Brownstein

Brownstein Hyatt Farber Schreck, LLP
303.223.1100 main
675 Fifteenth Street, Suite 2900
Denver, Colorado 80202

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Christopher O. Murray
Attorney at Law
303.223.1183 direct
cmurray@bhfs.com

VIA EMAIL ONLY

Jake Davis, Esq.
Nonhuman Rights Project
[redacted]
[redacted]
jdavis@nonhumanrights.org

RE: *The Nonhuman Rights Project v. Cheyenne Mountain Zoological Society et al (Case No. 2023CV31236)*

Dear Mr. Davis:

As you are aware this firm represents the Cheyenne Mountain Zoo ("CMZ") in the above referenced matter. This letter serves as your last opportunity to withdraw your Petition for Writ of Habeas Corpus (the "Petition") prior to our commencement of drafting CMZ's Motion to Dismiss and thus incurring attorneys' fees. Should you choose not to withdraw the Petition by Tuesday, August, 15, 2023, please be advised that we intend to seek an award for CMZ's attorneys' fees based on your decision to bring substantially groundless, frivolous and vexatious claims.

Nonhuman Rights Project (NhRP) has been attempting to litigate, in various courts, the same claim for a decade—each suit resulting in a loss. This is no longer a novel claim, rather it has been repeatedly rejected and now only serves to harass zoos, waste judicial resources, and act as a fundraising gimmick for NhRP.

Defendants have become aware of NhRP's track record with this very claim. As was the case when NhRP began this litany of litigation, animals remain outside of the definition of "persons" and thus are not afforded the legal rights of human beings. *Rowley v. City of New Bedford*, No. 20-P-257, 2020 WL 7690259, at *2 (App. Ct. Mass. Dec. 28, 2020) (citing *Com. v. Cass*, 467 N.E. 2d 1324, 1325 (Mass. 1984)) ("the word 'person' is synonymous with the term 'human being.'").

And similar to the New York Appellate Court's decision summarily denying even consideration of NhRP's petition for writ of habeas corpus on behalf of the chimpanzee Kiko, Colorado recognizes the application of habeas corpus only where the subject of the petition is entitled to immediate release from custody. *Compare Nonhuman Rights Project, Inc., ex rel. Kiko v. Presti*, 124 A.D. 3d 1334, 1335 (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.") *with Fields v. Suthers*, 984 P.2d 1167, 1169 (Colo. 1999) ("The writ of habeas corpus is designed primarily to determine whether a person is being detained unlawfully and therefore should be immediately released from custody.")

Assuming that the Court would even reach the merits of the Petition[1]—an indulgence that many courts have denied NhRP—like *all* of the courts that have considered the application of habeas corpus to nonhuman animals, the Court will undoubtedly conclude that NhRP's position is "without legal support or precedent." *Nonhuman rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D. 3d 73, 77 (1st Dept. 2017). For, as courts have repeatedly observed, "legal personhood has consistently been defined in terms of both rights *and duties*." *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D. 3d 148, 151 (3d Dept. 2014); *see also Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 216 A.3d 839, 842 (App. Ct. Conn. 2019) (concluding the NhRP lacked standing for the "fundamental reason" that "elephants, not being persons, lacked standing in the first instance"). Non-human animals cannot incur the corresponding responsibilities associated with rights bestowed on humans.

To the extent the court would entertain the application of common law habeas corpus to an elephant, the question becomes whether the elephant is confined illegally. The elephants at CMZ are cared for with the utmost focus on eudaemonia—meaning the happiness and welfare of the animal. Colorado statutes criminalize animal cruelty, neglect, and mistreatment in order to establish the proper means of caring for animals. *See* C.R.S. §§ 18-9-201–209. However, the Petition does not cite a single one of those provisions. This dearth of statutory support for NhRP's position is indicative of the frivolity of its claim.

As in one of NhRP's early losses, the Petition does not ask the Court to evaluate the living conditions for Missy, Kimba, Lucky, LouLou, and Jambo, as they measure against state and federal statutes respecting the domestic possession of wild animals. See *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D. 3d 148, 151 (3d Dept. 2014). Notably, CMZ has received glowing commendations

[1] While Colorado courts have seemingly yet to address or adopt the "next friend" standing doctrine, other courts considering this very issue have concluded that NhRP's claim does not meet the required elements. As explained in *Whitmore v. Arkansas*, 495 U.S. 149, 163-64 (1990), the next friend standing analysis asks whether (1) there is an adequate explanation of why the real party in interest cannot appear; and (2) the party bringing the claim must be truly dedicated to the best interests of *person* on whose behalf they seek to litigate. Additionally, some courts require that the acting party have a "significant relationship with the real party in interest. *Id.* at 164. Setting aside the reference, again, to a person, NhRP is not acting in the elephants' best interest, nor does it have a significant relationship with the five elephants named in this case.

from the Association of Zoos & Aquariums ("AZA")—for every year that the AZA has monitored the wellbeing of animals—related to CMZ's care for elephants. A challenge on those grounds would demonstrate at least a potential for true concern for the animals' wellbeing. Instead, NhRP yet again pursues its agenda to expand the common-law application of habeas corpus.

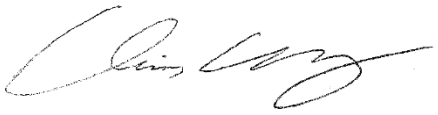
Moreover, the Petition acknowledges that NhRP does not seek the recognition of a constitutional right for these elephants but rather grounds the argument in the common law. *See* Petition ¶ 132. But common law habeas corpus is more circumscribed than that found in the United States and Colorado Constitutions. In fact, as observed by the Federal Supreme Court, history taught the Framers that "the common-law writ [of habeas corpus] all too often had been insufficient to guard against the abuse of monarchial power" employed against human beings. *Boumediene v. Bush*, 553 U.S. 723, 739–40 (2008). For in fact, the writ does not trace its origins back to a theory of liberty, but rather to one of power, arising from the royal prerogative. Halliday & White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L. Rev. 575, 594 (2008). Under common law, the writ was not a right, it was a privilege. *Id.* As explained by Chief Justice Sir John Popham in 1605, "The reason why the common law has such great regard for the body of a man "is so that he may be ready to preserve the king." *Id.* at 600. Even if the Court were to apply the common law writ of habeas to the elephants here in question, the limited breadth of the doctrine would not reach the relief the Petition requests.

Most recently, in *Nonhuman Rights Project, Inc. v. Breheny*, 197 N.E. 3d 921, 927–32 (N.Y. 2022), the New York Court of Appeals laid out the litany of reasons NhRP needs to focus its efforts in the legislature and not continue this fight in the courts, who are powerless to grant the relief NhRP seeks. Like the majority in *Breheny*, CMZ does not dispute the impressive capacities for intelligence and emotion elephants display; that is precisely why CMZ places such importance in their compliance with AZA requirements. But a petition for writ of habeas corpus is inapplicable to the present matter as "the great writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law." *Id.* at 927. The Court in *Breheny* reiterated the monumental ask this litigation presents and the drastic consequence that could follow, impacting all interactions between humans and animals in everything from pet ownership, to the agricultural industry, to medical research efforts. *Id.* at 929. The proper arena for this debate is the legislature, not the courts.

NhRP has, yet again, improperly brought this claim as a successive habeas corpus proceeding that is not warranted or supported by changed circumstances. *Nonhuman Rights Project, ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 75 (1st Dept. 2017). The extension of legal rights to animals, including that of habeas corpus, is an issue better suited for to the legislative process. *See Lewis v. Burger King*, No. 09-2160, 2009 WL 2837441, at *3 (10 Cir. 2009); *accord Nonhuman Rights Project, ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 80 (1st Dept. 2017).

Because NhRP's claim here has been litigated in a series of courts for the better part of a decade and because this claim has been dismissed in every instance it has been brought, CMZ cannot in good conscience fail to seek attorneys' fees against NfRP if it is forced to expend its members' and contributors' dollars to prepare a substantive motion to dismiss in this matter. My team and I will begin drafting this motion in earnest on Tuesday, August 15. I urge you and NhRP to withdraw your substantially frivolous, groundless and vexatious petition on or before NhRP becomes responsible for CMZ's fees in this matter.

Sincerely,



Christopher O. Murray