

<p>DISTRICT COURT, EL PASO COUNTY, COLORADO 270 South Tejon Colorado Springs, CO 80903</p> <hr/> <p>Petitioner: NONHUMAN RIGHTS PROJECT, INC., on behalf of Missy, Kimba, Lucky, LouLou, and Jambo,</p> <p>v.</p> <p>Respondents: CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.</p> <hr/> <p>Attorneys for Respondents</p> <p>BROWNSTEIN HYATT FARBER SCHRECK, LLP John W. Suthers, #8492 Christopher O. Murray, #39340 Rosa L. Baum, #56652 675 Fifteenth Street. Suite 2900 Denver, CO 80202 Telephone: (303) 223-1100 Facsimile: (303) 223-1111 Email: cmurray@bhfs.com; rbaum@bhfs.com</p>	<p style="text-align: center;">• ▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2023CV301236</p> <p>Div: 8</p>
<p style="text-align: center;">RESPONDENTS' REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS</p>	

This is not a lawsuit pioneering a just cause or even a quixotic attempt to change Colorado law. Rather this case presents a theory, unsuited for adjudication in our court system, which has been repeatedly and emphatically rejected in every other state in which it has been brought. By filing this claim, Petitioner intimidates zoos, burdens and over-taxes judicial resources, while funding its continued operation. This Court is now in a position to deter future lawsuits of this nature. Respondents Cheyenne Mountain Zoological Society and Bob Chastain, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society (together

“Respondents”), through undersigned counsel, respectfully submit this Reply in Support of their Motion to Dismiss and in support state:

I. INTRODUCTION

In almost 400 pages of pleadings, Petitioner has failed to cite a single case in all of American jurisprudence that supports the notion that habeas corpus can and should be applied to elephants. Instead, 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. This Court should decline Petitioner’s invitation, and award Respondents’ their attorneys fees incurred in defending this case.

II. ARGUMENT

A. The protections legislative bodies provide to animals do not entitle them to rights commensurate with those inherent to human beings.

Petitioner’s argument for the disassociation of the right to bodily liberty from the responsibilities associated with human personhood is a non-sequitur that lays bare the weakness of their position and supports dismissal. Respondents’ argument is not that protections provided to nonhuman animals are legally impossible because these animals cannot assume human responsibilities. Rather, Respondents’ argument is that 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. *Nonhuman Rights Project, Inc. v. Breheny*, 197 N.E.3d 921, 927 (N.Y. 2022) (“the great writ protects the right to liberty of humans *because* they are humans”) (emphasis in original).

To be sure, Respondents agree that elephants ought to be legally protected. But courts have repeatedly recognized that “legal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities.” *Id.*, 197 N.E.3d at 928 (citing *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.*, 216 A.3d 839, 845 (Conn. App. 2019); *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 152 A.D.3d 73, 78 (1st Dept. 2017); *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148, 151 (3d Dept. 2014); *Person*, Black’s Law Dictionary (11th ed. 2019)). “Unlike the human species, which has the capacity to accept social responsibilities and legal duties, nonhumans cannot—neither individually or collectively—be held legally accountable or required to fulfill obligations imposed by law.” *Id.* at 928–29. And thus, “courts have consistently determined that rights and responsibilities associated with legal personhood cannot be bestowed on nonhuman animals.” *Id.* at 928 (citing *Lavery*, 152 A.D.3d at 78; *Lavery*, 124 A.D.3d at 152; *Rowley v. City of New Bedford*, 159 N.E.3d 1085 (App. Ct. Mass. 2020); *R.W. Commerford*, 216 A.3d 844; *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Ent.*, 842 F.Supp.2d 1259, 1263 (S.D. Cal. 2012); *Lewis v. Burger King*, 344 Fed. Appx. 470, 472 (10th Cir. 2009); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177–78 (9th Cir. 2004); *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass 1993); *Miles v. City Council of Augusta, Ga.*, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983)). Legal protection for elephants, like other nonhuman animals,

must be enacted through the adoption of positive law. In Colorado, like all of the United States, this is the province of the legislative branch of government, not the courts.

B. This Court should heed the warnings of the majority decision in *Breheny*.

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 in *Breheny*, Respondents do not dispute the impressive capabilities of elephants nor the awesome power of the writ of habeas corpus. 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.

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 laws and regulations that govern. Petitioner is attempting to weaponize the writ of habeas corpus to achieve a *policy* endpoint.

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.” 197 N.E.3d at 928. Seemingly 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. 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.

The ordinance recently passed by the Ojai City Council, in Ojai, California shows that the decision to grant elephants the right to bodily liberty is an action properly taken by the legislative branches of government. 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).¹ 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. *Id.* (citing Nonhuman Rights Project findings and advocacy). For, 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. 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, should be directed to the legislature.” *Id.* at 932. Petitioner is in the wrong forum.

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

¹ 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 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/>. Ultimately, at its core, the Ojai Ordinance is an animal protection provision.

exists to protect liberty interests—is not the appropriate forum to resolve disputes concerning the confinement of nonhuman animals.” *Id.* at 930.

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 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. On the other hand, basing this right on “autonomy” rather than humanity threatens the most vulnerable human populations. *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.” *Id.* (emphasis in original). Petitioner’s argument thus relies on untenable premises and unworkable standards. This Court should therefore readily dismiss the Petition.

C. Petitioner’s arguments are not based on an arguably meritorious legal theory and thus this court should award Respondents their attorneys fees.

For the better part of a decade, courts across the United States have repeatedly instructed Petitioner that its argument lacks merit. *See, e.g., Breheny*, 197 N.E.3d at 931 (unwaveringly concluding “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.”); *R.W. Commerford*, 216 A.3d at 844 (decisively concluding that in habeas corpus jurisprudence there is “no indication that habeas corpus relief was ever intended to apply to a nonhuman animal, irrespective of the animal’s purported autonomous characteristics”). And most recently, the California Court of Appeals in and for the Fifth Appellate District summarily dismissed Petitioner’s appeal on its claims against the Fresno Zoo. *See Nonhuman Rights Project, Inc. v. Fresno’s Chaffee Zoo Corporation*, No. F085722 (May 18, 2023).

Critically, Petitioner’s position is not rational. *Cf. Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.*, 247 P.3d 567, 576 (Colo. 2011) (noting that the party’s argument was “at least rational” and attorneys fees are inappropriate “where

rational minds can disagree”); *Brown v. Silvern*, 141 P.3d 871, 875 (Colo. App. 2005) (“A claim or defense is frivolous if the proponent can present no *rational* argument based on the evidence or the law to support it.”) (emphasis added). And contrary to what Petitioner implies, there is no “conflicting authority” on this question. No court, in any state or jurisdiction, has determined that the writ of habeas corpus is available to, or should be available to, nonhuman animals. *See Ace Title Co., Inc. v. Casson Const. Co., Inc.*, 755 P.2d 457, 461 (Colo. App. 1988). Petitioner’s every attempt over the last decade to bring these claims has resulted in defeat. It is time that these legal antics be labeled what they are: frivolous, groundless, and vexatious.

III. CONCLUSION

Because of the reasons stated above, Respondents respectfully ask the Court to dismiss the Nonhuman Rights Project’s Petition and to award Respondents their attorneys fees incurred in defending against Petitioner’s claim.

Dated October 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October 2023, I electronically filed a true and correct copy of the foregoing **REPLY IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS** via the Colorado Courts E-Filing System which will send notification of such filing and service upon all counsel of record:

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