CAAP NO. 24-323

IN THE INTERMEDIATE COURT OF APPEAL

STATE OF HAWAI‘I

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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
Appeal from the First Circuit Court
Final Judgment, March 25, 2024
Hon. Gary W.B. Chang

NONHUMAN RIGHTS PROJECT, INC'S MOTION FOR RETENTION OF ORAL ARGUMENT

MEMORANDUM IN SUPPORT OF MOTION FOR RETENTION OF ORAL ARGUMENT

CERTIFICATE OF SERVICE

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I do hereby certify that the foregoing is a full, true and correct copy of the official court record of the Courts of the State of Hawai`i.
Dated at: Honolulu, Hawai`i 08-DEC-2025, /s/ Elizabeth Zack, Clerk of the Supreme Court, State of Hawai`i

MEMORANDUM IN SUPPORT OF
MOTION FOR RETENTION OF ORAL ARGUMENT

Plaintiff-Appellant Nonhuman Rights Project, Inc. ("NhRP"), by and through undersigned counsel, hereby respectfully moves this Court, pursuant to Hawai'i Rule of Appellate Procedure 34(c), for retention of oral argument for the reasons set forth below.

I. INTRODUCTION

Some of the most learned minds of the legal profession have expressed their belief that oral argument plays an essential role in appellate advocacy. John William Davis was Solicitor General under President Woodrow Wilson. In a famous lecture, *The Argument of an Appeal*, Mr. Davis remarked upon the importance of oral advocacy.

> The appellate court which I most frequently encountered in my early days [] made no secret of the fact that it regarded the time spent in hearing cases as a sheer waste; and the announcement "Submitted on briefs" always won an approving nod from the bench. Fortunately, I think, that was an idiosyncrasy which has passed away even in that tribunal. There is much testimony, ancient and modern, for the contrary view.[1]

Before joining the Supreme Court, Antonin Scalia once "quipped [that] oral arguments were 'a dog and pony show,'" "but after sitting for almost two decades he [came to] believe[] that 'things can be put in perspective during oral argument in a way that they can't in a written brief.'"[2]

Judge Myron Bright of the Eighth Circuit observed, "oral argument is an essential component of the decisionmaking process and plays an important role in assisting the appellate

[1] John W. Davis, *The Argument of an Appeal*, 3 J. APP. PRAC. & PROCESS 745, 748 (2001).

[2] Timothy R. Johnson, James F. Spriggs II, & Paul J. Wahlbeck, *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices' Decisions?*, 85 WASH. U. L. REV. 457, 458 (2007) (cleaned up).

judge in reaching a decision"; he added, "[v]ague points, complex points, and points that were simply overlooked may become evident during oral argument."[3]

Chief Justice William Rehnquist believed in oral argument: "You could write hundreds of pages of briefs, and you are still never absolutely sure that the judge is focused on exactly what you want him to focus on in that brief. Right there at the time of oral argument you know that you do have an opportunity to engage or get into the judge's mental process."[4]

Oral argument is not only encouraged by well-known legal professionals, but quantitative data supports its inclusion during litigation. In 2007, Timothy R. Johnson and his co-authors published an article "testing empirically the extent to which Justices utilize information that can be drawn from [] oral arguments, as well as the extent to which such information affects the decisions they make."[5] Their findings are compelling: "we offer substantial evidence for the position that oral arguments provide the Justices with information and that the attorneys' arguments influence the Justices' votes in a case."[6]

II. BACKGROUND

On October 31, 2023, the NhRP commenced this action by filing a common law petition for a writ of habeas corpus ("Petition") on behalf of Mari and Vaigai, two Asian elephants confined at the Honolulu Zoo. See Judiciary Information Management System ("JIMS"), Dkt. No. 13 (Record on Appeal), p. 1 (Case Detail Docket List), No. 1. On November 20, 2023, Respondents-

[3] Myron H. Bright, *The Power of the Spoken Word: In Defense of Oral Argument*, 72 IOWA L. REV. 35, 36 (1986) (cleaned up).

[4] *Id.* at 36–37 (citation omitted) (cleaned up).

[5] 85 WASH. U. L. REV. at 460.

[6] *Id.* at 525 (cleaned up).

Appellees, the City and County of Honolulu, Department of Enterprise Services, its Director Dita Holifield, and the Honolulu Zoo Director Linda Santos (collectively, "Respondents"), filed a motion to dismiss the Petition ("MTD") pursuant to Hawai‘i Rules of Civil Procedure, Rule 12(b)(6). *Id.* at p. 5, No. 27. The NhRP opposed the MTD on January 8, 2024. *Id.* at p. 8, No. 45. Respondents filed their reply brief on January 10, 2024. *Id.* at p. 9, No. 47. On January 16, 2024, the First Circuit Court conducted a nearly forty-minute hearing on the MTD and on an uncontested application for the *pro hac vice* admission of Mr. Jake Davis.[7] At the conclusion of the hearing, the Court granted the MTD without prejudice and entered judgment. *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 Jurisdictional Statement was timely filed on June 19, 2024. *Id.* at Dkt. No. 17. The NhRP submitted its opening brief on July 22, 2024, *id.* at Dkt. No. 19, followed by Respondents' answer brief on August 29, 2024. *Id.* at Dkt. No. 27. The NhRP's reply brief was filed on September 23, 2024. *Id.* at Dkt. No. 35. The Court issued the Order of No Oral Argument on November 28, 2025. *Id.* at Dkt. No. 55.

III. STATEMENT OF REASONS FOR HOLDING ORAL ARGUMENT

Oral argument is necessary because this case raises a question of first impression in Hawai‘i: do the protections afforded at common law by the writ of habeas corpus extend to Mari and Vaigai, autonomous and extraordinarily cognitively complex individuals who are not *Homo*

[7] Not addressed in this discussion are the repeated efforts to admit Mr. Jake Davis, Esq. to this Court *pro hac vice*. The latest *pro hac vice* application, which remains unopposed, is currently awaiting a ruling. *See* JIMS, Dkt. 51.

sapiens but confront the world in ways science has repeatedly shown parallel human experiences? Addressing this question requires a detailed analysis at the intersection of law and science.

Only with this foundational knowledge of who elephants are, including their unique needs, desires, and autonomous nature, can the Court meaningfully undertake the threshold task of applying proper habeas corpus procedures to Mari and Vaigai's claim for liberty. The First Circuit Court erred in this task, declining to issue an order to show cause despite the Petition establishing a prima facie case for relief. The error underscores the complex nature of the case and need for oral argument.

Determining whether a prima facie case exists, and more broadly, who may invoke habeas corpus protections, requires a common law analysis rather than a statutory one. The First Circuit Court adopted,[8] and Respondents embraced, a literal reading of the term "person" found in Hawai'i Revised Statutes § 660-3, which improperly foreclosed further analysis in this novel matter. Instead, this Court must interpret "person" flexibly without improperly attributing legislative limitations. The perceived complexity of the personhood analysis also underscores the need for oral argument.

Along with clarifying the specifics of legal personhood, further elucidation of the following topics may be helpful:

- The evolutionary development of the common law;
- The application of compelling common law themes like justice, changing societal norms, liberty, and equality;
- The concept of species membership;

[8] *See, e.g.,* JIMS, Dkt. 33 (Transcript of Proceedings, 1.16.2024), p. 28 ("habeas corpus is not available to the elephants in question because the two elephants in question are not persons within the meaning of the statute").

- The implications of *Cecilia's Case*;
- Concerns regarding the floodgates or slippery slope debate; and,
- The balance between common law stewardship and legislative deference.

Courts faced with similar questions have gone above and beyond to facilitate oral argument, recognizing that these issues are best resolved with as much input as time will allow. For example, in an analogous 2018 case, the NhRP successfully obtained the world's first habeas corpus order to show cause for an elephant. A New York trial court devoted *thirteen hours* over three days to oral argument on the issue. It was a remarkable judicial commitment, but necessary given the intricate, multi-layered analysis required. The court found the NhRP's arguments were "extremely persuasive for transferring Happy from her solitary, lonely one-acre exhibit at the Bronx Zoo, to an elephant sanctuary on a 2300 acre lot."[9] *Nonhuman Rights Project v. Breheny*, 2020 WL 1670735, at *1, *10 (N.Y. Sup. Ct. 2020).

For the New York court, the value of oral argument was clear, and courts in Hawai‘i have expressed the same view. In *Blair v. Harris*, former Justice of the Supreme Court of Hawai‘i, Simeon R. Acoba, Jr., observed that "the benefit of oral argument is evident" because it "'can assist judges in understanding issues, facts, and arguments of the parties, thereby helping judges decide cases appropriately.'" 98 Hawai‘i 176, 188 (Acoba, J., concurring in part and dissenting in part) (quoting R.J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 IOWA L. REV. 1, 4 (1986)). Justice Acoba further explained that "[a] dialogue among the members of the court and counsel, which is the essence of oral argument, enlivens the written briefs, heightens our awareness of what is significant to the parties, and

[9] However, the court ultimately found itself "regrettably" bound by appellate precedent and denied the petition. *Nonhuman Rights Project v. Breheny*, 2020 WL 1670735, at *1, *9 (N.Y. Sup. Ct. 2020).

invigorates our analytical senses." *Id.* In his view, "justices [] better understand the practical ramifications of our decisions when we hold oral argument," *id.*, and the "foregoing benefits of oral argument . . . outweigh any perceived disadvantage." *Id.* at 187. Ultimately, he concluded that "parties should be entitled to employ oral advocacy in their efforts to persuade us" because courts "should take part in a complete deliberative process, for the impact of [a] decision extends beyond the facts and parties involved in the case." *Id.*

Justice Acoba is not alone in Hawai'i in recognizing the essential role that oral argument plays during the judicial process. Earlier iterations of the state supreme court have also exercised their discretion to grant oral argument when "the issues raise a matter of great public interest." *Kalima v. State*, 111 Hawai'i 84, 97 (2006). Happy's case, discussed above, illustrates the great public interest generated by habeas corpus litigation challenging the injustice of confining elephants in zoos. The case drew extraordinary attention, with nearly 1.5 million individuals calling for her release from the Bronx Zoo.[10] While this case has not yet amassed the same volume of engagement, it has still generated substantial public interest. Despite little movement in the case over the past year, nearly thirty-six thousand individuals have called for Mari and Vaigai to be released from the Honolulu Zoo to an accredited sanctuary.[11] This great public interest underscores the need for oral argument where competing viewpoints can be sufficiently explored, and the Court can better understand the practical, moral, and novel aspects of the case.

Even the Hawai'i State Legislature has affirmed the importance of oral argument during the appellate process. By enacting Hawai'i Revised Statutes § 602-55, which provides that

[10] *End Happy the Elephant's 10 Years of Solitary Confinement*, change.org, available at: https://www.change.org/p/end-happy-the-elephant-s-10-years-of-solitary-confinement.

[11] *Free the Honolulu Zoo elephants to a sanctuary*, change.org, available at: https://www.change.org/p/free-the-elephants-suffering-at-the-honolulu-zoo-to-a-sanctuary.

"[p]arties are entitled to a hearing before a panel of not less than three intermediate appellate judges," the Legislature has made clear that litigants should have the opportunity to address the Court directly. This statutory commitment reflects a belief that oral argument is a critical component of a thorough and transparent judicial system. A system that promotes thoughtful deliberation and enhances the legitimacy of judicial outcomes.

IV. CONCLUSION

During oral argument, the Court will be able to make complex determinations with the aid of clarification and substantive engagement, the hallmarks of oral advocacy. Given the stakes (Mari and Vaigai facing a lifetime of devastating physical and psychological harm), the novelty of the issue(s), and the Court's role as the steward of the common law, oral argument is not only necessary, but also essential. The NhRP respectfully requests that the Court issue an order to show cause and set a date and time for oral argument.

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on behalf of Mari and Vaigai

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I HEREBY CERTIFY that a copy hereof was served upon the following by the Judiciary Information Management System on Dec. 5, 2025:

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