

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

Petitioner/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/Respondents-Appellees.

SCWC-24-0000323

CAAP-24-0000323

(Petition for a Common Law Writ of Habeas
Corpus)

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**ON APPLICATION FOR WRIT OF
CERTIORARI TO REVIEW (1)
JUDGMENT ON APPEAL BY
PRESIDING JUDGE HIRAOKA,
FILED FEBRUARY 26, 2026; (2)
OPINION OF THE COURT BY
PRESIDING JUDGE HIRAOKA,
FILED JANUARY 28, 2026**

INTERMEDIATE COURT OF APPEALS

Hon. Keith J. Hiraoka (Presiding Judge)

Hon. Clyde J. Wadsworth (Associate Judge)

Hon. Kimberly T. Guidry (Associate Judge)

REPLY TO RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

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I. INTRODUCTION

Contrary to Respondents, the relevant inquiry in deciding whether to grant certiorari is not whether other courts have rejected similar claims.¹ It is whether the ICA may disregard this Court’s on-point precedent, invert the Great Writ’s historic function in a manner that threatens not only the liberty interests of Mari and Vaigai, but human detainees as well,² and effectively vest the Legislature with plenary authority to restrict habeas corpus as it sees fit, thereby rendering the Hawai‘i Constitution’s Suspension Clause meaningless.

Accordingly, Respondents’ focus on the NhRP’s losses in other jurisdictions is irrelevant and misguided. Resp. at 1. They devote nearly two pages to reciting language from out-of-state decisions, suggesting that because other courts “thoroughly reviewed” and rejected similar claims, this Court should do the same. *Id.* at 9-10. But this Court has already made clear that as a matter of Hawai‘i law, it is “disinclined to decide an important issue merely on the basis of the number of states adopting a given approach.” *Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 375 n.1 (1968). Nor do prior NhRP cases answer the questions before this Court: whether the ICA committed grave errors of law by failing to issue an OSC, and by concluding that Chapter 660

¹ The lessons to be learned from those rejections are familiar to advocates pursuing landmark civil rights litigation, which never progresses in a straight line. Before Hawai‘i became the first state to recognize constitutional protections for same sex couples seeking the right to marry, those couples had already endured years of litigation setbacks across the country, including an outright rejection by the U.S. Supreme Court. *See Baker v. Nelson*, 409 U.S. 810 (1972), *overruled by Obergefell v. Hodges*, 576 U.S. 644 (2015). Still, prior defeats did not prevent this Court from becoming the first state high court to hold that denying marriage licenses to same sex couples presumptively violated constitutional equality guarantees. *Baehr v. Lewin*, 74 Haw. 530 (1993). As Evan Wolfson, an attorney who helped bring *Baehr*, later observed: “The history of civil rights litigation teaches that legal change often proceeds through precisely this pattern: initial categorical rejection; followed by expressions of judicial, public, and even legislative discomfort; followed by recognition that the old categories and categorical exclusions cannot be sustained.” Br. of Amici Curiae Shannon Minter and Evan Wolfson in Support of Plaintiff-Appellant at 14, *Nonhuman Rights Project, Inc. v. DeYoung Family Zoo, LLC, No. 169351* (Mich. Feb. 12, 2026), available at: <https://www.nonhumanrights.org/wp-content/uploads/2026/03/Minter-Wolfson.pdf>.

² After the majority in *Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 571-72 (2022) adopted an erroneously narrow view of habeas relief as available only for total discharge from all confinement, an intermediate appellate court relied on *Breheny* to dismiss a habeas petition brought on behalf of a psychiatric patient shackled to a hospital bed who sought removal of his 24-hour leg and wrist restraints. *See State ex rel. Louis M v. Popiel*, 234 A.D.3d 462, 462 (2025), *leave to appeal granted*, 44 N.Y.3d 904 (2025). That pending appeal illustrates the broader dangers posed by arbitrary limitations on the Great Writ.

supersedes the Great Writ in direct conflict with this Court’s decisions in *Brown v. Goto*, 16 Haw. 263 (1904) and *Eason v. State*, 157 Hawai‘i 252 (2025).

II. ARGUMENT

(1) If the ICA’s Decision Stands, *Brown v. Goto* and *Eason v. State* Must Be Overruled and the Hawai‘i Suspension Clause Will Be Rendered Meaningless

Chapter 660 does not supersede the common law writ of habeas corpus because this Court has already held otherwise. In *Brown*, this Court expressly recognized that the governing habeas corpus statute did not displace the common law writ. Instead, it held habeas corpus “is a common law writ” that is “guaranteed by the Constitution,” and therefore “the right to writ could not be taken away by statute.” *Brown*, 16 Haw. at 265. While Chapter 660’s predecessor statute was in effect when *Brown* was decided,³ that prior statute was materially the same as Chapter 660, in that it regulated venue and procedure for seeking habeas relief. *Brown* thus recognized the writ’s dual nature: procedure may be regulated by statute, but the writ’s substantive scope cannot be curtailed by statute and remains grounded in the common law because the Suspension Clause preserves its common law character. That is why this Court explained the Legislature may prescribe “by what courts, in what manner and under what conditions” the writ may be exercised, while simultaneously holding that “the right to the writ could not be taken away by statute.”⁴ *Id.*

³ In note 5 of the Application, the NhRP wrote *Brown* was decided when Chapter 660 existed in its inaugural form as Chapter 32 of the Laws of 1870. More precisely, the governing statute was Chapter 79 of the Laws of 1903, which made only minor amendments to the inaugural statute. The underlying point regarding Chapter 660’s historical continuity remains the same.

⁴ Respondents, in a tactic now repeated throughout this litigation, quote selective language from *Brown* while omitting the decision’s critical distinction between procedural regulation and substantive abrogation. Resp. at 7. They employ the same approach with *Priceline, Inc. v. Dir. of Taxation*, 144 Hawai‘i 72 (2019). Respondents first invoked *Priceline* in their motion to dismiss before the Circuit Court. JIMS (Case ID: CAAP-24-323), Dkt. No. 13 (Record on Appeal), p. 5, No. 27 (Motion to Dismiss) at 7. As the NhRP explained in opposition, the language Respondents quoted was expressly qualified on the very next page of that decision. *Id.* at p. 8, No. 45 (Opp’n) at 12. Respondents nevertheless used the same quote in their answer brief before the ICA. *Id.* at Dkt. 27 (Answer Br.) at 7. They now invoke *Priceline* again, this time for the proposition that the “common law may generally be overridden by statute.” Resp. at 6. But *Priceline* does not support the conclusion that Chapter 660 supersedes the Great Writ. To the contrary, the language Respondents selectively quote includes a footnote they ignore directing readers to *Berkson v. LePome*, 126 Nev. 492, 495 (2010), which explains that statutes interfering “with the judiciary’s authority to manage the judicial process” violate separation of powers and therefore cannot displace the common law. The ICA’s interpretation of Chapter 660 would do precisely that, but as

Fundamentally, *Brown* cannot be reconciled with the ICA’s conclusion that Chapter 660 supersedes the common law writ of habeas corpus. Either *Brown* remains good law and the ICA must be reversed, or *Brown* must be overruled and the ICA affirmed. Both decisions cannot coexist within the same jurisprudence.

If *Brown* is among this Court’s foundational statements on the nature of the Great Writ, *Eason* is its modern reaffirmation. The ICA committed grave errors of law by disregarding both decisions. *Eason* not only reaffirmed that habeas corpus is a common law remedy, 157 Hawai‘i at 264, but it also rejected the very premise that statutes may supersede the Great Writ. *Id.* at 270. In *Eason*, this Court overruled a prior decision “stating that the writ of habeas corpus has been abolished in the post-conviction context.” *Id.* at 266 (citing *Gordon v. Maesaka-Hirata*, 143 Hawai‘i 335, 360 n.36 (2018)). In overruling that decision, *Eason* explained that “Rule 40 has not ‘abolished’ habeas corpus actions post-judgment,” but instead that “the procedures in Rule 40 now apply, rather than the procedures set out in HRS chapter 660.” *Id.* at 269. Put differently, “the procedures in Rule 40 supersede chapter 660” in the post-conviction context. *Id.* *Eason* is therefore unequivocal: the procedures governing invocation of the writ can and do change, but the Great Writ is not abolished when procedural changes occur, nor could it be given the Suspension Clause. *Eason* thus drew a critical distinction between the writ itself and the procedures governing its use. Rules and statutes may supersede the latter, but never the former. Yet that is precisely what the ICA and Respondents attempt here by arguing Chapter 660 supersedes the Great Writ. Accordingly, either *Eason* remains good law and the ICA must be reversed, or *Eason* must be overruled and the ICA affirmed, thereby permitting the Legislature to curtail the substantive scope of habeas corpus notwithstanding the Suspension Clause. Both decisions cannot coexist.

Brown and *Eason* confirm that the significance of the Hawai‘i Suspension Clause is that it preserves the writ’s flexible common law character, thereby vesting courts with continuing authority to develop its scope as a living common law remedy. In light of that principle,

with *Brown*, Respondents omit the qualification undermining their argument. Furthermore, Respondents’ citations to *Herring v. Gulick*, 5 Haw. 57 (1884) and *Pogoso v. Sarae*, 138 Haw. App. 518 (2016), Resp. at 6, are irrelevant because neither case supports the notion that common law habeas corpus can be superseded by statute *when* the common law at issue is protected by the Hawai‘i Constitution, which is the case with the Great Writ here. *See, e.g., In re Water Use Permit Applications*, 94 Hawai‘i 97, 131-33 (2000) (rejecting argument that the common law doctrine of public trust, elevated to a constitutional mandate, has been supplanted by statute).

Respondents fundamentally misunderstand this case in arguing “the ICA’s holding does not conflict with the Suspension Clause [because] animals were never entitled to habeas relief in the first instance.” Resp. at 7-8. *Brown* makes clear that the Suspension Clause preserves habeas corpus as a “common law writ,” whose substantive scope can “not be taken away by statute.” 16 Haw. at 265. Because habeas corpus remains a common law writ, its scope necessarily evolves through judicial development. *Ex parte Apuna*, 6 Haw. 732, 735-36 (1869) (“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.”). That means habeas corpus today, as in England where the writ originated, remains above all “an adaptable remedy” whose “precise application and scope change[] depending upon the circumstances.” *Boumediene v. Bush*, 553 U.S. 723, 779 (2008).⁵ The relevant question therefore is not whether elephants historically received habeas relief, but whether today, courts retaining authority over the common law writ may recognize that modern scientific understandings of elephant cognition warrant an expansion of the writ’s scope.⁶ The ICA’s decision, if allowed to stand, renders the Suspension Clause meaningless, by reducing the scope of habeas corpus to legislative whims and abdicating the judiciary’s role in defining the contours of the Great Writ.

(2) The ICA Committed a Grave Error of Law by Failing to Issue an OSC Despite the Petition Establishing a Prima Facie Case of Unlawful Confinement

⁵ See Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 1014 (2012) (“the very nature of the writ” is one of “constant evolution”). See also Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 65 (2012) (“The [Suspension] Clause refers to preserving an existing writ.”).

⁶ Respondents argue that because habeas relief was unavailable to nonhuman animals at English common law, the ICA correctly concluded such relief is unavailable today. Resp. at 8-10. But that is a non-sequitur because this case concerns Hawai‘i common law, which this Court has long recognized as evolutionary in nature. See *Welsh v. Campbell*, 41 Haw. 106, 118 (1955) (describing the common law as “a constantly improving science”); *Fergerstrom*, 50 Haw. at 376 (“The common law system would have withered centuries ago had it lacked the ability to expand and adapt.”). Consider *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772), where Lord Mansfield issued the writ on behalf of an enslaved Black man despite adverse common law authority. If Respondents’ view was correct—that common law is frozen in antiquity—*Somerset* could never have advanced abolition. The relevant question therefore is not whether habeas corpus was once available to elephants in England, but whether Hawai‘i courts today may recognize such relief considering modern science and the common law’s enduring commitment to justice and liberty. The ICA committed a grave error by refusing to undertake that common law analysis, instead relying on an inapposite “plain meaning” statutory interpretation framework.

Respondents, in remarkably ironic fashion, accuse the NhRP of advancing a “backwards” argument while simultaneously mischaracterizing the NhRP’s prima facie discussion. Resp. at 8 n.12. Contrary to Respondents, the NhRP has never asked any Hawai‘i court to “accept its *legal* conclusion” at the pleading stage that Mari and Vaigai are entitled to habeas relief. *Id.* Rather, the NhRP cites *Somerset v. Stewart*, 1 Lofft. 1 (K.B. 1772), *Petition of Scott*, 44 Haw. 52 (1959), and *Russell v. Blackwell*, 53 Haw. 274 (1972), all of which contribute to understanding how prima facie review operates in Hawai‘i. See Application at 9 (*Somerset* discussion), 11 (*Petition of Scott* and *Russell* discussions). They explain that a reviewing court need only assume (without deciding) that the Petition’s factual allegations establish a prima facie case of unlawful confinement to warrant the issuance of an OSC. That inquiry turns on whether the allegations are nonfrivolous and sufficiently specific, not whether the court has already accepted the petitioner’s ultimate legal theory. Respondents fail to address these cases. Thus, Respondents’ argument is not only wrong on the law, but it also attacks a standard the NhRP has never advanced. See Application, Appendix C, § VI.A. (addressing the standard for issuing an OSC).

(3) A Common Law Court Has a Duty to Adapt the Law, and Deferring That Responsibility to the Legislature Abdicates the Judiciary’s Role

Respondents suggest the NhRP pursue legislative reform on behalf of Mari and Vaigai. Resp. at 10. But this Court has rejected the notion it must defer to the Legislature when the common law confronts new circumstances: “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 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.” *Lum v. Fullaway*, 42 Haw. 500, 510 (1958). See also *Bissen v. Fujii*, 51 Haw. 636, 646 (1970) (Levison, J., dissenting) (“this court has expressed a willingness and a duty to depart from long established rules . . . to effect desirable changes in the common law”) (citing cases). A common law court’s obligation to evolve the law is particularly relevant in cases concerning the Great Writ. *Breheny*, 38 N.Y.3d at 617 (Wilson, J., dissenting) (“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.”).

III. CONCLUSION

The NhRP respectfully requests certiorari and oral argument be granted.

DATED: San Diego, California, May 18, 2026.

/s/ Cheryl Nolan

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following by the Judiciary

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