4th Judicial District El Paso County El Paso County Judicial Building 270 S Tejon St Colorado Springs, CO 80903 **Petitioner:** NONHUMAN RIGHTS PROJECT, INC., on behalf of Missy, Kimba, Lucky, LouLou, and Jambo, **v.** **Respondents:** CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY and BOB CHASTAIN, in his official capacity as President & CEO of Cheyenne Mountain Zoological Society.	DATE FILED: October 5, 2023 10:14 AM FILING ID: 9BB4F8E7CECDD CASE NUMBER: 2023CV31236 ▲ ▲ **COURT USE ONLY**
NONHUMAN RIGHTS PROJECT, INC. Jake Davis, Esq. Bar No. 54032 525 Skyles Pl, Ste 302 Whitefish, MT 59937 Tel.: (513) 833-5165 Email: jdavis@nonhumanrights.org	Case Number: 2023CV031236 Division: 8
PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS	

Petitioner Nonhuman Rights Project, Inc. ("NhRP") opposes Respondents Cheyenne Mountain Zoological Society and Bob Chastain's (collectively, "Respondents") Motion to Dismiss ("MTD"), made pursuant to C.R.C.P Rules 12(b)(1) and 12(b)(5), that seeks to dismiss the NhRP's Verified Petition for Writ of Habeas Corpus ("Petition"). The NhRP states in support of its opposition:

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INTRODUCTION

The day after the NhRP filed its Petition on behalf of Missy, Kimba, Lucky, LouLou, and Jambo, five female African elephants confined at the Cheyenne Mountain Zoo, this Court ordered Respondents to "address whether the Petition sets out a prima facie case of entitlement to immediate release." Order 1, June 30, 2023. At this stage, the question before the Court is not whether to grant the ultimate relief sought in the Petition—ordering the elephants released and relocated to an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries ("GFAS"). It is whether to issue the writ and allow the case to proceed to a hearing on the merits.

Because the Petition makes a prima facie case that the elephants are entitled to immediate release, this Court "must issue a writ of habeas corpus forthwith" and set a hearing upon return of the writ. *Cardiel v. Brittian*, 833 P.2d 748, 752 (Colo. 1992). Refusing to do so is not only legal error, but would perpetuate a manifest injustice. The elephants, who are suffering greatly due to their unjust confinement and have committed no wrong warranting the loss of liberty, should not be denied the opportunity to seek their freedom. It is time to reject the irrational and arbitrary notion that only members of the human species may invoke the protections of the Great Writ.

Respondents' motion to dismiss must be denied in its entirety, as they fail to refute the prima facie case made in the Petition. Respondents rely almost exclusively on non-binding authorities from sister jurisdictions, yet they ignore the Petition's most significant authorities, including three opinions from New York State Court of Appeals judges: Judge (now Chief Judge) Rowan Wilson's dissent where he found that habeas corpus was available for an elephant to challenge her unjust confinement at a zoo; Judge Jenny Rivera's dissent where she arrived at the same conclusion; and Judge Eugene Fahey's concurrence where he urged courts to take

seriously the notion that the writ is available to autonomous nonhuman animals like chimpanzees. *See Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 577-626 (N.Y. 2022) (Wilson, J., dissenting); *id*. at 626-42 (Rivera, J., dissenting); *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1055-59 (N.Y. 2018) (Fahey, J., concurring).

Respondents' frivolous, bad-faith request for attorney fees must also be denied. Their claim that "the Petition is substantially frivolous, groundless, and vexatious" is preposterous on its face, especially given the significant evidence and legal authorities supporting the Petition as well as Respondents' failure to cite a single binding authority that would mandate dismissal.

ARGUMENT

A. The Petition makes a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are entitled to immediate release from the Cheyenne Mountain Zoo

"A petitioner makes a prima facie showing by producing evidence that, when considered in a light most favorable to the petitioner and when all reasonable inferences therefrom are drawn in the petitioner's favor, would permit the court to find that the petitioner is entitled to release." *Cardiel,* 833 P.2d at 752. The Petition makes a prima facie case because the evidence produced, when considered in the light most favorable to Missy, Kimba, Lucky, LouLou, and Jambo—and with all reasonable inferences drawn in their favor—permits this Court to find that they are entitled to release from the Cheyenne Mountain Zoo. Pet. ¶¶ 79-90. Specifically, the Petition establishes that (1) the elephants have the common law right to bodily liberty protected by habeas corpus (Pet. §§ VI.A-D), and (2) their right has been violated (Pet. § VI.G).

In order to issue the writ, this Court need not determine that the elephants have the right to bodily liberty, as it need only assume, without deciding, that the elephants could possibly have this right. Pet. ¶¶ 8, 10. *See Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746,

748 (Sup. Ct. 2015) ("Given the important questions raised here, I signed the petitioner's order to show cause, and was mindful of petitioner's assertion that 'the court need not make an initial judicial determination that [chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.'"). Throughout history, writs of habeas corpus have been issued for individuals whose right to bodily liberty was unrecognized, including two chimpanzees and an elephant. Pet. ¶¶ 87-89.

In assessing Respondents' motion to dismiss, this Court must accept the Petition's factual allegations as true and view them in the light most favorable to the NhRP. *See Allen v. Steele*, 252 P.3d 476, 481 (Colo. 2011); *Crystal Lakes Water & Sewer Ass'n v. Backlund*, 908 P.2d 534, 540 (Colo. 1996). Thus, this Court must accept as true, among other things, that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs; zoo captivity is physically and psychologically harmful to elephants; the Cheyenne Mountain Zoo is an unacceptable place for elephants since it cannot meet their complex needs; and the only acceptable place for Missy, Kimba, Lucky, LouLou, and Jambo is at an elephant sanctuary. Pet. ¶¶ 21-78.

Respondents' arguments are shaped by non-binding authorities from sister jurisdictions. This Court should favor the NhRP's contrary authorities because they are better reasoned, more logical, and in greater harmony with justice. *See, e.g., People, to Use of Tritch v. Cramer*, 15 Colo. 155, 161-62 (Colo. 1890) ("[W]e feel that the contrary view taken by Mr. Justice SHEPLEY in his dissenting opinion . . . is predicated upon sounder logic, and in harmony with higher considerations of justice."); *Stubert v. Cnty. Court for Jefferson Cnty.*, 163 Colo. 535, 547 (Colo. 1967) ("In our view the dissent in the Scott case is better reasoned and its logic more convincing than the majority opinion.").

B. Respondents' motion to dismiss for failure to state a claim must be denied

1. Legal personhood and the right to bodily liberty do not require the capacity to bear responsibilities

Respondents claim that Missy, Kimba, Lucky, LouLou, and Jambo "are not entitled to the rights of personhood" because the elephants are "incapable of bearing the responsibilities of personhood." MTD 4. In their view, habeas corpus "is attributed to *persons*, not nonhuman animals, because it carries with it commensurate responsibilities associated with human liberty interests." *Id*. at 5. However, this conception of rights and legal personhood is demonstrably wrong.

First, as an overarching matter, Respondents' framing of the question in this case—formalistically asking whether the elephants are "persons"—evades the more fundamental question of whether the elephants have a liberty interest that habeas corpus must protect. The focus of this Court's inquiry must be on whether the elephants have the common law right to bodily liberty protected by habeas corpus, not whether they fit the definition of "person" (although they do). Pet. ¶¶ 161-66. As Judge Fahey explained in the NhRP's chimpanzee case:

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here.

Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring). Whether the elephants possess the right to bodily liberty must be decided in accordance with the fundamental principles of the common law, including justice, liberty, and equality. Pet. §§ VI.A-D.

Once this Court recognizes that the elephants possess the right to bodily liberty, they are necessarily "persons" for purposes of habeas corpus. This is because a "person" is merely the consequence of being a rightsholder. A "person is any being whom the law regards as capable of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not."

Person, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).[1]

Second, to support the erroneous view that the right to bodily liberty requires the capacity to bear responsibilities, Respondents rely primarily on an outlier decision, *People ex rel. Nonhuman Rights Project, Inc. v. Lavery,* 124 A.D.3d 148 (3d Dept. 2014). *Lavery* was the first time a court in any English-speaking jurisdiction conditioned the recognition of legal personhood on the capacity to bear duties. It held:

> [U]nlike human beings, chimpanzees cannot bear any legal duties, submit to societal responsibilities or be held legally accountable for their actions. In our view, it is this incapability to bear any legal responsibilities and societal duties that renders it inappropriate to confer upon chimpanzees the legal rights—such as the fundamental right to liberty protected by the writ of habeas corpus—that have been afforded to human beings.

Id. at 152. However, this fundamentally flawed and irrational decision has been soundly refuted by three high court judges (*infra* p. 6), as well as distinguished philosophers, law professors, and other legal scholars.[2]

Judge Fahey decisively refuted *Lavery*'s reasoning and exposed its arbitrary nature by noting the obvious fact that numerous human beings cannot bear duties yet have rights: "Even if

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[1] *See also* IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("The significant fortune of legal personality is the capacity for rights."); Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY, 121-22 (Arthur Peacocke & Grant Gillett eds. 1987) ("[L]egal personality can be given to just about anything. . . . It is an empty slot that can be filled by anything that can have rights or duties.").

[2] *See, e.g.,* KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 41-59 (2018); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69, 76-87 (2017); Br. of Amici Curiae Law Professors 3-12, https://bit.ly/3R6ZAJu; Br. of Amici Curiae Philosophers 12-18, https://bit.ly/3sK2w4o; Br. of Amici Curiae Joe Wills et al. 4-18, https://bit.ly/45V9QbJ; Br. of Amici Curiae Laurence H. Tribe et al. 11-19, https://bit.ly/3LdrKi3; Br. of Amici Curiae Peter Singer et al. 19-25, https://bit.ly/3RcJb6p; Br. of Amicus Curiae Christine Korsgaard 15-19, https://bit.ly/45CLIuN; Br. of Amici Shannon Minter and Evan Wolfson 4-13, https://bit.ly/46xWEtG.

it is correct, however, that nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child or a parent suffering from dementia." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) (citations omitted).

Judge Wilson and Judge Rivera echoed Judge Fahey's criticism in their *Breheny* dissents. Judge Wilson explained that the notion that nonhuman animals cannot have rights because they cannot bear responsibilities "confuses who can confer rights with who can hold rights." 38 N.Y.3d at 585 (Wilson, J., dissenting). The "holder of a right need not have a duty at all. Humans can create a legal system that confers rights on animals even if animals cannot bear duties, and even if animals are unaware of the rights they have been granted." *Id*. at 586. In concluding that the elephant Happy should be allowed to proceed by habeas corpus, Judge Wilson stated that "the legal basis for denying the writ—that animals cannot have rights because they cannot bear responsibilities—is wrong." *Id*. at 626.

Similarly, Judge Rivera observed that the "human/nonhuman binary relied upon by the majority"—and by Respondents here—"depends on a 'rights and duties' framework that has no support in the historical application of the writ," which has not been "limited to humans solely on the grounds that humans have rights and, in some cases, bear duties." *Id*. at 630 (Rivera, J., dissenting) (citations omitted). "[H]istory, logic, justice, and our humanity must lead us to recognize that if humans without 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." *Id*. at 628.

Lavery's own authorities directly contradict its assertion that "legal personhood has consistently been defined in terms of both rights *and duties*." MTD 4 (quoting 124 A.D.3d at

151). These authorities include JOHN SALMOND, JURISPRUDENCE (10th ed. 1947) and JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW (2d ed. 1963), which are discussed in turn.[3]

Lavery incorrectly quoted *Jurisprudence* as follows, relying on Black's Law Dictionary: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties." 124 A.D.3d at 151 (quoting BLACK'S LAW DICTIONARY (7th ed. 1999), incorrectly citing JURISPRUDENCE at 318) (emphasis added). This was a misquotation error made by Black's, as Professor Salmond wrote "rights or duties," not "rights and duties." The error has been corrected in Black's eleventh edition.

Lavery also quoted THE NATURE AND SOURCES OF THE LAW as stating that "the legal meaning of a 'person' is 'a subject of legal rights and duties.'" 124 A.D. at 152 (quoting GRAY at 27). However, the court ignored the next qualifying sentences: "One who has rights but not duties, or who has duties but no rights, is . . . a person. . . . [I]f there is any one who has rights though no duties, or duties though no rights, he is . . . a person in the eye of the Law." GRAY at 27. Professor Gray went on to explain that "animals may conceivably be legal persons" for two independent reasons: either (1) "because possessing legal rights," or (2) "because subject to legal duties."[4] *Id*. at 42-44.

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[3] Respondents also cite *Justice by & through Mosiman v. Vercher*, 321 Or.App. 439, 449 (Or. Ct. App. 2022), for its historical statement that "[u]nder the English common law, only human beings and legal entities created by human beings were considered 'persons' capable of holding and asserting legal rights." MTD 4. This is true but irrelevant. That nonhuman animals during Blackstone's era had no rights under English common law—and thus were not "persons"—does not mean elephants today cannot have a liberty right under Colorado common law.

[4] *Lavery* also cited *Wartelle v. Women's & Children's Hosp., Inc.*, 704 So. 2d 778, 780 (La. 1997), in which the Louisiana Supreme Court—after noting that "'[p]erson' is a term of art"—quoted with approval a leading authority that stated: "the word person in a technical sense . . . signif[ies] a subject of rights or duties." (quoting A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEMS § 48 (1977)). 124 A.D.3d at 152.

In addition to citing authorities that contradict its view of legal personhood, *Lavery* also relied on a gross distortion of social contract theory, as do Respondents, stemming from the idiosyncratic views of a single academic. The court erroneously claimed that "[r]eciprocity between rights and responsibilities stems from principles of social contract," and under this view, "society extends rights in exchange for an express or implied agreement from its members to submit to social responsibilities. In other words, 'rights [are] connected to moral agency and the ability to accept societal responsibility in exchange for [those] rights.'" 124 A.D.3d at 151. (quoting Richard L. Cupp Jr., *Children, Chimps, and Rights: Arguments From "Marginal" Cases*, 45 ARIZ. ST. L.J. 1, 13 (2013)).

Social contract theory cannot be used to justify the proposition that legal personhood and the possession of certain rights, such as the right to bodily liberty, are contingent upon the ability to bear responsibilities. *Lavery*'s quid pro quo notion of "persons" receiving rights in exchange for bearing responsibilities "is not how political philosophers have understood the meaning of the social contract historically or in contemporary times." Br. of Amici Curiae Philosophers 13, https://bit.ly/3sK2w4o. As amici philosophers in *Breheny* explained, influential pioneers of social contract theory such as Thomas Hobbes, John Locke, and Jean-Jacques Rousseau "maintain[ed] that all persons have 'natural rights' that they possess independently of their willingness or ability to take on social responsibilities." *Id*. at 12. Further, as Judge Wilson observed, "[i[f the proposition that no rights may be awarded to a being who cannot shoulder responsibilities were based on social contract theory, we could not explain why children or profoundly disabled adults—who have no capacity to enter into a social contract—can be granted rights." *Breheny*, 38 N.Y.3d at 587 (Wilson, J., dissenting).

The irrelevance of social contract theory to habeas corpus relief was long made clear by the Connecticut Supreme Court in *Jackson v. Bulloch*, 12 Conn. 38, 43 (1837), where an enslaved individual, Nancy Jackson, was freed pursuant to habeas corpus—even though the court held that enslaved individuals were neither parties to the "social compact" described in Connecticut's constitution nor "represented in it." *Jackson* is directly contrary to *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 216 A.3d 839 (Conn. App. Ct. 2019), which Respondents cite for the position that elephants are not "persons." MTD 11. *Commerford* adopted *Lavery*'s erroneous view of legal personhood, concluding that elephants are not "persons" for purposes of habeas corpus because they are "incapable of bearing duties and social responsibilities required by [the Connecticut constitution's] social compact." 216 A.3d at 46. But as we have just seen, what the "social compact" may require is irrelevant in a habeas corpus case.

Judge Wilson's astute observations are applicable here: "At its core, this case is about whether society's norms have evolved such that elephants like Happy should be able to file habeas petitions to challenge unjust confinements. It is not about whether Happy is a person or whether Happy can bear responsibilities or enter into a social contract."[5] *Breheny*, 38 N.Y. at 587 (Wilson, J., dissenting).

2. Legal personhood and the right to bodily liberty are not limited to humans

Respondents erroneously claim that "Colorado's statutory provision of habeas corpus is expressly directed to any 'person,' meaning any human being." MTD 5. They represent to the

[5] The social contract is a legal and theoretical fiction, and its invocation as a basis to exclude individuals from the moral and legal community should be troubling. Legal scholar Anita L. Allen has warned that "judges' reliance on social contractarianism has served the interests of injustice—even extremes of injustice." Anita L. Allen, *Social Contract Theory in American Case Law*, FLA. L. REV. 1, 13 (1999).

Court, through the use of "*see*" and "*accord*" signals, that the following authorities directly support this assertion, but none of them do.

Culver v. Samuels, 37 P.3d 535 (Colo. App. 2001), a personal injury case where an individual was thrown off a horse, has nothing to do with habeas corpus, nothing to do with Colorado's habeas corpus procedural statutes, and nothing to do with the meaning of the term "person" in the habeas corpus context. Respondents point to the court's statement, "[t]he word 'person' means an 'individual human being.'" *Id*. at 536 (citation omitted). However, this statement—based on a dictionary definition—does not stand for the proposition that "person" can only mean an "individual human being," or that the word cannot encompass nonhuman animals like elephants in the habeas corpus context. *People v. Grosko*, 491 P.3d 484 (Colo. App. 2021), a criminal appeal concerning the pimping statute, is inapposite for the same reasons.

C.R.S. §§ 13-45-101–02, portions of Colorado's habeas corpus procedural statute, provide no support for Respondents' position that the meaning of the undefined term "person" is limited to humans. These sections are merely procedural and cannot curtail the substance or reach of the writ.[6] As relevant here, the *Lavery* court correctly observed that New York's similar habeas corpus procedural statute "does not purport to define the term 'person,' and for good reason. The 'Legislature did not intend to change the instances in which the writ was available,'

[6] *See Ryan v. Cronin*, 553 P.2d 754, 755 (Colo. 1976) ("The Colorado Habeas Corpus Act and the rules of this court delineate the right which may be enforced with the Great Writ of Habeas Corpus, and the procedure which is to be followed."); *Leonhart v. Dist. Court of Thirteenth Judicial Dist. In & For Sedgwick Cnty.*, 329 P.2d 781, 783 (Colo. 1958) ("Even under the Rules of Civil Procedure the substantive aspects of remedial writs are preserved, and relief of the same nature as was formerly provided in such proceedings may be granted in accordance with precedents established under the old practice."); *In re People ex rel. B.C.*, 981 P.2d 145, 149 n.4 (Colo. 1999) (As a general principle, "the rules of civil procedure are procedural and do not attempt 'to abridge, enlarge, nor modify the substantive rights of any litigants.'") (citation omitted).

which has been determined by 'the slow process of decisional accretion'. Thus, we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach."[7] 124 A.D.3d 150 (citation omitted).

To support their demonstrably false assertion that the law here is settled and unambiguous, Respondents cite *Rowley v. City of New Bedford*, 2020 WL 7690259 (App. Ct. Mass. Dec. 28, 2020), an unpublished Massachusetts opinion which cannot be cited as binding precedent, even in Massachusetts. MTD 5. The assertion in *Rowley*, quoted by Respondents, that "the word 'person' is synonymous with the term 'human being,'" originates from a decision interpreting the term "person" under Massachusetts' vehicular homicide statute. *Id*. That decision has nothing to do with habeas corpus, and the assertion does not stand for the proposition that the word "person" is synonymous with "human being" for all purposes. Indeed, being a "person" for one purpose does not entail being a "person" for other purposes (e.g., having the right to bodily liberty does not entail having the right to vote).

Finally, Respondents adopt the blatantly speciesist position, based on nothing more than a biological prejudice, that access to habeas corpus "depends, as it should, on the mere fact that the subject of the writ is a human being." MTD 6. They rely on an obvious non-sequitur made by the *Breheny* majority, that "the great writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law." *Id*. (quoting 38 N.Y.3d at

[7] *See Breheny*, 38 N.Y.3d at 582 (Wilson, J., dissenting) (explaining that the undefined term "person" in CPLR article 70 "was meant to have no substantive component," and "[j]ust as 'person' is used in a juridical sense to refer to any entity, real or fictional, as to which a statute or rule of the common law applies, 'person' in CPLR article 70 is irrelevant to whether the writ can extend beyond humans"); *id*. at 633 (Rivera, J., dissenting) ("While CPLR article 70 sets forth the *procedure* to seek habeas relief, it does not create the right to bodily liberty nor determine who may seek such relief. . . . [I]t is for this Court to decide the contours of the writ based on the qualities of the entity held in captivity and the relief sought.").

571). Habeas corpus does and should protect the right to liberty of human beings. However, this is no reason to limit the writ's protections to members of our own species, just as the fact that rights were once denied to children, women, and enslaved persons was no reason to then limit rights to adults, men, or free persons. The *Breheny* majority, like Respondents, ignore an important historical truth: "Even when those classes of human beings have, by operation of law, been denied legal recognition of their humanity, the writ of habeas corpus was still available to them."[8] 38 N.Y.3d at 632-33 (Rivera, J., dissenting).

As Judge Rivera correctly noted, the *Breheny* majority's argument is "question begging in its purest form." *Id*. at 633. Exposing the "incoherence of its circular logic," Judge Rivera observed that "[t]he majority's argument boils down to a claim that animals do not have the right to seek habeas corpus because they are not human beings and that human beings have such a right because they are not animals. . . . And glaringly absent is any explanation of why some kinds of animals—i.e., humans—may seek habeas relief, while others—e.g., elephants—may not. The majority's suggestion that the 'fundamental liberty rights' of human beings are 'recognized by law' is nothing more than a tautological evasion." *Id*. (citation omitted).

Judge Wilson noted that "in an attempt to prove that 'the Great Writ protects the right to liberty of humans *because* they are humans,' the majority links several incongruous citations," *id*. at 582 (Wilson, J., dissenting), and "[w]hat is patent from the glommed-together authorities is

[8] In highlighting this historical truth, "no one is equating enslaved human beings or women or people with cognitive disabilities with elephants." *Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting). Respondents say they "feel compelled to register" that an "odious comparison" is being made. MTD 15. But they have "profoundly misconstrued the point." *Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting). The references to "humans who were denied full rights under the law" demonstrate "the flexibility of the historical uses of the writ," and does not "undermine in any way the dignity of those individuals or diminish their struggles for equality and the right to live free." *Id*.

that they do not prove anything relevant here." *Id*. at 584. The question in *Breheny*, as in this case, is novel, which does not doom it to failure: "[N]ovel common-law cases—of which habeas is a subset—have advanced the law in countless areas. . . . The correct approach is not to say, 'this has never been done' and then quit, but to ask, 'should this now be done even though it hasn't before, and why?" *Id*. at 582.

Respondents' arbitrary and irrational view that the Great Writ's protections are limited to humans not only lacks credible legal and intellectual support but is in irreconcilable conflict with the fundamental common law principles of justice, liberty, and equality. Pet. §§ VI.A-D. The question this Court must confront is whether the elephants' species membership alone presents a distinction with a legal difference. As Judge Fahey so eloquently explained, "in elevating our species, we should not lower the status of other highly intelligent species."[9] *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

"The nature of injustice is that we may not always see it in our own times." *Obergefell v. Hodges,* 576 U.S. 644, 664 (2015). "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Id*. at 671. It is time to recognize that "an autonomous animal has a right to live free of an involuntary captivity imposed by humans, that serves no purpose other than to degrade life." *Breheny*, 38 N.Y.3d at 629 (Rivera, J., dissenting).[10]

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[9] "[I]t is arbitrary to utilize species membership alone as a condition of personhood, and it fails to satisfy the basic requirement of justice that we treat like cases alike. It picks out a single characteristic as one that confers rights without providing any reason for thinking it has any relevance to rights." ANDREWS ET AL. at 34.

[10] Respondents falsely suggest the NhRP argues that autonomy is necessary—as opposed to merely sufficient—for the right to bodily liberty. They quote the following *Breheny* majority assertion: "The selective capacity for autonomy, intelligence, and emotion of a particular nonhuman animal species is not a determinative factor in whether the writ is available as such

3. The history and flexibility of habeas corpus support its use here

Habeas corpus is "'the precious safeguard of personal liberty,' concerning which courts are admonished that 'there is no higher duty than to maintain it unimpaired.'"[11] *Geer v. Alaniz*, 331 P.2d 260, 261 (Colo. 1958) (citation omitted). It is a "'writ antecedent to statute, . . . throwing its root deep into the genius of our common law,'" *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (citation omitted), and is "an integral part of our common-law heritage." *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973). Significantly for this case, the history of the Great Writ is "inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia*, 372 U.S. 391, 400 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977). *See also Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (habeas corpus is "not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty").

Respondents distort the history and flexibility of habeas corpus beyond recognition in order to argue that "the writ is only available to human beings." MTD 6. They claim "[o]ur conception of the writ as the bastion of an individual's human right to liberty is a modern interpretation" based not on the common law—but legislation like the Habeas Corpus Act of

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factors are not what makes a person detained qualified to seek the writ." MTD 6 (quoting 38 N.Y.3d at 571). While autonomy is not a "determinative factor"—that is, necessary—for having the right to bodily liberty, it is certainly relevant. Respondents ignore the rich body of jurisprudence recognizing the fundamental importance of protecting an individual's autonomy under the common law. Pet. § VI.C. Moreover, the NhRP has never challenged the notion that being human is sufficient for rights, only that being human is necessary for rights.

[11] When used alone, the phrase "habeas corpus" refers to "the common-law writ of habeas corpus Ad subjiciendum, known as the 'Great Writ.'" *Stone v. Powell*, 428 U.S. 465, 475 n.6 (1976).

1679—and therefore the common law writ is of "limited breadth." *Id*. at 7, 8. This is demonstrably incorrect, as evident from Respondents' own cited authorities, including *Boumediene v. Bush*, 553 U.S. 723 (2008) and Paul D. Halliday, G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008) ("Halliday & White").[12]

Boumediene understood that "common-law habeas corpus was, above all, an adaptable remedy," with its "precise application and scope" changing "depending upon the circumstances." 553 U.S. at 779. This is because, at its core, habeas corpus is an equitable remedy. *Id*. at 780. While it is true, as Respondents note, that "the common-law writ all too often had been insufficient to guard against the abuse of monarchial power," 553 U.S. at 739-40, "the common-law habeas court's role was most extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention." *Id*. at 780 (emphasis added).

Halliday & White explain that "the writ's peculiar force was the product of judicial rather than statutory innovation."[13] 94 VA. L. REV. at 575. In fact, "the 'Great Writ' of common law not

[12] Respondents claim that under the common law, habeas corpus "was a right, not a privilege." MTD 6. But a "privilege" is a "special legal right." *Privilege*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 813 (2010) (Thomas, J., concurring) (Since the time of Blackstone, the words "privileges and immunities," standing alone or paired together, "were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms.'") (citation omitted).

[13] Citing Halliday & White, Respondents note that habeas corpus does not trace its conceptual origins to a theory of liberty but rather a theory of power, arising from the royal prerogative. MTD 6. But this is irrelevant. Although conceptually habeas corpus arose from a theory of power, "the legal possibilities this injected into the writ would permit the realization of those extra-legal ideals we invoke today when we speak the language of rights and liberties." 94 VA. L. REV. at 593. "[T]he royal prerogative would give to habeas corpus its distinctive judicial power to defend what, centuries later, we call human rights." *Id*. Indeed, the notion that all authority

only preceded, but was always greater--more expansive--than the writ enacted by statute." *Id*. at 580 n.10. This includes the Habeas Corpus Act of 1679, "which Blackstone over-enthusiastically called 'that second magna carta.'" *Id*. at 611. Putting aside the fact that the Habeas Corpus Act of 1679 applied only to those detained for "criminal or supposed criminal matters,"[14] thereby making it irrelevant to the private detention at issue here, the act "merely codified practices generated by King's Bench justices." *Id*. "As a general matter, in the century after the passage of the Habeas Corpus Act of 1679, all the important innovations in habeas corpus jurisprudence occurred through judicial use of the common law writ rather than the statutory one." *Id*. at 612. *See* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 80 (2010) (The "strength" of habeas corpus was "due to its roots in common law, whatever glorious attributes later generations would ascribe to the writ as it was used according to the Habeas Corpus Act of 1679.").[15]

The history of the Great Writ shows that it "serves to protect against unjust captivity and to safeguard the right to bodily liberty," and there is no reason to think those protections are "the singular possessions of human beings." *Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting). This is because the common law writ has long been flexibly used in novel situations to safeguard the

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came from the king "explains the writ's peculiar force as a mechanism for defending the subject's liberty." *Id*. 597.

[14] Rex Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace*, 40 CALIF. L.REV. 335, 337 n. 10 (1952) ("'The common law writ of habeas corpus . . . was left wholly untouched by [the Habeas Corpus Act] in all cases where the detainer was not for criminal or supposed criminal matter.'") (citation omitted).

[15] *See also* Stephen I. Vladeck, *Constitutional Remedies in Federalism's Forgotten Shadow,* 107 CALIF. L. REV. 1043, 1046 (2019) ("[T]he narrow and specific cases in which the 1679 Act authorizes relief pale in comparison to the vigorous--and flexible--common law writ that the King's Bench developed and expanded both long before and well after Parliament's late-seventeenth-century intervention.").

liberty of individuals with few or no rights. Pet. ¶¶ 91-98. "Most fundamentally, the writ was used to grant freedom to slaves, who were considered chattel with no legal rights or existence." *Breheny*, 38 N.Y. at 588 (Wilson, J., dissenting). "Similarly, the writ was used to grant freedom to wives and children, who, though not chattel, had few or no legal rights and legally were under the dominion of husbands and fathers." *Id*. at 589. Habeas corpus is thus "an innovative writ—one used to advocate for relief that was slightly or significantly ahead of the statutory and common law of the time."[16] *Id*.

For instance, *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772) http://bit.ly/3jpLmkH, "stands as an example of just how powerful the common law writ of habeas corpus could be, not only in protecting—but also expanding—liberty." AMANDA L. TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 27 (2021). There, Lord Mansfield ordered an enslaved Black man freed because "[t]he state of slavery is . . . so odious, that nothing can be suffered to support it" under the common law. 1 Lofft. at 19. Relying on *Somerset*, the New York Court of Appeals in *Lemmon v. People*, 20 N.Y. 562, 617 (1860), affirmed a decision granting a habeas corpus petition brought on behalf of eight enslaved individuals, and ruled that "slavery is repugnant to natural justice and right."

These decisions, as well as others throughout the Great Writ's history, resoundingly destroy Respondents' contentions regarding the alleged narrowness of habeas corpus.[17] They

[16] *See Breheny*, 38 N.Y. at 600 (Wilson, J., dissenting) ("The 'flexibility, creativity, and widening purview' vested in judges through habeas corpus led to judges 'broaden[ing] the principles that legitimated a widening oversight of detention in all forms.' . . . [H]abeas was used to challenge abusive husbands in the 1670s, to question detentions justified by concerns of state safety in the last decade of the seventeenth century, and to 'oversee other forms of detention that involved no wrongdoing' such as 'apprenticeship, slavery, and naval impressment' in the mid-eighteenth century.") (citations omitted).

demonstrate "the writ may be used to challenge a particular confinement as unjust based on the particular circumstances," and that "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." *Breheny*, 38 N.Y. at 602 (Wilson, J., dissenting). Moreover, since habeas corpus "is a common-law writ . . . , its judicial implementation mirrors the path generally used by courts to adapt the common law and conform it to present times," with habeas corpus being "just one example of how courts alter conduct as societal needs, values and aspirations evolve."[18] *Id*. at 613.

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[17] Respondents also incorrectly claim that common law habeas corpus "is narrower than the writ protected by the federal and state constitutions." MTD 6. But the two writs are one and the same. Federal and state constitutions, through their respective suspension clauses, merely prevent the common law writ from being "suspended" except under certain specified circumstances. *Williams v. Dist. Ct. of Eighth Williams v. District Court of Eight Judicial Dist. In and For Larimer Cnty.*, 160 Colo. 348, 355 (1966); *Boumediene,* 553 U.S. at 746 ("'at the absolute minimum,'" the federal suspension clause "protects the writ as it existed when the Constitution was drafted and ratified") (citation omitted). *See also* Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 Cornell L. Rev. 47, 64-65 (2012) ("The Suspension Clause stands alone as the only common law writ mentioned in the Constitution. . . . The Clause refers to preserving an existing writ[.]"); Kristin E. Slawter, *Torturous Transfers: Examining Detainee Habeas Jurisdiction for Nonremoval Challenges and Deference to Diplomatic Assurances*, 70 WASH. & LEE L. REV. 2487, 2522 (2013) ("The Constitution's framers designed the Suspension Clause to incorporate the broadly utilized common law writ of habeas corpus as a baseline[.]").

[18] The common law must accord with evolving societal norms against elephant captivity. Less than two weeks ago, the Ojai City Council, in Ojai, California, passed a historic ordinance—the first of its kind—recognizing the right to bodily liberty for elephants. Brad Matthews, *Southern California city grants elephants the right to freedom, first in the nation,* THE WASH. TIMES (Sept. 28, 2023), https://bit.ly/3RGDk9x. Of course, although the legislature can expand legal protections for nonhuman animals, that is no reason for this Court to deflect its duty to change archaic common law. "[I]t is for this Court to decide the contours of the writ based on the qualities of the entity held in captivity and the relief sought." *Breheny*, 38 N.Y. at 633 (Rivera, J., dissenting). The judges "who issued writs of habeas corpus freeing enslaved persons, or liberating women and children from households run by abusive men, or ordering the return home of underage soldiers could have said . . . , 'that's a job for the legislature,'" but "they did not." *Id*. at 617 (Wilson, J., dissenting). "The Great Writ's use . . . is part of the fundamental role of a common-law court to adapt the law as society evolves." *Id. See also* Pet. ¶ 157-58.

4. Animal welfare statutes and AZA requirements do not address Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty

The Petition establishes that Missy, Kimba, Lucky, LouLou, and Jambo's confinement violates their common law right to bodily liberty protected by habeas corpus and is therefore unlawful under the common law.[19] Pet. ¶¶ 5, 168-69. Thus, contrary to Respondents, their compliance with animal welfare statutes and AZA requirements is irrelevant; such compliance does not render the elephants' confinement lawful. MTD 9-10.

The question here is not whether the elephants' "detention violates some statute: historically, the Great Writ of habeas corpus was used to challenge detentions that violated no statutory right and were otherwise legal but, in a given case, unjust." *Breheny*, 38 N.Y.3d at 579 (Wilson, J., dissenting). Habeas corpus ensures the protection of an individual's liberty interest regardless of whether that interest is protected by a statute, a constitutional provision, or the common law. Throughout its history, the Great Writ has been flexibly employed on behalf of individuals such as enslaved persons, women, and children to challenge their unjust confinements even when existing statutory law provided no clear substantive basis for doing so. *See generally id*. at 588-602 (Wilson, J., dissenting).[20]

Respondents fail to address the NhRP's core argument that the unlawfulness of the elephants' confinement is based on the violation of their right to bodily liberty, regardless of the alleged exemplary care they are receiving. Pet. ¶¶ 5, 168-69. *See also Breheny*, 38 N.Y.3d at 637 (Rivera, J., dissenting) ("Critically, respondent failed to address the Nonhuman Rights Project's

[19] Confinement contrary to the common law can be the basis for habeas corpus relief. *See, e.g., Somerset v. Stewart*, 1 Lofft. 1, 19 (K.B. 1772) http://bit.ly/3jpLmkH.

[20] "Habeas corpus has been used throughout history in situations where no precise legal solution existed under codified law, but where leaving the status quo unchallenged would be unjust." Br. of Amici Curiae Habeas Corpus Experts 16, https://bit.ly/3P8QGbF.

core argument that the writ should issue because Happy's confinement at the Zoo was a violation of her right to bodily liberty as an autonomous being, regardless of the care she was receiving.").

Missy, Kimba, Lucky, LouLou, and Jambo's confinement violates their right to bodily liberty by depriving them of the ability to meaningfully exercise their autonomy and extraordinary cognitive complexity, including the freedom to choose where to go, what to do, and with whom to be. Pet. ¶¶ 5, 168-69. Deprived of the ability to travel, forage, communicate, socialize, plan, live, choose, and thrive as elephants should, they are suffering greatly as a result. The NhRP's Expert Scientific Declarations from seven of the world's most renowned elephant experts—with over 200 years of combined experience studying elephant behavior and cognition—collectively establish that elephants have complex biological, psychological, and social needs, which cannot be met at the Cheyenne Mountain Zoo. *Id*. at ¶¶ 21-75; Lindsay Decl. ¶¶ 35-68; Jacobs Decl. ¶¶ 12-21.[21]

For instance, elephants need a great amount of space to roam and exercise, as well as the freedom to choose how and where to spend their time. Free-living elephants have expansive home ranges that can extend from tens to many thousands of square kilometers, and they normally travel tens of kilometers each day across a large variety of terrains, with much greater distances being common. Pet. ¶ 64. Yet, Missy, Kimba, Lucky, LouLou, and Jambo spend at least half, if not more, of each day in a barn with an estimated maximum size of 2,000 yd^2, containing very little cushioning for their feet and joints, as well as a noisy interior. *Id*. at ¶ 65. When

[21] Dr. Keith Lindsay and Dr. Bob Jacobs' conclusions, regarding the specific harms inflicted upon the elephants, are informed by videos and photographs showing various aspects of the elephant compound (e.g., https://bit.ly/3kr6onn and bit.ly/3qV3YAI). Lindsay Decl. ¶ 43; Jacobs Decl. ¶¶ 21, 21(l). Moreover, Dr. Jacobs observed the elephants for approximately 2 hours at the zoo, an experience which led him to conclude that their impoverished environment "is worse in person than on paper." Jacobs Decl. ¶ 21.

allowed outside, they are commonly unable to walk more than 100 yards in any direction. *Id*. at ¶ 66. Even the so-called two-acre "Vacation Yard," accessible to the elephants only a few days per month, offers a tiny fraction of the miles that free-living elephants in natural environments cross on a daily basis. *Id*. Involuntary confinement in these tiny enclosures, with zoo staff intensively managing and controlling their movements, robs the elephants of agency and is both physically and psychologically harmful. *Id*. at ¶¶ 63-75.

Respondents acknowledge that Missy, Kimba, Lucky, LouLou, and Jambo "need diversity and stimulation" as they are "highly intelligent animals." MTD 3. Yet, there is little for the elephants to do, being unable to make meaningful choices. There is no opportunity to employ their capacities for exploration, spatial memory, or problem-solving, no opportunity to employ their wide range of vocalizations, and no opportunity to communicate and interact with a range of other elephants over distance. Pet. ¶ 67. None of the zoo's predictable "enrichment" efforts—such as training sessions, "yoga" stretches, and the endless back-and-forth shuffling between tiny, bleak enclosures—provide the elephants with much mental stimulation. *Id*. at ¶¶ 68-70; Lindsay Decl. ¶ 63. In fact, transient, inconsistent enrichment can cause them more stress and frustration than no enrichment at all. Jacobs Decl. ¶ 21(n).[22]

Inflicting such a monotonous, miserable existence upon Missy, Kimba, Lucky, LouLou, and Jambo cannot be described as care "centered around eudaemonia." MTD 3. Nor is subjecting their acute hearing to a regular bombardment of auditory disturbances, including noises coming from a constantly running artificial waterfall, crowds filled with screaming children, and nearby

[22] At a sanctuary, the elephants would be provided with a much more natural, and thus enriching, environment. Jacobs Decl. ¶ 21(n). The fact that Respondents recognize the need to provide the elephants with artificial enrichment is tantamount to a concession that the elephants are confined in an inarguably impoverished environment.

vehicles (e.g., https://bit.ly/46hF2mo). Pet. ¶¶ 65, 69, 74. Deprived of autonomy, their lives in this wholly unnatural environment are nothing but a succession of boring and frustrating days, damaging to their extraordinary minds and bodies. *Id*. at ¶ 63. It is no wonder that when Dr. Bob Jacobs visited the zoo, he observed several of the elephants suffering from obesity, which, coupled with limited space and hard substrate, is associated with arthritis and foot disease. *Id*. at ¶ 72. He also observed three elephants exhibiting marked stereotypies in the form of body rocking, swaying, and head bobbing (e.g., bit.ly/3qV3YAI), behavior never seen in elephants living freely in their natural habitat. *Id*. at ¶¶ 61, 75. Stereotypies represent a coping strategy to mitigate the overwhelming effects of psychosocial stress, and their presence is an unmistakable sign of brain damage.[23] *Id*. at ¶ 75.

Animal welfare statutes and the AZA requirements that Respondents repeatedly tout[24] do not address the unrelenting, sustained deprivation of the elephants' autonomy, along with the inevitable harms that result from that deprivation. Those statutes and requirements, in other words, do not address the elephants' right to bodily liberty, which is precisely why Respondents' compliance with them is irrelevant. *See Breheny*, 38 N.Y.3d at 642 (Rivera, J., dissenting) ("Confinement at the Zoo is harmful, not because it violates any particular regulation or statute relating to the care of elephants, but because an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—curtailed.").

5. Habeas corpus allows for Missy, Kimba, Lucky, LouLou, and Jambo's release to a GFAS-accredited elephant sanctuary

[23] Videos taken from June 2023 also show three of the elephants exhibiting stereotypies: bit.ly/45KFIjU. Pet. ¶ 75.

[24] The AZA requirements are "woefully inadequate for meeting the needs of elephants." Poole Decl. ¶ 59; Lindsay Decl. ¶¶ 35-41.

Upon determining that Missy, Kimba, Lucky, LouLou, and Jambo are unlawfully confined, this Court must order them released from Respondents' custody and relocated to a GFAS-accredited elephant sanctuary, where they can exercise their autonomy and extraordinary cognitive complexity to the greatest extent possible. Pet. ¶¶ 4, 167-174. The elephants, after decades of confinement in which humans have controlled every aspect of their lives, cannot simply return to their native habitat and live as elephants who grew up in the wild. Nor can they be released onto the streets. Nevertheless, the flexibility of habeas corpus permits the relief sought in the Petition. *Id*. at ¶ 172 (citing Colorado cases).

Respondents erroneously contend that since the NhRP does not seek the elephants' complete discharge from all confinement, habeas corpus relief is unavailable. MTD 10. They claim that the "limited circumstances" where habeas corpus permits relief short of complete discharge "are not applicable here," citing *Fields v. Suthers*, 984 P.2d 1167, 1169 (Colo. 1999) and *White v. Rickets*, 684 P.2d 239, 242 (Colo. 1984). *Id*. Further, Respondents claim the greatest relief that could be afforded the elephants is "a transfer between lawful confinements." *Id*. at 11 (quoting *Breheny*, 38 N.Y.3d at 572).

Fields simply recognizes, as do numerous other authorities, that habeas corpus relief "may be available in some cases where complete discharge from custody will not result." 984 P.2d at 1169. *See* Pet. ¶ 173 (citing cases). *Rickets* simply stands for the proposition that a habeas petitioner cannot be transferred from one confinement to another when the initial confinement is not unlawful, such as when the alleged illegality is the mere failure to transfer. 684 P.2d at 242. In *Rickets*, the habeas petitioner "allege[d] only that the place of his confinement should be altered." *Id*. This is not true here, since the Petition alleges it is the violation of the elephants'

right to bodily liberty—not the zoo's failure to transfer them—that renders their confinement unlawful.

In relying on *Breheny*, Respondents attempt to draw an equivalence between the Cheyenne Mountain Zoo's wholly unnatural environment and an elephant sanctuary. But this Court must not ignore the profound differences between the two. Pet. ¶¶ 76-78, 171. The orders of magnitude of greater space offered at sanctuaries allow elephants to exercise their autonomy, as well as develop healthier social relationships, and engage in near-natural movement, foraging, and repertoire of behavior. Poole Decl. ¶ 57. Their physical and psychological health improves, as seen from the decreased frequency or extinction of stereotypies, muscle tone gain, and formation of social bonds between elephants with different social histories. Jacobs Decl. ¶ 20. In the wild and in sanctuaries, the delight that elephants experience when they are allowed to forage naturally is the default situation. Lindsay Decl. ¶ 63. When allowed to choose how to spend their time in different foraging, wallowing, and resting sites, there is no need for circus tricks described as "yoga" or various other forms of "enrichment." *Id*.

There is still time to allow Missy, Kimba, Lucky, LouLou, and Jambo to lead normal, fulfilling elephant lives and mitigate the harms caused by the deprivation of their autonomy. While the Court cannot grant them complete release, it "can order the most practical and humane alternative: transfer to an elephant sanctuary."[25] *Breheny*, 38 N.Y.3d at 641 (Rivera, J. dissenting).

C. Respondents' motion to dismiss for lack of subject matter jurisdiction must be denied

[25] Respondents erroneously conflate "immediate release" with "complete release." Contrary to Respondents, in seeking the elephants' transfer to a sanctuary, the NhRP does seek their "immediate *release*." MTD 10.

The NhRP has standing under C.R.S § 13-45-102, which provides that a habeas corpus petition "shall be in writing, signed by the party or some person on his behalf, setting forth the facts concerning his imprisonment." *See* Pet. ¶¶ 16-20 (standing). Respondents do not cite any authority for the proposition that the phrase "some person on his behalf" is modified by a requirement for obtaining standing by a third party, or that the statute places any restriction on who may bring a habeas corpus petition.[26] Rather, they rely exclusively on cases from other jurisdictions, including cases having nothing to do with habeas corpus. MTD 11-14.

Relying on *Commerford*, Respondents argue that the NhRP lacks standing because the "elephants, not being persons[,] lacked standing in the first instance." MTD 11 (quoting 192 Conn.App. at 41). This argument fails for three reasons, aside from its lack of basis in Colorado law.

First, *Commerford*'s personhood conclusion is grounded on *Lavery* and is therefore fundamentally erroneous for the reasons already discussed above. Second, *Commerford* is in irreconcilable conflict with the Connecticut Supreme Court decision in *Jackson v. Bulloch*, where an enslaved person, Nancy Jackson, was freed through habeas corpus. 12 Conn. at 54. As a slave, Nancy Jackson had no legal personhood in the first instance.[27] Yet, the *Jackson* court had no

[26] Notably, two courts found that under New York's similar habeas corpus procedural statute, the NhRP had standing on behalf of nonhuman animals. *See Stanley,* 49 Misc.3d at 755-56 ("As [CPLR 7002(a)] places no restriction on who may bring a petition for habeas corpus on behalf of the person restrained, and absent any authority for the proposition that the statutory phrase 'one acting on his behalf' is modified by a requirement for obtaining standing by a third party, petitioner has met its burden of demonstrating that it has standing" on behalf of two chimpanzees.); *The Nonhuman Rights Project v. Breheny,* 2020 WL 1670735 *1, *7 (N.Y. Sup. Ct. 2020) ("The NhRP has standing . . . on behalf of Happy [the elephant].").

[27] Under Connecticut's Constitution, slaves were neither members of the "social compact" nor one of the "people" secured from unreasonable searches and seizures. *Jackson,* 12 Conn. at 42-43.

objection to James Mars, an abolitionist and former enslaved person, filing a habeas corpus petition on her behalf as next friend. *Id*. at 39. Just as James Mars' standing did not depend on Nancy Jackson's personhood status, the NhRP's standing does not depend on the elephants' personhood status. Third, *Commerford* erroneously conflated the standing inquiry with the merits, which this Court must not do.[28] The merits issue at the heart of the Petition is whether the elephants have the common law right to bodily liberty protected by habeas corpus—and are thus "persons" for purposes of habeas corpus. Therefore, it would be improper to resolve the question of the NhRP's standing by determining the merits issue of the elephants' personhood.

Respondents further contend that the NhRP lacks standing because it failed to satisfy the next friend prerequisites articulated in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), a federal habeas corpus case involving a death row inmate. MTD 12-13. This contention is entirely without merit. *Whitmore* has never been cited by any Colorado state court, and Respondents do not cite any authority for the notion that *Whitmore*'s next friend prerequisites—applicable in federal court—should be read into C.R.S § 13-45-102, the relevant procedural statute.[29]

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[28] *See Hoff v. Indus. Claim Appeals Office*, 383 P.3d 50, 55, *as modified on denial of reh'g* (Jan. 15, 2015), *reversed on other grounds by Pinnacol Assurance v. Hoff*, 375 P.3d 1214 (2016) ("we must not conflate the requirement for standing with a determination of the merits of the claim").

[29] Contrary to Respondents' assertions, MTD 13, the NhRP established that the elephants, being incompetent, are obviously unable to appear on their own behalf to prosecute this case. The NhRP is also truly dedicated to the elephants' best interests, as we seek their release to an elephant sanctuary so they can finally live normal elephant lives, rather than languish in a miserable existence. In fact, the NhRP has a standing offer to withdraw the Petition should Respondents agree to release the elephants to a sanctuary. *Cf. Stanley*, 49 Misc.3d at 756 ("In any event, petitioner demonstrates an interest in vindicating what it perceives to be the rights of these chimpanzees."). As for Respondents' erroneous claim that "a 'next friend' must have some significant relationship with the real party in interest," MTD 13 (quoting *Whitmore*, 495 U.S. at 163-64), this statement in *Whitmore*—framed in terms of a "suggestion"—was purely dicta. *Am. Civil Liberties Union Found. on behalf of Unnamed U.S. Citizen v. Mattis,* 286 F. Supp. 3d 53, 57 (D.D.C. 2017).

D. This Court should not deflect its responsibility to remedy the injustice inflicted upon Missy, Kimba, Lucky, LouLou, and Jambo onto the General Assembly

Respondents contend that this Court—as opposed to the legislature—is powerless to rule in favor of the elephants. MTD 14-15. This is because, according to Respondents, judicial recognition of the elephants' right to bodily liberty "would have an enormous destabilizing impact on modern society," such as by risking "the disruption of property rights, the agricultural industry (among others), and medical research efforts," and calling into question "the very premises of pet ownership, the use of service animals, and the enlistment of animals in other forms of work." *Id*. at 14 (quoting *Breheny*, 38 N.Y.3d at 573-74). Respondents further warn, "[d]rastic consequences will follow" should this Court even "entertain [the NhRP's] arguments." *Id*. at 15.

"These scenarios are so facially preposterous that they hardly deserve a response." *Breheny*, 38 N.Y.3d at 620 (Wilson, J., dissenting). Respondents' argument is based on the fundamental misapprehension that in order to rule in the elephants' favor, this Court must recognize the right to bodily liberty for all nonhuman animals. But the instant case solely concerns five elephants and the lawfulness of their confinement at Cheyenne Mountain Zoo; it does not concern other nonhuman animals, or even other elephants. Recognizing the right to bodily liberty for the elephants at issue neither requires nor would necessarily result in recognizing rights for any other nonhuman animal, and Respondents' contrary assertions are based entirely on wild speculations, unsupported by any evidence and the law. Granting habeas corpus relief for five elephants would represent an important evolution in the common law, but it is simply untrue—as Respondents claim—that the NhRP is asking this Court to "foment a monumental shift . . . for our judicial system" or "in quotidian human affairs." MTD 15.

"The common law, of which the Great Writ is a part, determines the scope incrementally, on a case-by-case basis." *Breheny*, 38 N.Y.3d at 623 (Wilson, J., dissenting). *See HealthONE v. Rodriguez ex rel. Rodriguez,* 50 P.3d 879, 890 (Colo. 2002) ("[O]ur holding that Ogin owed Rodriguez a common law duty of reasonable care is based entirely upon the particular facts and circumstances of this case."). Granting five elephants—"not the whole animal kingdom—the right to a full hearing on a writ of habeas corpus is about as incremental as one can get." *Breheny*, 38 N.Y.3d at 621 (Wilson, J., dissenting). Given the "inherently case-by-case" nature of habeas corpus, each case acts "directly only on the particular petitioner seeking relief," as with cases liberating enslaved persons, women, and children. *Id*. at 602. "Each subsequent case would define the contours of the common law, whatever the result—which is the enduring genius of the common law."[30] *Id*.

Crucially, elephant captivity "serves no purpose upon which society depends," thus disproving the claim that recognizing Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty "'would have an enormous destabilizing impact on modern society.'" *Id*. at 641 n.8 (Rivera, J., dissenting) (citation omitted). "[E]lephants exist wholly apart from human society, save for when human beings upset that natural order through their intervention." *Id*. at 640.

[30] Respondents also cite *Love v. Klosky*, 413 P.3d 1267 (Colo. 2018), claiming that the NhRP does not address the considerations for "depart[ing] from our existing law." MTD 14-15 (quoting 413 P.3d at 1270). Those considerations in *Love* only apply when a court is being asked to depart from or overrule prior Colorado precedent, but there is no prior Colorado precedent on point here. Accordingly, because "neither statute nor applicable common-law rule" governs this case, the Court "must so apply general principles in the light of custom, existing facts, and common knowledge, that justice will be done. So the courts of England and the United States have acted from time immemorial, and so the common law itself came into existence." *E.A. Stephens & Co. v. Albers*, 81 Colo. 488, 496 (1927). For discussion of the common law's evolutionary nature and why it must change here, *see* Pet. ¶¶ 99-100, 153-59.

Accordingly, Respondents' floodgate concerns lack any rational foundation and only distract from the injustice at hand.[31]

E. Respondents' frivolous, bad-faith request for attorney fees must be denied

Respondents' request for attorney fees is based on their wholly unsubstantiated accusation that the Petition is "substantially frivolous, groundless, and vexatious" under C.R.S. § 13-17-102. MTD 2. Given the serious nature of requesting attorney fees, it is outrageous to make such requests absent requisite legal and factual basis. Yet, Respondents fail to provide the Court with the applicable standards for granting their request or show how the Petition satisfies them.

"A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or the law to support it." *Brown v. Silvern*, 141 P.3d 871, 875 (Colo. App. 2005). "[A] claim or defense is groundless if the proponent's allegations, while sufficient to survive a motion to dismiss for failure to state a claim, are not supported by any credible evidence at trial." *Id*. "A vexatious claim or defense is one brought or maintained in bad faith." *Id*.

Under these applicable standards, the Petition cannot possibly be frivolous, groundless, or vexatious. It is supported by credible evidence and grounded in rational arguments, including arguments that high court judges have taken seriously and endorsed, and presents a good-faith attempt to extend or modify the existing common law of Colorado. Accordingly, this Court

[31] "'It is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation'." *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 133 (Ohio 1983) (citation omitted); *Falzone v. Busch*, 45 N.J. 559, 567 (N.J. 1965) ("[T]he fear of an expansion of litigation should not deter courts from granting relief in meritorious cases; the proper remedy is an expansion of the judicial machinery, not a decrease in the availability of justice."). *See also Crooker v. Transp. Sec. Admin.*, 323 F. Supp. 3d 148, 157 (D. Mass. 2018) ("The floodgates argument is frequently raised with but vague meaning and few facts to support its sometimes-shaky foundations.") (citation omitted).

cannot award Respondents attorney fees. *See In re Parental Responsibilities Concerning D.P.G.*, 472 P.3d 567, 573 (Colo. App. 2020); *Janicek v. Obsideo, LLC*, 271 P.3d 1133, 1140 (Colo. App. 2011); C.R.S § 13-17-102(7).

Ironically, Respondents' request for attorney fees is itself "substantially frivolous, groundless and vexatious," as it is so clearly lacking in legal or factual basis. Respondents predicate their request solely on the fact that the NhRP's prior habeas petitions—filed on behalf of nonhuman animals in other states—were dismissed by courts outside of Colorado. MTD 15. They are fully aware that the Petition concerns an issue of first impression in Colorado on which there is conflicting, non-binding authority, which necessarily precludes an award of attorney fees. *See Ace Title Co., Inc. v. Casson Const. Co., Inc.*, 755 P.2d 457, 461 (Colo. App. 1988) ("A claim for attorney fees on a matter in which there is conflicting authority and which is concededly an issue of first impression here, is itself, suspect as frivolous."); *Cherokee Metro. Dist. v. Upper Black Squirrel Creek Designated Ground Water Mgmt. Dist.*, 247 P.3d 567, 576 (Colo. 2011) ("Where rational minds can disagree, as evidenced by this court's own opinion, a party's claims to pursue a creative, but ultimately wrong, legal theory to protect its significant rights are not substantially frivolous, groundless, or vexatious.").

CONCLUSION

Respondents' motion to dismiss must be denied in its entirety, along with their frivolous, bad-faith request for attorney fees. Because the Petition makes a prima facie case that the elephants are entitled to immediate release from their unlawful confinement at the Cheyenne Mountain Zoo, this Court must issue the writ and allow the case to proceed to a hearing on the merits.

Dated: October 5, 2023 Nonhuman Rights Project, Inc.

/s/ Jake Davis
Jake Davis, #54032

Attorney for Petitioner Nonhuman Rights Project, Inc. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of October 2023, I electronically filed a true and correct copy of the foregoing **PETITIONER'S OPPOSITION TO 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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