpus exists "for securing a person's liberty by affording an effective means of immediate release from unlawful or unjustifiable detention whether in prison *or in private custody.*"[12] For illustration, we discuss three contexts in which the English courts have used the writ of habeas corpus to review private detentions: slavery, domestic abuse, and child custody and protection disputes.

Some of the most celebrated historical uses of habeas corpus have been instances where it was used to challenge the detention of enslaved persons by their masters. *Somerset v. Stewart* (K.B. 1772) Lofft 1 (hereafter *Somerset*), for example, 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." *Id*. 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 19. Although *Somerset* is the most well-known of the habeas slavery cases, there are others.[13]

From 1671 the King's Bench used habeas corpus to release wives from abusive husbands.[14] At the time, married women were governed by the common law "doctrine of coverture" which entailed that "the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband".[15] 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.[16] One way husbands sought to exert legal dominion over their wives was through "[c]onfinement, either within the home or in private madhouses."[17] Legal disputes relating

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[11] 6 ENCYCLOPEDIA OF THE LAWS OF ENGLAND 132 (A. Wood Renton ed., London, Sweet & Maxwell LD. 1898).

[12] Halsbury's Laws of England, § 205 (emphasis added).

[13] 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).

[14] Paul D. Halliday, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 124 (2010).

[15] William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 1765-1769 VOLUME 1 431 (1765).

[16] Margaret Valentine Turano, *Jane Austen, Charlotte Brontd, and the Marital Property Law*, 21 Harv. Women's L.J. 179, 179 (1998).

[17] Elizabeth Foyster, *At the Limits of Liberty: Married Women and Confinement in Eighteenth-Century England*, 17 Continuity and Change 39, 40 (2002).

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*."[18] For example, in *R. v. Turlington* (K.B. 1761) 97 Eng. Rep. 741, 741, 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.[19]

Until the end of the 19th century, fathers had near-absolute right to the custody of legitimate children.[20] 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."[21] 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.[22] Habeas corpus proceedings constituted a partial exception to this patriarchal approach. From the 1670's onwards, child custody disputes formed an important dimension of habeas corpus disputes.[23] 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."[24] 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.[25] In some instances the court would ignore the father's wishes "despite the common law norm of paternal custody."[26] Habeas was used to settle custody disputes into the nineteenth century.[27]

This brief glimpse at the historical record illustrates that the common law writ of habeas corpus was never confined to prisoners in state custody. Indeed, any such assertion

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[18] *Id.* at 41 (emphasis added).
[19] See e.g., *R. v. Lee* (K.B. 1676) 83 Eng. Rep. 482 (reviewing husband's treatment of wife); *Lister's Case* (K.B. 1721) 88 Eng. Rep. 17, 17 (ordering release of wife whose husband "[took] her violently into his custody"). For further examples see Paul D. Halliday, HABEAS CORPUS 121-27.
[20] See, e.g., *R. v. De Manneville* (1804) 5 East. 221.
[21] See, e.g., *Re Agar-Ellis* (1883) 24 Ch.D. 317, 329 (per Bacon V.C).
[22] John Eekelaar, *The Emergence of Children's Rights*, 6 Oxford Journal of Legal Studies 161, 164 (1986).
[23] Paul D. Halliday, HABEAS CORPUS 127.
[24] *Id.* at 128.
[25] *Id.*
[26] *Id*. at 130.
[27] *Earl of Westmeath v. Countess of Westmeath*, as set out in a reporter's footnote in *Lyons v. Blenkin* (1821) 1 Jac 245 at 264, 37 ER 842; *Rex v. Greenhill* (1836) 4 Ad & E 624 ("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)* (1857) 7 E & B 186; *R v. Howes* (1860) 3 El & El 332.

is entirely at odds with the historic use of habeas corpus to review an expansive array of detentions and restrictions on liberty.

Whilst conditions in California today are strikingly different in numerous respects to seventeenth and eighteenth-century England, this should not obscure the broader historic *raison d'être* of habeas corpus, which has been to challenge unjust detentions where no clear-cut legal remedy exists under codified law.[28] We should also be alive to the possibility that forms of unjust detainment persist to this day that have no obvious legal remedy. It is precisely in such instances that habeas corpus has served as a bastion against oppression.

C. The NhRP has made a prima facie case for relief

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.

Nonhuman Rights Project, Inc. v. Breheny (2022) 38 N.Y.3d 555, 602 (Wilson, J., dissenting) (hereafter *Breheny*).

This present case also concerns individuals who are treated as chattel and who have limited legal rights and independent legal status. The ethics of confining these individuals in zoos is increasingly being questioned, including by members of the California judiciary (see *infra*), and there is plausible evidence that these individuals would fare better in elephant sanctuaries. Nonetheless, conventional legal avenues for redressing this form of confinement have proved limited (see *infra*).

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." *Lavery*, 31 N.Y.3d at 1057, 1059 (Fahey, J., concurring). Indeed, "history, logic, justice, and our humanity must lead us to recognize that if humans without

[28] Paul D. Halliday, HABEAS CORPUS 133.

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 NhRP's habeas 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 Fresno Chaffee Zoo. This expert evidence also suggests that Amahle, Nolwazi and Mabu's needs could be better met in an elephant sanctuary.

These factual assertions are buttressed by rulings in other elephant captivity lawsuits. In the California taxpayer action *Leider v. Lewis* (2012) BC375234 (Superior Court of California, County of Los Angeles) at 30, the trial court found that "[c]aptivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are."[29] 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."[30] The appellate court further recognized "that animal sanctuaries might well provide a better form of captivity."[31]

Such findings have also been recognized outside of California. The NhRP filed a habeas corpus challenge in New York State on behalf of an Asian elephant named Happy who is confined in the Bronx Zoo. After a three-day hearing the Bronx Supreme 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, Judge 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." *Breheny*,

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[29] See also the Canadian case of *Reece v. Edmonton (City)* 2011 ABCA 238 at [103] (Fraser CJA dissenting), 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).

[30] *Leider v. Lewis* (Cal. App. 2d Dist. 2016) 197 Cal.Rptr.3d 266, 287, revd. (2017) 2 Cal.5th 1121.

[31] *Id.*

38 N.Y.3d at 626 (Wilson, J., dissenting). Judge 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 641 (Rivera, J., dissenting).[32]

Yet, whilst the California legislature has noted the "worldwide concern regarding the plight of elephants,"[33] it is clear that California's legislative framework is insufficient to protect the basic needs of these creatures. In *Leider v. Lewis*, despite finding three elephants in the Los Angeles Zoo – Bily, Tina and Jewel – to be "neither thriving, happy, nor content" and languishing in "particularly poor" captivity,[34] the trial court declined to find their treatment cruel or abusive contrary to California's penal code.[35] The Court of Appeal agreed, noting that "the deficiencies in the elephants' living conditions are in large measure by-products of their captivity."[36] Nevertheless, the trial court issued an injunction aimed at ensuring the conditions of Bily, Tina and Jewel's captivity were minimally sufficient and non-abusive.[37] The Court of Appeal affirmed this injunction, but this Court reversed on the procedural ground that taxpayer lawsuits cannot be used to enforce criminal animal cruelty laws.[38]

We can glean the following from the case of *Leider v. Lewis*: (1) elephants are members of an "intelligent, self-aware species"[39]; (2) captivity in zoos is often a "terrible existence" for them;[40] (3) "elephants would do better if they were not captive";[41] (4) "animal sanctuaries might well provide a better form of captivity,"[42] but subjecting elephants to the "terrible existence" of zoo captivity does not contravene California's penal code; (5) procedural vehicles for ameliorating, let alone ending, such a "terrible existence" are limited. It is precisely in such instances – where prima facie unjust confinement lacks a clear legal remedy – that the writ of habeas is used to "cut through barriers of form and

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[32] 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 579.
[33] Cal. Assem. Bill No. 96 (2015-2016 Reg. Sess.), § 1(a), approved by Governor, October 4, 2015 (adding § 2022 of the Fish and Game Code).
[34] *Leider v. Lewis*, BC375234 at 30.
[35] *Id.* at 31-36.
[36] *Leider v. Lewis*, 197 Cal.Rptr.3d at 287.
[37] *Leider v. Lewis*, BC375234 at 55.
[38] *Leider v. Lewis* (2017) 2 Cal.5th 1121, 1137.
[39] *Leider v. Lewis*, BC375234 at 30.
[40] *Id*.
[41] *Leider v. Lewis*, 197 Cal.Rptr.3d at 287.
[42] *Id*.

procedural mazes" and "reach all manner of illegal detention." *Harris v. Nelson* (1969) 394 U.S. 286, 291.

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.

CONCLUSION

UK Animal Law Experts believe the NhRP has made a prima facie case for habeas corpus relief and respectfully urge this Court to issue an order to show cause.

Respectfully submitted,

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The following amici sign this letter in their individual capacity. Institutional affiliations are included for identification purposes only and the views expressed in this brief should not be regarded as the position of their respective institutional affiliations.

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PROOF OF ELECTRONIC SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 811 Wilshire Blvd, Ste. 900, Los Angeles, CA 90017. On **August 30, 2023,** I served **Letter of Amicus Curiae, UK Animal Law Experts, Supporting Verified Petition for a Common Law Writ of Habeas Corpus and Issuance of an Order to Show Cause in In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus (No. S281614)** on the interested parties in this action by electronic service pursuant to CRC Rule 2.251. Based on the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic addresses listed below for each party.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 30, 2023, at Los Angeles, California.

_Jonathan Redford_____ /s/ Jonathan Redford_____
[Printed Name] Signature