<table>
<tr><td>DISTRICT COURT, EL PASO COUNTY, COLORADO
P.O. Box 2980
Colorado Springs, CO 80901
Telephone: (719) 452-5449</td><td>DATE FILED: December 3, 2023 5:05 PM
CASE NUMBER: 2023CV31236</td></tr>
<tr><td>Petitioner: NONHUMAN RIGHTS PROJECT, INC.

v.

Respondents: CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY and BOB CHASTAIN</td><td>▲ COURT USE ONLY ▲

Case No. : 23CV31236

Division: 8

Courtroom: W550</td></tr>
<tr><td colspan="2">ORDER RE RESPONDENTS' MOTION TO DISMISS</td></tr>
</table>

Before the Court is the motion filed by Respondents Cheyenne Mountain Zoological Society and Bob Chastain, its President and CEO (hereafter, jointly, "Zoo"), seeking to dismiss the habeas corpus petition filed by the Nonhuman Rights Project, Inc. ("NHRP") on behalf of five elephants who reside at the Zoo. I have reviewed the motion, NHRP's response, the Zoo's reply, and NHRP's supplemental filing, and I am familiar with the case file and with applicable law.

THE PETITION

NHRP is a nonprofit corporation with a mission of attempting to secure legal rights for highly intelligent nonhuman animals such as chimpanzees and elephants, and specifically to change their status from legal "things" to legal "persons." Its 99-page Verified Petition seeks a writ of habeas corpus on behalf of Missy, Kimba, Lucky, LouLou, and Jambo – five elderly African elephants (ranging in age from 40 to 54 years old) that it contends are unlawfully confined at the Zoo in violation of their right to bodily liberty. It contends that the elephants,

like humans, are autonomous and extraordinarily cognitively and socially complex beings, and they possess complex biological, psychological, and social needs that cannot be met at the Zoo. It has submitted the affidavits of seven eminent animal biologists who make the case for that proposition in substantial detail.

As described more fully below, the Zoo's motion to dismiss is necessarily determined on a one-sided record in which the Court takes the NHRP's evidence as true, draws all inferences in its favor, and denies the Zoo an opportunity to submit evidence in rebuttal. Taking the NHRP's affidavits as true, the affidavits demonstrate the following:

Elephants are autonomous and extraordinarily cognitively complex and social beings with complex biological, psychological, and social needs. They share numerous complex cognitive capacities with humans, including self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.

Elephants possess the largest absolute brain of any land animal. Their brains hold nearly as many cortical neurons (used to control executive functioning) as do human brains, and a much greater number than other highly intelligent species such as chimpanzees or bottlenose dolphins. They have extensive and long-lasting memories that are used to gather extensive social knowledge that accumulates with age. At least one elephant – Happy, the NHRP's best-known client – has demonstrated self-awareness, by means of a "mirror self-recognition" test.

Elephants are highly social animals, with brains evolved for social interactions. They use vocalizations to share knowledge and information with others. Scientists have identified 47 different call types, as well as more than 300 gestures, signals, and postures to communicate information to their audience. (Male elephants primarily communicate about their sexual status,

rank, and identity, whereas females use calls to emphasize and reinforce their social units.) Elephants use specific calls and gestures to discuss courses of action and make plans, and they have been observed engaging in highly coordinated group behavior in response to specific calls and gestures from other group members. These include cooperative problem-solving and empathic behaviors, with elephants (mostly females, apparently) actively assisting others who are injured or otherwise in difficulty. They have an understanding of death, and they exhibit group grieving behaviors. (Pet., pp. 10-33).

Elephants cannot function normally in captivity. Elephants in the wild travel tens of kilometers a day, and sometimes more than 100 kilometers, across diverse terrain with a variety of vegetation, in highly organized social groups. When deprived of exercise, a varied environment, and the social opportunities that the wild provides, they suffer from chronic frustration, boredom, and stress, resulting over time in physical disabilities, psychological disorders, and, often, brain damage. That frustration and stress can manifest in "stereotypical" non-functional behavior, such as repetitive swaying and rocking. (It is estimated that between 47% and 85% of elephants in zoos exhibit such behaviors.) Such behaviors tend to abate in zoo elephants that are transferred to elephant sanctuaries with much larger and more varied environments. (Pet., pp. 34-37, 46-48).

The Cheyenne Mountain Zoo, which is located on a strikingly beautiful but small parcel of land on a steep mountainside next to residential developments, lacks the extensive space and variety of environment that elephants need to flourish. The elephants spend at least half of each day, if not more, in a noisy indoor barn subdivided into individual stalls, the floors of which are covered with a rubberized concrete surface that provides inadequate cushioning for their feet and

joints. This involuntary confinement is both physically and psychologically harmful; it is likely to lead to foot and joint damage as well as psychological damage from the noise and the frustration of prevented choice and movement. When allowed outside, the elephants are commonly unable to walk more than 100 yards in any direction. The outdoor exhibit has a total area of 0.83 acres. There is, in addition, a “vacation yard” that is two acres in size, which is available to the elephants for only a few days a month, and a walking path with an estimated distance of 0.23 miles. In this wholly unnatural environment, the elephants’ behavioral repertoire is extremely limited and widely divergent from that of free-ranging elephants. Their lives lack variety, freedom of choice, and healthy social interaction. Their movements are controlled directly and exclusively by zoo staff, and the cold winter climate, unnatural to them, further limits their activities. The biologist who observed the elephant exhibit, Dr. Jacobs, as well as a subsequent observer, witnessed several of the Zoo’s elephants exhibiting stereotypical behavior in the form of rocking, swaying, and head bobbing, which, according to Dr. Jacobs, only stopped when they were being fed, interacting with other elephants, or in a training session. (Pet., pp. 38-46 & Supp. Exhibs. A & B.)

In light of that evidence, the NHRP contends that the elephants have a common law right to bodily liberty protected by habeas corpus – that they are essentially legal “persons” entitled to a right to liberty under the “great writ” – which right they contend has been violated by their confinement at the Zoo. It contends that the elephants are entitled to a hearing at which they can prove their case, followed by their immediate release to an accredited elephant sanctuary.

APPLICABLE LEGAL STANDARD

While habeas corpus petitions are typically filed to seek the liberty of persons held in criminal custody by the state, Colorado's habeas corpus statute allows for the filing of a habeas petition by any person who is being unlawfully detained by anyone, whether a state actor or not. *See* C.R.S. 13-45-102 ("When any person not being committed or detained for any criminal or supposed criminal matter is confined or restrained of his liberty under any color or pretense whatever, he may proceed by appropriate action … in the nature of habeas corpus …"); *and see Nelson v. Dist. Ct.*, 527 P.2d 811, 814 (Colo. 1974) (habeas proceeding properly used to resolve child custody dispute).

A petition for writ of habeas corpus should be dismissed if it is insufficient on its face, C.R.S. § 13-45-101, or if the allegations, even if accepted as true, fail to state a claim for relief. *White v. People,* 866 P.2d 1371, 1373 (Colo. 1994). "Unless a petition for habeas corpus makes a *prima facie* showing of invalid confinement and entitlement to immediate release or demonstrates a serious infringement of a fundamental constitutional right, it is 'insufficient on its face' and should be dismissed without a hearing." *Christensen v. People,* 869 P.2d 1256 (Colo. 1994); *and see Fields v. Suthers,* 984 P.2d 1167, 1169 (Colo. 1999) (petitioner must show that his or her detainment is unlawful). "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 v. Brittian,* 833 P.2d 748, 752 (Colo. 1992).

ANALYSIS

Virtually every issue raised by this case is an issue of first impression in Colorado. The issues raised by the NHRP's petition, as noted by a judge on New York's highest court in response to a similar petition regarding two chimpanzees, are "profound and far-reaching." *Matter of Nonhuman Rights Project, Inc., on behalf of Tommy v. Lavery ("Tommy"),* 31 N.Y.3d 1054, 1059 (N.Y. 2018) (Fahey, J, concurring). They address "a deep dilemma of ethics and public policy": "The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus … speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it." *Id.* at 1058-59.

I. BACKGROUND: EVOLVING NORMS AND EXPECTATIONS.

There is no doubt that views, norms, and expectations regarding treatment of highly intelligent species of animals are rapidly evolving. *See, e.g.,* Martha C. Nussbaum, *Justice for Animals: Our Collective Responsibility* (Simon & Schuster 2023); Jill Lepore, "The Elephant Who Could Be a Person," *The Atlantic,* Nov. 16, 2021; Lawrence Wright, "The Elephant in the Courtroom," *The New Yorker,* Mar. 7, 2022; Suzanne Monyak, "When the Law Recognizes Animals as People," *The New Republic,* Feb. 2, 2018.

As recounted by prominent historian Jill Lepore, the history of elephants in American zoos is a history in microcosm of the evolving relationship between Americans and the animal kingdom. First displayed as curiosities in circuses, elephants became the preeminent exhibits in zoos when those opened in the United States in the late nineteenth century. They were displayed in cages, often shackled. Early elephant exhibits were an exercise in brutality: the elephants proved difficult to manage, and multiple elephant insurrections, many of them lethal to their

keepers, were put down with public "executions." Much changed over time, and change has come with particular rapidity since the 1970s, with the advent and/or acceleration of the animal-welfare, animal-rights, and environmental movements. Since the 1970s, public opinion has rapidly changed; the "cage" model has been generally rejected, at least for elephants and some other highly intelligent species; and many zoos have either closed their elephant exhibits or else moved their elephants into larger spaces, like the Bronx Zoo's Wild Asia exhibit or the San Diego Zoo's Safari Park, intended to display the animals in settings closer to those in which they live in the wild. *See* Lepore, *supra*. Since 1991, more than thirty American zoos have closed their elephant exhibits or are in the process of doing so. (Pet., p. 66). In response to large-scale protests, The Ringling Bros. and Barnum & Bailey Circus put an end to elephant performances in 2016 and then went out of business entirely a year later. (It has recently reopened without animal performers). In sum, there is a growing consensus among much of the public that confinement in close quarters has substantial negative impacts on elephants and is inconsistent with evolving conceptions of morality. (Pet., pp. 66-68; *and see* Lepore, *supra;* Wright, *supra).*

One segment of the animal-rights movement seeks to go beyond the expansion of animal-welfare laws to recognize the legal "personhood" of at least some species of highly intelligent animals. This has led legislatures and courts in such countries as India, Pakistan, Hungary, Finland, Colombia, Costa Rica, Chile, and Argentina to pass laws or issue rulings characterizing animals such as elephants, dolphins and orcas, and orangutans as "non-human persons" entitled to certain rights and liberty interests under the law. Pet., pp. 69-71 (court rulings in Ecuador, Pakistan, Colombia, Argentina, and India); *and see* Nussbaum, *supra,* pp. 289-90 (court rulings in India and Colombia); Wright, *supra* (legislation and court rulings in

Hungary, Costa Rica, Chile, Finland, Argentina, and Pakistan). Issues of the sort raised by this case, involving mankind's stewardship of the planet and its living creatures, grow more pressing each year in light of the rapid advance of climate change, habitat loss, and the mass extinction of numerous species.

On the other side of the equation, it is unfortunate that this case pits two organizations against each other that perhaps ought to be on the same side. As noted above, the role of zoos has evolved, and today zoos, including the Cheyenne Mountain Zoo, play a leading role in wildlife conservation efforts and education. *(E.g.,* https://wildwelfare.org/the-conservation-mission-of-zoos-nabila-aziz/). The Zoo is known, in particular, for its work with giraffes, for which it is nationally recognized. (https://www.cmzoo.org/conservation/giraffe-conservation/).

This case, accordingly, raises profound issues of ethics, justice, and public policy. Those issues, however, merely serve as a backdrop to the legal issues presented to the Court. Where there is a pressing ethical issue, or an injustice, or a matter of important public policy, it goes without saying that the courts can address it only to the extent it is connected to a recognizable legal right. Injustices are everywhere in this world, and the law provides remedies for only a few of them.

II. THE LEGAL ISSUES.

An examination of the legal issues raised by NHRP's petition makes clear that what the NHRP is seeking is not the enforcement of existing legal rights but an expansion of those rights. This is not NHRP's first rodeo; it has commenced a number of similar legal proceedings in several states on behalf of chimpanzees and elephants held in zoos and other facilities, and in every court its petitions have been denied. *See Nonhuman Rts. Project, Inc. v. Breheny*, 38

N.Y.3d 555 (N.Y. 2022); *Tommy, supra,* 31 N.Y.3d 1054 (N.Y. 2018); *Nonhuman Rights Project, Inc. v. Lavery,* 152 A.D.3d 73 (N.Y. 1st Dept. 2017); *Matter of Nonhuman Rights Project, Inc. v Presti*, 124 A.D.3d 1334, 1335 (N.Y. 4th Dept. 2015), *lv. denied,* 26 N.Y.3d 901 (2015); *Matter of Nonhuman Rights Project Inc. v Stanley*, 2014 N.Y. Slip Op. 68434[U] (2d Dept. 2014); *Nonhuman Rights Project, Inc. v. R.W. Commerford and Sons, Inc.,* 216 A.3d 839 (Conn. App. 2019); *In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Vusmusi, On Habeas Corpus* (Fresno, CA, Sup. Ct. No. 22CRWR686796, Nov. 15, 2022).

Over the course of these legal defeats, however, several judges have expressed support for NHRP's cause: two judges on New York's highest court wrote lengthy opinions strenuously dissenting from that court's denial of NHRP's petition, *Breheny*, *supra,* 38 N.Y.3d at 577-626 (Wilson, J., dissenting); *id*. at 626-42 (Rivera, J., dissenting); and Judge Fahey, in the opinion quoted above, issued a sympathetic concurrence to a denial of review. Those dissents and Judge Fahey's concurrence provide the primary support for NHRP's position in this case.

Notwithstanding those dissenting opinions, the overwhelming weight of legal precedent is against the NHRP. Because the NHRP seeks an expansion of existing legal rights rather than enforcement of already-existing rights, its project is appropriately directed to the legislature, not to this Court. Existing law, which it is this Court's responsibility to interpret and apply, compels dismissal.

In the discussion below, I have attempted to organize the issues before the Court as simply as possible under two broad headings: first, have Missy, Kimba, Lucky, LouLou, and Jambo, through NHRP, made a *prima facie* showing that they have standing to bring this

lawsuit?; and second, have they made a *prima facie* showing that they are unlawfully confined and entitled to immediate release? The answer to both questions is "no."[1]

A. STANDING.

The standing issue has two parts: First, have Missy, Kimba, Lucky, LouLou, and Jambo made a *prima facie* case that they fall into the category of "person[s]" who may utilize the habeas corpus statute; that is, do they have standing "in the first instance" to bring this action? Second, if they do, may the NHRP properly bring suit on their behalf as their "next friend"? The Zoo urges the Court to answer "no" to both questions, and NHRP urges us to answer "yes."

1. Standing "In the First Instance."

In order to bring a legal action, a plaintiff must have standing. To determine whether a plaintiff has standing, a court "must determine whether the plaintiff suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. If a plaintiff suffered no injury in fact, or suffered injury in fact, but not from the violation of a legal right, the claim should be dismissed for lack of standing." *Anson v. Trujillo,* 56 P.3d 114, 117 (Colo. App. 2002). Thus, the question as to whether a plaintiff has standing is "an inquiry into whether the subject statute can properly be understood as granting a right to judicial relief to persons in the plaintiff's position." *Id.* As applied to the issue here, "the question of whether animals have

---

[1] The first of these two questions – the question of standing – encompasses a broad range of issues that the parties have, to a large degree, addressed under other headings. These issues include whether the elephants have legal "personhood," autonomy, and the right to bodily liberty, as well as the history and scope of the common-law writ of habeas corpus. I address all these issues below under the broad heading of standing. However, whether they are addressed as standing issues or as merits issues should not, I believe, have much import as a practical matter: whatever heading these issues are addressed under, the analysis is largely the same: the core threshold issue is whether the liberty interest protected by the writ extends to these nonhuman animals.

standing depends on the content of positive law. If [the legislature] has not given standing to animals, the issue is at an end." Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1359 (2000).

Thus, the Court's analysis of the standing issue here starts with the habeas corpus statute, and specifically with C.R.S. 13-45-102, which authorizes habeas petitions by persons detained in circumstances other than criminal matters. The statute, as noted above, states that "any person" who is unlawfully detained may file a habeas petition. C.R.S. 13-45-102.

I find that neither the habeas statute nor the common-law writ of habeas corpus confers a right to habeas relief on nonhuman animals, no matter how cognitively, psychologically, or socially sophisticated they may be.

a. Colorado's habeas corpus statute.

Colorado's habeas statute, in authorizing habeas relief for "any person" who is unlawfully detained, does not confer that relief on nonhuman animals.

As an initial matter, the term "person" is defined by statute. C.R.S. § 2-4-401 is Colorado's general definitional provision that "appl[ies] to every statute, unless the context otherwise requires." Pursuant to C.R.S. § 2-4-401(8), "'Person' means any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity." That definition appears to demonstrate the legislature's intention to limit the meaning of "person" in the Colorado statutes to human beings and to legal entities created by human beings. *See, e.g., Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1177-78 (9th Cir. 2004) (construing similar definition of "person"

in federal statute: "[t]here is no hint in the definition of 'person' … that the 'person' authorized to bring suit … can be an animal").

Even setting aside the statutory definition, the word "person" has a generally understood meaning, one which is universally reflected in dictionary definitions, both ordinary and legal, and which has been recognized in judicial opinions. The word "person," as generally understood, refers to human beings and to legal entities – that is, to "natural" and "artificial" persons.

"The word 'person' means an 'individual human being.'" *Culver v. Samuels,* 37 P.3d 535, 536 (Colo. App. 2001) (citing *Webster's Third New International Dictionary* 1686 (1968)). *And see, e.g.*, *Webster's Third New Int'l Dictionary* (unabridged ed. 2002) (defining "person" as "an individual human being," "a human being as distinguished from an animal or thing," and "a human being, a body of persons, or a corporation, partnership, or other legal entity that is recognized by law as the subject of rights and duties"); *Black's Law Dictionary* 1378-79 (11th ed. 2019) (defining "person" as "[a] human being," and "artificial person" as "[a]n entity, such as a corporation, created by law and given certain legal rights and duties of a human being"); *see also Justice by & through Mosiman v. Vercher,* 518 P.3d 131, 137 (Or. App. 2022) (citing these and other dictionary definitions of "person," historical and current).

No Colorado court – and, to the Court's understanding, no higher court of any other jurisdiction in the United States that has actually addressed the issue – has recognized the legal "personhood" of any nonhuman species, whether in the habeas context or any other.[2] While the

---

[2] Animal standing has been recognized in dicta in at least one case of which this Court is aware. In *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106, 1107 (9th Cir.1988), the Ninth Circuit wrote that an endangered member of the honeycreeper family,

NHRP stakes its case on the two dissenting and one concurring New York Court of Appeals judges noted above, the position of all other courts, to the Court's knowledge – and the far more persuasive position, under existing Colorado and American law – is that elephants and other nonhuman animals fall outside the category of "person[s]" who have standing to utilize the habeas corpus statute or other statutes. For cases addressing the habeas statute, *see* cases cited *supra,* pp. 8-9, and *Rowley v. City of New Bedford,* 159 N.E.3d 1085 (Mass. App. Ct. 2020) (unpub'd); and for cases addressing animal standing under other statutes, *see Lewis v. Burger King*, 344 Fed. Appx. 470, 472 (10th Cir. 2009) (service dog lacked standing to sue under the ADA); *Cetacean Cmty.*, 386 F.3d at 1176-79 (cetaceans lacked standing under multiple animal-protection statutes); *Legal for Cloud v. Yolo Cnty.*, 2018 WL 11462074, at * 3 (C.D. Cal. Dec. 3, 2018) ("the cats have no standing by reason of their species"); *Vercher, supra,* 518 P.3d at 137 (horse had no standing to sue for its injuries: "Under Oregon law, a person with the right to sue to redress a violation of rights is and always has been a human being or an entity created by

---

the Hawaiian Palila bird, "has legal status and wings its way into federal court as a plaintiff in its own right." The Ninth Circuit, however, subsequently recognized this statement as non-binding dicta and "little more than [a] rhetorical flourish[]." *Cetacean Cmty., supra,* 386 F.3d at 1173-74.

The position for non-human standing is well-stated in the *Breheny* dissents and was likewise passionately set out in a dissent by Justice Douglas in the landmark case of *Sierra Club v. Morton,* 405 U.S. 727, 741-43 (1972): "The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers… Inanimate objects are sometimes parties in litigation… The ordinary corporation is a 'person' for purposes of the adjudicatory processes…. So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life… Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction."

human law") (citing dictionary definitions as well as case law, treatises, and traditional commentaries).

As explained in *Cetacean Community v. Bush*, standing is a matter of statutory authorization; the question is whether the legislature has passed a statute conferring standing on the party in question. 386 F.3d at 1176. Whales, dolphins and porpoises lack standing under a myriad of federal statutes (the Endangered Species Act, Administrative Procedure Act, National Environmental Policy Act, and Marine Mammal Protection Act) because Congress has not seen fit to confer standing on them. *Id.* at 1176-79. "[I]f [the legislature] intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly." *Id.* at 1179 (internal citation omitted). In this case, even NHRP does not contend that the Colorado legislature has stated "plainly" that any nonhuman animals have standing to sue under the habeas corpus statute.

b. NHRP's contentions.

NHRP's objections to the conclusion set out above are multiple and ultimately unavailing. I have considered them all carefully, but, for the sake of space, I will focus on those I find the most persuasive.

NHRP contends, as a threshold matter, that the position set out above "erroneously conflate[s] the standing inquiry with the merits." Opp., p. 26 (citing *Hoff v. Indus. Claim Appeals Off.,* 383 P.3d 50, 55 (Colo. App. 2014), *rev'd on other grounds*, 375 P.3d 1214 (Colo. 2016)). I disagree. While separating out the standing and merits issues may be difficult (they substantially overlap), the standing inquiry, properly considered, addresses who has the right to file a habeas petition, and the merits inquiry, as described below, addresses whether the

petitioner is being detained unlawfully. Even if one might disagree with that distinction, it is ultimately a labeling issue, a distinction without a difference. The analysis is the same regardless of the heading under which it is addressed: the central threshold issue is whether the liberty interest protected by the writ extends to these nonhuman animals.

NHRP's central contention, rooted in the *Breheny* dissents, is that the common-law writ of habeas corpus provides relief far broader than that provided by Colorado's habeas corpus statute. It contends that Colorado's habeas corpus statute is "merely procedural" and "cannot curtail the substance or reach" of the common-law writ. The common-law writ, it contends, is significantly broader than the statute; it is broad, flexible, and possesses an undefined, aspirational reach, stretching beyond the laws on the books to encompass an evolving sense of fundamental justice and decency. *See, e.g., Breheny,* 38 N.Y.3d at 617-18 (Wilson, J., dissenting) (the great writ "has always been used to challenge confinement at the boundaries of evolving social norms, even by petitioners with the legal status of chattel (enslaved persons) or no legal identity or capacity to sue on their own (wives and children)"). As a result, the NHRP contends, the great writ confers on these five elephants the "right to bodily liberty," the right to be free from unjust confinement, based on evolving societal norms and fundamental justice, incorporating basic principles of liberty and equality.

There is no question that societal norms and conceptions of justice with respect to animal welfare are rapidly evolving. It is also incontestable that the common-law writ of habeas corpus has played an extraordinary role in the legal history of the English-speaking world. Habeas corpus has been described as "'the precious safeguard of personal liberty," *Geer v. Alaniz*, 331 P.2d 260, 261 (Colo. 1958), and as 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). There is no question that 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). It 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." *Peyton v. Rowe*, 391 U.S. 54, 66 (1968).

The question, of course, is: how far has the great writ grown? Does it have any boundaries at all? Does it extend beyond the realm of human society to protect the rights of nonhuman animals? No court of any American state – beyond the wholly aspirational dissents of Judges Wilson and Rivera – has ever held that it does.

To start, the Colorado cases cited by NHRP fail to support its position. *Ryan v. Cronin,* 553 P.2d 754 (Colo. 1976), on which NHRP relies, is directly contrary to its position. In that case, our Supreme Court made clear that "[t]he 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." *Id.* at 755; *and see R.W. Commerford, supra,* 216 A.3d at 845 ("[a]lthough the writ of habeas corpus has a long common-law history, the legislature has enacted numerous statutes shaping its use"). Thus, notwithstanding the broad uses of the writ in colonial times and before, the right of habeas corpus in Colorado is now a creature of statute: the Colorado habeas statute, and the cases construing it, spell out the scope of the right of habeas in Colorado; and they limit that right to "person[s]."

Even if somehow that is not the case – even if the common-law writ somehow trumps Colorado's habeas statute – nothing in that common law supports NHRP's position. While the writ may have been used in centuries past with great flexibility and imagination to release slaves, women, children, and others from unjust confinements, NHRP is unable to cite any cases in which an English or American court (and not just dissenting judges) has found a nonhuman animal entitled to habeas relief.

To the contrary. As William Blackstone, the preeminent authority on the English common law, explained, "Under the English common law, only human beings and legal entities created by human beings were considered 'persons' capable of holding and asserting legal rights." *Vercher, supra*, 518 P.3d at 136 (citing William Blackstone, 1 *Commentaries on the Laws of England* 123 (1771)). And, more recently, as the *Breheny* majority found, "no court of this state – or any other – has ever held the writ applicable to a nonhuman animal. Nothing in our precedent or, in fact, that of any other state or federal court, provides support for the notion that writ of habeas corpus is or should be applicable to nonhuman animals." 38 N.Y.3d at 571. The reason is obvious. "[T]he Great Writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law." *Id.* (emphasis in original). The great writ may be flexible, but "[t]hat flexibility … is not limitless." *Id.*

In fact, even trying to imagine an extension of the habeas right, or the status of personhood, or the "right to bodily liberty" to animals requires an exercise of considerable imagination. This case does not concern just "five elephants," as the NHRP asserts. (If it did, the NHRP would not be in business.) It concerns, as the NHRP well knows and intends, an opening of a heretofore-unopened legal door that – were it to make its way to the U.S. Supreme

Court and be affirmed – would quite likely have the effect of upending much of our legal system, in which humans, for better or worse, exercise dominion and control over the animal world. As the *Breheny* majority recognized, a ruling recognizing the “right to bodily liberty” of animals “would have an enormous destabilizing impact on modern society,” including “call[ing] into question the very premises underlying pet ownership, the use of service animals, and the enlistment of animals in other forms of work,” not to mention the consumption of animals for food, their use in agriculture and in medical research, and their legal status as property. *Breheny, supra,* 38 N.Y.3d at 573-74. If an elephant today, why not a dog, a pig, a cow, or a chicken tomorrow? One cannot help speculating that the *Breheny* dissenters were able to engage in the aspirational flights of fancy that they did – essentially pulling rights out of thin air, creating rights because they thought those rights *should* exist – precisely <u>because</u> they were in the minority. Had they been in the majority, they would have had to contend with the effects of their ruling.

c. The deeper philosophical issues.

The parties’ briefs wade deeply into some fundamental but somewhat abstruse philosophical issues, which it is not strictly necessary to decide. The Zoo contends, and some courts have found, that human beings, unlike animals, are entitled to rights because they have the capacity to bear responsibilities. The NHRP disagrees. One need not engage too deeply, however, with this challenging philosophical dispute. The reality is simpler. The documents on which this country was founded – the Declaration of Independence and the Constitution – start with the recognition of certain “self-evident truths” that this country has been struggling to live up to ever since: “that all men are created equal, that they are endowed by their Creator with

certain unalienable rights … That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." For better or worse, the social compact set out in these documents is a compact among humans. Our legal system is a human-made system that affords rights and responsibilities to humans and to no other species. While this conclusion may be labeled "speciesist," as NHRP and the *Breheny* dissenters do ("based on nothing more than biological prejudice"), it is reality.[3] Our laws provide certain protections to animals through animal welfare statutes, but it is humans who determine the scope of those protections; and the laws of this country (again, for better or worse) have never treated animals as "persons" with rights and responsibilities comparable to humans'. Had elephants, rather than humans, compacted together to form a society, the result, of course, would have been different. The result may also be different at some time in the future. But wishing does not make it so, and this Court lacks the authority to create new rights out of thin air.

In sum, because elephants fall outside the category of "person[s]" who are entitled to relief under the habeas corpus statute, this Court lacks subject-matter jurisdiction to hear the case. *Anson, supra,* 56 P.3d at 117.

2. "Next friend" status.

Even if the elephants had standing in the first instance, the second part of the standing issue would need to be addressed – namely whether NHRP is the proper representative or "next friend" to speak for them. (As a young person recently pointed out to me, there is a fictional, if

[3] And it is a reality recognized, at least in part, by one of the *Breheny* dissenters, Judge Wilson, who wrote: "Human beings should have greater rights than elephants, if only because we make the rules." *Breheny, supra,* 38 N.Y.3d at 578 (Wilson, J., dissenting).

not a legal, precedent for this: Dr. Seuss's *Lorax,* who proclaims, "I am the Lorax, I speak for the trees").

Colorado's habeas statute contains a liberal next-friend provision: it provides that a habeas petition may be signed "by the party or some person on his behalf." C.R.S. 13-45-102. Given, however, that the habeas statute, as discussed above, contemplates that the real party in interest be a "person," there is a significant question as to whether the NHRP's role as next friend to five elephants is exactly what the statute had in mind, and also whether its role satisfies existing legal principles about next-friend representation.

The U.S. Supreme Court has set a somewhat narrow course on standing in general (albeit over some strenuous dissents, *see* footnote 2, *supra*). In *Whitmore v. Arkansas*, 495 U.S. 149 (1990), it surveyed the development of the next-friend doctrine, both at common law and under the federal habeas statute, and concluded:

> "[N]ext friend" standing is by no means granted automatically to whomever seeks to pursue an action on behalf of another…. [T]he "next friend" must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate, and it has been further suggested that a "next friend" must have some significant relationship with the real party in interest. The burden is on the "next friend" clearly to establish the propriety of his status and thereby justify the jurisdiction of the court.

Id. at 163–64 (citations omitted).

The Ninth Circuit applied this requirement in *Naruto v. Slater,* 888 F.3d 418 (9th Cir. 2018), and concluded that PETA could not validly assert "next friend" status on behalf of a crested macaque monkey in order to claim a copyright in selfies it had apparently taken. In a conclusion squarely applicable to this case, the court found that PETA had "failed to allege any facts to establish the required significant relationship between a next friend and a real party in

interest … PETA does not claim to have a relationship with Naruto that is any more significant than its relationship with any other animal." *Id.* at 421. The Court explained:

> In short, requirements of a significant interest in the subject party protect against abuses of the third-party standing rule. As the [Supreme] Court noted in a prior case, "however worthy and high minded the motives of 'next friends' may be, they inevitably run the risk of making the actual [party] a pawn to be manipulated on a chessboard larger than his own case."

Id. at 422 (quoting *Lenhard v. Wolff,* 443 U.S. 1306, 1312 (1979)).

A concurring judge elaborated on these concerns:

> Animal-next-friend standing is particularly susceptible to abuse. Allowing next-friend standing on behalf of animals allows lawyers (as in *Cetacean*) and various interest groups (as here) to bring suit on behalf of those animals or objects with no means or manner to ensure the animals' interests are truly being expressed or advanced… Animal-next-friend standing is materially different from a competent person representing an incompetent person. We have millennia of experience understanding the interests and desire of humankind. This is not necessarily true for animals. Because the "real party in interest" can actually never credibly articulate its interests or goals, next-friend standing for animals is left at the mercy of the institutional actor to advance its own interests, which it imputes to the animal or object with no accountability.

Id. at 432 (Smith, J., concurring); *accord Vercher, supra,* 518 P.3d at 135-36.

These concerns are implicated in this case. The NHRP, while undoubtedly driven by a noble purpose, is dedicated not so much to these specific elephants as to a sustained nationwide campaign (as shown by the cases cited above) to establish rights for animals at large. Its interests appear to be the interests of animals at large (or at least of the most cognitively and emotionally sophisticated members of the animal kingdom), and not specifically these five elephants. It cannot claim any significant relationship with these elephants, or indeed any relationship at all; the extent of its contact with Missy, Kimba, Lucky, LouLou, and Jambo is the

two hours that one of its experts, Bob Jacobs, spent at the Zoo (17 months ago) observing them, plus an additional, more recent short visit by an NHRP representative.

This is not just a technicality. There is a legitimate question in this case as to who properly speaks for the elephants (or, in other words, who gets to be the "elephant Lorax") – the NHRP, which represents that it wants to improve their lives by moving them to an accredited elephant sanctuary, or the Zoo, which has fed them, nurtured them, and taken care of them for many years. It appears to be the Zoo, and not the NHRP, that has the more significant relationship with Missy, Kimba, Lucky, LouLou, and Jambo.

Related to this is the issue, referenced in the *Naruto* concurrence: what would the elephants want if they could speak? The NHRP (taking their affidavits as true, as I must in the posture of this motion) has made a strong case that elephants in general would be better served in a location where they have more room to roam, more access to natural vegetation, and more opportunities for the kinds of social and other activities that make elephants elephants. However, they have presented no evidence as to what these five elderly elephants would elect to do, if given the choice between relocating to a new and unfamiliar environment some 2,000 miles away and remaining in the familiar place they have known as home for many years, with keepers, routines, and surroundings that are familiar to them. In short, even taking its affidavits as true, NHRP has failed to establish that it is in a better position to speak for these elephants than the Zoo is.

B. THE ELEPHANTS ARE NOT BEING CONFINED UNLAWFULLY.

Even if the elephants, through NHRP, had standing to bring this habeas petition, NHRP must still make a *prima facie* showing that Missy, Kimba, Lucky, LouLou, and Jambo are unlawfully confined and entitled to immediate release. *See Fields, supra,* 984 P.2d at 1169 (habeas petitioner must show that his or her detainment is unlawful).

As noted above, this Court is required to take as true, for purposes of the Zoo's motion to dismiss, the representations in NHRP's affidavits. Taken as true, those affidavits demonstrate that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs; that zoo captivity is physically and psychologically harmful to them; and that the Zoo lacks the variety and extensiveness of environment needed to meet their complex needs. Taken as true, the affidavits demonstrate that the Zoo deprives Missy, Kimba, Lucky, LouLou, and Jambo of the space and variety of terrain that they need to roam, exercise, and live healthy elephant lives; and that they would be better off in an accredited elephant sanctuary. Based on what is admittedly a one-sided record, the NHRP makes a powerful case that zoos should not be in the business of keeping elephants unless they happen to have the kind of extensive acreage more commonly associated with a safari park.

The problem is that, if there is a wrong here, it is a wrong for which the law does not currently provide a remedy. The NHRP contends that the elephants have a common law right to bodily liberty protected by the writ of habeas corpus, and that right has been violated. As described above, however, the elephants have no such right, as a matter of existing law. While their right to bodily liberty may be supported by the *Breheny* dissents, it has not been recognized by a majority opinion of any American court, to this Court's knowledge.

The crux of the issue is whether the NHRP's affidavits, taken as true, establish that the Zoo's elephants are being confined in violation of any cognizable legal standard. They do not. The NHRP does not – and cannot – contend that the Zoo is holding these five elephants in violation of any existing law. To the contrary, it is beyond dispute that the Zoo holds these elephants under a broad framework of laws that permit zoos to hold nonhuman animals for public display in exactly the manner the Zoo is doing.

Nor does the NHRP ask the Court to evaluate the elephants' specific living conditions against state or federal statutes or regulations, or even against applicable zoo industry standards. Colorado has comparatively strong animal-welfare laws; the federal Animal Welfare Act sets out standards intended to ensure that animals exhibited at zoos and other facilities "are provided humane care and treatment," 7 U.S.C. 2131; and the Association of Zoos and Aquariums (the AZA) sets out basic standards for the care of elephants. The NHRP, however, does not contend that the Zoo is in violation of any of these laws or standards.

To the contrary, the NHRP's affidavits demonstrate that the Zoo, to all appearances, is in compliance with applicable zoo standards and regulations. The quarrel that the NHRP's experts have is not with the Zoo's compliance with existing standards for American zoos, but with the standards themselves. They take the position that "the enclosure space provided by <u>any</u> zoo is simply insufficient."[4] That position appears well-supported by the facts, but it is entirely unsupported by any enforceable legal standard.

---

[4] *See* Jacobs Decl., para. 21(a) ("Although the overall size of the 3 Cheyenne Mountain Zoo elephant exhibits … meets the minimum AZA requirement for six elephants…, it is immediately obvious that the allotted space at the zoo is woefully inadequate. Insofar as elephants in their natural habitat have expansive home ranges, extending from 10s to 10,000 km…, the enclosure space provided by <u>any</u> zoo is simply insufficient …") (emphasis added); Lindsey Decl., paras.

In other words, the record before the Court – even when considered in the light most favorable to NHRP – fails to demonstrate that the Zoo's confinement of Missy, Kimba, Lucky, LouLou, and Jambo is unlawful. While the elephants' confinement may be highly unsatisfactory and may even be substantially harmful to the elephants' physical and psychological health, the Zoo's confinement of Missy, Kimba, Lucky, LouLou, and Jambo does not violate any identifiable law or legal standard, and accordingly it is not unlawful for purposes of Colorado's habeas corpus statute.[5]

CONCLUSION

In sum, NHRP's habeas petition must be dismissed because (a) Missy, Kimba, Lucky, LouLou, and Jambo, as nonhuman animals, lack standing to bring a habeas petition and (b) even if they had standing, they are not being unlawfully confined.

Elephants are extraordinary creatures, possessed of truly exceptional cognitive, social, and psychological capabilities. Their numbers on the planet are rapidly diminishing as a result of habitat destruction and illegal poaching.[6] As a matter of pure justice (although based on an admittedly one-sided record at this stage of the case), the NHRP has made a persuasive case that elephants are entitled to be treated with the dignity befitting their species; and that that cannot be

---

35-42 (AZA standards are inadequate and compare unfavorably to U.K. and independent standards).

[5] In light of the Court's conclusions, it is not necessary to address an additional issue, namely that the Petition does not seek the release from confinement of the elephants but rather their transfer to an alternative confinement, in the form of an accredited elephant sanctuary.

[6] Both African and Asian elephants are listed as endangered on the "Red List of Threatened Species" published by the International Union for Conservation of Nature (https://www.iucnredlist.org).

done, no matter how conscientious those who care for them may be, if they are confined in zoos that lack the substantial acreage needed to allow them to flourish. This is a case that should be made, however, in a forum that has the power to effect a remedy.

Animal standing is a truly vital issue, but it is the legislature, and not this Court, that has the power to address it. As more than one commentator has noted, there is a vast gap between animals' rights "on paper" under state and federal animal-welfare statutes, and real-world enforcement, due to the fact that existing statutes are enforceable only by government agencies. *See* Sunstein, *Standing for Animals, supra,* 47 UCLA L. Rev. at 1334, 1339, 1359-61; Nussbaum, *supra,* pp. 282-92. Those who are motivated to do so could try to address that gap by lobbying for legislation conferring standing on individual persons, animal-rights organizations, or on the animals themselves, through appropriate representatives. *See id.* That is not within this Court's powers.

As to what constitutes unlawful confinement, to the extent there is a consensus on the standards necessary to ensure the flourishing of elephants and other highly intelligent animals at zoos and other facilities, it is up to those who support that consensus to try to memorialize it in statutes or regulations. (It appears the NHRP has pursued this path with some limited local success, as evidenced by an ordinance enacted very recently in Ojai, California). While courts may clarify the scope of existing rights (including rights embedded in statutes or constitutions that may not have been previously recognized), they may not create new rights out of thin air, out of aspiration, or solely out of expert opinion.

WHEREFORE, the Petition is DISMISSED.

The Zoo's request for attorney fees is DENIED, as the Petition represents a good faith attempt to establish a new theory of law in Colorado.

DONE and ORDERED this 3rd day of December, 2023.

BY THE COURT:

Eric Bentley
District Court Judge