

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)

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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)

**PETITIONER/PETITIONER-APPELLANT NONHUMAN RIGHTS PROJECT, INC.'S
RESPONSE TO BRIEF OF *AMICI CURIAE* ELEPHANT COGNITION EXPERTS
IN SUPPORT OF PETITIONER/PETITIONER-APPELLANT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. ARGUMENT	1
III. CONCLUSION	4

TABLE OF AUTHORITIES

Cases

<i>Almeida v. Correa</i> , 51 Haw. 594 (1970)	1, 2
<i>Campbell v. H. Hackfeld & Co.</i> , 20 Haw. 245 (1910)	3
<i>Carr v. Strode</i> , 79 Hawai‘i 475 (1995)	3
<i>In re Robert Hind, Ltd.</i> , 34 Haw. 40 (1936)	2
<i>Matter of Nonhuman Rights Project, Inc. v. Breheny</i> , 38 N.Y.3d 555 (2022)	2
<i>Nonhuman Rights Project, Inc. v. Cheyenne Mountain Zoological Society</i> , 2023 WL 12313504 (Colo. Dist. Ct. 2023)	2
<i>Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.</i> , 192 Conn. App. 36 (2019)	2
<i>Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery</i> , 31 N.Y.3d 1054 (2018)	4
<i>Soichi Fukuoka v. Dodo</i> , 43 Haw. 337 (1959)	2
<i>State v. Abella</i> , 145 Hawai‘i 541 (2019)	3

<i>Territory v. Araujo</i> , 21 Haw. 56 (1912)	2
<i>The Nonhuman Rights Project v. Breheny</i> , 2020 WL 1670735 (N.Y. Sup. Ct. Feb. 18, 2020)	2
<i>Union Pac. R. Co. v. Botsford</i> , 141 U.S. 250 (1891)	3
 <u>Statutes</u>	
HRS § 626-1, Rule 201	1, 2
 <u>Other Authorities</u>	
Anita L. Allen, <i>Social Contract Theory in American Case Law</i> , 51 FLA. L. REV. 1 (1999)	3

I. INTRODUCTION

Pursuant to this Court’s September 17, 2026, *Order Granting Motion for Leave to File Amicus Curiae Brief*, Dkt. 70, Petitioner/Petitioner-Appellant Nonhuman Rights Project, Inc. (“NhRP”) files this Response to the Brief of Amicus Curiae Experts on Elephant Cognition (“Elephant Cognition Experts”).

II. ARGUMENT

The Elephant Cognition Experts argue that “elephant autonomy is a fact properly subject to judicial notice.” Dkt. 68, p. 3. The NhRP agrees. The Elephant Cognition Experts establish that as a matter of scientific fact, elephants are autonomous beings who make meaningful choices about their movements, social relationships, foraging, and other fundamental aspects of their daily lives. *See generally id.* That conclusion applies to both African and Asian elephants, including Mari and Vaigai. *See, e.g.*, Dkt. 5, App. C, ¶ 25 n.10 (“References to elephants in the Expert Declarations are applicable to both African and Asian elephants.”). The NhRP’s underlying Petition for a Common Law Writ of Habeas Corpus establishes the same scientific facts through declarations from internationally renowned experts in elephant behavior, cognition, and communication. *Id.* at ¶¶ 16, 25-91. Respondents/Respondents-Appellees City and County of Honolulu, Department of Enterprise Services, its Director, Dita Holifield; the Honolulu Zoo; and its Director, John Berry (collectively, “Appellees”) cannot offer competing expert evidence because no credible scientific evidence disputes that elephants are autonomous. *See* Dkt. 68, p. 2 (“The scientific evidence concerning elephants submitted in this case is . . . beyond reasonable dispute.”). The scientific fact of elephant autonomy is therefore not subject to reasonable dispute because it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” HRS § 626-1, Rule 201(b)(2); *Almeida v. Correa*, 51 Haw. 594, 605

(1970) (“A fact is a proper subject for judicial notice if it is common knowledge or easily verifiable.”). This Court may therefore take judicial notice of elephant autonomy, just as Hawai‘i courts have taken judicial notice of other readily verifiable scientific and natural facts. *See, e.g., Soichi Fukuoka v. Dodo*, 43 Haw. 337, 341 (1959) (taking judicial notice that tuberculosis is a contagious disease); *In re Robert Hind, Ltd.*, 34 Haw. 40, 44 (1936) (taking judicial notice that all food consumed by a cow is not incorporated in milk); *Territory v. Araujo*, 21 Haw. 56, 59 (1912) (taking judicial notice that banana trees hold water).¹ If Appellees truly contend that elephant autonomy is subject to genuine scientific dispute, that contention warrants an evidentiary hearing pursuant to HRS § 660-24.

Should the Court take judicial notice that Mari and Vaigai are autonomous, which it may do “whether requested or not,” HRS § 626-1, Rule 201(c), it should then recognize that Mari and Vaigai possess the common law right to bodily liberty protected by habeas corpus as a matter of

¹ This Court may also consider the consistent judicial recognition of elephant autonomy and cognitive complexity in NhRP’s prior litigation. *See Matter of Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555, 567 (2022) (recognizing as “essentially undisputed” that “elephants are intelligent beings, who have the capacity for self-awareness, long-term memory, intentional communication, learning and problem-solving skills, empathy, and significant emotional response”); *id.* at 608-09 (Wilson, J., dissenting) (discussing scientific evidence of elephants’ memory, self-awareness, social relationships, and ability to anticipate the consequences of their actions); *id.* at 636-37 (Rivera, J., dissenting) (describing the record as “replete” with expert evidence of elephants’ “complex cognitive abilities and self-determinative behavior”); *The Nonhuman Rights Project v. Breheny*, 2020 WL 1670735, at *10 (N.Y. Sup. Ct. Feb. 18, 2020) (recognizing an Asian elephant as “an intelligent, autonomous being who should be treated with respect and dignity, and who may be entitled to liberty”); *Nonhuman Rights Project, Inc. v. R.W. Commerford & Sons, Inc.*, 192 Conn. App. 36, 48 n.9 (2019) (“We acknowledge that elephants are magnificent animals who naturally develop social structures and exhibit emotional and intellectual capacities. They are deserving of humane treatment whether they exist in the wild or captivity.”); *Nonhuman Rights Project, Inc. v. Cheyenne Mountain Zoological Society*, 2023 WL 12313504, at *12 (Colo. Dist. Ct. 2023) (“Elephants are extraordinary creatures, possessed of truly exceptional cognitive, social, and psychological capabilities. . . . As a matter of pure justice . . . the N[h]RP has made a persuasive case that elephants are entitled to be treated with the dignity befitting their species; and that that cannot be done, no matter how conscientious those who care for them may be, if they are confined in zoos that lack the substantial acreage needed to allow them to flourish.”).

Hawai‘i common law. *See* Dkt. 5, App. C, ¶¶ 130–191 (as a matter of justice, evolving social norms, liberty, and equality, this Court should recognize Mari and Vaigai’s asserted common law right).² If the Court recognizes that right, Mari and Vaigai are necessarily legal persons for purposes of that right. *See* Dkt. 5, pp. 9-11 (Legal Personhood).

Ignoring the relevant common law analysis required in this case, Appellees invoke the social contract theory in their response to the Brief of Amicus Curiae Animal Law Section of the Los Angeles County Bar Association. *See* Dkt. 74, p. 5 (“Nonhuman Animals Have No Duties and therefore, No Rights Under the ‘Social Contract’ Principle.”). However, one filing earlier, in their response to the Brief of Amicus Curiae Law Professors, Appellees insisted that the social contract theory is irrelevant to this case. *See* Dkt. 60, p. 1 n.2 (“The Social Contract Theory was not relied upon by any party in any court below in this appeal. Thus, the Court should disregard Amici’s arguments regarding the Social Contract Theory.”). Whether labeled a “social contract,” “social compact,” or rights-and-duties framework, the doctrine is the same. *See, e.g.,* Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 10 (1999) (referring to the “social contract” and “social compact” interchangeably). Appellees cannot have it both ways:

² Hawai‘i has long recognized that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others,” absent clear legal authority. *Campbell v. H. Hackfeld & Co.*, 20 Haw. 245, 250-51 (1910) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). And this Court has repeatedly grounded the common law protection against unwanted bodily interference in autonomy and self-determination. *See, e.g., State v. Abella*, 145 Hawai‘i 541, 553 (2019) (recognizing that the right to refuse life-sustaining medical treatment as incident to “bodily autonomy, and self-determination”); *see also Carr v. Strode*, 79 Hawai‘i 475, 484-85 (1995) (adopting the patient-oriented standard for informed consent because it better protects “self-determination”). These decisions establish that autonomy is the foundation of the right to bodily liberty.

dismiss the social contract theory as “just that — theory,” Dkt. 60, p. 1 n.2, while invoking it one brief later to justify denying Mari and Vaigai the common law right to bodily liberty.³

III. CONCLUSION

The Court should take judicial notice that Mari and Vaigai are autonomous, recognize that they possess the common law right to bodily liberty, and remand with instructions to issue an order to show cause to determine whether their confinement at the Honolulu Zoo violates their right. Alternatively, the Court should remand for an evidentiary hearing.

DATED: San Diego, California, September 24, 2026.

/s/ Cheryl Nolan

Cheryl Nolan, Esq.

—and—

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³ More fundamentally, the right to bodily liberty does not depend upon the capacity to bear reciprocal legal duties. Human infants and adults who lack the capacity to undertake legal obligations nevertheless have the liberty right habeas corpus protects. As Judge Eugene Fahey of the New York Court of Appeals observed, “no one would suppose that it is improper to seek a writ of habeas corpus on behalf of one’s infant child or a parent suffering from dementia.” *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 31 N.Y.3d 1054, 1057 (2018) (Fahey, J., concurring) (citing cases). The capacity to bear legal duties therefore cannot be a prerequisite to possessing the right to bodily liberty protected by habeas corpus.

CERTIFICATE OF SERVICE

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

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