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NO. CAAP-22-0000506 Dkt. 65 MEO

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

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
Plaintiffs-Appellants, )	DEPARTMENT OF PUBLIC SAFETY,
vs. )	STATE OF HAWAI‘I’S AMENDED
DEPARTMENT OF PUBLIC SAFETY, )	MOTION TO DISMISS, FILED ON
STATE OF HAWAI‘I; JOHN DOES 1-10; )	NOVEMBER 29, 2021 [Dkt. 17], FILED ON
JANE DOES 1-10; DOE )	MARCH 31, 2022 [Dkt. 37]; and (2) FINAL
PARTNERSHIPS 1-10; DOE )	JUDGMENT FILED ON AUGUST 2, 2022
CORPORATIONS 1-10; DOE )	[Dkt. 48]
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 OPPOSITION  
TO MOTION FOR LEAVE TO FILE 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, 15<sup>th</sup> Floor  
Honolulu, Hawai'i 96813  
Telephone: (808) 587-2900  
Facsimile: (808) 587-2965  
Email: [amanda.l.donlin@hawaii.gov](mailto:amanda.l.donlin@hawaii.gov)  
[james.e.halvorson@hawaii.gov](mailto: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  
HAWAII’S MEMORANDUM IN OPPOSITION TO MOTION FOR  
LEAVE TO FILE AMICUS CURIAE BRIEF**

Defendant-Appellee State of Hawai‘i, Department of Public Safety (“Appellee”) opposes the Motion for Leave to file Amicus Curiae Brief, filed on September 19, 2024 for the following reasons:

1. The filing of an amicus brief under the facts of this appeal is untimely; and
2. The “Proposed”<sup>1</sup> Amicus Curiae Brief raises issues that were not raised before the circuit court or by the parties in this appeal.

**BACKGROUND**

On March 31, 2022, the Circuit Court of the First Circuit (“Circuit Court”) entered its Order Granting Defendant Department of Public Safety, State of Hawaii’s Amended Motion to Dismiss, Filed on November 29, 2021 (“Order”). JIMS 37.<sup>2</sup> Even though the Circuit Court granted the motion, the court granted Plaintiffs Appellants Hawai‘i Government Employees Association, AFSCME, Local 152, AFL-CIO and United Public Workers, AFSCME Local 646, AFL-CIO (“Appellants”) leave to file an amended complaint within thirty (30) days. JIMS 37 at PDF 5. Appellants did not file an amended complaint.

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<sup>1</sup> Movant improperly filed its “Amicus Curiae Brief” as a separate document without the leave of this Court. Pursuant to Hawaii Rules of Appellate Procedure (“HRAP”) Rule 28(g), “[a]n amicus curiae brief may be filed *only by leave of the appellate court.*” (Emphasis added). Movant, however, filed its amicus brief concurrently with its motion rather than attaching it to the motion as a “proposed” amicus brief. For the purposes of this memorandum in opposition to motion for leave to file Amicus Curiae Brief, the document will be referred to as “Proposed Brief” and in light of the other problems with Movant’s request as outlined above, this Court should deny Movant’s motion and strike the Proposed Brief.

<sup>2</sup> Citations 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 docket number 16 at PDF 4.

On August 2, 2022, the Circuit Court issued its final judgment. JIMS 48.

Appellants filed their notice of appeal on October 19, 2022. JIMS 52.

On January 26, 2023, Appellants filed their opening brief. ICA docket number 38.

Appellee filed its answering brief on March 31, 2023. ICA docket number 44.

Appellants filed their reply brief on April 24, 2023. ICA docket number 54.

On September 19, 2024, Movant Public First Law Center (“Movant”) filed a motion for leave to file amicus curiae brief (“motion”) and a document titled Amicus Curiae Brief. ICA docket numbers 58 and 59.

### **1. THE MOTION IS UNTIMELY**

Movant filed its motion almost a year-and-a-half after the reply brief was filed. The motion alleged that Movant had a compelling interest as to how this Court interprets the Uniform Information Practices Act (“UIPA”), and in a footnote admitted that the motion was filed over a year after briefing closed. Although the motion alleges that Movant only recently learned of the case by happenstance, Movant attached to the motion no memorandum, declaration, or other evidence to support this assertion. ICA docket number 58.

Although HRAP does not provide a specific time-period to request to file an amicus curiae brief, under the facts of this case, where the briefing schedule set by the Court has already been completed for over a year-and-a-half, the Court should treat the motion as untimely and deny the motion.

### **2. MOVANT ATTEMPTS TO RAISE ISSUE NOT RAISED AND BRIEFED BY THE PARTIES**

Movant’s prolonged delay in requesting leave to file an amicus brief is exacerbated by the fact that it improperly attempts to raise issues and assert claims that the Appellants have not themselves raised in this case. “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)).

Here, Movant argues in its Proposed Brief:

- a. Unions do not have a cause of action to stop disclosure of information under UIPA (ICA docket number 59, page 2); and
- b. Other laws may provide a private right of action when a government agency is alleged to have wrongfully disclosed records to the public. ICA docket number 59, page 3.

Movant supports the position taken by Appellee at Circuit Court and in its Answering Brief. Although that may be helpful to Appellee, there is nothing further that Movant can offer this Court that has not already been argued and briefed by Appellee. Thus, there is no reason for an amicus brief to address that issue.

The second argument raised by Movant is one that was not addressed by Circuit Court and is not an issue currently before this Court. Although the Circuit Court inquired during oral argument about other causes of action that might exist, neither party raised such an action during the Circuit Court proceedings and the initial complaint filed by Appellants was never amended. ICA docket number 36, page 7, line 1, to page 8, line 16.

Further, Appellants were given the opportunity to amend their complaint by the First Circuit Court in its decision. JIMS 37 at PDF 5. Appellants never filed an amended complaint to include any other causes of action. The only claims raised as part of Appellants’ complaint were related to Hawai‘i Revised Statutes chapter 92F.

Appellants never raised a constitutional right of privacy claim, despite having multiple opportunities to do so, as part of the complaint they filed. Thus, this Court cannot allow such a

claim to be raised at this stage during an appellate court appeal, when briefing has already been completed, by a non-party through an amicus brief. *See In re KAHEA*, 150 Hawai`i at 50 n.9, 497 P.3d at 65 n.9 (declining to address KAHEA’s “other constitutional arguments” because they were “either [only] cursorily gestured towards in KAHEA’s briefing or advanced exclusively by amici curiae).”

For these reasons, this Court should deny Movant’s motion and strike the Proposed Brief.

### CONCLUSION

Movant’s motion is untimely and improperly attempts to raise issues not raised by Appellant or any other party in this case. As such, this Court should deny Movant’s motion and strike the Proposed Brief filed by Movant on September 19, 2024.

DATED: Honolulu, Hawai`i, September 25, 2024.

/s/ AMANDA DONLIN  
AMANDA DONLIN

Deputy Attorney General  
Attorney for Defendant-Appellee  
DEPARTMENT OF PUBLIC SAFETY,  
STATE OF HAWAI`I

NO. CAAP-22-0000506

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Defendants-Appellees. )	
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 25, 2024, a true and correct copy of DEFENDANT-APPELLEE DEPARTMENT OF PUBLIC SAFETY, STATE OF HAWAII'S MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE 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, Hawaii 96720  
[ted@tedhonglaw.com](mailto: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](mailto:brian@publicfirstlaw.org)  
[ben@publicfirstlaw.org](mailto:ben@publicfirstlaw.org)

Attorneys for Movant  
PUBLIC FIRST LAW CENTER

DATED: Honolulu, Hawai‘i, September 25, 2024

/s/ AMANDA DONLIN  
AMANDA DONLIN

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