

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, JOHN BERRY,

Respondents/Respondents-Appellees.

SCWC-24-0000323

CAAP-24-0000323

(Petition for a Common Law Writ of Habeas
Corpus)

**Electronically Filed
Supreme Court
SCWC-24-0000323
29-JUL-2026
07:14 AM
Dkt. 44 OT**

**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)

**PETITIONER/PETITIONER-APPELLANT NONHUMAN RIGHTS PROJECT, INC.'S
RESPONSE TO BRIEF OF *AMICI CURIAE* HAWAII VETERINARY MEDICAL
ASSOCIATION AND AMERICAN VETERINARY MEDICAL ASSOCIATION IN
SUPPORT OF RESPONDENTS/RESPONDENTS-APPELLEES**

CERTIFICATE OF SERVICE

Cheryl Nolan, Esq.
HI Bar No. 6412 | CA Bar No. 196272
Jake Davis, Esq.
AK Bar No. 2505026 | CO Bar No. 54032
611 Pennsylvania Ave SE #345
Washington, DC 20003
Tel.: (703) 955-1793
Tel.: (513) 833-5165
Email: CherylN@lassd.org
Email: jdavis@nonhumanrights.org
Attorneys for Petitioner/Petitioner-Appellant
on behalf of Mari and Vaigai, individuals



TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT	2
	A. Amici Misunderstand the Nature of Habeas Corpus	2
	B. Amici’s Parade of Horribles Misunderstands the Prima Facie Inquiry	3
	C. Amici’s Parade of Horribles Ignores the Evolution of Companion-Animal Law	5
	D. Amici Misunderstand the Judiciary’s Role in Developing the Common Law	8
	E. Amici’s Remaining Arguments Provide No Basis for Denying Relief	9
III.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases

<i>Acheson Hotels, LLC v. Laufer</i> , 601 U.S. 1 (2023)	3
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008)	2
<i>Brown v. Goto</i> , 16 Haw. 263 (1904)	3, 8
<i>Campbell v. Animal Quarantine Station</i> , 63 Haw. 557 (1981)	6
<i>DeBlase v. Hill</i> , 87 Misc.3d 1139 (N.Y. Sup. Ct. 2025)	6, 7
<i>Eason v. State</i> , 157 Hawai‘i 252 (2025)	3

<i>Ex parte Apuna,</i> 6 Haw. 732 (1869)	3
<i>Fergerstrom v. Hawaiian Ocean View Estates,</i> 50 Haw. 374 (1968)	7, 8, 10
<i>Goran Pleho, LLC v. Lacy,</i> 439 P.3d 176 (2019)	6
<i>Guth v. Freeland,</i> 28 P.3d 982 (2001)	6
<i>Hutch v. State,</i> 107 Hawai‘i 411 (2005)	3
<i>Johnson v. Avery,</i> 393 U.S. 483 (1969)	3
<i>Lum v. Fullaway,</i> 42 Haw. 500 (1958)	3, 9
<i>Matter of Nonhuman Rights Project, Inc. v. Breheny,</i> 38 N.Y.3d 555 (2022)	1, 2, 3, 4, 5, 6, 7
<i>Matter of Hawai‘i Elec. Light Co., Inc.,</i> 152 Haw. 352 (2023)	10
<i>Nonhuman Rights Project, Inc. v. Deyoung Family Zoo, LLC,</i> No. 169351, 2026 WL 2078146 (Mich. July 17, 2026)	4
<i>Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery,</i> 31 N.Y.3d 1054 (2018)	4
<i>Petition of Scott,</i> 44 Haw. 52 (1959)	4
<i>Rabideau v. City of Racine,</i> 627 N.W.2d 795 (Wis. 2001)	7
<i>Rasul v. Bush,</i>	

542 U.S. 466 (2004)	8
<i>Russell v. Blackwell</i> , 53 Haw. 274 (1972)	4
<i>Smith v. Smith</i> , 56 Haw. 295 (1975)	9
<i>State v. Tolentino</i> , No. SCWC-22-255, 2026 WL 1880408 (Haw. June 30, 2026)	1
<i>Territory of Alford</i> , 39 Haw. 460 (1952)	6, 9
<i>Tilikum v. Sea World Parks & Entm't, Inc.</i> , 842 F.Supp.2d 1259 (S.D. Cal. 2012)	1
<i>Welsh v. Campbell</i> , 41 Haw. 106 (1955)	6
<u>Statutes and Other Authorities</u>	
Haw. Const. art. I, §15	3
HRS § 663-8.9	6
<i>Brief of Amicus Curiae Nonhuman Rights Project, Inc.</i> <i>in Response to Amici Curiae Brief, DeBlase v. Hill</i> , Index No. 522689/2023 (N.Y. Sup. Ct., Kings Cnty. Sept. 30, 2024)	5
Jake Davis, <i>Argentine Court Recognizes Dogs as Rightsholders</i> , Nonhuman Rights Project (Sept. 16, 2022)	4
Jake Davis, <i>Mountain in New Zealand, Canaries in Argentina Recognized as Rights-Holders</i> , Nonhuman Rights Project (Apr. 29, 2025)	4
Lauren Choplin, <i>Argentine Court Recognizes Cougar as Rightsholder</i> , Nonhuman Rights Project (Sept. 1, 2022)	4
Natalie Prosin, <i>Judge Welcomes NhRP Amicus Memorandum in PETA v. SeaWorld</i> ,	

Nonhuman Rights Project (Jan. 6, 2012)	1
PAUL D. HALLIDAY,	
HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)	2
<i>Pececitos Dorados: Seres Sintientes con Derechos,</i>	
Diario Judicial (July 8, 2026)	4

I. INTRODUCTION

After the Animal Law Section of the Hawai‘i State Bar Association submitted an amicus brief in this appeal, Dkt. 11, Respondents urged the Court to disregard it because it purportedly “improperly expand[ed] the scope of the appeal” by advancing an argument grounded in the “Aloha Spirit” that the “NhRP did not raise . . . in its Application.”¹ Dkt. 13, p. 1. By Respondents’ own reasoning, the amicus brief submitted by the Hawai‘i Veterinary Medical Association and the American Veterinary Medical Association (“AVMA”) (collectively, “Amici”) suffers from the same defect. It addresses neither of the two questions presented in this appeal. Nevertheless, because Amici invite the Court to consider issues beyond those presented by this appeal, this response briefly explains why those arguments lack merit.

This appeal presents two narrow questions: (1) whether Chapter 660 displaced Hawai‘i’s common law writ of habeas corpus and, (2) if not, whether Mari and Vaigai can avail themselves of the writ’s protections to seek release from their confinement. Rather than addressing either question, Amici urge this Court to deny relief based on a parade of hypothetical concerns involving pet ownership, veterinary medicine, husbandry decisions, livestock acquisitions, tort liability, and insurance coverage, while relying on non-habeas authorities and litigation brought by organizations other than the Nonhuman Rights Project (“NhRP”).² None of those authorities address the questions presented on appeal, and they rest on the same slippery-slope predictions that now-Chief Judge Rowan Wilson aptly derided as “so facially preposterous that they hardly deserve a response.” *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 620 (2022) (Wilson, J., dissenting). This Court should reject Amici’s hypothetical scenarios divorced from the factual record.

Two additional points bear emphasis. First, Amici fundamentally misunderstand the common law function of habeas corpus, as evidenced by their invitation to resolve abstract policy

¹ Critically, Respondents ignore that this Court has repeatedly recognized Hawai‘i law as inherently and “uniquely inspired by the Aloha Spirit, Hawai‘i values, and a profound respect for human and nature’s dignity,” rather than by abstract speculation. *State v. Tolentino*, No. SCWC-22-255, 2026 WL 1880408, at *8 (Haw. June 30, 2026) (citation omitted).

² Including one case—*Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F.Supp.2d 1259 (S.D. Cal. 2012), Amici Br. at 4, 5—that the NhRP publicly criticized as “dangerously premature” and accurately warned would “damage” efforts to secure legal rights for nonhuman animals. Natalie Prosin, *Judge Welcomes NhRP Amicus Memorandum in PETA v. SeaWorld*, Nonhuman Rights Project (Jan. 6, 2012), <https://tinyurl.com/3bke6reu>.

questions rather than the questions on appeal. Habeas corpus has never developed through sweeping pronouncements about every conceivable future application of the writ; as part of the common law, it develops incrementally—one petitioner, one record, and one case at a time. *Id.* at 602 (“Because of the inherently case-by-case way in which habeas corpus works, each case acted directly only on the particular petitioner seeking relief.”). Issuing an order to show cause (“OSC”) neither guarantees the detainee’s release nor establishes a rule governing every other detainee in that prison. It simply requires the respondent to justify the legality of the detention on a fully developed factual record before the court determines whether relief is warranted. App. at 12 n.10 (an OSC does not resolve the merits).

Second, Amici largely ignore the extensive evidentiary record before this Court. The world’s foremost elephant scientists have concluded that Mari and Vaigai suffer profound physical, psychological, and neurological harm because of their confinement. Pet. ¶¶ 25-91 (The Expert Declarations). If Respondents genuinely dispute that evidence, or Amici sincerely maintain that continued confinement reflects the “pro-animal position,” those assertions should be tested through the ordinary adversarial process. Amici Br. at 3. An evidentiary hearing—not an amicus brief—is the proper forum for presenting expert testimony, examining scientific evidence, and permitting the court to determine whether Respondents have carried their burden of justifying the legality of Mari and Vaigai’s confinement.

II. ARGUMENT

A. Amici Misunderstand the Nature of Habeas Corpus

Amici cite no authority for their remarkable assertion that the Great Writ is a “blunt tool.” Amici Br. at 13. The unsupported premise reflects a fundamental misunderstanding of habeas corpus and, consequently, of the narrow questions presented by this appeal. The reality is precisely the opposite: habeas corpus is a flexible, adaptable remedy. In pre-revolutionary England, where the writ originated, “common-law habeas corpus was, above all, an adaptable remedy,” and its “precise application and scope changed depending upon the circumstances.”³ *Boumediene v. Bush*, 553 U.S. 723, 779 (2008). The same is true in Hawai‘i, where the Great Writ’s common law

³ See PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 101 (2010) (on King’s Bench, “[t]he judges’ flexibility, creativity, and widening purview were apparent in [habeas] decisions about all types of detention”). See generally *Breheny*, 38 N.Y.3d at 589-602 (Wilson, J., dissenting) (discussing the nature of habeas corpus).

character has been preserved by the state’s Suspension Clause (Haw. Const. art. I, §15). *See Brown v. Goto*, 16 Haw. 263, 265 (1904) (habeas corpus “is a common law writ”); *Eason v. State*, 157 Hawai‘i 252, 269 (2025) (overruling a prior decision “to the extent it stated the writ of habeas corpus has been *abolished* in the post-conviction context”). As this Court recognized in *Ex parte Apuna*, 6 Haw. 732, 735 (1869), the writ of habeas corpus “enjoyed here is the same in substance with the original [English] writ,” because “[a]nything less than this would make the provisions therefor in our Constitution and Statutes hollow and meaningless.”⁴

B. Amici’s Parade of Horribles Misunderstands the Prima Facie Inquiry

Nearly every substantive argument advanced by Amici rests on the same false premise: that recognizing Mari and Vaigai’s ability to invoke the Great Writ would immediately upend every aspect of the human-animal relationship, and for the worse. Yet Amici cite no authority suggesting that habeas corpus has ever developed in such a sweeping fashion, nor do they identify any jurisdiction in which recognizing legal rights for individual nonhuman animals has produced the catastrophic consequences they predict.

Resolving this appeal in Mari and Vaigai’s favor would not, contrary to Amici, redefine the “human-animal relationship . . . for all animals.” Amici Br. 2. The common law evolves incrementally, one case at a time.⁵ That is especially true of habeas corpus, perhaps the most

⁴ Consistent with the Great Writ’s adaptability, Amici are simply wrong to assert that “the sole remedy” available through habeas corpus “is releas[e] from all confinement.” Amici Br. at 8. Hawai‘i law refutes that proposition. In *Hutch v. State*, 107 Hawai‘i 411, 417 (2005), this Court, relying on *Johnson v. Avery*, 393 U.S. 483 (1969), recognized that a prisoner confined to a prison’s Special Holding Unit could obtain habeas relief restoring him to the general prison population. Habeas corpus therefore reaches unlawful restraints on liberty short of complete release from custody. *See also* Pet. ¶¶ 199-206 (explaining that habeas corpus permits courts to consider the conditions and terms of release); *Breheny*, 38 N.Y.3d at 589 (Wilson, J., dissenting) (“Additionally, the writ was flexibly used to transfer custody when circumstances demanded it, particularly in the case of children—a point contrary to the majority’s view that the writ cannot be used to transfer custody from a miserable situation to one less fraught.”).

⁵ *Lum v. Fullaway*, 42 Haw. 500, 503-04 (1958) (the common law ““stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work”) (citation omitted); *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 17 (2023) (recognizing the “common-law tradition of case-by-case adjudication”); *Breheny*, 38 N.Y.3d at 623 (Wilson, J., dissenting) (“The common law, of which the Great Writ is a part, determines the scope incrementally, on a case-by-case basis.”).

individualized remedy known to the common law. *See, e.g.*, Pet. ¶¶ 115-119 (illustrating that habeas corpus has long functioned as an individualized remedy even where the petitioner’s legal status was contested). Every habeas petition is evaluated on its own record and appropriately dismissed unless it establishes *prima facie* entitlement to relief. General assertions, conclusory allegations, and palpably incredible claims are summarily rejected. *Petition of Scott*, 44 Haw. 52, 54 (1959); *Russell v. Blackwell*, 53 Haw. 274, 284 (1972). That understanding alone disposes much of Amici’s brief. The question before this Court is not whether future habeas petitions brought on behalf of other nonhuman animals might establish a *prima facie* case for relief, let alone ultimately succeed. It is whether this Petition states a *prima facie* case warranting issuance of an OSC. It does. The Petition presents the same core scientific evidence, and the same fundamental legal questions, that persuaded multiple judges on New York’s highest court, as well as Justice Elizabeth Welch of the Michigan Supreme Court, that such claims warranted further judicial consideration of whether habeas corpus is available to vindicate the liberty interests of an elephant and chimpanzees.⁶

Practically speaking, Argentina provides a useful real-world test of Amici’s predictions. Over the past decade, Argentine courts have recognized legal rights on behalf of numerous nonhuman animals, including by granting habeas corpus relief to an imprisoned chimpanzee named Cecilia who was declared “a nonhuman legal person.” Pet. ¶ 154. Comparable relief has also been afforded to other species, including canaries, dachshunds, goldfish, and a cougar.⁷ Yet none of these decisions has disrupted Argentine society or fundamentally altered the nation’s broader legal treatment of nonhuman animals. Argentina continues to permit the use of animals for food, clothing, labor, entertainment, and other traditional purposes. Rather, these decisions

⁶ *Nonhuman Rights Project, Inc., on Behalf of Tommy v. Lavery*, 31 N.Y.3d 1054, 1055-59 (2018) (Fahey, J., concurring); *Breheny*, 38 N.Y.3d at 577-626 (Wilson, J., dissenting); *id.* at 626-642 (Rivera, J., dissenting); *Nonhuman Rights Project, Inc. v. Deyoung Family Zoo, LLC*, No. 169351, 2026 WL 2078146, at *1-*5 (Mich. July 17, 2026) (Welch, J., dissenting).

⁷ Jake Davis, *Mountain in New Zealand, Canaries in Argentina Recognized as Rights-Holders*, Nonhuman Rights Project (Apr. 29, 2025), <https://tinyurl.com/39ym4en2>; Jake Davis, *Argentine Court Recognizes Dogs as Rightsholders*, Nonhuman Rights Project (Sept. 16, 2022), <https://tinyurl.com/bdfpyakx>; *Pececitos Dorados: Seres Sintientes con Derechos*, Diario Judicial (July 8, 2026), <https://tinyurl.com/323y6685> (English translation); Lauren Choplin, *Argentine Court Recognizes Cougar as Rightsholder*, Nonhuman Rights Project (Sept. 1, 2022), <https://tinyurl.com/bdhupckd>. *See also* Pet. ¶ 154 (surveying international judicial decisions recognizing rights in some nonhuman animals).

afforded narrowly tailored relief to individual animals whose circumstances warranted judicial intervention. Argentina thus demonstrates that recognizing limited legal rights for individual nonhuman animals does not inevitably produce the sweeping legal and societal consequences Amici incorrectly predict.

Indeed, Amici repeatedly ask this Court to decide questions this case does not present. The Petition does not challenge livestock agriculture, biomedical research, pet ownership, veterinary decision-making, insurance law, or euthanasia. Amici Br. at 12. Nor does it seek legal rights for all nonhuman animals. As Judge Wilson explained, “[w]hatever rights and interest [an elephant] may have do not tell us anything about the rights my dog has.” *Breheny*, 38 N.Y.3d at 621 (Wilson, J., dissenting). The same is true here. The Petition asks only whether two autonomous, extraordinarily cognitively complex Asian elephants may invoke Hawai‘i’s common law writ of habeas corpus to challenge the legality of their confinement. Allowing this case to proceed to an appropriate evidentiary hearing would not create “instant, enormous, and pervasive confusion that could limit—or even eliminate—the ability of some owners to care for their animals.” Amici Br. at 3. It would simply require Respondents to justify the legality of Mari and Vaigai’s confinement through the ordinary judicial process.

C. Amici’s Parade of Horribles Ignores the Evolution of Companion-Animal Law

Amici repeatedly contend that recognizing a single legal right for Mari and Vaigai would fundamentally transform the human-animal relationship with sweeping consequences extending far beyond this case.⁸ But those predictions are inconsistent with both the way the common law develops and with the experience of courts that have confronted analogous questions. Amici’s discussion is therefore inconsistent with the careful, incremental way courts have developed the common law governing companion animals. Courts throughout the country are already engaged in the type of incremental common law development Amici insist is inappropriate.⁹ However, none

⁸ See, e.g., Amici Br. at 2 (asserting that recognizing such a right would “completely redefine the human-animal relationship”).

⁹ See, e.g., *Brief of Amicus Curiae Nonhuman Rights Project, Inc. in Response to Amici Curiae Brief, DeBlase v. Hill*, Index No. 522689/2023 at 15-24 (N.Y. Sup. Ct., Kings Cnty. Sept. 30, 2024), <https://tinyurl.com/2nzhhrs> (surveying jurisdictions recognizing emotional-distress damages for the loss of companion animals, including Hawai‘i, and demonstrating that the common law designation of animals as “property” has not prevented courts from recognizing legally protected interests arising from the human-animal relationship or incrementally

of those decisions has abolished companion-animal ownership or produced anything close to the parade of horrors Amici relentlessly predict.

The recent decision in *DeBlase v. Hill*, 87 Misc.3d 1139, 1166 (N.Y. Sup. Ct. 2025), is particularly instructive. There, after considering competing amicus briefs submitted by the NhRP and AVMA, numerous veterinarian associations, and pet-industry organizations, the court incrementally developed the common law by holding that a companion dog could qualify as “immediate family” for purposes of New York’s zone-of-danger jurisprudence, thereby permitting a NIED claim to proceed. Rejecting AVMA’s parade of horrors, the court instead undertook the inquiry common law courts have always performed: “applying the principles of natural right and justice to facts actually experienced in cases before them.” *Welsh v. Campbell*, 41 Haw. 106, 119 (1955). In doing so, the *DeBlase* court emphasized that the common law is neither static nor dependent upon legislative action, but instead evolves as courts reexamine precedent considering modern understandings of justice and societal norms. *DeBlase*, 87 Misc.3d at 1158 (“when legal recognition of a special status, societal views, common sense, and public policy suggest a different approach, courts may adjust the interpretation of law to align with shifting societal norms”); *id.* at 1160 (“It is not uncommon for a court that breaks from tradition to face criticism for legislating

recognizing common law rights). Hawai‘i itself illustrates the point. Amici assert that *Campbell v. Animal Quarantine Station*, 63 Haw. 557 (1981) was “legislatively overturned,” thereby confirming the continued status of companion animals as property. Amici Br. at 6. But that overstates the effect of HRS § 663-8.9. *Campbell* permitted recovery for the emotional distress caused by the death of a companion dog. Five years later, the Legislature enacted HRS § 663-8.9, which neither repudiated *Campbell* nor reclassified companion animals. Rather, it generally modified Hawai‘i’s common law tort of negligent infliction of emotional distress (“NIED”) by requiring that emotional distress arising solely from property damage result in physical injury or mental illness. *Goran Pleho, LLC v. Lacy*, 439 P.3d 176, 190 (2019); *Guth v. Freeland*, 28 P.3d 982, 985 (2001); HRS § 663-8.9(b). Thus, the Legislature did not reject *Campbell*’s recognition of the profound emotional harm attendant to the loss of a companion animal; it merely modified the elements of NIED claims generally. Amici therefore err in suggesting that Hawai‘i’s continued classification of nonhuman animals as property forecloses common law development. To the contrary, Hawai‘i—like the jurisdictions discussed in the *DeBlase* amicus brief—demonstrates that the property designation does not prevent courts from incrementally recognizing specific common law rights where “present-day standards of wisdom and justice” warrant it. *Territory of Alford*, 39 Haw. 460, 466 (1952). Recognition of the narrow common law liberty interest asserted on behalf of Mari and Vaigai would be just such an incremental development. *See Breheny*, 38 N.Y.3d at 621 (Wilson, J., dissenting) (“granting a single elephant-not the whole animal kingdom-the right to a full hearing on a writ of habeas corpus is about as incremental as one can get”).

from the bench. . . . Ultimately, if a [] court perceives a change in law, it is morally obligated to recognize it.”).

The *DeBlase* court also recognized that companion animals occupy a legal position distinct from ordinary personal property, discussing statutory developments such as pet trusts, custody determinations governed by a “best interests” standard, and other legislative protections reflecting society’s unique treatment of companion animals. *Id.* at 1162-63. Far from demonstrating that legislative action forecloses or should be prioritized to common law development, those enactments actually informed the court’s recognition that the common law must evolve alongside society’s understanding of companion animals. The same incremental process is at work here. Amici’s assertion that any “sudden or recent shift in societal values toward animals is a red herring” does not engage with the most current judicial authorities addressing analogous issues. Amici Br. at 12. Rather than confronting current decisions like *DeBlase*—a case in which the AVMA filed an amicus brief—Amici rely on quotations from a 2008 appellate brief and a 2010 law review article. *Id.* at 12 n.9. If any red herring is present, it is the effort to sidestep contemporary judicial authority, societal views, common sense, and public policy in favor of uncontested, decades-old discussions about the treatment of companion animals.

The lesson of *DeBlase* is applicable here. Courts have confronted the same policy objections advanced by Amici—that recognizing even modest doctrinal developments will produce unmanageable consequences—and have rejected those predictions in favor of careful, incremental adjudication. *See, e.g., Fergerstrom v. Hawaiian Ocean View Estates*, 50 Haw. 374, 377 (1968) (holding that “[t]he argument that recognizing the tort will result in a vast amount of litigation has accompanied virtually every innovation in the law” and is “unpersuasive” because although some litigants may abuse a newly recognized action, “the possibility of abuse cannot obscure the need to provide an appropriate remedy”); *Breheny*, 38 N.Y.3d at 622 (Wilson, J., dissenting) (“common-law courts are especially good at developing doctrines to deal with slippery slopes”). Most importantly, companion animal tort cases arise in an entirely different jurisprudential context than this appeal.¹⁰ Those cases largely concern the scope of damages recoverable by humans following injury to their pets. This case concerns only whether Mari and

¹⁰ Contrary to Amici, *see* Amici Br. at 9, *Rabideau v. City of Racine*, 627 N.W.2d 795 (Wis. 2001) was not a case about granting legal rights to animals. *See id.* at 806 (Abrahamson, J., concurring) (“Scholars would not classify this case as one about animal rights.”).

Vaigai may invoke Hawai‘i’s common law writ of habeas corpus to challenge the legality of their confinement. Companion-animal tort law therefore does not preclude recognition of the common law liberty interest asserted here. Moreover, Amici’s reliance on companion-animal jurisprudence is self-defeating because the body of law they invoke demonstrates that common law development occurs incrementally, without the sweeping consequences they insist will occur here.

D. Amici Misunderstand the Judiciary’s Role in Developing the Common Law

Unable to identify any defect in the Petition itself or meaningfully refute either of the questions presented, Amici instead rely on two familiar arguments: the absence of precedent and the contention that any further development of the common law governing habeas corpus should be left to the Legislature rather than the judiciary. Amici Br. at 13-15. Those arguments are incompatible with Hawai‘i law. Notwithstanding the simple fact that habeas corpus 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) (cleaned up), and that this Court has long recognized it as “a common law writ” protected in that capacity by the Suspension Clause, *Brown*, 16 Haw. at 265, this Court need look no further than its own decision in *Fergerstrom*, 50 Haw. at 374. That is because Amici’s policy concerns are simply the latest iteration of arguments this Court has already rejected.

In *Fergerstrom*, despite the absence of controlling precedent, the Court recognized a common law right to privacy. Beyond rejecting the speculative floodgates concerns discussed above in the *Fergerstrom* parenthetical, the Court also found equally unpersuasive both the absence of precedent and the contention that recognition of the right should be left to the Legislature. As to precedent, the Court spoke plainly: “the absence of precedent is a feeble argument.” *Id.* at 376. It explained, “[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.* As to legislative deference, the Court was even more emphatic:

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.

Id. at 142-43.

Nor is *Fergerstrom* an outlier. For the better part of a century, this Court has recognized that the absence of precedent and legislative silence does not foreclose common law relief. *Lum v. Fullaway*, 42 Haw. 500, 502 (1958) (“Plaintiff’s right to relief is not necessarily foreclosed by lack of precedent. . . . [T]he genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth.”). The common law “is not immutable but flexible and by its own principles adapts itself to varying conditions, and the court at all times in the application of any rule should give heed to present-day standards of wisdom and justice.” *Territory of Alford*, 39 Haw. 460, 466 (1952); *see also* Pet. ¶¶ 192-98 (rejecting the argument that this Court should defer to the Legislature rather than recognize Mari and Vaigai’s common law right to bodily liberty protected by habeas corpus); Reply Br. at 5 (arguing a common law court has a duty to adapt the law, and deferring that responsibility to the Legislature abdicates the judiciary’s role).

Amici ask this Court to abdicate its common law role in rationally developing the common law. Their position would make the absence of precedent and possibility of legislative action reasons not to undertake the judicial inquiry at all. *Fergerstrom*, *Lum*, and *Alford*, of which there are more, foreclose that approach. The question is not whether controlling precedent has already recognized Mari and Vaigai’s asserted liberty interest or whether the Legislature has acted. It is whether Hawai‘i’s common law writ of habeas corpus permits them to establish, through the ordinary judicial process, that their confinement is unlawful. That determination is not only within this Court’s authority; under Hawai‘i’s common law tradition, it is the Court’s responsibility. *Smith v. Smith*, 56 Haw. 295, 303 (1975) (“We follow the common law in this jurisdiction.”).

E. Amici’s Remaining Arguments Provide No Basis for Denying Relief

Several of Amici’s remaining arguments warrant only brief discussion because they concern additional issues not presented by this appeal. First, Amici repeatedly suggest that the NhRP lacks standing to bring this case on behalf of Mari and Vaigai. Amici Br. at 9. But Respondents never challenged standing below, the Circuit Court did not address it, the Intermediate Court of Appeals did not address it, and it is not an issue presented by this appeal. Furthermore, the Petition thoroughly explains why the NhRP satisfies the traditional standing requirements of a third-party habeas petitioner. Pet. ¶¶ 20-24. Amici offer no response to that analysis.

Second, Amici repeatedly emphasize that other courts have rejected similar habeas petitions. Amici Br. 7-10. That observation is neither surprising nor dispositive. Respondents made

the same argument in opposing the NhRP’s Application for a Writ of Certiorari, devoting nearly two full pages to extensively quoting from out-of-state decisions and urging this Court to follow jurisdictions that had already “thoroughly reviewed” and rejected similar claims. Resp. at 9-10. As the NhRP explained, however, 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*, 50 Haw. at 375 n.1. Indeed, significant developments in the common law often begin with courts declining to extend existing doctrine. The existence of contrary authority—even persuasive authority from other jurisdictions or foreign courts—therefore does not answer the questions presented here, which this Court must decide under Hawai‘i law. *See Matter of Hawai‘i Elec. Light Co., Inc.*, 152 Haw. 352, 359 (2023) (recognizing the common law evolves because “yesterday’s good enough has become today’s unacceptable”).

Third, Amici consistently argue as though the Court were deciding the ultimate merits of Mari and Vaigai’s habeas petition. It is not. Whether habeas relief should be granted can be determined only after Respondents answer the Petition and the court considers a fully developed factual record.

Finally, Amici frame this case as going “to the heart” of a purported conflict between animal rights and animal welfare. Amici Br. at 3. Aside from the fact that the NhRP counts many animal welfare organizations as its allies, neither the Petition nor this appeal asks the Court to choose between those philosophies. It asks only whether Respondents must justify the legality of confining two elephants whom the world’s leading elephant scientists have concluded are suffering profound physical, psychological, and neurological harm as a direct consequence of their confinement.

III. CONCLUSION

At bottom, Amici’s brief addresses neither of the questions presented on appeal. Instead, it invites the Court to decide this case based on speculation rather than experience, ignoring the only real-world examples in which comparable relief has been granted, including in Argentina. The Court should decline that invitation. It need only determine whether habeas corpus remains a common law remedy protected by Hawai‘i’s Suspension Clause and whether the Petition establishes a *prima facie* basis for requiring the Respondents to justify the legality of Mari and Vaigai’s confinement.

DATED: San Diego, California, July 29, 2026.

/s/ Cheryl Nolan
Cheryl Nolan, Esq.
Jake Davis, Esq.
Attorneys for Petitioner/Petitioner-
Appellant on behalf of Mari and Vaigai,
individuals

CERTIFICATE OF SERVICE

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

Information Management System on July 29, 2026:

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

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)768-5248
(808)768-5121

Facsimile:
(808)768-5105

--

Edward Gaus, Bar No. 12099
Shook Hardy & Bacon, LLP
555 Mission Street, Suite 2300
San Francisco, CA 94105
Tel: (415) 544-1900
Email: egaus@shb.com

Attorney for *Amici Curiae*:
Hawaii Veterinary Medical Association
American Veterinary Medical Association

--

DATED: San Diego, California, July 29, 2026

/s/Cheryl Nolan
Cheryl Nolan, Esq.
Attorney for Petitioner/Petitioner-Appellant