Appeal No. 15-16466

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALIKA ATAY; LORRIN PANG; MARK SHEEHAN; BONNIE MARSH; LEI'OHU RYDER; and SHAKA MOVEMENT,
Plaintiffs-Appellants,

vs.

ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY, "MAUI FARM BUREAU"; MOLOKAI CHAMBER OF COMMERCE; AGRIGENETICS, INC., DBA MYCOGEN SEEDS; MONSANTO COMPANY; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC., DBA MAKOA TRUCKING AND SERVICES; HIKIOLA COOPERATIVE; and COUNTY OF MAUI,
Defendants-Appellees.

Appeal from the United States District Court for the District of Hawaii
Case No. 1:14-CV-00582-SOM-BMK

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS FOR STANDING

BAYS LUNG ROSE & HOLMA
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000

Attorneys for Plaintiffs-Appellants
Alika Atay, Lorrin Pang, Mark Sheehan, Bonnie Marsh, Lei'ohu Ryder, and SHAKA Movement

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MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS FOR STANDING

I. INTRODUCTION

Plaintiffs-Appellants[1] have suffered particularized injuries sufficient to establish standing to appeal the District Court's order invalidating a local ordinance that places a temporary moratorium on the growth and testing of genetically engineered ("GE") crops in Maui County. Appellants include organic farmers who consume and sell non-GE crops, as well as individuals who live, work and participate in recreational activities in areas near facilities that grow GE crops. If the ordinance is not enacted, Appellants and other similarly situated individuals face economic, environmental, health and aesthetic/recreational harms from GE farming operations. Such harms are sufficient to confer standing under Article III of the U.S. Constitution. *Friend of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 183 (2000).

Hollingsworth v. Perry, 133 S. Ct. 2652, 2663 (2013), relied upon by Appellees in their Motion to Dismiss, establishes that sponsorship of a ballot

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[1]This appeal arises from District Court case 1:14-CV-00582, a lawsuit filed by Appellants against Appellees in state court, and subsequently removed to federal court. Notice Removal [State Court Dkt. 1]. This appeal has been consolidated with an appeal from District Court case 1:14-CV-00511, a lawsuit filed by the private Appellees against Maui County in federal court, and assigned to the same judge. Compl. [Dkt. 1]. Both cases were resolved by a single order. [Dkt. 166]. Citations to the record for 1:14-CV-00511 are identified as "Dkt." and citations to the record for 1:14-CV-00582 are identified as "State Court Dkt."

initiative *alone* does not confer standing on a private party to defend a state statute. However, *Hollingsworth* in no way overturned the traditional standing inquiry. The petitioners in *Hollingsworth* failed to show that they had a "personal stake" in defending the constitutionality of Proposition 8, a ballot initiative banning same-sex marriage. *Id*. Unlike the petitioners in *Hollingsworth*, Appellants in this case have a personal stake in the outcome of this lawsuit based on their environmental, aesthetic, health, and economic interests, which are subject to heightened protection under the challenged ordinance. These interests are distinguishable from the general public's interest in upholding the validity of the ordinance. Therefore, Appellants have standing to appeal the District Court's order granting summary judgment in Appellees' favor.

II. FACTUAL BACKGROUND

A. The Ordinance Protects Maui County Residents And Community Members Who Live, Recreate, Farm, And Engage In Native Hawaiian Practices From GE Operations

Chemical Companies[2] that produce genetically engineered crops have made Hawai`i the epicenter of their GE seed research and development because of Hawai`i's long growing seasons. These operations constitute a particularly intense

[2] Plaintiffs-Appellees are Monsanto Company; Agrigenetics, Inc.; Robert Ito Farm, Inc.; Hawai`i Farm Bureau Federation, Maui County; Molokai Chamber of Commerce; Concerned Citizens of Molokai and Maui; Friendly Isle Auto Parts & Supplies, Inc.; New Horizon Enterprises, Inc. dba Makoa Trucking and Services; and Hikiola Cooperative, and are collectively referred to herein as the "Chemical Companies" or "Appellees."

type of agricultural use that has harmful environmental and human health impacts.[3] GE plant trials involve the repeat application of unique pesticide combinations to disproportionately small areas of land leaving large areas barren and susceptible to environmental damage.[4]

Studies involving conventional GE crop farming have directly linked the exposure to pesticides suffered by farm workers, their families, and residents of nearby communities, to severe respiratory problems, neurological problems, cancer, brain tumors, and birth defects.[5] Health problems have also been directly observed throughout Maui County,[6] in areas located near GE crop fields.[7]

Testing and production of genetically engineered crops also threatens Maui County farmers who grow conventional or organic crops. *See Geertson Seed Farms v. Johanns*, No. C 06–01075 CRB, , U.S. Dist. LEXIS 14533, *13-14 (N.D. Cal. Feb. 13, 2007) ("Biological contamination can occur through pollination of non-genetically engineered plants by genetically engineered plants or by the mixing of genetically engineered seed with natural, or non-genetically engineered seed."). Some genetically engineered plants are designed to produce powerful drugs. *See Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1170 (D. Haw.

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[3] *See* Declaration of H. Valenzuela ("Valenzuela Dec."), ¶ 5 [Dkt. 102-1].
[4] *Id.* ¶ 5.
[5] *Id.* ¶¶ 17-18 (citation omitted).
[6] Maui County includes the islands of Maui, Molokai and Lanai.
[7] *See* Declaration of J. Stewman ¶ 3 [Dkt.102-9]; Declaration of A. Stokes ¶ 8 [Dkt. 102-10].

2006). Cross-pollination by such plants renders the contaminated plant unfit for human consumption. Elsewhere, pharmaceutical crops have escaped trial fields and contaminated commercial crops heading for market.[8]

More commonly, crops are genetically engineered to resist herbicides, or to produce pesticides. *Ctr. for Food Safety v. Vilsack*, 718 F.3d 829, 836 (9th Cir. 2013) (describing Monsanto's Roundup Ready "crop system" of the GE crop and associated pesticide). These plants can cause substantial harm to farmers and the environment. *Id.* at 832, 841. Other genetically engineered plants, like bentgrass and canola, have escaped from experimental or commercial fields and established themselves in the wild, where they may alter ecosystems, harm wildlife, and cross-pollinate with conventional crops. *See, e.g.*, *Int'l Ctr. for Tech. Assessment v. Johanns*, 473 F. Supp. 2d 9, 21 (D.D.C. 2007).

In November 2014, in order to address these harms, the citizens of Maui County voted into law, via citizen initiative, an ordinance placing a temporary moratorium on growing and testing of GE crops until a safety study is completed demonstrating that these activities are not harmful ("Ordinance").

The Ordinance's express purpose is to address the following environmental and health issues which are not addressed by federal or state law:

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[8] U.S. Gov't Accountability Office, GAO-09-60, *Genetically Engineered Crops: Agencies are Proposing Changes to Improve Oversight, but Could Take Additional Steps to Enhance Coordination and Monitoring* 14-16, 91-92 (Nov. 2008), *available at* http://www.gao.gov/new.items/d0960.pdf.

(1) transgenic contamination;[9] (2) economic impacts to organic farming; (3) protection from hazardous aspects of GE farming operations, including increased pesticide use; (4) health-related issues; (5) preservation of Public Trust Resources, defined in the Hawai`i Constitution as Hawai`i's natural beauty and all natural resources, including land, water, air, minerals, and energy sources; and (6) the cultural heritage of Native Hawaiians.[10]

B. Appellants Are Directly Harmed By The Failure To Implement The Ordinance

Appellants in this case consist of the original proponents of the Ordinance: the SHAKA Movement and five individual residents of Maui. SHAKA is a non-profit organization comprised of over 500 individuals. Declaration of Barbara E. Savitt, ¶ 2 [Dkt. 161-2]. SHAKA's purpose is to provide advocacy, communications, and educational outreach programs to the community regarding sustainable practices that will positively affect the environment and the people of Hawai`i. *Id.* ¶ 5. SHAKA's members include farmers, businesses, doctors, educators, and concerned parents and residents who live near these operations and who are exposed to chemicals, pollutants, and other adverse consequences of GE operations. *Id.*

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[9] Transgenic contamination refers to cross-pollination and contamination of non-GE plants GE organisms as discussed *infra* pp. 4-5.
[10] *See* "Exhibit A", Ordinance § 4 [Dkt. 1-1].

The five individual Appellants— Alika Atay, Mark Sheehan, Bonnie Marsh, Lei`ohu Ryder, Lorrin Pang— each will suffer particularized injuries if the Ordinance is not enforced.

Alika Atay is a Maui resident and native Hawaiian farmer who depends on Hawai`i's natural environment to support his organic farm. Declaration of Alika Atay ("Atay Decl.") ¶¶ 6-7 [Dkt. 161-3]. Pesticide drift and transgenic contamination threaten the financial viability of his farm, and his ability to gather native plants from areas surrounding GE operations. *Id.* ¶¶ 8-12. Mr. Atay is a longtime canoe paddler and coach, having served in several leadership positions with different canoe clubs over the years. *Id.* ¶13. Run-off from Monsanto's fields has directly impeded his ability to access the oceans off Ka Lae Pohaku Beach for recreational use. *Id.* The threat of such contamination is ongoing.

Mark Sheehan is a Maui resident and organic farmer. Declaration of Mark Sheehan ("Sheehan Decl.") ¶¶ 3, 8 [Dkt. 161-5]. Mr. Sheehan's farm is supported by local customers who do not buy genetically modified food products or non-organic produce. *Id.* ¶ 8. Accordingly, Mr. Sheehan was forced to locate his farm on the North Shore of Maui where the risk of pesticide drift and transgenic contamination from GE operations is substantially lower than in other areas of the island. *Id.* ¶¶ 10-11. However, Mr. Sheehan is concerned about the

continued financial risks that GE operations on Maui pose to his farming business because his customers will not purchase food products that have been contaminated by GE crops. *Id.* ¶12.

Bonnie Marsh is a Maui resident and Naturopathic Doctor who grows her own fruits and vegetables. Declaration of Bonnie March ("Marsh Decl.") ¶¶ 3-4 [Dkt.161-6]. As part of her medical practice, Ms. Marsh takes her patients into her garden to teach them about organic and home-grown food crops, and administers botanical medicines. *Id.* ¶¶ 6, 7. Ms. Marsh's ability to use her property for this purpose is negatively impacted by GE operations, because the plants she grows are potentially exposed to pesticide drift or transgenic contamination if the Ordinance is not implemented. *Id.* ¶ 7. Ms. Marsh has also observed the negative health impact of GE operations first-hand. *Id.* ¶ 8.

Leiohu Ryder is a native Hawaiian cultural practitioner who lives near Monsanto's fields in Kihei. Declaration of Leiohu Ryder ("Ryder Decl.") ¶¶ 4-7 [Dkt. 161-7]. Pesticide run-off from Monsanto's GE operations have diminished her use and enjoyment of nearby areas for recreation and aesthetic enjoyment, such as observing honu (turtles), and traditional practices such as gathering limu (seaweed) and swimming in the ocean for spiritual cleansing. *Id.* ¶¶ 8-10. Monsanto's GE operations have also diminished Ms. Ryder and her family's use

and enjoyment of their private property due to dust and pesticides that are blown from Monsanto's fields onto their family property. *Id*. ¶ 7.

Lorrin Pang is a Maui resident and works for the Hawai`i Department of Health. Declaration of Lorrin Pang ("Pang Decl.") ¶¶ 3-4 [Dkt. 161-4]. Mr. Pang is regularly exposed to pesticide drift from GE operations because he travels in the area of GE operations. *Id*. ¶ 10.

III. ARGUMENT

Appellants have standing to pursue this appeal because they have distinct, legally protected interests in seeing the Ordinance implemented. The Ordinance places a moratorium on GE operations in Maui County. If implemented, the Ordinance will provide heightened protection to organic and natural farmers who do not use pesticides or grow GE crops, as well as residents who live, work and recreate in the areas surrounding GE crop operations. Conversely, if the Ordinance is not implemented, the named Appellants and other members of SHAKA will suffer an injury due to the negative impact on their use and enjoyment of the areas surrounding GE crop operations, and the negative impacts on their health. Alika Atay and Mark Sheehan will also suffer economic injury as organic/natural farmers whose continued operations are threatened by GE crop operations. These personal and tangible harms confer standing on the named Appellants and SHAKA to pursue this appeal.

Because Appellants' own individualized harms are sufficient to establish standing, the Court's determination in *Hollingsworth* that a private party cannot appeal in lieu of state officials is not relevant to this motion. 133 S. Ct. at 2668.

A. Appellants Have Article III Standing To Pursue This Appeal

In order to establish standing, the claimant must show "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 180-81 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Additionally, where an organization brings claims on behalf of its members, the organization only needs to demonstrate that at least one of its members "would have standing to sue in [her] own right, [that] the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Laidlaw*, 528 U.S. at 181 (citation omitted).

1. Each of the Appellants have suffered an injury in fact

a. Appellants will suffer concrete and particularized harms if the Ordinance is not implemented

It is well-established that harms to a party's economic, recreational

and aesthetic interest are sufficient to satisfy the injury-in fact test. In *Laidlaw*, two environmental groups brought suit against Laidlaw, the operator of a hazardous waste incinerator, for violations of its NPDES permit. 528 U.S. at 176-77. On appeal, the Supreme Court *sua sponte* raised the issue of standing *Id.* at 180. The Court reviewed testimony from members of the groups about their use of the river at issue, specifically their unwillingness to continue certain uses such as hiking, fishing, swimming and camping because of "concerns about Laidlaw's discharges." 528 U.S. at 181-83 (citations omitted). The *Laidlaw* court held that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id*. at 183 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)).

Similarly, in *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000), this Court held that various plaintiff organizations had standing based on a single member's testimony concerning his recreational use and diminished enjoyment of a creek that the defendant's saw mill was allegedly polluting. This Court recognized that the only showing necessary to establish "injury in fact" is to show that one of the members has a "connection" to the area of concern "sufficient to make a credible contention that the person's future life will be less enjoyable— that he or she really has or will suffer in his or her degree

of aesthetic or recreational satisfaction— if the area in question remains or becomes environmentally degraded." *Id.* at 1149. While residential contiguity and frequency of use may be relevant, there is no "one-size-fits-all" approach for determining injury in fact. *Id.*

The individually named Appellants have set forth details on harms that surpass the harms attested to by the plaintiffs in *Laidlaw* and *Pacific Lumber*. Appellants use the areas surrounding GE test fields (including the oceans, public lands and private property) for recreational, farming and/or gathering purposes. Each of these individuals' use and enjoyment of the area has been degraded by pollution, or concerns about pollution, resulting from GE operations. *See* Marsh Decl. ¶ 7 [Dkt. 161-6] ("I . . . grow a vegetable/herb garden and fruit trees at my home. I enjoy teaching other about the herbs and taking patients out to my garden to pick fresh herbs for medicinal purposes . . . These practices are directly threatened by GMO . . . operations that can potentially cause damage to these natural plants through pesticide exposure and transgenic contamination, along with endangering my own health."); Ryder Decl. ¶ 10 [Dkt. 161-7] ("GMO operations have also affected native Hawaiian gathering rights and traditional cultural practices on Maui that affect me personally. For instance, a time to cleanse in the waters is part of the spiritual practice, but I no longer swim in the waters near Monsanto's field, because I know the waters are contaminated. I do not pick the

poisoned limu, as I once did, as part of the native Hawaiian gather rights."); Atay Decl. ¶ 10 [Dkt. 161-3] ("The continued GMO practices directly impact my practices as a natural native Hawaiian farmer. It prevents me from conducting natural farming activities near GMO operations . . . Moreover, my customers will not purchase crops of plants that have been contaminated by GMO pollen, because my customers do not want to eat GMO foods and crops. Therefore, I will also suffer financially if the GMO practices are permitted to continue without the appropriate testing."); Sheehan Decl. ¶ 12 [Dkt.161-5] ("It is my understanding that pesticides used as part of GMO operations can travel long distances. Based on the air and wind patterns in Maui, I am greatly concerned of the detrimental effects of having pesticide drift from ongoing GMO operations blowing onto my farm and contaminating my crops. Continued GMO operations threaten my business, as local customers who purchase crops from my fields will only buy the crops if they are organic and not genetically modified. The risk from pesticide drift and transgenic contamination threaten my natural farming operations.").

Appellants' declarations concerning the harms that GE operations cause are sufficient to satisfy the injury in fact test because a party need only testify "he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction –if the area in question remains or becomes environmentally degraded." *Pacific Lumber*, 230 F.3d at 1149. *See also Ocean*

Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 860 (9th Cir. 2005) (holding that an increased risk of an oil spill was sufficient to establish an injury in fact). Further, it is undisputed that the GE crop operations subject to regulation under the Ordinance are in close proximity to residential and recreational areas that are regularly used by the individual Appellants and other members of SHAKA. *See* Map of Monsanto's fields [Dkt. 131-2].

Appellants Atay and Sheehan also allege economic harm from continued GE operations, which may contaminate their organic farming operations through transgenic contamination or pesticide drift. Atay Decl. ¶¶10-12; [Dkt. 161-3]; Sheehan Decl. ¶¶11-12 [Dkt. 161-5]. Economic harm resulting from transgenic contamination— or even the perception of contamination— constitutes injury in fact. *See, e.g.*, *Monsanto Company v. Geertson Seed Farms et al*., 561 U.S. 139, 155 (2010) (finding that increased administrative costs required to demonstrate to clients that their product was not infected with the genetically engineered "Roundup ready gene" satisfied the injury-in-fact prong of the constitutional standing analysis). This economic injury is distinct from Appellants' recreational and aesthetic interests in the areas surrounding Appellees' GE operations.

b. The harms to appellants are actual and imminent

Appellees also attempt to argue that Appellants' injuries are "self-imposed" and "subjective" and therefore are not legally cognizable. Appellees Mot. Dismiss at 16-17. The Supreme Court has already considered and rejected this argument. In *Laidlaw*, the Court recognized that the relevant showing for Article III standing is injury to the plaintiff, not resulting injury to the environment. *Laidlaw*, 528 U.S. at 181-183. Thus, in *Laidlaw*, it was sufficient for the plaintiff to attest that he lived near the allegedly polluting facility, and "occasionally" drove over the nearby river that "looked and smelled polluted," which discouraged him from using the area for recreational purposes. *Id.* at 182-83.

Lei`ohu Ryder's testimony, which is singled out by Appellees for negative treatment, illustrates a far greater impact than the testimony the Supreme Court relied upon in *Laidlaw.* Specifically, she is no longer able to enjoy the oceans of her ancestral home in Kihei as she previously did growing up in the area because of Monsanto's operations. *See* Ryder Decl. ¶¶5, 10 [Dkt. 161-7]. This is the exact type of injury identified by the Court in *Laidlaw* as sufficient to confer standing. *See also Pacific Lumber*, 230 F.3d at 1150 ("[A]esthetic perceptions are necessarily personal and subjective . . . *Laidlaw* confirms that the constitutional law of standing so recognized, and does not prescribe any particular formula for

establishing a sufficiently 'concrete and particularized' . . aesthetic or recreational injury-in-fact.'") (quoting *Defenders of Wildlife*, 504 U.S. at 560).

Appellees suggest that Appellants' harms are "conjectural or hypothetical" citing to *Clapper v. Amesty Int'l USA*, 133 S. Ct. 1138 and *Munns. v. Kerry*, 782 F.2d 402 (9th Cir. 2015). These two cases are readily distinguishable. In *Clapper*, Amnesty International unsuccessfully challenged the Foreign Intelligence Surveillance Act. Amnesty International was not subject to surveillance, but claimed only that it could be subject to surveillance if a "highly attenuated chain of possibilities" happened first, and multiple conditions were satisfied. *Id.* at 1148.

Similarly, in *Munns*, this Court concluded that the plaintiff, a former contractor in Iraq who wished to return under more secure conditions, did not have standing to challenge an expired government policy granting security companies operating in Iraq immunity from prosecution. 782 F.3d at 409-11. The plaintiff's theory that he was discouraged from serving again in Iraq was not sufficient to establish standing because his injury was subject to multiple "inherent contingencies" and would extend standing to "almost any American even contemplating serving overseas[.]" *Id.*

Here, Appellants' theory of standing is not predicated on any string of contingencies, such as those enumerated in *Clapper* and *Munns*. Appellees are

certain to continue GE operations in Maui County if the Ordinance is not implemented— this lawsuit alone makes clear the Appellees' commitment to their GE operations in Hawai`i. The harms to Appellants' interests flow directly from these operations; there are no "inherent contingencies" that need be considered. While Appellees may challenge Appellants' showing of transgenic contamination and health impacts, harm to the environment need not be shown for Appellants to have environmental standing. *Laidlaw*, 528 U.S. at 181. Further, as discussed in *Geertson*, **perceived** transgenic contamination itself threatens organic/non-GE farmers, whose market niche depends on proving the purity of their product.[11] 561 U.S. at 155.

Because Appellants' injuries are both "concrete and particularized" and "actual or imminent", Appellants have suffered an "injury in fact" as required under *Defenders of Wildlife*. 504 U.S. at 560-61.

2. There is a causal relationship between Appellants' injuries and the District Court's decision which is redressable by a favorable decision from this Court

Appellants also satisfy the second and third prongs of the injury in fact test because there is a "causal connection" between their injuries and the

[11] Ironically, the challenged Ordinance would provide exactly the type of scientific information that the Chemical Companies now demands in its effort to defeat Appellants' standing. The Chemical Companies also opposed the Appellants' request for a continuance to obtain additional information about the harms from GE operations made pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. Intervenor-Appellants' Mem. Opp. Pl.'s Mot. Summ. J. 20 [Dkt. 101].

District Court's decision, and it is "likely as opposed to merely speculative" that a favorable decision from this Court will redress Appellants' injuries. *Defenders of Wildlife*, 504 U.S. at 560. First, Appellants will suffer an injury in fact if the District Court's order stands and the County does not implement the Ordinance. Therefore, there is a causal connection between Appellants' injuries and the order from which they appeal. Second, a favorable decision from this Court overturning the District Court's decision, and ordering the County to implement the moratorium on GE operations, will remedy these injuries. Accordingly, the individual Appellants meet the second and third prongs of the standing test. *Defenders of Wildlife*, 504 U.S. at 560.

3. Organizational Standing

Because the individual Appellants have standing to pursue this appeal, SHAKA as an organization also has standing as the interests at stake are "germane to the organization's purpose." *Defenders of Wildlife*, 504 U.S. at 560.

B. *Hollingsworth* Does Not Change The Court's Traditional Standing Inquiry

Appellees' motion stretches the significance of *Hollingsworth* beyond its limits. In *Hollingsworth*, petitioners' only argument concerning standing was that the California Constitution and its election laws gave them a "'unique,' 'special,' and 'distinct' role in the initiative process" because they had been the original proponents of the measure. *Id.* at 2662. The Court disagreed and held that

this status, standing alone, did not rise to an "injury in fact" because they had no personal stake "distinguishable from the general interest of every citizen of California." *Id.* at 2663 (quoting *Defenders of Wildlife*, 504 U.S. 555, 56).

The Court's limited holding concerning the petitioners' standing in *Hollingsworth* does not, as Appellees suggest, mean that proponents of a ballot initiative can never assert any "particularized injury" sufficient to confer standing. Rather, as determined in *Hollingsworth*, a private party's role as a ballot proponent— alone— is insufficient. 133 S. Ct. at 2668. The petitioners in *Hollingsworth*— proponents of a ban on same-sex marriage— identified no unique interest in the subject matter of the challenged ordinance. As the City and County of San Francisco highlighted in its brief to the Supreme Court, "[p]roponents have never once suggested that permitting same-sex couples to marry could harm them— or anyone else—personally." Brief of Respondent City and County of San Francisco at 11, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (U.S. Feb. 21, 2013) (No. 12-144).

Here, Appellants' interests are not so limited. Appellants' particularized interests include the protection afforded by the law to organic and indigenous farmers, and to individuals with an aesthetic or recreational interest in Hawai`i's natural environment, interests that the Supreme Court has consistently recognized rise to the level of "injury in fact." *See supra*. If the Ordinance is not

implemented, Appellants will suffer personal harm to their aesthetic, recreational, health and economic interests— harms not asserted by the Petitioners in *Hollingsworth*. It is these injuries upon which standing is predicated.

Finally, the procedural facts of this case are distinguishable from the facts before the Court in *Hollingsworth*. In this case, Appellants were the first to file a lawsuit in state court seeking to compel the County of Maui to enforce the Ordinance. *Atay et al. v. County of Maui*, Civil No. 14-1-0638(2) (filed November 12, 2014). Appellants also filed a motion for preliminary injunction in state court seeking this relief. Appellants had the right to raise these issues in state court under the Hawai`i Constitution, which recognizes that each person has the right to a clean and healthy environment, and may enforce these rights against any party, public or private, through appropriate legal proceedings. *See* Haw. Const. Art. XI, § 9. This case was removed to federal court over Appellants' objections, and the District Court denied Appellants' requests to remand the case, Order [State Court Dkt. 55], and to abstain from deciding the subsequently filed federal lawsuit that the Chemical Companies. Order [Dkt. 166]. The District Court then decided the cases on summary judgment without conducting an evidentiary hearing on any disputed issues. Order [Dkt. 166].

Additionally, Appellants are the Plaintiffs in the state court action, not Intervenors. When it denied Appellants' motion to remand, the District Court

denied Appellants' relief they would have been entitled to in state court as parties under state law, where the standing inquiry is different. In *Hollingsworth*, there was no first-filed state court action in play. Further, unlike the parties in *Hollingsworth*, Appellants never had the opportunity to make their record at trial, in the forum on their choosing. Instead, the matter was adjudicated on summary judgment before the federal court, without a hearing ever having been conducted on any of the factual issues, including standing. These facts make *Hollingsworth* readily distinguishable.

IV. CONCLUSION

For the reasons stated above, the Appellants have established Article III standing and *Hollingsworth* in no way creates a new test for standing purposes. The Court should deny this Motion.

DATED: Honolulu, Hawai`i, November 6, 2015.

/s/ Michael C. Carroll
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY

Attorneys for Plaintiffs-Appellants
ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, and SHAKA MOVEMENT

U.S. Court of Appeals Docket No. 15-16466

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 6, 2015. The following parties who are registered CM/ECF users will be served by the appellate CM/ECF system.

MARGERY S. BRONSTER, ESQ.
REX Y. FUJICHAKU, ESQ.
KENNETH S. ROBBINS, ESQ.
DONNA C. MARRON, ESQ.
Bronster Fujichaku Robbins
1003 Bishop Street, Suite 2300
Honolulu, HI 96813

Attorneys for Plaintiffs-Appellees
ROBERT ITO FARM, INC.; HAWAII FARM BUREAU FEDERATION, MAUI COUNTY; MOLOKAI CHAMBER OF COMMERCE; AGRIGENETICS, INC.

PAUL ALSTON, ESQ.
J. BLAINE ROGERS, ESQ.
NICKOLAS A. KACPROWSKI, ESQ.
MICHELLE N. COMEAU, ESQ.
Alston Hunt Floyd & Ing
1001 Bishop Street, Suite 1800
Honolulu, HI 96813

and

RICHARD P. BRESS, ESQ.
PHILIP J. PERRY, ESQ.
ANDREW D. PRINS, ESQ.
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, D.C. 20004

Attorneys for Plaintiffs-Appellees
MONSANTO COMPANY; CONCERNED CITIZENS OF MOLOKAI AND MAUI; FRIENDLY ISLE AUTO PARTS & SUPPLIES, INC.; NEW HORIZON ENTERPRISES, INC. dba MAKOA TRUCKING AND SERVICES; and HIKIOLA COOPERATIVE

PATRICK K. WONG, ESQ.
MOANA M. LUTEY, ESQ.
RICHARD B. ROST, ESQ.
CALEB P. ROWE, ESQ.
KRISTIN K. TARNSTROM, ESQ.
Department of Corporation Counsel, County of Maui
200 S. High Street
Wailuku, HI 96793

Attorneys for Defendant-Appellee
COUNTY OF MAUI

DATED: Honolulu, Hawaii, November 6, 2015.

/s/ Michael C. Carroll
A. BERNARD BAYS
KARIN L. HOLMA
MICHAEL C. CARROLL
LEINAALA L. LEY

Attorneys for Plaintiffs-Appellants
ALIKA ATAY, LORRIN PANG, MARK SHEEHAN, BONNIE MARSH, LEI'OHU RYDER, and SHAKA MOVEMENT

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