S281614

September 11, 2023

The Honorable Jorge E. Navarrete
Clerk and Executive Officer
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Letter of Amici Curiae, Shannon Minter and Evan Wolfson, in Support of Petition for a Common Law Writ of Habeas Corpus on behalf of Amahle, Nolwazi, and Mabu (Case No. S281614)

Dear Mr. Navarette:

Pursuant to California Rule of Court 8.500(g), amici submit this letter in support of the Petition for a Common Law Writ of Habeas Corpus on behalf of Amahle, Nolwazi, and Mabu. In accordance with California Rule of Court 8.500(g)(1), a copy of this letter was served on all parties to the case. As set forth below, amici believe that courts have the obligation to carefully consider the liberty claims of these intelligent, social, and emotionally sensitive beings, just as judges (and justices) came to understand that, notwithstanding now-discredited assumptions that difference justifies denial, they have a responsibility to take seriously the claims of lesbian, gay, bisexual, and transgender ("LGBT") people and other formerly excluded groups. Amici therefore urge this Court to issue an Order to Show Cause in the above-captioned case.

I. Interest of Amici

Amici are attorneys and longtime leaders in the LGBT movement, with experience and expertise in achieving social transformation and advancing rights and inclusion. They believe courts have a particular obligation to carefully scrutinize measures that exclude or harm those who are vulnerable, stigmatized, and underrepresented by the political system.

Shannon Minter is the Legal Director of the National Center for Lesbian Rights (NCLR), one of the nation's leading advocacy organizations for lesbian, gay, bisexual, and transgender people. Minter was lead counsel for some same-sex couples in the landmark California marriage equality case which held that same-sex couples have the fundamental right to marry and that laws that discriminate based on sexual orientation are inherently discriminatory and subject to the highest level of constitutional scrutiny. *In re Marriage Cases*, 43 Cal 4th 757 (Cal. 2008). Minter was also NCLR's lead attorney in *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), a U.S. Supreme Court decision upholding student group policies prohibiting discrimination based on sexual orientation and gender identity, and rejecting the argument that such policies violated a student group's rights to freedom of speech, religion, and association. NCLR represented Hastings Outlaw, an LGBTQ student group who intervened to help defend the nondiscrimination policy. Minter was also counsel for same-sex couples from Tennessee in *Obergefell v. Hodges*, 576 U.S. 644 (2015).

In 2009, Minter was named a "California Lawyer of the Year" by *California Lawyer*. In 2008, he was named among six "Lawyers of the Year" by *Lawyers USA* and among "California's

Top 100 Lawyers" by the legal publication *The Daily Journal*. He also received the 2008 Dan Bradley Award from the National Gay and Lesbian Bar Association for outstanding work in marriage cases and was the recipient of the Cornell Law School Exemplary Public Service Award.

In 2005, Minter was one of 18 people to receive the Ford Foundation's "Leadership for a Changing World" award. In 2004, he was awarded an Honorary Degree from the City University of New York School of Law for his advocacy on behalf of same-sex couples and their families. Minter has also received the Anderson Prize Foundation's "Creating Change Award" by the National Gay and Lesbian Task Force and the Distinguished National Service Award from GAYLAW, the bar association for LGBTQ lawyers, law students, and legal professionals in Washington, D.C., Cornell Law School's Exemplary Public Service Award, the Unity Award from Bay Area Lawyers for Individual Freedom, the Advocacy Award from the San Francisco Bar Association, the Justice Award from Equality California, and the Gerald B. Roemer award from DOJ Pride.

Evan Wolfson founded and led Freedom to Marry, the campaign to win marriage for same-sex couples in the United States. He is widely considered the architect of the freedom to marry movement that led to nationwide victory in 2015. In 1983, Wolfson wrote his Harvard Law School thesis on gay people and the freedom to marry. During the 1990s he served as co-counsel in the historic Hawaii marriage case, *Baehr v. Miike*, 910 P.2d 112 (1996), that launched the ongoing global movement for the freedom to marry. He has participated in numerous gay rights and HIV/AIDS cases. Wolfson earned a B.A. in history from Yale College in 1978 and a J.D. from Harvard Law School in 1983. He served as a Peace Corps volunteer in a Togo, West Africa village before law school. He wrote, *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*, published by Simon & Schuster in July 2004. Citing his national leadership on marriage and his appearance before the U.S. Supreme Court in *Boy Scouts of America v. James Dale*, 530 U.S. 640 (2000), *The National Law Journal* in 2000 named Wolfson one of "the 100 most influential lawyers in America." *Newsweek/The Daily Beast* dubbed Wolfson "the godfather of gay marriage" and *Time* magazine named him one of "the 100 most influential people in the world." In 2012, Wolfson received the Barnard Medal of Distinction alongside President Barack Obama.

Since achieving his goal of winning marriage equality for same-sex couples across the United States in 2015, Wolfson has devoted his time to advising and assisting diverse movements and causes in the U.S. and around the world to adapt the model and apply the lessons that made the Freedom to Marry campaign successful in the U.S. For example, under the banner of Freedom to Marry Global, he leads a team of attorneys and experts advising efforts to win marriage, non-discrimination, and decriminalization in countries around the world. Wolfson has taught law and social change as a Distinguished Visitor from Practice at Georgetown Law Center andas a Distinguished Practitioner in Grand Strategy at Yale University, where he will teach again this fall. He serves as Senior Counsel at Dentons, the world's largest law firm with nearly 200 offices in more than 80 countries.

II. Argument

a. Courts have the responsibility to adapt common law doctrines, including the writ of habeas corpus, to address changing societal standards and emerging civil issues.

This case presents an issue of great public importance: Whether the courts of this state are barred from exercising their broad common law jurisdiction to hear a habeas petition on behalf three elephants who were born free in Africa and now live in isolation and captivity at the Fresno Chaffee Zoo. There is no dispute that elephants are intelligent, self-aware, and social creatures who are harmed by prolonged isolation. Had the lower court reached the merits of Amahle, Nolwazi, and Mabu's claims, it would have been required to determine whether depriving intelligent social creatures of any contact with other members of their species is an unlawful deprivation of liberty.

The Superior Court originally denied the Petition on the grounds that Amahle, Nolwazi, and Mabu were not "in actual or constructive state custody" at the time of filing, but rather in private detention. *In re Nonhuman Rights Project, Inc., on behalf of Amahle, Nolwazi, and Vusmusi, On Habeas Corpus* (Fresno Sup. Ct. No. 22CECG02471) at 2 (internal quotations and citations omitted). In so holding, the lower court imposed artificial, judicially created constraints on the enormous flexibility of the common law. Nothing in the common law or prior cases addressing the scope of habeas petitions dictates that a petitioner be denied relief if he is detained by private actors—especially considering the rich history of habeas corpus in nongovernmental contexts. In holding otherwise, the lower court deflected the important questions presented by this case and fell short of its responsibility to apply the common law to new insights and to changing social conditions.

Unique to the common law system is its "flexibility and capacity for growth and adaptation" to address a host of societal issues. *Funk v. United States*, 290 U.S. 371, 382–83 (1933). The inherent flexibility of common law is at its zenith in the context of habeas corpus, which was designed to eradicate "*all* manner of illegal confinement" and "whatever society deems to be intolerable restraints." *Nguyen v. Kissinger*, 528 F.2d 1194, 1203 (9th Cir. 1975) (emphasis added) (additional citations omitted). Under English law, upon which the American common law writ is based, habeas corpus has a long history of application to all manner of confinement or restraint, including, *inter alia*, psychiatric institutionalization, child custody, private debt imprisonment, and naval impressment. *Goldswain's Case*, 96 Eng. Rep. 711 (C.P. 1778) (challenging a sailor's impressment); *R. v. Delaval*, 97 Eng. Rep. 913 (K.B. 1763) (challenging the unlawful custody of a child); *R. v. Turlington*, 97 Eng. Rep. 741 (K.B. 1761) (challenging a woman's custody in a "private mad-house"); *R. v. Nathan*, 93 Eng. Rep. 914 (K.B. 1730) (applying habeas to a commitment by the bankruptcy commissioners); *Lister's Case*, 88 Eng. Rep. 17 (K.B. 1721) (applying habeas to a husband's unlawful detention of his wife).

Unlike its federal law counterpart, the common law writ of habeas corpus has never been cabined to the context of criminal proceedings, or where the petitioner is otherwise confined to state custody. In the first half of the nineteenth century, for example, courts frequently received the habeas petitions of slaves seeking freedom from their slaveowners. *See, e.g., Lemmon v. People*, 20 N.Y. 562 (1860); *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836); *State v. Lasselle*, 1 Blackf. 60 (Ind. 1820); *Respublica v. Smith*, 4 Yeates 204 (Pa. 1805); *Respublica v.*

Blackmore, 2 Yeates 234 (Pa. 1797); *Arabas v. Ivers*, 1 Root 92 (Conn. Super. Ct. 1784); *Commonwealth ex rel. Lewis v. Holloway*, 1814 WL 1384, (Pa. 1814); *Respublica v. Betsey*, 1 U.S. 469, 1 L. Ed. 227 (1789). The same was true of indentured servants challenging the validity of their assignments of indenture. *See, e.g., Respublica v. Keppele*, 2 U.S. 197, 198-99 (Mem.) (Pa. 1793); *State v. Sheve*, 1 N.J.L. (1 Coxe) 230, 230 (N.J. 1794); *C'wealth ex rel. Stephenson v. Vanlear*, 1 Serg. & Rawle 248, 1815 WL 1221 (Pa. 1814); *In re Goodenough*, 19 Wis. 274 (1865).

Petitions for habeas corpus have also been widely used in the family law context. In the twentieth century, habeas petitions were used as vehicles to free spouses from the restraints of their guardians. *In re Hollopeter*, 52 Wash. 41, 100 P. 159, 21 L.R.A., N.S., 847 (1909) (husband held entitled to release of his wife from restraint by her parents); *In re Chace*, 26 R.I. 351, 358, 58 A. 978, 981, 69 L.R.A. 493 (1904) (wife held entitled to husband's society free of restraint by his guardian). Well into the twentieth century, habeas petitions were employed to challenge child custody determinations. *See*, *e.g.*, *In re Livingston*, 108 Cal.App. 716 (1930) (habeas petition by father seeking to change custody of child from mother); *Ford v. Ford*, 371 U.S. 187 (1962) (a petition for habeas corpus alleging that the wife had the children but was not a suitable person to keep them); *Boardman v. Boardman*, 135 Conn. 124, 138, 62 A.2d 521, 528 (Conn. 1948) ("[H]abeas corpus lies to determine the custody of a child. . . ."); *Barlow v. Barlow*, 141 Ga. 535, 81 S.E. 433, 433 (1914) (noting that the court may issue a writ of habeas corpus in a child custody dispute if required for the welfare of the child); *Ex parte Swall*, 36 Nev. 171, 134 P. 96, 97 (1913) (noting that "[p]roceedings in habeas corpus have so frequently been resorted to to determine the right to the possession of a minor. . . ."); *United States v. Green*, 26 F. Cas. 30 (C.C.D.R.I. 1824) (habeas petition alleging child was wrongfully detained in the custody of her grandfather). Even today, habeas petitions play an important role in some family law cases. See, e.g., *In re Paul W.*, 151 Cal.App.4th 37 (2007) (habeas petition by father alleging ineffective assistance of counsel in a juvenile dependency proceeding).

Given the expansiveness of habeas corpus and its longstanding application to private detention, this Court has clear jurisdiction over the Petition and should issue an Order to Show Cause.

b. Relief for Amahle, Nolwazi, and Mabu does not turn on constricted conceptions of personhood but, rather, on whether these intelligent non-humans share some right to liberty protected by habeas corpus.

When faced with similar petitions, some other courts have denied relief on the grounds that the right of habeas corpus is solely afforded to human beings. *See, e.g., Nonhuman Rights Project, Inc. v. Breheny* (2022) 38 N.Y.3d 555, 579 (hereafter *Breheny*). That improper justification for denying habeas relief is strikingly like the improper justifications for denying protection to gay people rejected by the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), when it struck down state laws criminalizing same-sex intimacy and reversed as wrong and short-sighted its own prior decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). As the Supreme Court rightly confessed in *Lawrence*, earlier rulings, including its own in *Hardwick,* asked the wrong questions. Rather than acknowledging the full breadth of the asserted constitutional privacy claim, the decision in *Hardwick* allowed the apparent novelty of the plaintiff's claim and identity as a gay man to obscure "the extent of the liberty at stake." 538 U.S. at 567.

The decision below warrants this Court's review because it betrays a similar failure to address the important questions presented by this case. To be clear, in making this comparison, amici do not suggest that the substantive issues in *Lawrence* and this case are the same, nor do they seek to make a facile comparison between the subject of this petition and LGBT people or members of other minority groups. Rather, they wish to show that the analytical errors identified by the Supreme Court when it reversed *Hardwick* can shed a powerful light on similar analytical errors that this Court should avoid here. Just as amici over the course of their careers as advocates have pressed courts in cases to fulfill their role and safeguard freedom and bodily autonomy, amici do so here as well.

Like Justice Kennedy writing for the Court in *Lawrence*, Judge Fahey explained in his concurrence in *Matter of Nonhuman Rights Project, Inc. v. Lavery*, 31 N.Y.3d 1054 (2018) that courts must frame the threshold question in these cases carefully if they are to resolve them in a way that does justice to the importance of the values they invoke and the concerns they present. Unfortunately, thus far, the courts have not asked, as they should, whether the subject of the petition has a *liberty interest* that habeas must protect, but, formalistically, whether the subject is a person. "The better approach," as Justice Fahey notes, "is to ask not whether a chimpanzee fits the definition of a person…, but instead whether he or she has the right to liberty protected by habeas corpus." *Id*. at 1057 (Fahey, J., concurring). By focusing instead on whether a nonhuman animal can be considered a person—a question that itself is more complex than a superficial first instinct may suggest—the courts have evaded the more fundamental question of whether intelligent, self-aware, social creatures such as Amahle, Nolwazi, and Mabu have a liberty interest that the common law of habeas is capacious enough to protect. "Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Id*. at 1058.

The courts' failure to address that central question is reminiscent of the Supreme Court's error in cases such as *Hardwick* when it focused on the identity of the plaintiff rather than the nature of the interest asserted. In *Hardwick*, the Court was presented with a claim that laws criminalizing same-sex intimacy violated the fundamental right to privacy. 478 U.S. at 188. Addressing that claim on its merits would have required a careful consideration of whether gay people have a protected privacy interest in consensual adult relationships, as the Court subsequently undertook in *Lawrence*. Instead, the Court dismissed the plaintiff's claim out of hand, ruling that because of its novelty—and because of plaintiff's stigmatized identity—the very assertion of such a claim was definitionally preposterous, or, in the Court's words, "facetious." 478 U.S. at 194. In effect, the Court held that because the plaintiff in *Hardwick* is gay, his assertion of a right to privacy in intimate relationships warranted no consideration.[1]

[1] The Supreme Court initially adopted a similarly dismissive and cursory response to the claims of same-sex couples seeking the freedom to marry. In *Baker v. Nelson*, 490 U.S. 810 (1972), the Court dismissed a petition by a gay male couple seeking review of the Minnesota Supreme Court's denial of their right to marry with a single sentence, summarily concluding: "The appeal is dismissed for want of a substantial federal question." Forty-three years later, the Supreme Court belatedly recognized that, to the contrary,

In *Lawrence*, the Supreme Court reversed *Hardwick* and recognized its prior error in tautologically defining the fundamental right to privacy to apply only to non-gay people simply because the right had not been applied to gay people in the past. Noting that the principles protected by the Due Process Clauses of the Fifth Amendment and Fourteenth Amendments are deliberately broad, the Court explained that their drafters "knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." 539 U.S. at 579.

This Court recognized the same principle in *Perez v. Sharp*, 32 Cal.2d 711 (1948), and *In Re Marriage Cases*, 43 Cal.4th 757 (2008). In *Perez*, this Court "did not characterize the constitutional right that the plaintiffs in that case sought to obtain as 'a right to interracial marriage' and did not dismiss the plaintiffs' constitutional challenge on the ground that such marriages never had been permitted in California." *In re Marriage Cases*, 43 Cal.4th at 811. "Instead, the *Perez* decision focused on the *substance* of the constitutional right at issue — that is, the importance to an individual of the freedom "to join in marriage *with the person of one's choice*" — in determining whether the statute impinged upon the plaintiffs' fundamental constitutional right." 43 Cal.4th at 811 (citing *Perez*, 32 Cal.2d App. at 715, 717) (emphasis in original). Similarly, when considering the claim of same-sex couples seeking the freedom to marry, this Court held that such couples could not be excluded from that fundamental right simply because they had been excluded historically. Rather, the Court held that it must consider how our society's treatment of such couples and understanding of their entitlement to legal protection had changed. Specifically, the Court noted:

> There can be no question but that, in recent decades, there has been a fundamental and dramatic transformation in this state's understanding and legal treatment of gay individuals and gay couples. California has repudiated past practices and policies that were based on a once common viewpoint that denigrated the general character and morals of gay individuals….This state's current policies and conduct regarding homosexuality recognize that gay individuals are entitled to the same legal rights and the same respect and dignity afforded all other individuals and are protected from discrimination on the basis of their sexual orientation, and, more specifically, recognize that gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.

43 Cal.4th at 821-22. Accordingly, this Court held that "in light of the evolution of our state's understanding concerning the equal dignity and respect to which all persons are entitled without regard to their sexual orientation, it is not appropriate to interpret [the due process and equal protection provisions of the California Constitution] in a way that, as a practical matter, excludes gay individuals from the protective reach of such basic civil rights." *Id*. at 823.

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same-sex couples have the same constitutionally protected freedom to marry as different-sex couples. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

These principles about how to interpret the California Constitution apply equally to the common law writ of habeas corpus, which has been broadly applied throughout our nation's history to protect individuals and groups once deemed outside of the law's protection, as our understanding of the principles of equality and freedom have evolved. Here, as our society's understanding of the capacities and sensitivities of animals such as elephants have evolved, this Court should take that evolution into account in considering this petition. As Justice Wilson noted in his dissent in *Breheny*: "The novelty of an issue does not doom it to failure." 38 N.Y.3d at 584 (Wilson, J., dissenting).

The majority decision in *Breheny* repeated *Hardwick*'s analytical error of focusing on the identity of the petitioner rather than the substance of the questions raised. Rather than examining whether a being who is intelligent, self-aware, and capable of complex social relationships has asserted a liberty interest that habeas protects, the decision reflexively barred such claims even from being considered, based on the mere identity of the petitioner rather than on substantive engagement with the values and concerns underlying petitioners' claims. Like the Supreme Court's flawed approach in *Hardwick*, the reasoning of that decision is circular: Because animals have not brought habeas petitions in the past, they cannot bring them now. Because the petitioners are animals rather than human beings, their assertion of any liberty interest must be dismissed out of hand, regardless of the potential strength of such a claim on the merits. This is not justice —nor is such blindness to injustice and suffering compelled by our Constitution or the law in all its majesty and scope. "A prime part of the history of our Constitution," as the Supreme Court has noted, "is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

The use of the word "person" in California's habeas procedural statute, Cal. Penal Code § 1473 *et seq.*, provides no basis to limit a court's authority to hear any habeas petition it deems proper or to impose an artificial, definitional limit on its scope. As the U.S. Supreme Court has noted, the "writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action" and must be "administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected." *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969). "The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers." *Id*. at 291. These considerations apply equally to the application of habeas petitions in California courts.

Moreover, even if this broad historic flexibility did not exist and habeas relief could be limited arbitrarily only to "persons," the assumption that an animal can never be considered a "person" in this context is flawed in ways that are also reminiscent of the Supreme Court's deficient and subsequently repudiated reasoning in *Hardwick*. There, the Court dismissed the plaintiffs' claims by defining the right to privacy narrowly, to protect only an arbitrarily circumscribed set of relationships, and then finding that gay people could not possibly participate in those relationships. Specifically, the Court held that the fundamental right to privacy applies only to issues related to family, procreation, and marriage, not to "any kind of private sexual conduct between consenting adults." 478 U.S. at 191. Having found the right to be so strictly limited, the Court then pronounced it "evident that none of the rights announced in [prior] cases bears any resemblance to the claimed

constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." Id. at 190-91.

But as amici Minter and Wolfson over their careers argued again and again—during which time the LGBT movement gained traction and successes began to come after long and repeated rejection—*rights are not defined by who is denied them*. The Supreme Court finally corrected its own prior failure of empathy and inability to acknowledge legitimate claims in *Lawrence*. There, the Court recognized that the right to privacy is not, as *Hardwick* claimed, limited to familiar relationships based on marriage and procreation. Instead, transcending mere identity, the Court in *Lawrence* noted that precedent properly applied meant that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship." 539 U.S. at 565.

In addition, the Court held that even when it comes to the more typically recognized areas of "personal decisions relating to marriage, procreation, and family relationships," what matters is that gay people have the same underlying interests as others. *Id*. at 574. Rather than affirming *Hardwick's* characterization of gay people as definitionally excluded from these core constitutional interests, *Lawrence* held that, notwithstanding their differences from the majority, "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id*.

Similarly, as noted above, this Court adopted this same approach—examining the nature of the underlying interests protected by the right to marry, rather than the identity of the persons asserting it—in both *Perez* and *In re Marriage Cases*. This Court should not abandon this approach here simply because the petitioners are non-human animals. What matters is not the identity of the petitioners, but whether they have they share in the underlying interests traditionally protected by the writ of habeas corpus. This is a serious question and one that should not be avoided simply by holding that their claim cannot be heard because they are not human.

c. The shared liberty interest and the need for relief are similarities that easily outweigh differences concerning an overly narrow definition of personhood.

The Supreme Court's correction of the above errors in *Hardwick* is instructive here in yet another way. In prior cases, some courts have adopted an arbitrarily narrow definition of who is a "person," holding that the term refers exclusively to someone who exercises duties as well as rights, and that such a definition necessarily excludes all animals. But neither of these assumptions holds water. Rather, as was true of the Court's crabbed definition of the right to privacy in *Hardwick*, the courts' arbitrary limit on who counts as a person and conclusory determination that animals cannot possibly meet that arbitrary standard seem designed to avoid, rather than answer, the important questions presented by these cases.

As Justice Fahey and many others have pointed out, such a narrow rule would exclude children, persons who are ill or incapacitated, and others who indisputably are able to bring habeas petitions in our common law and constitutional traditions. *See* 31 N.Y.3d at 1057 (Fahey, J., concurring). When confronted with this seemingly fatal flaw, the courts have responded only that while there may be exceptions to its judicially created definition of "person," these exceptions "are still human beings," not animals. *Nonhuman Rights Project, Inc*., 152 A.D.3d at 78. But that

response simply averts the eyes from injustice and suffering, sidestepping the problem. If our legal tradition contains—as it does—many examples of persons who are protected by the right of habeas corpus and yet who are incapable of exercising duties, why is that limitation properly applied only to exclude Amahle, Nolwazi, and Mabu and other similarly situated intelligent, self-aware, social beings? Courts must not so casually evade their duty to apply principle and logic to do justice.

Like the Supreme Court's conclusory definition of the right to privacy in *Hardwick*, a conclusory definition of "person" relies on a misleadingly partial view of history and law. In *Hardwick*, the Court sought to justify its holding that gay people are excluded from the fundamental right to privacy by claiming that "[p]roscriptions against [same-sex] conduct have ancient roots." 478 U.S. at 192. In *Lawrence*, the Court corrected the record by showing that "the historical grounds relied upon in *Bowers* [*v. Hardwick*] are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicated. Their historical premises are not without doubt and, at the very least, are overstated." 539 U.S. at 571. The Court also stressed the importance of more recent legal developments, including especially "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id*. at 572.

Similar concerns about oversimplifying history and disregarding the evolution of contemporary law are evident here. In concluding that history does not support courts' jurisdiction to hear habeas corpus petitions on behalf of nonhuman animals, courts have overstated the impact of laws that treat animals merely as property and understated the significant and continuing growth of new laws that treat animals as persons. Laws requiring that animals be given a degree of freedom appropriate to their nature and capacities date back to the origins of the common law.[2] More recently, California has enacted laws that expressly treat animals as persons, rather than property, for purposes of divorce proceedings.[3] Oregon law recognizes that "animals are sentient beings capable of experiencing pain, stress and fear."[4] Federal and state courts have recognized that each individual animal who suffered because of a violation of an animal cruelty law is a crime victim for sentencing purposes.[5] As this Court recognized in *In re Marriage Cases* with respect to LGBT people, this transformation in how California and other states regard animals matters greatly when considering how to apply California law.

In addition, the assumption that animals cannot exercise duties is far from self-evident. There are many examples, both historically and now, of circumstances in which animals are treated as responsible agents. For example, historically in medieval Europe, there was a long tradition of prosecuting nonhuman beings for murder and other crimes and of conducting trials in such cases

[2] Animal Legal & Historical Center, "The Development of the Anti-Cruelty Laws During the 1800's," available at: https://www.animallaw.info/article/development-anti-cruelty-laws-during-1800s

[3] Dareh Gregorian, "New California divorce law: Treat pets like people — not property to be divided up," NBC News (Dec. 29, 2018), available at: https://www.nbcnews.com/politics/politics-news/new-california-divorce-lawtreat-pets-people-not-property-be-n952096; Suzanne Monyak, "When the Law Recognizes Animals as People," The New Republic (Feb. 2, 2018), available at: https://newrepublic.com/article/146870/law-recognizes-animals-people.

[4] Or. Rev. Stat. § 167.305.

[5] Animal Legal Defense Fund, "Animals as Crime Victims: Development of a New Legal Status," available at: https://aldf.org/article/animals-as-crime-victims-development-of-a-new-legal-status/

in which the accused animal was represented by a lawyer.[6] These examples may seem far removed from our current reality; nonetheless, they underscore the seriousness of this question and the error of simply assuming, without careful investigation, that the concept of animals as legally responsible agents has no place in our legal tradition. As a matter of historical accuracy, the opposite is true. Today, while we no longer prosecute animals for crimes, there are many contexts in which animals have significant responsibilities, including in matters of life and death. For example, dogs perform a wide variety of critical jobs, from tracking kidnapped children and lost hikers,[7] to detecting diseases,[8] sniffing out unlawful drugs or explosives,[9] protecting businesses and homes,[10] providing transportation in remote areas,[11] and many other critical tasks. Across the

[6] *See*, *e.g.*, Sara M. Butler, "Persons under the Law? Medieval Animal Rights – Legal History Miscellany," available at: https://legalhistorymiscellany.com/2018/02/19/persons-under-the-law-medieval-animals-rights/; Philip Johnson, "The Advocate, or the Hour of the Pig," available at: https://animalsmattertogod.com/2012/05/25/the-advocate-or-the-hour-of-the-pig/; Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273 (2011), available at: https://www.animallaw.info/sites/default/files/lralvol17_2_273.pdf.

[7] KTVL, "Shady Cove woman recovered after getting lost in wilderness" (Jan. 3, 2022), available at: https://ktvl.com/news/local/shady-cove-woman-recovered-after-getting-lost-in-wilderness; Kelli Bender, "Connecticut Police Dog Finds Missing 10-Year-Old Girl," PEOPLE (Dec. 15, 2021), available at: https://people.com/pets/connecticut-police-dog-finds-missing-girl/; Jasmine Cooper, Marni Hughes, "Search and rescue dogs look for tornado victims in Kentucky," NewsNation (Dec. 14, 2021), available at: https://www.newsnationnow.com/prime/search-and-rescue-dogs-look-for-tornado-victims-in-kentucky/.

[8] Simon Spichak, MSc, "Training Dogs to Diagnose Parkinson's," Being Patient (Dec. 13, 2021), available at: https://www.beingpatient.com/dogs-sniff-dementia/; Dark Daily, "New Study Shows Dogs Can be Trained to Sniff Out Presence of Prostate Cancer in Urine Samples" (Dec. 10, 2021), available at: https://www.darkdaily.com/2021/12/10/new-study-shows-dogs-can-be-trained-to-sniff-out-presence-of-prostate-cancer-in-urine-samples/; Kim Bellware and Adela Suliman, "Coronavirus sniffing dogs unleashed at Miami International Airport to detect virus in employees," Washington Post (Sept. 9, 2021), available at: https://www.washingtonpost.com/nation/2021/09/09/covid-sniffer-dogs/; Leslie Nemo, "How Do Dogs Sniff Out Diseases?," Discover Magazine (July 19, 2021), available at: https://www.discovermagazine.com/the-sciences/how-do-dogs-sniff-out-diseases.

[9] Erin Tracy, "Modesto CHP dog trained at Disneyland, provided security for Mike Pence. Now he's retiring," Modesto Bee (Dec. 30, 2021), available at: https://www.modbee.com/news/local/article256899017.html; Penny Leigh, Dogs in Demand for Explosives Detection Work in U.S.," American Kennel Club (Apr. 13, 2018), available at: https://www.akc.org/expert-advice/news/dogs-in-demand-explosives-detection-us/; U.S. Dep't of Homeland Security, "Federal Protective Service Explosive Detection Canine Teams," available at: https://www.dhs.gov/explosive-detection-canine-teams.

[10] Mark Ellwood, "These Elite $125,000 Guard Dogs Are Trained to Detect Danger Before It Happens," Robb Report (Aug. 3, 2021), available at: https://robbreport.com/lifestyle/svalinn-guard-dogs-1234622969/; Poppy Koronka, "The Best Guard Dogs, According to Experts," Newsweek (Jul. 16, 2021), available at: https://www.newsweek.com/best-guard-dogs-according-experts-1609598.

[11] American Kennel Club, "Sled Dog Breeds: From Arctic Exploration to the Iditarod" (Nov. 22, 2020), available at: https://www.akc.org/expert-advice/dog-breeds/sled-dog-breeds-history-future/; Sara Kiley Watson, "Humans have partnered with sled dogs for 9,500 years," Popular Science (Jul. 14, 2020), available at: https://www.popsci.com/story/animals/sled-dog/; Kitso Jazynka, "Denali has only sled dogs in National Park Service," Washington Post (Feb. 19, 2018), available at: https://www.washingtonpost.com/lifestyle/kidspost/park-ranger-needs-furry-friends-to-help-get-around-the-alaskan-wilds/2018/02/16/5323ca6c-0b62-11e8-95a5-c396801049ef_story.html.

country, dogs, horses, and other animals support individuals who are blind or have mental health issues.[12] The U.S. military counts on dolphins to detect underwater mines.[13]

Animals paved the way for human space flight.[14] Horses and dogs play an essential role on many cattle ranches and sheep farms. Trained monkeys provide lifesaving support for people with spinal cord injuries.[15] And, as this case itself demonstrates, elephants and other animals often work long hours to provide entertainment in multiple settings, from zoos and parks to television and movie productions.[16]

In sum, it is simply untrue that animals do not bear significant duties and responsibilities in our culture. They do, and this Court should address the important concomitant question of whether they also have a right to, or at least some meaningful interest in, liberty. The alternative, as Justice Fahey has noted, is to treat even an intelligent, self-aware animal "as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others" and to avoid "consider[ing] whether a chimpanzee [or an elephant] is an individual with inherent value who has the right to be treated with respect." 31 N.Y.S.3d at 1058 (Fahey, J., concurring). There must at least be a range between the all-or-nothing of subject or object, protected being or a thing—and it is the obligation of courts to consider appeals for relief, rather than turn them away.

d. As in prior cases involving LGBT people and other excluded groups, this court must take care to frame the questions and consider the urgent claim for relief seriously, commensurate with the weighty and shared liberty interest at stake here for this nonhuman being.

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[12] Tiffany Rizzo, "At Naples Therapeutic Center, horses help with grief and mental health," Wink News (Dec. 16, 2021), available at: https://www.winknews.com/2021/12/16/at-naples-therapeutic-center-horses-help-with-grief-and-mental-health/; Jen Reeder, "Former CIA analyst shares adventures with guide dogs over 33-year career," TODAY (Sept. 29, 2021), available at: https://www.today.com/pets/former-cia-analyst-shares-adventures-guide-dogs-over-33-yeart232486; Univ. of Toledo, "Study finds evidence emotional support animals benefit those with chronic mental illness," Newswise (May 20, 2021), available at: https://www.newswise.com/articles/study-finds-evidence-emotional-support-animals-benefit-those-with-chronic-mental-illness; "Guide Dogs for the Blind and American Foundation for the Blind Launch Extensive Research Study," Business Wire (Oct. 21, 2020), available at: https://www.businesswire.com/news/home/20201021005166/en/Guide-Dogs-for-the-Blind-and-American-Foundation-for-the-Blind-Launch-Extensive-Research-Study.

[13] John Ismay, "Why Whales and Dolphins Join the Navy, in Russia and the U.S.," New York Times Magazine (Apr. 30, 2019), available at: https://www.nytimes.com/2019/04/30/magazine/beluga-whale-russia-military-dolphins.html.

[14] Samantha Mathewson, "Celebrating the animal astronauts who paved the way for human spaceflight," Space (Dec. 28, 2021), available at: https://www.space.com/animals-in-space-history-human-space-flight.

[15] Jeffrey Kluger, "Strong and Smart, Service Monkeys Give a Helping Hand to People With Quadriplegia," TIME (Oct. 24, 2018), available at: https://time.com/longform/service-monkeys-quadriplegia/.

[16] Ann Lee, "What's new, pussycat? How feline film stars are trained to perform," The Guardian (Jan. 3, 2022), available at: https://www.theguardian.com/film/2022/jan/03/whats-new-pussycat-how-feline-film-stars-are-trained-to-perform; Meredith Geaghan-Breiner and Kyle Desiderio,"How 10 Different Types of Animals Train for Film and TV Roles," Insider (Apr. 19, 2021), available at: https://www.insider.com/how-animal-trainers-wranglers-train-bugs-animals-for-movies-tv-2021-3.

The question at stake here—how to define the nature and scope of the liberty interest asserted by Petitioners—points to a final parallel between this case and *Hardwick*. In *Hardwick* the court defined the question presented as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Bowers* at 190. In *Lawrence*, the Court rejected that framing, holding that it had erred by construing the plaintiffs' claim as an interest in a particular sexual act. As the Court explained, "[t]hat statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* [*v. Hardwick*] was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." 539 U.S. at 567. As the Court further explained, when a person chooses to engage "in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice." *Id*.

Even before *Lawrence*, Justice Blackmun recognized this profound error in his dissent from the majority opinion in *Hardwick*:

> This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, *ante,* at 191, than *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), was about a fundamental right to place interstate bets from a telephone booth...

Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting). As Justice Blackmun recognized, it is dangerous, and inimical to the rational and humane development of the law, when the very framing of a legal question is tinged with unexamined bias and implicitly rests on a false conception of the subject of the litigation as inferior or as having no relationship to interests that courts readily understand to be important for others. In this case, one need not equate animals and humans in every respect to acknowledge that intelligent, self-aware animals such as Amahle, Nolwazi, and Mabu may have important liberty interests that warrant habeas corpus relief. This Court must not reduce Petitioners' interest to the mere avoidance of physical suffering. Like the erroneous framing of the asserted interest in *Hardwick*, this formulation fails "to appreciate the extent of the liberty at stake."

Rather than seeking mere freedom from physical maltreatment, Amahle, Nolwazi, and Mabu seek relief from being deprived of the freedom to interact with other elephants in a normal social environment, a cruel deprivation that is causing them severe emotional suffering and harm. There is no valid legal reason to restrict the scope of an animal's liberty interest to the avoidance of physical harm, any more than there was a valid legal reason in *Hardwick* to reduce the plaintiffs' claims to an asserted right to engage in a particular physical act.

But rather than grapple with those arguments in this and other similar cases, the lower courts have simply dismissed these claims out of hand. This is not right. This Court must not turn away from Petitioners' plight, or from this plea for justice, for relief.

When he struck down Utah's denial of same-sex couples' freedom to marry in 2013, Judge Robert Shelby refused to perpetuate a longstanding injustice and injury. Rebuffing the suggestion that the Constitution and laws did not apply to those coming before the court for inclusion and redress, he wrote, "it is not the Constitution that has changed, but the knowledge of what it means to be gay or lesbian."[17] In that telling passage, he captured and reflected the obligation of courts to truly seek to understand, and uphold, principles that underlie, and sometimes require change, in familiar or longstanding practices that harm and exclude. Here, too, all the answers may not be immediately apparent (or, indeed, needed to resolve this case), but this Court should not turn away. This Court should review Petitioners' claims for relief and meaningfully address the important questions and stakes for these intelligent, social, self-recognizing-and now cruelly confined-living beings.

Respectfully submitted,

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[17] *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D. Utah 2013), *affirmed*, 755 F.3d 1193 (10th Cir. 2014); *stay granted*, 134 S.Ct. 893 (2014); *petition for certiorari denied*, No. 14-124, 2014 WL 3841263 (Oct. 6, 2014).

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 **September 11, 2023,** I served **Letter of Amici Curiae, Shannon Minter and Evan Wolfson, in Support of Petition for a Common Law Writ of Habeas Corpus on behalf of Amahle, Nolwazi, and Mabu (Case 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 September 11, 2023, at Los Angeles, California.

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