Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re Nonhuman Rights Project, Inc., on behalf of Amahle, Nolwazi, and Mabu
on habeas corpus
No. ________

Verified Petition for a Common Law Writ of Habeas Corpus
Memorandum of Points and Authorities

Following the denial of relief in
In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Vusmusi, On Habeas Corpus (Fresno Sup. Ct. No. 22CRWR686796)
(Hon. Arlan L. Harrell)

Nonhuman Rights Project, Inc. v. Fresno's Chaffee Zoo Corporation et al.
(Cal. Ct. App. No. F085722)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Petitioner hereby certifies that it is not aware of any entity or person that rules 8.208 and 8.488 of the California Rules of Court require to be listed in this Certificate.

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VERIFIED PETITION FOR A COMMON LAW WRIT OF HABEAS CORPUS

INTRODUCTION

1. In California, it is blackletter law that when a privately-detained individual files a petition for a writ of habeas corpus, that individual does not need to be in actual or constructive state custody to satisfy the habeas corpus jurisdictional requirements. The Fresno County Superior Court (hereafter Superior Court) gravely misunderstood the fundamental principles of habeas corpus law. Its Order in the underlying case, holding that privately-detained individuals cannot seek habeas corpus relief, is wrong and must be rejected.

2. It is also blackletter law in California that an order to show cause (hereafter OSC) must be issued when a habeas corpus petition states factual allegations that, taken as true, would entitle the petitioner to relief. This Verified Petition for a Common Law Writ of Habeas Corpus (hereafter Supreme Court Petition), by Petitioner Nonhuman Rights Project, Inc. (hereafter NhRP), states factual allegations that, taken as true, establish a prima facie case for relief warranting the issuance of an OSC.

3. The NhRP sought habeas corpus relief in the Superior Court on behalf of Amahle, Nolwazi, and Vusmusi, three African elephants unlawfully imprisoned at the Fresno Chaffee Zoo (hereafter Fresno Zoo). *In re Nonhuman Rights Project, Inc., on behalf of Amahle, Nolwazi, and Vusmusi, On Habeas Corpus* (hereafter *In re NhRP*). There, Hon. Arlan L. Harrell denied the NhRP's first Verified Petition for a Common Law Writ of Habeas Corpus (hereafter Superior Court Petition) for lack of jurisdiction on the ground that it "failed to establish that any of the three elephants were in actual or constructive

custody of the State of California at the time the instant habeas petition was filed." Ex. I, p. 3.

4. The NhRP filed a second Verified Petition for a Common Law Writ of Habeas Corpus (hereafter Appellate Petition) on behalf of Amahle, Nolwazi, and an African elephant named Mabu in the Court of Appeal, Fifth Appellate District (hereafter Fifth District).[1] There, Hon. Herbert I. Levy, Hon. Rosendo Peña Jr., and Hon. Kathleen Meehan summarily denied the Appellate Petition.

5. Here, the NhRP files the Supreme Court Petition on behalf of Amahle, Nolwazi, and Mabu, who are unlawfully imprisoned and restrained of their liberty at the Fresno Zoo by Respondents Fresno's Chaffee Zoo Corporation and its Chief Executive Officer & Zoo Director, Jon Forrest Dohlin (hereafter Respondents), in the city of Fresno, California.

6. The NhRP seeks the following: (1) clarification that habeas corpus reaches individuals held in private detention, (2) issuance of an OSC requiring Respondents to justify their unlawful imprisonment of Amahle, Nolwazi, and Mabu because the NhRP has stated a prima facie case for relief, and (3) recognition of the elephants' common law right to bodily liberty protected by habeas corpus.

7. As the Memorandum of Points and Authorities explains, restricting habeas corpus relief to individuals in state custody: (1) contradicts the plain meaning of Cal. Penal Code § 1473(a); (2) contradicts California's long common law history of permitting habeas

[1] During the pendency of the proceedings in the Superior Court, Vusmusi was transferred out of the Fresno Zoo and replaced by Mabu.

corpus to challenge private detentions; and (3) violates Article 1, § 11 of the California Constitution (hereafter California Suspension Clause). This Court must reject the Superior Court's Order as an outlier and clarify that habeas corpus reaches private detentions.

8. The substantive question before this Court is whether Amahle, Nolwazi, and Mabu are entitled to habeas corpus relief under California common law. Upon this Court's recognition of the elephants' right to bodily liberty and determination that their imprisonment at the Fresno Zoo is unlawful, the NhRP seeks their discharge from the Fresno Zoo and placement in an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries, where they can exercise their autonomy and extraordinary cognitive complexity to the greatest extent possible.

9. Respondents' imprisonment of Amahle, Nolwazi, and Mabu is unlawful because it violates their common law right to bodily liberty protected by habeas corpus by depriving the elephants 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. Ex. II, ¶¶ 5, 196.

10. 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. See *Nonhuman Rights Project, Inc. v. Breheny* (2022) 38 N.Y.3d 555, 579 (hereafter *Breheny*) (Wilson, J., dissenting) ("The question is not whether [the elephant]'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."); *id*. at 642 (Rivera, J., dissenting) ("Confinement at the Zoo is harmful, not

because it violates any particular regulation or statute relating to the care of elephants, but because an autonomous creature such as Happy suffers harm by the mere fact that her bodily liberty has been severely—and unjustifiably—curtailed.”).

11. This Court—not the legislature—has the duty to recognize Amahle, Nolwazi, and Mabu’s common law right to bodily liberty protected by habeas corpus because California courts may not abdicate their responsibility for changing archaic common law when common-sense justice demands it. Ex. II, ¶¶ 163-165; see also *Breheny*, 38 N.Y.3d at 634 (Rivera, J., dissenting) (“the fundamental right to be free is grounded in the sanctity of the body and the life of autonomous beings and does not require legislative enactment”).

12. That this case presents an issue of first impression in California is no reason to deny the Supreme Court Petition. See *Breheny*, 38 N.Y.3d at 584 (Wilson, J., dissenting) (“The novelty of an issue does not doom it to failure: a novel habeas case freed an enslaved person; a novel habeas case removed a woman from the subjugation of her husband; a novel habeas case removed a child from her father’s presumptive dominion and transferred her to the custody of another. More broadly, novel common-law cases—of which habeas is a subset—have advanced the law in countless areas.”) (internal citations omitted).

JURISDICTION AND STANDING

13. This Court has original jurisdiction over the Supreme Court Petition. Cal. Const., art. VI, § 10. The Supreme Court Petition is timely as it is filed within 120 days after the Fifth District denied the Appellate Petition on May 18, 2023. See *Robinson v. Lewis* (2020) 9 Cal.5th 883, 902.

14. The NhRP has standing under Cal. Penal Code § 1474. Ex. II, ¶¶ 19-27. Neither the Superior Court nor the Fifth District took issue with the NhRP's standing on behalf of Amahle, Nolwazi, or Mabu.

ORDER TO SHOW CAUSE

15. This Court must issue an OSC as the Supreme Court Petition states a prima facie case for relief. In California, a prima facie case is made when a habeas corpus petition alleges unlawful restraint, names the person by whom the petitioner is so restrained, and specifies the facts on which he bases his claim that the restraint is unlawful. *In re Lawler*, 23 Cal.3d 190, 194 (hereafter *Lawler*) (citing Cal. Penal Code § 1474); Cal. Rule of Court 8.385(d) ("If the petitioner has made the required prima facie showing that he or she is entitled to relief, the court must issue an order to show cause."); *People v. Duvall* (1995) 9 Cal.4th 464, 475 (hereafter *Duvall*) ("If . . . the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC.").

16. In accordance with *Lawler*, the Supreme Court Petition (1) alleges that the Respondents' imprisonment of Amahle, Nolwazi, and Mabu is unlawful because the imprisonment violates the elephants' common law right to bodily liberty protected by habeas corpus, (2) names Fresno's Chaffee Zoo Corporation and Jon Forrest Dohlin as the Respondents, and (3) specifies that Respondents' imprisonment of Amahle, Nolwazi, and Mabu violates the elephants' common law right to bodily liberty protected by habeas corpus because it deprives them of their ability to meaningfully exercise their autonomy and extraordinary cognitive complexity, including the freedom to travel, forage,

communicate, socialize, plan for the future, and thrive as elephants should. See Ex. II, ¶¶ 96-104 (prima facie argument); Memorandum of Points and Authorities at § III. (same).

17. This would not be the first time that a court has issued an OSC in response to a petition seeking habeas corpus relief for a nonhuman animal. In 2015, the NhRP secured an OSC on behalf of two imprisoned chimpanzees, Hercules and Leo—the first time an OSC was issued on behalf of a nonhuman animal. *Matter of Nonhuman Rights Project, Inc. v. Stanley* (Sup. Ct. 2015) 49 Misc.3d 746 (hereafter *Stanley*). In 2018, the NhRP secured an OSC on behalf of Happy, an Asian elephant imprisoned at the Bronx Zoo in New York—the first time an OSC was issued on behalf of an elephant.[2] Mallory Diefenbach, *Orleans County issues first habeas corpus on behalf of elephant*, THE DAILY NEWS (Nov. 21, 2018), https://bit.ly/3AwkCWV.

18. To deny the Supreme Court Petition without issuing an OSC would be a "refusal to confront a manifest injustice." *Matter of Nonhuman Rights Project, Inc. v. Lavery* (2018) 31 N.Y.3d 1054, 1059 (hereafter *Tommy*) (Fahey, J., concurring).

PARTIES

19. Petitioner NhRP is a 501(c)(3) non-profit corporation incorporated in the State of Massachusetts, with a principal address at 611 Pennsylvania Avenue SE #345 Washington, DC 20003. The NhRP is the only civil rights organization in the United States

[2] On appeal before New York's highest court, 146 distinguished scholars, habeas corpus experts, philosophers, lawyers, and theologians submitted amicus briefs in support of Happy's right to liberty and release to a sanctuary. *Amicus Support* for the fight to #FreeHappy, NONHUMAN RIGHTS BLOG (Apr. 25, 2022), https://bit.ly/3Mm5Z0U.

dedicated solely to securing legal rights for nonhuman animals. Since 1995, the NhRP has worked to obtain the right to bodily liberty for nonhuman animals scientifically determined to be autonomous such as chimpanzees and elephants.

20. Respondent Fresno's Chaffee Zoo Corporation, which manages the Fresno Zoo, is a 501(c)(3) non-profit corporation incorporated in the State of California with a principal place of business at 894 W. Belmont Ave., Fresno, CA 93728. Respondent Jon Forrest Dohlin is the Chief Executive Officer & Zoo Director of the Fresno Zoo.

21. Amahle, Nolwazi, and Mabu are three elephants imprisoned at the Fresno Zoo. See generally Lindsay Decl. ¶¶ 43-55.

- Amahle is an approximately 13-year-old wild-born female African elephant who grew up in Swaziland's Hlane National Park.[3] In 2016, she was kidnapped from her home and brought to the Dallas Zoo. She was thereafter transferred to the Fresno Zoo where she has been imprisoned by Respondents ever since.[4]
- Nolwazi, the mother of Amahle, is an approximately 28-year-old wild-born female African elephant who grew up and raised Amahle in Eswatini's Hlane

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[3] The Elephant Database, Amahle, https://bit.ly/3y09H7g.

[4] Charles Siebert, *Zoos Called It a 'Rescue.' But Are the Elephants Really Better Off?* N.Y. TIMES (July 9, 2019), https://nyti.ms/2ZYi2vw ("Despite mounting evidence that elephants find captivity torturous, some American zoos still acquire them from Africa"); see also Teresa Gubbins, *Author Charles Siebert shares intel on his New York Times story about Dallas Zoo* (July 30, 2019), https://bit.ly/3xY7tW5 ("It's one of those longstanding questions about civilization itself, with all the darkness that comes with that. Why do we need to look at them and stare at them? At what point does our wonder no longer warrant another being's wounding?").

National Park.[5] In 2016, she was kidnapped from her home and brought to the Dallas Zoo. She was thereafter transferred to the Fresno Zoo.[6]

- Mabu, also known as Mabhulane, is an approximately 33-year-old wild-born male African elephant who was born in 1990 at Kruger National Park in South Africa. He was kidnapped and imported to the United States in 2003. He has been imprisoned at three zoos since 2003: the San Diego Zoo Safari Park in Escondido, CA (2003-2012; 2016-2018); the Reid Park Zoo in Tucson, AZ (2012-2016; 2018-2022); and the Fresno Zoo (2022-present).[7]

FACTUAL BACKGROUND

22. The Expert Scientific Declarations (hereafter Declarations) attached to the Supreme Court Petition are from seven of the world's most renowned elephant scientists with expertise in elephant behavior and cognition. See, *infra*, p. 15 (Exs. XI-XVI). The Declarations demonstrate that Amahle, Nolwazi, and Mabu are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs. The Declarations also demonstrate that Amahle, Nolwazi, and Mabu are suffering significant physical and psychological harm because of their imprisonment.

[5] The Elephant Database, Nolwazi, https://bit.ly/3EHhbOQ.

[6] Siebert, https://nyti.ms/2ZYi2vw.

[7] The Elephant Database, Mabu, https://bit.ly/3k88VSR.

23. Elephants possess numerous complex cognitive abilities, including: 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, 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.[8]

24. Elephants are autonomous as they exhibit self-determined behavior that is based on freedom of choice. As a psychological concept, autonomy implies that the

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

individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively.[9]

25. Asian elephants exhibit "mirror self-recognition" (MSR) using Gallup's classic "mark test."[10] MSR is significant because it is considered to be the key identifier of self-awareness, and 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.[11]

26. The capacity for mentally representing the self as an individual entity has been linked to general empathic abilities.[12] Empathy is defined as identifying with and understanding another's experiences or feelings by relating personally to their situation. Empathy is an important component of human consciousness and autonomy and a cornerstone of normal social interaction. 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 possible only if one can adopt or imagine another's perspective and attribute emotions to that other individual. Thus, empathy is a

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

[10] Bates & Byrne Decl. ¶ 38; McComb Decl. ¶ 32; Poole Decl. ¶ 30; Moss Decl. ¶ 26.

[11] 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.

[12] Bates & Byrne Decl. ¶ 40; McComb Decl. ¶ 34; Poole Decl. ¶ 32; Moss Decl. ¶ 28.

component of the "theory of mind." Elephants frequently display empathy in the form of protection, comfort, and consolation, as well as by actively helping those in difficult situations.[13]

27. Long-lived mammals like elephants who possess large, complex brains integral to their intricate socio-behavioral existence cannot function normally in captivity.[14] Given that the brains of large mammals have a lot in common across species, there is no logical reason why the large, complex brains of elephants would react any differently to a severely stressful environment than does the human brain.[15] Elephants experience <u>permanent</u> brain damage as a result of the trauma endured in impoverished environments.[16]

28. A crucial component of 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.[17] Captive/impoverished elephants living in small, monotonous enclosures are severely deprived of exercise, especially when one considers that elephants in the wild travel tens of kilometers a day (sometimes more than 100 kilometers).[18]

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[13] Bates & Byrne Decl. ¶ 41; McComb Decl. ¶ 35; Poole Decl. ¶ 33; Moss Decl. ¶ 29.

[14] Jacobs Decl. ¶ 19.

[15] *Id.* at ¶ 18.

[16] *Id.* at ¶¶ 13, 15, 19, 20, 21(g); Lindsay Decl. ¶ 68.

[17] Jacobs Decl. at ¶ 14.

[18] *Id.*

29. In a natural environment, 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, and such situations foster learned helplessness.[19] 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.[20]

30. From a neural perspective, imprisoning elephants and putting them on display is "undeniably cruel."[21] Confining elephants prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom, and stereotypical behavior.[22] When held in isolation, elephants become bored, depressed, aggressive, catatonic, and fail to thrive. And 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.[23]

31. Amahle, Nolwazi, and Mabu are not living any kind of life that is acceptable for an elephant.[24] Neither the indoor nor outdoor facilities at the Fresno Zoo allow the

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[19] *Id.* at ¶¶ 15-16.

[20] *Id.* at ¶ 16.

[21] *Id.* at ¶ 19.

[22] Poole Decl. ¶ 56.

[23] *Id.*

[24] Lindsay Decl. ¶¶ 56-77; Jacobs Decl. ¶¶ 19-21.

elephants to fulfill their physical and psychological needs, including the need to exercise their autonomy.[25] Forced to live in a tiny enclosure, they are unable to walk more than 100 yards in any direction.[26] In addition, they receive predicable enrichment, are unable to communicate with other elephants over large distances, and their acute hearing is bombarded by constant auditory disturbances. Their lives are nothing but a succession of boring and frustrating days, damaging to their bodies and minds, and punctuated only by the interaction with their keepers.[27]

32. Amahle, Nolwazi, and Mabu's physical and psychological health have been severely compromised by the sustained deprivation of their autonomy and freedom of movement and they should be sent to an elephant sanctuary.[28]

33. Sanctuaries offer orders of magnitude of greater space, which allows elephants to exercise their autonomy, develop more healthy social relationships, and engage in near-natural movement, foraging, and repertoire of behavior.[29] Elephants need a choice of social partners, and the space to permit them to be with whom they want, when they want, and to avoid particular individuals when they want.[30]

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[25] Lindsay Decl. ¶ 56

[26] *Id*. at ¶ 75.

[27] Lindsay Decl. ¶ 75.

[28] *Id.* ¶ 75; Jacobs Decl. ¶ 21(g); Poole Decl. ¶¶ 55-69.

[29] Poole Decl. ¶ 57.

[30] *Id.* at ¶ 58.

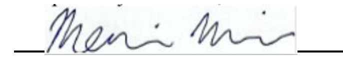
PRAYER FOR RELIEF

The NhRP respectfully requests that this Court:

1. Clarify that when a privately-detained individual files a petition for a writ of habeas corpus, that individual does not need to be in actual or constructive state custody to satisfy the habeas corpus jurisdictional requirements under California law;
2. Issue an Order to Show Cause why relief should not be granted;
3. Grant habeas corpus relief and order that Amahle, Nolwazi, and Mabu be discharged from their unlawful imprisonment at the Fresno Zoo;
4. Order Amahle, Nolwazi, and Mabu relocated to an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries;
5. Grant all other relief necessary for the just resolution of this case.

August 28, 2023

Respectfully submitted,



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**Pro hac vice* pending
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Attorneys for Petitioners

LIST OF EXHIBITS

The following exhibits are true and correct copies of the documents indicated. They are incorporated by reference into the Supreme Court Petition and Memorandum of Points and Authorities.

Exhibit I: Order by the Superior Court of California, County of Fresno, Central Division in *In re NhRP*.

Exhibit II: Verified Petition for a Common Law Writ of Habeas Corpus (i.e., Superior Court Petition).

Exhibit III: Order by the Superior Court of California, County of San Francisco, transferring the matter to Fresno County Superior Court.

Exhibit IV: Notice and Request for Ruling by the NhRP.

Exhibit V: Order Re: Request for Ruling by Superior Court of California, County of Fresno, Central Division.

Exhibit VI: Order Vacating October 18, 2022, Request That Respondent Submit a Response by Superior Court of California, County of Fresno, Central Division.

Exhibit VII: Notice of Transfer of Papers and Pleadings to Fresno County Superior Court, Criminal Division by Superior Court of California, County of Fresno, Central Division.

Exhibit VIII: Verified Petition for a Common Law Writ of Habeas Corpus (i.e., Appellate Petition)

Exhibit IX: Notice and Request for Ruling by the NhRP

Exhibit X: Order by the Court of Appeal, Fifth Appellate District

Exhibit XI: Declaration of Cynthia Moss, Sc.D.

Exhibit XII: Declaration of Karen McComb, Ph.D.

Exhibit XIII: Declaration of Bob Jacobs, Ph.D.

Exhibit XIV: Joint Declaration of Richard M. Byrne, Ph.D., and Lucy Bates, Ph.D.

Exhibit XV: Declaration of Keith Lindsay, Ph.D.

Exhibit XVI: Declaration of Joyce Poole, Ph.D.

VERIFICATION

I, Monica Miller, declare as follows:

I am an attorney admitted to practice law in the State of California. I am an attorney for Petitioner Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Mabu and am authorized to file the Supreme Court Petition on their behalf.

Amahle, Nolwazi, and Mabu are imprisoned at the Fresno Chaffee Zoo; my office is in Novato, California. For this reason, I am making this verification on their behalf.

I have read the foregoing Supreme Court Petition and the accompanying Memorandum of Points and Authorities and believe the allegations therein are true.

I certify under penalty of perjury under the laws of California and of the United States that the foregoing is true and correct.

August 28, 2023

Monica L. Miller
Attorney for the Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE SUPREME COURT PETITION

I. Introduction

This Memorandum addresses the following three questions: (1) Does habeas corpus reach private detentions in California? (2) Does the Supreme Court Petition state a prima facie case that Amahle, Nolwazi, and Mabu are entitled to relief from their private detention, thereby requiring this Court to issue an OSC? (3) Based on the elephants' autonomy and extraordinary cognitive complexity, should this Court recognize their common law right to bodily liberty protected by habeas corpus?

Habeas corpus has been used to remedy unlawful private detentions in California since the founding of the State. See, e.g., *Ex parte The Queen of the Bay* (1850) 1 Cal. 157 (hereafter *Queen of the Bay*). Yet, the Superior Court refused to issue the OSC because the Superior Court Petition did not allege that the elephants' custodian is the state of California, holding that "'in order to satisfy jurisdictional requirements under California law, an individual must be in actual or constructive state custody at the time he or she files a petition for writ of habeas corpus.'" *In re NhRP* at 2 (citations omitted). This holding (1) contradicts the plain meaning of Cal. Penal Code § 1473(a); (2) contradicts California's long common law history of permitting habeas corpus to challenge private detentions; and (3) violates the California Suspension Clause. Accordingly, this Court must clarify that when a privately-detained individual files a petition for a writ of habeas corpus, that individual does not need to be in actual or constructive state custody to satisfy the habeas corpus jurisdictional requirements under California law.

The NhRP has standing to bring this case on behalf of Amahle, Nolwazi, and Mabu, Ex. II, ¶¶ 19-27, and this Court must issue an OSC since the Supreme Court Petition, which incorporates the allegations in the Superior Court Petition, states a prima facie case for relief. Ex. II, ¶¶ 96-104. A petition states a prima facie case when it "allege[s] unlawful restraint, name[s] the person by whom the petitioner is so restrained, and specif[ies] the facts on which he bases his claim that the restraint is unlawful." *Lawler*, 23 Cal.3d at 194 (citing Cal. Penal Code § 1474). The Supreme Court Petition makes the requisite showing.

II. Facts and procedural history

On May 3, 2022, the NhRP filed the Superior Court Petition in the San Francisco County Superior Court (hereafter San Francisco Superior Court) on behalf of Amahle, Nolwazi, and Vusmusi, three elephants imprisoned at the Fresno Zoo. Ex. II. The San Francisco Superior Court transferred the matter to the Superior Court where the case remained. Ex. III. On October 17, 2022, the NhRP filed a notice and request for ruling pursuant to Cal. Rule of Court 4.551(a)(3)(B) because the Superior Court failed to rule on the Superior Court Petition within the required 60 days of its filing. Ex. IV. The next day, the Superior Court issued an order on the request for ruling, which stated: "pursuant to California Rule of Court 4.551(a)(4) and (b)(1)(A) the court hereby requests that Respondents submit a response to Petitioner's Petition . . . no later than November 2, 2022." Ex. V, p. 1. The following day, the Superior Court vacated its request for an informal response and said, "[a]n order ruling on the present petition will be issued shortly by a judge designated by the presiding judge to rule on petitions for writ of habeas corpus."

Ex. VI, p. 1. The Superior Court Petition was then transferred to the Superior Court's criminal division. Ex. VII.

On November 11, 2022, without notice to the NhRP, Respondents transferred Vusmusi out of the Fresno Zoo and replaced him with Mabu, a male elephant who had been imprisoned at the Reid Park Zoo in Tucson, Arizona. See *Mabu the elephant has moved*, NEWS 4 TUCSON (Nov. 12, 2022), https://bit.ly/3QAokaQ. On November 15, 2022, Judge Arlan L. Harrell denied the Superior Court Petition for lack of jurisdiction because it "failed to establish that any of the three elephants were in the actual or constructive custody of the State of California at the time the instant habeas corpus petition was filed." Ex. I, p. 3.

The NhRP filed its Appellate Petition in the Fifth District. Ex. VIII. On May 18, 2023, Hon. Herbert I. Levy, Hon. Rosendo Peña Jr., and Hon. Kathleen Meehan summarily denied the Appellate Petition. Ex. X.

III. The prima facie case for relief

A. Relevant procedure and the significance of issuing the order to show cause

This Court has left no ambiguity as to California's habeas corpus procedures. See, e.g., *People v. Romero* (1994) 8 Cal.4th 728, 736-42 (hereafter *Romero*). A petitioner initiates this process by "filing a verified petition for a writ of habeas corpus," *id.* at 737, or by having "some person in his behalf" file the petition. Cal. Penal Code § 1474. A court may deny a petition if it believes the petition "does not state a prima facie case for relief or that the claims are all procedurally barred." *Romero*, 8 Cal.4th at 737. Otherwise, it may

ask the respondent for an informal response or issue an OSC requiring the respondents to file a formal response. *Id.* at 741-42; Cal. Rule of Court 4.551(b), (c).

"An order to show cause is a determination that the petitioner has made a showing that he or she may be entitled to relief." Cal. Rule of Court 4.551(c)(3) (emphasis added); Cal. Rule of Court 8.385(d) (OSC in appellate court upon prima facie showing). In determining whether to issue the OSC, a "court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause." Cal. Rule of Court 4.551(c)(1); see also *Duvall*, 9 Cal. 4th at 475 ("Issuance of an OSC signifies the court's preliminary determination that the petitioner has pleaded sufficient facts that, if true, would entitle him to relief.").

As this Court has emphasized, this determination "is truly 'preliminary': it is only initial and tentative, and not final and binding." *In re Large* (2007) 41 Cal.4th 538, 549 (citation omitted). Thus, a court can issue an OSC and then determine that the allegations of the petition are insufficient as a matter of law to merit relief. See *In re Sassounian* (1995) 9 Cal.4th 535, 547 ("In issuing our order to show cause, we had preliminarily determined that petitioner had carried his burden of allegation as to two claims. . . . [But w]e are now of the opinion that petitioner has failed to carry his burden of allegation as to *any* claim.").

Although the issuance of an OSC does not mean a court must grant relief or even hold an evidentiary hearing, it nevertheless is a critical part of habeas proceedings. Only the issuance of an OSC commands the respondent to file a responsive pleading, called a return, setting forth facts that justify the petitioner's imprisonment. *Romero*, 8 Cal.4th at

738-39. The return "'becomes the principal pleading,'" roughly analogous to a civil complaint. *Id.* at 738 (citations omitted). The petitioner may then file a traverse (also known as a denial), which "may incorporate the allegations of the petition," or controvert the respondent's allegations and add new facts, showing that the imprisonment is unlawful. *Id.* at 739; Cal. Rule of Court 4.551(e). The court then determines whether it can deny or grant relief based on the undisputed facts; if the facts are disputed, it "should order an evidentiary hearing." *Romero*, 8 Cal.4th at 740 (citing Cal. Penal Code § 1484). The court cannot grant relief without first issuing an OSC. *Id.* at 744.

B. This Court must issue an order to show cause because the Supreme Court Petition establishes a prima facie case for relief

To issue the OSC, this Court need only assume, without deciding, that Amahle, Nolwazi, and Mabu may have the common law right to bodily liberty protected by habeas corpus.[31] It cannot determine the merits of the case at this stage. See generally *Romero*, 8 Cal.4th at 728. As the NhRP makes a prima facie showing that the elephants are entitled to relief, this Court must issue the OSC pursuant to Cal. Rule of Court 8.385(d); see also *Duvall*, 9 Cal. 4th at 475 ("If . . . the factual allegations, taken as true, establish a prima

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[31] In the landmark case of *Somerset v. Stewart* (K.B. 1772) 1 Lofft. 1 (hereafter *Somerset*), https://bit.ly/3jpLmKH, Lord Mansfield assumed, without deciding, that an enslaved Black man named James Somerset may 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. *Somerset* is part of California common law. Ex 2, ¶ 109. See also *Stanley*, 49 Misc. at 755 ("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 [the chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.'").

facie case for relief, the court will issue an OSC."). The Supreme Court Petition establishes a prima facie case because the evidence produced, when considered in the light most favorable to the elephants with all reasonable inferences drawn in their favor, permits this Court to find that they are entitled to release from their unlawful imprisonment to an accredited elephant sanctuary.

In a similar habeas corpus case brought by the NhRP on behalf of Happy the elephant, now Chief Judge Rowan D. 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.[32] *Breheny*, 38 N.Y.3d at 617 (Wilson, J., dissenting); *id*. at 628 (Rivera, J., dissenting). 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. He considered: "'what does the information submitted by the petitioner 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. Judge Wilson accepted "as true the (largely unchallenged) expert affidavits submitted on behalf of Happy" and found that "Happy and elephants like her 'possess complex cognitive abilities' of a great number." *Id*. at 618. "Happy is a being with highly complex cognitive,

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[32] This was the first time the highest court of any English-speaking jurisdiction considered whether a nonhuman animal was entitled to the protections of habeas corpus.

social and emotional abilities. She has self-awareness, social needs and empathy. She also comes from a wild, highly social species whose bodies and minds are accustomed to traversing long distances to connect with others and to find food." *Id.* at 620.

Next, Judge Wilson evaluated the nature of Happy's confinement. He found that it is a "miniscule fraction of the size of elephants' typical environments" in the wild, and 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. Judge Wilson concluded: "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." *Id.* at 626.

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," based on "submitted affidavits from several internationally renowned elephant experts [establishing] Happy's autonomy and the inherent harm of her captivity in the Zoo." *Id*. at 634 (Rivera, J., dissenting). She understood 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." *Id*. at 637.

Judge Wilson and Judge Rivera's instructive dissents provide crucial guidance to this Court. In California, a prima facie case is made when a petition "allege[s] unlawful restraint, name[s] the person by whom the petitioner is so restrained, and specif[ies] the facts on which he bases his claim that the restraint is unlawful." *Lawler*, 23 Cal.3d at 194 (citation omitted). In accordance with *Lawler* and *Romero*, the Supreme Court Petition (1)

alleges that the Respondents' imprisonment of Amahle, Nolwazi, and Mabu is unlawful because the imprisonment violates the elephants' common law right to bodily liberty protected by habeas corpus, (2) names Fresno's Chaffee Zoo Corporation and Jon Forrest Dohlin as the Respondents, and (3) specifies that Respondents' imprisonment of Amahle, Nolwazi, and Mabu violates the elephants' common law right to bodily liberty protected by habeas corpus because it deprives 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. See Ex. II, ¶¶ 96-104. As the Supreme Court Petition states a prima facie case, this Court must issue an OSC.

IV. Argument

A. Habeas corpus reaches private detention in California

1. The unambiguous language of Cal. Penal Code § 1473(a) is nearly unchanged since 1850 and that language has always permitted habeas corpus petitioners to challenge private detentions

The Superior Court denied the Superior Court Petition because the Superior Court Petition failed to allege that the three elephants were not in state custody, erroneously holding that "'in order to satisfy jurisdictional requirements under California law, an individual must be in actual or constructive state custody at the time he or she files a petition for writ of habeas corpus.'" *In re NhRP* at 2 (citations omitted). This holding directly contradicts the plain meaning of Cal. Penal Code § 1473(a).

"A person unlawfully imprisoned or restrained of their liberty, under <u>any pretense</u>, may prosecute a writ of habeas corpus to inquire into the cause of the imprisonment or restraint." Cal. Penal Code § 1473(a) (emphasis added). In construing this or any statute,

"'[t]he words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.'" *People v. Toney* (2004) 32 Cal.4th 228, 232 (citation omitted). "If the statutory language is unambiguous, 'we presume the legislature meant what it said, and the plain meaning of the statute governs.'" *Id.* (citations omitted). The critical phrase "any pretense" in § 1473(a) is neither circumscribed nor qualified by further legislative direction. It unambiguously permits challenges to any form of unlawful imprisonment or restraint, including private detentions.[33] Accordingly, prohibiting the use of habeas corpus to challenge private detentions is contrary to the plain meaning of § 1473(a).

The unambiguity of § 1473(a) is further evidenced by the fact that its language has remained essentially unchanged since at least April 20, 1850, when California enacted "An Act *concerning the Writ of Habeas Corpus*," which stated: "Every person unlawfully committed, detained, confined, or restrained of his liberty, under <u>any pretence whatever</u>, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Acts of 1850, Ch. 32, § 1, <u>https://bit.ly/3lsVjlN</u> (emphasis added).[34] The import of the language in the 1850 statute was made clear in *Queen of the Bay*, a private detention

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[33] Cf. *County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 398 (ignoring the disjunctive word "or" in the Workers' Compensation Act "does not square with the plain meaning of the statute"); *People v. Wharton* (1991) 53 Cal. 3d 522, 562, as modified on denial of reh'g (July 9, 1991) (concluding "the plain meaning of the language of [a statute] cannot be reasonably read as having the far-reaching, preclusive effect advocated by defendant and amici curiae").

[34] Cal. Penal Code § 1473 was originally enacted in 1872 and remains essentially unchanged today; the 1872 habeas corpus statute (in all relevant ways) was essentially unchanged from Ch. 32 of the Acts of 1850. (Ex. II, p. 20, ¶ 20).

case decided by this Court later that same year. *Queen of the Bay* was "a doozie of a case about some pirates who kidnap[ped] several female members of a Pacific island royal family and [brought] them to San Francisco for, well, no good purpose." The Hon. Dan McNerney, *Features: The Seminal Case*, 46 ORANGE CNTY. LAWYER 21, 22 (2004), https://bit.ly/3VVJf9J. The kidnapped women were eventually discharged from the "great cruelty" that was their private detention by a successful habeas corpus petition. *Queen of the Bay*, 1 Cal. at 157. The case has never been overruled and has been cited with approval by this Court. See *In re Clark* (1993) 5 Cal.4th 750, 764 (hereafter *Clark*) (citing, inter alia, *Queen of the Bay*, 1 Cal. 157) ("The writ has been available to secure release from unlawful restraint since the founding of the state.").

Accordingly, the plain meaning of Cal. Penal Code § 1473(a)—as informed by its statutory history and *Queen of the Bay*—leaves no doubt that even today, an individual need not be in actual or constructive state custody to satisfy the jurisdictional requirements for successfully litigating a habeas corpus petition.

2. Habeas corpus has long been used to challenge private detentions

For centuries, habeas corpus has been used to challenge private detentions. "[W]hether considered as it existed at common law or under the English statutes, or as guaranteed under the Constitutions of the various states, including our own, with appropriate statutory procedure for readily invoking it, the essential object and purpose of the writ is to inquire into all manner of involuntary restraint, as distinguished from voluntary, and relieve a person therefrom if such restraint is illegal." *In re Ford* (1911) 160 Cal. 334, 340, disapproved of on other grounds by *In re Petersen* (1958) 51 Cal.2d 177

(emphasis added); see also *Browne v. Superior Court of San Francisco* (1940) 16 Cal.2d 593, 608 (Shenk, J., dissenting) ("The essential object and purpose of the writ [is] to inquire into all manner of involuntary restraint. This writ has long been regarded as the greatest remedy known to the law whereby one unlawfully restrained of his liberty may secure release or have his civil rights defined.") (emphasis added); *Preiser v. Rodriguez* (1973) 411 U.S. 475, 484 (hereafter *Preiser*) (In England, "[w]hether the petitioner had been placed in physical confinement by executive direction alone, or by order of a court, or even by private parties, habeas corpus was the proper means of challenging that confinement and seeking release.") (citations omitted) (emphasis added).[35]

The most celebrated use of habeas corpus has been to free individuals who were privately enslaved. In the landmark case of *Somerset v. Stewart* (K.B. 1772) 1 Lofft. 1 (hereafter *Somerset*), https://bit.ly/3jpLmkH, a habeas corpus petition was brought on behalf of a privately enslaved Black man, James Somerset. Ultimately, Lord Mansfield of the King's Bench granted the petition and ordered Somerset freed, ruling that "[t]he state of slavery is . . . so odious, that nothing can be suffered to support it" under the common law. *Id.* at 19. *Somerset* is part of California common law and has never been overruled. Ex. II, ¶ 109. High court decisions in sister states have also relied upon *Somerset* to secure the freedom of enslaved humans in private detention through habeas corpus. See, e.g., *Lemmon v. People* (1860) 20 N.Y. 562, 604-06, 618, 623; *Jackson v. Bulloch* (1837) 12

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[35] See also *I.N.S. v. St. Cyr* (2001) 533 U.S. 289, 301-02 (habeas corpus "enabled [non-enemy aliens and citizens] to challenge Executive and private detention in civil cases as well as criminal") (emphasis added).

Conn. 38, 41, 42, 53; *Commonwealth v. Aves* (1836) 35 Mass. 193, 211-12. The *Somerset* case thus shows "how the Great Writ was flexibly used by the courts as a tool for innovation and social change." *Breheny*, 38 N.Y.3d at 592 (Wilson, J., dissenting).

As shown *supra*, (IV)(A)(1), the storied history of habeas corpus being used to challenge private detentions extended beyond *Somerset* in England to *Queen of the Bay* in California. A mere six years after *Queen of the Bay*, the writ was again invoked in California in the private detention context, this time to challenge the social norm of human slavery. In late 1855, a slaveholder from Mississippi living in San Bernardino "attempted to force all of the blacks he claimed as his slaves to go with him to Texas, where slavery was vigorously enforced, and where he might attempt to sell them." BRIAN MCGINTY, ARCHY LEE'S STRUGGLE FOR FREEDOM 30 (2020). "One of the blacks ['Biddy'] objected strenuously to the move. She managed to get a petition for habeas corpus filed before a district judge in Los Angeles named Benjamin Hayes."[36] *Id.* "In a written decision filed on January 19, 1856, Hayes ruled that 'Biddy' and all of the other blacks that Smith claimed as his slaves [14 in total] did not have to go to Texas." *Id.* Hayes wrote, "all of the said persons of color are entitled to their freedom, and are free and cannot be held in slavery or involuntary servitude," and "they are . . . free forever." *(1856) Mason v. Smith (The Bridget "Biddy" Mason Case)*, BLACKPAST, https://bit.ly/3VRvvgq (hereafter *Mason Case*). His reasoning hinged on the fact that had Black people been allowed to be removed from

[36] Benjamin Hayes was "a learned man with a brilliant legal mind," and his "inspiring rulings are still cited in [this] state's courts." *Benjamin Ignatius Hayes, Lawyer, and Judge*, AFRICAN AMERICAN REGISTRY, https://bit.ly/3jvvfpC.

California to Texas, their "free will and consent," along with "their liberty," would be "greatly jeopardized." *Id.*[37]

Somerset's adoption into California law, the controlling precedent of *Queen of the Bay*, the *Mason Case*, and the history of habeas corpus, directly refute the Superior Court's holding that habeas corpus cannot reach individuals in private detention. Indeed, the use of habeas corpus to challenge private detentions is part of the Great Writ's long history in California and throughout this country.[38] The Superior Court's Order in *In re NhRP* is an outlier and must be rejected.

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[37] "The court's decision was hailed throughout Los Angeles. The Los Angeles Star . . . printed the full text of Hayes' opinion under the heading 'Suit for Freedom.'" Cecilia Rasmussen, *In Key Court Case, Slaved Tested State's Commitment to Freedom*, L.A. TIMES (Jan. 27, 2022), https://www.latimes.com/archives/la-xpm-2002-jan-27-me-25048-story.html.

[38] See, e.g., *In re Glenn* (1880) 54 Md. 572, 576 ("Whenever a person is restrained of his liberty by being confined in a common jail, <u>or by a private person</u>, whether it be for a criminal or civil cause, he may regularly, by habeas corpus, have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment.") (cleaned up) (emphasis added); *Peterson v. Utah Bd. of Pardons* (1995) 907 P.2d 1148, 1153 n.2 ("A writ of habeas corpus may, of course, be used for purposes other than testing the authority of a governmental agency or officer to restrain the liberty of a person. It can also be used . . . in certain cases, to challenge the authority of a <u>private person</u> to restrain the liberty of another.") (citations omitted) (emphasis added); *Lozada v. Warden, State Prison* (1992) 223 Conn. 834, 841 ("a writ of habeas corpus could be granted 'in all cases where any person is restrained of his liberty by imprisonment . . . by any process or way not warranted by law; or when he is unlawfully confined, or wrongly deprived of his liberty <u>by a private person</u>'") (citation omitted) (emphasis added); see also Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2522-23 (1998) ("Despite the long association between habeas corpus and criminal confinement, the writ was available at common law to challenge a broad range of noncriminal confinement, <u>both public and private</u>. . . . Indeed, the common law writ has been used to test the legality of noncriminal custody since at least the early seventeenth century, and courts issued writs of habeas corpus in an array of noncriminal contexts.") (emphasis added).

3. Child custody cases in California make clear that habeas corpus is available to challenge private detentions

Child custody cases demonstrate a modern use of habeas corpus in the private detention context. In *In re Kyle* (1947) 77 Cal.App.2d 634, 636, a father filed a habeas corpus petition to recover the custody of his child from the mother, after the mother "refused to return the child" following a visit. The child was neither in actual nor constructive custody of the state of California; she was privately detained by her mother. Yet, the court still issued the order to show cause and ultimately granted the petition, ordering the child delivered to the father. *Id.* at 641. See also *In re Barr on behalf of Barr* (1952) 39 Cal.2d 25, 26 (hereafter *In re Barr*) (a mother, whose child custody decree was modified in favor of her ex-husband, successfully brought a habeas corpus action to recover her child from the possession of her ex-husband pending an appeal of said custody decree modification); *In re Paul W.* (2007) 151 Cal.App.4th 37, 67 (Bamattre-Manoukian, P.J., concurring) (explaining that a writ of habeas corpus can be brought "in a variety of circumstances," including when the child or children are "under the custody of the social services agency, or . . . as was the case here with the petitioner's daughters, in the custody of the other parent") (emphasis added); *In re John S.* (1977) 135 Cal.Rptr. 893, 902, hearing granted, cause dismissed (Apr. 20, 1977) (explaining that state custody is not a prerequisite for seeking habeas corpus relief: "Habeas corpus is an appropriate procedure to tender the issue of abuse of parental authority when brought on behalf of a minor child undergoing

some form of custodial detention, whether of a private institutional nature or one involving direct parental restraint.").[39]

As instructed by past and current habeas corpus practice in California, a privately-detained individual does not (since they cannot) need to allege that the state of California is their custodian when seeking habeas corpus relief. Cases such as *In re Kyle*, *In re Barr*, and *In re John S.*, as well as Judge Bamattree-Manoukian's guidance, further make clear that the Superior Court's Order is incorrect. This Court should take the opportunity to clarify and affirm that habeas corpus is available to challenge private detentions.

4. The New York Court of Appeals recently made clear that habeas corpus reaches private detentions

The court in Happy's case also made clear that habeas corpus protections extend to private detentions. *Breheny*, 38 N.Y.3d at 569 (noting that habeas corpus "'strikes at unlawful imprisonment or restraint of the person by state or citizen'") (citations omitted). On this point, the dissents were in agreement with the majority.

In explaining the broad scope of habeas corpus and its historical use, Judge Wilson stated that "[t]he writ reaches both public and private detentions." *Id.* at 580 (Wilson, J., dissenting). He would go on to explain that "[h]abeas petitions were not limited to

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[39] See also, e.g., *Ex parte Marshall* (1929) 100 Cal.App. 284 (habeas corpus petition granted; petitioner awarded custody of a minor child who had been abducted by his former spouse); *In re John S.*, 135 Cal.Rptr. at 900-01 ("Implicit in [minor's] argument is the premise that state action is somehow involved in his detention by his parents in a private mental hospital. . . . Indeed, the state has not acted at all, but has merely abstained from interfering in a conflict between parents and child. . . . No such state assistance has been invoked here," and California "does not control either admissions or treatment policies of the private hospital to which minor was admitted.").

detainment orchestrated or managed by the government; habeas equally reached private confinements." *Id.* at 589. Judge Wilson then provided examples of habeas corpus being used to challenge private detentions like "'stories told in the King's Bench about wives who were wrongfully confined in private madhouses,'" which showed that the writ "is a tool for society to challenge confinement, construed broadly, and can document and raise awareness of injustices that may warrant legislative, policy, or social solutions." *Id.* at 602. (citation omitted). Importantly, King's Bench decisions releasing women from private madhouses became part of California's jurisprudence when the state "passed an act 'adopting the common law'" of England, and made it "'the rule of decision in all the courts of this state.'" *Lux v. Haggin* (1886) 69 Cal. 255, 337 (citation omitted).

Judge Rivera echoed Judge Wilson's reasoning on using habeas corpus to challenge private detentions when she explained how, under the common law, "despite the legal doctrine of coverture which subsumed a woman's legal personhood into that of her husband, women nonetheless resorted to writs of habeas corpus to seek release from confinement in their abusive husbands' homes or private insane asylums." *Breheny*, 38 N.Y.3d at 630 (Rivera, J., dissenting) (citation omitted). As examples to demonstrate "the flexibility of the historical uses of the writ," Judge Rivera cited private detention cases involving "an enslaved human being with no legal personhood (*see Somerset*, 98 ER 499)" and "a married woman who could be abused by her husband with impunity (*see* Foyster)." *Id.* at 631-32.

5. The state custody requirement in *In re Sodersten* and *People v. Villa* applies only in the criminal context and is not applicable to private detentions

The Superior Court was wrong to rely on *In re Sodersten* (2007) 146 Cal.App.4th 1163 (hereafter *Sodersten*) and *People v. Villa* (2009) 45 Cal.4th 1063 (hereafter *Villa*) because those are criminal habeas corpus cases that do not apply to private detentions. *Sodersten* and *Villa* were cited for the proposition that "'in order to satisfy jurisdictional requirements under California law, an individual must be in actual or constructive state custody at the time he or she files a petition for writ of habeas corpus.'" *In re NhRP* at 2 (citations omitted). As the elephants were imprisoned at the Fresno Zoo (a private entity) at the time of the filing of the Superior Court Petition and therefore not in "actual or constructive state custody," the Superior Court Petition was denied for lack of jurisdiction. However, the state custody jurisdictional requirement enunciated in *Sodersten* and *Villa* reflects the law in California in the criminal context of individuals proceeding under habeas corpus while in the custody of a governmental entity. Those cases are clearly distinguishable from this case and do not reflect the law in the context of private habeas corpus proceedings.

In *Sodersten*, the petitioner was an inmate who sought habeas relief on the grounds that he was denied a fair trial. 146 Cal.App.4th at 1216. The court concluded it had jurisdiction because the petitioner was incarcerated in California and thus under actual custody of the state. *Id.* at 1217 ("As petitioner was imprisoned at all pertinent times, . . . he fulfilled the [jurisdictional] requirements."). In *Villa,* the petitioner was placed in a federal detention center in Alabama after he tried to renew his permanent resident status. 45 Cal.4th at 1067. The ground for the detention was his 1989 conviction for the possession of cocaine in California. *Id*. While in Alabama, the petitioner unsuccessfully sought habeas

corpus relief in a California court because he was in "neither actual nor constructive state custody as a result of the 1989 conviction." *Id.* at 1077.

Villa and *Sodersten* simply stand for the proposition that to meet the state custody jurisdictional requirement for habeas corpus relief in the criminal context, the petitioner must challenge California's custody of the individual in question. Significantly, they do not mention privately-detained individuals proceeding under habeas corpus. They cannot be interpreted to extend the jurisdictional requirement to private detention contexts, and no published habeas corpus case in California has ever imposed a state custody requirement on a privately-detained individual.

6. The Superior Court's Order violates the California Suspension Clause

The privilege of the writ of habeas corpus is enshrined in the California Suspension Clause, which provides that "[h]abeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion." Cal. Const., art. I, § 11. This clause has been enshrined in the state constitution since the state's founding without modification, *Clark*, 5 Cal.4th at 764 n.2, and "guarantees the right to habeas corpus." *In re Cook* (2019) 7 Cal.5th 439, 452; *In re Estevez* (2008) 165 Cal.App.4th 1445, 1460 (California Suspension Clause guarantees the "right to file a petition for a writ of habeas corpus"). The Superior Court's Order, which limits the jurisdictional reach of habeas corpus to "actual or constructive state custody," *In re NhRP* at 2, violates the California Suspension Clause because it prohibits the use of habeas corpus to challenge a private detention, thereby restricting the permissible reach of the Great Writ.

Like the California Suspension Clause, the terms of the similarly worded federal suspension clause "necessarily imply judicial action. In England, all the higher courts were open to applicants for the writ, and it is hardly supposable that . . . any [American] court would be, intentionally, closed to them." *Ex parte Yerger* (1868) 75 U.S. 85, 95-6. Those applicants include petitioners "placed in physical confinement by executive direction alone, or by order of the court, or even by private parties." *Preiser*, 411 U.S. at 484 (citations omitted) (emphasis added). Indeed, "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," and "was given explicit recognition in the Suspension Clause of the [Federal] Constitution." *Id.* at 485 (emphasis added). "[T]he Suspension Clause is not merely a technical regulation of the exercise of emergency powers, but a fundamental guarantee of the availability of a judicial remedy for unlawful detention." Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* Boumediene v. Bush, 110 COLUM. L. REV. 537, 578 (2010).[40]

The California Suspension Clause is no less protective of the right to habeas corpus than its federal counterpart.[41] Requiring actual or constructive state custody to prosecute a

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[40] The protections provided by the Suspension Clause are of such importance that Founding Father Patrick Henry "referred to the Suspension Clause as an 'exception' to the 'power given to Congress to regulate courts.'" *Boumediene v. Bush* (2008) 553 U.S. 723, 743 (citation omitted).

[41] See *In re Estevez*, 165 Cal.App.4th at 1461 (noting California's Suspension Clause and the federal suspension clause are "similarly worded"); see also 6 Witkin, Cal. Crim. Law 4th Crim Writs § 10 (2022) ("Habeas corpus . . . is a process guaranteed by both U.S. and California Constitutions to obtain prompt judicial release from illegal restraint.").

writ of habeas corpus would suspend the use of habeas corpus in private detention disputes. Accordingly, as this case does not arise at a time where "public safety" is at stake due to a "rebellion or invasion," the Superior Court's restriction on a permissible use of the Great Writ directly violates the California Constitution.

B. This Court must recognize Amahle, Nolwazi, and Mabu's common law right to bodily liberty protected by habeas corpus because of their autonomy and extraordinary cognitive complexity

1. The substantive question before this Court is not whether the elephants are "persons" but whether the Court should recognize their right to bodily liberty

Cal. Penal Code §1473(a) provides that "[a] person unlawfully imprisoned or restrained of their liberty, under any pretense, may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment or restraint." Consistent with the fact that habeas corpus is a common law writ, "person" is undefined by the procedural statute.[42] This Court's recognition of the elephants' common law right to bodily liberty protected by habeas corpus necessarily makes them "persons" for purposes of California habeas corpus procedural statutes. This is because a "person is any being whom the law regards as capable

[42] This case is not a matter of statutory interpretation or legislative intent. Even in statutory interpretation cases where the term "person" is undefined, courts have not limited the meaning of "person" 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* (1882) 50 Conn. 131. The court explained: "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 for admission under it. Shall we now hold that it cannot apply to black men?" *Id.* at 132-33.

of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not." *Person*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)); see also IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("The significant fortune of legal personality is the capacity for rights."). On this well-established understanding of personhood, the term "person" is merely a designation that attaches to any individual or entity with a legal right. Accordingly, "animals may conceivably be legal persons" if they possess legal rights, and there may be "systems of Law in which animals have legal rights." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 42-43 (2d ed. 1963); see also Ex. II, ¶¶ 166-174 (the elephants are "persons" for purposes of habeas corpus).

In 2018, the NhRP sought leave from the New York Court of Appeals to consider a habeas corpus case involving two chimpanzees, Tommy and Kiko. As in this case, the NhRP argued for the recognition of Tommy and Kiko's common law right to bodily liberty protected by habeas corpus based on their uncontroverted autonomy and extraordinary cognitive complexity. Although the motion for leave to appeal was denied, a judge on the Court of Appeals issued a separate opinion discussing the case's merits—the first time in the court's 176-year history.[43] See generally *Tommy*, 31 N.Y.3d at 1055 (Fahey, J., concurring). The unexpected concurring opinion was authored by Judge Eugene Fahey, and explained "that denial of leave to appeal [wa]s not a decision on the merits of [NhRP]'s

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[43] Rob Rosborough, *For the First Time Court of Appeals Issues a Separate Opinion While Denying Leave to Appeal*, NEW YORK APPEALS (May 9, 2018), https://bit.ly/3jKqmZn.

claims." *Id.* at 1056 (Fahey, J., concurring). It also presciently underscored that the "question will have to be addressed eventually. Can a nonhuman animal be entitled to release from confinement through the writ of habeas corpus?" *Id.* Although Judge Fahey did not answer that question outright, he provided guidance on what the substantive analysis should, and should not, entail.

Judge Fahey began his opinion by refuting the appellate division's analysis of the term "person" in the habeas corpus procedural statute governing Tommy and Kiko's petition. He noted that the statute (as is the case in California) does not define the term,[44] and criticized the appellate division for concluding that chimpanzees are not "persons" because of their inability to "'bear legal duties, or to be held legally accountable for their actions.'" *Id.* at 1057 (citations omitted). Judge Fahey observed that even if "nonhuman animals cannot bear duties, the same is true of human infants or comatose human adults, yet no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one's infant child." *Id.* at 1057 (citations omitted); see also Ex. II, ¶¶ 175-179. This was a crucial assessment because restricting the Great Writ, or personhood, to only those

[44] See CPLR § 7002(a) ("A person illegally imprisoned or otherwise restrained of his liberty . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance."). "The drafters of the CPLR made no attempt to specify the circumstances in which habeas corpus is a proper remedy. This was viewed as a matter of substantive law." Vincent Alexander, *Practice Commentaries*, MCKINNEY'S CPLR 7001.

individuals who can undertake legal responsibilities would abolish long-held legal protections for the most vulnerable among us.[45]

Moreover, Judge Fahey explained that the appellate division's erroneous "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief is in fact based on nothing more than the premise that a chimpanzee is not a member of the human species." *Tommy*, N.Y.3d at 1057 (Fahey, J., concurring) (citation omitted). While affirming the principle that "all human beings possess intrinsic dignity and value," Judge Fahey urged that "in elevating our species, we should not lower the status of other highly intelligent species." *Id.*

Judge Fahey then offered a rational way to evaluate whether a chimpanzee is entitled to habeas corpus relief without focusing on the undefined term "person." He said:

> 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.

Id. at 1057. Rather than focus on the definition of "person," Judge Fahey suggests that a court should determine whether the nonhuman animal has the right to liberty by assessing

[45] Indeed, it is this specious "duties and responsibilities" argument that some courts have used to justify denying nonhuman animals the ability to seek legal protection through the use of habeas corpus. See Ex. II, ¶¶ 176-194 (refuting this argument at length). See also *Breheny*, 38 N.Y.3d at 628-29 (Rivera, J. dissenting) ("I conclude that 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.").

the intrinsic nature of the species. In Tommy and Kiko's case, had the court recognized their right to liberty protected by habeas corpus, the chimpanzees would have necessarily become legal persons. Thus, initially determining whether a nonhuman animal is a "person" for purposes of the procedural statute is not the appropriate way to decide cases that deal with nonhuman animals seeking habeas corpus relief.

Instead, the appropriate way to evaluate habeas corpus cases brought on behalf of nonhuman animals is to assess the intrinsic nature of the species to determine whether the nonhuman animal has the common law right to bodily liberty protected by habeas corpus. The question then becomes how a court conducts such an assessment. Judge Fahey answered the question by looking to the science, especially to the affidavits submitted by eminent primatologists. He said:

> The record before us in the motion for leave to appeal contains unrebutted 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.

Id. at 1057-58. The primatologists were thus able to show that autonomy and extraordinary cognitive complexity are not exclusive to humans. Having accepted that chimpanzees are autonomous and extraordinarily cognitively complex beings, Judge Fahey recognized that whether a chimpanzee can use habeas corpus to challenge her imprisonment is "not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Id*. at 1058. He further remarked:

> 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. Instead, we should consider whether a chimpanzee is an individual with inherent value who has the right to be treated with respect.

Id. at 1058 (citation omitted). Judge Fahey concluded his opinion with a striking personal reflection admitting that he has "struggled with whether" denying the NhRP's motion for leave to appeal, in a previous chimpanzee case, was the right decision. *Id*. at 1059. Speaking broadly, he opined:

> 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.

Id.

Taken as a whole, Judge Fahey's reflections and accompanying findings provide a glimpse into how a superb common law judge intellectually and emotionally confronts important, novel legal questions over time. His concurring opinion provides a step-by-step guide for confronting such questions about nonhuman animals seeking relief from their respective imprisonments through the use of habeas corpus. To wit; (1), rather than determine if the nonhuman animal is included within the umbrella of the undefined term "person," assess the species' intrinsic nature to determine whether the nonhuman animal has the common law right to bodily liberty protected by habeas corpus; (2), to make such an assessment one must look at the science, which typically takes the form of affidavits or declarations from leaders in the field of nonhuman animal cognition and behavior; (3), if

the science establishes that the species is autonomous and extraordinarily cognitively complex, then the court must apply normative considerations like ethics and policy.

When normative considerations are applied to a nonhuman animal who is proven to be autonomous and extraordinarily cognitively complex, a court must recognize their common law right to bodily liberty protected by habeas corpus. It is proven that Amahle, Nolwazi, and Mabu are autonomous and extraordinarily cognitively complex beings. Exs. XI-XVI; Ex. II, ¶¶ 31-86. Therefore, this Court must recognize their right to bodily liberty. See Ex. II, ¶¶ 111-135 (considerations for changing the common law, including science, justice, reason, ethics, policy, etc.); *id.* at ¶¶ 136-142 (liberty argument); *id.* at ¶¶ 143-162 (equality argument).

2. The elephants can challenge their imprisonment through habeas corpus based on principles of justice and liberty

a. As a matter of justice, this Court must recognize the elephants' right to bodily liberty

Elephants are autonomous and extraordinarily cognitively complex beings, and the deprivation of their bodily liberty through their unnatural imprisonment at the Fresno Zoo is unjust. This Court has long recognized that the common law must evolve to accord with the demands of justice. See, e.g., *Rodriguez, v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 (hereafter *Rodriguez*) ("'Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.'") (citation omitted); *Katz v. Walkinshaw* (1903) 141 Cal. 116, 123 (hereafter *Katz*) ("the common law by its own

principles adapts itself to varying conditions, and modifies its own rules so as to serve the ends of justice under the different circumstances”).[46]

Defined as “[t]he quality of being fair or reasonable,” *Justice*, BLACK’S LAW DICTIONARY (11th ed. 2019) (hereafter BLACK’S), justice is a fundamental principle of the common law. The common law is “‘the embodiment of broad and comprehensive unwritten principles, inspired by natural reason and an innate sense of justice.’” *Rodriguez*, 12 Cal.3d at 393 (citation omitted). Justice requires that the common law stay abreast of society’s evolving norms.[47] See, e.g, *Green v. Superior Court* (1974) 10 Cal.3d 616, 640 (in discarding outworn common law property doctrines, “[we] merely follow the well-established duty of common law courts to reflect contemporary social values and ethics.”). This is because the “law cannot be divorced from morality in so far as it clearly contains . . . the notion of right to which the moral quality of justice corresponds.” *Justice*, BLACK’S (quoting PAUL VINOGRADOFF, COMMON SENSE IN LAW 19-20 (H.G. Hanbury ed., 2d ed. 1946)).[48]

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[46] See also *Dillon v. Legg* (1968) 68 Cal.2d 728, 748 (“To deny recovery would be to chain this state to an outmoded rule of the 19th century which can claim no current credence. No good reason compels our captivity to an indefensible orthodoxy.”); *Rowland v. Christian* (1968) 69 Cal.2d 108, 117 (“[I]t is clear that those distinctions [regarding a trespasser, licensee, or invitee] are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules—they are all too easy to apply in their original formulation—but is due to the attempts to apply just rules in our modern society within the ancient terminology.”).

[47] See Ex. II, ¶¶ 123-135 (progress of society).

[48] “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,

In *Breheny*, Judge Wilson understood that "[a]t 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." 38 N.Y.3d at 588 (Wilson, J., dissenting). He added, "[w]hether an elephant could have petitioned for habeas corpus in the 18th century is a different question from whether an elephant can do so today because we know much more about elephant cognition, social organization, behaviors and needs than we did in past centuries, and our laws and norms have changed in response to our improved knowledge of animals." *Id.* at 603. "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. That information was informed by the expert affidavits filed on Happy's behalf, which established that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs. 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.

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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)).

The same injustice led Judge Rivera to declare, "[w]e 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 Happy." *Id.* at 628 (Rivera, J., dissenting). Society's improved knowledge of elephants has helped it evolve to the point where "a court may consider whether to issue the writ because it is unjust to continue [an elephant]'s decades-long confinement in an unnatural habitat where she is held for the sole purpose of human entertainment." *Id.* Judge Rivera concluded:

> Captivity is anathema to Happy because of her cognitive abilities and behavioral modalities—because she is an autonomous being.. . . . 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. See also Ex. II, ¶ 118 (The Los Angeles Superior Court recognized that "[c]aptivity is a terrible existence for any intelligent, self-aware species, which the undisputed evidence shows elephants are. <u>To believe otherwise</u>, as some high-ranking zoo employees appear to believe, <u>is delusional</u>.") (emphasis added).

Amahle, Nolwazi, and Mabu's imprisonment at the Fresno Zoo is unjust. Held in a wholly unnatural environment, deprived of the ability to travel, forage, communicate, socialize, plan, live, choose, and thrive as elephants should—in other words, to be autonomous—they are not living a life that is anything close to acceptable for an elephant. Jacobs Decl. ¶¶ 19-21; Lindsay Decl. ¶¶ 56-77. They spend at least half of each day in a barn with little cushioning for their feet and joints, and when allowed outside, they are unable to walk more than 100 yards in any direction. Lindsay Decl. ¶ 75. (In contrast, free-

living elephants have expansive home ranges that can extend from tens to thousands of square kilometers, and normally travel about 8 to 12 kilometers per day across a large variety of terrains, with much greater distances (up to ~50 km/day) being common. Jacobs Decl. ¶ 21(c) and (d)). They are unable to make meaningful choices. Other than receiving predictable enrichment, there is little for the elephants to do, no opportunity to employ their capacities for exploration, spatial memory, or problem-solving, and no opportunity to communicate and interact with other elephants. Lindsay Decl. ¶ 70; Jacobs Decl. ¶ 21(a), (c), and (g). Additionally, the elephants are constantly bombarded by auditory disturbances. Lindsay Decl. ¶¶ 60, 70, 75; Jacobs Decl. ¶ 21(f). Their life is nothing but a succession of boring and frustrating days, damaging to their extraordinary minds and bodies. Lindsay Decl. ¶ 75.

The injustice of the elephants' imprisonment is further made manifest by the exhibition of stereotypical behavior in Amahle and Nolwazi (see videos here), behavior that has never been observed in free-living elephants. Jacobs Decl. ¶ 21(h); Lindsay Dec. ¶ 68. Stereotypies "reflect underlying (abnormal) disruption of neural mechanisms." Jacobs Decl. at ¶17. They are caused by chronic stress from captivity and are "a direct reflection of the dysregulation of motor control circuitry in the brain, that is, a form of brain damage." *Id*. at ¶ 21(h).[49]

The time has come for California common law to reflect the modern understanding that elephants are autonomous and extraordinarily cognitively complex beings and suffer

[49] Stress from captivity "often fosters learned helplessness and conditioned defeat." Jacobs Decl. ¶ 16.

in captivity. See *Nestle v. City of Santa Monic*a (1972) 6 Cal.3d 920, 924 (The common law must reflect "'knowledge as deep as the science . . . of the [] day.'") (citation omitted). Based on this understanding, and the common law principles espoused by *Rodriguez* and *Katz*, this Court must conclude that the deprivation of Amahle, Nolwazi, and Mabu's bodily liberty through their wholly unnatural environment at the Fresno Zoo is unjust. This Court should also look to the wisdom of Judge Wilson and Judge Rivera who have had the opportunity to analyze the very questions present in this case. It is evident that the only way to remedy the injustice of the elephants' imprisonment is to recognize their common law right to bodily liberty protected by habeas corpus so they can spend the rest of their lives in an environment that will respect their autonomy, i.e., an accredited elephant sanctuary. See *Breheny*, 38 N.Y.3d at 580 (Wilson, J., dissenting) ("the history of the Great Writ demonstrates that courts have used and should use it to enhance liberty when captivity is unjust, even when the captor has statutory or common law rights authorizing captivities in general"); *id*. at 629 (Rivera, J., dissenting) ("the Great Writ ensures the fundamental right to be free from unjust imprisonment by requiring judicial review of the proffered justification for confinement").[50]

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[50] See also 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.").

Confining elephants in an unnatural environment that prevents them from living the life they were meant to—as self-determinative, autonomous beings in the wild—is "inherently unjust and inhumane." *Id.* at 642 (Rivera, J., dissenting). "Such 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.

b. As a matter of liberty, this Court must recognize the elephants' right to bodily liberty

Autonomy is at the foundation of the common law right to bodily liberty. *Thor v. Superior Court* (1993) 5 Cal.4th 725, 734-35 (hereafter *Thor*) (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).

"'Anglo American law starts with the premise of thorough-going self determination.'" *Id*. at 736 (citation omitted); see also Ex. II, ¶¶ 136-142 (liberty argument). "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 law . . . The right to one's person may be said to be a right of complete immunity: to be let alone." *Thor*, 5 Cal.4th at 731 (quoting *Union Pac. Ry. Co. v. Botsford* (1891) 141 U.S. 250, 251). Thus, "'the role of the state is to ensure a maximum of individual freedom of choice and conduct.'" *Id.* at 740 (citation omitted).

In California, the protection given to an individual's autonomy under the common law is of such supreme importance that a competent individual may choose to reject lifesaving medical treatment and die. See, e.g., *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 531-32 (*Thor* "held that the common law right of a competent adult to refuse life-sustaining treatment extends even to a state prisoner . . . . [W]e based our conclusion that a prisoner had the right to refuse life-sustaining treatment solely on the common law."). While elephants may not be capable of making the types of decisions articulated in *Thor*, they are capable of making decisions concerning their bodily liberty, which habeas corpus protects. For example, they can "discuss" with other elephants where they wish to go, and when, and choose what they want to do, and with whom. Poole Decl. at ¶ 44.

The Great Writ, which safeguards the right to bodily liberty, can protect the autonomy of humans and nonhuman animals who have been unjustly confined. *See Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting) ("[T]he 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."). In *Tommy*, Judge Fahey recognized that autonomy lies at the heart of whether a chimpanzee "has the right to liberty protected by habeas corpus," noting "the answer . . . will depend on our assessment of the intrinsic nature of chimpanzees as a species." 31 N.Y.3d at 1057 (Fahey, J. concurring). As he observed, based on the scientific evidence that the NhRP presented, chimpanzees are "autonomous, intelligent creatures." *Id*. at 1059.

In *Breheny*, Judge Rivera concluded that the NhRP "made the case for Happy's release and transfer to an elephant sanctuary, and the writ should therefore be granted," based on the record developed below in which the NhRP "submitted affidavits from several internationally renowned elephant experts to establish Happy's autonomy and the inherent harm of her captivity in the Zoo." 38 N.Y.3d at 634. Similarly, 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. That showing is consistent with the kind of showings made by abused women and children and enslaved persons." *Id.* at 626 (Wilson, J., dissenting).

Accordingly, to safeguard Amahle, Nolwazi, and Mabu's autonomy and extraordinary cognitive complexity, this Court, as a matter of liberty, must recognize their common law right to bodily liberty protected by habeas corpus and order them freed.

V. CONCLUSION

The NhRP respectfully requests that this Court:

1. Clarify that when a privately-detained individual files a petition for a writ of habeas corpus, that individual does not need to be in actual or constructive state custody to satisfy the habeas corpus jurisdictional requirements under California law;
2. Issue an Order to Show Cause why relief should not be granted;
3. Grant habeas corpus relief and order that Amahle, Nolwazi, and Mabu be discharged from their unlawful imprisonment at the Fresno Zoo;

4. Order Amahle, Nolwazi, and Mabu relocated to an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries;
5. Grant all other relief necessary for the just resolution of this case.

August 28, 2023

Respectfully submitted,

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**Pro hac vice* pending
Jake Davis*
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Attorneys for Petitioners

CERTIFICATE OF WORD COUNT

I certify that the foregoing Verified Petition for a Common Law Writ of Habeas Corpus and accompanying Memorandum of Points and Authorities is in compliance with the requirements of California Rules of Court, rule 8.204(c)(l). The petition contains 13,997 words, calculated employing the Microsoft Word word count function, excluding the words in the sections that the California Rules of Court 8.204(c)(3) and 8.486(a)(6) instruct counsel to exclude.

August 28, 2023

Respectfully submitted,

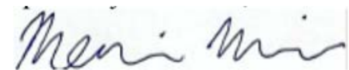

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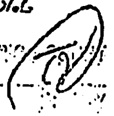
Exhibit I



FILED
NOV 15 2022
FRESNO COUNTY SUPERIOR COURT
By

SUPERIOR COURT OF CALIFORNIA, COUNTY OF FRESNO

CENTRAL DIVISION

In re Nonhuman Rights Project, Inc., on behalf of Amahle, Nolwazi, and Vusmusi, Petitioners, On Habeas Corpus.	No. 22CRWR686796 Dept. 62 ORDER

Having considered the petition for writ of habeas corpus, initially filed with the Superior Court of California, County of San Francisco on May 3, 2022, transferred to this Court on July 11, 2022, filed in this Court as a petition for writ of mandate on August 15, 2022, and refiled as a petition for writ of habeas corpus in this Court on October 21, 2022, the Court finds that Petitioner has not stated a prima facie case for relief.

In the instant petition, the Nonhuman Rights Project, Inc. requests that the Court issue a writ of habeas corpus regarding three African elephants, Amahle, Nolwazi, and Vusmusi, who are alleged to be unlawfully imprisoned and restrained of their liberty at the Fresno Chaffee Zoo by the Fresno's Chaffee Zoo Corporation and its Chief Executive Officer and Zoo Director, Jon Forrest Dohlin. (Petition for Writ of Habeas Corpus, p. 15, lines 5-11.)

1 However, "in order to satisfy jurisdictional requirements
2 under California law, an individual must be in actual or
3 constructive state custody at the time he or she files a petition
4 for writ of habeas corpus." (*In re Sodersten* (2007) 146
5 Cal.App.4th 1163, see *People v. Villa* (2009) 45 Cal.4th 1063,
6 1068-1074.)

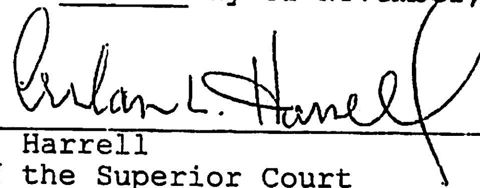
7 Initially, the Court notes that, in the instant petition, the
8 Nonhuman Rights Project, Inc. does not allege that any of the
9 named Respondents, the Fresno's Chaffee Zoo Corporation or Jon
10 Forrest Dohlin, are either a state or local governmental entity or
11 work for, or on behalf of, a state or local governmental entity.
12 (Petition for Writ of Habeas Corpus, p. 26, lines 12-16
13 [describing the Fresno's Chaffee Zoo Corporation as a "501(c)(3)
14 non-profit corporation incorporated in the State of California"
15 and Jon Forrest Dohlin as the "Chief Executive Officer & Zoo
16 Director of the Fresno Zoo"].)

17 Nevertheless, "[t]he critical factor in determining whether a
18 petitioner is in actual or constructive state custody … is not
19 necessarily the name of the governmental entity signing the
20 paycheck of the custodial officer in charge,' but "whether [the
21 petitioner's custody] is currently authorized in some way by the
22 State of California." (*Villa, supra,* 45 Cal.4th 1063, 1073.) In
23 this case, the Nonhuman Rights Project, Inc. does not allege that
24 any of the three elephants are currently present at the Fresno
25 Chaffee Zoo due to any actual custodial sentence imposed by a
26 trial court in the State of California, a constructive substitute
27 for an actual custodial sentence (such as parole or probation), or
28 "some official state action (like a detainer hold) connected to a

person's custodial status." (*Id.* at p. 1074.) Therefore, the Nonhuman Rights Project, Inc. has failed to establish that any of the three elephants were in the actual or constructive custody of the State of California at the time the instant habeas corpus petition was filed. Consequently, the petition "does not meet the habeas corpus jurisdictional requirements of California law." (*In re Williams* (2015) 241 Cal.App.4th 738, 745.)

Accordingly, the petition for writ of habeas corpus is denied.

DATED this 15TH day of November, 2022.



Arlan L. Harrell
Judge of the Superior Court