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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 On Appeal; 4th Judicial District El Paso County; Hon. Eric Bentley; Case Number: 2023CV31326	
Petitioner-Appellant: THE NONHUMAN RIGHTS PROJECT, INC. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo, v. **Respondents-Appellees:** CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.	**▲ COURT USE ONLY ▲**
NONHUMAN RIGHTS PROJECT, INC: Jacob Davis, Esq. Nonhuman Rights Project, Inc. 611 Pennsylvania Avenue SE #345 Washington, DC 20003 Phone: (513) 833-5165 Email: jdavis@nonhumanrights.org Bar Number: 54032	Case No. 2024SA21
REPLY BRIEF	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32.

This brief contains 5,700 words.

I understand that the brief may be rejected if it fails to comply with the above-referenced rules.

/s/ Jake Davis
Jacob Davis, Esq.
Nonhuman Rights Project, Inc.
611 Pennsylvania Avenue SE #345
Washington, DC 20003
(513) 833-5165
jdavis@nonhumanrights.org
Bar Number: 54032

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INTRODUCTION

At stake in this appeal is the fate of five extraordinary beings whom the District Court acknowledged are "entitled to be treated with the dignity befitting their species," (CF, 000532), but who have been unjustly confined—day after day, year after year—in a "wholly unnatural environment." (*Id.*, 000511). Notwithstanding the Zoo's attempt to misrepresent the factual record, and contrary to all expert evidence, Cheyenne Mountain Zoo is not a wonderful place for elephants.[1]

Missy, Kimba, Lucky, LouLou, and Jambo are unable to flourish and have been forced to languish in a miserable existence, deprived of the "space and variety of terrain that they need to roam, exercise, and live healthy elephant lives." (*Id*., 000530). They suffer from chronic frustration, boredom, and stress as a result, with three of the elephants exhibiting behavior indicative of brain damage. (*Petition*, CF, 000050, 000060; *Supplemental Pleading*, CF, 000484; *Petitioner's Opposition to Motion to Dismiss*, CF, 000448-450). As the District Court found, "they would be better off in an accredited elephant sanctuary." (CF, 000530).

[1] The Zoo lists a catalog of trivial and rather tragic details, relating to the elephants' supposedly "remarkable" and "meaningful" care, to suggest its elephant exhibit is suitable for such extraordinary beings. *See* AB. 4-5, 26. As the District Court's findings make clear, this is a profound distortion of reality. (*See* CF, 000509-511, 000530).

Excluding these individuals from the protections of the Great Writ of Habeas Corpus is a manifest injustice. Yet, the Zoo asks this Court to affirm this injustice. It asks this Court to embrace a principle of might makes right, the logic of human exceptionalism, by endorsing the odious proposition that autonomous and extraordinarily cognitively complex beings can be denied habeas relief simply because of their species membership (i.e. because they have the *wrong* biology). It asks this Court to reject our humanity, embrace arbitrariness and irrationality, and ignore the evolutionary nature of the common law—along with science, evolving societal norms, and the fundamental common law principles of liberty, justice, and equality.

In determining Missy, Kimba, Lucky, LouLou, and Jambo's fate, the competing positions in this appeal are clear. Should this Court affirm and perpetuate an unjust status quo, or should this Court reject it?

Colorado common law should evolve in favor of liberty. While 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), it is this Court's solemn obligation to see the injustice here and correct it. 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." *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 629 (2022) (Rivera, J., dissenting).

I. The Petition makes a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are entitled to release.

Because the Petition makes a prima face case that the elephants are being unlawfully confined, the District Court was required to issue a writ of habeas corpus and hold a merits hearing. *See* OB. 7, 27-32; *Breheny*, 38 N.Y.3d at 617 (Wilson, J., dissenting) ("Happy has sufficiently stated a prima facie case entitling her to a hearing"); *id*. at 634 (Rivera, J., dissenting) (NhRP "has made the case for Happy's release and transfer to an elephant sanctuary").

The unlawfulness of the elephants' confinement consists not in the violation of any statute, but in the violation of their common law right to bodily liberty protected by habeas corpus. OB. 27-28. Importantly, for purposes of issuing the writ, the District Court did not need to recognize their right to bodily liberty; it needed only to assume, without deciding, that they *could* have this right. *Id.* at 29-31. The court should have done so because recognition of the elephants' right to bodily liberty is supported by compelling considerations—including science, evolving societal norms, and fundamental common law principles of justice, liberty, and equality. *Id.* at 31-32. Instead, the District Court paid lip service to their undisputed

autonomy and dignity while nonetheless treating them as "things," as mere resources for human use.[2]

The Zoo fails to contest these points—and thus utterly fails to refute the Petition's prima facie case. In arguing that elephants are necessarily excluded from the Great Writ's protections, the Zoo (a) ignores the nature and history of habeas corpus, (b) ignores the role and duty of common law courts, (c) advances erroneous conceptions of legal personhood that limit the right to bodily liberty to humans, and (d) relies on wholly irrelevant and unfounded floodgate concerns. Additionally, the Zoo (e) erroneously contends that the Petition's prima facie case fails because it is not grounded on any statutory violation and because the Petition does not seek the elephants' total discharge from all confinement.

It bears emphasizing that dismissal for failing to make a prima facie showing of unlawful confinement "is not the same as dismissal for lack of jurisdiction." *Jones v. Williams*, 2019 CO 61, ¶21. Yet the Zoo improperly addresses legal personhood under subject-matter jurisdiction, arguing that the District Court lacked jurisdiction over the Petition because the elephants are not "persons" for purposes of habeas

[2] *See Nonhuman Rights Project, Inc, on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1058 (2018) (Fahey, J., concurring) ("To treat a chimpanzee as if he or she had no right to liberty protected by habeas corpus is to regard the chimpanzee as entirely lacking independent worth, as a mere resource for human use, a thing the value of which consists exclusively in its usefulness to others.").

corpus. Jurisdiction was not contingent upon the elephants' personhood status. *See* OB. 36-39. Whether the elephants are "persons" (i.e., whether they have the right to bodily liberty) is solely a merits issue.

A. Colorado's habeas statute (C.R.S. §13-45-101 et seq.) cannot preclude the possibility of the elephants obtaining habeas relief.

The Zoo does not dispute that the Great Writ, designated "the greatest of all writs" and "the precious safeguard of personal liberty," *Geer v. Alaniz*, 331 P.2d 260, 261 (Colo. 1958) (cleaned up), has long been used to challenge unjust confinements—including the unjust confinement of individuals with few or no rights (e.g., enslaved persons, women, and children). OB. 9-11. The common-law writ's very nature "'demands that it be administered with the initiative and flexibility to insure that miscarriages of justice within its reach are surfaced and corrected.'" *Horton v. Suthers*, 43 P.3d 611, 616 (Colo. 2002). *See Boumediene v. Bush*, 553 U.S. 723, 779 (2008) ("common-law habeas corpus was, above all, an adaptable remedy," with its "precise application and scope changed depending upon the circumstances").

But like the District Court, the Zoo distorts the Great Writ beyond recognition, treating it as a mere statutory remedy divorced from its celebrated common law history. The Zoo claims Colorado's habeas statute definitionally precludes the common-law writ's extension to elephants. *See* AB. 17 ("the text of the [Habeas

Corpus Act] plainly shows that nonhuman animals do not fall under the class of persons protected by habeas corpus"). However, the habeas statute is merely procedural and cannot curtail the Great Writ's substantive scope, that is, restrict who may avail themselves of its protections. *See* OB. 11-13.

The Zoo's cited cases (AB. 13-14) do not support the contrary proposition. In *Jones v. Williams*, at ¶18, this Court referred to the requirements in Colorado's habeas statute as "procedures." *See id*. at ¶19 (reading the statute's "warrant requirement as a statutory procedural requirement, instead of jurisdictional requirement"). In *Ryan v. Cronin*, 553 P.2d 754, 755 (Colo. 1976), this Court referred to the "Great Writ of Habeas Corpus," the great writ at common law, as that which enforces the right "delineate[d]" (i.e., described) in the habeas statute. Moreover, the statements in *White v. Rickets*, 684 P.2d 239, 241 (Colo. 1984) and *Reece v. Johnson*, 793 P.2d 1152, 1153 (Colo. 1990), regarding the circumstances defined in C.R.S. §13-45-103(2) under which habeas relief may be granted, do not address the question of *who* may avail themselves of habeas corpus but only *when* certain individuals (i.e., incarcerated prisoners) may be granted the specific remedy of discharge.

To argue elephants are statutorily precluded from obtaining habeas relief, the Zoo relies on the definition of "person" in C.R.S. §2-4-401(8), which it construes as

being limited to humans and human-created entities. AB. 16. That definition does not apply here. *See* OB. 16-17. Definitionally excluding elephants from habeas corpus would require this Court to impermissibly place a *statutory limitation* on the Great Writ's substantive scope, contrary to the mandates of Colorado's suspension clause. It is no answer to claim, as the Zoo does, that habeas corpus protections are not available to nonhuman animals "in the first place." AB. 17. Courts cannot preclude elephants from invoking such protections by concluding that the legislature has foreclosed this possibility, as that would cede the authority to define the scope of habeas corpus to the legislature, and thereby violate basic principles of separation of powers. *See Pena v. Dist. Court*, 681 P.2d 953, 956 (Colo. 1984) (courts have affirmative obligations to "'assert and fully exercise their powers'" and "'protect their independent status'") (citation omitted).

Who may avail themselves of the Great Writ's protections is inherently a common law determination, made by the courts. Even the *Breheny* majority acknowledged that "the courts—not the legislature—ultimately define the scope of the common-law writ of habeas corpus." 38 N.Y.3d at 576-77 (citations omitted). *See id*. at 580 (Wilson, J., dissenting) (habeas statute "does not (and cannot) curtail the substance or reach of the writ; it specifies procedure only"); *id*. at 633 (Rivera,

J., dissenting) (habeas statute "does not create the right to bodily liberty nor determine who may seek such relief").[3]

"[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." *Id*. at 633 (Rivera, J., dissenting). In an instructive case relied on by the Zoo (AB. 16), an appellate court correctly held that the term "person" in New York's similar habeas statute cannot determine whether the common-law writ extends to a chimpanzee:

> The 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,' which has been determined by 'the slow process of decisional accretion' (*People ex rel. Keitt v McMann*, 18 NY2d 257, 263 [1966] [citation omitted]). Thus, we must look to the common law surrounding the historic writ of habeas corpus to ascertain the breadth of the writ's reach.

People ex rel. Nonhuman Rights Project, Inc. v. Lavery, 124 A.D.3d 148, 150 (3d Dept. 2014).

The same is true here. Common law principles—not statutory definitions—govern this case, because whether the elephants may avail themselves of habeas corpus is a substantive normative question about whether they have the right to

[3] *Accord People ex rel. Tweed v. Liscomb*, 60 N.Y. 559, 566 (1875) (Habeas corpus "cannot be abrogated, or its efficiency curtailed, by legislative action"); *Shequin v. Smith*, 129 Vt. 578, 581 (1971) (same); *In re Patzwald*, 50 P. 139, 142 (Okla. Terr. 1897) (same).

bodily liberty (not a definitional question regarding legal personhood). *See* OB. 13-18.

B. Evolving the common law to recognize the elephants' right to bodily liberty is the responsibility of the courts, not the legislature.

The Zoo claims the "proper forum" for recognizing the elephants' right to bodily liberty is the legislature, not the courts. AB. 40. This position is antithetical to the Great Writ's history and ignores the evolutionary nature of the common law, treating it as an anachronism. *See* OB. 18-21. Stewardship of the common law is the responsibility of the judicial branch. Ironically, it is the Zoo that disregards the separation of powers by asking this Court to deflect a core judicial duty onto the legislature. *See* AB. 40 (claiming that evolving the common law in the elephants' favor would violate the separation of powers).

As then-Chief Justice Frantz explained, the common law is in constant growth, adapting to changing conditions, new knowledge, and experience to meet the demands of justice. *Tesone v. Sch. Dist. No. Re-2, Boulder Cnty.*, 152 Colo. 596, 602-03 (1963) (Frantz, C.J., dissenting), *overruled*, *Evans v. Bd. of Cnty. Comm'rs of El Paso Cnty.*, 174 Colo. 97 (1971). "[I]t is a sad commentary on the common law if it . . . cannot profit by the experiences and observations of the past and that thus the present shall always and irrevocably be controlled by the past." *Id*. at 603. "[T]here should be no dragging of feet once it is ascertained that a true advance in

the dispensation of justice and in the science of law can be achieved." *Id*. at 604. *See also People ex rel. Pub. Utilities Comm'n v. Mountain States Tel. & Tel. Co.*, 243 P.2d 397, 400 (Colo. 1952) ("courts of last resort have the power, and it sometimes is their duty, in serving the interests of justice, to depart from rules previously established by court decision").

Changing archaic common law is the role and duty of courts. *See* OB. 33-34 (citing, *inter alia*, cases where this Court has evolved the common law—including by expanding legal rights). This is especially true regarding habeas corpus, long "celebrated for its adaptability and potential to evolve." AMANDA TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 114 (2021). Throughout its history, the Great Writ was "used flexibly to address myriad situations in which liberty was restrained." *Breheny*, 38 N.Y.3d at 613 (Wilson, J., dissenting). The famous case of *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772), where Lord Mansfield ordered an enslaved Black man freed, "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." TYLER at 27.

Accordingly, the Zoo and District Court's contrary view, that expanding habeas corpus to protect elephants is the legislature's responsibility, is inconsistent with "the fundamental role of a common-law court to adapt the law as society

evolves." *Breheny*, at 38 N.Y.3d at 617 (Wilson, J., dissenting). "[T]he fundamental right to be free . . . does not require legislative enactment." *Id*. at 634 (Rivera, J., dissenting). Because "the common law is our bailiwick," the task of "determining the reach of a substantive common-law right whose existence pre-dates *any* legislative enactment on the subject" cannot be recast as "the exclusive purview of the legislative branch." *Id*. at 633. *See id*. at 616 (Wilson, J., dissenting) ("Not all change can or should come from the legislature; we 'abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule'") (citation omitted).

The Zoo characterizes NhRP's arguments as "policy arguments" meant to advance "policy goals," in an attempt to argue they belong in the legislature. AB. 3, 7, 9, 10. But NhRP's arguments are based primarily on considerations of science, evolving societal norms, and fundamental common law principles of justice, liberty, and equality. *See* OB. 31-32. Moreover, courts often rely on policy considerations when deciding whether to evolve the common law. *See*, *e.g*., *Rudnicki v. Bianco*, 2021 CO 80, ¶¶ 31-44 (evaluating "public policy considerations" on whether to depart from a common law rule and choosing to depart from the rule); *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 888-90 (Colo. 2002) (concluding, on

the basis of policy considerations, that a physician owed his patient a common law duty of reasonable care).

It is also irrelevant that no American court has ever "held the writ applicable to a nonhuman animal." AB. 30. *See* OB. 18-21. "[R]ights come not from ancient sources alone." *Obergefell*, 576 U.S. at 671. "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*.

As one of the Zoo's cited cases explained, "[t]he lack of precedent for treating animals as persons for habeas corpus purposes does not . . . end the inquiry, as the writ has over time gained increasing use given its 'great flexibility and vague scope.'" *Lavery*, 124 A.D.3d at 150-51 (citation omitted). "[N]ovel common-law cases—of which habeas is a subset—have advanced the law in countless areas." *Breheny*, at 38 N.Y.3d at 584 (Wilson, J., dissenting). Prior decisions do not foreclose NhRP's petition and "instead compel our acknowledgment of the availability of the writ to a nonhuman animal to challenge an alleged unjust confinement." *Id*. at 629 (Rivera, J., dissenting).

C. Legal personhood is not limited to humans.

1. The right to bodily liberty is not limited to humans.

Like the District Court, the Zoo contends elephants are not "persons" (and thus lack the right to bodily liberty) merely because of their biology, specifically because they have the *wrong* biology. AB. 18 (equating personhood with human being). This understanding of personhood is wrong. *See* OB. 14-15, 21-25.

"Conceptually speaking, legal personhood is a juridical category rather than a biological one." Matthew Liebman, *Animal Plaintiffs*, 108 MINN. L. REV. 1707, 1754 (2024). "Person" is a term that attaches to any individual or entity possessing a legal right. (*See Petition*, CF, 000104-105). As a leading jurisprudential scholar explained, "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). Ultimately, it is for this Court to decide the substantive normative question at the heart of this appeal: whether the elephants have the common law right to bodily liberty protected by habeas corpus. Upon recognition of this right, they are necessarily "persons" for purposes of habeas corpus.

A conception of legal personhood that limits the right to bodily liberty to humans is not only wrong, lacking credible support, but arbitrary and irrational. *See*

OB. 21-25. It is violently at odds with the fundamental values and principles that courts are duty-bound to uphold, including the supreme and cherished common law value of autonomy, which lies at the heart of the right to bodily liberty.[4] Science has demonstrated that "elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs." (*Order*, CF, p. 000530). Yet the Zoo defends their exclusion from the Great Writ's protections solely because they are not human. Adopting this position would affirm human exceptionalism. It would require this Court to avert its eyes from advances in scientific understanding and evolving societal norms and hold that autonomy, along with the fundamental common law principles of justice, liberty, and equality, does not matter. (*Petition*, CF, 000073-100).

The Zoo claims ruling in the elephants' favor based on their autonomy would threaten "the most vulnerable human populations." AB. 39. This categorically false assertion stems from a distortion of NhRP's position. Contrary to the Zoo's misrepresentations (AB. 7, 17, 39), NhRP does not contend that autonomy is

[4] The term "autonomy" is not undefined, as the Zoo claims. AB. 39. (*See Petition*, CF, 000026 at ¶23) (as defined by experts, autonomy is "self-determined behavior that is based on freedom of choice").

necessary for the right to bodily liberty, only that autonomy is *sufficient* for this right. (*Petition*, CF, 000090 n. 292).

Why should Missy, Kimba, Lucky, LouLou, and Jambo be excluded from the writ's protections simply because they are not human? The Zoo's question-begging answer that their species membership matters (just because it does) is "nothing more than a tautological evasion." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting). "[A]ll human beings possess intrinsic dignity and value," but "in elevating our species, we should not lower the status of other highly intelligent species." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring).

The Great Writ's history supports its extension here. As the District Court acknowledged, habeas corpus has long been used with "great flexibility and imagination to release slaves, women, children, and others from unjust confinements." (CF, 000524). Highlighting this history is neither "odious" nor "offensive." AB. 8, 21-23. "[N]o 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). The references to these humans do not "undermine in any way the dignity of those individuals or diminish their struggles for equality and the right to live free," but demonstrate "the flexibility of the historical uses of the writ." *Id*. "The legal and moral point . . . is that the Great Writ serves to protect against

unjust captivity and to safeguard the right to bodily liberty, and that those protections are not the singular possessions of human beings." *Id*.

2. The right to bodily liberty is not limited to those capable of bearing responsibilities.

Going beyond the District Court, the Zoo advances a conception of legal personhood that necessarily excludes elephants *and* vulnerable humans from the right to bodily liberty. It claims nonhuman animals "are incapable of bearing the responsibilities of personhood and therefore are not entitled to the rights of personhood." AB. 18-19. On this view, possessing the right to bodily liberty requires the capacity to bear responsibilities. *See* AB. 7, 20-21. This dangerously absurd view is unworthy of adoption by any court, and it has been subjected to decisive refutation, including by Judge Fahey, Judge Wilson, and Judge Rivera of the New York Court of Appeals—as well as distinguished philosophers, law professors, and other legal scholars. (*See generally Petitioner's Opposition to Motion to Dismiss*, CF, 000433-437).

The Zoo's conception of legal personhood, based vaguely on social contract theory, is refuted by the obvious fact that "[w]e afford legal protections to those unable to exercise rights or bear responsibilities, such as minors and people with certain cognitive disabilities." *Breheny*, 38 N.Y.3d at 630 (Rivera, J., dissenting). It "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*. As Judge Fahey explained: "Even if . . . 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).

Thus, denying the writ—on the basis that "animals cannot have rights because they cannot bear responsibilities—is wrong." *Breheny*, 38 N.Y.3d at 626 (Wilson, J., dissenting). Rights are granted to "living beings who bear no responsibilities and may never be able to do so." *Id*. at 587. *See id*. ("If 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.").

"[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 628-29 (Rivera, J., dissenting).

D. Floodgate concerns do not justify excluding the elephants from the Great Writ's protections.

Like the District Court, the Zoo relies on "facially preposterous" floodgate scenarios to claim that allowing the elephants to invoke habeas corpus "'would have an enormous destabilizing impact on modern society.'" *Breheny*, 38 N.Y.3d at 620 (Wilson, J., dissenting) (quoting majority). *See* AB. 43. They are premised on the wildly false assumption that ruling in the elephants' favor would require allowing all other animals to assert claims in court, contrary to the incremental nature of the common law—whose scope is determined gradually, i.e., on a case-by-case basis. *See* OB. 25-27.[5]

Because this case solely concerns the five elephants at Cheyenne Mountain Zoo, not members of other species, this Court is only being asked to make an incremental change in the common law. Granting these 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). It would not require, as the Zoo asserts, holding that the Great Writ's flexibility is "limitless." AB. 23. Nor would it mean "any other elephant would automatically be

[5] The common law's conceptual architecture "is intrinsically designed to accommodate the process of incremental normative change over time." Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1255 (2015).

entitled to file a habeas petition and receive a full merits hearing or would prevail at one." *Breheny*, 38 N.Y.3d at 623 (Wilson, J., dissenting).

"[W]hether a being can invoke habeas is highly case-specific." *Id.* at 621. "The writ is a procedural tool with a storied history of opportunity for challenging social norms, but one inherently limited by its necessarily case-by-case approach." *Id*. at 592-93. Moreover, "common-law courts are especially good at developing doctrines to deal with slippery slopes." *Id*. at 622.

Empirical reality has disproven the floodgates alarm, which serves only to distract from the injustice at hand. Courts in other countries have recognized the rights of nonhuman animals without—as the District Court hyperbolically claimed—"upending" their legal systems. Examples include Argentina, where an imprisoned chimpanzee named Cecilia was granted habeas corpus relief; and Pakistan, where an imprisoned Asian elephant named Kaavan was ordered released to a sanctuary in recognition of his legal rights. (CF, 000084, 000086); *see generally* Macarena Franceschini, *Animal Personhood: The Quest for Recognition*, 17 ANIMAL & NAT. RESOURCE L. REV. 93, 123-24, 145 (2021) (discussing, *inter alia*, Cecilia's and Kaavan's cases).

E. Animal protection laws are irrelevant in this case and habeas corpus permits the elephants' release to an accredited sanctuary.

The Zoo's entire discussion regarding animal protection laws is irrelevant. *See* AB. 31-36. The unlawfulness of the elephants' confinement is predicated on the violation of their common law right to bodily liberty protected by habeas corpus, not the violation of any statute. *See* OB. 28; (*Petition*, CF, 000018 at ¶¶5-6, 000108 at ¶¶168-69). Accordingly, the Zoo's compliance with animal protection laws does not render the elephants' confinement lawful. Equally irrelevant is the Zoo's compliance with AZA requirements, which are "woefully inadequate for meeting the needs of elephants." (*Poole Declaration*, CF, 000197 ¶59; *see generally Lindsay Declaration*, CF, 000351-353 ¶¶35-41).

Notably, the Zoo does not dispute—and the District Court appears to concede—that if the elephants have the right to bodily liberty, their right is being violated. (*See Order*, CF, 000532) ("[a]s a matter of pure justice," the elephants are not being treated "with the dignity befitting their species"); *Breheny*, 38 N.Y.3d at 637 (Rivera, J., dissenting) (NhRP's "core argument" is 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."); *id*. at 642 ("an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—curtailed"). Nor does the Zoo dispute

that recognition of the elephants' right to bodily liberty is supported by compelling considerations.

The Zoo cites the Traveling Animal Protection Act, nonsensically arguing that because it exempts Cheyenne Mountain Zoo from the statute's prohibitions, the Colorado legislature has "explicitly condoned the precise conduct" being challenged here. AB. 32. First, the statute does not address "the precise conduct" being challenged, i.e., the elephants' confinement. It only prohibits the "performance" of certain animals "in a traveling animal act," like circuses. C.R.S. §33-1-126(3). Second, as discussed above, the legislature cannot restrict the Great Writ's substantive scope and preclude the possibility of elephants obtaining habeas relief.

The Zoo also erroneously contends that because the Petition seeks the elephants' release to an accredited sanctuary—rather than total discharge from all confinement—habeas corpus is unavailable since the requested relief does not qualify as "release." AB. 36. "[R]elief short of total discharge is available through habeas corpus." *Marshall v. Kort*, 690 P.2d 219, 222 (Colo. 1984), *disapproved on other grounds*, 869 P.2d 211 (Colo. 1994); (*Petition*, CF, 000110 ¶¶ 172-74) (citing cases). In fact, "open-ended relief accords with the essential purpose of the writ." *Horton*, 43 P.3d at 616 (citation omitted).

White v. Rickets, 684 P.2d at 242 is plainly inapposite. In *Rickets*, the habeas petition was subject to dismissal because the petitioner alleged "only that the place of his confinement should be altered." *Id*. The petitioner did *not* allege his confinement violated any of his rights. *Id*. In contrast, NhRP alleges the elephants' confinement violates their right to bodily liberty, rendering it unlawful and thus entitling them to release.

II. The District Court had subject-matter jurisdiction.

1. The District Court's jurisdiction was not contingent upon the elephants' personhood status.

NhRP's compliance with the procedural requirements in C.R.S §13-45-102 was sufficient to invoke the District Court's jurisdiction. *See* OB. 35. "[H]abeas corpus jurisdiction is broad when a habeas court is presented with a properly pleaded petition for the writ." *Horton*, 43 P.3d at 616. "[A]ll district courts in this state have subject-matter jurisdiction to entertain and decide habeas corpus cases." *Id.* at 615.

The Zoo argues the District Court lacked jurisdiction because the elephants, not being "persons," lacked "'standing in the first instance.'" AB. 11 (citation omitted). However, jurisdiction was not contingent upon the elephants' personhood status. *See* OB. 36-39. Whether the elephants are "persons" (and thus have "standing") is irrelevant.

Habeas corpus jurisdiction must not be analyzed under the general standing framework, under which a court first determines whether "the plaintiff suffered [an] injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." AB. 11 (quoting *Anson v. Trujillo*, 56 P.3d 114, 117 (Colo. App. 2002)). "Claims for relief under . . . the common law" also satisfy the "legally-protected-interest requirement." *Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶10. More fundamentally, rigid application of this judicially developed test—meant to address *prudential* concerns not relevant here—is inconsistent with the Great Writ's revered status as "the great writ of freedom," and contrary to the admonishment that habeas corpus may not be "'hedged or in anywise circumscribed with technical requirements.'" *Jones v. Williams*, at ¶18 (citation omitted).

The writ "has long been available to those whose humanity was never fully recognized by law." *Breheny*, 38 N.Y.3d at 630 (Rivera, J., dissenting). In other words, individuals who could not pass today's standing test were able to invoke habeas corpus. English cases "suggest powerfully that neither free nor slave status, nor apparent place of birth, precluded using habeas corpus." PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 207 (2010). "[W]hat modern law

would call 'standing' was simply not an issue," as there was an "absence of concern about the legal nature of the detainee using habeas corpus." *Id*. at 208.

The Zoo's standing discussion also conflates two entirely different concepts: jurisdictional standing and non-jurisdictional standing. Jurisdictional standing "represents a challenge to the court's subject matter jurisdiction." *Lobato v. State*, 218 P.3d 358, 368 (Colo. 2009). Non-jurisdictional standing does not. *See*, *e.g., Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004) ("statutory standing" is not a jurisdictional question; where a plaintiff satisfies Article III standing but lacks statutory standing, suit should be dismissed for failure to state a claim, not for lack of subject-matter jurisdiction); *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018) (lack of statutory standing is "a determination on the merits," while lack of Article III standing is "purely jurisdictional").

To argue that the District Court lacked subject-matter jurisdiction, the Zoo relies on non-habeas, non-jurisdictional standing cases. *See* AB. 12, 19. The only exception is *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn.App. 36, 41 (2019) (AB. 11), which this Court should also disregard. *See* OB. 37-38. *Commerford* directly conflicts with *Jackson v. Bulloch*, 12 Conn. 38 (1837), and is based on the "rights and duties" conception of personhood refuted above.

2. NhRP did not need to allege a "significant relationship" with the elephants.

Contrary to the District Court's suggestion (CF, 000527-528), NhRP did not need to allege a "significant relationship" with the elephants to file the Petition on their behalf under C.R.S §13-45-102, which provides that a habeas petition may be signed "by the party or some person on his behalf." *See* OB. 39-43. When interpreting a statute, courts may not "'add or imply words that simply are not there.'" *People v. Diaz*, 2015 CO 28, ¶15 (citation omitted). Reading a "significant relationship" requirement into §13-45-102 is contrary to the statute's plain text, as well as the Great Writ's purpose as the precious safeguard of liberty and its history of allowing unrelated third parties to file petitions on behalf of confined individuals. *See* OB. 39-41.

The Zoo's entire discussion of this issue is deficient on its face, as it is based solely on non-Colorado cases having nothing to do with an interpretation of §13-45-102. *See* AB. 23-28. Like the District Court, the Zoo derives the "significant relationship" requirement from dicta in *Whitmore v. Arkansas*, 495 U.S. 149 (1990), concerning federal "next friend" standing prerequisites. *See* OB. 41-42. It cites no authority for reading *Whitmore*'s dicta into Colorado's habeas statute (because there is none). *Cf. Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 755-56 (N.Y. Sup. Ct. 2015) (rejecting argument that New York's similar habeas

statute contains a "substantial relationship" requirement; NhRP had standing on behalf of two chimpanzees); *The Nonhuman Rights Project v. Breheny*, No. 260441/19, 2020 WL 1670735 at *7 (N.Y. Sup. Ct. 2020) (NhRP had standing on behalf of elephant).

CONCLUSION

Missy, Kimba, Lucky, LouLou, and Jambo should not be denied the opportunity to challenge their unjust confinement. Because the Petition makes a prima facie case that they are entitled to release, this Court must reverse the District Court's decision with instructions to issue the writ.

Dated: July 17, 2024

Respectfully submitted,

/s/ Jake Davis
Jake Davis, #54032
Attorney for Petitioner-Appellant Nonhuman Rights Project, Inc. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo

CERTIFICATE OF SERVICE

I certify that on this 17th day of July 2024, a copy of the foregoing OPENING BRIEF was filed through the Colorado Courts E-Filing System, with a copy checked to be sent to counsel of record:

BROWNSTEIN HYATT FARBER SCHRECK, LLP
John W. Suthers, #8492
Rosa L. Baum, #56652
675 Fifteenth Street. Suite 2900
Denver, CO 80202
Telephone: (303) 223-1100
Facsimile: (303) 223-1111
Email: jsuthers@bhfs.com; rbaum@bhfs.com

/s/ Jake Davis
Jake Davis