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SCWC-24-0000323

IN THE SUPREME COURT OF THE STATE OF HAWAII

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 No. 1CCV-23-0001418
(Petition for Writ of Habeas Corpus)

APPEAL FROM:

(1) FINAL JUDGMENT, ENTERED MARCH
25, 2024

(2) ORDER GRANTING RESPONDENTS'
MOTION TO DISMISS, FILED MARCH 25,
2024

(3) [REJECTED BY THE COURT] ORDER
GRANTING MOTION FOR ADMISSION
TO APPEAL PRO HAC VICE FOR JAKE
DAVIS, ENTERED MARCH 25, 2024

HONORABLE JUDGE GARY W. B.
CHANG, CIRCUIT COURT OF THE FIRST
CIRCUIT

LAW PROFESSORS' AMICUS CURIAE BRIEF



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LAW PROFESSORS' *AMICUS CURIAE* BRIEF

Pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rules 27 and 28(g) and this Court's order, entered August 26, 2026 (dkt. 56), Amicus Curiae MATTHEW LIEBMAN, ZSEA BOWMANI, TAIMIE L. BRYANT, DAVID N. CASSUTO, LUIS E. CHIESA, MICHAEL C. DORF, DAVID S. FAVRE, PAMELA D. FRASCH, ISELIN M. GAMBERT, SUE GREBELDINGER, KATHY HESSLER, JUSTIN MARCEAU, RUSS MEAD, RAJESH K. REDDY, JESSICA RUBIN, JOAN SCHAFFNER, SARAH SCHINDLER, KRISTEN A. STILT, LAURENCE H. TRIBE, DELCIANNA WINDERS (collectively "Law Professors"), hereby file their *amicus curiae* brief.

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are 20 law professors from across the United States who specialize in the rapidly evolving field of animal law and in fields adjacent to animal law. *Amici* have a special expertise in the issues presented by this case and an interest in assisting the Court in addressing the foundational jurisprudential issues this case raises. Based on their interest in ensuring the field of animal law develops according to rational principles of justice consistent with the legal system's commitment to equality and liberty, *amici* write to situate this case in the broader legal landscape. *Amici* respectfully urge the Court to reverse the Intermediate Court of Appeals' ("ICA") dismissal of the petition for a writ of habeas corpus by the Nonhuman Rights Project ("NhRP") and remand with instructions to grant the petition.

II. ARGUMENT

The ICA gravely erred in dismissing NHRP's petition for a writ of habeas corpus. This brief argues that the elephants confined at the Honolulu Zoo, Mari and Vaigai, are entitled to justice—including the ability to challenge infringements on their right to liberty through the writ of habeas corpus—because they are autonomous beings and members of the community of legal rights-holders.

First, *amici* argue that the ICA erred in deciding this case on statutory grounds rather than common law grounds. It is well-established that statutes abrogate the common law only when the legislature clearly intended to do so, which is not the case with the habeas statutes in Hawai'i Revised Statutes ("HRS") Chapter 660.

Second, *amici* argue that this Court, in reviewing this case as a matter of common law, should recognize Mari and Vaigai’s right to liberty. As sentient beings with rich emotional, familial, and cultural lives, elephants are entitled to flourish without unjust restraints on those capacities. The ICA’s exclusion of Mari and Vaigai as nonpersons is flawed for two reasons. First, personhood is not required for habeas relief, so long as the petitioner has an interest in liberty, as elephants do. Second, elephants already *are* legal persons of a limited sort under Hawai’i law, because they are rights-bearers under various laws that protect their interests. Legal persons are simply those entities who hold rights or bear duties. The ICA’s holding to the contrary rests on a backwards-looking method that ignores the evolutionary nature of common law reasoning. Finally, *amici* address the social contract as a basis for rejecting habeas corpus for animals, upon which other U.S. courts have relied. *Amici* argue that the social contract is unjustly exclusionary of animals (and many humans), and it fails to adequately reflect the judicial values of Hawai’i. As rights-bearing legal persons, Mari and Vaigai are entitled to challenge their unjust confinement through the common law writ of habeas corpus.

A. The ICA Erred in Holding Chapter 660 Abrogates Common Law Writ of Habeas Corpus.

Of central importance to this case is the nature of habeas corpus claims in Hawai’i, whether they are strictly and exclusively governed by statute or whether they retain their common law status. If habeas is only statutory, legislative intent is paramount, which likely dooms Mari and Vaigai’s case (unless NhRP can show that the legislature meant for the statutory word “persons” to include elephants—a tall task). But if habeas is governed by the common law, as NhRP and *amici* argue, then the judiciary retains authority to determine the scope of the writ, regardless of statutory terminology.

The ICA held, “HRS Chapter 660 supersedes the common law writ of habeas corpus.” *Nonhuman Rts. Project, Inc. v. Honolulu*, No. CAAP-24-0000323, 2026 WL 226499, at *1 (Haw. App. Jan. 28, 2026) (SDO). That holding is unsupported by the statute and should be reversed. Since 1892, Hawai’i has incorporated the common law into state law. *Gold Coast Neighborhood Ass’n v. State*, 140 Hawai’i 437, 450, 403 P.3d 214, 227 (2017). The common law governs unless “otherwise expressly provided . . . by the laws of the State.” HRS § 1-1. Hawai’i courts “have repeatedly recognized the importance of the common law and have demonstrated an unwillingness to impliedly reject its principles.” *Gold Coast Neighborhood Ass’n*, 140 Hawai’i at 451-52, 403 P.3d at 228-29. Unless abrogation of the common law is “*imperatively required*” by “express intent

that the legislature [has] forsaken the common law rule,” this Court will follow the common law. *Id.* at 452, 403 P.3d at 229. There is a “strong reluctance to abolish common law rights and remedies absent a finding of express legislative intent.” *Id.*; see also *Burns Int’l Sec. Servs., Inc. v. Dep’t of Transp.*, 66 Haw. 607, 611, 671 P.2d 446, 450 (1983) (“[W]ithout express intent that the legislature had forsaken the common law rule . . . , we decline to so hold.”).

Here, the issue is whether Chapter 660 expressly abrogates the common law writ of habeas corpus and replaces it—in its entirety—with the statutory framework. The common law writ of habeas corpus is “one of the most powerful engines of popular liberty.” Edward Jenks, *The Prerogative Writs in English Law*, 32 Yale L.J. 523, 526 (1923). It stands, as one commentator puts it, “as a towering common law lighthouse of liberty.” Akhil Reed Amar, *Sixth Amendment First Principles*, 84 Geo. L.J. 641, 663 (1996). The “Great Writ” has a long historical pedigree at common law, its origins tracing to the Magna Carta eight centuries ago. *Boumediene v. Bush*, 553 U.S. 723, 740 (2008) (“[G]radually the writ of habeas corpus became the means by which the promise of Magna Carta was fulfilled.”). Given this powerful history, combined with the presumption against abrogation, this Court’s analysis of Chapter 660 must be exacting and searching.

The legislature did not “expressly provide[]” for the Great Writ’s abrogation when it enacted Chapter 660. HRS § 1-1. Nowhere does the legislation purport to eliminate, abolish, abrogate, supplant, or override the common law writ of habeas corpus; it does not use those terms, nor does it accomplish those ends. The ICA identified nothing in the language, context, structure, or legislative history of Chapter 660 that “imperatively require[s]” the extinguishing of common law habeas corpus, nor is there “express intent that the legislature [has] forsaken the common law rule,” *Gold Coast Neighborhood Ass’n*, 140 Hawai’i at 52, 403 P.3d at 227. In other words, Chapter 660 *sits atop* the centuries-old common law writ of habeas corpus. Chapter 660 supplements the common law by clarifying certain procedures, but it does not replace the Great Writ. Consequently, this Court must apply habeas corpus as a matter of common law, not statutory interpretation.

B. Mari and Vaigai Are Entitled to a Common Law Writ of Habeas Corpus.

Having established the appropriate framework for deciding the scope and coverage of the writ, *amici* turn next to common law.

1. *Common Law Principles Compel the Recognition of Mari and Vaigai as Entitled to*

Liberty and Subject to the Writ of Habeas Corpus.

NhRP and its expert affiants submitted extensive materials establishing elephants have fundamental interests in liberty. Amici agree. Elephants are sentient beings with a well-developed capacity for rich experiences, including pain, pleasure, sadness, joy, and a wide range of other physical and psychological experiences. *See, e.g.,* Joyce H. Poole & Cynthia J. Moss, *Elephant Sociality and Complexity: The Scientific Evidence*, in *ELEPHANTS AND ETHICS: TOWARD A MORALITY OF COEXISTENCE* 69 (Christen Wemmer & Catherine A. Christen eds. 2008). Elephants establish long-lasting bonds with their family members, form enduring memories that guide their social interactions, and grieve for their dead. *Id.* at 71, 87, 90. These capabilities establish that elephants have a fundamental interest in autonomously pursuing their lives and flourishing without unjustified human intervention. *See generally* MARTHA C. NUSSBAUM, *JUSTICE FOR ANIMALS* (2022). Elephants are sentient animals with goals, desires, emotions, familial connections, and other significant capabilities, including an interest in liberty. Habeas corpus demands that infringements of such liberty rights be explained and justified.

Despite this, the ICA rejected Mari and Vaigai’s petition because, “the common law writ of habeas corpus . . . applied only to persons.” *Nonhuman Rts. Project, Inc.*, 2026 WL 226499, at *1; *see also id.* at *2 (“[T]he common law writ of habeas corpus . . . applied only to persons.”). The court noted, “[a]t common law, the category of ‘persons’ was confined to humans, and the law separately addressed animals as objects of property.” *Id.* The court’s use of the past tense (“applied,” “was confined,” “addressed”) indicates its error. The court restrained its common law analysis to fixed rules from England’s past.

No one doubts the common law was historically hostile to the rights of animals. But that is not the issue. As Judge Rowan Wilson of New York’s highest court noted in his dissent in a separate NhRP case, “[t]he correct approach is not to say, ‘this has never been done’ and then quit, but to ask, ‘should this now be done even though it hasn’t before, and why?’” *Nonhuman Rts Project, Inc ex rel Happy v. Breheny*, 197 N.E.3d 921, 937 (N.Y. 2022) (Wilson, J., dissenting); *see also* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 453 (1972) (“Throughout legal history, each successive extension of rights to some new entity has been, theretofore, a bit unthinkable. We are inclined to suppose the rightlessness of rightless ‘things’ to be a decree of Nature, not a legal convention acting in support of some status quo.”).

The State’s common law “does not remain in a somnolent and sedent[a]ry state.” *In re Chun Quan Yee Hop’s Est.*, 52 Haw. 40, 43 (1970). Rather, this Court has repeatedly acknowledged the importance of the common law’s responsibility to evolve alongside changing norms, values, and knowledge. “[T]he genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth.” *Lum v. Fullaway*, 42 Haw. 500, 502 (Terr. 1958). Such growth arises from “adaptation to new conditions, interests, relations, and usages as the progress of society may require.” *Welsh v. Campbell*, 41 Haw. 106, 120 (Terr. 1955) (quoting *Miller v. Monsen*, 37 N. W. 2d 543, 547 (Minn. 1949)). Common law adjudication relies not on “absolute, fixed, and inflexible rules,” but on “broad and comprehensive principles based on justice, reason, and common sense.” *Id.*; see also *id.* at 118 (“[T]he common law consists of fundamental principles and reasons and is a system of legal logic rather than a fixed and inflexible set of rules.”).

The common law expands through its application to new sets of facts. But, as the Court stated in *Lum*, “[j]udicial law-making does not mean that judges may roam at will on a frolic of their own.” 42 Haw. at 504. Instead, courts discern “the underlying principle, the *ratio decidendi*” of prior cases; they must “then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.” *Id.* (quoting Benjamin Cardozo, *The Nature of Judicial Process* (ed. 2012)).

Here, the *ratio decidendi* of habeas corpus cases is the basic idea that no one who has an interest in liberty should be deprived of that interest without justification. Because elephants have an interest in liberty, this Court should, in Cardozo’s words, “move and develop” the principles underlying habeas corpus to apply to Mari and Vaigai. *Id.* Doing so is not judicial activism or usurping the power of the legislature, but simply the task of common law courts.

A second underlying principle supports habeas corpus for Mari and Vaigai: Kānāwai Māmalahoe, the Law of the Splintered Paddle. Common law development in Hawai‘i is not confined to inherited English values and assumptions. See *Robinson v. Ariyoshi*, 65 Haw. 641, 667 n.25, 658 P.2d 287, 306 n.25 (1982) (explaining that Hawai‘i’s present common law derives from the authority of the State and exists “without regard to what it may have been in England or anywhere else” (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938))). HRS § 1-1 recognizes that imported English common law is subject to displacement by Hawai‘i law. See *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 205, 504 P.2d 1330, 1348 (1973) (Marumoto, J., concurring and dissenting) The Hawai‘i Constitution carries Kānāwai Māmalahoe forward as a “unique and living

symbol of the State’s concern for public safety.” Haw. Const. art. IX, § 10. This Court has described the law as protecting everyone “‘great and humble’[,] [e]specially the vulnerable.” *State v. Wilson*, 154 Hawai‘i 8, 23, 543 P.3d 440, 455 (2024). Kānāwai Māmalahoe “imagines free movement without fear.” *Id.* at 24-25; 543 P.3d at 455-56.

Amici do not contend that Kānāwai Māmalahoe itself grants nonhuman animals a right to liberty, nor do they rely on article IX, section 10 of the Hawai‘i Constitution as a source of an individual constitutional right. See Stand. Comm. Rep. No. 36, in 1 Proceedings of the Constitutional Convention of Hawai‘i of 1978, at 583–84 (1980). *Amici*’s point is narrower. Kānāwai Māmalahoe embodies a distinctly legal commitment in Hawai‘i to protecting the vulnerable from harm. That principle properly informs the development of Hawai‘i’s common law, including its treatment of relationships in which one party exercises complete power over another.

Mari and Vaigai are wholly subject to human legal and physical power and cannot protect their liberty against that power. Their vulnerability is not a reason for legal indifference; it is a reason for the law’s solicitude. Requiring justification for their confinement would develop the common law consistently with a principle already present in Hawai‘i’s legal tradition: that the exercise of superior power carries obligations toward those vulnerable to it.

2. *The ICA Erred in Holding Elephants Cannot Be “Persons”*

The ICA held, “elephants are not ‘persons.’” *Nonhuman Rts. Project, Inc.*, 2026 WL 226499, at *1. The court treated this holding as dispositive of the petition for habeas corpus, but that conclusion is an error.

Amici note, first, that there is no compelling reason that one must be a legal person to have a liberty interest protectable through common law habeas corpus. As Justice Rowan Wilson wrote, “[w]hether 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.” *Breheny*, 197 N.E.3d at 934-35 (Wilson, J., dissenting). Justice Eugene Fahey, another member of the New York high court, expressed the same view in a separate case involving chimpanzees, noting that rather than ask “whether a chimpanzee fits the definition of a person or whether a chimpanzee has the same rights and duties as a human being,” the proper question is “whether he or she has the right to liberty protected by habeas corpus.” *Nonhuman Rts. Project, Inc., on Behalf of Tommy v. Lavery*, 100 N.E.3d 846, 847 (2018) (Fahey, J., concurring).

But even if personhood is a prerequisite for habeas relief, *amici* argue that the elephants are limited legal persons already. It is significant that the ICA did not define what constitutes a person, stating that it “need not be defined” because “the plain meaning of the word does not include animals.” *Nonhuman Rts. Project, Inc.*, 2026 WL 226499, at *2. In support of this assertion, the ICA cited statutes that distinguish between “person” and “animal.” *Id.* But these are statutes, reflecting legislative usage in those particular contexts.¹ They are not dispositive of the broader meaning of the concept of legal personhood and its applicability beyond these narrow statutory contexts, such as common law habeas corpus.

As a legal term, personhood is not synonymous with humanness, as evidenced by the personhood of corporations, ships, and municipalities. See Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 Hastings L.J. 369, 372–73 (2007) (recognizing that some human entities such as fetuses are not legal persons, while some nonhuman entities such as corporations are legal persons). Legal personhood is “not a question of biological or ‘natural’ correspondence.” *Byrn v. N.Y.C. Health & Hosps. Corp.*, 286 N.E.2d 887, 889 (N.Y. 1972).

Rather, legal persons are simply the bearers of legal rights. Rights are legal protections that stem from the positive enactment of legislation or from the extension of common law values to new cases in order to meet changing social norms. Where society, either through the legislative process of statutory law or the judicial process of the common law, extends legal protections to others, it has conferred a legal right and thus recognized the legal personhood of those it protects.

This perspective is consistent with the jurisprudential consensus that “a person is any being whom the law regards as capable of rights or duties . . . whether a human being or not[.]” Sir John William Salmond, *Salmond on Jurisprudence* § 61 (P.J. Fitzgerald ed 12th ed 1966); see also Bryant Smith, *Legal Personality*, 37 Yale L.J. 283, 283 (1928) (“To confer legal rights or to impose legal duties . . . is to confer legal personality.”). Personhood is the label the legal system attaches to those entities who have legal rights or duties.

Animals fit that description; they are legal rights-holders. “Animals have many legal rights, protected under both federal and state laws.” *Cetacean Community v. Bush*, 386 F.3d 1169, 1175 (9th Cir. 2004). Legal scholar Cass Sunstein echoes that observation, stating “it is entirely clear that

¹ The court also cites *State v. LeVasseur*, 1 Haw. App. 19 (1980), but *LeVasseur* is simply interpreting the words “another” and “person” as used in statutes (HRS §§ 703-302 and 701-118). As discussed above, statutory interpretation and common law adjudication are different judicial tasks.

animals have legal rights, at least of a certain kind.” Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1335 (2000). In Hawai‘i, animals have a negative right to be free from the infliction of unjustifiable pain and suffering and a positive right to the provision of adequate food, water, and shelter. See HRS §§ 711-1109 (prohibiting torture and requiring the provision of “necessary sustenance”), -1100 (defining torture as “every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted” and defining necessary sustenance to include food, water, and shelter). These protections are a form of legal rights for animals. See Matthew Liebman, *Animal Plaintiffs*, 108 Minn. L. Rev. 1707, 1774 (2024) (“If anticruelty laws create duties for humans . . . for the sake of animals themselves . . . , then they do establish rights for animals—precisely because a right is the corollary of a duty created to protect the interests of the right-holder.”).

There have been significant shifts in how the legal system conceptualizes animals and their legal rights. See David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800’s*, 1993 Det. CL Rev 1 (1993). These transformations have been most obvious in the development of anticruelty laws across the country. Early iterations of anticruelty laws were primarily concerned not with the animals themselves but with the property rights of animals’ human owners or, slightly more altruistically, with the need to safeguard public morals from the coarsening effects of public displays of animal cruelty. See *id.*; Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 Law & Soc. Inquiry 136 (2019).

As legislatures amended anticruelty laws, typically in response to advocacy from the animal protection movement, the statutes reflect concern for animal suffering and cruelty as moral wrongs in and of themselves. For example, in the late 19th century and early 20th century, many states began to eliminate the requirement that animals be the property of another to receive the protections of the statutes. By applying anticruelty laws to cruelty committed against one’s own animals, state legislatures recognized the wrong of animal cruelty not as a property crime against the owner of the animal, but rather an invasion of the legally recognized interests of the animal herself.

This legislative tradition of protecting individual animals themselves from suffering constitutes the conferral of legal rights and thus personhood, as a “person” is simply an entity who holds legal rights. Given animals’ legal personhood, they ought to enjoy not only those rights that have been legislatively conferred, as in the anticruelty law, but also those that may be judicially elaborated through the common law, as in the writ of habeas corpus.

Taken together, these trends establish that animals can no longer be seen as rights-less things, but rather as the holders of legal rights, and consequently legal persons. As entities who “have many legal rights[] protected under both federal and state laws,” *Cetacean Community*, 386 F.3d at 1175, animals are already legal persons, because “[t]o confer legal rights or to impose legal duties . . . is to confer legal personality.” Smith, *supra*, at 283.

Should this Court disagree with the *descriptive* claim that animals are already legal persons by virtue of their possession of legal rights, *amici* agree with the *normative* claim made by NhRP, that elephants should be recognized as member of the legal community because of their possession of those interests that the common law protects, namely interests in autonomy and liberty.

Simply put, *amici* agree that elephants have a substantive interest in autonomy and liberty. Because elephants have the very interests that the common law protects, they are normatively entitled to consideration as legal persons. As legal persons, the elephants in this case are entitled to a writ of habeas corpus to require the Honolulu Zoo to justify their detention. If the Zoo cannot do so, the elephants should be transferred to a reputable sanctuary where they can live as the wildlife that they are to the extent possible given their many years of captivity and its effect on their natural instincts.

3. This Court Should Reject the Social Contract Theory as a Basis for Excluding Elephants from the Writ of Habeas Corpus.

Although the ICA did not expressly reference social contract theory as a basis for rejecting the claim in this case, it cited several other courts that have. *Nonhuman Rts. Project, Inc.*, 2026 WL 226499, at *2 n. 4 (citing *Nonhuman Rts. Project, Inc. v. DeYoung Fam. Zoo, LLC*, --- N.W.3d ----, 2025 WL 2957821 (Mich. App. 2025); *Nonhuman Rts. Project, Inc. v. Cheyenne Mountain Zoological Soc’y*, 562 P.3d 63 (Colo. 2025); *Nonhuman Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921 (N.Y. 2022); *Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc.*, 231 A.3d 1171 (Conn. App. 2020)). Social contractarianism is the idea that government arises from a fictional exchange between members of society, and that those who cannot assume contractual responsibilities to follow the law are not entitled to the rights and protections that the social contract offers in return. See *Contractarianism*, Stanford Encyclopedia of Philosophy (Sep. 30, 2021), <https://plato.stanford.edu/entries/contractarianism>; see also *Breheny*, 197 N.E.3d at 928-29 (“[L]egal personhood is often connected with the capacity, not just to benefit from the provision of legal rights, but also to assume legal duties and social responsibilities. Unlike the human species, which has the capacity to accept social responsibilities and legal duties, nonhuman

animals cannot . . . be held legally accountable or required to fulfill obligations imposed by law.” (citations omitted)).

Amici urge this Court to treat social contract theory with skepticism and reject the exclusionary reasoning of the prior cases that have relied on it.

First, strict social contractarianism is difficult to reconcile with Hawai‘i’s own legal tradition. Kānāwai Māmalahoe reflects a principle that vulnerability to superior power is a reason for legal protection, not exclusion. Moreover, the Legislature has expressed a consistent policy judgment in HRS § 5-7.5, defining aloha spirit as “mutual regard and affection” that “extends warmth in caring with no obligation in return.”² Social contractarianism requires just the opposite; it makes inclusion in the legal and political community depend on self-interested exchange and reciprocal obligation.

Second, the use of social contract theory to exclude individuals from the moral, political, and legal community is deeply troubling. Arguments of this sort have excused the very worst forms of prejudice. Legal scholar Anita L. Allen has warned, “judges’ reliance on social contractarianism has served the interests of injustice—even extremes of injustice.” Anita L. Allen, *Social Contract Theory in American Case Law*, 51 Fla. L. Rev. 1, 13 (1999). Michigan Supreme Court Justice Elizabeth Welch, in her recent dissent from that court’s denial of review in NhRP’s *DeYoung* case, wrote, “I believe the Court of Appeals incorrectly relied upon Blackstone’s and Hobbes’s questionable applications of social contract theory to define ‘personhood.’ I believe those views are antiquated, and we should not rely on them in our jurisprudence.” *Nonhuman Rts. Project, Inc. v. DeYoung Fam. Zoo, LLC*, No. 169351, 2026 WL 2078146, at *3 (Mich. July 17, 2026) (Welch, J., dissenting from denial of review).

As the late philosopher Charles W. Mills observes, the development of the social contract theory through the writings of Hobbes, Locke, Rousseau, and Kant, from the mid-17th century through the early 19th century, coincides almost exactly with the era of European expansionism, colonialism, and imperialism and often served as a rationalization for such projects. Charles W. Mills, *Blackness Visible: Essays on Philosophy and Race* (1998); see also Charles W. Mills, *The*

² Historically, the word *aloha* has been used to describe the deep emotional bond that humans have with animals. Malcolm Nāea Chun offers this translation of a story from Hawaiian folklore: “And the female chief [Nāmakao Kaha‘i] saw that her dog [Moela] was dead, she was full of regret and love [*aloha*], and she collapsed in love [*aloha*] [for her pet].” Malcolm Nāea Chun, “Aloha: Traditions of Love and Affection,” in *No Na Mamo: Traditional and Contemporary Hawaiian Beliefs and Practices* (2011), p. 20.

Racial Contract (1997). While the social contract theory purported to describe a basis for political equality, it drew sharp distinctions between those who were considered participants in the formation of such a contract, viewing property-owning, white men as the archetypal social contractors.

Similarly, feminist political theorists and disability scholars have critiqued the social contract theory as premised on exclusionary presumptions about who is best situated to make the rules that govern society. Social contract theory's ahistorical myth of autonomous agents entering into arms-length contractual relationships failed to account for connectedness, dependency, and vulnerability that characterizes social existence, including animal societies. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 Yale J.L. & Feminism 1 (2008); Ani Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 Animal L. 1 (2009) (applying Fineman's vulnerability approach to animals). Disability scholar Sunaura Taylor argues, "the physical vulnerability of disabled individuals and animals is immensely problematic under a social contract tradition of justice, because even in a 'state of nature' an asymmetry in power exists between these groups and able-bodied human beings." Sunaura Taylor, *Beasts of Burden: Disability Studies and Animal Rights*, 19 Qui Parle 191, 199 (2011). Social contract theory also fails to account for unequal divisions of labor in formation of a public sphere. See generally Carole Pateman, *The Sexual Contract* (1988).

The Court should be wary of relying on social contract theory to justify the exclusion of animals from the community of legal rights-holders, as other courts have done in similar cases.

III. CONCLUSION

The ICA erred in deciding this case as a matter of statutory interpretation, because the legislature did not expressly abrogate the common law writ of habeas corpus when it enacted statutes concerning its procedures. Rather, this case presents a fundamental common law issue: who may avail themselves of the Great Writ of habeas corpus? As such, this Court is tasked with developing the common law, whose "genius . . . is its capacity for orderly growth." *Fullaway* 42 Haw. at 502.

In applying the common law, this Court should pay appropriate "respect for nature's dignity." *Hilo Bay Marina, LLC v. State*, 156 Hawai'i 478, 511 (2025) (Eddins, J., concurring). In light of our evolving knowledge of the capacities of elephants such as Mari and Vaigai and our

emerging relationships with nonhumans, this Court should adapt the common law to meet the values of Hawai‘i in the twenty-first century, rather than those of England in the eighteenth century. *See Robinson*, 65 Haw. at 667 n.25, 658 P.2d at 306 n.25; *see also DeYoung Fam. Zoo, LLC*, No. 169351, 2026 WL 2078146, at *3 (Mich. July 17, 2026) (Welch, J., dissenting from denial of review) (“As a foundational matter, I question whether an eighteenth-century British jurist’s interpretation of the Book of Genesis is a sound foundation for Michigan common law in the twenty-first century.”). In developing Hawai‘i’s common law, this Court should be informed by Hawai‘i’s own legal tradition. Kānāwai Māmalahoe reflects a principle that the exercise of superior power carries obligations toward those especially vulnerable to it. Allowing Mari and Vaigai to challenge the legality of their confinement would accord with that principle and with habeas corpus’s longstanding protection of liberty.

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Amici respectfully request this Court reverse the ICA and recognize Mari and Vaigai as entitled to
invoke Hawai'i's common law writ of habeas corpus to challenge the legality of their confinement.

DATED: Makawao, Maui, Hawai'i August 26, 2026

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