Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 On Appeal; 4th Judicial District El Paso County; Hon. Eric Bentley; Case Number: 2023CV31326	DATE FILED February 4, 2025 10:39 AM FILING ID: 2514A8D0DA271 CASE NUMBER: 2024SA21
Petitioner-Appellant: THE NONHUMAN RIGHTS PROJECT, INC. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo, v. **Respondents-Appellees:** CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.	**▲ COURT USE ONLY ▲**
NONHUMAN RIGHTS PROJECT, INC: Jacob Davis, Esq. Nonhuman Rights Project, Inc. 611 Pennsylvania Avenue SE #345 Washington, DC 20003 Phone: (513) 833-5165 Email: jdavis@nonhumanrights.org Bar Number: 54032	Case No. 2024SA21 Judgement affirmed in en banc opinion by Justice Berkenkotter, decided on January 21, 2025. Justice Hood did not participate.
PETITION FOR REHEARING PURSUANT TO C.A.R. 40	

CERTIFICATE OF COMPLIANCE

I hereby certify that this PETITION FOR REHEARING PURSUANT TO C.A.R. 40 complies with all the requirements of C.A.R. 32 and C.A.R. 40, including all the formatting requirements set forth in those rules.

The brief contains 1,899 words.

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

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INTRODUCTION

The Nonhuman Rights Project, Inc. ("NhRP") respectfully requests a rehearing of this appeal.

The Court held that the District Court lacked subject matter jurisdiction over NhRP's Verified Petition for a Writ of Habeas Corpus ("Petition") on behalf of Missy, Kimba, Lucky, LouLou, and Jambo because the elephants are not "persons" under Colorado's habeas statute (C.R.S. § 13-45-102). According to the Court's reasoning, jurisdiction depended on the elephants being "persons," and the General Assembly via statute has limited the term to humans. The Court predicated its decision on the view that habeas corpus in Colorado is not a common-law writ but a creature of statute. In so ruling, this Court subverts centuries-old stewardship of the Great Writ by an independent judiciary.

What made the common-law writ so powerful was its inherent adaptability. Long revered for its use in challenging unjust confinement—including the unjust confinement of individuals with few or no rights—habeas corpus is rightly regarded as the precious safeguard of personal liberty. However, under this Court's decision, the Great Writ as such no longer exists in Colorado; what remains is a mere statutory remedy whose protections are subject to legislative curtailment. This is wrong and

dangerous. If uncorrected, the Court's unprecedented decision opens a door to legislative curtailment that threatens human liberty interests.

Missy, Kimba, Lucky, LouLou, and Jambo should not be denied the opportunity to challenge their unjust confinement because of their biology. By its very nature, the common law—which includes habeas corpus—evolves to remedy injustice, and the Petition establishes a grave injustice here. The elephants are autonomous and extraordinarily cognitively complex beings who cherish their liberty and suffer immensely at Cheyenne Mountain Zoo, trapped in what the District Court described as a wholly unnatural environment. Science, evolving societal norms, and the fundamental common law principles of justice, liberty, and equality support recognizing their right to bodily liberty. By ignoring these considerations and refusing to look beyond the elephants' species membership, the Court wrongly treated Colorado common law as an anachronism.

ARGUMENT

1. This Court wrongly held that the District Court's subject matter jurisdiction depended on the elephants being "persons" under C.R.S. § 13-45-102.

Jurisdiction did not depend on whether the elephants are "persons" (and thus have standing). "[A]ll district courts in Colorado have subject matter jurisdiction to hear and decide habeas corpus cases," and this is because the Colorado

Constitution's suspension clause (Art. II, § 21) "grants the right to seek a writ of habeas corpus." *Jones v. Williams*, 2019 CO 61, ¶9.

At a minimum, the constitutional guarantee of habeas corpus protects the writ as it existed at common law. *See Boumediene v. Bush*, 553 U.S. 723, 746 (2008) (federal suspension clause protects, "'at the absolute minimum,'" the common-law writ as it existed in 1789) (citation omitted); *People ex rel. Sabatino v. Jennings*, 246 N.Y. 258, 261 (1927) (Under New York's suspension clause, "the writ of habeas corpus is preserved in all its ancient plenitude.").

Habeas corpus jurisdiction at common law was extraordinarily broad, reaching even individuals with no rights—those lacking legal personhood. There was an "absence of concern about the legal nature of the detainee using habeas corpus." PAUL HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE 208 (2010). As Professor Halliday explained:

> [N]either free nor slave status, nor apparent place of birth, precluded using habeas corpus. By their presence in England, or by living under the control of other of the king's subjects, such people were accepted as subjects for the purpose of investigating the legality of one person's detention by another. . . . [W]hat modern law would call 'standing' was simply not an issue.

Id. at 207-08. *See generally Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 588-89 (2022) (Wilson, J. dissenting); *id*. at 630 (Rivera, J. dissenting); *Boumediene*, 553 U.S. at 780 ("the common-law habeas court's role was most

extensive in cases of pretrial and noncriminal detention, where there had been little or no previous judicial review of the cause for detention").

The Court cited *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176 (9th Cir. 2004) for the proposition that standing for nonhuman animals—and thus subject matter jurisdiction—requires statutory authorization. 2025 CO 3, ¶23. However, *Cetacean Cmty.* is not a habeas case, and its discussion of "standing" in the sentence quoted by the Court pertains to "statutory standing," which has nothing to do with jurisdiction. 386 F.3d at 1175 (distinguishing between "statutory standing," which is not a jurisdictional requirement, and "Article III standing," which is).

Finally, even under the District Court's jurisdictional standard, this Court should at least assume—without deciding—that the elephants possess the right to bodily liberty based on the scientific evidence in the Petition. In other words, they are *prima facie* "persons" who can utilize habeas corpus. OB. 31-32.

2. This Court wrongly applied a statutory analysis to determine whether the elephants are "persons" under C.R.S. § 13-45-102.

Not only did the Court erroneously hold that jurisdiction depended on the elephants being "persons," its personhood analysis was wrong. Because the Great Writ is inherently common law, whether the elephants are "persons" requires a substantive common law analysis. OB. 13-18; RB. 7-9. However, this Court

eliminated the Great Writ's common-law nature and undertook a statutory analysis by applying the definition of "person" in C.R.S. § 2-4-401(8). 2025 CO 3, ¶26.

First, habeas corpus along with other remedial writs are "'common law writs,'" and even under the Rules of Civil Procedure their "substantive aspects" are preserved. *Leonhart v. Dist. Court of Thirteenth Judicial Dist. In & For Sedgwick Cnty.*, 329 P.2d 781, 783 (Colo. 1958) (citation omitted). Moreover, the term "Great Writ" refers to "the common-law writ of habeas corpus ad subjiciendum." *Preiser v. Rodriguez*, 411 U.S. 475, 484 n.2 (1973). *See Ryan v. Cronin*, 553 P.2d 754, 755 (Colo. 1976) (referring to the "right which may be enforced with the Great Writ of Habeas Corpus"); *People ex rel. Wyse v. Dist. Court In & For Twentieth Judicial Dist.*, 503 P.2d 154, 155 (Colo. 1972) (referring to the "great writ of habeas corpus").

Second, under Colorado's suspension clause, the constitutional guarantee of habeas corpus not only preserves the common-law writ but places its substantive scope beyond legislative curtailment. Thus, statutes cannot restrict who has the right to seek the writ by narrowing the definition of "person." "We have referred to this right in the most sweeping terms, calling habeas corpus the great writ of freedom in Anglo-American jurisprudence and have admonished that it is not to be hedged or in anywise circumscribed with technical requirements." *Jones v. Williams*, at ¶9.

(cleaned up). Only "the procedural mechanism for its exercise may change." *People ex rel. Wyse*, 503 P.2d at 156.

Accordingly, the definition of "person" in C.R.S. § 2-4-401(8) does not apply here. By applying it to exclude elephants, the Court impermissibly placed a statutory limitation on the Great Writ's substantive scope, contrary to the writ's common-law nature and the mandates of the suspension clause. "Person" in Colorado's habeas statute is an undefined placeholder for those who may avail themselves of the writ's protections, subject to judicial common law evolution. Even the *Breheny* majority acknowledged that "the courts—not the legislature—ultimately define the scope of the common-law writ of habeas corpus." 38 N.Y.3d at 576-77.

In support of Colorado habeas being solely statutory, the Court quoted a statement in *White v. Rickets*, 684 P.2d 239, 241 (Colo. 1984) concerning a provision applicable to habeas relief. 2025 CO 3, ¶18. That provision, C.R.S. § 13-45-103(2), applies to prisoners "in custody by virtue of process from any court legally constituted," and defines the circumstances under which they can be "discharged." It does not limit who can seek habeas corpus. The Court also quoted the statement in *Ryan*, 553 P.2d at 755, that refers to "the Great Writ of Habeas Corpus," which, as noted above, confirms the common-law nature of the writ.

3. This Court wrongly held that the common law does not support recognizing the elephants' right to bodily liberty.

The common-law merits question of whether the elephants are "persons" (i.e., have a liberty interest protected by habeas corpus) does not turn on species membership, as legal persons are not limited to humans. OB 14-15. The Court claims "nothing in the common law supports" extending the Great Writ's protections here because no U.S. court has recognized a similar extension for nonhuman animals. 2025 CO 3, ¶27. However, this argument from lack of precedent is antithetical to the Great Writ's history and wrongly assumes the common law is an anachronism, forever controlled by the past. OB. 18-21; RB. 9-12. It constitutes a refusal to confront a grave injustice.

By its very nature, the common law evolves, adapting to new knowledge, changing conditions, and experiences to comport with justice. *See Tesone v. Sch. Dist. No. Re-2, in Boulder Cnty.*, 152 Colo. 596, 602-04 (1963) (Frantz, C.J., dissenting), *overruled by Evans v. Bd. of Cnty. Comm'rs of El Paso Cnty.*, 174 Colo. 97 (1971). Prior decisions arbitrarily limiting habeas corpus to humans do not override this Court's "duty to keep the common law abreast of changes wrought by time." *Id*. at 603. "Judicial consistency loses its virtue when it is degraded by the vice of injustice." *Id*. at 609 (cleaned up).

The Great Writ exists to remedy unjust restraints on liberty and is at its core an equitable remedy. "[C]ommon-law habeas corpus was, above all, an adaptable remedy," with its "precise application and scope changed depending upon the circumstances." *Boumediene*, 553 U.S. at 779. Courts have long utilized its celebrated "adaptability and potential to evolve." AMANDA TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 114 (2021). The famous case of *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772), where Lord Mansfield ordered an enslaved human freed, "stands as an example of just how powerful the common law writ of habeas corpus could be, not only in protecting—but also expanding—liberty." *Id*. at 27.

Recognizing the elephants' right to bodily liberty by incrementally expanding habeas corpus accords with the history and purpose of the common-law writ, and is supported by science, evolving societal norms, and the fundamental common law principles of justice, liberty, and equality. OB. 21-25, 28-29, 31-32; RB. 13-16. The Court ignored these considerations.

The Court also disregarded the opinions of three high court judges extensively cited in NhRP's briefs, whose arguments refute the unjust decisions arbitrarily limiting habeas corpus based on species membership. OB. 8-9.

Finally, the Court wrongly claims NhRP does not seek the elephants' right to bodily liberty because the Petition's requested relief does not seek to set them loose

in downtown Colorado Springs. 2025 CO 3, ¶33. Whether the elephants have the right to bodily liberty is an entirely separate issue from whether habeas relief can include relocating them to an accredited sanctuary. This is because the former concerns the recognition of a legal right, while the latter concerns the appropriate remedy for violating that right. Furthermore, habeas relief is not limited to total discharge from all confinement. A habeas petitioner "may request relief that falls short of complete release from custody." *Horton v. Suthers*, 43 P.3d 611, 616 (Colo. 2002). Indeed, "'open-ended relief accords with the essential purpose of the writ.'" *Id*. (citation omitted); C.R.S. § 13-45-103(1) (habeas court "shall dispose of the prisoner as the case may require"); RB. 21.

CONCLUSION

For the foregoing reasons, the Court should grant rehearing.

Dated: February 4, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 4, 2025, a copy of the foregoing PETITION FOR REHEARING PURSUANT TO C.A.R. 40 was electronically filed and served via the Colorado Courts E-Filing System on the following counsel of record:

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