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IN THE COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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

PETITIONER NONHUMAN RIGHTS PROJECT, INC.'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS; MEMORANDUM IN SUPPORT OF OPPOSITION TO RESPONDENTS' MOTION TO DISMISS; CERTIFICATE OF SERVICE

JUDGE: GARY W.B. CHANG
TRIAL DATE: NONE
HEARING DATE: JAN. 16, 2024
HEARING TIME: 3:00 P.M. HST

PETITIONER'S OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

Petitioner Nonhuman Rights Project, Inc. ("NhRP"), by and through its attorney, Cheryl Nolan, hereby opposes the Motion to Dismiss ("MTD") filed by Respondents City and County of

Honolulu, Department of Enterprise Services and its Director, Dita Holifield, and the Honolulu Zoo Director, Linda Santos' (collectively, "Respondents"), made pursuant to Hawai'i Rule of Civil Procedure ("HRCP") 12(b)(6) and HRCP 7, and Rules 7 and 8 of the Rules of the Circuit Courts of the State of Hawai'i.

DATED: San Diego, California, January 8, 2024

/s/Cheryl Nolan
Cheryl Nolan, Esq.
Attorney for Petitioner NhRP on behalf of Mari and Vaigai

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IN THE COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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 **PETITIONER NONHUMAN RIGHTS PROJECT, INC.'S MEMORANDUM IN SUPPORT OF OPPOSITION TO RESPONDENTS' MOTION TO DISMISS** JUDGE: GARY W.B. CHANG TRIAL DATE: NONE HEARING DATE: JAN. 16, 2024 HEARING TIME: 3:00 P.M. HST

MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

At this stage, the question before the Court is not whether to grant the relief sought in the Petition for a Common Law Writ of Habeas Corpus ("Petition")—ordering Mari and Vaigai released and relocated to an elephant sanctuary accredited by the Global Federation of Animal Sanctuaries ("GFAS"). It is whether to issue an order to show cause ("OSC") and allow the case to proceed to a hearing on the merits. Since the Petition makes a prima facie case that Mari and Vaigai are entitled to immediate release, this Court must deny the MTD and "issue an order directing the person by whom the party is imprisoned or restrained to appear and show cause for the imprisonment or restraint." Haw. Rev. Stat. ("HRS") § 660-7; *see also* Dkt. 1, ¶¶ 92-112 (issuing the order to show cause).

Refusing to deny the MTD and issue an OSC is not only a legal error but would perpetuate a manifest injustice. The lives Mari and Vaigai have been forced to live at the Honolulu Zoo have resulted in physical and psychological damage so great that both elephants are manifesting signs of brain damage. Dkt. 1, ¶ 200. They are unjustly confined and have committed no wrong warranting the loss of liberty they currently endure. Mari and Vaigai should not be denied the opportunity to seek their freedom and beg this Court to engage the fundamental values of empathy and compassion. The NhRP respectfully submits that it is time Hawai'i rejects the irrational and arbitrary notion that only members of the human species may invoke the protections of the Great Writ.

Respondents' MTD must be denied in its entirety because it fails to refute the prima facie case made in the Petition. Respondents rely almost exclusively on the word "person" as it is used in statutes that have no relation to this case, a dictionary definition of the word "person" that is outdated, along with cases that do not stand for the proposition for which they are cited, and musings about the common law that are not legal arguments.

Moreover, Respondents ignore the Petition's most significant authorities, including three opinions from New York Court of Appeals judges: now Chief Judge Rowan Wilson's dissent where he found that habeas corpus was available for an elephant to challenge her unjust imprisonment at the Bronx Zoo; Judge Jenny Rivera's dissent where she found the same elephant was entitled to release under habeas corpus; and Judge Eugene Fahey's concurrence where he urged courts to take seriously the notion that the writ is available to some autonomous nonhuman animals. *See Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 577-626 (2022) (Wilson, J., dissenting); *id.* at 626-42 (Rivera, J., dissenting); *Nonhuman Rights Project, Inc., on behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1055-59 (2018) (Fahey, J., concurring) ("*Tommy*").

ARGUMENT

A. Respondents' MTD must be denied because Mari and Vaigai have made a prima facie case entitling them to relief

"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). This is true even in novel common law cases. For example, in *Ono v. Applegate*, "[t]he sole question presented by the Motion to Dismiss was . . . whether a common law dram shop action existed in Hawaii. The court below denied the Motion to Dismiss, thereby allowing the common law action, and the case proceeded to trial." 62 Haw. 131, 133 (1980). In affirming the lower court's denial of the Motion to Dismiss, the Supreme Court of Hawai'i recognized that "[u]nder the old common law rule, an injured third party could not recover against a supplier of liquor for injuries suffered as a result of the tavern patron's intoxication." *Id.* at 134. However, "[i]n recent years, numerous courts have refused to follow the old rule of non-liability and have allowed the injured person to recover from the liquor supplier." *Id.* Accordingly, "[t]he court below acted properly in denying the Motion to Dismiss and in allowing the [Plaintiff] to bring a common law dram shop action against [Defendant]" because "[t]he complaint did state a claim upon which relief could be granted and the [Plaintiff] was entitled to be heard on the merits." *Id.* at 141. Denying the Motion to Dismiss and allowing the case to proceed to a merits determination turned on the Court's recognition of the progress of society. *See id.* ("We hold that the consequences of serving liquor to an intoxicated motorist, in light of the universal use of automobiles and the increasing frequency of accidents involving drunk drivers, are foreseeable to a tavern owner."). Similarly, this Court should look to the progress of society with respect to elephant captivity in denying Respondents' MTD and issuing an OSC. *See* Dkt. 1, ¶¶ 130-155 (justice and changing social norms require this Court to recognize Mari and Vaigai's right to bodily liberty).

Furthermore, this Court must accept the NhRP's allegations as true and view them in the most favorable light. *Wong v. Clayton*, 111 Hawai'i 462, 476 (2006) ("dismissal is proper only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief'") (citation omitted). Under this standard, the NhRP has made a sufficient case at this stage for Mari and Vaigai's release and transfer to an elephant sanctuary. *See Breheny*, 38 N.Y.3d at 634 (Rivera, J., dissenting) (Per testimony provided by the same elephant scientists here, Judge Jenny Rivera found that "[b]ased on the record developed below, the Nonhuman Rights Project has made the case for Happy's release and transfer to an elephant sanctuary, and the writ should therefore be granted.").

Six declarations, from seven of the world's most renowned experts on elephant cognition and behavior, submitted in support of the Petition establish that elephants are autonomous and extraordinarily cognitively complex beings with complex biological, psychological, and social needs; that zoo captivity is physically and psychologically devasting to elephants; that the Honolulu Zoo is an unacceptable place for elephants since it cannot begin to meet their complex needs; and that the only acceptable place for Mari and Vaigai is a GFAS-accredited elephant sanctuary. *See* Dkt. 1, ¶¶ 25-91 (the expert declarations). This evidence, viewed in the light most favorable to Mari and Vaigai, permits the Court to find that they are entitled to release from the Honolulu Zoo. *Id.* at ¶¶ 92-112 (issuing an order to show cause).

Specifically, the Petition establishes that (1) because Mari and Vaigai are autonomous and extraordinarily cognitively complex, they have the common law right to bodily liberty protected by habeas corpus, and (2) because they are imprisoned at the Honolulu Zoo, their right has been violated. *Id.* at ¶¶ 113-206 (argument). Taking the Petition's allegations as true (as the Court must), the next step is to issue an OSC, shifting the burden to the Respondents so they can

attempt to demonstrate that their imprisonment of Mari and Vaigai is lawful. *Id.* at ¶ 97 (citing HRS § 660-17). In issuing an OSC, this Court need not make an initial determination that Mari and Vaigai have the right to bodily liberty because the Court need only assume (without deciding) that the elephants could have the right. *Id.* at ¶¶ 7, 98, 107. *See also Matter of Nonhuman Rights Project, Inc. v. Stanley*, 49 Misc.3d 746, 748 (Sup. Ct. 2015) ("Given the important questions raised here, I signed the petitioner's order to show cause, and was mindful of petitioner's assertion that 'the court need not make an initial judicial determination that [chimpanzees] Hercules and Leo are persons in order to issue the writ and show cause order.'").

That this case is novel is no reason for this Court to refuse to issue an OSC. Hawaiian courts are exceedingly unafraid to evolve the law in novel common law cases, going as far as to call "the absence of precedent [] a feeble argument" against granting relief in such matters. *Fergestrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 376 (1968). Indeed, "[t]he 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." *Id. See also* Dkt. 1, ¶¶ 113-121 (habeas corpus has long been used in novel situations); *see also Breheny*, 38 N.Y.3d at 584 (Wilson, J., dissenting) ("[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.") (citations omitted); *id.* at 628 (Rivera, J., dissenting) ("We are here presented with an opportunity to affirm our own humanity by committing ourselves to the promise of freedom for a living being with the characteristics displayed by Happy [the elephant]."); *id.* at 629 ("novel questions merely present opportunities to develop the law").

B. The right to bodily liberty and legal personhood are not limited to humans

Respondents argue that because "the Legislature [has not] included nonhuman animals in the definition of people," "elephants are not statutorily eligible for a writ of habeas corpus." Dkt. 27, p. 8. In support of this argument, they cite numerous statutes that use the word "person" although they have no relation to this case. There are citations to the Hawai'i Penal Code, a Historic Preservation Program, Campaign Finance laws, Income Tax Law, the Uniform Probate Code, the Uniform Limited Liability Company Act, the State Water Code, and at least one statute entitled, "Disposition of Remains," among quite a few others. *See generally* Dkt. 27, pp. 6-7 (listing statutes). Their argument for invoking these varying statutes is simple: because "there is no mention of nonhuman animals in any of these [statutory] definitions," the Petition must be denied.

Respondents' contentions are non-sequiturs that do little but confuse the underlying issue. The question before this Court is not whether Mari and Vaigai can participate in a historic preservation program or whether they are subject to campaign finance laws, it is: Are they "entitled to release from confinement through the writ of habeas corpus?" *Breheny*, 38 N.Y.3d at 628 (Rivera, J., dissenting). "That question, one of precise moral and legal status, is the one that matters here." *Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring). Moreover, "[t]his is not merely a definitional question, but a deep dilemma of ethics and policy that demands our attention." *Id.* at 1058. The only statutes that warrant consideration by this Court are HRS § 660-3 and, arguendo, HRS § 1-19.

i. HRS § 660-3 is a procedural statute that does not curtail substantive entitlement to the Great Writ

Respondents argue that only humans can invoke the Great Writ's protections because the "plain language of HRS § 660-3 is clear that writs of habeas corpus are limited to cases in which a 'person' is unlawfully restrained," and had "the Legislature wanted to include elephants or other nonhuman animals in HRS chapter 660, it would have." Dkt. 27, pp. 5, 7 (cleaned up).

In support of their contention, Respondents cite the 9th edition of *Black's Law Dictionary*, which "defin[es] 'person' as 'A human being." *Id.* at 5. However, this is merely one meaning of "person," certainly not its exclusive meaning. *Black's Law Dictionary*, "the gold standard for the language of the law," is now in its "greatly expanded 11th edition, with new material on every page." *Black's Law Dictionary, 11th*, THOMAS REUTERS (last visited Dec. 7, 2023), https://bit.ly/41MYK7R. Although the 11th edition contains the definition of "person" Respondents cite, it also contains a (corrected) definition of "person" 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 (11th ed. 2019) (quoting JOHN SALMOND, JURISPRUDENCE 318 (10th ed. 1947)) (emphasis added); *see also* Dkt. 1, ¶ 124 (same).[1] 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 ELEVENTH EDITION, BLACK'S LAW DICTIONARY (11th ed. 2019).

[1] In earlier editions of Black's, including the 9th, the dictionary had misquoted John Salmond's definition of "person" as "any being whom the law regards as capable of rights and duties."

Quite simply, Respondents' cherry-picked citation from the outdated 9th edition is grossly misleading because the (corrected) 11th edition specifically shows that "person" is not limited to humans. *See, supra*, THOMAS REUTERS ("If you're using an edition that was current when you were in law school, you're out of date.").

More to the point, Respondents' argument is predicated on the erroneous assumption that habeas corpus in Hawai'i is statutory rather than common law. Contrary to this assumption, Chapter 660 is a purely procedural statute and does not (as it cannot) curtail the substantive entitlement to the Great Writ, which is a 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 Jenny Rivera of the New York Court of Appeals 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.'"[2] *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) ("*Gold Coast*") ("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

[2] *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").

statutory enactments will not be construed as abrogating the common law 'unless that result is imperatively required.'") (citation omitted) (underline omitted); *see also* Dkt. 1, ¶¶ 130-191 (affirmative case for evolving the common law).

The ultimate question before this Court is whether it should recognize Mari and Vaigai's common law right to bodily liberty protected by habeas corpus and not whether the elephants are "persons." Dkt. 1, ¶¶ 122-29 (framing the question presented); *see also Breheny*, 38 N.Y.2d at 580-81 (Wilson, J., dissenting) ("Whether an elephant (or other animal) is a 'person' is not relevant to determining whether the writ of habeas corpus can be used to challenge a confinement."). However, the Court does not need to provide an answer to that question for purposes of issuing an OSC. It can be assumed that Mari and Vaigai have this right based on the NhRP's factual allegations the Court must accept as true. *See generally Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772) (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.); *see also* Dkt. 1, ¶ 107 (discussing *Somerset*, which is part of Hawaiian law), *id.* at ¶¶ 117-18 (same). Once that assumption is made, it is clear that the Petition states a prima facie case entitling the elephants to a merits hearing, which would determine if they do—in fact—possess the right to bodily liberty and are entitled to release. *Id.* at ¶¶ 92-122 (issuing the order to show cause); *see also Breheny*, 38 N.Y.3d 555, 628 (2022) (Rivera, J., dissenting) (an elephant's self-determinative behavior "means that a court may consider whether to issue the writ because it is unjust to continue [the elephant]'s decades-long confinement in an unnatural habitat where she is held for the sole purpose of human entertainment").

ii. HRS § 1-19 does not preclude habeas corpus relief for nonhuman animals

Respondents would like this Court to believe that the question of whether an elephant is a "person" for purposes of habeas corpus is a matter of statutory interpretation, but it is not. Dkt. 1, ¶ 122-129. They argue that even though § 660-3 does not define "person," the "Legislature has already provided a catchall definition of 'person' in HRS § 1-19, and it does not include animals." Dkt. 27, p. 5. Respondents' argument fails for the following reasons.

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). By analogy, the import of this language is straightforward: HRS § 1-19 cannot inform the term "person" in HRS § 660-3 because there is no clear legislative intent to do so.

Second, Respondents provide no basis for their position that HRS § 1-19 restricts the definition of "person" in HRS § 660-3 to humans besides providing a block quote of the former statute's language. Dkt. 27, p. 5. There is an absence of language manifesting a legislative intent to exclude nonhuman animals 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." Although Respondents would have this Court believe that "the word 'individual' does not include elephants," that position is wrong legally and semantically. Dkt. 27, p. 7.

At least two judges on the Supreme Court of Hawai'i 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, https://bit.ly/3HnUbrv (last visited Dec. 6, 2023); *see also* Dkt. 1, ¶ 122 n.271 (same). Accordingly, "individual" can include elephants within its definition. Whether Mari and Vaigai are "persons" for purposes of habeas corpus relief simply depends on whether this Court recognizes their right to bodily liberty, based on fundamental principles of the common law. Dkt. 1, ¶¶ 130-191 (arguing for the recognition of Mari and Vaigai's right to bodily liberty based on justice, liberty, and equality, among others).

Moreover and as discussed *supra*, (B)(i), the question before this Court should not be framed affirmatively, as in, "are elephants persons?" Rather, the right to bodily liberty must be the focus of the court's substantive inquiry. *See Tommy*, 31 N.Y.3d at 1057 (Fahey, J., concurring) ("The better approach in my view is to ask not whether a chimpanzee fits the definition of a person . . . but instead whether he or she has the right to liberty protected by habeas corpus."). Once this Court recognizes the elephants' right to bodily liberty, they are "persons" for purposes of seeking habeas corpus relief because the term "person" is merely a designation that attaches to any individual or entity with a legal right. Dkt. 1, ¶ 124 (noting that nonhuman animals "'may conceivably be legal 'persons' if they possess legal rights") (citation omitted).

C. Respondents egregiously misrepresent their citations

Respondents also argue that the term "individual" in HRS § 1-19 cannot include elephants because "the category of 'nonhuman animal' markedly strays from the commonality of" the enumerated categories in the statute. Dkt. 27, p. 7 Quoting *Priceline.com, Inc. v. Dir. of Taxation*, 144 Hawai`i 72, 90 (2019), Respondents claim that "where general words follow specific words in a statute, those general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Id*. But Respondents's citation of *Priceline.com, Inc*. is misleading.

In *Priceline.com, Inc.*, the Supreme Court of Hawai'i was simply defining the doctrine of ejusdem generis, and explicitly rejected it in that case. On the very next page of the opinion, the Court said, "we decline to apply the doctrine of ejusdem generis, and instead interpret [the phrase in question] in accordance with its plain text and legislative history." *Id.* at 91 (underline omitted). Not only is Respondents' cherry-picked language from *Priceline.com, Inc.* rejected on the next page of the opinion, but the case supports the NhRP's position that the ejusdem generis canon has no applicability to this case. A prerequisite for applying ejusdem generis, as relevant here, is the requirement to "identify the commonality shared by the enumerated examples," *id*. at 90, but Respondents merely assert—and do not attempt to identify—the commonality of the enumerated categories in HRS § 1-19.

Respondents also misleadingly cite *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1753 (2020) for its language that "the no-elephants-in-mouseholes canon . . . recognizes that [the legislature] does not alter fundamental details of a regulatory scheme in vague terms or ancillary provisions." Dkt. 27, pp. 7-8. As an initial matter, Respondents' strained attempt at fanciful wordplay aside, *Bostock* is a strange case for them to cite because its holding accords with the Court's recognition of the elephants' right to bodily liberty. There, the U.S. Supreme Court prohibited Title VII

discrimination based on sexual orientation and gender stereotypes, i.e., for being homosexual and for being transgender. *See generally Bostock*, 140 S. Ct. at 1731. As the NhRP argues in its Petition, bias towards individuals based on their sex is analogous to bias towards individuals based on their species. Dkt. 1, ¶¶ 170-191 (the comparative component of equality); *id.* at ¶ 187 n.303 (defining speciesism).[3]

More pertinently, Respondents yet again cite language without providing full context, misleading this Court into believing that the "no-elephants-in-mouseholes canon" applied in *Bostock*. Their cited language is followed one sentence later with the comment that the canon "has no relevance here." *Bostock*, 140 S. Ct. at 1753. Likewise, that canon has no relevance in this common law habeas corpus case. The import of *Bostock* (if any) should be its holding, not the language the Court mentioned and then immediately rejected. That holding noted the following: "As today's case [] exemplif[ies], applying protective laws to groups that were politically unpopular at the time of the law's passage . . . may be seen as unexpected. But to refuse enforcement just because of that, because the parties before us happened to be unpopular at the time of the law's passage, would not only require us to abandon our role as interpreters of statutes; it would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms." *Bostock*, 140 S. Ct. at 1751. The NhRP "has never hidden in a mousehole; it has been standing before [this Court] all

[3] *See also* RAFFAEL N. FASEL AND SEAN C. BUTLER, ANIMAL RIGHTS LAW 56 (2023) ("Racists violate the principle of equality by giving greater weight to the interests of members of their own race when there is a clash between their interests and the interests of those of another race. Sexists violate the principle of equality by favouring the interests of their own sex. Similarly, speciesists allow the interests of their own species to override the greater interests of members of other species. The patter is identical in each case.") (citation omitted); *see also* Elizabeth Barber, *What Would It Mean To Treat Animals Fairly?*, THE NEW YORKER (Dec. 16, 2023), https://bit.ly/3RHrfPQ ("Like racism and sexism, speciesism denies equal consideration in order to maintain a status quo that is convenient for the oppressors.").

along." *Id.* at 1753. Mari and Vaigai should be entitled to the benefit of common law habeas corpus, especially since nothing prohibits them from seeking relief through the Great Writ.

Priceline.com, Inc. and *Bostock* are not the only cases Respondents misleadingly cite. *K.L. v. R.I. Bd. of Educ.*, 907 F.3d 639, 640 (1st Cir. 2018), a federal opinion from a circuit to which Hawai'i's federal courts do not even belong, is more of the same. *K.L.* is cited for the argument that "the 'whole code' canon of statutory interpretation provides that 'courts [are to] construe terms across different statutes consistently," seemingly implying definitions of "person" in statutes unrelated to HRS § 660-3 should control this Court's reading of that chapter. Dkt. 27, pp. 5-6 (citing *K.L.*, 907 F.3d at 646). Yet again, one sentence later the 1st Circuit refutes this line of reasoning. It said, "the notion that Congress, acting on legislation separated by forty years and addressing different subjects, would be attentive to the consistent usage of a phrase, reflects a fanciful version of the legislative drafting process." *Id.* The 1st Circuit continued: "Indeed, there is little evidence that treating the United States Code as a single body of consistent law 'reflects how Congress drafts or even how it tries to draft' legislation." *Id.* Aside from their misleading and inapplicable citation, Respondents do not cite any authority for the position that the "whole code" canon applies to interpreting Hawai'i legislation. The notion that the Hawaiian Legislature intended HRS § 1-19 (or any of the statutes cited by Respondents) to apply to Hawai'i's habeas corpus procedural statute is indeed a fanciful version of the legislative drafting process absent authority to the contrary.[4]

[4] It bears noting that the text Respondents quoted from *K.L.* is itself quoted text from an article citable as Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside -- an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 936 (2013). In that article, which Respondents do not even acknowledge in their MTD with a "citation omitted" qualifier, is further evidence of how roundly inapplicable the "whole code" canon of statutory interpretation remains. The article, which is "the most extensive survey of [its] nature ever conducted," *id.* at 924, reports on the results of "a survey of 137

D. Chapter 660 and the common law are not in conflict

Respondents contend that "if any common law principles differ from the language of chapter 660, it is unclear whether such differing common law principles would still apply." Dkt. 27, p. 8. They add, "[e]ven if this Court were to rely solely on English common law, however, Petitioner's claims would still fail." *Id.* at 9. As shown above, Chapter 660 is merely a procedural statute, and it is for this Court to decide the contours of the Great Writ in Hawai'i. *Supra*, (B)(i). Additionally, the common law of England "is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by . . . the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." HRS § 1-1; *see also Smith v. Smith*, 56 Haw. 295, 303 (1975) ("We follow the common law in this jurisdiction.").

For example, in *Gold Coast*, the State of Hawai'i argued that the common law doctrine in question had been "implicitly abolished in Hawai'i." 140 Hawai'i at 451. The Supreme Court of Hawai'i rejected this argument and noted, "[o]ur courts have repeatedly recognized the importance of the common law and demonstrated an unwillingness to impliedly reject its principles." *Id.* at 451-52. It added, "statutes which abrogate the common law must do so expressly, not impliedly, and such statutes 'must be strictly construed.'" *Id.* at 451 (citation

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congressional staffers drawn from both parties . . . on topics ranging from [Congresspersons'] knowledge and use of the canons of interpretation [] to legislative history." *Id.* at 902. The findings are jarring. As pertinent here, the authors noted the following: "our respondents also vigorously disputed that the first cousin of the whole act rule--the 'whole code rule,' under which courts construe terms across different statutes consistently--reflects how Congress drafts or even how it tries to draft. Specifically, only 9% of respondents told us that drafters often or always intend for terms to apply consistently across statutes that are unrelated by subject matter." *Id.* at 936. Based solely on this finding, this Court should reject Respondents' unsupported contention that definitions of "person" in one Hawaiian statute apply to the same term in another statute, let alone the entire Hawaiian code.

omitted). Respondents provide no authority for the position that Chapter 660 abrogates the common law. They simply muse about what-ifs, which is not a legal argument.

Furthermore, the NhRP is not asking this Court to rely "solely on English common law" meaning the common law of William Blackstone's era. *See Welsh v. Campbell*, 41 Haw. 106, 120 (1955) ("the common law is not arrived at by simply following the English decisions"). Although English common law remains highly relevant for showing the inherent flexibility of habeas corpus,[5] explicit in the Petition is a request for this Court to apply science and the fundamental common law principles of justice, liberty, and equality in evolving the common law to recognize the applicability of habeas corpus to Mari and Vaigai. Dkt. 1, ¶¶ 130-191 (affirmative case for updating the common law). Evolving the common law is undoubtedly within the purview of this Court. *See, e.g.*, *Vierra v. Campbell*, 40 Haw. 86, 89 (1953) ("This court has held that the common law consists of fundamental principles and not set rules, and 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."); *Welsh*, 41 Haw. at 119 (The common law's "'principles are developed by *judicial decisions* as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice.'") (citation omitted); *see also* Dkt 1, ¶¶ 130-155 (justice and changing societal norms warrant updating the common law).

E. This Court should rely on the NhRP's citations in support of Mari and Vaigai's right to bodily liberty because they are more persuasive than Respondents'

[5] *See, e.g.,* Dkt. 1, ¶¶ 113-121 (examples of habeas corpus being used in novel situations at common law).

Respondents' MTD opens with an enumerated list of cases the NhRP has lost.[6] Dkt. 27, pp. 2-3 (listing cases). While it is true that no U.S. court has yet granted habeas corpus relief to a nonhuman animal, this fact is irrelevant because the NhRP is not currently asking for the Court to make a merits determination on the Petition. In the immediate procedural posture, the NhRP is seeking an OSC, which some judges have issued (while other judges have recognized can be issued) on behalf of nonhuman animals. *See* Dkt. 1, ¶ 111 (discussing OSCs that have been issued on behalf of nonhuman animals); *see also Breheny*, 38 N.Y.3d at 577-626 (Wilson, J., dissenting); *id.* at 626-42 (Rivera, J., dissenting); *Tommy*, 31 N.Y.3d at 1055-59 (Fahey, J., concurring). The MTD rounds out with the comment, "[n]o court has expanded [habeas corpus] to nonhuman animals." *Id.* at 10. This is a false statement. Habeas corpus has been extended to at least one nonhuman animal abroad. *See* Dkt. 1, ¶ 154 ("In November 2016, an Argentinian court granted habeas corpus relief to an imprisoned chimpanzee named Cecilia."). This Court should not so easily ignore the cases in which OSCs were issued on behalf of nonhuman animals and the opinions authored by now Chief Judge Wilson, Judge Rivera, and Judge Fahey, as Respondents have done by refusing to address them in their MTD.

Neither the Respondents' citations that reject the NhRP's argument nor the NhRP's citations that affirm its argument are controlling in this novel matter. Accordingly, the Court should rely on the more persuasive authorities. *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

[6] The NhRP prides itself on its transparency. Every case filed since the organization's founding (along with associated papers and court orders) can be found on the NhRP's website. *See generally The clients we're fighting for*, NONHUMAN RIGHTS PROJECT, https://bit.ly/3vmgyux (last visited Dec. 5, 2023).

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."). The opinions authored by Judge Fahey, Judge Wilson, and Judge Rivera are far more thorough, well-reasoned, and attendant to the circumstances of this case than any of the cases cited by Respondents.[7]

F. This case is not a matter for the Legislature

Respondents conclude their MTD with the following remark: "Petitioner may advocate for policy changes at the Legislature and City Council, but Petitioner cannot use a habeas petition to accomplish its policy goals." Dkt. 27, p. 10. Respondents cite no authority for this position and this argument was addressed head-on by Judge Wilson's dissenting opinion in *Breheny*:

> The judges, Justice Paine among them, who issued writs of habeas corpus freeing enslaved persons, or liberating women and children from households run by abusive men, or ordering the return home of underage soldiers could have said, as the majority does here, "that's a job for the legislature." They could have said, "existing law offers some protections, and we dare not do more." They could have said, "we can't be the first." But they did not. None of those declamations is remotely consistent with our Court's history, role or duty. Where would we or Judge Cardozo be, had he declined to act for any of those reasons? The Great Writ's use, as a case-by-case tool to probe whether the law may need to adapt, is part of the fundamental role of a common-law court to adapt the law as society evolves.

[7] Furthermore, Respondents' citation to *State v. LeVasseur*, 1 Haw. App. 19 (1980) is inapposite because it deals with an interpretation of the Hawai'i Penal Code, which does not cover habeas corpus. *See generally* Dkt. 27, p. 6 n.5 (discussing *LeVasseur*).

38 N.Y.3d at 617 (Wilson, J., dissenting). As this Court is undoubtedly aware, contending that "only the legislature can provide for such a cause of action" is an error of "Brobdingnagian proportions." *Fergestrom*, 50 Haw. at 375. To accept that the Legislature must be the branch of government to decide whether Mari and Vaigai have a common law right to bodily liberty protected by habeas corpus, "would constitute more than accepting a limited view of the essence of the common law." *Id.* Petitions for writs of habeas corpus are common law actions and legislative deference in such actions would constitute "no less than an absolute annihilation of the common law system." *Id.* Judge Rivera understood this, too:

> The difficu[lty] of the task–i.e., determining the reach of a substantive common-law right whose existence pre-dates any legislative enactment on the subject and whose core guarantees are unalterable by the legislature–is no basis to shrink from our judicial obligation by recasting it as the exclusive purview of the legislative branch. The common law is our bailiwick. To be clear, the legislature may expand a nonhuman animal's rights against cruel treatment and inhumane conditions, but the legislature may not limit rights that spring from an animal's status as an autonomous being. Put another way, statutory rights may expand existing rights and protections for nonhuman animals–and humans–but 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.

Breheny, 38 N.Y.3d at 633-34 (Rivera, J., dissenting); *see also State v. Uyesugi*, 100 Haw. 442, 478 (2002) (Appendix A) ("The possibility of unintended consequences resulting from establishing precedent should not, in my view, alter publication when warranted. We cannot hide behind the fear that, in deciding a case, we may be creating precedent. That is the nature of our common law."); *id.* ("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."). Hawaiian courts do not wait for legislative action to change archaic common law. They must not begin to do so here. *See generally* Dkt, 1, ¶¶ 192-198 (rejecting legislative deference in common law actions).

CONCLUSION

Since the Petition establishes a prima facie case that Mari and Vaigai are entitled to habeas corpus relief, this Court must deny Respondents' MTD and issue an OSC. In their MTD, Respondents provide cherry-picked citations that misrepresent their cases and are grossly misleading. Accordingly, we respectfully urge the Court to view all of their court filings as suspect.

DATED: San Diego, California, January 8, 2024

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IN THE COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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 **CERTIFICATE OF SERVICE** JUDGE: GARY W.B. CHANG TRIAL DATE: NONE HEARING DATE: JAN. 16, 2024 HEARING TIME: 3:00 P.M. HST

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following by the Judiciary Electronic Filing System (JEFS) on January 8, 2024:

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