DATE FILED
May 30, 2024 9:19 AM

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
OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32 and this Court's May 23, 2024 order.

This brief has 9,497 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes & Rules

Other Authorities

ISSUES ON APPEAL

This appeal concerns five wild-born female African elephants confined at Cheyenne Mountain Zoo—Missy, Kimba, Lucky, LouLou, and Jambo.

Nonhuman Rights Project, Inc. ("NhRP") filed a Verified Petition for a Writ of Habeas Corpus ("Petition") on their behalf, alleging they are being unlawfully confined by Cheyenne Mountain Zoological Society and Bob Chastain (collectively, "Zoo") and thus entitled to release to an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries ("GFAS"). The District Court granted the Zoo's motion to dismiss pursuant to C.R.C.P. Rules 12(b)(1) and 12(b)(5). The issues are:

I. Does the Petition make a prima facie case that Missy, Kimba, Lucky, LouLou, and Jambo are entitled to release?

II. Did the District Court have subject-matter jurisdiction?

INTRODUCTION

The common law is in constant growth, not static and immutable, adapting to changing conditions, new knowledge, and experience to accord with the demands of justice. This is especially true of the Great Writ of Habeas Corpus, whose 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.'" *Naranjo v. Johnson*, 770 P.2d 784, 786 (Colo. 1989) (citation omitted). In this case of first impression, the Court is presented with a unique opportunity to recognize that the

revered common-law writ can be flexibly used to reach and correct a manifest injustice.

This Court must decide a profound question of judicial responsibility and ethics: "whether the detention of an elephant can ever be so cruel, so antithetical to the essence of an elephant, that the writ of habeas corpus should be made available under the common law." *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 579 (2022) (Wilson, J., dissenting). Affirming the District Court's decision would perpetuate an entrenched and unjust status quo. This Court should instead "affirm our own humanity by committing ourselves to the promise of freedom" for living beings who, though not human, are like us in all the ways that matter. *Id*. at 628 (Rivera, J., dissenting).

Missy, Kimba, Lucky, LouLou, and Jambo are—as the expert evidence demonstrates—autonomous and extraordinarily cognitively complex beings languishing in a wholly unnatural environment, unable to flourish and have their complex physical and psychological needs met. They are suffering immensely and unnecessarily. The District Court acknowledged that as a matter of "pure justice," these individuals are not being "treated with the dignity befitting their species." (CF, 000532).

Yet the court denied them the opportunity to challenge their unjust confinement solely because they are not human, embracing human exceptionalism (a version of might makes right).[1] This denial "denigrates the human capacity for understanding, empathy and compassion." *Breheny*, 38 N.Y.3d at 626 (Wilson, J., dissenting). "In elevating our species, we should not lower the status of other highly intelligent species." *Nonhuman Rights Project, Inc, on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring).

It is time for Colorado common law to evolve. Having committed no wrong warranting their loss of liberty, Missy, Kimba, Lucky, LouLou, and Jambo should be allowed to invoke the Great Writ's protections so they can challenge their inherently harmful confinement.

STATEMENT OF THE CASE

The Petition alleges that the elephants are being unlawfully confined at Cheyenne Mountain Zoo in violation of their common law right to bodily liberty

[1] "[H]uman exceptionalism holds that humans possess *a unique moral worth* that endows them alone, among all living creatures, with the right never to be treated merely as means to the ends of others." Angus Taylor, *Review of Wesley J. Smith's A Rat is a Pig is a Dog is a Boy: The Human Cost of the Animal Rights Movement*, BETWEEN THE SPECIES 233 (2010). It is "not a statement of fact, but an assertion of domination." *Id*. at 234.

protected by habeas corpus, entitling them to release to a GFAS-accredited elephant sanctuary. (CF, 000017-18).

The Zoo moved to dismiss under C.R.C.P. Rules 12(b)(1) and 12(b)(5). (CF, 000395). The District Court ruled: "(a) [the elephants], as nonhuman animals, lack standing to bring a habeas petition and (b) even if they had standing, they are not being unlawfully confined." (CF, 000532).

STATEMENT OF FACTS

Elephants 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." (*Id*., 000508-509). This is demonstrated "in substantial detail" by declarations from seven "eminent" elephant experts. (*Id*., 000509).

Cheyenne Mountain Zoo, located on a "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." (*Id.*, 000510). "Elephants cannot function normally in captivity." (*Id.*, 000510). In the wild, elephants "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." (*Id*.) "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." (*Id*.)

Missy, Kimba, Lucky, LouLou, and Jambo "spend at least half of each day, if not more, in a noisy indoor barn . . . the floors of which are covered with a rubberized concrete surface that provides inadequate cushioning for their feet and joints." (*Id*., 000510-511). "This involuntary confinement is both physically and psychologically harmful," likely leading to "foot and joint damage as well as psychological damage from the noise and the frustration of prevented choice and movement." (*Id*., 000511)."When allowed outside, the elephants are commonly unable to walk more than 100 yards in any direction." (*Id*.).

"In this wholly unnatural environment, the elephants' behavioral repertoire is extremely limited and widely divergent from that of free-ranging elephants." (*Id*.). "Their lives lack variety, freedom of choice, and healthy social interaction," with their movements "controlled directly and exclusively by zoo staff." (*Id*.). The "cold winter climate, unnatural to them, further limits their activities." (*Id*.).

Because the Zoo deprives the elephants of "the space and variety of terrain that they need to roam, exercise, and live healthy elephant lives," they "would be better off in an accredited elephant sanctuary." (*Id.*, 000530).

ARGUMENT SUMMARY

C.R.C.P. 12(b)(5) ruling

A habeas petition establishing a prima facie case of unlawful confinement and entitlement to release cannot be dismissed without a hearing. Grounded in expert evidence, the Petition establishes such a case. Missy, Kimba, Lucky, LouLou, and Jambo's confinement violates their right to bodily liberty by depriving them of the ability to exercise their autonomy and extraordinary cognitive complexity.

The District Court concluded that because the elephants are not human, they are not "persons" and thus lack the right to bodily liberty. It ignored the evolutionary nature of the common law, which is not controlled by an archaic past but evolves to conform with justice. Habeas corpus has long been invoked to challenge the unjust confinement of individuals with few or no rights (e.g., enslaved persons, women, and children).

Consistent with the Great Writ's history, the District Court should have at least assumed, without deciding, that the elephants could have the right to bodily liberty. Recognition of their right is supported by compelling considerations: science, evolving societal norms, and fundamental common law principles of justice, liberty, and equality.

C.R.C.P. 12(b)(1) ruling

The District Court concluded it lacked subject-matter jurisdiction because the elephants are not "persons," but jurisdiction was not contingent upon their personhood status. Nothing in the Habeas Corpus Act limits a district court's jurisdiction to hear habeas cases, and the Great Writ has long been invoked on behalf of individuals with few or no rights.

ARGUMENT

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

A. Standard of review

C.R.C.P. 12(b)(5) motions are disfavored and review is de novo. *Bly v. Story*, 241 P.3d 529, 533 (Colo. 2010). A habeas petition establishing a prima facie case of unlawful confinement and entitlement to release cannot be dismissed without a hearing; instead, a writ of habeas corpus must issue. *Fields v. Suthers*, 984 P.2d 1167, 1169 (Colo. 1999); *People v. Calyer*, 736 P.2d 1204, 1207 (Colo. 1987); *Cardiel v. Brittian*, 833 P.2d 748, 752 (Colo. 1992) (articulating prima facie standard).

The District Court ruled the Petition did not establish a prima facie case. (CF, 000517). The lone reason being that because they are not human, the elephants lack "the common law right to bodily liberty protected by habeas corpus." (*Id.*, 000530).[2]

B. The District Court erred in concluding that the elephants lack the right to bodily liberty.

1. The high court opinions of Judge Wilson, Judge Rivera, and Judge Fahey provide powerful guidance.

The District Court acknowledged that "several judges have expressed support for NHRP's cause." (*Id*., 000516). These include three judges on New York's highest court: now-Chief Judge Rowan Wilson, who found habeas corpus was available for an elephant to challenge her unjust confinement at a zoo; Judge Jenny Rivera, who found habeas relief should be granted to that elephant; and Judge Eugene Fahey, who urged courts to take seriously the notion that the writ is available to autonomous nonhuman animals like chimpanzees. *Breheny*, 38 N.Y.3d at 577-626 (Wilson, J., dissenting); *id*. at 626-42 (Rivera, J., dissenting); *Tommy*, 31 N.Y.3d at 1055-59 (Fahey, J., concurring).

This Court should favor the opinions of these judges over contrary authorities because they are "predicated upon sounder logic" and "in harmony with higher

[2] The court addressed the right to bodily liberty, the history and scope of habeas corpus, and legal personhood under the heading of standing, but these issues are addressed in this section since they concern the merits.

considerations of justice." *People, to Use of Tritch v. Cramer*, 15 Colo. 155, 161-62 (1890) (finding a dissent more persuasive than majority opinion).

The District Court believed "the overwhelming weight of legal precedent is against the NHRP." (CF, 000516). But "[t]he weight of authority depends upon the better reasoning," not "the number of opinions." *Rupert v. People*, 20 Colo. 424, 436 (1894). "[S]ound reasoning, based upon complete investigation," is what "gives weight to judicial opinions." *Id*.

Cases denying habeas relief to nonhuman animals should be understood in the context of the entrenched status quo, in which "[f]or four thousand years, a thick and impenetrable legal wall has separated all human[s] from all nonhuman animals." STEVEN WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 4 (2000). Ignored by judges, nonhuman animals have been treated as "legal things." *Id*. As the opinions of Judges Wilson, Rivera, and Fahey demonstrate, the legal wall's "intellectual foundations are so unprincipled and arbitrary, so unfair and unjust, that it is crumbling." *Id*. at 5.

2. Habeas corpus can be used to challenge unjust confinements.

Habeas corpus 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). Reverently called the Great Writ, habeas corpus is "'the greatest of all

writs'" and "'the precious safeguard of personal liberty.'" *Geer v. Alaniz*, 331 P.2d 260, 261 (Colo. 1958) (citations omitted). "'[T]here is no higher duty than to maintain it unimpaired.'" *Id*.

The Great Writ's history 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, 401-02 (1963), *overruled on other grounds*, 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).

"'[O]pen-ended relief accords with the essential purpose of the writ,'" whose 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) (citation omitted); *accord Harris v. Nelson*, 394 U.S. 286, 291 (1969).

Enlightened judges have long used habeas corpus "to nudge advances in the law." *Breheny*, 38 N.Y.3d at 589 (Wilson, J., dissenting). "Most fundamentally, the writ was used to grant freedom to slaves, who were considered chattel with no legal

rights or existence. . . . 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 588-89. The Great Writ's history "demonstrates that courts have used and should use it to enhance liberty when a captivity is unjust, even when the captor has statutory or common law rights authorizing such captivities in general." *Id*. at 580.[3]

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." *Id*. at 602. The District Court's refusal to employ the writ to challenge Missy, Kimba, Lucky, LouLou, and Jambo's unjust confinement devalues the Great Writ's history and purpose.

3. The common law—not statutes—determines the substantive scope of habeas corpus.

Despite acknowledging the Great Writ's venerable history, the District Court viewed habeas corpus in Colorado as "a creature of statute." (CF, 000523). It

[3] In *Somerset v. Stewart*, 1 Lofft. 1, 19 (K.B. 1772), 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. *Somerset* "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 TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 27 (2021).

believed the habeas statute, C.R.S. §13-45-102, dictates the scope of the right of habeas corpus and limits it to humans. These assertions are wrong.

First, habeas corpus is not a creature of statute. Habeas statutes are merely procedural, "delineat[ing] the right which may be enforced with the Great Writ of Habeas Corpus, and the procedure which is to be followed." *Ryan v. Cronin*, 553 P.2d 754, 755 (Colo. 1976). While statutory provisions *delineate* (i.e., describe) the right of habeas corpus and the *procedures* to be followed, that right is *enforced* under the common law by the "Great Writ of Habeas Corpus."[4] *See 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 [including habeas corpus] are preserved[.]").

Second, statutes cannot curtail the Great Writ's substantive scope. The view that the legislature may do so is contrary to Colorado Constitution Article II, §21, which prohibits the writ's suspension except in cases of rebellion or invasion. *People ex rel. Wyse v. Dist. Court (Twentieth Judicial Dist.)*, 503 P.2d 154, 156 (Colo. 1972). Only "the procedural mechanism for its exercise may change." *Id*. The "procedures" in the Habeas Corpus Act "implement"—not determine—"the

[4] "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, 474 n.6 (1976).

constitutional right to seek a writ of habeas corpus." *Jones v. Williams*, 2019 CO 61, ¶18. Who may avail themselves of its protections is inherently a common law determination.

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).

Affirmance of the District Court's decision would render habeas corpus a mere statutory remedy divorced from its celebrated common law history—and thereby strip the judiciary of authority to decide who may avail themselves of the Great Writ. "[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," for "the common law is our bailiwick." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting).

4. Legal personhood is not limited to humans.

This Court must reject the conclusion that Missy, Kimba, Lucky, LouLou, and Jambo are not "persons" and thus lack the right to bodily liberty. (*Order*, CF, 000518, 000524).

a. Whether the elephants may avail themselves of the Great Writ's protections is a substantive normative question.

The District Court erred in its formalistic approach to the issue of whether the elephants may avail themselves of habeas corpus. The court treated it as a

definitional question regarding legal personhood, rather than a substantive normative question to be decided under common law principles—including fundamental principles of justice, liberty, and equality. (*See Petition*, CF, 000069-100). "[T]o whom to grant what rights is a normative determination, one that changes (and has changed) over time." *Breheny*, 38 N.Y.3d at 588 (Wilson, J., dissenting).

Whether the elephants have a liberty interest that habeas corpus must protect is "not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Tommy*, 31 N.Y.3d. at 1058 (Fahey, J., concurring). As Judge Fahey explained in 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.

Id. at 1057.

"Whether autonomous, nonhuman animals have rights that ought to be 'recognized by law' is *precisely* the question we are called upon to answer in this appeal." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting).

b. The elephants are "persons" for purposes of habeas corpus.

"Person" is a term that attaches to any individual or entity possessing (or capable of possessing) a legal right. 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)). *See* Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY 121-22 (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.").

Because "persons are the subjects of rights or duties, if animals have legal rights, then they are legal persons." Matthew Liebman, *Animal Plaintiffs*, 108 MINN. L. REV. 1707, 1756 (2024). "[T]he law can recognize an autonomous animal's right to judicial consideration of their claim to be released from an unjust captivity." *Breheny*, 38 N.Y.3d at 631 (Rivera, J., dissenting). Fundamental common law principles of justice, liberty, and equality—when applied to the expert scientific evidence—compel recognition of the elephants' right to bodily liberty, which necessarily entails they are "persons" for purposes of habeas corpus. (*Petition*, CF, 000069-100).

c. The scope of "person" in Colorado's habeas statute is not a matter of statutory interpretation.

"Person" in §13-45-102 is undefined, which is consistent with the fact that the common-law writ's substantive scope is determined by the courts—not the

legislature. *See Breheny*, 38 N.Y.3d at 582 (Wilson, J., dissenting) (undefined term "person" in New York's similar habeas statute "was meant to have no substantive component" and "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.").

Rather than undertake a common law analysis, the District Court applied C.R.S. §2-4-401(8), Colorado's general definitional provision, and concluded that "person" in Colorado statutes is definitionally limited to humans and human-created legal entities. (CF, 000518). This was error.

First, the general definitional provision does not apply here; it "appl[ies] to every statute, *unless the context otherwise requires*." §2-4-401 (emphasis added). As discussed, the substantive scope of the Great Writ cannot be curtailed by legislation, not without effecting an unconstitutional suspension. By construing "person" in §2-4-401(8) to definitionally exclude elephants from obtaining habeas relief, the District Court impermissibly placed a *statutory limitation* on the Great Writ's substantive scope. Courts must "avoid a situation where petitions are discouraged to the point where it may be said that, in effect, the writ of habeas corpus has been

unconstitutionally suspended." *Williams v. Dist. Court of Eighth Judicial Dist. (Larimer Cnty.)*, 417 P.2d 496, 501 (Colo. 1966).

Second, "person" plausibly encompasses elephants. Section 2-4-401(8) defines "person" to mean, among other things, "any individual." "Individual" is not further defined. The District Court erroneously assumed "individual" is limited to humans, forgetting "words frequently have more than one ordinary meaning." *People v. Opana*, 2017 CO 56, ¶12.

One definition of "individual" is "organism," a term that indisputably encompasses nonhuman animals. *See Burton v. Colorado Access*, 2018 CO 11, ¶29 (citing Webster's New College Dictionary, defining "individual" as "organism"); Dictionary.com, https://bit.ly/3HnUbrv (defining "organism" as "a form of life considered as an entity," including "an animal"). "Individual" can refer to nonhuman animals in common parlance,[5] and even the Zoo refers to nonhuman animals—including elephants—as "individuals."[6]

[5] *E.g.*, Michael Pardo, *Opinion: The elephants at Cheyenne Mountain Zoo deserve more than an acre*, The Denver Post (Nov. 22, 2023), https://bit.ly/49pWZ3A (referring to elephants as "individuals"); Charles Siebert, *The Animal Self*, N.Y. TIMES (Jan. 22, 2006), https://bit.ly/3OSSCFY (referring to nonhuman animals as "individuals").

[6] *E.g.*, *Cheyenne Mountain Zoo Responds to Malicious Lawsuit* (June 29, 2023), https://bit.ly/48rBuhw (referring to elephants as "individuals"); *Cheyenne Mountain*

The salient point, however, is that the District Court should *not* have engaged in a definitional analysis at all. Whether the elephants are "persons" for purposes of habeas corpus—that is, whether they have the right to bodily liberty—is inherently a substantive normative question, to be decided under the common law.

d. Given the common law's evolutionary nature, the lack of on-point precedent is no reason to limit the Great Writ's protections to humans.

The District Court claimed the common law does not support extending habeas beyond humans because no English-speaking court "has found a nonhuman animal entitled to habeas relief." (CF, 000524). But the "argument—'this has never been done before'—is an argument against all progress, one that flies in the face of legal history." *Breheny*, 38 N.Y.3d at 584 (Wilson, J., dissenting). Entrenching the Great Writ in the archaic past is antithetical to its revered history and the common law's evolutionary nature.

The common law is not an anachronism. It must evolve "to comport with changing social attitudes as well as to avoid injustice." *Bertrand v. Bd. of Cnty. Comm'rs of Park Cnty.*, 872 P.2d 223, 226 n. 5 (Colo. 1994). Then-Chief Justice Albert Frantz explained:

Zoo Shares Tragic Loss of Mila, 2-Year-Old Amur Tiger (Aug 29, 2023), https://bit.ly/49Fykbz (referring to a tiger as a "beloved individual").

> The common law of America is evolutionary; it is not static and immutable. It is in constant growth, going through mutations in adapting itself to changing conditions and in improving and refining doctrine. By its very nature, it seeks perfection in the achievement of justice.

See 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); *E.A. Stephens & Co. v. Albers*, 81 Colo. 488, 496 (1927) (Having "neither statute nor applicable common-law rule governing the case, we must so apply general principles in the light of custom, existing facts, and common knowledge, that justice will be done.").[7]

Habeas corpus "is a common-law writ and, although different in the respect that the legislature cannot alter its scope, its judicial implementation mirrors the path generally used by courts to adapt the common law and conform it to present times." *Breheny*, 38 N.Y.3d at 613 (Wilson, J., dissenting). Throughout history, courts have used the Great Writ "flexibly to address myriad situations in which liberty was

[7] *See City of Denver v. Dunsmore*, 3 P. 705, 711 (Colo. 1884) ("That [the announced rule] ought to be the law is evident from natural reason and the plainest principles of justice."); *Bertrand*, 872 P.2d at 226 ("this court decided a trilogy of cases that fundamentally altered the common law of Colorado regarding the doctrine of sovereign immunity," prospectively abrogating the doctrine after finding it "unjust and inequitable").

restrained." *Id*. *See* TYLER, *supra* note 3, at 114 ("[T]he judicially created common law writ has long been celebrated for its adaptability and potential to evolve.").

The question on appeal is novel since it is not governed by on-point precedent, but that "does not doom it to failure":

> [A] novel habeas case freed an enslaved person; a novel habeas case removed a woman from the subjugation of her husband; a novel habeas case removed a child from her father's presumptive dominion and transferred her to the custody of another. More broadly, novel common-law cases—of which habeas is a subset—have advanced the law in countless areas.

Breheny, 38 N.Y.3d at 584 (Wilson, J., dissenting).[8]

The District Court erroneously claimed it "lacks the authority to create new rights out of thin air." (CF, 000526). The right to bodily liberty already exists (for humans), and NhRP merely seeks recognition of this right for the elephants. Courts may be compelled to expand existing rights to individuals who previously did not have them.

Citing Blackstone, the District Court irrelevantly stated that "[u]nder the English common law, only human beings" and human-created legal entities "were considered 'persons' capable of holding and asserting legal rights." (CF, 000524)

[8] "[T]he common law would have atrophied hundreds of years ago if it had continued to deny relief in cases of first impression." *Falzone v. Busch*, 45 N.J. 559, 566 (1965).

(cleaned up). This does not mean elephants cannot have the right to bodily liberty today. "Courts should not be averse to molding common law principles to meet the dictates of experience and observation." *Tesone*, 152 Colo. at 603 (Frantz, C.J., dissenting). "[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.*

e. Limiting the Great Writ's protections to humans—based solely on species membership—is arbitrary and irrational.

The District Court stated "[o]ur legal system is a human-made system" that does not afford rights to other species, acknowledging this conclusion may be "speciesist" but glibly justifying it as "reality." (CF, 000526). Given the undisputed autonomy of elephants, a common law court—especially this Court—cannot accept this "reality."

Autonomy is a supreme and cherished common law value, which lies at the heart of the right to bodily liberty. *See People v. Medina*, 705 P.2d 961, 968 (Colo. 1985); *People v. Nelson*, 172 Colo. 456, 459 (1970); (*see generally Petition* CF, 000086-89). Habeas corpus is "deeply rooted in our cherished ideas of individual autonomy and free choice." *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 753 (N.Y. Sup. Ct. 2015) (citations omitted). It "serves to protect against unjust captivity and to safeguard the right to bodily liberty," and "those

protections are not the singular possessions of human beings." *Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting).

To exclude elephants from seeking habeas relief despite their proven autonomy is to hold that autonomy does not matter. It is to hold that the fundamental common law principles of justice, liberty, and equality, which command the protection of autonomy, do not matter either. "'Reason is the soul of the law.'" *Rains v. Rains*, 46 P.2d 740, 742 (Colo. 1935) (citation omitted). But excluding autonomous beings from the Great Writ's protections, based solely on species membership, exemplifies arbitrariness and irrationality.

To argue species membership is what matters—simply by asserting that it does—is "question begging in its purest form." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting). Preferring "the comforting incoherence of its circular logic," the District Court'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." *Id*.[9]

[9] *See* KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 34 (2019) ("[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

Adopting the *Breheny* majority's non-sequitur, the District Court wrote: "'[T]he great writ protects the right to liberty of humans *because* they are humans with certain fundamental liberty rights recognized by law.'" (CF, 000524) (citation omitted). This is "nothing more than a tautological evasion." 38 N.Y.3d at 633 (Rivera, J., dissenting). Habeas corpus does and should protect the right to liberty of humans, but this is no reason to limit the writ's protections to members of our species. 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)." *Id.* at 617-18 (Wilson, J., dissenting).

The District Court irrationally claimed nothing in the Great Writ's history supports extending its protections beyond humans, despite acknowledging the writ's "great flexibility and imagination" to remedy "unjust confinements" in the past. (CF, 000524). This case seeks to remedy an unjust confinement, as in habeas cases involving enslaved humans, wives, and children.

Why should Missy, Kimba, Lucky, LouLou, and Jambo be treated differently for purposes of habeas corpus?

---

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.").

To answer, "they are not human," assumes the validity of human exceptionalism: that there are categorical, fundamental differences between elephants and humans that could justify such profound discrepancies under the law. "Prior to the twentieth century, human understanding of animal intelligence was minimal," with humans regarding "themselves as 'unique in their sociality, individuality, and intelligence.'" *Breheny*, 38 N.Y.3d at 606 (Wilson, J., dissenting) (citation omitted). However, "researchers began to discredit the notion of human exceptionalism" as scientific knowledge progressed in the twentieth century. *Id*.

"Whether an elephant could have petitioned for habeas corpus in the 18th century is a different question from whether an elephant can do so today because we know much more about elephant cognition, social organization, behaviors and needs than we did in past centuries, and our laws and norms have changed in response to our improved knowledge of animals." *Id*. at 603. "[T]he contrast between what we now know and the paucity of information in earlier times must inform our analysis." *Id*. at 607. *See Tesone*, 152 Colo. at 603 (Frantz, C.J., dissenting) ("where the reason of the rule ceased the rule also ceased," and where "a particular rule had never been founded upon reason," "that rule likewise ceased") (cleaned up); *accord Rains*, 46 P.2d at 742.

Today we know "elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs." (*Order*, CF, p. 000530). For this Court to exclude them from the Great Writ's protections—based solely on species membership—is thus arbitrary and irrational. Such exclusion would affirm human exceptionalism, undermining the fundamental values and principles that courts are duty-bound to uphold.

f. Floodgate concerns do not justify limiting the Great Writ's protections to humans.

Citing the *Breheny* majority, the District Court claimed that recognizing the elephants' right to bodily liberty "would have an enormous destabilizing impact on modern society," including:

> [C]all[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. If an elephant today, why not a dog, a pig, a cow, or a chicken tomorrow?

(CF, 000525; cleaned up). Judge Wilson noted these imagined scenarios "are so facially preposterous that they hardly deserve a response." *Breheny*, 38 N.Y.3d at 620 (Wilson, J., dissenting).

The scenarios wrongly assume ruling in the elephants' favor would require or necessarily result in rights for other nonhuman animals. This case solely concerns

the five elephants at Cheyenne Mountain Zoo, whose autonomy and extraordinary cognitive complexity have been proven by expert scientific evidence; it does *not* concern members of other species. Ruling in their favor would represent a historic (and much-celebrated) evolution in the common law, but the hyperbolic claim that it "would quite likely have the effect of upending much of our legal system" is untrue, asserted without support. (*Order*, CF, 000525). *See Breheny*, 38 N.Y.3d at 621 (Wilson, J., dissenting) ("Whatever rights and interests Happy [the elephant] may have do not tell us anything about the rights my dog has.").

The common law's scope is determined "incrementally, on a case-by-case basis." *Id*. at 623. 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." *Id.* at 621.

The "inherently case-by-case" nature of habeas corpus is such that each case acts "directly only on the particular petitioner seeking relief," as with cases liberating enslaved persons, women, and children. *Id*. at 602. "[W]hether a being can invoke habeas is highly case-specific." *Id*. at 621. "Each subsequent case would define the contours of the common law, whatever the result—which is the enduring genius of the common law." *Id*. at 623. *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.").

Moreover, recognition of Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty could not possibly destabilize modern society, as their captivity "serves no purpose upon which society depends." *Breheny*, 38 N.Y.3d at 641 n.8 (Rivera, J., dissenting). Elephants have not "evolved to dwell alongside humans"; they "exist wholly apart from human society, save for when human beings upset that natural order through their intervention." *Id*. at 640.

Lacking any rational foundation, floodgate concerns merely distract from the injustice at hand.[10]

C. The Petition establishes a prima facie case that the Zoo violates the elephants' right to bodily liberty.

A habeas petition may only be dismissed without a hearing if it fails to make a prima face case of unlawful confinement. *Fields,* 984 P.2d at 1169. Because the Petition makes such a case, the District Court was required to issue a writ of habeas

[10] "But if *Sommersett's Case*, the *Lemmon Slave Case* or the cases involving women and children had produced a flood of habeas petitions freeing victims of unjust confinement, would history view them with disapproval?" *Breheny*, 38 N.Y.3d at 624 (Wilson, J., dissenting). "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 (1983) (cleaned up).

corpus and hold a merits hearing. (*Petition* CF, 000063-69). *See Breheny*, 38 N.Y.3d at 624 (Wilson, J., dissenting) ("Happy is entitled to a merits hearing on her habeas corpus petition[.]").

Assuming Missy, Kimba, Lucky, LouLou, and Jambo have the common law right to bodily liberty protected by habeas corpus, the Petition—grounded in expert evidence—establishes that the Zoo violates their right by depriving the elephants of "the space and variety of terrain that they need to roam, exercise, and live healthy elephant lives." (*Order*, CF, 000530). Unable to flourish, they cannot meaningfully exercise their autonomy and extraordinary cognitive complexity, including the freedom to choose where to go, what to do, and with whom to be. They are suffering immensely and unnecessarily.[11]

The District Court recognized that "[a]s a matter of pure justice" based on the current record, "elephants are *entitled* to be treated with the dignity befitting their species," which "cannot be done . . . if they are confined in zoos that lack the

[11] The violation of the elephants' common law right to bodily liberty renders their confinement unlawful. The question is not whether their "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).

substantial acreage needed to allow them to flourish." (CF, 000532) (emphasis added).

Recognition of their dignity must be accorded legal significance; otherwise, it is nothing more than an empty reference. *See Breheny*, 38 N.Y.3d at 628 (Rivera, J., dissenting) ("We cannot elide the question of Happy's legal rights and the use of the writ by a nonhuman animal with empty references to her 'dignity' and 'intelligen[ce].' . . . [T]here is nothing dignified about her captivity.") (citation omitted). The concept of dignity has a normative function. "It is a form of respect that matters to a moral agent as a guide, even an imperative, for how we ought to act." Melanie Challenger, *Beginning with Dignity*, *in* ANIMAL DIGNITY: PHILOSOPHICAL REFLECTIONS ON NON-HUMAN EXISTENCE 6 (2023). In *Medina*, this Court found that forcibly medicating a patient, solely to alleviate the risk of possible future injury, "would be *irreconcilable* with the personal dignity of the individual and would render the patient's interest in bodily integrity *nothing more than an illusion*." 705 P.2d at 974 (emphasis added).

1. The District Court did not need to recognize the elephants' right to bodily liberty for purposes of issuing the writ.

The District Court did not need to resolve the merits question of the elephants' right to bodily liberty, since throughout history, writs of habeas corpus have been issued for individuals whose right to bodily liberty was previously unrecognized.

(*See generally Petition* CF, 000067-69). "[T]he writ has long been available to those whose humanity was never fully recognized by law," notwithstanding "our country's tortured history of oppression and subjugation based on race, gender, culture, national origin, and citizenship." *Breheny*, 38 N.Y.3d at 631 (Rivera, J., dissenting). Habeas corpus has been "invoked on behalf of chattel (enslaved persons) or persons with negligible rights and no independent legal existence (women and children)." *Id*. at 602 (Wilson, J., dissenting). History should "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).

Courts have issued habeas orders to show cause (functionally equivalent to the writ) for nonhuman animals. Though constrained by precedent from granting relief, they were sympathetic to the claims of liberty.

In 2015, a historic habeas order was issued for two imprisoned chimpanzees, "[g]iven the important questions raised." *Stanley*, 49 Misc.3d at 748. The trial court understood it did not need to "'make an initial judicial determination that [the chimpanzees] are persons in order to issue the writ and show cause order.'" *Id*. (citation omitted).

In 2018, the world's first habeas order for an elephant was issued. (*Petition*, CF, 000069). A trial court found NhRP's arguments "extremely persuasive" for

transferring the elephant Happy from her zoo confinement to a sanctuary. *The Nonhuman Rights Project v. Breheny*, No. 260441/19, 2020 WL 1670735 at *10 (N.Y. Sup. Ct. Feb. 18, 2020) ("*Breheny (Trial Court)*"). Although "[r]egrettably" bound by precedent to deny relief, *id*. at *9, the court went out of its way to recognize that "Happy is more than just a legal thing," but an "intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty." *Id*. at *10.

Accordingly, the District Court did not need to recognize the elephants' right to bodily liberty for purposes of issuing the writ; it needed only to assume, without deciding, that they *could* have this right. The court appeared to agree. It asked whether the elephants have "made a *prima facie* case that they fall into the category of 'person[s]' who may utilize the habeas corpus statute"—not whether they ultimately fall into that category. (CF, 000517).

2. Compelling considerations support recognition of the elephants' right to bodily liberty.

"At its core, this case is about whether society's norms have evolved such that elephants . . . should be able to file habeas petitions to challenge unjust confinements." *Breheny*, 38 N.Y.3d at 588 (Wilson, J., dissenting). "The idea of a habeas petition on behalf of an elephant would have seemed ludicrous" to seventeenth-century philosopher René Descartes, "who saw animals as inanimate,

insentient objects." *Id*. at 609. "Given what we know today, it would be even more absurd to allow Descartes's views" to factor in this case since "human understanding of elephant cognition, social behavior, capabilities and needs demonstrates the absurdity of those ancient, uninformed views." *Id*.

Recognition of Missy, Kimba, Lucky, LouLou, and Jambo's right to bodily liberty is supported by compelling considerations—including science, evolving societal norms, and fundamental common law principles of justice, liberty, and equality. (*Petition*, CF, 000069-92). The District Court should have at least assumed, without deciding, that the elephants could have the right to bodily liberty. Its refusal to do so constitutes a "refusal to confront a manifest injustice." *Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring).

The court even acknowledged "their right to bodily liberty may be supported by the *Breheny* dissents." (CF, 000530). *See Breheny*, 38 N.Y.3d at 626 (Wilson, J., dissenting) ("[W]e should recognize Happy's right to petition for her liberty . . . because the rights we confer on others define who we are as a society."); *id*. at 629 (Rivera, J., dissenting) ("[A]n autonomous animal has a right to live free of an involuntary captivity imposed by humans, that serves no purpose other than to degrade life.").

3. The duty to recognize the elephants' right to bodily liberty must not be deflected onto the legislature.

The District Court stated that because NhRP "seeks an expansion of existing legal rights," the appropriate forum is "the legislature, not this Court." (CF, 000516). This unsupported position ignores that common law courts—including this Court—have expanded existing legal rights without waiting for legislative action. *See*, *e.g., Medina*, 705 P.2d at 971 (expanding the qualified common law right to refuse antipsychotic medication to incompetent patients); *Towns v. Anderson,* 579 P.2d 1163, 1164 (Colo. 1978) (expanding the common law right to recover for negligently inflicted emotional distress to those who suffered no direct physical injury but where the distress resulted in serious physical manifestations); *Rudnicki v. Bianco*, 2021 CO 80, ¶48 (abandoning "common law rule that allows only parents to recover their injured, unemancipated minor child's pre-majority medical expenses," thus expanding the right to recover such expenses to either the child or their parents).

Changing archaic common law is the role and duty of courts. The District Court abdicated its duty by deflecting that responsibility onto the legislature. *See Lovato v. Dist. Court (Tenth Judicial Dist.)*, 198 Colo. 419, 432 (1979) ("[W]e are not only entitled to resolve the question, but *have a duty to do so*. To act otherwise

would be to close our eyes to the scientific and medical advances made world wide in the past two or three decades.") (emphasis added).[12]

Judge Wilson admonished the *Breheny* majority for deflecting its responsibility:

> 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, as the majority does here, 'that's a job for the legislature.' They could have said, 'existing law offers some protections, and we dare not do more.' They could have said, 'we can't be the first.' But they did not. None of those declamations is remotely consistent with our Court's history, role or duty.

38 N.Y.3d at 617 (Wilson, J., dissenting). *See id*. at 634 (Rivera, J., dissenting) ("the fundamental right to be free . . . does not require legislative enactment").

II. The District Court had subject-matter jurisdiction.

A. Standard of review

When the facts are undisputed, "determination of a court's subject matter jurisdiction . . . is reviewed de novo." *Tulips Investments, LLC v. State ex rel. Suthers*, 2015 CO 1, ¶ 11.

[12] "[W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule." *Woods v. Lancet*, 303 N.Y. 349, 355 (1951).

The District Court concluded it lacked subject-matter jurisdiction because the elephants "lack standing to bring a habeas petition." (CF, 000532). It addressed the issue in two parts: "First, have [the elephants] 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?'" (*Id*., 000517).

B. The District Court erred in its jurisdictional analysis.

All district courts "have subject-matter jurisdiction to entertain and decide habeas corpus cases." *Horton*, 43 P.3d at 615. "[H]abeas corpus jurisdiction is broad when a habeas court is presented with a properly pleaded petition for the writ." *Id*. at 616.

C.R.S §13-45-102 states 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 and wherein the illegality of such imprisonment consists, and in whose custody he is detained." NhRP's compliance with these procedural requirements was sufficient to invoke the District Court's jurisdiction. *Cf. Jones v. Williams*, at ¶22 (steps taken by habeas petitioner, including filing in the district court and alleging the denial of parole consideration, were "sufficient to invoke the district court's jurisdiction").

Importantly, dismissal of a habeas petition for failing to make a prima facie showing of unlawful confinement "is not the same as dismissal for lack of jurisdiction." *Id.* at ¶21.

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

The District Court's conclusion it lacked subject-matter jurisdiction because the elephants are not "persons" wrongly assumed jurisdiction was contingent upon their personhood status. (CF, 000526). Personhood is not—and cannot be—a jurisdictional requirement.

While the legislature can make statutory requirements jurisdictional, "the legislature must make the limitation on the court's jurisdiction explicit" *and* "must also possess the authority to limit the court's jurisdiction." *Jones v. Williams,* at ¶17 (citations omitted). "In the Habeas Corpus Act, we find no language expressly or by necessary implication limiting the court's jurisdiction to hear habeas corpus cases," *id.* at ¶18 (citations omitted), and as discussed, the legislature lacks authority to limit the Great Writ's substantive scope.

Habeas corpus has long been invoked on behalf of individuals with few or no rights (e.g., enslaved humans, women, and children). Jurisdiction was never an issue in those cases. The same is true here:

> If an enslaved human being with no legal personhood, a Native American tribal leader whom the federal government argued could not be considered a person under law, a married woman who could be abused by her husband with impunity, a resident of Puerto Rico who is a United States citizen deprived of full rights because of Puerto Rico's colonial status, and an enemy combatant as defined by the federal government can all seek habeas corpus relief, so can an autonomous nonhuman animal.

Breheny, 38 N.Y.3d at 631 (Rivera, J., dissenting) (citations omitted).[13]

Whether the elephants "have standing 'in the first instance'" is irrelevant to the issue of jurisdiction. (CF, 000517). This erroneous framing was imported from *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn.App. 36, 41 (2019), where a Connecticut trial court was found to lack subject-matter jurisdiction over NhRP's petition on behalf of three elephants because "the elephants, not being persons, lacked standing in the first instance."

This Court must reject *Commerford* as it directly conflicts with *Jackson v. Bulloch*, 12 Conn. 38 (1837), where an enslaved person, Nancy Jackson, was freed through habeas corpus despite lacking legal personhood in the first instance. Jackson's status did not deprive the court of jurisdiction, and it had no objection to

[13] *See* PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 207-08 (2010) (Cases in England "suggest powerfully that neither free nor slave status, nor apparent place of birth, precluded using habeas corpus. . . . [W]hat modern law would call 'standing' was simply not an issue.").

James Mars, an abolitionist and former enslaved person, filing a habeas petition on her behalf.

The District Court incorrectly stated that, aside from the opinions of Judges Wilson, Rivera, and Fahey, "the position of all other courts" is that nonhuman animals are not "persons" with "standing to utilize the habeas corpus statute." (CF, 000520, 000515-516) (citing cases). Except for *Commerford*, none of the cited habeas cases found a lack of standing based on personhood status. Two trial courts explicitly found NhRP had standing on behalf of nonhuman animals, despite concluding they lacked personhood. *Stanley*, 49 Misc.3d at 756 (two chimpanzees); *Breheny (Trial Court)*, 2020 WL 1670735 at *7 (elephant).[14]

Rowley v. City of New Bedford, 99 Mass.App.Ct. 1104, 2020 WL 7690259 (2020) (unpublished) is also inapposite. (CF, 000520). *Rowley* affirmed the denial of a habeas petition brought on behalf of two elephants on the ground that they are not "persons," but this conclusion was a decision *on the merits*, not on standing. *See id*. at *1 n.2 (petitioner engaged in the unauthorized practice of law, but "we decline to dismiss the appeal on this basis, and instead reach the merits"). While the petitioner

[14] The District Court cited four non-habeas cases (three federal, one state) where nonhuman animals were found to lack standing, but those standing determinations were *not* jurisdictional. (CF, 000520-521).

could not litigate the case, the court ruled the relevant procedural statute "arguably does permit Rowley to file th[e] petition on [the elephants'] behalf." *Id*.

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

The District Court wrongly suggested NhRP had to allege a "significant relationship" with the elephants to file the Petition on their behalf. (CF, 000527-528).

First, C.R.S §13-45-102 allows a habeas petition to be signed "by the party or some person on his behalf" and contains no language requiring a "significant relationship." Absent any qualifying or limiting language, the habeas statute cannot be construed to include a "significant relationship" requirement. *See Garcia v. People*, 2023 CO 41, ¶14 ("We do not add words to the legislature's chosen text."); *accord People v. Diaz*, 2015 CO 28, ¶15.

Second, this Court has repeatedly "admonished that '[habeas corpus] is not to be hedged or in anywise circumscribed with technical requirements.'" *Jones v. Williams*, at ¶18 (citation omitted). Reading a "significant relationship" requirement into §13-45-102 would do exactly that. A challenge to an unlawful denial of freedom—brought by an unrelated third party—could not proceed no matter how well founded, which is an affront to the Great Writ's purpose as "'the precious safeguard of personal liberty.'" *Geer*, 331 P.2d at 261 (citation omitted).

Third, §13-45-102, essentially unchanged since its inception,[15] should be construed in accord with the Great Writ's history. Unrelated third parties have long been allowed to seek habeas corpus on behalf of individuals alleged to be illegally restrained of their liberty—including in England,[16] the United States,[17] and other English-speaking jurisdictions.[18] *See* 11 HALSBURY'S LAWS OF ENGLAND, §1476, p. 783 (4th ed. 1976), bit.ly/3X055uu ("Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment[.]"); JUDITH FARBEY ET AL., THE LAW OF HABEAS CORPUS 237-38 (3d ed. 2011) (Where "a prisoner is being held in circumstances which do not allow for

---

[15] Ch. 41 of the Acts of 1868, §2, https://bit.ly/43zYnha (petition may be "signed by the party or some person in his behalf").

[16] *E.g.*, *Case of Hottentot Venus*, 13 East 195 (K.B. 1805), https://bit.ly/3KIJsri (writ obtained on behalf of African woman); *Re Gootoo and Inyokwana*, 35 Sol. Jo. 481 (1891), https://bit.ly/3KxsyvW (same, two boys in danger of being sent abroad for slavery).

[17] *E.g.*, *Lemmon v. People*, 20 N.Y. 562 (1860) (writ obtained on behalf of eight slaves); *In re Kirk*, 1 Edm.Sel.Cas. 315 (N.Y. Sup. Ct. 1846) (same, slave child); *Com. v. Aves*, 35 Mass. 193 (1836) (same, slave child); *Ex parte The Queen of the Bay*, 1 Cal. 157 (1850) (same, five girls kidnapped and detained on a ship).

[18] *E.g.*, *Ex Parte West*, 2 Legge. 1475 (Supreme Court, New South Wales 1861), https://bit.ly/3uu9Ek1 (writ obtained on behalf of "aboriginal boy"); *Truth about Motorways Pty Limited v. Macquarie Infrastructure Investment Management Limited*, HCA 11, ¶¶ 2, 94, 162 (2000) (High Court of Australia) https://bit.ly/3xjAxc0 (strangers may seek habeas corpus).

recourse to the courts," "an application from a third party will be entertained where it is shown . . . that the prisoner is so confined as to be unable to initiate proceedings").

To find a "significant relationship" requirement, the District Court relied on *Whitmore v. Arkansas*, 495 U.S. 149 (1990) and *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018), (CF, 000527-528), non-habeas corpus cases which discuss "next friend" federal standing requirements.

In *Whitmore*, after articulating two prerequisites for next friend standing, the Court stated in dicta: "it has been *further suggested* that a 'next friend' must have some significant relationship with the real party in interest." 495 U.S. at 163-64 (emphasis added). The Ninth Circuit applied *Whitmore*'s dicta in *Naruto*, where it held a third party could not sue on behalf of a crested macaque monkey for copyright infringement because it could not claim a "significant relationship" with the monkey. 888 F.3d at 421. Neither *Whitmore* nor *Naruto* has been cited in any published Colorado decision. The District Court cited no authority, as there is none, for the

notion that *Whitmore*'s dicta (adopted by some courts, though not others)[19] should be read into §13-45-102.[20]

The District Court perversely suggested it is the Zoo that "properly speaks for the elephants," given the Zoo's "more significant relationship with [them]." (CF, 000529). The Zoo is the *least qualified* entity to do so: its interest in confining the elephants, to display them for paying customers, is fundamentally adverse to their interest in flourishing. *Cf. Potter v. Thieman*, 770 P.2d 1348, 1350 (Colo. App. 1989).

The District Court stated the Petition "presented no evidence" as to what these elephants would elect to do if given a choice between remaining at the Zoo or moving to an accredited elephant sanctuary. (CF, 000529). This assertion is irreconcilable with the court's acknowledgment that they "would be better off in an accredited elephant sanctuary." (*Id*., 000530). Similarly disingenuous is the assertion that, while "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

[19] *See Sam M. ex rel. Elliott v. Carcieri,* 608 F.3d 77, 92 (1st Cir. 2010); *Am. Civil Liberties Union Found. on behalf of Unnamed U.S. Citizen v. Mattis*, 286 F. Supp. 3d 53, 59 (D.D.C. 2017).

[20] "[S]tate courts are not bound to adhere to federal standing requirements." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

for the kinds of social and other activities that make elephants elephants," this may not be true for the elephants here. (*Id*., 000529). Not only is this statement irreconcilable with the court's acknowledgment just noted, there is no scientific basis for arguing wild and captive elephants are fundamentally different as they have the same biology and needs. (*Poole Decl*., CF, 000199 at ¶67).

Finally, the District Court falsely claimed NhRP is not dedicated to "these specific elephants" but to a "nationwide campaign . . . to establish rights for animals at large." (CF, 000528). The goal of every NhRP lawsuit is to secure the freedom of our nonhuman animal clients. Thus, NhRP has a standing offer—which the Zoo rejected—to withdraw the Petition should the Zoo agree to allow the elephants to be transferred to an accredited sanctuary. Having refused to do what is morally right and just, it is the Zoo that is not dedicated to Missy, Kimba, Lucky, LouLou, and Jambo, beyond exploiting these extraordinary beings for profit.

CONCLUSION

It is time for Colorado common law to evolve. The elephants' exclusion from the Great Writ's protections is unjust and must be corrected. This Court should reverse and remand the case with instructions to issue a writ of habeas corpus.

Dated: May 30, 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 30th day of May 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
Christopher O. Murray, #39340
Rosa L. Baum, #56652
675 Fifteenth Street. Suite 2900
Denver, CO 80202
Telephone: (303) 223-1100
Facsimile: (303) 223-1111
Email: cmurray@bhfs.com; rbaum@bhfs.com

/s/ Jake Davis
Jake Davis