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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; MONSANTO COMPANY; AGRIGENETICS, INC.; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC. DBA MAKOA	) CIVIL NO. 14-00511 SOM-BMK)) INTERVENOR-DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON CLAIMS 1, 2, AND 4 [DKT #70] AND RULE 56(d) REQUEST FOR CONTINUANCE; CERTIFICATE OF)) [*caption continued on next page*]

TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE, Plaintiffs, vs. COUNTY OF MAUI; ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT, Defendants.	)	WORD COUNT; CERTIFICATE OF SERVICE Date: March 10, 2015 Time: 9:00 a.m. Judge: Susan Oki Mollway

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I. INTRODUCTION

In November 2014, the residents of Maui County approved a voter initiative to place a temporary moratorium on further testing and cultivation of genetically modified crops. Maui voters adopted this law because of the harm to public health and environment, the failure of federal and state law to mandate or perform any studies, and the lack of federal and state oversight.

Hawai‘i is ground zero for the development of genetically modified organisms ("GMOs"). It has been a magnet for experimental GMO testing. GMO companies, such as Monsanto Company, conduct more testing on GMO crops in Hawai‘i than anywhere else in the world. These companies use the land in a more destructive way than commercial agricultural activities, which results in higher risks for pollution and health problems. Notwithstanding, there are no federal or state laws protecting against these harms or addressing Maui County's unique interests. Further, no tests have been conducted to show that these activities will not cause harm to the environment and people of Maui.

Plaintiffs seek to invalidate the recently-passed law (the "Ordinance") despite Maui voters' demand that this law be passed and their right to have the Ordinance implemented. Despite Plaintiffs' arguments that there are some broad

federal and state regulatory schemes that address the Ordinance's purposes and concerns, no such laws exist. Maui County is entitled, and in fact has a duty, to protect its residents, environment, and unique natural resources from these activities. The Ordinance is a valid exercise of the County's power and is not preempted by federal or state law.

First, there is no basis for federal preemption. There are no federal laws that regulate GMO operations. The executive branch adopted a policy regulating certain aspects of GMOs through the federal Coordinated Framework for Regulation of Biotechnology. This policy document, however, is not an act of Congress, and it does not have any preemptive effect.

Likewise, the underlying statutes Plaintiffs rely on throughout their brief do not preempt Maui County from regulating GMO operations. Where a state or municipality adopts a local law to protect an interest that is not being addressed on the federal level, the law is not preempted, expressly or implicitly, by federal law. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") regulates herbicides. It does not regulate the testing and cultivation of GMOs. Moreover, the FIFRA expressly allows local municipalities to place additional restrictions, provided it does not conflict with federal law.

The Plant Protection Act ("PPA") regulates the interstate movement of plant pests and noxious weeds. It does not preempt a county's ability to protect

public health and environmental safety, as these areas fall "within the traditional exercise of the police powers of the state."[1] The PPA also does not assure the protections to the environment and human health that this Ordinance seeks to address. The Ninth Circuit has already held that the PPA does not address any issues associated with the Ordinance, including transgenic contamination and environmental hazards resulting from increased herbicide use.[2]

Second, there are no state laws that regulate GMO operations or address the health and safety risks inherent in these activities. The State Legislature has not carved out the areas of environmental and agricultural regulation exclusively for the State. Rather, dual jurisdiction exists between the County and State in these fields, as provided in the Hawai‘i Constitution, various State laws, and various County provisions. Moreover, the Hawai‘i Department of Agriculture's ("HDOA") regulatory authority does not set forth an exclusive and comprehensive state statutory scheme governing the regulation of all GMO operations. Finally, the Ordinance does not conflict with any State laws regarding pesticide use, plant quarantine, and noxious weeds. As such, the Ordinance is not preempted by state laws.

HDOA's testimony at the public hearing is telling of the lack of oversight and a state regulatory mandate. When describing the analysis of

[1] Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 667-68 (9th Cir. 2003).
[2] Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 833 (9th Cir. 2013)

chemicals found in the environment, HDOA's representative explained: "***So we found [chemicals in the environment], frankly, we don't know what it means and no one in, we don't know how to compare that to any kind of health standards.***"[3] This statement captures the reason Maui voters approved the Ordinance—so that GMO activities are evaluated ***before*** companies continue practices that cause unknown environmental and health impacts. After-the-fact studies are ineffective.

Finally, this case presents sensitive issues that are appropriately decided on the state level first. The issues concern the interpretation of Hawai'i's Constitution and state law, and the separation of powers between the State and the County on fundamental local police powers. In particular, the enforceability of the Ordinance turns on the authority of the County to protect the Public Trust Resources pursuant to the duties recognized in the Hawai'i Constitution. For these reasons, Intervenor-Defendants respectfully request that this matter be stayed pending the resolution of the related State Court action, or, in the alternative, that this Court certify the state law issues to the Hawai'i Supreme Court. There are also factual issues in dispute such as how federal and state law is being interpreted and administered. At the very least, Intervenor-Defendants should be allowed to conduct discovery to establish a record as to why this Ordinance is not preempted, and why the County needs to execute the will of its voters.

[3] Exhibit K at p. 55 (testimony of Thomas K. Matsuda, Branch Chief, Pesticides Branch, State Department of Agriculture).

II. FACTUAL BACKGROUND

A. GMO Operations In Maui County

GMO operations in Maui involve a different type of agricultural use that creates potentially serious harmful environmental and human health impacts.[4] These impacts have never been studied and are not being evaluated on the federal or state level.[5] The practice involves the use of high levels and combinations of repeated pesticide application, and use of a disproportionately small portion of the land, leaving large areas barren and more susceptible to causing environmental pollution.[6] As discussed below, these practices result in potentially serious environmental and health problems.[7] Moreover, these activities are being performed in greater frequency than anywhere else in the United States.[8] Hawai‘i has been the site of over 2,230 field trials to develop new GMO crops.[9]

Of particular concern to Maui residents is that many of these open field tests involve the development of new GMO crops designed to be resistant to high levels and combinations of pesticides. For example, Monsanto has developed "Round-up Ready" crops, which are resistant to high levels of the herbicide

[4] See Valenzuela Dec. ¶ 5.
[5] See id., *infra* Sections II.B. and C.
[6] See Valenzuela Dec. ¶ 5.
[7] Id.
[8] Daylin-Rose Gibson, *Remembering the "Big Five": Hawai'i's Constitutional Obligation to Regulate the Genetic Engineering Industry*, 15 Asian-Pacific L. & Pol'y J. 213, 232 (Fall, 2013) ("Gibson") (citing Robyn Boyd, *Genetically Modified Hawai`i,* SCIENTIFIC AMERICA (Dec. 8, 2008), http://www.scientificamerican.com/article/genetically-modified-hawaii//.
[9] Id.

glyphosate.[10] Glyphosate has been linked to "significant chronic kidney deficiencies," "liver congestions and necrosis," "tumors," kidney disturbances and failure,[11] and other environmental hazards.[12] Glyphosate is the leading offender of pesticide drift[13] and is responsible for the creation of "superweeds" that are resistant to the high applications of the herbicide.[14] The use of genetically engineered crops has increased pesticide use exponentially, with an extra 527 million pounds of herbicides being used from 1997 to 2011.[15]

Despite the industry's claim (without citation to authority) that the use of GMO crops has increased yields, [Mem. in Supp. of Motion pp. 3-4.], there

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[10] See *Adoption of Genetically Engineered Crops in the United States: 1996-2014*, U.S. Dep't of Agric., http://www.ers.usda.gov/media/185551/biotechcrops_d.html (last visited January 30, 2015) (showing entries for HT [herbicide-tolerant] soybeans, cotton and corn); George A. Kimbrell & Aurora L. Paulsen, The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense, Vermont Law Review; Winter 2014, Vol. 39, Issue 2 ("Kimbrell"), p. 354 (citing Charles M. Benbrook, *Impacts of genetically engineered crops on pesticide use in the U.S.—the first sixteen years*, 24 ENVTL. SCI. EUR. 1, 3 (2012) *available at* http://www.enveurope.com/

[11] See *Republished study: long-term toxicity of a Roundup herbicide and a Roundup-tolerant genetically modified maize*, Environmental Sciences Europe, http://www.enveurope.com/content/26/1/14#sec5 (last visited January 30, 2015)

[12] See Valenzuela Dec. ¶ 18; see also *After 90 Percent Decline, Federal Protection Sought for Monarch Butterfly*, Ctr. For Food Safety (Aug. 26, 2014), http://www.centerforfoodsafety.org/press-releases/3418/after-90-percent-decline-federal-protection-sought-for-monarch-butterfly (last visited January 30, 2015).

[13] Assoc. of Am. Pesticide Control Officials, *2005 Pesticide Drift Enforcement Survey Report*, http://www.aapco.org/documents/surveys/DriftEnforce05Rpt.html (last visited January 30, 2015).

[14] George A. Kimbrell & Aurora L. Paulsen, The Constitutionality of State-Mandated Labeling for Genetically Engineered Foods: A Definitive Defense, Vermont Law Review; Winter 2014, Vol. 39, Issue 2 ("Kimbrell"), p. 354 (citing Charles M. Benbrook, *Impacts of genetically engineered crops on pesticide use in the U.S.—the first sixteen years*, 24 ENVTL. SCI. EUR. 1, 3 (2012) *available at* http://www.enveurope.com/ content/pdf/2190-4715-24-24.pdf.)

[15] Id.

have been no independent studies to substantiate this claim.[16] Moreover, in side-by-side comparisons between organic and chemical agriculture, organic systems have shown to match or surpass chemical agriculture.[17]

Dr. Hector Valenzuela is a Professor and Vegetable Crops Extension Specialist with the Department of Plant and Environmental Protection Sciences, at the University of Hawai'i at Manoa ("UH").[18] For the past 24 years, he has had statewide responsibility to assist commercial farmers, and he has studied the production of food crops, sustainable farming, and analyzed conventional and ecological farming systems.[19] Dr. Valenzuela is the only UH Crop Production Specialist in the State.[20]

In his Declaration, Dr. Valenzuela explains that the GMO practice in Maui includes spraying the fields with a high frequency and combination of pesticides.[21] On any given day, multiple pesticide applications may be sprayed on GMO farms, with a number of different pesticides, resulting in off-site pollution of

[16] See Kimbrell at p. 353 (citing DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, FAILURE TO YIELD: EVALUATING THE PERFORMANCE OF GENETICALLY ENGINEERED CROPS 1–5 (Apr. 2009), *available at* http://www.ucsusa.org/sites/default/files/legacy/assets/documents/food_and_agriculture/failure-to-yield.pdf.
[17] See Valenzuela Dec. ¶ 20 ("The greatest yield advances continue to be made through methods of traditional and classical breeding."); see also http://rodaleinstitute.org/our-work/farming-systems-trial/ (last visited on January 30, 2015).
[18] See Valenzuela Dec. ¶ 2; Exh. A.
[19] Id.
[20] Id.
[21] Id. ¶¶ 6-7.

these chemical combinations.[22] The operations in Hawai‘i use between 80-90 different chemical formulations.[23] This is far greater than those used in commercial GMO operations.[24]

While these practices involve a more severe use of the land, there have been no studies to evaluate the impacts to the environment or human health.[25] Studies performed elsewhere on conventional GMO farming have directly linked the exposure to pesticides on farm workers, their families, and residents from nearby communities, to severe respiratory problems, dermatological and/or mucocutaneous disorders, digestive problems, and neurological problems.[26] Further, studies link the exposure of pesticides from these operations to high levels of DNA damage resulting in cancer, lymphocytic leukemia, brain tumors, developmental disorders, physical birth defects, brain tumors in children, and fetal death, among other documented adverse side-effects.[27]

These harmful impacts have also been observed first hand. For example, Monsanto Mokulele Fields, one of Monsanto's testing fields in Maui, is located approximately 500 yards away from a neighborhood called Hale Piilani.[28] Residents in this small community report that you can taste the chemicals on your

[22] Id. ¶ 7.
[23] Id.
[24] Id.
[25] Id. ¶ 7.
[26] Id. ¶ 17.
[27] Id. ¶¶ 17-18 (citation omitted).
[28] Stewman Dec. ¶ 3.

mouth as frequently as once a week.[29] These residents report the same health problems noted in the studies performed in Latin America: vitamin deficiencies, respiratory problems, central nervous system issues, and seizures.[30]

The more severe health problems have also been observed first hand in Hawai‘i. Kathryn Xian is the Executive Director for the Pacific Alliance to Stop Slavery ("PASS"), a non-profit whose mission is to stop human trafficking.[31] Ms. Xian works closely with migrant workers who have worked as pesticide sprayers on GMO farms on Oahu.[32] Ms. Xian has worked with at least four migrant workers who have developed severe medical conditions as a result of being exposed to abnormally high and dangerous quantities of pesticides.[33] The health problems reported include: severe mobility and respiratory problems, hair loss, skin problems, brain tumors, cirrhosis of the liver, and Stage 4 liver cancer.[34]

While these reports have not been scientifically evaluated, according to Dr. Valenzuela, there is an "urgent need" to conduct studies on the impact of GMO operations on Maui, as there are "potentially serious health and environmental impacts that to date have not been evaluated."[35]

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[29] Stokes Dec. ¶ 8.
[30] Stokes Dec. ¶¶ 5-8; see also Stewman Dec. ¶ 5-12, 16.
[31] Xian Dec. ¶ 3.
[32] Id. ¶ 7.
[33] Id. ¶ 8.
[34] Id. ¶¶ 9-11; see also Exhibits C-E (photographs of one of these field workers showing severe skin problems he developed working as a pesticide sprayer).
[35] Id. at ¶ 19.

B. The Federal Coordinated Framework—An Executive Branch Policy Statement Regarding GMOs

There are no federal statutes that regulate farming operations concerning GMO crops. Instead, in 1986, the White House's Office of Science and Technology Policy adopted a policy statement called the Coordinated Framework for Regulation of Biotechnology ("Coordinated Framework") to address aspects of genetically modified crops without seeking legislation.[36] Under this policy statement, the White House recognized that certain areas involving genetically modified plants could be regulated by three agencies: (1) the Food and Drug Administration ("FDA"); (2) the Environmental Protection Agency ("EPA"); and (3) the U.S. Department of Agriculture ("USDA"), through the Animal and Plant Health Inspection Service ("APHIS"). In the nearly 30-years since the Executive Branch adopted this policy statement, Congress has never recognized any regulatory authority over GMO farming operations through legislation.

1. The FDA

The FDA is the primary federal agency responsible for ensuring the safety of commercial food and food additives, except for meat and poultry products.[37] The FDA's primary statutory authority is pursuant to the Federal Food,

[36] See Coordinated Framework for Regulation of Biotechnology, 51 Fed. Reg. 23,302 (June 26, 1986).
[37] 57 Fed. Reg. 22,984 (May 29, 1992).

Drug, and Cosmetic Act ("FFDCA").[38] "The FDA's authority is limited to removing adulterated food from the national food supply, which could include food from genetically modified plants."[39] There are no provisions in the FFDCA that address genetically modified plants.[40]

In 1992, the FDA adopted a policy statement that its role is to regulate the characteristics of genetically modified crops, and that it did not have a role in the development or manner in which the crop is created.[41] Instead, the FDA stated that ultimately, the food producer is responsible for safety, not the FDA.[42] According to the FDA, premarket review of any genetically modified plant is entirely voluntary.[43]

2. The EPA

The EPA's regulatory authority arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[44] FIFRA governs the use, sale, and labeling of herbicides.[45] A herbicide manufacturer is required to register a herbicide with the EPA before it can be distributed or sold in the United States.[46]

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[38] 21 U.S.C. §§ 301–399f.
[39] Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 833 (9th Cir. 2013).
[40] Id.
[41] Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984 (May 29, 1992).
[42] Id.
[43] Id.
[44] 7 U.S.C. §§ 136-136y.
[45] See Bates v. Dow Agrosciences LLC, 544 U.S. 431, 437 (2005).
[46] 7 U.S.C. §§ 136a(a),136j(a)(2)(F).

The EPA's involvement with genetically modified plants is limited because the FIFRA deals with chemicals, not plants. The EPA has adopted C.F.R.s that treats some GMOs as herbicides if they were genetically modified to produce pesticides, which the EPA has termed "plant-incorporated protectants" ("PIPs").[47] The EPA approves field tests under the auspices of 7 U.S.C. § 136c for "Experimental Use Permits" to register certain crops as PIPs.[48]

Under 7 U.S.C. § 136v, a state or municipality may also regulate the sale or use of any federally registered pesticide or device in the State so long as "the regulation does not permit any sale or use prohibited" by the FIFRA. The U.S. Supreme Court has held that the FIFRA does not preempt local municipalities from regulating the use of pesticides.[49]

In line with the lack of any Congressional mandate, the EPA has provided no oversight on any GMO operations in Maui County. According to testimony presented before the Maui City Council concerning the Ordinance, in the last five years, the EPA has not conducted any inspections or investigations in Maui County.[50] Moreover, the EPA does not conduct independent studies or tests

[47] See 40 C.F.R. §§ 152.3, 152.42, 174.1, 174.3.
[48] Id. at §§ 152.3, 152.42.
[49] Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 616 (1991).
[50] See Exhibit K, Minutes for Policy and Intergovernmental Affairs Committee, Council of the County of Maui, July 1, 2014 at pp. 23-24 (testimony of Pamela Cooper, Manager, Pesticides Office, US EPA Region 9 San Francisco Office).

with respect to any of the activities in Maui County.[51] Instead, the EPA relies entirely on industry reports and studies published in scientific journals.[52]

3. The USDA Through APHIS

The USDA has regulatory authority through the Animal and Plant Health Inspection Service ("APHIS") over the interstate movement of plant pests and noxious weeds under the Plant Protection Act ("PPA").[53] A "plant pest" is defined under the PPA as a number of organisms that can "directly or indirectly injure, cause damage to, or cause disease in any plant or plant product."[54] The statute does not include genetically modified organisms.

Through administrative regulations, APHIS has regulated certain GMO crops as plant pests if the plant is created using an organism that is itself a plant pest. 7 C.F.R. § 340.1 (defining a regulated article under APHIS's plant pest regulations as "[a]ny organism which has been altered or produced through genetic engineering, if the donor organism . . . or vector or vector agent belongs to any genera or taxa designated in § 340.2 and meets the definition of plant pest"). APHIS authorizes field trials of GMOs that fall within its definition of a plant pest

[51] Id. at p. 29 (testimony of William Jordan, Deputy Director for Programs, Office of Pesticides Programs, US EPA Headquarters).
[52] Id.
[53] 7 U.S.C. §§ 7701, 7754.
[54] See 7 U.S.C. § 7702(14).

before the plant can be given "nonregulated status."[55] Once a plant is given nonregulated status, APHIS's involvement ends.[56]

APHIS can authorize the release through a notification or permitting process.[57] Only 1% of all new GE crops proceeds through the permitting process.[58] Instead, the vast majority of GE crops are released based solely on notification from the developer of the product.[59] For notification, APHIS only requires the developer to perform a risk evaluation on whether the plant may be a plant pest.[60] No other considerations of risks are considered, such as human health or environmental impacts.[61] With respect to the 1% that proceeds to the permitting process, the primary emphasis is on confinement of the test field to avoid cross-contamination with other plants and release into the environment of the potential plant pest.[62] No other environmental or human health impacts are considered.[63]

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[55] 7 C.F.R. §§ 340.0-340.6.
[56] Id.; see also Maria R. Lee-Muramoto, *Reforming The "Uncoordinated" Framework for Regulation of Biotechnology*, 17 Drake J. Agric. L. 311, 319 (Summer, 2012) ("Lee-Muramoto")
[57] 7 C.F.R. §§ 340.3-4.
[58] Gibson at p. 235; Lee-Muramoto at 318-319 (citing COUNCIL ON ENVTL. QUALITY & OFFICE OF SCI. & TECH. POLICY, CASE STUDY NO. III: HERBICIDE-TOLERANT SOYBEAN 4 (2001), available at http://www.whitehouse.gov/files/documents/ostp/Issues/ceqostpstudy4.pdf.)
[59] Id.
[60] See Lee-Muramoto at pp. 318-319; see also 7 C.F.R. § 340.3; Int'l Ctr. for Tech. Assessment v. Johanns, 473 F. Supp. 2d 9, 27, 2007 U.S. Dist. LEXIS 7773, 43, 37 ELR 20044 (D.D.C. 2007) (stating that a plant meets the notification requirements and can be introduced if it meets certain "weediness criterion, which mandates that the organism or product "(1) not be listed as a noxious weed under APHIS's PPA regulations and (2) 'is not considered by the Administrator to be a weed in the area of release into the environment'").
[61] Id.
[62] See Lee-Muramoto at p. 319 (citing C.F.R. § 340.4).

Under the PPA, APHIS does not evaluate the following harms: (1) the crops effects on endangered plants and animals; (2) transgenic contamination – whether the plant could cross-pollinate with and alter the genetic structure of other plants; (3) increased herbicide use; (4) the creation of herbicide resistant weeds, i.e., "super weeds"; and (5) economic harm to organic farms as a result of transgenic contamination.[64]

C. State Regulations

Plaintiffs rely on two state laws concerning pesticides and noxious plants that are administered through the Hawai'i Department of Agriculture ("HDOA").

First, the Hawai'i Pesticide Law, which is codified in HRS Chapter 149A and administered by the HDOA, regulates pesticide users and distributors, imposing restrictions on the sale and use of pesticides other than those provided for in Federal law. Second, the Hawai'i Plant Quarantine Law ("HPQL") addresses the importation, exportation, and possession of restricted plants and organisms that are introduced into the State.[65] Under HRS § 150A-6.1, the Board of Agriculture is required to maintain a list of "restricted plants" that require a permit for entry into the State. The HDOA is required to designate, by rule, as restricted plants

[63] Id.
[64] Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 839-841 (9th Cir. 2013).
[65] See generally HRS 150A.

"specific plants [including noxious weeds] that may be detrimental or potentially harmful to agriculture, horticulture, the environment, or animal or public health."[66]

The HDOA has one person responsible for inspecting any operation concerning pesticide use throughout Maui County.[67] This one person is responsible for inspecting all stores that sell pesticides (i.e., Home Depot and grocery stores), pest control companies, golf courses, seed locations, and agricultural operations such as Monsanto.[68] According to the HDOA's testimony during the public hearing on this Ordinance, there are no statutes, rules, or guidelines of any kind provided by the federal government, the EPA, or the State of Hawai'i that regulates the amount of pesticide contamination, and the HDOA admittedly does not know how to evaluate the information.[69] According to the testimony from HDOA:

> We looked into stream sediments specifically for glyphosate, for Roundup, and we found Roundup in all of the samples that we took. All in all, we found 20 herbicides, 11 insecticides, 6 fungicides, 7 locations with glyphosate but no EPA benchmarks, there are no EPA benchmarks for sediment, for glyphosate. ***So we found stuff but, frankly, we don't know what it means and no one in, we don't know how to compare that to any kind of health standards. So there's additional work that needs to be done there.***[70]

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[66] HRS §§ 150A-6.1, 152-1.
[67] See Exhibit K at p. 55 (testimony of Thomas K. Matsuda, Branch Chief, Pesticides Branch, State Department of Agriculture).
[68] Id.
[69] Id. at p. 50.
[70] Id. at p. 50 (emphasis added).

D. The Ordinance

On November 4, 2014, Maui voters approved the Ordinance, which establishes a temporary moratorium on the growth, testing, and cultivation of GMOs until an EPHIS analyzing the key environmental and health effects of GMO operations is completed.[71] Intervenor-Defendants, the original drafters and proponents of the Ordinance, actively educated the Maui community on the importance of the Ordinance before the election.[72] The Ordinance's purpose is to address the following environmental and health issues that are not addressed by federal or state law: (1) transgenic contamination; (2) economic impacts to organic farming; (3) protection from hazardous aspects of GMO operations, including increased pesticide use; (4) health-related issues; and (5) preservation of Public Trust Resources and cultural heritage of Native Hawaiians.[73]

III. STANDARD OF REVIEW

Summary judgment may be granted only if the moving party "shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law."[74] The moving party has the initial burden of demonstrating the absence of any genuine issue of material fact.[75] A

[71] See Exhibit M ("Ordinance").
[72] See Savitt Dec. ¶ 5.
[73] See Ordinance § 4.
[74] Fed. R. Civ. P. ("FRCP") Rule 56(a).
[75] Makin v. Hawai'i, 114 F. Supp. 2d 1017, 1023-24 (D. Haw. 1999) (citations omitted); see also T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987).

genuine issue of material fact exists if there is sufficient evidence present such that a reasonable fact finder could decide the question in favor of the non-moving party.[76]

If the moving party meets its initial burden, then "the non-moving party must show that there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party."[77] The court must view the evidence in the light most favorable to the non-moving party, and where there is conflicting evidence, the court "must assume the truth of the evidence set forth by the nonmoving party with respect to that fact."[78] Inferences, disputed or undisputed, must be drawn in the light most favorable to the non-moving party.[79]

IV. THIS COURT SHOULD CERTIFY THE ISSUE OF STATE PREEMPTION TO THE HAWAIʻI SUPREME COURT

The parties have briefed separately the issue of whether this Court should abstain and allow the State Court to decide state law issues first. To the extent the Court is not inclined to abstain, the Court should certify the state law issues to the Hawaiʻi Supreme Court.

[76] Makin, 114 F. Supp. 2d at 1024.
[77] Guillermo v. Hartford Life & Accident Ins. Co., 986 F. Supp. 1334, 1336 (D. Haw. 1997) (internal quotation marks and citation omitted).
[78] T.W. Elec. Serv., Inc., 809 F.2d at 630-31.
[79] Id. at 631.

The U.S. Supreme Court has consistently used certification when a federal court case involves an important question of state law that is both unclear and would be determinative in the case.[80] The Court may certify a question on state law to the Hawai‘i Supreme Court where (1) the question concerns an area of state law that is determinative of the case, and (2) there is no clear controlling precedent in Hawai‘i.[81] In Richardson, this Court held that certification was appropriate where the issue of preemption involved broader issues concerning the counties' authority to enact legislation in areas that may conflict with state law, and where a ruling may have broader implications than the boundaries of the case.[82]

In this case, it is appropriate for this Court to certify the state law preemption issues to the Hawai‘i Supreme Court. A ruling on whether state law preempts the ordinance is determinative of the case. In fact, Syngenta Seeds, Inc. v. County of Kauai[83] and Hawai‘i Floriculture & Nursery Ass'n v. County of Hawai‘i[84]were both decided principally on state law grounds. There is also no clear controlling precedent on whether this Ordinance (imposing a moratorium on GMO operations) is preempted by the Hawaii Pesticide Law or the HPQL. This

[80] See Richardson v. City & Cnty. of Honolulu, 802 F. Supp. 326, 344 (D. Haw. 1992) (citations omitted).
[81] Haw. R. App. P. Rule 13.
[82] Richardson, 802 F. Supp. at 345-346.
[83] 2014 U.S. Dist. LEXIS 117820 (D. Haw. Aug. 25, 2014).
[84] 2014 U.S. Dist. LEXIS 165970 (D. Haw. Nov. 26, 2014)

issue also has broader implications than this case, as counties in this State have demonstrated the need to adopt local ordinances to address GMO operations that are causing potentially serious problems in the community. These issues should appropriately be decided by the Hawai‘i Supreme Court.

V. INTERVENOR-DEFENDANTS ARE ENTITLED TO CONDUCT DISCOVERY PURSUANT TO RULE 56(d)

Pursuant to FRCP Rule 56(d), if a nonmoving party demonstrates by declaration that, for specific reasons, it cannot present facts essential to justify its opposition, the court may (1) defer consideration of the motion or deny it; (2) allow time to obtain affidavits or declarations or obtain discovery, or (3) issue any other appropriate order. While Rule 56(d) facially gives judges the discretion to disallow discovery when the non-moving party is unable to submit evidence to support its opposition, the Supreme Court has restated the rule as *requiring*, rather than permitting, discovery "'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'"[85]

As set forth below, there are no federal or state laws that preempt the Ordinance. On the federal level, Plaintiffs rely on the Coordinated Framework, which is a policy statement adopted by the Executive Branch to regulate in an area that Congress has not addressed through legislation. In order to argue that there is

[85] Metabolife Int'l v. Wornick, 264 F.3d 832, 846 (9th Cir. 2001) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5 (1986)) (emphasis added).

preemption, Plaintiffs make the bold *factual* claim that the federal government has provided broad regulatory oversight with detailed "scientific safety standards", and the federal government conducts detailed "evaluations" and "federal scientific review." [Mem. in Supp. of Motion p. 5]. On state preemption, Plaintiffs likewise argue that there is a "statewide regulatory scheme" where the State of Hawai'i provides broad oversight on the "danger to other plants and the environment ***and*** pesticides." Id. at p. 9. Plaintiffs lay out in detail the "facts" that they allege support summary judgment in their Concise Statement of Facts [DKT No. 71]. These "facts" are disputed.

To rebut Plaintiffs' assertions, Intervenor-Defendants are left to prove the negative: (1) that these regulations *do not* preempt adoption of the Ordinance, (2) that the federal and state government *do not* provide broad legislation in these areas, (3) that the mechanism in which these agencies enforce these regulations *do not* regulate or provide oversight to address the local interest in protecting the environment and public health; and (4) that the federal and state agencies *do not* interpret or follow legislation in a manner that regulates the activities addressed in the Ordinance.[86]

[86] See Carroll Dec. ¶ 11.

To date, no discovery has been exchanged.[87] On January 9, 2015, Intervenor-Defendants served requests for answers to interrogatories, production of documents, and for inspection of property.[88] Once these discovery responses are provided, Intervenor-Defendants intend to conduct depositions on the factual issues related to this motion.[89] At the very least, Intervenor-Defendants should be allowed an opportunity to conduct discovery before this Court rules on this Motion to set forth the factual bases for their defense.[90] Accordingly, Intervenor-Defendants respectfully request that the Court defer considering this Motion until this discovery is completed.

VI. PLAINTIFFS HAVE NOT MET THEIR BURDEN IN DEMONSTRATING THAT THE CONTROVERSY IS RIPE FOR ADJUDICATION

The Federal Court's jurisdiction is limited under Article III of the U.S. Constitution to cases and controversies in which the plaintiff has standing and the matter is ripe for adjudication.[91] The doctrines of standing and ripeness may overlap, and both are intended to "prevent courts from becoming enmeshed in abstract questions which have not concretely affected the parties."[92] The "case or

[87] Id. at ¶ 5.
[88] See Exhibits F to J.
[89] See generally Carroll Dec.
[90] Id.
[91] Pac. Legal Found. v. State Energy Resources Conservation & Dev. Comm'n, 659 F.2d 903, 915 (9th Cir. 1981).
[92] Id. (citation omitted).

controversy" requirement mandates that standing and ripeness be present, and that the issues are "'definite and concrete, not hypothetical or abstract.'"[93]

Ripeness supplements the standing doctrine by not only considering whether there has been an "injury in fact," but also evaluating whether the injury has "matured sufficiently to warrant judicial intervention."[94] Neither the mere existence of a proscriptive law nor a generalized threat of prosecution is sufficient to establish that a challenge to a law is ripe for review.[95] In order for a case to be ripe, the plaintiff must show: (1) that the issue is fit for judicial decision; and (2) there is no undue harm if the court were to withhold consideration.[96] Where a better factual record would illuminate the issue of preemption or where the parties disagree that there are questions of fact, the challenged statute is not ripe for review until it has actually been applied.[97]

In Pacific Legal Foundation, the Ninth Circuit held that the certification requirement in a California law that placed a moratorium on the construction of new nuclear plants was not ripe for review.[98] The Ninth Circuit reasoned that the record was not sufficiently developed. Thus, factual

[93] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000).
[94] Pac. Legal Found., 659 F.2d at 915.
[95] Thomas, 220 F.3d at 1139.
[96] Pac. Legal Found., 659 F.2d at 915.
[97] Id.; see also Pence v. Andrus, 586 F.2d 733, 738 n.12 (9th Cir. 1978) (where the parties dispute whether the question is "purely legal," the court "will be in a significantly better position to confront the question of validity of the regulation after the factual development which will occur through application of the regulation.").
[98] Pac. Legal Found., 659 F.2d at 916.

development was necessary to avoid the court having to decide the issue "in the abstract."[99] Moreover, a delay in deciding the case did not cause undue hardship because the certification scheme did not have an "immediate and substantial impact on the plaintiffs."[100]

In this case, the issue of whether the Ordinance is preempted is not ripe for the Court's review. The election results approving the Ordinance have not yet been certified, and the Ordinance has not yet been implemented. Before the Ordinance can be implemented, the County needs to adopt rules of procedure to carry out the law. The Ordinance also requires that a Joint Fact Finding Group ("JFFG") convene to determine the "scope and design" of the EPHIS that is required to lift the moratorium.[101] There is no evidence that any information that will be requested as part of the EPHIS will in any way conflict or frustrate any federal or state laws.

In addition, Plaintiffs cannot demonstrate that they will suffer any undue hardship. The Ordinance expressly exempts any GMOs that are in mid-growth cycle when the chapter is enacted.[102] The threat that Plaintiffs may need to go through procedural hurdles to continue their operations after this initial cycle does not arise to an "immediate and substantial" impact sufficient to make the

[99] Id.
[100] Id.
[101] See Ordinance § 7.3.
[102] See id. at § 5.2.(B).

controversy ripe.[103] As the Ninth Circuit recognized, "the threat that procedural burdens might someday be imposed or that certification might someday be denied for failure to meet [the state commission] standards is remote at best."[104]

Other than generalized statements that Plaintiffs are testing GMO crops, Plaintiffs do not disclose what testing is being conducted, and how the Ordinance would impact ongoing testing other than a mere delay. On Monsanto's web page, they state that in countries where GMOs are banned, Monsanto simply substitutes GMO seeds with conventional non-GMO seeds.[105] There is nothing preventing these companies from making this change before the EPHIS is completed. There is no undue hardship in comparison to the threat to human health and the environment that the Ordinance seeks to address. Accordingly, Plaintiffs claims are not ripe, and this Court should allow the Ordinance to be implemented before ruling on preemption.

VII. THE ORDINANCE IS NOT PREEMPTED BY FEDERAL LAW

Under the Supremacy Clause of the U.S. Constitution, state laws are valid so long as they do not interfere or conflict with federal law.[106] "For the purposes of the Supremacy Clause, the constitutionality of local ordinances is

[103] Pac. Legal Found., 659 F.2d at 916.
[104] Id.
[105] See http://www.monsanto.com/products/pages/monsanto-agricultural-seeds.aspx.
[106] U.S. Const., art. VI, cl. 2; see also Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

analyzed in the same way as that of statewide laws."[107] "[P]reemption analysis begins with the presumption that Congress does not intend to supplant state law."[108] There is a presumption of constitutional validity when a state exercises its legitimate police powers, and this presumption is especially strong when a state seeks to protect the public health and safety.[109]

While Congress has the authority to preempt state and local laws, and may do so either expressly or implicitly,[110] Congress must "manifest its intent that federal law shall be controlling."[111] Express preemption occurs only when a federal statute explicitly confirms Congress' intention to preempt state or local law.[112] "If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."[113]

In the absence of explicit statutory language, Congress' intent to preempt state or local law can only be inferred in two ways: field preemption or

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[107] Id. at 713.
[108] Tillison v. Gregoire, 424 F.3d 1093, 1098 (9th Cir. 2005).
[109] Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960); see also Hillsborough, 471 U.S. at 716 (noting "the presumption that state and local regulation of health and safety matters can constitutionally coexist with federal regulation."); see also Plumley v. Massachusetts, 155 U.S. 461, 472 (1894) ("Health and safety issues have traditionally fallen within the province of state regulation.").
[110] Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 667-68 (9th Cir. 2003); see also Whistler Invs., Inc. v. Depository Trust & Clearing Corp., 539 F.3d 1159, 1164 (9th Cir. 2008) (internal citation omitted).
[111] Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).
[112] See English v. General Elec. Co., 496 U.S. 72 (1990).
[113] Altria Group v. Good, 555 U.S. 70, 76 (2008).

conflict preemption.[114] Under the doctrine of field preemption, a state or local law may be preempted where it regulates conduct in a field that Congress intended the federal government to occupy exclusively.[115] Under the doctrine of conflict preemption, a state or local law is preempted "to the extent that it actually conflicts with federal law," such that "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle" to the execution of the Congress' objectives and purposes."[116] The determination of whether preemptive conflict exists "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[117] Even if the court finds congressional intent, it must only invalidate state or local law to the extent of the preemption, and not beyond that scope.[118]

Ultimately, preemption analysis is guided by two fundamental principles. "First, 'the purpose of Congress is the ultimate touchstone in every preemption case.'"[119] Second, courts begin with the "assumptions that the historic police powers of the States" are not to be preempted by a federal statute "unless

[114] See Oxygenated Fuels, 331 F.3d at 667-68.
[115] English, 496 U.S. at 79.
[116] Hillsborough, 471 U.S. at 713 (internal quotations omitted).
[117] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).
[118] Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571, 679 (7th Cir. 1982); see Pac. Legal Found. v. State Energy Res. Conservation & Dev. Com., 659 F.2d 903, 919 (9th Cir. 1981).
[119] Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (citation omitted)).

that was the clear and manifest purpose of Congress."[120] Even assuming the presumption can be overcome, if a preemption clause is susceptible to multiple interpretations, a court "[h]as a duty to accept the reading that disfavors preemption."[121] As set forth below, the Ordinance is neither expressly nor impliedly preempted by federal law, and the Court should reject Plaintiffs' arguments.

A. Agency Determinations Are Irrelevant For A Preemption Analysis And Do Not Preempt The Ordinance

Any conclusion of full or partial preemption requires a finding that preemption of state or local legislation was Congress' "clear and manifest purpose."[122] When determining whether an agency has the authority to preempt state law, "the agency is powerless to clarify congressional intent."[123] While an agency's interpretation of congressional intent may be given some deference where Congress' intent is unclear, "such deference does not extend to an agency's

[120] Medtronic, 518 U.S. at 485 (internal quotation marks and citations omitted); Hillsborough, 471 U.S. 707, 715 (1985); P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 501 (1998) ("There is no federal pre-emption in vucuo, without a constitutional text or a federal statute to assert it.").

[121] Bates v. Dow Agrosciences, 544 U.S. 431, 449 (2005); see also Riegel v. Medtronic, Inc., 552 U.S. 312, 335 (2008) (quoting Bates, 544 U.S. at 432) (holding that the courts ordinarily disfavor preemption)).

[122] Medtronic, 518 U.S. at 485; Wyeth, 555 U.S. at 565 (noting that Congressional purpose is "the ultimate touchstone in every preemption case.").

[123] See Garrelts v. Smithkline Beecham Corp., 943 F. Supp. 1023, 1048 (N.D. Iowa 1996).

interpretation of its own power to preempt state law when Congress has not expressly stated its intent to delegate such power to the agency."[124]

Plaintiffs and Amicus Curiae Biotechnology Industry Organization heavily rely on the Coordinated Framework as their basis for federal preemption of the Ordinance. This argument is flawed. First, the Coordinated Framework is not a "regulatory scheme" or "federal law" resulting from Congress. It was not established by, nor does it represent, any congressional purpose or directive. It is an executive branch policy document, as noted in the Federal Register notice,[125] that carries neither the force of law nor purports to set statutory or regulatory standards.[126] Accordingly, the Coordinated Framework is not entitled to deference in a preemption analysis.[127] Further, all FDA, EPA, and USDA regulations cited by Plaintiffs relating to GMOs were made pursuant to the Coordinated Framework. If this Court agrees with Intervenor-Defendants' analysis that the Coordinated Framework has no preemptive force, the Court's analysis of Plaintiffs' federal preemption arguments should stop here.

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[124] Id.
[125] Coordinated Framework for the Regulation of Biotechnology, 51 Fed. Reg. at 23,302
[126] See e.g., Found. on Econ. Trends v. Johnson, 661 F. Supp. 107, 109 (D.D.C. 1986) ("The Framework and definitions contained therein are set forth to guide policymaking, not to regulate).
[127] United States v. Mead, 533 U.S. 218, 226-27 (2001) (citing Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)) (holding that agency decisions that are not made pursuant to legislative directives are not entitled to deference under Chevron, but may be entitled to some deference if the agency's decision is based on a permissible construction of the statute).

Even if this Court were to find that the Coordinated Framework holds preemptive value, it leaves many holes in the oversight of GMOs. Congress has never recognized any federal regulatory authority over GMO operations. Moreover, none of the federal agencies within the Coordinated Framework regulate the manner in which GMOs are created, nor do these regulations coherently address the risks posed by GMO operations. The FDA is responsible for ensuring the safety of commercial food and food additives. The EPA regulates chemicals and approves chemicals, which the EPA has expanded to include PIPs.[128] The USDA regulates the interstate movement of plant pests and noxious weeds. These agencies do not address public health and safety risks created by GMO operations, and they do not conduct any tests or studies to determine whether these practices are harming local communities.[129] Thus, the Coordinated Framework is incapable of comprehensively and exclusively occupying the field of GMOs.

B. The Ordinance Is Not Expressly Preempted By Federal Law

Plaintiffs' sole express federal preemption challenge to the Ordinance is pursuant to the PPA.[130] Plaintiffs' arguments appear to be limited to field trials and no other GMO activities. [Mem. in Supp. of Motion pp. 27-29.] The PPA's

[128] See 40 C.F.R. §§ 152.3, 152.42, 174.1, 174.3.
[129] See e.g., Ctr. for Food Safety v. Vilsack, 718 F.3d 829, 839-841 (9th Cir. 2013).
[130] 7 U.S.C. § 7701 *et seq.*

limited express preemption provision, however, is inapplicable for several reasons. First, the PPA does not regulate the health and safety risks of GMO operations. Second, even if the PPA were relevant to a preemption analysis, the Ordinance does not fall within the scope of the provision. Third, even if the Court finds that the provision is applicable, the Ordinance falls within the exception to the preemption provision. Thus, the PPA does not preempt the Ordinance.

1. The Ordinance Does Not Conflict With The Goals And Purposes Of The PPA

The purpose of the PPA is to prevent the spread of parasitic, diseased, and invasive plants and organisms through regulations of "plant pests" and "noxious weeds."[131] It does not address GMO crops, the associated health and safety risks, harms to endangered species, harms from increased pesticide use, or the harms associated with transgenic contamination.[132] Congress' purpose in enacting the PPA was to protect agriculture and the environment by regulating the interstate movement of plant pests and noxious weeds.[133] The PPA's preemption provision explains, among other things, when states and political subdivisions of states may not regulate in interstate commerce.[134]

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[131] Ctr. for Food Safety, 718 F.3d at 834.
[132] Id.
[133] See 7.U.S.C. § 7701, 7754.
[134] (b) Regulation of interstate commerce.
(1) In general.
Except as provided in paragraph (2), no State or political subdivision of a State may regulate the movement in interstate commerce of any article, means of

Where a state or municipality adopts a local law to protect public health and safety concerns that are not being addressed on the federal level, the law is not preempted, expressly or implicitly, by federal law. In Oxygenated Fuels Association v. Davis, the Ninth Circuit found that a California state ban on the use of a gasoline additive was not expressly or impliedly preempted by the Clean Air Act, even though it contained an express preemption provision regarding the regulation of oxygenate fuel additives, because the ban did not conflict with the goals and purposes of the Clean Air Act.[135] The Ninth Circuit found that in enacting the Clean Air Act, Congress left the states substantial authority to enact

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conveyance, plant, biological control organism, plant pest, noxious weed, or plant product in order to control a plant pest or noxious weed, eradicate a plant pest or noxious weed, or prevent the introduction or dissemination of a biological control organism, plant pest, or noxious weed, if the Secretary has issued a regulation or order to prevent the dissemination of the biological control organism, plant pest, or noxious weed within the United States.

(2) Exceptions.

(A) Regulations consistent with Federal regulations. A State or a political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, biological control organisms, plant pests, noxious weeds, or plant products that are consistent with and do not exceed the regulations or orders issued by the Secretary.

(B) Special need. A State or political subdivision of a State may impose prohibitions or restrictions upon the movement in interstate commerce of articles, means of conveyance, plants, plant products, biological control organisms, plant pests, or noxious weeds that are in addition to the prohibitions or restrictions imposed by the Secretary, if the State or political subdivision of a State demonstrates to the Secretary and the Secretary finds that there is a special need for additional prohibitions or restrictions based on sound scientific data or a thorough risk assessment.

7 U.S.C. § 7756(b).

[135] 331 F.3d 665, 668, 673 (9th Cir. 2003).

legislation governing matters of public health and environmental safety, as these areas fell "within the traditional exercise of the police powers of the state."[136]

In Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, the U.S. Supreme Court addressed a similar state law placing a moratorium on the construction of nuclear power plants.[137] The energy companies challenged the moratorium, arguing that it was preempted by the Atomic Energy Act.[138] The Court held that the moratorium on new nuclear plants was not preempted by federal law because the purpose of the state law was to address the economic feasibility of new plants, whereas the federal objective was to regulate the safety of nuclear facilities.[139]

Similarly, the Ordinance in this case addresses a local concern that is not addressed by the PPA or any other federal law. Section 4 of the Ordinance sets forth its purpose, which is to protect Maui County's environment and public trust resources, promote the economic integrity of organic and non GE markets, and to protect the cultural heritage of the indigenous people. The PPA does not protect these interests.[140] In fact, the PPA does not once mention the words "genetically engineered," either in its purposes or legislative history, evincing that Congress had no intent to regulate GMO crops, let alone an intent to preempt states and local

[136] Id. at 673.
[137] 461 U.S. 190, 207-08 (1983).
[138] Id. at 198.
[139] Id. at 222-23.
[140] Ctr. for Food Safety, 718 F.3d at 841.

governments from addressing these harms. The Ninth Circuit has also expressly held that these interests (such as transgenic contamination) are not issues appropriately addressed in the PPA.[141] "The job of updating Title 7 of the United States Code to address the potential harms caused by genetic modification (including transgenic contamination and increased herbicide use) is a job for Congress, not this court, to undertake."[142]

2. The Ordinance Does Not Constitute "Movement Within Interstate Commerce"

Even if the Court found that the PPA and the Ordinance were in conflict, Plaintiffs' express preemption argument still fails. The PPA's narrow preemption provision has several necessary elements, none of which are present in this case. To be applicable, the provision requires that a state or county must be attempting to regulate the "movement in interstate commerce" of an article "in order to control it as a plant pest or noxious weed[.]"[143]

The GMOs that are the subject of experimental field trials are not "in interstate commerce." The Ordinance is an intra-county moratorium on GMO operations solely within Maui County. A temporary moratorium does not involve commerce, let alone constitute "in commerce."[144] Since field trials by definition

[141] Id.
[142] Id.
[143] 7 U.S.C. § 7756(b)(1).
[144] See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 118 (2001) (explaining that the words "in commerce" have a narrower meaning than "affecting commerce" or "involving commerce").

involve regulated articles excluded from being "in commerce," the PPA's narrow preemption provision, which applies only to laws regulating "movement in interstate commerce," cannot preempt the Ordinance. In order to apply, the PPA's preemption provision also requires that articles be moving in interstate commerce.[145] The Ordinance does not regulate "*movement* in interstate commerce" of any article. Its measures strictly govern Maui County operations in a static location, and it does not touch upon the transporting of GMO articles within the State or between States.

3. The Ordinance Falls Within An Exception To The Narrow Preemption Provision

Further, under 7 U.S.C. § 7756(b)(2)(A), states or municipalities may regulate the interstate movement of plant pests if the regulation is consistent with and does not exceed the regulations or orders issued by the Secretary. The Ordinance satisfies this exception to the PPA's preemption provision. The PPA does not regulate the manner in which GMO activities are conducted, nor does it conduct any environmental or public health studies on GMO operations. There is nothing in the PPA addressing GMO operations. There is nothing that would prevent a developer of a new GMO plant from obtaining approval from APHIS for field trials (addressing whether the plant pest causes harm to other plants) while at the same time addressing the local concerns set forth in the Ordinance in order to

[145] 7 U.S.C. § 7756(b)(1).

lift the moratorium. These two laws are consistent and in no way contradict or defeat the purpose of the other. Thus, the Ordinance's purpose of addressing the creation and development of GMOs as well as the health and safety risks involved with such practices is consistent with existing federal law.

C. The Ordinance Is Not Impliedly Preempted By Federal Law

Plaintiffs argue that the Ordinance is impliedly preempted through conflict preemption in three ways. [Mem. in Supp. of Motion p. 32.] First, Plaintiffs argue that the Ordinance interferes with and frustrates the objective of the Coordinated Framework. Second, Plaintiffs argue that the Ordinance is impliedly preempted as to field testing. Third, Plaintiffs argue that the Ordinance is preempted as to the cultivation of deregulated GMO crops. All three of Plaintiffs' arguments fail.

Under the doctrine of conflict preemption, a state or local law is preempted if "compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[146] In determining whether a state or local law is impliedly preempted, the Court is "required to presume that Congress did not intend to preempt areas of law that fall within the

[146] Hillsborough Cnty v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (internal quotations omitted).

traditional exercise of the police powers of the states."[147] Environmental regulation traditionally has been a matter of state authority.[148] Only where there is "clear evidence" that Congress meant to preempt state action should this Court find federal preemption.[149]

As discussed in section VII, subsection A, *supra*, the Coordinated Framework does not hold any preemptive authority, as it is not federal law. Nevertheless, even when analyzing the Coordinated Framework's scope for preemption purposes, the Ordinance does not conflict with its objectives. The Coordinated Framework focuses on the products rather than the process. As such, there is no "physical impossibility" in complying with both the Ordinance and the Coordinated Framework. Moreover, Congress has not expressed in federal law that it intends to regulate the health and safety risks resulting from GMO operations and prevent states or municipalities from doing the same. It follows, then, that the Ordinance cannot stand as an obstacle to the execution of Congress' objective, when such an objective is non-existent.

Second, Plaintiffs' argument that the Ordinance is impliedly preempted as to GMO crop testing is also without merit. [Mem. in Supp. of Motion p. 35.] Plaintiffs rely on the APHIS and the EPA's regulatory programs as

[147] Oxygenated Fuels Ass'n v. Davis, 331 F.3d 665, 673 (9th Cir. 2003); see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[148] Oxygenated Fuels, 331 F.3d at 673; see also Exxon Mobil Corp. v. EPA, 217 F.3d 1246, 125 (9th Cir. 2000).
[149] Geier v. Am. Honda Motor Co., 529 U.S. 861, 885 (2000).

its basis for implied preemption. As noted above, the APHIS and EPA regulatory programs stem from the Coordinated Framework, which has no independent preemptive authority. Moreover, the Ordinance does not conflict with either testing program. If Plaintiffs can demonstrate through the Ordinance's EPHIS that the practices are not causing irreparable health and safety risks, the Plaintiffs can continue these practices. The Ordinance is not an obstacle to any of these tests. It addresses different interests that are particular to Maui County.

Plaintiffs' final argument in support of implied conflict preemption underscores Plaintiffs' mischaracterization of the Ordinance. As Plaintiffs cite, the objective of the "federal regulatory program" is "to provide a uniform national regulatory process regarding certain GE crops and related pesticide uses." [Mem. in Supp. of Motion p. 38.] Even assuming that this premise is correct, this is quite different from the objectives of the Ordinance. The Ordinance does not seek to regulate GMO crops. Rather, the Ordinance intends to regulate the *process*, whereas the federal government intends to regulate the *products*. Because there are no federal laws or regulations addressing the potential public health and safety risks involved with GMO practices, the Ordinance does not directly conflict with or frustrate the objectives of a federal regulatory program. If anything, the Ordinance is consistent with and supports federal law by addressing an area that is left void in federal regulations.

In sum, the federal agencies and programs cited by Plaintiffs do not preempt the Ordinance, either individually or collectively. Neither the text nor the legislative history of these federal regulations provide clear evidence of congressional intent to preempt state and local regulation in the area related to GMO operations.[150]

VIII. THE ORDINANCE IS NOT PREEMPTED BY STATE LAW

Hawai‘i's preemption doctrine is rooted in Article VIII, section 6 of the Hawai‘i Constitution, which states that the Article granting counties various powers shall not "limit the power of the legislature to enact laws of statewide concern."[151]

The Hawai‘i Supreme Court has set forth the general framework for determining when state law preempts local law. In Richardson, the Court concluded that "a municipal ordinance may be preempted pursuant to HRS § 46-1.5(13) if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform through the state or (2) it conflicts with state law."[152]

[150] See Oxygenated Fuels, 331 F.3d at 672.
[151] Haw. Const. art. VII, § 6; see also Richardson v. City & Cnty. of Honolulu, 76 Hawai‘i 46, 66, 868 P.2d 1193, 1213 (1994).
[152] Richardson, 76 Hawai‘i at 60, 868 P.2d at 1209.

A. The County Possesses The Authority To Enact The Ordinance Based On Dual Jurisdiction

As a threshold matter, the Hawai‘i Constitution vests the State *and* the counties with the dual authority and obligation to protect the environment. The Hawai‘i Constitution recognizes that in regulating certain vital areas, the County and State must work in concert to comprehensively address these considerations.

To conserve and protect Hawai‘i’s environment and natural resources, the Hawai‘i Constitution expressly includes the Public Trust Doctrine as a "fundamental principle" of constitutional law,[153] which provides:

> For the benefit of present and future generations, the State ***and*** its political subdivisions [the counties] shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[154]

The Hawai‘i Constitution further provides that the legislature shall create counties, and each county shall have and exercise such powers as shall be conferred under "general laws."[155] This autonomy of counties to enact legislation and make decisions in their jurisdiction is often referred to as the "Home Rule."

In accord with the Public Trust Doctrine and the Home Rule provision, the State Legislature expressly delegates to the counties the power to:

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[153] Kauai Springs, Inc. v. Planning Comm'n of Kaua‘i, 133 Hawai‘i 141, 171, 324 P.3d 951, 981 (2014) (citation omitted).
[154] Haw. Const. art. XI, § 1 (emphasis added).
[155] Id. at art. VIII, § 1.

(1) "enact ordinances deemed necessary to protect health, life, and property . . . of the county and its inhabitants . . . ." and (2) "enact and enforce ordinances necessary to prevent or summarily remove public nuisances[.]"[156]

Based on the County's authority to conserve and protect Maui's environment and natural resources, Maui County has adopted a comprehensive regulatory scheme in the Maui County Code (the "County Code"), addressing, in relevant part, environmental and agricultural concerns. Notably, since 2009, the County Code has prohibited the testing, cultivation, and growing of genetically engineered kalo (taro).[157] This ban on genetically engineered kalo has never been challenged. The County also regulates other environmental issues, such as the unlawful escape of "smoke, soot, poisonous gases, dirt, dust or debris" into the open air[158] and the control of soil erosion and sedimentation safeguard life and limb, protect property, and promote public welfare[.]"[159]

Consistent with the Hawai‘i Constitution, the State Legislature has adopted legislation recognizing that both the counties and State share dual jurisdiction over regulating zoning and agricultural issues. In particular, the State creates a statewide scheme, while the counties address specific measures that affect the individual counties differently. For example, pursuant to Hawai‘i's land use

[156] HRS § 46-1.5(12)-(13).
[157] County Code §§ 20-38-010-060.
[158] County Code §§ 20.04.020.
[159] County Code §§ 20.08.010-400.

structure, the state land use commission has the power to establish the boundaries of the districts in each county, "giving consideration to the master plan or general plan of the county."[160] In order to effectuate the policies in favor of agriculture use and development, the State relies on the counties' local plans and zoning "to guide the overall future development of the county[,]" including "[t]he areas in which particular uses may be subjected to special restrictions[.]"[161] Consistent with this dual authority, the Countywide Policy Plan provides a comprehensive agricultural regulatory scheme for Maui County, giving the County the power to enhance local efforts to monitor and regulate important agricultural issues.[162]

Based on the existence of dual jurisdiction between the County and State in areas of zoning and agriculture, the County has the authority to regulate GMO operations, as such practices can have potentially devastating effects on Maui's land and agricultural production.[163] The Ordinance does not conflict with the State's objectives and authority to regulate environmental and agricultural concerns. In fact, Maui County already banned genetically modified kalo six years

[160] HRS § 205-2.
[161] HRS § 46-4(a).
[162] See Countywide Policy Plan at p. 61. A true and correct copy of the County of Maui, Countywide Policy Plan, which was last visited on January 29, 2015 can be downloaded from http://www.co.maui.hi.us/documents/17/69/241/PublishedWholeCWPPredo121510.PDF.
[163] This Court found that "[t]he fact that the state Constitution declares agriculture to be of statewide concern, does not by itself preclude all county regulation in the entire field of agriculture, or trigger a requirement that the State must expressly grant the counties specific authority in the area of agriculture." Syngenta Seeds, Inc., 2014 U.S. Dist. LEXIS 117820, at *11.

ago. Since then, there has never been a conflict between this local ordinance and state law. The provisions cited by Plaintiffs neither limit the County's general police powers as set out in HRS § 46-1.5(13), nor divest the County of the authority to enact ordinances allowing for a temporary moratorium to determine the potential impacts of GMO operations. The County has the authority and an affirmative duty to implement such laws that it deems to be consistent with safe GMO operations under the Maui General Plan, in order to avoid adverse effects on the public health, the environment, and natural resources unique to Maui County.[164]

B. The Ordinance Does Not Conflict With State Law On The Basis That It Enters An Area Fully Occupied Or Is Duplicative Of State Law

Plaintiffs rely on two State laws concerning pesticides and noxious plants to support their argument that the Ordinance conflicts with State law. Plaintiffs are mistaken on both counts. First, the Hawaii Pesticide Law, which is codified in HRS Chapter 149A and administered by the HDOA, regulates pesticide users and distributors, imposing restrictions on the sale and use of pesticides other than those provided for in federal law. Second, the HPQL addresses the importation, exportation, and possession of restricted plants and organisms that are introduced into the State.[165] Under HRS § 150A-6.1, the Board of Agriculture is

[164] Mayer Dec., ¶ 12.
[165] See generally HRS 150A.

required to maintain a list of "restricted plants" that require a permit for entry into the State. The HDOA is required to designate, by rule, as restricted plants "specific plants [including noxious weeds] that may be detrimental or potentially harmful to agriculture, horticulture, the environment, or animal or public health."[166]

In considering whether the Ordinance encroaches upon areas in which the State has exclusive power to legislate, the Court must consider whether the Ordinance has entered "an area fully occupied by the statutes." The Hawaii Pesticide Law has no applicability to the Ordinance at issue, because the Ordinance does not seek to regulate pesticide users or distributers, nor does it impose any record keeping or reporting requirements on pesticide use. Although pesticide use is a concern to the public health given the unique nature on how GMO practices are being carried out, the Ordinance does not attempt to regulate any such pesticide use as envisioned by the Hawaii Pesticide Law. There are no additional reporting requirements, nor are there are any additional regulations on pesticide use. The Ordinance specifically addresses a practice that the Maui voters determined to be potentially noxious where a need for a moratorium is required.

There is also no conflict between the HPQL and the Ordinance. The HPQL regulates the importation, exportation, and possession of restricted plants

[166] HRS §§ 150A-6.1, 152-1.

introduced into the State. The Ordinance, on the other hand, seeks a temporary moratorium on a specific activity, i.e., the development, testing, and growth of GMOs. While the former addresses importation of plants into the State, which is a statewide concern warranting statewide regulation, the latter addresses local health and safety concerns regarding activities performed within the County.

Moreover, the Ordinance does not cover the same subject matter as those in the State statutes cited by Plaintiffs. The Ordinance is an exercise of the County's preliminary right to determine the potentially irreversible harms that GMO operations threaten to impose on agricultural business, the public health, and the unique environment and natural resources within Maui County. No State statutes address whether local governments in Hawai‘i are authorized to regulate in this area. Thus, the Ordinance does not fully occupy or duplicate any State laws, and it is accordingly not preempted by State law.

C. Plaintiffs' Reliance On *Hawaii Floriculture* And *Syngenta Seeds* Is Misplaced

Plaintiffs' comparison to the Court's holdings in Hawaii Floriculture[167] and Syngenta Seeds[168] as their basis for arguing state preemption is misplaced. First, both of these cases are currently on appeal in the Ninth Circuit,

[167] Hawaii Floriculture & Nursery Ass'n v. County of Hawaii, No. 14-00267, 2014 U.S. Dist. LEXIS 165970, (D. Haw. Nov. 26, 2014).
[168] Syngenta Seeds, Inc. v. County of Kaua‘i, No. 14-00014, 2014 U.S. Dist. LEXIS 117820, (D. Haw. Aug. 23, 2014).

so they should not carry any precedential value, as the Ninth Circuit will reevaluate them independently and review them *de novo*. Plaintiffs also cannot pick and choose portions of these decisions they favor concerning state law, and then ignore the portions where the decisions reject the principles of federal preemption and limit state preemption. Moreover, these holdings do not apply to the Ordinance, in large measure due to Plaintiffs' mischaracterization of the Ordinance. To the extent that there are any common questions between the two cases and the present case, the factual context of this case differs significantly.

The Hawai‘i County law sought an outright ban on the cultivation, propagation, development, or open-air testing of GMO crops or plants, with limited exceptions. The Ordinance in this case does not create an absolute ban, but rather a temporary moratorium subject to a requirement that an EPHIS be conducted. This temporary moratorium can be lifted once the EPHIS has been completed and the local concerns have been addressed.

On the federal level, the U.S. Supreme Court has held that where a local moratorium is adopted for the purpose of addressing a concern not addressed in a federal regulatory scheme, the local law is not preempted.[169] As the Supreme Court stated: "It is almost inconceivable that Congress would have left a regulatory vacuum; the only reasonable inference is that Congress intended the States to

[169] See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 207-208 (1983).

continue to make these judgments."[170] This same principle applies here where the State is not regulating the purpose of the Ordinance and the moratorium. Additionally, the Ordinance does not seek to impose additional regulations and obligations concerning the distribution and use of pesticides, the pre- and post-application disclosure requirements, buffer zone provisions, or an annual GMO notification provision, as set forth in the Kauai law.[171]

Finally, a different record has been set forth in this case laying out in detail the dangers to Maui, the compelling need for the Ordinance, and why preemption does not apply. This case should be decided on this record, not the record of cases decided in other counties. Thus, Plaintiffs' reliance on these two prior cases is unsupported, and the present case is distinguishable from these cases.

IX. THE ORDINANCE DOES NOT CONFLICT WITH THE MAUI COUNTY CHARTER AND RELATED LAWS

As discussed above, this case is not ripe, as the Ordinance has not yet been implemented, the County has not yet adopted rules on how to implement the law, and it has not been enforced. The lack of ripeness is clear in assessing Plaintiffs' challenges to the language of the Ordinance. The penalties to be imposed, the funding mechanism, how the inter-agencies intend to implement the law, are all issues that will be sorted out when the law is implemented. At this

[170] Id.
[171] Syngenta Seeds, No. 14-00014, 2014 U.S. Dist. LEXIS 117820, at *23-*24.

stage where the election results have not even been certified, any alleged injury is purely speculative.

Further, there is an express severability provision in the Ordinance that allows for the removal of any section if it is determined to be unenforceable. Each of Plaintiffs' challenges to specific sections can be severed. Plaintiffs' challenges do not form a basis to strike the entire law that Maui voters approved.

A. The Ordinance Does Not Restrict The Council's Repeal Powers

Plaintiffs argue that Section 6 of the Ordinance is invalid because it imposes additional requirements on the County Council's repeal powers. [Mem. in Supp. of Motion pp. 54-57.] However, Section 6 of the Ordinance provides, in pertinent part: "The temporary moratorium provided in Section 6 shall remain in effect until amended or repealed by the Maui County Council as described in subsection 2 of this Section, **or as otherwise authorized by law**."[172] Thus, the Ordinance does not prevent the County Council from exercising its amendment and repeal powers under Section 11-8 of the Maui County Charter ("Charter").

Even assuming that Section 6.2 is invalid, it can be severed from the remainder of the Ordinance. The remainder of the Ordinance would remain valid, and the County Council would still have the power to amend or repeal the Ordinance, or any portion thereof, pursuant to Section 11-8 of the Charter.

[172] Ordinance § 6.1 (emphasis added).

B. The Ordinance's EPHIS Funding Mechanism Is A Valid Regulatory Fee

Plaintiffs' argument that the funding mechanism under the EPHIS constitutes a tax is flawed. The funding mechanism is a proper "regulatory fee" that the County Council has the authority to set. The funding for the EPHIS is not a tax because it will not be put into a general fund, nor spent for the benefit of the entire community.[173] The funding also cannot be characterized as a user fee because it is not "based on the rights of the entity as a proprietor of the instrumentalities used."[174]

The Hawai'i Supreme Court has stated:

By contrast,

> [t]he class "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for example, raising money placed in a special fund to help defray the agency's regulation-related expenses.[175]

[173] See Haw. Insurers Council v. Lingle, 120 Hawai'i 51, 59-60, 201 P.3d 564, 572-73 (2008) ("Taxes are generally defined as burdens or charges imposed by legislative authority on persons or property to raise money for public purposes, or, more briefly, an imposition for the supply of the public treasury." (citation omitted)).
[174] See id. at 60, 201 P.3d at 573 (citations and internal quotation marks omitted).
[175] Id. at 60, 201 P.3d at 573 (quoting San Juan Cellular Tel. Co. v. Pub. Serv. Comm'n of Puerto Rico, 967 F.2d 683, 685 (1st Cir. 1992)).

"[A] regulatory fee is authorized by the state's police power to prescribe regulations for the promotion of public safety, health, and welfare."[176] As Plaintiffs note, in determining whether an assessment is a regulatory fee, the court considers whether:

> (1) a regulatory agency assess the fee, (2) the agency places the money in a special fund, and (3) the money is not used for a general purpose but rather to defray the expenses generated in specialized investigations and studies, for the hiring of professional and expert services and the acquisition of the equipment needed for the operations provided by law for the payor.[177]

According to Plaintiffs, the EPHIS funding mechanism is invalid because it is not imposed by a regulatory agency of Maui County. However, there has been no opportunity for a Maui County agency to implement the fee structure or a special fund in order to satisfy the first and second prong. Section 8 of the Ordinance provides for the Department of Environmental Management, or another appropriate Maui County Department, to enact and enforce regulations to implement to the Ordinance, including the assessment of the regulatory fee.

The EPHIS funding mechanism, however, already satisfies the third prong. The funding provided for the EPHIS is not used for a general purpose, but rather to defray the expenses generated in specialized investigations, hiring professional and expert services, and the acquisition of equipment needed for the

[176] Id. at 62, 201 P.3d at 575.
[177] Id. at 65, 201 P.3d at 578 (alterations and quotation marks omitted) (citing San Juan Cellular, 967 F.2d at 686).

EPHIS.[178] Thus, the Court should not find that the EPHIS funding mechanism is invalid or inconsistent with the Charter, nor the Hawai‘i State Constitution.

Finally, if the Court is inclined to conclude that the EPHIS funding mechanism is improper, this provision can be severed from the remainder of the ordinance. In that event, pursuant to Section 8 of the Ordinance, the Department of Environmental Management or another Maui County Department would be able to enact and enforce regulations that pertain to a regulatory fee structure for the EPHIS process.

C. The Ordinance Does Not Violate Separation Of Powers

The Charter draws its authority from the State Constitution, which provides:

> Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, shall not require the approval of a charter by a legislative body.
>
> **Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions**, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.[179]

The Charter provides, in pertinent part:

[178] See id. at 65, 201 P.3d at 578.
[179] Haw. Const. art. VIII, § 2.

> The council shall be the legislative body of the county. Without limitation of the foregoing grant or of other powers given it by this charter, the council shall have the power:
>
> 1. To legislate taxes, rates, fees, assessments and special assessments and to borrow money, subject to the limitations provided by law and this charter.
>
> . . . .
>
> 3. To conduct investigations of (a) the operation of any department or function of the county and (b) **any subject upon which the council may legislate**. . . .[180]

As discussed in subsection 2 above, the EPHIS funding mechanism constitutes a regulatory fee, which the Charter provides is a subject upon which the County Council may legislate, regardless of the fact that the Ordinance was enacted by voter initiative. Thus, the County Council has the power to conduct investigations of regulatory fees, which are, at the very least, incidental to its authority to legislate the same.[181] Accordingly, the Ordinance does not violate the separation of powers doctrine.

D. The Ordinance Does Not Permit Private Parties To Regulate the EPHIS Process

Plaintiffs argue that the Ordinance improperly delegates the legislative authority to the Joint Fact Finding Group ("JFFG") and an unbiased professional consultant (collectively, "EPHIS panel"). [Mem. in Supp. of Motion pp. 61-64.] However, Plaintiffs mischaracterize the role of the EPHIS panel by asserting that

[180] Maui County Charter, § 3-6.1., 6.3 (emphasis added).
[181] See Lingle, 120 Hawai'i at 70, 201 P.3d at 583.

the panel will regulate GMO operations through its design and scope of the EPHIS process. The Ordinance, however, does not confer regulatory authority on the EPHIS panel. Rather, the EPHIS panel's function is to conduct design and conduct the EPHIS to determine whether GMO operations have detrimental impacts on Maui County. Section 7.3 of the Ordinance sets forth items that that the EPHIS panel must include in conducting the EPHIS. Contrary to Plaintiffs' assertions, the Ordinance does not give the EPHIS panel the ability to determine exemptions from the Ordinance. [Id. at 61.] When the EPHIS is complete, "[t]he EPHIS **may make recommendations** that include, but are not limited to, possible actions the County may take . . . ."[182] Further, Section 8 of the Ordinance provides: "If necessary the Department of Environmental Management or other appropriate County Department may enact and enforce regulations to implement this chapter . . . ."[183] Thus, the Ordinance is not an improper delegation of the City Council's legislative authority.

E. Penalties Are Not Inconsistent

Plaintiffs also argue that Section 9.2 of the Ordinance is invalid because it was enacted through voter initiative. However, the Charter does not prohibit voters from enacting penalty provisions for ordinance violations. Section 11-1 of the Charter provides, in pertinent part:

[182] Ordinance § 7.4 (emphasis added).
[183] Id. at § 8.

> 1. The voters of the county shall have power to propose ordinances to the counsel. If the counsel fails to adopt an ordinance so proposed without any change in substance, the voters may adopt the same at the polls, such power being known as the initiative power.
>
> . . .
>
> 3. The initiative power shall not extend:
>
> a. To any part or all of the capital program or annual budget;
> b. To any property tax levied;
> c. To any ordinance making or repealing any appropriation of money;
> d. To any ordinance authorizing the issuance of bonds;
> e. To any ordinance authorizing the appointment of employees; or,
> f. To any emergency ordinance. (Amended 2002)[184]

Based on this language, Section 11-1 does not restrict initiative power from adopting ordinances that provide penalties for violations of the Maui County Code.

In addition, Plaintiffs argue that the penalties set forth in Section 9.2 of the Ordinance exceed the amounts purportedly allowed under the Charter, which limits penalties to $1,000.00 per violation, or one year imprisonment.[185] The penalty provision of the Ordinance, however, can be severed from the remainder of the provisions, as it is not the principal purpose of the Ordinance. The purpose of the Ordinance is to protect and preserve Maui County lands and its residents.[186] The penalties listed in Section 9.2 are intended to be deterrence factors in furtherance of such purpose, not punitive. Thus, even assuming that Section 9.2 of

[184] Maui County Charter, Section 11-1.1, 1.3.
[185] Maui County Charter, Section 13-10.
[186] See Ordinance § 4.

the Ordinance is invalid, it can be severed without affecting the remainder of the Ordinance.

Further, Plaintiffs argue that, pursuant to HRS § 46-1.5(24)(A), Section 9 of the Ordinance is invalid because it lacks a "notice and cure" provision. The statute provides, in pertinent part: "Each county may impose civil fines, in addition to criminal penalties, for any violation of county ordinances or rules after reasonable notice and requests to correct or cease the violation have been made upon the violator."[187] However, the statute does not require each ordinance to lay out the notice and cure requirements in its language.

In support of their argument that HRS § 46-1.5(24)(A) applies when a county seeks to impose civil fines, Plaintiffs cite State v. Bereday, 120 Hawai'i 486, 210 P.3d 9 (Ct. App. 2009). [Mem. in Supp. of Motion p. 54.] In Bereday, the defendant was convicted of two violations of Section 7-7.2 of the Revised Ordinances of Honolulu ("ROH"), which made "it a crime for a dog owner to negligently fail to control a dangerous dog."[188] The penalty provision set forth in ROH § 7-7.2(c) did not expressly state the right to notice and the right to cure.[189]

Bereday argued that, pursuant to HRS § 46-1.5(24)(A), the City and County of Honolulu was required to first provide her with "reasonable notice and

[187] HRS § 46-1.5(24)(A).
[188] State v. Bereday, 120 Hawai'i at 489-90, 492, 210 P.3d at 12-13, 15.
[189] Id. at 489 n.3, 210 P.3d at 13 n.3 (alterations in Bereday) (citing ROH§ 7-7.2).

the opportunity to correct or cease the alleged violation before charging her with violating ROH § 7-7.2."[190] The Hawai'i Intermediate Court of Appeals ("ICA") rejected Bereday's argument, stating that "the plain language of HRS § 46-1.5(24)(A) establishes that its notice requirements apply under circumstances in which a county seeks to impose civil fines."[191] The ICA did not take issue with the fact that ROH § 7-7.2, like Section 9 of the Ordinance, does not expressly state that notice and an opportunity to cure the alleged violation must be provided as a condition precedent to imposing a civil fine. Rather, the issue before the ICA was whether the City and County of Honolulu was first required to provide actual notice and an opportunity to cure before imposing civil penalties. Thus, in this case, HRS § 46-1.5(24)(A) only requires Maui County to provide parties with notice and an opportunity to cure the alleged violation of the Ordinance before imposing the civil penalties set forth in Section 9.

X. CONCLUSION

Based on the foregoing, as well as the arguments contained in Amici Curiae The Center for Food Safety, et al.'s brief in opposition to Plaintiffs' Motion for Summary Judgment on Claims 1, 2, and 4 of the Complaint, Intervenor-Defendants respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment on Counts 1, 2, and 4 of the Complaint.

[190] Id. at 495, 210 P.3d at 18.
[191] Id.

Intervenor-Defendants respectfully request that this Court exercise its discretion and abstain from ruling on the constitutional questions presented in Plaintiffs' Motion for Summary Judgment on Claims 1, 2, and 4 of the Complaint. In the event the Court is not inclined to abstain and grants summary judgment in favor of Plaintiffs on State law preemption grounds, Intervenor-Defendants respectfully request that the Court exercise its discretion to certify the issue of State law preemption to the Hawai'i Supreme Court.

DATED: Honolulu, Hawaii, January 30, 2015.

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