CAAP NO. 24-323
IN THE INTERMEDIATE COURT OF APPEAL
STATE OF HAWAI'I

NONHUMAN RIGHTS PROJECT, INC., on behalf of Mari and Vaigai, individuals,

Petitioner-Appellant,

v.

CITY AND COUNTY OF HONOLULU, DEPARTMENT OF ENTERPRISE SERVICES and its DIRECTOR, DITA HOLIFIELD, and the HONOLULU ZOO DIRECTOR, LINDA SANTOS,

Respondents-Appellees.

Civil Case No.: 1CCV-23-0001418 (GWBC)
(Circuit Court Appeal)

APPEAL FROM:

(1) FINAL JUDGMENT, dated March 25, 2024;

(2) ORDER GRANTING RESPONDENTS' MOTION TO DISMISS, dated March 25, 2024;

(3) ORDER REJECTING MOTION FOR ADMISSION TO APPEAR *PRO HAC VICE* FOR JAKE DAVIS, dated March 25, 2024.

FIRST CIRCUIT COURT

HONORABLE GARY W.B. CHANG

PETITIONER-APPELLANT'S OPENING BRIEF

APPENDIX

Exhibit 1: Final Judgment

Exhibit 2: Order on Respondents' Motion to Dismiss

Exhibit 3: Order Rejecting Motion for Admission to Appear *Pro Hac Vice*

STATEMENT OF RELATED CASES

CERTIFICATE OF SERVICE

Cheryl Nolan, Esq.
HI Bar No. 6412
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (703) 955-1793
Email: CherylN@lassd.org
— and —
Jake Davis, Esq.
(*Of the State Bar of the State of Colorado*)*
CO Bar No. 54032
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (513) 833-5165
Email: jdavis@nonhumanrights.org
*(*Pro Hac Vice* application forthcoming)
Attorneys for Petitioner-Appellant Nonhuman Rights Project, Inc.
on behalf of Mari and Vaigai

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes and Other Rules

Other Authorities

I. INTRODUCTION

Nearly a decade ago, Judge Dr. María Alejandra Mauricio freed a chimpanzee named Cecilia from Argentina's Mendoza Zoo through the procedural posture of a petition for a writ of habeas corpus. She concluded her opinion with the following refrain:

> Remember the following expressions: "We can judge the heart of a man by his treatment of animals." (Immanuel Kant). "Until one has loved an animal, a part of one's soul remains unawakened." (Anatole France). "When a man has pity on all living creatures, only then is he noble." (Buddha). "The greatness of a nation and its moral progress can be judged by the way its animals are treated." (Gandhi).[1]

Nearly a quarter-century ago, the founder of the Nonhuman Rights Project ("NhRP") wrote the following:

> [T]wentieth-century judicial decisions have confirmed and reconfirmed the legal thinghood of animals. But none have ever tried to justify this anachronism because judges fail to realize that it requires justification. They mechanically cite earlier cases, which cite still earlier cases that inevitably reach back to Kent or Blackstone or further still to Locke and Hobbes, then to Coke, and Bracton, until we arrive at Justinian and the Old Testament. It is time judges consider that as the ancient foundations have begun to rot away, so the laws of animals that rests upon them should be changed.

STEVEN M. WISE, RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS 47 (2000).

That time is now, and the status of Mari and Vaigai as rightless "things" must change. "Only then can we halt what the Greek scholar Moses Finley, described as the 'final paradox' . . . the rise of both liberty and slavery." *Id.* at 48. "This is our paradox, too, as those animals for whom our most important principles of justice dictate fundamental liberties continue to be enslaved in a world in which the liberties of human beings are so often on the rise." *Id.*

This appeal begins the process of vindicating Mari and Vaigai's right to bodily liberty, a right protected by the common law writ of habeas corpus. Mari and Vaigai are two wild-born, female Asian elephants imprisoned in a pernicious, artificial environment at the Honolulu Zoo by Respondents-Appellees City and County of Honolulu, Department of Enterprise Services, its Director, Dita Holifield, and the Honolulu Zoo Director, Linda Santos (collectively,

---

[1] *Presented by A.F.A.D.A. About the Chimpanzee "Cecilia" – Nonhuman Individual*, File No. P.72.254/15 (Third Court of Guarantees, Mendoza, Argentina, Nov. 3, 2016) [English translation], at: https://bit.ly/3mkkSmy (cleaned up) (hereafter, "*Cecilia's Case*").

"Respondents"). No court in America would support the imprisonment of a human under similar circumstances. Yet, because these prisoners are elephants they are forced to languish. The NhRP hopes to correct such callousness by convincing this Court to remand the case with a directive to issue an order to show cause ("OSC") so the merits of Mari and Vaigai's liberty claims can be adjudicated.

The underlying Verified Petition for a Common Law Writ of Habeas Corpus ("Petition") is supported by six declarations from seven of the world's foremost experts on elephant cognition (collectively, "Experts"), including Dr. Joyce Poole, "a world authority on elephant reproductive, communicative and cognitive behaviour."[2] The Experts' two-hundred-plus years of cumulative experience studying wild and captive elephants affirms the fact that Mari and Vaigai are autonomous and extraordinarily cognitively complex individuals who possess the capacities that habeas corpus serves to protect; it also confirms that Mari and Vaigai fully experience the cruelty of never-ending imprisonment, just as you and I would.

For example:

> From a neural perspective, imprisoning elephants and putting them on display is undeniably cruel. Holding elephants captive and confined prevents them from engaging in normal, autonomous behavior and can result in the development of arthritis, osteoarthritis, osteomyelitis, boredom, and stereotypical behavior. When held in isolation, elephants become bored, depressed, aggressive, catatonic, and fail to thrive. 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. It is now accepted that elephants experience permanent brain damage as a result of the trauma endured in impoverished environments.

Judiciary Information Management System ("JIMS"), Dkt. No. 13, p. 1, No. 1, Petition filed Oct. 31, 2023 (hereafter, "Pet.") at ¶ 76; *id.* at ¶ 70 ("Given that the brains of large mammals have a lot in common across species, 'there is no logical reason to believe that the large, complex brains of animals such as elephants . . . would react any differently to a severely stressful environment than does the human brain.'").

Mari and Vaigai continue to be imprisoned despite having committed no wrong. The only justification for their imprisonment is the irrelevant fact that they are not *Homo sapiens*. This Court

[2] Explorer Home, *Explorer Since 1988, Joyce Poole: Elephant ethologist/ecologist, Conservation biologist*, NAT'L GEOGRAPHIC, at: https://explorers.nationalgeographic.org/directory/joyce-poole.

must not disregard the fundamental common law values of liberty, equality, and justice it is duty-bound to protect. It must also consider the uncontroverted scientific evidence of elephant autonomy, which anchors the common law right to bodily liberty protected by habeas corpus.[3]

The question before this Court is not whether to grant ultimate relief. It is whether Mari and Vaigai have made a prima facie case entitling them to the issuance of an OSC. The now-Chief Judge of the New York Court of Appeals made instructive findings in a similar habeas corpus matter: "Because this appeal comes on a motion to dismiss, the legal question presented is whether the detention of an elephant can ever be so cruel, so antithetical to the essence of an elephant, that the writ of habeas corpus should be made available under the common law." *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 579, *reargument denied*, 39 N.Y.3d 967 (2022) (Wilson, J., dissenting). Indeed: "The ultimate question—should [an elephant] be granted a transfer out of the Zoo and into a residence better suited to her needs—is not before us. [The] Court did not attempt to resolve disputed issues of fact, but instead dismissed the case as a legal impossibility." *Id.* at 617. This Court should hold that Mari and Vaigai have stated a prima facie case and "remit for [the Circuit] Court to weigh the evidence, resolve conflicting issues and render a merits decision." *Id.*

In the tradition of the Great Writ and Hawai'i common law jurisprudence, this Court must reject the baseless and arbitrary notion that only *Homo sapiens* may invoke habeas corpus protections by remanding and directing the Circuit Court to issue an OSC forthwith.

II. STATEMENT OF THE CASE

A. Nature of the case

This case presents questions of first impression in Hawai'i: (1) should a court issue an OSC on behalf of two elephants because they made a prima facie case entitling them to release and placement in an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries ("GFAS"); and, (2) after issuing the OSC, should a court recognize the elephants' common law

[3] "Autonomy is defined as self-determined behavior that is based on freedom of choice. As a psychological concept, autonomy implies that the individual is directing their behavior based on some non-observable, internal cognitive process, rather than simply responding reflexively." Pet. at ¶ 27. "Elephants are autonomous since they exhibit self-determined behavior that is based on freedom of choice." *Id.*

right to bodily liberty and grant their habeas corpus petition by ordering them released from the Honolulu Zoo to an appropriate GFAS-sanctuary?

The O'ahu First Circuit Court committed error by dismissing the Petition without issuing an OSC although a prima facie case was made. This brief highlights that error and proves a prima facie case was made by establishing the following: (1) that Mari and Vaigai have the common law right to bodily liberty protected by habeas corpus because they are autonomous and extraordinarily cognitively complex; (2) their right has been unlawfully violated, thereby rendering their imprisonment at the Honolulu Zoo unlawful, because their imprisonment at the Honolulu Zoo prevents them from exercising their autonomy.

B. Disposition of proceedings

On Oct. 31, 2023, the NhRP filed the Petition on behalf of Mari and Vaigai and against the Respondents. *See* JIMS, Dkt. No. 13 (Record on Appeal), p. 1, No. 1. On Nov. 2, 2023, the NhRP filed a *pro hac vice* motion for Jake Davis, which was denied without prejudice on the same day. *Id.* at pp. 2-3, Nos. 10-13. On Nov. 10, 2023, the NhRP filed a second motion for admission to appear *pro hac vice* of Jake Davis ("PHV Motion"), including requisite declarations of local counsel Ms. Cheryl Nolan and Mr. Davis, along with a proposed notice of hearing; the PHV Motion was denied without prejudice on Nov. 14, 2023. *Id.* at pp. 3-5, Nos. 18-25.

On Nov. 20, 2023, Respondents filed a Motion to Dismiss the Petition under Hawai'i Rules of Civil Procedure, Rule 12(b)(6) ("MTD"). *Id.* at p. 5, No. 27. On Jan. 8, 2024, the NhRP filed an Opposition to the MTD. *Id.* at p. 8, No. 45. Respondents filed a Reply two days later. *Id.* at p. 9. No. 47. On Jan. 16, 2024, the Circuit Court held a nearly forty-minute hearing on the PHV Motion and the MTD. *Id.* at pp. 9-10, Nos. 51-52 (Minutes). Before taking up the MTD, the Circuit Court granted Mr. Davis' PHV Motion, allowing him to argue on behalf of Mari and Vaigai. *Id.* On March 25, 2024, the PHV Motion was retroactively denied, the MTD was granted without prejudice ("Order on MTD"), and judgment was entered. *Id.* at pp. 12-13, Nos. 63, 65, 71. The NhRP filed its Notice of Appeal on April 22, 2024. *Id.* at p. 14, No. 75. The Record on Appeal was transmitted on June 10, 2024. JIMS, Dkt. Nos. 12-13.

The NhRP has made two, unfulfilled requests for transcripts. The first request was made on Jan. 18, 2024. Record on Appeal ("ROA"), p. 10, No. 53. The second request was made on Apr. 22, 2024. JIMS, Dkt. No. 4.

C. Material Facts

1. Elephants are autonomous and extraordinarily cognitively complex beings

Like many *Homo sapiens*, Mari and Vaigai are "autonomous and extraordinarily cognitively complex with complex physical, psychological, and social needs." Pet. at ¶ 25. They possess "self-awareness, empathy, awareness of death, intentional communication, learning, memory, and categorization abilities." *Id.* at ¶ 26. "Many of these capacities have been erroneously considered unique to humans, and each capacity is a component of autonomy." *Id.* Indeed, the "presence of spindle cells in the same brain locations in elephants and humans strongly implies that these higher-order brain functions, which are the building blocks of autonomous, self-determined behavior, are common to both species." *Id.* at ¶ 32. In fact: "As do humans, Asian elephants exhibit 'mirror self-recognition ('MSR')," which is "the ability to recognize a reflection in the mirror as oneself." *Id.* at ¶ 49. "MSR is significant because it is a key identifier of self-awareness." *Id.*

"Human speech and language reflect autonomous thinking and internal behavior." *Id.* at ¶ 41. "Like humans, elephants vocalize to share knowledge and information." *Id.* "Elephant vocalizations are not merely reflexive, they have distinct meanings to listeners and communicate [similar to how] humans use language." *Id,* at ¶ 42. "Elephants display more than 300 gestures, signals and postures that they use to communicate information to their audience." *Id.* They "use specific calls and gestures to plan and discuss a course of action," like "detect[ing] alarm calls from some considerable distance and avoid[ing] the area where elephant killings by rural villagers or armed gangs take place." *Id.* at ¶ 43.

During the pendency of this appeal, a groundbreaking study was published concluding that elephants call one another by unique names, no different from how *Homo sapiens* communicate: "Our ability to create and share vocal labels, like names, is part of what makes us human. Until now, this kind of arbitrary vocal labeling was thought to be unique to humans." Celia Ford, *Elephants have names – and they use them with each other*, VOX (June 10, 2024), at: https://shorturl.at/O1Tv5. "In theory, findings like [this] could open the door to literal human-elephant communication."[4] *Id.*

[4] "More realistically, [the study's lead author, Michael Pardo,] hopes it will inspire people to invest in conservation efforts and rethink their relationships with elephants — both in their native habitat, and in captivity. 'I feel like we really need a major revolution in how we think about other animals . . . . Given the complexity of their social lives in the wild, Pardo no longer believes that it's ethical to keep elephants in captivity at all." Ford, *supra*.

"Elephants have extensive and long-lasting memories." Pet. at ¶ 33. For example: "Elephants inhabiting the deserts of Namibia and Mali may travel hundreds of kilometers to visit remote water sources . . . . sometimes along routes that have not been used for many years." *Id.* at ¶ 36. "These remarkable feats suggest exceptional cognitive mapping skills that rely upon the long-term memories of older individuals who may have traveled the same path decades earlier." *Id.* "Studies reveal that long-term memories, and the decision-making mechanisms that rely on this knowledge, are severely disrupted in elephants who have experienced trauma or extreme disruption due to 'management' practices initiated by humans." *Id.* at ¶ 37.

Elephants "can collectively hold specific aims in mind, then work together to achieve those goals." *Id.* at ¶ 66. They can "choose an appropriate action and incorporate it into a sequence of behavior to achieve a goal they kept in mind throughout the process." *Id.* at ¶ 67. "Asian elephants demonstrate the ability to understand goal-directed behavior," this "may be related to understanding psychological causation, which is an appreciation that others are animate beings who generate their own behavior and have mental state (e.g., intentions)." *Id.* at ¶ 68. "It is now increasingly recognized by conservation workers that coexistence can be achieved by humans entering into 'negotiation' with elephants." *Id.* at ¶ 69.

2. Mari and Vaigai suffer immense physical and psychological harm at the Honolulu Zoo, which is inarguably an unacceptable place for elephants

Mari and Vaigai "cannot function normally in captivity." *Id.* at ¶ 70. They are undoubtedly experiencing "permanent damage to their brains as a result of the trauma endured" at the Honolulu Zoo. *Id.* This is because "[a]n elephant's cerebral cortex is negatively affected by an impoverished environment." *Id.* at ¶ 71. A "crucial component to an enriched environment is exercise, which increases the supply of oxygenated blood to the brain and enhances cognitive abilities through a series of complex biochemical cascades." *Id.* at ¶ 72. "Captive/impoverished elephants living in small 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)." *Id*. The Honolulu Zoo shamefully provides Mari and Vaigai with a <u>total</u> of less than one-and-a-half acres between training and management areas. *Id.* at ¶ 79. This means that the "maximum linear distance available for directional walking within the largest exhibit yard is little more than 65 yards," and "Mari and Vaigai can explore every square meter of their surroundings within a few minutes." *Id.*

Moreover, the "sensory environment should be composed of a variety of sounds, smells, sights, and tactile and taste sensations." *Id.* ¶ 80. At the Honolulu Zoo, Mari and Vaigai's enclosure is mostly "bare, compact soil." *Id.* "The terrain is flat with little stimulation or room to explore." *Id.* "The landscaping is designed to project a feeling of a quasi-natural environment to visitors," but "it provides nothing meaningful to the elephants." *Id.* at ¶ 81. Perhaps most jarring is that the Honolulu Zoo's impoverished elephant enclosure does not allow Mari or Vaigai to engage in basic foraging, "which itself is comprised of over 20 different socio-cognitive activities." *Id*.

"Elephant family groups share a fission-fusion structure, separating and merging with larger groups of up to several hundred elephants." *Id.* at ¶ 78. "At the Honolulu Zoo, the social 'group' consists of only Mari and Vaigai who spend considerable time apart from each other and thus in virtual isolation." *Id.* "This occurs even though it is recommended that zoos should aim to simulate free ranging elephants' natural social structure." *Id*. "The Honolulu Zoo is clearly not simulating the complex social world of elephants and thus causing socioemotional deprivations and disruptions that profoundly affect Mari and Vaigai's corticolimbic structures, which results in continued emotional distress." *Id.*

Unsurprisingly, the "facilities and their management at the Honolulu Zoo fall far short of fulfilling the physical and psychological needs of Mari and Vaigai."[5] *Id.* at ¶ 79. "The elephant exhibit is located very close to the high-density tourist area of Waikiki Beach and appears to be barely 300 yards from the main high-rise apartment complex and tourist hotels on the Waikiki waterfront." *Id.* at ¶ 82. "The placement of the elephant exhibit in a high-density tourist area is undoubtedly causing Mari and Vaigai unending psychological harm because elephants depend a great deal on sound for communication, both vocally and seismically." *Id.* at ¶ 83. "The elephants are moved into the barn when zoo staff goes off duty, spending at least half their day (and probably longer) in the close confines of the barn." *Id.* at ¶ 84. "This is exceedingly concerning because confinement in sterile environments leads to foot and joint damage from standing on hard

[5] Dr. Joyce Poole made the following remarks about the Association of Zoos and Aquariums' ("AZA") guidelines for keeping elephants: "our more than four decades long study of free living elephants shows that the AZA specifications are woefully inadequate for meeting the needs of elephants." Pet. Ex. III, ¶ 59. To make matters worse, the Honolulu Zoo "lost its [AZA] accreditation from 2016-2020." *Id.* at Ex. VI, ¶ 22.

substrate, and psychological damage from noise, and the frustration of prevented choice and movement." *Id.*

When Mari and Vaigai "are not simply standing and feeding, they can be seen walking between the front and back yards on the same path every time." *Id.* at ¶ 87. Their "lives are nothing but a succession of boring and frustrating days, damaging to their bodies and minds, and punctuated only by interaction with their keepers." *Id.* The despondency of their imprisonment is amplified by the fact that they are both females who would likely be living in "matriarchal, multi-generational family groups of two to 10 adult females and juveniles," had they never been forcibly removed from the wild. *Id.* at ¶ 140. Female elephants especially "continue to learn and remember information about their environment throughout their lives, and this accrual of knowledge allows them to make better decisions and better lead their families as they grow older." *Id.* At the Honolulu Zoo, Mari and Vaigai have neither the opportunity for continued learning nor the ability to create, live with, or lead their own families. *Id.*

In his crushing expose of archaic industries like zoos and circuses, Jason Hribal elaborates on the bond between female elephants: "In pachyderm society, family is everything. Females, for instance, are never alone. Daughters will spend most of their lives with their mothers. These intense bonds are nearly unbreakable, and extend beyond the material world and into the spiritual. Elephants are known to have their own graveyards and complex rituals regarding the treatment of the dead." JASON HRIBAL, FEAR OF THE ANIMAL PLANET: THE HIDDEN HISTORY OF ANIMAL RESISTANCE 82 (*Counterpunch* and AK Press 2010). "Visits are made often to these funerary grounds, and the bones of relatives are touched, caressed, and even carried around. . . . Zoos and circuses, however, do not recognize or value the significance of these relations: familial or otherwise. The majority of calves are removed from their mothers by the age of two, if not sooner," if their mothers are even able to conceive.[6] *Id.* at 82-83.

The bottom line is Mari and Vaigai's "physical and psychological health has been severely compromised by the sustained deprivation of their autonomy and freedom of movement." Pet. at

[6] *See, e.g.,* Mirkka Lahdenperä et al., *Capture from the wild has long-term costs on reproductive success in Asian elephants*, PROC. R. SOC. B. 1, 1 (2019) ("Wild caught females demonstrated a consistent reduction in breeding success relative to captive-born females, with significantly lower lifetime reproduction probabilities, lower breeding probabilities at peak reproductive ages and a later age of first reproduction.").

¶ 87. "It is now accepted that elephants experience permanent damage to their brains because of the trauma endured in impoverished environments and the Honolulu Zoo is the epitome of such an environment." *Id.* at ¶ 88. "It is no surprise that the internationally recognized animal advocacy group, In Defense of Animals, has repeatedly ranked the Honolulu Zoo as one of the worst zoos for elephants in North America." *Id.*

3. A rewilding center or an elephant sanctuary is the only acceptable place for Mari and Vaigai

As Mari and Vaigai suffer immensely each day they are imprisoned in the Honolulu Zoo, they "should be moved, as soon as possible, to a 'rewilding' facility in their native [Asia] or to a suitable elephant sanctuary in the United States or Brazil." *Id.* at ¶ 89. "Authentic sanctuaries report improved physical and psychological health in elephants after their arrival, including decreased frequency or extinction in stereotypies, reduced aggression toward keepers, muscle tone gain, and formation of social bonds between elephants with different social histories." *Id.* at ¶ 90. This is because the "orders of magnitude of greater space offered at sanctuaries allow elephants to exercise their autonomy, develop more healthy social relationships, and engage in a near-natural movement, foraging, and repertoire of behavior." *Id.*

"Elephants need a choice of social partners, and the space to permit them to be with the ones they want, when they want, and to avoid individuals when they want." *Id.* "The delight that elephants experience when they are allowed to forage naturally is the default situation in the wild and in good sanctuaries." *Id.* "Elephants with serious physical or psychological problems in zoos have usually become more normal functioning when given more appropriate space in an elephant sanctuary." *Id.* at ¶ 91 (discussing sanctuary elephants who have overcome serious physical or psychological problems resulting from zoo imprisonment).

III. STATEMENT OF THE POINTS OF ERROR

A. The Circuit Court committed error when it did not issue an OSC despite the Petition establishing a prima facie case

HRS § 660-5 provides the pleading requirements for the issuance of "the writ or an order to show cause."[7] *See generally id.* at ¶¶ 93-98. The Petition adhered to those requirements and shows

[7] Although the writ and OSC are functionally equivalent, the NhRP is seeking the latter because the issuance of the writ requires the production of the prisoners while an OSC only requires the individual by whom the prisoners are restrained to appear and show cause. *Compare* HRS § 660-

entitlement to an OSC by establishing (a) that Mari and Vaigai have the common law right to bodily liberty protected by habeas corpus because they are autonomous and extraordinarily cognitively complex, and (b) their right has been violated thus making their imprisonment unlawful. In satisfying HRS § 660-5, the NhRP made a prima facie case requiring the issuance of an OSC so the merits of the Petition can be adjudicated.

To issue an OSC, the Circuit Court did not need to recognize Mari and Vaigai's right to bodily liberty; it needed only to assume (without deciding) that Mari and Vaigai could have this right. It should have done so because recognition of their right to bodily liberty is supported by compelling considerations—including science, evolving societal norms, and the fundamental common law principles of justice, liberty, and equality. It was legally wrong for the Circuit Court to make the ultimate determination that the right to bodily liberty should not be recognized before the issuance of an OSC.

The Great Writ's history and purpose show it has long been invoked on behalf of individuals with few or no rights (e.g., enslaved humans, women subject to coverture laws, and children). Whether Mari and Vaigai may avail themselves of the protections of habeas corpus is not a matter of statutory interpretation or a definitional question regarding legal personhood. It is a substantive normative question about whether they could have the right to bodily liberty based on common law principles. The evolutionary nature of the common law does not consist of absolute, fixed, and inflexible rules, but rather broad principles based on justice, reason, common sense, and advances in science. It is unjust, senseless, and antithetical to the history of habeas corpus to limit legal personhood and the protections of the Great Writ to *Homo sapiens*.

Accordingly, the Circuit Court committed error when it did not issue an OSC despite the Petition establishing a prima facie case.

Error in the Record: ROA, p. 12, No. 65 (Order Granting Respondents' Motion to Dismiss); *id.* at p. 13, No. 71 (Judgment).

Preservation of Error: *Id.* at p. 14, No. 75 (Notice of Appeal).

B. The Circuit Court erred when it retroactively denied Mr. Davis's PHV Motion

At the Jan. 16, 2024, hearing on the MTD, Judge Gary W.B. Chang asked local counsel Ms. Nolan to respond to enumerated conditions related to allowing Mr. Davis admission to the Hawai'i

---

7*, with* HRS § 660-6.

Bar for the limited purpose of arguing this case. After satisfactory answers from Ms. Nolan, the Circuit Court permitted Mr. Davis to argue.

After the hearing, Ms. Nolan submitted a proposed order for Mr. Davis' admission and enumerated eight (8) conditions in compliance with Haw. R. Sup. Ct. § 1.9 and the Circuit Court's pre-hearing remarks. *See* ROA, pp. 9-10, No. 51 ("Motion for Admission to Appear Pro Hac Vice of Jake Davis subject to the 8 conditions as stated at the hearing."). Ultimately, the Circuit Court rejected the proposed order and stated: "The order failed to state all of the conditions that the court stated in announcing its ruling during the hearing." *Id.* at p. 12, No. 63. No further details were provided.

Error in the Record: *Id.* (Rejecting [Proposed] Order Granting Motion for Admission to Appear Pro Hac Vice for Jake Davis).

Preservation of Error: *Id.* at p. 14, No. 75 (Notice of Appeal).

IV. STANDARDS OF REVIEW

A. Motion to dismiss

"The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Giuliani v. Chuck*, 1 Haw. App. 379, 385 (1980). Accordingly, "[a] circuit court's ruling on a motion to dismiss is reviewed *de novo*." *Wright v. Home Depot U.S.A., Inc.*, 111 Haw. 401, 406 (2006). The Petition must be viewed "in a light most favorable to [the NhRP] in order to determine whether the allegations contained therein could warrant relief under any alternative theory." *In re Est. of Rogers*, 103 Haw. 275, 280 (2003) (citation omitted). "For this reason . . . our consideration is strictly limited to the allegations of the [Petition], and we must deem those allegations to be true." *Id.* at 280-81 (cleaned up) (citation omitted).

B. Motion for admission to appear *pro hac vice*

"The circuit court's revocation of an out-of-state attorney's *pro hac vice* status, an action authorized by the inherent powers doctrine, is reviewed for an abuse of discretion." *Bank of Hawaii v. Kunimoto*, 91 Haw. 372, 387 (1999). "'A court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.'" *Id.* at 387 (citation omitted).

V. ARGUMENT

A. The opinions of now-Chief Judge Rowan Wilson, Judge Jenny Rivera, and Judge Eugene Fahey (retired) of the New York Court of Appeals—along with *Cecilia's Case*—should be favored over contrary authorities

Neither the Respondents' citations nor the NhRP's citations are controlling because this matter is novel. However, in keeping with Hawaiian tradition, this Court should favor the opinions authored by Judge Wilson, Judge Rivera, Judge Fahey, and in *Cecilia's Case*, as they are far more thorough, well-reasoned, and attendant to the circumstances of this matter. *See State v. Mattson*, 122 Hawai'i 312, 326 (2010) ("We are instead persuaded by the reasoning of the *Portuondo* dissent."); *Lorenzo v. State Farm Fire & Cas. Co.*, 69 Haw. 104, 109 (1987) ("This court, however, is free to adopt its own position on this question. . . . Moreover, the analysis provided by the dissent in *MacDonald* is more persuasive."); *Burrows v. Hawaiian Tr. Co.,* 49 Haw. 351, 357 (1966) ("In our view, the opinion did not come to grips with the problem presented and is not convincing. There was a well reasoned dissent."); *Puuku v. Kaleleku*, 8 Haw. 77, 80 (1890) ("It is a matter of constant practice in our Courts to cite and adopt the reasonings and principles of laws as found in decisions of the Courts of other countries, and it is necessary to do so, because everything which controls the decision of a case may not be found in any of our statutes.") (emphasis added).

B. The Petition establishes a prima facie case that the Honolulu Zoo violates Mari and Vaigai's common law right to bodily liberty protected by habeas corpus, which mandates the issuance of an OSC

As discussed s*upra*, HRS § 660-5 defines the pleading requirements for the issuance of "the writ or an order to show cause." Pet. at ¶ 93-94 (listing and explaining those requirements). The Circuit Court was required to issue an OSC per HRS § 660-7 because the Petition adhered to the pleading requirements laid out in HRS § 660-5 and showed entitlement to an OSC by establishing (1) that the elephants have the common law right to bodily liberty protected by habeas corpus because they are autonomous and extraordinarily cognitively complex, and (2) their right has been violated as Zoo imprisonment prevents them from exercising their autonomy.

Importantly, petitioners in habeas corpus proceedings are entitled to the issuance of an OSC unless they fail to show a prima facie case. The types of allegations that fail to make a prima facie case include "general assertions," *Petition of Scott*, 44 Haw. 52, 54 (1959), or "allegations [that] are 'vague, conclusory or palpably incredible.'" *Russell v. Blackwell*, 53 Haw. 274, 284 (1972). As will be discussed *infra*, given the fact that two judges on New York's highest court agreed that an elephant can invoke the protections of habeas corpus, the allegations in this Petition are far from vague, conclusory, or incredible. *See Breheny*, 38 N.Y.3d at 579 (Wilson, J., dissenting) (reasons for refusing to extend habeas corpus to an elephant "are groundless and inconsistent with its role

as 'the historic writ of liberty'"); *id.* at 628 (Rivera, J., dissenting) ("Happy should not be denied the opportunity to pursue and obtain appropriate relief by writ of habeas corpus.").

Moreover, to issue an OSC the Circuit Court needed to only assume (without deciding) that Mari and Vaigai could have the common law right to bodily liberty protected by habeas corpus. *See, e.g., The Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 49 Misc.3d 746, 755 (N.Y. Sup. Ct. 2015) ("Given the important questions raised here, I signed the petitioner's order to show cause, and was mindful of petitioner's assertion that 'the court need not make an initial judicial determination that [chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.'").[8] Accordingly, the NhRP asks this Court to remand this matter to the Circuit Court with a directive that an OSC be issued. Such an action would shift the burden to the Respondents, requiring them to demonstrate that their imprisonment of Mari and Vaigai is lawful (thus setting "the procedure of habeas corpus in motion"), something they have not been required to address because of the procedural posture of their MTD. *Petition of Scott*, 44 Haw. at 54; *see also* HRS § 660-17 ("any person to whom an order to show cause is directed, shall make return thereto with as much promptness as the nature of the case will permit"); *id.* at § 660-27 (Return, hearing).

Although it is possible Mari and Vaigai might not be granted ultimate relief,[9] they should nevertheless be allowed to appropriately challenge their ruinous imprisonment. To refuse to issue an OSC and allow the case to proceed to an adjudication on the merits of the Petition would be a

---

[8] Against the long-entrenched background of legally sanctioned slavery, "the courts of England and the United States worked, through the Great Writ, to secure liberty for those deemed chattel, equated, at most, with animals." *Breheny*, 38 N.Y.3d at 592 (Wilson, J., dissenting). This included the landmark case of *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772), at: http://bit.ly/3jpLmkH, where Lord Mansfield assumed (without deciding) that an enslaved Black man, James Somerset, could possess the common law right to bodily liberty protected by habeas corpus when he famously issued the writ requiring the respondent to justify Somerset's detention.

[9] The issuance of an OSC, filing of the return by Respondents, and the traverse by the NhRP, do not guarantee that Mari and Vaigai will secure their ultimate release. *See, e.g., Stanley*, 49 Misc.3d at 755 (after issuance of the first-ever OSC on behalf of nonhuman animals in the U.S., the New York State Attorney General's Office successfully justified the imprisonment of Hercules and Leo.).

"refusal to confront a manifest injustice." *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1059 (2018) ("*Tommy*") (Fahey, J., concurring).

C. It is error to conclude that the substantive entitlement to habeas corpus relief is governed by statute and not Hawai'i common law

1. Hawai'i continues to recognize habeas corpus under the common law and this Court must therefore undertake a common law analysis—not a statutory analysis—to determine Mari and Vaigai's right to bodily liberty

Habeas corpus is a time-honored common law remedy that protects a basic yet fundamental right to be free from unjust imprisonment. Limiting who may avail themselves of the protections of the Great Writ based on a statutory analysis is tantamount to concluding that habeas corpus is no longer a common law remedy in Hawai'i.

Accordingly, the Order on MTD is wrong as a matter of settled law and must be reversed to protect common law habeas corpus jurisprudence in the state. "'[T]he great and efficacious writ, in all manner of illegal confinement, is that of habeas corpus ad subjiciendum.'"[10] *In re Cambridge*, 1 Haw. 191, 192 (1855) (citation omitted). "The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty." *Ex parte Mankichi*, 13 Haw. 570, 571–72 (1901) (quoting *Ex parte Tom Tong*, 108 U.S. 556, 559 (1883)). "It may be conceded that it is a common law writ" and "[u]ndoubtedly the right to the writ could not be taken away by statute." *Brown v. Goto*, 16 Haw. 263, 265 (1904). It is "'a writ antecedent to statute . . . throwing its root deep into the genius of our common law.'" *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (citation omitted).

Enlightened common law judges have long used habeas corpus "to nudge advances in the law." *Breheny*, 38 N.Y.3d at 589 (Wilson, J., dissenting). *See generally id*. at 588-602 (discussing the history and use of habeas corpus in England and the United States). "Most fundamentally, the writ was used to grant freedom to slaves, who were considered chattel with no legal rights or existence. . . . Similarly, the writ was used to grant freedom to wives and children, who, though not chattel, had few or no legal rights and legally were under the dominion of husbands and

[10] "[W]hen the words 'habeas corpus' are used alone, they have been considered a generic term understood to refer to the common-law writ of habeas corpus ad subjiciendum, which was the form termed the 'great writ.'" *Preiser v. Rodriguez*, 411 U.S. 475, 484 n.2 (1973).

fathers." *Id*. at 588-89. The Great Writ's history thus "demonstrates that courts have used and should use it to enhance liberty when a captivity is unjust, even when the captor has statutory or common law rights authorizing such captivities in general." *Id*. at 602.[11]

Although the noun "person" is used in HRS § 660-3, the word is merely a placeholder with no substantive meaning.[12] The word is irrelevant to whether habeas corpus can extend beyond *Homo sapiens*. Whether to extend habeas corpus to Mari and Vaigai must be determined by a common law analysis because there is not a scintilla of evidence that the legislature intended to strip Hawaiian courts of their firmly settled common law authority to determine the scope of the Great Writ. There is every indication that the legislature fully intended to leave substantive habeas corpus to the common law. This is apparent not only from the fact that "person" is undefined by the procedural requirements of Chapter 660, but also because of the role habeas corpus plays in Hawaiian jurisprudence: "The writ of habeas corpus enjoyed here is the same in substance with the original writ as secured and vivified by the English Acts, Bills and Charters." *Ex parte Apuna*, 6 Haw. 732, 735-36 (1869). Its use, "to secure release from unlawful physical confinement, whether judicially imposed or not, [is] an integral part of our common-law heritage." *Preiser*, 411 U.S. at 485.

Therefore, a statutory interpretation analysis of the term "person," which retrospectively asks what the legislature intended when Chapter 660's predecessor was first enacted in 1870, fails to respect the common law source of the right to liberty. A common law analysis (i.e., the appropriate analysis here) is the opposite: "This court has held that the common law consists of fundamental principles and not set rules." *Vierra v. Campbell*, 40 Haw. 86, 89 (1953) (citations omitted). "Where there are no governing provisions of the written law, the courts in all matters coming

---

[11] The case of *Somerset*, 1 Lofft. at 1 http://bit.ly/3jpLmkH, "stands as an example of just how powerful the common law writ of habeas corpus could be, not only in protecting—but also expanding—liberty." AMANDA L. TYLER, HABEAS CORPUS: A VERY SHORT INTRODUCTION 27 (2021). There, Lord Mansfield ordered an enslaved Black man (James Somerset) freed because "[t]he state of slavery is . . . so odious, that nothing can be suffered to support it" under the common law. 1 Lofft. at 19.

[12] *See, e.g., Breheny*, 38 N.Y.3d at 582 (Wilson, J., dissenting) (explaining that the undefined term "person" in New York's similar habeas corpus procedural statute, "was meant to have no substantive component," and "is irrelevant to whether the writ can extend beyond humans").

before them endeavor to administer justice 'according to the promptings of reason and common sense.'" *Welsh v. Campbell*, 41 Haw. 106, 121 (1955). "[T]he courts of Hawaii can continue to declare, as they have in the past, the common law of Hawaii based upon justice and sound reason and not inconsistent with settled authorities." *Id.*

Ultimately, analyzing this case through a legislative lens rather than a common law lens will result in a backward and erroneous ruling that defies centuries of precedent. The Great Writ's history is "inextricably intertwined with the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints." *Fay v. Noia*, 372 U.S. 391, 401 (1963); s*ee also Peyton v. Rowe*, 391 U.S. 54, 66 (1968) (habeas corpus is "'not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty'"). In short: "The very history of habeas corpus is one of providing a mechanism for challenging the status quo." Br. of Amici Curiae Habeas Corpus Experts 26 (Sept. 24, 2021), at: https://bit.ly/3q4RsLN (citation omitted).

This Court must not forget: "We follow the common law in this jurisdiction." *Smith v. Smith*, 56 Haw. 295, 303 (1975). *See also Welsh*, 41 Haw. at 119-20 ("'The common law is but the crystallized conclusions [] the judges arrived at from applying the principles of natural right and justice to facts actually experienced in cases before them.'") (citation omitted).

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

Concluding that Mari and Vaigai are not "persons" for purposes of habeas corpus relief is couched in an incorrect assumption that entitlement to the Great Writ is governed by statute(s). Significantly, Chapter 660 merely governs habeas corpus procedure, not substantive entitlement to the common law right to bodily liberty that habeas corpus protects. It is an untenable position that the legislature can limit the common law authority of Hawai'i courts to determine the substantive scope of habeas corpus. It follows that the conclusion that Mari and Vaigai are not "persons," and that Chapter 660 can only be invoked by *Homo sapiens*, is rooted in the erroneous notion that the Great Writ's substantive scope is limited by statute. This position is wrong for the following reasons.

First, habeas corpus in Hawai'i is not a creature of statute. Hawaiian courts have long made clear that statutes governing the writ are merely procedural: "The statutes of this Kingdom contain no further provision on this important subject than that comprised in the general power given to the Justices of this Court . . . to issue writs of habeas corpus for inquiring into the cause of alleged imprisonment." *In re Cambridge*, 1 Haw. at 193. "But we think that, although this power is contained in very few words, and although the mode of its practical application is not particularly prescribed, a fair and reasonable construction of the language will give to us the same powers conferred upon the Justices in England." *Id.* "If we have the power to issue writs of habeas corpus to inquire into the cause of the imprisonment, it will not be denied, we think, that that power also implies and includes the power to do whatever justice may seem to require." *Id.* (emphasis added). As *In re Cambridge* shows, while statutes can set forth the procedure to be followed in habeas corpus proceedings, the right to bodily liberty at stake in such a proceeding is enforced under the common law.

Second, and as partially discussed *supra*, statutes cannot curtail the substance or reach of the Great Writ. Arguing that Chapter 660 statutorily limits the Great Writ's substantive scope would violate the Suspension Clause in the Constitution of the State of Hawai'i. The Clause prohibits the suspension of the common-law writ except in cases of rebellion, invasion, or for expressly prescribed legislative reasons. Haw. Const. art. I, § 15; *In re Cambridge*, 1 Haw. at 193 ("the privilege of the writ of habeas corpus can only be suspended by proclamation of the King, in case of the rebellion or invasion"). Practically, this means the Clause safeguards the common law right to bodily liberty so the judiciary can define the scope of the right.

Who may avail themselves of the Great Writ's protections is inherently a common law determination in Hawai'i and elsewhere. *See, e.g., Breheny*, 38 N.Y.3d at 576-77 ("it is true that the courts—not the legislature—ultimately define the scope of the common-law writ of habeas corpus"); *Shequin v. Smith*, 129 Vt. 578, 581 (1971) ("While a legislature may regulate the procedure with respect to habeas corpus, and, to some extent, the purposes for which it may be used, the writ may not be abrogated or its efficiency curtailed by legislative action."); *In re Forest*, 45 N.M. 204, 113 (1941) ("The legislature may add to the efficacy of the writ as known to the common law . . . but it cannot curtail such rights."); *In re Patzwald*, 50 P. 139, 142 (Okla. Terr. 1897) ("the writ of habeas corpus should remain as it existed at the common law, and should not be curtailed by legislative enactment, or by subtle and metaphysical judicial interpretation, and

legislatures can no more prevent its application to cases where it would have been applicable at common law than they can abrogate the right of trial by jury.").

Ultimately, this Court "must, therefore, be guided by these lights, and by the decisions of English and American Courts, concerning the law of habeas corpus; and [] the practice of this Court has never been opposed to this view." *Ex parte Apuna*, 6 Haw. at 736.

3. The Circuit Court failed its obligation by not issuing an OSC

The Circuit Court was obligated to issue an OSC if the NhRP made a prima facie case entitling Mari and Vaigai to relief. It was not to undertake a statutory analysis of the term "person" as erroneously set forth by Respondents in their MTD. Therefore, the Circuit Court's decision not to issue an OSC after the NhRP met its burden was wrong and evinces a misunderstanding of its role.

The question of who may avail themselves of the protections of habeas corpus, and thus entitlement to an OSC, is a matter for a court to decide based on the common law's "'adaptation to new conditions, interests, relations, and usages as the progress of society may require.'" *Id.* at 120 (citation omitted). Without explanation or any reference to the common law, the Circuit Court issued its Order on MTD. In doing so, it did not repudiate the Respondents' position that the NhRP failed "to state a claim under HRS chapter 660 because writs of habeas corpus are only available to 'persons.'" ROA, p. 5, No. 27. It also failed to assume (without deciding) that Mari and Vaigai could have the common law right to bodily liberty protected by habeas corpus. Had the Circuit Court accepted as true all the information submitted by the NhRP and assumed (without deciding) that Mari and Vaigai could have the common law right to bodily liberty protected by habeas corpus, an OSC would have been issued and this case would have proceeded to a merits determination.

D. This case concerns whether Mari and Vaigai have the right to bodily liberty; it does not concern whether they fit the definition of "person"

The failure to issue an OSC denied Mari and Vaigai the ability to have the merits of their case heard despite the overwhelming evidence of their autonomy and extraordinary cognitive complexity. A court must not treat the question of whether the elephants are entitled to avail themselves of the protections of habeas corpus as a definitional one regarding legal personhood, but rather must treat it as a substantive normative question decided under common law principles, including advances in science, justice, liberty, and equality. "[T]o whom to grant what rights is a normative determination, one that changes (and has changed) over time." *Breheny*, 38 N.Y.3d at

588 (Wilson, J., dissenting). Further, to deny Mari and Vaigai even the possibility of having their case heard merely because they are not members of the species *Homo sapiens* is arbitrary, without merit, and unjust.

This Court must not formalistically ask whether Mari and Vaigai fit the definition of "person." The focus of this Court's substantive inquiry must be on whether they have the common law right to bodily liberty protected by habeas corpus. In one of the NhRP's chimpanzee cases, Judge Fahey wrote the following:

> The better approach in my view is to ask not whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being, but instead whether he or she has the right to liberty protected by habeas corpus. That question, one of precise moral and legal status, is the one that matters here. Moreover, the answer to that question will depend on our assessment of the intrinsic nature of chimpanzees as a species.

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

The same approach applies here. "Whether autonomous, nonhuman animals have rights that ought to be 'recognized by law' is *precisely* the question we are called upon to answer in this appeal." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting). "That is the nature of our common law system." *State v. Uyesugi*, 100 Haw. 442, 478 (2002).

1. The definition of "person" is not limited to *Homo sapiens*

i. Mari and Vaigai are "persons" for purposes of habeas corpus

A "person" is merely the consequence of possessing a right or having the capacity to possess a right. It is a term that attaches to any individual or entity with a legal right, regardless of that right's source. As a leading jurisprudential scholar explained: "A person is any being whom the law regards as capable of rights or duties," and "[a]ny being that is so capable is a person, whether a human being or not." *Person*, BLACK'S LAW DICTIONARY (12th ed. 2024) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)). "All that is necessary for the existence of a person is that the lawmaker, be he legislator, judge, or jurist, or even the public at large, should decide to treat it as a subject of rights or other legal relations." F. H. Lawson, *The Creative Use of Legal Concepts*, 32 N.Y.U. L. REV. 909, 915 (1957); *see also* IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("The significant fortune of legal personality is the capacity for rights."); Richard Tur, *The "Person" in Law*, *in* PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY, 121 (1987)

("[L]egal personality can be given to just about anything. . . . It is an empty slot that can be filled by anything that can have rights or duties").[13]

Although "person" can refer to *Homo sapiens*, it is well established that the term is not limited to humans. There is even "no difficulty giving legal rights to a supernatural being and thus making him or her a legal person." JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 39 (2d ed. 1963).[14] Nor is there difficulty in giving legal rights to an inanimate object and thus making it a legal person. *See, e.g.*, *Tucker v. Alexandroff*, 183 U.S. 424, 438 (1902) ("A ship is born when she is launched . . . . She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name."). The same is true for nonhuman animals: "[A]nimals may conceivably be legal persons. . . .[T]here may have been, or indeed, may still be, systems of Law in which animals have legal rights." GRAY at 42-43.

"To be clear, conferring legal personhood on an animal (or even on a river, as New Zealand has done) doesn't mean it's human, but it does mean recognizing that the animal has rights to the protection of its dignity and life. As Mere Takoko, a Maori conservationist, writes, animals should have the right to freedom of movement, a healthy environment, and the 'ability to thrive alongside humanity.' Legal personhood goes beyond traditional conservation, Takoko says. It means recognizing that nature has inherent rights that should not be taken away, the same as humans." William Schulz, *The case for animal personhood*, THE BOSTON GLOBE (June 11, 2024), at: https://www.msn.com/en-us/news/opinion/the-case-for-animal-personhood/ar-BB1nZIRV.

---

[13] Importantly, being a "person" for one purpose does not entail being a "person" for all other purposes (e.g., possessing the right to bodily liberty does not entail having the right to vote). *See Byrn v. New York City Health & Hosps. Corp*, 31 N.Y.2d. 194, 200 (1972) (explaining that while unborn children have been, "recognized as acquiring rights or interests in narrow legal categories," they have, "never been recognized as persons in the law in the whole sense"); 1 ENGLISH PRIVATE LAW § 3.24, 146 (Peter Birks ed. 2000) ("A human being or entity . . . capable of enforcing a particular right, or of owing a particular duty, can properly be described as a person *with that particular capacity*," though not necessarily "a person *with an unlimited set of capacities*.").

[14] *See, e.g.,* Becca Warner, *This Ecuadorian forest thrived amid deforestation after being granted legal rights*, BBC (June 17, 2024), at: https://www.bbc.com/future/article/20240614-how-los-cedros-forest-in-ecuador-was-granted-legal-personhood ("To date, initiatives to recognise the rights of nature have been pursued in 44 countries, from Bolivia to Brazil and Uganda to the US. Some cases have defended a single animal, while other legal decisions have recognised the rights of rivers, mountains, and all of Mother Earth.").

"Indeed, if a corporation—a legal fiction created to benefit some humans—can have constitutional rights protected in our courts, then the law can recognize an autonomous animal's right to judicial consideration of their claim to be released from an unjust captivity." *Breheny*, 38 N.Y.3d at 631 (Rivera, J., dissenting).

The Petition demonstrates that the fundamental common law principles of justice, liberty, and equality—when applied to the Experts' scientific evidence—compel the recognition of Mari and Vaigai's right to bodily liberty. Pet. at ¶¶ 67-96. This recognition necessarily entails they are "persons" for purposes of habeas corpus.

ii. The scope of the undefined term "person" in Chapter 660 is not a matter of statutory interpretation

Chapter 660 is a purely procedural statute and does not (as it cannot) curtail the substantive entitlement to the Great Writ, which is a common law matter for the courts to decide. This manifests in the fact that "person" is undefined by Chapter 660. In assessing a statute nearly identical to HRS § 660-3, Judge Rivera found that "[w]hile CPLR article 70 sets forth the procedure to seek habeas relief, it does not create the right to bodily liberty nor determine who may seek such relief. Rather, the writ 'is not the creature of any statute.'"[15] *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting) (citation omitted); *see also Stanley*, 49 Misc.3d at 763 ("'Person' is not defined in CPLR article 70, or by the common law of habeas corpus."). "Thus, it is for this Court to decide the contours of the writ based on the qualities of the entity held in captivity and the relief sought." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting).

Deciding the contours of the Great Writ is well within the purview of this Court. *See Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 451-52 (2017) ("Our courts have repeatedly recognized the importance of the common law and have demonstrated an unwillingness to impliedly reject its principles; they have also determined that subsequent statutory enactments will not be construed as abrogating the common law 'unless that result is imperatively required.'") (citation omitted) (underline omitted).

---

[15] *Compare* NY CPLR § 7002 ("A person illegally imprisoned or otherwise restrained in his liberty . . . may petition without notice for a writ of habeas corpus to inquire into the cause of such detention and for deliverance."), *with* HRS § 660-3 ("the circuit courts may issue writs of habeas corpus in which persons are unlawfully restrained of their liberty").

iii. The definition of "person" in Chapter 1 is not controlling

At the Circuit Court, Respondents argued that the legislature has provided a catchall definition of "person" in its general provisions statute—HRS § 1-19—and it does not include nonhuman animals. This is incorrect because (1) HRS § 1-19 does not control matters of common law habeas corpus, and (2) that provision conveys a definition of "person" that does not exclude nonhuman animals.

First, HRS § 1-19 does not inform the definition of "person" in HRS § 660-3 because "[i]t is a generally accepted rule of statutory construction that unless a legislative intention to the contrary clearly appears, special or particular provisions control over general provisions." *Interest of R Children*, 145 Hawai'i 477, 485 (2019) (citation omitted). "It is also elementary that specific provisions must be given effect notwithstanding the general provisions are broad enough to include the subject to which the specific provision relates." *Id.* (citation omitted). Accordingly, HRS § 1-19, a general provision, cannot inform the term "person" in HRS § 660-3, a special provision, because there is no clear legislative intent to do so.

Second, nonhuman animals are not excluded from the definition of "person" in HRS § 1-19, which defines "person" as "individuals . . . corporations, firms, associations, societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally." The word "individual" includes Mari and Vaigai legally and semantically.

Semantically, the Honolulu Zoo defines each giraffe it has imprisoned as an individual: "Each individual knows its relative status in the hierarchy, which minimizes aggression." *Giraffa*, HONOLULU ZOO SOCIETY, at: https://shorturl.at/oxyWZ. The zoo also uses the term to describe lions: "They live in prides composed of 3 to 30 individuals, related adult females and their young." *Id.* at https://shorturl.at/svzH8. No matter that his conclusion on ambassadorship is wrong, one of the Honolulu Zoo Society's educators referred to Vaigai as an individual: "Whether it is Eleele the Siamang brachiating through the air, or Vaigai the elephant showering herself with dust, learning an animal's personal history generates an emotional connection that few wildlife documentaries can replicate. The animal becomes an individual and an ambassador for environmental responsibility." Charles Lee, *Helping Protect Wildlife at the Honolulu Zoo Helps Everyone*, HONOLULU CIVIL BEAT (Jan. 15, 2020), at: https://shorturl.at/gtBV1. These examples (of which

there are more) refute all semantic arguments that would limit the term "individual" in HRS § 1-19 to *Homo sapiens*.

Legally, at least two justices of the Hawai'i Supreme Court have found that an "'individual' in relevant part" is defined as "a particular being or thing as distinguished from a class, species, or collection," and includes both "a single human being" and "a single organism." *Castro v. Melchor*, 142 Hawai'i 1, 30 (2018) (McKenna, J., and Pollack, J., writing separately) (citing MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993)). In turn, "organism" is defined as "a form of life considered as an entity [including] an animal." *Organism*, DICTIONARY.COM, at: https://bit.ly/3HnUbrv. This example, from the state's highest court, refutes all legal arguments that would limit the term "individual" in HRS § 1-19 to *Homo sapiens*.

Accordingly, "individual" includes elephants within its definition. Whether Mari and Vaigai are "persons" for purposes of habeas corpus relief simply depends on how this Court answers the question of whether it should recognize their common law right to bodily liberty protected by habeas corpus based on fundamental principles of the common law.

iv. Dictionary definitions of "person" include Mari and Vaigai

While some dictionary definitions of "person" are limited to humans, these are far from the exclusive definitions of "person." In fact, in the current edition of *Black's Law Dictionary*, there is a (corrected) definition of "person," which is provided by a leading jurisprudential scholar, who explained: "So far as legal theory is concerned a person is any being whom the law regards as capable of rights or duties. Any being that is so capable is a person, whether a human being or not." *Person*, BLACK'S LAW DICTIONARY (12th ed. 2024) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)).[16]

Black's inclusion of Salmond's authoritative explanation of legal personhood was no afterthought. As Black's editor-in-chief explained, quotations from leading scholars "are more than merely illustrative: they are substantive. With each quotation, I have tried to provide the seminal remark—the *locus classicus*—for an understanding of the term." *Preface to the Twelfth Edition*, BLACK'S LAW DICTIONARY (12th ed. 2024). Accordingly, *Black's* legal definition of the

[16] Through the 9th edition of Black's, the dictionary had misquoted John Salmond's definition of "person" as "any being whom the law regards as capable of rights and duties."

term "person" shows that *Homo sapiens* are far from the exclusive recipients of legal rights and the status of legal persons.

2. The evolutionary nature of the common law warrants an extension of the Great Writ's protections to Mari and Vaigai

"The [] argument—'this has never been done before'—is an argument against all progress, one that flies in the face of legal history." *Breheny*, 38 N.Y.3d at 584 (Wilson, J., dissenting). "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied." *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015). Indeed, "the absence of precedent is a feeble argument. The common law system would have withered centuries ago had it lacked the ability to expand and adapt to the social, economic, and political changes inherent in a vibrant human society." *Fergerstrom v. Hawaiian Ocean View* Estates, 50 Haw. 374, 376 (1968). Confining the Great Writ to an unjust past is antithetical to its purpose of protecting liberty.

Mari and Vaigai's "right to relief is not necessarily foreclosed by lack of precedent." *Lum v. Fullaway*, 42 Haw. 500, 502 (1958). "True, there is a constant admonition against judicial legislation. But the genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth." *Id.* "The vehicle by which such growth is accomplished is what may be described as judge-made law. This is evident in the utterances of such learned oracles of law as Sir Frederick Pollock, Judge Benjamin Cardozo and Judge Learned Hand." *Id.* at 503. "'The common law does not consist of absolute, fixed, and inflexible rules, but rather of broad and comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation.'" *Welsh*, 41 Haw. at 120 (citation omitted) (italics omitted). "'Its principles have been determined by the social needs of the community and have changed with changes in such needs. These principles are susceptible of adaptation to new conditions, interests, relations, and usages as the progress of society may require.'" *Id.*

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

at 592. *See* TYLER, *supra*, at 114 ("[T]he judicially created common law writ has long been celebrated for its adaptability and potential to evolve.").

While the question underlying this appeal is not governed by on-point precedent, "novel questions merely present opportunities to develop the law." *Breheny*, 38 N.Y.3d at 629 (Rivera, J., dissenting). The issue's novelty "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.

Id. at 584 (Wilson, J., dissenting). *See also id*. at 613 ("[T]he law inevitably changes as [society's] values change. Indeed, *to change* is a function of the law: 'Law must be stable, and yet it cannot stand still.'") (citation omitted). "The correct approach is not to say, 'this has never been done' and then quit, but to ask, 'should this now be done even though it hasn't before, and why?'" *Id.* at 584.

As demonstrated above, common law courts may be compelled to expand existing rights. In Hawai'i, common law courts <u>are</u> compelled to expand existing rights to individuals who should but do not possess them. *See Kake v. Horton,* 2 Haw. 209, 212 (1860) ("[I]n all civil matters where there is no express law, the Judges are bound to proceed and decide according to equity, applying necessary remedies to evils that are specifically contemplated by law, and conserving the cause of morals and good conscience."). It is undoubtedly inequitable and immoral to keep Mari and Vaigai imprisoned at the Honolulu Zoo when the law contemplates a necessary remedy through the expansion of the right to bodily liberty on their behalf.

3. Denying Mari and Vaigai the protection of habeas corpus based on their species' membership demeans humanity

A common law court—especially this Court—cannot accept the position that only *Homo sapiens* can have rights because, well, they are *Homo sapiens*. This position is rooted in human exceptionalism (a version of might is right), which simply perpetuates an unjust status quo. It is irrefutable that Mari and Vaigai are autonomous, and autonomy anchors the right to bodily liberty. Hawaiian courts have made clear that autonomy is a supreme and cherished common law value that must be protected. For example: "'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own

person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *Campbell v. H. Hackfeld & Co.*, 20 Haw. 245, 250-51 (1910) (citation omitted)). *See also* Pet. at ¶¶ 156-165 (discussing the relationship between autonomy and the right to bodily liberty). "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." *State v. Mallan*, 86 Hawai'i 440, 457 (1998) (Levinson, J., dissenting) (quoting JOHN STUART MILLS, ON LIBERTY (1859)).

Habeas corpus is "deeply rooted in our cherished ideas of individual autonomy and free choice." *Stanley*, 49 Misc.3d at 753 (citations omitted). It "serves to protect against unjust captivity and to safeguard the right to bodily liberty," and "those protections are not singular possessions of human beings." *Breheny*, 38 N.Y.3d at 632 (Rivera, J., dissenting). Thus, to exclude elephants from seeking habeas relief despite their scientifically proven autonomy is to hold that autonomy does not matter. It is to hold that the fundamental common law principles of justice, liberty, and equality, which command the protection of autonomy, do not matter either. "It is not the words of the law but the internal sense of it that makes the law . . . the sense and reason of the law is the soul." *Marks v. Waiahole Water Co.*, 36 Haw. 188, 203 (1942) (Matthewman, J., dissenting) (internal quotations and citations omitted).[17]

To argue that species membership is all that matters—simply by asserting that it does—is "question begging in its purest form." *Breheny*, 38 N.Y.3d at 633 (Rivera, J., dissenting). Preferring "the comforting incoherence of its circular logic," Respondents' most likely argument will "boil[] down to a claim that animals do not have the right to seek habeas corpus because they are not human beings and that human beings have such a right because they are not animals. . . . And glaringly absent [will be] any explanation of why some kinds of animals—i.e., humans—may seek habeas relief, while others—e.g., elephants—may not." *Id*.[18]

---

[17] *See also Tommy*, 31 N.Y.3d at 1057 (Fahey, J. concurring) (criticizing the "conclusion that a chimpanzee cannot be considered a 'person' and is not entitled to habeas relief" as being "based on nothing more than the premise that a chimpanzee is not a member of the human species").

[18] *See also* KRISTIN ANDREWS ET AL., CHIMPANZEE RIGHTS: THE PHILOSOPHERS' BRIEF 34 (2019) ("[I]t is arbitrary to utilize species membership alone as a condition of personhood, and it fails to satisfy the basic requirement of justice that we treat like cases alike. It picks out a single

Notably, habeas corpus does and should protect the right to liberty of humans, but this is no reason to limit the writ's protections to members of our species. The Great Writ "has always been used to challenge confinement at the boundaries of evolving social norms, even by petitioners with the legal status of chattel (enslaved persons) or no legal identity or capacity to sue on their own (wives and children)." *Id.* at 617 (Wilson, J., dissenting).

To answer, "they are not human," assumes the validity of human exceptionalism: that there exists a categorical, fundamental difference between elephants and humans that could justify such profound discrepancies under the law. Based on the Experts' findings, we know this is not true. Elephants are like us in all the ways that should compel a court to recognize their fundamental right to bodily liberty protected by habeas corpus.

Moreover: "Prior to the twentieth century, human understanding of animal intelligence was minimal," with humans regarding "themselves as 'unique in their sociality, individuality, and intelligence.'" *Breheny*, 38 N.Y.3d at 606 (Wilson, J., dissenting) (citation omitted). However, "researchers began to discredit the notion of human exceptionalism" as scientific knowledge progressed in the twentieth century. *Id*. Accordingly: "Whether an elephant could have petitioned for habeas corpus in the 18th century is a different question from whether an elephant can do so today because we know much more about elephant cognition, social organization, behaviors and needs than we did in past centuries, and our laws and norms have changed in response to our improved knowledge of animals." *Id*. at 603. "[T]he contrast between what we now know and the paucity of information in earlier times must inform our analysis." *Id*. at 607.

Today we know that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs. To exclude Mari and Vaigai from invoking the protections of the Great Writ by not issuing an OSC—solely because they are not *Homo sapiens*—is arbitrary, illogical, and conflicts with how the common law works. *See, e.g., Territory v. Alford*, 39 Haw. 460, 465-66 (1952), *aff'd sub nom. Alford v. Territory of Hawaii*, 205 F.2d 616 (9th Cir. 1953) ("courts in the face of changing conditions are not chained to ancient formulae but may enforce conditions deemed to have been wrought in the common law itself by force of changing conditions"). Such an exclusion is also contrary to the fundamental values and

---

characteristic as one that confers rights without providing any reason for thinking it has any relevance to rights.").

principles of autonomy, justice, liberty, and equality that Hawaiian courts are duty-bound to uphold. *Lee v. Corregedore*, 83 Haw. 154, 178 (1996) (Levinson, J., and Klein, J., dissenting) (citations omitted) ("After all, '[i]n the past this court has expressed a willingness and a duty to depart from long established rules, and a readiness to act where precedent is lacking, in order to effect desirable changes in the common law.' Justice is not always served by slavish adherence to limited applications of established doctrines.").

As Judge Rivera found in Happy's case: "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." *Breheny*, 38 N.Y.3d at 642 (Rivera, J., dissenting).

E. *Cecilia's Case*

Judge Mauricio's venerated opinion in *Cecilia's Case* contemplates many of the foregoing arguments. This Court can (and should) "resort, for light, to the laws of those countries, to whose authority and opinions we yield the highest veneration," and evolve the common law in "accordance with justice and with sentiments and circumstances of an enlightened age." *Kake*, 2 Haw. at 212; *see also Puuku*, 8 Haw. at 80 ("It is a matter of constant practice in our Courts to cite and adopt the reasonings and principles of laws found in decisions of the Courts of other countries, and it is necessary to do so, because everything which controls the decision of a case may not be found in any of our statutes.").

To wit, in Nov. 2016, an Argentinian court declared the imprisoned chimpanzee Cecilia a nonhuman legal person and granted her habeas corpus relief, ordering her transferred from the Mendoza Zoo to a Brazilian sanctuary. *Cecilia's Case* at 32. Judge Mauricio rejected the State Attorney's argument that because Cecilia was a "thing" and not a "human person," habeas corpus could not be employed on her behalf. *Id.* at 5-6. Instead, Judge Mauricio asked, "is the human being the only one that can be considered as [a] legal person[]? Is man the only one that can have legal capacity?" *Id.* at 23. In answering, she held: "To classify animals as things is not a correct standard. The essential nature of things is to be inanimate objects in contrast with a living being." *Id.* She added: "A chimpanzee is not a thing, he is not an object that can be disposed of like a car or a building. Great apes are legal persons, with legal capacity." *Id.* at 24. Her justification for this position was the expert testimony that established chimpanzees as "intelligent," "conscientious of

themselves," "hav[ing] cultural diversity," "manifest[ing] grief," "express[ing] emotions such as happiness, frustration, desire or deceit," and "organization[al] capabilities," among many other autonomous attributes. *Id.* at 23-24.

Moreover, Judge Mauricio recognized the potential pushback from individuals who might believe she was assigning Cecilia equal rights as humans. She explained: "I insist that it is not about granting great apes the rights listed in civil and commercial law. Neither is it the purpose of this authority to create a catalog of the rights of great apes. This is about setting them in the category of nonhuman legal persons, where they really belong." *Id.* at 28 (cleaned up). The practical implication of this holding is simple: "great apes are not objects to be exposed like a work of art created by humans." *Id.* at 27. In other words, Judge Mauricio believes chimpanzees should have a right to liberty that is protected by the Great Writ, allowing them to "live, grow and die in the proper environment for their species," which is never a zoo. *Id.* The same is unequivocally true of Mari and Vaigai.

Echoing Judge Rivera's commentary about diminishing ourselves by relegating an autonomous and extraordinarily cognitively complex individual to a lifetime in a cage, Judge Mauricio held that "Cecilia's present situation moves us." *Id.* at 15. "If we take care of her wellbeing, it is not Cecilia who will owe us; it is us who will have to thank her for giving us the opportunity to grow as a group and to feel a little more human." *Id.*

Finally, in addressing whether habeas corpus was the proper procedure for determining whether Cecilia had a right to liberty, Judge Mauricio made the following finding:

> I consider that the habeas corpus action is the applicable procedure, adjusting the interpretation and decision to the specific situation of an animal deprived of his essential rights while these are represented by the essential needs and conditions of the existence of the animal in whose favor the action is presented. Under these circumstances, the habeas corpus action, in the present case, has to adjust strictly to preserve Cecilia's right to live in an environment and conditions appropriate for her species.

Id. at 31-32. This case similarly concerns Mari and Vaigai's right to liberty and thus an environment appropriate for their species-specific needs; it cannot be about more, and it should not dare to be about less.

F. Floodgate concerns do not justify depriving Mari and Vaigai of the Great Writ's protections

Now-Chief Judge Wilson and Judge Rivera found that the common law writ of habeas corpus was available for an elephant to challenge her unjust imprisonment at a zoo. They refuted the arbitrary and illogical notion that only members of the species *Homo sapiens* may invoke the protections of the Great Writ, recognizing that as societal norms and knowledge about nonhuman animals evolve, so too must the common law.

They also rejected the idea that the proverbial "slippery slope" or "floodgate" argument should be determinative of whether a nonhuman animal can seek habeas corpus relief. Specifically, Judge Wilson stressed the absurdity of adhering to floodgate concerns:

> Certain amici have contended that allowing Happy to present the merits of her habeas corpus claim would end dairy farming, result in neighbors filing habeas petitions to free domestic dogs and cats, and put children with ant farms to the task of responding to habeas petitions in court. These scenarios are so facially preposterous that they hardly deserve a response; it is also difficult to know which of many possible responses to offer.

Id. at 620. *See also Breheny*, 38 N.Y.3d at 622 (Wilson, J., dissenting) ("common-law courts are especially good at developing doctrines to deal with slippery slope"); *id.* at 623-24 ("[T]he *Lemmon Slave Case* freed only the eight family members who petitioned in that case. It did not end slavery and did not produce a flood of follow-on habeas petitions. The several habeas corpus petitions freeing women from abusive husbands or relocating children to better custodians also caused no great flood of filings. But if *Sommersett's Case*, the *Lemmon Slave Case* or the cases involving women and children had produced a flood of habeas petitions freeing victims of unjust confinement, would history view them with disapproval?").

The same logic pervades Hawaiian courts:

> The argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law. Assuming that it is true, that fact is unpersuasive unless the litigation largely will be spurious and harassing. Undoubtedly, when a court recognizes a new cause of action, there will be many cases based on it. Many will be soundly based and the plaintiffs in those cases will have their rights vindicated. In other cases, plaintiffs will abuse the law for some unworthy end, but the possibility of abuse cannot obscure the need to provide an appropriate remedy.

Fergerstrom, 50 Haw. at 377. *See also Uyesugi*, 100 Haw. at 478 ("We cannot hide behind the fear that, in deciding a case, we may be creating precedent."); *id.* ("To allow a concern for unintended consequences to govern our decisions is to abandon our common law tradition

altogether. To remain silent because we are afraid of what we might say undermines our role as the highest state court and the reason that we are here.").

G. This case is not a matter for the legislature as common law stewardship is the responsibility of the judiciary

Deflecting the responsibility to change archaic common law onto the legislature would be an abdication of judicial duty by this Court (as it is in sister jurisdictions). *See, e.g., Lum*, 42 Haw. at 510 ("If we follow defendant's argument, the legislature alone may keep up with the times and the courts are but automatons to match the colors provided by previous legislative acts and by established precedents. We do not think that the legislature has become so potent, and the judiciary so atrophied, that we must defer to the former in every situation where the colors do not match."); *see also Woods v. Lancet*, 303 N.Y. 349, 355 (N.Y. 1951) ("Legislative action there could, of course, be, but we abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule."); *accord Digby v. Digby*, 388 A.2d 1, 2 (R.I. 1978) (same); *Gates v. Foley*, 247 So. 2d 40, 43 (Fla. 1971) (same); *Rodriguez v. Bethlehem Steel Corp.*, 525 P.2d 669, 678 (Cal. 1974) (same).

This is why Hawaiian courts do not wait for legislative action to modernize the common law; in fact, they are loathe to wait:

> The defendant contends that since the ancient common law did not afford a remedy for invasion of privacy, and there is no case in Hawaii recognizing such a right, only the legislature can provide for such a cause of action. The magnitude of the error in the defendant's position approaches Brobdingnagian proportions. To accept it would constitute more than accepting a limited view of the essence of the common law. It would be no less than an absolute annihilation of the common law system. This spectre of judicial self-emasculation has pervaded one case in which the court accepted this line of argument.

Fergerstrom, 50 Haw. at 375.

In *Breheny*, now-Chief Judge Wilson admonished the majority for deflecting the responsibility to change archaic common law onto the legislature:

> The judges, Justice Paine among them, who issued writs of habeas corpus freeing enslaved persons, or liberating women and children from households run by abusive men, or ordering the return home of underage soldiers could have said, as the majority does here, "that's a job for the legislature." They could have said, "existing law offers some protections, and we dare not do more." They could have said, "we can't be the first." But they did not. None of those declamations is remotely consistent with our Court's history, role or duty.

38 N.Y.3d at 617 (Wilson, J., dissenting). *See also id*. at 634 (Rivera, J., dissenting) (while "statutory rights may expand existing rights and protections for nonhuman animals," "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").

Recognition of Mari and Vaigai's common law right to bodily liberty does not depend on legislative action. First, it is an abdication of judicial duty to refuse the issuance of a warranted OSC by holding the legislature must weigh in. Second, it is an abdication of judicial duty to refuse Mari and Vaigai ultimate relief after an OSC has been issued by holding the legislature must weigh in. This Court must rise above the all-too-convenient excuse that it cannot decide this matter because the legislature should. *See Uyesugi*, 100 Haw. at 478 ("we are duty bound to decide hard issues presented to us and render our best judgment in all cases").

H. The Circuit Court violated *pro hac vice* counsel's procedural due process rights and abused its discretion when it retroactively denied the PHV Motion

In *Kunimoto*, "[t]he circuit court's revocation of an out-of-state attorney's *pro hac vice* status, an action authorized by the inherent powers doctrine, [was] reviewed for an abuse of discretion." *Kunimoto*, 91 Haw. at 387. "An abuse of discretion occurs if the trial court has 'clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" *Miyashiro v. Roehrig, Roehrig, Wilson & Hara*, 122 Haw. 461, 474 (Ct. App. 2010).

"It is well settled that an out-of-state attorney has no right or entitlement under the United States Constitution (or the Hawai'i Constitution) to apply for or be granted pro hac vice status before any state court." *Kunimoto*, 91 Haw. at 388. "However, once an out-of-state attorney has been granted *pro hac vice* status in a particular case before a particular judge, the out-of-state attorney gains a 'limited property interest' that is held pursuant to RSCH Rule 1.9." *Id.* "The deprivation of this property interest—'previously held under state law'—must be in accord with requisite constitutional safeguards," *id.* (citation omitted), meaning basic procedural due process rights. *Id.* (citing cases). "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* (citation omitted).

1. The Circuit Court violated Mr. Davis' procedural due process rights

Over two months after allowing Mr. Davis to argue on behalf of Mari and Vaigai at the MTD hearing, which was held on Jan. 16, 2024, the Circuit Court denied the [Proposed] Order Granting Motion for Admission to Appear Pro Hac Vice for Jake Davis ("Proposed Order"). ROA, p. 12, No. 63. The Proposed Order was contemplative of the admonitions made by Judge Gary W.B. Chang and complied with the mandates outlined in Haw. R. Sup. Ct. § 1.9. The reason given for denying the Proposed Order was as follows: "The order failed to state all of the conditions that the court stated in announcing its ruling during the hearing." *Id*.

Without a transcript, which the NhRP requested twice, it is impossible to know if any "conditions" were omitted from the Proposed Order.[19] The Proposed Order listed exactly eight conditions, which were the ones described in open court. *Id.* at p. 10, No. 55. The Minutes from the *pro hac vice* hearing state the following: "Motion for Admission to Appear Pro Hac Vice of Jake Davis subject to the 8 conditions as stated at the hearing." *Id.* at pp. 9-10, No. 51. The Minutes thus confirm that Ms. Nolan and Mr. Davis covered each condition set forth by the Circuit Court. But to no avail.

Revocation of *pro hac vice* admission has only been upheld in cases involving reprehensible behavior not applicable here. *See Kunimoto*, 91 Hawai'i at 385-86 (Upholding *a pro hac* vice revocation due to the commission of "a fraud" on the court, which "recklessly or knowingly disregarded, if not the letter, then certainly the spirit of Court orders and Court proceedings."). Here, there was no impropriety, let alone fraud, between Mr. Davis' *pro hac vice* admission and subsequent revocation. Yet, the opportunities to be heard were far less. *See id.* at 389 ("Because the circuit court was concerned with due process considerations, it continued the hearing, for the fourth time."). Indeed, the Circuit Court did not notify local counsel that the PHV Motion was deficient, it did not set a hearing to attempt resolution of those deficiencies, and it did not provide specifics in its PHV Order as to how the Proposed Order was deficient.

The ROA appears to show the Proposed Order as being compliant with the Circuit Court's conditions. Under *Kunimoto*, the Circuit Court's inability to even attempt an articulation of the specific "conditions" set forth at the MTD hearing and allegedly omitted from the Proposed Order is a procedural due process violation because neither undersigned counsel nor Mr. Davis was given

[19] At the time this brief was filed, neither of the NhRP's transcript requests had been fulfilled nor was the NhRP notified by the reporter that either request "cannot be completed." HRAP Rule (b)(1)(E).

"notice" or a subsequent "opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 388.

2. The Circuit Court abused its discretion by revoking Mr. Davis' *pro hac vice* admission

In *Kunimoto*, a finding of abuse of discretion was not made. Nevertheless, the case remains illustrative of how the Circuit Court abused its discretion here. "[I]t is elementary that an attorney of record must be familiar with the facts and pleadings in the case." *Id.* at 392. Having established that an out-of-state attorney—at a minimum—is charged with the same obligations as licensed Hawai'i counsel, the Supreme Court found that *pro hac vice* counsel's acceptance of at-issue stock as payment for attorney's fees was "a reckless failure to comply with the Hawai'i Rules of Professional Conduct, particularly HRPC Rule 3.4." *Id*. It added: "it is incomprehensible that experienced *pro hac vice* counsel would accept stocks as payment for attorneys' fees from a judgment debtor amidst a receivership action without even contacting local counsel to discuss the ownership of the stock." *Id.* at 392-93.

The Circuit Court in *Kunimoto* did not abuse its discretion by revoking *pro hac vice* admission because counsel did not meet their "obligations under the Hawai'i Rules of Professional Conduct," and their behavior was so "reckless and/or intentional" that it constituted bad faith. Thus, the decision did not exceed "the bounds of reason or disregard rules or principles of law or practice," detrimental to "a party litigant." *Miyashiro*, 122 Haw. at 474.

Here, the circumstances are far different. Mr. Davis has complied with the Hawai'i Rules of Professional Conduct and refrained from even a semblance of reckless behavior both in and out of court. He has not sought anything illicit, let alone compensation. It would be categorically incorrect to allege Mr. Davis has acted in bad faith in any way. It follows that in combining the foregoing with the fact that the Circuit Court has provided no details as to how the Proposed Order was deficient, it is clear the Circuit Court exceeded the bounds of reason and disregarded notice principles of law in its revocation of Mr. Davis' *pro hac vice* admission.

Accordingly, the NhRP requests this Court reinstate Mr. Davis' *pro hac vice* status for the remainder of the case.

VI. CONCLUSION

Excluding Mari and Vaigai, autonomous and extraordinarily cognitively complex individuals, from the protections of the Great Writ because of their species membership—thereby condemning

them to a lifetime of never-ending suffering—is no longer tenable considering science, fundamental common law principles, and how the common law works.

Moreover, let us not forget "Tyke, the elephant," who "may have died that autumn day in 1994, but [whose] actions proved far from futile. She was part of a larger struggle against oppression and exploitation. . . . Indeed, her resistance that day altered the course of history. Humans were inspired into action. The City of Honolulu never against hosted a circus." HRIBAL at 60. "Tyke's adopted sisters and brothers are now living out their lives in peace [at elephant sanctuaries]." *Id.* at 61.

The never-ending suffering of imprisoned elephants should have ended at a full stop in Honolulu in 1994. It did not and as a result, Mari and Vaigai continue to suffer immense harm. However, their suffering—unlike Tyke's—can be addressed. Their suffering can still come to its long-overdue end.

For the reasons set forth herein, the NhRP respectfully submits that this Court should begin the process of remedying the unjustifiable disgrace that is the lives of Mari and Vaigai by reversing the Circuit Court's Order on MTD and remanding the case with instructions to issue an OSC so the merits of this case can be adjudicated; reinstate Mr. Davis' *pro hac vice* status for the remainder of this case, allowing him to argue on behalf of Mari and Vaigai; and grant such other and further relief as may be just and proper.

DATED: San Diego, California, July 22, 2024.

Respectfully submitted,

/s/ Cheryl Nolan
Cheryl Nolan, Esq.
HI Bar No. 6412
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (703) 955-1793
Email: CherylN@lassd.org
Attorney for Petitioner-Appellant
Nonhuman Rights Project, Inc.
on behalf of Mari and Vaigai

Appendix

Exhibit 1: Final Judgment

Exhibit 2: Order on Respondents' Motion to Dismiss

Exhibit 3: Order Rejecting Motion for Admission to Appear *Pro Hac Vice*

Exhibit 1

DANA M.O. VIOLA, 6095
Corporation Counsel
DANIEL M. GLUCK, 7959
JACQUELINE M. DE LEEUW HUANG, 11644
PATRÍCIA A.V. SENDÃO, 11708
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai‘i 96813
Phone Nos. (808) 768-5233/ (808) 768-5248/ (808) 768-5121
Emails: daniel.gluck@honolulu.gov
j.deleeuwhuang@honolulu.gov
patricia.sendao@honolulu.gov
Facsimile: (808) 768-5105

Attorneys for Respondents

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI‘I

NONHUMAN RIGHTS PROJECT, INC., on behalf of Mari and Vaigai, individuals, Petitioner, vs. CITY AND COUNTY OF HONOLULU, DEPARTMENT OF ENTERPRISE SERVICES and its DIRECTOR, DITA HOLIFIELD, and the HONOLULU ZOO DIRECTOR, LINDA SANTOS, Respondents.	CIVIL NO. 1CCV-23-0001418 JUDGMENT

JUDGMENT

In accordance with Rule 58 of the Hawai‘i Rules of Civil Procedure, and pursuant to the Order Granting Respondent City and County of Honolulu’s Motion to Dismiss filed

March 25, 2024 (Dkt. 65) ("Order"), GWBC

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment is hereby entered, consistent with the Order, in favor of Respondent City and County of Honolulu and against Petitioner, as to the Petition (Dkt. 1). Any and all remaining claims are dismissed without prejudice.

DATED: Honolulu, Hawai'i, March 25, 2024

/s/ Gary W. B. Chang

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/Cheryl Nolan
CHERYL NOLAN
JAKE DAVIS
Attorneys for Petitioner
NONHUMAN RIGHTS PROJECT, INC.

PLEASE NOTE CHANGES

Exhibit 2

DANA M.O. VIOLA, 6095
Corporation Counsel
DANIEL M. GLUCK, 7959
JACQUELINE M. DE LEEUW HUANG, 11644
PATRÍCIA A.V. SENDÃO, 11708
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai'i 96813
Phone Nos. (808) 768-5233/ (808) 768-5248/ (808) 768-5121
Emails: daniel.gluck@honolulu.gov
j.deleeuwhuang@honolulu.gov
patricia.sendao@honolulu.gov
Facsimile: (808) 768-5105

Attorneys for Respondents

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

NONHUMAN RIGHTS PROJECT, INC., on behalf of Mari and Vaigai, individuals, Petitioner, vs. CITY AND COUNTY OF HONOLULU, DEPARTMENT OF ENTERPRISE SERVICES and its DIRECTOR, DITA HOLIFIELD, and the HONOLULU ZOO DIRECTOR, LINDA SANTOS, Respondents.	CIVIL NO. 1CCV-23-0001418 (GWBC) ORDER GRANTING RESPONDENTS' MOTION TO DISMISS Hearing Date: January 16, 2024 Time: 3:00 p.m. Judge: The Honorable Gary W.B. Chang Trial Date: None

ORDER GRANTING RESPONDENTS' MOTION TO DISMISS

Petitioner Nonhuman Rights Project, Inc. ("Petitioner") filed a Petition for a Common Law Writ of Habeas Corpus on behalf of Mari and Vaigai, two elephants at the Honolulu Zoo

("Petition"). Before the Court is the Motion to Dismiss the Petition ("Motion") filed by Respondents City and County of Honolulu Department of Enterprise Services and its Director, Dita Holifield, and the Honolulu Zoo Director, Linda Santos ("Respondents"). GWBC

PLEASE NOTE CHANGES

After considering the written submissions of counsel, the records and files herein, and oral argument presented,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Respondents' Motion to Dismiss is granted, without prejudice.

DATED: Honolulu, Hawai'i, March 25, 2024.

/s/ Gary W. B. Chang

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

_____

CHERYL NOLAN
JAKE DAVIS
Attorneys for Petitioner
NONHUMAN RIGHTS PROJECT, INC.

Exhibit 3

Cheryl Nolan, Esq.
HI Bar No. 6412
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (703) 955-1793
Email: cnolan@nolananimallaw.com
— and —
Jake Davis, Esq.
(*Of the State Bar of the State of Colorado*)
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (513) 833-5165
Email: jdavis@nonhumanrights.org
(*Pro Hac Vice* application pending)

Attorneys for Petitioner Nonhuman Rights Project, Inc.

IN THE COURT OF THE FIRST CIRCUIT

STATE OF HAWAIʻI

NONHUMAN RIGHTS PROJECT, INC., on behalf of Mari and Vaigai, individuals,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU, DEPARTMENT OF ENTERPRISE SERVICES and its DIRECTOR, DITA HOLIFIELD, and the HONOLULU ZOO DIRECTOR, LINDA SANTOS.

Respondents.

Civil Case No.: 1CCV-23-0001418
(HCCR 7, 7.2; Haw. R. Sup. Ct. 1.9)

[REJECTED BY THE COURT] GWBC

ORDER GRANTING MOTION FOR ADMISSION TO APPEAR *PRO HAC VICE* FOR JAKE DAVIS

JUDGE: GARY W.B. CHANG
TRIAL DATE: NONE
HEARING DATE: 1/16/24
HEARING TIME: 3:00 PM HST

TO ALL PARTIES AND THEIR ATTORNEY(S) OF RECORD HEREIN:

Petitioner, THE NONHUMAN RIGHTS PROJECT, INC., on behalf of Mari and Vaigai's ("NhRP") application for admission of Jake Davis to the Bar of this Court *pro hac vice* came regularly before this Court on January 16, 2024, at 3:00 PM HST.

This Court, having questioned and received assurances from Hawai'i local counsel Cheryl Nolan as to applicant Jake Davis' civility, and posture to discovery, settlement, and adherence to Haw. R. Sup. Ct. §1.9. The Court also noted the following requirements,

1. Within 10 days after entry of this Order granting the petition for pro hac vice appearance, and within 10 days of making subsequent fee payments in January of each year, pro hac vice counsel shall pay the required fees to the Hawai'i State Bar Association and Office of Disciplinary Counsel.
2. Proof of payment by pro hac vice counsel shall be filed in the record of this Court within 10 days of the Order and January of each additional year under Haw. R. Sup. Ct. § 1.9.
3. This Order is void by operation of law for failure to pay the required fees and for failure to file proof of payment of the fees with this Court.
4. Hawai'i local counsel shall sign all pleadings, motions, briefs, and other documents submitted in this case, participate actively in all phases of the case, be directly involved, and be prepared to proceed with the case as required.
5. Pro hac vice counsel shall abide by the local custom and practice and shall also abide by the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers.
6. Pro hac vice counsel shall have full knowledge of Hawai'i local practice, rules of court, and local law.

7. Hawai‘i local counsel shall file a copy of this Order with the Hawai‘i State Bar Association and the Office of Disciplinary Counsel, and shall notify the Hawai‘i State Bar Association and the Office of Disciplinary Counsel when the pro hac vice counsel's involvement is terminated, the case is closed, or the order granting pro hac vice admission is no longer valid.
8. Pro hac vice counsel and Hawai‘i local counsel are subject to discipline and sanctions for any violations of this Order including Hawai‘i local counsel’s legal obligations in the supervision of legal work,

Based on the foregoing, the Court hereby ORDERS as follows:

NhRP’s application for admission of Jake Davis to the Bar of this Court *pro hac vice* is GRANTED.

IT IS SO ORDERED.

DATED: March 25, 2024

GWBC REJECTED BY THE COURT WITHOUT PREJUDICE GWBC

Hon. Gary W.B. Chang

GWBC REASONS: The order failed to state all of the conditions that the court stated in announcing its ruling during the hearing. GWBC

APPROVED AS TO FORM:

/s/ Patrícia A.V. Sendão
PATRÍCIA A.V. SENDÃO, 11708
DANIEL M. GLUCK, 7959
JACQUELINE M. DE LEEUW HUANG, 11644
Deputies Corporation Counsel
City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai‘i 96813

STATEMENT OF RELATED CASES

The NhRP is not aware of any related cases pending in Hawaiian courts.

DATED: San Diego, California, July 22, 2024.

Respectfully submitted,

/s/ Cheryl Nolan
Cheryl Nolan, Esq.
HI Bar No. 6412
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (703) 955-1793
Email: CherylN@lassd.org
Attorneys for Petitioner-Appellant
Nonhuman Rights Project, Inc.
on behalf of Mari and Vaigai

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following by the Judiciary Information Management System ("JIMS") on July 22, 2024:

Dana M.O. Viola (Bar No. 6095)
Corporation Counsel

Daniel M. Gluck (Bar No. 7959)
daniel.gluck@honolulu.gov
Jacqueline M. De Leeuw Huang (Bar No. 11644)
j.deleeuwhuang@honolulu.gov
Patricia A.V. Sendao (Bar No. 11708)
patricia.sendao@honolulu.gov
Deputies Corporation Counsel

City and County of Honolulu
530 South King Street, Room 110
Honolulu, Hawai'i 96813

Phone Nos.:
(808) 768-5233
(808) 768-5248
(808) 768-5121

Facsimile:
(808) 768-5105

DATED: San Diego, California, July 22, 2024

/s/Cheryl Nolan
Attorney for Petitioner-Appellant Nonhuman Rights Project, Inc.
on behalf of Mari and Vaigai