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“Society's determination as to whether elephants have a right to be free of oppressive confinement, which they may test through habeas corpus, is not likely to be the same today as it was 100 years ago. At its core, this case is about whether society's norms have evolved such that elephants like Happy should be able to file habeas petitions to challenge unjust confinements.”

- *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 588 (N.Y. 2022) (Wilson, J., dissenting).

“We are here presented with an opportunity to affirm our own humanity by committing ourselves to the promise of freedom for a living being with the characteristics displayed by [the elephant] Happy. We are asked to recognize that the writ may be invoked because Happy is a sentient being, who feels and understands, who has the capacity, if not the opportunity, for self-determination. That recognition means that a court may consider whether to issue the writ because it is unjust to continue Happy's decades-long confinement in an unnatural habitat where she is held for the sole purpose of human entertainment. . . . A gilded cage is still a cage. Happy may be a dignified creature, but there is nothing dignified about her captivity.”

- *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 642 (N.Y. 2022) (Rivera, J., dissenting).

“The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of habeas corpus is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a ‘person,’ there is no doubt that it is not merely a thing.”

- *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (N.Y. 2018) (Fahey, J., concurring).

VERIFIED PETITION FOR WRIT OF HABEAS CORPUS

Pursuant to Colorado common law, C.R.C.P. Rule 106(a)(1), and C.R.S § 13-45-102, Petitioner Nonhuman Rights Project, Inc. (“NhRP”), hereby submits this Verified Petition For Writ of Habeas Corpus (“Petition”) on behalf of Missy, Kimba, Lucky, LouLou, and Jambo, five African elephants unlawfully confined and restrained of their liberty at Cheyenne Mountain Zoo (“CMZ”) in Colorado Springs, Colorado, by Respondents Cheyenne Mountain Zoological Society and its

President and CEO, Bob Chastain (“Respondents”), and in support thereof, respectfully states as follows:

I. PRELIMINARY STATEMENT

1. This case presents a question of first impression in Colorado: should a court recognize the common law right to bodily liberty protected by habeas corpus of elephants based on their autonomy and extraordinary cognitive complexity?
2. In June of last year, Judge Rowan Wilson and Judge Jenny Rivera of the New York Court of Appeals—New York’s highest Court—found that the common law writ of habeas corpus was available for an elephant to challenge her unjust confinement at a zoo. *See Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 577-626 (N.Y. 2022) (Wilson, J., dissenting); *id.* at 626-42 (Rivera, J., dissenting). They refuted the irrational and arbitrary notion that only members of the species *Homo Sapiens* may invoke the protections of the Great Writ, recognizing that as societal norms and knowledge about nonhuman animals evolve, so too must the common law.
3. Missy, Kimba, Lucky, LouLou, and Jambo are five African elephants confined at CMZ. The [science](#) is [clear](#): like humans, elephants are [autonomous](#) and extraordinarily cognitively complex beings—and they possess complex biological, psychological, and social needs that cannot be met at the zoo. Elephants are meant to live as [self-determinative](#), autonomous beings in the [wild](#). When forced to live in an unnatural environment, they [suffer](#) greatly as a result. It is time for Colorado common law to evolve to allow the elephants at CMZ to obtain habeas corpus relief from their inherently unjust confinement.
4. The NhRP seeks this Court’s recognition of the elephants’ common law right to bodily liberty protected by habeas corpus and no other right. Upon recognizing the elephants’ common law

right to bodily liberty and determining that their confinement at the CMZ violates this right, this Court must order them released to an accredited elephant sanctuary where they can exercise their autonomy and extraordinary cognitive complexity to the greatest extent possible.¹

5. Respondents' confinement of Missy, Kimba, Lucky, LouLou, and Jambo is unlawful because it violates the elephants' common law right to bodily liberty protected by habeas corpus—by depriving them of their ability to meaningfully exercise their autonomy and extraordinary cognitive complexity, including the freedom to choose where to go, what to do, and with whom to be.
6. That Respondents may be in compliance with animal welfare statutes does not render the elephants' confinement lawful, as those statutes do not address the right to bodily liberty. Nor is it relevant that elephants are not members of the species *Homo Sapiens*. Regardless of the care the elephants are receiving or their species membership, their bodily liberty has been severely and unjustifiably curtailed, thus rendering their confinement unlawful.
7. The fundamental common law principles of justice, liberty, and equality compel Missy, Kimba, Lucky, LouLou, and Jambo's entitlement to their freedom.
8. The Petition makes a prima facie showing that the elephants are entitled to release. Specifically, the Petition establishes that (1) the elephants have the common law right to bodily liberty protected by habeas corpus, and (2) their right has been violated. Accordingly, this Court "must issue a writ of habeas corpus forthwith" and set a hearing upon return of the writ. *Cardiel v. Brittian*, 833 P.2d 748, 752 (Colo. 1992) (citations omitted); *People v. Calyer*, 736 P.2d 1204, 1207 (Colo. 1987) ("When a habeas corpus petition is filed, the court shall issue a writ unless

¹ Specifically, a sanctuary accredited by the Global Federation of Animal Sanctuaries (GFAS).

the petition or supporting documents indicate that no relief is available.”); C.R.S. § 13-45-101.

This Court need not initially determine that the elephants have the right to bodily liberty in order to issue a writ of habeas corpus (and set a hearing on the merits of the Petition); it need only assume, without deciding, that the elephants could possibly have this right.²

9. To refuse to issue the writ and allow the case to proceed to a hearing on the merits would be a “refusal to confront a manifest injustice.” *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (N.Y. 2018) (Fahey, J., concurring). Judge Eugene Fahey of the New York Court of Appeals asked: “Does an intelligent nonhuman animal who thinks and plans and appreciates life as human beings do have the right to the protection of the law against arbitrary cruelties and enforced detentions visited on him or her? This is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention.” *Id.* at 1058.
10. This Court would not be the first court in the United States to issue a writ of habeas corpus on behalf of a nonhuman animal. The NhRP secured the equivalent of a writ of habeas corpus in two prior cases, one on behalf of two chimpanzees confined at a state university,³ and one on behalf an elephant confined at a zoo.⁴ While the courts in those cases ultimately denied habeas corpus relief, the respondents were required to justify the legality of the confinements at issue.

² In habeas proceedings brought pursuant to C.R.S. § 13-45-102, pertaining to noncriminal matters, the “same proceedings shall thereupon be had in all respects as are directed in section 13-45-101.” C.R.S. § 13-45-102.

³ See *Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 748 (Sup. Ct. 2015) (“Given the important questions raised here, I signed the petitioner’s order to show cause, and was mindful of petitioner’s assertion that ‘the court need not make an initial judicial determination that [chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.’”).

⁴ See Mallory Diefenbach, *Orleans County issues first habeas corpus on behalf of elephant*, The Daily News (Nov. 21, 2018), <https://bit.ly/3AwkCWV>.

This Court must require Respondents to do the same regarding their confinement of Missy, Kimba, Lucky, LouLou, and Jambo.

11. Seven of the world’s most renowned experts on elephant cognition and behavior have submitted Expert Scientific Declarations in support of the Petition. Their declarations, listed below, are attached to the Petition and made a part hereof:

Exhibit 1: February 26, 2023, and April 20, 2023, Joint Declaration of Richard M. Byrne, Ph.D., and Lucy Bates, Ph.D. (“Bates & Byrne Decl.”).

Exhibit 2: March 20, 2023, Declaration of Joyce Poole, Ph.D. (“Poole Decl.”).

Exhibit 3: March 29, 2023, Declaration of Karen McComb, Ph.D. (“McComb Decl.”).

Exhibit 4: April 14, 2023, Declaration of Cynthia Moss, Sc.D. (“Moss Decl.”).

Exhibit 5: April 26, 2023, Declaration of Bob Jacobs, Ph.D. (“Jacobs Decl.”).

Exhibit 6: May 22, 2023, Declaration of Keith Lindsay, Ph.D. (“Lindsay Decl.”).

12. Pursuant to C.R.S § 13-45-102, the NhRP has standing to file the Petition on the elephants’ behalf. No prior petition for habeas corpus relief has been made to any court or judge with respect to this matter.

II. PARTIES

13. Petitioner NhRP is a 501(c)(3) non-profit corporation incorporated in the State of Massachusetts, with a principal address at 5195 NW 112th Terrace, Coral Springs, Florida. The NhRP is the only civil rights organization in the United States dedicated solely to securing legal rights for nonhuman animals. Since 1995, the NhRP has worked to obtain legal rights for autonomous nonhuman animals such as chimpanzees and elephants.

14. Missy, Kimba, Lucky, LouLou, and Jambo are five wild-born female African elephants confined at CMZ.⁵ *See generally* Lindsay Decl. ¶¶ 43-44.

- Missy is approximately 54 years old.⁶ She was captured in 1971 and imported to the United States. She has been confined at zoos since 1976: from 1976-2006, she was held captive at the Jacksonville Zoo and Gardens; from 2006-2015, she was held captive at the Lee Richardson Zoo; and since 2015, she has been held captive at CMZ.
- Kimba is approximately 46 years old and was born at Kruger National Park in South Africa.⁷ She was captured and imported to the United States in 1980. Kimba has been confined at CMZ since 1981.
- Lucky is approximately 43 years old and was born at Kruger National Park in South Africa.⁸ She was captured and imported to the United States in 1981. Lucky has been confined at CMZ since 1981.
- LouLou is approximately 41 years old and was born in Kenya.⁹ She was captured and imported to the United States in 1984. She has been confined at zoos since 1984: from 1984-2006, she was held captive at the Jacksonville Zoo and Gardens; from 2006-2015, she was held captive at the Lee Richardson Zoo; and since 2015, she has been held captive at CMZ.

⁵ Six elephants have died at CMZ, including most recently, a wild-born female African elephant named Malaika (aged 37). *See generally* Lindsay Decl. ¶ 45.

⁶ The Elephant Database, Missy, <https://bit.ly/46a5sXv>.

⁷ The Elephant Database, Kimba, <https://bit.ly/3pgUUVL>.

⁸ The Elephant Database, Lucky, <https://bit.ly/3CH9skQ>.

⁹ The Elephant Database, LouLou, <https://bit.ly/3NclI1q>.

- Jambo, formerly known as Dumbo, is approximately 40 years old.¹⁰ She was captured and imported to the United States in 1985. From 1986-2011, Jambo was held captive by Joe Frisco and forced to travel and perform in circus acts across the United States. Jambo killed an elephant trainer in 2010.¹¹ Jambo was transferred to CMZ in 2011 where she remains confined.

15. Respondent Cheyenne Mountain Zoological Society, which owns and operates CMZ, is a 501(c)(3) non-profit incorporated in the state of Colorado with a principal place of business at 4250 Cheyenne Mountain Zoo Road, Colorado Springs, CO 80906. Respondent Bob Chastain is the President and CEO of Cheyenne Mountain Zoological Society.

III. STANDING

16. The NhRP has standing to file the Petition on the elephants' behalf. The relevant habeas corpus procedural rule provides that a petition for a writ of habeas corpus, "shall be in writing, signed by the party or some person on his behalf, setting forth the facts concerning his imprisonment." C.R.S § 13-45-102 (emphasis added).

17. This language is essentially unchanged from the statute's original inception, Ch. 41 of the Acts of 1868, § 2, <https://bit.ly/43zYnha> ("he or she may apply for a writ of *habeas corpus* as aforesaid, in writing, signed by the party or some person in his behalf"). The 1868 habeas corpus statute, in turn, merely enshrined the traditional common law habeas corpus rule in effect for centuries in English-speaking jurisdictions—that ordinarily, anyone may seek habeas corpus on behalf of a detainee who is unlawfully deprived of their freedom.

¹⁰ The Elephant Database, Jambo, <https://bit.ly/44aLLwL>.

¹¹ CNN Wire Staff, *Elephant kills trainer at Pennsylvania Circus*, CNN (April 10, 2010), <https://bit.ly/43S4ddS>.

18. “Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment.” 11 HALSBURY’S LAWS OF ENGLAND, § 1476, p. 783 (4th ed. 1976), bit.ly/3X055uu; accord JUDITH FARBEY ET AL., THE LAW OF HABEAS CORPUS 237 (3d ed. 2011) (“where a prisoner is being held in circumstances which do not allow for recourse to the courts . . . an application from a third party will be entertained”); ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY, AND ON THE WRIT OF HABEAS CORPUS 211-12 (1858) (it “is not necessary that [the application] proceed from [the prisoner]. An agent or friend may make it on behalf of the prisoner . . . no legal relation is required to exist between the prisoner and the person making the application. It may be made by any one”). See *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990) (“As early as the 17th century, the English Habeas Corpus Act of 1679 authorized complaints to be filed by ‘any one on . . . behalf’ of detained persons . . . and in 1704 the House of Lords resolved ‘[T]hat every Englishman, who is imprisoned by any authority whatsoever, has an undoubted right, by his agents, or friends, to apply for, and obtain a Writ of Habeas Corpus, in order to procure his liberty by due course of law.’”) (citation omitted).¹²

¹² See also *Lemmon v. People*, 20 N.Y. 562 (1860) (abolitionist stranger obtained a writ of habeas corpus on behalf of eight slaves); *In re Kirk*, 1 Edm.Sel.Cas. 315 (1846) (abolitionist stranger obtained a writ of habeas corpus on behalf of a slave); *Commonwealth v. Taylor*, 44 Mass. 72 (1841) (abolitionist stranger obtained a writ of habeas corpus on behalf of a child slave); *Commonwealth v. Aves*, 35 Mass. 193 (1836) (abolitionist stranger obtained a writ of habeas corpus on behalf of a child slave); *Truth about Motorways Pty Limited v. Macquarie Infrastructure Investment Management Limited*, HCA 11, 85 (2000) (High Court of Australia) (stranger may seek habeas corpus), <https://bit.ly/3xjAxc0>; *In re Ning Yi-Ching*, 34 Am. J. Int’l 347 (1940) (stranger China Campaign Committee obtained a writ of habeas corpus on behalf of four Chinese nationals), <https://bit.ly/3JyAyLI>; *Boudreau v. Thaw*, 13 D.L.R. 712 (Quebec Sup. Ct. 1913) (stranger obtained a writ of habeas corpus), <https://bit.ly/3xiATQ9>; *Gootoo and Inyokwana*, 35 Sol. Jo. 481 (1891) (stranger and member of antislavery society obtained a writ of habeas corpus on behalf of children destined for slavery abroad), <https://bit.ly/3KxsvvW>; *Ex Parte West*, 2 Legge. 1475 (Supreme Court of New South Wales 1861) (stranger obtained a writ of habeas corpus on behalf of an aboriginal child), <https://bit.ly/3uu9Ek1>; *Case of Hottentot Venus*, 13 East 185, 104 Eng.

19. Consistent with C.R.S. § 13-45-102, Colorado courts have generally not restricted who may file a habeas corpus petition on another's behalf.¹³ See *Zimmerman v. Angele*, 137 Colo. 129 (1958) (habeas petition filed on behalf of a woman by her counsel to secure her release from state hospital); *Garcia v. Carmel*, 873 P.2d 1317, 1318 (Colo. 1994) (“[T]he petitioner, through counsel, a deputy state public defender, filed a petition for writ of habeas corpus in the Pueblo County District Court.”); *Jones v. Martinez*, 799 P.2d 385, 386 (Colo. 1990) (“[T]he public defender filed an amended petition for writ of habeas corpus on behalf of Jones.”); *Hunt v. People*, 76 Colo. 231 (1924) (“a petition for writ of habeas corpus was filed in the district court of Pueblo county on behalf of Victor Hunt”).
20. The NhRP has filed seven habeas corpus petitions in New York on behalf of an elephant and four chimpanzees. No court found that the NhRP lacked standing to seek habeas corpus relief on their behalf.¹⁴ In two of the cases, the courts explicitly stated that the NhRP had standing. See *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735 *1, *7 (N.Y. Sup. Ct. 2020) (hereafter *Breheny (Trial Court)*) (“The NhRP has standing to file the Petition for habeas corpus on behalf of Happy [the elephant.]”); *Matter of Nonhuman Rights Project, Inc. v.*

Rep. 344 (K.B. 1805) (stranger abolitionist society obtained a writ of habeas corpus on behalf of an African woman), <https://bit.ly/3KIJsri>.

¹³ It is only in the context of a child custody case that a stranger has been denied standing to bring a habeas corpus action. See *Lopez v. Smith*, 146 Colo. 180, 184 (1961) (“But a stranger lacks standing to maintain habeas corpus looking to an award of custody as against the parents of the child who are presumed to be entitled to the custody. One who seeks custody through habeas corpus must show a prima facie right to custody.”) (citations omitted).

¹⁴ Like C.R.S. § 13-45-102, the New York procedural statute governing the filing of habeas corpus petitions allows for a third party to bring a petition on anyone's behalf. See CPLR § 7002(a) (a petition for a writ of habeas corpus may be brought by “one acting on . . . behalf of [a] person legally imprisoned or otherwise restrained in his liberty within the state.”).

Stanley, 49 Misc.3d 746, 756 (Sup. Ct. 2015) (“As [CPLR 7002(a)] places no restriction on who may bring a petition for habeas corpus on behalf of the person restrained, and absent any authority for the proposition that the statutory phrase ‘one acting on his behalf’ is modified by a requirement for obtaining standing by a third party, petitioner has met its burden of demonstrating that it has standing” on behalf of two chimpanzees.).¹⁵

IV. THE EXPERT SCIENTIFIC DECLARATIONS

A. Elephants are autonomous and extraordinarily cognitively complex beings

21. The Expert Scientific Declarations demonstrate that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs. The cognitive abilities of elephants include: autonomy; empathy; self-awareness; self-determination; theory of mind (awareness others have minds); insight; working memory; extensive long-term memory that allows them to accumulate social knowledge; the ability to act intentionally and in a goal-oriented manner, and to detect animacy and goal directedness in others; understanding the physical competence and emotional state of others; imitation, including vocal imitation; pointing and understanding pointing; engaging in true teaching (taking the pupil’s lack of knowledge into account and actively showing them what to do); cooperating and building coalitions; cooperative problem-solving, innovative problem-solving, and behavioral flexibility; understanding causation; intentional communication,

¹⁵ Two decisions of the Appellate Court of Connecticut erroneously held that the NhRP lacked standing to bring its habeas corpus petition on behalf of three elephants because “the elephants, not being persons, lacked standing in the first instance.” *Nonhuman Rights Project, Inc. v R.W. Commerford and Sons, Inc.*, 192 Conn.App. 36, 41 (2019); *Nonhuman Rights Project, Inc. v R.W. Commerford & Sons, Inc.*, 197 Conn.App. 353, 360 (2020). Contrary to Connecticut Supreme Court precedent, those decisions improperly conflated the question of NhRP’s standing with the merits of the case (i.e., the elephants’ personhood). *See, e.g., Maloney v. Pac.*, 183 Conn. 313, 321 n.6 (1981) (“We emphasize that the question of standing is not an inquiry into the merits.”).

including vocalizations to share knowledge and information with others in a manner similar to humans; ostensive behavior that emphasizes the importance of a particular communication; displaying a wide variety of gestures, signals, and postures; using specific calls and gestures to plan and discuss a course of action, adjusting their planning according to their assessment of risk, and executing the plan in a coordinated manner; complex learning and categorization abilities; and, an awareness of and response to death, including grieving behaviors.¹⁶

22. Elephants share numerous complex cognitive capacities with humans, including self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities.¹⁷ Many of these capacities have been erroneously considered unique to humans, and each capacity is a fundamental component of autonomy and self-determination.¹⁸

23. Autonomy is defined as self-determined behavior that is based on freedom of choice.¹⁹ As a psychological concept, autonomy implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively.²⁰ Elephants are autonomous since they exhibit self-determined behavior that is based on freedom of choice.²¹

¹⁶ Bates & Byrne Decl. ¶¶ 37-60; McComb Decl. ¶¶ 31-54; Poole Decl. ¶¶ 29-69; Moss Decl. ¶¶ 25-48; Lindsay Decl. ¶¶ 7-34.

¹⁷ Bates & Byrne Decl. ¶ 37; McComb Decl. ¶ 31; Poole Decl. ¶ 29; Moss Decl. ¶ 25.

¹⁸ Bates & Byrne Decl. ¶ 37; McComb Decl. ¶ 31; Poole Decl. ¶ 29; Moss Decl. ¶ 25.

¹⁹ Bates & Byrne Decl. ¶ 30; McComb Decl. ¶ 24; Poole Decl. ¶ 22; Moss Decl. ¶ 18.

²⁰ Bates & Byrne Decl. ¶ 30; McComb Decl. ¶¶ 24, 54; Poole Decl. ¶ 22; Moss Decl. ¶ 18.

²¹ Bates & Byrne Decl. ¶¶ 30, 60; McComb Decl. ¶¶ 24, 31, 54; Poole Decl. ¶¶ 22, 69; Moss Decl. ¶¶ 18, 48; Lindsay Decl. ¶¶ 10, 33-34.

24. Elephants display a high degree of autonomy in the choices they make throughout their decades-long lives, as demonstrated in their foraging decisions and use of space.²² Herbivores with enormous metabolic requirements, elephants must select diets from the diverse vegetation available in complex and constantly variable natural ecosystems, which present both foraging opportunities and existential risks from natural and human hazards.²³ To cope and prosper in the face of these multi-layered challenges, elephants have evolved sensory systems and cognitive capacities that allow them to develop and exhibit flexible and responsive decision strategies.²⁴ These strategies make use of their highly developed anatomical, sensory, and cognitive adaptations and abilities, are fine-tuned over decades of experience navigating environments with predictable and unpredictable elements, and are shared between members of strongly bonded social groups through example, teaching, and learning.²⁵
25. Elephants possess the largest absolute brain of any land animal.²⁶ Even relative to their body sizes, elephant brains are large.²⁷ An encephalization quotient (“EQ”) of 1.0 means a brain is exactly the size expected for that body size; values greater than 1.0 indicate a larger brain than

²² Lindsay Decl. ¶ 10.

²³ *Id.* at ¶ 7.

²⁴ *Id.* at ¶ 8.

²⁵ *Id.* at ¶ 34.

²⁶ Bates & Byrne Decl. ¶ 32; McComb Decl. ¶ 26; Poole Decl. ¶ 24; Moss Decl. ¶ 20.

²⁷ McComb Decl. ¶ 26; Poole Decl. ¶ 24; Moss Decl. ¶ 20; Bates & Byrne Decl. ¶ 32 (“Encephalization quotients (EQ) are a standardized measure of brain size relative to body size and illustrate by how much a species’ brain size deviates from that expected for its body size.”).

expected for that body size.²⁸ Elephants have an EQ of between 1.3 and 2.3 (varying between sex and African and Asian species).²⁹ This means an elephant's brain can be more than twice as large as is expected for an animal of its size.³⁰

26. A large brain allows greater cognitive skill and behavioral flexibility.³¹ Typically, mammals are born with brains weighing up to 90% of the adult weight.³² At birth, human brains weigh only about 27% of the adult brain weight and increase in size over a prolonged childhood period.³³ This lengthy period of brain development (termed "developmental delay") is a key feature of human brain evolution.³⁴ It provides a longer period in which the brain may be shaped by experience and learning, and plays a role in the emergence of complex cognitive abilities such as self-awareness, creativity, forward planning, decision making and social interaction.³⁵ At birth, elephant brains weigh only about 35% of their adult weight, and elephants accordingly undergo a similarly protracted period of growth, development and

²⁸ Bates & Byrne Decl. ¶ 32; McComb Decl. ¶ 26; Poole Decl. ¶ 24; Moss Decl. ¶ 20.

²⁹ Bates & Byrne Decl. ¶ 32; McComb Decl. ¶ 26; Poole Decl. ¶ 24; Moss Decl. ¶ 20.

³⁰ Bates & Byrne Decl. ¶ 32; McComb Decl. ¶ 26; Poole Decl. ¶ 24; Moss Decl. ¶ 20.

³¹ Bates & Byrne Decl. ¶ 32; McComb Decl. ¶ 26; Poole Decl. ¶ 24; Moss Decl. ¶ 20.

³² Bates & Byrne Decl. ¶ 33; McComb Decl. ¶ 27; Poole Decl. ¶ 25; Moss Decl. ¶ 21.

³³ Bates & Byrne Decl. ¶ 33; McComb Decl. ¶ 27; Poole Decl. ¶ 25; Moss Decl. ¶ 21.

³⁴ Bates & Byrne Decl. ¶ 33; McComb Decl. ¶ 27; Poole Decl. ¶ 25; Moss Decl. ¶ 21.

³⁵ Bates & Byrne Decl. ¶ 33; McComb Decl. ¶ 27; Poole Decl. ¶ 25; Moss Decl. ¶ 21.

learning.³⁶ This similar developmental delay in the elephant brain is likewise associated with the emergence of analogous cognitive abilities.³⁷

27. Elephant brains hold nearly as many cortical neurons as do human brains, and a much greater number than do chimpanzees or bottlenose dolphins.³⁸ Elephants' pyramidal neurons—the class of neurons found in the cerebral cortex, particularly the pre-frontal cortex, which is the brain area that controls “executive functions”—are larger than in humans and most other species.³⁹ The degree of complexity of pyramidal neurons is linked to cognitive ability, with more complex connections between pyramidal neurons being associated with increased cognitive capabilities.⁴⁰ Elephant pyramidal neurons have many connections with other neurons for receiving and sending signals, known as a dendritic tree.⁴¹

28. Pyramidal neurons in elephants are just as complex as similar neurons in the human cortex, and like in humans, these neurons are also more complex in the frontal lobe (involved with higher cognitive function) than in the occipital lobe (involved in the early processing of incoming visual information).⁴² These parallels are remarkable in terms of the overall

³⁶ Bates & Byrne Decl. ¶ 33; McComb Decl. ¶ 27; Poole Decl. ¶ 25; Moss Decl. ¶ 21.

³⁷ Bates & Byrne Decl. ¶ 33; McComb Decl. ¶ 27; Poole Decl. ¶ 25; Moss Decl. ¶ 21.

³⁸ Bates & Byrne Decl. ¶ 35; McComb Decl. ¶ 29; Moss Decl. ¶ 23; Poole Decl. ¶ 27 (“Humans: 1.15×10^{10} ; elephants: 1.1×10^{10} ; chimpanzees: 6.2×10^9 ; dolphins: 5.8×10^9 .”).

³⁹ Bates & Byrne Decl. ¶ 35; Poole Decl. ¶ 27; Moss Decl. ¶ 23.

⁴⁰ Bates & Byrne Decl. ¶ 36; McComb Decl. ¶ 30; Poole Decl. ¶ 28; Moss Decl. ¶ 23.

⁴¹ Bates & Byrne Decl. ¶ 36; McComb Decl. ¶ 30; Poole Decl. ¶ 28; Moss Decl. ¶ 23.

⁴² Jacobs Decl. ¶ 9.

complexity of neurons and their functional involvement.⁴³ Due to the length of their dendrites, elephant neurons sample a wide variety of information; this broad synthesis of information may contribute to elephants' contemplative nature—they often appear to be examining their surroundings and thinking very deeply about what is going on around them.⁴⁴

29. Elephants have extensive and long-lasting memories.⁴⁵ Experimental playback of long-distance [contact calls](#) in Amboseli National Park, Kenya, showed that African elephants remember and recognize the voices of at least 100 other elephants.⁴⁶ Each adult female elephant tested was familiar with the contact-call vocalizations of individuals from an average of 14 families in the population.⁴⁷ When the calls came from the test elephants' own family, they contact-called in response and approached the location of the loudspeaker; when they were from another non-related but familiar family, one that had been shown to have a high association index with the test group, they listened but remained relaxed.⁴⁸ However, when a test group heard unfamiliar contact calls from groups with a low association index with the test group, the elephants bunched together and retreated from the area.⁴⁹

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Bates & Byrne Decl. ¶ 54; McComb Decl. ¶ 48; Poole Decl. ¶ 49; Moss Decl. ¶ 42; Lindsay Decl. ¶¶ 12-14.

⁴⁶ Bates & Byrne Decl. ¶ 54; McComb Decl. ¶ 48; Poole Decl. ¶ 49; Moss Decl. ¶ 42.

⁴⁷ Bates & Byrne Decl. ¶ 54; McComb Decl. ¶ 48; Poole Decl. ¶ 49; Moss Decl. ¶ 42.

⁴⁸ Bates & Byrne Decl. ¶ 54; McComb Decl. ¶ 48; Poole Decl. ¶ 49; Moss Decl. ¶ 42.

⁴⁹ Bates & Byrne Decl. ¶ 54; McComb Decl. ¶ 48; Poole Decl. ¶ 49; Moss Decl. ¶ 42.

30. This social knowledge accumulates with age, with older females having the best knowledge of the contact calls of other family groups.⁵⁰ Older females are also better leaders than younger elephants by exhibiting more appropriate decision-making in response to potential threats (in this case, in the form of hearing lion roars).⁵¹ Younger matriarchs under-reacted to hearing roars from male lions, elephants' most dangerous predators, and sensitivity to the roars of male lions increased with increasing matriarch age, with the oldest, most experienced females showing the strongest response to this danger.⁵² These studies show that elephants continue to learn and remember information about their environments throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they age.⁵³ The experiences elephants gain over a lifetime are shared between members of their strongly bonded social groups through example, teaching, and learning.⁵⁴
31. Further demonstration of elephants' long-term memory emerges from data on their movement patterns.⁵⁵ African elephants move over very large distances in their search for food and water.⁵⁶ One group living in the Namib Desert traveled over 600 km in five months, and other elephants in the same region visited water holes approximately every four days, though some

⁵⁰ Bates & Byrne Decl. ¶ 55; McComb Decl. ¶ 49; Poole Decl. ¶ 50; Moss Decl. ¶ 43.

⁵¹ Bates & Byrne Decl. ¶ 55; McComb Decl. ¶ 49; Poole Decl. ¶ 50; Moss Decl. ¶ 43.

⁵² Bates & Byrne Decl. ¶ 55; McComb Decl. ¶ 49; Poole Decl. ¶ 50; Moss Decl. ¶ 43.

⁵³ Bates & Byrne Decl. ¶ 55; McComb Decl. ¶ 49; Poole Decl. ¶ 50; Moss Decl. ¶ 43.

⁵⁴ Lindsay Decl. ¶ 34.

⁵⁵ Bates & Byrne Decl. ¶ 56; McComb Decl. ¶ 50; Poole Decl. ¶ 51; Moss Decl. ¶ 44.

⁵⁶ Bates & Byrne Decl. ¶ 56; McComb Decl. ¶ 50; Poole Decl. ¶ 51; Moss Decl. ¶ 44.

were more than 60 km apart.⁵⁷ Elephants inhabiting the deserts of Namibia and Mali may travel hundreds of kilometers to visit remote water sources shortly after the onset of a period of rainfall, sometimes along routes that have not been used for many years.⁵⁸ Older matriarchs lead their families over larger areas during droughts than families headed by younger matriarchs, drawing on their accrued knowledge about the locations of permanent, drought-resistant sources of food and water.⁵⁹ These remarkable feats suggest exceptional cognitive mapping skills that rely upon the long-term memories of older individuals who may have traveled that same path decades earlier.⁶⁰

32. Disrupting elephants' natural way of life has substantial negative impacts on their knowledge and decision-making abilities.⁶¹ Studies reveal that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to "management" practices initiated by humans.⁶² South African elephants who experienced trauma decades earlier showed significantly reduced social knowledge.⁶³ As a result of archaic culling practices, these elephants had been forcibly separated from family members and subsequently taken to new

⁵⁷ Bates & Byrne Decl. ¶ 56; McComb Decl. ¶ 50; Poole Decl. ¶ 51; Moss Decl. ¶ 44.

⁵⁸ Bates & Byrne Decl. ¶ 56; McComb Decl. ¶ 50; Poole Decl. ¶ 51; Moss Decl. ¶ 44.

⁵⁹ Bates & Byrne Decl. ¶ 56; McComb Decl. ¶ 50; Poole Decl. ¶ 51; Moss Decl. ¶ 44.

⁶⁰ Bates & Byrne Decl. ¶ 56; McComb Decl. ¶ 50; Poole Decl. ¶ 51; Moss Decl. ¶ 44.

⁶¹ Bates & Byrne Decl. ¶ 57; McComb Decl. ¶ 51; Poole Decl. ¶ 52; Moss Decl. ¶ 45.

⁶² Bates & Byrne Decl. ¶ 57; McComb Decl. ¶ 51; Poole Decl. ¶ 52; Moss Decl. ¶ 45.

⁶³ Bates & Byrne Decl. ¶ 57; McComb Decl. ¶ 51; Poole Decl. ¶ 52; Moss Decl. ¶ 45.

locations.⁶⁴ Two decades later, their social knowledge and skills and decision-making abilities were impoverished compared to an undisturbed Kenyan population.⁶⁵

33. Elephants display a sophisticated categorization of their environment with skills on par with humans.⁶⁶ Elephants of Amboseli National Park, Kenya were experimentally presented with garments that gave olfactory or visual information about their human wearers—either Maasai warriors who traditionally attack and spear elephants as part of their rite of passage, or Kamba men who are agriculturalists and traditionally pose little threat to elephants.⁶⁷ In one experiment, the only thing that differed between the cloths was the smell, derived from the ethnicity and/or lifestyle of the wearers.⁶⁸ The elephants were significantly more likely to run away when they sniffed cloths worn by Maasai men than those worn by Kamba men or no one at all (see video [here](#)).⁶⁹ In a second experiment, elephants were presented with two cloths that had not been worn by anyone; one was white (a neutral stimulus) and the other red, the color ritually worn by Maasai warriors.⁷⁰ With access only to these visual cues, the elephants showed significantly greater, sometimes aggressive, reactions to red garments than white.⁷¹

⁶⁴ Bates & Byrne Decl. ¶ 57; McComb Decl. ¶ 51; Poole Decl. ¶ 52; Moss Decl. ¶ 45.

⁶⁵ Bates & Byrne Decl. ¶ 57; McComb Decl. ¶ 51; Poole Decl. ¶ 52; Moss Decl. ¶ 45.

⁶⁶ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁶⁷ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁶⁸ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁶⁹ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷⁰ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷¹ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

Researchers concluded that elephants are able to categorize a single species (humans) into sub-classes (i.e., “dangerous” or “low risk”) based on either olfactory or visual cues alone.⁷²

34. It was further demonstrated that these same elephants distinguish human groups based on voices.⁷³ The elephants reacted differently, and appropriately, depending on whether they heard Maasai or Kamba men speaking, and whether the speakers were male Maasai versus female Maasai, who also pose no threat.⁷⁴ Scent, sounds, and visual signs associated specifically with Maasai men are categorized as “dangerous,” while neutral signals are attended to but categorized as “low risk.”⁷⁵ These sophisticated, multi-modal categorization skills demonstrate elephants’ acute sensitivity to the human world and how they monitor human behavior and learn to recognize when we might cause them harm.⁷⁶

35. Human speech and language reflect autonomous thinking and intentional behavior.⁷⁷ Elephants also use vocalisations to share knowledge and information with others; they are not merely reflexive, but have distinct meanings to listeners in a manner similar to the way humans use language.⁷⁸ Male elephants primarily communicate about their sexual status, rank and identity, whereas females and dependents use calls to emphasize and reinforce their social units.⁷⁹ Call

⁷² Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷³ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷⁴ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷⁵ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷⁶ Bates & Byrne Decl. ¶ 59; McComb Decl. ¶ 53; Poole Decl. ¶ 54; Moss Decl. ¶ 47.

⁷⁷ Bates & Byrne Decl. ¶ 50; McComb Decl. ¶ 44; Poole Decl. ¶ 42; Moss Decl. ¶ 38.

⁷⁸ Bates & Byrne Decl. ¶ 50; McComb Decl. ¶ 44; Poole Decl. ¶ 42; Moss Decl. ¶ 38.

⁷⁹ Bates & Byrne Decl. ¶ 50; McComb Decl. ¶ 44; Poole Decl. ¶ 42; Moss Decl. ¶ 38.

types are separated into those produced by the larynx (such as “rumbles”) and those produced by the trunk (such as “trumpets”), with different calls in each category used in different contexts.⁸⁰ Dr. Joyce Poole has described 47 call types.⁸¹ Field experiments have shown that African elephants distinguish between call types, and different call types elicit different responses in listeners; for example, [Contact-Calls](#) are rumbles that travel kilometers to maintain associations between elephants, and [Estrus-Rumbles](#) occur after a female has copulated.⁸²

36. Elephants display more than 300 gestures, signals and postures to communicate information to their audience (see [The Elephant Ethogram](#)).⁸³ Such signals are adopted in many contexts—such as aggressive, sexual or socially integrative situations—and each signal is well-defined and results in predictable responses from the audience (that is, each signal has a specific meaning both to the actor and recipient).⁸⁴ The use of gestures demonstrates that elephants communicate intentionally and purposefully to share information and/or alter the others’ behavior to fit their own will.⁸⁵ Experimental evidence shows that African elephants recognize the importance of visual attentiveness on the part of an intended recipient and of gestural communication, further demonstrating that elephants’ gestural communications are intentional

⁸⁰ Bates & Byrne Decl. ¶ 50; McComb Decl. ¶ 44; Poole Decl. ¶ 42; Moss Decl. ¶ 38.

⁸¹ Poole Decl. ¶ 42.

⁸² Bates & Byrne Decl. ¶ 50; McComb Decl. ¶ 44; Poole Decl. ¶ 42; Moss Decl. ¶ 38.

⁸³ Bates & Byrne Decl. ¶ 52; McComb Decl. ¶ 46; Poole Decl. ¶ 43; Moss Decl. ¶ 40.

⁸⁴ Bates & Byrne Decl. ¶ 52; McComb Decl. ¶ 46; Poole Decl. ¶ 43; Moss Decl. ¶ 40.

⁸⁵ Bates & Byrne Decl. ¶ 52; McComb Decl. ¶ 46; Poole Decl. ¶ 43; Moss Decl. ¶ 40.

and purposeful.⁸⁶ This ability to understand the visual attentiveness and perspective of others is crucial for empathy and mental-state understanding.⁸⁷

37. Elephants use specific calls and gestures to plan and discuss a course of action.⁸⁸ These may involve responding to a threat by group retreat or mobbing action (including celebration of successful efforts – [High-Fiving](#)), or planning and discussing where, when, and how to move to a new location.⁸⁹ Elephant group defensive behavior is highly evolved and involves a range of different tactical maneuvers adopted by different elephants.⁹⁰

38. In group-defensive situations, elephants respond with highly coordinated behavior, both rapidly and predictably, to specific calls uttered and particular gestures exhibited by group members.⁹¹ The rapid, predictable, and collective response of elephants to these calls and gestures indicates that elephants have the capacity to understand the goals and intentions of the signalling individual.⁹² For example, as documented in Episode 2 of PBS’s *Gorongosa Park: Rebirth of Paradise* (see video [here](#), starting at 42:30), matriarch Provocadora’s contemplation of Dr. Poole’s team ([Listening](#) and [J-Truck](#)), followed by purposeful [Perpendicular-Walk](#) (in relation to Dr. Poole’s team) toward her family and [Ear-Flap-Slide](#), was a clear indication to

⁸⁶ Bates & Byrne Decl. ¶ 53; McComb Decl. ¶ 47; Poole Decl. ¶ 48; Moss Decl. ¶ 41.

⁸⁷ Bates & Byrne Decl. ¶ 53; McComb Decl. ¶ 47; Poole Decl. ¶ 48; Moss Decl. ¶ 41.

⁸⁸ Poole Decl. ¶ 44.

⁸⁹ *Id.*

⁹⁰ *Id.* at ¶ 45.

⁹¹ *Id.*

⁹² *Id.*

her family to begin a [Group-Advance](#) (upon Dr. Poole’s team).⁹³ This particular elephant attack is a beautiful example of elephants’ use of empathy, coalition, and cooperation.⁹⁴ Provocadora’s instigation of the Group-Advance led to a two-and-a-half minute [Group-Charge](#), in which the three other large adult females of the 36-member family took turns leading the charge, passing the baton, in a sense, from one to the next.⁹⁵ Once they succeeded in their goal of chasing Dr. Poole’s team away, they celebrated their victory by [High-Fiving](#) (with their trunks) and engaging in an [End-Zone-Dance](#).⁹⁶ High-Fiving is also typically used to initiate a coalition and is both preceded by and associated with other specific gestures and calls that lead to very goal oriented collective behavior.⁹⁷

39. Ostensive communication refers to the way humans use behavior, such as tone of speech, eye contact, and physical contact, to emphasize that a particular communication is important.⁹⁸ Lead elephants in family groups use ostensive communication frequently (e.g., [Ear-Flap-Slide](#), [Ear-Slap](#), [Walk-Wait](#), [Foot-Swinging](#), [Trunk-Sweep](#), [Body-Axis-Pointing](#), and [Comment-Rumble](#)), as a way to say, “Heads up—I am about to do something that you should pay attention to.”⁹⁹

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at. ¶ 36.

⁹⁹ *Id.*

40. Elephants use both vocal and gestural communication when planning and communicating intentions regarding a movement.¹⁰⁰ For example, Dr. Poole has observed that a member of a family will use the axis of her body ([Body-Axis-Pointing](#)) to point in the direction she wishes to go and then vocalize, every couple of minutes, with a specific call known as a [Lets-Go-Rumble](#): “I want to go this way, let’s go together.”¹⁰¹ The elephant will also use intention gestures—such as [Walk-Wait](#), [Foot-Swinging](#)—to indicate her intention to move, and will [Look-Back](#) to see whether anyone is coming.¹⁰² Such a call may be successful or unsuccessful at moving the group or may lead to a 45-minute or longer discussion (a series of rumble exchanges known as [Cadenced-Rumbles](#)) that Dr. Poole interprets as negotiation.¹⁰³ One example of this behavior can be seen in this [video](#) where members of a family wanted to go in opposite directions.¹⁰⁴ Sometimes such negotiation leads to disagreement that may result in the group splitting and going in different directions for a period of time.¹⁰⁵ In situations where the security of the group is at stake, such as when movement is planned through or near human settlement, all group members focus on the matriarch’s decision—while “Let’s Go” rumbles are uttered, others adopt a [Waiting](#) posture until the matriarch (after much [Listening](#) and

¹⁰⁰ *Id.* at ¶ 46.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

[Contemplation](#)) decides it is safe to proceed, whereupon they bunch together and move purposefully, and at a fast pace in a [Group-March](#) (examples [here](#) and [here](#)).¹⁰⁶

41. The many different signals—calls, postures, gestures and behaviors elephants use to contemplate and initiate movements (including [Ear-Flap](#), [Ear-Flap-Slide](#))—are clearly understood by other elephants, mean very specific things, and indicate that elephants: 1) have a particular plan which they can communicate with others; 2) can adjust their plan according to their immediate assessment of risk or opportunity; and 3) can communicate and execute the plan in a coordinated manner.¹⁰⁷

42. The most effective responses to human-elephant conflicts treat elephants as autonomous beings and work with their biological nature to achieve solutions that promote coexistence.¹⁰⁸ It is increasingly recognized by conservation workers that, to effectively respond to human-elephant conflicts, coexistence can be achieved by entering into “negotiation” with elephants.¹⁰⁹ Aggressive deterrence methods or hard barriers have been met with mixed success, largely because elephants are able to respond and find ways around them.¹¹⁰ For example, when electric fences are erected to keep elephants out of crop fields, elephants have responded to the hazard of electric shocks by handling the 'hot' wire with non-conducting tusks, allowing them to snap the wire and enter the field; and they may also break fences by pushing

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Lindsay Decl. ¶ 29.

¹⁰⁹ *Id.* at ¶ 33.

¹¹⁰ *Id.* at ¶ 29.

other elephants into them. Both approaches demonstrate their higher cognitive ability and autonomy.¹¹¹

43. Self-awareness is intimately related to autobiographical memory in humans and is central to autonomy and being able to direct one’s own behavior to achieve personal goals and desires.¹¹² As do humans, Asian elephants exhibit “mirror self-recognition” (MSR) using Gallup’s classic “mark test.”¹¹³ MSR is the ability to recognize a reflection in the mirror as oneself, while the mark test involves surreptitiously placing a colored mark on an individual’s forehead that she cannot see or be aware of without the aid of a mirror.¹¹⁴ If the individual uses the mirror to investigate the mark, she must recognize the reflection as herself (see video [here](#)).¹¹⁵ MSR is significant because it is a key identifier of self-awareness.¹¹⁶ By demonstrating they can recognize themselves in a mirror, elephants must be holding a mental representation of themselves from another perspective and thus be aware that they are a separate entity from others.¹¹⁷

¹¹¹ *Id.* at ¶ 31.

¹¹² Bates & Byrne Decl. ¶ 38 (“‘Autobiographical memory’ refers to what one remembers about his or her own life; for example, not that ‘Paris is the capital of France,’ but the recollection that you had a lovely time when you went there.”); McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

¹¹³ Bates & Byrne Decl. ¶ 38; McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

¹¹⁴ Bates & Byrne Decl. ¶ 38; McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

¹¹⁵ Bates & Byrne Decl. ¶ 38; McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

¹¹⁶ Bates & Byrne Decl. ¶ 38; McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

¹¹⁷ Bates & Byrne Decl. ¶ 38; McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

44. Imitating another’s behavior also demonstrates a sense of self, as it is necessary to understand how one’s own behavior relates to the behavior of others; elephants can vocally imitate sounds they hear around them—from the engines of passing trucks (e.g., [Truck-Like-Call](#)) to the commands of human zookeepers.¹¹⁸
45. An understanding of death is also related to possessing a sense of self, for having a mental representation of the self likely confers an ability to comprehend death.¹¹⁹ Elephants demonstrate an awareness of death by reacting to dead family or group members, exhibiting behaviors akin to human responses to the death of a close relative or friend.¹²⁰ Indeed, the general demeanor of elephants attending to a dead elephant is one of grief and compassion, with slow movements and few vocalizations.¹²¹ For example, wild African elephants have been observed to cover the bodies of their dead with dirt and vegetation, and mothers who lose a calf may remain with the calf’s body for an extended period, but do not behave towards the body as they would a live calf.¹²² Furthermore, elephants’ interest in the bodies, carcasses and bones of elephants who have passed is so marked that when one has died, trails to the site of death become worn into the ground by the repeated visits of many elephants over days, weeks, months, even years.¹²³ Wild African elephants have also been shown experimentally to be more

¹¹⁸ Bates & Byrne Decl. ¶ 51; McComb Decl. ¶ 45; Poole Decl. ¶ 47; Moss Decl. ¶ 39.

¹¹⁹ Bates & Byrne Decl. ¶ 39; McComb Decl. ¶ 33; Poole Decl. ¶ 31; Moss Decl. ¶ 27.

¹²⁰ Bates & Byrne Decl. ¶ 39; McComb Decl. ¶ 33; Poole Decl. ¶ 31; Moss Decl. ¶ 27.

¹²¹ Bates & Byrne Decl. ¶ 39; McComb Decl. ¶ 33; Poole Decl. ¶ 31; Moss Decl. ¶ 27.

¹²² Bates & Byrne Decl. ¶ 39; McComb Decl. ¶ 33; Poole Decl. ¶ 31; Moss Decl. ¶ 27.

¹²³ Poole Decl. ¶ 31.

interested in the bones of dead elephants than the bones of other animals (see video [here](#)), and they have frequently been observed using their tusks, trunk or feet to attempt to lift sick, dying or dead individuals.¹²⁴ Although they do not give up trying to lift or elicit movement from a dead body immediately, elephants appear to realize that once dead, the carcass can no longer be helped; and instead they engage in more “mournful” or “grief-stricken” behavior, such as standing guard over the body with dejected demeanor and protecting it from predators (see photographs [here](#)).¹²⁵

46. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities, where empathy is defined as identifying with and understanding another’s experiences or feelings by relating personally to their situation.¹²⁶ Empathy, an important component of human consciousness and autonomy, is a cornerstone of normal social interaction.¹²⁷ It requires modeling the emotional states and desired goals that influence others’ behavior both in the past and future, and using this information to plan one’s own actions; empathy is only possible if one can adopt or imagine another’s perspective, and attribute emotions to that other individual.¹²⁸ Empathy is thus a component of “theory of mind” – the ability to mentally represent and think about the knowledge, beliefs and emotional states of

¹²⁴ Bates & Byrne Decl. ¶ 39; McComb Decl. ¶ 33; Poole Decl. ¶ 31; Moss Decl. ¶ 27.

¹²⁵ Bates & Byrne Decl. ¶ 39; McComb Decl. ¶ 33; Poole Decl. ¶ 31; Moss Decl. ¶ 27.

¹²⁶ Bates & Byrne Decl. ¶ 40; McComb Decl. ¶ 34; Poole Decl. ¶ 32; Moss Decl. ¶ 28.

¹²⁷ Bates & Byrne Decl. ¶ 40; McComb Decl. ¶ 34; Poole Decl. ¶ 32; Moss Decl. ¶ 28.

¹²⁸ Bates & Byrne Decl. ¶ 40; McComb Decl. ¶ 34; Poole Decl. ¶ 32; Moss Decl. ¶ 28.

others, while recognizing that these can be distinct from your own knowledge, beliefs and emotions.¹²⁹

47. Elephants frequently display empathy in the form of protection, comfort, and consolation, as well as by actively helping those in difficulty, such as assisting injured individuals to stand and walk, helping calves out of rivers or ditches with steep banks (see video [here](#)), or even feeding those who are not able to use their own trunks to eat.¹³⁰ Elephants have been seen to react when anticipating the pain of others (e.g., seen to wince when a nearby elephant stretched her trunk toward a live wire).¹³¹

48. Empathic behavior begins early in elephants.¹³² For example, during fieldwork in the Maasai Mara in 2011, Dr. Poole filmed a mother elephant using her trunk to assist her one-year-old female calf up a steep bank (see video [here](#)). Once the calf was safely up the bank, the calf turned around to face her five-year-old sister, who was also having difficulties getting up the bank. As the older calf struggled to clamber up the bank the younger calf approached her and first touched her mouth (a gesture of reassurance among family members) and then reached her trunk out to touch the leg that had been having difficulty. Only when her sibling was safely up the bank did the calf turn to follow her mother.¹³³

¹²⁹ Bates & Byrne Decl. ¶ 40; McComb Decl. ¶ 34; Poole Decl. ¶ 32; Moss Decl. ¶ 28.

¹³⁰ Bates & Byrne Decl. ¶ 41; McComb Decl. ¶ 35; Poole Decl. ¶ 33; Moss Decl. ¶ 29.

¹³¹ Poole Decl. ¶ 33.

¹³² *Id.*

¹³³ *Id.*

49. Relatedly, elephants can diagnose animacy and goal-directedness in others, understand the physical competence and emotional state of others, and attribute goals and mental states (intentions) to others.¹³⁴ This is borne out by examples such as:

Example 1: “IB family is crossing river. Infant struggles to climb out of bank after its mother. An adult female [not the mother] is standing next to calf and moves closer as the infant struggles. Female does not push calf out with its trunk, but digs her tusks into the mud behind the calf’s front right leg which acts to provide some anchorage for the calf, who then scrambles up and out and rejoins mother.” (See video [here](#)).¹³⁵

Example 2: “At 11.10ish Ella gives a “let’s go” rumble as she moves further down the swamp . . . At 11.19 Ella goes into the swamp. The entire group is in the swamp except Elspeth and her calf [<1 year] and Eudora [Elspeth’s mother]. At 11.25 Eudora appears to “lead” Elspeth and the calf to a good place to enter the swamp—the only place where there is no mud.”¹³⁶

Example 3: “The elephants’ sounds [relating to the birth] also attracted the attention of several males including young and inexperienced, Ramon, who, picking up on the interesting smells of the mother [Ella], mounted her, his clumsy body and feet poised above the newborn. Matriarch Echo and her adult daughter Erin, rushed to Ella’s side and, I believe, purposefully backed into her in what appeared to be an attempt to prevent the male from landing on the baby when he dismounted.”¹³⁷

50. These examples demonstrate that the acting elephant(s) (the adult female in the first example; Eudora in the second; and Erin and Echo in the third) were able to understand the intentions or situation of the other (the calf in the first case; Elspeth in the second; and Ella’s newborn and the male in the third), and could adjust their own behavior to counteract the problem being faced by the other.¹³⁸ Such interactions of helpful behavior have been recorded in very few

¹³⁴ Bates & Byrne Decl. ¶ 42; McComb Decl. ¶ 36; Poole Decl. ¶ 34; Moss Decl. ¶ 30.

¹³⁵ Poole Decl. ¶ 34.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

nonhuman animals.¹³⁹ In another example, an allo-mother (an elephant who cares for an infant and is not the infant’s mother) moves a log from under the head of an infant in what appears to be an effort to make him more comfortable (see video [here](#)).¹⁴⁰ There are numerous of other examples of empathy in [The Elephant Ethogram](#) under [Helping](#) behavior, including a [dramatic rescue](#) of an infant by two allomothers who prevent him from drowning by lifting his trunk out of the water so he can breathe.¹⁴¹

51. Attributing intentions and understanding another’s reference point is central to empathy and theory of mind.¹⁴² Elephants attribute intentions to others, as they follow and understand human pointing gestures.¹⁴³ As can be seen in this [video](#), the elephants understood that the human experimenter was pointing to communicate information to them about the location of a hidden object.¹⁴⁴ There is also evidence of “natural pedagogy” or true teaching in elephants, which occurs when a teacher takes into account the knowledge states of the learner as she passes on relevant information. Analysis of simulated “oestrus behaviours”¹⁴⁵ in African

¹³⁹ Bates & Byrne Decl. ¶ 42; McComb Decl. ¶ 36; Poole Decl. ¶ 34; Moss Decl. ¶ 30.

¹⁴⁰ Poole Decl. ¶ 34.

¹⁴¹ *Id.*

¹⁴² Bates & Byrne Decl. ¶ 43; McComb Decl. ¶ 37; Poole Decl. ¶ 35; Moss Decl. ¶ 31.

¹⁴³ Bates & Byrne Decl. ¶ 43; McComb Decl. ¶ 37; Poole Decl. ¶ 35; Moss Decl. ¶ 31.

¹⁴⁴ Bates & Byrne Decl. ¶ 43; McComb Decl. ¶ 37; Poole Decl. ¶ 35; Moss Decl. ¶ 31.

¹⁴⁵ Bates & Byrne Decl. ¶ 44 (“Ostension is the way that we can ‘mark’ our communications to show people that that is what they are. If you do something that another copies, that’s imitation; but if you deliberately indicate what you are doing to be helpful, that’s ‘ostensive’ teaching. Similarly, we may ‘mark’ a joke, hidden in seemingly innocent words; or ‘mark’ our words as directed towards someone specific by catching their eye. Ostension implies that the signaler knows what they are doing.”).

elephants—whereby a non-cycling, sexually experienced older female will simulate the visual signals of being sexually receptive, even though she is not ready to mate or breed again—demonstrates that these knowledgeable females can adopt false “oestrus behaviours” to demonstrate to naive young females how to attract and respond appropriately to suitable males.¹⁴⁶ The experienced females may be taking the youngster’s lack of knowledge into account and actively showing them what to do—a possible example of true teaching as it is defined in humans (see example [here](#)).¹⁴⁷ This evidence, coupled with the data showing elephants understand the ostensive cues in human pointing, suggests that elephants understand the intentions and knowledge states (minds) of others.¹⁴⁸

52. Coalitions and cooperation have been frequently documented in wild African elephants, particularly to defend family members or close allies from (potential) attacks by outsiders, such as when one family group tries to “kidnap” a calf from an unrelated family¹⁴⁹ or during the extraordinary teamwork executed when defending themselves against predators, particularly human beings.¹⁵⁰ These behaviors are related to empathy and are based on one elephant understanding the emotions and goals of a coalition partner.¹⁵¹ Cooperation is also evident in captive Asian elephants, who demonstrate they can work together in pairs to obtain a reward,

¹⁴⁶ Bates & Byrne Decl. ¶ 44; McComb Decl. ¶ 38; Poole Decl. ¶ 36; Moss Decl. ¶ 32.

¹⁴⁷ Bates & Byrne Decl. ¶ 44; McComb Decl. ¶ 38; Poole Decl. ¶ 36; Moss Decl. ¶ 32.

¹⁴⁸ Bates & Byrne Decl. ¶ 44; McComb Decl. ¶ 38; Poole Decl. ¶ 36; Moss Decl. ¶ 32.

¹⁴⁹ Bates & Byrne Decl. ¶ 45; McComb Decl. ¶ 39; Poole Decl. ¶ 37; Moss Decl. ¶ 33.

¹⁵⁰ Poole Decl. ¶ 37.

¹⁵¹ Bates & Byrne Decl. ¶ 45; McComb Decl. ¶ 39; Poole Decl. ¶ 37; Moss Decl. ¶ 33.

but also understand the pointlessness of attempting the task if their partner was not present or could not access the equipment (see video [here](#)).¹⁵² Problem-solving and working together to achieve a collectively desired outcome involve mentally representing both a goal and the sequence of behaviors that is required to achieve that goal; it is based on (at the very least) short-term action planning.¹⁵³

53. Wild elephants have frequently been observed engaging in cooperative problem-solving: examples include retrieving calves kidnapped by other groups; helping calves out of steep, muddy river banks; rescuing a calf attacked by a lion; and navigating through human-dominated landscapes to reach a desired destination such as a habitat, salt-lick, or waterhole.¹⁵⁴ These behaviors demonstrate the purposeful and well-coordinated social system of elephants and show that elephants can collectively hold specific aims in mind, then work together to achieve those goals.¹⁵⁵ Such intentional, goal-directed action forms the foundation of independent agency, self-determination, and autonomy.¹⁵⁶
54. Elephants also show innovative problem-solving in experimental tests of insight, defined as the “a-ha” moment when a solution to a problem suddenly becomes clear.¹⁵⁷ A juvenile male

¹⁵² Bates & Byrne Decl. ¶ 46; McComb Decl. ¶ 40; Poole Decl. ¶ 38; Moss Decl. ¶ 34.

¹⁵³ Bates & Byrne Decl. ¶ 46; McComb Decl. ¶ 40; Poole Decl. ¶ 38; Moss Decl. ¶ 34.

¹⁵⁴ Bates & Byrne Decl. ¶ 47; McComb Decl. ¶ 41; Poole Decl. ¶ 39; Moss Decl. ¶ 35.

¹⁵⁵ Bates & Byrne Decl. ¶ 47; McComb Decl. ¶ 41; Poole Decl. ¶ 39; Moss Decl. ¶ 35.

¹⁵⁶ Bates & Byrne Decl. ¶ 47; McComb Decl. ¶ 41; Poole Decl. ¶ 39; Moss Decl. ¶ 35.

¹⁵⁷ Bates & Byrne Decl. ¶ 48 (“In cognitive psychology terms, insight is the ability to inspect and manipulate a mental representation of something, even when you can’t physically perceive or touch the something at the time. Or more simply, insight is thinking and using only thoughts to solve problems.”); McComb Decl. ¶ 42; Poole Decl. ¶ 40; Moss Decl. ¶ 36.

Asian elephant demonstrated such a spontaneous action by moving a plastic cube and standing on it to obtain previously out-of-reach food, and after solving this problem once, he showed flexibility and generalization of the technique to other similar problems by using the same cube in different situations, or different objects in place of the cube when it was unavailable (see [video](#) here).¹⁵⁸ This experiment demonstrates that elephants can choose an appropriate action and incorporate it into a sequence of behavior to achieve a goal they kept in mind throughout the process.¹⁵⁹

55. Asian elephants also demonstrate the ability to understand goal-directed behavior.¹⁶⁰ When presented with food that was out of reach, but with some bits resting on a tray that could be pulled within reach, elephants learned to pull only those trays baited with food.¹⁶¹ Success in this kind of “means-end” task demonstrates causal knowledge, which requires understanding not just that two events are associated with each other, but that some mediating force connects and affects the two which may be used to predict and control events.¹⁶² Understanding causation and inferring object relations may be related to understanding psychological causation, which is an appreciation that others are animate beings who generate their own behavior and have mental states (e.g., intentions).¹⁶³

¹⁵⁸ Bates & Byrne Decl. ¶ 48; McComb Decl. ¶ 42; Poole Decl. ¶ 40; Moss Decl. ¶ 36.

¹⁵⁹ Bates & Byrne Decl. ¶ 48; McComb Decl. ¶ 42; Poole Decl. ¶ 40; Moss Decl. ¶ 36.

¹⁶⁰ Bates & Byrne Decl. ¶ 49; McComb Decl. ¶ 43; Poole Decl. ¶ 41; Moss Decl. ¶ 37.

¹⁶¹ Bates & Byrne Decl. ¶ 49; McComb Decl. ¶ 43; Poole Decl. ¶ 41; Moss Decl. ¶ 37.

¹⁶² Bates & Byrne Decl. ¶ 49; McComb Decl. ¶ 43; Poole Decl. ¶ 41; Moss Decl. ¶ 37.

¹⁶³ Bates & Byrne Decl. ¶ 49; McComb Decl. ¶ 43; Poole Decl. ¶ 41; Moss Decl. ¶ 37.

B. Zoo captivity is physically and psychologically harmful to elephants

56. Long-lived, large-brained mammals like elephants who possess large, complex brains integral to their intricate sociobehavioral existence cannot function normally in captivity.¹⁶⁴ From a neural perspective, imprisoning elephants and putting them on display is “undeniably cruel.”¹⁶⁵ They experience permanent brain damage as a result of the trauma endured in impoverished environments.¹⁶⁶
57. Over 60 years of neuroscience research indicates that an impoverished environment negatively affects the cerebral cortex, with effects that include a thinner cerebral cortex, decreased blood supply, smaller neuronal cells bodies with few glial (“helper”) cells for metabolic support, decreased dendritic branching for synthesizing information, fewer dendritic spines (indicating

¹⁶⁴ Jacobs Decl. ¶ 19.

¹⁶⁵ *Id.* at ¶ 19.

¹⁶⁶ Lindsey Decl. at ¶ 65, citing Bob Jacobs et al., *Putative neural consequences of captivity for elephants and cetaceans*, REVIEWS IN THE NEUROSCIENCES 4 (2021), which notes:

In terms of behavior, a prevalent abnormality is stereotypic behavior, which consists of aberrant, repetitive movements (e.g., limb swaying, and rocking) induced by the frustration of natural impulses. It is estimated that 47–85% of elephants in zoos and 100% of those in circuses exhibit stereotypies. Captive elephants also exhibit hyperaggression, in part because there is no opportunity for physical distancing during heightened intragroup stress. Medically, captive elephants suffer from both gastrointestinal diseases and nutritional/metabolic disorders because of their captive diet and lack of exercise, with obesity being a serious issue. Across North American zoos, 74% of elephants were found to be overweight with 34% believed to be clinically obese. Skin issues (e.g., inflammation, lesions, and pressure sores) are common as are foot-related disorders (e.g., hyperkeratosis, cracked nails, and abscesses). Osteoarthritis in the feet, exacerbated by locomotor stereotypies and obesity, occurs prematurely in captive elephants and can lead to euthanasia. Finally, captive elephants are particularly susceptible to several infectious diseases (e.g., *Mycobacterium tuberculosis*, TB, the endotheliotropic herpesvirus, EEHV), which are highly contagious. TB is deadly in elephants and treatment is often unsuccessful.

fewer connections with other neurons), and smaller, less efficient synapses.¹⁶⁷ There is no logical reason to believe that the large, complex brains of elephants react any differently to a severely stressful environment than the human brain.¹⁶⁸

58. A crucial component to an enriched environment is exercise, which increases the supply of oxygenated blood to the brain and enhances cognitive abilities through a series of complex biochemical cascades.¹⁶⁹ Captive elephants living in small enclosures are severely deprived of exercise, since elephants in the wild travel tens of kilometers a day (sometimes more than 100 kilometers) across diverse terrain with numerous plants and various substrates—something they cannot do in the small, monotonous enclosures that typify zoo exhibits.¹⁷⁰ The cortical neurons in captive elephants are less complex, receive less metabolic support, and process information less efficiently than cortical neurons from animals in an enriched, more natural environment.¹⁷¹

59. Captive/impooverished environments severely constrain or even prevent natural elephant behavior, resulting in chronic frustration, boredom, and stress.¹⁷² Two brain areas affected by such stress are (1) the hippocampus, which is involved primarily in declarative (i.e., facts and events) and spatial memory formation, and the (2) amygdala, which is involved in emotional

¹⁶⁷ Jacobs Decl. ¶ 13.

¹⁶⁸ *Id.* at ¶ 16.

¹⁶⁹ *Id.* at ¶ 14.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at ¶ 15.

processing.¹⁷³ Prolonged stress results in chronically elevated levels of glucocorticoids (stress hormones).¹⁷⁴ Chronic exposure to glucocorticoids contributes to wide-ranging neurodegeneration, including neuronal damage/death in the hippocampus, which results in memory deficits, as well as neuronal damage/death in the amygdala, which results in emotional processing deficits.¹⁷⁵

60. In natural environments, the body's stress-response system is designed for quick activation to escape dangerous situations; in captivity, where animals have a near total lack of control over their environment, there is no escape.¹⁷⁶ Chronic stress resulting from captivity has negative health and neural consequences, including learned helplessness and conditioned defeat.¹⁷⁷ The stress that humans experience under similar conditions is associated with a variety of neuropsychiatric diseases such as anxiety/mood disorders, including major depression, and post-traumatic stress disorder.¹⁷⁸

61. The psychosocial stress engendered by captivity also has negative effects on the complex circuitry between the basal ganglia and cerebral cortex, including the exhibition of stereotypic behavior.¹⁷⁹ Stereotypies, which are repetitive patterns of movements with no function, reflect

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at ¶ 15.

¹⁷⁷ *Id.* at ¶¶ 15, 16.

¹⁷⁸ *Id.* at ¶ 16.

¹⁷⁹ *Id.* at ¶ 17.

underlying (abnormal) disruption of neural mechanisms, and may represent coping strategy to mitigate the overwhelming effects of psychosocial stress.¹⁸⁰ Such behaviors are common human and non-human responses to chronic stress.¹⁸¹ In their natural habitat, elephants have never been noted to exhibit such stereotypies.¹⁸² However, between ~47% and ~ 85% of elephants in zoos exhibit stereotypies, which can consume up to ~20% of the animal's daily activity.¹⁸³

62. Elephants have evolved to move.¹⁸⁴ Confining elephants prevents them from engaging in normal, autonomous behavior, which can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom, and stereotypical behavior, and when held in isolation, elephants become bored, depressed, aggressive, catatonic, and fail to thrive.¹⁸⁵ Human caregivers are no substitute for the numerous, complex social relationships and the rich gestural and vocal communication exchanges that occur between free-living elephants.¹⁸⁶ Unable to walk for miles each day, or exert a high degree of control over their social interactions, elephants in zoos suffer psychologically and physically because of the limits of what can be provided within such restricted environments.¹⁸⁷

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at ¶ 18.

¹⁸² *Id.* at ¶ 17.

¹⁸³ *Id.* at ¶ 21(1).

¹⁸⁴ Poole Decl. ¶ 56.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Lindsay Decl. ¶ 48.

C. The Cheyenne Mountain Zoo is an unacceptable place for elephants

63. Living on the side of a mountain, surrounded by housing developments and a golf course, Missy, Kimba, Lucky, LouLou, and Jambo are not living a life that is anything close to acceptable for an elephant.¹⁸⁸ As Dr. Keith Lindsay explained in his Declaration, their life at CMZ is nothing but a succession of boring and frustrating days, damaging to their bodies and minds, with their physical and psychological health severely compromised by the sustained deprivation of their autonomy and freedom of movement.¹⁸⁹
64. The elephants' allotted space is woefully inadequate, as elephants in their natural habitats have expansive home ranges, extending from 10s to 10,000 km.².¹⁹⁰ Elephants travel tens of kilometres a day (sometimes more than 100 kilometres) across diverse terrain with numerous plants and various substrates, something they cannot do in the small, monotonous enclosures that typify zoo exhibits.¹⁹¹ "Quality space means that elephants can forage in natural, diverse vegetation, walk for miles each day, and exert a high degree of control over their social interactions."¹⁹² In a captive situation, only "100ha or more of diverse, natural habitat in a warm climate would offer individual elephants the opportunity to live fulfilling lives."¹⁹³

¹⁸⁸ *Id.* at ¶ 66.

¹⁸⁹ *Id.* at ¶ 67.

¹⁹⁰ Jacobs Decl. ¶ 21(a).

¹⁹¹ *Id.* at ¶ 14.

¹⁹² Lindsay Decl. ¶ 42.

¹⁹³ *Id.* at ¶ 42.

65. The indoor barn at CMZ has an estimated maximum size of 2,000 yd², subdivided into a number of stalls for holding the individual elephants, with the floor of the stalls covered with a rubberized concrete surface.¹⁹⁴ The elephants spend at least half, if not more, of each day in the barn with very little cushioning for their feet and joints.¹⁹⁵ On cold days, they are kept there all day.¹⁹⁶ It is also a noisy place, with the walls and ceiling made of metal reflecting sounds in the barn interior.¹⁹⁷ As elephants in the wild are actively moving for up to 18 hours every 24-hour period, this involuntary confinement is both physically and psychologically harmful, and removes their agency, depriving them of the basic need to decide how and where they spend their time.¹⁹⁸ Confining the elephants in the barn for more than a few hours on any given day is likely to lead to foot and joint damage from standing on the hard substrate, as well as psychological damage from the noise and the frustration of prevented choice and movement.¹⁹⁹

66. When allowed outside, the elephants are commonly unable to walk more than 100 yards in any direction.²⁰⁰ The outdoor exhibit has a total area of 0.83 acres, divided into three yards plus a Demo/training area.²⁰¹ There is an additional area, the “Vacation Yard,” that is two acres in

¹⁹⁴ *Id.* at ¶ 50.

¹⁹⁵ *Id.* at ¶ 67.

¹⁹⁶ *Id.* at ¶ 58.

¹⁹⁷ *Id.* at ¶ 50.

¹⁹⁸ *Id.* at ¶ 58.

¹⁹⁹ *Id.* at ¶ 51.

²⁰⁰ *Id.* at ¶ 67.

²⁰¹ *Id.* at ¶ 52.

size, available to the elephants for only a few days per month,²⁰² and a Walking Path with an estimated distance of .23 miles.²⁰³ The available space for directional walking is only a tiny fraction of the miles that elephants cross on a daily basis in natural environments.²⁰⁴

67. In this wholly unnatural environment, the elephants' behavioral repertoire is extremely limited and widely divergent from that of free-ranging elephants.²⁰⁵ Their movements within the different yards and along the Walking Path are controlled directly and exclusively by zoo staff.²⁰⁶ There is no variety in their lives, no challenge to employ their mental capacity for exploration, spatial memory, or problem-solving. There is no opportunity to employ their wide range of vocalisations, to communicate and interact with a range of other elephants over distance.²⁰⁷ The elephants receive very little exercise.²⁰⁸

68. In addition to the size limitation of the enclosures, the elephants' feeding regime is deficient.²⁰⁹ A variety of food items, including hay and occasionally woody browse, are scattered on the ground or suspended from hooks or baskets.²¹⁰ Richer food, such as vegetables, fruit or alfalfa

²⁰² *Id.* at ¶¶ 52, 54

²⁰³ *Id.* at ¶ 53.

²⁰⁴ *Id.* at ¶ 55.

²⁰⁵ *Id.* at ¶ 61.

²⁰⁶ *Id.* at ¶ 55.

²⁰⁷ *Id.* at ¶ 61.

²⁰⁸ Jacobs Decl. ¶ 21(h).

²⁰⁹ Lindsay Decl. ¶ 57.

²¹⁰ *Id.*

cubes may be fed during training sessions, interactions with the public or as enticements for carer-directed movements.²¹¹ There are also small niches in the mock termite hills and other sites where food can be hidden for the elephants to find.²¹² However, none of these “enrichment” efforts provide much stimulation to the intellect of elephants when compared to natural foraging challenges.²¹³ In their natural habitat, elephants are highly diverse feeders, consuming more than 100 seasonally and geographically varying food species (e.g., grasses, trees, bark, roots, fruits, and aquatic plants), and spending 60-80% of their waking hours foraging over long distances.²¹⁴ At CMZ, the elephants’ monotonous diet requires little manipulation and is quickly consumed.²¹⁵

69. In all the exhibit yards, there is little stimulation or room to explore; a few boulders are stuck in the ground and there is a 20ft. waterfall in the large exhibit.²¹⁶ While this landscaping may look appealing to the visiting public, the features provide no novelty or variety to the elephants themselves—they do nothing to alleviate the tedium of these sterile surroundings.²¹⁷ The artificial waterfall is also a constant source of high frequency noise.²¹⁸

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Jacobs Decl. ¶ 21(g).

²¹⁵ *Id.*

²¹⁶ Lindsay Decl. ¶ 56.

²¹⁷ *Id.*

²¹⁸ *Id.*

70. On June 6, 2022, Dr. Bob Jacobs visited CMZ for approximately two hours and observed 4 elephants: two were in the largest yard (Exhibit 1), and two were in the second largest yard (Exhibit 2).²¹⁹ Within 10 minutes of entering Exhibit 1, the two elephants had explored all locations containing food (feeders in artificial trees, vegetables and fruit that had been scattered on the ground, etc), an obvious indication of the inadequate quality and size of the space.²²⁰ They had explored almost every aspect of the exhibit within the first 10 minutes.²²¹ In Exhibit 2, which is about 5 times smaller than Exhibit 1 and essentially barren, the elephants briefly interacted with “enrichment devices” for delivering food—thereafter, there was nothing else for them to do.²²²

71. Despite Exhibit 1 being the largest yard, the elephants only get limited access to it during the day. A zookeeper informed Dr. Jacobs that only two elephants are allowed in Exhibit 1 at any given time.²²³ This means that in a 12-hour day (assuming the elephants are in the barn at night), each elephant only gets about 4 hours in Exhibit 1—for the other 8 hours of daylight, the elephants are in the much smaller, barren enclosures.²²⁴

72. The terrain on which the elephants walk is mostly densely packed, sandy soil, which is not a lot different from walking on concrete.²²⁵ Additionally, there is very little flat space for the

²¹⁹ Jacobs Decl. ¶ 21(b).

²²⁰ *Id.*

²²¹ *Id.*

²²² Jacobs Decl. ¶ 21(b).

²²³ *Id.* at ¶ 21(c).

²²⁴ *Id.*

²²⁵ Jacobs Decl. ¶ 21(e).

elephants since the zoo is on the side of the mountain.²²⁶ They must climb up and down the hillside to reach the water feature at the top of Exhibit 1—as Dr. Jacobs observed, this was clearly an issue for one of the elephants, who came down the incline very gingerly, presumably because of leg issues such as osteoarthritis.²²⁷ This will become an even greater issue as the elephants age.²²⁸ Limited space coupled with hard surfaces (e.g., concrete, packed soil) leads to osteoarthritis, which regularly occurs prematurely in captive elephants; such ailments are associated with pain and joint stiffness, inability to stand, and sometimes leads to euthanasia.²²⁹ Several of the elephants were observed to be obese; and obesity, coupled with limited space and hard substrate, is associated with high rates of arthritis and foot disease in captive elephants.²³⁰

73. The elephants are deprived of meaningful social interaction. When Dr. Jacobs visited CMZ, he observed virtually no social interaction among the two elephants in Exhibit 1; those in Exhibit 2 were separated by a gate and could not interact with each other.²³¹ One of them, after extracting food from the feeding device, leaned her head against the door to the barn, and didn't move at all for nearly 20 minutes.²³² Because there were three dyads of elephants at the zoo,

²²⁶ *Id.* at ¶ 21(f).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.* at ¶ 21(i).

²³¹ *Id.*

²³² *Id.* at ¶ 21(j).

each elephant interacts with only one other elephant.²³³ In contrast, free elephants tend to live in matriarcal, multi-generational family groups of two to 10 adult females and juveniles.²³⁴ Elephant family groups share a fission-fusion structure, separating and merging with larger groups of up to several hundred elephants.²³⁵ In elephant society, an intricate network of relationships radiates outward from the mother-offspring bond through the extended family and bond group, to clan, population and beyond to strangers, including the primary predatory threat to their survival: Humans.²³⁶ Elephants need the freedom to choose their own social companions, to avoid antagonism and bond in social groups with compatible others; however, in an area the size of the zoo compounds, and under the intensive management regime, there is little opportunity to form and maintain such separate sub-groups.²³⁷

74. The elephant exhibits are also filled with a disturbing abundance of anthropogenic noise, which elephants may easily perceive to be potential risks/threats.²³⁸ Their acute hearing is bombarded by constant auditory disturbances from the artificial waterfall, the nearby road and the visitors who can approach them closely.²³⁹ The twice daily public demonstration of training and health inspection in the Demo area, provided by zoo staff, is undoubtedly disturbing to the

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Poole Decl. ¶ 55.

²³⁷ Lindsay Decl. ¶ 64.

²³⁸ Jacobs Decl. ¶ 21(m).

²³⁹ Lindsay Decl. ¶ 67.

elephants.²⁴⁰ In a [recent video](#), one of the elephants is extremely agitated by the noise of a nearby truck—this is, presumably, not an isolated event.²⁴¹ Moreover, on the day Dr. Jacobs visited the zoo, there was a very large number of people (with many screaming children).²⁴² Elephants depend a great deal on sound for communication, both vocally and seismically.²⁴³ Their feet have a very high number of Pacinian corpuscles (skin receptors sensitive to vibration), which makes them very sensitive to low frequency (subsonic to human hearing) sounds/vibrations.²⁴⁴

75. Finally, Dr. Jacobs observed three elephants exhibit stereotypies in the form of body rocking, swaying, and head bobbing (see videos [here](#)), and they only stopped if they were being fed, interacting with other elephants, or in a training session.²⁴⁵ [Videos](#) taken from June 2023 also show three elephants exhibiting stereotypies. It is clear that large portions of time involve such behavior, which can further aggravate foot issues.²⁴⁶ The existence of stereotypies is a direct reflection of the dysregulation of motor control circuitry in the brain, a form of brain damage.²⁴⁷ As noted previously, stereotypies represent a coping strategy to mitigate the

²⁴⁰ *Id.* at ¶ 60.

²⁴¹ *Id.* at ¶ 21(m).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at ¶ 21(l).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

overwhelming effects of psychosocial stress, and such behavior has never been observed in elephants in their natural habitat.²⁴⁸

D. An accredited elephant sanctuary is the only acceptable place for Missy, Kimba, Lucky, LouLou, and Jambo

76. As Missy, Kimba, Lucky, LouLou, and Jambo are not living an acceptable life for an elephant, they should be moved, as soon as possible, to a suitable elephant sanctuary in the United States.²⁴⁹

77. The orders of magnitude of greater space offered at sanctuaries allow elephants to exercise their autonomy, develop more healthy social relationships, and to engage in a near-natural movement, foraging, and repertoire of behavior.²⁵⁰ Elephants need a choice of social partners, and the space to permit them to be with the ones they want, when they want, and to avoid particular individuals, when they want.²⁵¹ The delight that elephants experience when they are allowed to forage naturally is the default situation in the wild, and in good sanctuaries.²⁵² Authentic sanctuaries report improved physical and psychological health in elephants after their arrival, including decreased frequency or extinction in stereotypies, reduced aggression toward keepers, muscle tone gain, and formation of social bonds between elephants with

²⁴⁸ *Id.* at ¶ 17.

²⁴⁹ Lindsay Decl. ¶ 68.

²⁵⁰ Poole Decl. ¶ 57.

²⁵¹ *Id.* at ¶ 58.

²⁵² Lindsay Decl. ¶ 63.

different social histories, including elephants who were abused, traumatized, or solitary for decades.²⁵³

78. There is no basis for arguing that captive and wild elephants are fundamentally different; they have the same biology and needs, but the failure of captivity to meet these needs results in physical and psychological problems.²⁵⁴ Elephants with serious physical or psychological problems in zoos have usually become more normal functioning when given more appropriate space in an elephant sanctuary.²⁵⁵ For example:

- Maggie was considered to be an anti-social, aggressive elephant and by the time she was moved from the Alaska Zoo to the Performing Animal Welfare Society (“PAWS”) she was in such poor condition she could barely stand. She is now a thriving, socially active elephant and considered to be PAWS’ most social elephant.²⁵⁶
- Ruby was transferred from the Los Angeles Zoo in California to the Knoxville Zoo in Tennessee where she did not successfully integrate with the Knoxville elephants. When she was moved to PAWS, she integrated easily with the other elephants and has become a respected leader of her group.²⁵⁷
- Sissy is another classic example: she had been transferred four times and had spent a decade and a half alone before being sent to the Houston Zoo where she was labeled

²⁵³ Jacobs Decl. ¶ 20.

²⁵⁴ Poole Decl. ¶ 67.

²⁵⁵ *Id.* at ¶ 60.

²⁵⁶ *Id.* at ¶ 61.

²⁵⁷ *Id.* at ¶ 62.

autistic and antisocial. She was returned to her solitary zoo where she killed a person, which resulted in her being moved to the El Paso Zoo where she was beaten because she was a killer elephant. In 2000 she was transferred to The Elephant Sanctuary in Tennessee (“TES”) and within six months of arrival she was calm and cooperative, becoming a leader and putting all elephants at ease. In 2000 the United States Department of Agriculture had given Sissy only a year to live; twenty years later she is still going strong.²⁵⁸

- Bunny was 47 years old and had spent 40 years alone when she arrived at TES. She had been transferred four times and had only known less than a half-acre exhibit. Within 24 hours of arriving at the sanctuary she was completely and seamlessly integrated into the group.²⁵⁹
- Maia and Guida, the first two elephants at Santuário de Elefantes Brasil, had lived together for 40 years. For most of these years Maia was aggressive to Guida, knocking her over, pushing her down and pinning her to the ground. Within 12 hours of arriving at the sanctuary the gates were opened between the two elephants and from that day forward no further aggression was seen.²⁶⁰

V. THE PRIMA FACIE CASE

79. “In a habeas corpus proceeding, . . . the only question to be resolved is whether the custodian has authority to deprive the petitioner of his liberty.” *Reed v. People*, 745 P.2d 235, 238 (Colo.

²⁵⁸ *Id.* at ¶ 63.

²⁵⁹ *Id.* at ¶ 64.

²⁶⁰ *Id.* at ¶ 65.

1987) (citation omitted). “The petitioner bears the burden of alleging facts that warrant the relief sought. If the court determines that the petitioner has set forth sufficient allegations, it must set a hearing upon the custodian’s return of the writ.” *Moody v. Corsentino*, 843 P.2d 1355, 1361 (Colo. 1993) (citation omitted).²⁶¹

80. “A petitioner makes a prima facie showing by producing evidence that, when considered in a light most favorable to the petitioner and when all reasonable inferences therefrom are drawn in the petitioner’s favor, would permit the court to find that the petitioner is entitled to release.” *Cardiel*, 833 P.2d at 752. “Unless it appears from the petition and supporting documents that the petitioner is not entitled to relief, the court must issue a writ of habeas corpus forthwith.” *Id.* (emphasis added). *See also* C.R.S. § 13-45-101 (“The court to which the application is made shall forthwith award the writ of habeas corpus, unless it appears from the petition itself, or from the documents annexed, that the party can neither be discharged nor admitted to bail nor in any other manner relieved.”).

81. The Petition makes a prima facie showing because the evidence produced, when considered in the light most favorable to Missy, Kimba, Lucky, LouLou, and Jambo—and with all reasonable inferences drawn in their favor—permits this Court to find that they are entitled to release from their unlawful confinement to an elephant sanctuary. The elephants’ confinement at CMZ is unlawful because (1) the elephants have the common law right to bodily liberty protected by habeas corpus (*infra* § VI.A-D), and (2) their right to bodily liberty has been violated (*infra* § VI.G).

²⁶¹ “The office of the writ of habeas corpus is to give a person restrained of his liberty an *immediate hearing* so that the legality of his detention may be inquired into and determined.” *Johnson v. Black*, 137 Colo. 119, 124 (1958) (internal quotations and citation omitted).

82. The Expert Declarations establish that elephants are autonomous and extraordinarily cognitively complex beings (*supra* § IV), which will support this Court’s recognition of the elephants’ common law right to bodily liberty protected by habeas corpus. At this preliminary stage, however, this Court need only assume, without deciding, that the elephants could possibly have this right. *See Stanley*, 49 Misc.3d at 748 (“Given the important questions raised here, I signed the petitioner’s order to show cause, and was mindful of petitioner’s assertion that ‘the court need not make an initial judicial determination that [chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.’”).
83. In a similar habeas corpus case brought by the NhRP on behalf of Happy (an elephant confined at the Bronx Zoo), Judge Rowan Wilson and Judge Jenny Rivera of the New York Court of Appeals found that Happy made a prima facie showing entitling her to release to an elephant sanctuary. *See Breheny*, 38 N.Y.3d at 617 (Wilson, J., dissenting); *id.* at 628 (Rivera, J., dissenting).
84. Judge Wilson’s prima facie evaluation began by “taking the information Happy has submitted as true, and granting every possible reasonable inference in her favor.” *Id.* at 618. (Wilson, J., dissenting). He considered: “‘what does the information submitted by the petitioner [Happy] tell us about the petitioner?’ [and] ‘what does the information submitted by the petitioner tell us about the confinement?’” *Id.* at 621-22. “What was unknown about animal cognizance and sentience a century ago is particularly relevant to whether Happy should be able to test her confinement by way of habeas corpus, because we now have information suggesting that her confinement may be cruel and unsuited to her well-being.” *Id.* at 607. “Accepting as true the (largely unchallenged) expert affidavits submitted on behalf of Happy,” Judge Wilson found that “Happy and elephants like her ‘possesses complex cognitive abilities’ of a great number”:

Among those myriad qualities and abilities include “autonomy; empathy; self-awareness; self-determination; theory of mind (awareness that others have minds); insight; working memory; [and] an extensive long-term memory that allows them to accumulate social knowledge.” They are able to “act intentionally and in a goal-oriented manner,” “understand the physical competence and emotional state of others,” “engage in true teaching,” “cooperate and build coalitions,” engage in “cooperative” and “innovative problem-solving,” “understand causation,” and engage in “intentional communication.” They have “complex learning and categorization abilities,” and they understand death, practicing grieving behaviors that “are akin to human responses to the death of a close relative or friend” when they have lost a companion.

Id. at 618-19.

85. Next, Judge Wilson evaluated the nature of Happy’s confinement and found that her habitation at the Bronx Zoo—which “is a miniscule fraction of the size of elephants’ typical environments” in the wild—“is causing her deep physical and emotional suffering because it is so unnaturally different from conditions that meet the needs of elephants.” *Id.* at 619-20 (citation omitted). Judge Wilson concluded: “Happy has very substantial cognitive, emotional and social needs and abilities, and . . . those qualities coupled with the circumstances of her particular confinement establish a prima facie case that her present confinement is unjust.” *Id.* at 626.

86. Judge Rivera similarly concluded that the NhRP “made the case for Happy’s release and transfer to an elephant sanctuary, and the writ should therefore be granted.” *Id.* at 634 (Rivera, J., dissenting). She relied on “submitted affidavits from several internationally renowned elephant experts to establish Happy’s autonomy and the inherent harm of her captivity in the Zoo.” *Id.*²⁶² That expert evidence demonstrated:

²⁶² The trial court noted that the NhRP “placed before the Court five deeply educated, independent, expert opinions, all firmly grounded in decades of education, observation, and experience, by some of the most prominent elephant scientists in the world. In great detail, these opinions carefully demonstrate that elephants are autonomous beings possessed of extraordinarily cognitively complex minds.” *Breheny (Trial Court)*, 2020 WL 1670735 at *6.

Captivity is anathema to Happy because of her cognitive abilities and behavioral modalities—because she is an autonomous being. Confinement at the Zoo is harmful, not because it violates any particular regulation or statute relating to the care of elephants, but because an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—curtailed. Happy’s confinement by human beings has never been intended to benefit her but serves only to entertain and satisfy human curiosity, regardless of the loss of freedom to Happy. She is held in an environment that is unnatural to her and that does not allow her to live her life as she was meant to: as a self-determinative, autonomous elephant in the wild. Her captivity is inherently unjust and inhumane. It is an affront to a civilized society, and every day she remains a captive—a spectacle for humans—we, too, are diminished.

Id. at 642.

87. Historically, writs of habeas corpus were issued for individuals whose right to bodily liberty was previously unrecognized. For example, it is “against [the] long-entrenched background of legally sanctioned slavery that the courts of England and the United States worked, through the Great Writ, to secure liberty for those deemed chattel, equated, at most, with animals.” *Id.* at 592 (Wilson, J., dissenting). This included the landmark case of *Somerset v. Stewart*, 1 Lofft. 1, 98 Eng. Rep. 499 (K.B. 1772), <http://bit.ly/3jpLmkH>, where Lord Mansfield assumed, without deciding, that an enslaved Black man, James Somerset, could possess the common law right to bodily liberty protected by habeas corpus when he famously issued the writ requiring the respondent to justify Somerset’s detention—before ultimately granting his freedom. In *In re Kirk*, 1 Edm.Sel.Cas. 315, 332 (1846), a New York court recognized its duty to issue the writ on behalf of an enslaved Black child confined on a docked ship by a Georgia slaveholder: “I was bound to allow the writ of habeas corpus, even if I had been fully convinced of the legality of the imprisonment, and . . . it becomes my duty to consider and decide it--a duty from which I am not at liberty to shrink.” The court added: “I approach this with all the caution

becoming the gravity of the case, yet with a lively sense of what is due to personal liberty.” *Id.* at 335.²⁶³

88. Some courts issued writs of habeas corpus though ultimately denied relief. For example, in *In re Perkins*, 2 Cal. 424, 429 (1852), the Supreme Court of California issued a writ of habeas corpus for three enslaved Black men brought to California from out of state, although it subsequently determined that they were not entitled to their freedom and remanded them to their owner. In *Matter of Archy*, 9 Cal. 147, 147 (1858), that same court issued a writ of habeas corpus for Archy Lee, an enslaved Black man brought to California from out of state, before subsequently remanding Archy to the custody of his owner.²⁶⁴

89. More recently, courts have issued writs of habeas corpus on behalf of nonhuman animals even though relief was ultimately denied.

- In 2015, the NhRP secured the first-ever habeas corpus order to show cause on behalf of a nonhuman animal in the United States.²⁶⁵ The court held a hearing during which the New York State Attorney General’s Office was required to justify the confinement of the chimpanzees Hercules and Leo. *See Stanley*, 49 Misc.3d at 755.

²⁶³ See also *Lemmon v. People*, 20 N.Y. 562, 617 (1860); *Commonwealth v. Aves*, 35 Mass. 193, 193 (1836); *Jackson v. Bulloch*, 12 Conn. 38, 39 (1837); *Republica v. Blackmore*, 2 Yeates 234, 234 (Pa. 1797).

²⁶⁴ Archy’s “attorney had won the Supreme Court case on the law, but lost it on the final order delivered by the judges.” BRIAN MCGINTY, ARCHY LEE’S STRUGGLE FOR FREEDOM: THE TRUE STORY OF CALIFORNIA GOLD, THE NATION’S TRAGIC MARCH TOWARD CIVIL WAR, AND A YOUNG BLACK MAN’S FIGHT FOR LIBERTY 1, 58 (Lyons Press, 2019).

²⁶⁵ In New York, an “order to show cause” in the habeas context is the equivalent of “a writ of habeas corpus,” except that issuing the former does not require the detainee’s presence. *See CPLR* § 7003(a).

- In 2018, the NhRP secured the world’s first habeas corpus order to show cause on behalf of an elephant.²⁶⁶ Following a transfer of venue, a trial court heard thirteen hours of oral argument over three days and concluded that the NhRP’s arguments were “extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot.” *Breheny (Trial Court)*, 2020 WL 1670735 at *10.

90. To refuse to issue the writ and allow the case to proceed to a hearing on the merits would be a “refusal to confront a manifest injustice.” *Tommy*, 31 N.Y.3d at 1059 (Fahey, J. concurring).

VI. ARGUMENT

A. Habeas corpus has long been used in novel situations to challenge unjust confinements

91. Habeas corpus has long been available in novel situations to safeguard the liberty of individuals with few or no rights, and its history powerfully supports extending the Great Writ’s use here.²⁶⁷ Habeas corpus is “a writ antecedent to statute, . . . throwing its root deep into the genius

²⁶⁶ Mallory Diefenbach, *Orleans County issues first habeas corpus on behalf of elephant*, The Daily News (Nov. 21, 2018), <https://bit.ly/3AwkCWV>; Andrea Morris, *Judge To Rule On Historic Case Of Whether An Elephant Is A Person*, FORBES (Nov. 19, 2018), <https://bit.ly/2Z4MCmx>; Debra Cassens Weiss, *Judge takes first step to decide whether Happy the elephant should be released from Bronx Zoo*, ABA J. (Nov. 20, 2018), <https://bit.ly/3EnKSVv>.

²⁶⁷ The extension of habeas corpus to certain nonhuman animals is well grounded in the jurisprudential literature. *See generally*, Steven M. Wise, *The Struggle for the Legal Rights of Nonhuman Animals Begins—the Experience of the Nonhuman Rights Project in New York and Connecticut*, 25 ANIMAL L. 367 (2019); Steven M. Wise, *A New York Appellate Court Takes A First Swing at Chimpanzee Personhood. and Misses*, 95 DENV. L. REV. 265 (2017); Craig Ewasiuk, *Escape Routes: The Possibility of Habeas Corpus Protection for Animals Under Modern Social Contract Theory*, 48 COLUM. HUM. RTS. L. REV. 69 (2017); Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 GOLDEN GATE U.L. REV. 219 (2007); Justin F. Marceau and Steve Wise, *Exonerating the Innocent: Habeas for Nonhuman Animals*, in *Wrongful Convictions and the DNA Revolution: Twenty-Five Years of Freeing the Innocent*, Cambridge University, 2017, U DENVER LEGAL STUDIES RESEARCH PAPER No. 18-16.

of our common law.” *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (internal quotations and citation omitted). “By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage.” *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). “Over the centuries [habeas corpus] has been the common law world’s ‘freedom writ’ by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free.” *Williams v. Dist. Ct. of Eighth Williams v. District Court of Eight Judicial Dist. In and For Larimer Cnty.*, 160 Colo. 348, 355 (1966) (citation omitted); *Jones v. Williams*, 443 P.3d 56, 61 (2019) (calling habeas corpus “the great writ of freedom in Anglo-American jurisprudence,” and admonishing “that it is not to be hedged or in anywise circumscribed with technical requirements”) (citations omitted).

92. The “essential purpose of the writ of habeas corpus ‘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) (citations omitted). As the “precious safeguard of personal liberty, . . . there is no higher duty than to maintain it unimpaired.” *Geer v. Alaniz*, 331 P.2d 260, 261 (Colo. 1958) (citation omitted).

93. It is “a proper judicial use of the writ to employ it to challenge conventional laws and norms that have become outmoded or recognized to be of dubious or contested ethical soundness.” *Breheny*, 38 N.Y.3d at 602 (Wilson, J., dissenting). 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. It “is an innovative writ—one used to advocate for relief that was slightly or

significantly ahead of the statutory and common law of the time.” *Id.* at 589. As Judge Wilson explained:

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. . . . Not only does the history of the writ's usage destroy the foundations of the majority's contention, it shows how the writ was used by enlightened judges to nudge advances in the law.

Id. at 588-89.

94. Two seminal cases “show how the Great Writ was flexibly used by the courts as a tool for innovation and social change.” *Id.* at 592. The first is the famous English case of *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772), <https://bit.ly/3jpLmkH>, in which Lord Mansfield on the Court of King’s Bench 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. *Id.* at 19.²⁶⁸
95. The second is the famous New York Court of Appeals decision in *Lemmon v. People*, 20 N.Y. 562 (1860), where the court, relying on *Somerset*, affirmed a decision granting a habeas corpus petition brought on behalf of eight slaves.²⁶⁹ It ruled that “slavery is repugnant to natural justice

²⁶⁸ Lord Mansfield famously stated, “fiat justitia, ruat ccelum” (“let justice be done though the heavens may fall”). 1 Lofft. at 17. “The heavens did not fall, but certainly the chains of bondage did for many slaves in England.” Paul Finkelman, *Let Justice Be Done, Though the Heavens May Fall: The Law of Freedom*, 70.2 CHI.-KENT L. REV. 326 (1994). See also STEVEN M. WISE, *THOUGH THE HEAVENS MAY FALL: THE LANDMARK TRIAL THAT LED TO THE END OF HUMAN SLAVERY* 225 (Da Capo Press, Reprint ed. 2006) (“That black chattel slavery was so odious the common law would never support it was *Somerset’s* chief legacy. . . . *Somerset’s* principles have begun to radiate beyond humanity, as some lawyers are insisting today that at least the most cognitively complex nonhuman animals should no longer be treated as slaves.”).

²⁶⁹ The *Lemmon* court noted: “The judgment in *Somerset’s* case and the principles announced by Lord MANSFIELD, were standing admonitions that even a temporary restraint of personal liberty by virtue of a title derived under the laws of slavery, could not be sustained where that institution did not exist by positive law, and where the remedy by *habeas corpus*, which was a cherished institution of this country as well as in England, was established.” *Id.* at 605.

and right, has no support in any principle of international law, and is antagonistic to the genius and spirit of republican government.” *Id.* at 617.²⁷⁰ *Lemmon* “illustrates how courts have used and should use the common law writ of habeas corpus to expand liberty interests that were not just controversial at the time, but denied by ‘positive’ law legitimizing slavery.” *Breheny*, 38 N.Y.3d at 594 (Wilson, J., dissenting) (explaining that *Lemmon* directly conflicted with the infamous *Dred Scott* decision of 1857).²⁷¹

96. That the writ has yet to be extended to an elephant in Colorado only demonstrates that this case is novel. However, the case’s novelty does not render it without merit:

[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. The . . . argument—“this has never been done before”—is an argument against all progress, one that flies in the face of legal history. The correct approach is not to say, “this has never been done” and then quit, but to ask, “should this now be done even though it hasn’t before, and why?”

Breheny, 38 N.Y.3d at 582 (Wilson, J., dissenting). *See also id.* at 629 (Rivera, J., dissenting) (“[N]ovel questions merely present opportunities to develop the law. . . . I write to emphasize my view that prior decisions do not foreclose Happy’s petition and instead compel our acknowledgment of the availability of the writ to a nonhuman animal to challenge an alleged unjust confinement.”).

²⁷⁰ Other courts have also used habeas corpus to secure the freedom of enslaved humans. *E.g.*, *Jackson v. Bulloch*, 12 Conn. 38, 41, 42 (1837); *Commonwealth v. Aves*, 35 Mass. 193 (1836); *In re Belt*, 2 Edm.Sel.Cas. 93 (N.Y. Sup. Ct. 1848); *In re Kirk*, 1 Edm.Sel.Cas. 315 (1846).

²⁷¹ *Somerset* and *Lemmon*, while non-binding authorities, have persuasive value. *See Bieber v. People*, 856 P.2d 811, 815 (Colo. 1993) (“[S]ubsequent action by English courts [after 1607] as well as courts of other jurisdictions in the United States may have persuasive value” for interpreting the common law).

97. The above references to “humans who were denied full rights under the law to demonstrate the flexibility of the historical uses of the writ” does not “undermine in any way the dignity of those individuals or diminish their struggles for equality and the right to live free.” *Id.* at 632 (Rivera, J., dissenting).

98. The NhRP does not equate humans with elephants or other nonhuman animals. Rather, 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 “those protections are not the singular possessions of human beings.” *Id.* As Judge Rivera explained:

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. Indeed, if a corporation—a legal fiction created to benefit some humans—can have constitutional rights protected in our courts, then the law can recognize an autonomous animal's right to judicial consideration of their claim to be released from an unjust captivity.

Id. at 631 (citations omitted). *See also Tommy*, 31 N.Y.3d at 1059 (Fahey, J., concurring) (“I agree with the principle that all human beings possess intrinsic dignity and value, . . . but, in elevating our species, we should not lower the status of other highly intelligent species.”).

B. As a matter of justice and changing societal norms, this Court must recognize Missy, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus because they are autonomous and extraordinarily cognitively complex

99. The common law must change in appropriate circumstances “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); *accord E.A. Stephens & Co. v. Albers*, 81 Colo. 488, 496 (1927) (“Having then 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. So the courts of England and the United States have acted from time immemorial, and so the common law itself came into existence.”). As former Chief Justice

Frantz stated long ago:

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.

Thus it has been said that courts may reshape ancient rules of the common law so as to fit them to present conditions; verily, it is their duty to keep the common law abreast of changes wrought by time. Courts should not be averse to molding common law principles to meet the dictates of experience and observation. Indeed, it is a sad commentary on the common law if it can be said of it that 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.

Tesone v. Sch. Dist. No. Re-2, in Boulder Cnty., 152 Colo. 596, 602-03 (1963) (Frantz, C.J., dissenting), *overruled by Evans v. Bd. of Cnty. Comm'rs of El Paso Cnty.*, 174 Colo. 97, 101 n.9 (1971) (adopting the principles espoused by Frantz’s dissent).²⁷² “It is the glory of the common law that its fundamental conceptions are sufficiently elastic to cover the rapidly developing relations and conditions of a progressive society.” *Denver Jobbers’ Ass’n v. People*, 21 Colo.App. 326, 361-62 (1912).

100. Defined as “[t]he quality of being fair or reasonable,” *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019), justice is a fundamental principle of the common law. *Denver & R.G.R. Co. v. Outcalt*, 2 Colo.App. 395, 402 (1892) (for centuries, “the principles of natural justice and equity of the common law . . . have been regarded as fundamental”). “[L]aw cannot be divorced

²⁷² *Evans* was superseded by statute when the General Assembly restored governmental immunity in response to the Court’s decision abrogating it. See *Open Door Ministries v. Lipschuetz*, 373 P.3d 575, 578 (Colo. 2016) *as modified on denial of reh’g* (June 27, 2016). However, the statute did not implicate the fundamental common law principles espoused by Chief Justice Frantz’s dissent in *Tesone* and adopted in *Evans*.

from morality in so far as it clearly contains . . . the notion of right to which the moral quality of justice corresponds.” *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019) (quoting PAUL VINOGRADOFF, COMMON SENSE IN LAW 19-20 (H.G. Hanbury ed., 2d ed. 1946)).²⁷³ “[I]t will be well to bear in mind Blackstone's definition that law is a rule of action commanding what is right and prohibiting what is wrong.” *Denver Jobbers’ Ass’n*, 21 Colo.App. at 361.²⁷⁴

101. “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.” *Breheny*, 38 N.Y.3d. at 603 (Wilson, J., dissenting). 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.” *Id.* at 588.

102. The time has come for the common law to reflect the modern understanding that elephants are autonomous and extraordinarily cognitively complex beings, and the deprivation of their bodily liberty, through their wholly unnatural confinement at CMZ, is unjust. This injustice, along with changing societal norms and the evolving legal status of nonhuman animals,

²⁷³ See BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150 (1921) (“I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice . . . there should be less hesitation in frank avowal and full abandonment.”); Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 131 (2004) (The “moral judge” “embraces his professional life most fully when he is prepared to fight—and be criticized or reversed—in striving for justice.”).

²⁷⁴ See also *Bertrand*, 872 P.2d at 226 (Colorado Supreme Court “fundamentally altered the common law of Colorado” by abrogating “the doctrine of sovereign and governmental immunity after determining that the doctrine [wa]s unjust and inequitable”); *City of Denver v. Dunsmore*, 3 P. 705, 711 (Colo. 1884) (“[W]e are satisfied that the rule announced for this state is a safe and equitable one. That it ought to be the law is evident from natural reason and the plainest principles of justice.”).

compels the recognition of Missy, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus.²⁷⁵

i. Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at Cheyenne Mountain Zoo is unjust

103. It was long believed that nonhuman animals are unable to think, believe, remember, reason, and experience emotion. *See generally* RICHARD SORABJI, *ANIMAL MINDS & HUMAN MORALS: THE ORIGINS OF THE WESTERN DEBATE* 1-96 (1993). As infamously posited by the seventeenth-century philosopher René Descartes, nonhuman animals are neither rational nor conscious creatures. *See generally, Breheny*, 38 N.Y.3d at 607 (Wilson, J., dissenting) (citing Peter Harrison, *The Virtues of Animals in Seventeenth-Century Thought*, 59 J. OF THE HIST. OF IDEAS 463, 463 (1998)). But “[g]iven 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.* at 609. Indeed, “[s]cientific knowledge about elephant intelligence has been increasing rapidly in the past decade: what we currently know is only a tiny fraction of what elephant brains are likely capable of, and yet more amazing abilities are still likely to be discovered.” Poole Decl. ¶ 69.

104. There is no question that confining elephants at the CMZ is unjust. The NhRP’s Expert Declarations establish that elephants are autonomous and extraordinary cognitively complex

²⁷⁵ “In the common-law system, there is often not a sharp boundary between doctrine and policy – that is, between existing law (‘what do the cases say?’) and an analysis of the social effects of the law (‘what legal rule would be a good idea in our society?’). In fact, considerations of policy – along with other types of analysis, like considerations of morality and experiential knowledge – are one of the primary motivations for the creation and ongoing development of legal doctrine.” SHAWN BAYERN, *AUTONOMOUS ORGANIZATIONS* 135-36 (2021) (citing MELVIN EISENBERG, *THE NATURE OF THE COMMON LAW* 14-19 (1988)).

beings with complex biological, psychological, and social needs (*supra* § IV.A). Yet, as detailed above, Missy, Kimba, Lucky, LouLou, and Jambo are not living a life that is anything close to acceptable for an elephant, having been deprived of their ability to travel, forage, communicate, socialize, plan, live, choose, and thrive as elephants should—in other words, to be autonomous (*supra* § IV.B-C).

105. Their life at CMZ is nothing but a succession of boring and frustrating days, damaging to their bodies and minds. Lindsay Decl. ¶ 67. There is no variety in their lives, no challenge to employ their mental capacity for exploration, spatial memory, or problem-solving, and no opportunity to employ their wide range of vocalisations, to communicate and interact with a range of other elephants over distance. *Id.* at ¶ 61.

106. Courts have recognized the injustice of confining elephants in zoos. In *Breheny (Trial Court)*, the trial court relied on expert affidavits from “some of the most prominent elephant scientists in the world” demonstrating that “elephants are autonomous beings possessed of extraordinary cognitively complex minds.” 2020 WL 1670735 at *6.²⁷⁶ It further found that Happy “is an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty.” *Id.* at *10. Although the court felt “[r]egrettably” bound

²⁷⁶ “A deepening pool of scientific research gives clear evidence that elephants and other animals are smarter, more aware, and more emotional than previously thought. . . . Elephants are intelligent and empathetic. They use tools, have close family ties, comfort their friends, and even appear to mourn their dead.” Rachel Fobar, *A person or a thing? Inside the fight for animal personhood*, NAT. GEO (Aug. 4, 2021), <https://on.natgeo.com/3Fqukwg>. One of many examples showing the advanced cognition of elephants can be seen in the response elephants have to the murder of their own kind. Specifically, “[a] herd as far away as a hundred miles from a cull – the brutal practice of gunning down elephants in those areas where their numbers interfere with human settlements – can both emit and hear alarm calls outside our ears’ register about the unfolding cataclysm. In the aftermath of such slaughters, when the body parts are locked away in sheds for later sale, other elephants have been known to return to break in and retrieve the remains for proper burials.” Charles Siebert, *Zoos Called It a ‘Rescue.’ But Are the Elephants Really Better Off?*, N.Y. TIMES (July 9, 2019), <https://nyti.ms/3qmjuRJ>.

by precedent to rule against Happy, *id.* at *9, it recognized the injustice of her confinement at the Bronx Zoo:

This Court is extremely sympathetic to Happy’s plight and the NhRP’s mission on her behalf. It recognizes that Happy is an extraordinary animal with complex cognitive abilities, an intelligent being with advanced analytic abilities akin to human beings. . . . The arguments advanced by the NhRP are extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot.

Id. at *10.

107. On appeal, Judge Wilson concluded that the scientific evidence submitted by the NhRP “demonstrates that Happy has very substantial cognitive, emotional and social needs and abilities, and that those qualities coupled with the circumstances of her particular confinement establish a prima facie case that her present confinement is unjust.” *Breheny*, 38 N.Y.3d at 626 (Wilson, J., dissenting).²⁷⁷ “What was unknown about animal cognizance and sentience a century ago is particularly relevant to whether Happy should be able to test her confinement by way of habeas corpus, because we now have information suggesting that her confinement may be cruel and unsuited to her well-being.” *Id.* at 607. “[T]he contrast between what we now know and the paucity of information in earlier times must inform our analysis.” *Id.* Judge Wilson aptly observed: “Driving many of the changing social norms about wild animals is our

²⁷⁷ “More recently, hard science has begun to reveal just how radically the elephant’s outwardly plodding appearance belies the exquisiteness of its senses and sensibilities. Neuroimaging has shown that elephants possess in their cerebral cortex the same elements of neural wiring we long thought exclusive to us, including spindle and pyramidal neurons, associated with higher cognitive functions like self-recognition, social awareness and language. This same circuitry, of course, renders elephants susceptible to the various psychic pathologies that afflict imprisoned humans: extreme boredom and depression, stereotypical behaviors like manic pacing and rocking and heightened aggression.” Charles Siebert, *Zoos Called It a ‘Rescue.’ But Are the Elephants Really Better Off?*, N.Y. TIMES (July 9, 2019), <https://nyti.ms/3qmjuRJ>.

vastly enhanced understanding of their cognitive abilities, needs and suffering when in captivity.” *Id.* at 606.

108. Judge Rivera similarly recognized the injustice of continuing “Happy’s decades-long confinement in an unnatural habitat where she is held for the sole purpose of human entertainment. . . . A gilded cage is still a cage. Happy may be a dignified creature, but there is nothing dignified about her captivity.” *Id.* at 628 (Rivera, J., dissenting). Based on the expert evidence establishing Happy’s autonomy and the inherent harm of her confinement, Judge Rivera concluded:

Captivity is anathema to Happy because of her cognitive abilities and behavioral modalities—because she is an autonomous being. Confinement at the Zoo is harmful, not because it violates any particular regulation or statute relating to the care of elephants, but because an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—curtailed. . . . She is held in an environment that is unnatural to her and that does not allow her to live her life as she was meant to: as a self-determinative, autonomous elephant in the wild. Her captivity is inherently unjust and inhumane. It is an affront to a civilized society, and every day she remains a captive—a spectacle for humans—we, too, are diminished.

Id. at 642.

109. More than a decade ago, a court found after a six-day trial that three elephants confined at the Los Angeles Zoo were “neither thriving, happy, nor content.” *Leider v. Lewis*, Case No. BC375234 at 30 (L.A. Cnty. Sup. Ct. July 23, 2012), <https://bit.ly/3KRQfln>.²⁷⁸ The injustice of the elephants’ confinement was clear as their life was “empty, purposeless, boring, and occasionally painful.” *Id.* at 45. The court added: “Captivity is a terrible existence for any

²⁷⁸ The California Supreme Court reversed on legal grounds because “the Legislature did not intend to overturn the long-established law governing equitable relief for violations of penal law” *Leider v. Lewis*, 2 Cal.5th 1121, 1137 (2017).

intelligent, self-aware species, which the undisputed evidence shows elephants are. To believe otherwise, as some high-ranking zoo employees appear to believe, is delusional.” *Id.* at 30.²⁷⁹

110. Finally, the Islamabad High Court recently ordered the release of an elephant named Kaavan from the Marghazar Zoo to an elephant sanctuary, after finding that Kaavan had been subjected to “unimaginable pain and suffering for the past three decades.” *Islamabad Wildlife Mgmt. Bd. v. Metropolitan Corp. Islamabad*, W.P. No. 1155/2019 at 62 (H.C. Islamabad, Pakistan May 21, 2020), <https://bit.ly/3tXu4zT>. The court recognized the “exceptional abilities” of elephants and that the “needs of this innocent creation cannot be met in the captive environment of a zoo.” *Id.* at 12, 13.

111. To remedy the injustice of Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at CMZ, this Court must recognize their common law right to bodily liberty protected by habeas corpus so that they can spend the rest of their lives in an elephant sanctuary where their proven autonomy and extraordinary cognitive complexity will be respected to the greatest extent possible. “[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.” *Breheny*, 38 N.Y.3d at 629 (Rivera, J., dissenting).

ii. Societal norms about keeping elephants in captivity as well as the legal status of nonhuman animals have changed

112. Whether the elephants can challenge their confinement through a writ of habeas corpus “arises within our country's history of evolving norms and knowledge about animals. Those

²⁷⁹ In reaching its conclusions, the Los Angeles Superior Court relied on the testimony of Dr. Joyce Poole, who has submitted an expert declaration in the instant case. The court noted that Dr. Poole is “one of the world’s leading experts on elephant behavior” who “essentially pioneered the study of the social organization of African elephants,” and found her to be “far and away the most qualified witness at trial.” *Id.* at 17, 18.

evolving norms and our deepening understanding about animals, along with legal developments that reflect them, provide the essential context for deciding this case.” *Id.* at 610 (Wilson, J., dissenting). Societal norms towards keeping elephants in captivity as well as the legal status of nonhuman animals more generally have changed. It is time for the common law to evolve to reflect these changes, which do not comport with the elephants’ confinement at CMZ.

113. There is burgeoning societal agreement that elephants should not be confined, given the well-documented horrifying effects of captivity:

Elephants are particularly unhappy in zoos, given their great size, social nature and cognitive complexity. Many suffer from arthritis and other joint problems from standing on hard surfaces; elephants kept alone become desperately lonely; and all zoo elephants suffer mentally from being cooped up in tiny yards while their free-ranging cousins walk up to 50 miles a day. Zoo elephants tend to die young. At least 20 zoos in the United States have already ended their elephant exhibits in part because of ethical concerns about keeping the species captive.

Emma Marris, *Modern Zoos Are Not Worth the Moral Cost*, N.Y. TIMES (June 11, 2021), <https://nyti.ms/33ESIw3>.²⁸⁰

114. Since 1991, more than thirty American zoos have closed their elephant exhibits or are in the process of doing so.²⁸¹ Lion Country Safari, for example, closed its elephant exhibit in

²⁸⁰ See also Charles Siebert, *Zoos Called It a ‘Rescue.’ But Are the Elephants Really Better Off?*, N.Y. TIMES (July 9, 2019), <https://nyti.ms/3qmjuRJ> (“The physical ailments that afflict captive elephants — foot sores and infections, joint disorders, a high incidence of tuberculosis — have been well known for years. . . . [A] 2012 Seattle Times investigation found that 390 elephants had died in accredited zoos in the previous 50 years, a majority of them from captivity-related injuries and diseases.”).

²⁸¹ *Closed or closing elephant zoo exhibits*, IN DEFENSE OF ANIMALS, <https://bit.ly/30P8hjI>.

2006, with its director of wildlife explaining: “If we can’t keep elephants in captivity properly, we shouldn’t And we’ve proven that we can’t.”²⁸²

115. In Happy’s case before the New York Court of Appeals, 146 distinguished scholars, habeas corpus experts, philosophers, lawyers, and theologians submitted amicus briefs in support of an elephant’s freedom to a sanctuary,²⁸³ prompting the majority in *Breheny* to observe: “this case garnered extraordinary interest from amici curiae and the public—a testament to the complicated and ever-evolving relationship between human beings and other animals.”²⁸⁴ 38 N.Y.3d at 577.

116. Historian Jill Lepore²⁸⁵ described Happy’s habeas corpus case as the “most important animal-rights case of the 21st century,” observing that her “misery comprises forms of distress that many humans, just now, understand better than they used to. In this 21st-century *Planet of the Apes* moment, humans have so ravaged the planet that many feel themselves caged, captive, isolated, and alone, dreading each dawn . . . seeing in Happy a reflection of their own despair.” Jill Lepore, *The Elephant Who Could be a Person*, Atlantic (Nov. 16, 2021), <https://bit.ly/41IGIOg>.

²⁸² Jill Lepore, *The Elephant Who Could Be A Person*, THE ATLANTIC (Nov. 16, 2021), <https://bit.ly/3oDpw0M>.

²⁸³ *Amicus Support* for the fight to #FreeHappy, NONHUMAN RIGHTS BLOG (Apr. 25, 2022), <https://bit.ly/3Mm5Z0U>

²⁸⁴ A Change.org petition to free Happy has gathered nearly 1.4 million signatures, of which almost 1 million have been added since the NhRP filed its habeas petition on behalf of Happy. Available at: <https://bit.ly/3qgkx1Y>.

²⁸⁵ Jill Lepore is a prize-winning professor of American History at Harvard University, an award-winning author, a staff writer at *The New Yorker*, a prolific essayist, and a past president of the Society of American Historians, among other notable achievements. *Biography*, HARVARD UNIVERSITY, <https://bit.ly/3t1rwCr>.

117. In a radio interview, Lepore added: “I have come—in looking at [Happy’s] case carefully, to believe it is a necessary part of the political journey and the history of humankind toward granting rights to more than just the people in power. . . . We are in a long moral journey as a species and I think we have taken some terribly, terribly bad turns on this road.” Jill Lepore (interviewed by Melissa Harris-Perry), *Happy the Elephant Could Change the Face of Animal Rights*, WYNC STUDIOS: THE TAKEAWAY (Dec. 14, 2021), <https://bit.ly/3s3CJlw>.
118. As our knowledge of nonhuman animals have evolved, their legal status has changed and is changing still. For example, “[a]nimal cruelty was not a crime under common law,” but by the end of the nineteenth century, “many states had enacted laws that reflected society’s acceptance of the idea that animals had an inherent right to be free from unnecessary pain and suffering and that the legal system should recognize that right.” *People v. Harris*, 2016 COA 159, ¶ 48, 49. Colorado enacted such a statute in 1889, with the Colorado Supreme Court observing that “animal cruelty laws had evolved as society gained a greater understanding of animals’ capacity for pain and suffering.” *Id.* at ¶ 50 (citing *Waters v. People*, 46 P. 112, 113 (Colo. 1896)).
119. In response to changing societal norms about companion animals, “all fifty states and the District of Columbia now have ‘pet trust’ laws on their books, which enable guardians to create legally enforceable arrangements for the care of their animal companions.” Pamela Frasch, Joyce Tischler, *Animal Law: The Next Generation*, 25 *Animal L.* 303, 316 (2019).
120. Finally, courts around the world have recognized the rights of some nonhuman animals.

- In 2022, Ecuador’s highest court—the Constitutional Court—decided an appeal from the denial of a writ of habeas corpus for a chorongo monkey named Estrellita.²⁸⁶ *Judgment No. 253-20-JH/22 Rights of Nature and animals as subjects of rights, ‘Estrellita Monkey’ Case* (Constitutional Court of Ecuador, 2022) [English Translation], <https://bit.ly/3MhkBw6>. By a 7-2 vote, the Court ruled: “Animals are subjects of rights protected by the rights of Nature.” *Id.* at ¶ 181, p. 55. Regarding the availability of habeas corpus for wild nonhuman animals, the Court wrote:

[T]he rights of a wild animal must be protected objectively, taking its life, freedom and integrity as their own inherent rights, and not based on the claims, desires or intentions of third parties. In these cases, if the judges prove that the deprivation or restriction of the freedom of a wild animal is unlawful, they must provide the most suitable alternative for the preservation of the life, freedom, integrity and other related rights of the victim; they may order, without being restrictive, its reinsertion in its natural ecosystem, its translocation to shelters, sanctuaries, aquariums, eco zoos, or its treatment in animal rehabilitation centers.

Id. at ¶ 173, p. 53.²⁸⁷

- In 2020, the Islamabad High Court ordered the release of an imprisoned Asian elephant named Kaavan from the Marghazar Zoo to an elephant sanctuary, stating “without any hesitation” that Kaavan is the subject of “legal rights.” *Islamabad Wildlife Mmgt. Bd.*

²⁸⁶ In 2020, the Constitutional Court selected this case for appeal in order to “develop case law determining the scope of a motion for *habeas corpus* with respect to the protection of other living beings, and if these can be considered as subjects entitled to rights covered by the laws of nature.” Selection Court of the Constitutional Court of Ecuador re: Case No. 253-20-JH at para. 9 (Dec. 22, 2020) [English translation], <https://bit.ly/3LYoMf8>.

²⁸⁷ The Constitutional Court relied upon a joint amicus brief submitted by the NhRP and Harvard Law School’s Animal Law & Policy Program, citing it ten times. Judgment No. 253-20-JH/22 at ¶ 5, p. 3; ¶¶ 10-13, pp. 4-5; ¶ 68, p. 22; ¶ 86 n.89, p. 28; ¶ 126 n.117, p. 38; ¶ 128, pp. 38-39; ¶ 132 n.125, p. 41; ¶ 136 n.129, p. 42; ¶ 143 n.133, p. 44; ¶ 144, pp. 44-45. The joint amicus brief is available at <https://bit.ly/3F0QViM>.

v. Metropolitan Corp. Islamabad, W.P. No. 1155/2019 at 59, 62 (H.C. Islamabad, Pakistan, May 21, 2020), <https://bit.ly/3tXu4zT>.

- In 2017, the Civil Cassation Chamber of the Colombia Supreme Court granted habeas corpus relief to an imprisoned spectacled bear named Chucho and ordered him transferred from the Barranquilla City Zoo to the Río Blanco Natural Reserve. *Luis Domingo Gomez Maldonado contra Corporacion Autonoma Regional de Caldas Corpocaldas*, AHC4806-2017 at 17 (Supreme Court of Colombia, Civil Cassation Chamber, July 26, 2017) [English translation], <https://bit.ly/3GUb0rw>. That decision was subsequently nullified on due process grounds and the nullification was confirmed by the Colombian Constitutional Court in a 7-2 decision. *Tutela Action Filed by the Botanical and Zoological Foundation of Barranquilla (FUNDAZOO) against the Supreme Court of Justice*, SU016/20 (Constitutional Court of Colombia, Jan. 23, 2020) [English translation], <https://bit.ly/3yzWTog> (hereafter Tutela Action). Magistrate Diana Fajardo Rivera powerfully dissented on the basis of the Great Writ’s history, concluding that Chucho is “the holder of the right to animal freedom, understood as conditions in which he is better able to express his vital behavioral patterns,” and possesses “intrinsic value.” *Id.* at ¶¶ 117, 118 (Fajardo, J., dissenting).²⁸⁸ An official court announcement regarding the Tutela Action indicated that Magistrate Alberto Rojas Ríos partially dissented because “the concept of person is not synonymous with human being and that personality is not merely a biological concept,” and that

²⁸⁸ Magistrate Fajardo cited the NhRP and its President and Founder, Steven Wise, ten times. *Tutela Action* at ¶ 41 and fns. 90, 91, 96, 114, 155, 177, 187, 189 (Fajardo, J., dissenting); *Tutela Action* at ¶¶ 57-58 (Annex to Fajardo, J., dissent). She also cited with approval Judge Fahey’s concurrence in *Tommy. Tutela Action* at ¶ 75 and fns. 163, 168 (Fajardo, J., dissenting).

- nonhuman animals, “according to their autonomy, should have basic rights which can be protected.” *Report No. 03*, SU016/20 at 7 (Constitutional Court of Colombia, Jan. 23, 2020) [English Translation], <https://bit.ly/3GZgocT>.
- In November 2016, an Argentinian court granted habeas corpus relief to an imprisoned chimpanzee named Cecilia, declared her a “nonhuman legal person,” and ordered her transferred from the Mendoza Zoo to a Brazilian sanctuary. *Presented by A.F.A.D.A. About the Chimpanzee “Cecilia” – Nonhuman Individual*, File No. P.72.254/15 at 32 (Third Court of Guarantees, Mendoza, Argentina, Nov. 3, 2016) [English translation], <https://bit.ly/3mkkSmy>.
 - In 2014, the Supreme Court of India held that all nonhuman animals possess certain constitutional and statutory rights. *Animal Welfare Board v. Nagaraja*, MANU/SC/0426/2014 at paras. 32, 54, 56, 62, 77 (Supreme Court of India, July 5, 2014), <https://bit.ly/3JbHdMP>.

C. As a matter of liberty, this Court must recognize Missy, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus because they are autonomous and extraordinarily cognitively complex

121. “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of the law.” *People v. Nelson*, 172 Colo. 456, 459 (1970) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

122. ““The right to one's person may be said to be a right of complete immunity; to be let alone.”” *Botsford*, 141 U.S. at 251 (citation omitted). “The common law over the centuries has always protected individuals from unwarranted intentional contacts with their person. It has been

observed that ‘there is perhaps no right which is older than a person’s right to be free from unwarranted personal conduct.’” *People v. Medina*, 705 P.2d 961, 968 (Colo. 1985) (citation omitted).²⁸⁹

123. Autonomy anchors the common law right to bodily liberty. *See, e.g., id.* at 968 (“The common law action of battery developed out of the law’s recognition of an individual’s interest in personal autonomy and bodily integrity—that is, the right of a person to participate in and make decisions about his own body.”); *id.* at 970 (recognizing common law principle that “‘every human being of adult years and sound mind has a right to determine what shall be done with his body’”) (citation omitted); *People In Interest of Marquardt*, 369 P.3d 653, 655 (Colo. App. 2014) (the common law has “long protected a person’s right to personal autonomy and bodily integrity”).²⁹⁰

²⁸⁹ *See also Whitford v. Panama R.R. Co.*, 23 N.Y. 465, 467-68 (1861), *overruled in part on other grounds by Farber v. Smolack*, 20 N.Y.2d 198 (1967) (“*Prima facie*, a man is entitled to personal freedom and the absence of bodily restraint, and to be exempt from physical violence to his person, everywhere.”); *People ex. rel Caldwell v. Kelly*, 35 Barb. 444, 457-58 (Sup. Ct. 1862) (Potter, J., concurring) (“Liberty and freedom are man’s natural conditions; presumptions should be in favor of this construction. . . . and I think should be applied to the decision of this case.”); *In re Hall*, 50 Conn. 131, 137 (1882) (“All restrictions upon human liberty . . . are to be regarded as having the presumption of law against them.”); *State v. Oquendo*, 223 Conn. 635, 650 (1992) (“no man can be restrained of his liberty . . . or be in any way imprisoned, or confined, unless by virtue of the express laws of the land”) (quoting ZEPHANIAH SWIFT, A DIGEST OF THE LAWS OF THE STATE OF CONNECTICUT 180 (1795)).

²⁹⁰ *See also Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) (“In our system of a free government, where notions of individual autonomy and free choice are cherished, it is the individual who must have the final say in respect to decisions regarding his medical treatment in order to insure that the greatest possible protection is accorded his autonomy and freedom from unwanted interference with the furtherance of his own desires.”); *Thor v. Superior Court*, 855 P.2d 375, 380 (Cal. 1993) (noting “‘the long-standing importance in our Anglo–American legal tradition of personal autonomy and the right of self-determination.’ . . . As John Stuart Mill succinctly stated, ‘Over himself, over his own body and mind, the individual is sovereign.’”) (citations omitted).

124. In Colorado, the protection given to an individual's autonomy under the common law is of such importance that "an involuntarily committed mental patient has a qualified common law right to refuse antipsychotic medication," since forcibly medicating a patient with antipsychotic drugs "directly implicates the patient's legal interests in personal autonomy and bodily integrity." *Medina*, 705 P.2d at 968. *See also Goedecke v. State, Dep't of Institutions*, 603 P.2d 123, 125 (Colo. 1979) (affirming "a patient's common law right to decline medical treatment" even when the patient has been certified for short-term treatment); *People ex rel. Ofengand*, 183 P.3d 688, 693 (Colo. App. 2008) (patient's qualified right to refuse medical treatment "rooted in both the common law and Colorado's statutory scheme relating to the civil commitment process").

125. The Great Writ can be used to protect the autonomy of both humans and nonhuman animals. 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). *See also Stanley*, 49 Misc.3d at 753 ("The great writ of habeas corpus lies at the heart of our liberty, and is deeply rooted in our cherished ideas of individual autonomy and free choice.") (internal citations and quotations omitted).

126. In *Tommy*, Judge Fahey understood that autonomy lies at the heart of whether a chimpanzee "has the right to liberty protected by habeas corpus," noting that the recognition of this right "will depend on our assessment of the intrinsic nature of chimpanzees as a species." 31 N.Y.3d at 1057 (Fahey, J. concurring). Understanding their intrinsic nature requires looking at the scientific evidence:

The record before us in the motion for leave to appeal contains un rebutted evidence, in the form of affidavits from eminent primatologists, that chimpanzees have advanced cognitive abilities, including being able to remember the past and plan for the future, the capacities of self-awareness and self-control, and the ability to

communicate through sign language. Chimpanzees make tools to catch insects; they recognize themselves in mirrors, photographs, and television images; they imitate others; they exhibit compassion and depression when a community member dies; they even display a sense of humor. Moreover, the amici philosophers with expertise in animal ethics and related areas draw our attention to recent evidence that chimpanzees demonstrate autonomy by self-initiating intentional, adequately informed actions, free of controlling influences.

Id. 1057-58 (citations omitted). Based on this evidence, Judge Fahey recognized that chimpanzees are “autonomous, intelligent creatures.” *Id.* at 1059.

127. In *Breheny*, Judge Wilson understood the central importance of autonomy to an elephant’s right to petition for her liberty: “Happy has a level of autonomy, intelligence and understanding that could make suffering particularly acute.” 38 N.Y.3d at 619 (Wilson, J., dissenting). Judge Rivera similarly recognized the importance of the “submitted affidavits from several internationally renowned elephant experts [establishing] Happy’s autonomy and the inherent harm of her captivity in the Zoo,” and concluded that Happy was entitled to habeas corpus relief. *Id.* at 634 (Rivera, J., dissenting).²⁹¹

128. While elephants may not be capable of making the types of decisions articulated in *Medina*, they are capable of making decisions that habeas corpus protects; for example, they can use specific calls and gestures (e.g., [Lets-Go-Rumble](#) and [Cadenced-Rumble](#)) to discuss with other elephants where they wish to go, and when, and choose what they want to do, and with whom. Poole Decl. ¶ 44.

²⁹¹ See also *Breheny (Trial Court)*, 2020 WL 1670735 at *10 (trial court recognized Happy as “an intelligent, autonomous being who should be treated with respect and dignity,” and found the NhRP’s arguments “extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot”).

129. There is no doubt that Missy, Kimba, Lucky, LouLou, and Jambo are autonomous and extraordinarily cognitively complex beings. Accordingly, as a matter of liberty, this Court must recognize their common law right to bodily liberty protected by habeas corpus.²⁹²

D. As a matter of equality, this Court must recognize Missy, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus because they are autonomous and extraordinarily cognitively complex

130. “Our whole system of law is predicated on the general fundamental principle of equality of application of the law.” *Truax v. Corrigan*, 257 U.S. 312, 332 (1921); accord *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (our “institutions are founded upon the doctrine of equality”) (citation omitted).

131. Equality is deeply woven into the fabric of the common law. See, e.g., *Denver & R.G.R. Co.*, 2 Colo.App. at 400 (“a fundamental principle of, the common law, assert[s] the inviolability of the equality of all persons before the law”); *Sullivan v. Minneapolis & R. R. Ry. Co.*, 121 Minn. 488, 492 (1913) (“the general principle of equality is a principle of the common law”) (citation omitted); *Simrall v. City of Covington*, 14 S.W. 369, 370 (Ky. 1890) (“Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual right.”); *James v. Commonwealth*, 12 Serg. & Rawle 220, 230 (Pa. 1825) (“the common law . . . stamps freedom and equality upon all who are subject to it”).

132. Equality is also enshrined in state and federal constitutions. See *Garhart ex rel. Tinsman v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 583 (Colo. 2004), as modified on denial of reh'g (Aug. 16, 2004), as modified (Sept. 1, 2004) (Both U.S. Const. amend. XIV and Colo. Const.

²⁹² The NhRP does not contend that autonomy is necessary for the possession of the right to bodily liberty, but only sufficient for having this right.

art. II, § 25 guarantees the right to equal protection.); *see also* Colo. Const. art. II, § 6 (Equality of Justice Clause). This is significant because “constitutional values — especially the values so meticulously set out in our lengthy state charters — . . . can enrich the common law.” Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 RUTGERS L. J. 727, 743 (1992). The two-way street that exists between common law and constitutional adjudication can result in “common law decisionmaking infused with constitutional values.” *Id.* at 747. Accordingly, while the instant habeas corpus litigation does not seek the recognition of a constitutional right, constitutional equality principles can inform this Court’s analysis.

133. Equality has two components: it has (1) a comparative component, in which one’s entitlement to a right is determined by comparing one’s situation to the situation of another who has that right, and (2) a noncomparative component, in which one’s entitlement to a right is determined by making a normative judgment.

134. The comparative component requires like cases be treated alike. *See Benavidez v. Sierra Blanca Motors*, 122 N.M. 209, 214 (1996) (“[O]ne of the most basic principles of the common law” is that “like cases will be treated alike.”).²⁹³ The noncomparative component forbids unjust discrimination. *See Bayles v. Kansas Pac. R. Co.*, 13 Colo. 181, 187 (Colo. 1889) (“At common law the question is whether, under all the circumstances, the charge is reasonable. . . .

²⁹³ *See also City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (The Fourteenth Amendment’s Equal Protection Clause is “essentially a direction that all persons similarly situated should be treated alike.”).

In the administration of the law the principle itself has never been modified, but the courts have declared in many cases that there must be no unjust discrimination.”).²⁹⁴

135. The comparative component of equality is violated when individuals similar in relevant respects are treated in dissimilar ways, while the noncomparative component is violated when the treatment lacks a legitimate or just reason. Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at CMZ violates both equality principles.

i. Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at Cheyenne Mountain Zoo violates the comparative component of equality because elephants and humans are similar in relevant respects for purposes of habeas corpus

136. The comparative component of equality is integral to Colorado common law, as it is in other common law jurisdictions.²⁹⁵ This is reflected in the fact that courts have evolved the common law by mandating similar treatment of relevantly similar groups.

137. For example, the Colorado Supreme Court in *Medina* extended the qualified common law right to refuse antipsychotic medication to incompetent patients. 705 P.2d at 971. The Court explained this qualified right “cannot justifiably be limited to those patients who are competent to make treatment decisions,” because “[t]he disruption of bodily integrity is no less real in the case of an incompetent patient; nor, for that matter, are the risks from the antipsychotic

²⁹⁴ See also *Kansas Pac. Ry. Co. v. Bayles*, 35 P. 744, 745 (Colo. 1894) (“To permit a railroad company to unjustly discriminate in the carriage of either freight or passengers, in favor of one shipper as against another, or in favor of one locality as against others, would be destructive of common right, and allow private and public enterprises to be built up or pulled down at the will or caprice of a common carrier deriving its franchise from the people.”).

²⁹⁵ See, e.g., *Enright by Enright v. Eli Lilly & Co.*, 77 N.Y.2d 377, 388 (N.Y. 1991) (It is a “fundamental principle of justice” under the common law that “like cases should be treated alike”); *De Ayala v. Florida Farm Bureau Cas. Ins. Co.*, 543 So. 2d 204, 206 (Fla.1989) (“Under . . . our common law heritage, all similarly situated persons are equal before the law.”); *Benavidez*, 122 N.M. at 214 (“[O]ne of the most basic principles of the common law” is that “like cases will be treated alike.”).

medication any less for a patient who is unable to give an informed consent to the proposed treatment.” *Id.* Indeed, the Court noted that “[i]f anything, the state has a greater responsibility towards those who are unable to protect themselves and to afford such persons ‘the same panoply of rights and choices it recognizes in competent persons.’” *Id.* (citation omitted).

138. In *Hogsett v. Neale*, 478 P.3d 713, 715 (Colo. 2021), the Court updated the “*Lucero* test” used to prove the existence of a common law marriage—to reflect the reality that same-sex couples, following *Obergefell v. Hodges*, 576 U.S. 644 (2015), could now lawfully marry. It found the *Lucero* test “ill-suited for same-sex couples” given its “gender-differentiated terms and heteronormative assumptions,” which made it virtually impossible, even dangerous, for those couples to prove a common law marriage. *Id.* at 715. To rectify this inequality among the relevantly similar groups (same-sex and opposite-sex couples), the Court evolved the common law by refining the *Lucero* test. *Id.* at 723-24. In doing so, the Court noted that “common law marriage may be particularly important for same-sex partners who lived as married couples for years but could not formally marry.” *Id.* at 719.

139. Courts in other states have also updated their common law to accord with the foundational equality principle that like cases must be treated alike. *See, e.g., Millington v. S.E. Elevator Co.*, 22 N.Y.2d 498, 505 (1968) (overruling prior precedent to acknowledge “the equal right of the wife to damages as a result of her loss of consortium,” thus treating married women and married men equally for purposes of loss of consortium); *Klein v. Klein*, 376 P.2d 70, 71 (Cal. 1962) (abrogating spousal immunity for negligent torts, thus treating spouses and non-spouses equally for tort purposes); *Falcone v. Middlesex Cnty. Med. Soc.*, 34 N.J. 582, 598 (N.J. 1961) (affirming judgment requiring a physician to be admitted to full membership in a private

medical society, since he met all of the qualifications prescribed in the organization's by-laws, thus treating him and admitted members equally for purposes of membership).²⁹⁶

140. As these decisions show, common law equality requires similar treatment of individuals who are relevantly similar. Three judges on New York's highest court understood that nonhuman animals who are autonomous are relevantly similar to humans for purposes of habeas corpus. Judge Fahey explained in *Tommy* that "in elevating our species, we should not lower the status of other highly intelligent species." 31 N.Y.3d at 1057 (Fahey, J., concurring). Suggesting that chimpanzees may have the right to liberty protected by habeas corpus, Judge Fahey emphasized the fact that they are "autonomous, intelligent creatures." *Id.* at 1059.

141. In *Breheny*, Judge Wilson and Judge Rivera recognized the right of autonomous beings like elephants to seek relief pursuant to habeas corpus. Judge Wilson underscored that the ancient 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)," and concluded that because Happy made a prima facie case that her confinement was unjust, she was entitled to full hearing on the merits of her habeas corpus petition. *Breheny*, 38 N.Y.3d at 618 (Wilson, J., dissenting). Judge Rivera similarly concluded: "history, 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).

²⁹⁶ See also *Ferguson v. Gies*, 46 N.W. 718, 720 (Mich. 1890) (recognizing Black men have a private right of action for civil damages against unjust discrimination in public places, "just as perfect and sacred . . . [as] any other citizen," thus treating Black men and non-black men equally for purposes of discrimination actions).

142. This Court must determine whether the elephants at CMZ are similar in relevant respects to humans for purposes of habeas corpus. Just as Judge Fahey recognized with respect to chimpanzees, and Judge Wilson and Judge Rivera recognized with respect to Happy, the answer is they are. This is because elephants are autonomous and extraordinarily cognitively complex beings, and habeas corpus is used to protect the autonomy of individuals held in unjust confinement (*supra* § VI.E). Accordingly, Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at CMZ violates the comparative component of equality. It is therefore this Court’s duty to evolve the common law to recognize that the elephants have the common law right to bodily liberty protected by habeas corpus.²⁹⁷

ii. Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at Cheyenne Mountain Zoo violates the noncomparative component of equality because it lacks a legitimate or just reason

143. The noncomparative component of equality forbids unjust discrimination, which occurs when there is no legitimate or just reason for distinguishing among relevantly similar groups. Distinctions among relevantly similar groups based upon a single irrelevant characteristic are illegitimate and/or unjust.

144. In *Romer v. Evans*, 517 U.S. 620, 633 (1996), the United States Supreme Court struck down on equal protection grounds a provision in Colorado’s Constitution (Amendment 2) that prohibited the protection of gay and lesbian individuals from discrimination, because the law “identif[ied] persons by a single trait [sexual orientation] and then deni[ed] them protection

²⁹⁷ Judge Wilson and Judge Rivera understood that treating elephants and humans similarly for purposes of habeas corpus does not imply an equivalence in terms of their moral and legal status. See *Breheny*, 38 N.Y.3d at 578 (Wilson, J., dissenting) (“Human beings should have greater rights than elephants, if only because we make the rules.”); *id.* at 632 (Rivera, J., dissenting) (“To be clear, I do not place nonhuman animals like Happy on equal footing with humans. Science and history establish that human beings’ cognitive abilities far surpass those of nonhuman animals.”).

across the board.” The law’s “sheer breadth [was] so discontinuous with the reasons offered for it that the amendment seem[ed] inexplicable by anything but animus toward the class it affect[ed] [gay and lesbian persons].” *Id.* at 632. In other words, “Amendment 2 classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else.” *Id.* at 635. *See also Equality Found. v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (noting that *Romer* found Amendment 2 “so obviously and fundamentally inequitable, arbitrary, and oppressive that it literally violated basic equal protection values”).²⁹⁸

145. In common law equality cases, courts have also rejected the notion that irrelevant characteristics can justify treating relevantly similar individuals differently. In *Medina*, for example, the Court found the ability to competently make medical treatment decisions irrelevant to whether an individual possesses the qualified common law right to refuse antipsychotic medication, given that the “disruption of bodily integrity is no less real” for incompetent patients; “[t]he inability competently to choose should not result in the forfeiture of a person’s legal rights.” 705 P.2d at 971.

146. Likewise in *Hogsett*, the Court found “the gender-differentiated terms and heteronormative assumptions of the *Lucero* test” irrelevant for establishing a common law marriage, given that same-sex couples may now lawfully marry. 478 P.3d at 714. *See also Millington*, 22 N.Y.2d at 509 (terminating “an unjust discrimination under New York law” that

²⁹⁸ *See also Buck v. Davis*, 580 U.S. 100, 123 (2017) (“Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.”); *United States v. Windsor*, 570 U.S. 744, 770 (2013) (The Constitution’s guarantee of equality ‘must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot’ justify disparate treatment of that group.) (citation omitted); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (an “irrational prejudice against the mentally retarded” is not a legitimate governmental interest).

distinguished wives and husbands, regarding the right to recover loss of consortium, solely upon the irrelevant characteristic of sex); *James v. Marinship Corp.*, 155 P.2d 329, 339 (Cal. 1944) (finding that a labor union's "discriminatory practices" treated qualified Black workers unequally solely upon the irrelevant characteristic of race).²⁹⁹

147. Just as distinctions grounded upon these irrelevant characteristics are illegitimate and unjust, so too are distinctions grounded upon the irrelevant characteristic of species. There is no rational, non-arbitrary reason to limit the Great Writ's protections to human beings. This Court must choose the position that harmonizes best with the most essential values and principles embraced by Colorado courts. The position that only species membership matters for the right to bodily liberty protected by habeas corpus not only deeply conflicts with the importance of protecting an individual's autonomy under the common law (*supra* § VI.E), it also perpetuates an unjust discrimination.

148. In *Tommy*, Judge Fahey recognized that given the autonomous nature of chimpanzees, it is illegitimate and unjust to deny them the right to bodily liberty protected by habeas corpus simply because they are not human. He criticized a lower court's "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species." *Tommy*, 31 N.Y.3d at 1057 (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." *Id.* at 1058. "Instead, we should consider

²⁹⁹ See also *Falcone*, 34 N.J. at 598 (finding that, contrary to the common law, a private medical society's unwritten requirement used to exclude a physician from membership was "patently arbitrary and unreasonable").

whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.” *Id.*

149. Judge Wilson and Judge Rivera agreed that given the autonomous nature of elephants, it was illegitimate and unjust to deny Happy the right to bodily liberty protected by habeas corpus simply because she is not human. Judge Wilson understood the crucial question in the case was “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.” 38 N.Y.3d at 579 (Wilson, J., dissenting).

150. In other words, “given what we know about the qualities an elephant has—and in particular, the qualities Happy has—should the law afford her certain rights through habeas corpus?” *Id.* at 581. Answering this question should not depend on the irrelevant fact that an elephant is not a member of the human species. To illustrate this point, Judge Wilson quoted English philosopher, jurist, and social reformer Jeremy Bentham:

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. . . . It may come one day to be recognised, that the number of legs, the villosity of the skin, or the termination of the *os sacrum*, are reasons equally insufficient for abandoning a sensitive being to the same fate. What else is it that should trace the insuperable line? . . . [T]he question is not, Can they *reason*? nor, Can they *talk*?, but *Can they suffer*?

Id. at 578-79 (citation omitted). The contrary position—held by the majority in *Breheny*—that autonomous beings like elephants cannot have fundamental liberty rights simply because they are not human, despite their great suffering in captivity, embraces blatant species bias to justify

an unjust discrimination.³⁰⁰ It thereby “denies and denigrates the human capacity for understanding, empathy and compassion.” *Id.* at 626.

151. In her dissent, Judge Rivera exposed the majority’s position as arbitrary and irrational, criticizing the “incoherence of its circular logic”:

The majority’s argument boils down to a claim that animals do not have the right to seek habeas corpus because they are not human beings and that human beings have such a right because they are not animals. But, of course, humans are animals. And glaringly absent is any explanation of why some kinds of animals—i.e., humans—may seek habeas relief, while others—e.g., elephants—may not. The majority’s suggestion that the “fundamental liberty rights” of human beings are “recognized by law” is nothing more than a tautological evasion. 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.

Id. at 632-33 (Rivera, J., dissenting). Looking beyond Happy’s biological classification, Judge Rivera understood 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.” *Id.* at 629. She recognized that “[c]aptivity is anathema to Happy because of her cognitive abilities and behavioral modalities—because she is an autonomous being.” *Id.* at 642. Unable to live the life she was meant to—as a self-determinative, autonomous elephant in the wild—“Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—

³⁰⁰ This bias is called “speciesism.” See PETER SINGER, ANIMAL LIBERATION: THE DEFINITIVE CLASSIC OF THE ANIMAL MOVEMENT 6 (2009), <https://bit.ly/3JPxbCo> (“Speciesism . . . is a prejudice or attitude of bias in favor of the interests of members of one’s own species and against those of members of other species.”); *Speciesism*, ANIMAL ETHICS, <https://bit.ly/3qJvJLK> (last visited Mar. 31, 2023) (“Speciesism is a form of discrimination. Discrimination occurs when someone is given less moral consideration than others or treated worse for an unjustified reason.”). See also KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS’ BRIEF 34 (2018) (“[I]t is arbitrary to utilize species membership alone as a condition of personhood, and it fails to satisfy the basic requirement of justice that we treat like cases alike. It picks out a single characteristic as one that confers rights without providing any reason for thinking it has any relevance to rights.”).

curtailed.” *Id.* Simply by being born an elephant, she’s been confined solely to “entertain and satisfy human curiosity.” *Id.*

152. This Court must decide whether it is illegitimate and unjust to deny the elephants at CMZ their right to bodily liberty simply because they are not human. Just as Judge Fahey recognized with respect to chimpanzees, and Judge Wilson and Judge Rivera recognized with respect to Happy, the answer is that it would be. This is because the elephants’ confinement is grounded upon nothing more than the irrelevant characteristic of species. In the eyes of the zoo, the elephants are regarded merely as resources for human use and thus lacking inherent value, despite their autonomous nature and the great suffering they endure from the loss of freedom. Accordingly, their confinement lacks a legitimate or just reason and violates the noncomparative component of equality. It would therefore be unjust discrimination to refuse to recognize Missy, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus.

E. This Court must not deflect its duty to recognize Miss, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus onto the legislature

153. Courts have a “duty to keep the common law abreast of changes wrought by time,” and “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). “Indeed, it 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.* “[T]he strength of the common law has always been its responsiveness to the changing needs of society.” *Towns v. Anderson*, 579 P.2d 1163, 1164 (Colo. 1978). *See also Wilson v. People*,

103 Colo. 150, 162 (1938) (“I profess no veneration for the rubbish of antiquity, resting on foundations inapplicable to the present state of society.”) (citation omitted).

154. Colorado courts do not wait for legislative action to change archaic common law. *See Rudnicki v. Bianco*, 501 P.3d 776, 784 n.2 (Colo. 2021) (noting the Court’s history of choosing “to depart from existing common law rules when we have become convinced that those rules were originally erroneous or no longer sound because of changing conditions, and when more good than harm will come from departing from our precedent”) (citing examples).

155. In *Rudnicki*, the Colorado Supreme Court abandoned “the common law rule that allows only parents to recover their injured, unemancipated minor child’s pre-majority medical expenses,” after rejecting the rule’s outdated rationales. *Id.* at 786. In *Lovato v. Dist. Court In & For Tenth Judicial Dist.*, 198 Colo. 419, 432 (1979), the Court judicially recognized the concept of brain death for the first time in Colorado, rejecting the notion that the absence of legislative action precluded it from resolving the issue: “Under the circumstances of this case we 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.” The Court also “decided a trilogy of cases that fundamentally altered the common law of Colorado regarding the doctrine of sovereign immunity,” prospectively abrogating the doctrine after determining it was “unjust and inequitable.” *Bertrand*, 872 P.2d at 226 (citations omitted).

156. Deflecting the responsibility to change archaic common law onto the legislature is an abdication of judicial duty. *See, e.g., Woods v. Lancet*, 303 N.Y. 349, 355 (N.Y. 1951) (“Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made

rule.”); *accord Digby v. Digby*, 388 A.2d 1, 2 (R.I. 1978); *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971); *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 678 (Cal. 1974).

157. The duty of courts to evolve habeas corpus is even more compelling. When Judge Wilson confronted whether to change archaic common law so that an elephant can invoke the protections of habeas corpus, he admonished the majority for deflecting that responsibility onto the legislature:

The judges, Justice Paine among them, 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. Where would we or Judge Cardozo be, had he declined to act for any of those reasons? The Great Writ's use, as a case-by-case tool to probe whether the law may need to adapt, is part of the fundamental role of a common-law court to adapt the law as society evolves.

Breheny, 38 N.Y.3d at 617 (Wilson, J, dissenting).

158. Judge Rivera similarly observed: “[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. The difficulty of the task—i.e., determining the reach of a substantive common-law right whose existence pre-dates *any* legislative enactment on the subject and whose core guarantees are unalterable by the legislature—is no basis to shrink from our judicial obligation by recasting it as the exclusive purview of the legislative branch. The common law is our bailiwick.” *Id.* at 633 (Rivera, J, dissenting).³⁰¹

³⁰¹ Even the majority in *Breheny* agreed that “the courts—not the legislature—ultimately define the scope of the common-law writ of habeas corpus.” *Breheny*, 38 N.Y.3d at 576 (citations omitted).

159. Accordingly, this Court must not deflect its duty to recognize Miss, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus onto the legislature.

F. Upon this Court’s recognition of Missy, Kimba, Lucky, LouLou, and Jambo’s common law right to bodily liberty protected by habeas corpus, they are “persons” for purposes of habeas corpus

160. The relevant procedural statute provides that “[w]hen any person not being committed or detained for any criminal or supposed criminal matter is confined or restrained of his liberty under any color or pretense whatever, he may proceed by appropriate action as prescribed by the Colorado rules of civil procedure in the nature of habeas corpus.” C.R.S. § 13-45-102. Consistent with the fact that habeas corpus is a common law writ, “person” is undefined by the procedural statute, and nothing in the statute limits the term to human beings.³⁰² The question of whether the elephants may employ habeas corpus is therefore not a matter of statutory interpretation or legislative intent; rather, it a matter for this Court to decide in accordance with the fundamental principles of the common law previously discussed.³⁰³

³⁰² The general definitions statute, applicable to every statute unless the context otherwise requires, defines “person” as “any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, limited liability company, partnership, association, or other legal entity.” C.R.S. § 2-4-401(8). However, this definition provides no guidance on the question here. Just as in *People v. Jones*, 2020 CO 45, ¶ 57, where the Court found that the general definitions statute did not “aid our interpretation of the term ‘person’ as it is used in the child abuse statute,” the general definitions statute does not aid in the interpretation of the term “person” as it is used in the habeas corpus procedural statute. *See also id.* at ¶ 77, n.1 (Boatright, J., dissenting) (general definitions statute provides “no guidance on the question presented here”).

³⁰³ Even in statutory interpretation cases where the term “person” is undefined, courts have not limited its meaning to the legislative intent at the time the statute was enacted. For example, the Supreme Court of Connecticut held that the term “persons” in a statute regarding the admission of attorneys to the bar included women and Black men, even though no legislator at the time contemplated the statute applying to those individuals. *In re Hall*, 50 Conn. 131, 131-33 (1882). The court explained:

161. The focus of this Court’s substantive inquiry must be on whether the elephants have the common law right to bodily liberty protected by habeas corpus, not their legal personhood, which merely flows as a consequence from possessing the right. Upon recognizing that the elephants have the right to bodily liberty, they are *necessarily* “persons” for purposes of habeas corpus. This is because 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)) (emphasis added)).³⁰⁴ On this well-established understanding of personhood, a rightsholder is a “person” for purposes of the legal right in question; the term is merely a designation that attaches to any individual or entity with a legal right. Further, being a “person”

[W]e come back to the question whether we are by construction to limit the application of the statute to men alone, by reason of the fact that in its original enactment its application to women was not intended by the legislators that enacted it. . . . But if we hold that the construction of the statute is to be determined by the admitted fact that its application to women was not in the minds of the legislators when it was passed, where shall we draw the line? All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. . . . When the statute we are now considering was passed it probably never entered the mind of a single member of the legislature that black men would ever be seeking admission under it. Shall we now hold it cannot apply to black men?

Id. at 132-33.

³⁰⁴ See also IV ROSCOE POUND, JURISPRUDENCE 197 (1959) (“The significant fortune of legal personality is the capacity for rights.”); Richard Tur, *The “Person” in Law*, in PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY, 121-22 (Arthur Peacocke & Grant Gillett eds. 1987) (“[L]egal personality can be given to just about anything. . . . It is an empty slot that can be filled by anything that can have rights or duties.”); Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 283 (1928) (“To confer legal rights or to impose legal duties . . . is to confer legal personality.”); J.-R. Trahan, *The Distinction Between Persons and Things: An Historical Perspective*, 1 J. CIVIL L. STUD. 9, 14 (2008) (“First, the modern theory (re-) defines ‘person’ as the ‘subject of rights and duties,’ in the sense of that which is ‘capable of being ‘subjected’ to duties and/or of being ‘invested’ with rights.”).

for one purpose does not entail being a “person” for other purposes (e.g., having the right to bodily liberty does not entail having the right to vote).³⁰⁵

162. In Happy’s case, Judge Wilson and Judge Rivera understood that the question of whether a nonhuman animal can employ the protections of habeas corpus is not answered by focusing on whether the nonhuman animal is a “person.” *See Breheny*, 38 N.Y.3d at 582 (Wilson, J., dissenting) (explaining that the undefined term “person” in CPLR article 70, New York’s habeas corpus procedural statute, “was meant to have no substantive component,” and “[j]ust as ‘person’ is used in a juridical sense to refer to any entity, real or fictional, as to which a statute or rule of the common law applies, ‘person’ in CPLR article 70 is irrelevant to whether the writ can extend beyond humans”); *id.* at 633 (Rivera, J., dissenting) (“While CPLR article 70 sets forth the *procedure* to seek habeas relief, it does not create the right to bodily liberty nor determine who may seek such relief. . . . [I]t is for this Court to decide the contours of the writ based on the qualities of the entity held in captivity and the relief sought.”).

163. In the NhRP’s chimpanzee case, Judge Fahey wrote that the right to bodily liberty must be the focus of the court’s substantive inquiry, rather than the definition of “person”:

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. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species.

Tommy, 31 N.Y.3d at 1057 (Fahey, J., concurring).

³⁰⁵ *See Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 200 (1972) (while “unborn children” have rights “in narrow legal categories,” they “have never been recognized as persons in the law in the whole sense”); 1 ENGLISH PRIVATE LAW § 3.24, 146 (Peter Birks ed. 2000) (“A human being or entity . . . capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person *with that particular capacity*,” though not necessarily “a person *with an unlimited set of capacities* . . .”).

164. It is also well-established that personhood is not limited to human beings. As a theoretical matter, “[l]egal personality may be granted to entities other than individual human beings, e.g. a group of human beings, a fund, and idol.” GEORGE WHITECROSS PATON, A TEXTBOOK OF JURISPRUDENCE 351 (3d ed. 1964). There is even “no difficulty giving legal rights to a supernatural being and thus making him or her a legal person.” JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 39 (2d ed. 1963) (“*Gray*”). The same is true for nonhuman animals: “[A]nimals may conceivably be legal persons. *First*, legal persons because possessing legal rights. . . . [T]here may have been, or indeed, may still be, systems of Law in which animals have legal rights.” *Gray*, 42-43. “Indeed, if a corporation—a legal fiction created to benefit some humans—can have constitutional rights protected in our courts, then the 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).³⁰⁶
165. Significantly, many nonhuman animals are actually rightsholders recognized by law and thus “persons.” This includes domestic and pet animals in Colorado, who are “persons” because they can be beneficiaries of fully enforceable trusts with the statutory right to the trust corpus.³⁰⁷ See C.R.S. § 15-11-901(2) (“[A] trust for the care of designated domestic or pet

³⁰⁶ See also *People v. Graves*, 78 N.Y.S.3d 613, 617 (4th Dept. 2018) (“[I]t is common knowledge that personhood can and sometimes does attach to nonhuman entities like corporations or animals.”) (citations omitted).

³⁰⁷ A trust is “[t]he right . . . to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*).” *Trust*, BLACK’S LAW DICTIONARY (11th ed. 2019). Trust beneficiaries are necessarily “persons.” See C.R.S. § 15-10-201(5) (“‘Beneficiary,’ as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer.”); *Beneficiary*, BLACK’S LAW DICTIONARY (11th ed. 2019 (“beneficiary” is “[a] person to whom another is in a fiduciary relation, . . . esp., a person for whose benefit property is held in trust”).

animals and the animals’ offspring in gestation is valid. . . . [T]he determination of the ‘animals’ offspring in gestation’ is made at the time the designated domestic or pet animals become present beneficiaries of the trust.”) (emphasis added). Other states have also made certain nonhuman animals beneficiaries—granting them trust beneficiary rights—and therefore recognized their personhood for trust purposes, including California (Cal. Prob. Code § 15212), Massachusetts (M.G.L. 203E § 408), Nevada (Nev. Rev. Stat. § 163.0075), New York (EPTL § 7-8.1), and Virginia (Va. Code § 64.2-726). And as previously discussed, courts around the world have recognized that many nonhuman animals possess various legal rights (*supra* § VI.B, ¶ 120).

166. In short, being a “person” is merely the necessary consequence of being a rightsholder. The focus of this Court’s substantive inquiry must be on determining whether Missy, Kimba Lucky, LouLou, and Jambo have the common law right to bodily liberty protected by habeas corpus, not whether they fall within the purview of the undefined term “person” in Colorado’s habeas corpus statute. Once this Court recognizes that these elephants possess the right to bodily liberty, they are necessarily “persons” for purposes of habeas corpus.

G. This Court must order Missy, Kimba, Lucky, LouLou, and Jambo released from Cheyenne Mountain Zoo and relocated to an accredited elephant sanctuary because their confinement is unlawful

167. Once this Court recognizes the elephants’ common law right to bodily liberty protected by habeas corpus, it must determine whether they are being unlawfully confined at CMZ. *See Duran v. Price*, 868 P.2d 375, 377 (Colo. 1994) (“A habeas corpus proceeding is a civil action, the essential purpose of which is to determine whether a person is unlawfully detained.”). This Court must “proceed in a summary way to settle the facts by hearing the testimony and

arguments of all parties interested civilly, . . . and shall dispose of the prisoner as the case may require.” C.R.S. § 13-45-103(1).

168. Missy, Kimba, Lucky, LouLou, and Jambo’s confinement at CMZ is unlawful because it violates their common law right to bodily liberty protected by habeas corpus—by depriving them of the ability to meaningfully exercise their autonomy and extraordinary cognitive complexity, including the freedom to choose where to go, what to do, and with whom to be. Deprived of their ability to travel, forage, communicate, socialize, plan, live, choose, and thrive, the elephants are not living a life that is anything close to acceptable for a member of their species (*supra* § IV.C). Their life is nothing but a succession of boring and frustrating days, damaging to their bodies and minds. Lindsay Decl. ¶ 67. There is no variety in their lives, no challenge to employ their mental capacity for exploration, spatial memory, or problem-solving, and no opportunity to employ their wide range of vocalisations, to communicate and interact with a range of other elephants over distance. *Id.* at ¶ 61.

169. That Respondents may be in compliance with animal welfare statutes does not render the elephants’ confinement lawful, as those statutes do not address the right to bodily liberty.³⁰⁸ As Judge Wilson observed in *Breheny*, “[t]he question is not whether Happy’s 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.” 38 N.Y.3d at 579 (Wilson, J., dissenting). Habeas corpus is rooted in the protection of an individual’s liberty interest regardless of whether that interest is protected by a statute, a constitutional provision, or the common law. Thus, in the landmark decision of *Somerset v.*

³⁰⁸ Nor is it relevant that CMZ may be in compliance with the elephant-specific standards of the Association of Zoos and Aquariums, which are wholly inadequate for meeting the needs of elephants. *See* Lindsay Decl. ¶¶ 35-41; Poole Decl. ¶ 59.

Stewart, 1 Lofft. 1, 19 (K.B. 1772), Lord Mansfield protected the liberty interest of an enslaved Black man by liberating him through habeas corpus, declaring that “[t]he state of slavery is . . . so odious, that nothing can be suffered to support it” under the common law. *Id.* at 19. The NhRP’s “core argument” in *Breheny*, as it is here, was that “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.” 38 N.Y.3d at 637 (Rivera, J., dissenting).

170. Since the elephants are being unlawfully confined, this Court must order them released from the custody of Respondents. *See Fields v. Suthers*, 984 P.2d 1167, 1169 (Colo. 1999) (“The writ of habeas corpus is designed primarily to determine whether a person is being detained unlawfully and therefore should be immediately released from custody.”); *Stilley v. Tinsley*, 385 P.2d 677, 681 (Colo. 1963) (“The trial court correctly determined that at the time of his pronouncement, Tinsley had no authority to restrain Stilley, and that the mittimus, Tinsley’s purported authority, was void. Having so decided, the trial judge had only one remaining duty to perform in the case then before him—order Stilley released from the custody and restraint of Tinsley.”).

171. To remedy the injustice of the elephants’ confinement, this Court must order their relocation to an environment where they can exercise their autonomy and extraordinary cognitive complexity to the greatest extent possible. The elephants can still lead something approaching a normal life at an elephant sanctuary. *See Lindsay Decl.* ¶ 68; *Jacobs Decl.* ¶ 21(n); *Poole Decl.* ¶ 57. As Dr. Joyce Poole explained, “the orders of magnitude of greater space” offered in sanctuaries “permits autonomy and allows elephants to develop more healthy social relationships and to engage in near natural movement, foraging, and repertoire of behavior.” *Poole Decl.* ¶ 57.

172. The flexibility of habeas corpus permits the relief sought herein. As the Colorado Supreme Court explained, “open-ended relief accords with the essential purpose of the writ: The very nature of the writ 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) (citations omitted); accord *Naranjo*, 770 P.2d at 786. See also C.R.S. § 13-45-103(1) (“The court . . . shall dispose of the prisoner as the case may require.”) (emphasis added).
173. That the elephants cannot be released onto the streets does not preclude habeas corpus relief since the writ permits relief short of total discharge. See, e.g., *Marshall v. Kort*, 690 P.2d 219, 222 (Colo. 1984), *disapproved on other grounds by Jacobs v. Carmel*, 869 P.2d 211 (Colo. 1994) (“This court has held that relief short of total discharge is available through habeas corpus. . . . Thus, any restriction in excess of legal restraint that substantially infringes on basic rights may be remedied through habeas corpus, even if total discharge does not result.”); *People v. Wiedemer*, 852 P.2d 424, 434 n.11 (Colo. 1993) (same); *Kodama v. Johnson*, 786 P.2d 417, 419 (Colo. 1990) (same); *Jacobs*, 869 P.2d at 213 (same).
174. Indeed, “underscoring the flexibility of the Great Writ, its history evinces that habeas corpus could be used to transfer custody from one confinement, if determined to be unlawful, to another type of custody; habeas petitions were not required to seek or result in total liberation as the remedy.” *Breheny*, 38 N.Y.3d at 598 (Wilson, J., dissenting). The writ thus “allows for consideration of the proper conditions of a release when, as here, the captive is a nonhuman animal and cannot live as a free being within human society.” *Id.* at 641 (Rivera, J., dissenting). Judge Rivera concluded that the inherent flexibility of habeas corpus permitted the relief sought by the NhRP:

The fact that Happy cannot be set totally free on the streets of New York City is a consequence of human beings' attempts to exert such unnatural control over her. Humans removed her as a calf from her natural habitat. Humans separated her from her herd. After a lifetime of captivity, in which humans have controlled every aspect of her life, she cannot return, 50 years later, and simply live as would any elephant who grew up in a wild environment. However, a court can order the most practical and humane alternative: transfer to an elephant sanctuary.

Id.

VII. CONCLUSION

175. This Court must recognize Missy, Kimba, Lucky, LouLou, and Jambo's common law right to bodily liberty protected by habeas corpus, and order them relocated to an accredited elephant sanctuary in order to remedy the harms of their unlawful confinement. Justice demands nothing less from this Court.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests this Court to:

- (1) issue a writ of habeas corpus;
- (2) grant the Petition by ordering Missy, Kimba, Lucky, LouLou, and Jambo released from their unlawful confinement at Cheyenne Mountain Zoo and relocated to an elephant sanctuary accredited by Global Federation of Animal Sanctuaries; and
- (3) grant such other and further relief as this Court may deem just, proper and equitable.

DATED: June 28, 2023

Nonhuman Rights Project, Inc.

By: /s/ Jake Davis
 Jake Davis, Esq.

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

VERIFICATION

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.
Executed on the 28th day of June 2023, at Whitefish, Montana.

/s/ Jake Davis
Jake Davis, Esq.

525 Skyles Pl
Ste 302
Whitefish, MT 59937
(513) 833-5165

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on June 28, 2023, sent by United States Mail, first-class postage prepaid, true and complete copies of Petitioner Nonhuman Rights Project, Inc.'s Verified Petition for Writ of Habeas Corpus, to:

Respondents:

Cheyenne Mountain Zoological Society
4250 Cheyenne Mountain Zoo Road,
Colorado Springs, CO 80906

Bob Chastain, President & CEO of Cheyenne Mountain Zoological Society
4250 Cheyenne Mountain Zoo Road,
Colorado Springs, CO 80906

/s/ Jake Davis
Jake Davis, Esq.