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IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI‘I

HAWAI‘I GOVERNMENT EMPLOYEES)	CIVIL NO. 1CCV-21-0001304
ASSOCIATION, AFSCME, LOCAL 152,	)	(DECLARATORY JUDGMENT)
AFL-CIO; and, UNITED PUBLIC)	
WORKERS, AFSCME, LOCAL 646,	)	APPEAL FROM:
AFL-CIO,	)	(1) ORDER GRANTING DEFENDANT
	)	DEPARTMENT OF PUBLIC SAFETY,
Plaintiffs-Appellants,	)	STATE OF HAWAI‘I’S AMENDED
	)	MOTION TO DISMISS, FILED ON
vs.	)	NOVEMBER 29, 2021 [Dkt. 17], FILED ON
	)	MARCH 31, 2022 [Dkt. 37]; and (2) FINAL
DEPARTMENT OF PUBLIC SAFETY,	)	JUDGMENT FILED ON AUGUST 2, 2022
STATE OF HAWAI‘I; JOHN DOES 1-10;	)	[Dkt. 48]
JANE DOES 1-10; DOE PARTNERSHIPS)	
1-10; DOE CORPORATIONS 1-10; DOE)	
GOVERNMENTAL AGENCIES AND)	
DOE ENTITIES 1-10,)	
	)	JUDGE: HON. LISA W. CATALDO
Defendants-Appellees.)	
)	

**DEFENDANT-APPELLEE DEPARTMENT OF PUBLIC SAFETY, STATE OF
HAWAI‘I’S MEMORANDUM IN RESPONSE
TO PUBLIC FIRST LAW CENTER’S AMICUS CURIAE BRIEF**

CERTIFICATE OF SERVICE

ANNE E. LOPEZ 7609
Attorney General of Hawai'i

AMANDA DONLIN 9552
JAMES E. HALVORSON 5457
Deputy Attorneys General
Department of the Attorney
General, State of Hawai'i
235 South Beretania Street, 15th Floor
Honolulu, Hawai'i 96813
Telephone: (808) 587-2900
Facsimile: (808) 587-2965
Email: amanda.l.donlin@hawaii.gov
james.e.halvorson@hawaii.gov

Attorneys for Defendant-Appellee
DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAI'I

**DEFENDANT-APPELLEE DEPARTMENT OF PUBLIC
SAFETY, STATE OF HAWAI‘I’S MEMORANDUM IN RESPONSE
TO PUBLIC FIRST LAW CENTER’S AMICUS CURIAE BRIEF**

Defendant-Appellee Department of Public Safety, State of Hawai‘i (“Appellee”) submits the following Memorandum in Response to Public First Law Center’s (“PFLC”) Amicus Curiae Brief. PFLC argues that Hawai‘i Government Employees Association, AFSCME, Local 152, AFL-CIO and United Public Workers, AFSCME, Local 646, AFL-CIO (“Appellants”) do not have a cause of action pursuant to Hawai‘i Revised Statutes (“HRS”) § 92F-14. Appellee agrees, and this is consistent with the position Appellee has taken before the Circuit Court and in this appeal. PFLC’s first point is thus not addressed in this response memorandum.

PFLC’s amicus brief goes on to note that “the Unions’ complaint may state a claim for invasion of privacy under the Hawai‘i Constitution, even if it does not state a claim under UIPA.” ICA Dkt. 76 at PDF 4. However, as addressed more fully below, Appellee urges this Court to disregard that argument because it was not raised in Appellants’ opening brief and is thus waived. Additionally, Appellant’s complaint did not cite any other basis for liability besides HRS ch. 92F.

I. ARGUMENT

**A. APPELLANTS WAIVED ANY CLAIM OF A CONSTITUTIONAL
VIOLATION OF PRIVACY**

The case law is clear: “An amicus curiae generally cannot raise new arguments on appeal and arguments not raised by a party in an opening brief are waived.” *In re KAHEA*, 150 Hawai‘i 43, 50 n.9, 497 P.3d 58, 65 n.9 (2021) (quoting *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009)). This applies even where the new arguments raise constitutional issues. *See In Re KAHEA*, 150 Hawaii at 50 n.9, 197 P.3d at 65 n.9 (rejecting

constitutional arguments that were “either cursorily gestured towards in KAHEA’s briefing or advanced exclusively by amici curiae”).

Here, PFLC argues in its amicus brief that “[o]ther laws may provide a private right of action when a government agency is alleged to have wrongfully disclosed records to the public.” *See* Dkt. 76 at PDF 3. However, nothing in the record shows that Appellants at any point in these proceedings raised “other laws” as a basis for their lawsuit or their alleged right to privacy. Appellants’ complaint referenced HRS § 92F-14 as the sole basis for its first cause of action and the complaint was never amended, despite Appellants being granted leave from the Circuit Court to do so. *See* JIMS 1, PDF 8;¹ ICA Dkt. 36, at PDF 7 and 8. Although Appellants raised privacy as an issue, the complaint cited HRS § 92F-14 as the basis for liability and not a right to privacy under the Hawai‘i Constitution, United States Constitution, or any other law regarding privacy. *See* JIMS 1.

The Circuit Court inquired during oral argument on Appellee’s motion to dismiss if other causes of action existed. *See* ICA Dkt. 36, transcript dated January 11, 2022, at PDF 7 and 8. Neither party identified any other cause of action in response. *See* ICA Dkt. 36.

Additionally, even though in the order granting the motion to dismiss, the Circuit Court gave Appellants leave within thirty days to amend the complaint (without limitation), Appellants did not amend their complaint. *See* ICA Dkt. 36, at PDF 7 and 8. Thus, Appellants had ample opportunity to allege a violation of privacy claim under the Hawai‘i Constitution, if they so desired.

¹Citations to the record from the circuit court are to the JIMS docket number as listed in the Case Detail Docket List contained in the Record on Appeal filed in the ICA, followed by the PDF page number. *See* ICA Dkt. 16 at PDF 4.

Not only did Appellants not allege a violation of privacy claim under the Hawai‘i Constitution in Circuit Court proceedings, they have not raised such an issue in these appellate proceedings.

In Appellants’ opening brief, Appellants identified the following points of error:

(1) Alleged error #1, the Circuit Court misinterpreted the scope of Section 92F-14 HRS and Chapter 92F, HRS.

. . . .

(2) Alleged error #2, the Circuit Court expanded the application of the Hawaii State Supreme Court’s decision in *Organization of Police Officers v. City and County of Honolulu*, 149 Hawaii 492, 494 P.3d 1225 (2021).

. . . .

(3) Alleged error #3, the Circuit Court dismissed all Negligence based claims in the Complaint.

. . . .

(4) Alleged error #4, the Circuit Court misstated the law regarding organizational standing.

. . . .

See ICA Dkt. 38 at PDF 3, 5, 6 and 7.

None of the four points of error referenced “other laws” of the kind PFLC appears to highlight, and the only reference to privacy rights was with regard to HRS ch. 92F. Appellants are limited in these proceedings to those points of error. *See* Rule 28(b)(4), Hawai‘i Rules of Appellate Procedure.

Thus, Appellants’ failure to raise in their complaint and argue in their opening brief a violation of privacy claim under the Hawai‘i Constitution has caused such argument to be waived. PFLC cannot introduce a brand new claim into this case for Appellants, and especially not on appeal. *See KAHEA, supra* (“An amicus curiae generally cannot raise new arguments on appeal and arguments not raised by a party in an opening brief are waived.”).

B. EVEN IF THIS COURT CONSIDERED WHETHER “OTHER LAWS” WERE VIOLATED, THERE WAS NO VIOLATION OF PRIVACY

The absence of an argument by Appellants that Appellee violated “other laws” regarding privacy prevents this Court from considering PFLC’s second argument, which concerns such “other laws.”

But even assuming *arguendo* that the argument was properly raised, it must be rejected because there was no private medical information, or other information entitled to protection by any privacy law, that Appellee disclosed.

It is clear that the email sent out by Appellee did not reveal any medical information such as the vaccination status of any employee. *See* JIMS 5 at PDF 2-3. The subject email was sent to both employees who had been vaccinated and those who had not been vaccinated. *See* JIMS 1 at PDF 6, JIMS 2 at PDF 6-8, JIMS 3 at PDF 204, and JIMS 5 at PDF 2-3. Even though the sender of the email mistakenly “cc’d” the addressees, rather than “bcc’d” them, there was still no way for anyone who received the email to know the vaccination status of any of the employees on that email. *See* JIMS 5 at PDF 2-3.

In addition, the Supreme Court of Hawai‘i has held that the constitutional right to privacy only extends to “highly personal and intimate information.” *See Honolulu Civ. Beat Inc. v. Dep’t of the Att’y Gen.*, 151 Haw. 74, 80 n.7, 508 P.3d 1160, 1166 n.7 (2022) (quoting *State of Hawai‘i Org. of Police Officers v. Soc’y of Prof’l Journalists-Univ. of Hawai‘i Chapter*, 83 Hawai‘i 378, 398, 927 P.2d 386, 406 (1996)). As explained by the Court:

Under article I, section 6, “[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.” We have held that “the privacy right protected by the ‘informational privacy’ prong of article I, section 6 is the right to keep confidential information which is ‘highly personal and intimate.’” *State of Hawai‘i Org. of Police Officers (SHOPO) v. Soc’y of Prof’l Journalists-Univ. of Hawai‘i Chapter*, 83 Hawai‘i 378, 398, 927 P.2d 386, 406 (1996)). As the court in *SHOPO* recognized, “highly personal and intimate

information” is analogous to that implicated by the invasion of privacy tort, which encompasses information about “[s]exual relations,” “family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a [person's] life in [their] home, and some of [their] past history that [they] would rather forget.” *Id.* (citing Restatement (Second) of Torts § 652D cmt. B (Am. Law Inst. 1977)).

Honolulu Civ. Beat Inc., 151 Haw. at 80 n.7, 508 P.3d at 1166 n.7.

Thus, since the information at issue is not “highly personal and intimate information,” even if this Court were to consider the second argument made by PFLC, it should find that under the facts of this case, there was no basis to find a privacy violation based upon any “other law.”

II. CONCLUSION

PFLC’s amicus brief does not raise any argument that warrants reversal of the Circuit Court’s decision. Thus, the order granting the amended motion to dismiss and final judgment should be affirmed.

DATED: Honolulu, Hawai‘i, June 4, 2025.

/s/ AMANDA L. DONLIN

AMANDA L. DONLIN

Deputy Attorney General

Attorney for Defendant-Appellee
DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAI‘I

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_____)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 4, 2025, a true and correct copy of DEFENDANT-APPELLEE DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAI'I'S RESPONSE TO PUBLIC FIRST LAW CENTER'S AMICUS CURIAE BRIEF was served electronically (through the Judiciary Electronic Filing System), upon the following persons at their last known email addresses:

TED H.S. HONG, ESQ.
P. O. Box 4217
Hilo, Hawai'i 96720

ted@tedhonglaw.com

Attorney for Plaintiffs-Appellants
HAWAI'I GOVERNMENT EMPLOYEES
ASSOCIATION, AFSCME, LOCAL 152,

AFL-CIO; and UNITED PUBLIC
WORKERS, AFSCME, LOCAL 646,
AFL-CIO

ROBERT BRIAN BLACK, ESQ.
BENJAMIN M. CREPS, ESQ.
Public First Law Center
700 Bishop Street, Suite 1701
Honolulu, Hawai'i 96813

brian@publicfirstlaw.org
ben@publicfirstlaw.org

Attorneys for Amicus Curiae
PUBLIC FIRST LAW CENTER

DATED: Honolulu, Hawai'i, June 4, 2025.

/s/ AMANDA L. DONLIN
AMANDA L. DONLIN
Deputy Attorney General

Attorney for Defendant-Appellee
DEPARTMENT OF PUBLIC SAFETY,
STATE OF HAWAI'I